SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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,

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,

Defendants,

-and-

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

Intervenor-Defendant,

-and-

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSUN, 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

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Index No. 101105/14

Hon. Philip G. Minardo

REPLY MEMORANDUM OF LAW IN SUPPORT OF UNITED FEDERATION OF TEACHER'S MOTION TO DISMISS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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 and President of the University of the State of New York;

Defendants,

-and-

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSUN, 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.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

State Constitution & Statutes

PRELIMINARY STATEMENT

Plaintiffs ask this Court to invalidate statutes that accord teachers due process protections, simultaneously attacking the accompanying statutory measures that may be invoked by a school district to discipline or remove those educators who fail to provide efficient and competent services. Wright Br. at 1, 4; Wright Am. Comp. ¶ 6.[1] Plaintiffs contend that the Challenged Statutes are the root cause of alleged academic failure and impede Plaintiffs' desired objective – the summary dismissal of those teachers Plaintiffs unilaterally brand as "ineffective." *Id.* In truth, it is Plaintiffs' claims that are fundamentally flawed.

In response to Defendants' motions, Plaintiffs acknowledge, as they must, that to fall within the purview of a constitutional challenge under the Education Article a "systematic failure to provide a sound basic education" must be alleged. Wright Br. at 11. They recognize, too, that to elevate their claim to one of cognizable constitutional dimension instead of one that is not actionable under the Education Article they must demonstrate in their pleadings that (i) State action—as contrasted with Local School District action—is at the heart of their asserted grievance, (ii) the alleged failures complained of are "systemic," and (iii) the provision of educational services is below a minimally adequate "constitutional floor." *N.Y. Civ. Liberties Union v. New York,* 4 N.Y.3d 175 (2005); Wright Br. at 12. They have not done so.

Armed with a political belief that the Challenged Statutes somehow disserve our children and a handful of "studies" that stand, at most, for the unremarkable proposition that teaching (among other "inputs") significantly impacts student learning, Plaintiffs' claims fall woefully

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[1] "Wright Br." refers to the *Wright* Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenors-Defendants' Motions to Dismiss the Action. We cite primarily to the *Wright* Brief, as the *Davids* Plaintiffs have now joined with the *Wright* Plaintiffs and, essentially, rely upon the latter's brief for response to the questions of law presented on the motions to dismiss. Unless otherwise stated, the balance of the abbreviations and references herein will be as stated in the Memorandum of Law in Support of United Federation of Teacher's Motion to Dismiss (hereinafter, the "UFT Mov. Br.").

short of the system-wide allegations of deficiency required to bring a constitutional challenge. Perhaps it is not surprising, then, that in a vain attempt to avoid dismissal, Plaintiffs fall back on the procedural posture of this motion, the minimal pleading standard required on a motion to dismiss and their supposed need for discovery. But that familiar theme did not persuade the courts in *New York Civil Liberties Union* or in *Paynter v. New York,* 100 N.Y. 2d 434 (2013), both of which were decided on a motion to dismiss as a matter of law, the same grounds asserted here.

That the allegations present a "political question" not implicating the Education Article is evident from what Plaintiffs essentially ask the Court to decide: that "ineffective" teachers are teaching New York State children as a result of the Challenged Statutes. The determination as to whether a teacher is "effective," "ineffective" or other—an issue that goes to the crux of Plaintiffs' claims—is precisely "the subjective, unverifiable educational policy making by Judges, unreviewable on any principled basis," that has been rejected by the Court of Appeals as "anathema." *Campaign for Fiscal Equity, Inc. v. New York*, 86 N.Y.2d 307, 332 (1995) (hereinafter, "*CFE I*") (Levine, J., concurring). Indeed, Plaintiffs do not even undertake the task themselves, rejecting the recently revamped statutory process for rating teachers, but studiously avoiding defining what constitutes for them an "effective" or "ineffective" teacher or stating how they are to be identified, or by what criteria and by whom.

As Plaintiffs point out, in *Campaign for Fiscal Equity, Inc. v. New York*, 100 N.Y.2d 893, 914 (2003) (hereinafter "*CFE II*") (the principal case upon which they rely), the Court could easily conclude that "tens of thousands of students were placed in overcrowded classrooms"; were "provided with inadequate facilities and equipment"; and were taught by teachers who were either uncertified in the subjects they were teaching or uncertified altogether. Wright Br. at 11.

These are the discernible and systemic factors a court is equipped to consider under the Education Article; however, the exceedingly complex and locally driven decision of whether a teacher is effective or deserving of tenure is not. Moreover, *CFE* and its progeny squarely attacked the State funding system—alleging educational harm directly caused by the State's legislative provision of insufficient resources to New York City schools. Plaintiffs here have not pled such causality, and State funding is not at issue. To compensate, Plaintiffs repeatedly ask the Court in their submission to draw "inferences" regarding the connection between granting tenure to teachers (and the reverse seniority layoff provisions), on the one hand, and the alleged deprivation of the opportunity for a "sound basic education" on the other. In reality, Plaintiffs need far more than an inference to meet the requisite causation attributable to the State. Without any support (save a solitary and inconclusive survey conducted before the most recent statutory amendments and collective bargaining agreements) tying the Challenged Statutes to the retention of ineffective teachers in the classroom, among the myriad factors impacting student performance, their claims require a chasmic leap of logic and speculation that defies the plausibility needed to survive Defendants' motions to dismiss.

