New York Supreme Court

Appellate Division—Second Department

App. Div. No. 2015-03922

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, 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-

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,

Intervenor-Defendant-Appellant,

-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,

Intervenors-Defendants-Appellants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants.

BRIEF OF INTERVENOR-DEFENDANTS – APPELLANTS UFT AND COHEN, ET AL. IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, FOR AN INTERIM STAY AND FOR A STAY PENDING APPEAL

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Intervenor-Defendant-Appellants United Federation of Teachers Local 2, American Federation of Teachers, AFL-CIO ("UFT"), together with 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 ("NYSUT") (the "teacher defendants") move, pursuant to CPLR § 5602(b)(1) and 22 N.Y.C.R.R. 500.11, for leave to appeal to the Court of Appeals from the Order and Decision of this Court, dated March 28, 2018 affirming the Orders and Decisions of the Supreme Court, Richmond County, entered March 17, 2015 and October 22, 2015, respectively, denying motions to dismiss filed by all Defendants (the "Supreme Court order") and Defendants' motions to renew.

Copies of the Supreme Court's Orders and Decisions are attached as Exhibit "A" to the moving affirmation of Charles G. Moerdler ("Moerdler Aff."). The UFT's notices of appeal to this Court, timely filed on April 24, 2015 and November 18, 2015, are attached as Exhibit "B" to the Moerdler Aff. This Court's affirmance is attached as Exhibit "C" to the Moerdler Aff.

TIMELINESS OF THE MOTION FOR LEAVE TO APPEAL

This motion for leave to appeal is timely. Plaintiffs served Notice of Entry on March 29, 2018. Pursuant to CPLR § 5513(b), this motion is being submitted within thirty (30) days after the service of this Court's Order with Notice of Entry.

A copy of the Order with Notice of Entry is attached as Exhibit "D" to the Moerdler Aff.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of the motion for leave to appeal. Jurisdiction is based upon CPLR § 5602.

PRELIMINARY STATEMENT

It cannot be seriously disputed that this case presents legal and public policy issues of immense statewide significance. Plaintiffs have asked the Court to invalidate the statutes that (a) accord due process to those teachers who have successfully completed probation (N.Y. Educ. Law §§ 1102, 2509, 2573, 2590, 2590-j, 3012, 3014, 3020 and 3020-a), (b) involve teacher evaluation (N.Y. Educ. Law § 3012-c)[1] and discipline for those teachers who fail to provide efficient and competent services, and (c) require, in the event of a city-wide or district-wide layoff, that such layoffs be conducted in reverse seniority order (N.Y. Educ. Law §§ 2510, 2585, 2588 and 3013) (collectively, the "Challenged Statutes").

The lives of over 2.7 million students and over 205,000 teachers throughout the State will be directly impacted by the Plaintiffs' challenge to the constitutionality of these long-standing statutes, including teacher tenure in particular, which for well over a century has been repeatedly upheld by the Court of Appeals as not only a benefit to students, but also as a cornerstone of the State

[1] As set forth in Section III, Educ. Law 3012-c has been superseded by Educ. Law 3012-d.

education system. *E.g.*, *Callahan v. Bd. of Educ. of City of New York,* 174 N.Y. 169 (1903). Teacher recruitment and retention throughout the State thus hangs in the balance.

The legal issues presented in this case are of statewide public importance and merit review. Such review can only occur should this Court grant leave to appeal since the order of this Court does not finally determine the action. CPLR 5602(b). Leave should be granted because "the issues are novel or of public importance," and "present a conflict with prior decisions" of the Court of Appeals. *See* Rules of the Court of Appeals, § 500.22 (b)(4).

The issues thus tendered include the first impression legal question of how New York views the cognizability of a complaint that does not assert or even implicate inadequate funding or related claims brought under Article XI, § 1 of the New York State Constitution -- the Education Article. *See*, *Paynter v. State of New York*, 100 N.Y. 2d 434, 442 (2003).

Additionally, review of the determinations of the Supreme Court and this Court is sought in order to square their holdings with the long-held and oft articulated Court of Appeals jurisprudence that

- allegations of "academic failure," even if true, do not suffice to sustain a cognizable claim under the Education Article (*N.Y. Civ. Liberties Union v. State*, 4 N.Y.3d 175 (2005));

  a cognizable claim under the Education Article is not stated unless the plaintiffs allege a specific "district-wide" or "system-wide"

failure of gross or glaring inadequacy (*e.g., Aristy-Farer v. State*, 29 N.Y.3d 501 (2017));

- a cognizable claim is not stated unless the plaintiffs allege (1) the deprivation of a sound basic education and (2) causes attributable to the State (*N.Y. Civ. Liberties Union*, 4 N.Y. 3d at 178-79); and

- a cognizable claim under the Education Article is not stated unless there is a "clear articulation of the asserted failings of the state, sufficient for the state to know what it will be expected to do should the plaintiffs prevail" (*N.Y. Civ. Liberties Union*, 4 N.Y.3d at 180).

