To Be Argued By:
CHARLES G. MOERDLER
(Time Requested: 15 minutes)

New York Supreme Court

Appellate Division—Second Department

App. Div. No. 2015-03922

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, 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,

Plaintiffs-Respondents,

-against-

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,

Intervenor-Defendant-Appellant,

-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,

Intervenors-Defendants-Appellants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants

BRIEF OF INTERVENOR-DEFENDANT – APPELLANT UFT

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RICHMOND COUNTY CLERK'S
INDEX NO. 101105/14

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

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App. Div. No. 2015-03922

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Plaintiffs,

- against -

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,

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Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

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Richmond County
Consolidated Index No. 101105/14

STATEMENT
PURSUANT TO CPLR 5531

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JOHN KEONI WRIGHT; GINET BORRERO; TAUANA GOINS; NINA DOSTER; CARLA WILLIAMS; MONA PRADIA; ANGELES BARRAGAN;

Plaintiffs,

- against –

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York;

Defendants

-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,

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

-and-

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

Intervenor-Defendant.

----------x

1. The index number in the New York Supreme Court, Richmond County for this proceeding is 101105/14.

2. The full names of the original parties and the names are as they appear in the above caption. There has been no change in the parties.

3. This proceeding was commenced by Summons and Amended Complaint, dated July 24, 2014 in the New York Supreme Court, Richmond County, and Summons and Complaint, dated July 28, 2014 in the New York Supreme Court, Albany County.

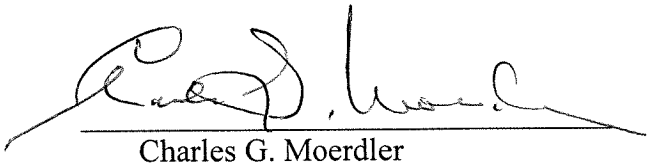
4. This is an action for a declaratory judgment that the challenged statutes under the Education Law are unconstitutional.

5. This appeal is from the Decision and Order of the Supreme Court, Richmond County, dated March 12, 2015, entered in the Office of the Clerk of Richmond County on March 20, 2015, and the Decision and Order of the Supreme Court, Richmond County, dated October 23, 2015, entered in the Office of the Clerk of Richmond County on October 28, 2015. No other appeal is pending in this action.

6. The appeal is being made on a reproduced record.

Dated: New York, New York
March 28, 2016

STROOCK & STROOCK & LAVAN LLP



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The United Federation of Teachers (the "UFT") appeals from two Orders of the Supreme Court, Richmond County (Minardo, J). The first Order, made and entered March 12, 2015, as relevant to this appeal, denied dismissal motions made by the UFT and the remaining Defendants. (R. 17).[1] The second Order, made and entered October 28, 2015, denied the UFT's motion seeking renewal and/or dismissal (and similar motions made by the other Defendants), but stayed all further proceedings pending determination by this Court of all appeals. (R. 954).

PRELIMINARY STATEMENT

Plaintiffs-Appellees ("Plaintiffs") seek injunctive and declaratory relief barring enforcement of various provisions of the Education Law (R. 39, 69),[2] arguing that the Challenged Statutes abridge Article XI of the New York State Constitution—the Education Article. *Id.* The Challenged Statutes include not only those laws providing due process for teachers who have successfully completed years of probation (*i.e.,* those teachers who have earned "tenure") (N.Y. Educ. Law §§ 1102, 2509, 2573, 2590, 2590-j, 3012, 3014, 3020 and 3020-a), but also those involving the evaluation of teachers (N.Y. Educ. Law §3012-c) and the provisions prioritizing teaching experience in the event of a city-wide layoff (N.Y. Educ. Law §§ 2510, 2585, 2588 and 3013) (collectively, the "Challenged Statues").

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[1] References preceded by "R." are to pages of the Record on Appeal served and filed simultaneously herewith by all Defendants.

[2] This action consolidates the amended complaint filed by the *Davids* plaintiffs in Richmond County on July 24, 2014 and a complaint filed by the *Wright* plaintiffs in Albany County, a few days later, on July 28, 2014. The actions were consolidated by Order of the Supreme Court, Richmond County, dated September 18, 2014.

Plaintiffs maintain that the laws that create tenure—which, as discussed below, is nothing more than due process for post-probationary educators—must be completely struck down as unconstitutional because Plaintiffs believe these laws, of themselves, give rise to "...schoolchildren [that] are taught by *ineffective teachers*," "... prevent the removal of *ineffective teachers*, and result in the layoffs of effective teachers in favor of *less-effective*, more senior teachers." (R. 72-73, ¶¶ 24-25) (emphasis added). The issue before the Court is not whether among the hundreds of thousands of teachers in New York State there may, arguably, exist a small number of teachers who might, upon a proper showing, deserve discipline or termination (a reality applicable to lawyers, doctors, public officers and other professions). If true, such discipline or termination is already authorized (and occurring) under existing provisions of law, which are enforceable by individual school districts (*see, e.g.*, N.Y. Educ. Law §§ 2590-j(7), 3020-b, 3020(4a) and 3012-c(5a)). To the extent Plaintiffs believe it is not occurring, or not occurring with sufficient rigor, Article 78 provides the proper vehicle for challenges to localities who omit to enforce such claims. *N.Y. Civ. Liberties Union v. State*, 4 N.Y.3d 175, 183-84 (2005). But plaintiffs have not brought such an Article 78 claim. Instead, they challenge as unconstitutional a series of laws that expressly state a teacher (after being accorded due process) can be fired if just cause is found.

Plaintiffs' argument is replete with gaps in logic. The crux of their claim is that (i) students are not doing well (in some districts), (ii) the only possible cause for this alleged failure is the students' teachers, and (iii) the only possible reason that teachers are not providing an adequate education is that post-probationary teachers are accorded due process under the Challenged Statutes. Based on this questionable trail of assumptions, which, even assuming it is justiciable, fails to meet the causation requirement for an Education Article pleading (*see, infra,* pp. 37-39), Plaintiffs ask this Court to invalidate due process even though the Legislature has made the determination, repeatedly upheld by the Court of Appeals, that due process for teachers ultimately benefits students and is a cornerstone of the education system.

First, and perhaps most revealing of the quicksand on which Plaintiffs' entire thesis rests, is that the validity of the tests and resultant scores on which Plaintiffs rely purportedly to demonstrate that students are not doing well in some districts, has been called into question by the Legislature, the experts at the Board of Regents and by educational scholars convened by the Governor to examine underlying educational issues. The lynchpin of Plaintiffs' claims is typified by paragraph 41 of the Wright Amended Complaint in which Plaintiffs seem to claim that students must not be receiving a quality education if "only 31% of students taking the English Language Arts and Math standardized tests meet the standard for proficiency." (R. 77). However, this argument has now been revealed as

unfounded, for 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. Indeed, the State Board of Regents has determined to stay *enforcement of the test result-teacher evaluation metric.* (Rules of the Board of Regents, § 30-2.14).

