To be argued by: Richard E. Casagrande
Time Requested: 15 Minutes

NEW YORK SUPREME COURT
APPELLATE DIVISION -- SECOND DEPARTMENT

MYMOENA DAVIDS, et al.,
Plaintiffs-Respondents,

-against-

Docket Nos. 2015-03922
2015-12041

THE STATE OF NEW YORK, et al.,
Defendants-Respondents,

-and-

Richmond County
Index No.: 101105/14
(Consolidated)

MICHAEL MULGREW, et al.,
Intervenors-Defendants-Appellants.

JOHN KEONI WRIGHT, et al.,
Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK, et al.,
Defendants-Appellants,

-and-

SETH COHEN, et al.,
Intervenors-Defendants-Appellants.

REPLY BRIEF ON BEHALF OF INTERVENORS-DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Intervenor-defendants-appellants, eight New York State public school teachers and NYSUT ("teacher defendants"), submit this brief in reply to the briefs filed by Plaintiffs-Respondents Mymoena Davids, et al. ("*Davids* plaintiffs") and by Plaintiffs-Respondents John Keoni Wright, et al. ("*Wright* plaintiffs") in the appeal from the Richmond County Supreme Court's (Minardo, J.) denial of their motions to dismiss the plaintiffs-respondents' consolidated lawsuits and denial of appellants' motions to renew the motions to dismiss. (R. 17-33, 954-58).[1]

The *Davids* plaintiffs wrongly assert that the teacher defendants have conceded that plaintiffs properly plead a claim under Article XI, Section 1 of the State Constitution ("the Education Article"). *Davids* brief, at 5-6. The teacher defendants have made no such admission. *See* Teacher Defendants' March 24, 2016 brief, at p. 2. To the contrary, the briefs submitted by the teacher defendants demonstrate that the plaintiffs completely failed to meet the pleading requirements for an Education Article claim.

[1] References to the Record on Appeal are identified as R. _____.

POINT I

PLAINTIFFS' BRIEFS ILLUSTRATE THAT THEIR CLAIMS ARE NON-JUSTICIABLE POLICY MATTERS.

The amended complaints should be dismissed as non-justiciable. The plaintiffs have offered no substantive rebuttal to teacher defendants' argument that this case is non-justiciable.

The *Wright* plaintiffs again inaccurately claim that "appellants cannot identify a single case where a constitutionally-protected right was at issue, but the court nevertheless concluded that the matter was non-justiciable on political question grounds." *Wright* brief, at 54. This claim studiously ignores *Benson Realty v. Beame,* 50 N.Y.2d 994 (1980), *appeal dismissed*, 449 U.S. 1119 (1981), cited throughout teacher defendants' brief.

Benson is *precisely* a case where a constitutional claim was at issue and the Court of Appeals concluded that the "political questions" were suited for the "legislative or executive branches...[as] the judiciary [had] neither the authority nor the capabilities for their resolution." 50 N.Y.2d at 996. The *Wright* plaintiffs fail to distinguish or even to mention *Benson* in their brief.

Another case where a constitutional right was at issue and the court appropriately refrained from encroaching on the Legislature's authority is *Herzog v. Board of Education*, 171 Misc. 2d 22 (Sup. Ct., Nassau Co. 1996). In *Herzog,*

the school district moved to dismiss a teacher's Article 78 petition for retroactive pension credit, contending that Retirement and Social Security Law § 803 was unconstitutional and "violate[d] Article VIII, Section 1 of the New York State Constitution's prohibition against gifts." 171 Misc. 2d at 24, 25. Pursuant to CPLR §103(c), the court deemed the motion "an action for declaratory judgment... ." *Herzog*, 171 Misc. 2d at 26. After acknowledging that "[l]egislative enactments enjoy a strong presumption of constitutionality," the court denied the action for a declaratory judgment, holding that:

> RSSL 803 does not violate the constitutional prohibition against gifts set forth in Article VIII, Section 1 of the State Constitution. This Court may not address the wisdom or the expediency of the statute, or address issues raised which the proponents of those issues lack capacity to prosecute. Redress from the alleged unanticipated and substantial expenses incurred by the respondent school district lies within the legislative process.

Herzog, 171 Misc. 2d at 27, 28.

Ignoring these precedents, the plaintiffs demand that the courts usurp the role of the legislative and executive branches. The *Wright* plaintiffs specifically aver that:

> ...[I]f Plaintiffs are successful in proving a violation of Article XI, the court will still need to craft an appropriate remedy. At that point, [the] UFT would be free to raise arguments about the effect of particular remedies on its members.

See Wright brief, at 48. This assertion has no lawful foundation and is categorically wrong.

