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Appellate Division: Second Department

MYMOENA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, 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 her parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Docket Nos. 2015-03922, 2015-12041

Plaintiffs-Respondents,

against

(Caption Continued on Inside Cover)

BRIEF FOR THE MUNICIPAL APPELLANTS

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THE STATE OF NEW YORK, 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

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, 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.

TABLE OF AUTHORITIES

Page(s)

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Abramovich v. Bd. of Educ.,
46 N.Y.2d 450 (1979) 25

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43 N.Y.2d 855 (1978) 21

Campaign for Fiscal Equity v. State of New York,
8 N.Y.3d at 14, 28 (2006) 21

Campaign for Fiscal Equity v. State of New York,
86 N.Y.2d 307 (1995) 29, 30

Campaing for Fiscal Equity, Inc. v. State of New York,
100 N.Y.2d, 893 901 (2003) 6, 32

Church of St. Paul v. Barwick,
67 N.Y.2d 510 (1986) 38

Matter of Davies v. New York City Dep't of Educ.,
117 A.D.3d 446 (1st Dep't 2014) 11

Donohue v. Copiague Union Free Sch. Dist.,
64 A.D.2d 29 (2d Dep't 1978) 22

Ebercohn-Mauro v. Bd. of Educ.,
5 A.D.3d 595 (2d Dep't 2004) 11

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75 N.Y.2d 596 (1990) 25

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42 N.Y.2d 357 (1977) 21, 23

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Page(s)

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45 N.Y.2d 402 (1978) 24, 28

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18 N.Y.3d 457 (2012) 10

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61 N.Y.2d 525 (1984) 22

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124 A.D.3d 451 (1st Dep't 2015) 31

Matter of New York City Sch. Bds. Assoc. v. Bd. of Educ.,
39 N.Y.2d 111 (1976) 21

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4 N.Y.3d 175 (2005) 29

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64 N.Y.2d 233 (1984) 24, 39

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100 N.Y.2d 434 (2003) 27, 29, 30

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134 A.D.3d 499 (1st Dep't 2015) 11

Reform Educ. Fin. Inequities Today v Cuomo,
86 N.Y.2d 279 (1995) 31

Ricca v. Bd. of Educ.,
47 N.Y.2d 395 (1979) 24

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 23

TABLE OF AUTHORITIES (cont'd)

Page(s)

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44 N.Y.2d 545 (1978) 27, 28

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132 A.D.3d 882 (2d Dep't 2015) 10

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541 U.S. 267 (2004) 27

Statutes

8 N.Y.C.R.R. § 30-3.1 19

8 N.Y.C.R.R. § 30-3.3 19

Educ. Law §1102 14

Educ. Law § 2509 .... 10, 14

Educ. Law § 2510 14

Educ. Law § 2573 .... 12, 14

Educ. Law § 2573(1) 17, 26, 38

Educ. Law § 2573(5) .... *passim*

Educ. Law § 2585 14

Educ. Law § 2588 .... 11, 14

Educ. Law § 2590 14

Educ. Law § 2590-j 14

Educ. Law. § 2590-j(7) 11

Educ. Law § 3012 .... 10, 14

TABLE OF AUTHORITIES (cont'd)

Page(s)

Educ. Law § 3012-c .... *passim*

Educ. Law § 3012-c(1) 10, 12, 13

Educ. Law § 3012-c(6) 13

Educ. Law § 3012-d 18, 27, 37

Educ. Law § 3012-d(4) 18

Educ. Law § 3012-d(5) 18

Educ. Law § 3012-d(6) 18, 26

Educ. Law § 3012-d(8) 17, 26, 37

Educ. Law § 3013 .... 11, 14

Educ. Law § 3014 .... 10, 14

Educ. Law § 3020 .... 12, 14

Educ. Law § 3020(1) 11

Educ. Law § 3020-a 11, 12, 13, 14

Educ. Law § 3020-a(2)(b) 11

Educ. Law § 3020-a(3) 13

Educ. Law § 3020-a(4) 13

Educ. Law § 3020-a(5)(b) 13

Educ. Law § 3020-b 13

Educ. Law § 3020-b(3) 18, 26, 37

Educ. Law § 3020-b(5) 13

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Page(s)

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L. 1980, ch. 422 24

L. 2010, ch. 103 .... 9, 25

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L. 2012, ch. 57 9

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Sawchuck, Stephen, *Steep Drops Seen in* 8

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Page(s)

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Testimony of Mayor Bill de Blasio before the New York State Senate Finance & Assembly Ways & Means Comm. (Feb. 25, 2015, 9:35 AM) 6

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Valerie Strauss, *The real reasons behind the U.S. teacher shortage,* WASH. POST, Aug. 24, 2015, *available at* http://wapo.st/1RxLPNa 5

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Yana Kunichoff, *The Big Money behind California's Tenure Lawsuit*, Truthout (June 19, 2014), http://bit.ly/1XVqoal.. 25

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

A. Hiring, Retaining, and Evaluating Teachers in New York City's Public Schools 4

B. The Statutory Framework for Teacher Tenure at the Time These Lawsuits Were Brought 9

1. Obtaining Tenure 9

2. Performance and Accountability 12

C. Plaintiffs' Broad-Based Challenge to the Tenure Statutes and Defendants' Motion to Dismiss 14

D. The Post-Commencement Amendments to the Statutory Framework for Teacher Tenure 16

ARGUMENT 19

POINT I 19

PLAINTIFFS' DISAGREEMENT WITH TEACHER TENURE DOES NOT RAISE A JUSTICIABLE CONTROVERSY 19

A. The Education Article Does Not Authorize Courts to Superintend Education Policy. 20

Page

B. Plaintiffs' Broadside Attack on the State's Teacher Tenure Laws Does Not Transform a Policy Debate Into a Justiciable Controversy. 23

