STATE OF NEW YORK
SUPREME COURT 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 FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers,

Intervenors-Defendants,

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intrvenors-Defendants,

Consolidated under
Index No.: 101105-2014

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Philip G. Minardo, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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

Defendants,

-and-

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

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenors-Defendants,

-and-

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

Intervenor-Defendant.

(Index No. 1500641/14; Upstate Index No. A641-14)

School Administrators Association of New York State
OFFICE OF GENERAL COUNSEL
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TABLE OF CONTENTS

PRELIMINARY STATEMENT

The issue of public education in New York State and the subsets of this issue herein, educator tenure and retention, are of great import and the subject of much debate. It is safe to say that every party in this litigation wishes to ensure the children of this state will be provided the "sound basic education" guaranteed under the New York State Constitution. In fact, it is the very reason why the individually named intervening defendants chose public education as their professions. Providing students with a sound basic education is not nearly as simple as the Plaintiffs believe. Giving individual school districts the unfettered right to pick and choose which educators to keep and which to eliminate for alleged ineffectiveness has historically resulted in employment decisions not being made on merits, but rather on political bases, causing as much harm to students as the potential retention of ineffective educators. New York State has acknowledged this harm and has spent more than a century developing and continually evolving its system of educator tenure and retention to find an avenue that provides stability for both students and educators, yet allows for flexibility and accountability as society advances and pedagogy changes.

In their opposition papers, Plaintiffs accuse all of the Defendants of "subterfuge" and attempting to cloud the issue of whether the Challenged Statutes are effectively denying students of a sound basic education when they raised in the various motions to dismiss the constitutional rights of the educators under attack and pointed out that the State is continuously revising and improving upon the Education Law. Yet, it is the Plaintiffs who are clouding the issue by relying on out of date data, not addressing the current data submitted by the various Defendants in support of their motions to dismiss,

and either completely ignoring the fact that the Legislature is continuously revising the Challenged Statutes or worse, claiming that the revised timelines will be intentionally violated. (*Wright* Memorandum of Law at 37). Moreover, Plaintiffs are clearly attempting to illegitimately build a constitutional case where none exists by using blatantly incorrect terms such as "permanent employment" or that "high performing junior teachers" must be laid off. Taken on their face, these buzz words would certainly give one pause; however, they are blatantly contradicted by the plain language of the statutes in question. There is no such thing as "permanent employment" under the education law and the choices of individual school districts whether or not to apply the Challenged Statutes cannot be imputed upon the State to create a constitutional violation.

Education reform is a continuous and active process in New York State. It is a process that has very clearly been designated to the legislative branch of government and, in this particular instance, the judiciary has no legitimate role in. Despite their best efforts, and presumed best intentions, the Plaintiffs have failed to state a cause of action and, even if they did, the matter is not justiciable and they do not have standing.

STATEMENT OF FACTS

Defendants Cammarata and Mambretti rely on the facts as set forth in the December 15, 2014 Affirmation of Arthur P. Scheuermann, Esq.; the October 23, 2014 Affirmation of Arthur P. Scheuermann, Esq.; and their October 23, 2014 Memorandum of Law.

POINT I:

PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION

When determining a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87–88 (1994). This being said, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference. Doria v. Masucci, 230 A.D.2d 764 (2d Dep't., 1996). Thus, courts are not to accept unwarranted inferences, baseless conclusions of law, sweeping legal conclusions cast in the form of factual allegations, or factual claims that are either inherently incredible or contradicted by documentary evidence. Ulmann v. Norma Kamali, Inc., 207 A.D.2d 691 (1st Dep't. 1994) (unsupported allegations and attempts to circumvent traditional at-will employment laws insufficient to withstand motion to dismiss); EBC I, Inc. v. Goldman Sachs &Co., 5 N.Y. 3d 11, 27 (2005).

A. Through the use of out of date statistics, Plaintiffs are challenging the constitutionality of statutes that no longer exist due to applicable statutory amendments.