The *Wright* plaintiffs cannot insist that a court "craft an appropriate remedy," when the remedy sought in the amended complaint is "a declaratory judgment, that the challenged statutes violate the New York Constitution" and an injunction "enjoining Defendants from implementing or enforcing the Challenged Statutes" (R. 1374). Even the case law cited by the *Wright* plaintiffs – *Housing & Development Administration of the City of New York v. Cmty. Hous. Improvement Program, Inc.*, 90 Misc. 2d 813 (1977), *aff'd*, 59 A.D.2d 773 (2d Dep't 1977) – supports the conclusion that such judicial relief is unattainable.

The *Wright* plaintiffs cite *Housing & Development Administration* for the proposition that "[l]aws constitutional when enacted may become unconstitutional as administered or applied." *Wright* brief, at 54. But the plaintiffs fail to note that the court in *Housing & Development Administration* abstained from "craft[ing] an appropriate remedy" to address the rent control concerns raised in that matter. Instead, the court respected justiciability standards, stating:

> It is not the purpose of this court to legislate what the changes in administration should be. It *is* the responsibility of the courts to inform the proper authorities when a statute is being administered improperly. The time has come for the Legislature to take whatever steps are necessary to remedy the administrative morass that now passes itself off as "rent-control administration."

Housing & Development Administration, 90 Misc. 2d at 816 (emphasis in original).

Because an adequately pleaded Education Article claim must specifically articulate the State's failings so the State will know how to cure such failings should plaintiffs prevail, it is obvious that a court cannot create the remedy. *See New York Civ. Liberties Union v. State of New York ("NYCLU"),* 4 N.Y.3d 175, 180 (2005); *rearg. denied,* 4 N.Y.3d 882 (2005). Thus, by asserting that a court will "need to craft an appropriate remedy," the *Wright* plaintiffs admit that they are asking the Court to do something it cannot – legislate from the bench and judicially impose a teacher employment system to replace the challenged statutes.

The plaintiffs' objective is clear. They oppose New York's tenure and seniority laws -- laws carefully designed to recruit, retain, and empower good teachers; to insulate them from arbitrary dismissal; and to thus promote academic freedom and independent thinking in our public schools. *See Ricca v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 47 N.Y.2d 385, 391 (1979). The plaintiffs think they have a better idea.

The *Wright* plaintiffs admit that "[t]he very premise of Plaintiffs' lawsuit is that individual school districts and administrators should be free to hire effective teachers and fire ineffective ones without the artificial barriers imposed by the Challenged Statutes... ." *Wright* brief, at 41. Accordingly, the plaintiffs are

advocating for the abolition of a tenure system that has been consistently recognized and upheld by New York courts, including during the pendency of this case.

Most recently, in *Springer v. Board of Education*, 27 N.Y.3d 102, 108 (2016) (citations omitted), the Court of Appeals, addressing a regulatory issue unique to New York City, once again recognized the importance of tenure:

> [The] result [in this case] does not minimize the public policy interests that have prompted this Court "to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system." Nor does it undermine this Court's recognition that a tenured teacher has a "protected property interest in [his or] her position" and right to retain that position absent discharge in accordance with Education Law § 3020-a... .

Notwithstanding the Court of Appeals' long-standing endorsement of the tenure laws, the plaintiffs demand that the courts eviscerate this lawful system and its public policy underpinnings. The plaintiffs, however, cannot ask the courts to make policy by imposing modifications to the current laws. *See Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006).

The courts should not venture into the area of education policy, when they are "ill-equipped to undertake the responsibility" and the matter "'revolve[s] around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.'" *Jones v. Beame*, 45 N.Y.2d

402, 408-09 (1978); *Roberts v. Health and Hosp. Corp.*, 87 A.D.3d 311, 323 (1st Dep't 2011) (citation omitted), *lv. denied*, 17 N.Y.3d 717 (2011). The plaintiffs' briefs illustrate the political questions and complexities of education policy; and demonstrate that the plaintiffs' claims boil down to a dislike of the Legislature's policy judgments.

Policy decisions by the legislative and executive branches cannot be overturned or modified by the judiciary just because the *Wright* plaintiffs disagree with the result. As the Appellate Court in *Vergara v. California*, 246 Cal. App. 4th 619, 643 (2016), *review filed* (May 24, 2016), succinctly stated when rejecting a constitutional challenge to California's tenure and seniority laws:

> ...Policy judgments underlying a statute are left to the Legislature; the judiciary does not pass on the wisdom of legislation. (*Estate of Horman* (1971) 5 Cal.3d 62, 77 ["Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature"]... .)