Neither have Plaintiffs even attempted to counter the UFT's position as to why tenure and seniority protection are rationally related to the government's interest in providing a "sound basic education." Instead, Plaintiffs side-step the issue, arguing that that the "rational basis" test is limited solely to Equal Protection challenges. Wright Br. at 25. However, Plaintiffs fail to cite a single authority that so holds. Neither do they cite to any case calling into question the Court of Appeals' dispositive ruling in *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, that:

> [We] [have]expressly held that *rational basis was the proper standard for review* when the challenged State action implicated the right to free, public education. Nothing in the

> present litigation impels a departure from that decision, made as it was with full recognition of the existence in our State Constitution of the education article (art. XI).

57 N.Y.2d 27, 43 (1982) (emphasis added). Indeed, the Court of Appeals has invoked the rational (or reasonable) basis standard in a wide variety of cases presenting constitutional challenges on grounds other than Equal Protection.

Finally, tucked into a footnote in Plaintiffs' submission (Wright Br. at 18 n.5) is an acknowledgment that their constitutional claim is not a facial challenge, but rather an "as-applied" one, recognizing, as they must, that the statute *is* applied constitutionally in the vast majority of cases. *See also* UFT Mov. Br. at 11 (noting Plaintiffs' recognition in their complaint that the majority of teachers are providing a quality education). Yet they seek the facial invalidation of the entire statutory scheme as unconstitutional. Wright Compl. ¶ 24. Plaintiffs have not explained and cannot explain why the wholesale invalidation of the entire, longstanding statutory scheme is an appropriate remedy, rather than simply ensuring that these facially constitutional laws are properly enforced at a local level.

For the reasons thus summarized and those detailed below and in the UFT's moving papers, Plaintiffs' complaints should be dismissed as a matter of law.

ARGUMENT

POINT I

THE EDUCATION ARTICLE OF THE STATE CONSTITUTION IS INAPPLICABLE

As recently as this past month, the Court of Appeals reiterated its recognition of

> ... the importance the Legislature has accorded the status of tenure in the educational context as well as its attendant purpose to preserve the process by which tenured educators are to be disciplined and removed ... .

Matter of Kilduff v. Rochester City Sch. Dist., – N.Y.3d – , 2014 WL 6473636 (N.Y. Nov. 20, 2014) (internal citation omitted). Indeed, as detailed in our Moving Brief (pp. 1-3, n.1), time and

again over the last 100 years, the New York Court of Appeals has made clear it "construe[s] the [teacher] tenure system broadly" in recognition of "a firm public policy determination that the interests of the public in the education of our youth can [thereby] best be served." *Ricca v. Bd. of Educ.*, 47 N.Y.2d 385, 391 (1979).

Without citation of a single contrary authority, Plaintiffs attempt to belittle that line of Court of Appeals decisions. In lieu of decisional authority they offer the *ipse dixit* that to them "it is of no moment that ... the court [in cases like *Ricca*] had occasion to opine on the policy rationale for the [tenure] statute." Wright Br. at 26. But that approach fails, for the courts have firmly concluded that sound public policy warrants the due process protections of tenure (and, as we demonstrate below, those holdings are dispositive of Plaintiffs' constitutional challenges when, as is required here, the rational basis test is applied (*see infra*, pp. 21-22)). And Plaintiffs also incorrectly suggest that the cited Court of Appeals rulings were *dicta*. Wright Br. at 26-27. In each cited case, tenure was at the crux of the issue presented and the Court was therefore properly obliged to address its nature, scope and tenability. Similarly, Plaintiffs err in positing that the courts' historic affirmance of tenure and its public policy-based underpinnings has gone without any constitutional scrutiny. *See, e.g., Gould v. Bd. of Educ.*, 81 N.Y.2d 446, 450 (1993); *Boyd v. Collins,* 11 N.Y.2d 228 (1962).[2]

Nonetheless, by these proceedings, Plaintiffs seek to deprive *every* teacher in the State of the protected right to due process in the form of notice of charges and a just cause hearing before

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[2] Indeed, a three-Judge Federal Court applying New York law and citing United States Supreme Court precedent has squarely held that tenure rights earned by teachers following years of probationary service have a sound constitutional underpinning and "that a tenured teacher has a property interest in continued employment in the absence of 'sufficient cause' for dismissal." *Kinsella v. Bd. of Educ.*, 378 F. Supp. 54, 59 (W.D.N.Y. 1974) (citing *Perry v. Siderman*, 408 U.S. 593, 601-03 (1972)); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). Thus, for those teachers who already have tenure, Plaintiffs' suit would certainly strip them of an already earned property right. *See, e.g, Franza v. Olin*, 73 A.D.3d 44, 47 (4th Dep't 2010) (vested property rights may not be disturbed by retrospective application of laws).

a disinterested fact finder. The sole ground advanced for this draconian request is the claim that an unspecified and unidentifiable *minority* of teachers are supposedly "ineffective"—in many cases, apparently *despite* a higher rating on the teacher evaluation system created in accordance with N.Y. Educ. Law § 3012-c and approved by the State Education Department—and the local authorities charged by law with administering discipline supposedly have failed to pursue legally prescribed disciplinary measures with a vigor sufficient to satiate Plaintiffs' appetites.

To be clear, as Plaintiffs readily admit, New York law already provides the ability for Local School Districts to remove teachers for numerous reasons, including inefficiency, incompetency, physical or mental disability, neglect of duty or a failure to maintain required certifications. Wright Br. at 6 (citing N.Y. Educ. Law § 3012(2)). Yet, rather than pressing for *enforcement* of the laws that provide for discipline where necessary (*e.g.*, N.Y. Educ. Law § 3020-a), Plaintiffs ask this Court to *invalidate* the statutory provisions that make possible the removal of ineffective teachers. Wright Br. at 4.

