To be argued by:
RICHARD DEARING
15 minutes requested

New York County Clerk's Index No. 155933/2022

New York Supreme Court
Appellate Division: First Department

In the Matter of

Case No. 2022-03313

TAMARA TUCKER and MELANIE KOTLER, individually, and on behalf of all parents and guardians of New York City public school students and PAUL TRUST and SARAH BROOKS, individually, and on behalf to all similarly situated New York City public school teachers,

Petitioners-Respondents,

against

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID C. BANKS, in his official capacity,

Respondents-Appellants,

(caption continued on inside cover)

BRIEF FOR APPELLANTS

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August 23, 2022

(caption continued from outside cover)

For an Order, Pursuant to Section 6301 and Article 78 of the CPLR and Sections 2590-g and 2590-q of the New York Education Law, Annulling the Adoption of the New York City FY 2023 Budget and the New York City Department of Education FY 2023 Education Budget.

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PRELIMINARY STATEMENT

This expedited appeal by the City of New York, the City's Department of Education (DOE), and DOE's Chancellor (together, "appellants"), challenges a sweeping—indeed, unprecedented—order of Supreme Court, New York County (Frank, J.), issued just weeks before the start of the school year. The order (a) annulled DOE's fiscal year 2023 budget that had been adopted by the City Council, and (b) directed DOE's "spending levels" to "revert back" to the prior fiscal year's levels, even though the prior year's DOE budget was historically anomalous due to one-time federal COVID-19-related funding. This Court should reverse.

The case arose from city policymakers' decision to set DOE's operating budget for the 2023 fiscal year at about $500 million lower than its budget for the 2022 fiscal year, reflecting a sharp drop in both pandemic-related federal funding and anticipated student enrollment. Petitioners—two parents and two teachers of public school students—object to the spending cuts necessitated by this loss of funding. But their legal theory is a purely procedural one, challenging the City Council's vote to adopt the budget because

it occurred before DOE's Panel on Educational Policy (PEP), had completed a public comment period and vote on DOE's advisory departmental budget estimate.

Supreme Court erred several times over by finding the City Council's vote invalid. Most fundamentally, the court missed that concern for the separation of powers requires courts to tread lightly when hearing challenges to budgets, which generally involve quintessential political questions. In the rare cases where the Court of Appeals has permitted such challenges, there was an alleged *substantive* defect in the budget—something petitioners do not and cannot assert exists here.

Moreover, on the merits, the court fundamentally misunderstood the statutes governing the budget process. It reasoned that the PEP vote on the departmental estimate was a "condition precedent" to the Council's vote on the budget, but nothing in the statutory scheme makes the PEP vote essential to the validity of the Council's vote. The PEP vote on DOE's departmental estimate is at most a step in the submission of that

non-binding estimate to the Mayor. It has no meaningful connection to the City Council's vote on the final city budget.

In any event, the supposed procedural defect regarding the PEP vote is illusory. The Education Law permits adoption of a departmental estimate in advance of a PEP hearing and vote if the Chancellor declares an emergency requiring that step, and the Chancellor rationally did that here. Moreover, the PEP ultimately voted to approve the estimate in question, ensuring, at minimum, substantial compliance with the asserted statutory requirement. Thus, for multiple independent reasons, Supreme Court had no proper predicate for usurping the core policymaking and budgetary functions of the Mayor and City Council.

Beyond its errors on the merits, there was no justification for the extraordinary remedy Supreme Court imposed. The Court of Appeals has made clear that there should not be a retrospective remedy—even for a procedural violation directly involving the legislative process—if that relief would create confusion and disorder, as the lower court's ruling unquestionably would here. And indeed, petitioners have identified no instance in which the

Court of Appeals has held a budget to be invalid without finding that the budget was substantively flawed; annulled a budget based on a procedural violation ancillary to, rather than within, the legislative process; or directed reversion to a prior year's budget or "spending levels."

Supreme Court also mandated the return to last year's "spending levels" without identifying a sound basis for equitable relief. Though petitioners fell short of their burden of proving irreparable harm, the court compensated for their threadbare showing by invoking *appellants'* urgent showing of harm that the injunction itself would cause: budgetary "limbo." The court also failed to undertake a balancing of the equities. Had it done so, it would have concluded that the enormous disruption to schools and students from annulment of DOE's budget far outweighed whatever harm the court hoped to avert. This Court should correct these foundational errors by reversing the order below in its entirety.

QUESTION PRESENTED

Did Supreme Court improperly annul DOE's adopted budget for fiscal year 2023, and order DOE's spending levels to revert back to the prior fiscal year's levels, based on a supposed procedural violation regarding a non-binding departmental budget estimate that has no connection in law to the validity of the City Council's vote on the final budget?

STATEMENT OF THE CASE[1]

A. Statutory background

A summary of the complex process by which the City of New York adopts its massive yearly budget—which enables DOE and dozens of city agencies to fund and provide critical public services for 8.3 million inhabitants—lends perspective to the peripheral nature of petitioners' sole claim of procedural error, and in turn illuminates the improper and vastly outsized nature of the ordered remedy.

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[1] This case is being perfected on the original record by permission of this Court. Unless otherwise indicated, all NYSCEF citations refer to entries in Supreme Court's electronic docket.

1. The New York City budget process

The City's budget process is set forth primarily in Chapter 10 of the New York City Charter, §§ 225-258, and involves the Mayor, City Council, Comptroller, Office of Management and Budget, borough presidents, local community boards, agency heads, other stakeholders, and the public. The process is intricate and intense, especially in the first half of the calendar year, when it occupies enormous time and attention from, in particular, the Mayor and City Council and their staffs.

These efforts typically result in a budget for the City on the order of $100 billion, covering the operations of around 90 agencies, districts, and boards and over 300,000 government employees.[2] DOE's budget is the largest component of the City's overall budget, representing up to a third or more of it. The budget reflects a delicate balancing of the City's innumerable policy priorities and goals for the year, as constrained by available funds and prudent fiscal planning for the future.

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[2] City of New York, *List of NYC Agencies*, https://tinyurl.com/bdcx728f; Wikipedia, *Government of New York City*, https://tinyurl.com/m7fn3at6.

While the cast of characters in this process is large, the Mayor and City Council unquestionably fill the leading roles. The process is often described as a negotiation between those two branches of city government. The Charter sets forth three events that frame their negotiation: (1) the Preliminary Budget; (2) the Executive Budget; and (3) the Adopted Budget.[3] N.Y. City Charter §§ 225, 236, 249, 254.

The first of those steps is release of the Preliminary Budget, which the Charter directs the Mayor to send to the City Council by January 16. *Id.* § 236. The Preliminary Budget proposes expenditures and forecasts revenues for the City for the upcoming fiscal year and three subsequent years. *Id.* § 225(a). The City Council then invites public comment and conducts hearings at which agency heads—as well as residents, advocates, and others—may testify regarding the impact of the proposed allocations. *Id.* § 237(a). Typically, at least one of those hearings focuses specifically on DOE's budget.

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[3] New York City Council, *The Budget Process*, https://tinyurl.com/2s4xwnje.

The next step is the Executive Budget, which the Mayor must submit to the City Council by April 26. *Id.* § 249. The Executive Budget represents the starting point for the budget itself and operates to frame the Mayor's veto power. *Id.* § 254(c). The Council is to hold hearings on the Executive Budget between May 6 and May 25. *Id.* § 253. Once again, at least one of those hearings usually focuses specifically on DOE's budget.

Following submission of the Executive Budget, the Mayor and City Council negotiate over the final budget, based on policy priorities, the needs of various agencies, and the City's overall fiscal condition. The Charter prescribes how the Council may amend the Mayor's Executive Budget as a result of this process. *Id.* § 254(a).

Ultimately, the Council passes the Adopted Budget. The Mayor may veto any items of appropriation that the Council has added to the Executive Budget (subject to possible Council override), but may not veto appropriations that were already in the Executive Budget. *Id.* §§ 254(c), 255. The Charter calls for the

budget to be adopted by June 5. *Id.* § 254(d), (e). It is common, however, for the process to extend later than that.[4]

2. The non-binding departmental budget estimates for individual agencies such as DOE

The City Charter also establishes a process—referred to as the submission of "departmental estimates"—by which municipal agencies (and DOE, though it is a legally distinct entity) provide non-binding input to the Mayor about the levels of funding needed for the coming year. *See* N.Y. City Charter § 231. In contrast to the key steps outlined above, the Charter prescribes no date by which departmental estimates must be provided to the Mayor, instead making them due on "such date as the mayor may direct." *Id.* § 231(a).

In the case of DOE, the Education Law provides that the Chancellor's departmental estimate of the funds needed for the upcoming year must be approved by the Panel for Educational

[4] For example, press described the 2023 Adopted Budget, approved on June 13, as two weeks early. City & State, *Adrienne Adams' City Council passes its first budget* (June 14, 2022), https://tinyurl.com/2sjkaf74.

Policy, or PEP.[5] Educ. Law § 2590-q(4)(a). As in most areas where its approval is required, the PEP may vote only after providing a 45-day notice and comment period and holding a public hearing. *Id.* § 2590-g(7), (8). The Education Law also specifies, however, that where swifter action is required, the Chancellor or the PEP is authorized to act on an emergency basis. *Id.* § 2590-g(9). Such emergency action is valid only for a maximum of 60 days, during which the PEP must review the action in accordance with its notice and hearing requirements and vote whether to make the action permanent—which effectively constitutes an after-the-fact ratification. *Id.* § 2590-g(9).

