To be Argued by:
MARK D. ROSENBAUM
(Pro Hac Vice Pending)
(Time Requested: 20 Minutes)

APL-2024-00099
New York County Clerk's Index No. 152743/2021
Appellate Division–First Department Case No. 2022-02719

Court of Appeals
of the
State of New York

INTEGRATENYC, INC., COALITION FOR EDUCATION JUSTICE, P.S. 132 PARENTS FOR CHANGE, A.C., H.D. ex rel. W.D., M.G. ex rel. M.G., L.S. ex rel. S.G., C.H. ex rel. C.H., Y.K.J. ex rel. Y.J., A.M., V.M. ex rel. J.M., R.N. ex rel. N.N., M.A. ex rel. F.P., S.S. ex rel. M.S., S.D. ex rel. S.S., K.T. ex rel. F.T. and S.W. ex rel. B.W.,

Plaintiffs-Respondents,

– against –

THE STATE OF NEW YORK, KATHY HOCHUL, as Governor of the State of New York, NEW YORK STATE BOARD OF REGENTS, NEW YORK STATE EDUCATION DEPARTMENT, BETTY A. ROSA, as New York State Commissioner of Education, BILL DE BLASIO, as Mayor of New York City,

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFFS-RESPONDENTS

SARAH MEDINA CAMISCOLI
PEER DEFENSE PROJECT
40 Rector Street, 9th Floor
New York, New York 10006
(347) 670-4332
sarah@peerdefense.org
- and -
MARK D. ROSENBAUM
(Pro Hac Vice Pending)
AMANDA MANGASER SAVAGE
(Pro Hac Vice Pending)
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
(213) 385-2977
mrosenbaum@publiccounsel.org
asavage@publiccounsel.org

MELISSA COLÓN-BOSOLET
EAMON P. JOYCE
KARMA O. FARRA
ALYSSA M. HASBROUCK
ERNESTO R. CLAEYSSEN
NATALIE T. JEAN
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
mcolon-bosolet@sidley.com
ejoyce@sidley.com
kfarra@sidley.com
ahasbrouck@sidley.com
eclaeyssen@sidley.com
njean@sidley.com

Attorneys for Plaintiffs-Respondents
(For Continuation of Appearances See Inside Cover)

CP COUNSEL PRESS (800) 4-APPEAL • (332127)

NEW YORK CITY DEPARTMENT OF EDUCATION and MEISHA PORTER, as Chancellor of the New York City Department of Education,

Defendants-Appellants,

– and –

PARENTS DEFENDING EDUCATION,

Intervenor-Defendant-Appellant.

CARTER G. PHILLIPS
(Pro Hac Vice Forthcoming)
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Attorneys for Plaintiffs-Respondents

STATUS OF RELATED LITIGATION

Pursuant to Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(a), Plaintiffs-Respondents state that they are not aware of any related litigation as of the date of filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f), the undersigned counsel for Plaintiffs-Respondents respectfully state the following:

- On January 8, 2025, IntegrateNYC Inc.'s ("IntegrateNYC") Board voted to merge with Circle Up! Youth Restorative Justice Arts d/b/a The Circle Keepers (the "Circle Keepers"), a 501(c)(3) organization with no parents, subsidiaries, or affiliates. On January 12, 2025, the Circle Keepers' Board voted to approve the merger. Upon the merger, which shall occur upon approval of the New York State Attorney General's Charities Bureau, IntegrateNYC will cease to exist as a corporate entity. As of the date of filing, IntegrateNYC has no parents, subsidiaries, or affiliates.
- Coalition for Education Justice, a coalition of community-based organizations, is a fiscally sponsored project of Tides Center. Coalition for Education Justice has no formal subsidiaries or affiliates, but has four participant organizations: New Settlement Parent Action Committee, Make the Road New York, MASA-MEXED, Inc. (Masa), and Alliance for Quality Education. Tides Center has no parents or subsidiaries, but is affiliated with Tides Network, Tides Foundation, Tides Two Rivers Fund, and Tides Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions, Statutes, and Rules

Legislative History

Other Authorities

PRELIMINARY STATEMENT

Constitutionally charged with educating over one million students from diverse racial and ethnic backgrounds, New York City's public schools remain among the most segregated in the country, resulting in grossly disparate educational inputs and outcomes for students of different races. The tragic results of this two-tiered educational system are heartbreaking and predictable. Through a pipeline that extends from kindergarten until the end of their education, children are sorted into superior and inferior schools. This denies many students the opportunity for academic journeys that fulfill the promise of the New York Constitution, including what this Court has termed "meaningful civic participation in contemporary society." The complaint here details the causes for a separate and unequal system whose statutory and unconstitutional violations limit, if not doom, the futures of far too many children.