POINT II 28

IN THE ALTERNATIVE, PLAINTIFFS DO NOT STATE A VIABLE CLAIM UNDER THE EDUCATION ARTICLE.. 28

A. Plaintiffs Do Not Allege the Kind of Systemic Shortfall in Resources Required for an Education Article Claim. 29

B. Plaintiffs' Request for the Statewide Tenure Statutes To Be Eliminated or Rewritten Is Unsupported by Their Allegations and Defeated By Their Concessions. 33

C. The Challenge Is Not Ripe In Any Event Because the Tenure Statutes Have Been Amended in Key Ways. 35

CONCLUSION 40

CERTIFICATE OF COMPLIANCE 41

PRELIMINARY STATEMENT

Few public duties are more important than educating our state's schoolchildren. Educational policy is thus often controversial. The field is also complex: it raises difficult questions about how to prioritize and reconcile different objectives, how to confront shifting real-world needs and challenges, and how to weigh alternative policy approaches. While there is much room for debate on these points, such policy disagreements, no matter how sincere, are not proper grounds for constitutional litigation.

Plaintiffs here challenge the state's system of teacher tenure, which has formed part of our educational fabric for almost a century and remains a central strategy for recruiting and retaining good teachers across the state. Tenure has its detractors, plaintiffs among them. Plaintiffs are a self-selected group of parents and children who contend that tenure offers teachers too many protections and that our educational system would be better off without it. And they seek to impose this viewpoint statewide by asking the courts to invalidate the tenure statutes and thus to

override the Legislature's considered judgment that tenure is an overall benefit to education.

This Court should dismiss the suit as non-justiciable and misconceived, reversing the contrary rulings of Supreme Court, Richmond County (Minardo, J.). The Education Article of the State Constitution is not a vehicle for litigating over the Legislature's choices among educational policy alternatives. The Court of Appeals' trilogy of decisions in the *Campaign for Fiscal Equity* ("*CFE*") case does not suggest otherwise. That case asked whether the overall level of state educational *funding* was insufficient and whether the courts should direct funding to be increased. Those questions—though far from simple—were held to fall within the bounds of judicial competency.

The questions raised here are very different and fall on the other side of that boundary: they do not address the overall level of state support for education or request a remedy of increased funding. Instead, they involve complex weighing of pros and cons among alternative means of regulating one particular aspect of educational policy: how to attract, retain, and evaluate teachers.

Those policy decisions lend themselves neither to judicially administrable standards nor to judicially crafted remedies. The courts do not sit as super-legislatures: debates over educational policy should be resolved through the political process, not through litigation.

QUESTIONS PRESENTED

1. Does plaintiffs' policy disagreement with teacher tenure fail to present a justiciable controversy, where there are no judicially manageable standards for evaluating the merits of plaintiffs' broadside attack on the statewide statutory framework, and courts are ill equipped to superintend policy judgments weighing the practical, economic, and political complexities in devising a structure for attracting, retaining, and evaluating the performance of public school teachers?

2. In the alternative, have plaintiffs failed to state a plausible claim under the Education Article of the State Constitution, where they raise only generalized allegations about "ineffective teachers," based on stale data that predate substantial

amendments to the scheme, and fail to allege a systemic deficiency in education?

STATEMENT OF THE CASE

A. Hiring, Retaining, and Evaluating Teachers in New York City's Public Schools

DOE operates New York City's school district—which, with more than 1.1 million students taught by more than 70,000 teachers in about 1,800 schools, is the largest public school system in the country.[1] The administration of this system is a massive undertaking, requiring a breathtaking range of complex policy judgments and the careful balancing of countless, sometimes conflicting, policy interests and objectives.

Few of the City's public duties are more important than ensuring that its schoolchildren receive a quality education. DOE could not fulfill this critical mission without the tens of thousands of dedicated teachers who work in the City's schools each and

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[1] NYC Department of Education, About Us, http://on.nyc.gov/1pE68yI (last visited March 27, 2016); New York City Independent Budget Office, Demographics and Work Experience: A Statistical Portrait of New York City's Public School Teachers, 1 (May 2014), *available at* http://bit.ly/1LS4p3h.

every day. Attracting and retaining these teachers is an essential part of fulfilling DOE's broader educational mandate.

A network of state statutes—including those regulating teacher tenure—provide the framework for DOE's efforts. Tenure has been part of our state's educational fabric for more than a century,[2] and is a key tool in recruiting and retaining good teachers. Teaching is a challenging profession.[3] Providing educators with a degree of job security incentivizes quality educators to remain in public classrooms.[4] Of course, at the same time, because of the important task we entrust in our educators,

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[2] The Legislature's first tenure statute was enacted in 1917. L. 1917, ch. 796.

[3] Valerie Strauss, *The real reasons behind the U.S. teacher shortage,* WASH. POST, Aug. 24, 2015, *available at* http://wapo.st/1RxLPNa ("Fifty-one percent of teachers reported feeling under great stress several days a week, an increase of 15 percentage points reporting that level in 1985.").

[4] *See* Valerie Strauss, *Why teachers can't hotfoot it out of Kansas fast enough*, WASH. POST, Aug. 2 2015, *available at* http://wapo.st/1UQDWG9 (describing the large increase of teachers leaving the Kansas public school system after the state curtailed its teacher tenure protections) (last visited March 27, 2016); *see also* Staci Maiers, *Teachers Take "Pay Cut" as Inflation Outpaces Salaries*, National Education Association (November 14, 2006), *available at* http://bit.ly/22FmLfk (discussing teacher pay as posing a challenge to recruitment and retention).

we must also have high expectations for their performance.[5] Thus, in addition to providing for some measure of job security, tenure protections are coupled with performance benchmarks and evaluative criteria to maintain standards of accountability.[6] DOE, for example, uses "Advance,"[7] a system of teacher evaluation and development that helps DOE to identify instructional strategies that work, support teachers in developing their teaching practices to implement these strategies, and to identify teachers who fail to meet these standards.

