To Be Argued By:
Richard E. Casagrande
Time Requested: 30 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - THIRD DEPARTMENT

NEW YORK STATE UNITED TEACHERS
by its President KAREN E. MAGEE, NAOMI
AVERY, SETH COHEN, TIMOTHY MICHAEL EHLERS,
KATHLEEN TOBIN FLUSSER, MICHAEL LILLIS,
ROBERT PEARL as a Parent, Individually and on behalf
of his children KYLEIGH PEARL, MICAELA PEARL,
AVA PEARL and NOLAN PEARL, BRIAN PICKFORD,
HILARY STRONG as a Parent, Individually and on behalf
of her child KEVIN STRONG,

Plaintiffs-Appellants,

-against-

The STATE OF NEW YORK, ANDREW M. CUOMO
as Governor of the State of New York, THOMAS P.
DiNAPOLI as Comptroller of the State of New York,
and JOHN B. KING, JR., as Commissioner of the
New York State Education Department and THOMAS
H. MATTOX, as Commissioner of the New York State
Department of Taxation and Finance,

Defendants-Respondents.

APPELLANTS' BRIEF

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QUESTION PRESENTED

Did the Supreme Court err when it granted the defendants-respondents' motion to dismiss the plaintiffs-appellants' amended complaint and second amended complaint pursuant to CPLR §3211(a)(7) for failing to state a cause of action?

The answer is yes. Appellants have stated viable claims under the Education Article, the equal protection and due process clauses of the federal and State Constitutions; as well as under the First Amendment to the U.S. Constitution and Article 1 § 8 of the State Constitution.

PRELIMINARY STATEMENT

Appellants submit this brief in support of their appeal of the September 23, 2014 and March 16, 2015 decisions and orders of the Albany County Supreme Court (McGrath, J.), granting respondents' motion to dismiss all claims in the appellants' amended and second amended complaints, which challenge Education Law §§2023-a, 2023-b, collectively known as the Tax Cap and Freeze.

The Tax Cap limits annual local school district property tax increases to the lesser 2% or the rate of inflation, unless 60% of voters approve a larger increase. The Tax Freeze, in the 2014 and 2015 tax years, provides State tax credits to eligible taxpayers in districts that stay within the Cap, but it denies such credits to otherwise eligible taxpayers in districts that pierce the Cap.

This case involves the impairment of protected rights: the right of school children to a public education and to equal educational opportunity; the right of parents and other school district voters to direct and meaningful control over local school funding decisions; and the right to vote on school budgets without governmental interference. The appellants make four basic legal claims.

1. Local Control

The Court of Appeals has determined that unequal public school funding and opportunity is lawful *only* because it is the product of "substantial" and “direct and meaningful" local control of educational funding decisions, a right protected by the State Constitution's Education Article. The Tax Cap and Freeze intentionally and illegally impair the right of local control.

2. Equal Protection

Every child in New York has an equal right to a free, public education, but New York's school funding scheme is grossly unequal, providing the least funding and opportunity to children with the greatest need, based on their school district’s wealth. Similarly, school district voters have an equal right to provide for the education of their district's children through local funding decisions, but the Tax Cap and Freeze places grossly unequal caps on the funding that can be raised, again, based on a district's taxable property wealth. The Court of Appeals in 1982 rejected an equal protection challenge to New York's unequal education funding system. The approval of funding inequality was rationalized as the product of local control of funding decisions. The Court of Appeals has never considered the legality of these amendments to the funding system, which now not only provides the least funding and opportunity to children with the greatest need, but which does so through laws that impair local control by "capping" and "freezing" funding at unequal levels.

3. Substantive Due Process

The Tax Cap arbitrarily and unequally limits funding increases at the lesser of 2% or the rate of inflation, without regard to current spending or to student need or achievement. A percentage cap allows wealthier districts to raise substantially greater additional revenue than poorer districts can raise. The Freeze provides disproportionately large tax credits to taxpayers in the wealthiest districts, where students already have enhanced educational resources. This wholly arbitrary impairment of

some students' right to a public education, and of voters' local control of education, violates the guarantee of substantive due process.

4. Illegal Use of Tax Credits to Impair Protected Rights

Finally, the Tax Freeze awards tax credits to eligible taxpayers whose districts stay within the Tax Cap, but denies credits to otherwise eligible taxpayers whose districts, exercising the Constitutional right of local control through budget votes, pierce the cap. The United States Supreme Court has held that the denial of tax credits cannot be used to directly impair or to chill the free exercise of constitutionally protected rights. The Tax Freeze illegally punishes taxpayers by denying them tax credits if their District's voters exercise their right to pierce the Cap, and illegally chills the free exercise of local control rights by using tax credits to influence the outcome of school budget votes.

These legal claims may be regarded as novel, but the Tax Cap and Freeze impose novel, unprecedented limitations on protected rights. Each of plaintiffs' claims is well supported factually and by case law, and the lower Court erred in dismissing them.

PLAINTIFFS-APPELLANTS

The individual appellants are school district voters and taxpayers, as well as parents of public school students. (R. 77, ¶1).[1] Each is a taxpayer in a school district where proposed school tax increases failed because of the Tax Cap's supermajority requirements. (R. 81-83, ¶13-37; R. 105, ¶141), This failure led to budget cuts, causing significant losses of academic staff and educational programs and services. (R. 106-121, ¶147-226). Appellant NYSUT represents over 600,000 in-

[1] References to the Record will be abbreviated as (R. ___).

service and retired public and private employees, including more than 98% of New York's public school teachers, many of whom have children who attend New York's public schools. (R. 77, ¶1)

STATEMENT OF FACTS

New York has long been a leader[2] in promoting the public education of its children.[3] For over two hundred years, the State and local communities have shared this responsibility. (R. 223). And, for over a century, Article XI, §1, of our State Constitution has mandated that the Legislature provide for the public education of all the State's children.

The educational opportunity provided by New York's public schools is far from equal. The wealthiest decile of districts outspends the poorest decile by 180%. (R. 37). This disparity exists because education funding is based largely on local property taxes, so local funding is determined by a district's property wealth. Thus, school children in poorer districts, who have the greatest educational needs, generally have diminished educational opportunities and generally have lower student achievement and graduation rates. (R. 97-102, ¶116-128).

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[2] New York's public schools have long been highly regarded. *See Levittown UFSD v. Nyquist*, 57 N.Y.2d 27, 38 (1982). Until recently, *Education Week* ranked New York's public schools as second and third, nationally. *See* REPORT AWARDS STATE GRADES FOR EDUCATION PERFORMANCE, POLICY; NATION EARNS A D-PLUS ON ACHIEVEMENT, SOME MOVEMENT SEEN ON REFORM INITIATIVES DESPITE RECESSION, EDUCATION WEEK (January 11, 2011), *available at* http://www.edweek.org/media/ew/qc/2011/ QualityCounts2011_PressRelease.pdf; STATE REPORT CARDS, EDUCATION WEEK, VOL. 31, ISSUE 16 (2012), *available at* http://www.edweek.org/ew/qc/2012/16src.h31.html; STATE AND NATIONAL GRADES ISSUED FOR EDUCATION PERFORMANCE, POLICY; U.S. EARNS A C-PLUS, MARYLAND RANKS FIRST FOR FIFTH STRAIGHT YEAR, EDUCATION WEEK (January 10, 2013), *available at* http://www.edweek.org/media/QualityCounts2013_Release.pdf. In 2012 New York State was ranked 1st in education and innovation and technology by CNBC. *America's Top States for Business 2012: Overall Rankings 2012,* CNBC, *available at* http://www.cnbc.com/id/100016697. However, for the first time in years, in 2014, New York fell out of the top ten ranking, slipping to seventeenth in the nation behind states such as North Dakota, Iowa, Wisconsin and Kansas. *See* STATE REPORT CARDS, EDUCATION WEEK, VOL. 33, ISSUE 16 (2014), *available at* http://www.edweek.org/ew/qc/2014/state_report_cards.html?intc=EW-QC14-LFTNAV.

[3] In New York, education is compulsory until the age of 16. *See* Education Law §3025(1)(a).

This inequality is not new, but it is growing. Funding inequality between poor and rich school districts has reached record levels, growing nine percent (9%) over the last few years to $8,733 per pupil -- the highest level in State history.[4]

Three decades ago the Court of Appeals, in *Levittown UFSD. v. Nyquist*, 57 N.Y.2d 27 (1982), determined that so long as children are provided a sound basic education, school funding inequality is lawful because -- *but only because* -- communities are free to provide enriched educational opportunities through the *local control* of their taxes and budgets. *Id*. at 44-46. The Tax Cap and Freeze vitiates this rationale by impairing local control. Therefore, judicial review of these amendments to the finance system is warranted.

Educational Governance and Finance in New York

Article XI §1[5] states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." The Court of Appeals interprets this to require the State to provide a "sound basic education" to all its children. *CFE v. State (CFE I)*, 86 N.Y.2d 307, 315 (1995). A "sound basic education" is a "meaningful high school education" preparing children to function productively as citizens and civic participants. *CFE v. State (CFE II)*, 100 N.Y.2d 893, 905 (2003).

To provide a sound basic education, certain educational "inputs" must be furnished, including qualified and competent teachers; schools and classrooms providing enough light, space, heat and air, and reasonable class sizes to permit children to learn; and appropriate instrumentalities of learning,

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[4] ALLIANCE FOR QUALITY EDUCATION, RECORD SETTING INEQUALITY: NEW YORK STATE'S OPPORTUNITY GAP IS WIDER THAN EVER (Jan. 12, 2015), *available at* http://www.aqeny.org/wp-content/uploads/2015/01/final-final-record-setting-inequality.pdf.

[5] The Education Article was adopted in 1894, and renumbered as Article XI §1 during the 1938 Constitutional Convention, without any language change. (R. 94, ¶93).

including classroom supplies, textbooks, libraries and computers. *CFE I,* at 317. The educational opportunities of school children are directly related to these educational inputs. *Levittown,* 57 N.Y.2d at 48. These inputs cost money. The courts have specifically found that ". . . [t]here is a causal link between funding and educational opportunity." *CFE II*, 187 Misc.2d 75 (Sup. Ct. New York County 2001), *aff'd*, *CFE II*, 100 N.Y.2d at 919-920; *see also, Levittown,* 57 N.Y.2d at 38 (significant inequality in funding leads to significant inequity in educational opportunities).

Since 1795 New York has maintained a school funding system relying on State aid supplemented by local taxation. (R. 93, ¶85). The 1812 Common School Act established that: (1) common schools are a state function under state control; (2) the school district is the primary administrative unit for public education; and (3) funding of public schools is a joint state-local responsibility. (R. 93, ¶91). The right of local school boards and voters to make their own decisions regarding education and local school funding is "enshrined in" and protected by Article XI §1. *Paynter v. State*, 100 N.Y.2d 434, 442 (2003); *Levittown,* 57 N.Y.2d at 44-46. This right is known as "local control."

Local control of school funding is the *only* rational basis the courts have identified for upholding the gross inequalities in the State's education financing system. *See, Levittown*, 57 N.Y.2d at 44-46; *Paynter,* 100 N.Y.2d at 442. Because local school funding is based on property taxes, there are large funding inequities between districts, given that property values vary widely by district.[6] This

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[6] According to a 2005 New York State Education Department report, the willingness and ability to raise funds locally to support education is essential in assuring that all children have the resources needed to achieve high academic standards. NEW YORK STATE EDUCATION DEPARTMENT, FISCAL ANALYSIS & RESEARCH UNIT, 2004 ANALYSIS OF LOCAL EFFORT IN NEW YORK STATE SCHOOL DISTRICTS (April 2005), *available at* http://www.oms.nysed.gov/faru/Articles/2004AnalysisofLocalEffort.htm. According to this analysis, diminution of local tax effort in high need school districts poses a significant concern, particularly if the local tax effort is already inadequate. (R. 95, ¶ 101-102).

disparity is often greatest in districts where there is high poverty and a high percentage of minority students. (R. 101-02, ¶125-28).

Thus, except for the "big five" districts (New York City, Yonkers, Syracuse, Rochester, and Buffalo), school funding in New York has two major elements: State funding and local funding based on taxes levied by a school district on the district's taxable property.[7] The purposes of this State/local funding partnership were concisely identified in *CFE II,* 100 N.Y.2d at 348:

> As *Levittown* indicates, the justification for a school funding system based on local taxation is "the preservation and promotion of local control of education" [internal citations omitted]. Conversely, the purposes of state aid to schools are, according to the SED, to assist school districts in providing an effective education; maintain a state-local partnership in public education; equalize school revenues by providing state aid in inverse proportion to each school district's ability to raise local revenues; and encourage model programs to address the needs of the school community. Clearly these purposes reflect a recognition that inputs should be calibrated to student need and hence that state aid should increase where need is high and local ability to pay is low.