This emergency process is triggered when either the Chancellor or the PEP determines that immediate action is "necessary for the preservation of student health, safety or general

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[5] The PEP is the present-day iteration of the Board of Education after the Legislature's 2002 restructuring of the City's school system. Though changes to the statutory makeup of the PEP took effect on August 15, 2022, at all relevant times it was composed of 15 voting members, nine of whom were appointed by the Mayor, Educ. Law § 2590-b(1)(a)(1)(B), with the Chancellor serving as an ex-officio non-voting member, *id.* § 2590-b(1)(a)(2). The PEP is principally responsible for "advis[ing] the chancellor on matters of policy affecting the welfare of the city school district and its pupils" and ratifying certain policies and proposals affecting schools. *Id.* § 2590-g.

welfare and that compliance" with the 45-day waiting period prior to adoption "would be contrary to the public interest." *Id*. § 2590-g(9). In 11 out of the last 13 years, the vagaries of timing regarding DOE's funding sources and intense planning needs for the start of school have made the 45-day waiting period for PEP action on the departmental estimate impracticable, leading multiple Chancellors—and, in two years, the PEP itself—to adopt the estimated budget on a temporary basis before budget allocations are sent to schools, subject to final PEP approval after notice and hearing.[6]

No provision of law states or implies that the PEP vote on DOE's departmental estimate is a necessary precursor to a valid vote by the City Council to adopt the final budget.

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[6] *See* N.Y. City Dep't of Education, *Emergency Declarations*, https://tinyurl.com/3kpvzjb4; https://tinyurl.com/yjcht844; https://tinyurl.com/n5rrram8.

B. The City's fiscal year 2023 budget

1. The Mayor's and City Council's negotiations

The budget ultimately adopted by the City Council in June 2022 contained a roughly $500 million reduction in DOE's more than $31 billion operating budget—a change of less than 2% as compared with the previous fiscal year.[7] As petitioners acknowledge, the City's public schools are projected to see a 4% reduction in enrollment for this school year (NYSCEF No. 44 (Pet'rs' Mem. of Law 4)).[8]

The budget cut, compared with the record-high levels of last year's budget, reflects that substantial amounts of federal stimulus

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[7] City of New York, *Adopted Budget Fiscal Year 2023* ("Adopted Budget") (June 2022), https://tinyurl.com/yy54nt3r. This $500 million figure reflects comparison of DOE's fiscal year 2023 Adopted Budget against DOE's fiscal year 2022 Adopted Budget. In Supreme Court, appellants focused on this year's $215 million reduction to schools' budgets attributable to declining enrollment, which reflects a $375 million decrease due to changes in enrollment that is partly offset by $160 million in federal stimulus funds. *See* New York City Council, Finance Division, *Report on the 2023 Preliminary Plan and the Fiscal 2022 Report for the Department of Education* (March 2022) ("Report on the Preliminary Budget") at 9, *available at* https://tinyurl.com/mr68kkrb. But for purposes of comparing DOE's year-to-year expense budget as adopted by the City Council, the entire DOE operating budget is a more appropriate number.

[8] N.Y. Post, *Enrollment at NYC public schools continues startling plummet, data shows* (June 15, 2022), https://tinyurl.com/muvhv4nd.

funds were made available last year as a result of the generational COVID-19 pandemic (NYSCEF No. 22 (Schanback Aff. ¶ 33)).[9] Indeed, DOE's operating budget for fiscal year 2022 reflected a nearly 15% jump from the prior year's budget—a spike without precedent in recent history.[10] By way of comparison, the percentage change in DOE's operating budget over the five prior fiscal years was under 5%.[11] And while city and state educational funding was increased for fiscal year 2023 (roughly $500 million each from the State and the City),[12] those additions only partly compensated for the drop in federal stimulus funds (NYSCEF No. 22 (Schanback Aff. ¶ 33); NYSCEF No. 38 (Verified Answer ¶ 138)).

Reductions in DOE's budget, substantially larger than those ultimately adopted, were proposed from the outset. The Mayor's

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[9] *See* Adopted Budget, *supra*.

[10] DOE's operating budget for each fiscal year can be found on OMB's website at https://tinyurl.com/yc4tr688. Each year's Expense Revenue and Contract Budget link contains a summary of expense budget by Agency, which contains the operating budget for that year. This publicly available information is collated in more accessible form in the attorney affirmation submitted in support of the City's motion for a stay and other relief filed in this case (AD1 Case No. 2022-03313, NYSCEF No. 3 (Aff. of Devin Slack ¶¶ 3-4)).

[11] *See id*.

[12] *See* https://tinyurl.com/yns6p9cn.

Preliminary Budget, sent to the Council on February 16, 2022, included a proposed operating budget for DOE of $30.73 billion, a reduction of approximately $826 million as compared to the Adopted Budget for fiscal year 2022.[13] The budget reflected a reduction of $375 million—due to a combination of reduced enrollment (partially offset by an allocation of federal funding) and, more markedly, by the loss of $1.4 billion in federal funding as compared with the previous year (NYSCEF No. 22 (Schanback Aff. ¶ 25).[14]

In response, the City Council produced a detailed report analyzing the Preliminary Budget's provisions relating to DOE, including an analysis of those units of appropriation most relevant to school budgets,[15] and on March 21, 2022, held a hearing that

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[13] *See* City of New York, Financial Plan: Fiscal Years 2022–2026 ("Preliminary Budget") (February 2022) at 21, available at https://tinyurl.com/3z6fs6pf; https://tinyurl.com/2afeu5d8.

[14] City of New York, *Financial Plan: Fiscal Years 2022–2026* ("Preliminary Budget") (February 2022), https://tinyurl.com/3z6fs6pf; Report on Preliminary Budget at 1, 7-8, 9, *supra* n. 7.

[15] Report on the Preliminary Budget, *supra*.

specifically addressed DOE's proposed budget.[16] The hearing included testimony from DOE's Chancellor, and other officials, along with testimony from the president of the United Federation of Teachers (UFT), PEP Vice Chair Tom Sheppard, the director of advocacy group Class Size Matters, and over 100 teachers, parents, students, and community, children's aid and legal services organizations.[17] Petitioners did not testify (NYSCEF No. 38 (Verified Answer ¶ 124)).

On April 1, 2022, the City Council presented its formal response to the Preliminary Budget to Mayor Adams, proposing an increase of $2.8 billion to the total City budget (*id.* ¶ 125).[18] The Council urged increases to the DOE budget in a number of specific areas, including for counselors and social workers in District 79 schools, which serve vulnerable populations; community coordinators for students experiencing homelessness; a team

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[16] A transcript of the March 21 meeting is available at https://tinyurl.com/4phrkfrx. The City Council link contains links to relevant attachments, including the hearing transcript.

[17] *See id.*

[18] The City Council's response to the Preliminary Budget is available at https://tinyurl.com/2fmtss4f.

focused on the needs of students in foster care; instruction for English Language Learners; and music and arts instruction.[19]

On April 26, 2022, Mayor Adams presented an Executive Budget, of $99.7 billion, which reflected a DOE operating budget of $30.95 billion—an increase of approximately $200 million over the Preliminary Budget (*id.* ¶ 126).[20] Approximately two weeks later, on May 10, the City Council produced a detailed report examining the Executive Budget's adjustments to DOE's budget—in particular, how the Executive Budget addressed the Council's concerns regarding the Preliminary Budget[21]—and conducted a hearing on the issue, at which DOE's Chancellor and 13 other school officials testified.[22] DOE answered members' questions on a range of topics, including the loss of funding to large community

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[19] *See id.* at 14-17.

[20] City of New York, *April 2022 Executive Budget, Fiscal Year 2023*, https://tinyurl.com/3r46xnsd.

[21] N.Y. City Council, *Report to the Committee on Finance and the Committee on Education on the Fiscal 2023 Executive Plan and the Fiscal 2023 Executive Capital Plan*, "Department of Education" ("Report on Executive Budget") (May 2022), available as an attachment link at https://tinyurl.com/mryv7x7x.

[22] A transcript of the May 10 hearing is also available as an attachment link at https://tinyurl.com/mryv7x7x.

schools, the availability of federal stimulus funding for fiscal 2023, the funding of arts programming, and DOE's plans to reduce class sizes (*id.* ¶ 17).[23]

The City Council then conducted a public hearing regarding the Executive Budget, including DOE's budget, on May 25, 2022 (NYSCEF No. 42 (Dantowitz Aff.) ¶ 19). The Council again heard testimony from public school students and parents, as well as numerous organizations and individuals, including the UFT president, the president of the Council of School Supervisors and Administrators, the Executive Director of Class Size Matters, and more.[24] The Council also accepted additional written testimony from the public concerning DOE's budget on May 25, 2022 (NYSCEF No. 38 (Verified Answer ¶ 130)).[25] But petitioners neither testified at the May hearings nor submitted written statements (*see id.* ¶¶ 128, 130)).

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[23] *See id.* at 34-54.

[24] A transcript of the hearing is available as an attachment link at https://tinyurl.com/mr4btc92.