Even with the benefits of tenure, thousands of teachers leave the DOE's employ each year. They leave for a variety of reasons:

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[5] Dana Goldstein, THE TEACHER WARS: A HISTORY OF AMERICA'S MOST EMBATTLED PROFESSION 4 (Doubleday 2014); *see also Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d, 893 901 (2003) ("*CFE*") ("We begin with a unanimous recognition of the importance of education in our democracy.").

[6] *See also* Testimony of Mayor Bill de Blasio before the New York State Senate Finance & Assembly Ways & Means Comm. (Feb. 25, 2015, 9:35 AM) ("Our educational reform efforts begin with the importance of quality teachers. Attracting and retaining the best teachers is critical . . . [as is] hold[ing] teachers accountable as well.").

[7] NYC Department of Education, Advance, http://on.nyc.gov/1UvyRU4 (last visited March 27, 2016) (describing "Advance" DOE's teacher development and evaluation system, which it implemented after the State Legislature enacted Educ. Law § 3012-c in 2010).

some, for example, choose to pursue other careers, transfer to other school districts, or retire; others find their service discontinued by DOE. Whatever the reasons, DOE hires approximately 6,000 new teachers each year, to ensure a sufficient number of teachers.[8]

This is no easy task. One out of every two new teachers will leave the profession within five years.[9] And our country is currently experiencing a dramatic shortage of qualified teachers, which has not spared New York.[10] In recent years, the City has faced challenges in finding sufficient teachers for core academic subjects, including English, mathematics, biology, and special education.[11] The problem will only get worse: enrollment in

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[8] NYC Department of Education, Who We Want, http://bit.ly/1q9FK0m (last visited March 27, 2016).

[9] Goldstein, *supra* note 5, at 7.

[10] Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. TIMES, Aug. 9, 2015, *available at* http://nyti.ms/1UVaTzV; Eric Westervelt, *Where Have All The Teachers Gone?*, NATIONAL PUBLIC RADIO (March 3, 2015, 2:03 PM), *available at* http://n.pr/1ZFB4LN.

[11] U.S. Department of Education, Teacher Shortages Areas Nationwide, March 2015, at 111-116, *available at* http://1.usa.gov/1ZFBaTG (last visited March 27, 2016).

teacher training programs has fallen precipitously in recent years, with New York being among the states hardest hit.[12]

Some teacher turnover is inevitable, but substantial turnover can have profound negative impacts.[13] Turnover disrupts schools and students, and results in declines in student achievement.[14] When experienced teachers leave schools, institutional and organizational knowledge leave with them.[15] Like many employment contexts, new employees need to be trained and develop on-the-job experience.[16] Unlike other employment contexts, the costs are borne not just by the employer, but by schoolchildren who experience the disruption firsthand.

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[12] Sawchuck, Stephen, *Steep Drops Seen in Teacher-Prep Enrollment Numbers*, Education Week, Oct. 21, 2014, *available at* http://bit.ly/1PyPWUH.

[13] Jeffrey Mervis, *Data Say Retention is Better Answer to "Shortage" Than Recruitment*, 330 SCIENCE 580 (Oct. 29, 2010), *available at* http://bit.ly/1PyPWUH.

[14] Susana Loeb, Mathew Ronfeldt, & Jim Wyckoff, *How Teacher Turnover Harms Student Achievement*, AM. EDUC. RESEARCH J. 1-6, 13-17 (Oct. 23, 2012), *available* http://stanford.io/1SoJxjx.

[15] *Id.* at 5.

[16] *Id.*

B. The Statutory Framework for Teacher Tenure at the Time These Lawsuits Were Brought

The tenure statutes plaintiffs challenge in this case embody the Legislature's judgment about the best way to manage the State's education workforce. This scheme has operated for a century and has undergone significant evolution in recent years.[17]

1. Obtaining Tenure

Currently, New York City teachers must provide four years of "competent, efficient, and satisfactory service," before they become eligible for tenure. Educ. Law § 2573(5); *see also* Educ.

[17] *See* L. 2010, ch. 103 (creating a statewide teacher evaluation framework and establishing expedited hearings for underperforming teachers); L. 2012, ch. 21 (refining the teacher evaluation framework); L. 2012, ch. 67 (requiring disclosure of performance reviews); L. 2012, ch. 57 (imposing a 155-day time limit for all disciplinary hearings); L. 2015, ch. 56 (further reforming the evaluation system and imposing more rigorous teacher accountability measures).

Law § 3012-c.[18] At the time plaintiffs filed their complaints, New York City teachers generally had a three-year probationary term. The Legislature extended the probationary period to four years during the course of this litigation. L. 2015, ch. 56.

During their probationary period, teachers may be discontinued at any time and for any lawful reason, including, of course, inadequate performance. *See* Educ. Law § 3012-c(1); *see also Kahn v. New York City Dep't of Educ.*, 18 N.Y.3d 457, 471 (2012). And courts should and do uphold the right of school districts to terminate the employment of probationary teachers during this period. *See, e.g.*, *Matter of Slutsky-Nava v. Yonkers City Sch. Dist.*, 132 A.D.3d 882, 883 (2d Dep't 2015).

