*To Be Argued By*:
JAY P. LEFKOWITZ
*Time Requested: 15 Minutes*

# New York Supreme Court

**APPELLATE DIVISION—SECOND DEPARTMENT**

MYMOENA DAVIDS,
by her parent and natural guardian MIAMONA DAVIDS,

*Plaintiffs-Respondents,*

—against—

THE STATE OF NEW YORK,

*Defendants-Appellants,*

MICHAEL MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,

*Intervenor-Defendant-Appellant.*

**DOCKET NOS.**
**2015-03922**
**2015-12041**

(*Caption continued on inside cover*)

## BRIEF FOR PLAINTIFFS-RESPONDENTS JOHN KEONI WRIGHT, ET AL.

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Richmond County Clerk's Index No. 101105/14

ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by his parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

*Plaintiffs-Respondents,*

—against—

THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN and JANE DOES 1-100, XYZ ENTITIES 1-100,

*Defendants-Appellants,*

—and—

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, individually and as President of the New York State United Teachers, PHILIP A. CAMMARATA and MARK MAMBRETTI,

*Intervenors-Defendants-Appellants.*

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JOHN KEONI WRIGHT, GINET BORRERO, TAUANA GOINS, NINA DOSTER, CARLA WILLIAMS, MONA PRADIA, ANGELES BARRAGAN, LAURIE TOWNSEND and DELAINE WILSON,

*Plaintiffs-Respondents,*

—against—

THE STATE OF NEW YORK and THE BOARD OF REGENTS OF THE STATE OF NEW YORK,

*Defendants-Appellants,*

—and—

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, individually and as President of the New York State United Teachers, PHILIP A. CAMMARATA, MARK MAMBRETTI, NEW YORK CITY DEPARTMENT OF EDUCATION, and MICHAEL MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,

*Intervenors-Defendants-Appellants.*

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The *Wright* Plaintiffs are nine parents seeking to enforce the constitutional guarantee of a sound basic education for their children and for all of New York's schoolchildren. As the Court of Appeals has explained, a cause of action lies under Article XI where a plaintiff alleges "the deprivation of a sound basic education" and "causes attributable to the State." *N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 178-79 (2005) ("*NYCLU*"). That is precisely what Plaintiffs have alleged here, and the motion court thus properly denied each motion to dismiss filed by Defendants and by the Unions that have intervened in this action. Those decisions should be affirmed.

*First*, Plaintiffs have alleged the deprivation of a sound basic education by challenging a systemic, state-wide failure to ensure that New York's schoolchildren are taught by effective teachers. *See* Part I.A *infra*. As set forth in Plaintiffs' Amended Complaint, the New York public school system is experiencing serious deficiencies in teacher quality, and teacher quality is the single most important "input" for a meaningful education. These deficiencies fall squarely within Article XI's requirement of a "sound basic education," which includes the

promise that children will receive adequate instruction. *See Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317 (1995) ("*CFE I*"). And while the State and the Unions challenge the soundness of the test scores and other statistical evidence that Plaintiffs have cited in their Amended Complaint to show the negative effects of ineffective teaching on New York's schoolchildren, those factual disputes only confirm that the case should proceed into discovery because they cannot be resolved at the pleading stage.

*Second*, Plaintiffs have also alleged "causes attributable to the State," *NYCLU*, 4 N.Y.3d at 178-79, by pleading facts which show that the State's enforcement of three sets of tenure laws (the "Challenged Statutes") are a substantial cause of the existing teaching crisis. *See* Part I.B *infra*. In brief, the Permanent Employment Statutes grant lifetime tenure to nearly every teacher who seeks it, without adequate screening for effective teaching; the Disciplinary Statutes make it virtually impossible to remove ineffective teachers once they are actually identified; and the Last-in-First-Out (LIFO) Statute prevents schools from removing ineffective teachers when positions are eliminated, forcing them to fire *effective* teachers in their place.

Plaintiffs' commonsense allegation that the failure to identify and remove ineffective teachers is causing poor student outcomes is more than enough to survive a motion to dismiss, particularly where the Court of Appeals has made clear that plaintiffs are not required to put forward clear evidence of causation at the pleading stage. *CFE I*, 86 N.Y.2d at 318. That should be the end of the matter. Because Plaintiffs have pleaded both elements of an Article XI claim, they must be permitted to proceed forward with discovery and adjudication on the merits.

*Third*, the State and the Unions nevertheless resist this conclusion by offering up several arguments in an attempt to justify the Challenged Statutes, but those arguments are beside the point. It is simply irrelevant that the Legislature may have had a "rational basis" for enacting the Challenged Statutes, *see* Part I.C.1 *infra*; that tenured teachers have a right to due process before being stripped of tenure, *see* Part I.C.2 *infra*; or that the Challenged Statutes may be constitutional in some applications, *see* Part I.C.3 *infra*. Plaintiffs' claims do not depend on disproving any of those assertions.

*Fourth*, the State and the Unions devote the bulk of their briefs to arguing that the Courts lack authority even to review Plaintiffs' Article XI claim. But those arguments too are wrong. *See* Part II *infra*. As the motion court rightly recognized, "the state may be called to account when it fails in its obligation to meet the minimum constitutional standards of educational quality." R31 (citing *NYCLU*, 4 N.Y.3d at 178). Judges have the responsibility to "interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry." *Id.* (citing *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 931 (2003) ("*CFE II*")). The Judiciary, therefore, "will not close the courthouse door to parents and children with viable constitutional claims." R32.

*Finally*, one of the Unions continues to press the baseless assertion that Plaintiffs were required to join every school district and every teacher's union in the State of New York. *See* Part III *infra*. Because neither the school districts nor the teacher's unions are "primarily responsible for the challenged policies," *Joanne S. v. Carey*, 115 A.D.2d 4, 9 (1st Dep't 1986), they are not necessary parties, and the

motion court properly rejected this last-ditch effort to avoid adjudication on the merits.

## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Have Plaintiffs adequately pleaded a violation of Article XI by alleging a systemic, state-wide failure to provide effective teachers that is having a negative effect on student performance and is caused by the State's enforcement of the Challenged Statutes?

*The trial court answered "yes."*

2. Does the Judiciary have the power to adjudicate this alleged constitutional violation?

*The trial court answered "yes."*

3. Were Plaintiffs required to join as defendants every individual school district and every teacher's union in the State of New York?

*The trial court answered "no."*

## COUNTERSTATEMENT OF THE NATURE OF THE CASE

The *Wright* Plaintiffs are parents of students who attend schools throughout New York State, including in Albany, the Bronx, Brooklyn, Manhattan, Queens, and Rochester. In their Amended Complaint, they allege that the State's enforcement of the Challenged Statutes has denied New York's schoolchildren—including their own—a sound basic education in violation of Article XI, § 1 of the New York Constitution. Specifically, Plaintiffs allege that the enforcement of these statutes, individually and even more so together, has led to the hiring and retention of ineffective teachers with deleterious effects on students' performance both inside and outside the classroom. They have brought this suit to remedy this constitutional crisis.

### A. Plaintiffs' Allegations

The Amended Complaint contains extensive allegations, including through the inclusion of reports and studies, demonstrating both that "[e]ffective teachers are the most important factor in student performance," R1357 ¶ 27, and that the State is failing to provide this essential education "input" due to its enforcement of three sets of tenure statutes (the "Challenged Statutes") that together result in the promotion and retention of ineffective teachers at the expense of New

York schoolchildren's right to a sound basic education under Article XI of the New York State Constitution.

***The Permanent Employment Statutes.*** Sections 2509, 2573, 3012, and 3012-c of the Education Law (the "Permanent Employment Statutes") provide permanent employment to New York teachers on a nearly automatic basis following limited teacher evaluations. *See* R1360 ¶ 38. And while teachers are supposed to be rated as "Highly Effective," "Effective," "Developing," or "Ineffective," *see* R1361 ¶ 40, the reality is that the design of the evaluation process "does not adequately identify teachers who are truly 'Developing' or 'Ineffective,'" *id.* ¶ 41, and many teachers who do receive these ratings are nevertheless kept on board, *see* R1362 ¶ 45. As a result, the State's continued enforcement of these laws "ensure[s] that ineffective teachers unable to provide students with a sound basic education are granted virtually permanent employment in the New York public school system and near-total immunity from termination." R1359 ¶ 34.

***The Disciplinary Statutes.*** Sections 3020 and 3020-a of the Education Law (the "Disciplinary Statutes") "impose dozens of hurdles to dismiss or discipline an ineffective teacher, including investigations,

hearings, improvement plans, arbitration processes, and administrative appeals." R1364 ¶ 50. They "make it prohibitively expensive, time-consuming, and effectively impossible to dismiss an ineffective teacher who has already received tenure." *Id.* ¶ 51. Administrators cannot discipline ineffective teachers precisely because the requirements for doing so are so burdensome. *See* R1366 ¶ 55. Thus, "[b]ecause of the difficulty, cost, and length of time associated with removal, the number of ineffective teachers who remain employed is far higher than the number of those disciplined or terminated." R1364-65 ¶ 51.

***The Last-in-First-Out (LIFO) Statute.*** Section 2585 of the Education Law (the "LIFO Statute") provides that, "[w]henever a board of education abolishes a position . . . , the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued." N.Y. Educ. Law § 2585(3). Decisions about which teachers to let go must be made "irrespective of a teacher's performance, effectiveness, or quality." R1370 ¶ 67. Studies show, however, that "seniority . . . has little correlation to a teacher's effectiveness," *id.* ¶ 69, meaning that ineffective teachers will be retained at the expense of more effective junior teachers. And the

increased cost of senior teachers also means that more teachers have to be dismissed in response to budgetary constraints, to the detriment of students. *See* R1371 ¶ 71.

