New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

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

Plaintiffs-Respondents,

—against—

THE STATE OF NEW YORK,

Defendants-Appellants,

MICHAEL MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant-Appellant.

(*Caption continued on inside cover*)

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WRIGHT PLAINTIFFS-RESPONDENTS' OPPOSITION TO MOTIONS FOR LEAVE TO APPEAL

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

Plaintiffs-Respondents,

—against—

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

Defendants-Appellants,

—and—

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R.TUCK, and KAREN E. MAGEE, individually and as President of the New York State United Teachers, PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants.

JOHN KEONI WRIGHT, GINET BORRERO, TAUANA GOINS, NINA DOSTER, CARLA WILLIAMS, MONA PRADIA, ANGELES BARRAGAN, LAURIE TOWNSEND and DELAINE WILSON,

Plaintiffs-Respondents,

—against—

THE STATE OF NEW YORK and THE BOARD OF REGENTS OF THE STATE OF NEW YORK,

Defendants-Appellants,

—and—

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

Intervenors-Defendants-Appellants.

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INTRODUCTION

The *Wright* Plaintiffs are nine parents seeking to enforce New York's constitutional guarantee of a sound basic education for their children and for children across the State. N.Y. Const. art. XI. They have alleged that several state statutes governing teacher tenure, discipline, evaluation, and quality-blind layoffs cause ineffective teachers to remain in New York's public schools and thereby deny students that constitutional right. Defendants and Intervenor-Defendants, in an effort to avoid litigating these issues on their merits, sought dismissal of Plaintiffs' claims on the grounds that Plaintiffs did not adequately allege a violation of Article XI and that their claims are nonjusticiable. The motion court and this Court were correct to reject those arguments, which are contrary to settled precedent in this State.

Those holdings were not novel, review of them at this stage is not a matter of public importance, and they are not in conflict with any decisions of the Court of Appeals or the Appellate Division. The Court of Appeals has expressly contemplated that plaintiffs may bring challenges under Article XI for deficiencies other than funding and that these claims may be brought on a statewide basis. Likewise, the law is

clear that constitutional rights are justiciable and that a change in law that does not remedy a plaintiff's claims does not render the controversy moot. Given that this Court's holding followed inexorably from settled precedent, there is no reason to grant leave for Defendants to appeal. Instead, this case should proceed expeditiously to resolution on the merits, as four school years have already passed since this case was filed, and with every further day that these laws persist, more students across this State are being subjected to ineffective teachers and are thereby suffering deprivation of their constitutional right to a sound basic education.

BACKGROUND

The *Wright* Plaintiffs are nine parents of students who attend or attended schools throughout New York State, including in Albany, the Bronx, Brooklyn, Manhattan, Queens, and Rochester. They allege that the State's enforcement of several education-related statutes denied New York schoolchildren, including their own, a sound basic education, in violation of Article XI, § 1, of the New York Constitution. After two failed attempts to dismiss Plaintiffs' claims in the motion court, Defendants and Intervenor-Defendants—the State, municipalities, and teachers' unions (collectively, "Defendants")—appealed to this Court raising pleading and justiciability issues that this Court correctly rejected. Defendants now seek leave to appeal this Court's ruling to the Court of Appeals.

A. The Challenged Statutes

The State's enforcement of Education Law §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020(a) (the "Challenged Statutes") violates the bedrock constitutional guarantee that all students in New York are guaranteed a "sound basic education." *N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 178-79 (2005) ("*NYCLU*"). These statutes individually and collectively have led to the hiring and

retention of ineffective teachers, resulting in deleterious effects on student performance in the classroom and causing long-term harm that also affects them outside the classroom.

The Permanent Employment Statutes. Sections 2509, 2573, 3012, and 3012-c of the Education Law (the "Permanent Employment Statutes") effectively provide permanent employment to New York teachers on a nearly automatic basis following limited teacher evaluations. *See* R1360 ¶ 38. And while teachers are supposed to be rated as "Highly Effective," "Effective," "Developing," or "Ineffective," *see* R1361 ¶ 40, the reality is that the design of the evaluation process "does not adequately identify teachers who are truly 'Developing' or 'Ineffective,'" *id.* ¶ 41, and many teachers who do receive these ratings are nevertheless retained, *see* R1362 ¶ 45. As a result, the State's continued enforcement of these laws "ensure[s] that ineffective teachers 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." R1359 ¶ 34.

