To be argued by:
PHILIP V. TISNE
15 minutes requested

Supreme Court, Richmond County – Index No. 10105/14

Supreme Court of the State of New York
Appellate Division – Second Department

MYMOENA DAVIDS,
by her parent and natural guardian MIAMONA DAVIDS,

Plaintiffs-Respondents,

-against-

Docket No. 2015-03922, 2015-12041

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 continues on inside front cover*)

REPLY BRIEF FOR STATE APPELLANTS

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Dated: September 30, 2016

(*caption continued from front cover*)

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-

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.

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

Plaintiffs-Respondents,

-against-

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

Defendants-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.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Statutes

Miscellaneous

PRELIMINARY STATEMENT

The state defendants' opening brief demonstrated three independent reasons that plaintiffs' claims should have been dismissed. Plaintiffs fail to rebut any of these arguments.

First, plaintiffs' challenge to the State's former teacher tenure laws is moot now that the Legislature has amended those statutes. Plaintiffs attempt to avoid mootness by labeling these reforms as "minor," but that characterization is both irrelevant and incorrect. The scope of the Legislature's reforms is irrelevant to the mootness question because, however extensive or narrow those reforms may be, it is undisputed that they superseded the statutes that plaintiffs challenge here. As a result, any determination that these superseded provisions were unconstitutional and could not be prospectively enforced would be academic, since they already lack legal effect. Moreover, far from being "minor" or peripheral to plaintiffs' claims, the Legislature's amendments specifically addressed the very provisions of the old teacher-tenure system that plaintiffs attack—including by implementing reforms that plaintiffs themselves concede would

address their concerns about teacher effectiveness. Because plaintiffs have not made *any* claims or allegations about the amended statutes now in effect, well-settled mootness principles bar them from proceeding with their obsolete claims.

Second, plaintiffs fail to show that these actions are anything other than an improper attempt to litigate nonjusticiable political questions. As plaintiffs' decision not to amend their complaints demonstrates, the gravamen of their claims is that teacher tenure is impermissible in *any* form. But whether to afford tenure to public school teachers at all is a classic example of the type of broad educational policy issue committed to the political branches. Plaintiffs cannot evade this basic principle of separation of powers by styling their grievances as constitutional claims. Regardless of their form, plaintiffs' claims are in substance a demand that the courts resolve issues that the Constitution commits to the Legislature and the Executive and that cannot be decided by the judiciary. Such claims are not justiciable.

Third, plaintiffs have not stated a viable claim under the Education Article of the New York Constitution. Plaintiffs cannot

survive a motion to dismiss without alleging (among other things) concrete facts about deficiencies in educational services and outcomes—*i.e.*, "inputs" and "outputs"—pervading the schools in their own districts. But plaintiffs' complaints are bereft of such allegations.

Plaintiffs' allegations also fail to satisfy the independent requirement that an Education Article claim concretely attribute any educational deficiencies to actions by the State. It is undisputed that school districts, not the State, are principally responsible for hiring, firing, disciplining, and evaluating teachers. Such local control does not wholly preclude Education Article claims against the State alleging teacher ineffectiveness. But at minimum the school districts' disproportionate influence over teacher quality requires plaintiffs to identify how and why the State is responsible for the harms they allege. The complaints' failure here to satisfy this causation requirement provides an additional reason for dismissal.

ARGUMENT

POINT I

PLAINTIFFS' CHALLENGES TO THE STATE'S SUPERSEDED TEACHER TENURE STATUTES ARE MOOT

Plaintiffs commenced these actions in 2014 seeking solely prospective relief against state statutes then in effect that provided certain tenure protections to public school teachers. The Legislature revamped that system the following year by enacting the Education Transformation Act of 2015 (the "Transformation Act"), ch. 56, pt. EE, 2015 N.Y. Laws at 108-156 (L.R.S.). The Transformation Act substantively amended every aspect of the former tenure system targeted in the complaints. The Act thus rendered plaintiffs' claims moot under well-settled law. See Br. for State Appellants ("State Br.") at 22-34.

Plaintiffs attempt to avoid that straightforward conclusion by calling the Transformation Act a set of "modest" reforms, supposedly distinct from a "wholesale change in the law." Brief for Plaintiffs-Respondents John Keoni Wright *et al.* ("Wright Br.") at

61, 63.[1] But the Act was far from modest, and plaintiffs' claims are moot in any event for the simple and indisputable reason that their rights are no longer governed by the State's superseded teacher tenure system. To the extent plaintiffs claim the Transformation Act failed to cure all alleged defects in the former system, their remedy is to file a new complaint addressing the State's *current* system—something they deliberately chose not to do (R. 1337)—rather than to continue litigating on the basis of obsolete pleadings that address only the expired tenure regime.

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[1] On appeal, the *Davids* plaintiffs adopt the arguments advanced by the *Wright* plaintiffs. *See* Brief for Plaintiffs-Respondents Mymoena Davids *et al.* ("Davids Br.") at 14. This brief therefore focuses on the arguments advanced in the *Wright* plaintiffs' appellate brief.

A. Plaintiffs' Challenges to the State's Former Teacher Tenure Statutes Are Moot Because Those Statutes Already Lack Legal Effect.

1. The validity of New York's former tenure system is a purely hypothetical issue in light of the Transformation Act's extensive reforms to that system.