Under the precise terms of N.Y. Education Law § 2573(5) (and its counterparts outside New York City) the continued employment of a teacher with tenure is statutorily dependent on "good behavior and efficient and competent service." *Id.* Departure from that standard permits discipline, including removal. *See, e.g.*, N.Y. Educ. Law §§ 3020-a, 3012-c. Plaintiffs' proclaimed goal is the invalidation not only of tenure, but also the statutory grounds for discipline, including the provisions for removal of so-called "ineffective" teachers, as part of a wholesale invalidation of all tenure-related laws. Wright Br. at 4. The outcome of Plaintiffs' goal would be a return to the corrupting and corroding practices that the Legislature and the Courts have agreed (*see, e.g.*, *Callahan* and *Ricca, supra*) disserve students and the public interest by, for example, allowing those of influence to intimidate teachers on issues ranging

from grades to instructional strategies to union activity. *See, e.g., Capace v. Schultz,* 24 Misc.3d 1230(A), 2009 WL 2370979 (Sup. Ct., Richmond Cnty. 2009) (Minardo, J.). Plaintiffs' ill-considered effort will assuredly result in a deterioration of New York's ability to attract and retain competent teachers. That, in turn, will assuredly risk depriving students of the sound basic education that the Education Article (Article XI) of the State Constitution was intended to secure (and in which Plaintiffs profess interest).

Further, as in *Paynter*, Plaintiffs' quest "has no relation to the discernible objectives of the Education Article," the purpose of which "was to constitutionalize 'the established system of common schools rather than to alter its substance'" and certainly not to the "degree as the remedies that would follow from plaintiffs' theory of their case." *Paynter*, 100 N.Y.2d at 442 (quoting *Reform Educ. Fin. Inequities Today v. Cuomo,* 86 N.Y.2d 279, 284 (1995)); *see also N.Y. Civ. Liberties Union*, 4 N.Y.3d at 181-82.

Plaintiffs' claims are founded solely on the notion—unsupported by a single New York authority—that both the tenure and accompanying disciplinary laws, "[a]s applied" or as "implemented [abridge] ... the constitutional right guaranteed under Article XI." Wright Br. at 3, 6.

In the *only* cases decided by the Court of Appeals in which Education Article challenges *other than funding insufficiency* were presented, the Court of Appeals declined to extend the reach of the Article to asserted non-funding claims. *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 175; *Paynter,* 100 N.Y.2d at 434. Though Plaintiffs choose to misstate the UFT's position (Wright Br. at 27), we do not negate the possibility that in an appropriate case the courts may at some point be faced with an Education Article claim founded on a challenge other than funding inadequacy and then conclude that it is cognizable. But this is not such a case. Indeed, the Court

of Appeals has been explicit that cases seeking to go beyond funding concerns will be held to a very high standard, one that is not here met. Such challenges must demonstrate that a Local School District has acted to "sabotage the measures by which it secures for its citizens their constitutionally-mandated rights." *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 182 (citing *Paynter*, 100 N.Y. 2d at 922). There is no such claim here. Even when Plaintiffs charge that unidentified Local School District administrators with no ill intent omit to enforce statutorily-dictated discipline, the claim is posited in terms of omissions by the Local School District administrators based on what Plaintiffs claim is simply a desire not to be burdened or to incur costs or to become involved. *See, e.g.*, Wright Br. at 16. Those desires, however, do not rise to the issues of constitutional dimension.

The vice here charged is not one inherent in the Challenged Statutes. Rather, as Plaintiffs admit, the problem they complain of results from the *application* of the statutes by Local School District administrators. That acknowledgment by Plaintiffs is dispositive in two respects. First, the Court of Appeals has squarely ruled—and Plaintiffs admit that they are bound by the mandate (Wright Br. at 10-11)—that State action, as contrasted with Local School District action, must be demonstrated to state a cognizable Education Article claim:

> 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). As we have shown (UFT Mov. Br. at 27), the hiring and firing of teachers is vested in the Local School Districts, as are the initiation of disciplinary charges, their prosecution, layoffs and *all* of the actions and omissions which form the bases of Plaintiffs' complaints.

Second, the law is clear that a wholesale constitutional invalidation of the Challenged Statutes must be avoided if another potential remedy exists. *See People v. Eaton,* 19 N.Y.2d 496, 505-06 (1967); *Matter of Ahern v. So. Buffalo Ry. Co.,* 303 N.Y. 545, 555 (1952).

Turning to the first point, Plaintiffs' acknowledgment that their grievance lies in the application or implementation of the Challenged Statutes at the Local School District level thus ends the inquiry under *New York Civil Liberties Union.* Wright Br. at 6 ("*[a]s applied,* the Disciplinary Statutes result in the retention of ineffective teachers" (emphasis added)); *id.* at 4 (while the tenure statutes "*authorize* awarding tenure to teachers," it is the Local District "superintendent of schools [who] shall make a written report ... recommending for appointment on tenure those persons who have been found competent ...." (emphasis added)); *id.* at 6 ("[a] number of factors deter *administrators* from even bringing charges under the Disciplinary Statutes" (emphasis added)); *id.* at 7 ("[i]t is difficult for *school districts* to collect enough evidence for a 3020-a [disciplinary] hearing within the three-year period" [following three earlier years of probation]" (emphasis added)). It thus is evident that causality (to the extent it exists at all) rests with the Local School Districts, not the State. Indeed, therein lies the distinction between the "insufficient funding" cases (like the *CFE* trilogy) and the two decisions of the Court of Appeals, *Paynter* and *New York Civil Liberties Union,* that addressed issues other than funding. Funding is an inherently State legislative action. The hiring and firing of teachers, the establishment of school boundaries and the operation of the schools themselves are inherently Local School District responsibilities.

