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

New York Supreme Court
Appellate Division: Second Department

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

Plaintiffs-Respondents,

against

(Caption Continued on Inside Cover)

Docket Nos.
2015-03922,
2015-12041

MUNICIPAL DEFENDANTS' MOTION FOR LEAVE TO APPEAL

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April 30, 2018

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

Defendants-Appellants,

and

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

Intervenors-Defendants-Appellants.

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

New York Supreme Court
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Plaintiffs-Respondents,

against

Docket Nos. 2015-03922, 2015-12041

(Caption Continued on Next Page)

NOTICE OF MUNICIPAL DEFENDANTS' MOTION FOR LEAVE TO APPEAL

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

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and

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Intervenors-Defendants-Appellants.

PLEASE TAKE NOTICE that upon the attached affirmation of Jason Anton and the accompanying memorandum of law, both dated April 30, 2018, and all the prior pleadings and proceedings, and pursuant to 22 N.Y.C.R.R. § 600.14(b), defendants City of New York and New York City Department of Education will move this Court, located at 45 Monroe Place, Brooklyn, New York, 11201, on May 11, 2018, at 9:30 a.m., for an order granting them leave to appeal to the Court of Appeals from the decision and

order of this Court entered March 28, 2018, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 30, 2018

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

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

New York Supreme Court
Appellate Division: Second Department

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Plaintiffs-Respondents,

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Docket Nos.
2015-03922
2015-12041

MEMORANDUM OF LAW IN SUPPORT OF MUNICIPAL DEFENDANTS' MOTION FOR LEAVE TO APPEAL

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April 30, 2018

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

Defendants-Appellants,

and

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

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PRELIMINARY STATEMENT

This action is without precedent. Plaintiffs seek a judicial ruling that the State's teacher tenure laws—which have century-deep roots, are frequently retooled, and have long been the subject of heated debate—are unconstitutional under the Education Article of the State Constitution. By opening the door to this theory, the Court has taken a leap beyond existing Education Article case law into a delicate policy arena.

That dramatic step raises serious questions about justiciability and the separation of powers, points toward a new universe of Education Article claims, and threatens to undermine a longstanding statewide institution. It therefore warrants review by the Court of Appeals.

OVERVIEW OF THE CASE

A. The teacher tenure system

Teacher tenure has been around for nearly as long as the Education Article itself. *See* L. 1917, ch. 796. For more than a century, it has been a cornerstone of efforts to attract and retain

teachers.[1] Those objectives have never been more important than today, when high turnover compounds a dramatic nationwide shortage in qualified educators.[2]

Currently, to be eligible for tenure, public school teachers in New York City must provide four years of "competent, efficient and satisfactory" service. Educ. Law § 2573(5); *see also id.* §§ 2573(1)(a)(ii), 3012-c. Teachers who successfully complete that probationary period can be awarded tenure if district leadership deems them qualified. *See id.* § 2573(5).

Tenured teachers have some, but not inviolate, job security. A tenured teacher is subject to removal for "just cause," *id.* § 3020(1), and is entitled to notice and a hearing, *see id.* § 3020-a. For New York City teachers, "just cause" includes, but is not

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[1] *See Who We Want*, NYC Dep't of Educ., http://bit.ly/1q9FK0m (last visited Apr. 26, 2018); Brenda Iasevoli, *Study: When Tenure is Taken Away, Teachers Leave*, Education Week Teacher Beat (Mar. 1, 2017), https://bit.ly/2vtSExB.

[2] *See* Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. Times, Aug. 9, 2015, available at http:/nyti.ms/1UVaTzV; Eric Westervelt, *Where Have All the Teachers Gone?*, National Public Radio (Mar. 3, 2015, 2:03 p.m.), http://n.pr/1ZFB4LN.

limited to, "[i]ncompetent or inefficient service," "neglect of duty," and "conduct unbecoming [the] position." *Id.* § 2590-j(7)(b).

Each teacher is subject to "rigorous annual performance reviews" based on student testing and a suite of state and local measures of effectiveness. Assembly Sponsor's Mem., at 1, *reprinted in* Bill Jacket, L. 2010, ch. 103 at 7; *see generally* Educ. Law § 3012-c.[3] The resulting rating—highly effective, effective, developing, or ineffective—is a "significant factor" in future employment decisions. Educ. Law §§ 3012-c(1), (2)(a)(1).