### B. Proceedings Below

The *Wright* Plaintiffs commenced their action on July 28, 2014, by filing suit against the State of New York and several individual state officials in Albany County. *See Wright v. State of New York*, Index No. A00641/2014 (Sup. Ct., Albany Cty.); R67-89. The action was later consolidated with a similar action, *Davids v. State of New York*, Index No. 101105/14 (Sup. Ct., Richmond Cty.), which was brought by another group of concerned parents (the "*Davids* Plaintiffs," collectively with the *Wright* Plaintiffs, "Plaintiffs" or "Respondents"). The trial court granted motions to intervene filed by additional state parties—Philip A. Cammarata and Mark Mambretti (both tenured administrators in New York schools), and the New York City Department of Education—as well as two teachers' unions—the United Federation of Teachers and the New York State United Teachers.

#### 1. The Initial Motions to Dismiss

The *Wright* Plaintiffs served their amended complaint in the consolidated proceeding on November 13, 2014 (the "Amended

Complaint"). *See* R1350-1374; *see also* R90-445 (Exhibits to Original & Amended Complaints). Defendants and Intervenor-Defendants filed several motions to dismiss in late October 2014, raising mostly the same arguments that are raised here on appeal. *See* R461; R598; R747; R751; R754.

Following full briefing by the parties, the Honorable Justice Philip Minardo of the Supreme Court, Richmond County, heard oral argument on the motions on January 14, 2015. In an order dated March 12, 2015, the motion court severed and dismissed the claims against two state officials—Merryl H. Tisch and John B. King—but denied the balance of the motions (the "March 12, 2015 Decision and Order"). *See* R17-33.

The motion court squarely rejected the contention that Plaintiffs had failed to state a claim under Article XI. The court recognized that "[t]he core of plaintiffs' argument at bar is that schoolchildren in New York State are being denied the opportunity for a 'sound basic education' as a result of teacher tenure, discipline and seniority laws." R29. And the court held that Plaintiffs had thereby stated a viable claim under Article XI:

> [T]he facts alleged in the respective complaints are sufficient to state a cause of action for a judgment declaring that the

> challenged sections of the Education Law operate to deprive students of a "sound basic education" in violation of Article XI of the New York State Constitution, *i.e.*, that the subject tenure laws permit ineffective teachers to remain in the classroom; that such ineffective teachers continue to teach in New York due to statutory impediments to their discharge; and that the problem is exacerbated by the statutorily-established "LIFO" system dismissing teachers in response to mandated lay-offs and budgetary shortfalls. In opposition, none of the defendants or intervenor-defendants have demonstrated that any of the material facts alleged in the complaints are untrue.

R30.

Far from breaking new ground, the motion court explained that this result followed directly from the Court of Appeals' existing Article XI precedent. Under that precedent, "it is the state's responsibility to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e.*, 'the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury,' (*Paynter v. State of New York*, 100 NY2d at 440), which has been judicially recognized to entitle children to 'minimally adequate teaching of reasonably up-to-date basic curricula . . . by sufficient personnel adequately trained to teach those subject areas' ([*CFE I*], 86 NY2d at 317)." R30-31.

Against that well-established legal backdrop, the motion court held that the Amended Complaint pleaded a viable claim under Article XI. The court pointed to allegations in the Amended Complaint showing each of the following:

- "serious deficiencies in teacher quality," R31;
- "its negative impact on the performance of students," *id.*;
- "the role played by subject statutes in enabling ineffective teachers to be granted tenure and in allowing them to continue teaching despite ineffective ratings and poor job performance," *id.*;
- "a legislatively prescribed rating system that is inadequate to identify the truly ineffective teachers," *id.*;
- "the direct effect that these deficiencies have on a student's right to receive a 'sound basic education,'" *id.*;
- "plus the statistical studies and surveys cited in support thereof," *id.*

The court held that these allegations are "sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students, *e.g.*, a lack of proficiency in math and English." *Id.*

The motion court also readily dismissed the non-justiciability arguments that the State and the Unions had raised, holding that plaintiffs raised quintessential constitutional claims appropriate for

judicial resolution. Specifically, the court explained that it was well-equipped to "interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry." R31 (citing *CFE II*, 100 N.Y.2d at 931). And, addressing standing, the motion court concluded that the plaintiffs were those best situated to raise these claims: "the individually-named plaintiffs clearly have standing . . . as students attending various public schools within the State of New York who have been or are being injured by the deprivation of their constitutional right to receive a 'sound basic education.'" R32.

Upon entry of the motion court's order, the State and the Unions filed notices of appeal by April 22, 2015. They initially had until October 22, 2015 to perfect the appeals, *see* 22 N.Y.C.R.R. § 670.8(e)(1), but this Court later extended that deadline to December 28, 2015.

### 2. The Renewed Motions to Dismiss

Following the motion court's March 12, 2015 Decision and Order, the Legislature made minor modifications to the Education Law as part of the 2015-16 budget bill. As several legislators have noted, these

changes were modest and did nothing to address the issues raised in the Amended Complaint. For instance, Assemblyman Thiele remarked that "[w]e will be back here again revisiting this issue. . . . I feel like we are rearranging the deck chairs on the Titanic."[1]

Specifically, the Permanent Employment Statutes have been adjusted to change the probationary period for new teachers to four years rather than three. *See* N.Y. Educ. Law §§ 3012(1)(a)(ii), 2573(1)(a)(ii), 2509(a)(ii).[2] The Disciplinary Statutes have been given a new teacher evaluation standard governed by § 3012-d. But § 3012-d maintains the former rating scale under which teachers are rated "Highly Effective," "Effective," "Developing," or "Ineffective," *see* N.Y. Educ. Law § 3012-d(3), and provides that teachers will be rated based on two components: student performance and teacher observations. *See id.* § 3012-d(4). Each school district, however, must negotiate the

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[1] Nick Reisman, *Lawmakers Reluctantly Approved Education Budget Bill*, State of Politics (Mar. 31, 2015, 11:30 PM), http://www.nystateofpolitics.com/2015/03/lawmakers-reluctantly-approved-education-budget-bill/.

[2] The Permanent Employment Statutes now require a "Highly Effective" or "Effective" rating in three out of the four probationary years, and do not allow an "Ineffective" rating in the fourth year. *See id.* at §§ 3012(2)(b), 2573(5)(b), 2509(2)(b).

specific terms of its evaluation system in much the same way that they had to negotiate the terms of the APPR in prior years. *See id.* § 3012-d(10). The LIFO Statute remains untouched.

Notwithstanding the modesty of these changes, the State and the Unions seized on them as an opportunity to re-litigate their motions to dismiss. In late May 2015, Appellants moved for leave to renew the prior motions to dismiss, to dismiss upon renewal, and for a stay of proceedings pending the appeals of the March 12, 2015 Decision and Order. *See* R959; R1151; R1278; R1339; R1655. Following full briefing by the parties, the motion court heard oral argument on these renewed motions on August 25, 2015.

In an order dated October 22, 2015, the Supreme Court denied the renewed motions on the merits, but granted the stay that the State and the Unions had requested pending the appeal of the March 12, 2015 Decision and Order (the "October 22, 2015 Decision and Order"). R954-58. The motion court explained that, "[i]n principal part," Appellants had simply regurgitated "the same grounds for dismissal rejected by the Court in its prior determination." R957. The court recognized that the renewal motions were "essentially motions for leave to reargue and, as

such, [were] improperly 'based on matters of fact not offered on the prior motion(s)' (CPLR 2221[d][2]), *e.g.*, the aforementioned legislative amendments." *Id.* Evaluating the legislative modifications to the Education Law, the motion court agreed with Plaintiffs that they were modest and plainly had not resolved the constitutional violations asserted in the Amended Complaint. The court explained that "the legislature's marginal changes" to the Challenged Statutes, "affecting, *e.g.*, the term of probation and/or the disciplinary proceedings applicable to teachers, are insufficient" to justify renewal because they "'would [not] change the prior determination' of the court." *Id.* (quoting CPLR 2221(e)(2)).

Upon entry of the October 22, 2015 Decision and Order, the Appellants again served and filed notices of appeal. On December 16, 2015, the State moved to consolidate the two appeals and for additional time to perfect the appeals of the March 12, 2015 Decision and Order. In an order dated January 26, 2016, this Court granted the State's motion to enlarge the time to perfect the appeals of the March 12, 2015 Decision and Order until February 26, 2016, and denied the motion to consolidate the appeals as unnecessary as the appeals may be

consolidated as of right. Following a third enlargement of time, Appellants each perfected their appeals of the March 12, 2015 Decision and Order and the October 22, 2015 Decision and Order by March 28, 2016.

## STANDARD OF REVIEW

This Court must apply the same deference to the Amended Complaint as provided by the trial court in reviewing the motions to dismiss. *See Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563, 572 (2015). The "standard of review is well familiar: 'On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction' (*Leon v. Martinez,* 84 N.Y.2d 83, 87 [1994]; *see* CPLR § 3026). Courts must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (*Leon,* 84 N.Y.2d at 87–88)." *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 227 (2011). Thus, the "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest

any cause of action cognizable at law a motion for dismissal will fail." *People v. Coventry First LLC*, 13 N.Y.3d 108, 115 (2009).