Moreover, the Common Core standards themselves, on which these tests are based, have also been found to be deficient and the implementation has been similarly suspended by the State—both because the standards were not educationally sound for certain students and because teachers had neither the training nor the curriculum to teach students the material. The Court need not take the UFT's word for this; it need only take judicial notice of the conclusions of the Governor's Task Force on the Common Core which included, among others, the Commissioner of the New York State Education Department, the Chair of the Senate Education Committee, the Chair of the Assembly Education Committee, the executive director of the New York State School Board Association, a superintendent, a principal, the President of the District Parent Coordinating Council of Buffalo and a Rochester area parent. (*New York Common Core Task Force, Final Report* ("Task Force Report"), Appendix A. Biographies of Task

Force Members).[3] The Task Force found the tests wholly inadequate in a variety of respects and proposed an overhaul of the very tests upon which Plaintiffs rely, specifically recommending, among other sweeping measures,

> Until the new system is fully phased in, the results from assessments aligned to the current Common Core Standards, as well as the updated standards, shall only be advisory *and not be used to evaluate the performance of individual teachers or students.*

Id. (Emphasis added).

On December 14, 2015, following the Task Force recommendations, and as part of an ongoing legislative and executive branch process, the Board of Regents *prohibited the use of the very tests Plaintiffs cite in the evaluation of teachers* (Rules of the Board of Regents, § 30-2.14) (the Legislature had already banned the inclusion of the tests in students' permanent records and the use of the tests in grade promotion decisions for students) (N.Y. Educ. Law § 305(47)). If the educational experts who formulated, espoused and administered those tests cannot now endorse their validity, how can it be said that the Judiciary is the proper forum for resolution of such thorny policy issues and ought to use this data in its determination, particularly when student testing and teacher evaluation is currently the subject of ongoing rigorous debate and change?

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[3] Available at: https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NewYorkCommonCoreTaskForceFinalReport2015.pdf.

Second, assuming, *arguendo,* that the assumption students are not learning has merit, Plaintiffs make the unsupported leap that this alleged lack of learning is largely attributable to teachers based on nothing more than an outdated, non-scientific survey (which happens to exclude data from New York City). Plaintiffs argue that the effectiveness of teachers is not properly measured by the system set forth in the Education Law (as modified on multiple occasions in the last few years) because, in their view, not enough teachers have been rated ineffective. (*Id.* at R. 47, ¶¶ 40-41). They, again, reach this conclusion based on student performance on State Common Core test results. The reasoning is entirely invalid.

Initially, that broad brush calculus ignores the host of other influences that shape students' performance on standardized tests, *e.g.*, the basic validity (or invalidity) of the tests, overcrowded classrooms, lack of funding, poverty, assessment of students for whom standardized tests may be inappropriate, and other societal considerations that limit performance on standardized assessments. The existence of these myriad influences is why the Education Article does not, under any plain reading, establish that policy issues, such as how to measure student and teacher performance, are properly ones for the Judiciary. Indeed, the Education Article, recognizing the complex and political nature of the concerns, expressly vests responsibility in the Legislature (N.Y. Const., Article XI, Section 1) and that body, understanding the need for expertise, has vested initial responsibility in the State Board of Regents (N.Y. Educ. Law § 101). Nonetheless,

Plaintiffs would have this Court step inside the classroom and measure teacher effectiveness, a role clearly outside the scope of judicial competency.

Third, Plaintiffs allege that since 2007 a significant number of teachers were awarded tenure or had their probationary periods extended, while "only 3% of tenure-eligible were denied tenure outright," and that, of itself, "...indicate[s] that most ineffective teachers are not denied tenure." (*Id.* at ¶ 37; *see*, R. 76). The non sequitur is obvious and unavailing. Even assuming, *arguendo*, this is true, many teachers are dismissed, counseled out or otherwise leave voluntarily during the probationary period and before earning tenure, while many others have their probationary period extended to further evaluate whether the granting or denying of tenure is appropriate. This, of course, is precisely the point of the probationary period and why Plaintiffs argued it should be longer.

In fact, it is because the probationary period serves this purpose that Plaintiffs' next challenge to tenure, grounded on the length of the probationary period is unfounded. The Legislature has now mooted that argument by mandating a four-year probationary period for most new hires (which Plaintiffs advocated).[4] Among the other changes the Legislature has made that moots this lawsuit since it was filed, was to *require* most newly hired teachers to achieve *three* year-end overall "effective" ratings in order to earn tenure. It is not surprising then that, even before this change, Plaintiffs were forced to acknowledge in their pleading

[4] N.Y. Educ. Law §§ 2509 and 2573.

that "[the] majority of teachers are providing students with a quality education." (*Davids Compl.* at ¶ 4, R. 36). That Plaintiffs continued to press the point below on renewal (and likely will continue to press it now on appeal) despite the legislative change only underscores the political nature of their policy preference for a return to the tenure-free school system that existed a century ago and which the Court of Appeals roundly condemned in *Callahan v. Bd. of Educ. of City of N.Y.,* 174 N.Y. 169, 177-78 (1903), and its progeny. *See Mtr. of Leggio v. Oglesby,* 69 A.D.2d 446, 448-449 (2d Dept. 1979); *see also Matter of Ward v. Nyquist,* 43 N.Y.2d 57, 62-63 (1977), citing *Matter of Lynch v. Nyquist,* 41 A.D.2d 363 (3d Dept. 1973), *aff'd* 34 N.Y.2d 588 (1974).

Student performance on deeply flawed tests is not evidence that students are not learning; and, even if students are not learning, Plaintiffs have not factually alleged how the Challenge Statutes in any way *cause* this purported failure, particularly given the myriad factors that impact student learning (*e.g.*, class size, funding and resources). Repeated Court of Appeals determinations sustaining tenure and seniority may not be cast aside based on the flimsy (if not entirely repudiated) arguments and data advanced.

Finally, as a seeming afterthought, Plaintiffs urge that, in the event of hypothetical layoffs, established and politically neutral seniority principles should be cast aside, inevitably inviting favoritism as an alternative. Plaintiffs theorize that seniority "result[s] in the layoffs of effective teachers in favor of *less-effective*,

more senior teachers." (R. 72-73). This thesis, too, rests on logical quicksand-the unfounded and unsupported speculation that those teachers new to the profession are by their nature somehow more effective than experienced ones who have honed their craft. Based on that fundamentally flawed *ipse dixit*, and the mistaken speculation that wholesale layoffs are imminent or inevitable, Plaintiffs allege that the seniority system coupled with tenure preserves ineffective teachers. Of course, no layoffs have occurred in New York City for decades. Thus, the Plaintiffs' position is nothing more than meaningless rhetoric. Plaintiffs have alleged only their political beliefs and opinions, not credible *facts*, about whether the seniority system compels administrators to keep ineffective teachers.

Even as to their entirely political arguments, there is no credible support—and none is offered—for the counterintuitive notion that experience is of no value and, indeed, that lack of experience ensures more effective teachers. The underlying seniority precepts have been squarely sustained as a valid, non-biased indicator of effectiveness by this Court and other appellate tribunals. *See Mtr. of Leggio v. Oglesby,* 69 A.D.2d 446, 448-449 (2d Dept. 1979); *see also Matter of Ward v. Nyquist,* 43 N.Y.2d 57, 62-63 (1977), citing *Matter of Lynch v. Nyquist,* 41 A.D.2d 363 (3d Dept. 1973), *aff'd* 34 N.Y.2d 588 (1974).

Put simply, Plaintiffs cannot and have not pled that the laws they challenge cause students to receive a constitutionally inadequate education. Instead, what they have alleged is, at best, a non-justiciable policy question, one not actionable

under the Education Article, and one for which they lack standing to sue. Moreover, the legislative and executive branch actions taken subsequent to the initial order below have mooted Plaintiffs' claims.