A teacher who receives an ineffective rating is subject to dismissal through a hearing process governed by strict time limits. *See id.* § 3020-a(3)(c), (4)(a), (4)(b). Further, teachers who receive two consecutive ineffective ratings are subject to an expedited hearing process. *Id.* §§ 3012-c(6), 3020-b.

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[3] New York City uses the Charlotte Danielson framework, which is comprised of 22 evaluative components. *Teacher Practice*, NYC Dep't of Educ., http://on.nyc.gov/1RxXLOS (last visited April 26, 2018).

B. Plaintiffs' novel use of the Education Article to challenge the tenure system

Plaintiffs brought this action in 2014, contending that New York's then-existing tenure statutes violated the Education Article, N.Y. State Const., art. XI, § 1 (R. 36–53, 67–89). They based their claims on the theory that these laws permit an unidentified number of "ineffective teachers" to remain in the school system, placing some children "at risk" of being assigned to an underperforming teacher (R. 38, 68–69).

But plaintiffs did not allege that any one of them had been deprived of the "sound basic education" the Education Article guarantees, much less that the tenure statutes have resulted in a systemic crisis of teacher quality. Plaintiffs, in fact, concede that "the majority of teachers in New York are providing students with a quality education" (R. 38), and contend that only those taught by a small minority of teachers are disadvantaged. *See Davids v. State*, Nos. 2015-03922, 2015-12041, 2018 N.Y. App. Div. LEXIS 2029 at *7 (2d Dep't Mar. 28, 2018).

Below, defendants—a group that includes the State, New York's largest school district, and its largest teacher unions—

moved to dismiss. Supreme Court, Richmond County (Minardo, J.) denied the motions in relevant part, concluding that plaintiffs had stated claims for relief and that those claims were justiciable simply because they pertained to constitutional rights (R. 31–32).

Thereafter, in 2015, the Legislature amended the tenure statutes. *See* L. 2015, ch. 56, Part EE. Those reforms, many of which will be phased in over the next several years, include reformulated performance review standards; an extension of the probationary period to four years; a prohibition on teachers rated ineffective from teaching the same students in consecutive years; and presumptions of incompetence for teachers who receive consecutive ineffective ratings. *See* Educ. Law §§ 2573(1)(a)(ii), 3012-c, 3012-d(8), 3020-b(3)(c)(v).

Though the overall mix of tenure protections had undoubtedly shifted, plaintiffs declined to amend their complaints (*see* R. 1337). Even so, when defendants renewed their motions to dismiss in light of the 2015 amendments, Supreme Court found, with no supporting allegations, that the reforms were "marginal"

and "insufficient to achieve the required result," such that plaintiffs' lawsuit could proceed (R. 957).

Defendants appealed, arguing among other things that plaintiffs' allegations are non-justiciable, superseded by the amendments, and insufficient to state a claim for relief. This Court affirmed. *See Davids*, 2018 N.Y. App. Div. LEXIS 2029 at *10–12.

REASONS TO GRANT LEAVE

While the Education Article empowers courts to hold the State to its duty to "provide for the maintenance and support of a system of free common schools," N.Y. State Const., art. XI, § 1, it reserves education policy—the "complex" web of initiatives and procedures designed in response—"to the discretion of the political branches of government," *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) (*"CFE III"*) (quotation marks omitted). The "tension between [the judiciary's] responsibility to safeguard rights and the necessary deference" to the political branches means that even traditional Education Article actions fall on the fault-line between justiciable and non-justiciable

claims. *Id.* The Court of Appeals has thus warned courts to "tread carefully" in this area. *Id.*

To date, the Court of Appeals has identified only a narrow band of justiciable Education Article claims. The trio of *Campaign for Fiscal Equity* decisions holds that courts are competent to adjudicate the constitutionality of a "gross and glaring inadequacy" in funding. *Bd. of Educ. v. Nyquist*, 57 N.Y.2d 27, 48 (1982); *see also Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317–19 (1995) ("*CFE I*"). Discerning the connection between under-funding, on one hand, and educational inputs (teachers, textbooks, etc.) and outputs (test scores, graduation rates, etc.), on the other hand, generally presents no great challenge. Indeed, the causal theory in *Campaign for Fiscal Equity* bordered on tautology: better-funded schools have stronger educational inputs and thus improved educational outcomes. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 919 (2003) ("*CFE II*").

