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 *Caption continued on next page*	Index No. 101105/14 Hon. Philip G. Minardo **NOTICE OF MOTION**

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.

PLEASE TAKE NOTICE, that upon the Memorandum of Law in Support of its Motion to Dismiss the within actions, Intervenor-Defendant MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, will move this Court at 18 Richmond Terrace, Staten Island, New York 10301 on the 14th day of January, 2015 at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order dismissing the within actions pursuant to CPLR 3211(a)(7);

PLEASE TAKE FURTHER NOTICE that, pursuant the amended schedule set forth by Justice Minardo on October 23, 2014, answering papers are due on Friday, December 5, and reply papers are due on Monday, December 15.

Dated: New York, New York
October 28, 2014

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AFFIRMATION OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CHARLES G. MOERDLER, an attorney duly admitted to practice law before the Courts of this State, hereby affirms the following to be true under penalties of perjury:

1. I am not a party to the action, am over 18 years of age and I am a Member of the firm of Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, New York 10038.

2. That on the 28th of October, 2014, I served the within Notice of Motion to Dismiss and Memorandum In Support Of United Federation Of Teachers' Motion To Dismiss Pursuant To CPLR 3211(A), by electronic mail, and also caused the same to be delivered by overnight mail, on the parties listed below:

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CHARLES G. MOERDLER

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

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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PRELIMINARY STATEMENT

Plaintiffs seek to invalidate the due process protections of tenure. Their claims are devoid of merit. The Court of Appeals, as well as the Appellate Division, have repeatedly recognized the importance and validity of tenure as being in the public interest because it benefits students and teachers, avoids corruption and other abuses and encourages independent thought.[1] Thus, for more than 100 years New York has recognized

> [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., 47 N.Y.2d 385, 391 (1979). Indeed, teacher tenure has been a cornerstone of New York's educational public policy since its adoption as part of the Greater New York Charter in 1897.[2]

> The statute makes good conduct and good work the basis of tenure as to all teachers ... [T]he purpose ... 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 v. Bd of Educ., 174 N.Y. 169, 178 (1903).

Despite these clear statements of applicable law, an effort here is made to mislead this Court into believing that "The Teacher Tenure Statutes Confer Permanent Employment On

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[1] *Callahan v. Bd. of Educ.*, 174 N.Y. 169, 177-78 (1903); *see also Matter of Speichler v. Bd. of Co-op. Educational Servs.*, 90 N.Y.2d 110, 117-18 (1997); *Ricca v. Bd. of Educ.*, 47 N.Y.2d 38, 391 (1979); *Matter of Abramovich v. Bd. of Educ.*, 46 N.Y.2d 450, 455 (1979); *Holt v. Bd. of Educ.*, 52 N.Y.2d 625, 632 (1981); *Matter of Boyd v. Collins,* 11 N.Y.2d 228, 232 (1962); *Matter of Sanders v Bd. of Educ.*, 17 A.D.3d 682, 683 (2d Dep't 2005); *Matter of Kobylski v. Agone*, 234 N.Y.S.2d 907, 912-13 (Sup. Ct. Broome Cnty. 1962), *aff'd*, 19 A.D.2d 731 (3d Dep't 1963).

[2] L. 1897, ch. 378, §§ 1114, 1117, re-enacted in L. 1901, ch. 466, §§ 1093, 1101; *see also Murphy v. Maxwell,* 177 N.Y. 494, 497 (1904).

Ineffective Teachers." Wright Complaint (hereinafter "Wright Compl.") at § II; *see also id.* ¶¶ 34, 45.[3] As a matter of law, that is untrue. By statute, tenure is simply the right to due notice of charges and an impartial just cause hearing before removal or other sanction. Specifically, to quote N.Y. Education Law § 2573(5), one of the tenure statutes applicable to New York City teachers (*see Matter of Mannix v. Bd. of Educ.*, 21 N.Y.2d 455, 456 (1968)):

> [Individuals in the] teaching service of the schools of a city, who have served the full probationary period, shall hold their respective positions *during good behavior and efficient and competent service*, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a of this chapter.

N.Y. Educ. Law § 2573(5) (emphasis added).[4]

The *sole* basis for Plaintiffs' claims seeking the elimination of tenure is the Education Article of the State Constitution (Article XI). The basic theory advanced is that the asserted retention of and failure to swiftly discipline a small number of allegedly "ineffective" teachers requires the invalidation of tenure statutes. However, the Education Article has *never* been interpreted as negating or impinging on the due process protections of tenure. Indeed, the Education Article was upon adoption (as it is now) devoid of any provision respecting teacher competency, hiring, or discipline, much less tenure, although prior to the Constitutional Convention some (including Governor DeWitt Clinton) had urged otherwise. *See Paynter v. State,* 100 N.Y.2d 434, 459 (2003) (G.B. Smith, J., dissenting) (reviewing 2 Documents of 1894 NY Constitutional Convention No 62, at 1).

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[3] On September 18, 2014, this Court transferred to it *Wright v. New York*, Index No. A00641/2014 (Sup. Ct. Albany Cnty.) (hereinafter "Wright") and consolidated it with *Davids v. New York,* Index No. 101105/2014 (Sup. Ct. Richmond Cnty.) (hereinafter "Davids"). Contemporaneously, the UFT's intervention motion was granted. The Davids Amended Complaint challenges N.Y. Education Laws §§ 1102(3), 2509, 2573, 2590(j), 3012, 3014, 3020-a, and 3013(2). The Wright Complaint challenges N.Y. Education Laws §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020(a). For convenience, the Davids Verified Original and Amended Complaints will be referred to, respectively, as "Davids Orig. Compl." and "Davids Am. Compl."

[4] Education Law § 2573 and § 2590 together serve to provide due process rights to teachers in New York City.

As repeatedly recognized by the Court of Appeals, the Education Article *was* enacted to create systemic change—the creation and maintenance of a uniform statewide "*system*" of public education (in place of some 11,000 distinct local systems), but one which would continue to be operated by local school districts. *E.g.*, *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 47 (1982) (hereinafter "*Levittown*"). There is thus a clear dichotomy between the Constitutional responsibility of the State as compared with the control afforded to local school districts. *N.Y. Civ. Liberties Union v. New York,* 4 N.Y.3d 175, 181-82 (2005).

The *State's* responsibility under the Education Article is to provide minimally adequate funding, resources, and educational supports to make basic learning possible. *See, e.g.*, *Paynter,* 100 N.Y.2d at 439-41 (in sum, the requisite funding and resources to make possible "a sound basic education [which] consists of the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury"). Neither Complaint charges inadequate funding or lack of resources provided by the State.

The responsibility of *local school districts* under *Levittown* and its progeny is to exercise "local control" in accordance with the "constitutional principal that districts make the basic decisions on … operating their own schools." *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 182. That right to exercise "local control" includes the statutory obligation on a district by district basis to recruit, hire, discipline and otherwise manage teachers, including assertedly "ineffective" teachers. *Id.*

The distinction between State and local district responsibility, as a matter of law, is critical. These complaints allege violations of the Education Article with respect to the hiring, retention and discipline of teachers. However, responsibility for these activities rests with the

local districts. Thus, Plaintiffs' focus is flawed, for, to quote the Court of Appeals, "Plaintiffs' failure to sufficiently plead causation *by the State* is fatal to their claim." *Id.* at 179 (emphasis added).

In fact, the claims here advanced are inherently inconsistent. The individuals who press the *Davids* litigation acknowledge that "tenure *per se*" is not only valid but "constitutionally-protected," especially in the context of challenges to individual teacher effectiveness. Davids Orig. Compl. ¶¶ 3, 5.[5] Their grievance is with the enforcement of disciplinary mechanisms when it comes to so-called "ineffective" teachers. By contrast, the sponsors of the *Wright* litigation maintain that the Education Article empowers the judiciary to invalidate tenure altogether, leaving the determination of who are "ineffective" teachers to administrators to summarily dismiss any teacher with or without cause. No such power exists. Indeed, the Court of Appeals has consistently held that tenure is warranted and should be broadly construed in favor of teachers as a matter of public policy. *E.g.*, *Ricca,* 47 N.Y.2d at 391. Nonetheless, it is claimed that, because some small but unidentified group of teachers is, in Plaintiffs' view, "ineffective," *every teacher* in New York should now be stripped of tenure's due process protections. That is simply not the law. The positions espoused by Plaintiffs do not give rise to a cognizable cause of action under the Education Article and since that is the *sole* basis for both suits, dismissal should follow.

Just as tenure has consistently been sustained by the courts as a sound and rationally based exercise of legislative power, so too have the seniority concepts that Plaintiffs challenge. *See, e.g.*, *Matter of Leggio v. Oglesby*, 69 A.D.2d 446, 448-49 (2d Dep't 1979) (recognizing

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[5] The admissions made under oath in the Davids Verified Original Complaint are binding. *QBE Ins. Corp. v. Jinx-Proof Inc.*, 102 A.D.3d 508, 515 (1st Dep't 2013); *Performance Comercial Importadora E Exportadora Ltda v. Sewa Intl. Fashions Pvt. Ltd.*, 79 A.D.3d 673, 673-74 (1st Dep't 2010).

legislative purpose behind seniority statute); *see also Matter of Ward v. Nyquist,* 43 N.Y.2d 57, 62-63 (1977); N.Y. Educ. Law § 2588(3)(a). Again, the rationale has been clearly stated:

> 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 the order of their seniority*, from dismissal without regard for the comparative abilities of the teachers.