These pleading requirements ensure that the Education Article is not used to "alter the substance" of the established education system, and that it remains a system-oriented mandate rather than a tool to constitutionalize individual dissatisfaction with the local administration of education or other political disagreements. *E.g.*, *Paynter, supra,* 100 N.Y.2d at 442. These standards, as articulated in *Paynter,* also are designed to ensure that the judiciary does not involve itself in complex pedagogical policy questions such as what makes for an "effective" or "ineffective" teacher. And the pleading dictates preserve the gatekeeping function of the court in shielding the City, State and other governmental entities and defendants from years of costly discovery based upon unsupported allegations or general political disagreement with education policy in New York.[2]

[2] Relatedly, the Intervenors-Defendants-Appellants challenged Plaintiffs' complaints on the grounds that they failed to plead the requisite injury necessary to confer standing. This Court only treated this issue briefly, and it too, is appropriate for the Court of Appeals to address.

At issue, therefore, is whether suit should be permitted past the motion to dismiss stage where it creates a lower pleading standard than the Court of Appeals has mandated for bringing an Education Article claim. The Court of Appeals should decide whether it will allow such claims to be brought under the guise of a constitutional challenge.

Indeed, Plaintiffs have implicitly conceded that they have not met the two-prong test of sufficiency mandated by *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 178-79, arguing that they "are not required to offer clear evidence of causation at the pleading stage." (Moerdler Aff. Exhibit "E"). Yet, the Court of Appeals has expressly held that the failure to "sufficiently plead" causation by the State is "*fatal*" to an Education Article claim. *N.Y. Civ. Liberties Union*, 4 N.Y.3d at 178-79 (emphasis added). Thus, by permitting this action to proceed in the face of an explicit prerequisite mandated by the Court of Appeals, new and vastly expanded law in Education Article jurisprudence would be created, of itself meriting Court of Appeals review.

Notably, less than a year ago, the Court of Appeals in *Aristy-Farer v. State,* 29 N.Y.3d 501, 515-16 (2017), again made crystal clear that a showing of causality – the touchstone issue which plaintiffs herein maintain they may avoid at this juncture – is the *sine qua non* of a cognizable Education Article claim. And it merits emphasis that *Aristy-Farer* presented that touchstone issue under procedural

circumstances strikingly similar to those here present. There, as here, the Supreme Court declined to grant defendants' dismissal motions. The First Department affirmed and Court of Appeals review followed, with the First Department agreeing that Court of Appeals review was merited because of the statewide importance of educational issues that, at the very least, provide a fair ground for dispute and resolution. After all, allowing the case to proceed would also create a new far-reaching cognizable theory under the Education Article, one in which the Judiciary would enter the classroom and evaluate the classroom experience as part of a constitutional analysis. Stated otherwise, almost any perceived departure from a plaintiff's view of the proper basic educational experience would fall within the rubric of an Education Article challenge, one that would not only impose impossible burdens on the education system, but would have the judiciary become the arbiter of educational standards. And that would fly in the face of the precise terms of the Education Article, which in its opening terms places the burden on the Legislature, not the Judiciary or even Executive Branch ("The legislature shall provide for the maintenance and support of a system of free common schools ...." N.Y. S. Constitution, Art. XI, § 1).

The significant precedential impact of permitting the case to go forward should not overshadow the practical effect. This Court recognized the realistic impact of proceeding past the motion stage. Already pending since 2014, at oral

argument, this Court was keenly interested in the likely length of time and cost that discovery would entail. In response to a specific question posed by Justice Rivera, Plaintiffs' counsel responded that discovery could take at least two additional years. No doubt it would also cost hundreds of thousands, if not millions, of dollars of money from the public fisc, not to mention the limited funds of teacher representatives. Public officials throughout the State – potentially the Chancellor of the Board of Education in New York City, members of the Board of Regents, superintendents of school districts statewide and others – would likely need to be deposed; the educational records of hundreds, if not thousands of students would likely be called for, as would the records of school districts across the state, all of which would then have to be examined and copied to substantiate or contradict the outdated and discredited statistics of academic performance and rank conclusory assertions upon which the complaints herein depend. Among the myriad reasons for closely examining Education Article cases at the pleading stage is the significant time and expense of proceeding to discovery on the seemingly unbound question of the adequacy of New York State's education system – a question that took years to resolve in the *CFE* litigation. Hence, it is no wonder that the preponderance of cases to reach the Court of Appeals under the Education Article were decided following motions to dismiss.

