To Be Argued By:
CHARLES MOERDLER
Time Requested: 15 Minutes

New York Supreme Court

Appellate Division—Second Department

App. Div. Nos.: 2015-03922
2015-12041

MYMOENA DAVIDS, *et al.*,
Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK,
Defendants-Appellants,

MICHAEL MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant-Appellant,

(Caption continued on inside cover)

REPLY BRIEF OF INTERVENOR-DEFENDANT–APPELLANT UFT

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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 his parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs-Respondents,

—against—

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—

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.

JOHN KEONI WRIGHT, GINET BORRERO, TAUANA GOINS, NINA DOSTER, CARLA WILLIAMS, MONA PRADIA, ANGELES BARRAGAN, LAURIE TOWNSEND and DELAINE WILSON,

Plaintiffs-Respondents,

—against—

THE STATE OF NEW YORK and THE BOARD OF REGENTS OF THE STATE OF NEW YORK,

Defendants-Appellants,

—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, PHILIP A. CAMMARATA, MARK MAMBRETTI, NEW YORK CITY DEPARTMENT OF EDUCATION, and MICHAEL MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,

Intervenors-Defendants-Appellants.

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The United Federation of Teachers (the "UFT") respectfully submits this reply brief in support of its appeal from two Orders of the Supreme Court, Richmond County (Minardo, J.) dated March 12, 2015 and October 28, 2015 and in response to the briefs filed by Plaintiffs-Respondents John Keoni Wright, *et al.* (the "Wright Plaintiffs") on April 28, 2016 and by Plaintiffs-Respondents Myomena Davids, *et al.* (the "Davids Plaintiffs") on July 8, 2016.

PRELIMINARY STATEMENT

The impetus for this lawsuit was a trial court ruling in California, *Vergara v. California*, BC484642, 2014 WL 6478415 (Cal. Sup. Ct. L.A. County Aug. 27, 2014), which, during the pendency of this appeal, has been reversed by the Second Appellate District in California. In *Vergara*, a lower court judge struck down California's tenure statutes as violative of the Equal Protection Clause of the United States and California constitutions. This action (as well as a suit in Minnesota) soon followed, taking similar aim at New York's tenure policy.

Aside from the timing, evidence of *Vergara's* inspiration for this lawsuit can be found throughout the Davids and Wright pleadings and in their briefs in the lower court, which are replete with references to the California action. The Wright Plaintiffs, for example, annexed the trial court *Vergara* decision to their Amended Complaint (R. 378-393) as an exhibit and the opinion is cited extensively in their opposition to Defendants' motions to dismiss. (R. 1115, 1119, and 1133). The

imprimatur of the *Vergara* case can similarly be found in the specific nature of the Wright and Davids Plaintiffs' claims. Just as in California, Appellees here challenged three primary aspects of teacher retention and dismissal: (1) the length of probation, (2) the "dismissal statutes" and (3) the seniority-based "reduction-in-force" statutes (hereinafter, collectively, the "Challenged Statutes"). And, as in *Vergara*, the conclusion Appellees sought to be drawn was that tenure was the cause of low test scores that allegedly reflected students' supposedly inadequate education. Finally, *Vergara* was the centerpiece of Appellees' oral arguments below, with the theme that the decision's underlying thesis controlled. Such commonality is unsurprising, given the commonality of the sponsorship and stated viewpoints of the *Vergara* plaintiffs and those here.