Matter of Silver v. Bd. of Educ., 46 A.D.2d 427, 431-33 (4th Dep't 1975) (emphasis added). As an alternative to the legislatively-crafted, unbiased seniority system, Plaintiffs aspirationally allege, "upon information and belief," that "in the absence of the Challenged Statutes school administrators would make teacher employment and dismissal decision based, in large part and/or entirely on their students' need for effective teachers." Davids Am. Compl. ¶ 43. The statute and well-settled case law ensure that teachers need not rely on Plaintiffs' unsubstantiated assumption.

Long standing jurisprudence has also provided the appropriate standard of scrutiny for the challenged laws. The Court of Appeals has ruled that "rational basis [is] the proper standard for review when the challenged State action implicate[s] the right to free, public education." *Levittown*, 57 N.Y.2d at 43. Both as to tenure (*see, e.g.*, *Ricca,* 47 N.Y.2d at 391) and as to the retention of experienced teachers during layoffs (*see, e.g.*, *Matter of Leggio,* 69 A.D.2d at 448-49), the courts have concluded that a rational basis exists for the challenged protections, namely that the public interest is thereby best served. Thus, Plaintiffs' "as applied" constitutional challenge to the application of the tenure and seniority statutes fails.

While Plaintiffs profess concern about the needs of children, neither the *Davids* nor the *Wright* Plaintiffs address the "myriad" factors that the Court of Appeals has repeatedly stressed directly impact student achievement, including inadequate funding, poverty, class size and inadequate facilities and instrumentalities of learning. *See, e.g.*, *Paynter,* 100 N.Y.2d at 440-41.

Nonetheless, Plaintiffs choose to distract the Court, the Legislature, and the public from the many challenges faced by school systems throughout the State by blaming and vilifying teachers for all the ails of the educational system, real or perceived. Indeed, the point is readily illustrated, especially in the context of the inadequate funding that the Court of Appeals has repeatedly held is at the core for claims of academic failure. *Campaign for Fiscal Equity v. New York*, 100 N.Y.2d 893, 909-14, 919-20 (2003) (hereinafter "*CFE II*"). Thus, in a recent television interview on NY1, lead Plaintiff in the Wright Complaint, Keoni Wright, the father of twins, defined one of the key differences in effectiveness as between his twins' teachers as being that one teacher purchased supplies *out of her own personal funds,* while the other did not. The privately purchased materials, to him, made a significant educational difference.[6] Inadequate funding was the cause of claimed educational failure; yet, teachers are blamed in Mr. Wright's Complaint.

This lawsuit, in essence, amounts to little more than an attempt at lobbying under the guise of litigation. What is important to Plaintiffs and what drives this litigation is the platform it provides for media attention. Indeed, Campbell Brown, the public face for the *Wright* Complaint, made that evident when, following the initial hearing of this consolidated action before this Court, she acknowledged in remarking on this lawsuit:

> [M]aybe this is just the hammer that breaks through sort of the logjam that has existed in our legislature or in other states, where it's just been inaction and inertia and how do you just wake people up? Is this, potentially, the beginning of a conversation that wakes people up about what's going and forces the conversation, and forces the debate, so that there will be legislative action and we don't have to take this through the entire legal process.[7]

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[6] *Inside City Hall: Campbell Brown & Keoni Wright Discuss Teacher Tenure,* Partnership for Educational Justice (Aug. 6, 2014), http://www.edjustice.org/inside-city-hall-campbell-brown-keoni-wright-discuss-teacher-tenure/.

[7] *Campbell Brown Talks Teacher Tenure*, YouTube (posted by American Enterprise Institute, Oct. 2, 2014) http://www.youtube.com/watch?v=7RLFO9bYgSM#t=50m48s.

With respect, it is not the role of the judiciary either to be a foil for legislative lobbying or to jump start the legislative process. It rests with the Legislature to come to grips with the root causes of educational concern repeatedly recognized by the Court of Appeals—inadequate funding, poverty, class size and the myriad other shortcomings that impact educational excellence.

These proceedings reflect an inappropriate attempt by those with a special agenda to draw the judiciary into a political thicket involving political questions and public policy debates that have recently been and remain the subject of concerted and ongoing action by the legislative and executive branches of the government (*e.g.*, the recently-enacted changes in Education Law § 3012-c, or the "Teacher Evaluation Law"). Indeed, if Plaintiffs were correct, this Court would be placed in precisely the role the Court of Appeals and, more recently, the Second Department have viewed as inappropriate for judicial intercession. *See N.Y. Civ. Liberties Union*, 4 N.Y.3d at 180-82; *Capece v. Schultz*, 117 A.D.3d 1045 (2d Dep't 2014).

Similarly, Plaintiffs err in the attenuated argument that due process causes academic failure. Recognizing the logical gap between due process and asserted academic failures, Plaintiffs point to statistics and outdated or specially-commissioned studies. However, the Court of Appeals has already rejected that leap of logic:

> [I]f the State truly puts adequate resources into the classroom, it satisfies its constitutional promise under the Education Article, even though student performance remains substandard.

Paynter, 100 N.Y.2d at 441. There is no factual allegation in either Complaint that the State has failed to fund or itself otherwise commit adequate resources to the classroom. Nonetheless, Plaintiffs presumably would urge that the State has been remiss by permitting "ineffective" teachers to remain in the classroom (either by inaction or legislative enactment). But that notion likewise fails. First, as the Court of Appeals recognized in *Callahan* and as the Education Law

(particularly §§ 2573(5), 3020-a and 3012-c) make clear, the Legislature has provided the statutory mechanism for the removal or discipline of tenured teachers, if shown to be ineffective. Second, Plaintiffs' claim of lack of or lax disciplinary action (*see, e.g.*, Davids Am. Compl. ¶¶ 32-43; Wright Compl. ¶¶ 49-65), is not cognizable under the Education Article. *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 183-84. In a proper case, Article 78 provides redress, and no such claim is here asserted (even assuming such a claim had merit). *Id.* Third, the Court of Appeals has ruled that the Education Article may not be availed of to effectively bypass local governance. *Id.* at 182-84.

There is no basis in law for these suits, as the Education Article is inapplicable. Even if that were not the case, multiple other grounds compel dismissal of this consolidated action as a matter of law. Thus, as detailed below, the claims are neither justiciable nor redressable; they simply tender political questions that the judiciary is ill-equipped to address and should not entertain; Plaintiffs lack standing to sue; and, finally, the due process protections termed "tenure" do not abridge any constitutional stricture.

Let there be no misunderstanding as to what underlies these proceedings. At stake is an attempt to eviscerate all tenure laws (based on little more than an inconclusive anecdote and self-selected and largely outdated statistics of academic performance and teacher retention and dismissal). What Plaintiffs propose is that teachers risk summary dismissal for independent thought, for speaking out, for grading students in accordance with their merit rather than their parentage or sponsorship, and for a host of other perceived slights, real or pre-textual. Presumably, the assault on independent public service would not stop there. Teachers and other educators are not alone when it comes to some specie of tenure. Just cause protections have, in some form, long been accorded to public servants in New York. *See* N.Y. Civ. Serv. Law of

1909, c. 15, § 22, subds. 1, 2, & 4. Today, a wide variety of statutes, as well as statutorily sanctioned collectively bargained agreements, provide many, if not most of New York's public servants with specified due process protections against arbitrary dismissal once they have fulfilled particularized job requirements and any prescribed probationary period.[8]

Despite history, long standing practice and repeated judicial sanction, Plaintiffs seek to eviscerate tenure, a right that is *earned* after years of probationary service and performance reviews. The shrill demand to confiscate that hard-earned right, and, particularly that of Plaintiffs in *Wright,* is reminiscent of Alice's haughty Queen of Hearts in proclaiming, "off with their heads." Lewis Carroll, *Alice's Adventures in Wonderland* (1865).

ARGUMENT

POINT I

THE ALLEGATIONS OF THE COMPLAINT FAIL TO STATE A CAUSE OF ACTION

Plaintiffs' allegations, on their face, fail to state a cause of action under the Education Article. *Paynter*, 100 N.Y.2d at 441. While pleadings are, of course, to be liberally construed on a motion to dismiss for failure to state a cause of action, vague and conclusory allegations will not suffice. *Washington Ave. Assocs. v. Euclid Equip.*, 229 A.D.2d 486, 487 (2d Dep't 1996). Thus, to support a claim under the Education Article, Plaintiffs must present facts alleging deprivation of the opportunity to obtain a sound basic education as a result of the State's failure to meet its obligation to maintain and support a system of free common schools. *N.Y. Civ.*

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[8] Numerous public servants in the competitive class of the classified civil service are accorded due process rights in the following terms: "[they] shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." N.Y. Civ. Serv. Law § 75(1). Since 1970, Civil Service Law § 76(4) has extended those rights by authorizing expansion of the protections afforded under § 75 pursuant to negotiated collective bargaining agreements, including, *inter alia*, the use of impartial arbitrators to hear such charges. *See Bd. of Educ. v. Nyquist*, 48 N.Y.2d 97, 104 (1979); *Antinore v. New York*, 49 A.D.2d 6, 7-8 (4th Dep't 1975), *aff'd*, 40 N.Y.2d 921 (1976). The safeguards thus accorded by Sections 75 and 76 have been held to accord fully with New York public policy. *Auburn Police Local 195 v. Helsby*, 62 A.D.2d 12, 17 (3d Dep't 1978) (citing *Antinore*, 40 N.Y.2d 921, 922).