As will be demonstrated, the Tax Cap and Freeze undermines each of these identified purposes by: (1) intentionally impairing local control; (2) worsening funding inequality through an arbitrary and unequal cap on local tax increases; and (3) making no provision for calibrating local funding to student need and disproportionately directing State tax credits to the wealthiest, lowest need districts.

<u>*The Recent Decline in State Education Funding and Its Impact*</u>

At the same time as the State has impaired local control through the Cap and Freeze, the State has failed to meet its own school funding obligations. For many years, the State's average share of

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[7] The federal government also contributes, although for most districts federal aid is a relatively minor funding component. (R. 94, ¶ 96).

school funding, across all districts, typically ran between 41% and 47%. (R. 96, ¶104). As of the 2011-2012 school year, the state's average share of funding dropped to approximately 39.7%, the lowest percentage since the 1992-1993 school year. (R. 96, ¶105).

Between 2008-2009 and 2011-2012, the total aid provided by the State to school districts declined by $1.86 billion dollars while, during that same time period, student enrollment in those districts remained virtually unchanged. (R. 96, ¶107). This decline occurred despite the Legislature's statutory commitment, in response to the Campaign for Fiscal Equity (CFE) litigation, to increase Foundation Aid for schools by $7 billion, by the 2010-2011 school year. (Chapter 57, Laws of 2007). As of the 2013-14 school year, the State had fallen short of this commitment by approximately $4.7 billion. (R. 96, ¶110).

This shortfall was caused in part by the "gap elimination adjustment" (GEA). (R. 96, ¶112). The GEA was enacted in 2009 and made permanent in 2011. (R. 96, ¶112). The GEA is intended to close the gap between budgeted State expenditures and available revenues. (R. 96, ¶112). In 2010-2011, for instance, the GEA reduced State school aid by $2.1 billion. (R. 96, ¶112). According to the Board of Regents, because high need, low wealth districts are most dependent on State aid, the GEA imposed the largest per pupil spending cuts on high need and average need districts.[8]

Further, the State has also capped the growth in State education aid. Chapter 58 of the Laws of 2011 specifically linked the "allowable growth" of State school aid to the growth of personal income in the State. (R. 102, ¶130). The decline in State education funding is such that former

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[8] NEW YORK STATE BOARD OF REGENTS, NEW YORK STATE DEPARTMENT OF EDUCATION, PROPOSAL ON STATE AID TO SCHOOL DISTRICTS FOR SCHOOL YEAR 2012-13, at 7-8 (January 2012), *available at* http://www.p12.nysed.gov/stateaidworkgroup/2012-13RSAP/RSAP1213final.pdf.

Commissioner of Education John King warned that some of the State's school districts will soon face "educational insolvency."[9] (R. 97, ¶113).

Many school districts may also be on the verge of actual financial insolvency.[10] (R. 97, ¶114). In 2014, about 36 low wealth/high need districts and about 60 average need districts were unable to meet the local funding share expected by the State – a particularly damaging failure because the State calculates aid based on a district meeting its expected local contribution. (R. 95; ¶20;) Education Law § 3602(4)(a).

The impact of the State's funding cuts on individual school districts is profound. For example, in 2012-2013, Unadilla CSD, with a Combined Wealth Ratio (CWR)[11] of .358, was shorted $2,845,955 in foundation aid. (R. 103, ¶135). Elmira CSD, with a CWR of .379, was shorted $18,745,787.[12] (R. 103, ¶135). Conversely, Island Park and Great Neck, with CWRs of 2.253 and 3.358, respectively, received $318,097 and $1,762,568 *more* than the foundation aid formula requires. (R. 103-104, ¶135). This is because New York utilizes a "save harmless" approach to distributing

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[9] *Public Hearing: Joint Legislative Public Hearing on 2013-2014 Executive Budget Proposal: Topic: "Elementary & Secondary Education," NYS Joint Legislative Budget Hearing* (January 19, 2013)(testimony of NYS Educ. Dep't Comm. John B. King), *available at* http://www.nysenate.gov/event/2013/jan/29/joint-legislative-public-hearing-2013-2014-executive-budget-proposal-topic-element; *see also* Scott Waldman, *4th R: Running Out of Money*, ALBANY TIMES UNION, January 24, 2012, *available at* http://www.timesunion.com/ local/article/4th-R-running-out-of-money-2680574.php.

[10] SCHOOL DISTRICT FISCAL REPORT: A TALE OF TWO INSOLVENCIES, N.Y.S. ASSOCIATION OF SCHOOL BUSINESS OFFICIALS (September 2012), *available at* http://www.nysasbo.org/uploads/pdf/1351005694_School_District_Insolvency_Report_September_2012.pdf.

[11] The State uses the "combined wealth ratio" ("CWR") to compare the relative wealth of school districts. (R. 98, ¶118). The CWR indexes each district against the statewide average on a combination of two factors, property wealth per pupil and income wealth per pupil. (R. 98, ¶118). Districts with a ratio greater than 1.0 are wealthier than the state average. Districts with a ratio under 1.0 have below average wealth. (R. 98, ¶118).

[12] In the 2012-2013 school year, Elmira and Unadilla were forced to make numerous cuts to teaching staff and academic and extra-curricular programs. (R. 109-111, ¶156-164; R. 120-122, ¶217-228).

education aid, which guarantees that no district receives less funding than it received during the previous budget cycle (R. 103, ¶135-136).

The impact of these cuts cannot be denied. Since 2008, New York's public schools have eliminated nearly 35,000 teachers and other staff, along with untold academic programs and other student services. (R. 97, ¶115).

The Tax Cap

While the State has reneged on its foundation formula promise, imposed GEA cuts and capped state funding increases, through the Tax Cap the State has limited the tax school districts can levy on real property. As noted, under the Cap, a school district cannot increase the property tax levy by more than the Consumer Price Index (CPI) rate of inflation or two percent (2%)[13], whichever is less, absent approval of a 60% supermajority of the school budget voters. Education Law §2023-a(1) and (2)(a).

The Tax Cap's percentage-based formula allows wealthier school districts, which already spend more and provide more educational opportunity for their children, to raise substantially more funding per student than poorer districts. (R. 103, ¶132-134). Within the Tax Cap, the wealthiest decile of districts can raise an average aggregate of $27,313 per student, more than five times as much as the poorest decile ($4,970 per student). (R. 401, ¶16). Thus, within the Cap, the existing inequality in local spending and educational opportunity can only widen. Worse, because tax levies

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[13] Under the statute, the Tax Cap for individual districts can exceed 2% or fall below 0%. The lesser of 2% or the CPI is the first step in a nine step calculation process for each district's tax levy limit. Education Law § 2023-a(2)(a). The calculation also includes a tax base growth factor which allows the tax levy to grow to reflect "the physical or quantity change" in the district. *See* Education Law §2023-a(2-a). This is designed to allow the tax levy to grow to reflect the percentage increase in a school district's total property valuation attributable to new construction and/or physical additions to existing real property. There are also exemptions for certain public pension payments, court orders, and capital expenditures which may allow for a larger levy increase. Education Law §2023-a(2)(i). There are also adjustments which may require a district to reduce the levy from the prior year to remain within their levy limit. For instance, if there is an increase in "payments in lieu of taxes" (PILOTS), then the levy limit is reduced dollar for dollar. Education Law §2023-a(3)(6).

are arbitrarily capped at or *below* the rate of inflation, educational spending and opportunity can, over time, only stagnate or diminish, harming all school children and districts, wealthy, average, and poor.

With the decline in State funding, school districts are now faced with a Hobson's choice: incorporate deep cuts in staffing and programs, or propose budgets that require Cap-piercing tax levies. This is a risky proposition. If a Cap-piercing budget proposal fails twice, the school district must adopt a budget with no tax increase. Education Law §2023-a(8).

Further, under Education Law §2023-a(6)(b), when a school board proposes a budget that would require a tax levy exceeding the tax cap, the ballot for such budget must include this statement:

> **Adoption of this budget requires a tax levy increase of ____ which exceeds the statutory tax levy increase limit of ____ for this school year and therefore exceeds the state tax cap and must be approved by sixty percent of the qualified voters present and voting.**

In the 2013-14 school year, only twenty-eight (28) districts sought to pierce the Cap, with only seven (7) districts succeeding on the first vote. For the 2014-15 year, twenty-four (24) districts sought to pierce the Cap, with fifteen (15) succeeding on the first vote.

In May 2012, ten districts obtained majority support for Cap-piercing proposed budgets, but each failed to meet the 60% supermajority requirement. (R. 87, ¶59). These districts were already facing substantial staffing and program cuts, which were exacerbated by the Tax Cap. (R. 97, ¶112). This included the loss of numerous teaching positions, in every tenure area; academic intervention services, foreign language, art, music, technology, family and consumer science, and health courses; AP course electives; coaching positions and varsity, junior varsity, and intramural sports; after school band, chorus, newspaper clubs, literary magazine, and science clubs; special education teachers and services; guidance counselors, speech therapists, behavioral intervention specialists; cuts in school supplies; cuts in professional development; transportation cuts and longer transportation times;

increased class sizes; elimination of summer school; and deferral of building maintenance and capital improvements. (R. 104-122, ¶138-226).

When *Levittown* upheld New York's unequal public school funding system, poorer districts were, as a practical matter, already unable to keep up with wealthier districts' local support for education. They were, however, *legally* free to raise as much local revenue as the school board and a majority of voters were willing to support. Under the Tax Cap, this right has been impaired and *de facto* inequality has become *de jure* inequality.

<u>*The Tax Freeze*</u>

For the 2014 and 2015 tax years,[14] the Tax Freeze provides a "pre-paid" state income tax credit to eligible taxpayers, reimbursing them for any tax increases within the Tax Cap. Tax Law §§ 606(bb)(4). Taxpayers eligible for a Freeze credit must meet certain individual criteria. Most notably, however, they must reside in a school district that in the 2014 and 2015 tax years passes a budget within the district's Tax Cap levy limit. Education Law §§2023-a(2)(i) and 2023-b(2).

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[14] Chapter 20 of the Laws of 2015 added a new subsection (n-1) to Section 606 of the Tax Law. This subsection adds a new "Property Tax Relief Credit" for tax years 2016 through 2019. School Tax Relief Program (STAR) eligible property owners outside of New York City are eligible for an income tax credit beginning in the fall of 2016. These "tax credits" are paid to eligible homeowners by October 31st each year of the program in the form of a separate check. A school district must pass a budget within the property tax levy limit in order for their residents to qualify for the Property Tax Relief Credit. The value of the tax credit is a flat dollar amount in 2016 of $130 for each eligible property owner located within the Metropolitan Commuter Transportation District (MCTD) region and $185 to eligible property owners residing outside of the MCTD region. The value of the tax credit in years 2017 through 2019 is calculated as a percent of the savings which the eligible homeowners currently receives from the State School Tax Relief (STAR) program. The value of the credit is also adjusted by the income level of the recipient. The homeowner's income must be below $275,000 to receive a benefit under this program. Although this new amendment was not part of appellants' challenge, the fact that these future tax credits are made dependent on the outcome of a school budget vote raises the same questions as are raised by the Tax Freeze for the 2014 and 2015 tax years.

The Tax Freeze imposes a grossly regressive distribution of State funds. Because wealthier districts can raise greater additional funding within the Tax Cap, a vastly disproportionate share of Tax Freeze credits go to eligible taxpayers in the wealthiest districts:

Estimated Value of Tax Freeze Credit By Wealth Decile

Decile and Upper Limit Combined Wealth Ratio	Estimated Value of Tax Freeze Credit	Share of Tax Credit Payments
1 (0.450) Poorest	$6,686,994	2.0%
2 (0.520)	$10,286,034	3.0%
3 (0.581)	$19,067,055	6.0%
4 (0.658)	$17,973,660	6.0%
5 (0.751)	$26,817,558	9.0%
6 (.0879)	$38,841,718	13.0%
7 (1.042)	$43,335,605	14.0%
8 (1.327)	$47,372,372	16.0%
9 (2.151)	$46,594,861	15.0%
10 (50.646) Wealthiest	$43,967,200	15.0%
Statewide Total	$300,943,057	100.0%

(R. 91).