With the reversal of *Vergara*, however, the decision no longer supports Appellees' position. To the contrary, the *Vergara* lower court opinion was appropriately reversed for the same reason the lower court decision here should be reversed: the Challenged Statutes do not (and cannot) *cause* the deprivation of a sound basic education. *Vergara v. California,* 246 Cal. App. 4th 619 (2d Dist. 2016). The appellate court found that the multiple intervening and independent local administrative decisions involved in assessing and assigning teachers necessarily meant that the California tenure statute did not *cause* ineffective teachers to remain in the classrooms. *Id.* at 649. California school districts are

responsible for the implementation of educational programs and activities; paying, hiring, and dismissing teachers; and transferring and reassigning teachers. With so much of the decision-making in the system delegated to local districts and individual schools, the court ruled that the challenged statutes could not have possibly caused the provision of a (purportedly) substandard education in certain geographic areas. *Id.* at 649-50. While plaintiffs in California may have identified a troubling problem, the *Vergara* appellate court found, they did not properly identify the appropriate cause.

The similarities here are inescapable. Though grounded in New York's Education Article rather than California's Equal Protection Clause, Appellees here have attempted to hold the State accountable for what they deem to be an unconstitutional statutory system of tenure. Yet, in New York, just as in California, educational programs and activities are decided upon and administered locally. Each and every teacher in New York State is hired, paid, assigned and subject to supervision and discipline by a local school district, *not* the State. Intervening local failures, if they even exist, cannot, as a matter of law, supply the requite causation attributable to the State necessary for an Education Article claim; indeed, they negate it. Even were Appellees' claims that (outdated) test scores reveal educational deficiencies true, which they are not, they have not sufficiently pled a claim that the statutes at issue cause those deficiencies. For this reason, the

Complaint, without more, should have been dismissed. *See N.Y. Civ. Liberties Union v. State*, 4 N.Y.3d 175, 178-79 (2005) (finding plaintiffs' failure to sufficiently plead causation by the State is fatal to their claim).

The likeness between the broad brush attempts to eliminate tenure in California and in New York is not mere coincidence. This action is not an isolated legal challenge by students or parents of students who have been singularly aggrieved or deprived of the constitutionally mandated "sound basic education" in New York. Instead, it is part of a nationally, well-financed and coordinated political movement to try to dismantle, or, at the very least, significantly disrupt, this country's public education system. Appellees and their political counterparts disagree with tenure as a policy for all students nationwide. While misguided, that is their right. However, the courts are not the proper vehicle for the change they desire. It is not the role of the judiciary to be a foil for legislative lobbying. It rests with the Legislature to come to grips with the true root causes of educational concern and fundamental grievances repeatedly recognized by the Court of Appeals—inadequate funding, poverty, class size and the myriad other factors that impact educational excellence—and to fashion a system that addresses these concerns. As the appellate court in California decided in overturning the *Vergara* decision, the "court's job is merely to determine whether the statutes are constitutional, not if they are a 'good idea.'" (*Vergara*, 246 Cal. App. 4th at 627).

ARGUMENT

POINT I
PLAINTIFFS PRESENT A FACIAL CHALLENGE TO THE CONSTITUTINALITY OF THE CHALLENGED STATUTES

The Court in *Vergara* explained that plaintiffs' constitutional challenge was properly construed as a facial one because plaintiffs sought to enjoin *any* application of the statute and did not attempt to establish that the challenged laws were applied unconstitutionally to a particular person or in a particular circumstance. *Vergara*, 246 Cal. App. at 644 ("Plaintiffs did not attempt to establish that the statutes were applied unconstitutionally to a particular person, the type of challenge made in an as-applied case"). The same analysis applies here. Appellees have *not* sought to invalidate the laws as they apply to a particular student, category of students or particular circumstance in which the Challenged Statutes are applied. Instead, they have mounted a frontal attack on the entire tenure system as it functions for all New York State school children. Appellees allege that the statutes operate unconstitutionally. It is not an "as-applied" challenge when an action broadly challenges the statutes as they are applied *to all*. *See, e.g., People v. Stuart,* 100 N.Y.2d 412, 421 (2003) (an "as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant under the facts of the case.").