Liberties Union, 4 N.Y. 3d at 180-82; *Campaign for Fiscal Equity v. New York*, 86 N.Y.2d 307, 318-19 (1995) (hereinafter "*CFE I*"). They have not done so.

The Complaints are laden with—and rely upon—vague and conclusory allegations. Viewing the actual facts asserted, despite the recognition that the "majority of teachers are providing students with a quality education," Davids Am. Compl. ¶ 4, Plaintiffs, in essence, base their claim that tenure is unconstitutional on the citation of specious statistics regarding the number of teachers receiving tenure, the alleged cost of terminating teachers on account of ineffectiveness, and inconclusive surveys from administrators on the many reasons why charges, though considered, were not pursued. Plaintiffs then summarily conclude that effective enforcement of the "Challenged Statutes," which they self-servingly deem "cumbersome," results in the denial of a "sound basic education." Even if true (which they are not), these allegations of *local* failings in effectively enforcing the "Challenged Statutes," fail to rise to a constitutional dimension. *See infra* Point II.

The basis for both sets of Plaintiffs' attacks on due process is the same: the disciplinary process allegedly contains multiple steps and requires time and resources to navigate, Wright Compl. ¶ 50; Davids Am. Compl. ¶¶ 38-39, fewer teachers than Plaintiffs feel should be are charged by administrators with being ineffective or otherwise subject to discipline, Wright Compl. ¶¶ 51-55; Davids Am. Compl. ¶ 39, and, therefore, it must follow that the statute "makes it nearly impossible" or "highly impractical," Davids Am. Compl. ¶ 34; Wright Compl. ¶¶ 53-60, for administrators to do their jobs.[9] Yet, it is admitted that public employees who complete probation "must be afforded due process rights." Wright Compl. ¶ 36; Davids Orig. Compl. ¶ 5. These admissions recognize coordinate constitutional provisions in the State and Federal

[9] Both complaints use the same conclusory types of phrases to make their claims, stating that the statutes "compel" school administrators, make dismissals "nearly impossible" or are a "substantial cause." Davids Am. Compl. ¶¶ 33, 34, 5; *see also* Wright Compl. ¶¶ 3, 24 ("nearly impossible"), ¶ 6 ("prevents").

Constitutions and reveal that the real issue is not whether teachers should have due process protections, but that Plaintiffs would prefer either at-will employment or a different process to the existing one.

Plaintiffs begin with the unremarkable notion that teachers are an important input to education, Wright Compl. ¶¶ 2, 27, 28; Davids Am. Compl. ¶¶ 3, 29, and that better teachers benefit students. Wright Compl. ¶¶ 32, 33; Davids Am. Compl. ¶¶ 30-31. The *Davids* Plaintiffs acknowledge that the vast majority of teachers are providing a quality education, more than satisfying the constitutional minimum of a sound basic education. Davids Orig. Compl. ¶ 4. Plaintiffs also concede that certain teachers are: (i) being denied completion of probation or having their probation extended, Wright Compl. ¶¶ 37, 45; (ii) being rated ineffective in the first years of their performance review cycle under Education Law § 3012-c, Wright Compl. ¶¶ 41,42; and (iii) being charged and disciplined or terminated for ineffectiveness under the statutory due process mechanism. Wright Compl. ¶¶ 51, 62; Davids Am. Compl. ¶¶ 6, 39. In short, the statutory scheme is being utilized properly by administrators. Thus the statutes—whether or not "cumbersome," as Plaintiffs claim—do not "compel" school administrators to grant tenure to all teachers regardless of effectiveness; neither do they compel retention of nor make it "impossible" to charge ineffective teachers. Who then are the teachers really at issue in Plaintiffs' required systemic challenge to the probation, due process and layoff statutes? The answer is, even accepting the Complaints on their face for purposes of this motion, a very small minority of teachers. But, the mere existence or even actual experience of having an ineffective teacher does not create a cause of action under the Education Article. Aside from vague references to ineffective teachers and statistics without meaning, the Complaints do little to quantify the alleged problem. There are almost no factual allegations regarding the composition

of this hypothetical group of "ineffective" teachers upon which the entirety of Plaintiffs' Complaints rest.

With respect to probation, the *Wright* Plaintiffs cite a single statistic and complain that only a portion of teachers who reach the end of their probationary period and qualify for completion are actually denied tenure. Wright Compl. ¶ 37. Nonetheless they admit that principals may seek to extend probation in cases where they require additional time to reach a determination and that the school district does, at times, extend probation with teacher consent. *Id.* While Plaintiffs argue that the high rate of probation completion among those that have put in the requisite time somehow implies that some teachers who are granted tenure do not deserve it, they provide no explanation for why that is true, let alone how the statute compels that result. At most, the allegation is that, in Plaintiffs' view, administrators are simply not fulfilling their supervisory responsibility with regard to probation. This naked *ipse dixit* between the statute and cherry-picked statistics—conveniently overlooking the alleged inactions of administrators—is emblematic of Plaintiffs' assertions.

As to due process, the only facts asserted by the *Davids* Plaintiffs as proof that the existing process is flawed is that between 1995 and 2006, an alleged 547 teachers outside New York City were dismissed as the result of a Section 3020-a hearing determination.[10] Plaintiffs attach the word "only" before the number 547 to indicate that it is too few teachers in their view. But, the assertion itself, despite the addition of the word "only," undermines the theory. For

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[10] One example provided by the *Wright* plaintiffs is that administrators (understandably, according to Plaintiffs) do not properly rate teachers under the Annual Professional Performance Review ("APPR") (the process set forth in Education Law § 3012-c) because an ineffective rating in the first year would require the principal to do more work, specifically, to participate in a teacher improvement plan designed to help developing and ineffective teachers in their first years to improve. Wright Compl. ¶ 53. To avoid that extra work, Plaintiffs assert, administrators artificially inflate evaluation scores. From that alleged failure, Plaintiffs ask the Court to imply that it is the Statute that falls below the constitutional minimum, not that it is administrators (if true) that have failed to perform their function. Indeed, the Wright Plaintiffs go so far as to state that administrators fail to follow express time limitations found in the Statute and that as a result, it is the statute that should be invalidated. Wright Compl. ¶¶ 56-57.

even if some number of additional teachers perhaps should have been charged by administrators, and there is no plausible allegation that this is true, the vast majority of teachers are doing a good job, as are a good proportion of administrators, by charging and seeing through the termination of ineffective teachers. All of these things are happening under the same statutory scheme. If administrators are able to charge and successfully terminate 547 teachers, then the statute neither makes it impossible to terminate an ineffective teacher nor compels administrators to keep ineffective teachers.

Finally, Plaintiffs take issue with the statutory no-fault layoff provisions that provide an objective order for teacher layoffs—reverse seniority with probationary employees being first to be laid off. According to Plaintiffs, the layoff law is flawed because it does not allow administrators to determine layoff order based upon levels of teacher effectiveness. Plaintiffs believe that seniority—*i.e.*, experience level—is unrelated to teacher effectiveness. Davids Am. Compl. ¶ 46; Wright Compl. ¶ 69. Of course, seniority *is* a valid, non-biased indicator of effectiveness and it has been sustained by the Second Department and the Court of Appeals. *See, e.g.*, *Matter of Leggio,* 69 A.D.2d at 448-49; *see also Matter of Ward,* 43 N.Y.2d at 62-63. After all, tenure is granted only upon satisfactory completion of probation and, even after tenure is thus earned, the evaluation system is utilized by localities to meaningfully evaluate teachers throughout their career (standards that, as Plaintiffs concede, are operative the majority of the time). A rational basis thus exists for that statutory scheme and the Constitution has no claim on the order in which qualified teachers are laid off. *See Matter of Leggio,* 69 A.D.2d at 448-49; *Matter of Ward,* 43 N.Y.2d at 62-63; *see also Matter of Silver,* 46 A.D.2d at 431-32.

It remains only to emphasize that tenure is not simply given, it must be earned following years of probationary testing. The underlying concept is that, if a teacher proves his or her

mettle then, upon completion of the probationary process, he or she has *earned* the right to due process protection. What Plaintiffs effectively seek by their effort to invalidate tenure is permanent probation. That is not what the Court of Appeals has found to be merited, it is not what the Education Article mandates, and it is not what the Legislature has deemed to be in the public interest. The allegations of the Complaints simply do not make a cognizable case for such a conclusion.