Beyond a passing indication that Education Article claims may extend to the provision of "other resources," *N.Y. Civil*

Liberties Union v. State, 4 N.Y.3d 175, 182 (2005), the Court of Appeals has never held that any education policy outside the funding context is amenable to judicial scrutiny. Quite the opposite—the Court has doubled down on its "respect for the separation of powers" given the judiciary's "limited access ... to the controlling economic and social facts" which dictate policy, *CFE III*, 8 N.Y.3d at 28 (internal quotation marks omitted), reiterating as recently as last year that courts "cannot intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches," *Aristy-Farer v. State*, 29 N.Y.3d 501, 512 (2017) (quotation marks omitted).

This case breaks new ground. Plaintiffs attack teacher tenure, a century-old institution that reflects "strong public policy considerations." *Feinerman v. Bd. of Co-op. Educ. Servs. of Nassau Cty.*, 48 N.Y.2d 491, 497 (1979). Its precise impact on teaching quality, however, is inherently a matter of policy judgment. Unlike in the funding context, where the impact of educational inputs is one-directional, any downside to tenure must be weighed against its benefits, for example, in improving teacher recruitment

and retention. *See, e.g., Ricca v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 47 N.Y.2d 385, 391 (1979) (noting tenure "foster[s] academic freedom"). Balancing these effects lies outside the judiciary's usual compass. *See Jones v. Beame*, 45 N.Y.2d 402, 408–09 (1978) ("[T]he court ... will abstain from venturing into areas if it is ill-equipped ... and other branches of government are far more suited to the task.").

The Legislature, by contrast, has thoroughly weighed tenure's pros and cons. In response to continually-evolving public debate,[4] it has repeatedly revisited and refined the tenure statutes, including five times in the last ten years (and once during this litigation). Few areas of public policy have received more consideration, and at each opportunity, the Legislature has concluded that tenure has a net beneficial effect on our education system. That judgment is a considered one, and while it may be

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[4] *See, e.g.*, Yana Kunichoff, *The Big Money Behind California's Tenure Lawsuit*, Truthout (June 19, 2014), http://bit.ly/1XVqoal; Timothy R. Williams, *Tenure Decision Draws Sharp Debate*, N.Y. Times, Times Insider, June 12, 2014, https://nyti.ms/2vtQq1f. The debate continues. *See, e.g.*, Monica Disare, *With changes coming to New York's teacher evaluations, union and state officials prepare to clash*, Chalkbeat (Feb. 12, 2018), https://bit.ly/2qKDI9D.

"debatable," it was not so "irrational" as to place tenure outside the menu of policies compliant with the Education Article's "constitutional ... floor." *CFE III*, 8 N.Y.3d at 20, 31.

At a minimum, allowing plaintiffs to use the Education Article to second guess the Legislature's judgment is a sharp departure from how the Court of Appeals has interpreted the Article to date, and a substantial expansion of its scope. A wide range of policies—from charter authorizations, to curriculum requirements, to testing regimes—may fairly be said to affect both education inputs and outputs, and this Court's decision may render them all subject to constitutional challenge by plaintiffs who disagree with them. Whether it is appropriate for the courts of the State to entertain such challenges is a matter warranting review by the Court of Appeals.

That question is fundamental to this case, and it will not disappear with further proceedings. The Court of Appeals should consider it now, before the lower court undertakes to scrutinize matters that till now have been reserved to the political branches, and before the launch of a discovery and trial process that will

dwarf the profound burdens posed by more straightforward funding cases of the past. *See, e.g.*, *CFE II*, 100 N.Y.2d at 950 n.2 (describing 111-day trial involving high-ranking officials).

CONCLUSION

Leave to appeal to the Court of Appeals should be granted.

Dated: New York, NY
April 30, 2018

Respectfully submitted,

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

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CERTIFICATE OF COMPLIANCE

This brief was prepared with Microsoft Word 2010, using Century Schoolbook 14 pt. for the body and Century Schoolbook 12 pt. for footnotes. According to the aforementioned processing system, the portions of the brief that must be included in a word count pursuant to 22 N.Y.C.R.R. § 670.10.3(a)(3) contain 1802 words.

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

New York Supreme Court
Appellate Division: Second Department

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Plaintiffs-Respondents,

against

Docket Nos. 2015-03922, 2015-12041

(Caption Continued on Next Page)

AFFIRMATION IN SUPPORT OF MUNICIPAL DEFENDANTS' MOTION FOR LEAVE TO APPEAL

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

Defendants-Appellants,

and

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

Intervenors-Defendants-Appellants.

JASON ANTON, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury as follows.

1. I am an Assistant Corporation Counsel in the Office of the Corporation Counsel of the City of New York, which represents defendants City of New York and the New York City Department of Education ("Municipal Defendants") in this appeal.