Nonetheless, at least the Wright Appellees' insist that their Complaints are in the nature of an "as-applied" challenge,[1] perhaps to avoid the more stringent legal standard applied to a facial attack. *See Amazon.com, LLC v. New York State Dep't of Taxation & Fin.*, 81 A.D.3d 183, 194 (1st Dept. 2010), *affirmed sub nom, Overstock.com, Inc. v. New York State Dept. of Taxation and Finance*, 20 N.Y.3d 586 (2013), *cert. denied*, 134 S.Ct. 682 (2013). In opposition to Appellants' briefs, the Davids' Appellees suggest that there are "many instances in which courts will invalidate statues [*in toto*] without casting the claim as a 'facial' challenge." (Wright Opp. Br. at 51). Yet, in support of the proposition that there are "many instances," Appelleess cite not a single case from New York, but rather a single law review article. (*Id.* at 51) That is likely because the vast majority of true as-applied challenges are either decided in the context of an Article 78 proceeding or in plenary actions seeking remedies far narrower than the judicially disfavored wholesale cancellation of an entire Legislative enactment. *E.g., Wood v. Irving,* 85 N.Y.2d 238 (1995); *Tamagni v. Tax Appeals Tribunal,* 91 N.Y.2d 530 (1998).

Appellees also argue in opposition that they are the masters of their complaints. (Wright Opp. Br. 51). Appellants do not dispute this rudimentary principle of law. What *is* disputed is that as "master" of these Complaints, Appellees have lodged a facial attack on the Challenged Statutes. Though

[1] The Davids Appellees have been more ambivalent, characterizing the claims as attacks on the Challenged Statutes "as written and as applied." (Davids Opp. Br. 2, 8-9).

Appellees wait until page 50 of their brief to address it (and, indeed, the issue was only treated in a footnote in the court below), the distinction between an "as applied" versus facial challenge is consequential. Facial challenges are disfavored, and a plaintiff "can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Amazon.com, LLC*, 81 A.D.3d at 194.

The Appellees have conceded that the "vast majority" of students receive a "sound basic education" and thus, that the statute *is* regularly applied in a constitutional manner. (R. 1120). Thus, under a facial attack analysis, the Complaints must be dismissed as a matter of law. *See Amazon.com, LLC,* 81 A.D.3d at 194. Appellees have yet to explain the appropriateness of declaratory relief for the wholesale invalidation of the entire longstanding statute, as contrasted with remedial relief (assuming any relief is warranted) in an appropriate case (naming the specific localities and claims involved) and seeking relief that ensures these facially constitutional laws are appropriately enforced at a local level.[2]

Indeed, as a facial challenge, the constitutionality of the tenure and related legislation here challenged must be judged under the rational basis test, "...which

[2] Nowhere is this more clear than paragraph 56 of the Wright Complaint, where the Appellees offer an unscientific study that excluded New York City in order to attempt to show that disciplinary proceedings are too lengthy "[d]espite statutory time limits." If Plaintiffs must first disclaim the language of the statute they assail to make their case, then the problem (if there is one at all) is with the enforcement of the statue, not the constitutionality of it. Perhaps this is why the study purports to cover the time period of 2004-2008, before the statutes were amended in 2008, 2010, and 2012, to make the process more efficient, to say nothing of the significant changes made after the complaints were filed.

is not demanding, and a statute will pass muster under it unless a challenger meets 'the tremendous burden of demonstrating that no facts can reasonably be conceived to show the existence of a rational basis in support of some legitimate state interest in drawing the distinction." *New York State United Teachers v. State of New York*, Opinion at p. 6, ---A.D.3d --- (3d Dep't May 5, 2016) (internal citation omitted).