Plaintiffs' opposition to the various motions to dismiss broadly claim that a cause of action under the Education Article of the New York State Constitution was properly plead because each of the two Complaints use the phrases "systemic failure" and "denial of a sound basic education." The use of these catchphrases, gleaned from other Education Article cases, is insufficient to state a cause of action in and of itself because they are merely legal conclusions. The Complaints in question, along with the opposition to the

pending motions to dismiss are further riddled with inherently incredible facts and conclusions of law disguised as facts.

Initially, it is once again pointed out that there have been revisions to the Challenged Statutes and data therefrom that are more recent than the studies cited by Plaintiffs in support of their specious claims. Despite these revisions being pointed out in multiple motions to dismiss, Plaintiffs still present out of date, arguably invalid, studies as "facts." For example, Plaintiffs in *Wright* still continue to cite a 2009 survey stating that school districts may have declined to pursue 3020-a charges to remove a tenured teacher because the process was purportedly "too cumbersome or expensive." (*Wright* Memorandum of Law at 16; *Wright* Amended Complaint ¶55). It is beyond cavil that the Plaintiffs would dare to use that statistic in defense of dismissal, given that Education Law §3020-a was revised to streamline the process in 2012 and has, in fact, reduced the time and expense associated with such a hearing. (See, October 23, 2014 Affirmation of Arthur P. Scheuermann ¶¶ 88-91) Additionally, the APPR process within Education Law §3012-c, which contains an expedited due process hearing for the removal of a tenured educator after two ineffective ratings, was not even enacted until 2010- one year after the cited study. Even more egregiously, in their opposition to the ripeness argument, Plaintiffs have unfairly marginalized the importance of these revisions because the time limits within the statutes "have never been complied with" and have been "routinely violated" under "previous versions of 3020-a". *(Wright* Memorandum of Law at 37; *Wright* Amended Complaint ¶¶ 56-58). Thus, by Plaintiffs' own admissions, they are actually challenging the constitutionality of statutes that no longer exist and wish the

Court to impute wrongdoing upon revisions based upon the unsupported conclusion that if violations happened once, they will happen again.

In addition to the reliance on out of date data, the Complaints are replete with unsubstantiated legal conclusions and specious theories masquerading as facts. None of the Plaintiffs herein are alleged to be involved in the field of education, other than as students/parents. Accordingly, any statements or data contained within the Complaints are completely speculative because there is no authority that would tie these out of date conclusions to the new and/or revised statutes.

Moreover, the Complaints have failed to successfully allege the necessary action by the State in order to successfully challenge the constitutionality of the Challenged Statutes. Contrary to the Plaintiffs' blatantly false assertions that the implementation of the Challenged Statutes are within the province of the State, a simple reading of the statutes clearly shows that the decisions to either award tenure or terminate a probationary employee, bring disciplinary charges against a tenured educator, determine the tenure area of an administrator, and lay off positions, rest **solely with the local school district board of education** without input by the State. Further, eighty percent (80%) of the newly enacted evaluation procedures within Education Law § 3012-c are mandated by statute to be negotiated between the school district and the applicable collective bargaining unit. Contrary to Plaintiffs' bald assertion, control over these statutes rests almost entirely at the local level and is not an attempt to confuse the court, but rather, a simple statement of law. There can be no State action making the Challenged Statutes unconstitutional because the State has no right to grant tenure, proffer disciplinary

charges or enact layoffs within a public school district. Thus, Plaintiffs have failed to state a cause of action as a matter of law.

B. The Complaints cannot survive dismissal under the rational relationship test

Plaintiffs contend that the Complaints must survive dismissal because "[r]ational basis review is the appropriate standard for an equal protection claim, *not* an Article XI claim."(*Wright* Memorandum of Law at 24) Plaintiffs cite to no law indicating that rational basis review is inappropriate, but rather draw distinctions between the instant allegations and educational funding claims sounding in due process rights. The theory that rational basis review is somehow limited to equal protection claims is clearly erroneous. *See,* People v. Knox, 12 N.Y.3d 60 (2009) (Court of Appeals used rational relationship test to analyze due process liberty implications of Sex Offender Registration Act); People v. Oyola, 215 A.D.2d 597, 598 (2d Dep't., 1995)(Statutory provision permitting victim to make a statement at sentencing does not deprive defendant of *any* constitutional rights under rational basis review.). Accordingly, the Court must examine the Challenged Statutes under the rational basis test.