Though a now unanimously-overruled trial court decision in *Vergara* precipitated the instant litigation (R. 85, 376-393), any discussion of the appellate court's decision in *Vergara* is conspicuously missing from the plaintiffs' briefs. Instead, the *Wright* plaintiffs futilely attempt to support their position by mischaracterizing *Brady v. A Certain Teacher*, 166 Misc. 2d 566 (Sup. Ct., Suffolk Co. 1995).

The *Wright* plaintiffs attack *Brady* by erroneously stating that the decision rests "on the repudiated premise that 'there is no fundamental right to education or to a minimum level of education under the State Constitution.'" *Wright* brief, at 44 fn. 5. In New York, education is not recognized as a fundamental right under the State Constitution. *See Levittown UFSD v. Nyquist*, 57 N.Y.2d 27, 43 (1982). Further, the statement in *Brady* that there is not "a minimum level of education" is appropriate in the context of the cited decisions – *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440 (1979), and *Bennett v. City Sch. Dist.*, 114 A.D.2d 58 (1985). *Donohue* and *Bennett* recognized the State's constitutional obligation to provide a sound basic education and "minimal acceptable facilities and services," but explained that:

> ...this general directive was never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education, the breach of which duty would entitle a pupil to compensatory damages.

See Donohue, 47 N.Y.2d at 442-43; *Bennett*, 114 A.D.2d at 67. No New York court has ever interpreted Article XI, Section 1 to create a cause of action for the failure of a single student to receive a sound basic education. Rather, any claim for the deniable of a sound basic education must allege a school district-wide failure. *NYCLU*, 4 N.Y.3d at 182.

The *Wright* plaintiffs' challenge to the Legislature's policy making is perhaps best illustrated by their detailed, albeit inaccurate discussion of the 2015 adoption of Education Law § 211-f, a statute that permits the removal of teachers without regard to tenure or seniority rights under certain circumstances. *See Wright* brief, at 62 fn. 7. Notably, they allude to Governor Cuomo's proposed legislative changes and the Legislature's decision to implement different legislation. *Id.* Referencing a remark from Assemblyman Fred Thiele, the *Wright* brief incorrectly suggests that the 2015 Education Law "changes were modest and did nothing to address the issues raised in the Amended Complaint." *Wright* brief, at 14-15. However, Assemblyman Thiele did not say that, nor did the article cited in the *Wright* plaintiffs' brief.

In actuality, the article referenced in the *Wright* brief states:

> ...[T]here was also a sense among lawmakers that the education reform measures approved in the budget will not just have *wide-reaching effects* for schools and politics, but will likely be before them again next year.
>
> "We will be back here again revisiting this issue," said Assemblyman Fred Thiele. "I feel like we are rearranging the deck chairs on the Titanic."

See Nick Reisman, *Lawmakers Reluctantly Approved Education Budget Bill, available at* http://www.nystateofpolitics.com/2015/03/lawmakers-reluctantly-approved-education-budget-bill/ (last visited Aug. 9, 2016) (emphasis added).

Accordingly, the article describes "the education reform measures" as "wide-reaching" – not "modest."

Regarding Assemblyman Thiele's statement, it is evident that he was referring to the ongoing policy debate in the Legislature and his concerns with the now well-recognized, failed roll-out of the Common Core curriculum. New York State, New York Common Core Task Force, *available at* http://www.ny.gov/programs/common-core-task-force (last visited Aug. 9, 2016).

In 2014, Assemblyman Thiele introduced legislation to curb the use of Common Core assessments in teacher evaluation. *See* A.8929, 2014 Leg., 237th Sess. (N.Y. 2014). Assemblyman Thiele said that the Common Core "was implemented from an ivory tower in a top-down fashion that didn't take into account parents or teachers." *See* http://sagharboronline.com/senator-lavalle-and-assemblyman-thiele-address-concerns-in-noyac/ (last visited Aug. 9, 2016). Assemblyman Thiele has also stated that "[a]s far as Common Core is concerned, the Titanic had a better roll out. The Board of Regents didn't get the input from the community that it should have… ." *See* http://www.hamptons.com/Real-Estate/Land-and-Law/21819/A-Conversation-With-New-York-State-Assemblyman.html#.VyjZQaP2ZLM (last visited Aug. 9, 2016).

Assemblyman Thiele's statement about the 2015 amendments is representative of the ongoing political debate and attention in the Legislature to

education matters. By highlighting Assemblyman Thiele's comments, the *Wright* plaintiffs have effectively made the teacher defendants' point that this is a matter of legislative policy debate, which certainly does not present a justiciable issue.

Statutes governing public education are a matter of ongoing revision by the Legislature and the Board of Regents. As the plaintiffs have not presented a justiciable controversy, the amended complaints should be dismissed.

