To be argued by:
BENJAMIN WELIKSON
10 minutes requested

Richmond County Clerk's Consolidated Index No. 101105/14

New York Supreme Court
Appellate Division: Second Department

MYMOENA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian, JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs-Respondents,

against

(Caption Continued on Inside Cover)

Docket Nos.
2015-03922,
2015-12041

REPLY BRIEF FOR THE MUNICIPAL APPELLANTS

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for the City of New York
and the New York City
Department of Education
100 Church Street
New York, New York 10007
212-356-0823
bwelikso@law.nyc.gov

RICHARD DEARING
DEVIN SLACK
BENJAMIN WELIKSON
of Counsel

September 30, 2016

THE STATE OF NEW YORK, THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN and JANE DOES 1-100, XYZ ENTITIES 1-100,

Defendants-Appellants,

and

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers, PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants.

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PRELIMINARY STATEMENT

Plaintiffs, a small group of dissatisfied parents of children attending public schools, maintain that the Education Article of the State Constitution allows them to pursue a challenge that is at once staggeringly broad and singularly focused—that the century-old institution of teacher tenure that applies statewide is unconstitutional. But plaintiffs refuse to explain how this unprecedented challenge could be litigated and adjudicated.

Plaintiffs' pleas notwithstanding, it is not premature to ask them to articulate a coherent theory, and concrete factual allegations, to support their contention that the balance that the Legislature has struck on teunre—which serves the critical function of recruiting and retaining teachers—contravenes the Education Article's command that the State "support a system of free and common schools." It is not premature to ask plaintiffs how it is possible to systemically litigate the relationship between an evolving regime of tenure protections and teacher performance, or the relationship between teacher performance and educational outcomes. And it is not premature to ask plaintiffs to identify the remedies they might seek and explain how they would be within the power of any court to provide.

In their brief to this Court, plaintiffs leave these and many other questions unanswered. While plaintiffs claim that answers can await a later day, these are glaring deficiencies that reveal that plaintiffs' sweeping challenge to teacher tenure to be deeply flawed, based in policy and not the Education Article, and rooted in their disagreement with the concept of tenure itself, not the particular tenure protections afforded by State law today. It also reveals that this case strays far afield from any case ever brought under the Education Article, including *Campaign for Fiscal Equity v. State of New York*—which likely represents the outer limits of justiciable Education Article claims and involved a challenge targeted at the article's core command that schools be adequately funded, was founded on a wholesale system default caused by dramatic underfunding, and sought additional funding as a remedy to speak directly to the underlying problem.

If anything, plaintiffs' arguments on appeal confuse more than clarify. For example, plaintiffs disclaim any facial challenge to the tenure statutes identified in their complaints, claiming instead that the overall mix of tenure protections afforded by the statutes have an indirect effect on educational outcomes. Yet plaintiffs, who elected not

to revisit their complaints after the Legislature amended the tenure statutes during this litigation, have alleged no facts indicating how the current overall mix of tenure protections will have an effect of constitutional proportions. If plaintiffs do not claim that tenure is incompatible with a sound basic education in every application, they bear the burden of alleging why the amended tenure statutes are unconstitutional as administered. They have made no effort to do so.

By all accounts, plaintiffs seek an unprecedented level of unspecified judicial intrusion into the management of the State's education system—and on the flimsiest of foundations. But education policy is enormously challenging and complex. The Education Article empowers courts to act when the system has fundamentally defaulted; it does not permit courts to intercede in this fraught area and second-guess how best to manage these basic pedagogical decisions. Our democratic process provides a means to answer these evolving and difficult policy questions. The process has worked and is working: the Legislature has repeatedly revisited and adjusted its approach to tenure over the years. The Court should let the process continue, not hijack it, as plaintiffs propose and the court below allowed.