Against the backdrop of these failings, the Appellate Division, First Department denied in substantial part pleadings-based motions to dismiss this case brought by schoolchildren and organizations advocating on their behalf. The complaint seeks to enforce the rights of New York City's schoolchildren to a "sound basic education" and equal protection under New York's Constitution, and to vindicate their rights under the State Human Rights Law ("NYSHRL"). As the Appellate Division held, relying on bedrock precedent from this Court, Plaintiffs'

lawsuit pleads facts that implicate these core constitutional and statutory protections, challenging City and State policies and practices that have created a racially discriminatory and pedagogically indefensible pipeline that denies students, particularly Black and Latino/a students, access to the City's better resourced and achieving schools.

Indeed, this Court has repeatedly held, including in the educational context, that the constitutional and statutory claims underlying this case are the "province of the Judicial branch" to adjudicate. Invoking those precedents, the Appellate Division issued an authored opinion unanimously reversing the IAS Court's cursory ruling dismissing the entire action as non-justiciable. The Appellate Division correctly recognized that it was "incumbent" upon the IAS Court to evaluate the merits, even if it were to someday conclude—"upon a finding a finding of liability"—that it could not "grant the full panoply of injunctive relief sought by [P]laintiffs." R.590-91.

On appeal, the City and State largely abandon the now-reversed justiciability ruling, which they barely addressed in the IAS Court. (Only the intervenor, which did *not* raise justiciability there, now seriously seeks to defend its ruling.)

Instead, the City and State attack the Appellate Division's decision holding that Plaintiffs stated cognizable claims under the Education Article, Equal Protection, and NYSHRL that must be tested on the evidence. Unmentioned in their briefs here, Defendants and PDE urged the Appellate Division to reach failure to

state a claim (despite that the IAS Court had not). The Appellate Division did just that, thoroughly examining the pleaded facts to correctly hold that Plaintiffs' claims were well pleaded in substantial part. *See* R.584-90, R.592-608. The Appellate Division also properly called out the City and State for, in the face of their own admissions that dire conditions exist, unseemly fallback arguments that each nonetheless should be dismissed because the other was at fault for the existence and persistence of the separate and unequal system to which too many City students are subject. R.587-88, R.597.

As to the Education Article, the Appellate Division properly recognized that Defendants did not dispute the constitutionally deficient outcomes that Plaintiffs allege, *i.e.*, what this Court has termed "outputs." R.596; *see* R.588 ("racially disparate and dismal results"). The court correctly concluded that Defendants' core dismissal argument presented "a question of fact that can only be resolved after development of the record," namely whether Plaintiffs could prove that the constitutionally inadequate "inputs" that they alleged "*cause[]* New York City public school students to receive less than a sound basic education." R.596 (emphasis added). Despite the Appellate Division's order granting leave to appeal its whole decision, the Education Article claim reaches this Court with little more than the same fact question presented. To be sure, Defendants also attempt to cabin Education Article claims to those alleging inequitable funding as the causal input for

lack of a sound basic education, but, as the Appellate Division recognized, those arguments find no support in this Court's rulings, and would lead to the perverse result that schools can provide patently *un*sound education as long as funding disparities are not the cause. R.591-92.

As to Equal Protection, the Appellate Division properly held that Plaintiffs had sufficiently stated a claim of intentional discrimination based on the use of pedagogically unsound, unvalidated admissions testing for the City's Gifted & Talented ("G&T") programs, screened middle and high schools, and specialized high schools, which has long resulted in extreme segregation. R.601-02. That includes, as one glaring example, an admissions test for the specialized high schools that the Legislature adopted in the 1970s to thwart the City's efforts to study whether its existing testing was "culturally biased." R.587, R.601-03. The Appellate Division recognized that Plaintiffs pleaded support for concluding that legislative enactment, which remains in effect, was overtly discriminatory, R.601-02, and many other facts of the type relevant to inferring discriminatory intent, R.598-602. Again, whether the evidence ultimately *proves* intent is a "factual issue inappropriate for resolution here." R.603.