The Disciplinary Statutes. Sections 3020 and 3020-a of the Education Law (the "Disciplinary Statutes") "impose dozens of hurdles

to dismiss or discipline an ineffective teacher, including investigations, hearings, improvement plans, arbitration processes, and administrative appeals." R1364 ¶ 50. They "make it prohibitively expensive, time consuming, and effectively impossible to dismiss an ineffective teacher who has already received tenure." *Id.* ¶ 51. Administrators cannot discipline ineffective teachers precisely because the requirements for doing so are so burdensome. *See* R1366 ¶ 55. Thus, "[b]ecause 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." R1364-65 ¶ 51.

The Last-In-First-Out Statute. Section 2585 of the Education Law (the "LIFO Statute") provides that, "[w]henever a board of education abolishes a position ... , the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued." N.Y. Educ. Law § 2585(3). Decisions about which teachers to let go must be made "irrespective of a teacher's performance, effectiveness, or quality." R1370 ¶ 67. Studies show, however, that "seniority . . . has little correlation to a teacher's effectiveness," *id.* ¶ 69, meaning that ineffective teachers will be retained at the expense of

more effective junior teachers, violating the students' rights guaranteed by Article XI. And the increased cost of senior teachers also means that more teachers have to be dismissed in response to budgetary constraints, to the detriment of students. *See* R1371 ¶ 71.

The State's enforcement of these three sets of statutes has led to the hiring and retention of ineffective teachers who in turn cause students to underperform both inside and outside the classroom. These laws thus deprive students in New York public schools their constitutional right to a sound basic education under Article XI.

B. Procedural History

The *Wright* Plaintiffs commenced this action on July 28, 2014, against the State of New York and several individual state officials in Albany County. *See Wright v. State of New York*, Index No. A00641/2014 (Sup. Ct. Albany Cty.); R67-89. The action was later consolidated with a similar action, *Davids v. State of New York*, Index No. 101105/2014 (Sup. Ct. Richmond Cty.), which was brought by another group of parents (the "*Davids* Plaintiffs," collectively with the *Wright* Plaintiffs, "Plaintiffs"). The trial court granted motions to intervene filed by additional state parties Philip A. Cammarata and

Mark Mambretti (both tenured administrators in New York schools), and the New York City Department of Education. It also granted motions to intervene filed by two teachers' unions, the United Federation of Teachers and the New York State United Teachers.

1. The motion court denied Defendants' first motions to dismiss.

In late fall 2014, Defendants filed motions to dismiss. *See* R461; R598; R747; R751; R754. The court dismissed the claims against two state officials—Merryl H. Tisch and John B. King—but denied the balance of the motions. *See* R17-33.

In its decision, the motion court squarely rejected the contention that Plaintiffs failed to state a claim under Article IX or that their claims were nonjusticiable. Plaintiffs stated a claim, the court explained, because the Court of Appeals has clearly provided that "it is the state's responsibility to provide minimally adequate funding, resources, and educational supports to make basic learning possible, . . . which has been judicially recognized to entitle children to minimally adequate teaching of reasonably up-to-date basic curricula . . . by sufficient personnel adequately trained to teach those subject areas." R30-31 (internal quotation marks and citations omitted). Plaintiffs'

allegations about "serious deficiencies in teacher quality" and the resulting "negative impact on the performance of students," to name only a few, were "sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students, *e.g.*, a lack of proficiency in math and english." *Id.* at 31. And the claims were justiciable, the court ruled, both because the judiciary is well-equipped to "interpret and safeguard constitutional rights and review the acts of the other branches of government," *id.*, and because Plaintiffs "clearly have standing," as they "have been or are being injured by the deprivation of their constitutional right to receive a 'sound basic education.'" R32.