Indeed, in this case on April 23, 2018, the Supreme Court, Richmond County (Justice Alan Marin), was urged by Plaintiffs to permit the promised multi-year discovery onslaught to commence, beginning with document discovery. Justice Marin, perhaps having in mind the requirement that statewide proofs of alleged violation would be required (*Aristy-Farer, supra,* 29 N.Y.3d at 506) and noting that Court of Appeals review might narrow if not obviate the resultant statewide document dragnet, declined that invitation and, instead, extended Defendants' time to answer, thereby permitting the filing of this leave application prior to such onslaught.

In addition to creating new law on the sufficiency and character of a constitutional claim, the determinations sought to be reviewed also alter the established definition of "mootness". The changes to the Challenged Statutes that Plaintiffs seek have, with limited exceptions, now been either directly amended by Chapter 56 of the Laws of 2015 (Ch. 56, 2015 N.Y. Laws 108-156 (L.R.S.)), have significantly impacted prior law in their implementation, or reflected consideration and rejection by the Legislature, which is particularly important given that the Education Article directs the "Legislature" (not the Executive or Judicial Branches) to provide the mandated protections. Even accepting, *arguendo*, Plaintiffs' claim that somehow poor student performance can be discerned from the test scores (some dating as far back as 2007 and which the Board of Regents have

found unsuitable for student or teacher evaluation) and that such performance is attributable to (supposedly) ineffective teachers who are retained solely as a result of tenure and seniority, Plaintiffs have not pled, nor can they, that this occurred under the *current* statutory regime, which includes a longer probationary period, a newly revised teacher evaluation system, and new standards for teacher disciplinary hearings. For example, Plaintiffs railed below against the sufficiency of a three-year probation period and had urged it be four years. After considerable debate, the Legislature changed the probationary period to four years for most new hires. This (and other) Legislative action in the field reinforces the point that Plaintiffs have presented non-justiciable, political questions, ones more appropriately handled by the other branches of government. The Court of Appeals should decide whether these new laws of statewide application, obviate the need for this lawsuit.

This Court briefly addressed the mootness of the challenge based on the Budget Bill, suggesting that it cannot be concluded at this stage that a declaration would have "no practical effect on the parties." *Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801, 811 (2003). But the same case cited by the Court, *Saratoga County*, also holds that the mootness doctrine applies where "changed circumstances" prevent the court from rendering a decision which would determine an actual controversy between the parties. That is precisely what

occurred here. "Changed circumstances" means that Plaintiffs are now challenging a statutory regime *that is largely no longer operative*, or, stated otherwise, are predicating their claims upon asserted abridgment of statutes that, in critical respects, no longer say what they once said. And that too presents an apt question for review since in the final analysis it is for the Court of Appeals to make clear what it intended and whether determination of that question should be preceded by years of burdensome discovery and trial or may, as we submit, be determined on motion to dismiss under these circumstances.

The impact of this Court's decision is not limited to the Education Article context. With a broad brush, Plaintiffs have attempted to hold the State and the entire statutory system of tenure unconstitutional; they have not sought to invalidate the laws as they apply to a particular student, category of students or particular circumstances in which the Challenged Statutes are applied or misapplied. Instead, Plaintiffs have mounted a frontal attack on the entire tenure system as it functions for all students. It has long been axiomatic that legislative enactments enjoy a strong presumption of constitutionality and a party mounting a facial constitutional challenge – as is the case here – bears the substantial burden of demonstrating that "in any degree and in any conceivable application the law suffers wholesale constitutional infirmity." *Moran Towing Corp. v. Urbach,* 99 N.Y.2d 443 (2003). There must be "no set of circumstances" under which the Act

would be valid. *Id. at* 448. However, Plaintiffs conceded in their complaint that the "vast majority" of students receive a "sound basic education", and thus, that the statute *is* regularly applied in a constitutional manner (Exhibit "F" to Moerdler Aff.). Assuming constitutional scrutiny is even applicable here, review is warranted by the Court of Appeals to clarify these principles of facial versus as applied challenges and the strongly presumed constitutionality of existing law.