It is no answer for Plaintiffs to maintain, as their sole response, that it is the State's enactment of tenure laws that makes Plaintiffs' asserted grievances possible, thereby providing the requisite State action. Wright Br. at 10-11. Neither is state-wide application of the statute

sufficient to allege a systemic failure. After all, as the *Paynter* Court observed, one important aspect of the plaintiffs' complaint there was that N.Y. Educ. Law § 3202, together with other State laws, allegedly created residency requirements that the State enforced and perpetuated, thereby causing substandard academic performance. *Paynter*, 100 N.Y.2d at 438. The Court of Appeals held that "essentially, striking down Education Law § 3202 (2) ... would likewise diminish local control and participation" and did not give rise to a cognizable Education Article claim.[3] *Id.* at 442. Similarly the Court declined to find abridgment of the Education Article by virtue of the charge that it was, assertedly, "the State's fault ... in practices and policies that have resulted in high concentrations of racial minorities and poverty in the school district, leading to abysmal student performance." *Id.* at 438. That, too, was found to be insufficient State action, with the Court holding that such an approach "would be to subvert the important role of local control and participation in education." *Id.* at 442.

Plaintiffs now seek to conjure up an amorphous new State action upon which they can rest their claim—"enforcement," a claim that is not further explained (*e.g.*, how and when the State actually "enforces" the Challenged Statutes). Wright Br. at 11, 14. That effort is in any event unavailing. Plaintiffs tell this Court that they comply with *New York Civil Liberties Union*'s requirement of a pleaded showing of State causality by the assertion in their brief of State "enforcement" of the tenure statutes. *Id.* But that same claim was made in *Paynter*—that the State's enforcement of the residency statutes created the conditions of poverty and segregation that produced abysmal educational results—and was there found to be unavailing. *Paynter*, 100 N.Y.2d at 438, 442-43. Thus, we are left with an explicit recognition by Plaintiffs

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[3] In attempting to distinguish *Paynter*, the *Wright* brief misstates that the complaint in *Paynter*, unlike those here, did not "allege that a State statute resulted in a student being denied a sound education." Wright Br. at 19. That is incorrect. N.Y. Educ. Law § 3202(2) and other statutes creating enforced residency requirements were invoked and sought to be invalidated. *Paynter*, 100 N.Y.2d at 438.

that a pleaded showing of State causality is indispensible to a cognizable claim and the demonstrated absence of that requisite showing. Wright Br. at 11. As in *Paynter*, dismissal is thus required.

While Plaintiffs offer snippets from *CFE I* to imply that the State's responsibility far exceeds funding, Chief Judge Kaye disposed of that approach in *Paynter*, reasoning:

> While we concluded in *CFE I* that the [Education] 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). Further, in *New York Civil Liberties Union* the Court addressed the argument that the Local School District inaction or omission to correct abysmal student scores and performance required the State to assume responsibility under the Education Article:

> Plaintiffs misinterpret our recognition in ... *[CFE II]* that education is ultimately a responsibility of the State as a holding that education is not ultimately a responsibility of school districts. In *CFE II*, we explained that because both the Board of Education and the City of New York are creatures or agents of the State, which delegated whatever authority over education they wield, the State "remains responsible when the failures of its agents sabotage the measures by which it secures its citizens the constitutionally-protected rights." This observation, however, is in no way inconsistent with the principles of local control set forth in *Levittown* and reaffirmed in *Paynter*, which would require any such "sabotage" be committed by the district.

N.Y. Civ. Liberties Union, 4 N.Y.3d at 182 (citations omitted). Again, there is no claim here, much less a showing, that the claimed actions or omissions by the City or any Local School District "sabotaged" Education Article compliance by the State. There is no allegation that agents of the State have nefariously undermined the Challenged Statutes. In sum, the State causation required under *Paynter* and *New York Civil Liberties Union* must be an affirmative

action or omission, not just the passage of legislation that is locally applied or misapplied, which is, at most, what Plaintiffs rely upon.

As to the second point, it is hornbook law that, assuming a cognizable wrong can be stated by reason of Local School District action or omission, declarations of constitutional invalidity must nonetheless be abjured, particularly if another potential remedy exists, *i.e.*, addressing that claimed wrong at its source. *See Eaton,* 19 N.Y.2d at 505-06; *Matter of Ahern,* 303 N.Y. at 555. That remedial process, as *New York Civil Liberties Union* holds, lies in a separate Article 78 proceeding. 4 N.Y.3d at 183-84. This proceeding does not state an Article 78 claim.

Plaintiffs' arguments simply do not withstand scrutiny. The Education Article is inapplicable here for, among other reasons, the lack of causality attributable to the State, as delineated in *New York Civil Liberties Union*, and dismissal should follow.

POINT II

PLAINTIFFS FAIL TO ALLEGE A COGNIZABLE CLAIM

Plaintiffs recognize that a 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; Wright Br. at 10-11. As shown above, they fail to meet the second element. They also fail to meet the requirement that a "systemic statewide failure" exists in providing a "sound basic education." *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 181-82. Plaintiffs have failed to assert *any* facts that would support their allegations of a "systemic statewide failure" to provide a sound basic education resulting from the Challenged Statutes.[4] Instead, Plaintiffs ask this Court to take it on blind faith that there exist untold numbers of

[4] Plaintiffs attempt to link student performance on statewide standardized assessments with the deprivation of a sound basic education but, as discussed *infra* at 14, such a link is inapposite.

teachers they deem to be ineffective through some undefined set of criteria. More importantly, they provide neither a definition of "ineffective" teacher nor a methodology for making such a determination, presumably leaving it to this Court to provide some apt educational standard without "a clear articulation" of what is expected. But that is inappropriate. *Id.* at 180.