POINT II
THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE EDUCATION ARTICLE, WHICH, IN ANY EVENT, IS INAPPLICABLE HERE

The *sole* basis of this action is the Education Article—Article XI of the New York State Constitution. Both Complaints are founded on its alleged abridgment. (R. 39, Davids Am. Compl. ¶ 7; R. 69, Wright Compl. ¶ 6.) As explained extensively in the UFT's opening brief (UFT Br. at 29-35) the Education Article, which has been successfully invoked *only* in school funding cases (UFT Br. at 33-35), is inapplicable here and, as a result, dismissal must follow. As the Third Department aptly ruled in May of this year, "a viable Education Article claim [is stated] [only if it implicates] the State's 'duty ... to provide funding sufficient to bring the educational inputs locally available up to a minimum standard.'" *New York State United Teachers,* Opinion at p. 5, --A.D.3d – (3d Dep't May 5, 2016), quoting *Paynter v. State of New York,* 100 N.Y.2d 434, 442 (2003). No such claim is made here. Moreover, the Court of Appeals continues to focus on the State's affirmative obligation to provide resources as the *sine qua non* of a cognizable

Education Article suit, since the responsibility for the retention or removal of supposed "ineffective" teachers and other administrative and pedagogical, in-class decisions rests with the local districts (in New York City, *see, e.g.,* N.Y. Educ. Law §§ 2573, 2590-g(2)).

Appellees are correct that the purpose of the adequate funding requirement recognized by the Court of Appeals in cases like *CFE I* is to ensure that school districts have the funds necessary to enable them to provide key resources. (Wright Br. at 23). This, however, is where Appellees' logic falls apart. The reason the Court has focused on funding is because that is the primary resource for which the State is responsible. It does *not* follow *a fortiori*, as Appellees would have this Court believe, that a local district's failure to ensure an sound basic education, even if true, is also actionable under Article XI (particularly on matters of substantive pedagogy). As set forth in the UFT's opening brief (at 38-39) and again below, the decisions for hiring, assigning, retaining and disciplining teachers are made at the local level. Thus, the Education Article cannot here apply.

Even if the Education Article were applicable, however, which it is not, Appellees have failed to state a claim upon which relief can be granted. There is no dispute that a cognizable claim under the Education Article requires two elements: (i) the deprivation of a sound basic education and (ii) causes attributable

to the State. *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 178-79. Appellees fail to meet those conditions precedent to the statement of a valid cause of action.

A. Appellees Have Not Alleged Causes Attributable To The State

Appellees base the validity of their complaint on the mistaken belief that they "are not required to put forward clear evidence of causation at the pleading stage." (Wright Br. at 3, *citing CFE I,* 86 N.Y.2d 307, 318). The Court in *CFE I,* however, did not make such a broad holding. There, the Court simply stated that an "extended causation discussion" is premature. 86 N.Y.2d at 318. The Court did not hold that bald legal assertions (*e.g.*, that the State's enforcement of the Challenged Statutes are a "substantial cause of the existing teaching crisis" (Wright Br. at 2)) or conclusory allegations (*e.g.,* "as a result of the Challenged Statutes, school districts grant tenure to almost all teachers, regardless of their effectiveness" (Wright Opp. Br. at 35)), are sufficient to sustain a claim. Rather, the Court of Appeals has held the complete opposite. *E.g., Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) ("conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss"). Indeed, with regard to claims under the Education Article specifically, the Court of Appeals has stated in plain and precise terms that "[p]laintiffs' failure to *sufficiently plead* causation by the State is *fatal* to their claim." *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 179 (emphasis added).

The California Court of Appeals came to a similar conclusion in *Vergara.* There, the court found that "the challenged statutes here, by only their text, do not *inevitably cause* poor and minority students to receive an unequal, deficient education." *Vergara*, 246 Cal. App. 4th at 649. The *Vergara* Court pointed to the power of school district superintendents to assign and transfer teachers, subject to limitations placed by collective bargaining agreements, district policies and statute. Specifically, the *Vergara* court found "that the challenged statues do not in any way *instruct* administrators regarding which teachers to assign to which schools. Thus, it is administrative decisions (in conjunction with other factors), and not the challenged statutes, that determine where teachers are assigned throughout a district." *Vergara*, 246 Cal. App. 4th at 649-50.

