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 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.

PROPOSED AMICI CURIAE BRIEF OF THE ENLARGED CITY SCHOOL DISTRICT OF MIDDLETOWN, R.E.F.I.T., and MID-HUDSON SCHOOL STUDY COUNCIL

Case No. 521358

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Albany County Index No. 963-13

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

Abigail Adams famously stated:

> *Learning is not attained by chance, it must be sought for with ardor and attended to with diligence.*

New York constitutionalized the idea that all children –no matter their race, religion, poverty level and/or language barriers –must be provided with access to schools that have adequate resources to make the pursuit of learning meaningful. Recognizing that education is "paramount to every other interest in this State," the drafters of Article XI of the Constitution made it incumbent upon the Legislature to provide for the maintenance and support of public schools. The present system, consisting of unfunded mandates, insufficient state aid, and capped local resources does not lend a constitutional level of support to and local control over public schools. Rather, school children, especially those in poor communities, are increasingly seeing their dreams of educational pursuits thwarted by apparent political caprice and indifference.

Whether public education becomes an actualized vision or a vacant promise turns on whether the system of education itself is adequately funded. School funding, of course, has been a fertile ground for litigation over the years. In the cases addressing school funding outside of New York City, the core issue was whether the Legislature was required to supplement education above its Constitutional bare minimum. Those cases, ironically, underscored the notion that

a school funding scheme that divested local control over school budgets was constitutionally infirm. To this end, the interests of full equality, no matter how laudable and sympathetic, were subordinate to the long-standing traditional right of local school boards (and a majority of their voters) to enhance their school programs by means of a budget vote to increase the local tax levy.

It is in this regard that the Tax Cap most fundamentally fails. In the view of the herein *Amici*, because the Tax Cap abrogates local control over education, the lower court erred by relying on *Levittown*. *Levittown*'s recognition of local control over education as a rational basis for the disparities in education funding across the State provides no basis for upholding the Tax Cap, because the Tax Cap abrogates local control over education.

In the context of the statutory and regulatory scheme of public education, the Tax Cap has created a near impenetrable barrier to local school districts raising the revenue they require as determined by a majority vote to educate children. The State has placed unfunded mandates on local school districts, discriminatorily withheld promised State funding, and capped the capacity of local school districts to step in and remediate the State's failure. The net effect of the Tax Cap, in conjunction with these unfunded mandates and inadequate State aid, is that many low-wealth and predominantly minority school districts are unable to achieve proficiency in core subjects.

In its most basic sense, New York's lawmakers have refused to meet their obligations under Article XI, §1, and they have amended the law to prevent school districts from filling the gap, even with the support of the majority of local school district voters. Any law that facially discriminates against those who support public education is irrational and cannot be allowed to stand.

STATEMENT OF INTEREST OF PROPOSED *AMICI CURIAE*

The Enlarged City School District of Middletown is a low-wealth, high-need school district located in Orange County, New York. Middletown has strived in earnest to make education a meaningful pursuit for every student, including the most vulnerable and at-risk populations. Middletown's efforts have been severely undermined by the Tax Cap. With increased fixed costs ranging from health care to pension contributions and overbearing unfunded mandates, Middletown simply cannot bring all of its students within the State's new definition of academic proficiency under the current system of inequitable State funding and the cap on local revenue.

R.E.F.I.T. (Reform Educational Financing Inequities Today) is a consortium of school districts that have joined together to secure for their students the advantages enjoyed by their peers in other areas and for their communities a fair and equitable share of New York State Aid to Education. Formed after the initial landmark rulings on school funding, R.E.F.I.T. was itself the lead Plaintiff in

R.E.F.I.T. v. Cuomo, 86 N.Y.2d 279, 631 N.Y.S.2d 551 (1995), where the Court of Appeals reaffirmed that the pre-Tax Cap school funding system had a rational basis because its underpinnings were based on "the desire to provide local control." R.E.F.I.T. seeks to be heard as a friend of the Court to fulfill its mission of ensuring all children, irrespective of poverty levels, are provided with the educational resources to pursue learning in its most meaningful and productive way.

Located in Newburgh at the Mount St. Mary campus, the Mid-Hudson Study Council exists as a non-profit corporation serving the needs of its member school districts, and dedicated to bring about improvement in education in the school districts located in the Mid-Hudson Valley. The Council aims to accomplish this purpose through the cooperative study of common educational problems, the effective diffusion of educational practices, and the stimulation of active participation of school boards, administrators, teachers, pupils, and laypersons in educational planning and activity.

THE CHALLENGED STATUTE

As Albert Einstein sagely observed, "no problem can be solved by the same consciousness that created it." The same consciousness that created unfunded mandates and inequitable and discriminatory State-aid formulas now seeks to solve funding shortfalls by capping revenues at the local level.

On June 24, 2011, New York's Governor Andrew Cuomo signed into law L.2011, ch.97 (the "Tax Cap"). The thrust of the Tax Cap is that the annual increase (if any) in the total amount of real property taxes that may lawfully be levied by or on behalf of a school district during the ensuing fiscal year is capped at a maximum of 2%, or less (depending on a growth factor based on the rate of inflation)[1], of the amount of taxes levied by the school district for the prior fiscal year. N.Y. General Municipal Law § 3-c; N.Y. Education Law § 2023-a. The 2% cap was arbitrarily chosen and without reference to mandatory fixed costs that actually exceed 2%.