Plaintiffs rely on the statement in *CFE I*, 85 N.Y.2d at 316, that under the Education Article, "[c]hildren are entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science and social studies by sufficient personnel adequately trained to teach those subject areas." Wright Br. at 21. Even assuming the applicability of *CFE I* to the facts here, such reliance in support of their effort to alter the substance of State education policy is misplaced. The Court of Appeals has made clear that the Education Article is an "unambiguous acknowledgement of a constitutional floor with respect to educational adequacy." *CFE I*, 86 N.Y.2d at 315.

Indeed, in *CFE II*, the Court of Appeals refined the analysis, identifying 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.

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 that have little, if anything, to do with 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 it is defined at all) may produce better outcomes for students. Wright Am. 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. These studies decidedly do not provide any support for Plaintiffs' bare conclusion that the Challenged Statutes cause poor teachers to remain inappropriately in the classroom. Indeed, as detailed in Point III below, such studies are of no moment as a matter of law. *Montgomery v. Daniels*, 38 N.Y.2d 41, 53 (1973).[5]

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. As recognized by the Legislature in recent enactments limiting the impact of certain standardized test scores and the Court of Appeals in *Paynter* and *New York Civil Liberties Union*, there are myriad factors that influence student performance; it is not teachers alone (and certainly not the tenure and seniority statutes) that can cause poor student performance. UFT Mov. Br. at 21. Moreover, as the court found in *New York State Association of Small City School Districts, Inc. v. New York*, 42 A.D.3d 648, 652 (3d Dep't 2007), aggregate statistics for selected districts are not sufficient to demonstrate a State-wide systemic failure. *See also 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 same tenure statutory scheme which Plaintiffs allege deprive schoolchildren of "sound basic education."

Plaintiffs rely heavily on student performance on the State's Common Core-aligned standardized assessments as evidence that New York's children are being denied a sound basic

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[5] It should not go unnoticed that the only arguably relevant information repeatedly cited by Plaintiffs is a survey which purports to evidence the administrative burden of bringing charges as the explanation for the alleged failure to discipline "ineffective" teachers. Wright Br. at 16, 34. In truth, the survey shows that in 49% of the instances, charges were not pursued by administrators because the purported "ineffective" employee resigned (and not because they were dissuaded by the statutorily-mandated process). Wright Am. Compl. ¶ 55 & Exh. 14 at 1.

education. *See* Wright Br. at 12. While the UFT has endorsed the learning standards set by the State Education Department ("SED") and has worked tirelessly with SED to ensure appropriate implementation of the standards, allegations of "academic failure[s] alone" do not suffice for an Education Article claim. *Paynter,* 100 N.Y.2d at 441.[6]

Finally, Plaintiffs claim that a "minimal" pleading requirement here exists, thus excusing Plaintiffs' failure to allege more specifically an Education Article claim. Wright Br. at 14. To that is then added the usual refrain that discovery should first be had before the Court considers dismissal. *Id.* at 18. Wholly ignored is the mandate expressed by the Court of Appeals in *New York Civil Liberties Union* (and earlier in *Paynter)* that to survive dismissal motions where an Education Article claim is advanced, specific facts or plausible allegations must be pled. *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 178-79. Plaintiffs here have failed to allege any such facts. While liberality in pleading is generally an appropriate standard, where, as here, specific showings must be made to support the tenability of a Constitutional claim, such evasions, as well as attempts to hide behind unbounded future disclosure, simply cannot be excused.[7]

POINT III

THE COMPLAINTS DO NOT STATE A JUSTICIABLE CLAIM

Plaintiffs are relegated to rudimentary principles of law to counter the UFT's argument that the case presents a political question. They turn to *Marbury v. Madison,* 5 U.S. 137, 177

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[6] Even assuming statistics of academic performance were sufficient, and they are not, the Common Core standards adopted by SED go far beyond the judicially created constitutional floor of a "sound basic education."

[7] In a misleading use of snippets from quotations, the *Wright* brief (p. 19) seeks to minimize the mandate, established in the 2005 decision in *New York Civil Liberties Union* that "failure to sufficiently plead causation by the State is fatal," by reference to an out-of-context snippet from the earlier decision in *CFE II.* In context, the *CFE* Court was setting forth the basic requirement for a funding inadequacy claim under the Education Article and not addressing, as here, the requirements for a cognizable *non*-funding claim, *viz.*, "[t]he requirement stated in *CFE*, ... was for plaintiffs to 'establish a causal link between the present funding system and any proven [educational] failure, not to eliminate any possibility that other causes contribute to that failure." *CFE II,* 100 N.Y.2d at 923 (citations omitted).

(1803), for the proposition that courts determine the constitutionality of statutes. Wright Br. at 29. Of course they do, but that is not applicable here. Simply stating that they have asserted constitutional claims does not automatically invoke the courts' jurisdiction because courts are equipped to decide legal issues, not educational ones.