Those same intervening factors are at play in New York. Neither the hiring, nor retention, nor alleged lack of discipline that Appellees complain of are attributable to system-wide *State* ailments, they are all squarely local functions (in New York City, *see, e.g.*, N.Y. Educ. Law §§ 2573, 2590-g(2)).

To illustrate, in New York City, teachers are, by law, hired by the Board of Education of the City School District of the City of New York (the "DOE"),[3] retained and paid by the DOE, and disciplined under DOE-administered processes.

[3] In conjunction with amendments to the State Education Law enacted in 2002, many of the powers previously held by the Board of Education of the City School District of the City of New York, devolved to the Chancellor, with the administrative operations assigned to a body denominated by the Mayor as the New York City Department of Education. Nonetheless, the Board of Education of the City School District of the City of New York remains the statutory employer of personnel for the City School District.

N.Y. Educ. Law §§ 2573, 2590-g, 3020. The same construct exists throughout the State, with local school districts responsible for hiring, paying and disciplining teachers (in addition to the granting or denying of tenure). *See, e.g.*, N.Y. Educ. Law §§ 2503(5), 2554(2). Of itself, Appellees' assertion that their grievance is predicated upon such local action (or inaction), as contrasted with State action, mandates dismissal under the Court of Appeals' ruling in *N.Y. Civ. Liberties Union.*

Appellees' argument that they need not eliminate any possibility that other causes contribute to the purported systemic failure is equally unavailing. (Wright Opp. Br. at 40). The Court in *CFE II* dismissed the State's argument that other factors may be contributing to the failure to provide a sound basic education, but the Court emphasized that that the State's funding failure was the *primary cause*. *CFE II*, 100 N.Y.2d at 923. As discussed above, and as recognized by the Court of Appeals in California, the determinations made by individuals and districts at the local level are the primary influence on teacher hiring, retention and discipline, *not* the Challenged Statutes. Thus, Appellees' argument that there need not be a "single cause of the failure" (Wright Opp. Br. at 40) is inapposite. See, fn.2, *supra.*

Plainly stated, Appellees' grievance turns not upon the State's overall funding of schools or provision of adequate resources and supports, but upon what they perceive as the improper administration of the school system—specifically the

alleged failure of school districts to avail themselves of the existing procedures to remove allegedly "ineffective" teachers—*a matter exclusively within local control.* Wholly absent here is the indispensable element of *State* causality mandated in *N.Y. Civ. Liberties Union*, *Id.* at 178-79, and that void is *fatal* to their claim. Importantly, this void has been stressed in this action from the outset, and Appellees refusal to address it is an implicit acknowledgement that they cannot fill the dispositive gap with cognizable claims.

B. Appellees Have Failed To Allege Facts That Demonstrate The Absence Of A Sound Basic Education

Appellees' claims are equally deficient in their failure to allege facts that demonstrate the absence of a sound basic education. In their opposition brief, Appellees continue to trot out outdated test scores that the State itself, as well as knowledgeable educators have disavowed in an effort to support their claim that there is systemic crisis of educational performance. Appellees ignore this crucial fact. The predicate for their claims—namely, the student performance on standardized tests—has been discredited and the Board of Regents has determined that those outcomes may not be used to measure student *or* teacher performance.[4]

[4] Not only have the old tests been entirely discredited, but the significance of the newer tests has recently been questioned as well. The tests and scoring rules are in a state of flux, making it impossible for them to serve as an appropriate barometer of the constitutionality of our tenure system. *See, e.g.,* Elizabeth Harris, *New York State Test Scores Inspire Conflicting Interpretations*, New York Times, A17, August 6, 2015; *see also* Monica Disare, *Could Scoring Changes Explain the Rise in New York's Tests Results? Experts Say They're Not Convinced*, Chalkbeat, August 5, 2016, available at http://www.chalkbeat.org/posts/ny/2016/08/05/could-scoring-changes-explain-the-rise-in-new-yorks-english-test-results/l.