POINT II

PLAINTIFFS' BRIEFS FURTHER DEMONSTRATE THAT PLAINTIFFS HAVE NOT MET THE LEGAL PLEADING REQUIREMENTS FOR AN ARTICLE XI, §1 CLAIM, NOR HAVE THEY ALLEGED FACTS SUFFICIENT TO SUPPORT THE CLAIM THAT EACH OF NEW YORK'S 700 SCHOOL DISTRICTS IS NOT PROVIDING A SOUND BASIC EDUCATION.

A claim under the New York Constitution's Education Article XI, §1 can survive a motion to dismiss only if it specifically alleges the deprivation of a sound basic education, asserts causes attributable to the State, and pleads a district-wide failure. *See NYCLU*, 4 N.Y.3d at 178-79, 182; *New York City Parents Union v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 124 A.D.3d 451, 452 (1st Dep't 2015); *New York State Ass'n of Small City Sch. Dists., Inc. v. State of N.Y.*, 42 A.D.3d 648, 652 (3d Dep't 2007).

The plaintiffs have not adequately alleged any of these elements in attempting to state a claim under the Education Article.

A. Plaintiffs have failed to allege any facts showing school districts, statewide, employ significant numbers of ineffective teachers.

Plaintiffs fail to provide *any* facts to support the allegation that school districts employ a significant number of ineffective teachers. Plaintiffs never even seek to define the term "ineffective teacher." The Court should not accept the sufficiency of speculative allegations that there are large numbers of ineffective teachers when plaintiffs cannot even define this term or provide any supporting evidence. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 27 (2005); *Ruffino v. New York City Transit Authority*, 55 A.D.3d 817-18 (2d Dep't 2008).

Plaintiffs say that at the pleading stage they "have no obligation to plead such a specific definition." *See Wright* brief, at 25. This is simply incorrect. The Third Department in *Hussein v. State* found that plaintiffs' complaint sufficiently stated a cause of action to survive a motion to dismiss because it was "replete with detailed data" demonstrating a plethora of district-wide issues, including "inadequate teacher qualifications" and unfit "building standards and equipment." *See Hussein v. State*, 81 A.D.3d 132, 134-36 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). After recognizing the depth of data provided within the complaint, while the Third Department still found that "it would be premature for us to determine the merits of plaintiffs' allegations," it nonetheless permitted the case to move forward into discovery to develop a factual record, in order to fully evaluate and

resolve the tangible issues affecting New York's public schoolchildren in the specific, at-issue districts. *See Hussein,* 81 A.D.3d at 136.

Here, plaintiffs' entire argument is premised on the flawed notion that the challenged statutes are keeping ineffective teachers in the system; but they are unable to define what an ineffective teacher is, or even point to a single ineffective teacher who has been retained because of the challenged statutes.

The *Wright* plaintiffs have previously admitted that there is a high number of effective and highly effective teacher ratings, claiming that these numbers are inflated by a supposedly flawed evaluation system. *See* R. 1362. Importantly, the *Davids* plaintiffs concede that the vast majority of New York's educators (95%) are effective, while alleging, without any facts at all, that ineffective teachers constitute the bottom five percent of New York's teachers. (R. 38, 43).

B. Plaintiffs have failed to allege facts showing there is a systemic failure in the State to provide a sound basic education.

Plaintiffs argue that they have "satisfactorily pled the first element of an Article XI claim by alleging the State's 'systemic failure' to ensure effective teachers resulting in the denial of the right to a sound basic education for a significant number of students." *See Wright* brief, at 30. Plaintiffs fail to cite a single instance where any district has retained an "ineffective" teacher due to the challenged statutes, and plaintiffs do not allege even a shred of acceptable evidence showing a statewide failure to provide a sound basic education.

The cited results of the grade 3-8 2013 Common Core assessments are completely insufficient to defeat a motion to dismiss plaintiffs' claim that systemically, New York's 700 public school districts are failing to provide a sound basic education *because* of the challenged statutes. Plaintiffs have utterly failed to respond to the substantial public information cited in teacher defendants' brief, showing that hundreds of New York public school districts perform exceedingly well under the Challenged Statutes. *See* Teacher-Defendants' brief, Mar. 24, 2016, at 32-33. In fact, many school districts have recently improved their students' overall proficiency levels over the last year, or between 2015 and 2016. *See, e.g.*, NYSED Districts (latest version available), *available at* https://data.nysed.gov/lists.php?type=district (last visited Aug. 3, 2016).

