SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

MYMOENA DAVIDS, &c., et al.,

Plaintiffs–Respondents,

-against-

THE STATE OF NEW YORK, et al.,

Defendants–Appellants,

-and-

MICHAEL MULGREW, &c., et al.,

Intervenors–Defendants–Appellants

Docket Nos. 2015-03922
2015-12041

Index No. 101105/14
(Consolidated)
Supreme Court
Richmond County

NOTICE OF MOTION

JOHN KEONI WRIGHT, et al.,

Plaintiffs–Respondents,

-against-

THE STATE OF NEW YORK, et al.,

Defendants–Appellants,

-and-

SETH COHEN, et al.,

Intervenors–Defendants–Appellants.,

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affirmation of Philip V. Tisne, dated April 30, 2018, the undersigned will move this Court at the Courthouse, 45 Monroe Place, Brooklyn, New York, 11201, on May 11, 2018, at 10:00 A.M., for an order granting the State Appellants leave to appeal to the Court of Appeals from this Court's decision and order dated March 28, 2018, and for such other relief as the Court may deem just and proper.

Dated: New York, New York
April 30, 2018

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

MYMOENA DAVIDS, &c., et al.,

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Docket Nos. 2015-03922
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Index No. 101105/14
(Consolidated)
Supreme Court
Richmond County

AFFIRMATION

JOHN KEONI WRIGHT, et al.,

Plaintiffs–Respondents,

-against-

THE STATE OF NEW YORK, et al.,

Defendants–Appellants,

-and-

SETH COHEN, et al.,

Intervenors-Defendants–Appellants.,

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

PHILIP V. TISNE, an attorney admitted to practice law in the State of New York, who is not a party to this appeal, under penalty of perjury affirms:

1. I am an Assistant Solicitor General in the Office of Eric T. Schneiderman, Attorney General of the State of New York, counsel for defendants-appellants the State of New York, the Board of Regents of the

University of the State of New York, and the New York State Education Department (collectively, the "State Defendants") in this appeal. I submit this affirmation based on personal knowledge in support of the State's motion for leave to appeal this Court's March 28, 2018 decision and order to the Court of Appeals pursuant to C.P.L.R. 5602.

2. At issue in this litigation is the validity of New York's system of teacher tenure. Teacher tenure is an important public policy that advances multiple state interests, including (a) the State's commitment to providing public school teachers with job security and due process protections, and (b) the State's goal of improving the quality of children's education by giving them a stable teaching environment and providing the public schools with an additional tool to recruit qualified teachers. Plaintiffs in this litigation—parents and students who reside in the New York City, Rochester, and Albany public school districts—seek to invalidate New York's teacher-tenure system under the Education Article of the New York Constitution, *see* N.Y. Const. art. XI, § 1, on the ground that teacher tenure denies students the opportunity to receive a sound basic education.

3. Supreme Court, Richmond County (Minardo, J.), denied defendants' motions to dismiss, and this Court affirmed. This Court's holding that the complaint here survives a motion to dismiss raises important questions about the pleading standards to state a claim under the Education

Article, and conflicts with the Court of Appeals' recent decision in *Aristy-Farer v. State*, 29 N.Y.3d 501 (2017). This Court's further holding that plaintiffs' claims are not moot despite significant amendments to the statutes that they challenge conflicts with decisions from both the Court of Appeals and the other departments of the Appellate Division. Leave should be granted to permit the Court of Appeals to address these important issues and resolve the legal conflicts created by this Court's ruling.

BACKGROUND

4. Plaintiffs in these actions challenge New York's statutes providing tenure for public school teachers. Plaintiffs' basic claim is that the teacher-tenure system effectively requires school districts to retain incompetent teachers. Plaintiffs allege that, as a result, every school district in the State fails to provide its students with the sound basic education required by the Education Article. (*See, e.g.*, Record (R.) 39 [¶ 7], 1353 [¶7].)

5. The operative complaints here identified four discrete aspects of the teacher tenure system that allegedly contributed to incompetent teaching: (i) teacher evaluation, (ii) tenure eligibility, (iii) teacher discipline, and (iv) seniority protection. While this litigation was pending, the Legislature in 2015 made substantial changes to the teacher-tenure system, including revisions in each of the areas identified by plaintiffs, as part of the Education Transformation Act of 2015 (the "Transformation Act"). *See* Ch. 56, pt. EE,

2015 N.Y. Laws 228, 228-66. The discussion below summarizes both the original statutes challenged by plaintiffs, and the amendments made by the Transformation Act in 2015.

6. ***Teacher Evaluation.*** The law in effect at the time that plaintiffs filed these actions, Education Law § 3012-c, required each school district to adopt an annual professional performance review (APPR) system, under which teachers would be given one of four ratings—highly effective, effective, developing, and ineffective. School districts were required to make APPR ratings a significant factor in teacher employment decisions, including decisions about tenure.