Supermajority Votes Applied Only To Public Schools

In order for a school district to override the 2% cap, a supermajority of 60% of the voters voting on the budget must vote in favor of the budget. N.Y. Education Law § 2023-a(6)(a). Every other "local government" in the State (*e.g.*, villages, towns, libraries) may adopt a budget that overrides the tax cap if 60% of the governing body of such local government votes in favor of the override. N.Y. General Municipal Law § 3-c(5). A taxpayer's vote in favor of a budget exceeding the cap only counts less than his/her neighbor's vote against it when he or she is voting on the school district budget.

[1] In Middletown this year, the cap will be under 2%.

The Tax Cap requires a 60% supermajority of the votes cast to pass any separate proposition on the ballot—even those placed on the ballot at the behest of the electorate—relating to funding. N.Y. Education Law § 2023-a(9); *see also* N.Y. Education Law §§ 2008, 2035, 2601-a(1). **According to the State Education Department, a ballot proposition can cause a supermajority to be needed to pass a school budget vote, even if the school board adopts a budget within the cap.**[2]

Deterrents To Overriding The Cap

The Tax Cap is laced with efforts to create an impenetrable barrier to a supermajority vote. For example, as a prerequisite to obtaining a 60% override, the ballot voted upon must include the following statement:

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

N.Y. Education Law § 2023-a(6)(b). The purpose of this mandated statement, tantamount to placing a proverbial skull and crossbones on the ballot, is to dissuade voters from trying to override the Tax Cap. School districts are thereby forced to engage in a legislatively-mandated marketing campaign against their own proposed budgets.

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2 http://www.p12.nysed.gov/mgtserv/propertytax/taxcap/docs/Property_Tax_%20Cap_General_Guidance_and_FAQS.pdf

In the event that a school district's original proposed budget is not approved by the voters, the board of education may adopt a final budget, subject to the Tax Cap, or resubmit to the voters the original or a revised budget, in accordance with pre-existing law for submitting a defeated school budget. N.Y. Education Law § 2023-a(7). However, the law sets up harsh consequences if a board is unsuccessful in obtaining the requisite 60% supermajority vote. Regardless of whether the proposed budget is submitted to the voters once or twice, if the budget is defeated by the voters, the maximum tax levy that may be raised to fund school spending during the ensuing school and fiscal year is *frozen* at the amount levied during the prior year. This freeze takes place irrespective of increases in fixed costs and unfunded mandates. N.Y. Education Law § 2023-a(7)(8).

The impact of this provision has been, and will continue to be, devastating. Consider, for example, a school district that has automatic increases in its fixed costs for mandatory step increases of $5 million under applicable collective bargaining agreements or by virtue of the Triborough Law. If that district's budget is defeated twice, the district would be forced to develop a "contingency budget," and the Tax Cap would arbitrarily freeze the tax levy. The school district in the above example will face $5 million in budget cuts, the burden of which will inevitably be shouldered by the district's students, by way of cuts to educational

programs and staff, because the district is prohibited by law from generating local revenue to address the shortfall.

The specter of a zero increase in the school tax levy irrationally makes failure pre-ordained. As if this were not enough, as demonstrated in Point V of the appellants' brief, the State has now used tax credits to create further deterrents to attempting to override the Tax Cap. Stated simply, the Tax Cap creates a certainty that New York's public education system will fail to pass Constitutional muster. Public education, so important to our societal and economic interests, cannot be cavalierly hamstrung. As Connecticut's high court has observed, "[education] is our fundamental legacy to the youth of our state to enable them to acquire knowledge and possess the ability to reason: for it is the ability to reason that separates man from all other forms of life." *Horton v. Meskill*, 172 Conn. 615, A.2d 359, 377 (1977) (Bogdanski, J., concurring). "Reason" dictates that the Tax Cap be stricken.

ARGUMENT

POINT I

THE SUPERMAJORITY PROVISIONS OF THE TAX CAP UNCONSTITUTIONALLY DIVEST SCHOOL DISTRICTS OF LOCAL CONTROL OVER EDUCATION

A. The Tax Cap Violates The Equal Protection Clause Of The State And Federal Constitutions And Article XI Of The State Constitution

1. The Tax Cap Abrogates Local Control Over Education By Capping Local Funding

Public education in New York is a Constitutional mandate. According to New York's highest Court:

> The fundamental value of education is embedded in the Education Article of the New York State Constitution by this simple sentence: 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. (NY Const, art XI, § 1).

Campaign for Fiscal Equity v. New York, 100 N.Y.2d 893, 902-03 (2003); *accord Campaign v. New York*, 8 N.Y.3d 14, 20 (2007) (wherein the Court of Appeals reaffirmed "the fundamental value of education in our democratic society"). Indeed, in a concurring opinion in the 2003 *CFE* case, Justice Smith described education as the State's "most important responsibility," one eclipsing and superseding other State Constitutional imperatives. *Campaign for Fiscal Equity*, 100 N.Y.2d at 933.

The Court of Appeals went on to rule that "by mandating a school system 'wherein all the children of this state may be educated,' the State has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children." *Campaign for Fiscal Equity*, 100 N.Y.2d at 902, *quoting Bd. of Educ. v. Levittown Union Free Sch. Dist.*, 57 N.Y.2d 27 (1982).