For example, the Jasper-Troupsburg CSD, with a 0.423 CWR, is one of the poorest school districts in the State. (R. 90, ¶73). Last year, its voters, by supermajority vote, exceeded its tax levy limit for the 2014-15 budget. (R. 90, ¶73). Even though it pierced the Cap, Jasper-Troupsburg was only able to raise spending by $152 per pupil. (R. 90, ¶73). Because its voters pierced the Tax Cap, otherwise eligible taxpayers in this poor district were denied the tax credits furnished to those in wealthier districts, which already spend considerably more per student, and which were able to raise substantially more money per student within the Tax Cap. (R. 90-92, ¶73-77). These tax credits were

subsidized by all State taxpayers, including those in Jasper-Troupsberg. This regressive distribution of State funds is, of course, exactly contrary to the proposition that "State aid should increase where student need is high and the local ability to pay is low." *CFE II*, 100 N.Y.2d at 929.

Students in Districts with High Poverty Rates Have the Greatest Educational Needs.

Unsurprisingly, there is a direct correlation between poverty, spending, and measurable student achievement. For the 2012-2013 school year, children in the wealthiest decile of districts scored more than 230% higher on the State English Language Arts (ELA) exams and more than 260% higher on the State Math exams than children in the poorest decile. (R. 102). The pernicious effects of grinding poverty on public school students and educational achievement cannot be honestly denied, nor can the need to provide these children with expanded educational services.

The 1978 lower court *Levittown* decision analyzed the causal link between poverty and students' educational needs. Justice L. Kingsley Smith found that students who live in poverty often have impaired learning readiness, and impaired mental, emotional, and physical health. *Id*., 94 Misc.2d 466, 511 (Sup.Ct. Nassau County 1978). He found that poverty generates a variety of living conditions that prevent many children from being ready for school, and that a child living in such conditions requires special assistance to ensure that the child is ready to learn. *Id*.

Our courts continue to recognize the greater educational needs of students living in poverty. *See*, *CFE II*, 100 N.Y.2d at 942. More recent rulings specifically require that an educational platform of programs and services be provided as a way to ensure that at-risk students, who are often students living in poverty, have the opportunity for a meaningful and sound basic education. This platform includes, but is not limited to: intensive math and literacy interventions, specialized reading

instruction, "more time on task" also known as extended learning time, and a school student and family support team. *CFE II,* 187 Misc.2d at 51, 76, 114.

Academic research confirms these common sense judicial findings. One recent study concluded that the conditions that attend poverty, such as "overcrowding, noise, substandard housing, separation from parent(s), exposure to violence, family turmoil" and other forms of extreme stress can be toxic to the developing brain, just like drug or alcohol abuse.[15] These conditions provoke the body to release hormones such as cortisol, which could sabotage the development of the brain as the child grows up.

Children exposed to five or more significant adverse experiences in the first three years of childhood face a 76% likelihood of having one or more delays in their language, emotional or brain development.[16] By the time many children enter elementary school, they are already experiencing the physical, social, and mental health impacts of growing up in poverty; they have developed self-coping behavioral and other mechanisms that impede educational progress.[17]

Poverty has been shown to be a dominant contributor for decreased health in students. A study by two prominent neuroscientists suggested that intelligence is directly linked to health.[18] Children

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[15] Fox S.E., Levitt P. and Nelson C.A. 3rd, *How the timing and quality of early experiences influence the development of brain architecture.* CHILD DEVELOPMENT, VOL 81, ISSUE 1 (Jan/Feb. 2010), *available at* http://www.ncbi.nlm.nih.gov/pubmed/20331653.

[16] Recognizetrauma.org, Statistics, http://www.recognizetrauma.org/statistics.php (last visited June 30, 2015).

[17] Greg J. Duncan & Jeanne Brooks-Gunn, *The Effects of Poverty on Children*, THE FUTURE OF CHILDREN, CHILDREN AND POVERTY, VOL. 7, NO. 2, at 65 (Summer/Fall 1997), *available at* http://www.princeton.edu/futureofchildren/publications/docs/07_02_03.pdf

[18] Jeremy R. Gray and Paul M. Thompson, *Neurobiology of Intelligence: Health Implications?*, DISCOVERY MEDICINE (June 19, 2009), *available at* http://www.discoverymedicine.com/Jeremy-R-Gray/2009/06/19/neurobiology-of-intelligence-health-implications/

living in poverty are more likely to be diagnosed with asthma, and five times more likely to be in poor health and to miss more school.[19]

In addition, nutrition is directly correlated to health. Children who grow up in poor families are exposed to food with lower nutritional value. This can adversely affect them even in the womb.[20] Moreover, poor nutrition at breakfast affects gray matter mass in children's brains.[21] Skipping breakfast is highly prevalent among urban minority youth, and it negatively affects students' academic achievement by adversely affecting cognition and raising absenteeism.[22]

Poverty also adversely affects mental health. Mental illness, in return, reinforces poverty.[23] Children with anxiety, depression, or any associated illnesses – ills often caused by poverty – have a great deal of difficulty focusing in the classroom.[24] These children often have low thresholds of frustration and will act out in the absence of pro-social coping mechanisms. (*Id.*)

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[19] B. Bloom, Cohen RA and Freeman G., *Summary health statistics for U.S. children: National Health Interview Survey, 2011,* NATIONAL HEALTH INTERVIEW SURVEY, CENTER FOR DISEASE CONTROL, SERIES 10, NO. 254 (Dec. 2012), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_254.pdf

[20] Iwa Antonow-Schlorke, Matthias Schwab, et al., *Vulnerability of the fetal primate brain to moderate reduction in maternal global nutrient availability,* PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, VO. 108(7), 2011 FEB. 15, PMC3041099 (Jan. 20 2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3041099/

[21] Yasuyuki Taki, Hiroshi Hashizume, et al., *Breakfast staple types affect brain gray matter volume and cognitive function in healthy children,* PLOS ONE, VOL. 5(12), 2010, PMC2999543 (Dec. 8, 2010), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2999543/

[22] C.E. Basch, *Breakfast and the achievement gap among urban minority youth*, JOURNAL OF SCHOOL HEALTH, VOL. 81, ISSUE 10 (Sept. 16, 2011), *available at* http://www.ncbi.nlm.nih.gov/pubmed/21923876.

[23] Ujunwa Anakwenze and Daniyal Zuberi, *Mental Health and Poverty in the Inner City,* HEALTH & SOCIAL WORK, VOL. 38, ISSUE 3 (Sept. 4, 2013), available at http://hsw.oxfordjournals.org/content/38/3/147.abstract.

[24] Roy AL, McCoy DC and Raver CC, *Instability Versus Quality: Residential Mobility, Neighborhood Poverty, and Children's Self-Regulation*, Developmental Psychology, Vol. 50(7), (July 2014), *available at* http://www.ncbi.nlm.nih.gov/pubmed/24842459.

Many other studies link the variables of family and neighborhood poverty with suppressed academic performance and IQ scores.[25] Children who grow up in depressed socioeconomic conditions typically have a smaller vocabulary, which raises the risk for academic failure.[26] Children from low-income families hear, on average, 13 million words by age 4. In middle-class families, children hear about 26 million words during that same time period. In upper-income families, children hear a staggering 46 million words by age 4. *Id*.

Poverty in the home, neighborhood poverty, and greater lengths of time in poverty contribute to a number of issues, including: childhood neglect[27]; higher rates of parental incarceration[28]; and higher crime rates,[29] and lower incidence of adult diplomas.[30] High-poverty neighborhoods have more violence, which makes children in poverty more likely to be victims or witnesses of violence, both

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[25] Valentina Nikulina, et al., *The role of childhood neglect and childhood poverty in predicting mental health, academic achievement and crime in adulthood*, AMERICAN JOURNAL OF COMMUNITY PSYCHOLOGY, VOL. 48, ISSUE 3-4 (Dec. 2011), *available at* http://link.springer.com/article/10.1007/s10464-010-9385-y?no-access=true; Misty Lacour and Laura D. Tissington, T*he effects of poverty on academic achievement,* EDUCATIONAL RESEARCH AND REVIEWS, VOL.6, NO. 7 (July 2011), *available at* http://eric.ed.gov/?id=EJ936666; *see also* Ezekiel J. Dixon-Roman, et al., *Race, Poverty and SAT Scores: Modeling the Influence of Family Income on Black/ White High School Students' SAT Performance*, TEACHERS COLLEGE RECORD (2013), *available at* http://www.tcrecord.org/Content.asp?ContentId=16925.

[26] Eric Jensen, *How Poverty Affects Classroom Engagement*, EDUCATIONAL LEADERSHIP, VOL. 70, NO. 8 (May 2013), *available at* http://www.ascd.org/publications/educational-leadership/may13/vol70/num08/How-Poverty-Affects-Classroom-Engagement.aspx

[27] *See* Valentina Nikulina *supra,* note 26.

[28] Erica J. Hashimoto, *Class Matters*, 101 J.CRIM. L. & CRIMINOLOGY 31, 57 (2011)(those below the poverty level were three time more likely to be incarcerated in a state prison than the average person and were four times more likely than those above the poverty threshold).

[29] Carter Hay, et al., *Compounded Risk: The implications for delinquency of coming from a poor family that lives in a poor community*, JOURNAL OF YOUTH AND ADOLESCENCE, VOL. 36, ISSUE 5 (2007), *available at* https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=240995

[30] Kai A. Schafft, et al., *Poverty, residential mobility, and persistence across urban and rural family literacy programs in Pennsylvania*, ADULT BASIC EDUCATION AND LITERACY JOURNAL, VOL. 3, NO. 1 (Spring 2009), *available at* http://eric.ed.gov/?id=EJ836281 (ERIC No. EJ836281).

of which make children very susceptible to the illnesses associated with poverty – anxiety, depression and Post Traumatic Stress Disorder.[31]

The joblessness and under employment that is prevalent in high-poverty neighborhoods take away the positive sense of well-being and functioning from their citizens.[32] Research suggests that lower socioeconomic status is often associated with viewing the future as containing more negative events than positive ones.[33] Low or no expectancy ("helplessness") is directly related to low socioeconomic status. (*Id*.) If students think failure or low performance is likely, they are less likely to try.[34]

The appellants are under no illusion that this Court can remedy these ills, nor do the appellants seek any additional funding. This Court can, however, address the legality of statutory amendments that deter or punish willing voters who wish to provide greater educational opportunity for these children.[35]

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[31] American Psychological Association, *Effects of Poverty, Hunger, and Homelessness on Children and Youth*, http://www.apa.org/pi/families/poverty.aspx (last visited June 30, 2015); see also Yumiko Aratani, *Homeless Children and Youth, Causes and Consequences,* NATIONAL CENTER FOR CHILDREN IN POVERTY, COLUMBIA UNIVERSITY, MAILMAN SCHOOL OF PUBLIC HEALTH DEPARTMENT OF HEALTH POLICY & MANAGEMENT, pg. 7 (Sept. 2009), *available at* [*http://nccp.org/publications/pdf/text_888.pdf.*](http://nccp.org/publications/pdf/text_888.pdf)

[32] *See* Roy AL, note 25.

[33] *See* Eric Jensen, *supra*, note 27.

[34] *See* Eric Jensen, *supra,* note 27; *see also* Lisa S. Blackwell, et. al., *Implicit theories of Intelligence Predict Achievement Across an Adolescent Transition*, CHILD DEVELOPMENT, VOL. 78, NO. 1 (January/February 2007).

[35] *See also*, Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts,* 85 N.C. L. Rev. 1467, 1471-1476 (2007)(indicating that students from poor households have increased educational needs).

New York's School Funding System is Grossly Unequal, Providing
<u>the Least Funding to Students with the Greatest Need</u>.

As of 2014-15, the most recent school year for which complete data is available, the poorest decile of school districts in the state had CWR values ranging from .187 to .45 (R. 98, ¶119), meaning that property in the poorest district had 18.7% of the value of the average district. (R. 98, ¶119). The wealthiest decile of districts had CWR values ranging from 2.168 to 50.646, meaning that the property in the wealthiest district was valued more than 50 times than that of the average district.[36] (R. 98-99, ¶119).

In 2012-2013, the average amount spent per pupil by districts in the lowest decile was $19,823. (R. 99, ¶120). In contrast, the districts in the highest decile spent 80% more on average, or $35,690 per student. (R. 99, ¶120). Individual disparities are shocking: in 2012-13 Schenectady CSD spent $15,964 per student. (R. 101, ¶127). Albany CSD spent $19,505 per student. (R. 101, ¶127). Meanwhile, Southhampton UFSD spent $35,582 per student, and Fire Island UFSD spent $93,271 per student (R. 99-100, ¶121-122).[37]

<u>The Tax Cap Places Unequal Funding Limits on Districts, According to Their Wealth</u>

Reducing State aid and capping local funding has a greater, adverse impact on the districts in the greatest financial distress. In general, because the highest spending districts are the property wealthiest districts, they exert the least tax effort. (R. 97-98, ¶116-117). In contrast, communities which want good schools, but which do not have a large tax base, must bear a disproportionately heavy local tax burden. (R. 98, ¶117). The Tax Cap unequally limits the ability of poorer districts

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[36] New York has the dubious distinction of leading all other states in income inequality. Amanda Noss, *Household Income: 2013, American Community Survey Briefs*, US CENSUS BUREAU, September 2014 Issue (2014), *available at* http://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-02.pdf

[37] Other examples are set forth at R. 99-100, ¶ 121-122.

to raise funds to provide educational opportunity to schoolchildren, but leaves wealthier districts in a relatively better position to provide added funding. (R. 98, ¶117).