Finally, allowing Plaintiffs to proceed in this action positions New York State as a national outlier, an unenviable position when it comes to teacher recruitment and retention. This case is one of a series of cases throughout the country seeking to invalidate teacher tenure filed on the heels of a California lower court determination. It is the only one still surviving. Thus, in *Vergara v. State,* 246 Cal. App. 4th 619 (2016), which at the outset of this litigation was proclaimed by plaintiffs as the benchmark for determining the validity of tenure—plaintiffs challenged the constitutionality of California's statutory protections for teachers (including the length of probation, the statutes governing dismissal and the "last-in-first out" statutes). There, as here, plaintiffs relied on test scores, without more, and asserted that tenure was the cause of poor performance, which reflected an inadequate education. A nationwide public relations campaign followed trumpeting the virtue of the initial *Vergara* ruling. Yet, *Vergara* was dismissed on appellate review. In Minnesota, too, plaintiffs in *Forslund v. Minnesota* alleged

that the teacher tenure statutes in that state deprived students of an adequate education under that State's Education Clause by leaving "ineffective" teachers in the classroom and prematurely conferring "permanent" employment. It too was dismissed. *Forslund v. State,* 2017 Minn. LEXIS 766 (Minn., Nov. 14, 2017). *See also*, *H.G., a minor, through her Guardian, Tanisha Garner v. Kimberly Harrington, et al.*, (Dkt No. L-2170-16, N.J. Superior Court, Mercer Co., May 4, 2017).

The complaints in *Vergara* and *Forslund* were dismissed – in *Vergara*, because plaintiffs failed to show that the challenged statutes *caused* a constitutional violation, and in *Forslund,* because the Appeals Court found that the complexity of what makes for an "effective" or "ineffective" teacher was not within the jurisdictional province of the judiciary to decide. The exact same defects are cited as predicates for dismissal here, among other reasons. At the very least, the Court of Appeals should have the final word on whether New York State should remain a national outlier on the question of the constitutionality of teacher tenure.

QUESTIONS FOR REVIEW

1. Was it error to deny the UFT and teacher defendants' motions to dismiss Plaintiffs' amended complaints alleging violations under the Education Article (Article XI, § 1) of the New York State Constitution despite Plaintiffs' failure to plead causality, "system-wide" failure and singular reliance on repudiated statistics, anecdotes and conclusory argument?

This Court answered this question: "No."

2. Was it error to deny the UFT and teacher defendants' motions to dismiss Plaintiffs' amended complaints despite "changed circumstances" resulting from legislative action which render the amended complaints' allegations regarding the Challenged Statutes moot?

This Court answered this question: "No."

3. Was it error to deny the UFT and teacher defendants' motions to dismiss Plaintiffs' facial challenge to the Challenged Statutes despite Plaintiffs' failure to plead that there are no circumstances under which the laws operate constitutionally?

This Court answered this question: "No."

4. Was the order of the Supreme Court properly made?

This Court answered this Question "Yes," by its affirmance of the order of Supreme Court.

STANDARD OF REVIEW

In determining whether to grant leave to appeal, the Court generally looks to the novelty, difficulty, and importance of the legal and public policy issues the appeal raises. *In re Shannon B.,* 70 N.Y.2d 458, 462 (1987). Leave to appeal is often granted when the issues implicate significant state interests or are of statewide application and importance. *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its far-reaching consequences"); *see also* 22 N.Y.C.R.R. § 500.22 (leave should be granted when "the issues are novel or of public importance"). Here, the issues

implicate significant state interests that ought to be decided by the Court of Appeals.

ARGUMENT

I. THE SUFFICIENCY OF PLAINTIFFS' COMPLAINTS CHALLENGING THE CONSTITUTIONALITY OF TEACHER TENURE AND SENIORITY IS OF STATEWIDE IMPORTANCE

This action threatens to upend a system of due process that has existed for a century and that has been determined by the Court of Appeals to be a crucial cornerstone of New York's education system. *Callahan, supra,* 174 N.Y. 169. It is undeniable that the case is of critical statewide significance and will have far-reaching consequences. At issue, among other statutes, is the constitutionality of New York's tenure law, which allows dedicated, high quality teachers to know that they can work without fear of unwarranted repercussions and that they are insulated from political and other outside influences. This is particularly important in today's politically charged climate where teachers are under heightened scrutiny and critique. Indeed, since 2008, teacher ranks have diminished and the pace of retirements has been a strain in school districts trying to fill teaching positions. Spector, Joseph, *NY's Teacher Ranks Continue to Plummet,* THE JOURNAL NEWS, Feb. 15, 2016. The number of public classroom teachers has fallen by 8% over the past 10 years. Clukey, Keshia, *As Shortage Looms, State Rethinks How It Recruits and Treats Its Teachers*, POLITICO, March 7, 2016. With

33% of the State's teaching force nearing retirement age, and a continuing decrease in those attending college to become teachers, New York's teacher shortage may soon become a crisis. *Id.* Given this exceedingly challenging atmosphere, it is no wonder that the Legislature has been actively working on measures addressing fair evaluation and due process for post-probationary teachers. Tenure does not simply afford due process to post-probationary teachers, it inures to the benefit of *students* by enabling teachers to grade papers honestly, differentiate instruction for students who need accommodation, speak out for the needs of children, teach controversial subjects and blow the whistle on corruption and poor practices.