QUESTIONS PRESENTED

1. Did the Supreme Court err in denying the UFT's motion to dismiss Plaintiffs' amended complaint alleging New York State Education Law §§ 1102, 2509, 2510, 2573, 2585, 2588, 2590, 2590(j), 3012, 3012-c, 3013, 3014, 3020 and 3020-a violate students' rights under the Education Article (Article XI, § 1) of the New York State Constitution?

   Yes. The amended complaints should have been dismissed as (i) non-justiciable, (ii) for alleging non-applicable Education Article claims; (iii) for failing to state a constitutional claim under the Education Article; (iv) because they are not ripe; and (v) because Plaintiffs lack standing to sue.

ARGUMENT

POINT I

PLAINTIFFS' FACIAL CHALLENGE TO TENURE LACKS MERIT

Neither the motion court nor the Plaintiffs have squarely addressed the issue of whether the Complaints present a "facial" or "as-applied" attack on the Challenged Statutes. Tucked into a footnote in their opposition below to Defendants' motions to dismiss, Plaintiffs assert that their constitutional claim is an "as-applied" one, recognizing, as they must, that the statute *is* regularly applied in an indisputably constitutional manner. (R. 1120). Yet, Plaintiffs seek the facial invalidation of the entire statutory scheme as unconstitutional. The motion court and Plaintiffs have not (and cannot) explain or justify the appropriateness of declaratory relief that provides for the wholesale invalidation of the entire, longstanding statute as contrasted with remedial relief (assuming, *arguendo*, that any relief is warranted) that simply ensures that the facially constitutional laws are properly enforced at the local level (if, indeed, they are not). Thus, despite their attempts to mischaracterize it differently (and the motion court's decision not to address it), Plaintiffs' pleadings amount to a facial challenge to the comprehensive statutory tenure system.

It is well established that courts disfavor a facial challenge—one which, as here, argues that the claimed statute is unconstitutional on its face and requires no

reference to the manner in which the challenged statute is applied nor can any corrective action as to the manner of application suffice to cure the infirmity:

> ...as was recently reiterated by the [U.S.] Supreme Court...[A] plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.,* that the law is unconstitutional in all of its applications.... Since legislative enactments enjoy a strong presumption of constitutionality ... parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt. Moreover, courts must avoid if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional.

Amazon.com, LLC v. New York State Dept. of Taxation and Finance, 81 A.D.3d 183, 194 (1st Dept. 2010), *affirmed sub nom, Overstock.com, Inc. v. New York State Dept. of Taxation and Finance*, 20 N.Y.3d 586 (2013), *cert. denied*, 134 S.Ct. 682 (2013) (internal citations and quotations omitted); *see also U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (holding 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 valid, *i.e.*, that the law is unconstitutional in all of its applications."); *Lavalle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (holding courts "must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional").

Thus, a plaintiff alleging that a statute is unconstitutional bears a heavy burden even at the pleading stage. Such a claim requires an allegation that there

exists no rational basis for the challenged laws, *People v. Knox*, 12 N.Y.3d 60, 67 (2009), and that the laws "as written" (rather than "as administered") are unconstitutional. *Benson Reality Corp. v. Beame*, 50 N.Y.2d 994, 996 (1980). Plaintiffs have not (and cannot) allege sufficient facts to make such a showing. Tenure is not only rationally founded, but has been determined by the Court of Appeals to be a *crucial* cornerstone of New York's education system for over a century. *See. e.g., Callahan, supra,* 174 N.Y. at 177-8.

Tenure is a much misunderstood concept and often misused term. It does not, as Plaintiffs claim, provide "permanent employment" *regardless of competence* (*e.g.*, R. 72-73, ¶¶ 24-25). Instead, in the words of the relevant statutes, tenure is dependent upon continuing *"good behavior and efficient and competent service."* *See, e.g.*, N.Y. Educ. Law § 2573. Tenure does not diminish one iota the force of disciplinary statutes that permit discharge or other penalty where shown to be warranted. (*See, e.g.*, N.Y. Educ. Law §§ 2590-j(7), 3020-b, 3020(4a) and 3012-c(5a)). The laws challenged simply accord post-probationary teachers due process—notice of the charges leveled and an impartial just cause hearing before dismissal.

Tenure is not a gift to teachers. Rather, tenure enables teachers to grade papers honestly, differentiate instruction for students who need accommodation, speak out for the needs of children, teach controversial subjects and blow the whistle on corruption and poor practices. As the Court of Appeals has explained,

tenure does not simply afford due process to post-probationary teachers, it inures to the benefit of *students* by insulating their educators from the political influence that have been otherwise historically evidenced:

> [T]he purpose [of tenure] ... was to get the best work from all teachers by assuring them of safety and protection, without resort to outside influence, so long as they maintain a high standard of conduct and efficiency, and authorizing their removal if they fall below it. This construction is in harmony with the theory of appointment under the rules of the civil service... .

Callahan, 174 N.Y. at 177-78. New York's highest court has made this clear again and again:

> [Tenure is] a legislative expression of a firm public policy determination that the interests of the public in the education of our youth can best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors.

Ricca v. Bd. of Educ., City School Dist. of City of N.Y., 47 N.Y.2d 385, 391 (1979). Consistent with that statement:

> In establishing that the tenure system is to be viewed "broadly in favor of the teacher," we made clear in *Ricca* that "[e]ven 'good-faith' violations of the tenure system must be forbidden, lest the entire edifice crumble from the cumulative effect of numerous well-intentioned exceptions" (internal citations omitted).

Speichler v. Bd. of Co-op. Educ. Services, Second Supervisory Dist., 90 N.Y.2d 110, 117 (1997).

Due process allows dedicated, high quality teachers to know that they can work without fear of unwarranted repercussions. Kahlenberg, Richard D., "*Tenure, How Due Process Protects Teachers and Students.*" AMERICAN EDUCATOR, 39.2 (2015). This is particularly true in today's politically charged climate where teachers are under heightened scrutiny and critique. Absent tenure, influence from administrators can jeopardize, if not negate, the ability of teachers to teach appropriately. *Id.* Exposing students to both sides of controversial subjects would become a risky proposition. *Id.* Speaking out about the needs of a student would, likewise, become dangerous. Even grading or disciplining students could become perilous given the tremendous consequences that are in place for schools and supervisors that have low test scores or other issues.

Indeed, it merits note that since 2008, teacher ranks have diminished and the pace of retirements has put a strain in school districts trying to fill teaching positions. Spector, Joseph, *NY's Teacher Ranks Continue to Plummet,* THE JOURNAL NEWS, Feb. 15, 2016. Indeed, the number of public classroom teachers has fallen by 8% over the past 10 years. Clukey, Keshia, *As Shortage Looms, State Rethinks How It Recruits and Treats Its Teachers*, POLITICO, March 7, 2016. With 33% of the State's teaching force nearing retirement age, and a continuing decrease in those attending college to become teachers, New York's teacher shortage may soon become a crisis. *Id.* Given this exceedingly challenging atmosphere, it is no

wonder that the Legislature has adopted laws requiring due process for post-probationary teachers.