Plaintiffs' complaints challenge a statutory scheme that ceased to govern teacher tenure in New York once the State adopted the Transformation Act in 2015. Courts have long recognized that challenges of this type are moot for the basic reason that, following a statutory amendment, "the rights of the parties are no longer affected by the original" legislation; thus, a ruling invalidating the prior legislation "would have no practical effect and would merely be an impermissible advisory opinion." *Matter of NRG Energy, Inc. v. Crotty*, 18 A.D.3d 916, 919 (3d Dep't 2005); *see also*, *e.g.*, *State ex rel. Harkavy v. Consilvio*, 8 N.Y.3d 645, 653 (2007) (challenge to prior system of sex-offender civil management was moot after enactment of Mental Hygiene Law article 10); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 810-11 (2003) (expiration of amendment to tribal gaming compact mooted constitutional challenge to amendment).

This rule is rooted in limits on the jurisdiction of the courts and serves important interests by preventing parties from embroiling the judicial system in hypothetical controversies. A contrary practice would inappropriately extend the judicial power beyond concrete disputes and waste limited resources on matters of no practical import. But courts do not sit to address questions that "have no practical effect on the rights or liabilities" of the parties. *Harkavy*, 8 N.Y.3d at 653.

The present matter is a case in point. The complaints here challenge a specific set of laws—New York's teacher-tenure statutes as they existed in 2014. The crux of plaintiffs' claims is that the tenure statutes in effect in 2014 caused every public school throughout the State to have constitutionally ineffective teachers. And plaintiffs seek only prospective relief preventing the enforcement of the statutes going forward. But the Transformation Act substantively reformed the State's tenure statutes in every area challenged by plaintiffs. A pronouncement that the State's former tenure statutes failed to ensure a constitutionally adequate teaching pool would not speak to the sufficiency of the

current tenure statutes. And prospective relief directed at these former statutes would be academic because they already have no legal effect. Plaintiffs' claims are therefore moot.

Plaintiffs attempt to avoid mootness by characterizing the Transformation Act as a "new coat of paint" on the State's former tenure laws. Wright Br. at 62. That argument is irrelevant to mootness because, whatever the scope of the Legislature's reforms, it is undisputed that the amendments altered the very aspects of the prior laws on which plaintiffs based their complaints—specifically, provisions governing teacher evaluation, tenure eligibility, teacher discipline procedures, and seniority protection. See State Br. at 6-14, 27-32.

In any event, plaintiffs' characterization of these reforms as "minor" (Wright Br. at 14), vastly understates the scope of the changes implemented by the Legislature. Indeed, the Act adopted key reforms that plaintiffs themselves conceded would be sufficient in their complaints. Plaintiffs claimed, for instance, that a three-year probationary period before a teacher could be tenured was too short and specifically alleged that a four-year period was

required. (R. 1363 [¶ 46].) Plaintiffs also alleged that teachers were routinely granted tenure based on only two years of evaluations. (R. 1360 [¶ 38], 1363 [¶ 47].) The Transformation Act directly addressed both issues: it extended the probationary period to the four years that plaintiffs deemed sufficient; and it required tenure decisions to take into account the evaluation from each of a probationer's four years, including the final year's evaluation (which may not be "ineffective" for tenure to be granted). *See* ch. 56, 2015 N.Y. Laws at 114-17, 120-25 (L.R.S.).

Similarly, plaintiffs alleged that teacher evaluations under the prior system did not "adequately identify" ineffective teachers (R. 1361 [¶ 41]), and that teacher discipline procedures made it "effectively impossible to dismiss" incompetent teachers (R. 1364 [¶ 51]; *see also* R. 44 [¶ 33]). The Transformation Act overhauled both systems, adopting more rigorous criteria for teacher evaluations, adding two new expedited disciplinary procedures for ineffective teachers, and amending the regular discipline procedures. *See* ch. 56, 2015 N.Y. Laws at 127-28, 134-38, 140, 143-47 (L.R.S.).

Finally, plaintiffs challenged the State's seniority protection statutes (the "last-in, first-out" or "LIFO" system) as a purported impediment to the removal of incompetent senior teachers in case of layoffs, and specifically highlighted the supposed disadvantage to students in low-performing districts. (R. 1371 [¶¶ 72-73].) But the Transformation Act altered the seniority protections for teachers in the State's lowest performing schools so that senior teachers may be removed before more junior teachers. *See* ch. 56, pt. EE, subpt. H, 2015 N.Y. Laws at 152-53 (L.R.S.).

These reforms thus defeat any attempt by plaintiffs to assert that the State's current tenure laws are the same as the ones challenged in the complaints, such that a pronouncement about the legality of the former regime might also be thought to determine the legality of the current one. The substantial and material changes enacted by the Legislature make the constitutionality of the now-superseded statutes challenged by plaintiffs here a hypothetical issue whose resolution will have no practical legal effect.

2. There is no exception to mootness for substantive amendments to challenged legislation that purportedly fail to cure the original legislation's asserted defects.

Plaintiffs posit that their claims remain live because the Transformation Act's reforms are inadequate, and that they thus continue to be aggrieved by the new tenure legislation. But plaintiffs' dissatisfaction with the extent of the Legislature's teacher-tenure reforms does not permit them to preserve this challenge to statutes that the Legislature specifically replaced.