Plaintiffs' proposed relief – eliminating due process and seniority rights for hundreds of thousands of experienced teachers statewide – will only exacerbate statewide difficulties in attracting and retaining the most qualified teachers. Nine cases under the Education Article have come before the Court of Appeals since 1982, the preponderance on motions to dismiss. As here, the issues in all of the cases, the adequacy of the education system in New York State, present matters of clear and immense statewide importance. However, this is the first case to present a challenge not in any way related to the sufficiency of funding or asserted discrimination, either geographic, demographic or the like.

II. THIS COURT'S AFFIRMANCE OF THE SUPREME COURT'S DECISION PRESENTS A CONFLICT WITH PRIOR EDUCATION ARTICLE DECISIONS OF THE COURT OF APPEALS

The Court of Appeals has never sustained the validity of a challenge such as here mounted. To the contrary, the *only* successful challenges under the Education Article that have ever been recognized by the Court of Appeals are those involving the Legislature's failure to adequately fund or provide sufficient resources and supports, financial or otherwise, to schools. Attempts to expand the scope of challenge have been rejected. *E.g., Paynter supra,* 100 NY.2d 434.

Of the decisions rendered by the Court of Appeals addressing the cognizability of Education Article claims, only two squarely presented issues other than the adequacy of funding, *Paynter* and *N.Y. Civ. Liberties Union,* two of the three most recent decisions by that Court. Significantly, both *Paynter* and *N.Y. Civ. Liberties Union* came to the Court, as here, on motions to dismiss. And, in both, the Court *rejected* the plaintiffs' attempts to invoke the Education Article.

In *Paynter*, the claim, grounded as here on statistical data, was that the State had failed to redress demographic imbalances thereby causing the schools in Rochester to have some of the worst test scores in the State. 100 N.Y.2d at 440. The plaintiffs maintained that the State had a responsibility to find a solution, including permitting students to attend schools outside their district, effectively invalidating N.Y. Educ. Law § 3202(2). The Court of Appeals affirmed dismissal

of the complaint, holding that it did not state a claim under the Education Article and, instead, abridged the fundamental concept of local operational control. *Paynter,* 100 N.Y.2d at 442. In *N.Y. Civ. Liberties Union*, adequacy of State funding was not the primary issue, although a funding component was arguably present. Rather, the plaintiffs alleged that some 27 named schools were failing in "that minimally acceptable educational services are not being provided in their schools" and the State was remiss in not finding a solution. 4 N.Y.3d at 181. Again, the Court of Appeals dismissed.

Since 1982, in *Levittown v. Nyquist,* the Court of Appeals has, in a series of cases, clarified what the Education Article requires and what claims are appropriately decided in the judicial branch and what claims are more prudentially left to legislative and local prerogative (or, where *ad hoc* challenges to specific teachers, districts or issues are presented, Article 78 challenges apply). The Court of Appeals has been clear that the aim of the constitutional provision was to preserve an established system of common schools, not to "alter its substance." *Paynter,* 100 N.Y.2d at 442.

To survive the pleading stage, an Education Article claim must allege (1) the deprivation of a sound basic education; and (2) causes attributable to the State. *N.Y. Civ. Liberties Union*, 4 N.Y.2d at 178-79. To meet the first prong, a claim must be based on more than allegations of "academic failure[s]," even if true; and

the claim must be of a State-wide or district-wide systemic failure. To satisfy the second, a causal connection between State action or inaction and the complained of deprivation of a sound basic education. Plaintiffs do not claim to have met those criteria; instead, they maintain that they do not have to, at this stage at least. (Exhibit "E" to Moerdler Aff). To sustain that drastic view of the law—as the determinations here sought to be reviewed have effectively done – merits review by the authors of the predicate test, the Court of Appeals.

The allegations in this proceeding do not meet threshold requirements that the Court of Appeals has heretofore articulated for a cognizable claim under the Education Article. Plaintiffs invoke the Education Article based on little more than a handful of repudiated statistics (*e.g.,* the recently discredited 2013 grade 3-8 English Language Arts and Mathematic State Assessment scores), inconclusive anecdotes (*e.g.,* a three-paragraph description of two students who progressed at different levels), and bald conclusory argument (*e.g.*, alleging, without support, that there are "tens of thousands" of public school students with ineffective teachers), rather than factual allegations. Indeed, Plaintiffs acknowledge their failure by the claim that they "are not required to put forward clear evidence of causation at the pleading stage." (Exhibit "E" to Moerdler Aff.). Whether the Education Article was meant to be utilized in this fashion – and that has never been the view of the Court of Appeals – of itself merits review.