2. The motion court denied Defendants' renewed motions to dismiss.

After the motion court denied the first motions to dismiss, the Legislature made minor modifications to the Education Law, but the modifications did nothing to remedy Plaintiffs' complaint. The Permanent Employment Statutes were adjusted to change the probationary period for new teachers to four years rather than three, *see* N.Y. Educ. Law §§ 3012(1)(a)(ii), 2573(1)(a)(ii), 2509(1)(a)(ii), and to

require a "highly effective" or "effective" rating in three out of the four probationary years while not allowing an "ineffective" rating in the fourth year, *see id.* §§ 3012(2)(b), 2573(5)(b), 2509(2)(b). The Disciplinary Statutes were given a new teacher-evaluation standard—governed by the former rating scale under which teachers are rated "highly effective," "effective," "developing," or "ineffective," *see id.* § 3012-d(3)—and provided that teachers will be rated based on student performance and teacher observation, *id.* § 3012-d(4). But each school district still must negotiate the specific terms of its evaluation system, in much the same way it did in prior years. *See id.* § 3102-d(10). The LIFO Statute did not change in any relevant way.

Despite the modest nature of these changes, Defendants moved for leave to renew their motions to dismiss, *see* R959; R1151; R1278; R1339; R1655, and the motion court denied them, *see* R954-58. Because the motions "[i]in principal part" simply regurgitated "the same grounds for dismissal rejected by the Court in its prior determination," the court recognized that the renewed motions were "essentially motions for leave to reargue." R957. "[T]he legislature's marginal changes," the court explained, "would [not] change the prior determination of the court." *Id.*

(internal quotation marks and citation omitted). Although it rejected the motions on the merits, the court granted a stay pending appeal so that Defendants could seek review in this Court.

3. This Court affirmed the denial of the motions to dismiss.

This Court affirmed on March 28, 2018. It first concluded that Defendants "were not entitled to dismissal" for failure to state a claim, because Plaintiffs had stated a cause of action that the Challenged Statutes "separately and together violate the right to a sound basic education protected by the Education Article of the NY Constitution." *Davids v. State*, 159 A.D.3d 987, 990 (2d Dep't 2018). The Court also concluded that the case is justiciable. "[D]espite the amendments to some of the statutes they challenge," the Court explained, Plaintiffs' claims "are not academic." *Id.* at 992. That is so because "at this stage of the proceedings," a "declaration as to the validity or invalidity of those statutes" would have a "practical effect on the parties." *Id.* (internal quotation marks and citation omitted). And the Court held that Plaintiffs clearly had standing, "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." *Id.* (citing *Bernfeld v. Kurilenko*, 91 A.D.3d 893, 894 (2d Dep't 2012)). The Court thus affirmed, noting that Defendants' "remaining contentions are without merit." *Id.*

Defendants moved this Court for leave to appeal that decision on April 30, 2018, repeating their now well-worn arguments that Plaintiffs failed to state a claim and that the controversy is not justiciable.[1] *See* State of N.Y. Mot. for Leave to Appeal (Apr. 30, 2018) ("State Mot."); United Fed'n of Teachers, Local 2, *et al.* Brief in Support of Mot. for Leave to Appeal (Apr. 30, 2018) ("UFT Br.") (incorporated by reference into UFT Mot. for Leave to Appeal (Apr. 30, 2018) ("UFT Mot."), and N.Y.S. United Teachers Mot. for Leave to Appeal (April 30, 2018) ("NYSUT Mot.")); Mun. Defs.' Mot. for Leave to Appeal ("Mun. Mot.").

ARGUMENT

This Court should not grant leave to appeal its March 28 decision, as the Court's rejection of Defendants' arguments for dismissal was not

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[1] To the extent that any of Defendants' motions request a further stay from this Court, those requests are procedurally improper. Under CPLR § 2201, motions for a stay of proceedings must be filed in the Supreme Court, as it is the "court in which [the] action is pending." In any event, a stay here is not warranted because the Court's decision was correct and proceeding with this litigation will not impose any undue hardship on Defendants.