Legislative enactments, such as the Challenged Statutes, are strongly presumed to be constitutional and "the court must not substitute its judgment for that of the Legislature." People v. Cintron, 13 Misc. 3d 833, 843-46 (Sup. Ct. 2006), aff'd, 46 A.D.3d 353 (1st Dep't., 2007) aff'd sub nom. People v. Knox, 12 N.Y.3d 60 (2009) (Constitutionality of Sex Offender Registration Act analyzed under the "rational

relationship" test and upheld.) This strong presumption of constitutionality exists whether a statute is challenged on its face or as applied. Id.

Under both theories of challenging the constitutionality of a statute, the Court of Appeals has acknowledged that the rational basis test must be utilized. Id., *citing* Affronti v. Crosson, 95 N.Y.2d 713, 719 (2001); Hernandez v. Robles, 7 N.Y.3d at 367 (2006). Upon such review, a statute will be upheld as constitutional unless the harm caused is "so unrelated to the achievement of any combination of legitimate purposes that ... [it is] irrational." Id., *quoting* Affronti, 95 N.Y.2d at 719. The individuals challenging constitutionality of a statute the have the burden to demonstrate "the statute's invalidity beyond a reasonable doubt." Id., *quoting* Dalton v. Pataki, 5 N.Y.3d 243 (2005).

Plaintiffs' argument that the case must survive beyond the instant motion to dismiss phase because they want data and information presumably within the possession of the State Defendants to prove their case is unavailing in a rational basis review. This is because the burden of proving there is no rational basis rests solely with the Plaintiffs and "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice *is not subject to courtroom factfinding* and may be based on *rational speculation* unsupported by evidence or empirical data." Id., *quoting* Affronti, 95 N.Y.2d at 719.

The cases and legislative history submitted by the Defendants in the various motions to dismiss clearly demonstrate that there was a rational basis behind each of the Challenged Statutes. As established in the motion to dismiss, not only are the bases behind the Challenged Statutes rational, but the courts have interpreted them to have important due process and first amendment protections as well. Accordingly, not only

have the Plaintiffs facially failed to state a cause of action, but their challenge also fails under the rational basis test as a matter of law.

POINT II:

THE CONSOLIDATED COMPLAINTS ARE NOT JUSTICIABLE

A matter is deemed justiciable when there exists a case or controversy that can be finally decided by a judicial entity as opposed to a political entity, such as a legislative or executive branch. Aetna Life Ins. Co. v. Haworth, 300 U.S.227 (1937); Sedita v. Board of Ed. of City of Buffalo, 43 N.Y.2d 827 (1977). As a matter of policy, the courts will abstain from hearing cases if the allegations are such that the judiciary would be ill-equipped to undertake and other branches of government are better suited to the task. Jones v. Beame, 45 N.Y.2d 402, 408-09 (1978). When "policy matters have demonstrably and textually been committed to a coordinate, political branch of government, any consideration of such matters by a branch or body other than that in which the power expressly is reposed would, absent extraordinary or emergency circumstances… constitute an *ultra vires* act." New York State Inspection, Sec. & Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 239-40, 475 N.E.2d 90, 93 (1984) (Claim not justiciable because, "[b]y seeking to vindicate their legally protected interest in a safe workplace, petitioners call for a remedy which would embroil the judiciary in the management and operation of the State correction system."), *citing* James v. Board of Educ., 42 N.Y.2d 357, 367.