Under the Constitution, it is not the responsibility of local school districts to make up the shortfall in state funding that deprives them of the ability to assure a sound basic education for their resident pupils. *Campaign for Fiscal Equity*, 100 N.Y.2d at 924. In practice, however, they must, and this is where the Tax Cap runs afoul of Article XI.

Without realizing the divestiture of local control and its draconian consequences for school children, the lower court relied on *Levittown*, *supra*, for the proposition that there is a rational basis for the Tax Cap. We respectfully disagree.

In *Levittown*, the Court of Appeals relied on *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973) to reject the plaintiffs' argument that New York's system of funding public education through locally-raised property taxes unconstitutionally discriminates against property-poor districts. *Levittown*, 57 N.Y.2d at 41-42. Dispositive here, the Court of Appeals upheld the constitutionality of New York's school finance scheme on the basis that the

"preservation and promotion of local control of education [was] both a legitimate state interest and one to which the . . . financing system [was] reasonably related." *Id.* at 44. The Court noted that:

> 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 added).

As commentators have recognized, "the output/input equation [in *Levittown* and its progeny] is born out of the court's adherence to the preservation of local control. The scope of both requirements act (*sic)* to shield the interest of localities." Noonan, Bran, *The Fate of New York Public Education Is A Matter Of Interpretation: A Story of Competing Methods of Constitutional Interpretation, the Nature of Law, and a Functional Approach to the New York Education Article*, 70 Alb. L. Rev. 625, 635 (2007). The Court of Appeals affirmed the centrality of local control to its holding in *Levittown* in *Paynter ex rel Stone v. State*, 100 N.Y.2d 434, 441 (2003) (declining to embrace the plaintiffs' theory that the State is responsible for the demographic makeup of every school district because such a conclusion "would be to subvert the important role of local control and participation in education.").

Rather than encouraging and preserving local control over education and implementing the "desires" of the majority of voters, the Tax Cap *divests* local school districts of control over education and debases and dilutes electoral support. Local school boards can neither freely propose a budget that meets the needs of their students, nor can a majority of school voters approve a school budget that goes beyond an arbitrary cap. Further, ***a mere twenty-five voters can place a proposition*** on the ballot that will sabotage a carefully drafted budget proposal that is otherwise within the levy Tax Cap and thereby trigger the necessity of a supermajority vote, and the potential punitive consequences if that supermajority is not obtained.[3] For example, in the Patchogue-Medford School District, the elected school board submitted a budget to the voters that did *not* exceed the Tax Cap. Fifty-seven percent of the electorate approved that budget. Nonetheless, the budget was defeated at the polls because a voter proposition for transportation triggered the supermajority requirement that the majority had ***no interest in triggering***.[4] In that situation, the district could have faced a zero percent levy increase if the budget had been defeated a second time, even though 57 percent of the voters approved the budget submitted by the school board. This is not local

[3] A typical school district policy, like Middletown Policy 1650, provides, in relevant part: "Questions or propositions . . . shall be signed by twenty-five (25) qualified voters, or five percent (5%) of the registered voters of the District who voted in the previous annual election of Board members, whichever is greater..."

[4] See http://patch.com/new-york/patchogue/pat-med-school-budget-results-are-0.

control over education, but rather a divestiture of local control that the Court of Appeals rejected in *Levittown:*

> Any legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts –whether by providing that revenue for local education shall come exclusively from State sources to be distributed on a uniform per pupil basis, by prohibiting expenditure by local districts of any sums in excess of a legislatively fixed per pupil expenditure, or by requiring every district to match the per pupil expenditure of the highest spending district by means of local taxation or by means of State aid (surely an economically unrealistic hypothesis) –would inevitably work the demise of the local control of education available to students in individual districts.

Id. at 45-46 (emphasis added). The Tax Cap has created just such a demise of local control. The law thwarts the ability of the majority of duly elected representatives of a school board and a majority of their taxpaying constituents to locally control their revenue stream. The Tax Cap bars a majority of local voters from approving a revenue increase above the cap. [5] *Cf. Paynter v. State of New York*, 100 N.Y.2d 444 ("the premise of the [education] article is thus in part that a system of local school districts exists and will continue to do so because the residents of such school districts have the right to participate in the governance of their own schools.")

Consequently, with one hand the State has passed its responsibility to adequately fund education to local school districts, and, with the other hand, it has

[5] This year, the cap will go below 2% in Middletown and hover around 1% in some districts.

handcuffed boards of education and a majority of school district voters from making up the very funding deficiencies that the State has passed to them. There is no case law that supports this system.

The State's reliance on *Rodriguez* only illustrates the Tax Cap's infirmities. That case was fueled by the Court's recognition that the encouragement of local control over education was a "legitimate" state purpose. As stated by the Supreme Court:

> The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision making process that determines how those local tax dollars will be spent.

411 U.S. at 49.

In fact, the Court expressly *declined* to address whether a funding structure that effectively *bars* districts from raising desired tax revenue, such as the Tax Cap, would pass constitutional muster:

> Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented.

Rodriguez, 411 U.S. at 53 n.107 (emphasis added).