"novel," review at this stage is not a matter of "public importance," and none of the Court's conclusions "present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4). To the contrary, this Court's holding on each of the issues Defendants raise follows directly from precedent and is in accord with other decisions of the Court of Appeals and the Appellate Division.

I. This Court Correctly Held That Plaintiffs Have Adequately Alleged a Violation of Article XI, And Further Review Is Not Warranted.

This Court rightly affirmed the motion court's sound conclusion that, at this threshold pleading stage, Plaintiffs have adequately alleged a violation of Article XI of the New York Constitution. That conclusion is not novel, review of it is not a matter of public importance, and it does not conflict with any decisions of the Court of Appeals or the Appellate Division.

A. Plaintiffs have stated a claim for a violation of Article XI.

Article XI of the New York Constitution "requires the Legislature to provide for the maintenance and support of a system of free common schools, wherein all the children of this state shall be educated."

Davids, 159 A.D.3d at 989 (internal quotation marks and citations omitted). New York students thus have a "constitutional right to a 'sound basic education,'" *id.* (citing *Paynter v. State*, 100 N.Y.2d 434, 439 (2003), and NY Const. art. XI, § 1), which "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," *id.* (quoting *Paynter*, 100 N.Y.2d at 439-440) (internal quotation marks and citations omitted). As the Court of Appeals has explained, teaching is "the most important input" in a "sound basic education," as the "quality of teaching correlates with student performance." *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 908, 909, 911 (2003) ("*CFE II*").

This Court was correct when it concluded that Plaintiffs have adequately alleged the "two elements" of a claim under Article XI: "the deprivation of a sound basic education" and "causes attributable to the State." *Davids*, 159 A.D.3d at 989 (quoting *Aristy-Farer v. State*, 29 N.Y.3d 501, 517 (2017)).

Deprivation of a sound basic education. Plaintiffs have adequately alleged the first element of their Article XI claim—the

deprivation of a sound basic education—by alleging a systemic, state-wide failure to provide students with effective teachers. Plaintiffs have alleged, among other things, that the process for evaluation and promotion of teachers is a mere "formality," R75 ¶ 36, that the disciplinary laws cause inflated ratings and "deter[] administrators from trying to remove ineffective teachers," R81 ¶ 54, and that seniority-based layoffs push out effective teachers by subordinating effectiveness to seniority, R85 ¶ 68.

It is beyond dispute that effective teachers are an essential ingredient for a sound basic education. Indeed that is precisely what the Court of Appeals said in *Campaign for Fiscal Equity, Inc. v. State*, when it held that, under Article XI, "[c]hildren are . . . entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas." 86 N.Y.2d 307, 317 (1995) ("*CFE I*"). And not only does the "quality of teaching correlate[] with student performance," but the negative effects of an ineffective teacher compound over time—"the longer students are

exposed to . . . bad teachers, the . . . worse they perform." *CFE II*, 100 N.Y.2d at 910-11.[2]

Moreover, as the motion court recognized, Plaintiffs' complaint sets forth extensive allegations "sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students, *e.g.*, a lack of proficiency in math and english." R31 (citing *CFE II*, 100 N.Y.2d at 910). The motion court based that conclusion on allegations showing "serious deficiencies in teacher quality; its negative impact on the performance of students; . . . the direct effect that these deficiencies have on a student's right to receive a 'sound basic education'; plus the statistical studies and surveys cited in support thereof." *Id.* The motion court thus rightly concluded, and this Court rightly agreed, that Plaintiffs have pleaded facts on which a viable claim could be based and that "the court's inquiry is [therefore] complete and the complaint must be declared legally sufficient." *Id.* (citing *CFE I*, 86 N.Y.2d at 318).

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[2] *See also Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 390 (N.C. 2004) (affirming that the state must "ensure there are competent teachers in classrooms" to satisfy its obligation to provide students with a "sound basic education"); *State v. Campbell Cty. Sch. Dist.*, 19 P.3d 518, 550 (holding that "teacher quality is critical to providing a constitutional education"), *on reh'g*, 32 P.3d 325 (Wyo. 2001).