Thus, the Court of Appeals, as well as this Court, have left no doubt that tenure is an essential foundation of New York's system of free public school education as mandated by Article XI of the State Constitution—the Education Article.[5]

POINT II

THIS CASE PRESENTS A NON-JUSTICIABLE POLICY OR POLITICAL QUESTION

The threshold question that a court must ask itself at the inception of any litigation is whether the issues presented are justiciable, that is whether they are properly ones for judicial resolution. *See The Soc. of the Plastics Indus., Inc., v. County of Suffolk,* 77 N.Y. 2d 761, 769 (1991). The courts have answered that question to exclude precisely the educational policy claims asserted here. Early on courts recognized that "[c]ases that have presented non justiciable controversies involve political questions, advisory opinions, moot issues and those where there is no standing to maintain an action." *Flast v. Cohen,* 392 U.S. 83 (1968). A court should "abstain from venturing into areas if it is ill-equipped to undertake the

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[5] *See also Matter of Abramovich v. Bd. of Educ. of Cent. School Dist.*, 46 N.Y.2d 450, 455 (1979); *Holt v. Bd. of Educ., Wetbutuck Cent. Sch Dist.*, 52 N.Y.2d 625, 632 (1981). *See also Boyd v. Collins*, 11 N.Y.2d 228, 232 (1962); *Matter of Sanders v. Bd. of Educ. of City School Dist. of City of New York*, 17 A.D.3d 682 (2d Dept. 2005); *Matter of Kobylski v. Agone*, 37 Misc.2d 255 (Sup. Ct. Broome Cty. 1962), *aff'd*, 19 A.D.2d 761 (3d Dept. 1963).

responsibility and other branches are far more suited to the task." *Jones v. Beame,* 45 N.Y.2d 402, 409 (1978). Succinctly stated,

> [the courts] review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy.

Roberts v. Health and Hosp. Corp., 87 A.D.3d 311, 321-325 (1st Dept.) (footnotes omitted), *leave den.,*17 N.Y.3d 717 (2011).

A. The Motion Court Erred In Confusing Justiciability With Jurisdiction

The motion court improperly confused justiciability with jurisdiction. Instead of ruling on whether the claims alleged by Plaintiffs were justiciable, the motion court concluded that "... the matter before it [is] justiciable since a declaratory judgment action is well suited to, *e.g.*, interpret and safeguard constitutional rights and review the acts of other branches of government...." (R. 31). But, jurisdiction and the aptness of a declaratory judgment action as a procedural matter is not the issue and was not contested. To quote the Court of Appeals, "...even apart from principles of subject matter jurisdiction, [the courts] will abstain from venturing into areas if it is ill-equipped to undertake the responsibility...." *See Roberts*, 87 A.D.3d at 323 (quoting *Jones,* 45 N.Y.2d at 408-09); *see also Matter of N.Y.S. Inspection Sec. & Law Enforcement Empls. v. Cuomo,* 64 N.Y.2d 233, 239-40 (1984) ("While it is within the power of the Judiciary to declare the vested rights of a specifically protected class of individuals,...the manner by which the State addresses complex societal and

governmental issues is a subject left to the discretion of the political branches of government.") (citations omitted). The motion court's underlying error resulted in its omission to address the fundamental issue, "...the responsibility of determining whether a matter falls within the purview of another branch of government...." *Roberts,* 87 A.D.3d at 322.

Had the court undertaken this analysis, it would have recognized that the *Davids* and *Wright* Complaints are examples of lobbying under the guise of litigation, an attempt to force educational policy change (the proper province of the legislative and executive branches) by using the Judiciary to force the adoption of the so-called "reforms" they have been unable to press upon the political branches.

At bottom, Plaintiffs disagree with due process for teachers—tenure—as a political policy. Though educational excellence—a cause to which the UFT has continually devoted its energies—is not singular in its needs, Plaintiffs are singularly focused. They are dissatisfied with the purported number of teachers being dismissed for being what they characterize (but studiously avoid defining) as "ineffective."[6] Plaintiffs are entitled to their political view, albeit misguided, that the basic due process protections of tenure are to blame for all that ails New York State's educational system. But New York's guarantee of a "sound basic education" does not constitutionalize every disagreement with our State's

[6] Does the existence of a few inept law enforcement officials or the continued existence of crime equate with forcing those in law enforcement to now become at will employees or privatizing law enforcement, a patently absurd concept, yet one not so different from that urged by Plaintiffs?

education policy. Instead, it mandates that "minimally acceptable educational services and facilities" be provided. *Campaign for Fiscal Equity v. New York,* 86 N.Y.2d 307, 316 (1995) ("*CFE I*").

With respect to teachers and teaching, the Constitution, at most, requires the State to provide the teaching of reasonably up-to-date basic curricula by "sufficient personnel adequately trained." *Id.* at 317. While the UFT, of course, strives for excellence in its teaching force, such goal exceeds the constitutional mandate this Court is bound to enforce. The focus, from a constitutional perspective, is on the funding of the system as a whole, not on the particulars of policy or pedagogy or a purported ineffective teacher. The space between the State's provision of the minimal guarantee under the State Constitution and the highest quality education that every child deserves is filled with political and policy decisions and actions at every level, from the Executive, to the Legislative, to the State Education Department, school districts and even individual schools. The Education Article was never meant to be an invitation for the Judiciary to enter and then evaluate the classroom experience. *See Bd. of Educ. v. Nyquist*, 83 A.D.2d 217 (2d Dept. 1981) (finding the educational funding controversy justiciable under the Education Article because it did not require the judiciary to "interject itself into the day-to-day administration of the school system or educational policy."). The Court of Appeals has astutely left these type of in-classroom issues to "people with a community of interest and tradition of acting together to govern themselves," so

that they may make the "basic decisions" on "operating their own schools." *Paynter v. State of New York,* 100 N.Y.2d 434, 442 (2003). It has further ruled that judicial challenges to specific acts of omission or commission by those charged with educating our children and with disciplining ineffective educators lies exclusively in distinct proceedings under CPLR Art. 78. *N.Y. Civ. Liberties Union*, 4 N.Y.2d at 183-84.

Indeed, the historical aim of the Education Article was to preserve an established system of common schools, not to "alter its substance." *Paynter,* 100 N.Y.2d at 442. As the Court of Appeals held in *CFE I,* the constitutionality of particular levels of education funding to the overall system is a proper matter for consideration by the courts. However, as *Paynter* and *N.Y. Civ. Liberties Union* demonstrate, that does not equate with unbridled judicial interdiction in all aspects of education, much less the specific methods of educating our children and evaluating our teachers. The Judiciary must maintain a "disciplined perception of the proper role of the courts in the resolution of our State's educational problems." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 49 (1982). After all, the same constitution that guarantees a "sound basic education" to New York's school children also vests the exclusive responsibility for the maintenance and support of a system of free common schools in the Legislature and in the Executive. N.Y. Const. art XI, § 1. Moreover, recognizing the need for expertise in this complex arena, the Legislature has clearly prescribed that the Regents "shall

exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education." N.Y. Educ. Law § 207.

The separation of powers sensitivities that underpin the non-justiciability doctrine are heightened where the political branches actively engage in what they believe to be considered, good-faith reform. *Hussein v. State*, 19 N.Y.3d 899, 911 (2012) (Reed, J., *dissenting*). That is particularly so where, as here, a truly effective reform must focus holistically on the multi-faceted matters facing our educational system—that is, issues of underlying inadequate funding, class size, poverty and the like that have been shown to have a direct impact on student achievement. Perhaps that is why the Court of Appeals has recognized that "aggregate statistics" and allegations of "academic failure alone" do not suffice for an Education Article claim. *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 180-82; *Paynter*, 100 N.Y.2d at 441.