After completing the probationary period, a teacher may be awarded tenure only if the superintendent who oversees their

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[18] Plaintiffs' challenge to the tenure scheme includes Tenure Statutes that do not apply to the New York City's school system (*see* RA46-47, 69). For example, plaintiff challenge Educ. Law § 2509, which applies to city school districts in cities with less than 125,000 inhabitants; § 3012, which applies to non-city school districts; and § 3014, which applies to boards of cooperative educational services. This brief will focus on the tenure statutes that apply to New York City, but plaintiffs challenge the availability of tenure statewide, even though they have failed to join as parties more than 700 school districts that would be directly affected by the relief they seek.

district determines that they are qualified. Educ. Law § 2573(5). Tenure status provides teachers with some, but not inviolate, job stability. A tenured teacher is subject to removal for "just cause," Educ. Law § 3020(1), and is entitled to notice and a hearing, Educ. Law § 3020-a. For New York City teachers, "cause" includes, but is not limited to, "incompetence," "ineffective service," "neglect of duty," and "conduct unbecoming the teacher's position." Educ. Law § 2590-j(7); *see, e.g., Matter of Reed v Dep't of Educ.*, 134 A.D.3d 499 (1st Dep't 2015) (failure to plan and execute lessons); *Matter of Davies v. New York City Dep't of Educ.*, 117 A.D.3d 446, 447 (1st Dep't 2014) (failure to effectively manage the classroom); *Ebercohn-Mauro v. Bd. of Educ.*, 5 A.D.3d 595, 595 (2d Dep't 2004) (unsatisfactory teaching performance). Teachers may be reassigned or suspended during the hearing process. Educ. Law § 3020-a(2)(b). Finally, tenure status affords teachers with certain seniority rights in the event of a layoff or the abolition of a position. Educ. Law §§ 2588, 3013.

2. Performance and Accountability

The statutory tenure framework balances these job security protections, essential to recruiting and retaining good teachers, with prescribed accountability standards. *See, e.g.*, Educ. Law §§ 2573, 3012-c, 3020, 3020-a. The Legislature has been particularly active in this area in recent years.

In May 2010, for instance, the Legislature established "rigorous annual performance reviews" to more effectively measure teacher performance. Assembly Sponsor's Mem., at 1, *reprinted in* Bill Jacket, L. 2010, ch. 103 at 7. These performance reviews are based on measures of "student growth" on state assessment tests and state and locally selected[19] measures of teacher effectiveness, including detailed evaluations of teacher practices,[20] multiple classroom observations, analysis of teacher

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[19] Locally selected measures may be determined through collective bargaining but are limited to a specific menu of approved options. Educ. Law § 3012-c(1); NYC Department of Education, Student Learning, http://on.nyc.gov/1SoQzon (last visited March 27, 2016).

[20] DOE uses the Charlotte Danielson framework, which is comprised of 22 evaluative components that analyze all facets of good teaching practice. NYC Department of Education, Teacher Practice, http://on.nyc.gov/1RxXLOS (last visited March 27, 2016).

artifacts, and feedback from multiple evaluators. The 2010 amendments prescribed a new ratings scale for teacher performance reviews, ranging from highly effective, to effective, to developing, to ineffective. Educ. Law § 3012-c(1)-(2). By statute, these performance reviews must be "a significant factor" in employment decisions related to "promotion, retention, tenure determination, [and] termination." Educ. Law § 3012-c(1).

These reforms have streamlined the dismissal process as well. Under Section 3020-a, an arbitration hearing may not last longer than 125 days "absent extraordinary circumstances," Educ. Law § 3020-a(3)(c)(vii), and hearing decisions must be implemented with fifteen days of their receipt, Educ. Law § 3020-a(4)(b). In addition, teachers who receive two consecutive ineffective ratings are subject to dismissal through an expedited hearing process. Educ. Law §§ 3012-c(6); L. 2010, ch. 103, § 5. Under this process, a hearing decision must be issued within ten days of the final date of the hearing. The filing of an appeal does not delay the implementation of any hearing decision. Educ. Law §§ 3020-a(5)(b), 3020-b(5)(b).

C. Plaintiffs' Broad-Based Challenge to the Tenure Statutes and Defendants' Motion to Dismiss

In 2014, two sets of plaintiffs initiated these actions, later consolidated, seeking declaratory and injunctive relief.[21] Plaintiffs claim that New York's statutory tenure framework violates the Education Article of the State Constitution (RA37-60, 67-89). Plaintiffs launch a scattershot attack on the Education Law, claiming at least fourteen provisions are infirm, including Education Law §§ 1102(3), 2509, 2510, 2573, 2585, 2588, 2590, 2590-j, 3012, 3012-c, 3013(2), 3014, 3020, 3020-a (RA38, 1353). According to plaintiffs, these statutes together "inevitably present[] a total and fatal conflict with the right to a sound basic education," (RA45) and must therefore be struck (RA1353).

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[21] The underlying actions involve a complaint filed in Richmond County, captioned *Mymoena Davids, et al. v. State of New York, et al.* (the "*Davids* action" (RA36-66), and a complaint filed in Albany County captioned, *John Keoni Wright, et al. v. State of New York, et al.* (the "*Wright* action") (RA67-89). Supreme Court consolidated the actions in September 2014 (RA763-65). The City of New York and DOE are named defendants in the *Davids* action and DOE intervened as a defendant in the *Wright* action (RA17, 36, 1669-70). After the cases were consolidated, plaintiffs in the *Wright* action amended their complaint to conform to the new caption but did not amend their allegations (RA1350-74).

Plaintiffs admit that "the majority of teachers in New York provide students with a quality education" (RA38). Their claims are based on the theory that the tenure statutes leave an unidentified number of "ineffective teachers" in the school system, placing some children "at risk of being assigned" to an underperforming teacher at some point (RA1352; *accord* RA38). Plaintiffs do not define what they consider to be an ineffective teacher or provide any administrable standard for identifying who fits this nebulous category.