Finally, the Appellate Division held Plaintiffs stated a NYSHRL claim against the City based on denial of facilities via discriminatory admissions. R.606-07. In contrast to the fact-bound Education Article and Equal Protection issues Defendants

argued, the City contends that the NYSHRL categorically forecloses disparate impact claims. *See* City-Br. 56-62. The Appellate Division rightly rejected that, relying on this Court's holdings that another subsection of the statute allows such claims. R.606-07. Defendants did not contest that disparate impacts exist.

This Court should affirm the Appellate Division's well-reasoned decision, whether upon full analysis of it or upon concluding that "no question of law is presented" as to many rulings encompassed by the order (R.578) broadly allowing leave to appeal. *See Brooklyn Union Gas Co. v. State Bd. of Equalization & Assessment*, 64 N.Y.2d 643, 644 (1984). Plaintiffs sufficiently pleaded facts to give them the opportunity to prove that segregated and inferior schools have no place in New York City, and that it is the City's and State's responsibility to end the injustice.

QUESTIONS PRESENTED

I. Did the Appellate Division correctly reverse the IAS Court's dismissal of this action as allegedly non-justiciable based solely on its concerns about formulating remedies if Plaintiffs prevail on the merits? Yes.

II. Did the Appellate Division correctly find that the facts pleaded by Plaintiffs regarding, *inter alia*, hypersegregation in New York City's public schools and woeful educational outcomes in them stated claims under (A) the Education Article, (B) the State Equal Protection Clause, and (C) the State Human Rights Law? Yes.

STATEMENT OF THE CASE

Premised on longstanding failings in educational outcomes and intractable segregation within the New York City schools, Plaintiffs, consisting of both student and parent organizations and individual public school students, filed the operative Amended Complaint on June 25, 2021, against the State of New York, the Governor, the Board of Regents, the Education Department, and the Commissioner of Education (together the "State"), as well as the Mayor of New York City, the Department of Education, and its Chancellor (together the "City") (and collectively, the "City and State" or "Defendants"). Plaintiffs brought claims under the Education Article, N.Y. Const. art. XI, § 1, the Equal Protection Clause, *id.* art. I, § 11, and the NYSHRL, N.Y. Exec. L. § 290 *et seq.* R.89-95. Plaintiffs challenge City and State policies and practices governing New York City public schools that have subjected—and continue to subject—Black, Latino/a, and certain Asian students to racial discrimination and deprivation of the opportunity to receive a sound basic education enshrined under the State Constitution, which have led to grossly unequal outcomes and disparities for those students. Plaintiffs seek both declaratory and injunctive relief. R.95-96.

Plaintiffs allege that Defendants' policies and practices create a racially discriminatory pipeline that has created one of the nation's most highly segregated school systems, despite the City having over one million students from diverse

ethnic and racial backgrounds. R.584-86; *see, e.g.*, R.26 ¶13; R.45-46 ¶79; R.51 ¶86; R.60 ¶99. As to the pipeline, during the 2018-19 school year (the most recent year of reporting pre-litigation), nearly 75% of Black and Latino/a students attended schools with less than 10% of white students whereas over 34% of white students attended schools with majority *white* populations, despite that just 15% of students were white. R.18 ¶6. This segregation begins the moment students enter the City system. Starting with kindergarten, Defendants have created and maintained unequal systems that funnel Black and Latino/a students into the City's underperforming schools and programs while leaving higher-performing and more desirable schools and programs, including specialized high schools, virtually devoid of such students. *See, e.g.*, R.16-27 ¶¶5-6, 8-14, R.44-46 ¶¶78-79, R.49-60 ¶¶84-99. This racially discriminatory pipeline long began with a single standardized test administered to four-year-old children as the sole basis for admissions to the G&T program. R.49-50 ¶84, R.586.[1] Yet, as experts state, "[t]he City has never demonstrated that…its early tracking of students into G&T versus general education programs…is pedagogically sound." R.587; *see* R.49-50 ¶¶84-85. This has resulted in a significant underrepresentation of Black, Latino/a, and low socioeconomic status students in the

[1] During litigation, the City announced that it would not use the G&T test for admissions. *See, e.g.*, Lola Fadulu, *New York City to Expand Gifted and Talented Program but Scrap Test*, N.Y. Times (Apr. 14, 2022), https://www.nytimes.com/2022/04/14/nyregion/nyc-gifted-talented.html. Nothing bars the City from reverting to test-only admissions.