With respect to the required showing of causality, neither the hiring, nor retention, nor discipline that Plaintiffs complain of are attributable to system-wide *State* ailments; they are all squarely local functions.[3] Of itself, Plaintiffs' assertion that their grievance is predicated upon such local action (or inaction), as contrasted with State action, mandates dismissal under the Court of Appeals' ruling in *N.Y. Civ. Liberties Union.*

From a broader perspective, the types of claims alleged here, political dissatisfaction with the policy of tenure or anecdotal frustration with individual teachers has never been the sustained target of the Education Article. The constitutional protection was meant to be (and has been) applied in cases where the Legislative and Executive branches fail in their function to provide the basic level of funding for schools, school buildings and standards for certification. With respect to teachers and teaching, the Constitution, according to the Court of Appeals, at most, requires the State to provide the teaching of reasonably up-to-date basic curricula by "sufficient personnel *adequately trained*." *Campaign for Fiscal Equity v. New York,* 86 N.Y.2d 307, 316 (1995) (emphasis added). No claim is made herein of inadequate training, to provide just one illustration of the

[3] To illustrate, in New York City, teachers are, by law, hired by the Board of Education of the City School District of the City of New York (the "DOE"), retained and paid by the DOE, and disciplined under DOE-administered processes. N.Y. Educ. Law §§ 2573, 2590-g, 3020. The same construct exists throughout the State, with local school districts and their boards of education responsible for hiring, paying and disciplining teachers (in addition to the granting or denying of tenure). *See, e.g.*, N.Y. Educ. Law §§ 2503(5), 2554(2).

insufficiency of Plaintiffs' claims. The focus from a constitutional perspective on "sufficient personnel" is on funding and training and on the system as a whole, not on the particulars of policy or pedagogy or a purportedly ineffective teacher. The Court has left in-classroom issues, such as the efficacy of teachers, to "people with a community of interest and tradition of acting together to govern themselves," so that they may make the "basic decisions" on "operating their own schools." *Paynter,* 100 N.Y.2d at 442. The Education Article was not intended to "interject [the Judiciary] into the day-to-day administration of the school system or educational policy." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 83 A.D.2d 217, 234 (2d Dept. 1981). Plaintiffs' claims would interject the Judiciary into the local administration of education.[4] The determination as to whether this first impression opening to the expansion of judicial interjection is permitted should, we submit, rest with the Court that has thus far ruled otherwise.

Like many of the cases that were dismissed by the Court of Appeals, Plaintiffs' claims threaten to disrupt the "disciplined perception of the proper role of the courts in the resolution of our State's educational problems" and could "alter the substance" of the education system of New York State. *Bd. of Educ.,Levittown*

[4] As just one example, Plaintiffs argue that the § 3020-a procedures are too burdensome, leading to the promotion and retention of ineffective teachers. However, eliminating the § 3020-a process, as Plaintiffs purport to seek, is a far cry from the manifest and palpable inadequacies which give rise to constitutional challenges, and which are properly decided by the courts.

Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 49 (1982). The claims amount to statewide education policy-making in an area where the government has been exceedingly active. As detailed at Point III, the legislative and executive branches in New York are now actively engaged in addressing the multi-faceted matters facing our educational system – issues of underlying inadequate funding, class size and the like, which have all been shown to have a direct impact on student achievement. The Legislature has prescribed a new set of requirements regarding teacher probation, evaluation, discipline and dismissal.[5] Plaintiffs seek to have the Judiciary effectively supplant the Legislature's evaluation system with its own determination of what makes for an effective teacher.

Moreover, while the Court of Appeals has ruled that under the Education Article, as one of the analytical inputs to a "sound basic education," children are "entitled to minimally adequate teaching of up-to-date basic curricula such as reading, writing, mathematics, science and social studies by sufficient personnel adequately trained to teach those subject areas," not only is the adequacy of training nowhere challenged in these pleadings, more importantly, it has never been held by the Court of Appeals or any other court in New York, that this analytical "input" involves a judicial assessment of the "effectiveness" of a teacher. To conclude otherwise would create a far broader reach for the Education

[5] It merits noting that the Legislature has, as of *last week*, introduced another bill to amend the evaluation system to reduce reliance on the very tests on which Plaintiffs seek to base their complaints.