Plaintiffs cite *Campaign for Fiscal Equity v. State ("CFE II")*, 100 N.Y.2d 893, 914 (2003), where the Court of Appeals found that "tens of thousands of students ... placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment ... is large enough to represent a systemic failure." The amended complaints in this case, however, starkly contrast with the complaint filed in *CFE II*, as plaintiffs have not sufficiently alleged any facts to demonstrate that there are, in fact, thousands of students in unfit facilities taught by ineffective teachers. What plaintiffs have provided is *not* in any way close to pleading a statewide, systemic failure.

Plaintiffs also claim they have "done more than enough to satisfy their minimal burden at the pleading stage" by citing "numerous studies and statistics to support their claims," but they continually cite to outdated facts and studies that have been disproven. *See Wright* brief, at 26. For instance, they insist on relying on an obsolete study that incorrectly states that the average length of Education Law § 3020-a cases is 500 to 800 days, (*Wright* brief at 26, 47) which has been debunked by current statistics in the record. (R. 479-480). And, plaintiffs' argument again ignores the principle that courts evaluate the constitutionality of statutes as they are written, not as they may be misadministered. *Benson Realty*, 50 N.Y.2d at 995-96. As stated in teacher defendants' March 24, 2016 brief, section 3020-a "just cause" disciplinary proceedings must be completed, absent extraordinary circumstances, within 155 days. Education Law § 3020-a(3)(c)(vii)(4). Even more, in cases involving consecutive ineffective ratings, an expedited 30-day or 90-day process is established. Education Law § 3020-b(3)(c)(i). There simply is no precedential basis for a claim that such expedited statutory procedures are somehow unconstitutional.

C. Plaintiffs have failed to allege any district-wide failures to provide a sound basic education.

Plaintiffs wholly disregard the requirement that an Education Article claim must allege and factually support a school district-wide failure to provide a sound basic education. *See NYCLU*, 4 N.Y.2d at 182; *New York State Ass'n of Small City*

Sch. Dists., 42 A.D.3d at 652; *New York City Parents Union*, 124 A.D.3d at 451-52; *Hussein v. State*, 81 A.D.3d at 134-36. Plaintiffs are from only three school districts and do not seek class certification, but allege that all of New York's 700 school districts are failing to provide a sound basic education.

Plaintiffs erroneously claim they have satisfied this element of their Education Article claim by taking "precisely the sort of systemic focus that motivated the Court of Appeals' decision in *NYCLU* by alleging a state-wide failure to provide effective teachers for New York's schoolchildren." *See Wright* brief, at 33. Plaintiffs attempt to explain their decision to divert from the governing legal precedent by saying that their claims are based on the "state-wide effects of statutes that are enforced across the State," rather than on "funding disparities in particular districts." *See Wright* brief, at 31.

The plaintiffs have misread *NYCLU.* The Court in *NYCLU,* and in every other relevant Education Article case, have required that a school district-wide failure be pleaded. As the Court of Appeals stated in *NYCLU*, " because school districts, not individual schools, are the local units responsible for receiving and using state funding, and the State is responsible for providing sufficient funding to school districts, *a claim under the Education Article requires that a district-wide failure be pleaded.*" 4 N.Y.2d at 182 (emphasis supplied).

The two other cases plaintiffs cite as support that a state-wide failure can be sufficiently pled under the Education Article, *Hussein* and *New York State Ass'n of Small City Sch. Dists., Inc.*, contain language similar to *NYCLU* and clearly state the pleading requirement of alleging a school district-wide failure. *See Wright* brief, at 31-32; *Hussein*, 81 A.D.3d at 134-136 ("plaintiffs' complaint is replete with detailed data allegedly demonstrating, among other things, inadequate teacher qualifications, building standards and equipment, *which illustrate glaring deficiencies in the current quality of the schools in plaintiffs' districts* and a substantial need for increased aid.") (emphasis supplied). *See also Paynter v. State*, 100 N.Y.2d 434, 440 (2003) ("Moreover, both the identification of deficiencies and the explanation of causation *must be established for individual school districts, rather than as a statewide matter*.") (emphasis supplied).

In *New York State Ass'n of Small City Sch. Dists.*, 42 A.D.3d at 652, the Third Department found that in stating a cause of action under the Education Article, it was not enough to "allege inequalities in the educational opportunities offered by different school districts." The Third Department concluded that plaintiffs additionally needed to demonstrate, through their allegations, that they were actually harmed by some district-wide failure. *See Id.*

Here, plaintiffs not only fail to allege inequalities in educational opportunities within the State's different school districts, but they also fail to allege that they were even remotely harmed by any such district-wide failure.

Additionally, in *New York City Parents Union*, the First Department affirmed the lower court's dismissal of plaintiffs' complaints for their failure to satisfy the pleading requirements under the Education Article, in part because while "[t]he complaint gives examples of poor conditions in four public schools...it does not allege any 'district-wide' failure (*see New York Civ. Liberties Union*, 4 NY3d at 182)." *New York City Parents Union*, 124 A.D.3d at 452.