Article XI §§1, 2 of the New York State Constitution squarely places the responsibility of establishing and maintaining a system of public education with the legislature. The Challenged Statutes, as all statutes pertaining to public education, are

subject to debate and adoption by the legislature. The Board of Regents, which provides regulations and guidance on the standards and maintenance of public education, is governed and its powers are conferred by the Legislature. N.Y. Constitution, Art. XI §2. Thus, if the court became involved in determining the appropriateness of the Challenged Statutes, it would clearly be impeding the legislature's functions and ultimately embroil itself in the management and operations of public education.

The courts particularly acknowledge the non-justiciability of cases involving political questions, as they involve "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." Roberts v. Health & Hospitals Corp., 87 A.D.3d 311, 323 (1st Dep't., 2011), *citing* 16A Am. Jur. 2d, Constitutional Law § 268. Specifically, the Court of Appeals has been very clear that matters pertaining to the maintenance and standards within a school district are largely not justiciable. James v. Bd. of Ed. of City of New York, 42 N.Y.2d 357, 366-68 (1977).

Here, the Plaintiffs attempt to circumvent the question of justiciability and outright deny that the Challenged Statutes present a political question on the basis that challenges to the constitutionality of a statute are appropriate for judicial review. The overarching crux of the Complaints are not with the concepts of tenure or seniority (in fact, the *Davids* complaint acknowledges the importance of tenure), but rather that prior versions of the Challenged Statutes make it difficult for school districts to remove ineffective tenured teachers. The Court of Appeals has made it abundantly clear that such claims are not justiciable as,

> "Any problems that result from pervasive nonenforcement are political questions for the solution of which recourse would have to be had to the legislative or executive branches; the judiciary has neither the authority nor the capabilities for their resolution." Benson Realty Corp. v. Beame, 50 N.Y.2d 994, 996 (1980).

Without conceding to the accuracy of the Plaintiffs' allegations surrounding the lack of enforcement of the Challenged Statutes by local school districts and the reasons therefore, the legislature has openly acknowledged room for improvement within the Challenged Statutes, as evinced by the continuous revisions to them. Plaintiffs summarily reject this fact, contending that the defendants "overstate the significance" of legislative revisions to the Challenged Statutes. (*Wright* Memorandum of Law at 37) In reality, it is the Plaintiffs who understate the significance of these revisions, as such revisions clearly prove the political question aspect of the issues at hand. Moreover, as detailed in Point I and the December 15, 2014 Affirmation of Arthur P. Scheuermann, Esq., many revisions to the Challenged Statutes have been made by the legislature subsequent to the data contained within the Complaints, rendering the data completely inapplicable.

Accordingly, the Challenged Statutes are nonjusticiable as a matter of law because a decision on the merits would equate to an improper advisory opinion and also because the Challenged Statutes involve political questions. Thus, Complaints must be dismissed as a matter of law.

POINT III:

PLAINTIFFS HAVE FAILED TO REFUTE THE FACT THAT THEY DO NOT HAVE STANDING

Standing is a threshold requirement for a plaintiff seeking to challenge governmental action. New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004); Dairylea Coop., Inc. v. Walkley, 38 N.Y.2d 6, 9 (1975); VTR FV, LLC v. Town of Guilderland, 101 A.D.3d 1532, 1533 (3d Dep't 2012). There is a two-part test for determining standing. First, it must be shown that there is an "injury in fact" and a speculative injury is insufficient to establish harm. Id. Second, the parties must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision being challenged. Id.

In opposition to the pending motions to dismiss, the Plaintiffs claim that they meet the jurisdictional requirement of standing "because the Challenged Statutes guarantee that Plaintiffs are either presently being taught by ineffective teachers or suffer imminent risk of being assigned to an ineffective teacher." (*Wright* Memorandum of Law at 3).

With a single exception, none of the Plaintiffs in either Complaint are alleged to have been taught by an ineffective teacher. Nor is there a single example in either Complaint as to how any of the Plaintiffs have been denied a sound basic education as a result of the Challenged Statutes. Instead, Plaintiffs' opposition papers claim that the threat of future harm is sufficient to confer standing. (*Wright* Memorandum of Law at 35).