2. Municipal Defendants appealed to this Court from an order of Supreme Court, New York County (Minardo, J.), dated March 12, 2015, which, in relevant part, denied Municipal

Defendants' motion to dismiss the complaint; and a second order, dated October 22, 2015, in which Supreme Court adhered to its prior determination.

3. On March 28, 2018, this Court affirmed. Plaintiffs served notice of entry of this Court's decision and order on Municipal Defendants on March 30, 2018, by fax.

4. A true and correct copy of the notice of entry, and the Court's decision and order, is attached here as Exhibit A.

5. For the reasons set forth in the accompanying memorandum, Municipal Defendants now seek leave to appeal to the Court of Appeals.

6. The question sought to be certified is whether this Court's order was properly made.

Dated: New York, New York
April 30, 2018

Respectfully submitted,

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Corporation Counsel
of the City of New York
Attorney for the City of New York and the New York City Department of Education

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EXHIBIT A

2014-026935
GL - J. Birnbaum

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

MYMOENA DAVIDS, by her parent and natural guardian Miamona Davids, *et al.*, and John Keoni Wright *et al.*,

Index No. 101105/2014

Justice: Hon. Justice Marin

Plaintiffs,

NOTICE OF ENTRY

- against -

THE STATE OF NEW YORK, *et al.*,

Defendants,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, local 2, American Federation of Teachers, AFL-CIO, *et al.*

Intervenor- Defendants

----------x

PLEASE TAKE NOTICE that the annexed order is a true and correct copy of an order duly entered in the above entitled action and filed in the office of the Clerk of the Supreme Court, Appellate Division, Second Department, on March 28, 2018.

Dated: New York, New York
March 29, 2018

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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Argued - November 30, 2017

REINALDO E. RIVERA, J.P.
JEFFREY A. COHEN
JOSEPH J. MALTESE
ANGELA G. IANNACCI, JJ.

2015-03922 DECISION & ORDER
2015-12041

Mymoena Davids, etc., et al., respondents, v State of New York, et al., defendants-appellants, et al., defendants; Michael Mulgrew, etc., et al., intervenors-defendants-appellants.

(Index No. 101105/14)

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Arthur P. Scheuermann, General Counsel, School Administrators Association of

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Jonathan W. Tribiano, PLLC, Staten Island, NY, for respondents Mymoena Davids, Eric Davids, Alexis Peralta, Stacy Peralta, Lenora Peralta, Andrew Henson, Adrian Colson, Darius Colson, Samantha Pirozzolo, Franklin Pirozzolo, and Izaiyah Ewers.

Kirkland & Ellis LLP, New York, NY (Jay P. Lefkowitz and Devora W. Allon of counsel), for respondents John Keoni Wright, Ginet Borrero, Tauana Goins, Nina Doster, Carla Williams, Mona Pradia, and Angeles Barragan.

Wendy Lecker, Albany, NY, for amicus curiae Alliance for Quality Education.

In a consolidated action for declaratory relief, the defendants State of New York, Board of Regents of the University of the State of New York, and New York State Department of Education, the defendants City of New York and New York City Department of Education, the intervenor-defendant Michael Mulgrew, the intervenor-defendants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, and the intervenor-defendants Philip A. Cammarata and Mark Mambretti separately appeal, as limited by their respective briefs, from (1) so much of an order of the Supreme Court, Richmond County (Philip G. Minardo, J.), dated March 12, 2015, as denied their respective motions pursuant to CPLR 3211(a) to dismiss the complaints insofar as asserted against each of them, and (2) so much of an order of the same court dated October 22, 2015, as, in effect, upon renewal, adhered to its prior determination.

ORDERED that the appeals from the order dated March 12, 2015, are dismissed, as that order was superseded by the order dated October 22, 2015; and it is further,

ORDERED that the order dated October 22, 2015, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

This consolidated action challenges the constitutionality of several sections of the Education Law relating to the tenure, discipline, evaluation, and layoff of teachers, on the ground that those sections permit ineffective teachers to remain within New York's public schools and thereby deny students the "sound basic education" guaranteed by article XI, § 1 of the NY Constitution (hereinafter the Education Article) (*Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27, 48).