G&T program. R.51 ¶86; *see also* R.20-21 ¶¶8-9 (difficulty in assessing particulars within broad "Asian" category used in City and State statistics). In the 2017-2018 term, although Black and Latino/a students comprised 65% of kindergarteners, they received just 18% of G&T program offers. R.51 ¶86. In contrast, Asian and white students comprised 18% and 17% percent of the kindergarten population, respectively, but received 42% and 39% percent of G&T offers. *Id.*

The G&T program exacerbates these racial disparities as students continue to advance through the City's schools. The G&T program provides superior academic preparation and assists students, primarily white and certain Asian students, to continue through the pipeline of academically screened middle schools, "relegating Black and Latinx students to unscreened schools, often in poorly maintained buildings with limited extracurricular programs." R.586; R.52 ¶88.

Those selective middle schools often allocate seats using fourth-graders' State standardized test scores even though those tests were not designed or intended for admissions purposes. R.52-53 ¶89; R.54 ¶92; *see* R.587.[2] This yields screened

[2]At the time of the complaint, approximately 37% of middle schools used competitive screens. R.52 ¶89; *see also* Julian Shen-Berro, *As NYC Middle School Applications Open, Selective Programs Surge in One Brooklyn District*, Chalkbeat, (Oct. 11, 2023), https://www.chalkbeat.org/newyork/2023/10/11/23913634/nyc-middle-school-admissions-academic-screen-selective-application-integration/ (post-complaint use of screens).

middle schools with unrepresentative student bodies at more than twice the rate of unscreened middle schools. R.45 ¶79 n.56.

The segregation further compounds thereafter. In the eighth grade, students begin applying to programs at any of the City's 400 public high schools. R.55 ¶93. These admissions often involve standardized tests to screen students. *Id.* At 27 of the City's top-performing screened high schools, for example, white and Asian students were admitted at almost double the rates of Black and Latino/a students. R.45-46 ¶79. This is most severe at "[t]he end of the pipeline, or 'zenith'…[,] admission to one of eight New York City specialized high schools based on the results of the Special High School Admissions Test (the SHSAT)." R.586-87; *see* R.55-56 ¶¶93-94.

The City's system of sorting and channeling students to the specialized high schools hinges upon the SHSAT alone. R.55-56 ¶94. "[T]he 1971 Hecht-Calandra Act, which mandated the SHSAT for three of the nine specialized high schools, was passed 'to thwart the City's investigation of the test's potential bias against Black and Puerto Rican students.'" R.588. As the Appellate Division recounted, "[t]he amended complaint avers that the historical background leading to the passage of the Hecht-Calandra Act evinces discriminatory intent." *Id. see* R.55-57 ¶¶94-95; R.601-02 ("[P]laintiffs allege that the Hecht-Calandra Act was designed to exclude Black and Latinx students from specialized high schools and to 'stymie' efforts to

study discrimination in admissions testing."). Plaintiffs' experts explained that the SHSAT has not been validated, as is essential for tests generally and more so where they are used for admission. R.57 ¶95. Moreover, despite the test's checkered origins, the City and State have not investigated its potential cultural biases. *Id.*; *see* R.587 (summarizing Plaintiffs' experts' findings). Conditioning admissions to the City's specialized high schools on a single examination results in radically disparate admissions outcomes for Black and Latino/a students. R.60 ¶99; R.588-89. For example, in 2020, although Black and Latino/a students comprised nearly 70% of City students, they received 4.5% and 6.6%, respectively, of admissions offers to specialized high schools. R.588; *see* R.588-89 (white and Asian students received nearly 28% and 54% of total offers, respectively). Black students received only 10 out of 766 admission offers in 2020 and 7 offers in 2019 to Stuyvesant High School, one of the City's most selective specialized high schools. R.60 ¶99. In 2020, Latino/a students received only 20 offers, 13 fewer than in 2019. *Id.*[3]