The legislative and executive branches in New York are now actively engaged in education policy-making. The Legislature has prescribed a new set of requirements regarding teacher probation, evaluation, discipline and dismissal, many of which necessitated application of pedagogical expertise by the executive branch through the State Department of Education ("SED") prior to implementation and that continue to require the application of such expertise. L.

2015, Ch. 56 (the "Budget Bill," a copy of relevant portions of which can be found at R. 1290-1336). That Plaintiffs disagree with the wisdom of the legislation or even that they may lack confidence in the abilities of the SED Commissioner does not create a constitutional question. To the contrary, it reinforces the point that the judicial process is being used as a platform to espouse a political cause. Whatever its merit, it does not rise to a justiciable controversy, much less warrant judicial interdiction in the functions properly and historically exercised by the legislative and executive branches.

Moreover, the Legislature has concluded that, in the event of district-wide layoffs, a preference should, as a matter of public policy, be extended to more experienced teachers. Whenever a teaching position is abolished—that is, when there is a decision by the district to eliminate one or more teaching positions—teachers with the most experience in the school district in a particular license area are laid off last. N.Y. Educ. Law §2588(3)(a). Thus, in New York City, if the Department of Education decides it has to lay off 20 high school biology teachers, layoffs will proceed in order of reverse seniority, with less experienced teachers being laid off before more experienced teachers. Plaintiffs argue that this legislative policy choice and the judicial precedents that support it should be eliminated as they allegedly sacrifice "effective," less experienced teachers in favor of purportedly "ineffective" experienced teachers. (R. 85-87, *Wright Compl.* ¶¶ 66-76; R. 47-49, *Davids Am. Compl.* ¶¶ 44-51). With the Legislature's

enactment of a four-year probationary period (N.Y. Educ. Law §§ 2509 and 2573), on the theory that more experience helps determine effectiveness (a point advocated by Plaintiffs, R. 76, *Wright Compl.* ¶ 38), together with the legislative presumption that teachers who are rated as ineffective should be removed (N.Y. Educ. Law §3020) there exists a process ensuring that only high quality teachers remain in the classroom. Thus, Plaintiffs' argument that the seniority statutes protect ineffective teachers rings hollow. More to the point, Plaintiffs' position has been the subject of continuing legislative debate, but the Legislature has declined to adopt it for a variety of valid public policy reasons, including the benefits of retaining more experienced teachers and the need to have a non-discriminatory basis for conducting no-fault layoffs.

Indeed, the Legislature has considered, but never passed, repealed or changed the historic seniority statutory policy of retaining experienced teachers during district-wide layoffs. Senate Bill 3501-B/2012 would have eliminated the so-called "last in, first out" rule and required that other factors (including student performance on flawed Common Core assessments and the teacher evaluations that Plaintiffs repudiate) be considered. The bill passed in the Senate but died in the Assembly in 2012. There also have been a number of other bills in the Legislature that would further alter the Challenged Statutes *See, e.g.*, A9626 (March 2016); A9461 (March 2016); A9336 (February 2016); A8192 (January 2016); A7663 (January 2016). They have not been enacted, and often for good reason.

Unsuccessful in Albany, Plaintiffs seek to bypass the Legislature and turn the Judiciary into a substitute body. That is patently inappropriate.

Finally, and crucially, such seniority provisions are only triggered by district-wide layoffs. Not only is there no indication that New York City is contemplating any district-wide layoffs that would trigger these seniority provisions, but Plaintiffs chose not to make any such claim in their pleadings. In fact, New York City has not "abolished" teacher positions since the 1970's. Thus, even if justiciable, Plaintiffs' claims are premature. *See, e.g., Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 522-523 (1986) ("How much, if any, of plaintiff's rebuilding program will be thwarted and whether and to what extent it will suffer resultant constitutional harm cannot be known until the Commission acts on plaintiff's request for approval of its plans.").

Plaintiffs cite approvingly to the Court of Appeals in the *CFE* cases. Importantly, however, the Education Article was not construed in *CFE* nor has it ever been construed as including within the courts proper purview what makes for an "effective" teacher, the terms and conditions of employment for teachers, how long it should take to evaluate teacher performance for tenure status, or what makes for the optimal method of terminating teachers during district-wide layoffs. These are not judicial issues. They are the type of "subjective, unverifiable educational policy making...unreviewable on any principled basis, which was

anathema to the [Court of Appeals]" in the seminal *Levittown* decision. *CFE I,* 86 N.Y.2d at 332 (Levine, J., *concurring*).

The UFT emphasized on its motion to dismiss in the court below that creating a cohesive system that combines the longstanding benefit to the public of due process for teachers with a fair and valid teacher evaluation system in the classrooms is precisely the type of "practical and politically complex" question that the Legislature has been trying to address and a question upon which the Court, with respect, should be hesitant to intrude. The recently enacted Budget Bill confirms this. It reflects that, right or wrong, the Legislature—expressly charged under the Education Article with responsibility for action in this arena—and the Executive had concluded that a series of changes were warranted and that other proposed changes were not. There had been prior extensive deliberation among executive branch officials, legislators, State Education Department personnel, educational policy experts and union representatives on the teacher evaluation law (N.Y. Educ. Law § 3012-c), and there now will be continuing discussions with these same groups on the meaning and implementation of the Budget Bill. The proper forum for these discussions is the Legislature, where an effective solution can focus and act more globally—that is the underlying inadequate funding, class size, poverty and the like. It is precisely the debate and political question that the executive and legislative branches are meant to address (*i.e.*, "issues of enormous practical and political complexity" that should be "largely left to the interplay of

the interests and forces involved...in the arenas of legislative and executive activity." *Levittown,* 57 N.Y.2d at 49, n. 9).

B. The Complaints Have Been Mooted By Legislative Action

Mootness is another branch of the justiciability question and one that favors judicial abstention in this case. *Roberts,* 87 A.D.3d at 321. On April 1, 2015, after the motion court's decision on Defendants' initial motions to dismiss, the Legislature, pressed by the Governor, enacted the Budget Bill (which the Governor promptly signed) that included not only substantial changes to the statutory scheme challenged herein by Plaintiffs, but also reflected a decision, in the course of legislative deliberation, to limit the changes it would make in other parts of the Challenged Statutes. Specific illustrations of the material changes enacted by the Budget Bill are detailed at R. 1285-86. To illustrate, Plaintiffs railed below against the sufficiency of a three-year probation period and had urged it be four years. After considerable debate, the probationary period was changed to four years for most new hires.

The State Defendants maintained below—and urge here—that these actions of the Legislature warrant dismissal of the present claims, a conclusion to which the UFT subscribes. The comprehensive changes to the Challenged Statutes, whether good or bad, emphasize the political nature of the claims asserted by Plaintiffs and have rendered the controversy moot. Simply stated, Plaintiffs' Amended Complaints challenge the constitutionality of a statutory scheme that is

no longer law. *See Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980). The Challenged Statutes, with limited exceptions, have been either directly amended by the Budget Bill, significantly impacted in their implementation, or considered and rejected by the Legislature. Even accepting, *arguendo*, Plaintiffs' claim that somehow poor student performance can be discerned from the Common Core assessments and that it is attributable to ineffective teachers who are retained solely as a result of tenure and seniority, Plaintiffs have not pled, nor can they, that this occurred under the *current* statutory regime, which includes a longer probationary period, a newly revised teacher evaluation system, and new standards for teacher disciplinary hearings.