The Court of Appeals has spoken directly on this issue. In *Cornell University v. Bagnardi*, the plaintiff university challenged as unconstitutional a city ordinance that prohibited the university's intended use of a house that it owned. *See* 68 N.Y.2d 583, 589-90 (1986). While the matter was pending before the Court of Appeals, the city enacted a new ordinance that allowed the university to obtain a permit for the proposed use if it satisfied certain criteria. *See id.* at 590-91. Although the new ordinance did not resolve all of the university's objections, the Court nonetheless held that the university's challenge was "clearly moot" for the simple reason that the new permitting scheme, rather than the

old scheme, would "unquestionably govern" the university's use of the house going forward. *Id.* at 592.[2]

Similarly, in *Matter of Law Enforcement Officers Union, District Council 182 v. State*, 229 A.D.2d 286 (3d Dep't 1997), petitioners challenged an interim rule governing inmate double-celling on the ground, among others, that it conflicted with preexisting requirements prescribing minimum square footage per prisoner in multiple-occupancy housing units. *See id.* at 288-89. While the litigation was pending, the interim rule was superseded by a final rule. *Id.* The Third Department rejected petitioners' argument that their claims remained viable because the square-

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[2] The Court acknowledged the existence of a live dispute based on the university's request for an injunction restraining defendants from interfering in any way with its proposed use of the house, relief that the trial court had granted. *See Cornell Univ.*, 68 N.Y.2d at 592. No similar circumstance is presented here, as plaintiffs disavow any comparable request for relief from all forms of teacher tenure. Indeed, although the *Davids* plaintiffs had included such a request in their prayer for relief, they abandoned that request by adopting the *Wright* plaintiffs' position that their claims are limited to "challenging the *effects* of the Challenged Statutes and [the] constitutional violations resulting from their implementation." Wright Br. at 49. And, in any event, any challenge to the very institution of teacher tenure presents nonjusticiable political questions. See *infra* at 19-23.

footage issue "remain[ed] unaddressed in the final rule." *Matter of Law Enf't Officers Union, Dist. Council 182 v. State*, 168 Misc. 2d 781, 782 n.* (Sup. Ct. Albany County 1995). To the contrary, the Third Department explained, the final rule "rendered the controversy over the validity of the original regulation moot" because "the rights of petitioners were no longer affected by the original regulation"—notwithstanding the final rule's failure to remedy the interim rule's alleged square-footage defect. *Matter of Law Enf't Officers Union*, 229 A.D.2d at 290.

The same principle applies here. The statutory regime plaintiffs alleged infringed their Education Article rights when it was in effect is now defunct—and thus incapable of infringing anything—and that fact renders plaintiffs' claims moot regardless of their assertions that the new regime supposedly failed to cure all of the defects of the old.

3. The exception to mootness for cases capable of repetition but evading review does not apply to these actions.

Plaintiffs are incorrect that this proceeding qualifies for an exception to mootness for claims that are capable of repetition, yet likely to evade review. *See* Wright Br. at 66. Plaintiffs suggest that this exception applies because students graduate from high school every year. But it is not the annual graduation of students that renders plaintiffs' claims moot. Rather, it is the fact that the statutory scheme plaintiffs challenged has been replaced by a new and significantly different scheme. And there is no basis to conclude that the conduct challenged in the complaints will recur—*i.e.*, that the State will revert to the teacher tenure system that preexisted the Transformation Act.

Nor, for that matter, is the constitutionality of the State's current tenure regime—the only one from which plaintiffs can obtain any relief—likely to evade review if not determined in these actions. The constitutionality of the new tenure system may be tested in a litigation that actually places it in issue. The problem

for plaintiffs is that they have chosen not to do that here—a choice that prohibits them from proceeding any further with this action.

B. Plaintiffs Cannot Avoid Mootness by Attempting to Challenge the State's New Teacher Tenure System in the Absence of Any Allegations About the New System.

Plaintiffs suggest that dismissal on mootness grounds is inappropriate because the efficacy of the Transformation Act presents a factual dispute that requires discovery to resolve. *See* Wright Br. at 65. But this proceeding does not present *any* dispute about the efficacy of the Transformation Act because plaintiffs have not advanced a single allegation addressing that Act or the revised tenure regime it created. Instead, their allegations deal exclusively with the State's superseded tenure system. Regardless of whether plaintiffs might in theory be able to assert viable claims against the State's tenure laws, notwithstanding the extensive changes made by the Transformation Act, plaintiffs have not in fact asserted any such claims. Indeed, they have affirmatively refused to do so, declining the invitation to amend their complaints.

It is well settled that where challenged legislation is amended while litigation is pending, and the challenger believes the amended statute remains defective, the challenger must either file an amended pleading or commence a new action addressing the new legislation. What a challenger may not do is what plaintiffs attempt to do here—*i.e.*, litigate the validity of new legislation on the basis of unamended pleadings addressing only superseded legislation. *See, e.g.*, *Matter of Grp. for S. Fork, Inc. v. Town Bd. of Southampton*, 285 A.D.2d 506, 508 (2d Dep't 2001) (claims challenging superseded statute will be dismissed unless plaintiffs file amended complaint); *Matter of N.Y. State Sch. Bds. Ass'n v. N.Y. State Bd. of Regents*, 210 A.D.2d 654, 654-55 (3d Dep't 1994) (same).