This case presents just such a statutory provision. Unlike the system in *Rodriguez*, the Tax Cap creates a "ceiling [that] presently bars desired tax increases." That bar violates Article XI and the Equal Protection Clause.

2. The Tax Cap Irrationally And Arbitrarily Makes No Provision For Adequate Local Funding If The School District Budget Is Rejected By The Voters

The legal authority that boards of education long enjoyed, prior to the Tax Cap, to develop and adopt an "austerity" or "contingency" budget is grounded in the State's constitutional requirement and guarantee of a system of free public education for the children of this state. N.Y. Const., Art. XI, § 1. Prior to enactment of the Tax Cap, a school district did not shut down when the voters rejected the budget proposed by their local board of education. Instead, the district continued to operate under an austerity or contingency budget during the ensuing school/fiscal year, which runs from July 1 through June 30. N.Y. Education Law §§ 2(15), 2515.

The body of law that governed contingency budgets prior to the enactment of the Tax Cap was designed to ensure that even if a school district's budget was defeated, the board of education could adopt a budget that would not result in the wholesale dismantling of programs needed to provide a sound basic education in a safe environment for its students. Now, however, in disregard for children, especially poor children, the Tax Cap obliterates the statutory power and authority

of boards of education to fashion contingency budgets that make sufficient appropriations for school expenditures that are necessary to satisfy school district expenses *if* funding such expenditures will necessitate an increase in the school tax levy in excess of the Tax Cap.

Significantly, the Tax Cap eliminates almost all the statutory exclusions that were authorized by law under the former contingency budget spending cap, including expenditures resulting from a tax certiorari proceeding or expenditures resulting from a court order or judgment. Capital expenditures is the only category that remains wholly intact under the Tax Cap. Now, under the Tax Cap, a single adverse legal judgment can destroy student programs.

The Tax Cap repealed the statutory exclusion (for purposes of calculating a school district's former "contingency budget cap") of *all* expenditures resulting from tax certiorari proceedings, and all expenditures resulting from court orders and judgments against school districts, without limitation.[6] School districts are still authorized, and indeed required by law, to make budgetary appropriations for the types of expenditures that were previously excluded from the statutory limits on school budget increases during a contingency budget. This limitation can only be

[6] The portion of the school tax levy that is necessary for expenditures resulting from court orders or judgments against the school district arising out of tort actions for any amount that exceeds five (5%) percent of the total tax levied in the prior school year is excludable from the Tax Cap. N.Y. General Municipal Law § 3-c(g); N.Y. Education Law § 2023-a(2)(c)(i). However, this applies solely to judgments in tort actions and solely to the portion of the judgment that exceeds 5% of the prior year's levy. Any school district that is ordered to pay such a catastrophic tort claim must make corresponding cuts elsewhere in the school district budget.

exceeded with the approval of sixty percent (60%) of the votes cast on the budget, or 60% of the votes cast on a special budget proposition (as applicable).

Under the Tax Cap, the tail wags the dog, inasmuch as necessary and/or desirable school spending requirements no longer dictate the amount of the school tax which may be levied. At its core, then, if a school district makes a failed attempt to obtain a supermajority override, even if it is supported by a majority, the concept of a contingency budget is no longer a reality. Instead, the inevitable result is the dismantling of necessary programs for children. This irrationally eviscerates local control over the provision of a sound basic education. In other words, the Tax Cap does not recognize the requirement of a sound education; rather, education is subservient to a flat or arbitrarily capped levy. This violates Article XI.

3. The Tax Cap Divests Local Control By Failing To Provide Exceptions Or Allowances For Unfunded Mandates

The Tax Cap is irrational on the additional ground that the cap on revenues (local taxes) is not accompanied by any corresponding reduction in state-mandated expenses. Under the law, the school tax levy is *frozen* if the budget is defeated, and the tax levy is arbitrarily *capped* regardless of external factors beyond school districts' control that drive school spending ever upwards, not the least of which

are the myriad unfunded mandates imposed upon school district taxpayers by the very same lawmakers who enacted the Tax Cap.[7]

That is to say, school districts whose budgets are defeated are irrationally subject to all the same mandates as school districts whose budgets are approved by the voters, regardless of whether the school district has the ability to raise sufficient revenue through the local tax levy to pay for such mandates. Local control simply does not exist under the cap.

Many of the unfunded mandates that contribute dramatically to the expenses of running public schools have already been baked into a cake by New York's lawmakers. Standing alone, the costs of the various unfunded mandates, combined with the Tax Cap, have already led to mass layoffs and program cuts. For example, the Long Island Education Coalition reported on September 11, 2015, that in the five years leading up to this litigation, the Tax Cap has resulted in the elimination of 4,853 positions on Long Island, largely from high-need, low-income districts.

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[7] Examples of such mandates include: (1) the Triborough Law, which requires school districts to continue paying salary step advances and lane movements when a collective bargaining agreement expires; (2) Wick's Law, which drives up construction costs by requiring separate bids for plumbing, electrical and HVAC work; (3) Chapter 4 of the Laws of 1998, which authorizes the creation of charter schools; and (4) Education Law § 3635, which requires school districts to provide transportation to nonpublic school students. Other mandates have hidden costs, such as having to pay for substitutes to cover leave time, overburdening administrators, and increasing overhead and supply costs. Additional mandates include implementation of the "Common Core" curriculum and on-line computer-based assessments.