Plaintiffs do not allege that any one of them has been deprived of a sound basic education.[22] Nor do they allege any specific instance in which the tenure statutes have prevented an ineffective teacher from being dismissed. Instead, plaintiffs make sweeping claims regarding their disagreement with the policy of

[22] The only specific allegation of harm plaintiffs plead in the complaints is that one plaintiff "fell behind" her sister, who also attends public school, during the period she was assigned to an "ineffective teacher" (RA1352-53).

tenure based on stale data that predate the significant reforms the Legislature enacted in 2010 and over the next few years.[23]

In October 2014, defendants moved to dismiss. Supreme Court, Richmond County (Minardo, J.), denied defendants' motions (RA17-33). Without significant elaboration, the court concluded that plaintiffs' claims were justiciable because they pertained to constitutional rights (RA31-32). The court also determined that plaintiffs had stated a claim for relief based on their contention that the tenure statutes result in the retention of ineffective teachers (RA31).

D. The Post-Commencement Amendments to the Statutory Framework for Teacher Tenure

In 2015, after Supreme Court's initial decision, the Legislature passed Chapter 56 of the Laws of 2015,[24] significantly amending the tenure statutes. The law made numerous changes to the tenure framework's accountability standards, making the ability to obtain tenure more difficult, the teacher performance

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[23] *See* L. 2012, ch. 21; L. 2012, ch. 67; L. 2013, ch. 57.

[24] L. 2015, ch. 56, Part EE.

review system more standardized and rigorous, the dismissal of underperforming teachers significantly easier, and the hearing process more streamlined and more efficient. Specifically, the statutory reforms include:

- Prohibiting a student from being taught by any teacher in their district who has received an ineffective rating for more than one consecutive year. Educ. Law § 3012-d(8).
- Extending the standard probationary period for New York City teachers from three to four years. Educ. Law § 2573(1)(a)(ii).
- Requiring that teachers receive a rating of effective or higher in each of the last three years of their probationary period to be eligible for tenure. Educ. Law § 2573(5)(b).

- Reformulating teacher performance review standards to make them more standardized and more rigorous. Educ. Law § 3012-d.[25]
- Establishing a presumption of incompetence for a teacher who has received two ineffective ratings, and requiring dismissal "absent extraordinary circumstances." unless overcome "by clear and convincing evidence." Educ. Law § 3020-b(3)(v).
- Establishing an even stronger presumption of incompetence for a teacher who has received three ineffective ratings unless overcome by "clear and convincing evidence" of fraud. Educ. Law § 3020-b(3)(v).

Many of the 2015 amendments will be phased in during the next number of years. School districts, like the City of New York's

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[25] Under Section 3012-d, performance evaluations will be based on two categories: student performance and teacher observation. Educ. Law § 3012-d(4). The statute also provides a detailed rubric for how each category is determined and scored. Educ. Law § 3012-d(4)-(6). If a teacher is rated ineffective in either category, the teacher will not receive an overall effective rating that year. Educ. Law § 3012-d(5).

school district, will continue to use their current performance review systems until the State approves their revised plans. 8 N.Y.C.R.R. §§ 30-3.1, 30-3.3.

Based on these significant statutory amendments, which substantially increase teacher accountability, all defendants renewed their motions to dismiss. Despite the material changes to the tenure scheme, Supreme Court denied these motions as well (RA954-58).

ARGUMENT

POINT I

PLAINTIFFS' DISAGREEMENT WITH TEACHER TENURE DOES NOT RAISE A JUSTICIABLE CONTROVERSY

In this case, plaintiffs seek to transform the Education Article in the State Constitution from a flexible constitutional mandate into a recipe for routine litigation over the merits of education policy. Their understanding of the Education Article is deeply flawed, incompatible with bedrock separation-of-powers principles, and fundamentally a bad idea.

A. The Education Article Does Not Authorize Courts to Superintend Education Policy.

The Education Article declares that "[t]he 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." New York State Const., art. XI, § 1. The Education Article thus mandates "maintenance and support" of public schools by the State. But it does not purport to prescribe particular policy choices in the area of education nor to authorize courts to second-guess the Legislature's choices among policy alternatives.

The Constitution's flexible mandate instead affords the political branches discretion to determine the means for providing the state's schoolchildren with a sound education. And rightly so: education policy is an extraordinarily complex and often controversial area, requiring education officials to make difficult policy judgments and balance a wide array of interests and objectives. As in other areas raising "complex societal and governmental issues," education policy is "a subject left to the discretion of the political branches of government." *Campaign for*

Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 28 (2006) ("*CFE*") (quotation marks omitted).

Consistent with traditional understandings of the respective institutional competencies of the political branches and the judiciary, courts have an important, but limited, role to play in this area.[26] Courts can review whether the State is meeting its basic constitutional obligation of support by evaluating whether the overall mix of educational "inputs" produces adequate educational "outputs." *See Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 316 (1995) ("*CFE I*"). Thus, for example, a challenge to the overall level of funding provided by the State was held justiciable, and a remedy ordering increased funding held to be appropriately issued upon a sufficient evidentiary showing. *CFE III*, 8 N.Y.3d at 29.

But this case involves something very different, and something that courts are neither empowered nor equipped to do:

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[26] *See generally Matter of New York City Sch. Bds. Assoc. v. Bd. of Educ.*, 39 N.Y.2d 111, 121 (1976); *see also Matter of Bokhair v. Bd. of Educ.*, 43 N.Y.2d 855, 856 (1978); *James v. Bd. of Educ.*, 42 N.Y.2d 357, 368 (1977).

plaintiffs ask the courts to micromanage the Legislature's educational policy judgments by isolating one area within that field, second-guessing how the Legislature has chosen to regulate it, and reweighing the pros and cons of various alternatives. Courts are not free to superintend matters of educational policy by substituting their judgment as to the "best way" to ensure a sound basic education. *CFE III*, 8 N.Y.3d at 27; *see also Hoffman v. Bd. of Educ.*, 49 N.Y.2d 121, 125-126 (1979) (providing that courts "may not substitute their judgment . . . for the professional judgment of educators and government officials"). Plaintiffs' lawsuit asks the courts to do precisely that.