Article than has thus far been permitted by the Court of Appeals, a Court that has been expressly "loathe to enmesh" itself in the local administration of schools. *Hussein v. New York*, 19 N.Y.3d 899, 907 (2012). The minimal constitutional guarantee was never meant to embroil the courts in the local and national debate on student achievement, standardized tests and how to measure student and teacher performance. This potential significant statewide expansion of constitutional claims should be decided by the Court of Appeals.

III. THE SUPREME COURT'S DETERMINATION, AS AFFIRMED BY THIS COURT, CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF MOOTNESS

It is black letter law that a court is prohibited from providing "advisory opinions" or ruling on "academic, hypothetical, moot or otherwise abstract questions." *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 810-11 (2003) (quoting *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980)). This principle is founded partly in the constitutional separation of powers doctrine, which is of particular import here. The function of the legislative branch is to make the laws, it is the role of the judicial branch to interpret them. Should the judicial branch be permitted to interpret laws earlier than is necessary, the line between the legislative and judicial branches could become blurred. This is exactly the type of interference Plaintiffs propose by challenging a statutory scheme that is no longer operative.

Plaintiffs brought this action in 2014. In 2015, the Legislature amended the Challenged Statutes and, in doing so, addressed many of Plaintiffs' concerns. In enacting the 2015 amendments, the Legislature contemplated each and every statute challenged by Plaintiffs. These deliberations resulted in amendments to the Challenged Statutes, including, *inter alia,* an increase in the length of the probationary period for new teachers (from three years to four), revisions to the teacher evaluation system delineating specific rules for determining an individual teacher's rating, and expedited removal processes for teachers who are rated as ineffective. (R. 1285-86).

The complaints herein do not present one single allegation regarding the interaction of the statutes *as amended*, instead they ask the courts to opine on how the *prior statutes or previous statutory language* may have operated in the past and, based on those allegations, invalidate the statutes as now re-written. Such a request not only implicates the mootness doctrine but also threatens the separation of powers doctrine upon which it is premised.

While the parties here may disagree as to the extent of the changes in the Challenged Statutes, that should be of no moment. The relevant issue for purposes of Defendants' motion to dismiss is that the statutes identified by the Plaintiffs as unconstitutional are, in certain respects, *no longer in effect.*

Indeed, Plaintiffs were provided an opportunity by the trial court to amend their complaints in light of the 2015 amendments *but chose not to do so;* instead, despite the invitation of the Supreme Court to redirect their challenges to what now is the law, Plaintiffs opted to continue their attack on a now defunct statutory scheme. While this Court's decision indicates that whether the claims are moot "cannot be concluded at this stage of the proceedings," the question is an entirely legal one – no factual discovery – much less a statewide onslaught of discovery, will change the analysis of whether the new law supplants the old or the pleadings before the Court even address extant laws.

Where "changed circumstances" prevent the court from rendering a decision that would determine an *actual* controversy between the parties, the mootness doctrine applies. *Saratoga County*, 100 N.Y.2d at 811. There, plaintiffs challenged an amendment that had, by its terms, expired, thus rendering the action moot. *Id.*. Similarly, here, Plaintiffs are proceeding with a challenge to statutes that are no longer in effect. As in *Saratoga County*, there is no live controversy to be adjudicated and we submit the Court of Appeals should decide whether the doctrine of mootness can be avoided in such circumstances.[6]

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[6] Notably, this Court did not find that any of the exceptions to the mootness doctrine recognized by the Court of Appeals were applicable here. Indeed, they are not. The Court of Appeals has recognized the following exceptions to the mootness doctrine: (i) where there is a likelihood of repetition, either between the parties or among other members of the public; (ii) for a phenomenon typically evading review; or (iii) where there is a showing of significant or important questions that the courts have not previously passed on. *Hearst Corp.*, 50 N.Y.2d at

IV. THIS COURT'S AFFIRMANCE OF THE SUPREME COURT'S DECISION CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES OF CONSTITUTIONAL REVIEW

Finally, this Court's affirmance should be addressed by the Court of Appeals because it conflicts with long-standing requirements for pleading a facial constitutional challenge to existing law. Under well-established precedent, a plaintiff "can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Amazon.com, LLC v. New York State Dept. of Taxation and Finance*, 81 A.D.3d 183, 194 (1st Dept. 2010), *affirmed sub nom, Overstock.com, Inc. v. New York State Dept. of Taxation and Finance*, 20 N.Y.3d 586 (2013). Plaintiffs have conceded that the "vast majority" of students in fact do receive a "sound basic education" and thus, that the statute *is* regularly applied in a constitutional manner. (Exhibit "F" to Moerdler Aff.). Thus, under a facial attack the complaints should have been dismissed as a matter of law.