POINT II

ARTICLE XI OF THE STATE CONSTITUTION IS INAPPLICABLE

The *sole* basis of this action is the Education Article—Article XI of the New York State Constitution. Both Complaints are predicated on its alleged abridgment. Davids Am. Compl. ¶ 7; Wright Compl. ¶ 6. The Education Article, however, is inapplicable here and, without more, dismissal must follow.

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, teacher competence was not the concern of the Education Article or its successful sponsors:

> 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). Thus, the primary aim of the provision was to constitutionalize the established system of common schools rather than to alter its substance. *Id.*; *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 recently, and 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. Or, 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 *New York Civil 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.

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; *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. 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. There is no claim in either the *Wright* or *Davids* Complaints of the Legislature's failure to adequately fund or provide sufficient resources and supports, financial or otherwise, to schools. *Id.* And there is no supported claim 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—much less of "deprivations" caused by State action, which have been the only types of successful challenge under the Education Article ever recognized by the Court of Appeals:

> Fundamentally, an Education Article claim requires two elements: the deprivation of a sound basic education and *causes attributable to the State*. As our cases make clear, even gross educational inadequacies are not, standing alone, enough to state a claim under the Educational 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 (the hiring, retention or removal of claimed "ineffective"

teachers), a matter *exclusively within local control* under the system intended by Education Article.

The main thrust of the pleadings before this Court is aimed at the removal of asserted "ineffective" teachers, and that is the responsibility of local districts, not the State (in New York City, *see, e.g.*, N.Y. Educ. Law §§ 2573, 2590-g(2)). Three dispositive conclusions are compelled by that distinction.

First, the Court of Appeals has made clear that should the local districts fail in their enforcement, Article 78 provides the remedy in an appropriate case. *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...."). Fatally, however, neither Complaint before this Court alleges an Article 78 claim (assuming, *arguendo*, a cognizable claim could be stated). Thus, to the extent local failure of enforcement is relied upon, such reliance is misplaced as a matter of law.

Second, wholly absent here is the indispensable element of State causality mandated in *New York Civil Liberties Union*. *Id.* at 178-79 ("Plaintiffs' failure to sufficiently *plead causation by the State is fatal to their claim.*" (emphasis added)). Neither the hiring, nor retention, nor discipline that Plaintiffs complain of are attributable to system-wide *State* ailments. Instead, assuming *arguendo* the validity of Plaintiffs' assertions, any failure in hiring, retention or discipline are local or district responsibilities, and the claimed omissions are locally or district driven. 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"),[11] retained and paid by the DOE,

[11] 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

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. *See, e.g.*, N.Y. Educ. Law §§ 2503(5), 2554(2). As was aptly stated by Chief Judge Kaye:

> [I]n seeking to require the State to assess and rectify the failings of individual schools, plaintiffs' theory would
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> > "subvert the important role of local control and participation in education.' As we observed in *Levittown*, the Education Article enshrined in the Constitution is a state-local partnership in which people with a community of interest and tradition acting together to govern themselves 'make the basic decisions on funding *and operating* their own schools.' The premise of the Article is thus in part that a system of local school districts exists and will continue to do so because the residents of such districts have the right to participate in the governance of their own schools. The aim of the Article was to constitutionalize the established *system* of common schools rather than alter its substance."

N.Y. Civ. Liberties Union, 4 N.Y.3d at 181-82 (*quoting Paynter*, 100 N.Y.2d at 442) (internal citations omitted, emphasis added).

Third, to the extent Plaintiffs may claim that cognizable State action under the Education Article occurs by reason of the enactment of legislation providing for teacher due process rights and that such enacted rights preclude the discipline of ineffective teachers, such claim fails on the face of the operative statute. To illustrate, as previously noted, Education Law § 2573(5), which applies to New York City teachers (*see Matter of Mannix*, 21 N.Y.2d at 456), provides:

> [Individuals in the] teaching service of the schools of a city, who have served the full probationary period, shall hold their respective positions *during good behavior and efficient and competent service*, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a of this chapter.

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.

N.Y. Educ. Law § 2573(5) (emphasis added). By its terms, the statute provides that the due process rights of tenure are conditional upon "good behavior and efficient and competent service" and expressly provides for a removal mechanism under Education Law § 3020-a (to which must now be added the Teacher Evaluation Law discussed herein). Manifestly, there is no merit to any argument that the State action creating due process tenure 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 tenure to take local disciplinary action where warranted.

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 *New York Civil Liberties Union,* the two most recent decisions by that Court. Significantly, both cases came to the Court, as here, on motions to dismiss. And, in both, the Court rejected Plaintiffs' attempts to invoke the Education Article. In *Paynter*, the claim 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. Plaintiffs maintained that the State had a responsibility to find a solution, including permitting students to attend schools outside their district, effectively invalidating Education 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 *New York Civil Liberties Union*, adequacy of State funding was not the primary issue, although a funding component was arguably present. Rather, 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 182 (internal quotations omitted).

Two lessons may fairly be drawn from the dismissal of these 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. That, of course, is the case here, for the responsibility for the retention or removal of supposed "ineffective" teachers rests with the local districts.[12]

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[12] In the interests of completeness, we note two cases decided in this calendar year at the Supreme Court level. Both involved what the trial court perceived was an inappropriate attempt to extend the scope of the Education Article. Recently, in *New York State United Teachers v. New York*, a challenge to Education Law § 2033-a, which establishes a cap on the allowable tax levy, charging, *inter alia*, that it had the effect of limiting educational opportunity, with a disproportionate impact on poorer districts. Index No. 963-13, 2014 N.Y. Misc. LEXIS 4218, at *18-19 (Sup. Ct. Albany Cnty. September 23, 2014). The Supreme Court dismissed the Complaint holding that the Education Article did not apply since the claim did not rest on the "failure by the State to provide resources—financial or otherwise." *Id.* at *17. The other case, decided, earlier this year on motion to reargue, involved the dismissal of a complaint charging discrimination as between public schools and charter schools in the allocation of resources by the local district. *N.Y.C. Parents Union v. Bd. of Educ.*, Index No. 108538/2011, 2013 N.Y. Misc. LEXIS 5226, at *12-14 (Sup. Ct. N.Y. Cnty. Apr. 26, 2013), *rearg. denied*, 2014 N.Y. Misc. LEXIS 114 (Sup. Ct. N.Y. Cnty. Jan. 13, 2014). Dismissal was directed, the court emphasizing that Article XI protections do not extend to bar alleged favoritism or bias against public schools and that dismissal of the complaint must follow, "even if there exists an educational inequality between public school students and charter school students." *Id.* at *17-18.

POINT III

THE COMPLAINTS PRESENT A NON-JUSTICIABLE POLITICAL QUESTION

The *Davids* and *Wright* Complaints are examples of lobbying by litigation, an attempt to force educational policy change (the province of the Legislative and Executive branches) by using the Judiciary as a vehicle to obtain, indirectly, the policies they have been unable to convince the political branches to accept. Their pleadings also reflect an attempt to subvert judicial processes to distort the root causes of what the Court of Appeals has termed "academic failure[s]," *e.g.*, *Paynter,* 100 N.Y.2d at 441, namely to excuse the Legislature from tackling the "myriad" factors that cause academic failures (*e.g.* inadequate funding, class size, books and supplies, poverty or the like) by substituting a convenient scapegoat—teachers. Educational excellence—a cause to which the UFT has continually devoted its energies—is not singular in its needs. Plaintiffs are apparently dissatisfied with the number of teachers dismissed for being deemed "ineffective," and are either unwilling or unable to persuade New York legislators to ignore all the other factors that affect the performance of schools and bow to their political philosophy. They thus seek judicial intervention with its attendant publicity to remedy what they perceive is what ails New York State's educational system—which they term the "Challenged Statutes."

Even if New York decided (which it has not) to provide "super due process," as Plaintiffs put it, and even if the dismissal statutes contained in the Education Law in fact disserved our students (and they do not), the appropriate place to debate such education policy, if necessary, is in the voting booth or the Legislature, not the courts. However convenient some may find it to

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It merits note that the UFT and its counsel have in the past attempted to expand the reach of the Education Article under circumstances, like those above, where unfairness in relation to education was perceived. But like the above-noted cases, as well as *Paynter* and *New York Civil Liberties Union*, the courts have consistently ruled otherwise.

blame teachers and to view serious and multi-faceted pedagogical issues through a single-faceted, self-serving lens, the Court of Appeals has aptly and repeatedly reminded us that educational excellence requires the simultaneous focus upon the myriad factors illustrated above. *See, e.g., CFE I*, 86 N.Y.2d at 317; *Paynter,* 100 N.Y.2d at 440.

As a general rule, the Judiciary avoids questions more appropriately settled by the political process. *Jones v. Beame*, 45 N.Y.2d 402, 406-07 (1978). New York courts act with restraint and do not interfere with matters that fall within the province of the Legislature, so as to preserve the separation of powers. Moreover, courts abstain from venturing into political issues when they are "ill-equipped to undertake the responsibility and other branches of government are more suited to the task." *Id.* at 409. The details of municipal administration—the determination of policies, priorities and the allocation of resources—are "properly left to the Legislature and the elected officials of State and local government." *Id.*

It is true, of course, that the walls separating our three branches of government are not always "solid." *Paynter*, 100 N.Y.2d at 452 (Smith, J., dissenting). The Education Article, by its very inclusion in the State Constitution, may implicate some judicial encroachment on the traditional educational purview of the Legislature and the Executive branches. But it is a limited encroachment. *Id.* at 452-53.

