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

REPLY 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.,

REPLY AFFIRMATION IN FURTHER 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 Barbara D. Underwood, 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 reply affirmation based on personal knowledge in further 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. Because this Court's order is nonfinal, only this Court may grant leave to appeal to the Court of Appeals. *See* C.P.L.R. 5602(b)(1). The State's motion identified three aspects of this Court's order that raise novel and important issues warranting leave. *See* Affirmation in Support of Motion for Leave to Appeal ("State Mot.") ¶¶ 16-27. Plaintiffs offer no compelling response on these points. Indeed, plaintiffs do not and cannot seriously dispute the novelty and importance of the legal issues raised here, or the central importance of the teacher tenure system that plaintiffs' lawsuit seeks to fundamentally transform outside of the ordinary legislative process. Leave should thus be granted.

3. *First*, Court of Appeals review is warranted to address whether and under what circumstances a plaintiff may assert an Education Article claim on a statewide basis, without alleging district-specific deficiencies. As the Court of Appeals held just last year, Education Article claims ordinarily cannot be asserted on a statewide basis, but rather "must be pleaded with district specificity to be viable." *Aristy-Farer v. State*, 29 N.Y.3d 501, 510

(2017). That pleading requirement reflects the fact that local school-district control over a variety of education policies—including teacher employment decisions—mean that "it cannot ordinarily be inferred that deficiencies in . . . *educational services* in one school district are mirrored in another." *Id.* at 511 (emphasis added). As applied to the facts of this case, *Aristy-Farer* would preclude any easy inference that teacher tenure rules have precisely the same effect on teacher quality in every school district—thus necessitating district-specific allegations to satisfy pleading requirements for Education Article claims. Yet plaintiffs' complaints are bereft of district-specific allegations, and plaintiffs do not contend otherwise: they acknowledge that they can proceed here only if they are permitted to assert their claims on a statewide basis. *See* Plaintiffs' Opposition to Motions for Leave Appeal ("Leave Opp.") 19.

4. The Court of Appeals has never upheld a statewide claim under the Education Article, and no other court has ever permitted such a claim prior to this case.[1] Plaintiffs attempt to rely a footnote in *Aristy-Farer*, in which the Court of Appeals refused to "foreclose" the possibility that a plaintiff "might" be able to assert an Education Article claim on a statewide basis. *Aristy-Farer*, 29 N.Y.3d at 510 n.5; *see also* Leave Opp. 20. But plaintiffs' reliance is

---

[1] Contrary to plaintiffs' suggestion (Leave Opp. 19), the *Campaign for Fiscal Equity* litigation involved Education Article claims about a single school district—the New York City school district—not a statewide claim. *See, e.g., Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 314 (1995) ("*CFE I*").

misplaced. That footnote acknowledged, at most, that certain statewide policies might be so drastic that it would be nearly inconceivable that students could receive a minimally adequate education—for example, if the State were to totally defund math education. Teacher tenure protections bear no resemblance to these extreme hypothetical policies because they arguably improve teacher quality by providing important incentives to recruit and retain good teachers, and because their effects are not uniform across individual school districts, but rather depend on non-uniform localized decisions. Before plaintiffs' statewide claim is permitted to proceed, the Court of Appeals should be permitted to resolve this dispute over whether and to what extent statewide claims are still permitted after *Aristy-Farer*.

5. *Second*, leave to appeal is warranted to clarify the requirements for pleading causation in the context of an Education Article claim. As the State's motion explained, plaintiffs in this case rely on a novel method for pleading causation: they make the bare assertion that the State is causally responsible for the quality of the teacher workforce, without accounting for the intervening cause that is proximately responsible for the composition of that workforce—namely, the control by local school districts over which teachers to hire and fire. *See* State Mot. ¶¶ 19-20.

6. Plaintiffs do not dispute the existence of this intervening cause; nor could they, as it is a matter of long-settled "basic policy" in New York that

local school districts alone have sole authority to make decisions about which teachers to hire and fire. *Matter of Frasier v. Board of Educ. of City School Dist. of City of N.Y.*, 71 N.Y.2d 763, 766 (1988); *see also Ricca v. Board of Educ. of City School Dist. of City of N.Y.*, 47 N.Y.2d 385, 392 (1979). And plaintiffs do not point to any decision permitting an Education Article claim to proceed where the asserted causal link between the State's conduct and alleged educational deficiencies has been severed by an undisputed intervening proximate cause.[2]