7. The Transformation Act established a new evaluation system, codified at Education Law § 3012-d, which retains the prior law's rating categories, but significantly modifies how those ratings are assigned, reducing local control over the criteria used to evaluate teachers and giving greater weight to specific criteria. Under the new legislation, a teacher's overall rating must be based on both student performance and teacher observations. And the new legislation imposes multiple constraints on the ratings that teachers may receive. *See generally* Brief for State Appellants ("State Br.") at 10-11.

8. ***Tenure Eligibility.*** Under the prior system, a new public school teacher was eligible for tenure after a probationary period of three years if the district superintendent certified that the teacher was "competent, efficient and

satisfactory." Education Law § 2573(5). The Transformation Act extended the probationary period from three years to four—a change that plaintiffs themselves had endorsed (R. 1363 [¶ 46])—and limited grants of tenure to teachers who received an APPR rating of "highly effective" or "effective" in at least three of the four prior years, and did not receive an "ineffective" rating in the last year. *See* Ch. 56, pt. EE, subpt. D, 2015 N.Y. Laws 232, 233-34, 237, 240-41, 242.

9. ***Teacher Discipline Procedures.*** Under the prior system, a teacher could be removed only for cause after a hearing pursuant to procedures set forth in Education Law § 3020-a. The Transformation Act streamlined these disciplinary procedures and created new expedited procedures—set out in a new statutory section, Education Law § 3020-b—specifically designed to identify and remove ineffective teachers more readily. *See* State Br. 7-8, 12-13.

10. ***Seniority Protection.*** When plaintiffs filed these actions, the Education Law contained a "last in, first out" (LIFO) requirement for teacher layoffs mandating that, should a school district abolish a teacher position, the teacher or teachers with the least seniority in that position must be terminated first. *See* Education Law § 2585(3). The Transformation Act added a new provision that limits seniority protection for teachers in failing schools. *See id.* § 211 f(7)(b).

11. The allegations in plaintiffs' complaints all arise from the

operation of New York's pre-Transformation Act statutes. For example, plaintiffs allege that the APPR evaluation system established by Education Law § 3012-c fails to adequately identify incompetent teachers; there is no allegation about the new teacher evaluation system mandated by Education Law § 3012-d. (R. 1361 [¶ 41].) Likewise, plaintiffs allege that the pre-Transformation Act discipline procedures of Education Law § 3020-a effectively prevent school districts from removing incompetent teachers; plaintiffs do not allege any defect in the amended version of those procedures or the new expedited procedures of Education Law § 3020-b. (R. 1364 [¶ 51].)

12. The State originally moved to dismiss plaintiffs' claims before the Transformation Act was enacted on the ground that plaintiffs' allegations were insufficient to satisfy the strict standards imposed on claims under the Education Article. Supreme Court denied the motion on March 12, 2015 (R. 17-33).

13. Plaintiffs declined to amend their complaints after the passage of the Transformation Act. The State moved to renew its motion to dismiss. The State argued that plaintiffs' challenge to the prior teacher-tenure system was moot in light of the Transformation Act's wholesale modification of that system. Supreme Court denied the renewal motion, finding that "the legislature's marginal changes . . . are insufficient to achieve the required result." (R. 957.)

14. This Court affirmed both of Supreme Court's orders. This Court held that plaintiffs' claims were not moot because "[i]t 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.'" *Davids v. State*, 2018 N.Y. Slip Op. 02168, at *2 (2d Dep't 2018) (quoting *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 811 (2003)). And the Court held that plaintiffs' allegations were sufficient to state an Education Article claim on a statewide basis, despite contrary Court of Appeals precedent that this Court cited but did not distinguish. *See id.* at 2; *see also Aristy-Farer v. State*, 29 N.Y.3d 501 (2017).

REASONS FOR GRANTING LEAVE

15. Leave should be granted because this Court's order involves important and novel issues of statewide concern, and conflicts with Court of Appeals and Appellate Division precedent. *See* 22 N.Y.C.R.R. § 500.22(b)(4).

A. This Case Raises Important Questions About the Pleading Requirements for Education Article Claims.

16. This Court's decision allowing plaintiffs' Education Article claims here to proceed conflicts with two fundamental principles established by the Court of Appeals for nearly a quarter century—and reaffirmed just last year. Leave is warranted to resolve this conflict and to clarify the pleading standards for Education Article claims.