The Budget Bill and the Legislature's continuing efforts focused on the very issues raised herein reaffirms that the Court should not accept Plaintiffs' invitation to embroil itself in the entirely political and pedagogical policy question of who is an effective teacher and how to address the handful that are not.

Indeed, as noted previously, the point has even more recently been underscored. In 2014, the Legislature banned the use of the tests based on the Common Core—the underlying premise of Plaintiffs' claims—in student promotional decisions and prohibited the inclusion of the test scores in a student's permanent record. N.Y. Educ. Law § 305(47) Then, following review in 2015 by the Governor's Task Force on the Common Core (a body comprised of legislative and executive branch representatives, experts and stakeholders), the very same

tests were found deficient and the Board of Regents has now concluded that, until a new "system" is phased in they shall only be advisory *and not be used to evaluate the performance of individual teachers.* (Rules of the Board of Regents, § 30-2.14). Whatever merit to Plaintiffs' claims could, arguably, be said to have survived the legislative overhaul of the challenged statutory scheme, it evaporated when the tests that are the cornerstone of their claims were found deficient and their value negated by the Board of Regents.

POINT III

THE EDUCATION ARTICLE DOES NOT APPLY

The *sole* basis of this action is the Education Article—Article XI of the New York State Constitution. Both Complaints are founded on its alleged abridgment. (R. 39, Davids Am. Compl. ¶ 7; R. 69, Wright Compl. ¶ 6.) The Education Article, however, is inapplicable here and, as a result, dismissal must follow.

A. The Constitution Requires The Provision Of A Sound Basic Education In A System Of Schools

Article XI of the New York Constitution, as relevant, provides that:

> 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.

The Education Article was adopted "when there were more than 11,000 local school districts in the State ... offering disparate educational opportunities." *Levittown*, 57 N.Y.2d at 47. It was not intended to be all-encompassing or to

ensure educational equality throughout the State, but rather to establish a "State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of *instruction then in existence*." *Id.* at 47 (emphasis added). As Judge Levine observed, the primary aim of the provision was to constitutionalize the established system of common schools rather than to alter its substance:

> Instead, the evident purpose of [the Education Article] was to deprive the legislature of discretion in relation to the establishment and maintenance of common schools, and to impose on that body the absolute duty to provide a general system of common schools.

Reform Educ. Fin. Inequities Today v. Cuomo, 86 N.Y.2d 279, 284 (1995) (quoting 3 Lincoln, Constitutional History of New York at 554); *see also 5 Revised Record of the Const. Convention of the State of New York, May 8, 1894 to September 29, 1894*, Document 62 ("Report of the Committee on Education and the Funds Pertaining Thereto").

The Court of Appeals has definitively established that the parameters of the Article XI guarantee of a "sound basic education" are not open-ended. Instead, they are designed to assure "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civil participants capable of voting and serving on a jury." *CFE I*, 86 N.Y.2d at 316. Similarly, as more recently stated by the Court of Appeals, in affirming the dismissal of a complaint charging abridgment of the Education Article:

> To embrace plaintiffs' theory that the State is responsible for the demographic makeup of every school district, moreover, would be to subvert the important role of local control and participation in education.... While we concluded in *CFE I* that the Article creates a right to adequate instruction and facilities-*which may entail a duty on the State's part to provide funding* sufficient to bring the educational inputs locally available up to a minimum standard-the State action necessary to ensure such a right does not "alter the substance" of the established system to anything like the same degree as the remedies that would follow from plaintiffs' theory of their case. That theory has no relation to the discernible objectives of the *Education Article*.

Paynter, 100 N.Y.2d at 442 (emphasis added). As was the case in *N.Y. Civ. Liberties Union*, dismissal must follow here because "[a]t bottom, plaintiffs' claim is not premised on any alleged failure of the State to provide 'resources'—financial or otherwise—but seeks to charge the State with the responsibility to determine the causes of the schools' inadequacies and devise a plan to remedy them." 4 N.Y.3d at 180. Even worse, here, Plaintiffs seek to require the Court to measure the effectiveness of every teacher, to establish a "one size fits all" standard for such measurement (*e.g.,* what value does a math score have in determining the fitness of a gym or music teacher?) and to evaluate the adequacy of teaching and student learning in all of New York State and, to accomplish this, have the Court strike down decades-old laws.

The constitutional requirement that the State provide a "sound basic education" to public school students thus has a clear historical and substantive

premise that has been carefully defined and refined by the Court of Appeals. *Id.* at 179; *Paynter*, 100 N.Y.2d at 440-424; *Campaign for Fiscal Equity v. State of New York,* 100 N.Y.2d 893, 905-08 (2003) ("*CFE II*"); *CFE I*, 86 N.Y.2d at 315-16; *Levittown*, 57 N.Y.2d at 47-48. It is, in sum, a system-oriented mandate that requires the State to assure funding and other resources sufficient to maintain a system that is locally administered and driven. *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 179; *Paynter*, 100 N.Y.2d at 440-42; *CFE II,* 100 N.Y.2d at 905-08; *CFE I*, 86 N.Y.2d at 315-16; *Levittown*, 57 N.Y.2d at 47-48.

The allegations in this proceeding come nowhere near the threshold requirements for a cognizable claim under the Education Article. Allegations of what the courts have termed "academic failure[s]," even if true, do not suffice. *Paynter,* 100 N.Y.2d at 441. Indeed, there is no claim in either the *Wright* or *Davids* Complaints (much less the requisite factual predicate showing) of a system-wide failing violative of the Education Article—*i.e.*, that all or even a majority of teachers in the system as a whole or even in any district are ineffective; without more, that void mandates dismissal of the Complaints. *See N.Y. Civ. Liberties Union,* 4 N.Y.3d at 178-79. Instead, Plaintiffs invoke the Education Article based on little more than a handful of repudiated statistics (*e.g.,* the recently invalidated 2013 grade 3-8 English Language Arts and Mathematic State Assessment scores), inconclusive anecdotes (*e.g.,* a three-paragraph description of two students who progressed at different levels), and bald conclusory argument (*e.g.*, alleging,

without support, that there are "tens of thousands" of public school students with ineffective teachers), rather than factual allegations. The Education Article was never meant to be utilized in this fashion.

B. Article XI Of The Constitution Has Only Been Applied To School Funding Cases

The Court of Appeals has never sustained the validity of a challenge such as here mounted. To the contrary, the *only* successful challenges under the Education Article that have ever been recognized by the Court of Appeals are those involving the Legislature's failure to adequately fund or provide sufficient resources and supports, financial or otherwise, to schools. Attempts to expand the scope of challenge have been rejected.