While the courts have on occasion conferred standing based upon the threat of future harm, these occasions have a degree of certainty to the future harm. For example, in Swinton v. Safir, 93 N.Y.2d 758 (1999), the Court of Appeals granted standing to a discharged police officer because of the high likelihood, as acknowledged by his former employer, that his personnel file, containing stigmatizing information, would be disseminated to other potential employers before he could go forward with a name clearing hearing. The Court of Appeals went on to cite several other cases for the proposition that "proof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective *or preventive remedies under 42 USC § 1983*, without awaiting actual injury." *(Emphasis added)* Swinton, 93 N.Y.2d at 765-66, *citing* Luckey v Harris, 860 F2d 1012, 1017 (11th Cir., 1988) (42 U.S.C. §1983 case seeking to compel Georgia to provide constitutionally minimum legal representation for the indigent permissible.); Farmer v. Brennan, 511 US 825, 845 (Threat of cruel and unusual punishment in the form of transsexual inmate being placed in general population when it was alleged that prison officials had cause to know of a heightened risk of harm sufficient, even if not actual injury had occurred.); Helling v McKinney, 509 US 25, 33-34 (Threat of cruel and unusual punishment in the form of denial of medical services relating to a preexisting condition sufficient even though inmate had yet to suffer a related injury).

This instant action is significantly different from the above cases, rendering the ubiquitous future harm from the Challenged Statutes insufficient to create an injury that qualifies for standing. First, each of the cases, except Swinton, sought to have constitutional rights enforced or violations remedied under 42 U.S.C. §1983, not, as here,

to have statutes declared unconstitutional. Second, each of the potential future violations in the above cases were imminent and either had already occurred or were based on conditions that the defendants had knowledge of. Here, there is no allegation that anyone other than Kyler Wright had ever been taught be an ineffective teacher (and it isn't even alleged that such teacher was tenured) and there is no basis to impute knowledge of the conclusory statement that, "[e]ach year, tens of thousands of New York students find themselves in the classrooms of those ineffective teachers who would be removed but for the challenged statutory scheme, and Plaintiffs- no less than other students- face an imminent threat each year that they move into a new teacher's classroom." (*Wright* Amended Complaint ¶¶4-5; *Wright* Memorandum of Law at 35). Plaintiffs' entire argument presupposes that all ineffective educators are longstanding and have tenure. This conclusory argument completely discounts the strong possibility that ineffective educators are likely those at the beginning of their careers, who do not have tenure, and are considered at-will employees during their probationary periods. The likelihood of injury is not inevitable, as Plaintiffs claim, and should some injury actually occur, it is result of those in charge of the application of the statutes, the local school districts, not of the Challenged Statutes themselves.

Contrary to the Plaintiffs' conclusion that the vague promise of being assigned an ineffective teacher in the future is sufficient to establish standing, the Court of Appeals has very clearly held that an injury in fact is necessary in order to avoid the judiciary rendering advisory opinions. Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 77 N.Y.2d 761, 773 (1991), *citing* Cuomo v. Long Is. Light. Co., 71 N.Y.2d 349, 354. Of particular import here, the Court of Appeals has elaborated:

> "That an issue may be one of "vital public concern" does not entitle a party to standing. Courts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures, both of which have functioned here. By contrast to those forums, a litigant must establish its standing in order to seek judicial review." Soc'y of Plastics Indus., Inc., 77 N.Y.2d at 769.

No one disputes that public school education in general is of "vital public concern," but there are other forums, such as public hearings and elected legislatures, where the fundamental underlying issue can *and has been* addressed. Should this Court choose to find that Plaintiffs' broad conclusory statements are sufficient to confer standing, notwithstanding a complete lack of foreseeable harm stemming from the Challenged Statutes, it will be rendering an advisory opinion on how the people of this state, through its elected officials and local governing school districts, have consciously chosen to administer public education. Such an act is clearly impermissible as a matter of law and the case must be dismissed.

CONCLUSION

For the foregoing reasons, the Intervenors-Defendants respectfully request that the Court grant their motion to dismiss the Complaints in their entireties, along with such other relief as the court may deem appropriate, as a matter of law.