7. Rather, plaintiffs contend that their allegations are sufficient because the burden to plead causation is minimal. *See* Leave Opp. 17. But this confuses the nature of plaintiffs' pleading failure: it is the *quality* of plaintiffs' allegations of causation, not their *quantity,* that is insufficient. Local control over teacher employment decisions severs any causal link that might exist between the State's teacher tenure laws and the composition of the teacher workforce in a given school district. Absent some allegation to reconnect that causal link, plaintiffs' allegations of causation are, in reality, no allegation of causation at all. And this Court's decision to permit such a claim to proceed

---

[2] Plaintiffs' singular reliance (Leave Opp. 17) on *Campaign for Fiscal Equity* is particularly unavailing, as the Court of Appeals made clear in that litigation that Education Article liability cannot obtain if there is a "supervening cause" that is "sufficiently independent" of the state action that is alleged to have caused the Education Article violation. *Campaign for Fiscal Equity v. State* ("*CFE II*"), 100 N.Y.2d 893, 923, 925 (2003).

conflicts with unanimous Court of Appeals precedent requiring concrete allegations of some plausible causal link between the State and the educational deficiencies alleged. Leave should be granted to resolve this conflict.

8. *Third*, leave is warranted because this Court's mootness holding conflicts with longstanding precedent from the Court of Appeals and the Appellate Division. As the State's motion explained (State Mot. ¶¶ 24-26), two such decisions—*Cornell University v. Bagnardi*, 68 N.Y.2d 583 (1986), and *Matter of Law Enforcement Officers Union, District Council 182, AFSCME, AFL-CIO v. State*, 229 A.D.2d 286 (3d Dep't 1997)—illustrate the settled rule that a statutory challenge becomes moot if the challenged statutory provision is amended during the course of the litigation, regardless of whether the amendment makes all of the changes plaintiff deems are required.

9. In essence, Plaintiffs seek an exception to this rule of mootness. Under plaintiffs' view, an amendment will render a statutory challenge moot only if the amendment provides the plaintiff with the complete relief sought through litigation. *See* Leave Opp. 27-28. Plaintiffs do not dispute that their claims would be barred as moot if there is no such exception to mootness.

10. Again, plaintiffs point to no decision applying their proposed exception. Plaintiffs instead assert that the decisions cited by the State involved statutory amendments that afforded the plaintiffs in those cases the relief they sought. *See id.* The cases do not support this assertion. The amended

ordinance in *Cornell University* did not provide plaintiffs complete relief; on the contrary, the new ordinance was "even more restrictive and unlawful than the old." Br. of Plaintiff-Appellant at 6, *Cornell Univ.*, 68 N.Y.2d 583 (No. 447). And the new regulation in *Matter of Law Enforcement Officers Union* did not resolve the central grievance of petitioners' article 78 proceeding—namely, that the regulation should incorporate a per-inmate minimum-square-footage requirement for double-celled inmates. *See* 229 A.D.2d at 288-90.

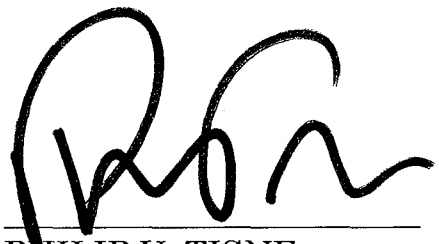
11. In both *Cornell University* and *Matter of Law Enforcement Officers Union*, mootness turned not on whether the amendment gave plaintiffs what they sought in the litigation, but on whether the parties' relationship was governed by a new legal regime not challenged in the plaintiffs' action. Here, there is no dispute that the Legislature substantially modified *every provision* that plaintiffs' complaint identifies as the source of their constitutional injury. Allowing plaintiffs' claims to proceed despite their mootness thus creates an irreconcilable conflict in authority that the Court of Appeals should be permitted to resolve.

12. This Court should therefore certify the following question:

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
May 31, 2018



PHILIP V. TISNE

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK):

Max Kober, being duly sworn, deposes and says:

(1) I am over eighteen years of age and an employee in the office of Barbara D. Underwood, Attorney General of the State of New York, attorney for the State Defendants herein.

(2) On May 31, 2018, I served one paper copy of the attached Reply Affirmation, by U.S. Postal Service first-class/priority mail upon the following named person(s):

Devora W. Allen
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022

Jason Anton
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Charles G. Moerdler
Alan M. Klinger
Stroock & Stroock & Lavan
180 Maiden Lane
New York, NY 10038

Adam S. Ross, Esq.
United Federation of Teachers
52 Broadway
New York, NY 10004

Robert T. Reilly, Esq.
52 Broadway
New York, NY 10004

Arthur P. Scheuermann
Jennifer L. Carlson
School Administrators Association of New York
8 Airport Park Boulevard
Latham, New York 12110

Max Kober

Sworn to before me on
May 31, 2018

Assistant Solicitor General