(UFT Br. 3-4) Appellees are unable to provide any response to this development, negating the claims alleged in their Complaint. Thus, the Complaints must be dismissed.

POINT III
THIS CASE PRESENTS A NON-JUSTICIABLE POLICY OR POLITICAL QUESTION

A. The Motion Court Erred In Confusing Justiciability With Jurisdiction

In its opening brief (UFT Br. 18), the UFT explained that the lower court confused justiciability with jurisdiction. In addressing nonjusticiability, the court ruled that a declaratory judgment action is well-suited to interpret and safeguard constitutional rights. Yet, the Court failed to address Defendants' main argument below – that is, that it was clearly outside the appropriate province of the courts to wade into substantive pedagogical policy. Simply because the court is the proper branch of government to issue a declaratory judgment and opine on the constitutionality of statutes typically does not answer the question of whether a decision on this particular declaratory judgment application implicates a political question. It does.

The Education Article was not intended to "interject [the Judiciary] into the day-to-day administration of the school system or educational policy." *Bd. of Educ. v. Nyquist,* 83 A.D.2d 217, 234 (2d Dep't 1981). The Court of Appeals has resolutely held that the constitutional provision was never meant to supplant or

wrest the political decisions, policy determinations and administration about the schools in New York from the vested stakeholders to the Judiciary. *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 181-82; *Paynter*, 100 N.Y.2d at 441-42. While the courts may intervene to ensure the adequate financial appropriation and minimum certification standards necessary to provide a "sound basic education" to New York State students, the minimal constitutional guarantee was never meant to embroil the courts in the local and national debate on student achievement, standardized tests and how to measure student and teacher performance.

In the court below, Appellants emphasized that the aptness of a declaratory judgment as a judicial tool was undisputed. What *was* disputed is that an essential predicate determination for the court if it is to issue a declaratory judgment *in this case*—namely, adjudging the Challenged Statutes unconstitutional—is the decision that the tenure system and its statutory scheme causes "ineffective" teachers to remain in the classroom (as contrasted with, for example, locality administrative action or inaction). Putting aside the question of whether the Challenged Statutes could cause any particular teacher to remain in the classroom, as discussed *infra* at 19, the judiciary lacks the requisite and fundamental expertise necessary to decide the complex and pedagogically disputed issue of which teachers are "effective" and which are "ineffective" in the first place.

In response to Appellants' opening briefs, Appellees reflexively repeat what the lower court held: namely that the judiciary can enforce constitutional rights. Again, this basic tenet of hornbook constitutional law is not disputed. Neither is it disputed that the Education Article confers the basic right to a "sound basic education," as the Court of Appeals has held in cases where the Legislature and Executive branches fail in their function to provide the basic level of funding for schools, school buildings and standards for certification. Though Appellees harp, as they did in the lower court, on the Court of Appeals' requirement of reasonably up-to-date basic curricula by "sufficient personnel adequately trained," (Wright Opp. Br. 24), the focus from a constitutional perspective on "sufficient personnel" is on funding and training and on the system as a whole, not on the particulars of policy or pedagogy or a purportedly ineffective teacher. Obviously, absent adequate funding "sufficient personnel adequately trained" cannot be hired. Yet, Appellees would have this Court step into the classroom and constitutionalize every frustration with the education system. (*See* Wright Opp. Br. 53) (asserting that "*any* claim under Article XI is "unquestionably a judicial and justiciable question.").