[25] *See id.*

On June 10, 2022, the Mayor and City Council announced a budget deal.[26] On June 12, the Council scheduled its budget vote for the next day. And on June 13, the City Council voted 44-6 to approve the proposed budget for fiscal year 2023, which, for DOE, included an operating budget of over $31 billion, representing an increase of approximately $100 million over the amount set forth in the Executive Budget (NYSCEF No. 38 (Verified Answer ¶ 137)).

2. DOE's departmental estimate for fiscal year 2023

The State concluded its own intense period of budget negotiations on April 9, 2022 (eight days late), and in that budget provided $13.5 billion in education funding for the City. As noted, on April 26, the Mayor submitted his Executive Budget to the City Council, including his proposed units of appropriation for DOE, which reflected the additional state aid and roughly $500 million in

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[26] N.Y. City Council, *Speaker Adrienne E. Adams, Finance Committee Chair Justin Brannan, and Council Members Announce Agreement with Mayor Eric Adams on $101 Billion Fiscal Year 2023* Budget (June 10, 2022), https://tinyurl.com/39btj3hy.

additional city funding, as well as the dramatic drop in federal stimulus funding for the year.

Ten days later, on May 6, the Chancellor published DOE's proposed departmental estimate of the funding needed to operate schools in the upcoming fiscal year (NYSCEF No. 39 (Estimated Budget)). On the same date, DOE posted the required 45-day notice of PEP's next regularly scheduled meeting, *see* Educ. Law § 2590-g(8)(a), to be held on June 23, 2022, during which it would vote on the estimate (NYSCEF No. 40 (Public Notice)).

On May 31, before expiration of PEP's 45-day notice period, DOE's Chancellor issued an emergency declaration under Education Law § 2590-g(9) adopting the proposed departmental estimate on an interim basis (NYSCEF No. 41 (Emergency Declaration)). The declaration, published on the DOE's website, explained: "Due to the timing of the release of projected funding for the city school district used to develop the Estimated Budget, there is not sufficient time to complete the public comment period and obtain [PEP] approval of the estimated budget before budget allocations are sent to schools and the FY23 City Budget is adopted"

(*id.*). Because "[d]elaying the school-based budgeting process would have a harmful effect on the operation of schools," immediate action was "necessary to preserve the health, safety and general welfare of the students and the school system as a whole" (*id.*)

Less than a week later, on or around June 5, DOE notified principals and communities of individual schools' fiscal year 2023 initial budgets (NYSCEF No. 38 (Verified Answer ¶ 133)). Principals use these budgets to allocate funds based on anticipated needs, including for staff, programs, goods, services, and the like (*id.* ¶ 144). A period of intense activity ensues as principals and DOE central management follow through on these plans, hiring and moving staff and ordering goods and services to meet programming and enrollment needs in time to greet students three months later (AD1 Case No. 2022-03205, NYSCEF No. 3 (Schanback Aff. ¶ 10)).[27]

[27] Although this affidavit was not submitted to Supreme Court, this Court may take judicial notice of its contents since it was annexed as an exhibit to the City's stay motion filed in this Court. *See People v. Byrd*, 57 A.D.3d 442, 443 (1st Dep't 2008) ("[C]ourts may take judicial notice of their own prior proceedings and records, including exhibits…."); *see also City of New York v. 330 Cont. LLC*, 60 A.D.3d 226, 232 n.9 (1st Dep't 2009); *Vasquez v. Christian Herald Ass'n*, 186 A.D.2d 467, 468 (1st Dep't 1992).

For the school system as a whole, this amounts to some 3,500 budget-related decisions each working day of the summer (*id.*).

At its next regularly scheduled meeting held on June 23—the date announced in the May 6 public notice—the PEP approved the Chancellor's departmental estimate by a vote of 10-4, thereby completing the approval process for the departmental estimate (*id.* ¶¶ 34-37). The PEP received written comments in advance of the meeting and heard extensive live public comment.[28]

As noted, between the Chancellor's May 31 emergency declaration and PEP's June 23 meeting, the City Council scheduled its budget vote for June 13 and, on that date, approved the Adopted Budget (NYSCEF No. 38 (Verified Answer ¶ 143)).

C. DOE's actions based on the Mayor's Executive Budget and, later, the Adopted Budget

As described above, following issuance of school allocations, DOE administrators and thousands of school officials across 1,400 schools relied on the allocations in planning how to operate the schools within their budgets throughout the upcoming school year

[28] A link to a video of the meeting is at https://vimeo.com/723750056.

(NYSCEF No. 38 (Verified Answer ¶ 144)). Where school budgets were reduced, schools decided which programs, positions, or other expenditures should be eliminated (*id.* ¶ 145). Under the UFT's collective bargaining agreement, teachers were entitled to be notified by June 15, or as soon thereafter as practicable, if they were being "excessed" from their positions (*id.*). These teachers could then seek positions with other schools that had vacancies or, failing that, become available to serve as substitute teachers (*id.*), still receiving full salary and benefits. There were no layoffs (*id.*).

With implementation of the new school budgets, there are ongoing adjustments to individual school budgets, as some schools see greater enrollment than projected, need to replace one type of teacher with another, or require funds for new programming—all of which require DOE central management to release additional funding to particular schools (AD1 Case No. 2022-03205, NYSCEF No. 3 (Schanback Aff. ¶ 11)). Principals may also move money within their budgets to address different priorities (*id.*). Smooth implementation of such changes requires early action, so that staff can seek transfers and be timely hired (*id.*).

D. This proceeding and Supreme Court's order annulling DOE's budget and directing reversion to last year's record-high DOE spending levels

On July 18, 2022, petitioners filed a proposed order to show cause to commence this hybrid action/proceeding seeking declaratory and injunctive relief as well as relief under CPLR article 78 (NYSCEF No. 2).[29] They filed 48 days after the Chancellor's emergency declaration and 35 days after the City Council's adoption of the City's budget. By then, preparations for the upcoming school year were already well under way, with only weeks remaining before the first day of school.

The petition alleged as a sole cause of action that the City violated Education Law § 2590-q by holding the PEP public meeting and vote on DOE's departmental estimate after the City Council's vote on the citywide Adopted Budget (NYSCEF No. 1 (Pet. ¶¶ 2-3,

[29] Though the pleading is denominated a petition, it is properly viewed as a hybrid action/proceeding since it seeks multiple forms of declaratory relief and on its face is brought "pursuant to Section 6301 and Article 78 of the CPLR and Sections 2590-g and 2590-q of the New York Education Law" (*see* NYSCEF No. 38 (Verified Petition, Caption and Prayer for Relief)).

108-09)).[30] Yet it did not allege that petitioners participated in any of the public hearings on DOE's budget, that they had ever intended to testify before PEP, or that their personal rights were harmed by the deferred PEP vote. Instead, it contained pages upon pages alleging "irreparable harm" consisting of the DOE budget cuts (*id*. ¶¶ 15, 19, 21, 46-90, 97), which were described as "egregious" and "devastating" (*id*. ¶ 12, 15, 46, 74, 81, 86).

In addition to various forms of declaratory relief, the petition sought an order annulling the Council's approval of DOE's fiscal year 2023 budget and requiring the Council to reconsider and re-vote on that budget (*id.,* Prayer for Relief ¶ 1(f) & (g)). Petitioners also filed an order to show cause seeking a temporary restraining order enjoining DOE from implementing the current year's budget cuts and from "spending at levels other than as required by" the record-high fiscal year 2022 DOE budget, pending further City

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[30] The petition also contained allegations about abridgment of the constitutional right to a sound basic education (NYSCEF No. 1 ¶¶ 91-105, Prayer for Relief 1(e). The court did not address that claim, which the City maintains was insufficiently pleaded (*see* NYSCEF No. 43 (City's Mem. of Law) at 17-18).

Council action (*id.*, Prayer for Relief ¶ 2(a) & (b); NYSCEF No. 2 (Proposed Order to Show Cause 4)).

After signing the order to show cause, granting a temporary restraining order *ex parte*, and then denying the City's application to vacate the TRO (NYSCEF No. 21),[31] Supreme Court accepted the City's answer to the petition and petitioners' reply (*see generally* NYSCEF Nos. 38-44). On August 4, the court held a brief oral argument; on August 5, the court issued a decision and order granting petitioners what the court denominated a preliminary injunction, though it granted effectively all the relief petitioners had sought and was rendered after full briefing of the petition (NYSCEF No. 49 (August 5 Order)). The order incorporated by reference the reasoning reflected in the transcript of the oral argument (*id.* at 1).

Supreme Court first concluded that the Chancellor's declaration of an emergency was not a "valid exercise" of his powers under the Education Law (August 5 Order at 1; AD1 Case No. 2022-

[31] By order dated July 29, 2022, a single Justice of this Court denied the City's motion to vacate the grant of the interim relief (Case Nos. 2022-03187 & 2022-03205).

03313, NYSCEF No. 3 (Motion Exhibit B, August 4 Transcript at 32, 34-35). From there, without referencing any statutory source for support, the court concluded that the PEP vote was a "condition precedent" to the City Council's adoption of a budget, akin to a requirement mandating a notice of claim before commencing a lawsuit (August 4 Transcript at 5-6, 32-34). Based on this reasoning, the court concluded that petitioners had "succeeded on the merits" (August 5 Order at 1).

