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.

Case No. 521358

(Albany County Index No. 963-13)

NOTICE OF MOTION OF ENLARGED CITY SCHOOL DISTRICT OF MIDDLETOWN, R.E.F.I.T., AND MID-HUDSON SCHOOL STUDY COUNSEL FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Kate I. Reid, sworn to the 25th day of September, 2015 ("Reid Affirmation") and the proposed *amici curiae* brief attached as an exhibit thereto, a motion will be made at a term of this Court to be held at State Street, Room 511, Albany, New York, on the 12th day of October, 2015, for an order granting the Enlarged City School District of Middletown, R.E.F.I.T. and Mid-Hudson School Study Counsel leave to file the brief attached as Exhibit A to the Reid Affirmation as *amici curiae* in

the above-captioned action, and for such other and further relief as the Court may deem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 N.Y.C.R.R. § 800.2(a) answering papers, if any, must be filed before 11 o'clock a.m. on Friday, October 9, 2015.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 N.Y.C.R.R. § 800.2(a) this motion will be submitted on the papers and that personal appearance in opposition to the motion is neither required nor permitted.

Dated: September 25, 2015

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC.

By: _____

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Defendants-Respondents.

AFFIRMATION OF KATE I. REID IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE BRIEF*

Kate I. Reid, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an associate at the law firm of Bond, Schoeneck & King, PLLC, and I submit this affirmation in support of the Motion of the Enlarged City School District of Middletown, R.E.F.I.T., and Mid-Hudson School Study Counsel (collectively, "Proposed Amici") for Leave to File Brief as Amici Curiae in Support of the above-captioned appeal.

2. Attached hereto as **Exhibit 1** is a copy of the brief that Proposed Amici wish to submit to the Court (the "brief"). Proposed Amici have duly authorized me to submit this brief on their behalf.

3. Proposed Amici seek leave to file the brief because this appeal presents questions of law that are of great importance to Proposed Amici and their members. Specifically, Proposed Amici and their members have an interest in ensuring that local control over education is restored, and that the votes of those who support education do not continue to be debased. The interests of individual Proposed Amici are set forth in greater detail in the attached brief.

4. Given Proposed Amici's substantial interest and expertise as described above and in the attached brief, I respectfully submit that the brief will be of special assistance to the Court in determining the constitutionality of the Tax Cap. The brief presents law or arguments that might otherwise escape the Court's consideration by expanding upon and elaborating the arguments in support of reversing the decision below in the above-captioned action. Accordingly, I respectfully request that the instant motion be granted in all respects and that Proposed Amici be given leave to file the attached brief in this appeal.

Dated: September 25, 2015

Kate I. Reid
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EXHIBIT 1

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,

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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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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.