This wealth disparity is well-illustrated by free and reduced-price lunch program (FRPL) rates. (R. 100, ¶123). In the 2012-13 school year, the decile of districts with the highest percentage of FRPL eligible students were, within the Tax Cap, able to raise an additional $161 per student. (R. 100, ¶123). The decile of school districts with the lowest FRPL rate were able to raise an additional $677 per student – more than four times as much. (R. 100, ¶123).

There is also a direct correlation between poverty, education funding, and high school graduation rates. (R. 100, ¶124). According to a 2011 study, 92% of students in the highest income, lowest need districts graduate on time; 81% graduate on time in average need districts, but only 57% graduate on time in high needs districts.[38] But, in 2012-13, the school districts in the decile with the lowest graduation rates were, within the Tax Cap, able to raise an average of only five (5) additional dollars per student, while the school districts in the decile with the highest graduation rates were able to raise an additional $359 per student -- **71 times as much**. (R. 379).

Unsurprisingly, many low-wealth districts are also districts with high concentrations of minority school children.[39] (R. 101, ¶125). Many of these districts spend, per student, far below the State average, and have graduation rates far below the State average. (R. 101, ¶126-127).

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[38] PUBLIC POLICY AND EDUCATION FUND OF NEW YORK AND ALLIANCE FOR QUALITY EDUCATION, UNEQUAL OPPORTUNITY = UNEQUAL RESULTS, at 4 (2011), *available at* http://www.aqeny.org/ny/wp-content/uploads/2011/02/Unequal-Opportunity-Equals-Unequal-Results-2.pdf

[39] New York has the most segregated schools in the country: in 2009, black and Latino students in New York had the highest concentration in intensely-segregated public schools (less than 10% white enrollment), the lowest exposure to white students, and the most uneven distribution with white students across schools. UCLA THE CIVIL RIGHTS PROJECT, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE, at 11-13 (March 26, 2014), *available at* http:///www.escholarship.org/uc/item/5cx4b8pf.

District	2012-13 Spending Per Pupil	CWR	Graduation Rate	Minority %	Eligible for FRPL
Albany City School District	$19,505	0.709	47.8%	71%	67%
Schenectady City School District	$15,964	0.384	52.3%	50%	72%
Poughkeepsie City School District	$19,117	0.580	57.2%	84%	88%
Newburgh City School District	$19,040	0.579	60.7%	70%	69%
Dunkirk City School District	$19,805	0.404	65.2%	50%	71%
Brentwood Union Free School District	$19,378	0.426	65.5%	90%	74%

(R. 101, ¶127).

The Tax Cap's percentage limit will lock in and over time will, with mathematical certainty, widen these stark inequalities. (R. 400-402, ¶13-17).

The Tax Cap Has a Regressive Impact on the Ability of Poor Districts to Provide Educational Opportunity to Their School Children.

Educational inputs are purchased with dollars, not with percentages. In this regard, the Tax Cap's math is inescapable. Applying a percentage cap to a tax base yields an amount that is wholly a function of the tax base to which it applies. Thus, a percentage Cap is anything but equal.

For instance, in the 2012-2013 school year, high needs Elmira CSD levied its maximum tax levy increase, according to the Tax Cap, of 2.83%. (R. 103, ¶133). Based on its property wealth, that

increase yielded an additional $124 per student. (R. 103, ¶133). In comparison, the Great Neck Union Free School District, which is comparable in terms of size of enrollment, imposed a maximum increase, according to the tax cap, of 2.49%, yielding an additional $713 per student – **575% more per student than Elmira**. (R. 103, ¶133). (*See* R. 103, ¶134 for additional examples). Tellingly, that year over 55% of Elmira's voters voted to pierce the Cap, but failed to overcome the Cap's supermajority requirement. (R. 110, ¶162). This exacerbated Elmira's drastic budget cuts. (R. 110).

The Purpose and Effect of the Cap and Freeze

The only purpose of the Cap and Freeze is to limit property taxes by impairing local control of school district funding decisions. The effect of the Cap and Freeze is to place the impramatur of law on the State's grossly unequal school funding.[40] As shown above, high wealth, low need school districts are permitted to raise far more additional tax revenue within the Cap than are low wealth, high need districts. Under the Freeze, this greater additional revenue is subsidized by State tax credits to eligible taxpayers, but only in Cap-compliant districts. These credits overwhelmingly and disproportionately go to taxpayers in lower need, higher wealth districts.

The Cap, which in theory can be pierced by supermajority vote, has already been remarkably effective in institutionalizing inequality in public school funding and opportunity. For the 2013-14 school year, less than 2% of New York's school districts pierced the Cap. (R. 88, ¶61).

The Cap and Freeze has vitiated the local control rationale of *Levittown* and has subverted every previously identified justification for New York's unequal school funding system. Instead of preserving and promoting local control, the Cap and Freeze impairs local control. Instead of

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[40] In 2014, New York's school spending inequality, compared to other states, has earned it an "F" rating from the Education Law Center. EDUCATION LAW CENTER AND RUTGERS GRADUATE SCHOOL, IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD, THIRD EDITION, at 15 (Jan. 2014), *available at* http://www.edlawcenter.org/assets/files/pdfs/publications/National_Report_Card_2014.pdf

equalizing school revenue, the Cap and Freeze worsens inequality. Instead of calibrating funding to student need and providing increased State aid where need is high and ability to pay is low, the Cap and Freeze disproportionately directs State tax credits to districts where the need is low and the ability to pay is high.

In sum, in 2015 New York's public education funding system is grossly and grotesquely unequal. Children with the greatest educational need are provided the fewest educational resources. Thirty years ago, our highest Court accepted this inequality, but *only* because it was the result of local control of education spending. Today, a system that provides the least support to schools and children with the greatest need, that deprives school boards and voters of local control, and that legally institutionalizes inequality, can no longer be tolerated as rational or constitutional, under any level of judicial scrutiny.

<u>The Decisions Below</u>

In September, 2014, the Albany County Supreme Court (J. McGrath) granted both respondents' motion to dismiss appellants' amended complaint and appellants' motion to amend that complaint so as to include, *inter alia*, the then-newly enacted Tax Freeze. On the merits, the court dismissed the amended complaint in its entirety for a failure to state any valid causes of action. Notably, the court opined that appellants had presented only facial challenges to the constitutionality of the Tax Cap. (R. 9, 30).

As to appellants' Education Article claims, the court engaged in a thorough discussion of relevant precedent, including *Levittown* and *Paynter*, *supra*. While the court recognized that the crux of the appellants' claims was that the degradation of local control violated the State Constitution, it concluded that the only "cognizable cause of action under the Education Article" is one which alleges

a specific failure to provide a "sound basic education." (R. 12-13). The court found that the Tax Cap did not hinder local control, in that "[t]he vote itself connotes local control." (R. 13). The court did not, however, specifically address whether a vote taking place under a supermajority requirement, together with the preexisting inequity in funding, meets the *Levittown* criteria of being "substantial," "direct," and "meaningful."

The court then turned to appellants' equal protection claims. Relying heavily on *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), the court declined to revisit whether education should be considered a fundamental right and, accordingly, applied the rational basis test. (R. 13). The court concluded that the Cap was not irrational, and related to the State's "legitimate interest in retaining jobs and businesses here in New York." *Id*. Notably, the court did not consider *San Antonio's* express caveat that the Court's ruling did not address situations where a local school district was constrained in the amount of taxes it could levy. *San Antonio,* 411 U.S. at 50, fn. 107.

Next, to the extent relevant to this appeal, the lower court rejected appellants' substantive due process claim, founded upon the fundamental right of parents and local voters to provide educational opportunity to children. The Court recognized that the "interest that parents have in the care, custody, control, and management of their children, including [their] right to control their education" is "one of the oldest liberty interests recognized by the Supreme Court." (R. 18). The court, however, declined to find a substantive due process violation. (R. 18).

The court granted appellants' motion to amend. (R. 19). Thereafter, the second amended complaint was filed and preliminary injunctive relief was sought. Respondents moved to dismiss the second amended complaint and opposed the application for injunctive relief. (R. 65, 140).

In March , 2015, the court dismissed the second amended complaint. Relying on "law of the case," it again dismissed the claims based on the Education Article, equal protection, and substantive due process. (R. 22). With regard to the Tax Freeze, the court dismissed appellants' challenges under the Education Article, equal protection, substantive due process and right to vote claims on the same grounds as it dismissed their Tax Cap challenges, finding that neither the Cap nor the Freeze, nor both working in tandem, violated the State or federal constitutions. (R. 24-25).

The court also ruled that the Cap and Freeze was neither an unconstitutional condition on free speech nor an impermissible chill. As to the former, it concluded that "voters are not burdened *'because* of the content of their speech'" in that voters both in favor and against the Cap can receive a tax credit payment. (R. 29, emphasis in original, internal citation omitted.) As to chilling effect, the court acknowledged that "there is little doubt that the credit is designed to influence voters to stay within the cap," yet concluded that there was no chilling consequence because the effects of government's promise of a cash payment was "unknowable." (R. 30).

ARGUMENT

POINT I

THE LOWER COURT SHOULD NOT HAVE GRANTED RESPONDENTS' MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION BECAUSE APPELLANTS ALLEGED A VIABLE FACTUAL AND A LEGAL BASIS FOR THEIR CLAIMS.

Motions to dismiss under CPLR Rule 3211(a)(7), alleging a failure to state a cause of action, address the sufficiency of the plaintiffs' factual pleadings. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Here, the lower court erred in granting respondents' motion to dismiss because the court, in effect, decided the ultimate merits of the case, not simply whether the appellants pleaded

sufficient facts to have a cause of action. *See*, *Becker v. Schwartz*, 46 N.Y.2d 401, 408 (1978)(court's function is not to determine whether plaintiffs will ultimately prevail).

On a motion to dismiss under CPLR 3211, the pleading is to be afforded a liberal construction, and the court should accept the facts as alleged in that pleading as true, according plaintiffs the benefit of every possible favorable inference, determining only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87-8 (1994); *CFE (I)*, 86 N.Y.2d at 218. The court's focus should be on "whether the pleader has a cause of action rather than on whether he [or she] has properly stated one." *Rovello v. Orofino Realty, Inc.*, 40 N.Y.2d 633, 638 (1976). If from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer*, 43 N.Y.2d at 275.

Even in the context of a declaratory judgment action, issues of fact raised by the pleadings will defeat a motion to dismiss. *See e.g.*, *Washington County Sewer Dist. No. 2 v. White,* 177 A.D.2d 204, 206 (3d Dept. 1992)(where, in the absence of any dispute of fact, proper procedure for a court with jurisdiction is to deny the motion to dismiss, although it could make a declaration in defendants' favor). In such cases, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgement." *Id.,* 177 A.D.2d at 206. The court's function on a motion to dismiss is not to determine "whether plaintiffs should ultimately prevail," but only to determine whether plaintiffs have any cause of action. *Becker*, 46 N.Y.2d at 408.

In the instant case, although it briefly set forth in its decision the standard of review under 3211(a)(7), the court never discussed the sufficiency of the plaintiffs pleadings, discussing instead only its conclusions of law, in other words, only its decision on the ultimate merits. In addition, had it wanted to treat defendants' CPLR 3211 motion to dismiss as a 3212 motion for summary

judgement, the court needed to give the parties adequate notice; something it did not do. *Mihlovan v. Grozavu,* 72 N.Y.2d 506, 508 (1988); CPLR 3211(c).

Further, although statutes enjoy a presumption of constitutionality, that presumption is not irrefutable. *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). Appellants contend that they have sufficiently plead constitutional claims. As will be demonstrated in Points II-V below, all of appellants' claims are legally cognizable and factually well-supported.