Of the decisions rendered by the Court of Appeals addressing the cognizability of Education Article claims, only two squarely presented issues other than the adequacy of funding, *Paynter* and *N.Y. Civ. Liberties Union,* the two most recent decisions by that Court. Significantly, both *Paynter* and *N.Y. Civ. Liberties Union* came to the Court, as here, on motions to dismiss. And, in both, the Court *rejected* the plaintiffs' attempts to invoke the Education Article. In *Paynter*, the claim, grounded as here on statistical data, was that the State had failed to redress demographic imbalances thereby causing the schools in Rochester to have some of the worst test scores in the State. 100 N.Y.2d at 440. The plaintiffs maintained that the State had a responsibility to find a solution, including permitting students

to attend schools outside their district, effectively invalidating N.Y. Educ. Law § 3202(2). The Court of Appeals affirmed dismissal of the complaint, holding that it did not state a claim under the Education Article and, instead, abridged the fundamental concept of local operational control. *Paynter,* 100 N.Y.2d at 442. In *N.Y. Civ. Liberties Union*, adequacy of State funding was not the primary issue, although a funding component was arguably present. Rather, the plaintiffs alleged that some 27 named schools were failing in "that minimally acceptable educational services are not being provided in their schools" and the State was remiss in not finding a solution. 4 N.Y.3d at 181. The Court of Appeals affirmed dismissal, holding:

> But even inferring from plaintiffs' claims of inadequate teaching, facilities and instrumentalities of learning that such deficiencies could be ameliorated by increased funding, we nevertheless conclude that plaintiffs have failed to state a cause of action for a more fundamental reason: In identifying individual schools that do not meet minimum standards, plaintiffs do not allege any district-wide failure. Rather, in seeking to require the State to assess and rectify the failings of individual schools, plaintiffs' theory would subvert the important role of local control and participation in education.

Id. at 181 (internal quotations omitted).

Two lessons may fairly be drawn from the dismissal of the *Paynter* and *N.Y. Civ. Liberties Union* complaints. First, regardless of snippets of language that can be drawn, out of context, from the earlier purely funding cases, the Court of Appeals continues to focus on the State's affirmative obligation to provide

resources as the *sine qua non* of a cognizable Education Article suit. Second, the Court of Appeals is firm in its resolve to distinguish between, on the one hand, action or omission by the State and, on the other hand, local district action or omission, concluding that if the local district bears the assigned responsibility, the claim fails. Notably, that is the case here. The responsibility for the retention or removal of supposed "ineffective" teachers rests with the local districts (in New York City, *see, e.g.,* N.Y. Educ. Law §§ 2573, 2590-g(2)). Indeed, it could well be said that, having interpreted the Educational Article broadly to include funding-related obligations, the Court of Appeals has in *Paynter* and *N.Y. Civil Liberties Union* drawn a clear line and the issues here tendered fall outside its demarcation.

POINT IV

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

Even if the alleged wrongs claimed by Plaintiffs were cognizable under the Education Article (which they are not), Plaintiffs have failed to properly state such a claim. The Court of Appeals has squarely ruled that a cognizable claim under the Education Article requires two elements: (i) the deprivation of a sound basic education and (ii) causes attributable to the State. *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 178-79. Plaintiffs fail to meet those conditions precedent to the statement of a valid cause of action.

As shown above, Plaintiffs' pleadings fail to meet the requirement that students have been deprived of a sound basic education—the first element of the

test. *See N.Y. Civ. Liberties Union,* 4 N.Y.3d at 178.[7] Instead, Plaintiffs ask this Court to take it on blind faith that there exist untold number of teachers they deem to be ineffective through some undefined set of criteria (though ones that are different than those set out in State law). They provide neither an explanation of what constitutes an "ineffective" teacher nor a methodology for making such a determination, presumably leaving it to this Court to overrule the legislative determination as to how to evaluate teachers and provide some apt educational standard without "a clear articulation" of what is expected. But, as discussed *supra* at 16, that is inappropriate. *Id.* at 180. Moreover, and independently dispositive, Plaintiffs have failed to meet the second requirement—a showing of causally related State action, bearing particularly in mind that the responsibility for "weeding out" so-called "ineffective" teachers rests with the individual localities.

A. Plaintiffs Have Failed To Allege Facts That Demonstrate The Absence Of A Sound Basic Education

In *CFE II*, the Court of Appeals identified the factors appropriate for the Court to consider in determining whether teachers meet the minimally adequate standard mandated by the Education Article—namely, the Court of Appeals considered principal evaluations, teacher certification, teacher performance on content-specific State certification examinations, and teacher experience. 100 N.Y.2d at 911. Plaintiffs have failed to allege the absence of any of these factors.

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[7] Plaintiffs attempt to link student performance on statewide standardized assessments with the deprivation of a sound basic education but, as discussed *infra* at p. 4, such a link is inapposite.

Rather than focus on these cognizable factors identified by the Court of Appeals as necessary to set the constitutional floor for "minimally adequate" teaching, Plaintiffs have cobbled together inapplicable studies and commentaries by like-minded advocates that have little, if any, relationship to the definition of a "sound basic education" under the New York Constitution. Instead, that data, to the extent relevant at all, stands for the undeniable proposition that good teachers (defined differently in each study to the extent defined at all) may produce better outcomes for students. (R. 73-74, *Wright Compl.* ¶¶ 28-31). Not only is this matter not in dispute, it cannot and does not form the basis for a claim asserting deprivation of a "sound basic education" in violation of the Education Article. Moreover, as noted (*supra*, p. 4), the predicate for Plaintiffs' claims founded on test scores has now been discredited and the Board of Regents has determined that those outcomes may not measure student or teacher performance. In sum, the studies and the theses upon which Plaintiffs rest their claims are irrelevant and decidedly do not provide any support for Plaintiffs' bare conclusion that the Challenged Statutes cause poor teachers to remain inappropriately in the classroom.

Finally, even if the "test scores" upon which Plaintiffs' claims are based had not been discredited, Plaintiffs' reliance on student performance statistics specifically tailored to the individual districts in which they allege they have been denied a "sound basic education" is no more cogent. Aggregate statistics for

selected districts are not sufficient to demonstrate the requisite *State-wide* systemic failure necessary to deem the Challenged Statutes unconstitutional. *New York State Assoc. of Small City School Districts, Inc. v. New York*, 42 A.D.3d 648, 652 (3d Dept. 2007); *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 181-82. After all, there are many high performing school districts in New York State operating under the very statutory scheme that Plaintiffs allege deprive schoolchildren of a "sound basic education."

B. Plaintiffs Have Not Alleged Causes Attributable To The State

The Court of Appeals has stated in plain and precise terms the essential elements for a cognizable claim under the Education Article:

> Fundamentally, an Education Article claim requires two elements: the deprivation of a sound basic education, *and causes attributable to the State*. As our case law makes clear, even gross educational inadequacies are not, standing alone, enough to state a claim under the Education Article. *Plaintiffs' failure to sufficiently plead causation by the State is fatal to their claim.*

N.Y. Civ. Liberties Union, 4 N.Y. 3d at 178-79 (emphasis added).

Plainly stated, Plaintiffs' grievance turns not upon the State's overall funding of schools or provision of adequate resources and supports, but upon what they perceive as the improper administration of the school system—specifically the alleged failure of school districts to avail themselves of the existing procedures to remove allegedly "ineffective" teachers—*a matter exclusively within local control* (in New York City, *see, e.g.*, N.Y. Educ. Law §§ 2573, 2590-g(2)).