ARGUMENT

POINT I

PLAINTIFFS' INABILITY TO IDENTIFY ANY STANDARDS TO RESOLVE THEIR CHALLENGE IS FATAL TO THEIR CLAIMS

Plaintiffs posit that their unprecedented challenge to the State's tenure system is justiciable simply because they purport to base their claims on the State Constitution. As explained below, freewheeling disputes over complex policy questions, like this one, are not transformed into justiciable controversies merely because a plaintiff invokes a constitutional provision. *See, e.g., Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 25 (2010) (systemic ineffective assistance of counsel claims "addressed to attorney performance" under the Sixth Amendment held nonjusticiable). Rather, judicial redress becomes possible only where courts have "clear" standards to apply and remedies to enforce. *Id.* at 26; *see also People v. Ohrenstein*, 153 A.D.2d 342, 361 (1st Dep't 1989), *aff'd*, 77 N.Y.2d 38 (1990) (a court cannot resolve a dispute without "discoverable and manageable standards").

A. Plaintiffs Identify No Clear Standards a Court Could Use to Adjudicate their Claims.

The absence of clear justiciable standards is especially pronounced in the education context. *See, e.g.*, *Torres v. Little Flower Children Servs.*, 64 N.Y.2d 119, 125 (1984) (observing that the "court system is not the proper forum" to evaluate "different educational approaches") (citation omitted). Despite this, plaintiffs never articulate how a court could test, and reevaluate, the manner in which the Legislature has calibrated teacher tenure to help recruit and retain qualified teachers—one part of a broader mosaic of educational policies that intersect in a multitude of ways. As an initial matter, plaintiffs do not explain how a court could even isolate tenure protections from other factors that affect teacher recruitment and retention, like leave policies, or from the diverse range of educational inputs, like infrastructure and technology, that also affect educational outcomes.

But even if such an endeavor were possible (and it is not), plaintiffs offer no standard that would enable a court to adjudicate how the overall (and evolving) mix of tenure protections provided by State law affects teacher performance, or how teacher performance, in turn, affects bottom-line educational outcomes. Each link in this chain

presents its own justiciability problems. The chain as a whole reveals just how far this case lies from the kind of disputes that fall within the competency of the courts to decide.

Indeed, plaintiffs refuse to articulate a standard for the linchpin of their case: a definition for an "effective teacher" (Resp. Br. at 25-26), or "teacher quality" (Record on Appeal ("R.") 37, 1358).[1] However phrased—teacher "quality" or "effectiveness"—the concept is equally indeterminate and plaintiffs fail to explain how it could be adjudicated, connected to specific tenure protections, and divorced from the wide range of other educational inputs, so that the relationship between teacher tenure and the sound basic education that is constitutionally required could be ascertained. Previously, plaintiffs proposed various measures—including whether students "earn more money," matriculate at "colleges of higher quality," achieve "higher test scores," or "reside in higher quality neighborhoods" (R. 43, 1358)—but these are, at best proxies, for educational outcomes (and ones that exceed the constitutional minimum). Plaintiffs articulate no basis—legal or

[1] The term "Resp. Br." refers to the brief filed by the *Wright* plaintiffs, which the *Davids* plaintiffs incorporated.

otherwise—for a court to determine how these measures could be used to adjudicate teacher effectiveness itself, its relationship to specific tenure protections, or its effect on educational outcomes.

This does not mean that there are no measures of teacher effectiveness on which educators may legitimately rely, but they rightly vary locally from district to district, change as educational practices evolve, and, as with any measure of employee performance, often turn on individualized assessments. New York City's Department of Education, for example, currently uses "Advance," a system developed through a multi-year pilot program following the Legislature's enactment of Education Law § 3012-c, which assesses teacher performance based on, among other things, classroom observations, state and local student assessment tests, and supervisory evaluations.[2]

While plaintiffs believe that this system does not adequately identify teachers in need of improvement—and that other unspecified measures of performance would be better—the choice between these "competing" approaches is a decision that the political branches and

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[2] NYC Department of Education, Advance Overview, http://on.nyc.gov/2cRY74H (last visited September 30, 2016).

school administrators are best suited to make. *See Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984). Our State Constitution entrusts these choices to the Legislature and education officials tasked with the day-to-day administration of our schools, not plaintiffs or the courts. *See Donahue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 445 (1979). And the Legislature has continued to reassess and improve upon teacher evaluations, most recently in the 2015 Education Transformation Act. L. 2015, ch. 56, Part EE (*see* Br. for Municipal Appellants at 16-18) (discussing the Legislature's numerous amendments to the statutes' teacher accountability and review standards).