The issue is not whether such mandates serve salutary purposes. The problem is that New York's lawmakers keep imposing mandates without funding them, and then criticize public school districts for profligate spending that cannot be controlled at the local level. Instead of acknowledging that the spending wrought by their own mandates cannot continue, our State lawmakers have burdened public school districts and public education by capping school districts' ability to raise revenue through the local tax levy. The statutory scheme "bears no rational relationship to the educational needs of individual school districts" and therefore cannot stand. *DuPree v. Alma Sch. Dist.*, 279 Ark. 340, 651 S.W.2d 90 (1983). A statutory scheme that converts educating children from a constitutional mandate into a Hobson's Choice of program cuts is inherently and undeniably irrational and violative of the Education Article.

B. The Supermajority Provisions Of The Tax Cap Violates "One Person One Vote" And Equal Protection

The guiding principle of our democracy is the concept of "one person, one vote." As stated by the United States Supreme Court:

> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing—one person, one vote.

Gray v. Sanders, 372 U.S. 368, 381 (1963); *accord* THE FEDERALIST NO. 58 (James Madison) (making clear that the majority rule is "the fundamental principle of free

government"). New York has enshrined this fundamental right in its State Constitution. *See* N.Y. Const. art I, § 1; art II, § 1; *see also In re Esler*, 56 N.Y.2d 306 (1982).

Under the supermajority provisions of the Tax Cap, a constituent's vote against the school budget has greater weight than his/her neighbor's vote in favor of the budget. The Tax Cap lays waste to the centuries-old bedrock principle upon which our system of government rests—namely, that the voting "majority" rules. Under the Tax Cap, the wishes of a majority of the members of the local board of education in framing the school budget, and the desires of the majority of the voters present and voting on the school district budget will, in many cases, be rendered meaningless. Such a result is an anathema to the core beliefs that underlie a democratic system of government. *See League of Educ. Voters v. State of Washington*, 176 Wn.2d 808, 824 (Wash. 2013) (noting that "allowing a supermajority requirement for ordinary legislation alters our system of government."). The current state of public education requires equitable sacrifices to be made. Those requirements, if supported by a duly elected representative majority of a school board and a majority of voters, should not be quashed by a minority.

The lower court's reliance on *Lance v. Gordon*, 403 U.S. 1 (1971) to defend the Tax Cap is misplaced. In *Gordon*, the United States Supreme Court upheld a

West Virginia law that prohibited political subdivisions from incurring bonded indebtedness or increasing taxes beyond those established by the West Virginia Constitution unless a supermajority of 60% of the voters approved such action in a referendum election. There, the Court concluded that the West Virginia law did not discriminate against any identifiable class and, therefore, did not violate the Equal Protection Clause of the United States Constitution. *Gordon*, 403 U.S. at 5, 7. The Court also found that requiring a supermajority of the electorate to approve bond votes was justified because of the "intergenerational" effect of incurring bonded indebtedness to finance projects over the long-term. *See* King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, U. CHI. L. SCH. ROUNDTABLE 133, 145-46 (1999).

In contrast, the "intergenerational" effect that concerned the Court in *Gordon* is simply not present. Here, it is the *annual* school district spending plan that is at stake when a local board of education submits its proposed budget to the voters for approval. Consequently, even assuming, *arguendo*, that the prospect of intergenerational "debt" justifies the imposition of a supermajority voter approval requirement, the adoption or rejection of the local school budget proposed by an elected board of education falls outside this category.

Moreover, unlike the law at issue in *Gordon*, the Tax Cap discriminates against a specific and identifiable class: public school districts. In this regard, the *Gordon* Court took pains to distinguish its holding from *Hunter v. Erickson*, 393 U.S. 385 (1969). In *Hunter*, the Akron Ohio City Charter was amended to provide that any ordinance which explicitly, or in effect, regulated the use, sale, advertisement, transfer, listing assignment, lease, sublease, or financing of real property on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the voters before becoming effective. *Id.* Housing discrimination was thereby perpetuated and left to the endorsement of the voting majority. In *Hunter*, the Court invalidated the City Charter amendment because fair housing was singled out for a public referendum. *Id.*

With the Tax Cap here, like fair housing in *Hunter*, public school districts and public education have been singled out for a mandatory public referendum before the Tax Cap may be overridden. *See id.* The arbitrary and capricious discriminatory treatment of school districts as an identifiable class is real and palpable. Local governments and other political subdivisions of the State are given favored status by not being required to submit to the electorate the decision of whether to override the Tax Cap. Instead, in such local governments and political subdivisions, the decision is made by 60% of the governing body of that subdivision.