The same Constitution that guarantees a "sound basic education" to New York's school children also expressly vests the 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; *see also Levittown,* 57 N.Y.2d at 38-39 (given its attendant "issues of enormous practical and political complexity," the realm of education is "largely left to the interplay of the interests and forces directly involved . . . in the arenas of legislative and executive activity"). Thus, the judiciary must maintain "a disciplined perception of the proper role of the courts in the resolution of our State's educational problems." *Levittown*, 57 N.Y.2d. at 49 n.9. Even in *CFE II*, the seminal funding inadequacy case repeatedly cited by Plaintiffs, the Court was careful to observe that it has "neither the authority, nor the ability, nor the will, to micromanage education financing." 100 N.Y.2d at 925.

The Education Article is distinct from other state constitutional rights, because, as the Court of Appeals recognizes, there are "inherent limitations of courts in making constitutional decisions on educational quality and quantity," *CFE I*, 86 N.Y.2d at 326 (Levin, J., concurring), and the court is "loathe to enmesh" itself in the local administration of schools. *Hussein v. New York*, 19 N.Y.3d 899, 907 (2012) (quotation omitted).

Indeed, in *Levittown,* the Court of Appeals was careful to recognize the "discretely different constitutional perspectives" between Federal and State Constitutional provisions, adding that in the context of provisions relating to the State Constitution's declaration of the

Legislature's obligations in maintaining the educational system, "the State Constitution contains reference to matters which could as well have been left to statutory articulation." *Levittown*, 57 N.Y. 2d at 43 n.5. That restraint adds background and force to the Court of Appeals' more recent holdings, each citing *Levittown* with approval, respecting the role of the Education Article, and the Courts' reluctance to invoke it where the effort may "alter [the] substance" of the educational system. *Reform Educ. Fin. Inequities Today v. Cuomo*, 86 N.Y.2d 279, 284 (1995); *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 181-82 (citing *Paynter*, 100 N.Y.2d at 442). Instead, the courts have simply acted under the Education Article to ensure that a "constitutional floor" is met and in the manner in which the State is uniquely positioned to act—funding. *CFE I*, 86 N.Y.2d at 315.

Neither are Plaintiffs' claims brought within the range of judicial cognizance by their citation to studies and statistics, some of which predate the implementation of such reforms as the Teacher Evaluation Law (§ 3012-c). *See* UFT Mov. Br. at 26. The Court of Appeals has made clear such tactics are unavailing, holding that the courts are not "called on to weigh the relative worth of data or arguments which may be marshaled on either side as to the wisdom of determinations made by the Legislature in the realm of policy." *Montgomery,* 38 N.Y.2d at 53.

What Plaintiffs really seek is to impose their views of education policy. That, however, is not the process mandated by the State Constitution. Rather, should the parties seek to "alter [the] substance" of New York's education system, *Reform Educ. Fin. Inequities Today*, 86 N.Y.2d at 284, such changes should be sought in the legislative or executive branch, where the multifaceted and complicated challenges faced by our school systems—including underfunding, poverty, class size and inadequate instrumentalities of learning—can be considered. In effect, among other things, Plaintiffs argue that the § 3020-a procedures are too burdensome, leading to

the "promotion and retention of ineffective teachers." Wright Br. at 11. However, "streamlining" the § 3020-a process, as Plaintiffs purport to seek, is a far cry from the manifest and palpable inadequacies which give rise to constitutional challenges, and which are properly decided by the courts.

Plaintiffs similarly argue that the seniority layoff provisions lead to the retention of "senior, low-performing, and more highly paid teachers [who] continue to provide poor instruction to their students," Wright Br. at 9, while at the same time effectively conceding that a challenge to such statutes is not yet ripe in New York City. *Id.* at 32-39 (failing to rebut the UFT's argument that a challenge to the "last in, first out" statute that applies to New York City teachers is not ripe because district-wide layoffs are neither pending nor threatened). Plaintiffs fail to give credence to the judicially-sustained legislative determination that seniority provides an unbiased way for school districts to deal with difficult economic circumstances. *Silver v. Bd. of Educ.*, 46 A.D. 2d 427, 431-33 (4th Dep't 1975) ("To prevent the use of favoritism and personal preference in the retention of teachers, the statutes are designed to protect tenured teachers within their respective areas, in order of their seniority, from dismissal without regard for the comparative abilities of the teachers."); *see also Matter of Ward v. Nyquist,* 43 N.Y.2d 57, 62-63 (1977); *Leggio v. Oglesby*, 69 A.D.2d 446, 448-49 (2d Dep't 1979).

As the UFT explained in its opening brief, the issues of identifying ineffective teachers, arriving at the terms and conditions of employment for teachers, the proper timing of evaluating teacher performance for tenure status or what makes for the optimal method of terminating teachers during district-wide layoffs are precisely the types of issues the courts have avoided in this area; for they are not judicial issues. UFT Mov. Br. at 24. Moreover, while Plaintiffs protest that they have asserted individual constitutional claims, not policy arguments, not a single

Plaintiff has described how his or her constitutional rights have, in fact, been abridged. Speculation as to what harm might some day eventuate is insufficient. Indeed, any fair reading of both sets of Plaintiffs' complaints as well as their opposition briefs reveals that Plaintiffs are arguing tenure *policy*, not individual rights. This, then, translates into a case about broadly-applied political preferences, not personal constitutional harm. *See 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)).

Perhaps most illustrative of the non-justiciable nature of this claim is that Plaintiffs have not, in either their papers or the hundreds of pages of "studies" annexed thereto, advanced a description or definition of the so-called "ineffective teachers" complained of. Determining whether a teacher is "effective," "ineffective" or otherwise, which this Court must necessarily determine in order to evaluate the sufficiency of Plaintiffs' claim, is precisely the "subjective, unverifiable educational policy making by Judges, unreviewable on any principled basis" that the Court of Appeals has rejected as "anathema" to the judiciary. *CFE I*, 86 N.Y.2d at 332 (Levine, J., concurring).