B. The Absence of Standards Is Compounded by the Extraordinary Breadth of Plaintiffs' Challenge.

Plaintiffs' failure to propose workable standards to adjudicate teacher effectiveness is particularly problematic given the extraordinary sweep of their challenge. Plaintiffs claim that teacher tenure is unconstitutional across the state, evidently in every school district in New York. As a consequence, teacher effectiveness—and its place in the broader mosaic of educational inputs and outputs—would need to be evaluated on a district-wide and, potentially, statewide basis.

Even it were possible to articulate a justiciable standard to evaluate teacher effectiveness on a case-by-case or classroom-by-classroom basis (and plaintiffs have not done even that much), adjudicating teacher effectiveness on the broadest scale would pose even greater obstacles—obstacles that plaintiffs ignore rather than confront.

Plaintiffs never explain how a court could evaluate countless educators across the state. Many of the ordinary mechanisms for evaluating teacher performance—like contemporaneous and consistent classroom observations—would be unavailable. Even if courts possessed the institutional "tools" to undertake such a task, no standard exists to determine how many ineffective teachers give rise to a systemic claim. *Jones v. Beam*, 45 N.Y.2d 402, 409 (1978).

Plaintiffs' own arguments prove the point. Plaintiffs disclaim any contention that the tenure statutes are inherently incompatible with maintaining quality teachers (Resp. Br. at 48-49). Indeed, they concede that "the majority of teachers" are already providing students with a quality education (R. 38). Plaintiffs instead claim that the tenure statues provide a level of job protections that permit an unspecified but impermissible number of underperforming teachers to remain in schools

(R. 1352, 1372). But plaintiffs provide no standard for the courts to determine what level of job protections or what proportion of underperforming teachers would comport with their strained vision of the Constitution. *See Matter of Bokhair v. Bd. of Educ. of the City of New York*, 43 N.Y.2d 855, 856 (1978) (whether a school system employs a sufficient number of attendance teachers is "inappropriate for court resolution").

C. Reliance on a Constitution Provision Does Not Render a Nonjusticiable Claim Justiciable.

Plaintiffs are also incorrect in arguing that courts find claims justiciable merely because constitutionally protected rights are invoked.[3] The justiciability of a dispute turns on whether courts are the appropriate "forum for resolution," not on the source of a claimed right. *Jones*, 45 N.Y.2d at 409. Court intervention cannot be had where there are no "standards" for the court to employ, *Ohrenstein*, 153 A.D.2d at

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[3] *See, e.g.*, *Hurrell-Harring*, 15 N.Y.3d at 24-26 (countywide Sixth Amendment ineffective assistance of counsel claims held nonjusticiable); *see also Saxton v. Carey*, 44 N.Y.2d 545, 549-50 (1978) (degree of itemization necessary for the State budget to comply with art. VII, § 1 held nonjusticiable); *Ram v. Blum*, 77 A.D.2d 278, 279-80 (1st Dep't 1980) (challenge to the level of public assistance under art. XVII, § 1's mandate to provide for the "aid, care, and support of the needy" held nonjusticiable).

366, or where "the controlling economic and social facts" cannot be sufficiently accessed through the court's adjudicatory fact-finding process, *Campaign for Fiscal Equity v. State of New York*, 8 N.Y.3d 14, 28 (2006) ("*CFE III*") (quotation marks omitted).

In this regard, *Hurrell-Harring*, where the Court of Appeals held that a claim alleging the systemic denial of effective assistance of counsel was nonjusticiable to the extent it was based on attorney performance, is instructive. 15 N.Y.3d at 24-26. The *Hurrell-Harring* plaintiffs, a putative class of indigent criminal defendants, sought declaratory and prospective relief against five New York counties claiming that the counties failed to provide them with adequate counsel as required by the Sixth Amendment. *Id.* at 15-16. Their complaint alleged that the counties routinely arraigned indigent defendants before they were provided with counsel and that counsel, once assigned, were "completely unresponsive" and waived important rights. *Id.* at 19.