Neither can Appellants' arguments regarding political question be so broadly and cavalierly swept aside by invoking a judges role in protecting constitutional rights. The Education Article is distinct from other state constitutional rights,

because, as the Court of Appeals recognizes, there are "inherent limitations of courts in making constitutional decisions on educational quality and quantity," *CFE I*, 86 N.Y.2d at 325 (Levine, J. concurring), and the court is "loathe to enmesh" itself in the local administration of schools. *Hussein v. New York,* 19 N.Y.3d 899, 907 (2012). Thus, the courts have simply acted under the Education Article to ensure that a "constitutional floor" is met and always in the manner in which the State is uniquely positioned to act—funding. *CFE I*, 86 N.Y.2d at 315. Left unaddressed by Appellees is the UFT's more nuanced argument from its opening brief (UFT Br. 20) that the space between the State's provision of a "sound basic education" and the highest quality education that every child deserves is filled with political and policy decisions at every level of local and State government.

The questions raised in these Complaints occupy the space between. As just one example, Appellees argue that the § 3020-a procedures are too burdensome, leading to the promotion and retention of ineffective teachers. (Davids Opp. Br. at 11). However, streamlining the § 3020-a process, as the Davids Appellees purport to seek, is a far cry from the manifest and palpable inadequacies which give rise to constitutional challenges, and which are properly decided by the courts. As another example, whether the length of the probationary period should be three or four years (and the Legislature has mooted this claim by

elongating the process to four years) is also not an issue of constitutional deprivation or magnitude. It is a legislative matter and was addressed as such.

The issues of identifying ineffective teachers, arriving at the terms and conditions of employment for teachers, the proper timing of evaluating teacher performance for tenure status or what makes for the optimal method of terminating teachers during district-wide layoffs are precisely the types of issues the courts have properly avoided in this area. (UFT Br. at 24). Moreover, while Appellees protest that they have asserted individual constitutional claims, not policy arguments, not a single Appelle has described how his or her constitutional rights have, in fact, been abridged. After all, a specific grievance would, if anything, bespeak an as applied challenge appropriately addressed by Article 78 proceedings. Speculation as to what harm might someday eventuate is insufficient. Indeed, any fair reading of both sets of Appellees' complaints as well as their opposition briefs reveals that Appellees are arguing tenure *policy*, not individual rights. This case is about broadly-applied political preferences, not personal aggrievement or constitutional harm. *See Matter of N.Y.S. Inspection Sec. & Law Enforcement Empls. v. Cuomo,* 64 N.Y.2d 233, 239-40 (1984) ("While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, ... the manner by which the State addresses complex societal and

governmental issues is a subject left to the discretion of the political branches of government." (citations omitted)).

One final point merits note. Appellees quickly dismiss as "irrelevant" (Wright Opp. Br. 54) the argument that the extensive Legislative and Executive deliberation in this area demonstrates the lack of justiciability. Yet, it is a fundamental principle of New York law that "each department of government should be free from interference in the lawful discharge of the duties expressly conferred" to it and it is "not the province of the courts to direct the legislature how to do its work." *Matter of Montano v. Cnty. Legislature of Cnty. of Suffolk*, 70 A.D.3d 203, 210 (2d Dep't 2009) (citations omitted). Appellees are right that it is the function of the courts to monitor and safeguard the rights provided in the State Constitution. In this instance, courts are charged with safeguarding the provision of a minimal system-wide level of education under the Education Article. It has never been held, however, nor was it ever intended, that this safeguarding function would convert the judiciary to monitoring the local administration of our school system and its policies. *Hussein*, 19 N.Y.3d at 901. And the Legislature's continuing efforts focused on the very issues raised herein reaffirms that the Court should not accept Appellees' invitation to embroil itself in the entirely political and pedagogical policy question of who is an effective teacher and how to address the handful that may not be.

B. The Complaints Have Been Mooted By Legislative Action

That the Legislature and Executive branches have enacted and continue to work to enact substantial changes to the statutes that are herein challenged by Appellees both underscores the political and policy nature of the issues before the Court and moots Appellees' Complaint. Mootness, like the political question doctrine, favors judicial abstention. *Roberts v. Health and Hosp. Corp.*, 87 A.D.3d 311, 321 (1st Dep't 2011). As the UFT explained in its opening brief (UFT Br. 27), the Challenged Statutes, with limited exception, have been either directly amended, significantly impacted in their implementation or rejected by the Legislature.