As the *CFE I* Court and its progeny recognized, the Education Article simply establishes a "constitutional floor" with respect to educational adequacy, nothing more. *CFE I*, 86 N.Y.2d at 315. The Court of Appeals has in its most recent determinations on the subject made clear that it was not the intent of the Education Article to wrest from the Legislature and local school districts and to ensconce within the purview of the courts educational policy disputes about the best way to educate children. *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 181-82; *Paynter*, 100 N.Y.2d at 441-

42. There is a qualitative component of the Education Article, but the component simply mandates that "*minimally* acceptable educational services and facilities" be provided. *CFE I*, 86 N.Y.2d at 316 (emphasis added). With regard to teachers and teaching, the Constitution, at most, requires the State to provide the teaching of reasonably up-to-date basic curricula by "sufficient adequately trained personnel." *Id.* at 317. Neither Complaint raises the issue of curricula nor of funding to hire sufficient personnel. Instead, what is charged is that among the teachers hired by the local districts, there are an unidentified number who supposedly fail Plaintiffs' unspecified test for "effectiveness" and that they are not counseled out of the profession, nor identified and removed by the local school districts during the probationary period nor locally disciplined with sufficient vigor to suit Plaintiffs.

The Court need not wade further into these details of teacher tenure, seniority rules or educational policy. The space between the State's provision of a "sound basic education"—the minimal guarantee provided by the State Constitution—and the highest quality education that every child deserves is filled with political and policy decisions and administration at every level, from the Executive, to the Legislative, the State Education Department, school districts and even individual schools. Yet, falsely emboldened by the patently unsupported decision of the trial court in *Vergara v. California*, No. BC484642 (Cal. Sup. Ct., Los Angeles Cnty. 2014)—a decision now on appeal and which has been criticized by many legal scholars[13]—and improperly relying on the *CFE* decision—a case primarily involving the non-pedagogical issue of sufficient educational funding—Plaintiffs now seek to embroil the Judiciary in determining

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[13] The Vergara decision has been publicly criticized by prominent constitutional scholars, among them, Dean Erwin Chemerinsky of the University of California Irvine, *Scapegoating California Teachers*, Orange County Register (June 25, 2014, 3:06 p.m.), http://www.ocregister.com/articles/teachers-627127-california-job.html; Professor Noah Feldman of Harvard Law School, *California's Weak Case Against Teacher Tenure*, BloombergView (June 11, 2014, 11:33 a.m.), http://www.bloombergview.com/articles/2014-06-11/california-s-weak-case-against-teacher-tenure); and Professor Pedro Noguera of New York University School of Law, *In Defense of Teacher Tenure*, Wall Street Journal Online (June 18, 2014 7:42 p.m.), http://online.wsj.com/articles/pedro-noguera-in-defense-of-teacher-tenure-1403134951.

what makes for an ineffective teacher, despite their concession that "the majority of teachers in New York are providing students with a quality education." Davids Am. Compl. ¶ 4. While it is true that a "sound basic education" for public school children is guaranteed under New York's Constitution (which differs from California's and, of course, is interpreted by a different body of jurisprudence), the Education Article was not construed in *CFE,* nor has it ever been construed, as inviting the courts to decide what makes for an "effective" teacher, the terms and conditions of employment conditions 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 an anathema to the [Court of Appeals]" in the seminal *Levittown* decision. *CFE I*, 86 N.Y.2d at 332 (Levine, J., concurring). The courts "have neither authority, nor the ability, nor the will, to micromanage education [financing]." *Hussein v. New York*, 19 N.Y.3d 899, 901 (2012) (Ciparick, J., concurring).

Indeed, the *Levittown* decision, upon which all of the succeeding Court of Appeals decisions rest, "cogently pointed to the 'enormous practical and political complexity' of deciding upon educational objectives and providing funding for them which, under our form of government, *are legislative and executive prerogatives upon which courts should be especially hesitant to intrude*." *CFE I*, 86 N.Y.2d at 330 (quoting *Levittown*, 57 N.Y.2d at 39) (emphasis added). Nonetheless, in a remarkable passage in the *Wright* Complaint, Plaintiffs assert that "studies indicate that teacher effectiveness is typically established by the fourth year of teaching" after which "effective teachers tend to remain relatively effective," and yet suggest that a teacher's long-term effectiveness cannot be determined with any degree of confidence during the

first three years of teaching. Wright Compl. ¶ 46. With respect, it is not for the court system to decide whether the probationary period should be three or four years. The Legislature has repeatedly addressed that issue.[14]

Striking the appropriate balance between the benefit of due process protections for teachers with the time it takes to accurately identify ineffective teachers and the real possibility that with additional support struggling teachers can succeed, is precisely the type of "practical and politically complex" question upon which this Court should be particularly hesitant to intrude. It requires expert analysis and considered legislative judgment by elected officials. "Acquiring data and applying expert advice to formulate broad programs," particularly when it entails "competing and equally meritorious approaches" is not within the province of the courts. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-36 (1984).

Neither is it the proper province of the judiciary to decide how to conduct layoffs during an economic downturn. *See, e.g.*, Davids Am. Compl. ¶¶ 44-51; Wright Compl. ¶¶ 66-74. In *Matter of Roberts v. Board of Education*, for example, petitioners challenged the Board of Education's decision to terminate 642 non-teacher employees to implement a 3.26% reduction in school budgets. Index No. 113029/2011, 2012 N.Y. Misc. LEXIS 1717, at *1 (Sup. Ct. N.Y. Cnty. Apr. 11, 2012). As a "policy matter," the court ruled that it would not interfere in areas in which it was "ill-equipped to undertake" and held that the termination of these employees was an

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[14] The Legislature has on multiple occasions over the years changed the length of the probationary term in its continuing attention to teacher qualification (*see infra* p. 28-29). Moreover, in addition to the three-year initial period (longer than some other states, including California), the courts have already provided an avenue for schools and districts to extend the statutory probationary period should it be determined that a teacher needs additional time to prove his or her teaching competency. In *Juul v. Board of Education*, the Court of Appeals upheld a determination of the Second Department that a teacher may knowingly and voluntarily waive tenure rights to continue employment beyond the original probationary period. 76 A.D.2d 837, 838 (2d Dep't 1980), *aff'd*, 55 N.Y.2d 648 (1981) ("The public policy of this State is not violated by certain knowing and voluntary waivers of the protections afforded by the Education Law."). Thus, individual school districts can extend probationary periods beyond three years in those instances where it is thought the teacher needs another year to prove him or herself, provided that the teacher voluntarily signs an agreement extending the probationary period without the due process rights of tenure.

"inherently administrative process, which is uniquely part of that official's function and expertise." *Id.* at *7. There, as here, petitioners' claim presented a non-justiciable controversy. *Id.* In the same vein, the Appellate Division, Second Department recently held that the determination as to whether a teacher merited tenure was not an appropriate judicial function. *Capece v. Schultz*, 117 A.D.3d 1045, 1046-47 (2d Dep't 2014).

One additional point merits mention. It is not sufficient for Plaintiffs to simply cite, out of context, aggregate educational statistics or the alleged limited number of teachers dismissed due to being ineffective in order to gain access to the court system, especially where that data precedes the 2010 and subsequent revisions of applicable laws (*e.g.*, the Teacher Evaluation Law). If courts were forced to tackle any challenged pedagogical, administrative or operational procedure because it allegedly denies a "sound basic education" to students, the courts would be inundated with suits and school districts would effectively be run by judges, not school administrators, parents, and teachers. It is for precisely this reason that the Court of Appeals has left these issues to "people with a community of interest and a tradition of acting together to govern themselves," so that they may make the "basic decisions" on "operating their own schools." *Paynter*, 100 N.Y.2d at 442 (quoting *Levittown*, 57 N.Y.2d at 46).

Plaintiffs' request that the Court involve itself in evaluating the tenure and layoff processes is even more egregious because the Legislature, Defendants and the UFT have been working extensively in this field to ensure that teacher quality is appropriately measured. Designing a system to determine whether a teacher is "effective" or "ineffective" is not as simple as Plaintiffs insinuate in conclusory fashion, and has been the subject of extensive deliberation with executive branch officials, legislators, State Education Department personnel, educational policy experts and union representatives all weighing in on crafting of the new evaluation

process. Indeed, in May 2010, the State Legislature enacted the Teacher Evaluation Law, to more expeditiously deal with allegations of incompetence.

Education Law § 3012-c not only defines what constitutes an "ineffective" teacher, it provides various methods for determining how to identify "highly effective," "effective" "developing" and "ineffective" teachers, including multiple measures of student performance and observations of teacher practice. All teachers are rigorously evaluated every school year and, under the law, two consecutive years of "ineffective" ratings give rise to a presumption of ineffectiveness that (in New York City) may be used in an expedited due process hearing under § 3020-a to terminate a tenured teacher. N.Y. Educ. Law §§ 3012-c(5-a)(j), 3020-a(3)(c)(i-a)(A).