Those who would benefit from increased local expenditures for public education, as opposed to those who would benefit from increased public expenditures for other governmental services, thus constitute the identifiable class that was missing in *Gordon*. *See Altadena Lib. Dist. v. Bloodgood*, 192 Cal. App. 3d 585, 591, 237 Cal. Rptr. 649 (Cal. Ct. App. 1987), where the Court held:

> In the same opinion, the Supreme Court distinguished general supermajority requirements from similar 'vote dilution' measures directed at an 'identifiable' group. "we are not ... presented with a case like *Hunter v. Erickson* [(1969) 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616], in which fair housing legislation alone was subject to an automatic referendum requirement. [¶]The class singled out in *Hunter* was clear—'those who would benefit from laws barring racial, religious, or ancestral discriminations,' [citation omitted]. In contrast we can discern *no independently identifiable group* or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote.' (403 U.S. at p. 5, 91 S.Ct. at p. 1982; italics added.)
>
> Likewise, in the instant case, **if** Proposition 13 had singled out education and imposed a supermajority requirement solely on tax increases to be used for that purpose the library supporters might well have had a valid equal protection claim under *Hunter v. Erickson*. Under this assumption, the proposition would have drawn the legislative classification on the basis of membership in an 'independently identifiable' class—'those who would benefit from' increased expenditures on education as opposed to those who would benefit from increased expenditures on other governmental services. But Proposition 13, like the supermajority requirement in *Gordon v. Lance*, 'applies equally to all [revenue increases] for any purpose, whether for schools, sewers, or highways.'

This case is the **"if"** in the above-quoted paragraphs. The Tax Cap has "singled out public education and imposed a supermajority requirement solely on

tax increases to be used for that purpose." *Altadena Lib. Dist., supra.* The New York State Comptroller has highlighted the singling out of school districts as an "independently identifiable class."[8] **With respect to libraries, the Comptroller notes that "[i]f the library governing board overrides the tax cap and the library budget or taxes to support the library is subject to voter approval, the proposition must be approved by only a simple majority of the voters (i.e. more than 50%)**, unless, in the case of a special act library district, it is otherwise provided in the special act creating the district."[9] Based on this plain language, votes on public education are treated entirely differently than votes on any other type of municipal funding (i.e., "sewers or highways"). *Altadena Lib. Dist., supra.* Consequently, *Gordon* does not lend support to the supermajority provisions of the Tax Cap.

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[8] http://www.osc.state.ny.us/localgov/realprop/pdf/legislationsummary.pdf ("The law also gives local governments and school districts the option to override the tax cap for the coming fiscal or school year. The process by which this can happen will differ depending on whether the entity is a local government or a school district") (emphasis added).

[9] http://www.osc.state.ny.us/localgov/realprop/pdf/faqs.pdf.

POINT II

THE TAX CAP WILL RESULT IN INVIDIOUS DISCRIMINATION AGAINST POOR AND PREDOMINANTLY MINORITY STUDENTS

A. The Tax Cap Discriminates Against Poor (and Predominantly Minority) School Districts

The nationwide segregation of African-American and Hispanic children in our poorest schools is nowhere more evident than in New York State, which holds the unfortunate record for the most racially-segregated schools in the country.[10] Due to "double segregation," these minority school districts require more public funding than their affluent counterparts to achieve successful educational outcomes, yet these high-minority districts have in fact been systematically underfunded in New York State.[11] The data illustrating this alarming correlation, which is the subject of a racial discrimination complaint that is currently under investigation by the United States Department of Education, Office for Civil Rights, is attached to this brief as **Exhibit A**.

The State cannot seriously dispute that the Tax Cap prohibits relatively poorer school districts from providing the same level of support from the local real property tax levy for their neighborhood schools than wealthier school districts are

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[10] Kucsera, John, "New York State's Extreme School Segregation: Inequality, Inaction, and a Damaged Future," *The Civil Rights Project* (2014).

[11] Baker, Bruce, "School Funding Fairness in New York State," prepared on behalf of the New York State Association of Small City School Districts, Oct. 1, 2011.

able to provide. Take, for example, two hypothetical school districts: District "A" and District "B"—both of which have a $40 million school budget. District "A" is wealthy and has a strong tax base and is able to raise $36 million through the local tax levy. Under the Tax Cap, District "A" can increase the local $36 million tax levy by a maximum of 2%, or $720,000 without the consent of a supermajority of school voters. By comparison, District "B" is poor and has a weak and declining tax base. District "B" receives from the State ninety percent (90%) of the revenue it needs to sustain its $40 million budget, i.e., $36 million, and generates only $4 million through the local tax levy. District "B" can only increase the local $4 million tax levy by a maximum of 2%, or $80,000, without approval of a supermajority of school voters.

Thus, in two school districts, one wealthy and one poor, with the exact same overall school spending, the wealthy district that already offers superior opportunities for its students has the discretion to raise $640,000 more in a single year through the local tax levy than the poorer district, which likely serves a larger percentage of minority students. The Legislature either irrationally disregarded or did not consider that the differences in spending between District "A" and District "B" will inevitably result in disparate spending for educational programs and services between the two districts in ways that profoundly affect the quality of education.

The painful truth is that the Legislature irrationally and in violation of its constitutional mandate passed a law that treats poor children as disposable. As stated by the California Supreme Court:

> [The legislature] has undertaken to create a school financing system which, by making the quality of educational opportunity available to a student dependent upon the wealth of the district in which he lives, is manifestly inconsistent with fundamental constitutional provisions guaranteeing the equal protection of the laws of all citizens of this state. That system, we hold today, can no longer endure.

Serrano v. Priest, 18 Cal.3d 728, 557 P.2d 929 (1977). Indeed, under the Tax Cap, low-wealth school districts with less money built into the system will not only have no hope of catching-up, but are destined to fall further behind. Under the hypothetical discussed above, by year five (5) of the Tax Cap, District "B" will have put over $3 million less into their schools than District "A." This turns equal protection into no protection for poor children:

> We can find no legitimate state purpose to support the system. It bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district. The trial court found the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence, and we concur in that view. Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.