Moreover, in addition to Legislative statutory change, following review in 2015 by the Governor's Task Force on the Common Core (a body comprised of legislative and executive branch representatives, experts and stakeholders), the test results upon which Appellees' claims are predicated were found deficient and are no longer to "be used to evaluate the performance of individual teachers." (Rule of the Board of Regents, § 30-2.14).

Appellees devote little attention to the argument that their claims have been rendered moot, unilaterally (and self-servingly) deciding that the Legislature has not made "substantial changes to the statutory scheme," but instead made changes that are "modest and ineffectual." (Wright Opp. Br. 61). Putting aside the actual

significant alterations to the Challenged Laws (*see* R. 1285-86), it is not Appellees' own opinion (which is, in all actuality, nothing more than a guess) of the likely efficacy of the legislation that controls. This is particularly true where they have not alleged any actual and particularized injury. Appellees may not agree with the reach or scope of the legislation, but they cannot decide on their own that the Bill will not be effective even before it is implemented, much less foist that on the Court as a basis for judicial interdiction.

In the final analysis, one fact is indisputable: perhaps more than any other legislative change, the result of these changes will be watched and monitored by an array of interested parties. When implemented and tested, reasoned opinion will emerge as to efficacy. Until then, speculation is presumptuous and any judicial decision that opines upon the constitutionality of an altered statutory scheme would be academic.

POINT IV
THE QUESTIONS PRESENTED ARE NOT RIPE AND APPELLEE'S LACK STANDING

Although not directly addressed by Appellees, the issues presented are not ripe. (UFT Br. 40). Appellees ignore that the Board of Regents has rejected any presumption that can be drawn from the very test scores upon which Plaintiffs' rely to show purported harm. Further, Appellees have failed to identify what, specifically, is wrong with the Challenged Statutes, let alone to state with clarity

what makes for an "ineffective" teacher (other than discredited student test scores). Rather they ask this Court to simply invalidate the Challenged Statutes wholesale. It is, at best, pure speculation that this would redress the harm alleged. In the absence of a showing of redressability, this Court cannot act. *Linda R.S. v. Richard D.,* 410 U.S. 614, 618 (1973); *Hussein v. New York*, 81 A.D.3d 132, 135 (3d Dep't 2011), *aff'd,* 19 N.Y.3d 899 (2012). Without tenure, students education would actually be harmed, as educators become subject to bureaucratic pressures, fearful of teaching controversial subjects, unable to speak out for their students without risking reprise and disincentivized from blowing the whistle on corrupt or inappropriate practices.

Similarly, as the motion court seemingly acknowledged, Appellees have not alleged "injury in fact." The court below, at Appellees urging, suggested that "plaintiffs' purported injuries can certainly be ascertained during discovery." (R. 32). One would think, however, that Plaintiffs would have knowledge of their own injuries *before* bringing an action alleging constitutional harm. Indeed, the Court of Appeals has specifically rejected the motion court's view that critical issues such as injury-in-fact may be deferred, ruling that standing is a threshold issue that must be ascertained at the outset of the litigation, not deferred until costly discovery, burdensome motion practice and other processes have taken their toll on litigants and taxpayers. *Soc. of the Plastics Indus., Inc. v. Cnty. of Suffolk*, 77

N.Y.2d 761, 769 (1991). Thus, the motion court's error should be reversed and the claims dismissed for lack of standing.

CONCLUSION

The March 12, 2015 and October 28, 2015 orders of the motion court should be reversed and a declaration should issue that the Amended Complaints are dismissed for failure to state a cause of action.

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CERTIFICATE OF COMPLIANCE PURSUANT TO

22 NYCRR § 670.10.3(F)

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