The two cases cited by plaintiffs are not to the contrary. The first, *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell* ("*CCJEF*") is distinguished by the very fact that there, unlike here, plaintiffs filed an amended pleading to address legislative reforms adopted during the course of the litigation. *See* No. HHD-CV05-4050526-S (X07), 2013 WL 6920879, at *1-*2, *6,

*9 (Conn. Super. Ct. Dec. 4, 2013). The second, *Hussein v. State*, 81 A.D.3d 132 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012), involved claims filed after the Legislature had adopted reforms to New York's public education funding statutes, and alleged that those reforms were insufficient to remedy constitutional deficiencies allegedly caused by historic funding shortfalls. *See id.* at 133. Thus, the *Hussein* plaintiffs, unlike plaintiffs here, challenged statutes then in force. *See id.*; *see also* Br. for Pls.-Resps. at 32, *Hussein v. State*, 81 A.D.3d 132 (3d Dep't 2011) (No. 509778) ("Plaintiffs challenge the education funding formula *now in effect* . . . ." (emphasis added)).

That point is dispositive. Contrary to plaintiffs' suggestion, a party cannot evade the requirement to file a new pleading to reflect amendments to challenged legislation simply by arguing that the amended version remains unconstitutional. A pleading is not an empty formality. *See*, *e.g.*, *Valley Cadillac Corp. v. Dick*, 238 A.D.2d 894, 897 (4th Dep't 1997) (claim must be dismissed where pleading is defective and no motion is made to conform pleadings to proof at trial); *Dufur v. Lavin*, 101 A.D.2d 319, 324

(3d Dep't 1984) (same), *aff'd*, 65 N.Y.2d 830 (1985). Rather, pleadings serve crucial purposes, including apprising parties of the factual and legal bases of the pleader's claims and preventing surprise. *See*, *e.g.*, *Cole v. Mandell Food Stores, Inc.*, 93 N.Y.2d 34, 40 (1999); *see also*, *e.g.*, *Mavroudis v. State Wide Ins. Co.*, 102 A.D.2d 864, 864 (2d Dep't 1984) (issues framed by pleadings determine scope of discovery). Those purposes would be seriously undermined if plaintiffs could proceed with their constitutional challenges to the State's teacher tenure system without alleging that the system currently in force violates the Constitution.

Furthermore, the requirement to file an amended pleading is neither unreasonable nor unfair. Plaintiffs could have avoided mootness here, as the plaintiffs did in *CCJEF*, by amending their complaints to challenge the current teacher tenure system when Supreme Court afforded them the opportunity to do so (R. 1337). But plaintiffs chose not to pursue that opportunity, and they cannot now complain of the consequences of their decision.

POINT II

PLAINTIFFS' CLAIMS RAISE NONJUSTICIABLE POLITICAL QUESTIONS

Plaintiffs' claims, to the extent they can be thought to present any live controversy at all, raise sensitive questions of broad educational policy that are committed to the political branches under the Constitution. We explained as much in our opening brief. See State Br. at 34-42. Plaintiffs respond that their claims are justiciable because the courts are empowered to determine whether a particular "legislative enactment" violates the Constitution. Wright Br. at 55. But this argument fundamentally mischaracterizes the nature of plaintiffs' claims and the narrow scope of the State's political-question argument.

What plaintiffs' mootness arguments have demonstrated is that their claims are not fundamentally addressed to any particular "legislative enactment" addressing teacher tenure. Rather, their true grievance is with the very existence of tenure for public school teachers, regardless of its statutory form. Such a grievance does not turn on any particularized complaints about the effect that particular forms of teacher tenure may have on

students' education. Instead, plaintiffs dispute the basic judgment that teacher tenure itself—and, more specifically, its emphasis on seniority and job security—improves teacher effectiveness and the quality of education. But that fundamental policy judgment is one that is properly addressed to the Legislature and the Executive alone, not to the Judiciary.

Plaintiffs' assertion that they are pursuing a cognizable Education Article claim here cannot be squared with their mootness argument that the Legislature's substantial amendments to New York's teacher-tenure system are irrelevant. Put simply, plaintiffs cannot have it both ways. Either the details of New York's teacher-tenure statutes matter, and the Legislature's changes to those details moot their claims. Or, as plaintiffs have insisted, those details do not matter, and this case instead turns on basic policy judgments that are properly dedicated to the political branches, rather than to the courts.

Plaintiffs attempt to avoid this conclusion by asserting that courts are equipped to adjudicate controversies over parties' constitutional rights, and that these actions present such a

controversy. But the mere invocation of a constitutional right does not preclude application of the political-question doctrine. Rather, courts look to the substance of the issue a party seeks to litigate, not the form in which the grievance is cast.

In *Matter of Gottlieb v. Duryea*, for instance, an Assembly member claimed his First Amendment rights were violated by the Speaker's refusal to mail at public expense a letter to certain of the member's constituents. *See* 38 A.D.2d 634, 635 (3d Dep't 1971), *aff'd*, 30 N.Y.2d 807 (1972). The Court of Appeals nevertheless upheld the dismissal of the member's claim on political question grounds, because "the grievance alleged . . . [was] an internal matter to be handled within the procedures of the Legislature." *Id.*; *see also*, *e.g.*, *Saxton v. Carey*, 44 N.Y.2d 545, 550 (1978) (dismissing on political-question grounds challenge under a constitutional provision requiring the Governor to submit an itemized budget to the Legislature); *Urban Justice Ctr. v. Pataki*, 38 A.D.3d 20, 27-30 (1st Dep't 2006) (dismissing on political-question grounds constitutional challenge to Legislature's allocation of resources to members).