The lower court also erred in characterizing appellants' claims as a strictly facial challenge. (R. 28).While the line between facial and "as applied" challenge is not always clear (*Citizens United v. FEC*, 558 U.S. 310, 331 (2010)), it is clear that the amended complaint raised facial and as applied challenges. And, "a finding of facial constitutionality does not foreclose 'as applied' challenges." *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 184 (2d Cir. 2006). Further, since an "as applied" challenge is one that alleges that a statute is unconstitutional as it relates to the party asserting the cause of action under the facts of the case (*People v. Stuart*, 100 N.Y.2d 412, 421 (2003)), until the facts of the case are determined, the court cannot grant a motion to dismiss an "as applied" challenge.

Some aspects of the appellants' challenge may be seen as facial, such as the claim that the Tax Freeze's discriminatory denial of the tax credits unlawfully impairs and chills the exercise of voting rights. (See Point V). But, the challenge to the Tax Cap's impairment of local control and violation of equal protection and substantive due process are also "as applied" challenges.

An "as applied" challenge is one that alleges that a statute is unconstitutional as it specifically relates to the party asserting the cause of action under the facts of the case. *See, e.g.*, *People v. Stuart*, 100 N.Y.2d 412, 421 (2003); and *Texas Eastern Transmission Corp. v. Tax Appeals Tribunal*, 260

AD2d 127, 130 (3rd Dept., 1999). Here, the appellants pleaded their complaint as a facial and as an "as applied" challenge. (R. 80, ¶8; R. 148, ¶8; R. 214, ¶8). And, the individual appellants specifically alleged facts to show that budgets proposed by their districts' school boards failed because of the Tax Cap's restrictions, causing exacerbated cuts to staffing, academic programs, and extra-curricular activities in their districts. (R. 106-122, ¶147-227). A good example is appellant Strong, who is a resident of the Elmira CSD, and whose children attend school there. (R. 83, ¶35-37).

As delineated in the complaint, Elmira is a poor school district. (R. 103-104, ¶132-135; R. 109-110, ¶156-164). In 2012-2013 alone, Elmira was denied over 18 million dollars in State foundation aid. (R. 103, ¶135). In 2012-2013 it was facing drastic school budget cuts, together with the loss of numerous educational staff and programs. (R. 109, ¶156-164). The Board of Education recommended a Cap-piercing budget that would have ameliorated the cuts, and a large majority of voters approved, but the budget was defeated under the Tax Cap's supermajority requirements. (R. 110, ¶162). This caused further cuts. (R. 110, ¶163). Similar facts were pleaded by the individual appellants in nine other school districts. (R. 106-109, ¶147-155; R. 111-122, ¶165-228).

Thus, even if the Tax Cap could be seen as lawful as applied to school districts that are receiving all of their promised state aid and which, because of their property wealth, can raise significant new funding within the Tax Cap, the same cannot be said for districts like Elmira.

The lower court erred in dismissing the complaint. Its decision should be reversed, and the respondents should be directed to answer.

POINT II

THE TAX CAP AND FREEZE VIOLATES THE RIGHT OF PARENTS AND VOTERS TO LOCAL CONTROL OF EDUCATION, A RIGHT ENSHRINED IN THE EDUCATION ARTICLE OF THE NEW YORK STATE CONSTITUTION.

The appellants have stated a claim under the Education Article, alleging the challenged statutes unlawfully impair the right of local control. (R. 123-126, ¶229-246). Our Court of Appeals says this right is "enshrined" in the Education Article. *Paynter*, 100 N.Y.2d at 442. The right of local control has been found to be the *sole* rational basis justifying statewide inequality in school funding. *Levittown*, 57 N.Y.2d at 44-46; *Reform Education Financing Today (REFIT) v. Cuomo*, 86 N.Y.2d 279, 285 (1995). Clearly, the *only* purpose of the Tax Cap and Freeze is to limit property tax increases by impairing the constitutionally protected right of local control.

The right of local control is the product of more than two centuries of legal history and tradition in New York. (R. 93-94, ¶85-95). The collective right of a school district's voters and democratically elected boards of education to make the basic decisions concerning the education provided to the district's school children is directly related to the individual rights of children to learn and of parents to provide an education -- liberties long recognized as fundamental and fully protected by the Fourteenth Amendment. *Meyer v. Nebraska, 2*62 U.S. 390 at 399-401 (1923). As the Supreme Court has recently explained, collectively-exercised rights are no less worthy of respect and enforcement than individual rights. *Schuette v. Coalition to Defend Affirmative Action (BAMN)*, 134 S.Ct., 1623 (2014) (plurality decision) (slip op. at 15-16); rationale adopted by majority, *Obergefell v. Hodges*, 2015WL2473451 (June 26, 2015).

Appellants do not seek additional school funding; nor do they allege that children in any individual school district are being denied a sound basic education. This does not mean, as

erroneously determined below, that they have no claim under the Education Article. The Court of Appeals has never held that the only possible claim under the Education Article is one for increased State funding. *See Paynter,* 100 N.Y.2d at 441. Because the Court of Appeals has repeatedly determined that local control is *the* rational basis for unequal school funding, the appellants may fairly challenge amendments that circumscribe local control.

The Court in *Levittown* noted the willingness of taxpayers in many districts to provide "enriched" educational services. 57 N.Y.2d at 45. Citing legislation in Hawaii, the Court stated: "Allowing local communities to go above and beyond [state] established minimums to provide for their people encourages the best features of democratic government." *Id.* Appellants allege that the Cap and Freeze impair their ability to provide such services. Unless the Education Article's right of local control is to be reduced to a mere platitude, the State's ability to impair local control must have *some* limits.

The right of local control *is* more than a platitude. When *Levittown* was decided, the State's education funding scheme allowed taxpayers to enact tax levies "perceived by the local board of education to be responsive to the needs and desires of the community."[41] *Id.* at 45. According to the Court of Appeals, "the Education Article enshrined in the Constitution a state-local partnership in which "people with a community of interest and a tradition of acting together to govern themselves" make the "basic decisions on funding and operating their own schools." *Paynter*, 100 N.Y.2d at 442. In the words of the Court, the Education Article promises "that a system of local school districts exists and will continue to do so because the residents of such districts have the right to participate in the governance of their own schools." *Id.*, internal citations omitted.

As the Court stated in *Levittown*:

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[41] When *Levittown* was decided, there was a Small Cities Tax Cap, but it apparently played no role in the Court's consideration or decision.

> Throughout the State, voters, by their action on school budgets, exercise a *substantial control* over the educational opportunities made available in their districts; to the extent that an authorized budget requires expenditures in excess of State aid, which will be funded by local taxes, there is a direct correlation between the system of local school financing and implementation of the desires of the taxpayer. [*Id.* at 45, emphasis supplied]
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> * * *
>
> Through the years, the people of this State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing an operation of those schools is generated by *giving citizens direct and meaningful control* over the schools that their children attend. [*Id.* at 46, emphasis supplied].

Again, the identified right of local control protects more than the ability to provide school children with a minimally acceptable sound basic education. Rather:

> It is the willingness of the taxpayers of many districts to pay for and provide enriched educational services and facilities beyond what basic per pupil expenditure figures will permit that creates differentials in services and facilities. *Levittown*, 57 N.Y.2d at 45.

The Court concluded that “any” legislative attempt to interfere in the choices of school districts and voters to provide for educational opportunities beyond those that other districts might elect, or to make additional spending "uniform and undeviating", or to prohibit "expenditure by local districts of any sums in excess of a legislatively fixed per pupil expenditure" “would inevitably work the demise of the local control of education available to students in individual districts." *Id.*, 57 N.Y.2d at 45-46.

The Cap and Freeze clearly impairs the "substantial," and "direct and meaningful" local control of school boards and district voters over funding decisions, at least as local control has previously been described by the Court of Appeals. Indeed, the very purpose and clear effect of the

Cap and Freeze is to "work the demise" of local control.

The law now sets an arbitrary local funding increase limit, with no regard to the need of the District's children, or to the desires of the Board of Education or voters. The law imposes an unprecedented and undemocratic supermajority voting requirement, giving a superminority of voters veto power over the will of the majority.[42] The law imposes severely adverse budgetary consequences for failed efforts to pierce the Cap. In the 2014 and 2015 tax years, the Cap and Freeze financially punishes the exercise of local control, by denying tax credits to taxpayers in Districts that pierce the Cap.

The impact of the Cap and Freeze on local control is real. Its application to the appellants, to their school districts, and to their children is well-documented. (R. 106-122, ¶147-228). As applied to appellants' individual school districts, the failure to pierce the Cap by supermajority vote led directly to increased, significant cuts to school staffing and school programs for their children – educational opportunities that the Board of Education and a majority of voters wanted to provide. (R. 106-122, ¶147-228).

Further, today a tiny fraction of school districts even try to pierce the Cap. (R. 105-106, ¶143-146). An even smaller percentage succeed. (R. 105-106, ¶143-146). Even with a strong majority of a District's voters, budgets that lack super majority approval are vetoed by minority opposition, resulting in budget cuts and the loss of educational staff and programming for the District's children. (R. 106-122, ¶147-228).

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[42] The lower court held that the supermajority requirement did not impair local control, since there is still a budget vote. This holding is erroneous. First, the supermajority is only one of several impairments of local control imposed by the Cap and Freeze. Second, if *any* budget vote satisfies local control, then a 75% or 90% super majority would still be local control. Indeed, allowing even *one* taxpayer to veto any increase would, in a sense, still be local control. But, at some point, a State imposed prohibition on majority rule makes hollow the Court's promise of "citizens at the local level . . . with a community of interest acting together to govern themselves . . . ." (*Levittown*, 57 N.Y.2d at 46.)

This is not *direct*, *meaningful,* and *substantial* local control of education funding, at least not in the sense that such control previously existed. The Cap and Freeze is exactly what the Court explicitly warned against in *Levittown*: legislative interference with the willingness of individual school boards and voters to provide educational opportunities to schoolchildren by prohibiting local expenditures in excess of a statutorily established level. *Id*., at 45-46.

The lower court erred in granting the motion to dismiss. There *is* a constitutional right of local control. No court has yet defined the limits of the State's authority to impair that right. Appellants carefully detailed in their complaint how the Cap and Freeze impair the local control that existed at the time of *Levittown*. (R. 123-126, ¶229-246). This was sufficient to state a claim.

POINT III

THE TAX CAP AND FREEZE VIOLATES THE GUARANTEE OF EQUAL PROTECTION OF LAW. IT INSTITUTIONALIZES UNEQUAL EDUCATION FUNDING AND OPPORTUNITY AND CONDEMNS THE STATE'S NEEDIEST STUDENTS TO AN INFERIOR EDUCATION.

To state an equal protection claim, a plaintiff must allege that two classes of similarly situated people are treated differently and that either (1) the disparate treatment is based upon the person's membership in a class or (2) the classification serves to impair a protected right; where the person's membership in a "suspect" class or the impairment is of a fundamental right, the government's action is subject to strict scrutiny, otherwise the legislative classification will be upheld so long as it bears a rational relationship to a legitimate goal. *See, Romer v. Evans*, 517 U.S. 620, 631 (1996).

Here, all school children are identically situated with respect to their right to a public education, but the educational funding, resources, and opportunity provided to New York's children is vastly unequal, with children in the wealthiest school districts receiving almost twice as much funding as those in the poorest. (R. 97-100, ¶116-122). The Tax Cap unequally limits the ability to

raise local funding, based on district property wealth This impairs students' right to a public education.

Similarly, school district voters are identically situated with respect to their right to provide an education to the school district's children. Yet, under the Cap and Freeze, parents and voters in poor districts are, within the Cap, allowed to raise far less funding to provide educational opportunity to their children. Again, this unequal classification is based on the property wealth of the school district, and impairs voters' right to provide educational opportunity, and to locally control how much they wish to spend.

A. *San Antonio* and *Levittown* Are Not Controlling

As found by the lower court, equal protection claims based on unequal school funding were rejected by the U.S. Supreme Court in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) and by the Court of Appeals in *Levittown*, 57 NY2d at 44-46. Neither those cases, nor *REFIT,* considered equal protection claims based on unequal funding that was institutionalized through the imposition of an arbitrary Tax Cap and regressive Tax Freeze.

In *San Antonio,* there was no claim that Texas' local tax ceiling barred desired tax increases and, therefore, the constitutionality of the ceiling was not before the Court. According to the Court, the constitutionality of such a ceiling, "must await litigation in a case where it is properly presented." 411 U.S. at 52, fn 107, and see dissent of Justice White, 411 U.S. at 67. In so finding, the Court cited *Hargrave v. Kirk*, 313 F. Supp. 944 (MD Fla. 1970). *Hargrave* presented an equal protection issue very similar to that presented by the case at bar.