Significantly, the Legislature did not merely enact the Teacher Evaluation Law and simply hope for the best, but has been actively involved in monitoring its implementation and refining the provisions to ensure the best possible implementation. Since its enactment in 2010, the law has been amended three times. In March 2012, the Legislature added into the law the specific scoring bands that are to be used by individual districts in determining a teacher's performance rating. *Id.* § 3012-c(2)(a)(2)(A-D). This amendment not only refined the description of the growth measures to be used by districts in determining student achievement, but also set forth the parameters of the teacher observation process, specifically stating that a majority of the points assigned for teacher performance shall be based on multiple classroom observations by school principals or other trained administrators. *Id.* § 3012-c(2)(a)(1). It further required that the Commissioner of Education approve the Annual Professional Performance Review Plan (the "APPR Plan") of every school district in the State, ensuring that individual localities comply with the Legislature's mandates. *Id.* § 3012-c(k).

In 2013, the Legislature again amended 3012-c by adding a provision mandating that school districts that had failed to negotiate an approved APPR Plan prior to the deadline set by the Governor (namely, New York City under former Mayor Bloomberg) engage in an arbitration process before the Commissioner of Education who would then impose a plan. *Id.* § 3012-c(2)(m)(2). This amendment assured that every classroom teacher in the State of New York would be rated under the new system, enabling school districts to identify teachers rated as "ineffective" and take at the locality level the necessary steps to support teachers and deal with any concerns.

The most recent amendments, during this past legislative session, focused on student testing, including the addition of provisions to expedite the process for eliminating unnecessary student assessments and to reduce the time students spend on taking "field tests." *Id.* § 3012-c(2)(k-2).

Plainly stated, the Teacher Evaluation Law sets forth a "more streamlined and ... a more effective process" for removing a teacher while, at the same time, "building on existing state law" and while also ensuring due process rights. NYLS' Governor's Bill Jacket, 2010 Chapter 103, Assembly Debate Transcript at 20, 23. The result is a "more nuanced and ... more effective [teacher] evaluation [system] that will result in better classrooms and better outcomes for the children." *Id.* at 25.

Moreover, it is disingenuous for Plaintiffs to imply that they or their like-minded colleagues have a formula for assuring teacher excellence. The public policy debates on these unquestionably political issues are recurring and contentious, but with no easy answers. To illustrate, the statutes governing the probation period of teachers have been changed no less than eight times over the last century. L.1917, c.786; L.1937, c.314; L.1945, c.833; L.1950, c. 762;

L.1955, c. 583, 11; L.1971, c.116; L.1974, c.735; L.1980, c.442. The probationary period has fluctuated as high as five years in 1971, but was reduced to three years in 1974 because the five year period was considered by the governor to be "unreasonably long," especially "when viewed in the context of the amount of time needed by school districts to assess teacher competence." L.1974, c. 735, Governor's Memorandum (June 7, 1974). The due process protections in the tenure statutes have likewise been streamlined and improved over the years by statute and collective bargaining agreements. *See, e.g.*, L.2008, c.296; L.2010, c.103; 2014 UFT-BOE Contract, Memorandum of Agreement §§ 8, 9 and 16.[15] Such recurring and highly politicized reassessments by the Legislature are not uncommon when it comes to educational concerns. One lesson they teach is that educational excellence cannot be effectively advanced by focusing only on issues of, at best, peripheral relevance to the overall concern. As repeatedly recognized by the Court of Appeals, the effective solution focuses on the level of inputs, that is, consideration of the underlying inadequate funding, class size, and the like—issues that are at the heart of the quest for educational excellence. But that would unquestionably entail significant expense and attendant efforts to secure additional resources, which turns on matters of political debate. As separation of power principles and the previously cited cases make clear, such political issues are best left to the other branches of government.

In sum, the Court should not accept Plaintiffs' invitation to embroil itself in the political questions involving who is an effective teacher and how to address the handful that are not.

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[15] Available at http://www.uft.org/files/attachments/final-complete-moa-contract-2014.pdf.

POINT IV

THE ALLEGED CONSTITUTIONAL VIOLATION IS NOT JUSTICIABLE AND CANNOT HERE BE REDRESSED

Yet another aspect of the political question doctrine discussed above arises out of the fact that Plaintiffs' claims are not justiciable in that the courts cannot effectively redress their alleged injury. True, as a matter of sheer power, if the Plaintiffs could surmount the numerous legal obstacles here discussed (and they cannot), the Court might conceivably be persuaded to simply grant the relief requested—terminating all tenure rights, including those of all teachers who have relied thereon for decades. The impact this would have on teacher retention, not to mention future recruitment, and on teachers' ability or willingness to champion students interests or provide instruction on controversial subjects, as well as their ability to withstand pressures ranging from efforts to change their grading to suppressing their reporting of abuses, is difficult to overstate. Despite this, Plaintiffs would have the Court strike down an entire statutory scheme, one the Court of Appeals has, on repeated occasions, enforced in recognition of the fact that it is in the public interest. *See Callahan*, 174 N.Y. at 177-78; *Ricca*, 47 N. Y.2d at 391; *Matter of Speichler v. Bd. of Co-op. Educational Servs.*, 90 N.Y.2d 110, 117-18 (1997); *Matter of Abramovich v. Bd. of Educ.*, 46 N.Y.2d 450, 455 (1979); *Holt v. Bd. of Educ.*, 52 N.Y.2d 625,632 (1981); *Matter of Sanders v. Bd. of Educ.*, 17 A.D.3d 682, 682-83 (2d Dep't 2005).

If the Court cannot adequately redress the harm Plaintiffs have supposedly suffered, then Plaintiffs have not presented a justiciable question. *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) ("[I]n order to warrant a determination of the merits of a cause of action, a party requesting relief must state a justiciable question—one that is capable of review and redress by the courts at the time it is brought for review").

The alleged harm here—addressing a handful of assertedly ineffective teachers fairly and effectively—is beyond the power of the Judiciary to effectively redress without either (1) making teaching in New York subject to one endless probationary period during which teachers can be summarily dismissed at any time and without hearing or, (2) the Court assuming administrative supervision of every local school district and administrator in the State (the very same administrators Plaintiffs claim are not currently meeting their supervisory obligations) to ensure that in every instance they hire, retain and discipline every teacher based solely on constitutionally permissible criteria. This would eviscerate the separation of powers and flout controlling precedent from the Court of Appeals. *Jones*, 45 N.Y.2d at 406-09 (abstaining from adjudicating two declaratory judgment actions raising "questions of broad legislative and administrative policy [that were] beyond the scope of judicial correction," and observing that "the tools with which a court can work, the data which it can fairly appraise, [and] the conclusions which it can reach as a basis for entering judgments, have limits." (quotations omitted)); *see also Roberts v. N.Y.C. Health & Hosp. Corp.*, 87 A.D.3d 311, 322-23 (1st Dep't 2011).

Indeed, only recently, the Second Department was confronted with a case where a teacher had demonstrably been unfairly sanctioned and the Supreme Court not only set aside the penalties but ordered that tenure be granted. The Second Department affirmed the finding of unfairness and the revocation of penalties and, yet, it reversed the direction that tenure be granted, holding that the Judiciary had no business making such administrative judgments. *Capece*, 117 A.D.3d at 1045-47.

The many assumptions that must be made and the active tasks which the Court would here be compelled to undertake in order to actually redress the harm Plaintiffs claim, underscores

their non-justiciable nature. *Linda R.S.*, 410 U.S. at 618 (finding non-justiciability where possibility that court ruling would redress harm "can, at best, be termed only speculative").

To be sure, no one should or does espouse the hiring or retention of ineffective teachers who do not improve after being given the proper support. Where ineffective teachers are found to exist, such teachers should receive the support needed to improve their skills, and, if they do not, removal from the classroom should follow. At its core, this dispute is one of competing policy visions, and judicial tools to solve it are either inappropriate or too limited for realistic application. *Jones*, 45 N.Y.2d at 407-09 (abstaining from adjudicating a dispute that could require the courts to "reorder priorities, allocate the limited resources available, and in effect decide how the vast municipal enterprise conducts its affairs").

POINT V

PLAINTIFFS LACK STANDING TO BRING THIS ACTION

Even if there were a cognizable basis for this litigation, Plaintiffs lack standing to assert these claims. Standing is a threshold determination that must be considered at the outset of any litigation. To have standing, a party must show that the injury suffered is personal, *i.e.*, "distinct from that of the general public." *Transactive Corp. v. N.Y. Dep't of Social Servs.*, 92 N.Y.2d 579, 587 (1998). A plaintiff cannot demonstrate standing simply by enlarging the representative group. *N.Y.S. Ass'n of Small City Sch. Dists., Inc. v. New York*, 42 A.D.3d 648, 649 (3d Dep't 2007). These prerequisites ensure that interest groups or advocacy organizations cannot avail themselves of the courts any time they would like to expend funds and challenge government action or inaction. *Animal Legal Defense Fund, Inc. v. Aubertine*, 119 A.D.3d 1202, 1205 (3d Dep't 2014). Standing concerns are particularly salient where, as here, plaintiffs present a constitutional "as applied" challenge to a statute. *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 522 (1986).