DuPree v. Alma Sch. Dist., 279 Ark. 340, 651 S.W.2d 90 (1983); *see also Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 332 (Sp. Ct. Wyo. 1980) ("These disparities ... can lead to but one conclusion: the quality of a child's

education ... is dependent upon the property tax resources of his school district. The right to an education cannot constitutionally be conditioned on wealth in that such a measure does not afford equal protection.").

Equal protection of the law requires "the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Hargrave v. Kirk*, 313 F. Supp. 944, 948 (M.D. Fla. 1970), *vacated and remanded on other grounds by* 401 U.S. 476 (1971); *quoting Reynolds v. Simms*, 377 U.S. 533 (1964); *see also Shannon v. Jacobowitz*, 394 F.3d 90 (2d Cir. 2005). What rational basis can New York's lawmakers have for curtailing increases in local school tax levies by preventing poorer school districts from increasing their tax levies as much as richer ones? *See*, *Hargrave*, 313 F. Supp. 944 at 948. The Tax Cap does not even come close to withstanding minimum scrutiny:

> We need not decide whether such decentralized financial decision-making is a compelling state interest, since under the present financing system, *such fiscal freewill is a cruel illusion for the poor school districts*. We cannot agree that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends over $1,200. As defendants themselves recognize, perhaps the most accurate reflection of a community's commitment to education is the rate at which its citizens are willing to tax themselves to support their schools.

Serrano v. Priest, 5 Cal. 3d 584, 611, 487 P.2d 1241 (1971) (emphasis added).

Because the Tax Cap makes "fiscal free will" a "cruel illusion" for low-wealth school districts, it violates Equal Protection and must be stricken.

B. The Tax Cap Infringes Upon The Fundamental Right To Vote

The Tax Cap burdens the fundamental right to vote. *See Burson v. Freeman*, 504 U.S. 191, 213-14 (1992); *Reynolds v. Simms*, 377 U.S. 533, 561-62 (1964); *Wo v. Hopkins*, 118 U.S. 356, 370-71 (1886). The Tax Cap compels the plaintiff school board members, in their official capacity as board members, to participate in debasing and diluting the votes of school district voters who support the board's proposed budget by requiring the board to: (1) publish information in the notice of the annual district meeting and election about the school tax levy limit; (2) publish information in their school district's Real Property Tax Report Card about the school district's tax levy limit; (3) affirmatively include boilerplate language on the ballot with any budget proposition that will necessitate an increase in the tax levy over the Tax Cap; and (4) disregard the votes of a majority of school district voters who vote in favor of a proposed budget that will necessitate a levy increase in excess of the Tax Cap unless the proposition is approved by at least 60% of the voters voting on the budget proposition.

Accordingly, the State must demonstrate that these provisions of the Tax Cap are narrowly tailored to serve a "compelling" state interest. For the reasons that follow, the State cannot satisfy this burden, and therefore the supermajority vote requirement imposed by the Tax Cap violates equal protection of the law guaranteed to the plaintiffs in their capacity as school district voters. In the

alternative, even if the Court finds that the supermajority vote requirement imposed by the Tax Cap does not implicate strict scrutiny, the State cannot satisfy its burden of demonstrating that the supermajority vote requirement is "rationally related" to any legitimate State interest.

1. The Tax Cap Is Not Narrowly Tailored To Achieve A Compelling State Interest And Therefore Fails Strict Scrutiny

It is hard to discern any State interest necessitating the Tax Cap, let alone a compelling State interest in targeting public school districts for disparate treatment. We can only surmise that the reason behind the enactment of the Tax Cap provisions is to devalue the votes of voters in favor of the budget. Indeed, the Tax Cap itself contains no statement of legislative purpose or history. It is also noteworthy that the Tax Cap continues in effect through June 15, 2020 and remains in effect thereafter only under limited circumstances (*i.e.*, so long as the public emergency requiring regulation and control of residential rents and evictions, and all such laws providing for such regulation and control also continue). This is perhaps the greatest insight into the origins and ultimate purpose of the Tax Cap. If we know nothing else about the purpose of the Tax Cap, we know that it was the product of an arranged marriage with New York's rent control laws that was orchestrated by State lawmakers. It cannot be gainsaid that political marriages of convenience, consummated in the proverbial back room, are not a compelling interest that justifies the dismantling of public education.

In its most basic sense, the Tax Cap seems to be "justified" by only the hyperbole gleaned from news media accounts about State lawmakers' beliefs and/or perceptions that school districts' local tax levies in support of public education are "too high." Yet in every case, *such tax levies have been authorized by a majority of the school district voters who directly vote on their local school budgets.* The very concept of a budget approved by a majority being "too high" is an anathema to *Levittown.* The allegation that school budgets and the corresponding tax levies are too high for voter approval is an irrational conclusion that cannot be reconciled with the objective facts: before enactment of the Tax Cap, a majority of school district voters present and voting in each and every school district exercising constitutional local control approved their own school districts' spending plan and corresponding tax levy. There is simply no compelling need for the legislature to usurp the voice of the voting majority.