Causes attributable to the State. Plaintiffs have also adequately pleaded the second element of their Article XI claim—"causes attributable to the State," *NYCLU*, 4 N.Y.3d at 178-79—by alleging that the State's enforcement of the Challenged Statutes has led to an intolerable excess of ineffective teachers in New York's public schools. *See* R1359-72 ¶¶ 34-76. These statutes force school districts to offer permanent employment, through tenure, to nearly all junior teachers without giving school districts sufficient time to determine which teachers will be minimally effective, and then impede school districts from dismissing the worst performing teachers after they are prematurely awarded tenure, and indeed require the school to lay off more qualified teachers if they are less senior than their colleagues. *See, e.g.*, R1361-62 ¶¶ 37, 41, 42; R1368 ¶ 60; R1371 ¶ 70.

This Court was correct to reject Defendants' arguments that Plaintiffs failed to "identify a 'causal link' between any alleged educational deficiencies and the [Challenged Statutes]." State Mot. 9 ¶ 19; UFT Br. 5. Defendants complain that Plaintiffs "simply presume that teacher quality will improve" and make "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," State Mot. 10 ¶ 20, but that argument is foreclosed by *CFE I*. The Court of Appeals in *CFE I* could not have made clearer that it is "premature" to require an "extended causation discussion" at the pleading stage. 86 N.Y.2d at 318-19. Allegations that "could support a conclusion" of causation is sufficient, *id.*, and those allegations abound in the complaints in this case. Plaintiffs clearly alleged that the Challenged Statutes incentivize schools to promote teachers without regard to effectiveness, *see* R75 ¶ 36, and make it nearly impossible to remove ineffective teachers with tenure, *see* R80 ¶ 51. It thus cannot be said that "allowing plaintiffs' claims to proceed here" would "conflict with the Court of Appeals' requirements" for causation pleading, or otherwise provides grounds for an appeal at this stage, as the Court of Appeals' decision in *CFE I* compelled the Court's correct conclusion here.

B. Further review of whether Plaintiffs adequately stated a claim is not warranted.

Defendants seek leave to appeal these conclusions on the ground that Plaintiffs' complaints do not state a claim for funding deficiency, they lack district-specific allegations, and they rely on unreliable

studies and statistics. This Court was correct to reject those arguments, and that decision does not warrant review by the Court of Appeals.

First, claims under Article XI are not limited to claims about funding deficiencies, notwithstanding Defendants' arguments to the contrary. *See* UFT Br. 16-22. Nothing in Article XI, or the case law interpreting Article XI, prohibits Plaintiffs from alleging that State actions other than underfunding have caused a deprivation of rights. The Court of Appeals expressly recognized as much in *New York Civil Liberties Union v. State*, where the Court faulted the plaintiffs for not alleging a "failure of the State to provide 'resources'—financial *or otherwise*"—necessary to guarantee a constitutionally adequate education. 4 N.Y.3d at 180 (emphasis added). The Court thus made unmistakably clear that the Legislature's "failure to adequately fund or provide sufficient resources" to schools are not, as Defendants would have it, the "*only*" way to bring a "successful challenge[] under the Education Article." UFT Br. 16; *see also* Mun. Br. 7. As the very purpose of the adequate-funding requirement recognized in cases like *CFE I* is to ensure that school districts have the funds necessary to enable them to provide key resources like effective teachers, it follows *a fortiori* that

a failure to provide the necessary resources for a sound basic education, regardless of particular funding levels, is actionable under Article XI. That conclusion, far from "break[ing] new ground," Mun. Br. 8, follows directly from Court of Appeals precedent.