The court then summarily dispatched the other two prongs of the analysis for injunctive relief. On irreparable harm, the court said only that petitioners had met their burden because "both sides" agreed that "limbo as to the budget" would irreparably harm "City schools" (*id*. at 2). Next, the court opined that the legal violation it had found *necessarily* weighed in favor of an injunction—stating starkly that "the balance of the equities clearly favors the petitioners due to the found violation of state law"—and performed no further analysis (*id.*). Further, the court refused to consider the City's request to impose a remedy short of retrospective relief (*see* Aug. 4 Tr. 37-38).

In the decretal section of the order, the court first "vacated" the City's fiscal year 2023 budget as it relates to DOE. The court did not stop there, but went on to direct that "all such spending levels shall revert back to the levels" in the City's fiscal year 2022 budget (August 5 Order at 2). The court next "authorized" the City Council and Mayor "to amend" the fiscal year 2023 City budget in a manner consistent with the order and applicable laws (*id.*). Only upon such "amend[ment]" would "the [f]iscal [y]ear 2022 spending levels … no longer be required to be complied with" (*id.*).[32] The court disavowed any opinion on the appropriate level of funding for DOE and specified that its order made no budgetary changes to agencies other than DOE—though it also "did not preclude any amendments otherwise" to the fiscal year 2023 budget consistent with the order and applicable law (*id.*).

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[32] The court further specified that its order did not prevent four limited categories of action: (a) the allocation of additional funds to DOE from sources other than the City, such as the federal government; (b) implementation of DOE's dyslexia program; (c) "net-zero transactions" involving transfer of staff within the system; and (d) budgetary changes associated with grants from a grantor other than the City (August 5 Order at 2).

E. Appellate proceedings to date

On the same day that the order issued, the City filed a notice of appeal (NYSCEF No. 50). Soon after, the City moved in this Court for confirmation that the injunctive portion of the order triggered the automatic-stay provision of CPLR 5519(a)(1), and alternatively sought a discretionary stay of the order, and further requested an expedited appeal.[33]

On August 9, a Justice of this Court denied the stay motion as unnecessary, expressly citing the automatic stay provided by CPLR 5519(a)(1). Petitioners later cross-moved to vacate the stay and for other relief (including another request for expedition). By order dated August 15, the same Justice granted the City's request for an expedited appeal. Both the motion and cross-motion, to the extent they were not resolved on an interim basis, were referred to the full court and remain pending as of this brief's filing.

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[33] The City also sought leave to appeal in the event the Court determined that Supreme Court's order was not appealable as of right (AD1 Case No. 2022-03313, NYSCEF No. 3 (Notice of Motion)).

ARGUMENT

SUPREME COURT IMPROPERLY ANNULLED DOE'S BUDGET AND ORDERED REVERSION TO THE PRIOR YEAR'S SPENDING LEVELS

Supreme Court granted petitioners drastic and unprecedented relief, annulling DOE's fiscal year 2023 budget and directing DOE to "revert back" to the prior fiscal year's "spending levels"—verbiage that seems to require DOE to spend now at levels likely to exhaust the funding allocated to it well before the end of the school year. The enormous disruptions to DOE's operations that this order would have occasioned—jeopardizing the system's very ability to be ready for students on the first day of school—have been staved off for now only by the automatic stay under CPLR 5519(a), as confirmed by an interim order of a Justice of this Court.

Supreme Court's order rests on a series of essential legal errors. It granted relief on a nonjusticiable claim and erroneously disregarded appellants' assertion of the laches defense; relied on a thorough misunderstanding of the statutes governing the City's budget process, and the tangential role of the PEP in that process; found a violation of statutory procedures were none exists; awarded

sweeping retrospective relief without regard to the effects of that relief on the school system and its students, in contravention of Court of Appeals precedent; and, in awarding injunctive relief, both confused the parties' respective claims of irreparable harm and failed to balance the equities. This Court should now reverse and restore the DOE budget formally adopted by the City Council, with concurrence of the Mayor.

A. Petitioners' challenge to the budget should be dismissed as nonjusticiable or barred by laches.

This Court need not reach the merits to reverse the order on review because petitioners' retrospective challenge to the budget is nonjusticiable and barred by the doctrine of laches. Supreme Court might have had the power to hear a claim for prospective declaratory relief addressing an alleged violation of the Education Law's procedures for preparing a departmental estimate. And, were the challenge brought in time, the court might have had the power to contemplate an order directing compliance with those procedures. But here, Supreme Court did not address the portions of the petition seeking prospective relief, and petitioners did not

bring their challenge in time to seek an order directing that their conception of procedural requirements be adhered to in advance of the Council's budget vote. By entertaining petitioners' request instead to annul the Council's vote after the fact, the court exceeded the bounds of its authority.

Petitioners sought to declare invalid and annul DOE's budget, part of a legislative enactment of the City Council, based on an alleged defect in procedure (NYSCEF No. 1 (Pet., ¶¶ 1-2, Prayer for Relief ¶ 1)). But out of respect for the separation of powers, courts must not "trespass into the wholly internal affairs of the Legislature." *King v. Cuomo*, 81 N.Y.2d 247, 250 (1993) (quotation marks omitted); *see Saxton v. Carey*, 44 N.Y.2d 545, 549 (1978) (in "a system of checks and balances," each branch of government "should be free from interference in the discharge of its peculiar duties, by either of the others").

In particular, the courts' role does not extend to legislative matters involving the "allocation of government resources" and the discretion-laden "ordering of priorities." *N.Y.S. Inspection, Sec. & Law Enforcement Emples., Dist. Council 82 v. Cuomo*, 64 N.Y.2d

233, 239 (1984). A budget is both of those things, and "the courts cannot and will not intervene in the budget process if doing so requires them to substitute their judgment on matters of discretion." *Korn v. Gulotta*, 72 N.Y.2d 363, 369 (1988); *cf. Maybee v. State*, 4 N.Y.3d 415, 420 (2005) (no judicial review of governor's statement of fact permitting immediate vote on bill).

To be sure, courts may entertain challenges to the legislative process that implicate "the scope of that authority which is granted by the Constitution to the other two branches of the government." *King*, 81 N.Y.2d at 250. So, for example, the Court of Appeals found justiciable a claim that county officials had violated an express charter requirement to include a statement of the county's cash balance in the budget. *Korn*, 72 N.Y.2d at 369-70. The Court also heard a challenge to the State Legislature's violation of a constitutional bar on altering appropriation items submitted by the Governor, *N.Y. Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 102-03 (1993); *see also King*, 81 N.Y.2d at 250-52 (permitting challenge to Legislature's extra-constitutional practice of "recalling" bills submitted to the Governor for signature).

But this is not such a case. Petitioners assert no violation of the City Council's constitutional authority. Their theory is that the Council's vote is invalid because deferral of the PEP vote "deprived the City Council of the benefit of the public hearing, public comments, and vote by the [PEP]" (NYSCEF No. 1 (Verified Petition, ¶ 2)). The Court of Appeals declined to review an analogous challenge, based on the premise that insufficient itemization in the Governor's proposed budget had prevented the Legislature from taking an informed vote. *See Saxton*, 44 N.Y.2d at 548. The Court explained that the remedy rested instead with the Legislature, which, if it lacked sufficient information, had the means to insist on knowing more. *See id.* at 550; *see also Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n*, 30 N.Y.2d 207, 220 (1972) (rejecting procedural challenge to legislation because, among other things, legislature could have declined to pass bill if "time for consideration was too short").

The Council is an independent branch of the City's government, and the Charter gives it tools of its own to ensure that its budget vote is an informed one, including both the power and

obligation to hold multiple public hearings on the budget. The Council also has tools that apply after its budget vote, particularly where the City's budget is typically modified by the Council and Mayor on a quarterly basis. *See* Charter §§ 106, 107, 216.[34] Those are the proper tools to address the fundamentally political questions that lie at the heart of petitioners' grievance. It is not the role of the courts to step in, *after* the Council has formally voted to adopt the budget, to undo that vote based on a challenger's view that the body was ill-informed.

While the justiciability bar alone defeats the claims at issue, petitioners' delay in suing only compounds the problem and provides an additional reason that Supreme Court should have

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[34] As an example of such tools, a group of council members recently introduced a resolution regarding DOE's budget cuts. The proposed resolution indicates no legal infirmity in the Council's June 2022 budget vote and makes no reference, implicit or explicit, to the PEP's vote. Rather, it expresses a desire to negotiate a budget modification with the Mayor, as well as the view that DOE can "cover[] any shortfall at least until a budget modification can be negotiated." *See* https://tinyurl.com/rex7vpez ("text" tab). Thus, if adopted, the resolution would "call[] on the Mayor and the Chancellor … to immediately reverse the DOE's reductions to school budgets; call[] on the Chancellor to submit updated school budgets to the [PEP] reflecting the restoration, as well as an accounting of unspent federal stimulus funds; and call[] on the Mayor to promptly utilize any unspent and unallocated federal stimulus or other funds and submit a budget modification to the Council that fully restores the $469 million removed from schools by the DOE."

declined to entertain a challenge to the City Council's vote. The Chancellor's emergency declaration that petitioners challenge was issued on May 31. Had they "proceeded with dispatch," *Elefante v. Hanna*, 40 N.Y.2d 908, 908-09 (1976), they could have brought suit before the City's entire fiscal year 2023 budget—including DOE's whopping $31 billion share—was adopted on June 13. Instead, petitioners waited to sue until July 18—more than a month after the Council's vote, and nearly seven weeks after the Chancellor issued his emergency declaration. At that point, the retrospective relief they sought should not have been "countenanced," given the disruption it would cause appellants (and the public). *Id*. at 909.