Courts are, in short, the wrong forum to litigate the merits and efficacy of particular educational policies. *See Donohue v. Copiague Union Free Sch. Dist.*, 64 A.D.2d 29, 35 (2d Dep't 1978), *aff'd*, 47 N.Y.2d 440 (1979). This is because courts are not well positioned to acquire and evaluate the foundational knowledge required for making broad and complex judgments about what makes good education policy. *See Klosterman v. Cuomo*, 61 N.Y.2d 525, 535 (1984). It is also because courts lack the dexterity to

create and adjust policy solutions in the fluid area of education, which, more than most fields, turns on ever-evolving theories about best practices.

Education policy requires a process of "research and experimentation" overseen by the political branches and education experts, rather than "inflexible" constraints imposed by judicial fiat. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973). While, in the frequently divisive realm of education, it is often "possible to question the educational wisdom of [a particular] solution, it is not for the courts to do so." *James,* 42 N.Y.2d at 367 (quotation and alterations omitted). Questions of educational policy will thus normally present a non-justiciable controversy, one best left to the political branches, checked, as always, by the democratic process.

B. Plaintiffs' Broadside Attack on the State's Teacher Tenure Laws Does Not Transform a Policy Debate Into a Justiciable Controversy.

Nowhere do these principles of deference make more sense than in the area of teacher tenure, which has been a foundational premise of our state's public school systems for nearly a hundred

years. The Legislature first adopted tenure for public school teachers in 1917. *See* L. 1917, ch. 796, § 1. Since then, the Legislature has revisited teacher tenure on numerous occasions,[27] continuously reaffirming tenure's importance to the broader effort to provide our schoolchildren with the education they deserve, and periodically adjusting tenure's contours to fit changing circumstances and evolving understandings of best educational practices.

Teacher tenure is the product of a reasoned policy judgment about how best to recruit and retain qualified teachers, *New York State Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 239 (1984); *Jones v. Beame*, 45 N.Y.2d 402, 409 (1978). The statutory framework furthers this fundamental objective, while maintaining meaningful standards for holding educators accountable. *See generally Ricca v. Bd. of Educ.*, 47 N.Y.2d 395, 391 (1979); *Abramovich v. Bd. of Educ.*, 46

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[27] *See, e.g.,* L. 1937, ch. 314; L. 1945, ch. 833; L. 1950, ch. 762; L. 1955, ch. 583; L. 1971, ch. 116; L. 1974, ch. 735; L. 1980, ch. 422; L. 2015, ch. 56.

N.Y.2d 450, 454-55 (1979); *cf. Forti v. New York State Ethics Comm'n*, 75 N.Y.2d 596, 614 (1990).

It is no secret that teacher tenure is under attack from some quarters in our society.[28] Education is often a contentious area, and teacher tenure is no exception. Plaintiffs' expansive challenge to our state's teacher tenure laws in this case is part of a broader public debate on the merits of teacher tenure. This debate is important, but it is appropriately left to the democratic process. The correctness of this basic insight is confirmed by the political branches' responsiveness to the public debate: in recent years, the Legislature has revisited and adjusted the statutory framework for teacher tenure on five different occasions, including during the course of this lawsuit. *See* L. 2010, ch. 103; L. 2012, ch. 21; L. 2012, ch. 67; L. 2013, ch. 57; L. 2015, ch. 56.

The reforms recently adopted by the Legislature have been far-reaching, and many of them speak directly to plaintiffs' professed concerns. As detailed above (*see* Stmt. of the Case,

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[28] *See, e.g.*, Yana Kunichoff, *The Big Money Behind California's Tenure Lawsuit*, Truthout (June 19, 2014), http://bit.ly/1XVqoal.

Section D), in the past few years alone, the Legislature has extended the probationary period for all new teachers from three to four years; imposed higher standards for obtaining tenure; precluded students from being taught by ineffective teachers for two consecutive school years; strengthened various systems for holding tenured teachers accountable and for terminating underperforming teachers. *See, e.g.*, Educ. Law §§ 2573(1)(a)(ii) & (5)(b), 3012-d(6), 3012-d(8), 3020-b(3)(c)(i) & (v). Time and again, the merits of teacher tenure have been discussed and evaluated in the political sphere, where the debate belongs. While plaintiffs may disagree with the outcome of the political process, their disagreement does not entitle them to ask the courts to sweep aside an educational policy with deep roots and strong support.

Indeed, the nub of plaintiffs' disagreement—that tenure's protections lead to "ineffective" teachers—is especially ill-suited for judicial resolution. Plaintiffs assert that the tenure statutes result in an unspecified but small minority of "ineffective teachers" remaining in the classroom, and they take issue with how educators measure teacher performance in schools (*see* RA51,

1372). But there is no "judicially manageable" standard for evaluating teacher performance, much less on a systemic scale, or for discerning the relationship between the individual component parts of the statutory tenure scheme and the quality of the education students receive. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion); *see Saxton v. Carey*, 44 N.Y.2d 545, 550 (1978). The effectiveness of a teacher depends on a host of factors, some of which will vary by the diverse needs of individual schools and their students. *See* Educ. Law §§ 3012-c, 3012-d; *see also Paytner v. State*, 100 N.Y.2d 434, 441 (2003) ("The causes of academic performance may be manifold."). While plaintiffs might prefer a "uniform definition" of effectiveness (RA1361), they do not articulate what that definition might be or explain how it would be judicially administrable.