Not only do the segregated schools and deficient educations leave Black and Latino/a students less likely to advance to the City's screened middle and high schools, but such students experience significantly worse educational outcomes

[3] This has persisted post-litigation. *See, e.g.*, Jillian Jorgenson, *Data: Black and Hispanic students remain underrepresented at some top high schools*, Spectrum News (June 18, 2024), https://ny1.com/nyc/all-boroughs/education/2024/06/18/black-and-hispanic-students-remain-underrepresented-at-specialized-high-schools.

overall. *See* R.587-90. Due to their exclusion from the most coveted educational opportunities, Black and Latino/a students experience disproportionately high drop-out rates. Disparate graduation rates reflect the cumulative harm of this system, with the City's 2020 graduation rate for Black and Latino/a students being 75.9% and 74.1%, respectively, nearly 8 and 10 percentage points lower than the rate for white students. R.588; R.48-49 ¶83. In 2018, 50% of Asian students and 35% of white students earned advanced Regents diplomas, as compared to 8% of Black students and 12% of Latino/a students. *Id.* And even among the students who do graduate, they graduate from City schools substantially less prepared for higher education and the work force. *See* R.16-19 ¶¶5-6, R.20-28 ¶¶8-14, 16, R.44-46 ¶¶78-79, R.48-49 ¶83, R.51-60 ¶¶86-99. Within schools, while Black and Latino/a students do not misbehave more frequently or more severely than their white peers, they are disproportionally subjected to racially disproportionate disciplinary practices and police intervention. R.48 ¶82, R.63-64 ¶102.

In addition to policies and practices that create a racially discriminatory pipeline, numerous other deficient inputs have harmed Black and Latino/a students who disproportionately experience negative measurable outcomes (*e.g.*, graduation rates), including "the dearth of adequate teaching materials; the overabundance of large class sizes; the absence of sports, arts, and other extracurricular programs; and the parlous physical state of school buildings." R.594 ("inadequate 'inputs' at such

segregated, unscreened schools"); R.587-90. More specifically, Plaintiffs allege deficiencies in, *inter alia*,

> *physical facilities*, especially in the unscreened schools to which Black and Latino/a students are generally relegated. R.18-19 ¶6, R.28 ¶16, R.50-51 ¶85, R.61-63 ¶¶100-01, R.64-65 ¶103;
>
> *instrumentalities of learning*, including outdated, dilapidated, and insufficient numbers of textbooks and lack of basic classroom materials and supplies, R.18-19 ¶6, R.28 ¶16, R.61-62 ¶100, R.64-65 ¶103; *see also* R.27-28 ¶15, R.73-75 ¶¶115-17;
>
> *teaching and staffing*, including inadequate recruitment, retention, and support of teachers, R.14-15 ¶3, R.16-19 ¶¶5-6, R.27-28 ¶15, R.42 ¶68, R.46-47 ¶80, R.68-69 ¶109, R.71 ¶112, R.75-82 ¶¶118-32, R.83-84 ¶135; *see also* R.27-28 ¶15, R.85-86 ¶140, R.88-89 ¶145 (problems exacerbated by staff deficiencies); and
>
> *curriculum*, including ignoring or demeaning culture of students of color, thus hindering their learning. R.16-19 ¶¶5-6, R.27-28 ¶15, R.28-29 ¶17, R.65-75 ¶¶104-17.

In the face of the facts Plaintiffs pleaded regarding the highly segregated nature of the City's schools and the poor resulting outcomes, the City, State, and Parents Defending Education ("PDE")[4] separately moved the IAS Court to dismiss. R.99-100; R.108-09; R.182-83. They primarily argued that Plaintiffs failed to state a claim under each cause of action.[5] The City and State also spent a few pages arguing that Plaintiffs' claims were nonjusticiable. *See* NYSCEF Doc. No. 131 at

---

[4] Over Plaintiffs' and the City's objections, the trial court granted PDE's motion to intervene as a defendant. R.9-12.

[5] *See* Index No. 152743/2021, NYSCEF Doc. No. 121 at 4-19 (Sup. Ct. N.Y. Cnty. 2021); NYSCEF Doc. No. 131 at 13-24; NYSCEF Doc. No. 160 at 5-21.