The plaintiffs' dilemma in pleading this case is apparent. They have pleaded no facts to show that any of their children has had an ineffective teacher, or that such a teacher was retained because of the challenged statutes. But, on the heels of the trial court decision in *Vergara*, plaintiffs wanted to quickly assert the fashionable new legal theory that, somehow, teacher tenure laws are unconstitutional. Without an adequate factual or legal basis for an individual claim, or for a school-district wide claim, the plaintiffs simply created the unsupportable theory that *all* New York school districts are failing because of these decades' old laws. This claim is without factual or legal foundation and should be rejected.

D. Plaintiffs have failed to allege facts showing a causal connection between the challenged statutes and a systemic failure to provide a sound basic education, nor have they specified how the State must correct its supposed deficiencies alleged in the complaints.

Plaintiffs erroneously state that they have "easily satisfied their minimal burden" to show that the State is not providing a sound basic education "by alleging that the employment and retention of huge numbers of ineffective teachers is attributable to" the challenged statutes. *See Wright* brief, at 34.

This claim fails for several reasons. First, as noted, plaintiffs have not defined what an "ineffective" teacher is, nor have they pleaded any *facts* showing that any of their children have ineffective teachers, much less that there are "huge" numbers of such teachers employed throughout the state.

Second, they have failed to allege the existence of any ineffective teacher, anywhere in the state, who has been retained because of the challenged statues. In this regard, plaintiffs ignore that in a constitutional challenge, courts evaluate the challenged statutes as written. *Benson*, 50 N.Y.2d at 995-96. Under the challenged statutes, school districts are free to remove tenured teachers at any time for pedagogical incompetence or a variety of other reasons, utilizing the expeditious procedures provided under the challenged statutes. *See* Education Law §3020, §3020-a. Our Court of Appeals has repeatedly stressed the public policy importance of protecting teachers from arbitrary discharge, and courts throughout the country have now rejected the spurious claim that tenure and seniority

protections damage students by making it impossible to discharge ineffective teachers.

In *Vergara*, the case that directly precipitated the current litigation, the appeals court specifically rejected the claim that the challenged tenure and seniority laws "inevitably" caused a constitutional violation, finding that any harm to students was caused not by the statutory scheme, but by administrative staffing decisions. 246 Cal. App. 4th at 649-50, 651.

Similarly, in *North Carolina Ass'n of Educators v. State*, 786 S.E.2d 255, 266 (N.C. 2016), the Supreme Court of North Carolina found that the State's tenure laws were an "important incentive" in recruiting and retaining high quality teachers, and that tenured teachers could be dismissed for inadequate performance.

Likewise, in *Elliott v. Bd. of Trustees of Madison Consolidated Schools*, 2015 WL 1125022 (S.D. Ind., 2015), *app. filed* 2015 WL 2341226 (2015), the court, in overturning Indiana's repeal of teacher seniority protection, found that:

> ...school boards have *always* had the ability to fire poor-performing tenured teachers; in fact, school boards did not – indeed, they still do not – have to wait for a [reduction in force] in order to terminate poor performing tenured teachers. (*Id.*, at 11) (emphasis in original).

Here, despite the plaintiffs' wholly inaccurate insistence that the challenged statutes provide lifetime, guaranteed employment (*Wright* brief, at 8), the truth is that these laws have always provided school boards with the ample legal authority

to fire tenured teachers for good cause – including pedagogical ineffectiveness – in expedited due process proceedings.

Finally, the plaintiffs completely disregard the Education Article pleading requirement that a plaintiff specify *how* the State must correct its supposed failures. *See NYCLU*, 4 N.Y.3d at 180. Nowhere in their pleadings or briefs do plaintiffs say *what* system should replace these challenged statutes, which constitute the backbone of the state's education system.

In *NYCLU*, the Court of Appeals concluded that it is insufficient for plaintiffs to charge the State with the responsibility of devising a plan to remedy alleged inadequacies, because it is precisely the plaintiffs' duty to do so in their complaint. *See NYCLU*, 4 N.Y.3d at 180. The Court of Appeals stated:

> At 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. An Education Article claim, however, requires a clear articulation of the asserted failings of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail. *Id.*

Indeed, plaintiffs' repeated failure to include any details of which statutory scheme the State should adopt in place of the challenged statutes does precisely what the Court of Appeals warns against in *NYCLU*: plaintiffs seek to charge the state with the responsibility of determining the reasons for these schools' shortcomings and

create a plan to solve them. But that is never the state's responsibility in an Education Article claim. Plaintiffs' disregard of the Court of Appeals' precedent as set forth in *NYCLU* is fatal to their amended complaints.