Second, Article XI does not require district-specific allegations where, as here, Plaintiffs are alleging the State's systemic failure to ensure effective teachers for a significant number of students. Article XI 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." N.Y. Const. art. XI, § 1 (emphasis added). And courts have recognized a legally cognizable claim where plaintiffs allege systemic failure in the quality of education. *See, e.g.*, *CFE II*, 100 N.Y.2d at 914 (holding that "tens of thousands of students . . . placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment . . . is large enough to represent a systemic failure"). Defendants thus miss the point entirely in faulting Plaintiffs for not alleging failures in effective teaching on a district-by-district basis, *see* State Mot. 8, as Plaintiffs' claims are based on the state-wide effects of statutes that are enforced state-wide.

Defendants' principal authority for the proposition that this Court's holding conflicts with decisions of the Court of Appeals—that court's recent decision in *Aristy-Farer*, 29 N.Y.3d 501—actually supports this Court's conclusion. While *Aristy-Farer* held that the "claimed funding deficiencies" in that case must include "district-by-district facts," it expressly contemplated the possibility that allegations sufficient to state an Article XI claim "could be made on a statewide basis." *Id.* at 510 n.5. So although the plaintiff was required to "plead[] with district specificity" for purposes of "the type of claims brought" there, the Court recognized that it would be a different case altogether if the State had, for example, a uniform policy that did "not allow state monies to be spent on math education." *Id.* at 509-10 & n.5. To challenge a uniform policy such as that one, statewide allegations would not be "foreclose[d]" by the district-specific pleading standard for ordinary funding cases. *Id.* at 509 n.5. There is no conflict at all between the Court's decision and *Aristy Farer*, as the allegations at issue here apply uniformly across the State and thus are more like a no-money-for-math policy than a district-specific funding claim. *Id.* at 511.

Third, Defendants suggest in passing that Plaintiffs' underlying statistical support for their claims is inadequate, *see* State Mot. 8-9 ¶¶ 17-18; UTF Br. 18, but arguments about the adequacy of the statistical evidence cited in the complaint and other merits arguments are not appropriate at this stage, because "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss," *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005), especially in the Article XI context, *see, e.g.*, *Hussein v. State*, 81 A.D.3d 132, 133 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). As the motion court explained, "movants' attempted challenge to the merits of the plaintiffs' lawsuit . . . is a matter for another day, following the further development of the record." R32. In the meantime, the motion court explained, the court "will not close the courthouse door to parents and children with viable constitutional claims." *Id.* This Court was eminently correct in affirming that conclusion, *Davids*, 159 A.D.3d at 991-92, and its decision to do so was in no way novel, a decision of public importance, or in conflict with any decisions of the Court of Appeals or the Appellate Division.

II. This Court Correctly Held That Plaintiffs' Article XI Claims Are Justiciable, And Further Review Is Not Warranted.

In addition to their baseless contentions on the merits, Defendants also raised several arguments in an attempt to prevent adjudication of Plaintiffs' claims in the first place. As the motion court succinctly put it, however, "the state may be called to account when it fails in its obligation to meet the minimum constitutional standards of educational quality." R31 (citing *NYCLU*, 4 N.Y.3d at 178). This Court was correct to affirm that holding, and its decision to do so was not novel, of public importance, or in conflict with any other decisions.

A. Article XI Claims Do Not Present Non-Justiciable "Political Questions."

This Court did not issue a novel ruling or create a conflict with any other court when it concluded that the Judiciary has the authority to adjudicate Plaintiffs' claims, and that conclusion does not warrant further review at this stage. *Davids*, 159 A.D.3d at 991-92. It is indisputably the role of the Judiciary to determine whether a statute, whatever the policy rationale for its enactment, offends the New York State Constitution. *See, e.g. Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) ("*CFE III*") ("We [the judiciary of New York] are the ultimate arbiters of our State Constitution.") (citation omitted);

Cohen v. State, 94 N.Y.2d 1, 11 (1999) ("The courts are vested with a unique role and review power over the constitutionality of legislation . . . .") (citations omitted). And like other constitutional entitlements, the rights under Article XI are enforced through judicial review. *See CFE II*, 100 N.Y.2d at 920 ("[W]e have a duty to determine whether the State is providing students with the opportunity for a sound basic education."). Thus while matters of policy may be the exclusive domain of the majoritarian branches, constitutional rights decidedly are not—including the constitutional rights at issue in this case. *See CFE III*, 8 N.Y.3d at 28.