Dated: Latham, New York
December 15, 2014

SCHOOL ADMINISTRATORS
ASSOCIATION OF NEW YORK STATE,
OFFICE OF GENERAL COUNSEL
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STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

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Intervenor-Defendant.

REPLY AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

Index No. 101105-2014

Hon. Philip G. Minardo

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

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Individually and as President of the New York State United Teachers,

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

ARTHUR P. SCHEUERMANN, an attorney duly admitted to the practice of law before the courts of the State of New York, affirms the following under the penalty of perjury:

1. I am the General Counsel of the School Administrators Association of New York State ("SAANYS"), attorneys for the Intervenor-Defendants Philip Cammarata and Mark Mambretti ("Administrators"). I am fully familiar with pleadings, facts and circumstances of this matter.

2. I submit this affirmation in reply to Plaintiffs' opposition to the pending motions to dismiss. The Affirmation is based on personal knowledge and information and belief, the source being my review of the instant file.

3. Specifically, this affirmation replies to Plaintiffs' wholescale failure to acknowledge the political question aspect of judiciability.

4. In their motions to dismiss the consolidated action, defendants Cammarata and Mambretti, as well as the other defendants, provided the court with information and legislative history detailing how the legislature is continuously revising and evolving the Challenged Statutes to improve upon the public education system.

5. Significantly, Education Law §3020-a, which provides for a due process hearing before formal discipline being conferred upon a tenured educator, was revised in 2012 to, among other things, shorten the timeframes in which the hearing and decision must be rendered once charges are filed. (See, L. 2012, c. 57)

6. In the two years since these amendments were enacted, data from the State Education Department has indicated a decrease in the time, and correspondingly the cost to school district, it takes for 3020-a hearings to come to completion. (October 23, 2014 Affirmation of Arthur P. Scheuermann, Esq. ¶88)

7. Additionally, based on my own personal observations as General Counsel for SAANYS, the new timeframes have been consistently applied. (October 23, 2014 Affirmation of Arthur P. Scheuermann, Esq. ¶¶90-91)

8. Thus, Plaintiffs' proposed inference that the revised timeframes within the 2012 amendments will not be adhered to is without merit.

9. Additionally, in 2010, Education Law §3012-c was enacted. This statute created a mandatory evaluation system for all teachers and building principals. Built into the statute was an expedited 3020-a hearing for tenured educators who receive two consecutive "ineffective" ratings.

10. Since its enactment in 2010, the statute has been revised four times by the legislature and is constantly subject to revised "guidance" from the State Education Department. (Added L.2010, c. 103, § 1, eff. July 1, 2010. Amended L.2012, c. 21, §§ 1 to 11, eff. March 27, 2012; L.2012, c. 57, pt. A, § 22-a, eff. March 27, 2012; L.2012, c. 68, § 1, eff. July 1, 2012; L.2013, c. 57, pt. A, §§ 7, 7-a, eff. March 29, 2013, deemed eff. April 1, 2013; L.2014, c. 56, pt. AA, subpt. G, § 1, eff. March 31, 2014.) The most recent amendment to the State's guidance documents was release July 16, 2014.

11. Despite these facts being raised by multiple defendants in multiple motions to dismiss, Plaintiffs had the audacity to state the revisions have no bearing on the instant motions to dismiss because the timelines in prior versions of the statutes were not consistently adhered to. *(Wright* Memorandum of Law at 37)

12. Not only is this concept completely disrespectful to the fact that the legislature intentionally made the amendments in order to address some of the very issues raised in the Complaints, it is a blatant attempt to throw the court off from the fact that the amendments render much of the conclusory statements and supporting data invalid as out of date.

13. For example, Paragraph 6 of the *Davids* Amended Complaint speaks about the number of teachers terminated in New York City for ineffectiveness for the period of 1997-2007, well before the revisions to Education Law §3020-a or the creation of Education Law §3012-c.