POINT III

CONTRARY TO PLAINTIFFS' ASSERTION, THE AMENDED COMPLAINTS POSE A FACIAL ATTACK ON THE CHALLENGED STATUTES.

The *Wright* plaintiffs have incorrectly continued to assert that their claims constitute an as-applied, rather than facial, challenge to the challenged statutes. This contention is completely inconsistent with the doctrines governing both varieties of challenge.

The authority cited by the *Wright* plaintiffs in their brief at pages 48-51 does nothing to alter the inescapable conclusion that plaintiffs have brought a facial challenge. Nothing in either complaint alleges any facts showing that any of the plaintiffs' children has been denied a sound basic education, or that this denial has been brought about by the application of the challenged statutes.

Rather, the *Wright* plaintiffs argue that their complaint represents an as-applied challenge simply because they say it is. Plaintiffs posit that they are the "master of the complaint." *Wright* brief, at 49 (citing *Bindit Corp. v. Inflight Advertising, Inc.*, 285 A.D.2d 309, 312 n.1 (2d Dep't 2001) (internal citations omitted)). In making this claim, plaintiffs misconstrue the holding of *Bindit*.

Bindit specifically refers to the "well-pleaded complaint" rule, and addresses whether a cause of action pled only under state law can be removed to federal court when a federal cause of action could also have been pled. *Id.* at 312. Consistent with precedent, the plaintiff corporation in that matter was deemed to be "master of the complaint" in that it had the discretion as to whether to plead under state or federal law or both. *Id.* at 312, n. 1. Nothing in *Bindit* suggests that being the "master of the complaint" grants plaintiffs anything more than this discretion in pleading.

Thus, the *Wright* plaintiffs' assertion that the Court must treat its complaint as an as-applied challenge because they seek to employ that label is wholly without support. Courts should not disregard legal doctrine due to a party's inaccurate identification of its own claims. As demonstrated by the amended complaints themselves (*See, e.g.*, R. 49, 51, 1372-73) this is clearly a facial challenge, seeking a declaration that the challenged statutes are unconstitutional, statewide. As such, the particular standards of a facial challenge must be applied, including the "heavy burden" that must be met to win such a challenge. *Wood v. Irving*, 85 N.Y.2d 238, 244-45 (1995) (citing *McGowan v. Burstein*, 71 N.Y.2d 729, 732-33 (1995)).

Further, if the plaintiffs were challenging these laws as applied, they would not be seeking the total invalidation of statutes, but only a nullification of the application of the statutes to their own situations. The U.S. Supreme Court

described this remedy-based distinction in *Citizens United v. FEC,* 558 U.S. 310, 331 (2010) ("The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court..."). Moreover, the *Citizens United* Court reiterated the holding from *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995). In that case, the U.S. Supreme Court held that it was not appropriate to craft a remedy that would result in a statute being struck down, when a narrower remedy would provide the litigants the full relief they requested. *Id.* at 477-78. In other words, courts need not -- and should not -- invalidate laws when doing so is not necessary to remedy a plaintiff's injury.

As noted, the plaintiffs in this matter have not pleaded any facts to demonstrate that the challenged statutes have been unconstitutionally applied to them. If plaintiffs had pleaded an as–applied claim, they would have no basis to seek a total invalidation of the challenged statutes in their entirety, and in all contexts and applications. The only remedy available to plaintiffs, had they brought an as-applied challenge, would be an invalidation of the statutes as they unconstitutionally apply to the plaintiffs.

The *Wright* plaintiffs attempt to rebut this principle by pointing the Court to *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), which held that "[a] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in

the legitimate exercise of state power is beyond question." *Wright* brief, at 49. The plaintiffs here, however, have not conceded the "general validity" of the challenged statutes. In fact, it has been their contention at every stage of this matter that these statutes are *not* generally valid but are instead *entirely* invalid, statewide, and must be struck down. (*See, e.g.*, R. 49, 51, 1372-73).

A statute can be struck down on its face only if it is demonstrated that the law is unconstitutional in all of its applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Contrary to plaintiffs' claims (*Wright* brief, at 50) the *Salerno* test still governs the distinction between as-applied and facial challenges and the corresponding remedies. *See* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 882 (2005)("The net effect of the current *Salerno* approach is that facial challenges now operate solely at the wholesale level, encompassing only across-the-board claims of unconstitutionality, while as-applied challenges include more limited attacks on a statute as unconstitutional in a particular range of cases as well as fact-based claims based on a specific application.")