Plaintiffs' claims founder for similar reasons here. As we explained in our opening brief (see State Br. at 35-36), courts will not decide questions that are constitutionally committed to a coordinate branch of government or that lack manageable judicial standards. This case implicates both concerns.

First, the Education Article commits fundamental questions of education policy—such as whether affording tenure protection to teachers improves the quality of instruction in the State—to the Legislature and the Executive. *See, e.g.*, *James v. Bd. of Educ. of City of N.Y.*, 42 N.Y.2d 357, 365-66 (1977); *Matter of N.Y.C. Sch. Bds. Ass'n v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 39 N.Y.2d 111, 121 (1976). Those branches have long adhered to a "strong public policy" that providing public school teachers with the protection of tenure promotes academic freedom, creates a better workforce, and improves the quality of instruction. *Matter of Feinerman v. Bd. of Coop. Educ. Servs. of Nassau Cty.*, 48 N.Y.2d 491, 497 (1979); *see also Ricca v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 47 N.Y.2d 385, 391 (1979); *Matter of Baer v. Nyquist*, 34 N.Y.2d 291, 295 (1974).

Second, there is no manageable standard for a court to determine whether that policy decision is correct—other than to substitute its own views for those of the political branches as to the ultimate desirability of teacher tenure. But whether such a system redounds to the overall social good is a far cry from the type of concrete adversarial dispute courts are equipped to resolve. The Court of Appeals made this point in *New York City School Boards Association*, where it refused to substantively review a decision by the New York City Board of Education to reduce the school day by two forty-five-minute periods per week. *See* 39 N.Y.2d at 116, 121. While it was possible, the Court noted, to question "the educational wisdom" of the Board's decision, "it is not for the courts to do so." *Id.* at 121. Courts may not "assume the exercise of educational policy," *id.*, or "make judgments as to the validity of broad educational policies," *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 444-45 (1979); *accord James*, 42 N.Y.2d at 358-59. That point disposes of plaintiffs' attempt to litigate the validity of teacher tenure as an institution.

POINT III

PLAINTIFFS FAIL TO STATE AN EDUCATION ARTICLE CLAIM

There are two elements to an Education Article claim: (i) deprivation of a sound basic education, and (ii) causes attributable to the State. *See N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 178-79 (2005). As explained in the State's opening brief, plaintiffs fail to adequately allege either element here.

A. Plaintiffs Do Not Allege Deprivation of a Sound Basic Education.

To allege deprivation of a sound basic education, a plaintiff must allege gross and glaring deficiencies in both educational *inputs* (instruction, facilities, instrumentalities of learning, etc.) and educational *outputs* (measures of student achievement). *See Paynter v. State*, 100 N.Y.2d 434, 440 (2003); *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317-18 (1995) ("*CFE I*"). Plaintiffs must also concretely allege deficient inputs and outputs in their particular districts, and not based on generalized or statewide data. *See N.Y. Civil Liberties Union*, 4 N.Y.3d at 181-82; *N.Y. State Ass'n of Small City Sch. Districts v. State*, 42 A.D.3d

648, 652 (3d Dep't 2007) ("*Small City School Districts*"). Plaintiffs' complaints fail to satisfy these pleading requirements.

1. Plaintiffs do not identify concrete deficiencies in educational inputs.

Unlike other Education Article claimants who have succeeded in stating claims, plaintiffs do not attempt to plead a violation by broadly alleging across-the-board deficiencies in a variety of educational inputs. *Cf. CFE I*, 86 N.Y.2d at 318 (complaint supported by "fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc."); *Hussein*, 81 A.D.3d at 136 (complaint was "replete with detailed data allegedly demonstrating, among other things, inadequate teacher qualifications, building standards and equipment"). Rather, plaintiffs here narrowly focus on a single input—teaching. And in doing so, they fall far short of alleging the type of systemic deficiency that would be necessary to plead an Education Article violation. As explained in the State's opening brief, plaintiffs cannot state a claim merely by asserting that their school districts

have occasionally employed incompetent teachers, because such allegations do not show that any district is depriving its student body as a whole—or even any particular students—of the opportunity to acquire the basic skills making up a sound basic education. See State Br. at 51.

Plaintiffs respond that they should not be required to allege specific numbers of incompetent teachers without discovery. *See* Wright Br. at 25-26, 39-40. But the problem is not simply plaintiffs' lack of precise figures: plaintiffs fail to allege *any* non-conclusory basis to infer that their school districts employ a teaching force so incompetent that it violates the Constitution.

Plaintiffs argue that an inference that incompetent teachers pervade the public school system, including their districts, plausibly arises from an allegation that representatives of some school districts stated in a 2009 survey that they would have brought disciplinary charges against tenured teachers but declined to do so, "often because the process was too cumbersome or expensive." Wright Br. at 26. But the bare fact that some districts were previously reluctant to invoke a now-defunct

disciplinary process against unspecified numbers of teachers, in unspecified circumstances, says precious little about the actual current composition of the teacher workforce in any school district. In fact, plaintiffs admit that the "majority of teachers in New York are providing students with a quality education." (R. 38 [¶ 4].)