## ARGUMENT

### I. Plaintiffs Have Adequately Alleged a Violation of Article XI at the Pleading Stage.

The motion court rightly denied the motions to dismiss because Plaintiffs have adequately alleged the two elements of an Article XI claim: (a) "the deprivation of a sound basic education" and (b) "causes attributable to the State." *NYCLU*, 4 N.Y.3d at 178-79. That is all the law requires at the pleading stage. While the State and the Unions contest Plaintiffs' claims on the merits, and specifically attack the statistical evidence cited in the Amended Complaint, these factual disputes only confirm that the motions to dismiss were properly denied and that discovery should move forward. As the motion court explained, "movants' attempted challenge to the merits of the plaintiff's lawsuit . . . is a matter for another day, following the further development of the record." R32. In the meantime, the Judiciary "will not close the courthouse door to parents and children with viable constitutional claims." *Id.*

### A. The Complaint Alleges a Deprivation of Students' Right to a Sound Basic Education Based on a Systemic, State-Wide Failure to Provide Effective Teachers.

Plaintiffs have satisfied the first element of their Article XI claim—"the deprivation of a sound basic education"—by alleging a systemic, state-wide failure to provide students with effective teachers. It is well-established both that effective teachers are a critical component of a sound basic education, and that allegations of a *systemic* educational failure are sufficient to state a claim under Article XI.

#### 1. Effective Teachers Are Essential to a Sound Basic Education.

Plaintiffs have brought this lawsuit to remedy the State's failure to provide New York schoolchildren with one of the most critical ingredients of a sound basic education: effective teachers. It is beyond dispute that effective teachers are an essential ingredient for a sound basic education. That is precisely what the Court of Appeals said in *CFE I* when it held that, under Article XI, "[c]hildren are . . . entitled to minimally adequate teaching of reasonably up-to-date curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas." 86 N.Y.2d at 317. And not only does the "quality of teaching correlate[] with

student performance," but the negative effects of an ineffective teacher compound over time—"the longer students are exposed to . . . bad teachers, the . . . worse they perform." *CFE II*, 100 N.Y. 2d at 910-11.[3]

Moreover, as the motion court recognized, the Amended Complaint sets forth extensive allegations "sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students, *e.g.*, a lack of proficiency in math and English." R31 (citing *CFE I*, 86 N.Y.2d at 910). The motion court based that conclusion on the allegations in the Amended Complaint showing "serious deficiencies in teacher quality; its negative impact on the performance of students; . . . the direct effect that these deficiencies have on a student's right to receive a 'sound basic education'; plus the statistical studies and surveys cited in support thereof." *Id.* The motion court thus rightly concluded that Plaintiffs have pleaded facts on which a viable claim could be based and that "the court's inquiry is

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[3] *See also Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 390 (N.C. 2004) (affirming that the state must "ensure there are competent teachers in classrooms" to satisfy its obligation to provide students with a "sound basic education"); *State v. Campbell Cty. Sch. Dist.*, 19 P.3d 518, 550 (holding that "teacher quality is critical to providing a constitutional education"), *on reh'g*, 32 P.3d 325 (Wyo. 2001).

[therefore] complete and the complaint must be declared legally sufficient." *Id.*

Plaintiffs have also cited several studies which lend further support to the straightforward allegation that effective teachers are a necessary component of a sound basic education. *See, e.g.*, R1358 ¶ 29 ("In the short-term, effective teachers provide tangible educational results in the form of higher test scores and higher graduation rates."); *id.* ¶ 30 ("In the long-term, students taught by effective teachers are . . . more likely to progress in their education . . . earn more money throughout their lives, live in neighborhoods of higher socioeconomic status, and save more money for retirement."); *id.* ¶ 31 ("High-quality instruction from effective teachers helps students overcome traditional barriers demographics impose").

Appellants offer a series of misguided arguments in an effort to side-step this common-sense conclusion. But none has merit.

*First*, Appellants contend that claims under Article XI are limited to those about funding deficiencies. *See* UFT Br. 33-35.[4] Such a narrow

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[4] Five briefs were filed appealing the March 12, 2015 Decision and Order and the October 22, 2015 Decision and Order: Brief for State Appellants ("State Br."); (Continued...)

view is wholly unsupported. Nothing in Article XI, or the case law interpreting Article XI, restricts Plaintiffs from alleging that State actions other than underfunding have caused a deprivation of rights. The Court of Appeals made this clear in *New York Civil Liberties Union v. State*, 4 N.Y.3d 175 (2005). There, the Court faulted the plaintiffs for failing to allege a "failure of the State to provide 'resources'—*financial or otherwise*"—necessary to guarantee a constitutionally adequate education. *Id.* at 180 (emphasis added). It thus made unmistakably clear that financial resources are not, as Appellants would have it, "the *sine qua non* of a cognizable Education Article suit." UFT Br. 35.

Rather, the very purpose of the adequate-funding requirement recognized in cases like *CFE I* is to ensure that school districts have the funds necessary to enable them to provide key resources like effective teachers. It follows *a fortiori* that a failure to provide the necessary

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Brief for the Municipal Appellants ("NYC Br."); Brief on Behalf of Intervenors-Defendants-Appellants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen Magee, Individually and as President of the New York State United Teachers ("NYSUT Br."); Brief of Intervenor-Defendant-Appellant UFT ("UFT Br."); and Appellants' Brief for Intervenor-Defendants-Appellants Cammarata and Mambretti ("SAANYS Br.").

resources for a sound basic education, regardless of particular funding levels, is actionable under Article XI.

The right to a sound basic education encompasses *several* essential components, ranging from adequate facilities and physical learning materials, to effective teaching by adequately-trained personnel. *See CFE I*, 86 N.Y.2d at 317 (explaining that the State "must assure that some essentials are provided"). Just as children "are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn," and "access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks," *id.*, they are also "entitled *to minimally adequate teaching . . . by sufficient personnel* adequately trained to teach those subject areas," *id.* (emphasis added). Quality teaching is, in fact, the most important input for a sound basic education. *See CFE II*, 100 N.Y.2d at 909 ("The first and surely most important input is teaching."). That is a matter of the simplest common sense: state-of-the-art facilities and top-of-the-line textbooks are useless without effective teachers to put them to appropriate use.

It bears repeating how radical and self-serving Appellants' contention is: that the constitutional guarantee of a sound basic education provides a means only for school districts to get more funding, leaving students and their families powerless to ensure that the funding received is actually used to provide a sound basic education. That construction would turn Article XI on its head. The funding addressed in cases like *CFE* is not an end to itself, but a means to an end: the provision of effective teachers and other key ingredients of a sound basic education.

*Second*, Appellants claim that the Amended Complaint should be dismissed because it does not offer a precise definition of "effective teacher." *See* State Br. 52-53. But particularly at the pleading stage, Plaintiffs have no obligation to plead such a specific definition. The motion court correctly recognized that, at the pleading stage, "a court 'must accept as true the facts as alleged in the complaint . . . , accord plaintiffs the benefit of every possible favorable inference and [without expressing any opinion as to whether the truth of the allegations can be established at trial], determine only whether the facts as alleged fit any cognizable legal theory.'" R29 (quoting *Sokoloff v. Harriman Estates*

*Dev. Corp.*, 96 N.Y.2d 409, 414 (2001)). And Plaintiffs have readily met that standard.

Plaintiffs have cited numerous studies and statistics to support their claims. As only one example, Plaintiffs have cited a 2009 survey which found that 48% of districts surveyed considered bringing 3020-a charges to remove a teacher and declined to do so, often because the process was too cumbersome or expensive. *See* R1366 ¶ 55. Another telling example is that, to comply with the LIFO Statutes, between 2010 and 2012 the Rochester school district made over 500 teacher layoffs due to budgetary constraints and had to discontinue the employment of top performing, recently-hired, teachers, while retaining low-performing teachers, who happened to have been hired earlier. *See* R1371 ¶ 70. Plaintiffs have thus done more than enough to satisfy their minimal burden at the pleading stage.

In particular, the State is misguided in faulting Plaintiffs for not alleging in the Amended Complaint failures to meet specific metrics for "certification rates, test results, and teaching experience" that were "identified by the Court of Appeals in *CFE*." State Br. 52-53 (citing *CFE II*, 100 N.Y.2d at 909-10). In *CFE II*, the Court of Appeals was

reviewing a ruling that had been entered after "[e]xtensive discovery" and a trial, *id.* at 902—not at the pleadings stage. And in the cited passage from *CFE II*, the Court of Appeals was discussing evidence that had been reviewed by "plaintiffs' expert on the labor market for teachers, Dr. Hamilton Lankford," in forming his expert opinions, *id.* at 909-10—not allegations from the complaint. Thus, *CFE II* only confirms that the State's arguments are inappropriate at the pleading stage and that the motion court was right that the case should proceed forward to discovery and adjudication on the merits.

Moreover, as the Court of Appeals explained in *CFE I*, the ultimate question in that case was whether "the present financing system is not providing City schoolchildren with an opportunity to obtain a sound education." 86 N.Y.2d at 317. That question, however, was not addressed in the pleadings by reference to an objective definition of "adequate funding," but instead by "fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc." *Id.* at 319.