The Court of Appeals held that to the extent the plaintiffs' constitutional claims turned on whether the representation afforded was "effective," the claims were nonjusticiable. *Id.* at 23. In so reasoning, the Court distinguished between claims predicated on

"nonrepresentation," meaning the wholesale denial of counsel—which were justiciable—and claims based on poor performance—which were not. *Id.* at 22-24. Claims "exclusively predicated on deficient performance," were nonjusticiable because no standard existed to adjudicate individual attorney performance system-wide and the Court could not devise any remedy addressed to the alleged injury without intruding upon the executive and legislative's authority. *Id.* at 26.

Thus, while courts may assess whether the State is meeting "a clear constitutional" mandate, they cannot second-guess the subsidiary discretionary choices in fulfilling such a duty—both because there are no objective judicial standards to choose among a range of reasonable alternatives and because the task of deciding amongst them is vested in the democratically accountable branches. *Id.* at 26. To be sure, in *CFE*, the Court of Appeals found justiciable a claim that a school system was so dramatically underfunded that it had yielded a wholesale systemic failure to provide an education. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318-19 (1995) ("*CFE I*"). But such claims were premised on a total systemic default—inadequacies with respect to every aspect of the system, resulting in a complete failure to provide a

"basic education." *Id.* at 318; *see also Hurrell-Harring*, 15 N.Y.3d at 27 (holding that only the complete "absence of representation" pleads a justiciable claim). There is a wide gulf between that fundamental default and what plaintiffs allege in this case, as discussed further below.

D. Plaintiffs' Inability to Identify an Available Remedy Underscores the Justiciability Problem.

The Court of Appeals has twice rejected Education Article claims—even when based on "gross educational inadequacies"—where the plaintiffs failed to propose specific remedies that courts could impose. *See New York Civil Liberties Union v. State of New York*, 4 N.Y.3d 175, 179-181 (2005) ("*NYCLU*") (Education Article claim based on individually failing schools held not cognizable because any remedy would require the court to subvert local control); *Paytner v. State of New York*, 100 N.Y.2d 434, 442-43 (2003) (plaintiffs' claims held not cognizable where they "suggest no credible remedies" to redress alleged inadequate educational opportunities).

Plaintiffs disclaim any argument that tenure is per se incompatible with a sound basic education (Resp. Br. at 49). Their claims are instead premised on the contention that the statutes' overall

mix of job protections and accountability measures has the "effect" of placing too many ineffective teachers in schools (*id.* at 37). But there is no method—and plaintiffs have not suggested any—to respond to plaintiffs' objections without reweighing these basic legislative judgments and fashioning new educational policy out of whole cloth. Such a remedy would "subvert" the essence of the education system "enshrined in the Constitution." *Paytner*, 100 N.Y.2d at 442.

The authority to shape education policy is vested in the Legislature and in the officials who are responsible for the day-to-day operation of "their own schools." *NYCLU*, 4 N.Y.3d at 182. Plaintiffs identify no remedy that would not clash with this allocation of responsibility by requiring courts to formulate education policy. *Paytner*, 100 N.Y.2d at 442 (quotations omitted). The Education Article does not permit plaintiffs to rewrite education policy in the courts.

POINT II

PLAINTIFFS' ALLEGATIONS DO NOT SUPPORT A VIABLE CLAIM UNDER THE EDUCATION ARTICLE

Even if plaintiffs' sweeping challenge to teacher tenure were justiciable (and it is not), plaintiffs nonetheless fail to allege a cognizable Education Article claim. Plaintiffs purport to focus on the

State's alleged failings (Resp. Br. at 20-33), and maintain that the effect of those purported failings have been felt in New York City (and elsewhere). But plaintiffs' allegations fall far short of suggesting there is a "gross and glaring" systemic shortfall that has denied New York City students from obtaining a sound basic education. *See*, *Paytner*, 100 N.Y.2d at 439 (quotation mark omitted). Indeed, plaintiffs offer no specific allegations about the educational outcomes of New York City students at all (*see* Resp. Br. at 31-33), and their broad-based objection to tenure does not advance an Education Article claim.