Hargrave involved Florida's Millage Rollback Act, which denied state education aid to counties that exceeded a state cap on local school property taxes. *Id*., at 945. The plaintiffs argued

that the Act denied equal protection because the 10 millage limit was fixed by a standard related solely to a county's wealth, not to the educational needs of its children. *Id.*, at 946. As an example, the three-judge federal court noted that under the cap, Charlotte County could raise $725 per student, while Bradford County could raise only $52 per student. *Id.*, at 947.

Rejecting the State's defense that plaintiffs could exceed the cap simply by foregoing State aid, the court, utilizing rational basis review, held that equal protection prohibited a State from allocating authority to tax by reference to a formula based on wealth:

> What rational basis can be found for the distinctions that are inherent in the Act? Do they have any rational relationship to a legitimate state end, or are they based on reasons totally unrelated to the pursuit of that goal? What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? As postulated by the plaintiffs, 'The legislature says to a county, 'You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do.' We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.
>
> While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it 'may not accomplish such a purpose by invidious discrimination between classes of its citizens.' [*Id.*, at 948. (Citations omitted.)]

Hargrave,[43] of course, is not binding precedent. But is telling that *Hargrave* was cited in *San Antonio* for the proposition that the Court was not deciding whether an unequal funding system based on local control would pass muster if the State imposed a wealth-discriminatory cap. *San Antonio*, 411 U.S. at 52, fn. 107. Because the equal protection claim raised by *Hargrave* and by the case at bar

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[43] *Hargrave* was vacated by the U.S. Supreme Court on abstention grounds, (*sub nom Askew v. Hargrave*, 401 U.S. 476 (1971)) and the case appears to have been withdrawn after the statute was repealed, possibly in part as a result of the suit. (Florida Laws 1970, ch. 70-94, 39). *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 Yale L.J. 1303, 1341 (1972).

was not decided by *San Antonio*, the lower court erred in relying on *San Antonio* for its conclusion that appellants failed to state a claim.

Similarly, the Court of Appeals' *Levittown* and *REFIT* decisions rejected equal protection challenges based entirely on the conclusion that inequality was permissible because it was the result of voters' exercise of their State constitutional right of local control. *Levittown*, 57 N.Y.2d at 44-46; *REFIT*, 86 N.Y.2d at 285. That local control has now been impaired by the Cap and Freeze.

The changes in New York's funding system since *Levittown*, including the State's failure to meet the foundation formula, the GEA, the Cap on State education aid, along with growing inequality in wealth and opportunity,[44] require fresh judicial consideration of whether New York's *current* funding system, as amended by the Cap and Freeze, violates equal protection. Because unequal educational funding and opportunity is now "capped" and "frozen" by state law, the local control rationale applied by the Supreme Court in *San Antonio,* and by the Court of Appeals in *Levittown* and *REFIT*, is simply inapplicable.

B. There is a Viable Equal Protection Challenge to the Cap and Freeze Under Any Level of Scrutiny.

In equal protection analysis, different levels of scrutiny apply: either rational basis, intermediate scrutiny, or strict scrutiny, depending on whether the rights at stake are fundamental or the classifications made by the statute at issue are suspect. The appellants have stated a viable equal protection challenge to Tax Cap and Freeze under each level of scrutiny.

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[44] Since *Levittown* was decided in 1982, economic inequality in America has greatly increased. Growing Economic Inequality "Endangers our Future," http://www.npr.org/2012/06/05/154345390/growing-economic-inequality-endangers-our-future. As noted, New York leads all states in such inequality. Economic opportunity - - the ability to achieve the American dream -- has also diminished. Why Most People Will Never Achieve the American Dream, http://www.forbes.com/sites/glennllopis/2012/09/03/why-most-people-will-never-achieve-the-American-dream.

1. <u>*The Tax Cap and Freeze Lack a Rational Basis*</u>

The lower court determined that rational basis review was the proper standard for this case. (R. 13). The rational basis test requires the court to uphold a statute if it furthers a legitimate state purpose and any state of facts can be rationally conceived to support the classification. *Romer*, 517 U.S. at 631. Rational basis review is "respectful and indulgent", but not "toothless." *Windsor v. U.S.*, 699 F.3d 169, 180 (2d Cir., 2012), *aff'd*, *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).

Here, under the Education Article and the Fourteenth Amendment, all of New York's children have an equal right to a public education. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Similarly, under the Education Article, school district voters have an equal right to provide the educational opportunity they see fit, through local control. New York's educational financing system, as amended by the Cap and Freeze, arbitrarily classifies children and voters with respect to these rights according to the property wealth of their school districts. This wealth-based classification has no rational relationship to any legitimate objective of our State's school financing laws.

Under the rational basis standard, as stated in *Levittown*, the proper inquiry is "whether there is an absence of a rational basis for the present school financing system, premised as it is on local taxation within individual school districts with supplemental State aid allocated in accordance with Legislatively approved formulas." 57 N.Y.2d at 44. When rationally based, the statutory framework for the school financing system advances certain objectives.

These objectives have been clearly delineated by the Court of Appeals: (1) preserving and promoting local control; (2) providing state aid in inverse proportion to local ability to raise funds; and (3) calibrating inputs to student need. *CFE II*, 100 N.Y.2d at 929. And, as explained in *Levittown*, the school financing system allows willing taxpayers to "pay for and provide enriched

educational services and facilities . . . ." 57 N.Y.2d at 45. These are the identified objectives of the constitutionally "enshrined", state-local funding framework that comprised the pre- Cap and Freeze education financing system. *Paynter,* 100 N.Y.2d at 442.

Limiting property taxes, without regard to student need or the willingness of voters to provide enriched educational services, has never been an objective or rationale for the school financing system. Indeed, statutorily capping and freezing property taxes has no relationship to properly financing public education, equalizing educational opportunity, calibrating funding to need, or preserving local control of public education.

In this regard, the State is truly trying to have it both ways. For more than three decades, it has successfully argued that gross disparities in school funding and educational opportunity must survive equal protection challenge because these disparities are the result of the constitutional right of local control, and that preserving local control is a rational, legitimate and laudable State purpose. *Levittown*, 57 N.Y.2d at 44-46; *REFIT*, 86 N.Y.2d at 285. Now, after imposing an arbitrary and unequal Tax Cap that impairs local control, and a Tax Freeze that punishes taxpayers whose districts exercise the right to local control by exceeding the Cap, the State argues that the courts must disregard the impairment of local control and uphold the current system simply because limiting local taxes is a rational State purpose.

But this argument does not accurately address the proper legal test to be applied. Rather, appellants submit that any amendments to New York's school financing system must rationally relate to the overall identified purposes of that financing system, not simply to some other State purpose viewed in isolation from that system. *See REFIT*, 86 N.Y.2d at 285.

a. The Cap and Freeze Do Not Rationally Relate to the Purposes of New York's School Financing System.

A basic tenet of a rational basis analysis is that the government-created classification scheme must bear a rational relationship to the legitimate objectives of the legislation it impacts – and not some other law. "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Johnson v. Robison*, 415 U.S. 361, 375 (1974). In other words, there must be some connection between the purpose of the legislation and the distinction created by that legislation. Even in a rational basis analysis, the court must look into the actual purpose of the legislation to ensure that the rationale advanced for a certain statute is not "an afterthought supplied purely by hindsight," *Alma Soc'y Inc. v. Mellon*, 601 F.2d 1225, 1235 (2d Cir. 1979), or "unrelated to the purpose sought to be achieved by such statute." *Levittown*, 94 Misc.2d at 530-31, *citing Reed v. Reed,* 404 U.S. 71 (1971) and *Johnson v. Robison*, *supra.*

An extreme example may be illustrative. For instance, saving the Karner Blue Butterfly or increasing State prison security are certainly legitimate State purposes. A law which directed any new school property tax increases to these purposes, rather than to school funding, however, would bear no rational relationship to the objectives of the school financing system.

Here, the objectives of a rationally based education financing scheme, as articulated by the courts in *Levittown* and *CFE II*, are utterly divorced from the objectives of the Tax Cap and Freeze. Sections 2023-a and 2023-b substantially amended the school financing scheme not to advance public education, not to promote local control or local support for enriched educational services, not to equalize educational opportunity, and not to calibrate inputs to student need, but solely to limit property taxes. Even the lowest level of equal protection scrutiny does not allow this. The challenged

statutes are in no way related to the state's legitimate objectives in funding public schools. To the contrary, the Tax Cap and Freeze runs directly counter to each and every previously articulated rationale for the State's public school financing system.

b. The Cap and Freeze Undermines All of the State's Previous Justifications For New York's School Financing System.

First, as discussed in Point II, the Tax Cap and Freeze is *specifically designed to impair local control*. The supermajority requirement, the ballot notice, the adverse budgetary consequences for failed efforts to pierce the Cap, and the forfeiture of tax credits for piercing the cap, all are designed to discourage or punish school boards and voters with respect to the exercise of local control.

Second, it is irrational to cap and freeze a grossly unequal system. The Court of Appeals has recognized that inequitable funding means inequitable educational opportunity, and that State's role in the State/local funding partnership is to equalize opportunity. *See, Levittown*, 57 N.Y.2d at 38, and *CFE II*, 100 N.Y.2d at 929. But, as alleged in the second amended complaint, the State-imposed Cap and Freeze undermines these very goals.

This is because applying an arbitrary percentage to grossly unequal tax bases means that wealthier districts are legally permitted to raise more revenue than poorer districts. This is no more equal or rational than a law that "equally" limited the percentage of income a billionaire hedgefund manager and a minimum wage worker could spend for their childrens' education.

Third, the Tax Freeze mocks the premise that State assistance "should be calibrated to student need and hence state aid should increase where need is high and local ability to pay is low." *CFE II*, 100 N.Y.2d at 929. The Tax Freeze is truly a reverse Robin Hood scheme, with a vastly disproportionate share of state tax credits going to districts where need is low and taxpayer ability to pay is high. (R. 46, 89-92).

Fourth, even if this Court ignores the fact that the Cap and Freeze undermine every previously articulated purpose of New York's school funding system, and views this question presented as only whether the Cap and Freeze rationally relate to the isolated goal of curbing taxes, appellants' equal protection challenge should still survive. This is because even where the State's interest is legitimate, the means chosen must rationally relate to the interests affected. *See e.g. Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 82 (1988).

Here, capping and freezing school taxes may certainly reduce the growth in local taxes, but it is not rational to do so when it means that children who are already receiving significantly less educational opportunity are disproportionately harmed. Further, at the same time the State has imposed the Cap, it has failed to meet its foundation formula obligation, imposed a GEA which disproportionately hurts high need districts, and imposed a Freeze that disproportionately sends State tax dollars to taxpayers in high wealth, low need districts.

c. Appellants have stated a viable equal protection claim under rational basis review.

Many state and federal courts have allowed – and often sustained – equal protection challenges to wealth-based classifications, including challenges to education funding schemes similar to that challenged here.[45] Fiscal prudence, as in *Hargrave*, may be a legitimate State goal, but the

[45] *See, e.g., Harper v. Virginia State Bd. of Education*, 383 US 663, 668 (1966) (striking down poll tax because of effect on indigent voting; *Gannon v. State*, 298 Kan. 1107, 1150, 1175 (2014) (Kansas constitution requires state to provide adequate and reasonably equitable educational funding and opportunities); *Brigham v. State of Vermont*, 166 Vt. 246 (1997) (striking down property tax based school funding on equal protection grounds); *Dupree v. Alma School District*, 651 S.W.2d 90 (1983) (Public school's financing system was ruled inadequate to rectify inequalities inherent in a financing system based on widely varying local tax bases, and actually widened the gap between the property poor and property wealthy districts in providing educational opportunities. *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310 (Wyo. 1980) and *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (1971) (State's unequal school finance violated equal protection); and *Pauley v. Kelly*, 162 W. Va S.E.2d 672 (1979) (State's unequal school finance violated equal protection); and *Horton v. Meskill*, 172 Conn. 615. 615, 648-49 (1976) ((State's unequal school finance violated equal protection); and *Serrano v. Priest*, 5 Cal Rptr. 584 (1971)(same); and *Hargrave v. Kirk*, 313 F. Supp 944 (MD Fla 1970), vacated on other grounds sub nom. *Askew v.*

Tax Cap and Freeze in no way can be said to advance the articulated purposes of New York's Constitutional obligation to provide a sound basic education or to advance any of the stated goals of New York's State/local funding partnership. Contrary to the lower court's holding, neither *San Antonio* nor *Levittown* resolved or even addressed the equal protection claims raised in this case. The appellants have stated a viable equal protection claim. The lower court erred in dismissing it.