Here too, Plaintiffs have offered fact-based allegations in support of their claim that the State is not providing schoolchildren with an

opportunity to obtain a sound education. *See, e.g.*, R1361 ¶ 41 (alleging that only 1% of teachers were rated as "Ineffective" under the State's standards even though only 31% of students achieved proficiency in math and English); R1360-62 ¶¶ 37, 42 (alleging that, under the Challenged Statutes, 97% of eligible teachers nevertheless received tenure); R1366 ¶ 55 (alleging that school districts are declining to remove ineffective teachers because the required procedural steps are too cumbersome). To the extent more objective metrics will be needed to adjudicate Plaintiffs' claims on the merits, those metrics can be determined and evaluated in the discovery process. But in the meantime, Plaintiffs have more than satisfied their burden.

*Third*, talking out of both sides of their mouths, Appellants simultaneously attack the objective statistics that Plaintiffs *have* cited in the Amended Complaint and included in its exhibits. *See* UFT Br. 37-38; SAANYS Br. 33-34; State Br. 55-57; NYSUT Br. 23-29. But those factual disputes provide no basis for dismissing Plaintiffs' claims at the pleading stage.

For example, in the Amended Complaint, Plaintiffs cited a study showing that "only 31% of students taking the English Language Arts

and Math standardized tests meet the standard for proficiency." R1361 ¶ 41 (citing R352-53); *see also* R352 ("More than 83 percent of the teachers in grades 4-8 were rated effective or highly effective on the portion of their Annual Professional Performance Reviews (APPR) tied to their students' test scores. But just 31 percent of students who took ELA and math tests met the new standards for proficiency on each of them."). Appellants attack these figures on the ground that "the English and math State test scores upon which Plaintiffs rely have, following careful analysis, been rejected as invalid and have been disavowed by the State Board of Regents (which initially adopted them) because they were inappropriate." UFT Br. 5. The State is free to disavow its own statistics as invalid or faulty. But it may not ask the Court to evaluate the persuasiveness or weight of this evidence at the pleading stage in this case. To do so would be contrary to the Court's mandate to "accept as true the facts as alleged in the complaint" and "accord plaintiffs the benefit of every possible favorable inference." *Sokoloff*, 96 N.Y.2d at 414.

As the motion court properly recognized, Appellants' disagreement about the import of particular statistics "is a matter for another day,

following the further development of the record." R32. Appellants' challenge to Plaintiffs' cited evidence, like so many of their arguments, is a merits argument that is not appropriately considered on a motion to dismiss. Indeed, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss," *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005)—a point that courts have particularly emphasized in Article XI cases. *See, e.g.*, *Hussein v. State*, 81 A.D.3d 132, 133 (3d Dep't 2011) ("In the procedural context of this case, it would be premature for [the Court] to determine the merits of plaintiffs' allegations" and whether they "are inadequate to meet the constitutional standards established by the Court of Appeals in the *CFE* cases."), *aff'd*, 19 N.Y.3d 899 (2012).

### 2. Plaintiffs Have Alleged a Systemic Failure to Provide New York Schoolchildren with Effective Teachers.

Plaintiffs have satisfactorily pled the first element of an Article XI claim by alleging the State's "systemic failure" to ensure effective teachers resulting in the denial of the right to a sound basic education for a significant number of students. Article XI requires the Legislature to "provide for the maintenance and support of a *system* of free common

schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1 (emphasis added). And courts have recognized a legally cognizable claim where plaintiffs allege systemic failure in the quality of education. *See, e.g.*, *CFE II*, 100 N.Y.2d at 914 (holding that "tens of thousands of students . . . placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment . . . is large enough to represent a systemic failure").

Appellants thus miss the point entirely in faulting Plaintiffs for not alleging failures in effective teaching on a district-by-district basis. *See* State Br. 47-49, 53-55; NYSUT Br. 31-33. Plaintiffs' claims are based on the state-wide effects of statutes that are enforced across the State. Appellants are therefore misguided in relying on cases where plaintiffs raised constitutional claims based on funding disparities in particular districts.

In *New York State Association of Small City School Districts, Inc. v. State*, 42 A.D.3d 648 (3d Dep't 2007), the plaintiffs brought suit on behalf of small school districts, raising claims that those particular districts were "so substantially underfunded that they [we]re unable to provide a sound basic education to students as required by [Article XI]."

*Id.* at 649. It is therefore unsurprising that the Third Department faulted them for failing to provide "any factual allegations which are specific to the four school districts represented by the remaining plaintiffs," after it dismissed other plaintiffs from the case. *Id.* at 652. That holding in no way suggests, however, that district-by-district allegations are required where the alleged constitutional violation is occurring systematically on a state-wide basis, rather than in some specific district or districts. *See also Hussein*, 81 A.D.3d at 133 (addressing claims that "the school districts where the students attend school are substantially underfunded").

In *NYCLU*, the claim was that "students in 27 named schools outside of New York City [we]re being denied the opportunity for a sound basic education," and that the State should be required to "determine the causes of failure of each of the cited schools, and do something to correct it." 4 N.Y.3d at 178. There, the Court of Appeals held that Article XI, which is focused on the provision of a "system of common schools," does not provide a cause of action to remedy alleged failures in *individual* schools. *See id.* at 181-82. And the plaintiffs were therefore faulted for failing to "allege any district-wide failure."

*Id.* at 181. In contrast here, Plaintiffs have taken precisely the sort of systemic focus that motivated the Court of Appeals' decision in *NYCLU* by alleging a *state-wide* failure to provide effective teachers for New York's schoolchildren.

Plaintiffs have alleged a systemic crisis of educational performance that is the result of promoting and retaining ineffective teachers under the Challenged Statutes. *See* R1357 ¶¶ 25-26. It is well-established that a plaintiff may allege the deprivation of a sound basic education under Article XI by showing deficiencies in "inputs" such as "teaching, facilities and instrumentalities of learning" and "outputs" such as "test results and graduation rates." *Paynter v. State*, 100 N.Y.2d 434, 440 (2003); *see also CFE I*, 86 N.Y.2d at 319 (complaint adequately alleged Article XI claims on the basis of "fact-based claims" of deficient inputs and outputs and "inferences to be drawn therefrom"). Here, Plaintiffs have alleged both, by pleading that gross deficiencies in the most critical educational input—teacher effectiveness—have resulted in deficient student outputs, *see* R1361-62 ¶¶ 41-44, including the fact that, in 2012, *less than a third* of New York students tested proficient in both math and English, *see* R1361 ¶ 41. That is, as the

motion court concluded, enough to satisfy the first element of Plaintiffs' claim under Article XI.

### B. The Complaint Alleges that the State's Enforcement of the Challenged Statutes Has Caused This Systemic, State-Wide Failure.

Plaintiffs have also adequately pleaded the second element of their Article XI claim—"causes attributable to the State," *NYCLU*, 4 N.Y.3d at 178-79—by alleging that the State's enforcement of the Challenged Statutes has led to an intolerable excess of ineffective teachers in New York's public schools.

Plaintiffs have easily satisfied their minimal burden by alleging that the employment and retention of huge numbers of ineffective teachers is attributable to three sets of statutes enacted and enforced by the State: the Permanent Employment Statutes, the Disciplinary Statutes, and the LIFO Statutes. *See* R1359-72 ¶¶ 34-76. In combination, the Challenged Statutes force school districts to offer permanent employment, through tenure, to nearly all junior teachers without giving school districts sufficient time to determine which teachers will be minimally effective, and then impede school districts from dismissing the worst performing teachers after they are

prematurely awarded tenure. *See, e.g.*, R1361 ¶ 41 (in 2012, only 1% of teachers were rated "Ineffective" under the APPR, even though only 31.5% of students met the State proficiency standards); R1360-62 ¶¶ 37, 42 (97% of tenure-eligible New York City teachers receive tenure even though fewer than 97% of teachers are effective); R1368 ¶ 60 (school must pass through a tedious nine step process involving several hearings and adjudicatory entities to bring disciplinary charges against a teacher); R1371 ¶ 70 (school districts are forced to lay off top-performing teachers with lower seniority, while retaining low-performing teachers with greater seniority).

Thus, contrary to the State's suggestion, Plaintiffs already have alleged that "the *reason* school districts employ incompetent teachers is because state law requires them to do so." State Br. 59. As a result of the Challenged Statutes, school districts grant tenure to almost all teachers, regardless of their effectiveness. *See* R1360 ¶¶ 36-37. And, because of the State's implementation of the Disciplinary Statutes, an ineffective teacher with tenure is rarely, if ever, removed. *See* R1369 ¶¶ 62-64. As applied, the procedural hurdles of the Disciplinary Statutes—which are prohibitively difficult, expensive, and time

consuming—make it nearly impossible for administrators to remove an ineffective teacher with tenure. *See* R1364-65 ¶¶ 50-51; *see also* R1370-72 ¶¶ 66-76 (explaining that the LIFO Statute further causes school districts to retain ineffective teachers while firing effective teachers).

The inexorable inference from these factual allegations is that too many ineffective teachers are working in New York public schools as a result of the Challenged Statutes. At a minimum, this inference is supported by a "reasonable view of the facts," which is all that Plaintiffs must show to withstand a motion to dismiss. *CFE I*, 86 N.Y.2d at 318. Appellants again offer scatter-shot arguments to resist this conclusion, but those too fail.

*First*, Appellants argue that the court should turn a blind eye to the crisis facing New York schools because the State is not solely responsible for the employment of ineffective teachers. *See* State Br. 58-60; NYSUT Br. 33-34; UFT Br. 38-40. But Plaintiffs have adequately pleaded causation by alleging that the State's enforcement of the Challenged Statutes impedes school districts from employing and retaining effective teachers and removing ineffective ones and is therefore a significant cause of the alleged educational inadequacies.