29-33; NYSCEF Doc. No. 160 at 3-5. PDE did not raise justiciability at all. Yet, on May 25, 2022, the IAS Court dismissed the entire action on justiciability grounds alone, based on its characterization of remedies the complaint sought. R.7-8. The court's one paragraph order held that it "lack[ed] jurisdiction to grant the relief sought," asserting, "[t]he petition improperly seeks this Court to make education policy and, therefore, presents a nonjusticiable controversy." R.8. Plaintiffs timely appealed. R.3-5.

On May 2, 2024, the Appellate Division issued a decision reversing the justiciability-based dismissal in full. R.585 ("[I]n a cursory decision, the court dismissed the amended complaint as nonjusticiable, focusing entirely on plaintiffs' request for injunctive relief. This was error"); R.607-08. It explained that the IAS Court "incorrectly found that plaintiffs' request for injunctive relief rendered the entire case nonjusticiable." R.590. Relying on a host of this Court's precedents, the Appellate Division recognized that irrespective of remedies, it is "the responsibility of courts" to adjudicate whether parties have shown their rights have been violated under statutes and constitutional provisions at issue, even if the issues touch education policies. R.591 (cleaned up); *see* R.591-92 (recognizing that "even if, upon a finding a finding of liability, a court could not grant the full panoply of injunctive relief sought by plaintiffs, a case may still be justiciable" because courts

can "grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded").

Although the IAS Court did not address failure to state a claim, Defendants urged the Appellate Division to do so on appeal. The Appellate Division obliged, sustaining the Education Article claim in full and the other two claims in significant part. *See* R.593-608.[6]

First, it concluded that Plaintiffs "sufficiently allege[] that State and City policies cause New York City public school students, particularly Black and Latinx students, to receive less than the sound basic education to which they are entitled by the Education Article." R.594; *see id.* (discussing allegations regarding "segregated, unscreened schools"); *see* R.593-95 (discussing this Court's cases defining a "sound basic education," including the obligation to provide skills "for meaningful civic participation"). The Appellate Division recognized that Plaintiffs "adequately alleged 'outputs' that indicate New York City public schools fail to provide a sound basic education" and which "defendants do not dispute," including negative

[6] The Appellate Division did so although no Defendant cross-appealed, despite that an appeal is necessary to grant affirmative relief to a party, *see, e.g.*, *Hecht v. City of N.Y.*, 60 N.Y.2d 57, 60-61 (1983); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3 (2002), and there is no question that a dismissal for failure to state a claim is affirmative relief that enlarges a party's rights beyond the dismissal without prejudice that results from a justiciability-based decision, *see, e.g.*, *Burnett v. Warner Bros. Pictures*, 113 A.D.2d 710, 712 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 912 (1986).

"educational outcomes for Black and Latinx" students. R.596 (noting as examples "[t]he disparity in graduation rates, access to competitive schools, [and] conferral of Regents diplomas[,]" that indicate that the "State and City's policies deprive a substantial portion of Black and Latinx students of a sound basic education"). The court then recognized that the question of whether these concededly deficient outputs indicating the lack of a sound basic education were *caused by* the various "inputs" Plaintiffs pleaded was "a question of fact that can only be resolved after development of the record." R.596. The court recognized that Plaintiffs had pleaded a multi-factor combination of causal "inputs" at these "severely segregated schools." R.594-95; *supra* pp.11-12 (detailing same); *see* R.595-96 (discussing State's and City's own research and policies supporting Plaintiffs' causation theories).

Second, the Appellate Division held that Plaintiffs stated an Equal Protection claim premised on allegations that the particular standardized admissions testing at issue is non-pedagogically sound, unvalidated, and biased. R.601.[7] The Appellate Division relied on: the disparate impacts on Black and Latino/a students that Defendants concede were severe; "the legislative history of the Hecht-Calandra Act, the timing of its enactment, and the contemporaneous statements of its co-sponsor" as factors that support an inference of segregative intent; Defendants' knowledge of

[7] The court concluded that Plaintiffs failed to state an Equal Protection claim as to academic screens unrelated to this standardized testing. R.601.

the segregative effects of the "culturally biased and pedagogically unsound" standardized testing and continued adherence to it nonetheless; and the lack of adequate remedial efforts that Defendants recently undertook to address racial disparities in certain programs and schools. R.601-02.[8]

Finally, the Appellate Division held that Plaintiffs stated a claim under the NYSHRL against the City regarding the denial of certain facilities, based on the use of discriminatory admissions screens.[9] R.605. It concluded that Plaintiffs sufficiently alleged both discriminatory intent, R.606, and, independently, disparate impacts, which are cognizable under the NYSHRL, R.606-07.