Defendants do not identify a single case where a constitutionally protected right was at issue but the court concluded that the matter was non-justiciable on political question grounds. It thus cannot be said that the Court created a conflict with a decision of the Court of Appeals or the Appellate Division warranting leave to appeal.

B. Plaintiffs Have Adequately Alleged Standing.

This Court's sound conclusion that Plaintiffs have standing because "they adequately alleged a threatened injury in fact to the protected right of a sound basic education due to the retention and

promotion of alleged ineffective teachers" was imminently correct, broke no new ground, and did not conflict with any decisions of the Court of Appeals or Appellate Division. *Davids*, 159 A.D.3d at 992.

There can be little doubt that Plaintiffs—parents of New York schoolchildren who are alleged to be deprived of a sound basic education—have standing under settled law. *See, e.g.*, *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 18 (N.Y. Sup. Ct. 2001) ("[T]he children of these parents who attend public school in New York City have established an injury-in-fact which is redressable by this court. Pursuant to CPLR 1201 children must appear in court via their parent or guardian."). Plaintiffs send their children to school in districts handicapped by the Challenged Statutes, which result in the promotion and retention of ineffective teachers. R1354-55 ¶¶ 10-16. Plaintiffs have clearly alleged how the Challenged Statutes deny their right to a sound basic education, *see* R1357-59 ¶¶ 27-33, by, for example, granting a teacher tenure before she has been proven effective, R1359-64 ¶¶ 34-48, keeping ineffective teachers in the classroom as a result of a faulty disciplinary system, R1364-69 ¶¶ 49-65, and during reductions-in-force,

maintaining the employment of more senior, yet ineffective, teachers while firing junior, but more effective, teachers, R1370-72 ¶¶ 66-76.

Plaintiffs have also squarely alleged an injury that is within the zone of interests protected by Article XI. *See Matter of Ass'n for a Better Long Island, Inc. v. N.Y.S. Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014). Article XI 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." N.Y. Const., art. XI, § 1 (emphasis added). There is no doubt that however far the zone of Article XI extends, its primary beneficiaries are the schoolchildren of New York State. As those expressly singled out for Article XI's protection, and as current students in the State's education system, Plaintiffs' children have a "genuine stake in the litigation" that is "different from that of the public at large," and which is therefore sufficient to confer standing. *Ass'n for a Better Long Island,* 23 N.Y.3d at 6 (internal quotation marks and citations omitted). The Court was correct to find that Plaintiffs have standing here, and that holding follows directly from settled precedent.

C. The Legislature's Minor Amendments to the Challenged Statutes Have Not Mooted the Litigation.

Defendants' argument that leave to appeal is warranted because the Legislature's "substantial changes" to the Challenged Statutes renders this dispute moot is also without merit, and provides no justification for an interlocutory appeal to the Court of Appeals. *See* State Mot. 11; EFT Br. 22-24.

At the outset, the Legislature's changes to the statutes were far from substantial, and they in no way remedied Plaintiffs' allegations. For instance, the revised statutes still allow an arbitrator to decide against dismissing a teacher who has been found guilty of incompetence on the basis that future remedial efforts may help. *See* R1369 ¶¶ 62-64. Although the Legislature adopted some revised evaluation procedures, § 3012-c, and expedited disciplinary procedures, § 3020-a, Plaintiffs have alleged that statutory time limits are routinely violated, *see* R1366-67 ¶¶ 56-65, and there is no reason that the new time limits would carry any greater force. And even if the review process were to take less time, students' rights remain infringed during the two years of ineffective teaching necessary to collect the reviews that can give rise to a disciplinary proceeding. *See id.* Moreover, the standards by which

teachers are evaluated have not changed, nor have the potential consequences if a teacher is found "Ineffective." *See* N.Y. Educ. Law § 3012-c. And the LIFO statute still requires layoffs based on seniority, not effectiveness. *Id.* § 2585. The Court was thus eminently correct when it concluded that Plaintiffs' claims "are not academic" because "a declaration of the validity or invalidity of those statutes" would carry a "practical effect on the parties." *Davids*, 159 A.D.3d at 992 (internal quotation marks omitted) (citing *Saratoga Cty Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 811 (2003)).