Indeed, it is hard to imagine how plaintiffs would even go about supporting their broad-based objections if this case were to continue. Plaintiffs do not articulate any objective measure of teacher performance, nor do they suggest how a trial court could apply and adjudicate the issues they raise. Do plaintiffs propose to

conduct discovery on the classroom performance of individual teachers from across the state? To put a broad swath of administrators, teachers, and students on the stand to testify about individual educational outcomes? To present expert testimony about how systems of teacher hiring, retention, and evaluation should be structured, with statistical modeling to predict how educational outcomes would differ for various schools, subjects, and students under alternative approaches? These points all underscore that plaintiffs' dispute with teacher tenure is not justiciable, but rather presents policy questions that the courts are not competent to resolve. *See Jones*, 45 N.Y.2d at 409; *Saxton,* 44 N.Y.2d at 550. Plaintiffs' disagreement with the teacher tenure statutes, while no doubt sincere, should remain directed to the political branches, not litigated in the courts.

POINT II

IN THE ALTERNATIVE, PLAINTIFFS DO NOT STATE A VIABLE CLAIM UNDER THE EDUCATION ARTICLE

Even if plaintiffs' policy disagreement with teacher tenure were appropriately addressed to the courts, their allegations

nonetheless fail to establish entitlement to relief, for several reasons.

A. Plaintiffs Do Not Allege the Kind of Systemic Shortfall in Resources Required for an Education Article Claim.

The Education Article's core command is that the State fund a public school system that provides a minimally adequate education. *See Paynter v. State of New York*, 100 N.Y.2d 434, 439-40 (2003). It is concerned not with individual educational outcomes, but rather with the maintenance of the education system as a whole, and whether the overall mix of educational inputs and outputs succeeds in ensuring a sound education across the state and across individual school districts. *See CFE I*, 86 N.Y.2d at 316. As a result, to state a claim under the Education Article, a plaintiff must do more than point to individual educational outcomes that fall below expected standards: a plaintiff must allege that a systemic failure by the State in providing financing or other resources has caused gross and glaring educational deficiencies on a statewide or districtwide basis. *See New York Civil Liberties Union v. State*, 4 N.Y.3d 175,

178-79 (2005); *Paynter*, 100 N.Y.2d at 439. Even claims in this vein will rarely succeed, and rightly so because, as the *CFE* trilogy illustrates, the failings must be profound before judicial intervention will be warranted.

Plaintiffs fall far short of pleading the facts required to support an Education Article claim. To be sure, plaintiffs may believe that our public school system would be better off without teacher tenure (a point on which the Legislature disagrees), and posit that ineffective teachers lead to less desirable educational outcomes. But plaintiffs do not allege what is required for any Education Article claim: that schoolchildren across the state or across a school district are unable to develop "the basic literacy, calculating, and verbal skills necessary to enable [them] to eventually function productively as civil participants." *CFE I*, 86 N.Y.2d at 316. If anything, plaintiffs' allegations refute such a claim: if "the majority of teachers" provide "a quality education" (R38), as plaintiffs concede, then it is hard to see where the systemic deficiency lies.

Plaintiffs offer but one specific allegation of an educational shortcoming that has purportedly caused them injury. It is alleged that *one* plaintiff was assigned to an ineffective teacher (presumably, the teacher was tenured, but plaintiffs do not specify) in one school year and fell behind her peer as a result (RA1353). This is far too flimsy a foundation on which to rest a broadside attack on the state's entire tenure system, and a far cry from the kind of statewide or districtwide failing required for an Education Article claim. Allegations of disparate educational outcomes, even "extreme" disparities, will not support a claim, where the system still generally provides a minimally adequate education. *Reform Educ. Fin. Inequities Today v. Cuomo*, 86 N.Y.2d 279, 284 (1995); *see also New York City Parents Union v. Bd. of Educ.*, 124 A.D.3d 451, 451-52 (1st Dep't 2015).

Even if plaintiffs had alleged systemic educational deficiencies, they have not plausibly alleged that teacher tenure is a driving force behind them. Plaintiffs try to tether teacher tenure to educational outcomes with speculation, not concrete factual allegations. While plaintiffs may believe that tenure provides too

much protection to a minority of underperforming teachers, they do not (and could not credibly) dispute that tenure is a valuable tool in recruiting and retaining good teachers too. *See CFE II*, 100 N.Y.2d at 911 (noting the importance of a district's "ability to attract and retain qualified teachers"). Despite this, plaintiffs do not explain why it is plausible to conclude that eliminating teacher tenure would, on the whole, do more good than harm. Quality teachers looking for a more stable work environment could leave the employment of the City's school system for other states or schools districts, or be discouraged from entering the profession in the first instance, diminishing the talent in the labor pool overall.

Plaintiffs ask the courts to constitutionalize one specific aspect of educational policy and to override the considered judgments made by elected officials and educational administrators about how to implement it. Plaintiffs do not allege the kind of injury that the Education Article is meant to address. For this reason, too, their claims should be dismissed.

B. Plaintiffs' Request for the Statewide Tenure Statutes To Be Eliminated or Rewritten Is Unsupported by Their Allegations and Defeated By Their Concessions.

Plaintiffs' claim is without precedent: they contend that the teacher tenure laws—which apply in more or less the same form in every school district across the state—should be invalidated in their entirety (RA45, 52, 69, 1353). Even though plaintiffs do not and cannot speak for all the schoolchildren and educators in this state, they seek to use the courts to impose their particular policy viewpoint on everyone. Moreover, unlike the plaintiffs in *CFE*, plaintiffs here seek to use the Education Article to strike down a statute—or, more precisely, a broad swath of statutes—as unconstitutional. Plaintiffs fail to either provide the factual predicate for this "drastic" remedy or suggest what education policy should be imposed in its stead. *McGee v. Korman*, 70 N.Y.2d 225, 231 (1987).