The Plaintiffs have not even come to a unified conclusion as to how they themselves would characterize their allegations. At least the Wright Plaintiffs

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714-15. As discussed above, actions under the Challenged Statutes cannot be repeated as the statutes are no longer operative. Nor is this a circumstance where there is no opportunity for review. Should the Plaintiffs have issue with the currently operative statutory scheme, they are free to bring a proceeding challenging the current iteration of the statutes. Indeed, Plaintiffs were given this opportunity by the trial court. Finally, it cannot be said that the issues presented herein have not been previously passed on by the court. The Court of Appeals has long-held tenure to be of vital import to the New York State education system. *Callahan*, 174 N.Y. 169.

insisted that their complaint is in the nature of an "as-applied" challenge, perhaps to avoid the more stringent standard applied to facial attacks. The Davids Plaintiffs suggested that there are "many instances in which courts will invalidate statutes *in toto* without casting the claim as a 'facial' challenge." Yet, in support of the proposition that there are "many instances," they failed to cite a single case from New York. That is likely because the vast majority of true, as-applied challenges are either decided in the context of an Article 78 proceeding or in plenary actions seeking remedies far narrower than the judicially disfavored wholesale cancellation of an entire Legislative enactment. *E.g., Wood v. Irving,* 85 N.Y.2d 238 (1995); *Tamagni v. Tax Appeals Tribunal,* 91 N.Y.2d 530 (1998).

The distinction between an "as-applied" versus facial challenge is consequential. Facial challenges are disfavored, and Plaintiffs have yet to explain the appropriateness of declaratory relief for the wholesale invalidation of an entire legislative scheme (albeit one that has materially changed), as contrasted with remedial relief (assuming any relief is warranted) in an appropriate case (naming the specific localities and claims involved) and seeking relief that ensures these facially constitutional laws are appropriately enforced at a local level. Plaintiffs have attempted to avail themselves of the remedy of a facial challenge – wholesale invalidation of the Challenged Statutes – with a level of scrutiny reserved for "as-applied" challenges. That approach conflicts with decades of Court of Appeals

precedent on the nature of constitutional challenges. *E.g., McGowan v. Burstein,* 71 N.Y.2d 729 (1988).

The Court of Appeals has also clearly laid out two distinct levels of scrutiny for challenges to a statute as applied against *all* individuals and entities and those solely seeking invalidation as those statutes apply to the parties. Plaintiffs have not adhered to this framework, and the Court of Appeals should determine how this well-established system applies to the attacks on the Challenged Statutes.

V. A STAY PENDING APPEAL SHOULD BE GRANTED

Defendants have made clear that they intend to pursue discovery in this action, despite the pendency of the leave application, and would continue to do so even if leave is granted. Thus far, the Supreme Court has resisted the commencement of the promised exceedingly onerous discovery, but has deliberately left to the appellate tribunals the determination as to what they deem appropriate on this leave application. The Court should stay discovery while it decides whether this case should go forward and during the pendency of an appeal.

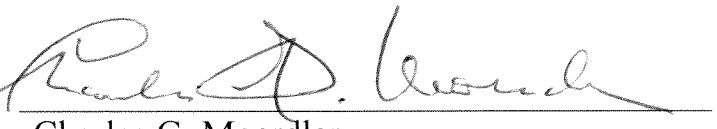
The terms of CPLR § 5519(c) afford litigants in civil judicial proceedings the opportunity, at the discretion of the court, to obtain a court ordered stay of an order pending appeal. While the language in CPLR § 5519(c) does not provide any criteria for issuing a discretionary stay, courts frequently consider the merits of the appeal (*see Rosenbaum v. Wolff,* 270 A.D. 843 (2d Dept. 1946)), as well as the

exigency or hardship confronting a party without the stay (*see McKinney's Cons Laws of NY*, Book 7B, CPLR C5519:4 (2015)). Stays are also granted where it will prevent the disbursement of public funds pending an appeal, which may be determined in the government's favor. *Summerville v. City of New York*, 97 N.Y.2d 427 (2002).

The reasons for a stay pending appeal here are self-evident. Defendants intend to seek an appeal and there is no prejudice to Plaintiffs from a stay. Yet, the commencement of discovery will force all Defendants, including the government, to expend a great deal of resources, when the appeal (dealing strictly with legal issues) may obviate or limit the need for discovery. Accordingly, the Intervenors-Defendants-Appellants request that this Court grant a stay pending appeal in the Court of Appeals.

Dated: New York, New York
April 30, 2018

STROOCK & STROOCK & LAVAN LLP

By: 

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