Even authority favorably cited by the *Wright* plaintiffs *supports* this remedy-based distinction between as-applied and facial challenges. *See Wright* brief, at 50, *citing* Richard H. Fallon Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 923 (2011). For instance, Richard H. Fallon Jr. indicates that "both

courts and commentators have tended to adopt a definition of facial challenges as ones seeking to have a statute declared unconstitutional in all possible applications" and that that definition of both varieties of constitutional challenge "are sufficiently clear and well accepted." Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges,* 99 Cal. L. Rev. at 923. The plaintiffs are, simply put, attempting to get the best of both worlds: the lower burden of an as-applied challenge and the more expansive remedy of a facial challenge.

POINT IV

PLAINTIFFS' BRIEFS REFLECT A FUNDAMENTAL MISUNDERSTANDING OF DUE PROCESS PROTECTIONS WITHIN THE EDUCATION LAW.

Both the *Wright* and *Davids* plaintiffs claim that, "the Challenged Statutes go well beyond the constitutional minimum of due process," and mischaracterize the State's actions as "enforcing a set of laws that allow ineffective teachers to remain in their classrooms until a 3020-a hearing can be completed." *See Wright* brief, at 46-47. But plaintiffs cite no judicial precedent, from any jurisdiction, holding that a state may not provide procedural due process protections that exceed a constitutional minimum. And, by seeking to strike down Education Law § 3020, which establishes a protected property interest by prohibiting dismissal except for just cause, plaintiffs are seeking to strip teachers of all due process protection - - constitutional and statutory.

This result is certainly in line with plaintiffs' real goal, which is to make it easy to fire teachers by stripping them of their due process rights. This would eviscerate decades of legislative policy making and judicial solicitude for a tenure system that enables school districts to attract and retain good teachers who are empowered to practice their profession without fear of arbitrary dismissal. *Ricca*, 47 N.Y.2d at 391.

As plaintiffs attack the statutory procedures provided to teachers through the Education Law, they plainly misinterpret Supreme Court precedent. Plaintiffs erroneously claim that the scope of the right to procedural due process "is informed by the terms of the statutes that create and define what 'tenure' entails." The Supreme Court has explicitly rejected this characterization of due process rights in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Court held that the U.S. Constitution merely establishes a floor for procedural due process protections for those public employees with an objective expectancy of continued employment through individual contracts, collective bargaining agreements, or state law. *Id.* at 542-43; *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972). There is no authority for the proposition that a legislature, in crafting statutory procedures designed to supply constitutionally-mandated procedural due process, are limited to a certain constitutional *minimum*. Quite the contrary, the Supreme Court has held that a state, acting as an employer,

has considerably more latitude then when it acts as a sovereign. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)(internal citation and quotation marks omitted).

The State of New York, through its Legislature, has the right to establish the basic terms and conditions of employment for public employees, including teachers. There is no legal cause of action to eliminate the constitutional and statutory due process rights of public employees, including teachers. The amended complaints should be dismissed.

POINT V

THE PLAINTIFFS FAILED TO JOIN NECESSARY PARTIES.

The *Wright* plaintiffs misunderstand teacher defendants' argument regarding the failure to join necessary parties. Teacher defendants have not stated that "each and every school district and teacher's union in New York [should be joined] as necessary parties." *See Wright* brief, at 67. Rather, the teacher defendants' point is that the amended complaints must be dismissed because those "local teachers' unions and school districts who are parties to collective bargaining agreements that contain alternate procedures to Education Law § 3020-a are indispensable parties to this action... ." *See* Teacher Defendants brief, at 55.

The *Wright* plaintiffs now say that they do "not seek the invalidation of any collective bargaining agreement" and that they "are not attacking [collective bargaining agreements] in this action." *Wright* brief, at 68. If that is the case, this

Court should at least dismiss the second cause of action in the *Wright* amended complaint as it pertains to the New York City and Rochester plaintiffs, since the applicable collective bargaining agreements provide for an alternate disciplinary procedure (R. 1368-69). *See Kilduff v. Rochester City Sch. Dist.*, 24 N.Y.3d 505, 507, 512 (2014).

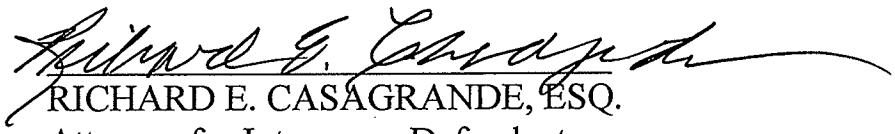
The failure to join necessary parties is a relevant and meritorious argument that the lower court failed to examine on the merits (R. 28, 32).

CONCLUSION

The decisions of the lower court should be reversed, and the amended complaints should be dismissed.

Dated: August 10, 2016
Latham, New York

Respectfully submitted,



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