2. *The Appellants' Equal Protection Challenge Should be Reviewed Under Intermediate or Strict Seniority*

The Court of Appeals has specifically rejected any claim that an equal protection challenge based on disparate educational spending by school districts warrants other than rational basis review. *Levittown,* 57 N.Y.2d at 40; *REFIT,* 86, N.Y.2d 285. Appellants recognize that subordinate courts are not free to ignore this ruling. Appellants submit that the *Levittown-REFIT* analysis of the proper review standard is outdated, warranting fresh review. To preserve this claim, Appellants will address it briefly.

a. Intermediate Scrutiny

The Education Article, according to the Court of Appeals, embeds "[t]he *fundamental value* of education." (*CFE v. State (II)*, 100 N.Y.2d 893 (2003) [emphasis added]). Because the Court of Appeals has described education as a fundamental value, the Tax Cap and Freeze should be subject to at least intermediate scrutiny.

Semi-suspect classifications, such as those suggested by fundamental values, call for intermediate scrutiny. Such semi-suspect classifications have been held to exist where a classification infringes upon an important although not constitutionally "fundamental" or "preferred" interest.

Hargrave, 401 U.S. 476 (1971) (statute which denied state aid to counties that exceeded property tax cap on education funding challenged on equal protection grounds).

Other cases, while not expressly stating what level of scrutiny the court used, can be read to the same effect, and have been viewed to that effect. *Delgado v. Kelly*, 127 AD3d 644 (1st Dep't 2015) (regulation of firearms); *Windsor v. U.S.*, 699 F.3d 169, 185 (2d Cir. 2012) (homosexuality); *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258 (2d Cir. 2014) (First Amendment); and *Alevy v. Downstate Med. Center of State of N.Y.*, 39 N.Y.2d 326, 333 (1976) (reverse discrimination issue).

Under the intermediate scrutiny standard, the challenged classification must serve "important" rather than merely "legitimate" government objectives and it must "substantially" further their achievement. *See, Craig v. Boren*, 429 U.S. 190, 197 (1976). Further, even where an important objective is shown to be substantially served, the state must show that a less intrusive alternative could not accomplish the same purpose. *Orr v. Orr*, 440 U.S. 268 (1979); *see also, Craig*, 429 U.S. at 197. Finally, the State has the burden of demonstrating both the importance of the governmental purpose to be served and the substantial relationship between the chosen means and articulated end. *See, Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142, 151 (1980).

The Cap and Freeze fails intermediate scrutiny. As noted above, the Cap and Freeze advance none of the stated objectives of New York' school financing system. Further, even with respect to lowering property taxes, the Court should remember that at the same time the State imposed the Cap and Freeze, in low-wealth districts like Elmira the State was, simultaneously, grossly failing to meet its own funding contribution levels under the foundation formula. (R. 103-104, ¶135).

b. Strict Scrutiny

"Equal protection analysis demands that when a suspect classification is involved or when the challenged classification impinges upon fundamental interests, the challenged classification is subject to 'strict scrutiny,' and to pass constitutional muster must be supported by a compelling State interest."

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); *Golden v. Clark*, 76 NY2d 618 (1990); *Werner v. Middle County Cent. Sch. Dist. No 11*, 89 AD2d 967 (2d Dep't 1982). Because education should be viewed as a fundamental right and because wealth should be viewed as a suspect class, the Court should apply strict scrutiny to the Tax Cap and Freeze.

(1) Education Should be Deemed a Fundamental Right

The Supreme Court has long-regarded a child's right to learn and the corresponding right of parents to provide for a child's education[46] as fundamental rights within the Fourteenth Amendment's guarantee of liberty. *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); cited with approval in *People v. Knox*, 12 N.Y.3d 60, 67 (2009). Just this last term, in upholding marriage equality, the Supreme Court stated: "A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of child-rearing, procreation, and education. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer*, 262 U.S. at 399." *Obergefell v. Hodges*, 2015WL2473451 (June 26, 2015). And, as noted, our Court of Appeals has recognized education as a "fundamental value." *CFE v. State (II)*, 100 N.Y.2d at 901.

Many states now recognize education as a fundamental right.[47] The findings of California's highest court are instructive, given that California is a state of similar size, diversity, and interests to

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[46] This individual right of parents is closely linked to the state constitutional right of local control, a right exercised collectively, but a right nonetheless. *See* pp. 52-53 below.

[47] Alabama, Arizona, California, Connecticut, Kentucky, Minnesota, New Hampshire, New Jersey, North Dakota, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. (*Opinion of the Justices*, 624 So.2d 107, 157 (Ala. 1993)); (*Shofstall v. Hollins*, 110 Ariz. 88 (1973)); (*Serrano v. Priest*, 18 Cal.3d 728 (Cal. 1976)); (*Horton v. Meskill*, 195 Conn. 24 (1985)); (*Rose v Council for Better Educ.*, 790 S.W.2d 186 (1989)); (*Skeen v. State,* 505 N.W.2d 299 (1993)); *New Hampshire Claremont Sch. Dist. v. Governor*, 144 N.H. 210 (1999)); (*Robinson v. Cahill*, 69 N.J. 133 (1975)); (*Bismark Public Sch. Dist. v. State*, 511 N.W.2d 247 (1994)); (*Brigham v. State*, 166 Vt. 246 (1997)); (*Scott v. Commonwealth of Virginia*, 247 Va. 379 (1994)); (*Pauley v. Kelly*, 162 W.Va. 672 (1979)); (*Kukor v. Grover*, 148 Wis.2d 469 (1989)); (*Washakie County Sch. Dist. v Herschler*, 606 P2d 310 (Wyo. 1980), *cert. denied*, 449 US 824 (1980)).

New York. *Serrano v. Priest*, 5 Cal.3d 584 (1971) (*Serrano I*).

In *Serrano*, California's court found education to be a fundamental right based on the following facts: (1) education is a major determinant of an individual's chances for economic and social success in our competitive society; (2) education is a unique influence on a child's development as a citizen and his or her participation in political and community life; (3) education is essential in preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background; (4) education is universally relevant; (5) public education continues over a lengthy period of life- between 10 and 13 years -- in fact, few other government services have such sustained, intensive contact with the recipient; (6) education is unmatched in the extent to which it molds the personality of the youth of society by actively attempting to shape a child's personal development in a manner chosen not by the child or his parents but by the state; and (7) the state has made it compulsory. *Serrano I*, at 22-27.

Our Court of Appeals first considered this issue in the *Levy* case in 1976, in the wake of the U.S. Supreme Court's ruling in *San Antonio.* The *Levy* case dealt with the rights of a handicapped child to receive a free and appropriate education under the State constitution. *Levy v. City of New York*, 38 N.Y.2d 653 (1976). In support of the general proposition that the right to education is not a "fundamental constitutional right" so as to entitle a school child "special constitutional protection" in an equal protection claim, the Court cited *San Antonio,* without any analysis of our State constitution. *Id.* at 658. The Court decided *Levittown* just a few years later in 1982. *Levittown v. Nyquist*, 57 N.Y.2d 27 (1982).

Much has changed since the Court's decisions in *Levy* and *Levittown.* Then, a high school degree was generally all that was needed to find stable, full-time employment. Today, a post-

secondary education is simply a prerequisite to getting a job interview.[48] Even 30 years ago, in *Levittown*, Judge Fuchsberg's dissenting opinion recognized the crucial role of education in our State's future:

> In any meaningful ordering of priorities, it is in the impact education makes on the minds, characters and capabilities of our young citizens that we must find the answer to many seemingly insoluble societal problems. In the long run, nothing may be more important – and therefore more fundamental – to the future of our country. *Levittown*, 57 NY2d at 51.

Clearly, the right to an education today is more than a certain step on the State's "high list of priorities," and it should be deemed a fundamental right under Article XI, §1.

(2) Wealth as a Suspect Class

Strict scrutiny also applies when a suspect class is at issue. Wealth should be deemed a suspect class.

A statutory classification on the basis of wealth is considered "disfavored," especially when applied to fundamental interests. *Harper v. Virginia Bd. of Education*, 383 U.S. 663, 668 (1966). The highest courts of two states, California's in *Serrano* and Wyoming's in *Washakie*, have held that their respective states' statutory scheme for funding education -- schemes relying primarily on local property tax revenue -- constituted a suspect classification on the basis of wealth as applied to the states' fundamental interest in education. Those courts applied the strict scrutiny standard of review, holding their state funding schemes to be unconstitutional. *Washakie County School Dist. v. Herschler*, 606 P.2d 310 (1994); *Serrano v. Priest (Serrano II)*, 18 Cal.3d 728, 768 (1976).

In the final analysis, New York's school funding system, as altered by the Tax Cap and Freeze,

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[48] Catherine Rampell, *It Takes a B.A. to Find a Job as a File Clerk*, N.Y. TIMES, Feb. 19, 2013, *available at* http://www.nytimes.com/2013/02/20/business/college-degree-required-by-increasing-number-of-companies.html?pagewanted=all. In this day and age, the importance of a quality education cannot be overstated.

is irrational, and should not survive any level of equal protection scrutiny. In striking down, on equal protection grounds, its similar wealth-based funding system, Vermont's Supreme Court stated:

> . . . this is not a case, however, that turns on the particular constitutional test to be employed. Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may not have as its determining force the mere fortuity of a child's residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system. [*Brigham v. State of Vermont*, 166 Vt. 246, 265 (1997)].

These words apply perfectly to the Cap and Freeze.

POINT IV

THE TAX CAP AND FREEZE VIOLATES APPELLANTS' SUBSTANTIVE DUE PROCESS RIGHTS BECAUSE IT ARBITRARILY IMPAIRS STUDENTS' RIGHT TO AN EDUCATION AND VOTERS' RIGHT TO PROVIDE AN EDUCATION.

Closely related to appellants' equal protection claim is their substantive due process claim. The Due Process Clause of the Fourteenth Amendment prohibits the state from infringing fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

To state a claim for a violation of substantive due process, a plaintiff must show that the government's conduct is wholly without legal justification (*Loudon House LLC v. Town of Colonie*, 123 A.D.3d 1406, 1408-1409 (3d Dep't 2014)), or shocking in a constitutional sense, but "[t]he question of whether conduct is shocking in a constitutional sense is highly context specific." *Belmer v. Oliveira*, 594 F. 3d 134, 143, (2nd Cir. 2009); *Zherka v. Ryan*, 52 F.Supp.3d 571, 582 (SDNY 2014).

The Cap and Freeze impairs basic rights. These include the right of children to a public

education; the right of a local community to provide that education; and the right to do so through free and fair elections, without state interference.

As to a child's right to an education, "The American people have always regarded education and acquisition of knowledge a matters of supreme importance which should be diligently promoted." *Meyer,* 262 U.S. at 400. *Meyer* also recognized the fundamental right of parents to provide an education. *Id*.

In New York, the right to provide an education is exercised collectively, through the Education Article's protection of local control. This does not make this right any less important or any less worthy of judicial protection. *See, Schuette v. Coalition to Defend Affirmative Action (BAMN)*, 134 S. Ct. 1623, 1637 (2014).

Further, the right to vote, and the right to free and fair budget votes, are clearly fundamental rights, protected by substantive due process. *See, League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (allegations showing that a voting system deprived citizens of the right to vote or severely burdened the exercise of that right stated a claim for a violation of substantive due process); *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir 1998), *cert. den.*, 525 U.S. 1103 (1999)(when election irregularities transcended garden variety problems, the election is invalid on substantive due process grounds). The Cap and Freeze impair each of these protected rights in a wholly arbitrary way.

First, the State has now "capped" local education spending, but only by eviscerating local control of such spending in the most arbitrary way imaginable. While the legislative history is bereft

of any rationale for a percentage cap set at the lesser of inflation or 2%,[49] clearly, such a ceiling is irrational. If there were a semblance of equality in funding and educational opportunity across the state's school districts, perhaps such a ceiling might make some sense, by preserving a relatively fair status quo. But, the inequality of both funding and educational opportunity and achievement is well known. (R. 100-102, ¶124-128; R. 400-402, ¶13-17). Legislatively "capping" such inequality is the height of arbitrariness.

Second, the alternative 2% cap, applicable in years when inflation exceeds 2%, is even more arbitrary. There is no proffered rhyme or reason why this figure was chosen or why, if inflation grows to 4, 8, or 16 percent, a 2% cap is rational. Clearly, the impact would be to force school district to drastically cut educational inputs.

Third, as discussed above, applying a percentage cap to an already unequal funding system, based on local property wealth, is particularly arbitrary because it invidiously favors those who already provide greater opportunity to their children, while placing a drastically lower dollar cap on those who already are able to provide less. Stunningly, within the Cap, the top decile of districts can raise an aggregate average of $27,313 per student. The lowest decile can only raise $4,970 per student. (R. 401, ¶16). Within the Cap, wealthier districts, such as Great Neck, can raise five times as much new funding per students as similarly sized, poorer districts, such as Elmira. (R. 103, ¶133). Within the Cap, the decile of districts with the highest graduation rates can raise *71* times as much new funding as the decile with the lowest graduation rates. (R. 100, ¶124).