The first complaint in the consolidated action was filed by Mymoena Davids, among others (hereinafter collectively the Davids plaintiffs), in Richmond County. The Davids plaintiffs are 11 children who reside in the State of New York and attend New York City public schools. The first complaint named as defendants, among others, the State of New York, the Board of Regents of

the University of the State of New York, and the New York State Department of Education (hereinafter collectively the State defendants), and the City of New York and the New York City Department of Education (hereinafter together the City defendants). The second complaint in the consolidated action was filed by John Keoni Wright, among others (hereinafter collectively the Wright plaintiffs), in Albany County. The Wright plaintiffs are nine parents of students who attend public schools in Albany, New York City, and Rochester. The second complaint named as defendants, among others, the State of New York and the Board of Regents of the University of the State of New York. The actions were consolidated by order of the Supreme Court, Richmond County. Michael Mulgrew, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (hereinafter the UFT), 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 (hereinafter collectively the Teacher defendants), and Philip A. Cammarata and Mark Mambretti (hereinafter together the School Administrator defendants), were granted leave to intervene as defendants in the consolidated action.

The State defendants, the City defendants, the UFT, the Teacher defendants, and the School Administrator defendants (hereinafter collectively the defendants) made separate motions pursuant to CPLR 3211(a)(2), (3), (7), and (10) to dismiss the complaints insofar as asserted against each of them on the grounds, inter alia, that they failed to state a cause of action, that they presented a nonjusticiable controversy, and that the Davids plaintiffs and the Wright plaintiffs (hereinafter together the plaintiffs) did not have standing to maintain the actions. In an order dated March 12, 2015, the Supreme Court, among other things, denied the defendants' respective motions. The defendants then made separate motions, inter alia, for leave to renew their prior motions, contending that the actions had become academic since the New York State Legislature had amended some of the statutes challenged by the plaintiffs. In an order dated October 22, 2015, the court, in effect, granted renewal and, upon renewal, adhered to its original determination. The defendants appeal.

"In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), our well-settled task is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" (*Aristy-Farer v State of New York,* 29 NY3d 501, 509 [internal quotation marks omitted]; *see Campaign for Fiscal Equity v State of New York,* 86 NY2d 307, 318; *People v New York City Tr. Auth.,* 59 NY2d 343, 348). The plaintiffs are entitled to all favorable inferences that can be drawn from their pleadings (*see Aristy-Farer v State of New York,* 29 NY3d at 509). Thus, if the court determines that the plaintiffs are entitled to relief on any reasonable view of the facts stated, the inquiry is complete and the court must declare the complaint legally sufficient (*see id.*).

"The Education Article requires the Legislature to 'provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated'" (*Paynter v State of New York,* 100 NY2d 434, 439, quoting NY Const, art XI, § 1). "[S]tudents have a constitutional right to a 'sound basic education'" (*Paynter v State of New York,* 100 NY2d at 439, quoting *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d at 28). "[A] sound basic education consists of 'the basic literacy, calculating, and verbal skills necessary to enable

children to eventually function productively as civic participants capable of voting and serving on a jury'" (*Paynter v State of New York,* 100 NY2d at 439-440, quoting *Campaign for Fiscal Equity v State of New York,* 86 NY2d at 316). "'Fundamentally, an Education Article claim requires two elements: the deprivation of a sound basic education, and causes attributable to the State'" (*Aristy-Farer v State of New York,* 29 NY3d at 517, quoting *New York Civ. Liberties Union v State of New York,* 4 NY3d 175, 178-179).

Here, the Davids plaintiffs allege in their complaint that teachers are a key determinant of the quality of education students receive and have a profound impact on students' lifetime achievement. The Davids plaintiffs allege that students taught by ineffective teachers—those in approximately the bottom five percent of teachers in New York—suffer lifelong problems and fail to recover from this marked disadvantage.

The Davids plaintiffs allege that the statutory scheme which controls the dismissal of teachers in New York and a seniority-based layoff system make it nearly impossible for school administrators to dismiss ineffective teachers. Specifically, the Davids plaintiffs allege that the following statutes pertaining to the dismissal of teachers deprive students of a sound basic education: Education Law §§ 1102(3), 2509, 2573, 2590-j, 3012, 3014, and 3020-a (hereinafter collectively the Dismissal Statutes). They further allege that Education Law § 3013(2), which mandates that teachers with the least seniority be laid off first (i.e., "last in first out"; hereinafter the LIFO Statute), also deprives students of a sound basic education.