Plaintiffs suggest that they need not allege concrete facts to support their belief that New York City schools have an undetermined amount of ineffective teachers causing a systemic default. Indeed, they do not even allege that the tenure statutes completely deny their children effective teachers—only that they are "at risk" of being assigned to one (R. 1352; *see also* R. 38). Instead, plaintiffs maintain that they can sustain their pleading burden merely by citing to (stale) studies that support their view that there are ineffective teachers and that officials sometimes find it difficult to remove them (Resp. Br. at 25-27). But pleading facts pointing to a systemic deficiency in providing a

sound basic education is far more demanding—it "requires a clear articulation" of the educational failings that is particularized enough for a court, and the litigants before it, to determine what they "will be expected to do." *NYCLU*, 4 N.Y.3d at 180.

Because the Education Article does not provide courts with "the authority . . . to micromanage" education policy, *CFE III*, 8 N.Y.3d at 28, courts may only "intrude" into this arena only when a clear systemic violation has been pleaded, *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 38-39 (1982); *see also NYCLU*, 4 N.Y.3d at 180. Stated differently, providing concrete allegations that enable a court to evaluate whether, if those allegations are credited, a systemic default has occurred and is traceable to the challenged conduct is crucial to pleading a viable Education Article claim. Plaintiffs' vague and shifting objections to the manner in which teacher performance is evaluated, and the existence of tenure protections in the abstract, do not meet this threshold.

But putting aside the imprecision of plaintiffs' allegations, their complaints are subject to dismissal for a more fundamental reason—the focus of their challenge does not support a cognizable Education Article

claim. While plaintiffs may be correct that the Court of Appeals has never definitively limited Education Article claims to inadequate funding, it has clearly expressed doubt about whether non-funding claims are cognizable. *See NYCLU*, 4 N.Y.3d at 180 n.2; *see also Aristy-Farer v. State of New York*, __ A.D.3d __, 2016 N.Y. Slip Op. 05960, at *9 (1st Dep't Sept. 8, 2016) (partially dismissing a claim invoking the Education Article where "not sufficiently related to the State's funding duty"). There is good reason to question whether the Education Article can ever extend beyond the funding context, much less so far as to allow a plaintiff to pluck a single aspect of educational policy from its broader context and claim it has some indirect effect on educational outcomes.

After all, the claims in *CFE* were premised on a fairly self-evident theory—that a school system's dramatic lack of funding yields poor educational outcomes. *CFE I*, 86 N.Y.2d at 316. At the time, the State's education funding formulas resulted in New York City having the lowest large city per-pupil expenditures in New York. *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 905 (2003) ("*CFE II*"). The skewed allocation of funding caused a cascade of deficiencies in every aspect of the City's school system—"inadequacies in physical

facilities, curricula, numbers of qualified teachers, [and the] availability of textbooks [and] library books." *CFE I*, 86 N.Y.2d at 318-19. These glaring systemic deficiencies—all traceable to the overall level of funding—prevented thousands of students from obtaining a basic education. *Id.* Increasing New York City's funding thus plausibly stood to remedy the situation. *Id.*; *see also CFE II*, 100 N.Y.2d at 925.

Plaintiffs' allegations stand on far different footing. Plaintiffs make no claims whatsoever about inadequate funding, which has a clear connection to the Education Article's command that the State "support a system of free and common schools." Plaintiffs do not even focus on a single educational input, but rather target a combination of policies (tenure protections) that they assert have an indirect effect on one educational input (teacher quality). But plaintiffs offer no factual allegations that, if credited, would show that tenure protections are the driving force behind systemic and glaring educational deficiencies in New York City schools. Plaintiffs' "speculation" that altering the tenure system in some unspecified way will improve teacher performance and lead to better educational outcomes falls wildly short of stating a plausible claim under the Education Article. *See Paytner*, 100 N.Y. at

443; *NYCLU*, 4 N.Y.3d at 180. Assuming there can ever be a cognizable Education Article claim outside of the funding context, plaintiffs have failed to plead one in this case.

POINT III

PLAINTIFFS ARE NOT ENTITLED TO PROSPECTIVE RELIEF AGAINST THE AMENDED TENURE STATUTES

Even if plaintiffs could surmount all of these hurdles, they fail to explain why their claims remain ripe despite the Legislature's reforms to the tenure system during this litigation. As plaintiffs concede (Resp. Br. at 15-16, 61), many of the specific objections they once posed have been addressed by the Legislature's recent statutory amendments. *See, e.g.,* Educ. Law § 2573(1)(a)(ii) (extending the standard probationary period for New York City teachers to four years); *id.* § 2573(5)(b) (requiring teachers to receive a rating of effective or higher in at least three of four probationary years).