The issue Plaintiffs tender turns on their claims respecting "ineffective" teachers and unbiased layoff procedures. Plaintiffs have not alleged a single fact indicating that they have been denied a "sound basic education" or that they have been taught by ineffective teachers (let alone those who have tenure or who are teaching despite layoffs). There are no allegations regarding any actual personal harm to the individual Plaintiffs as a consequence of an ineffective teacher distinct from the generalized grievance about the operation of the tenure statutes and their alleged overall and aggregate impact on the educational system. Other than the rote recital and wholly conjectural paragraphs that Plaintiffs are "at substantial risk of being harmed" by what they term the "Challenged Statutes," there is nothing in the Complaints even speculating that each of the Plaintiffs have been or will be denied a "sound basic education." Davids Am. Compl. ¶ 54; *see also* Wright Compl. ¶ 1 ("[I]n any given school year, New York schoolchildren are at risk of being assigned to an ineffective teacher.").

That there are no facts describing how Plaintiffs have actually been impacted by the "Challenged Statutes" speaks volumes of the politically motivated efforts to force policy issues into the courts. This action is not brought by aggrieved Plaintiffs who have been denied a "sound basic education"; it is brought by political advocacy groups attempting to drive policy that is in closer alignment with their own political preferences for the way they believe New York State School Districts ought to be run. The standing doctrine requires more. Standing sufficient to permit suit requires actual injury precisely so that these overarching, non-justiciable policy debates are kept out of the courts and are decided by the other branches of government and in other fora. *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773-74 (1991); *Animal Legal Defense Fund, Inc.*, 119 A.D.3d at 1205.

The individual Plaintiffs have not suffered injury in fact. *Soc'y of Plastics Indus.* 77 N.Y.2d at 772-73.[16] Indeed, the sum total of the specific allegations dealing with individual *Davids* Plaintiffs are that they "attend public school in New York City," and, by New York's Constitution, are "guaranteed a sound basic education." Davids Am. Compl. ¶¶ 8-18. Similarly, the *Wright* Plaintiffs allege that they are students who attend school in the New York City School District (and in two instances, the Rochester City School District). Wright Compl. ¶¶ 10-16.

The only specific facts regarding the Plaintiffs' experience in New York State schools and the quality of education they receive is a bare, three-paragraph description in the *Wright* Complaint of two of the Plaintiffs, twins Kaylah and Kyler Wright, who, it is alleged, have progressed at different levels in their schooling. *Id.* ¶¶ 4-5. This unremarkable allegation (that twins progress differently) in no way asserts that the Plaintiffs have been denied a "sound basic education" or explains how the "Challenged Statutes" are to blame. Putting aside the entirely vague and conclusory allegation that the twins' teachers "caused measurable differences in their educational progress" (one by spending her own money to buy additional supplies while the other declined to volunteer to do so) (*see supra*, at p. 6), Plaintiffs do not allege that the less effective teacher, an unidentified teacher of Plaintiff Kyler, was even granted tenure, much less found by any objective or measurable standard to be ineffective. *Id.* at ¶ 5. The insufficiency of the *Wright* Complaint regarding these two individual plaintiffs, the only paragraphs in either

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[16] While the Davids Verified Complaint was initially fashioned as a class action complaint, no "class allegations" are alleged in the revised Amended Complaint. Regardless, even if the Amended Complaint is viewed as bringing a class action, a class cannot be maintained when the class plaintiffs have not suffered representative injury. *Broome v. ML Media Opportunity Partners L.P.*, 273 A.D.2d 63, 64 (1st Dep't 2000) (holding that plaintiffs, a group of limited partners in a public limited partnership, could not assert a class action against the general partner for mismanagement of funds because such claims are derivative only "and do not implicate any injury to [the individual] plaintiffs distinct from the harm to the partnership"); *Murray v. Empire Ins. Co.*, 175 A.D.2d 693, 695 (1st Dep't 1991) ("The procedural device of a class action may not be used to bootstrap a plaintiff into standing which is otherwise lacking."). Similarly, despite their usage of aggregate data and the apparent class-wide relief sought, the Wright Plaintiffs do not even purport to represent a class of New York State students.

Complaint that plead actual personal educational experience, underscores Plaintiffs' glaring lack of standing.

Moreover, Plaintiffs have failed to demonstrate that they have suffered any injury distinct from that of the general public, let alone to plead the essential facts establishing any such claim. The failure to plead such fundamental jurisdictional facts is fatal to the Complaints. *N.Y.C. Parents Union*, 2013 N.Y. Misc. LEXIS 5226, at *12-14, *rearg. denied*, 2014 N.Y. Misc. LEXIS 114.

POINT VI

PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW

A. *Plaintiffs' Challenge To Seniority Protections, As Applied In New York City, Is Not Ripe For Judicial Review*

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 DOE decides it has to lay off 50 high school biology teachers, layoffs will proceed in order of reverse seniority, with less experienced teachers being laid off before more experienced teachers. These provisos have been judicially sanctioned. *See Matter of Leggio,* 69 A.D.2d at 448-49; *see also Matter of Ward,* 43 N.Y.2d at 62-63 (*citing Matter of Lynch,* 41 A.D.2d 363, 365 (3d Dep't 1973), *aff'd*, 34 N.Y.2d 588 (1974)).

However, Plaintiffs argue that this protection should be eliminated as it allegedly sacrifices "effective," less experienced teachers in favor of purportedly "ineffective" veteran teachers. Wright Compl. ¶¶ 66-76; Davids Am. Compl. ¶¶ 44-51. Bearing in mind Plaintiffs'

proclamation that the three-year probationary period is not long enough and that more experience is essential in order to determine effectiveness, Wright Compl. ¶ 38, there is a distinct hollow ring to their assertion. 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, repeals or changes to the "last in, first out" statutes that express a preference to retain experienced teachers during district-wide layoffs. Senate Bill 3501-B/2012 would have eliminated the "last in, first out" rule and required that other factors (including student performance and teacher evaluations) 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 dilute tenure protections (and which also attempt to revive the changes to "last in, first out"). *See, e.g.*, Assembly Bill 1854 (2013-2014 Legislative Sessions); Assembly Bill 3284 (2013-2014 Legislative Sessions); Assembly Bill 7831-A (2011-2012 Regular Sessions). They have not been enacted, and for good reason (as one reason, in New York City, some 1/3 of newly hired teachers leave within the first five years). Unsuccessful in Albany, Plaintiffs seek to bypass the Legislature and turn the Judiciary into a substitute body. That is patently inappropriate. In any event, the new evaluation scheme should provide a system for discharging "ineffective" teachers well before any district-wide layoff, leaving only "developing," "effective" and "highly effective" teachers with seniority protections.

Finally, and crucially, such seniority protections 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 fail to make any such claim in

their pleadings. In fact, New York City has not "abolished" teacher positions since the 1970's. Thus, Plaintiffs' claims are premature. *See, e.g., Church of St. Paul & St. Andrew*, 67 N.Y.2d at 522-23 ("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.").

B. *Because The Evaluation Process And Its Consequences Have Not Yet Ripened, The Tenure And Discipline Claims Are Premature*

The recent amendments to the Teacher Evaluation Law provide that a teacher in New York City found to be "ineffective" faces a presumption of incompetence and, unless rebutted, dismissal will result absent extraordinary circumstances. New York City, however, has only completed one year of evaluations under the new process, with the second year just commencing. Until at least the two-year cycle has been completed and assessed, it is little more than idle speculation as to whether a real problem continues to exist (assuming there really was one), who and how many teachers are impacted, and whether this legislative solution has merit.

Moreover, in June 2014, the UFT and the Board of Education for the City School District of the City of New York entered into a new collective bargaining agreement that further streamlined the evaluation process. 2014 UFT-BOE Contract, Memorandum of Agreement, § 6.[17] Until those changes have taken hold, and the initial two-year evaluation period has occurred and been assessed, prematurity precludes Plaintiffs' claims. *See Am. Ins. Ass'n. v. Chu,* 64 N.Y.2d 379, 383 (1985) (dismissing challenge to the constitutionality of statute as premature where plaintiffs had not presented a justiciable question because the complaint "involve[d] a future event beyond control of the parties which may never occur").

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[17] Memorandum of Agreement, available at http://www.uft.org/files/attachments/final-complete-moa-contract-2014.pdf.

POINT VII

PLAINTIFFS' CLAIMS CANNOT WITHSTAND SCRUTINY UNDER THE APPLICABLE "RATIONAL BASIS" STANDARD

Plaintiffs challenge the constitutionality of statutes providing due process protections to teachers, the disciplinary statutes that permit their sanction or termination and the no-fault district-wide layoff provisions. The *Wright* Complaint advances the most extreme claims, stridently maintaining that due process protections are too "expensive," "time-consuming" and burdensome to permit exercise. Wright Compl. ¶¶ 50-54. Their challenge to the tenure concepts repeatedly recognized as salutary by the Court of Appeals extend, seemingly, to the existence of *any* due process rights. The individuals who press *Davids*, on the other hand, limit their attack to the processes by which the teachers they deem "ineffective" are retained or dismissed. Indeed, the *Davids* Plaintiffs acknowledge that they offer no challenge to "tenure *per se*," and "recognize the constitutionally-protected procedural due process rights that teachers with tenure enjoy." Davids Orig. Compl. ¶¶ 3, 5.