14. Paragraph 39 of the *Davids* Amended Complaint cites inapplicable studies on the purported time and costs associated with 3020-a hearings in 2007.

15. The same paragraph cites the number of 3020-a dismissals of tenured teachers for the period of 1995-2006. *Davids* Amended Complaint ¶39.

16. After citing clearly out-of-date statistics, the *Davids* Plaintiffs make the demonstrably incorrect, conclusory statement, "[t]he dismissal process has not improved in the years since 2007." *Davids* Amended Complaint ¶39.

17. The *Wright* Amended Complaint fairs no better in the face of these amendments. Notably, Paragraph 37 cites statistics from 2007 relating to the percentage of teachers granted tenure and updates the figure based upon statistics from 2011 and 2012. *Wright* Amended Complaint ¶37.

18. The 2007 statistics predate the creation of evaluation criteria contained within Education Law §3012-c and the 2011 and 2012 statistics are not reflective of changes to the newly created statute or full implementation thereof.

19. Paragraph 55 of the *Wright* Amended Complaint relies upon statistics from 2009 concerning a specious percentage of times school districts have foregone filing 3020-a charges against a tenured educator for a variety of reasons, including the time associated with the process.

20. These statistics and the allegations therefrom should be disregarded as invalid because they do not properly reflect the amendments to Education Law §3020-a and the creation of the

expedited termination procedures within Education Law §3012-c. This being said, it should be noted that Plaintiffs concede that one of the reason cited by school districts for not proceeding with 3020-a charges is that the tenured educator resigned in lieu of being charged. *Wright* Amended Complaint ¶55.

21. Paragraph 56 cites statistics from 2004-2008 predating the amendments to Education Law §3020-a relating to the time and cost of a 3020-a hearing. *Wright* Amended Complaint ¶56.

22. Paragraph 57 cites statistics from 1995-2006 predating the amendments to Education Law §3020-a relating to the time and cost of a 3020-a hearing. *Wright* Amended Complaint ¶57.

23. Paragraph 67 cites statistics from 1997-2007 relating to the number of tenured teachers terminated in New York City for incompetence. Not only do these statistics predate the amendments to Education Law §3020-a and the creation of Education Law §3012-c, it does not contain any information relating to the number of tenured educators who were terminated for other causes. *Wright* Amended Complaint ¶67.

24. Plaintiffs continue to disregard the amendments to the statutes, still relying upon the out of date data in their opposition to dismissal, and actually advocate for the court to disregard the amendment. (*Wright* Memorandum of Law at 37)

25. The court simply cannot disregard these amendments to the Challenged Statutes because they are prima facie proof of the fact that the Challenged Statutes present a political question and are not justiciable.

26. The crux of Plaintiffs' Complaints is that the Challenged Statutes are resulting in ineffective teachers because the school districts allegedly find them burdensome, but case law is clear that problems stemming from "pervasive non-enforcement" are political questions within

the province of the legislature to correct. Benson Realty Corp. v. Beame, 50 N.Y.2d 994, 996 (1980).

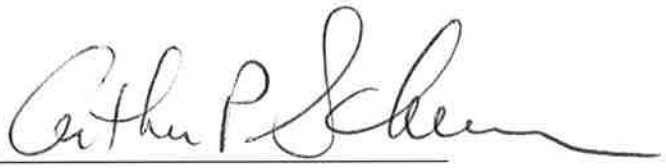
27. Additionally, allowing the Complaints to proceed will result in the courts rendering an advisory opinion on the Challenges Statutes and will embroil the courts in the administration and operations of public education, both of which are expressly contrary to the concept of judiciablity. New York State Inspection, Sec. & Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 239-40, 475 N.E.2d 90, 93 (1984); Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 77 N.Y.2d 761, 773 (1991)

28. Accordingly, it is respectfully submitted that the Complaints in this consolidated action must be dismissed as a matter of law.

Dated: December 15, 2014

Latham, New York

SCHOOL ADMINISTRATORS ASSOCIATION
of NEW YORK STATE
Office of General Counsel, Arthur P. Scheuermann

By: 

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