Plaintiffs also claim that the State has withheld "information from the public about teacher quality and the retention of ineffective teachers." Wright Br. at 38. But that is simply not true. Plaintiffs had access to a wealth of detailed, factual information about teacher effectiveness that they could have included in their complaints. For instance, the State has created a comprehensive system of evaluations to measure teacher effectiveness and makes those evaluations available to the public on a district-by-district basis. *See* State Education Department (SED), 2013-14 Teacher Evaluation Database, *at* data.nysed.gov/downloads.php. The State also provides public access to its "Report Card Database," a comprehensive collection of statistics for each school district in literally hundreds of categories,

including staff certification rates, student test results, and teacher experience levels. *See* SED, 2013-2014 Report Card Database.

In *Campaign for Fiscal Equity, Inc. v. State* ("*CFE II*"), the Court of Appeals specifically pointed to these categories of information as the type of information that would be relevant in asserting an Education Article claim. *See* 100 N.Y.2d 893, 909-910 (2003). Plaintiffs complain that *CFE II* was decided after discovery (*see* Wright Br. at 26-27), but plaintiffs ignore that the same types of data referred to by the Court in *CFE II* were also included in the complaint held sufficient in *CFE I* (along with specific facts about a variety of other educational inputs), *see CFE I*, 86 N.Y.2d at 318. Unlike the complaints here, the *CFE* complaint provided specific allegations that quantified, on a district-wide basis, New York City's comparatively high level of uncertified teachers and high teacher turnover rate, and its comparatively low level of

teacher experience.[3] Plaintiffs provide no comparable allegations here.

Indeed, plaintiffs do not even articulate how they propose to identify an incompetent teacher. See State Br. at 52-53. Plaintiffs argue that they have no obligation to do so (*see* Wright Br. at 25), but the core of plaintiffs' claims is their assertion that their school districts employ "huge numbers of ineffective teachers." Wright Br. at 34. Without *any* metric or objective criteria for identifying "ineffective" teachers, however—and plaintiffs supply none—the label is a bare conclusion that fails to put defendants on notice of what types of teachers need to be pushed out of their districts and why. The State thus lacks notice of what specific steps it is supposed to take to cure a purported constitutional violation.

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[3] *See* Record on Appeal at 65-66 (¶ 50), *CFE I*, 86 N.Y.2d 307 (Sup. Ct. N.Y. County Index No. 111070/93) ("New York City has the largest percentage of uncertified teachers (11.8% in 1991-92 compared to 7.3% statewide, and 4.6% in suburban districts), the least experienced teachers (13 years, compared to 16 years statewide, and 19 years for suburban districts) and the highest teacher turnover rate in the state (14% in 1989-90, compared to a statewide average of 9% and a suburban average of 7%).").

In this regard, plaintiffs' allegations are the equivalent of unadorned assertions that school districts throughout the State have "deficient physical facilities." A complaint consisting solely of such allegations—without any facts about the nature or scope of the problem, or the facilities or types of facilities involved, or even an explanation of what makes a facility deficient—would contain only bare legal conclusions and therefore fail to state a claim. Plaintiffs' complaints suffer from the same fundamental problem. As the Court of Appeals has made clear, even on a motion to dismiss, plaintiffs must allege "fact-based claims of inadequacies in . . . numbers of qualified teachers." *CFE I*, 86 N.Y.2d at 319. They have utterly failed to do so here.

2. Plaintiffs do not adequately allege deficiencies in educational outputs.

In addition to deficient educational inputs, plaintiffs were required to allege district-specific deficiencies in educational outputs, such as poor student results on standardized tests and low graduation rates. *See Paynter*, 100 N.Y.2d at 440; *see also CFE II*, 100 N.Y.2d at 908 & n.3. As the Court of Appeals has

explained, allegations of inadequate outputs are necessary because positive student achievement "might indicate that [students] somehow still receive the opportunity for a sound basic education" despite deficient inputs. *CFE II*, 100 N.Y.2d at 914. Plaintiffs fail to adequately allege deficient outputs for two related reasons.

First, plaintiffs do not allege that they have been deprived of the specific educational opportunity that the Education Article protects—the opportunity for a sound basic education. See State Br. at 51-52. A sound basic education is a "constitutional minimum or floor," *Campaign for Fiscal Equity, Inc. v. State* ("*CFE III*"), 8 N.Y.3d 14, 20 (2006), and consists of the chance to learn the "basic literacy, calculating and verbal skills necessary to enable [students] to function as civic participants capable of voting and serving as jurors," *CFE I*, 86 N.Y.2d at 318. Although the State maintains higher standards of excellence, an Education Article claim will not lie merely from the allegation that students are denied the opportunity to achieve at those higher levels. *See id.* at 317.

As the State's opening brief pointed out, plaintiffs do not allege that students are currently receiving an education that falls below the constitutional floor guaranteed by the Education Article. See State Br. at 50-52. Plaintiffs respond that it is a matter of "simplest common sense" (Wright Br. at 24), that students will achieve greater success if they are taught by better teachers. But this does not answer the question posed by the Education Article—*i.e.*, whether students are deprived of the opportunity to learn the "basic literacy, calculating and verbal skills" that constitute a sound basic education. *CFE I*, 86 N.Y.2d at 318.