Wright acknowledges its real grievance lies with enforcement of the statutes: "Through *enforcement* by the Defendants, the Challenged Statues confer permanent employment, prevent removal of ineffective teachers, and result in layoff of effective teachers in favor of less-effective, more senior teachers." Wright Compl. ¶ 24 (emphasis added). *Davids* makes the same point, asserting that "the continued *enforcement* of certain New York statutes (the 'Challenged Statutes') ... effectively prevent the removal of ineffective teachers from the classroom, and, in economic downturns, require layoffs of more competent teachers." Davids Am. Compl. ¶ 5 (emphasis added, internal footnotes omitted).

This, then, is not a "facial" challenge.[18] Rather it is an "as applied" attack on the constitutionality of the statutes that Plaintiffs collectively characterize as the "Challenged Statutes" (*see supra* n.18). Indeed, Plaintiffs effectively concede their challenge is an as-applied one. Davids Orig. Compl. ¶ 3 ("to be clear from the outset ... parents of the named plaintiffs are [not] against tenure *per se*"); Wright Compl. ¶ 50 ("*as applied*, the Disciplinary Statutes impose dozens of hurdles to dismiss or discipline an ineffective teacher") (emphasis added).

Under rudimentary principles of constitutional jurisprudence, the nature of Plaintiffs' "as applied" challenge to the statutes implicates "rational basis scrutiny," that is, the statutes at issue must bear only a rational relationship to an important government purpose in order to withstand challenge. Moreover, the Court of Appeals has expressly held that "rational basis [is] the proper standard for review when the challenged State action implicated the right to free, public education." *Levittown*, 57 N.Y.2d at 43. Courts, in this context, look to whether there has been a "demonstrated ... absence of a rational basis" for the challenged laws. *Id.* at 44. As in *Levittown*, Plaintiffs here have made no such showing.

Among other reasons, the recruitment and retention of teachers in New York, which due process protections are designed to advance, are eminently legitimate State interests that are rationally related to the statutes at issue in this lawsuit. The tenure and seniority protections allow teachers to grade (and fail) students based solely on their work and they permit teachers the freedom to speak out privately and publically for what their students need. The protections give teachers the courage to seek out the most challenged students in the most difficult

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[18] In any event, it is well-settled in New York that "facial invalidation is an extraordinary remedy and generally is disfavored." *Amazon.com LLC v. N.Y.S. Dep't of Tax. & Fin.*, 81 A.D.2d 183, 193 (1st Dep't 2010). Legislative enactments enjoy a strong presumption of constitutionality and a plaintiff can only succeed in a facial challenge by "establishing 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." *Id.* (internal citations omitted); *accord Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003); *Cohen v. New York*, 94 N.Y.2d 1, 8 (1999). Here, it is self-evident that the Challenged Statutes are not unconstitutional in all of their applications. As recognized in the *Davids* Amended Complaint, "the majority of teachers in New York are providing students with a quality education." Davids Am. Compl. ¶ 4.

neighborhoods and they ensure that teachers are not scapegoated when their school provides them inadequate resources to teach their students. Despite Plaintiffs' attempt to label it pejoratively, tenure is simply a descriptor of another form of the commonly accepted due process protections afforded many, if not most, post-probationary public servants, one legislatively shaped and administratively enforced for over a century to ensure that professionalism and educational standards are maintained, thereby permitting the attraction and retention of qualified persons to teaching. As the *Callahan* Court recognized over 100 years ago, excluding from the educational system "personal or political reasons" for teacher selection or retention is to the "manifest" benefit of the system. 174 N.Y. at 177-78.

Indeed, the Court of Appeals has already concluded that a rational basis exists for the Challenged Statutes. *Holt,* 52 N.Y.2d at 632 (recognizing Education Law § 3020-a as "a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice") (quoting *Abramovich v. Bd. of Educ.,* 46 N.Y.2d 450, 454 (1979)); *see also Ricca*, 47 N.Y.2d at 391. The *Davids* Plaintiffs admit that a rational basis exists for the legislative protections supplied teachers: "[T]he parents of the named plaintiffs recognize the constitutionally-protected procedural due process rights that teachers with tenure enjoy, ... *especially with respect to the charges that a teacher is ineffective and cannot deliver the sound basic education guaranteed by the New York State Constitution* . . . ." Davids Orig. Compl. ¶ 5 (emphasis added).

Application of the rational basis standard is here required with the result that the constitutional challenges fail and dismissal should follow.[19]

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[19] We will not belabor the point on this dismissal motion. However, we are constrained to note an underlying public policy concern that should not be assumed to be correct. The thesis Plaintiffs essentially posit is that teachers and, perhaps, all public servants should become at-will employees. But that notion was rejected over a century ago and that rejection has since been reiterated because it was concluded that corrupting influences rather than merit,

POINT VIII

NEITHER DUE PROCESS PROTECTIONS, NOR TENURE, CAUSE "INEFFECTIVE" TEACHERS; SIMILARLY, THEY DO NOT ABRIDGE THE EDUCATION ARTICLE

Even if the Challenged Statutes were not rationally based, Plaintiffs have not shown that the laws are causally related to the vaguely described harm complained of. As discussed *supra*, at Point I, the law is clear that allegations of academic failure alone are insufficient to state a cause of action absent allegations that credibly connect *how* the State somehow fails in its obligation to "provide funding [or other resources] sufficient to bring the educational inputs locally available up to a minimum standard" and thereby secure a basic education. *Paynter*, 100 N.Y.2d at 442. Plaintiffs here point to (cherry-picked) inconclusive statistics and out of context test results as the sole measure of asserted teacher ineffectiveness, citing selected research correlating teacher effectiveness with educational performance. They then lay blame for the alleged educational failures in New York City and the greater State school system on the tenure statutes without any credible connection. There are, for example, no facts alleged in the Complaints claiming that if the due process protections of tenure were to vanish, administrators across the board would now do that which Plaintiffs maintain they do not do today, namely, act decisively and effectively to identify objectively and remove promptly truly "ineffective" teachers (especially where discretion in hiring and firing would implicate discretion to retain friends and other political favors).

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personal biases rather than independent thought and expediency rather than intelligence were threatened and would undermine the education of our children. *See, e.g., Callahan*, 174 N.Y. at 177-78; *Ricca*, 47 N.Y.2d at 391. That judgment plainly provides a rational basis for the Challenged Statutes, as does the determination that a system of probation (to test abilities and permit the acquisition of experience) followed by tenure for so long only as efficient and able service was rendered is, insofar as educators and other civil servants are concerned, preferable to at will employment. *See* Neil H. Buchanan, *The Road Show Blaming Teachers for Society's Ills Moves from California to New York*, Verdict (Sept. 26, 2014), http://verdict.justia.com/2014/09/26/road-show-blaming-teachers-societys-ills-moves-california-new-york.

Plaintiffs do not quarrel with the conclusion that many, if not most, New York school districts perform well under the very same statutes that are challenged here. More fundamentally, Plaintiffs here would hold the State responsible not for the demographic composition of every school, as in *Paynter*, but on an even more granular level, for the effectiveness of *every* teacher in *every* school, despite the fact that every teacher is hired, paid and retained by the local district, not the State. *See supra* Point II.

Simply stated, there are no facts alleged in the Complaints causally linking the grievance and a real outcome on a system-wide basis. Indeed, the Complaints contain a series of assumptions, none substantiated or explained, which all must be true to make any credible connection at all between the Challenged Statutes and an impact on student learning.

To consider these various assumptions, the most basic of which is that a soundly managed school cannot, under current law, properly identify ineffective teachers, or having identified them, the administrators cannot bother to pursue disciplinary action, is to realize how foundationally wobbly are the underpinnings to Plaintiffs' argument. There is no viable theory that "causally connect[s]" the Challenged Statutes to the denial of a sound basic education.

Perhaps most glaring of the necessary, yet utterly attenuated, causal steps, is the notion that administrators cannot remove ineffective teachers because it is too "cumbersome" or that the ratings are a "rubber stamp" for tenure. Wright Compl. ¶¶ 48, 52; *see also* Davids Am. Compl. ¶¶ 32-35. That Plaintiffs believe certain *administrators* at certain schools may be "ineffective" at their jobs does not mean that the statutes impacting *teachers*, in any way, causally abridge the Education Article. Indeed, both Complaints are replete with intervening local failures and inefficiencies masquerading as causation. Yet, without a true causal connection linking the

Plaintiffs' concerns with student performance in New York to the Challenged Statutes, the Complaints must fail as a matter of law. *See, e.g., Paynter*, 100 N.Y.2d at 440-42.

CONCLUSION

For the foregoing reasons, Intervenor-Defendant UFT respectfully requests that the Court grant its motion to dismiss the Complaints, with costs.

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