Plaintiffs are not required to allege that the State action complained of is the exclusive cause of those deficiencies. On the contrary, the case law does not require "a search for a *single cause* of the failure of New York . . . schools." *CFE II*, 100 N.Y.2d at 920 (emphasis added). And at the pleading stage, a plaintiff's burden to plead causation is minimal. *See CFE I*, 86 N.Y.2d at 318 (stating that an "extended causation discussion . . . is premature given the procedural context of th[e] case").

*Second*, Appellants misstate Plaintiffs' burden by arguing that the Challenged Statutes cannot cause employment of inadequate teachers because the statutes do not *compel* school boards to hire ineffective teachers and do not make it *impossible* to remove them. *See* State Br. 57-60; UFT Br. 38-40. This argument ignores the crux of the Amended Complaint, which is that the Challenged Statutes are unconstitutional—not because they require schools to employ ineffective teachers—but because the *effect* of their application is to prevent school districts from effectively determining which teachers deserve tenure, and from disciplining and removing ineffective teachers once tenure has been granted, and from retaining effective teachers during times of budgetary constraints. *See, e.g.*, R1363-72 ¶¶ 46-47, ¶¶ 50-51, ¶ 75. It

is well established that legislation may be unconstitutional due to its effect. *See, e.g.*, *Tenn. Gas Pipeline Co. v. Urbach*, 96 N.Y.2d 124, 131 (2001) (declaring the Natural Gas Import Tax statute unconstitutional based on its "practical effect"); *Flushing Nat'l. Bank v. Mun. Assistance Corp. for City of N.Y.*, 40 N.Y.2d 731, 736 (1976) (declaring the New York State Emergency Moratorium Act unconstitutional because its "effect . . . is [] to permit the city . . . to ignore its pledge of faith and credit"); *New Yorkers for Students' Educ. Rights v. State*, 2014 N.Y. Misc. LEXIS 4957, at *11 (Sup. Ct. Nov. 17, 2014) (complaint adequately alleged that statewide cap on local property taxes resulted in constitutionally insufficient funding of public schools).

*Third*, Appellants again claim that Plaintiffs have failed to come forward with the sufficient evidence. *See* State Br. 55-57; NYC Br. 30-32; NYSYUT Br. 23-31; UFT Br. 36-38; SAANYS Br. 33-34. But Plaintiffs are not required to prove their case on the pleadings. And more importantly, Appellants should not benefit at this stage of litigation from their own withholding of information from the public about teacher quality and the retention of ineffective teachers. Because the State's APPR system does not adequately identify teachers who are

truly "Developing" or "Ineffective," R1361 ¶ 41, accurate information about teacher effectiveness is largely within Defendants' knowledge and control. *See CFE II*, 100 N.Y.2d at 909 (describing expert testimony that "principals' reviews tend to conceal teacher inadequacy because principals find it difficult to fire bad teachers"); *cf. Berkowitz v. Molod*, 261 A.D.2d 128, 129 (1st Dep't 1999) (denying a motion to dismiss where the complaint pled facts upon information and belief that were "peculiarly within the knowledge of the party against whom the charges were being asserted") (quoting *Jered Contracting Corp. v. N.Y.C. Transit Auth.*, 22 N.Y.2d 187, 194 (1968)).

As the Court of Appeals explained in *CFE I*, at this procedural juncture before discovery, "an exhaustive discussion and consideration of a 'sound basic education' is premature. Only after discovery and development of a factual record can this issue be fully evaluated and resolved." 86 N.Y.2d at 317. Plaintiffs have limited resources and limited access to the State's comprehensive data about teacher retention and promotion at this stage, and it is precisely for that reason that this type of information is not required of a complaint. The Amended Complaint provides an adequate factual foundation for the

claim that, as a result of the Challenged Statutes, New York schools employ too many teachers ill-equipped to provide their students with a sound basic education.

*Finally*, Appellants are also misguided in their attempts to shift causative responsibility from the State to school districts and local boards of education for failing to effectively hire and fire teachers. *See* State Br. 59; UFT Br. 38-40. The Amended Complaint alleges that the Challenged Statutes are *why* school boards and districts are failing to properly evaluate teacher effectiveness before granting tenure, *see, e.g.*, R1363 ¶ 46, and failing to remove ineffective teachers, *see, e.g.*, *id.* at ¶¶ 62, 74. Moreover, to establish causation of a systemic failure, a plaintiff need "not . . . eliminate any possibility that other causes contribute to that failure." *CFE II*, 100 N.Y.2d at 923 (internal quotations and citation omitted). Instead, "the law recognizes that there may be many causal links to a single outcome" and does not "mandate[] a search for a single cause of the failure of . . . schools." *Id.* at 920. It is therefore irrelevant if other factors, such as the actions of local school boards and districts, are partially responsible for the employment and retention of ineffective teachers. It is neither

necessary nor appropriate at the pleading stage for the Court to wade into a dispute about the primary cause of these decisions regarding ineffective teachers. It suffices that Plaintiffs have alleged facts that plausibly attribute the cause to enforcement of the Challenged Statutes.

Contrary to Appellants' suggestion, Plaintiffs are not trying to "encourage direct state control over teacher employment decisions." State Br. 59. Quite the opposite. The very premise of Plaintiffs' lawsuit is that individual school districts and administrators should be free to hire effective teachers and fire ineffective ones without the artificial barriers imposed by the Challenged Statutes, which prevent them from doing so. Cases like *Paynter* and *NYCLU* are thus inapposite on this point. Those cases merely held that a complaint does not state an Article XI claim by alleging that the State has failed to take *affirmative measures* to remedy unidentified or local educational inadequacies. *See Paynter*, 100 N.Y.2d at 438-39 (complaint alleged that the state "fail[ed] to mitigate demographic factors that may affect student performance"); *NYCLU*, 4 N.Y.3d at 180 (complaint sought "to charge the State with the responsibility to determine the causes of the schools' inadequacies and devise a plan to remedy them"). Requiring such affirmative

measures, the Court in *NYCLU* explained, would "subvert local control" over schools by obligating the State "to intervene on a school-by-school basis to determine each of the . . . school's sources of failure and devise a remedial plan." 4 N.Y.3d at 182.

Here, by contrast, Plaintiffs allege that the State is already engaged in affirmative actions that have harmed, are harming, and will inevitably continue to harm New York schoolchildren if not halted. Plaintiffs allege that the State is actively causing schools to employ ineffective teachers, not that the State has failed to take affirmative steps to remedy vague educational inadequacies. And Plaintiffs are seeking to permit local authorities to promote more effective teachers without the burdensome constraints of the Challenged Statutes, not to have the State take control of teacher retention decisions. *See* R1373-74, Prayer for Relief.

### C. Appellants' Additional Arguments for Dismissal Are Meritless.

In addition to their misguided attacks on the two elements of Plaintiffs' Article XI claim, Appellants have also offered arguments for dismissal that are focused on the Challenged Statutes themselves,

rather than their effect on New York's ability to provide a sound basic education. None of these arguments merits dismissal.

### 1. The Assertion that the Legislature Had a "Rational Basis" for Enacting the Challenged Statutes Is Irrelevant.

Despite the well-established standard for pleading an Article XI claim, Appellants nevertheless contend that Plaintiffs' claims should be dismissed because, they say, the Legislature had a rational policy reason for enacting the Challenged Statute. *See* SAANYS Br. 35-44; NYSUT Br. 36-52. But that argument is an invitation to error. There is no "rational basis" defense to an Article XI claim. Rational basis review is the appropriate standard for an equal protection claim or a generic substantive due process claim, *not* an Article XI claim. This argument is yet another attempt by Appellants to distract the Court's attention away from the legal issues at hand.

Appellants rely primarily on *People v. Knox*, 12 N.Y.3d 60 (2009), a case involving challenges to the Sex Offender Registration Act on theories of substantive due process and equal protection. There, the Court of Appeals merely held (correctly) that a plaintiff bringing those challenges must show that the statute lacked any rational basis if the

claim is not premised on a fundamental right (or discrimination against a discrete and insular minority), in which case heightened scrutiny would apply. *See id.* at 67. But that principle is simply irrelevant to a claim under Article XI, where the two required elements are already well defined. *See also Affronti v. Crosson*, 95 N.Y.2d 713, 716 (2001) (addressing claim that "the statutorily enacted pay disparities between the Family Court Judges of Monroe County and Judges serving in the Family Courts of Sullivan, Putnam and Suffolk Counties violate[d] [the Moore County judges'] rights to equal protection under the 14th Amendment of the Federal Constitution"); *Hernandez v. Robles*, 7 N.Y.3d 338, 358 (2006) (addressing substantive-due-process challenge to ban on same-sex marriage), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).[5]

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[5] NYSUT also cites *Brady v. A Certain Teacher*, 166 Misc. 2d 566, 568 (N.Y. Sup. Ct., Suffolk Cty. 1995), for the proposition that "two of the challenged statutes—Education Law §§ 3012 and 3020-a—have already been found constitutional under Article XI." NYSUT Br. 36. But *Brady* is a trial court decision that was decided only three months after the Court of Appeals' seminal decision in *CFE I* (which it did not cite) and plainly missed its holding, since the court rested its decision on the repudiated premise that "there is no fundamental right to education or to a minimum level of education under the State Constitution." 166 Misc. 2d at 574.