Plaintiffs do not attempt to address that standard. Instead, they rely on general allegations that better instruction would lead to "higher test scores" and would enable students to "earn more money," to "live in neighborhoods of higher socioeconomic status," and to "save more money for retirement." Wright Br. at 22 (quoting R. 1358). These benchmarks, however laudable, are not measures of the constitutional minimum guaranteed by the Education Article, and plaintiffs' allegation that students have

been stymied in their attempts to achieve these benchmarks does not state an Education Article violation.

Second, plaintiffs fail to allege any "facts showing the outcomes of the educational process, such as examination results." *Paynter*, 100 N.Y.2d at 440. Plaintiffs point to a single statewide allegation about student performance: that approximately two thirds of students in the State taking certain standardized tests did not achieve the high level of proficiency that the New York Board of Regents' standards demand. *See* Wright Br. at 28-29. But this statewide allegation demonstrates nothing about how the students in plaintiffs' particular school districts are performing. As the Court of Appeals has emphasized, without a district-specific allegation about student outputs, there is no way to determine whether students in plaintiffs' school districts "still receive the opportunity for a sound basic education" despite the alleged deficiency in competent instruction. *CFE II*, 100 N.Y.2d at 914. And plaintiffs' single, statewide allegation is insufficient in any event because it is based on Regents standards that exceed

the constitutional floor guaranteed by the Education Article. *See CFE I*, 86 N.Y.2d at 317.

3. Plaintiffs do not allege any facts about systemic deficiencies in inputs and outputs that are particular to their school districts.

Plaintiffs' attempt to plead deficiencies in educational inputs and outputs founders for an additional reason: plaintiffs do not allege any facts about the experience in their particular school districts. Settled precedent requires that an Education Article claim be supported by district-specific allegations. *See N.Y. Civil Liberties Union*, 4 N.Y.3d at 181-82; *see also N.Y.C. Parents Union v. Board of Educ. of City Sch. Dist. of N.Y.*, 124 A.D.3d 451, 452 (1st Dep't 2015); *Small City Sch. Dists.*, 42 A.D.3d at 652. Plaintiffs' failure to allege district specific facts is thus dispositive.

Plaintiffs do not argue that their complaints contain factual allegations specific to their particular school districts. Instead, plaintiffs contend that they are excused from alleging district-specific facts because they have asserted a constitutional violation that is "occurring systematically on a state-wide basis, rather than

in some specific district." Wright Br. at 32. In plaintiffs' view, they are required only to allege statewide deficiencies in educational inputs and outputs because they have framed their claims as addressing an issue that affects more than one school district.[4]

But the Third Department rejected precisely this argument in *Small City School Districts*. The plaintiffs in that case alleged systemic funding inadequacies for a group of school districts; the complaint contained allegations of deficient educational inputs and outputs for the group as a whole, but did not include allegations specific to individual school districts. *See id.* at 652. After winnowing the case to the four plaintiffs with standing to sue, *see id.* at 649-51, the court dismissed the action for failing "to

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[4] The First Department's decision in *Aristy-Farer v. State*, 2016 N.Y. Slip Op. 05960 (1st Dep't Sept. 8, 2016), does not support plaintiffs' attempt to proceed on the basis of statewide allegations. In that case, the court found that plaintiffs alleged district-specific facts to support their Education Article claims as to some school districts, and on that basis permitted plaintiffs to pursue Education Article claims as to other school districts that were not specifically identified in the complaints. *See id.* at *8-*9. The court did not hold that a showing of district-wide failures was unnecessary to state a claim under the Education Article, or that allegations of a statewide deficiencies alone would be sufficient.

include any factual allegations which are specific to the four school districts represented by the remaining plaintiffs." *Id.* at 652. The court reasoned that, without district-specific allegations, there was no way to determine whether the remaining plaintiffs were "actually aggrieved" by the funding inadequacies alleged to have affected the entire group. *Id.*

Plaintiffs argue that *Small City School Districts* "in no way suggests . . . that district-by-district allegations are required where the alleged constitutional violation is occurring systematically on a state-wide basis." Wright Br. at 32. But that is precisely what *Small City School Districts* requires. The court squarely held that allegations of systemic deficiencies affecting a large group of school districts are insufficient to state an Education Article claim absent allegations that the systemic problem affects plaintiffs' individual school districts. The same rationale applies here: without allegations about the teachers in plaintiffs' school districts, there is no way to determine from the face of the complaints whether plaintiffs live in a school district that lacks

sufficient competent teachers to provide the opportunity for a sound basic education.

The requirement of district-specific allegations reflects two important policies that plaintiffs attempt to subvert here. *First*, the Court has expressed great caution about the limits of judicial intervention in the context of public education, *see, e.g.*, *James*, 42 N.Y.2d at 364, and has shaped its Education Article jurisprudence purposely to avoid involving the judiciary in policy issues that are properly reserved for the political branches, *see, e.g.*, *CFE II*, 100 N.Y.2d at 925; *CFE III*, 8 N.Y.3d at 28-29. Requiring litigants to make concrete allegations about specific school districts reflects this caution by limiting the judiciary to "actual cases and controversies, not abstract global issues." *CFE II*, 100 N.Y.2d at 928. Whether extending tenure to public school teachers is a socially beneficial policy is exactly the type of "abstract global issue" that should not be litigated in the absence of concrete allegations of deficiencies rendering *plaintiffs'* schools unconstitutional.