17. *First*, unlike any other Education Article claim that the Court of Appeals has ever upheld, plaintiffs' claims here are asserted on a statewide basis, without any attempt to identify particular school districts with constitutional deficiencies in educational services. But as the Court of Appeals reaffirmed just last year, a fundamental requirement of any Education Article claim is a plaintiff's pleading of "district-by-district facts." *Aristy-Farer*, 29 N.Y.3d at 509. Those allegations of district-specific deficiencies must include "deficient inputs—teaching, facilities and instrumentalities of learning—which lead to deficient outputs such as test results and graduation rates." *Paynter v. State*, 100 N.Y.2d 434, 440 (2003). And a plaintiff must further concretely plead that the school district's educational deficiencies are "attributable to the State." *New York Civil Liberties Union v. State*, 4 N.Y.3d 175, 178-79 (2005).

18. The complaints here lack the concrete allegations of district-specific deficiencies required to plead an Education Article claim. There are no nonconclusory allegations that the teachers in plaintiffs' school districts are so incompetent as to deny students the opportunity to acquire a minimally adequate sound basic education. Instead, plaintiffs' complaints contain just a single anecdote relating to one allegedly deficient teacher that one student had for one school year; a single statewide achievement test result of dubious import; and a handful of studies and statistics purportedly indicating that

tenure provisions in general inhibit the removal of "ineffective" teachers. Allowing plaintiffs' Education Article claims to go forward here thus conflicts with the Court of Appeals' unambiguous holding about the pleading requirements for such claims.

19. *Second*, the complaints here do not satisfy the independent requirement that an Education Article claim concretely attribute any educational deficiencies to actions by the State. *See Paynter*, 100 N.Y.2d at 441. It is undisputed that it is the State's nearly 700 local school districts—not the State itself—that directly operate the State's public schools and provide the educational services to which students are entitled. The important element of local control over schools "enshrined in the Constitution," *Aristy-Farer*, 29 N.Y.3d at 511, means the quality of education in a particular school district may be affected less by statewide policies than by local decisions—including a district's policies for hiring and training teachers, which are not controlled by the State. The fact of local control has led the Court of Appeals to require unambiguously that a plaintiff seeking to invalidate a state law under the Education Article identify a "causal link" between any alleged educational deficiencies and the law in question. *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995).

20. The complaints here lack any allegations of such a causal link. Instead, the complaints simply presume that teacher quality will improve once

teachers are stripped of the protections provided by the tenure system. But there are no allegations whatsoever about how local school districts have made or will make the myriad hiring, firing, disciplinary, and retention decisions that are most directly responsible for the teacher workforce in any given locality. Allowing plaintiffs' claims to proceed here without such allegations would thus conflict with the Court of Appeals' requirements for pleading Education Article claims.

21. The pleading requirements that this Court's decision exempts plaintiffs from satisfying are critically important for respecting the separation of powers and the primacy of local control of the public schools. Enforcement of the Court of Appeals' strict pleading requirements for Education Article claims avoids excessive judicial "interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies." *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 444-45 (1979); *see also Matter of New York City School Bds. Assn. v. Board of Educ. of the City School Dist. of the City of N.Y.*, 39 N.Y.2d 111, 121 (1976); *James v. Board of Educ. of City of N.Y.*, 42 N.Y.2d 357, 366 (1977). When, as here, a plaintiff essentially raises a policy objection to a state law rather than identify a district-specific deficiency attributable to the State, "the responsibility" of the courts is "to defer to the Legislature in matters

of policymaking," *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 925 (2003).

22. These concerns about improper judicial interference are particularly heightened in this case, where plaintiffs seek to dislodge the "strong public policy" favoring teacher tenure. *Matter of Feinerman v. Board of Coop. Educ. Servs. of Nassau County*, 48 N.Y.2d 491, 497 (1979). The teacher tenure system provides workplace protections to hundreds of thousands of public servants across the State, which these actions seek to limit or eliminate altogether. And it is not just the teachers whose interests hang in the balance: as plaintiffs themselves acknowledge, a strong and vital teacher workforce is one of the most important ingredients in ensuring that students receive the highest quality education available. The specific policies challenged by plaintiffs here thus make it particularly important that the Court of Appeals have the opportunity to examine whether plaintiffs' allegations satisfy the pleading standards established by the Court's recent precedents.

B. This Court's Mootness Holding Creates a Conflict with Decisions from the Court of Appeals and the Appellate Division.

23. This Court's ruling on mootness also warrants leave to appeal. Contrary to this Court's conclusion, no further factual development or inquiry is necessary to dismiss a plaintiff's claim as moot when the Legislature makes substantial changes to the very statutes challenged by a complaint.

24. This Court's holding to the contrary conflicts with decisions from the Court of Appeals, which has squarely held that a statutory amendment renders a challenge to a prior statute moot, even when the amendment did not fully remedy the alleged defects in the superseded system. For example, in *Cornell University v. Bagnardi,* a university challenged a town's zoning ordinance that did not permit an intended use of the university's property. *See* 68 N.Y.2d 583, 589-90 (1986). The university claimed a constitutional "exemption from local zoning ordinances" and sought a declaration that the town's zoning ordinance could not constitutionally be applied to the university. Comp. ¶ 9, *Cornell University v. Bagnardi,* No. 83-297 (Sup. Ct. Tompkins County Equity Term Oct. 18, 1983).