Moreover, the Court of Appeals' Article XI cases confirm that there is no "rational basis" defense to such claims. In *Board of Education, Levittown Union Free School District v. Nyquist*, the Court of Appeals had applied rational basis review to an equal protection claim: plaintiffs alleged unconstitutional disparities in school funding between rich and poor school districts. 57 N.Y.2d 27, 43 (1982). In that case, however, the provision of a sound basic education was not in question. As the *Levittown* court explained, "no claim is advanced in this case . . . that the educational facilities or services provided in the school districts that they represent fall below the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents." *Id.* at 38. Instead, plaintiffs' "attack [was] directed at the existing disparities in financial resources which lead to educational unevenness *above that minimum standard*." *Id.* (emphasis added).

That was why, in *CFE I*, the Court of Appeals rejected the State defendants' efforts to analogize the plaintiffs' Education Article claim to that in *Levittown*. 86 N.Y.2d at 314, 316, 320 (applying rational basis review to equal protection claim and not applying it to Education Article claim). The Court explained that "[p]laintiffs advance the very

claim we specifically stated was not before us in *Levittown*, i.e., that minimally acceptable educational services and facilities are not being provided in plaintiffs' school districts." *Id.* at 316. *Levittown*, the *CFE I* court explained, "manifestly left room for a conclusion that a system which failed to provide for a sound basic education would violate Article XI." *Id.*; *see also N.Y.S. United Teachers ex rel. Iannuzzi v. State*, 46 Misc. 3d 250, 259 (N.Y. Sup. Ct. 2014). *CFE I* not only distinguished the facts of *Levittown*, but also did not import *Levittown*'s rational basis analysis to the context of an alleged Education Article violation.

### 2. The Repeated Invocation of "Due Process" Is Incorrect and Also Irrelevant.

UFT also tries to distract the Court by its repeated invocations of "due process." UFT casts the Challenged Statutes as providing nothing more than due process for tenured teachers. But this talismanic invocation of due process is both incorrect and irrelevant.

UFT's invocation of due process is incorrect because the Challenged Statutes go well beyond the constitutional minimums of due process. For example, as a matter of due process, a tenured employee is entitled only to "a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing." *Gilbert v.*

*Homar*, 520 U.S. 924, 929 (1997). Instead, the State is enforcing a set of laws that allow ineffective teachers to remain in their classrooms until a 3020-a hearing can be completed, which took "an average of 502 days" between 2004 and 2008. R1366 ¶ 56. That is simply not what due process requires.

UFT's invocation of due process is also irrelevant because a core component of Plaintiff's challenge goes to the rules for granting tenure in the first place (the Permanent Employment Statutes). Teachers that have not yet been granted tenure do not yet have any due process rights—it is well-established that "due process protection afforded to public employees threatened with dismissal is dependent upon whether the employee has acquired a liberty or property interest in his employment." *Voorhis v. Warwick Valley Cent. Sch. Dist.*, 92 A.D.2d 571, 571 (2d Dep't 1983). Even when an employee does receive tenure, the scope of his or her due process rights is informed by the terms of the statutes that create and define what "tenure" entails. *See, e.g.*, *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (explaining that interests protected by due process, like tenure, "are created and their dimensions are defined by existing rules or understandings that stem

from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits").

It is thus entirely question-begging for UFT to claim that the invalidation or modification of the Challenged Statutes would violate anyone's due process rights, particularly to the extent that they are invalidated or modified on a prospective basis. Moreover, if Plaintiffs are successful in proving a violation of Article XI, the court will still need to craft an appropriate remedy. At that point, UFT would be free to raise arguments about the effect of particular remedies on its members.

### 3. The Unions Erroneously Invoke the Doctrine of Facial Challenges.

Finally, both Unions argue that Plaintiffs' claims should be construed as "facial" challenges to the Challenged Statutes and dismissed on the theory that those statutes are not facially invalid because they have at least some constitutional applications. *See* UFT Br. 12-17; NYSUT Br. 37. In so arguing, however, the Unions misconstrue both Plaintiffs' claims and the doctrine of facial challenges.

To start, Plaintiffs are "the master of the complaint," *Bindit Corp. v. Inflight Advertising, Inc.*, 285 A.D.2d 309, 313 n.1 (2d Dep't 2001) (quotation omitted), and have not argued that they are raising a facial challenge. To the contrary, Plaintiffs have previously explained that they are bringing an as-applied challenge because they are challenging the *effects* of the Challenged Statutes and alleging constitutional violations resulting from their implementation. *See* R1120 n.5; *see also Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.").

Moreover, whether Plaintiffs are required to "prov[e] that the invalidity of the law is beyond a reasonable doubt," *id.*, is not a question for this stage of the litigation, where Plaintiffs are entitled to all reasonable inferences in their favor. *See Leon*, 84 N.Y.2d at 87-88 ("We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within *any cognizable legal theory*.")

(emphasis added). It is thus premature for the Unions to attack Plaintiffs' claims by forcing them into a particular legal theory.

But even more importantly, the Unions' argument is based on a fundamental misunderstanding of the doctrine of facial challenges. The Unions argue that "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which [the law] would be invalid, *i.e.*, that the law is unconstitutional in all of its applications.'" UFT Br. 13 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But that is not a correct statement, at least to the extent it would have the Court apply the *Salerno* "no set of circumstances" standard to Plaintiffs' claims.

The United States Supreme Court has explained that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010); *see also* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 917 (2011) ("[T]he conventional wisdom regarding facial challenges . . . is more wrong than right."). In reality, there are

many instances in which courts will invalidate statutes without casting the claim as a "facial" challenge and without applying the *Salerno* standard. *See* Fallon, *supra*, at 935-40. For instances, as noted above, courts will often invalidate statutes based on their unconstitutional effects, rather than any constitutional infirmity that would be obvious from the text of the statute itself. *See supra* pp. 37-38. The Unions are thus simply wrong to assert that Plaintiffs' claims must rise or fall under *Salerno*.

## II. Plaintiffs' Article XI Claims Are Justiciable.

In addition to their baseless contentions on the merits, Appellants have also raised several arguments in an attempt to prevent the Court from even addressing the merits of Plaintiffs' suit in the first place. As the motion court succinctly put it, however, "the state may be called to account when it fails in its obligation to meet the minimum constitutional standards of educational quality." R31 (citing *NYCLU*, 4 N.Y.3d at 178). Appellants' attempts to avoid this obvious and central tenet of constitutional law are unavailing.

### A. Article XI Claims Do Not Present Non-Justiciable "Political Questions."

Each of the Appellants spends a substantial number of pages arguing that the Judiciary lacks authority to adjudicate Plaintiffs' claims because they supposedly present a non-justiciable "political question." *See* UFT Br. 17-27; SAANYS Br. 15-30; State Br. 34-42; NYC Br. 19-39; NYSUT Br. 7-21. But their arguments are flatly wrong.

It is indisputably the role of the Judiciary to determine whether a statute, whatever the policy rationale for its enactment, offends the New York State Constitution. *See, e.g. Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) ("*CFE III*") ("We [the judiciary of New York] are the ultimate arbiters of our State Constitution."); *Cohen v. State*, 94 N.Y.2d 1, 11 (1999) ("The courts are vested with a unique role and review power over the constitutionality of legislation.") (citations omitted). And like other constitutional entitlements, the rights under Article XI are enforced through judicial review. *See CFE II*, 100 N.Y.2d at 920 ("[W]e have a duty to determine whether the State is providing students with the opportunity for a sound basic education.").

While matters of policy may be the exclusive domain of the majoritarian branches, constitutional rights decidedly are not.

Plaintiffs have asserted constitutional claims, not policy arguments, against application of the Challenged Statutes. And alleged deprivations of constitutional rights are not insulated from judicial review merely because the Legislature may have had a policy reason for enacting statutes that may run afoul of the Constitution. Every statute may have some policy rationale that lies behind it. But even the most compelling policy rationale does not give carte blanche to violate the Constitution. And a claim under Article XI that the State is depriving children of their right to a sound basic education is unquestionably a judicial and justiciable question. *See CFE III*, 8 N.Y.3d at 28.

The amount of legislative deliberation and revision that preceded enactment of the Challenged Statutes is thus irrelevant to the question of justiciability. *See* State Br. 34-42; NYSUT Br. 12-21; NYC Br. 23-26 UFT Br. 22-25; SAANYS Br. 18-30. What is good "policy" to some does not offer talismanic immunity to violate the constitutional rights of others. "While the Legislature may vote to [enact a law], it cannot create one that offends constitutional rights." *People v. LaValle*, 3 N.Y.3d 88, 120, 128 (2004). Here in particular, the mandate of Article XI is directed at the Legislature: "The legislature *shall provide* for the

maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. art. XI, § 1. And even a statute that may be "valid when enacted may become invalid by change in the conditions to which it is applied." *Realty Revenue Corp. v. Wilson*, 181 Misc. 802, 804 (N.Y. Sup. Ct. 1943); *see also Hous. & Dev. Admin. of City of N.Y. v. Cmty. Hous. Improvement Program, Inc.*, 90 Misc. 2d 813, 815 (N.Y. App. Div.), *aff'd*, 59 A.D.2d 773 (2d Dep't 1977) ("Laws constitutional when enacted may become unconstitutional as administered or applied.").