Even at that late date, though, Supreme Court could have entertained a request for a prospective declaration that the Chancellor may not use a similar rationale to defer the PEP vote in future budget cycles (subject to review by this Court on an ordinary appellate schedule). But insofar as the petition sought retrospective remedies, it was barred by laches, as well as by justiciability principles, given petitioners' prejudicial delay in filing suit. *See id*.; *Schulz v. State*, 81 N.Y.2d 336, 347-50 (1993).

B. Supreme Court erred in holding that the Council's budget vote was invalid.

1. The PEP vote was not a "condition precedent" to a valid vote by the Council.

Having improperly reached the merits, Supreme Court further erred in holding the City Council's vote invalid. The court concluded that petitioners had "succeeded on the merits" because the Council's budget vote "should have occurred after the [PEP] held its own vote on the budget" (NYSCEF No. 49 (August 5 Order at 1)). This statement was incorrect in multiple key respects.

The PEP, of course, does not vote on "the budget," but rather on the departmental estimate that DOE submits to the Mayor. *See* Educ. Law § 2590-g(1)(e). And neither the Charter provisions defining the City's budget process, nor the provisions of the Education Law governing the DOE's departmental budget estimates, make the completion of the PEP vote a requirement for a valid budget. Supreme Court's theory that the PEP vote was a "condition precedent" to a valid budget vote by the Council, which petitioners did not advance, is fundamentally mistaken.

Absent express statutory language, *see, e.g.*, CPLR 3216(b), courts do not lightly conclude that the Legislature intended to create a condition precedent. At a minimum, language clearly indicating an indispensable requirement is needed. *See, e.g., Campbell v. City of N.Y.,* 4 N.Y.3d 200, 203-04 (2005).

To discern a true condition precedent, the Court of Appeals has relied on legislative language absent here, such as "upon the condition that" or "provided that." *Id.* at 204; *Huang v. Johnson*, 96 N.Y.2d 599, 603 (2001). Standing alone, commonly used mandatory terms such as "required" or "must" or "shall" or even "unless," though they create a legal right, are not enough to support the unyielding implications of a condition precedent. *Campbell*, 4 N.Y.3d at 204; *cf. State by Abrams v. Ford Motor Co.*, 74 N.Y.2d 495, 500 (1989) (construing warranty)*; VXI Lux Holdco S.A.R.L. v. SIC Holdings, L.L.C.*, 171 A.D.3d 189, 195 (1st Dep't 2019) (construing contract); *Tecchia v. Bellati*, 203 A.D.3d 496, 497 (1st Dep't 2022) (same); *see also Sullivan v. Siebert*, 70 A.D.2d 975, 975 (3d Dep't 1979) (mandamus).

Under the relevant statutory language, the question here is not close. The Charter provisions governing the budget process do not mention DOE's departmental estimate as a component of the Council's deliberations about the final budget or state that any departmental estimate must be approved before the Council may validly vote on the budget. N.Y. City Charter § 231. Nor do the provisions of the Education Law governing DOE's departmental estimates.

Together, Education Law § 2590-g(1)(e) and § 2590-q(4) set the PEP's limited and advisory role in the *Mayor's* preparation of budget proposals, and on an indefinite schedule at that. Specifically, they provide that the PEP "shall" have the power and duty to "approve annual estimates of the total sum of money which it deems necessary for the operation of the city district," Educ. Law § 2590-g(1)(e), and that, "on such date as the Mayor shall direct," those adopted estimates "shall" be submitted to the Mayor by the Chancellor, *id.* § 2590-q(4). They do not expressly advert to the City Council, let alone draw any line to its final vote, conditional or otherwise.

The same is true of the three sections of the Education Law that petitioners relied on below (*see* NYSCEF No. 1 (Verified Petition ¶ 3)). Two of the provisions—§§ 2590-q(4) and (5)—do not mention the City Council at all. Only Education Law § 2590-q(6) mentions the Council, and it merely contemplates that the Council will "act[] on the proposed units of appropriation for programs or activities of community district education councils"—which is sharply distinct from the operations of DOE as a whole. Taken together, the statute's express reference to the Council concerning proposed funding for community district education councils, and absence of any similar mention in relation to the departmental estimate for DOE overall, decisively undercut petitioners' theory. *See, e.g.*, *Colon v. Martin*, 35 N.Y.3d 75, 81 (2020) (applying "the *expressio unius* maxim").

Supreme Court examined none of this language before proclaiming the PEP vote to be a condition precedent and using that conclusion to truncate the necessary analysis. If it had, it could have looked for comparison no further than Education Law § 3813, which creates the precise kind of notice-of-claim condition

precedent that the court misguidedly analogized to (AD1 Case No. 2022-03313, NYSCEF No. 3 (Motion Exhibit B, August 4 Transcript 5-6, 32-34), but which, as shown in the margin, uses absolute terms in setting forth a necessary antecedent time frame for specified conditions before a different action may be taken.[35]

It is for good reason that nothing in the Charter or the Education Law purports to restrict the Council from voting on the City's budget until the PEP has voted on the departmental estimate. The budget process belongs, in the main, to the Mayor and the City Council. The Mayor proposes the budget and negotiates over priorities with the Council, and ultimately the Council votes to adopt the budget.

Like most other arms of municipal government, DOE is not a direct participant in this process. Through the Chancellor, with

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[35] The Education Law's notice of claim provision reads: "*No action or special proceeding, for any cause whatever* … relating to [certain types of proceedings], shall be prosecuted or maintained against any [school body] *unless* it shall appear by and as an allegation in the complaint … that a written verified claim …was presented to the governing body of said district or school *within three months after the accrual of such claim*, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for *thirty days after such presentment*." Educ. Law § 3813 (emphasis added).

approval of the PEP, it submits a non-binding budget estimate to the Mayor on whatever date the Mayor directs. Educ. Law §§ 2590-g(1)(e), 2590-q(4). But the Mayor's Executive Budget reflects his own judgment about the City's needs—regarding not just education, but all public functions—in light of fiscal conditions at the time. And the City Council, in turn, exercises its own judgment, as a separate branch of city government, in approving the final budget, after extensive hearings and negotiation.

The course of the budget process further confirms that Supreme Court misconstrued the PEP's role. The Council scheduled its June 13 vote on the proposed city budget on June 12, just shy of two weeks after the Chancellor issued his emergency declaration. The Council knew full well at that point that the PEP would not hold an advance vote. In fact, either the Chancellor or the PEP has invoked the same emergency procedure regarding the PEP vote in at least 11 of the last 13 budget cycles,[36] never sparking complaint from the Council. Nor did any of the four petitioners in this

[36] *See Emergency Declarations*, https://tinyurl.com/3kpvzjb4; https://tinyurl.com/yjcht844; https://tinyurl.com/n5rrram8.

proceeding exercise their right to public participation by testifying or submitting public comments before the City Council, the body with direct control over the budget.

Neither the Charter nor Education Law draw any connection between the requirement of a PEP vote on DOE's non-binding departmental estimates submitted to the Mayor on the one hand, and the City Council's vote on the final budget on the other. Certainly, the validity of the Council's vote does not depend on the completion of the PEP vote, as Supreme Court mistakenly supposed.

2. Further, there was no procedural violation here.

The above analysis shows that any claimed procedural violation provides no legal ground to annul the City Council's budget vote. But Supreme Court's order also fails on the additional ground that no cognizable procedural violation occurred. Even where, unlike here, the alleged procedural lapse bears a direct relationship to the legislation in question, challenges on that basis are reviewed for substantial—rather than strict—compliance with

procedures. *See Schneider v. Rockefeller*, 31 N.Y.2d 420, 434 (1972). And no procedural challenge to legislation that we are aware of has involved a claimed procedural requirement like the one at issue here—one that may be deferred in the exercise of executive discretion under the plain terms of the statute.

As discussed below, there was actual compliance—and, at a minimum, substantial compliance—with statutory procedures here. The Chancellor's emergency declaration was a valid exercise of his authority under the Education Law. And even if it were not, the fact remains that, when the PEP ultimately voted, it firmly voiced its approval of the departmental estimate. That ratification ensured that DOE was, at a minimum, in substantial compliance with the Education Law.

a. The Chancellor's emergency declaration was rational.

Supreme Court erred in finding the emergency declaration invalid. On any item ordinarily requiring PEP approval, the Education Law vests the Chancellor with broad discretion to issue an emergency declaration and act on an interim basis whenever he

finds it "necessary to the preservation of student health, safety or general welfare" and that compliance with default rules for a PEP vote "would be contrary to the public interest." Educ. Law § 2590-g(9); *see id.* § 2590-g(1). Such a determination must be upheld unless it is irrational; de novo review cannot be had. *See James v. Bd. of Educ.*, 42 N.Y.2d 357, 365-67 (1977); *see also Bd. of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 20 (1983).