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[49] Based on inflation data so far in 2015, school officials warn that next year's Cap may be zero. NEW YORK STATE EDUCATIONAL CONFERENCE BOARD, TAX CAP ADJUSTMENTS CAN HELP SCHOOLS BALANCE STUDENT NEEDS, FISCAL STABILITY, AND TAXPAYER CONCERNS, at 2 (Feb. 2015), *available at* http://www.nyssba.org/clientuploads/nyssba_pdf/ecb-tax-cap-02252015.pdf . The 2015 State Budget Finance Plan also projects 0% inflation for the year. http://www.budget.ny.gov/budgetFP/FY16FinPlan.pdf p. 58.

Fourth, the Cap imposes these arbitrary constraints on local control without regard for a district's current spending or resources; without regard for the current educational opportunities currently provided to the district's children; and without regard for the needs of or educational achievement of the district's children. Thus, while lower taxes may be a laudable goal, a law seeking to achieve this goal in such a blind and unequal way can hardly be deemed rational.

The Tax Freeze is worse. It metes out financial rewards and penalties without any consideration of a district's current tax effort, educational spending, student need, or educational results. A poor, high needs district that pierces the Cap to raise as little as $152 in new per-student funding must forfeit tax credits. (R. 90-91, ¶73; R. 340, ¶18). A low need, high wealth district can raise many times more new per-student funding, and be rewarded with tax credits. (R. 340, ¶18). The Freeze is thus divorced from any objective criteria, but is designed *solely* to influence voters to vote against any budget that would exceed an arbitrary limit.

Appellants submit that the Tax Cap and Freeze, viewed in the context of New York's grossly unequal school funding system, is "so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale v. Town of Ridgefield*, 170 F. 3d 258, 263 (2nd Cir. 1998); *Bower Associates v. Town of Pleasant Valley*, 2 N.Y. 3d 617, 626 (2004). The lower court's decision dismissing appellants' substantive due process claim should be reversed.

POINT V

THE TAX CAP AND FREEZE, BY DENYING TAX CREDITS TO OTHERWISE ELIGIBLE VOTERS IN DISTRICTS WHICH PIERCE THE CAP, UNLAWFULLY IMPAIRS PLAINTIFFS' VOTING AND LOCAL CONTROL RIGHTS.

The Tax Cap and Freeze unconstitutionally interferes with Appellants' voting and local control rights. It unlawfully uses tax credits to influence voters to enact Cap-compliant budgets, and

unlawfully denies tax credits to otherwise eligible taxpayers in districts which pierce the Cap. Such State interference in school budget elections is clearly designed to secure a vote reflecting the government's preference that no district exceed the Cap. This is patently unconstitutional with respect to voters' rights and to local control rights.[50]

The right to vote is a fundamental right protected by the First Amendment (*Reynolds v. Sims*, 377 U.S. 533, 554-555 [1964]) and Article 1 §8 of the State Constitution (*Alevy,* 39 N.Y.2d at 332). The right to vote includes the rights of voters to communicate with each other openly and free of coercion during the election process. *Schuette,* 134 S.Ct. at 1637; *Obergefell,* 2015WL2473451at 24; *The System of Freedom of Expression* (Emerson, Random House) at p. 698 ("Emerson"). Second, as discussed above in Point II, the right of school district voters to locally control the educational funding decisions of their schools is a right protected by the Education Article.

Actionable government interference with speech can take the form of a direct limitation on speech or a limitation deterring or chilling speech. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 12 1972). The Cap and Freeze directly impair and chill the exercise of these protected rights.

A. Direct Limitation of Speech/Voting Rights

"[A] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. N.Y.S. Crime Victims Bd.*, 502 U.S. 105, 115 (1991). The denial of tax credits is such an impermissible burden.

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[50] The impairment of these rights by the Cap and Freeze can be viewed as an equal protection violation or as a direct impairment of First Amendment rights. For example, a content-based restriction of picketing, which is in and of itself a First Amendment violation, may also violate equal protection. *See, e.g., Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). Appellants, for purposes of this appeal, will address only their direct impairment claims.

As the Supreme Court has warned:

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation of free speech...'It is settled that speech can be effectively limited by the exercise of the taxing power...'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for the speech.... So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is "frankly aimed at the suppression of dangerous ideas". [*Speiser v. Randall*, 357 U.S. 513, 518-519 (1958), internal citations omitted].

State efforts to place unconstitutional conditions on the exercise of protected rights have repeatedly been struck down by the Supreme Court, even when the benefit being denied is "gratuitous," that is, something the government need not provide at all. *See Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2596 (2013).

Under the Tax Cap and Freeze, tax credits are provided to taxpayers only in districts that agree with the State's favored viewpoint that school district budgets should not raise taxes in excess of the Cap. Accordingly, the Tax Cap and Freeze places an unconstitutional condition on voters' speech because "it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster*, 502 U.S. at 115. It constitutes "the denial of a tax exemption for engaging in certain speech" which, as condemned by the Court in *Speiser,* has "the effect of coercing the [plaintiffs] to refrain from the proscribed speech." 357 U.S. at 518-519.

The lower court rejected this argument, finding that individual voters' speech is not burdened because they may receive a tax credit regardless of how they vote. (R. 27). But, in the context of an election, where voters act *collectively* to exercise rights held *in common*, the absence of a direct, individual *quid pro quo* is irrelevant.

As the Supreme Court recently explained, “freedom does not stop at individual rights.” *Schuette,* 134 S.Ct. at 1637. The “First Amendment dynamics” of voting are broader, involving:

> [T]he right of citizens to debate so they can learn and decide and then, through the political process, *act in concert* to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater than before...[and to hold in such a way that would destroy that right] would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by *all in common*. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process. [*Id.*, *emphasis supplied.*]

As the Court of Appeals explained in *Paynter*, until now, local school funding decisions were made by "people with a community of interest acting together to govern themselves" and to make the "basic decisions on funding and operating their own schools." 100 NY2d at 442. The right of a community to provide a suitable education for its children, at least in New York school districts under Article XI §1, is a right held *in common* by all the eligible voters of a school district. This is what local control, as described in *Levittown* and *Paynter*, is all about. By awarding tax credits based on the outcome of a budget vote, the Cap and Freeze have unconstitutionally conditioned these "held in common" rights.

Democratic elections are determined by collective, community action. Contrary to the lower court’s conclusion, the collective denial of tax credits based on a collective budget vote is analytically no different than the denial of an individual tax benefit based on individual speech, condemned in *Speiser* as an unconstitutional condition on speech. 357 U.S. at 518-519.

B. <u>Chilling Effect on Speech</u>

The Tax Cap and Freeze has an unconstitutional chilling effect on voters’ speech. The chilling of protected voting rights is not of constitutional concern because of the result it may

produce. It is offensive to the right to freely vote because it may interfere with voters' decision-making. Accordingly, such a "real an imminent fear" of chilling is sufficient to render a statute unconstitutional. *Nat'l Organization for Marriage v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013).

Elections surely are among the most sacred exercises of free expression. In order for there to be free and fair elections, the decision making process of each and all the voters must be free from tangible interference by the government. This is particularly true where that interference is a promised financial benefit for voting in accordance with the government's preferred viewpoint.

"[G]overnment participation in the system [of free expression] brings with it serious dangers. Emanating from a source of great authority in the society[,] government expression carries extra psychological weight for many citizens. It comes from officials who often wield enormous actual power over those they address, thereby evoking concern in the listener lest he offend the powers that be by appearing to oppose." *Emerson,* p. 698. Government participation should not be allowed to "deter or suppress private expression," particularly in the most sacrosanct of places, the voting booth. *Id.* at 699. Such disfavored government coercion of expression most commonly "takes place when the government expression hints at or threatens official reprisals against persons or groups holding views in conflict with official policy; or when the government expression arouses hostility in the community against certain opinions and thereby brings private economic and social pressures to bear on those who espouse the unpopular position." *Id.* at 699-700.

The unprecedented act of the State directly providing a tax credit for a particular outcome in an election, and thus chilling free expression, has never been addressed by our State's courts. Jurists, nevertheless, have provided guidance on the courts' duty to protect the voting process and ensure that voters are allowed to express their viewpoints free of undue government influence or inducement.

For example, in his partial dissent in *People v. Ohrenstein*, 77 N.Y.2d 38, 58 (1990), questioning the legality of using legislative employees for political purposes, Judge Simons stated that "partisan political activities are private, not public functions, and the use of public funds for such purposes is improper." *Id.* at 58, internal citations omitted. In reference to the lengthy list of cases he cites, Judge Simons specified that some of them "relate to the use of public funds by State agencies to support propositions rather than candidates" and that "*[c]ampaigning, whether for a cause or candidate, is a private activity. The government has no interest in paying for partisan activity to obtain a particular election result.*" *Id.,* emphasis supplied.

In *Stern, et al. v. Kramarsky, et al.*, 84 Misc.2d 447 (N.Y. Sup. Ct. 1975), one of the cases cited by Judge Simons in *Ohrenstein*, the court similarly expressed its concern over the New York State Division of Human Rights' act of campaigning in favor of passage of the Equal Rights Amendment:

> It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda in favor of or against any issue or candidate. This may be done by totalitarian, dictatorial or autocratic governments but cannot be tolerated, directly or indirectly, in these democratic United States of America. *Id.* at 452.

Here, as the lower court noted, "there is little doubt that the [Freeze credit] is designed to influence voters to stay within the cap." (R. 30). Thus, it seems evident that the promise of a tax credit from the State in exchange for an election result no less demeans the democratic process than it did in *Stern*.

As the lower court acknowledged, the chilling effect of the use of tax credits to influence an election is the intended and inevitable interference with a voter's decision-making process. (R. 29-30;

"The Court agrees with plaintiff[s] that when examining whether a statute exercises a chilling effect on speech, the relevant time period is prior to casting a vote."). As the lower court noted, the complete effect of this interference in an election is "unknowable." (R. 30). But, in the context of an election, it is not possible to overcome that inability to know, without forcing each voter to openly declare their vote, as well as the reasoning and influences behind it. That is incompatible with free and fair elections.

The Tax Cap and Freeze impermissibly chills the right to vote. By making an assurance to district voters that they will be given or denied a cash payment if they collectively vote a certain way, the respondents are "arous[ing] hostility in the community against" a decision to pierce the Tax Cap, bringing "private economic and social pressures to bear." *Emerson,* at 699-700.

C. The Tax Cap and Freeze is Not Narrowly Tailored to Serve a Compelling State Purpose

As has been demonstrated, the Tax Cap and Freeze expressly favors a particular viewpoint. It also interferes with constitutionally guaranteed voting rights and direct local control of education. Thus, the question turns to whether the defendants' promise of a cash payment to school district voters in exchange for their collective agreement with that viewpoint is narrowly tailored to a compelling government objective. It is not.

The objective of the Tax Cap and Freeze payment is indisputably clear: to obtain school budget votes that comport with the government's preferred viewpoint of staying within a State-mandated level of taxation. This objective however, no matter how the law may be drawn, is illegitimate, because "[t]he government has no interest in paying for partisan activity to obtain a particular election result." *Ohrenstein,* 77 N.Y.2d at 58 (J. Simons dissenting in part)*; see also, Kramarsky,* 84 Misc.2d at 452 ("The spectacle of State agencies campaigning for or against

propositions or proposed constitutional amendments to be voted on by the public, albeit perhaps well-motivated, can only demean the democratic process . . .").

Further, as noted, the Tax Cap and Freeze operates without any regard for existing, local educational spending or need. The State has no rational or compelling interest in designing laws that increase the educational inequity inherent in our school finance system, or in punishing school boards, voters and schoolchildren in low-wealth districts who raise taxes to try to provide more educational opportunity for their children or to close the educational opportunity gap.

CONCLUSION

The goal of reducing taxes seems less rational and laudable when effectuated by laws that deter and punish willing school boards and voters from providing the best possible education to their children, especially to those with the greatest need.

And while this Court cannot eliminate poverty or ensure that children in poorer districts have the same educational opportunities as children fortunate enough to live in wealthier districts, it can permit appellants to challenge laws that directly undercut the local control that is the legal basis of judicial decisions upholding this inequality. It can permit parents and voters to challenge laws that arbitrarily limit and punish their right to make local school funding decisions.

The appellants stated viable legal claims. The decision of the lower court should be reversed in all respects, and the respondents should be directed to answer the second amended complaint.

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Latham, New York

Respectfully submitted,

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