25. By the time the case reached the Court of Appeals, however, the challenged ordinance had been replaced by a new ordinance that would have allowed the university's use "subject to obtaining a special permit." *Cornell Univ.*, 68 N.Y.2d at 591. The University argued that its action was not moot because the new ordinance was "even more restrictive and unlawful that the old" one. Br. of Pl.-Appellant at 6, *Cornell Univ.*, 68 N.Y.2d 583 (No. 447); *see also* Br. of Defs.-Appellants at 7-8, *Cornell Univ.*, 68 N.Y.2d 583 (No. 447) (arguing in Point I that the case was moot). But the Court disagreed, holding instead that the university's challenge to the old ordinance was "clearly moot" for the simple reason that the new ordinance, rather than the old one, would

"unquestionably govern" the university's conduct going forward. *Cornell Univ.*, 68 N.Y.2d at 592; *see also 903 Park Ave. Corp. v. City Rent Agency*, 31 N.Y.2d 330, 333 (1972) (challenge to local law rendered moot by enactment of modified replacement local law).

26. This Court's mootness holding also diverges from the decisions of other departments of the Appellate Division. For instance, in *Matter of Law Enforcement Officers Union, District Council 182, AFSCME, AFL-CIO v. State*, the Third Department dismissed as moot a challenge to an interim rule governing the square footage required in living quarters for inmates at a prison, after the interim rule was replaced by a final rule with slightly different square footage requirements. *See* 229 A.D.2d 286, 288-90 (3d Dep't 1997). The Third Department held that the claims challenging the interim rule were moot, despite the final rule's failure to fully remedy the interim rule's alleged square-footage defect. *See id.* at 290.

27. Resolving this conflict is important because a rule that would allow a plaintiff to proceed with constitutional claims against a superseded statute risks wasting judicial resources over a dispute that has become academic, *Thomas R.W. ex rel. Pamela R. v. Massachusetts Dep't of Educ.*, 130 F.3d 477, 479 (1st Cir. 1997); and further increases the likelihood that courts will "intrude into areas committed to the other branches of government" by issuing legal proclamations unconnected from any concrete, adversarial dispute, *Flast*

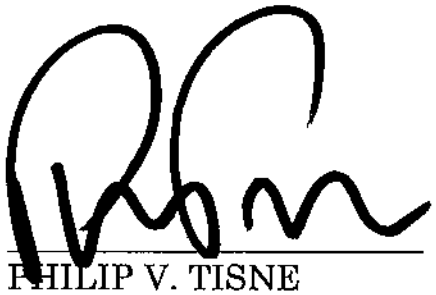
v. Cohen, 392 U.S. 83, 95 (1968). By contrast, adhering to the well-settled principle that legislative amendments moot challenges to a superseded statute ensures that courts are properly evaluating the laws that actually affect the plaintiff.

28. Pursuant to this Court's rules, 22 N.Y.C.R.R. § 670.6(c), the State proposes the following question of law in support of their request for leave to appeal:

Was this Court's March 28, 2018, order properly made?

WHEREFORE, the State respectfully requests that this Court grant leave to appeal to the New York Court of Appeals this Court's March 28, 2018 order.

Dated: New York, New York
April 30, 2018



PHILIP V. TISNE

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

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Argued - November 30, 2017

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

2015-03922
2015-12041

DECISION & ORDER

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)

Eric T. Schneiderman, Attorney General, New York, NY (Steven C. Wu, Andrew W. Amend, and Philip V. Tisne of counsel), for defendants-appellants State of New York, Board of Regents of the University of the State of New York, and New York State Department of Education.

Zachary W. Carter, Corporation Counsel, New York, NY (Richard Dearing, Devin Slack, and Benjamin Welikson of counsel), for defendants-appellants City of New York and New York City Department of Education.

Stroock & Stroock & Lavan LLP, New York, NY (Charles G. Moerdler, Alan M. Klinger, Beth A. Norton, David J. Kahne, and Adam S. Ross, of counsel), for intervenor-defendant-appellant Michael Mulgrew.

Richard E. Casagrande, Latham, NY (Jennifer N. Coffey, Wendy M. Star, Keith J. Gross, Jacquelyn Hadam, and Christopher Lewis of counsel), for intervenors-defendants-appellants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee.

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

New York State, Latham, NY (Jennifer L. Carlson of counsel), for intervenors-defendants-appellants Philip A. Cammarata and Mark Mambretti.

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