Here, the Chancellor rationally determined that the release of the Mayor's projected funding for DOE, which is required to develop its departmental estimate, had not arrived in time to complete the 45-day public comment period and obtain PEP approval of the departmental estimate before budget allocations were sent to individual schools and the fiscal year 2023 City Budget was adopted (NYSCEF No. 41 (Emergency Declaration)). The Chancellor rationally found that waiting for the PEP to vote would have "[d]elay[ed] the school-based budgeting process," and that delay in turn "would have [had] a harmful effect on the operation of schools" (*id.*). It fell squarely within the Chancellor's province to conclude that such a delay could harm "student health, safety or general

welfare," and run "contrary to the public interest." Educ. Law § 2590-g(9).

Even if, as petitioners argued, DOE could have issued the departmental estimate sooner, the fact remains that there was insufficient time for the PEP process to run its course. As the Court of Appeals has observed, "[e]mergencies are often precipitated by the failure to take needed action in the past despite adequate warning," but they may nonetheless be treated as emergencies when they come to a head. *Bd. of Visitors-Marcy Psychiatric Ctr.*, 60 N.Y.2d at 20. Put another way, it is all well and good to protest that quicker action could have prevented a time crunch, but the crunch still requires action. Faced with such a situation, the Chancellor permissibly invoked the procedures available to him under the Education Law to resolve it.

b. In any case, the City substantially complied with the law because the PEP voted to ratify the departmental estimate.

Independent of the above, the PEP's ultimate vote to approve the departmental estimate unquestionably establishes substantial

compliance with the Education Law. Even where, unlike here, legislation is challenged for a procedural defect *central* to a legislative process itself, courts do not demand strict adherence to procedural rules, absent any assertion that the resulting legislation bears some constitutional or other substantive defect. Instead, "substantial compliance with the letter and spirit" of the disputed procedure is enough. *Schneider*, 31 N.Y.2d at 434; *see N.Y. State Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 102 (1993); *Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n*, 30 N.Y.2d 207, 219 (1972); *Dixon v. La Guardia*, 277 N.Y. 84, 88-89 (1938); *cf. Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 N.Y.2d 531, 535 (1992) ("[a] rule that rendered every administrative decision void unless it was determined in strict literal compliance with statutory procedure would not only be impractical but would also fail to recognize the degree to which broader public concerns, not merely the interests of the parties" may be affected).

This principle of forbearance should apply with special force to a budget vote. Budgeting is an essential function of government

that often disappoints many, and thus would invite innumerable lawsuits if the doors of the courthouse were wide open to them. Plus, the intricate and multi-faceted budget process for the nation's largest city is bound to have any number of arguable imperfections each year. If dissatisfied denizens are empowered to comb through the record of each precursor step and obtain such extreme declaratory and injunctive satisfaction for any procedural lapse, the courts will be clogged with lawsuits and the fiscal health of the City—which is required by law to have a balanced budget[37]—constantly jeopardized by paralysis. *Cf. Maybee*, 4 N.Y.3d at 420 (holding nonjusticiable Governor's finding permitting immediate vote on bill, since "any statute, no matter how important to the state, would have to be thrown out by the courts" based on a defect in the finding).

To the extent the door is open to such procedural challenges, petitioners' challenge should not have made it through. Even if petitioners were right about the Chancellor's emergency

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[37] *See* State Fin. Emergency Act § 8(1)(a); N.Y. City Charter § 1516(a).

declaration—and as discussed above, they aren't—the declaration merely deferred the PEP vote, which ultimately occurred. Indeed, the Education Law expressly contemplates that the PEP may later ratify an item adopted on an interim basis as the result of an emergency declaration, providing that the item will be effective only for 60 days or until the PEP votes. Educ. Law § 2590-g(7).

And that is just what happened here. The PEP has now voted, and—after hearing at length from members of the public—still adopted the departmental estimate. Thus, every party statutorily involved in the departmental estimate has now approved it. At a minimum, DOE certainly achieved substantial compliance with the statutory scheme.

While petitioners speculated below that the PEP vote was not meaningful because the City's budget process was already complete (*see* NYSCEF No.1 (Verified Petition ¶¶ 16-18)), that claim is refuted by the fact that four of the PEP's members dissented (*see* NYSCEF No. 38 (Verified Answer ¶ 143)). Neither the emergency declaration, nor the timing of the vote, prevented those members—or any of the others—from making their views known. And

petitioners have no non-speculative basis to suggest that the PEP's approval was less than considered. Nor, critically, have petitioners ever sought a re-vote by PEP in this suit—a tacit concession of the vote's validity and an acknowledgment that the PEP fulfilled its statutory role.

3. Petitioners have repeatedly shown that their true intention is to improperly involve the courts in substantive budgetary matters.

Supreme Court took at face value petitioners' assertion that their challenge was simply procedural—to ensure that the PEP vote and the City Council's vote occurred in what petitioners asserted was the proper order. But from beginning to end, the record contains persuasive indications that petitioners' one true target in this proceeding was to obtain a judicial order countermanding the Council's choice to approve cuts to DOE's budget. And, as discussed earlier, the wisdom of those cuts is "[m]anifestly" not an issue for the courts. *Korn*, 72 N.Y.2d at 369; *accord Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-36 & 540 (1984); *Bd. of Educ. v. Nyquist*, 57 N.Y.2d 27, 38-39 (1982).

At points, the petition invokes the supposed harm to the City Council from a lack of information (NYSCEF No. 1 (Verified Petition ¶¶ 2, 4, 19, Prayer for Relief 1(a), 1(c))), or to the PEP itself from the delay in its vote (*id.* ¶¶ 17, 112). But these tangential assertions cannot be what this case is really about. Petitioners would have no standing to assert an alleged injury to either body. *See Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991). Nor could they sue in furtherance of some generalized interest in compliance with statutory procedures. *See id*.

The petition also contains no allegation of an injury to petitioners from the purported procedural defect they challenge. It does not recite that petitioners participated in the public hearings on the budget—though 70 people spoke at the PEP hearing and hundreds of people testified at the City Council hearings on DOE's budget (*see supra* at 14-17). *Cf. La Rossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 590 (1984) (parties who chose not to avail themselves of available opportunities to avert harm "cannot now be heard to complain that they were not afforded a reasonable opportunity to protect themselves"). Moreover, if petitioners' true

concern were procedural, their supposed injury was manifest when the Chancellor issued his emergency declaration on May 31; they did not have to wait for spending cuts to materialize to assert a claim. Indeed, if their goal were really to fix a procedural issue without wreaking havoc on the school system, they ought to have sued before the City's budget process was complete (*see supra* at 34-35).

Not surprisingly, then, the petition overwhelmingly asserts injuries to students and teachers from the DOE budget cuts found in the Adopted Budget. It contains pages of allegations of "irreparable harm" flowing from the cuts (Verified Petition ¶¶ 15, 19, 21, 46-90, 97), which it repeatedly describes as "egregious" or "devastating" (*id.* ¶ 12, 15, 46, 74, 81, 86). Petitioners' subsequent filings show the same laser focus on the effects of the budget cuts (*see* NYSCEF No. 16 (Pet'r Mem. of Law) 2, 4, 8, 11-19, 27; NYSCEF No. 44 (Pet'r Reply Mem. of Law) 5-6, 14-15, 18-19, 21-22).

But, as noted (*see supra* at 31-34), assessing the proper allocation of government funds is a political question, not subject to judicial review. Supreme Court recognized that the courts have no

role in reviewing the discretionary budget choices of elected policymakers (NYSCEF No. 49 (August 5 Order) at 2; AD1 Case No. 2022-03313, NYSCEF No. 3 (Motion Exhibit B, August 4 Transcript at 3). But despite the strong evidence to the contrary, the court was apparently convinced that petitioners sought only to right a claimed procedural wrong, rather than to entangle the courts in matters of policy. And under this misimpression, the court failed to grapple with the serious standing problem presented by petitioners' indirect challenge to the content of the budget.

Standing requires a close connection between the asserted injury and the action at issue. *See Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 352 (2005) ("Even assuming injury in fact, plaintiffs have not linked this purported injury … to the wrong that they seek to redress…."). Because petitioners challenged a procedural matter tangential to the budget process, yet asserted harms resulting from the ultimate result of the process, there was a critical mismatch between their claim and the harm alleged. *See Transactive Corp. v. New York State Dep't of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998) (plaintiff allegedly harmed by State's adoption of

electronic benefits system lacked standing to challenge subsequent choice of vendor to run the system).

All of these points confirm that petitioners have improperly fastened onto and leveraged the chronology of the PEP hearing—which, when it was held, did not produce a vote in their favor—as a backdoor means to undo policymakers' reductions in DOE's budget. But disagreements over such policy judgments can be and are resolved in the political sphere, where the courts may not intervene. Supreme Court should have perceived the telltale signs of petitioners' true purpose and rebuffed their improper invitation to meddle in substantive matters entrusted to the two other branches.

C. Even if a procedural violation were properly found, it would not have warranted the sweeping and unprecedent remedy of annulment of DOE's budget.

Supreme Court also separately erred when it jumped directly from its mistaken finding of a procedural violation to annulment of DOE's budget and a direction to revert to the prior fiscal year's budget (NYSCEF No. 49 (August 5 Order at 1-2); AD1 Case No. 2022-03313, NYSCEF No. 3 (Motion Exhibit B, August 4 Transcript

at 33-34)). As the Court of Appeals has made clear, the court should have analyzed the question of remedy as a "critically distinct issue" from whether there was a violation of procedure. *King v. Cuomo*, 81 N.Y.2d 247, 255 (1993). It expressly declined to do so (August 4 Tr. at 37-38).