Second, plaintiffs' failure to allege district-specific educational deficiencies ignores the bedrock principle "enshrined in the Constitution" that public education in New York is the product of a "state-local partnership" in which local communities have a "right to participate in the governance of their own schools." *Paynter*, 100 N.Y.2d at 442. That local right of participation is particularly pronounced in the context of hiring and retaining public school teachers, which decisions are controlled solely by local school districts as a matter of the State's long-standing "basic policy." *Matter of Frasier v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 71 N.Y.2d 763, 766 (1988); *see also Ricca v. Bd. of Ed. of City Sch. Dist. of N.Y.*, 47 N.Y.2d 385, 391 (1979) (teacher employment decisions are "entrusted by law to the school board alone"). Requiring Education Article litigation to focus on individual school districts preserves this constitutionally mandated local element of participation by acknowledging that the experience of local school districts varies throughout the State and by tailoring relief to address the unique problems that actually affect each particular school district.

B. Plaintiffs Do Not Allege Causes Attributable to the State Because School Districts, Not the State, Are Responsible for Hiring and Retaining Teachers.

Even if plaintiffs had alleged deprivation of the opportunity for a sound basic education, their Education Article claims would still fail because they do not allege a "causal link" between the alleged deprivation and any action by the State. *CFE I*, 86 N.Y.2d at 318; *see also Paynter*, 100 N.Y.2d at 441. The independent authority of local school districts to hire and fire public school teachers operates as a supervening cause that severs the causal link between the State's teacher tenure system and the (un)alleged shortfall of competent teachers in plaintiffs' school districts. See State Br. at 57-60.

Plaintiffs argue that school district employment decisions are but one reason why there are insufficient numbers of competent teachers in their school districts and point out that an Education Article plaintiff "need 'not eliminate any possibility that other causes contribute'" to the alleged constitutional violation. Wright Br. at 40 (quoting *CFE II*, 100 N.Y.2d at 923 (alterations omitted)); *see id.* at 36-37. But a school district's

authority to make employment decisions for itself is not just another reason for the alleged constitutional violation; those employment decisions are the single cause responsible for the composition of a school district's teacher workforce. The State does not decide which teachers a school district hires or fires; those employment decisions are "entrusted by law to the school board alone," *Ricca*, 47 N.Y.2d at 392. And while state law may regulate *how* a school district hires or fires its teachers, the State plays no role in determining *whether* to hire or fire any particular teacher. *See, e.g.*, *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 379 (2d Cir. 2006) (noting that while the State "set the baseline qualifications for fully licensed public school teachers," it was the local New York City school district "who hired, promoted, demoted, and fired teachers in New York City").

This is critical because, as the Court of Appeals made clear in *CFE II*, Education Article liability cannot obtain if there is a "supervening cause" that is "sufficiently independent" of the state action that is alleged to have caused the Education Article violation. *CFE II*, 100 N.Y.2d at 923, 925.

School districts' independent authority over which teachers to hire and fire fundamentally distinguishes the causation argument in this case from the one the Court of Appeals rejected in *CFE II*. In that case, the State argued that the New York City school district's inefficient management of its teacher workforce was a supervening cause of alleged funding shortfalls. The Court of Appeals rejected this argument because it found that the City's alleged mismanagement was not "sufficiently independent from the State's funding system." *CFE II*, 100 N.Y.2d at 923. The Court concluded that the State could not avoid liability merely because the "failures of its agents sabotage the measures by which [the State] secures for its citizens their constitutionally-mandated rights." *Id.* at 922; *see also Campaign for Fiscal Equity, Inc. v. State*, 295 A.D.2d 1, 18-19 (1st Dep't 2002) (same).

But it is one thing for the State to impose efficiency controls where necessary to ensure that the funds it provides are not wasted. It is quite another for the State to dictate to local school districts how, whether, and when to hire, fire, or discipline its teachers. As noted above, those employment decisions are left to

school districts alone. And it is that school district authority over teacher employment decisions—authority that is constitutionally independent of the State's authority—that serves as a supervening cause between the State's rules about how a school district manages its teacher workforce and the ultimate composition of that workforce.

Plaintiffs fundamentally misunderstand this point. In arguing that their claims are not moot, they assert that "not a single ineffective teacher was fired upon enactment" of the Transformation Act. Wright Br. at 65-66 n.9. But such a result would not follow even if plaintiffs succeeded in invalidating the entire institution of public school teacher tenure. Local school districts would still have to exercise their own independent authority to make plaintiffs' desired employment decisions.

Refusing to give effect to this independent authority will result in a level of state involvement in school districts' employment decisions that undermines the constitutionally prescribed allocation of authority among the State and local communities. See State Br. at 58. If the State's obligation to

provide the opportunity for a sound basic education extends to ensuring that local school districts hire only competent teachers and immediately fire any incompetent ones, the State will effectively be forced to police each decision by a school district about who to hire and who to fire. Such a rule would necessitate a dramatic shift to central state control in derogation of the long tradition of "giving citizens direct and meaningful control over the schools that their children attend." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 46 (1982) (quotation marks omitted); *see also Gulino*, 460 F.3d at 365.

CONCLUSION

Supreme Court's decision should be reversed and these consolidated actions should be dismissed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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