Appellants cannot identify a single case where a constitutionally-protected right was at issue, but the court nevertheless concluded that the matter was non-justiciable on political question grounds. Instead, the cases Appellants cite on this point involve one of two irrelevant scenarios: 1) dismissing claims about alleged violations of *statutory* rights, *see e.g. N.Y.S. Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233 (1984) (statutory right to safe workplace); *Retired Public Emps. Ass'n v. Cuomo*, 123 A.D.3d 92 (3d Dep't 2014) (statutory right to monthly benefits); or 2) dismissing claims where the plaintiffs did not assert an established right at all, *see,*

*e.g. Jones v. Beame*, 45 N.Y.2d 402, 406 (1978) (claim against the Mayor of New York City for failing to adequately provide for animals in city zoos); *Abrams v. N.Y.C. Transit Auth.*, 39 N.Y.2d 990, 992 (1976) (claim against the New York City Transit Authority for noisy subways). None of these cases involved claimed violations of constitutional rights, and therefore each is inapposite to the question of justiciability here. In any event, it is not uncommon for the Court of Appeals to determine that a legislative enactment runs afoul of the constitution, whether the law furthers a compelling policy or not.[6]

The inclusion of Article XI in the New York State Constitution tells us that the Legislature and the Executive are not the sole guardians of children's educational rights. As Judge Ciparick explained

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[6] *See, e.g. City of N.Y. v. N.Y.S. Div. of Human Rights*, 93 N.Y.2d 768, 771 (1999) (statute unconstitutional under N.Y. Const. art. V, § 6); *LaValle*, 3 N.Y.3d at 120 (statute unconstitutional under N.Y. Const. art. I, § 6); *People v. Golb*, 23 N.Y.3d 455, 468 (2014) (statute unconstitutional under N.Y. Const. art. I, § 8); *Aliessa ex rel. Fayad v. Novello,* 96 N.Y.2d 418, 429 (2001) (statute unconstitutional under N.Y. Const. art. XVII, § 1); *McDermott v. Regan*, 82 N.Y.2d 354, 358 (1993) (statute unconstitutional under N.Y. Const. art. V, § 7); *N.Y.S. Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 101 (1993) (statute unconstitutional under N.Y. Const. art. VII, § 4); *Burrows v. Bd. of Assessors for Town of Chatham*, 64 N.Y.2d 33, 36 (1984) (statute unconstitutional under N.Y. Const. art. I, § 11); *Cty. of Rensselaer v. Regan*, 80 N.Y.2d 988, 992 (1992) (statute unconstitutional under N.Y. Const. art. V, § 1). *Bellanca v. N.Y.S. Liquor Auth.*, 54 N.Y.2d 228, 236 (1981) (statute unconstitutional under N.Y. Const. art. I, § 8).

in *Hussein v. State*: "If we declare that a sound basic education consists only of what the Legislature and Executive dictate, the scope of the State's constitutional duty under the Education Article and, conversely, the scope of the constitutional rights of our schoolchildren, is limited to what those branches say it is." 19 N.Y.3d at 903 (Ciparick, J. concurring). But the Constitution neither "entrust[s] the Legislature and Executive with the decidedly judicial task of interpreting the meaning of the Education Article" nor "cast[s] them in the role of being their own constitutional watchdogs." *Id.* Instead, the task of constitutional review is emphatically a judicial one: "Our system of separation of powers does not contemplate or permit such self-policing, nor does it allow [courts] to abdicate [their] function as 'the ultimate arbiters of our State constitution.'" *Id.* (citations omitted).

### B. Plaintiffs Have Adequately Alleged Standing.

Despite the well-pleaded allegations of systemic failure in the state education system, Appellants also claim that Plaintiffs have failed to articulate a sufficient injury to survive a motion to dismiss. *See* UFT Br. 42-44; SAANYS Br. 30-31. But that claim too is wrong.

*First*, Plaintiffs have standing under settled law as parents of New York schoolchildren who are alleged to be deprived of a sound basic education. *See, e.g.*, *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 18 (N.Y. Sup. Ct. 2001) ("[T]he children of these parents who attend public school in New York City have established an injury in fact which is redressable by this court. Pursuant to CPLR 1201 children must appear in court via their parent or guardian."). Plaintiffs send their children to school in districts handicapped by the Challenged Statutes—statutes which result in the promotion and retention of ineffective teachers. Plaintiffs have clearly alleged how the Challenged Statutes deny their right to a sound basic education, *see* R1357-59 ¶¶ 27-33, by, for example, granting a teacher tenure before she has been proven effective, R1359-64 ¶¶ 34-48, keeping ineffective teachers in the classroom as a result of a faulty disciplinary hearing system, R1364-69 ¶¶ 49-65, and maintaining the employment of more senior, yet ineffective, teachers at the expense of junior, but more effective, teachers, R1370-72 ¶¶ 66-76.

Plaintiffs have also squarely alleged an injury that is within the zone of interests protected by Article XI. *See Ass'n for a Better Long*

*Island, Inc. v. N.Y.S. Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014). Here, Plaintiffs allege a violation of Article XI, which requires the Legislature to "provide for the maintenance and support of a system of free common schools, wherein *all the children of this state* may be educated." N.Y. Const., art. XI, § 1 (emphasis added). There is no doubt that however far the zone of Article XI radiates, its primary beneficiaries are the schoolchildren of New York State. As those expressly singled out for Article XI's protection, and as current students in the State's education system, Plaintiffs' children have a "genuine stake in the litigation" that is "different from that of the public at large," and which is therefore sufficient to confer standing. *Ass'n for a Better Long Island,* 23 N.Y.3d at 6.

*Second*, Appellants' argument about allegations of "injury in fact" on appeal is flatly contrary to the argument that the State made below that "[i]t has never been held, *and would be incongruous with the language of the Education Article*, that a student's individual educational experience can give rise to a facial constitutional challenge under the Education Article." R1625. Appellants cannot have it both ways: if, as the State argues, an individual education experience is not

the standard for a constitutional claim under Article XI, then Plaintiffs' standing cannot also be deficient for failure to allege an injury that is individualized rather than systemic.

What Appellants are really doing is masking a merits argument as a standing question. Whether—even assuming systemic harm—the individual Plaintiffs have been injured is a repackaged variation of Appellants' causation argument, which can only be answered on a fuller record and at the merits stage. Courts routinely decline to decide standing on a motion to dismiss where the defendants raise standing challenges that turn on a question of fact. *See, e.g.*, *Deutsche Bank Nat'l Trust Co. v. Rivas*, 95 A.D.3d 1061, 1062 (2d Dep't 2012); *U.S. Bank Nat'l Ass'n v. Faruque*, 120 A.D.3d 575, 578 (2d Dep't 2014); *Brach v. Harmony Servs., Inc.*, 93 A.D.3d 748, 750 (2d Dep't 2012); *Genger v. Genger*, 87 A.D.3d 871 (1st Dep't 2011).

*Finally*, the imminent *risk* of injury alone establishes standing. Future harm suffices to confer standing where, as here, "there is more than an amorphous allegation of potential future injury." *Ass'n for a Better Long Island*, 23 N.Y.3d at 7. Unfortunately, it is an inevitability that some number of New York schoolchildren each year will land in a

classroom controlled by an ineffective teacher whom administrators are unable to dismiss due to enforcement of the Challenged Statutes. That is not speculation, but a reality of the status quo. And "proof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventative remedies . . . without awaiting actual injury." *N.Y. Cty. Lawyers' Ass'n v. State*, 294 A.D.2d 69, 74 (1st Dep't 2002) (citing *Swinton v. Safir*, 93 N.Y.2d 758, 765-66 (1999)). Addressing a standing challenge in the Article XI context, the Third Department explained that separate proof of actual harm is not necessary to support standing because "the hardship that may be suffered if we do not permit consideration of these claims to go forward cannot be said to be insignificant, remote or contingent." *Hussein*, 81 A.D.3d at 137. That makes sense: there is no reason to wait for inevitably greater harm to occur when relief can be provided now. Indeed, prospective review is particularly appropriate for a declaratory judgment, where the "primary purpose . . . is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 538 (1984) (citations omitted).

### C. The Legislature's Minor Amendments to the Challenged Statutes Have Not Mooted the Litigation.

Appellants finally assert that, due to the modest legislative amendments to portions of the Challenged Statutes, Plaintiffs' claims are both moot as to the old statutory scheme and unripe as to the new one. *See* UFT Br. 27-29, 40-42; SAANYS Br. 5-15; State Br. 22-34; NYC Br. 35-39. But this is just another baseless attempt to avoid adjudication on the merits.