Wholly absent here is the indispensable element of *State* causality mandated in *N.Y. Civ. Liberties Union*, *Id.* at 178-79, and that void, of itself, is *fatal* to their claim. Neither the hiring, nor retention, nor discipline that Plaintiffs complain of are attributable to system-wide *State* ailments, they are all squarely local functions. To illustrate, in New York City, teachers are, by law, hired by the Board of Education of the City School District of the City of New York (the "DOE"),[8] retained and paid by the DOE, and disciplined under DOE-administered processes. N.Y. Educ. Law §§ 2573, 2590-g, 3020. The same construct exists throughout the State, with local school districts responsible for hiring, paying and disciplining teachers (in addition to the granting or denying of tenure). *See, e.g.*, N.Y. Educ. Law §§ 2503(5), 2554(2). Of itself, Plaintiffs' assertion that their grievance is predicated upon such local action (or inaction), as contrasted with State action, mandates dismissal under the Court of Appeals' ruling in *N.Y. Civ. Liberties Union.*

Manifestly, there is no merit to any argument that the State action creating due process causes "ineffective" teachers to be retained, or precludes their removal where appropriate—precisely the opposite is true. The local districts (in this instance, the DOE) are expressly empowered by the same statute that creates

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[8] In conjunction with amendments to the State Education Law enacted in 2002, many of the powers previously held by the Board of Education of the City School District of the City of New York, devolved to the Chancellor, with the administrative operations assigned to a body denominated by the Mayor as the New York City Department of Education. Nonetheless, the Board of Education of the City School District of the City of New York remains the statutory employer of personnel for the City School District.

tenure to take local disciplinary action where warranted. And, as the Court of Appeals has made clear, should Plaintiffs seek to assert that one or more of the localities was supposedly remiss in its hiring, firing, discipline or other oversight, that claim is jurisdictionally cognizable only in an Article 78 proceeding complying with all of the strictures of such a claim, not, as here, by a blunderbuss constitutional challenge to due process. *N.Y. Civ. Liberties Union*, 4 N.Y. 3d at 183-84 ("Inasmuch as plaintiffs seek to test the action or inaction of a public officer, their sole available remedy lies, as the courts below held, in a CPLR article 78 proceeding seeking mandamus to compel.").

POINT V

THE QUESTIONS PRESENTED ARE NOT RIPE

Upon either of two grounds, the issues presented are not ripe. First, with the suspension by the Board of Regents of any presumptions that can be drawn from test scores pending the establishment and "phasing in" of a "new system" for assessing students (which directly impacts the evaluation of teachers), Plaintiffs' claims lack any basis in law. Only when that "new system" eventuates and only if it then offers even a semblance of support for Plaintiffs otherwise bare conclusory rhetoric will a cognizable claim lie.

Moreover, Plaintiffs have not alleged a harm that can be redressed. In the absence of a showing of redressability, this Court cannot act. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Hussein v. New York*, 81 A.D.3d 132, 135

(3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). It is, at best, pure speculation to suggest that a judgment in Plaintiffs' favor here would redress the harm they allege. Plaintiffs cast their pleadings as nothing more than a request "for a routine judicial remedy." (R. 1133). By doing so, they ask this Court to make its rulings in this case in a vacuum, ignoring practical consequences. That, as the Court of Appeals noted in *N.Y. Civ. Liberties Union, supra* at 181, is impermissible.

Plaintiffs have failed to identify what, specifically, is wrong with the Challenged Statutes, let alone to state with clarity what makes for an "ineffective" teacher (other than discredited student test scores). Plaintiffs concede, as they must, that qualifying public school teachers are entitled to some due process with respect to their continued employment. (R. 45, 79 *Wright Compl.* ¶ 49; *Davids Compl.* ¶ 36). But, if Plaintiffs' complaint is that the Challenged Statutes offer teachers "too much" due process, what then, according to Plaintiffs, is "just enough"? Plaintiffs never say. Instead, they leave it to the Court to unsnarl a web of their own creation by finding an answer that creates a harmonious system balancing teachers' due process and seniority rights, administrative concerns, and a fair and accurate teacher evaluation system. That, however, effectively asks this Court to trample on the separation of powers so fundamental to our tripartite system of government and which the Court of Appeals has squarely held is not judicially cognizable. *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 180.

Courts consider, at the outset and as a matter of law, whether the relief that the plaintiffs demand—here, the blanket invalidation of a series of statutes that govern the due process and seniority provisions that govern hundreds of thousands of professionals who teach millions of students in the State—would actually *fix* what Plaintiffs describe as an "education system in crisis." (R. 1103). It goes to the very heart of judicial restraint that courts act only where they have the ability to redress the issue Plaintiffs allege. *Jones,* 45 N.Y.2d at 408-09.

POINT VI

PLAINTIFFS LACK STANDING

Plaintiffs and the court below seemingly acknowledge that Plaintiffs have not alleged "injury in fact." Plaintiffs asked that the motion court not apply the standing rules in a "heavy-handed" or "overly restrictive manner" (R. 1140). The motion court went one step further, suggesting that "plaintiffs' purported injuries could be ascertained during discovery." (R. 32). That was error.

One would think that, if nothing else, Plaintiffs would have knowledge of *their own injuries* before bringing an action alleging constitutional harm. Moreover, the Court of Appeals has specifically rejected the motion court's view that critical issues such as injury-in-fact may be deferred, ruling that standing is a threshold issue that must be ascertained at the outset of the litigation, not deferred until costly discovery, burdensome motion practice and other processes have taken their toll of litigants and taxpayers. *Soc. of the Plastics Indus.,* 77 N.Y.2d at 769

("Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation"); *Soc. of the Plastics Indus.*, 77 N.Y.2d at 769 ("Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria.... That an issue may be one of "vital public concern" does not entitle a party to standing.").

At most, in their complaints, Plaintiffs have given a three-paragraph description of two of the plaintiffs, Kaylah and Kyler Wright, who have progressed at different levels in their schooling. Plaintiffs do not allege that any particular "ineffective" teacher, however defined, was granted tenure, that the children were denied a "sound basic education," or how any of the Challenged Statutes are to blame for the unremarkable fact that the two particular children advanced academically at different rates. As for the other named children, Plaintiffs speculatively state, without any support, that they are "at risk of being assigned to an ineffective teacher" and similarly argue in vague fashion that it is "inevitabl[e] that some number of New York schoolchildren each year will land in a classroom controlled by an ineffective teacher." (R. 68, 1137). Such speculative assumptions are not "reasonable and sufficient to demonstrate a likelihood of actual injury." *Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 213 (2004) (holding that "plaintiff's assumption lacks the concreteness required for 'injury in fact'").

Plaintiffs' failure to allege actual personal harm evinces a far deeper problem. The existence of an injury in fact—an actual legal stake in the matter being adjudicated—is required because "[g]rievances generalized to the degree that they become broad policy complaints ... are best left to the elected branches." *Rudder v. Pataki*, 93 N.Y.2d 273, 280 (1999). Without an allegation of injury-in-fact, "plaintiffs' assertions are little more than an attempt to legislate through the courts." *Id.* That impermissible approach equates with non-justiciability. The proper forum for Plaintiffs' generalized and political grievance with the Challenged Statutes is the Legislature.

Finally, Plaintiffs suggest that the Education Article is for the benefit of all children of the State. R. 1135. That is not disputed. But simply falling within the class of persons the Education Article was designed to protect-namely, *all* New York State public school children-does not, in itself, confer standing or give rise to a justiciable suit. Even in cases brought by groups or organizations, a plaintiff must first demonstrate a harmful effect on at least one of its members to bring a claim. *Rudder*, 93 N.Y.2d at 280. The standing doctrine requires actual harm and a fully ripened, real controversy between two parties to avoid dismissal. Plaintiffs' Complaints are utterly devoid of any such allegations, thus bringing us back to our continuing challenge: this dispute is not justiciable.

CONCLUSION

The March 12, 2015, Order of the Motion Court should be reversed and a Declaration should issue that the Amended Complaints herein should be dismissed for failure to state a cause of action.

Dated: New York, New York
March 28, 2016

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CERTIFICATE OF COMPLIANCE PURSUANT TO

22 NYCRR § 670.10.3(F)

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