First, plaintiffs concede that even with the teacher tenure laws as they existed before the 2015 amendments, "the majority of teachers in New York are providing students with a quality education" (R38). Therefore, the mere allegation that some

fraction of teachers underperform and keep their jobs due to tenure protections, and thereby put some students "at risk" of being taught by an underperforming teacher (RA1352), does not show that the statutes are invalid across-the-board. Plaintiffs do not allege that the tenure laws invariably result in students receiving an education below the constitutional minimum, or provide a factual predicate for their assertion that teacher tenure is fundamentally incompatible with a sound education. Their statutory challenge thus fails. *See LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (parties challenging a statute as unconstitutional must establish its "invalidity beyond a reasonable doubt")

Moreover, to the extent that plaintiffs seek some further (and as yet unspecified) remedy—either to require courts to directly intervene in each school's evaluation of their educational personnel or even to direct the Legislature to return to the drawing board to craft something new or different—such a remedy would be neither advisable nor appropriate. Courts are not equipped to examine the benefits of one educational policy over another. In contrast to *CFE*, where the remedy of additional funds

necessarily led to redress of the alleged harm, there is simply no way for courts to fashion a remedy that would appropriately address the harm claimed here or for courts to predict whether a particular remedy or alternative policy would do more good than harm.

C. The Challenge Is Not Ripe In Any Event Because the Tenure Statutes Have Been Amended in Key Ways.

Whatever the contours of plaintiffs' challenge, their claim that the tenure statutes have the effect of leaving ineffective teachers in schools, thereby depriving some students of a basic education, cannot be tested at this time. Simply put, plaintiffs' allegations are directed at a statutory scheme that no longer exists. Because the inevitable impacts of recent statutory reforms are yet to be determined, any challenge to the scheme is not ripe for review.

Indeed, when plaintiffs commenced these actions in 2014, the data underlying their claims were already stale. The great bulk of the allegations in the complaint rely on data predating tenure reforms that were phased in beginning in 2010 (*see* RA39,

1360). The 2010 amendments "led to a substantial drop in the percentage of eligible teachers being approved for tenure" (RA331).[29] But even setting that to one side, given the Legislature's 2015 amendments, plaintiffs' contentions are directed at a statutory scheme that has been fundamentally revised. As described above (*see* Stmt. of the Case, Section D), in 2015, after plaintiffs brought these lawsuits, the Legislature enacted a series of amendments to the tenure laws.

In several ways, the statutory amendments made it harder for teachers to obtain tenure and revised and strengthened statutory standards for teachers accountability. Simply by way of example, the amendments:

- Require teachers to receive a rating of effective or higher in each of the last three years of their probationary period to be eligible for tenure, Educ. Law § 2573(5)(b);

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[29] In bringing these lawsuits, plaintiffs also relied on data having nothing to do with education in New York City in particular (*see* RA46, 1366).

- Reformulate teacher performance reviews to make them more standardized and rigorous, Educ. Law § 3012-d;
- Prohibit students from being taught by ineffective teachers for two consecutive years, Educ. Law § 3012-d(8); and
- Create a presumption that any teacher who receives two ineffective ratings is incompetent and mandating their dismissal, "absent extraordinary circumstances," unless the teacher rebuts the showing by "clear and convincing evidence," Educ. Law § 3020-b(3)(v).

These amendments are undoubtedly significant, and materially alter the way tenure will work in this state in the future. Some of the amendments speak *directly* to plaintiffs' professed concerns. For example, plaintiffs previously attacked teachers' eligibility for tenure after three years of service, citing studies "indicat[ing] that teacher effectiveness is typically established by the fourth year of teaching" (R1363). With the recent amendments, however, teachers in New York City will have

to provide a minimum of four years of service, for at least three of which they must be rated effective, before they will be eligible for tenure. Educ. Law § 2573(1)(a)(ii). The statute is thus now aligned with plaintiffs' previously expressed policy preference.

To be sure, the amendments do not appear to have satisfied plaintiffs, suggesting that their true disagreement is with tenure in any form, regardless of real-world outcomes. But even if their claim could be forced into some kind of Education Law framework, they cannot avoid the fact that it is premature to evaluate the impact that the current tenure framework will have on educational outcomes at this time, especially as many changes will only be phased in over the next several years. Because the effects of these substantial reforms cannot yet be ascertained, it is too early to test their validity or to ask the courts to impose or require any further forward-looking changes to the statutes.

The effect that the current teacher tenure laws will have on educational outcomes is "incomplete and undetermined." *Church of St. Paul v. Barwick*, 67 N.Y.2d 510, 522 (1986). Thus, plaintiffs'

challenge, in addition to its other defects, is unripe. *See State Inspection*, 64 N.Y.2d at 240.

* * *

Judgments about how best to structure a public school system—including how to attract, retain, and evaluate teachers—are entrusted to the political branches. It is those branches that are both constitutionally charged and institutionally suited to weigh policy alternatives and to choose among them, with adjustments for changing circumstances and evolving economic and practical realities. There is ample room for public debate and institutional reform on these subjects, as the ongoing healthy discourse and history of legislative change demonstrates.

We share plaintiffs' desire to improve public education and to ensure that the state's schoolchildren receive not just the minimally adequate education guaranteed by the Constitution, but a robust education that will allow them to fulfill their potential and promote the future of our society. We welcome debate about how to do so: the State Legislature has shown itself

open to the debate, and the City has actively participated in it. The courts should stay their hand.

CONCLUSION

For all these reasons, the order below should be reversed, and these actions should be dismissed.

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March 28, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief was prepared with Microsoft Word 2010, using Century Schoolbook 14 pt. for the body and Century Schoolbook 12 pt. for footnotes. According to the aforementioned processing system, the portions of the brief that must be included in a word count pursuant to 22 N.Y.C.R.R. § 670.10.3(a)(3) contain 7,185 words.