This case is readily distinguishable from the cases Defendants identify as creating a conflict with this Court's decision. *See* State Mot. 12-13; UFT Br. 22-24. The State's principal authority on this front, *Cornell University v. Bagnardi*, involved a wholesale change in law that expressly allowed the university to use its property in a way that the previous law had forbidden. 68 N.Y.2d 583, 589-90 (1986); *see* State Mot. at 12 (explaining that the challenged zoning ordinance "did not permit an intended use of the university's property" and the new ordinance "allowed the university's use" subject to obtaining a permit); *see also 903 Park Ave. Corp. v. City Rent Agency*, 31 N.Y.2d 330, 333

(1972) (challenge to New York City rent control law as violating state statute rendered moot by passage of new rent control law clearly permissible under state statute). The State's minor modifications to the education laws at issue here do not effectively remedy Plaintiffs' claims, as the change in law did in *Cornell*.

Nor does this Court's decision conflict with the Appellate Division's decision in *Matter of Law Enforcement Officers Union, Dist. Council 82 v. State*, 229 A.D.2d 286, 288-90 (3d Dep't 1997). In that case, plaintiffs challenged an interim rule governing the square footage required in living quarters for inmates at a prison, but the interim rule was replaced by a final rule with different square footage requirements such that "the rights of petitioners were no longer affected by the original regulation." *Id.* at 290. The effect of the final rule suffices to distinguish that case from the circumstances here, where "[i]t cannot be concluded at this stage of the proceedings that a declaration as to the validity or invalidity of [the Challenged Statutes] would 'have no practical effect on the parties.'" *Davids*, 159 A.D.3d at 992 (quoting *Saratoga Cty Chamber of Commerce*, 100 N.Y.2d at 811). This Court's mootness holding thus is not novel or a matter of public importance,

and it did not conflict with any other decision of the Court of Appeals or the Appellate Division.

D. Defendants' Challenge To Plaintiffs' Legal Theory Is Premature.

Finally, Defendants argue that Plaintiffs' claims should be construed as "facial" challenges to the Challenged Statutes and dismissed on the theory that those statutes are not facially invalid because they have at least some constitutional applications. *See* UFT Br. 25-26. But that argument misconstrues both Plaintiffs' claims and the doctrine of facial challenges.

To start, Plaintiffs are "the master of the complaint," *Bindit Corp. v. Inflight Advert., Inc.*, 285 A.D.2d 309, 313 n.1 (2d Dep't 2001) (internal quotation marks omitted), and have not argued that they are raising a facial challenge. Plaintiffs have previously and repeatedly explained that they are bringing an as-applied challenge because they are challenging the *effects* of the Challenged Statutes and alleging constitutional violations resulting from their implementation. *See* R1120 n.5; *see also Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its

general validity as a measure enacted in the legitimate exercise of state power is beyond question.").

Moreover, whether Plaintiffs are required to "prov[e] that the invalidity of the law is beyond a reasonable doubt," R1120 n.5, is not a question for this threshold stage of the litigation, where Plaintiffs are entitled to all reasonable inferences in their favor. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) ("We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within *any cognizable legal theory*.") (emphasis added) (citations omitted). It is thus premature for Defendants to attack Plaintiffs' claims by forcing them into a particular legal theory. *See Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563, 572 (2015). This Court's rejection of those efforts was not novel, review of it at this stage is not a matter of public importance, and it does not conflict with any decisions of the Court of Appeals or the Appellate Division.

CONCLUSION

For the foregoing reasons, Defendants' motion for leave to appeal should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to § 670.10, I hereby certify that the foregoing brief complies with the type-volume limitation of § 670.10. This computer generated brief was prepared using Microsoft Word 2010 and a proportionally spaced serifed typeface.

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