Nor is the Tax Cap narrowly tailored. The Legislature could have addressed whatever interest it purports to have by either: (1) treating school districts like all other local governments and political subdivisions by permitting a vote of 60% of the governing board to override the Tax Cap; or (2) repealing the unfunded mandates that are overburdening school districts and their constituent taxpayers. *See generally Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842 (1986) ("Strict scrutiny is not met when there are "other" less intrusive means of

accomplishing similar purposes."). The Tax Cap is not narrowly tailored to achieve any purported compelling interest State lawmakers may assert to justify interfering with the fundamental right to vote.

C. The Supermajority Vote Required To Override The Tax Cap Is Not A Rational Means Of Achieving Any Governmental Objective

The United States Supreme Court has made clear that "having once granted the right to vote on equal terms the State may not, by arbitrary and disparate treatment, value one person's vote over another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). On its face, the Tax Cap values one person's vote over another and overrides decades-long democratic processes in connection with school district elections.

Even if the Court concludes that our State's lawmakers do not need to demonstrate that the Tax Cap is narrowly tailored to achieve a compelling governmental objective, the law still must be supported by some rational basis to survive an equal protection challenge. There can be no rational basis for giving a minority of voters a virtual veto power over the majority with regard to school budgets. Just because a minority of voters may opt not to support public education to the same extent as the majority, does not provide a rational basis for statutorily empowering the minority to preempt the will of the majority of voters. *See generally Moore v. Ogilvie*, 394 U.S. 814 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote

basis of our representative government."); *State v. Stacy*, 82 S.2d 264, 265 (Ala. 1955) ("It is a fundamental principle of popular government that the legally expressed will of the majority must prevail in elections.").

There is simply no demonstrable relationship between the Tax Cap's arbitrary limit on school tax levies and the purported problem of excessive school district taxation that State lawmakers ostensibly sought to redress by enacting the Tax Cap. *See Londonderry Sch. Dist. v. New Hampshire*, 2006 WL 563120 (Sup. Ct. N.H. 2006) ("If the State is permitted to determine the cost of an adequate education simply by arbitrarily allocating an amount of funds it is willing to provide to fulfill that duty, the duty creates no obligation, and is no longer a duty.").

From time in memoriam, in the vast majority of public school districts, budgets have been developed and approved through a unique blend of "representative" and "direct participatory" democracy. *See* N.Y. Education Law Article 41, §§ 2001-2038; McKinney's Consolidated Law of New York Annotated, Book 16 (Chapter 16 of the Education Law), 2007 Thompson West, "Preface" on p. III. School district budgets are the product of "representative" democracy insofar as school district voters elect the members of their local board of education by a plurality of the voters present and voting. N.Y. Education Law §§ 2034(7)(a), 2502(9)(n), 2502(9-a)(n), 2610(4). The full board, or, at a minimum, a simple

majority thereof, in turn, then develops and approves a proposed district budget for approval or rejection by the voters via public referendum. N.Y. Education Law, Articles 41 and 53, §§ 2001-2004, §§ 2601 *et seq.* The right of school district voters to cast their ballots for or against the school district budget prepared by and proposed by their elected board of education has long been codified as a statutory right of the school district electorate. *See, e.g.*, McKinney's Consolidated Law of New York Annotated, Education Law § 2002, *Historical and Statutory Notes: Derivation.*

New York's lawmakers did not need to require a supermajority vote of the school electorate to override the arbitrary Tax Cap in order to preserve the long-standing tradition of having school district voters directly approve their respective school district's budget. This tradition could have been preserved by simply allowing a 60% vote of the members of the school board to override the cap, subject to subsequent approval of the school budget by a *majority* of the voters, like every other municipal entity.

There is no reasonable basis for concluding that school district voters lack the intelligence to continue to vote down budgets that they deem too high. The Orwellian notion of the Tax Cap – that assumes Big Brother knows more than a majority of local voters – lacks a rational basis. *Cf. Gray*, 372 U.S. at 382 ("Within a given constituency, there can be room for but single constitutional

rule—one voter, one vote."). It appears the lawmakers are of the view that, of all the duly elected local government officials, only school board members lack the requisite skill and good judgment to determine whether to develop a budget that overrides the Tax Cap. Plainly, this is irrational. It is likewise irrational for the Legislature to presume that a voter who opposes a budget in excess of the cap is vastly wiser than his/her neighbor and indeed the majority of voters who support it.

CONCLUSION

New York legislators have devised a system that will effectively allow some school districts to supplement, with additional local tax dollars, the State's support for our constitutionally mandated system of free public education, while depriving other school districts of this same opportunity. The system that has been devised is unconstitutional because it obliterates local control over education, is dependent upon diluting and debasing the votes of a majority of voters in favor of the voting minority, and because it will have an adverse and irrational disparate impact on impoverished school districts. Over time, the unconscionable disparate impact of the law will be to effectively treat children attending poor school districts as disposable—and not deserving of the educational opportunities of their wealthier counterparts. The long-term societal costs of such a two-tiered system of education are not only untenable, but also unconstitutional.

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Respectfully submitted,

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EXHIBIT A

SSFC

FOUNDATION AID per STUDENT: OVERPAID vs. UNDERPAID
by % Minority 2015-16

EXHIBIT A