Contrary to Appellants' contention, the Legislature has not made "substantial changes to the statutory scheme." UFT Br. 27. As explained above, *see supra* pp. 14-17, those changes were modest and ineffectual. For instance, the revised statutes still allow an arbitrator to decide against dismissing a teacher who has been found guilty of incompetence on the basis that future remedial efforts may help. *See* R1369 ¶¶ 62-64. The Legislature also adopted revised evaluation procedures in § 3012-c, expediting disciplinary procedures under § 3020-a. But Plaintiffs have already alleged in the Amended Complaint that the previous statutory time limits were routinely violated, *see* R1366-67 ¶¶ 56-58, and there is thus no reason to think that the new time limits will make any difference. Additionally, even if the review process now

takes less time, students' rights are still infringed during the two years of Ineffective teaching necessary to collect the reviews to begin 3020-a proceedings. *See id.* Moreover, the standards by which teachers are adjudged have not changed, nor have the potential consequences if a teacher is found "Ineffective." The Challenged Statutes thus still work to increase the number of ineffective teachers hired and retained, depriving New York schoolchildren of a sound basic education.[7]

Appellants would hide behind the new law, but a new coat of paint cannot mask an already-crumbling structure. *See Conn. Coalition for Justice in Educ. Funding v. Rell,* No. XO7HHDCV0540505265, 2013 WL 6920879, at *6 (Conn. Sup. Ct. Dec. 4, 2013) (rejecting motion to

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[7] The 2015 budget bill did add § 211-f, which created a narrow exception to the LIFO statute, allowing a failing or persistently failing school's receiver to dismiss teachers based on their effectiveness rating, without regard to seniority. *See* N.Y. Educ. Law § 211-f(7)(b). Under § 211-f(1), however, only the "lowest achieving five percent of public schools in the state" shall be designated as failing and will thus be eligible for receivership. N.Y. Educ. Law § 211-f(1). Initially, Governor Cuomo proposed a much broader change to the LIFO system, whereby failing districts, not just schools, would be allowed to take into account a teacher's § 3012-d evaluation when conducting layoffs. *See* 2015-16 New York State Executive Budget, The Education Opportunity Agenda Article VII, N.Y. Educ. Law § 211-g(5)(f) (proposed Jan. 21, 2015) *available at* https://www.budget.ny.gov/pubs/executive/eBudget1516/fy1516artVIIbills/EducationReform_ArticleVII.pdf. But the Legislature rejected that broader proposal, and as it stands, in at least 95% of schools across New York, the LIFO statutes will apply unchanged, and ineffective senior teachers will remain in the classroom while junior effective teachers are dismissed.

dismiss complaint for lack of ripeness, holding that "[t]he plaintiffs should be given an opportunity to prove ... that the education system remains unconstitutional in spite of [recent] reforms.").

This case is quite distinct from cases where a wholesale change in the law rendered a party's claim moot. For example, in *NRG Energy, Inc. v. Crotty*, 18 A.D.3d 916, 919 (3d Dep't 2005), a challenge to certain regulations was rendered moot because the regulations at issue were repealed, and it was "unquestionabl[e]" that newly enacted regulations "supercede[d] . . . the original . . . regulations." Because it was clear that the "rights of the parties [were] no longer affected by the original ... regulations," the court reasoned that "any ruling by th[e] Court regarding the validity of those regulations would have no practical effect[.]" *Id.* The same was true in *Flanders Associates v. Town of Southampton*, 198 A.D.2d 328 (2d Dep't 1993), where a local law exempted plaintiff's property from a moratorium on development that plaintiff was challenging. *See also Stato v. Squicciarini*, 59 A.D.2d 718, 719 (2d Dep't 1977) (challenge to planning board's permit issuance as in violation of Town Law was rendered moot when Legislature amended the law to explicitly allow planning board's actions). As when two

parties settle their dispute, *see, e.g.*, *Amherst & Clarence Insurance Co. v. Cazenovia Tavern*, 59 N.Y.2d 983 (1983), these changes in the law left the plaintiffs with no relief left to seek.[8] By contrast, all of the laws that Plaintiffs challenge remain in place, albeit with slight modifications. A ruling in Plaintiffs' favor, in sharp contrast with *Amherst*, would have a significant "practical effect."

A nearly identical argument to Appellants' was addressed and rejected in *Hussein v. State*, 81 A.D.3d 132 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). There, plaintiffs' Article XI claim relied on data that predated the enactment of education aid reform legislation. The State

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[8] *See also Jenkins v. Astorino*, 121 A.D.3d 997, 999 (2d Dep't 2014) (suit seeking to compel county administrator to fund program at a level required by 2012 county budget rendered moot when 2013 budget did not require the program to be funded at any level); *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 592 (1986) (challenge to zoning law was rendered moot when the City of Ithaca modified the law to explicitly allow the use sought by plaintiff); *903 Park Ave. Corp. v. City Rent Agency*, 31 N.Y.2d 330, 333 (1972) (challenge to New York City rent control law as violating state statute rendered moot by passage of new rent control law clearly permissible under state statute); *N.Y. City Parents Union v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 124 A.D.3d 451 (1st Dep't 2015) (challenge to Board of Education practice allowing charter schools to co-locate with public schools rent-free rendered moot by passage of law explicitly authorizing such practice); *Funderburke v. State Dep't of Civil Serv.*, 49 A.D.3d 809, 811 (2008) (challenge to school district's denial of benefits provided to same-sex spouse rendered moot by change in policy providing those benefits with retroactive application); *Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 811 (2003) (challenge to gambling agreement between the State and St. Regis Mohawk Tribe rendered moot by expiration of the agreement).

Defendants argued that because the new legislation "had not yet been fully implemented, the factual record is incomplete and the effects of the legislation cannot be measured." *Id.* at 135. The court roundly rejected that logic, finding that plaintiffs nonetheless stated a justiciable claim. Without any nonspeculative demonstration that the legislative changes moot this case, Appellants have not met their burden.

Indeed, by the logic of Appellants' own argument, it would be impossible for them to prove that the legislative amendments have mooted the case because "the inevitable impacts of recent statutory reforms are yet to be determined." NYC Br. 35. At bottom, the actual impact of the legislative amendments on New York school districts' ability to provide a sound basic education is ultimately a factual issue that cannot be resolved at the pleadings stage. Instead, it is something that the parties can explore in discovery.[9]

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[9] For the same reason, the State is wrong to fault Plaintiffs for not amending their complaint once again following these legislative changes. *See* State Br. 22. Plaintiffs have brought suit to remedy a deprivation of a sound basic education due to the hiring and retention of ineffective teachers—one that has been caused by the enforcement of the Challenged Statutes. The legislative amendments did nothing to remedy that situation: not a single ineffective teacher was fired upon enactment of

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Finally, even assuming *arguendo* that amendments to the Education Law could otherwise render this case moot, this case falls squarely within the well-recognized exception to the mootness doctrine, where: "(1) [there is] a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15 (1980). Because thousands of children enter the New York school system each year and are at risk of being assigned to an ineffective teacher, this is precisely the type of case whose importance extends well beyond the parties. As the Amended Complaint alleges: "Cumulatively, these laws make it nearly impossible to dismiss and discipline teachers with a proven track record of ineffectiveness or misconduct. Plaintiffs, *and other New York State schoolchildren*, are the primary victims of this failing system." R1352 ¶ 3 (emphasis added).[10]

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the budget bill. While Appellants argue that the new provisions will change matters in the long run, that is a factual issue that remains to be determined.

[10] *East Meadow Community Concerts Ass'n v. Board of Education of Union Free School District No. 3,* 18 N.Y.2d 129, 135 (1966), is similarly on point. There, the

(Continued...)

## III. Intervenor-Defendants' Additional Argument Concerning the Joinder of All Teachers Unions and School Districts in the State Is Meritless.

Finally, NYSUT continues to press the meritless contention that the motion court should have dismissed Plaintiffs' suit for failure to join each and every school district and teacher's union in New York as necessary parties. *See* NYSUT Br. 53-55.

Plaintiffs were not required to join all New York school districts, however, because it is well-established that, in matters where governmental policies and programs are challenged, "only those governmental entities that are primarily responsible for the challenged

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court considered an appeal about the constitutionality of a school board's decision to bar a folk singer's concert in one of its school buildings. Even though the scheduled date for the concert had passed by the time of the appeal, the court concluded that was "no basis for declining to review the important constitutional issues presented." *Id.* In a statement that could just as easily have been describing this case, the court explained that "[i]t is settled doctrine that an appeal will, nevertheless be entertained where, as here, the controversy is of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well." *Id.* Similarly, in *Rosenbluth v. Finkelstein,* 300 N.Y. 402, 404 (1950), the court held that although an appeal pertaining to the administration of emerging housing legislation in New York City had "become moot and academic" the court would "refrain from dismissing it because of the importance of the issue presented." The court concluded that the case "invite[d] immediate decision" because "the question is one of major importance" that "will arise again and again." *Id.* The same holds true here. The longer these constitutional issues go unresolved, the greater the number of New York schoolchildren who will receive a constitutionally inadequate education, again and again. *See also Hearst*, 50 N.Y.2d at 715 n.1 (citing more cases).

policy are necessary parties." *Joanne S.*, 115 A.D.2d at 9; *see also Mid Island Therapy Assocs. v. N.Y.S. Dep't of Educ.*, 99 A.D.3d 1082, 1083 (3d Dep't 2012). Because the State of New York and the Board of Regents are primarily responsible for enacting and enforcing the Challenged Statutes, the joinder of all school districts is unnecessary.

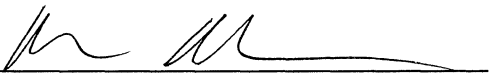
Plaintiffs were also not required to join each of the local teachers' unions. The premise of this joinder argument is that collective bargaining agreements will be affected if the challenged statutory scheme is found unconstitutional. *See* NYSUT Br. 54-55. This is not, however, "an action to set aside a contract." *Id.* at 55. Rather, Plaintiffs' claim concerns the constitutionality of the Challenged Statutes, and does not seek the invalidation of any collective bargaining agreement. Those agreements are mentioned in the Amended Complaint only to note that, in some instances, they exacerbate the problems caused by the Challenged Statutes. But Plaintiffs are not attacking them in this action. Thus, teachers' unions need not be joined.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

April 28, 2016

Respectfully submitted,



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