The Davids plaintiffs allege that because of the Dismissal Statutes, school administrators are compelled to either leave ineffective teachers in place or transfer them from school to school. This statutory scheme, they allege, inevitably presents a fatal conflict with the right to a sound basic education guaranteed by article XI, § 1 of the NY Constitution because it forces certain New York students to be educated by ineffective teachers who fail to provide such students with the basic tools necessary to compete in the economic marketplace and participate in a democratic society. The Davids plaintiffs further allege that the LIFO Statute creates a seniority-based layoff system, irrespective of a teacher's performance, effectiveness, or quality. They allege that the LIFO Statute, together with the other statutes at issue, ensures that a certain number of ineffective teachers who are unable to prepare students to compete in the economic marketplace or to participate in a democracy retain employment in the New York school system, and substantially reduces the overall quality of the teacher workforce in New York public schools. The Davids plaintiffs seek a declaration that the Dismissal Statutes and the LIFO Statute, separately and together, violate the right to a sound basic education protected by the Education Article of the NY Constitution.

The Wright plaintiffs challenge the constitutionality of Education Law §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020-a (hereinafter collectively the Challenged Statutes). They allege that the Challenged Statutes confer permanent employment, prevent the removal of ineffective teachers from the classroom, and mandate that layoffs be based on seniority alone, rather than effectiveness. The Wright plaintiffs allege that the Challenged Statutes ensure that ineffective teachers who are unable to provide students with a sound basic education are granted virtually permanent employment in the New York public school system and near-total immunity

from termination of their employment. They allege that the Challenged Statutes impose dozens of procedural hurdles to dismiss or discipline ineffective teachers, including investigations, hearings, improvement plans, arbitration processes, and administrative appeals, making it prohibitively expensive, time-consuming, and effectively impossible to dismiss an ineffective teacher who has already received tenure. The Wright plaintiffs allege that, because of the difficulty, cost, and length of time associated with removal, the number of ineffective teachers who remain employed is far higher than the number of those disciplined or terminated, and that ineffective teachers return to the classroom and students are denied their right to a sound basic education.

The Wright plaintiffs further allege that Education Law § 2585 mandates that the last teachers hired are the first fired when school districts conduct layoffs that reduce the teacher workforce, irrespective of teacher effectiveness or quality. They allege that, in the absence of that statute, school administrators conducting layoffs would consider teacher performance, a higher number of effective teachers would be retained, and fewer children would suffer the loss of an effective teacher. The Wright plaintiffs allege that Education Law § 2585, both alone and in conjunction with the other Challenged Statutes, ensures that a number of ineffective teachers unable to provide students with a sound basic education retain employment in the New York school system. The Wright plaintiffs seek a declaration that the Challenged Statutes violate the NY Constitution.

We agree with the Supreme Court that the Davids plaintiffs' allegations are sufficient to state a cause of action for a judgment declaring that the Dismissal Statutes and the LIFO Statute separately and together violate the right to a sound basic education protected by the Education Article of the NY Constitution. In addition, the Wright plaintiffs' allegations are sufficient to state a cause of action for a judgment declaring that the Challenged Statutes violate the NY Constitution. Accordingly, the defendants were not entitled to dismissal under CPLR 3211(a)(7).

Contrary to the defendants' further contentions, the plaintiffs' allegations present a justiciable controversy (*see Matter of Montano v County Legislature of County of Suffolk,* 70 AD3d 203, 211). "[T]o avoid resolving questions of law merely because a case touches upon a political issue or involves acts of the executive would ultimately 'undermine the function of the judiciary as a coequal branch of government'" (*Matter of Boung Jae Jang v Brown,* 161 AD2d 49, 55, quoting *Matter of Anderson v Krupsak,* 40 NY2d 397, 404). "Notwithstanding the doctrines of justiciability and separation of powers or, perhaps more aptly, because of them, the courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the two other branches of the government" (*Matter of Montano v County Legislature of County of Suffolk,* 70 AD3d at 211 [internal quotation marks omitted]; *see Korn v Gulotta,* 72 NY2d 363, 369; *Saxton v Carey,* 44 NY2d 545, 551).

We further agree with the Supreme Court that the plaintiffs' claims are not academic despite the amendments to some of the statutes they challenge. It cannot be concluded at this stage of the proceedings that a declaration as to the validity or invalidity of those statutes would "have no practical effect on the parties" (*Saratoga County Chamber of Commerce, v Pataki,* 100 NY2d 801, 811). Further, contrary to the defendants' contentions, the plaintiffs had standing to commence these actions, as they adequately alleged a threatened injury in fact to their protected right of a sound basic education due to the retention and promotion of alleged ineffective teachers (*see generally Bernfeld*

v Kurilenko, 91 AD3d 893, 894).

The defendants' remaining contentions are without merit.

RIVERA, J.P., COHEN, MALTESE and IANNACCI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court