Plaintiffs take issue with the Legislature's definition of an "ineffective" teacher under Education Law § 3012-c—another of the statutes Plaintiffs seek to invalidate. Wright Br. at 4. There, the Legislature has recognized that the available assessments of student outcomes are but one measure of teacher effectiveness and that multiple measures are necessary to paint a complete picture. Plaintiffs apparently disagree, as their reliance upon studies and reports

indicates. But that disagreement alone is not sufficient to strip the Legislature of its discretion over such issues. *See Montgomery*, 38 N.Y.2d at 53 ("'Whether the enactment is wise or unwise....whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.'" (quoting *Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 569 (1911))).

Though Plaintiffs insist, without support, that legislative deliberation and revision to the Challenged Statutes is irrelevant to justiciability, the argument is plainly unsupportable. It is a fundamental principle of New York law that "each department of government should be free from interference in the lawful discharge of the duties expressly conferred" to it and it is "not the province of the courts to direct the legislature how to do its work." *Matter of Montano v. Cnty. Legislature of Cnty. of Suffolk*, 70 A.D.3d 203, 210 (2d Dep't 2009) (citations omitted). Plaintiffs are right that it is the function of the courts to monitor and safeguard the rights provided in the State Constitution—courts are charged with safeguarding the provision of a minimal system-wide standard of education under the Education Article. But it has never been held, nor was it ever intended, that this safeguarding function would extend to the micro-management and local administration and enforcement of our school system and its policies. *Hussein*, 19 N.Y.3d at 901.

POINT IV

PLAINTIFFS' CONSTITUTIONAL CHALLENGES DO NOT SURVIVE THE RATIONAL BASIS TEST

The Court of Appeals in *Levittown* found that Education Article claims are to be reviewed by the courts under a deferential rational basis review. *Levittown*, 57 N.Y.2d at 43

("[R]ational basis [is] the proper standard for review when the challenged State action implicate[s] the right to free, public education."). Thus, Plaintiffs' complaints must be dismissed because there exists, at the very least, a rational relationship between tenure and seniority protection, on the one hand, and the government's interests in providing a sound basic education, on the other.

The UFT, NYSUT, and the State Defendants have already established the salutary benefits of the tenure and seniority protection statutes at issue here and explained how they advance the State's Education Article interests. *See, e.g.*, UFT Mov. Br. at 39-40; NYSUT Mov. Br. at 31-51; State Defs. Mov. Br. at 14-15. Indeed, the Court of Appeals has already held that a rational basis exists for the challenged tenure statutes. *Holt v. Bd. of Educ.*, 52 N.Y.2d 625, 632 (1981); *Matter of Abramovich v. Bd. of Educ.*, 46 N.Y.2d 450, 454 (1979).

Plaintiffs do not dispute those arguments. Wright Br. at 24-27. Rather, they argue that the rational basis or relationship test applies only to Equal Protection claims. *Id.* at 24. Plaintiffs cite no authority for this proposition. In fact, it is directly at odds with a long line of authority from the Court of Appeals applying rational basis in a variety of contexts other than Equal Protection. *See, e.g.*, *Tilles Inv. Co. v. Huntington*, 74 N.Y.2d 885, 887-88 (1989) (applying rational basis review to the constitutionality of a zoning decision); *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 71 N.Y.2d 313, 319-20 (1988) (applying rational basis to economic legislation).

Plaintiffs' failure even to contest the rational relationship that exists between the Challenged Statutes and Article XI dooms their claims. They have not answered the UFT's contention that tenure and the attendant due process rights rationally advances the recruitment and retention of quality teacher in New York and promotes independence in education. Nor have

they answered the UFT's argument that seniority, *i.e.* experience level, *is* a valid, non-biased benchmark for effectiveness. In sum, Plaintiffs cannot rebut the presumption of constitutionality that attaches to the Challenged Statutes. *Overstock.com, Inc. v. N.Y.S. Dep't of Taxation & Fin.*, 20 N.Y.3d 586, 593 (2013) ("Legislative enactments enjoy a strong presumption of constitutionality ... [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt." (quotations omitted)). Should this Court still entertain any doubt as to whether a party could fairly debate the existence of a rational relationship, Plaintiffs' claims should *still* be dismissed because they cannot rebut the strong presumption of constitutionality that attaches to the Challenged Statutes. *Williams v. Oyster Bay*, 32 N.Y.2d 78, 81 (1973) ("The burden of establishing invalidity rests, of course, upon the plaintiff. If the legislative classification is 'fairly debatable,' it must be allowed to control."). Without more, dismissal is compelled.

POINT V

THE COMPLAINTS FAILS TO ALLEGE A REDRESSABLE HARM

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." Wright Br. at 31. By doing so, they ask this Court to make its rulings in this case in a vacuum, ignoring practical consequences.

It goes to the very heart of judicial restraint and the separation of powers doctrine that courts act only where they have the ability to redress the issue plaintiffs allege. *Jones v. Beame,* 45 N.Y.2d 402, 408-09 (1978). Thus, 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 rights of 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." Wright Br. at 1.