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY HELD THAT PLAINTIFFS' CLAIMS ARE JUSTICIABLE

The Appellate Division correctly reversed the sole basis on which the IAS Court dismissed, namely that this entire case was purportedly non-justiciable even on the pleadings simply based on the IAS Court's perception of what remedies might

[8] Plaintiffs did not categorically attack the use of standardized tests as part of admissions processes or G&T programs generally, as opposed to the unvalidated, discriminatory testing used here. *See, e.g.*, R.95 (challenging "screens currently in use, and prohibition of future such screens to the extent that they operate in a racially discriminatory manner").

[9] The court dismissed the claim against the State, finding it was not an "educational institution" under the statute, R.603-05, as well as Plaintiffs' harassment-based theory, R.605.

be imposed if Plaintiffs ultimately prevail on the merits. R.590 ("[t]he court incorrectly found that plaintiffs' request for injunctive relief rendered the entire case nonjusticiable"); *see* R.590-92.

Here, Defendants have no serious contention that the IAS Court was correct to dismiss for lack of justiciability. That is understandable given, as the Appellate Division recognized (R.590-91), this Court has repeatedly held that it is "the province of the Judicial branch" to adjudicate claimed constitutional or statutory violations, including in the educational context. *Campaign for Fiscal Equity v. State*, 100 N.Y.2d 893, 925 (2003) ("*CFE II*"); *Bd. of Educ., Levittown Union Free Sch. Dist v. Nyquist*, 57 N.Y.2d 27, 39 (1982) ("*Levittown*") ("[It is] the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches."); *James v. Bd. of Educ. of City of N.Y.*, 42 N.Y.2d 357, 365 (1979) (similar). The Appellate Division properly applied such precedents in holding that Plaintiffs' claims are justiciable. As it recognized, "cases involving '[r]acial discrimination' are commonly heard by the courts even though they touch 'often deeply' education policies," R.591 (quoting *James*, 45 N.Y.2d at 365-66), "not in order to make policy but in order to assure the protection of constitutional rights," *see CFE II*, 100 N.Y.2d at 931. It rightly reasoned that the IAS Court's focus on the potential that certain remedies *might* prove non-justiciable did not support

dismissal because Plaintiffs sought declaratory relief, R.592 (citing *Klostermann v. Cuomo*, 61 N.Y.2d 525, 538-39 (1984), and *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 27 (2006)), and, as to injunctive relief, courts are not even "confined to relief sought by plaintiffs" but instead are "empowered to grant any type of relief within [their] jurisdiction once violations are proven." R.592 (cleaned up).

The City and State do not challenge any of that. The City's brief does not try to defend the IAS Court's justiciability holding. Similarly, the State does not take issue with the Appellate Division's application of this Court's justiciability precedents or attempt to rehabilitate the IAS Court. Instead, the State makes a strained nod toward the IAS Court, suggesting that the "justiciability doctrine" somehow "counsels against" finding that Plaintiffs sufficiently pleaded an Education Article claim. State-Br. 31, 34. The State does so despite that it is well-established that "whether [a] controversy is a justiciable one" is distinct from "the merits of plaintiffs' causes of action." *Klostermann*, 61 N.Y.2d at 535; *see, e.g.*, *U.S. Bank Nat'l Ass'n v. Nelson*, 36 N.Y.3d 998, 1006 (2020) (Wilson, J., concurring) (warning against conflating failure to state a claim and justiciability). Erroneous conflation aside, the State does not show that any justiciability principle supports dismissal. *See also infra* §II.A (discussing the State's quasi-justiciability points where they belong, as arguments that Plaintiffs purportedly fail to state an Education Article claim).

Only PDE makes any sustained contention that this entire action should have been dismissed on the pleadings for lack of justiciability. *See* PDE-Br. 10-21. That is ironic. PDE (unlike the City and State) did not raise justiciability in moving to dismiss. *See* No. 152743/2021, NYSCEF Doc. No. 121 at 1-20 (Sup. Ct. N.Y. Cnty. Aug. 23, 2021) (only arguing failure to state a claim). Even if this Court does not exercise its discretion by declining to consider those arguments that PDE "raised for the first time on appeal," *e.g.*, *Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003), PDE's original failure to raise them speaks volumes.