Not every procedural violation justifies retrospective relief. Even a procedural violation involving the core legislative process itself does not justify a retrospective remedy that would "wreak more havoc in society than society's interest in stability will tolerate." *King*, 81 N.Y.2d at 256. Here, that havoc is manifest from the eleventh-hour nature of the order upsetting a mammoth budget that was adopted by the Council more than a month before petitioners even challenged it.

Though the Chancellor's emergency declaration was issued on May 31, 2022—well before the budget process was anywhere near its end—by the time petitioners filed this case purporting to challenge that declaration, the delicate, complex budget process had been put to bed. School principals and DOE administrators had begun to implement the new spending allocations (as had

thousands of employees at other city agencies). As a direct result of petitioners' delay, by the time this order entered, schools were set to reopen in just five weeks. The order—and indeed the very inception of the proceeding itself—simply came too late to warrant any equitable remedy undoing the fiscal year 2023 budget.

A retrospective remedy should also not be available without a resulting defect in the budget itself. Indeed, the handful of New York cases that have upheld a challenge to a budget have done so only for a substantive defect, not a mere lapse in procedure. (At a minimum, petitioners never came forward with examples of such precedent.) For example, in *Korn v. Gulotta*, 72 N.Y.2d 363 (1988), as noted, the Court of Appeals directed Nassau County officials to submit a new budget where the executive budget had failed to include a charter-mandated statement of the county's cash balance. And in *Block v. Sprague*, 285 N.Y. 69 (1941), and *People v. Tremaine*, 281 N.Y. 1 (1939), either the executive or adopted budget included impermissible lump-sum appropriations. Thus, all three cases—in pointed contrast to this one—involved a defect in the budget itself. And none of the cases went so far as to reimpose a

prior year's budget, as Supreme Court did here, much less one representing a historic differential in funds. Nor did the court here find that the Mayor or City Council breached their obligations under the Charter and relevant statutes governing their conduct.

At the very most, a proper finding in petitioners' favor on the merits could have entitled them to forward-looking relief in the form of a declaration that, in future years, the Chancellor may not rely on timing challenges of the type described to declare an emergency—the sort of remedy that provides a "more prudent and less detrimental course of action" than disruptive retrospective relief. *Winner v. Cuomo*, 176 A.D.2d 60, 64 (3d Dep't 1992). The Court of Appeals approved a similar outcome in *King*, where it invalidated the State Legislature's practice of "recalling" unsigned bills from the Governor's desk, but declined to award retrospective relief as to the recalled bill at issue. 81 N.Y.2d at 256. The Court emphasized that "courts should not act so as to cause disorder and confusion in public affairs even though there may be a strict legal

right," and thus rule only prospectively where retrospective relief "would have a broad, unsettling effect." *Id*. (cleaned up).[38]

D. Supreme Court's ill-considered reversion remedy was unsupported by any valid findings on irreparable harm or a balancing of the equities.

Supreme Court also fundamentally erred by displacing DOE's current budget in favor of last year's budget and ordering DOE's "spending levels" to "revert back" to those of the prior fiscal year. Again, petitioners have identified *no* decision imposing such a remedy. Yet before imposing this extreme relief, the court failed to consider whether such an injunction was warranted, and its findings on irreparable harm and balance of the equities fall apart

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[38] Petitioners mistakenly argued below that the remedial portion of *King* reflects the Court of Appeals' unwillingness to resuscitate all the past bills in which the invalidated recall process was employed (NYSCEF No. 44 (Pet'rs' Reply Mem. of Law) at 23). But that was an additional reason for the Court's remedial ruling; the first ground for declining to award retrospective relief was the disruption caused by resuscitating the particular legislation at issue in the case. *King*, 81 N.Y.2d at 256. The same logic bars Supreme Court's annulment of the DOE budget here. In fact, judicial reversal of the legislation at issue in *King*—which concerned the discrete issue of siting solid-waste management-resource recovery facilities within agricultural districts, *id*. at 250—would have been far less disruptive than upending the $31 billion budget of the nation's largest school district just before the start of the school year.

under the slightest scrutiny. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

1. Supreme Court identified no irreparable harm flowing from the asserted procedural lapse.

On irreparable harm—a "sine qua non" of such injunctive relief, *De Lury v. New York*, 48 A.D.2d 405, 405 (1st Dep't 1975)—the sum total of the court's finding is: "limbo as to the budget will cause irreparable harm to New York City schools, and therefore that prong of the petition is met" (NYSCEF No. 49 (August 5 Order 2)).

But the Chancellor's emergency declaration caused no form of limbo. On the contrary, the declaration's aim and effect was to ensure orderly budgetary planning at the individual school level. The same is true of the budget cuts that petitioners decry. Whether fiscally prudent or totally unwarranted, cuts are definitive. In no way do they cause or create budgetary doubt.

It was petitioners' burden to show the prospect of irreparable harm "if the injunction [were] *not* issued." *U.S. RE Cos. v. Scheerer*, 41 A.D.3d 152, 154 (1st Dep't 2007) (emphasis added). Yet it was

the late date when they filed this proceeding—coupled with the outsized relief sought and ordered—that created the "limbo as to the budget." Thus, the court turned the inquiry on its ear, allowing the very havoc created by petitioners to inure to their benefit. And, critically, the court identified absolutely no irreparable harm actually caused by the alleged procedural violation that is the sole ostensible predicate for petitioners' case.

2. Supreme Court failed to balance the equities and disregarded the City's robust showing of harm.

Supreme Court further erred by failing to assess the balance the hardships, leaping directly from a statutory violation to an intrusive equitable remedy (*see* August 5 Order 2 ("the balance of the equities clearly favors the petitioners *due to the found violation of state law*" (emphasis added))). But the harm to the City from annulling the budget and ordering reversion to the prior year's spending levels far outweighed any harm to petitioners from what was, at most, a procedural misstep. *See Goldstone v. Gracie Terrace Apt. Corp.*, 110 A.D.3d 101, 106 (1st Dep't 2013); *see also Van Wagner Advert. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 195 (1986)

(effect of equitable relief should not cause "disproportionate" harm to defendant).

Supreme Court correctly perceived the damaging effects of budgetary "limbo" on DOE's schools, thereby recognizing the merit of the City's showing on this point. But the court misconceived the idea that reversion to fiscal year 2022 "spending levels" was somehow an appropriate way to fix the problem. Had the order not been stayed by the City's appeal—and all the more so if it were allowed to take effect now—it would plunge DOE into chaos at the worst possible time and cause irreparable harm to appellants and public school communities. Since these harms far outweighed any harm to petitioners flowing from the claimed procedural violation, injunctive relief should have been denied. *See OraSure Tech., Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348, 349 (1st Dept 2007)*; Gulf & Western Corp. v. New York Times Co.*, 81 A.D.2d 772, 773 (1st Dep't 1981).

The shockwaves caused by this unprecedented judicial intrusion into DOE's fiscal operations would leave DOE's officials and staff—as well as caregivers, students, and school

communities—uncertain about how to prepare for the new school year, as to both the logistics of getting things in place in short order and the imprudence of replacing expenditures that may evaporate. The order issued just five weeks before the nation's largest school system was set to reopen and some 900,000 students return to schools. Principals and administrators have been planning for that day since at least the initial release of school budgets in early June, if not much earlier. Supreme Court's remedy would throw a wrench into those plans with consequences that may reverberate throughout the school year.

The injection of so much doubt would complicate the long-term commitments that are critical to staffing and programmatic allocations and normally would be expected to endure for the next nine months. The court's order mandates a "reversion" to the unusually high fiscal year 2022 spending levels unless and until the City Council "amends" the fiscal year 2023 budget.[39] But planning

[39] This language represents yet another deficiency in the order. It does not clearly account for a scenario in which a new vote is held and *rejects* any amendments, raising the possibility of additional litigation and an extended period of uncertainty.

must account for the specter of a future Council vote that still contains a substantial shortfall—in which case commitments to higher spending now will be impossible to fulfill. And so the potential exists for a second upheaval coming in the midst of the school year—with uncertain results then too.

Though its order is far from clear on this point, Supreme Court may also have placed DOE in the untenable position of being under court order to spend money over the course of a year that it does not have. After vacating the fiscal year 2023 budget "as it relates to expenditures by [DOE]," the court ordered the agency to "revert" to the "spending levels" of its fiscal year 2022 budget. There is an especially wide gulf between those amounts due to a combination of the post-pandemic infusion of federal funding that is not being renewed and DOE's historic drop in student enrollment (*see supra* at 12-13). A single trial court judge is ill-equipped to tackle these kinds of complexities—magnified by the requirement of a balanced citywide budget, enshrined in state and local law—especially in a lawsuit that has never confronted them. And the vagaries produced by the order on review perfectly illustrate the

havoc that results when such complications are carelessly brushed aside.

Of the order's many faults, its timing is perhaps the most glaring. In the near term, just weeks before classes are scheduled to start, the order threatened mass confusion over how DOE and its 1,400 principals can practically prepare for the fast-approaching school year. Over any longer period, the injunction may push DOE to exceed its funding levels, which it cannot do, or cause it simply to run out of money mid-year. And the harm caused by the order must be assessed on its own terms, not on the hope that it will pressure public officials to reach a new political solution—one that could not be found during months of prior negotiations and that is, by the court's own admission, not within the judiciary's province to order.