Plaintiffs thus seek prospective relief against a statutory regime that has been significantly altered to address many of their objections. The "contingent" impact that the amendments may have cannot be determined now, especially where the harm plaintiffs claimed under the earlier statutes was the mere "risk" of being assigned to an ineffective

teacher, and, by their own account, the majority of teachers are effective. *Matter of New York State Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 240 (1984); *see also Hall v. Beals*, 396 U.S. 45, 48 (1969) (prospective relief is unavailable against an amended statute); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir. 1992) ("Constitutional challenges to statutes are routinely found moot when a statute is amended or unripe when proposed regulatory amendments are pending.") (internal citations omitted).

Here, plaintiffs contend that the tenure statutes collectively result in the retention of too many ineffective teachers (Resp. Br. at 7-9). Their challenge depends on their assertion that the dovetailing effect of the statutes—"*in combination*"—gives teachers too much protection, and results in too much teacher retention (*id.* at 34 (emphasis added)). But because the Legislature amended the statutes—and materially so—plaintiffs' assertions about the combined interaction of the old statutory regime, speculative to begin with, no longer present a ripe controversy. Simply put, whether the collective impact of the new statutes will result in a critical mass of ineffective teachers in City schools, as plaintiffs

previously claimed, "cannot be known at this point." *Cuomo v. Long Island Lighting Co.*, 71 N.Y.2d 349, 355 (1988).

Nor can plaintiffs avoid this conclusion by pointing to *Hussein v. State of New York*, 81 A.D.3d 132 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). The plaintiffs in *Hussein* alleged that their school districts were failing because they were substantially underfunded even after accounting for reform legislation. 81 A.D.3d at 136. The complaint in that action contained detailed allegations about the severe inadequacy of current educational aid as well as aggravating factors—such as the poverty levels in their districts and the higher than average at-risk students—that suggested that the amount of increased aid anticipated by the State's budget reforms simply would not be sufficient to meet the funding shortfalls. *Id.* Thus, the plaintiffs credibly alleged that the intervening change (additional funding) would not ameliorate the underlying problem (insufficient funding). *Id.* at 137.

Here, in contrast, plaintiffs do not even attempt to project the impact of the Legislature's rebalancing of the tenure system. Indeed, their "combined effect" claim is premised on inferences drawn from information that far predates even the Legislature's most recent

amendments. Plaintiffs cannot have it both ways: either tenure is inconsistent with a sound basic education "in every conceivable application"—which plaintiffs disclaim—or plaintiffs must allege facts that support their theory that the amended tenure statutes—as they exist today, not yesterday—are unconstitutional as administered. *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (citation omitted). Plaintiffs' refusal to adjust their allegations to the current statutory landscape demonstrates that their true objections are with tenure itself, not the specific mix of tenure protections afforded by State law.

A functioning education system requires competing objectives to be integrated and balanced. The choices about how best to balance these objectives will have advantages and disadvantages. The Legislature has reasonably determined that a pool of quality and committed educators is best fostered by providing a mix of job protections and measures that ensure that teachers are evaluated and held accountable. And they continue to reevaluate and revise the best way to achieve these goals. While plaintiffs object to how the Legislature has balanced these

objectives, their disagreement with these policy choices does not present a legal claim.

CONCLUSION

The order below should be reversed, and these actions should be dismissed.

Dated: New York, NY
September 30, 2016

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for the City of New York
and the New York City
Department of Education

By: _____
BENJAMIN WELIKSON
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-0823
bwelikso@law.nyc.gov

RICHARD DEARING
DEVIN SLACK
BENJAMIN WELIKSON
of Counsel

CERTIFICATE OF COMPLIANCE

This brief was prepared with Microsoft Word 2010, using Century Schoolbook 14 pt. for the body and Century Schoolbook 12 pt. for footnotes. According to the aforementioned processing system, the portions of the brief that must be included in a word count pursuant to 22 N.Y.C.R.R. § 670.10.3(a)(3) contain 4,074 words.