While Plaintiffs speculate that invalidating the Challenged Statutes will improve the public school system in New York, in truth, invalidating the Challenged Statutes may harm overall teaching quality and student performance rather than improve them. Eliminating tenure and seniority protection may, among other things, undermine efforts to build a stable, professional core of educators in New York schools and would have a particularly devastating impact on poor and minority students, who are over-represented in schools that are already difficult to staff. Plaintiffs' error in speculating that judicial action will remedy the system is particularly egregious given the corrective measures currently being implemented by the recent amendments to Education Law § 3012-c (the law governing teacher evaluations) (*see* UFT Mov. Br. at 37) and the reforms included in the new collective bargaining agreement between the UFT and the Board of Education for the City School District of the City of New York. This Court should not be called upon to disrupt the system, when the legislative and executive branches have already taken action.

Finally, Plaintiffs' failure to state a claim that can be redressed by the judiciary is further highlighted by their inability to identify what, specifically, is wrong with the Challenged Statutes. Plaintiffs concede, as they must, that qualifying public school teachers are entitled to some form of due process rights with respect to their continued employment. Wright Br. at 31. 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 find an answer that strikes a balance between teachers' due process and seniority

rights, administrative concerns, and student interests to come up with a new plan (this, however, effectively asks this Court to trample on the separation of powers so fundamental to our tripartite system of government). The Court of Appeals has squarely held that that approach is unacceptable and not judicially cognizable. *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 180.

POINT VI

PLAINTIFFS LACK STANDING

Acknowledging that they have not suffered "injury in fact," Plaintiffs seek, instead, to persuade the Court that the law requires only that they fall within the "zone of interest" affected by the Challenged Statutes. Plaintiffs are mistaken. Standing in the statutory and regulatory context is a two-part test. *N.Y.S. Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). Well-settled case law establishes that any plaintiff challenging the constitutionality of a statute has the burden of pleading *both* an injury in fact *and* that the "injury . . . of which it complains" falls within the "zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761 (1991) (quotations omitted); *Matter of Ass'n for a Better Long Island, Inc. v. N.Y.S. Dep't of Envtl. Conservation*, 97 A.D.3d 1085 (3d Dep't 2012).[8]

Though they, understandably, have requested that the Court not apply the standing rules in a "heavy-handed" or "overly restrictive" manner (Wright Br. at 38), Plaintiffs have effectively conceded that they have failed to plead the fundamental and threshold requirement of an "injury in fact." Thus, their claims must be dismissed. At most, as discussed in the UFT's moving brief, Plaintiffs have given a three-paragraph description of two of the plaintiffs, Kaylah and Kyler

[8] The purpose of the additive "zone of interest" analysis, typically found in environmental and land use cases is simply to ensure that "a group or an individual who has been injured but whose interests are only marginally related to or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Matter of Transactive Corp. v. N.Y.S. Dep't of Social Servs.*, 92 N.Y.2d 579, 587 (1998) (internal citation omitted).

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." Wright Br. at 35; *see also* Wright Am. Compl. ¶ 1. Such speculative assumptions are not "reasonable and sufficient to demonstrate a likelihood of actual injury." *Novello,* 2 N.Y.3d at 213 (holding that "plaintiff's assumption lacks the concreteness required for 'injury in fact'").[9] Tellingly, Plaintiffs request that this Court allow discovery to develop their claims of alleged harm. Wright Br. at 35. One would think, if nothing else, that Plaintiffs would have knowledge of their own injuries before bringing an action alleging constitutional harm.

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.* As set forth in Section III of this Reply and in the UFT's Moving Brief

[9] Despite their insistence on the "zone of interest" including all New York schoolchildren (and even wider, all New York children) and their persistent reliance on the import of aggregate studies and statistics, neither the *Wright* Plaintiffs nor the *Davids* Plaintiffs purport to represent a class of New York State students. In any event, a class action cannot be used to "bootstrap a plaintiff into standing which is otherwise lacking." *Murray v. Empire Ins. Co.*, 175 A.D.2d 693, 695 (1st Dep't 1991).

(pp. 21-29), the proper forum for Plaintiffs' generalized and political grievance with the Challenged Statutes is the Legislature.[10]

Finally, Plaintiffs suggest that the Education Article is for the benefit of all children of the State. Wright Br. at 33. That is not disputed. But simply falling within the class of persons the Education Article was designed to protect does not 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 devoid of any such allegations.

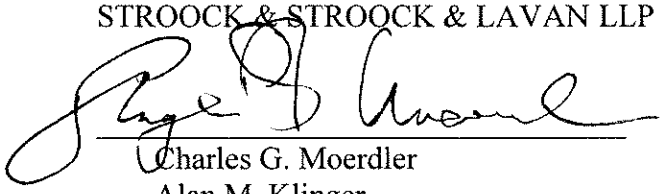
[10] It merits mentioning that Courts prohibit one litigant from raising the legal rights of another and require an actual aggrieved party "so as to cast[] the dispute in a form traditionally capable of judicial resolution." *Community Bd. 7 v. Shaver*, 84 N.Y.2d 148, 155 (1994) (quotations omitted). Here, even assuming the issues are justiciable, how are these Plaintiffs to "cast the dispute" so as to enable the Court to decide the exceedingly complex question of what makes for an constitutionally "ineffective" teacher or whether having a single ineffective teacher can result in the denial of a "sound basic education" under the Education Article, much less with tenure and seniority as the causal effect, if they have not alleged any particularized harm? Perhaps even more fatally, how can Plaintiffs credibly allege that the Challenged Statutes cause the system-wide failure required by the Education Article if they themselves have not presented a single plaintiff who has actually suffered concrete injury as a result of their application?

CONCLUSION

For the foregoing reasons together with those detailed in the UFT's moving submission, Intervenor-Defendant UFT respectfully requests that the Court grant its motion to dismiss the Complaints, with costs.

Dated: New York, New York
December 15, 2014

STROOCK & STROOCK & LAVAN LLP



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