The operation of a school system with some 900,000 students is an enormously complex undertaking. Making it work requires careful planning, necessarily starting with a known quantity of resources. This order was issued deep into the summer, when schools had already undertaken substantial planning regarding

how to spend available resources and were well into the process of implementing those plans. During the summer months leading up to a new school year, individual schools and DOE administrative offices daily engage in some 3,500 budget actions involving programming, staffing, and other matters (AD1 Case No. 2022-03205, NYSCEF No. 3 (Aff. of Benjamin Schanback ¶ 10)). By the time this appeal is heard—despite extreme expedition of the briefing—the school year will have already commenced. The injunction throws these thousands of actions, and the decision making underlying them, into disarray at the eleventh hour or later.

And the actions already taken in reliance on the final Council vote are not easily undone, especially if they may later have to be redone. For instance, though layoffs have been avoided despite the cuts, many teachers have been excessed. Even if schools were able scramble to undo those staffing decisions, those steps may be short-lived. Students will hardly benefit from whipsaws in staffing. For another example, if afterschool programs that were pared back or

eliminated are now restored, working parents may come to rely on those programs only to see their expectations later dashed.

Further, since the City is required by both the Charter and state law to have a balanced budget, additional funding for DOE would have to come from some other source. Nor can the City simply reallocate funds from one agency to another—a possibility the order seemingly suggests—without significant complexities. The injunction thus fundamentally upends the status quo. And given that an injunction directing unfunded spending is ultimately unsustainable, it fails to advance even petitioners' stated goals of protecting specific teachers and programs from budget cuts.

For this reason, and all the others detailed above, Supreme Court's order lacks any basis in law or sound exercise of judicial authority. The court improperly acceded to petitioners' request to annul the vote of the City's elected policymakers based on an unfounded claim of procedural error tangential to the City's budget process. The result was an unprecedented and enormously disruptive directive to reimpose a prior-year education budget, just weeks before the first day of school. A stay of that extraordinary

ruling has enabled DOE to continue preparations for the upcoming school year. This Court should now undo Supreme Court's errors in full and reverse the order below.

CONCLUSION

Supreme Court's order should be reversed.

Dated: New York, NY
August 23, 2022

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer, using Century Schoolbook 14 pt. for the body (double-spaced) and Century Schoolbook 12 pt. for the footnotes (single-spaced). According to Microsoft Word, the portions of the brief that must be included in a word count contain 13,716 words.

STATEMENT PURSUANT TO CPLR 5531

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of

Docket No.
2022-03313

TAMARA TUCKER and MELANIE KOTLER, individually, and on behalf of all parents and guardians of New York City public school students and PAUL TRUST and SARAH BROOKS, individually, and on behalf to all similarly situated New York City public school teachers,

Petitioners-Respondents,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID C. BANKS, in his official capacity,

Respondents-Appellants,

For an Order, Pursuant to Section 6301 and Article 78 of the CPLR and SECTIONS 2590-g and 2590-q of the New York Education Law, Annulling the Adoption of the New York City FY 2023 Budget and the New York City Department of Education FY 2023 Education Budget.

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1. The index number in the Court below is 155933/2022.

2. The full names of the original parties appear in the caption above. There have been no changes in the parties.

3. This proceeding was commenced in the Supreme Court, New York County.

4. This proceeding was commenced by Order to Show Cause on July 18, 2022. Issue was joined by Respondents' Verified Answer on August 2, 2022.

5. This proceeding was commenced as a hybrid proceeding/action seeking declaratory and injunctive relief annulling the City's New York's fiscal year 2023 budget for the New York City Department of Education based on an alleged procedural error in the Department of Education's approval of its department estimate.

6. This appeal is from an order and decision of the Honorable Lyle E. Frank, Supreme Court, New York County, entered on August 5, 2022.

7. This appeal is being taken on the original record.

Notice of Appeal and Order Appealed From

Supreme Court of the State of New York
County of New York

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In the Matter of

TAMARA TUCKER and MELANIE KOTLER, individually, and on behalf of all parents and guardians of New York City public school students and PAUL TRUST and SARAH BROOKS, individually, and on behalf to all similarly situated New York City public school teachers,

Petitioners,

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and THE CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID C. BANKS, in his official capacity,

Respondents.

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NOTICE OF APPEAL

Index No. 155933/2022

PLEASE TAKE NOTICE that respondents appeal to the Appellate Division, First Department, from the decision and order of Supreme Court, New York County (Frank, J.) dated and entered August 5, 2022 (NYSCEF No. 49).

Dated: New York, New York
August 5, 2022

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York

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Counsel for Petitioners

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

In the Matter of TAMARA TUCKER and MELANIE KOTLER, individually, and on behalf of all parents and guardians of New York City public school students and PAUL TRUST and SARAH BROOKS, individually, and on behalf to all similarly situated New York City public school teachers,

Petitioners,

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and the CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, David C. Banks, in his official capacity,

Respondents.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ■ Civil Action
- ☐ CPLR article 75 Arbitration
- ■ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ■ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

■ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
■ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☐ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 08/05/2022	Entered: 08/05/2022
Judge (name in full): Hon. Lyle E. Frank	Index No.: 155933/2022
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ■ Yes ☐ No

If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

2022-03187, 2022-03205

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

In this hybrid proceeding seeking relief under article 78 of the CPLR and declaratory relief, by order dated and entered August 5, 2022, Supreme Court, New York County (Frank, J.), granted a preliminary injunction that, among other things, vacated the New York City FY-23 budget as it relates to the expenditures by the Department of Education and required all such spending levels to revert back to the levels in the FY-22 budget.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Did Supreme Court err in granting a preliminary injunction?

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Tamara Tucker	Petitioner	Respondent
2	Melanie Kotter	Petitioner	Respondent
3	Paul Trust	Petitioner	Respondent
4	Sarah Brooks	Petitioner	Respondent
5	City of New York	Respondent	Appellant
6	New York City Department of Education	Respondent	Appellant
7	Chancellor of the New York City Department of Education, David C. Banks	Respondent	Appellant
8			
9			
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20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1-4			
Attorney/Firm Name: Tahirih Sadrieh & Deborah Brenner / New York City Law Department			
Address: 100 Church Street			
City: New York	State: NY	Zip: 10007	Telephone No: 212-356-0847 or -2500
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City:	State:	Zip:	Telephone No:
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Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
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E-mail Address:			
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City:	State:	Zip:	Telephone No:
E-mail Address:			
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E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

----------X

INDEX NO. 155933/2022

TAMARA TUCKER, MELANIE KOTLER, PAUL TRUST, SARAH BROOKS

MOTION DATE 07/27/2022

Petitioner,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID C. BANKS, IN HIS OFFICIAL CAPACITY,

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 44, 45, 46, 47, 48

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents and following a transcribed oral argument of August 4, 2022, the order to show cause is granted and a preliminary injunction is granted for the reasons indicated on the record and in the instant Decision and Order.

Specifically, the approval of the Fiscal Year 2023 New York City Budget (FY'23) as it relates to funds set out for the New York City Department of Education ("DOE") was in contravention of New York State Law. What was most in question was whether the Emergency Declaration put forth by the Schools Chancellor on May 31 was a valid exercise of the Chancellor's powers. The Court finds that it was not, for the reasons indicated on the record. As such, the vote of the New York City Council on the FY'23 budget should have occurred after the Panel for Education Policy held its own vote on the budget, which it did not. Therefore, the Court finds that the petitioners have succeeded on the merits.

As both sides have argued, limbo as to the budget will cause irreparable harm to New York City schools, and therefore that prong of the petition is met. Lastly, the balance of the equities clearly favors the petitioners due to the found violation of state law.

This Decision and Order does not, and this Court cannot opine as to what level of funds should have gone into the FY'23 budget as it relates to the DOE budget. This Decision and Order is limited to the DOE budget and should not be seen in any way as making any changes to the budget as to any other agency's budget. That being written, this decision does not preclude any amendments otherwise to the FY'23 to be consistent with this Decision and Order and other applicable law.

Based on the foregoing, it is hereby

ORDERED that except as indicated below, the New York City FY '23 budget as it relates to expenditures by the Department of Education **only** is vacated, and all such spending levels shall revert back to the levels in the Fiscal Year 2022 New York City budget; and it is further

ORDERED that the New York City Council and the Mayor of the City of New York shall be authorized to amend the Fiscal Year 2023 New York City budget consistent with this Decision and Order and all other applicable law, at which point the Fiscal Year 2022 spending levels will no longer be required to be complied with; and it is further

ORDERED that nothing in this Order shall prevent: a) the allocation of additional funds to DOE from sources other than from New York City expenditures, such as the Federal Government; b) the implementation of the dyslexia program already being created by the DOE; c) net-zero transactions involving transfer of staff within the system; and d) budget changes associated with grants where the grantor is not the City of New York.

INDEX NO. 155933/2022

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8/5/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

NYSCEF Confirmation Notice

New York County Supreme Court

The NYSCEF website has received an electronic filing on 08/05/2022 11:53 AM. Please keep this notice as a confirmation of this filing.

155933/2022
Tamara Tucker et al v. The City of New York et al
Assigned Judge: Lyle E. Frank

Documents Received on 08/05/2022 11:53 AM

Doc #	Document Type
50	NOTICE OF APPEAL
51	NO FEE AUTHORIZATION (LETTER/ORDER/AFFIRMATION)

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