Specifically, echoing the IAS Court's fundamental error, PDE primarily and lengthily contends that remedies that may flow from a *merits* judgment in Plaintiffs' favor renders the underlying claims non-justiciable. *See, e.g.*, PDE-Br. 12 ("[T]o remedy those illegalities, [Plaintiffs] ask this Court to intervene in and monitor decisions [by political branches]...and many other details of the day-to-day administration of the City's schools"); *id.* at 17 ("At bottom, Plaintiffs 'call for a remedy which would embroil the judiciary in the management and operation of [the City's school] system'"); *id.* at 12-14 (discussing remedies); *id.* at 14-15 (oversight vested in political branches); *id.* at 16 ("compliance with...remedial orders"); *id.* at 18-21 (similar). This fails. To begin, PDE (like the IAS Court) cannot cite a single New York case in which hypothetical concern about potential remedies after a

judgment in plaintiffs' favor rendered the unadjudicated claims non-justiciable, let alone on the pleadings.

Rather, PDE's argument runs headlong into this Court's holdings in *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 316 (1995) ("*CFE I*") and *Klostermann.* In *CFE I*, this Court recognized that upon a motion to dismiss, discussion of remedy "is premature, because the only issue before the Court at this time is whether plaintiffs have pleaded a viable cause of action.... The question of remedies is not before the Court." 86 N.Y.2d at 316 n.4. In *Klostermann*, the Court distinguished between justiciable claims and potential justiciability issues that remedies might implicate, 61 N.Y.2d at 530-33, 536-37, while underscoring that "there is nothing inherent in plaintiffs' attempts to seek a declaration and enforcement of their rights that renders the controversy nonjusticiable," *id.* at 537.[10]

---

[10] The cases PDE cites do not advance its argument. *See* PDE-Br. 13-15. For example, PDE primarily relies on *Matter of N.Y. State Inspection v. Cuomo*, 64 N.Y.2d 233 (1984), but that was an appeal from a court-imposed injunction, putting the *remedy*'s justiciability squarely at issue. *See id.* at 238. Even so, this Court emphasized that "[w]e do not, by our decision today, suggest that petitioners' claims…are strictly beyond the realm of judicial consideration," reiterating that it is "within the power of the judiciary to declare the vested rights of a specifically protected class of individuals." *Id.* at 239-41 (citing *Klostermann*, 61 N.Y.2d at 525). That is, other remedies remained potentially justiciable and did not affect the underlying claims, just as the Appellate Division recognized here in a posture where nothing about remedy is ripe. *See supra* pp.17-18. Similarly off-base is *James* (PDE-Br. 15), where this Court found a particular preliminary injunction that had been *imposed* "was an unlawful interference with an educational policy judgment," 42 N.Y.2d at 358, while emphasizing that constitutional claims, even those "touch[ing], often deeply, educational policies...are judicially cognizable," *id.* at 366. And in

In addition to its overarching legal error, PDE is mistaken to suggest that the complaint's Request for Relief paragraphs compel a non-justiciability holding regarding the underlying *claims*. *See* R.591-92 (rejecting those arguments). This Court has long held that "[a] prayer for relief...is not controlling and may even be disregarded." *Erbe v. Lincoln Rochester Tr. Co.*, 3 N.Y.2d 321, 325-26 (1957). Moreover, as the Appellate Division recognized, "even if, upon a finding of liability, a court could not grant the full panoply of injunctive relief sought by [P]laintiffs," R.591, there would be no inherent justiciability problem. For example, (i) "[P]laintiffs sought a declaration, which is justiciable," R.592; *see* R.96,[11] (ii) "courts are not confined to relief sought by plaintiffs," R.592, and (iii) even if they were, the Request for Relief seeks, *inter alia*, classic prohibitory relief, *see, e.g.*, R.95 ¶(a) ("Injunctive relief requiring Defendants…to eliminate and remedy any intentional discrimination and disparate impacts"); R.95-96 ¶¶(a)(i), (c).[12] At bottom, PDE's arguments on justiciability, beyond being premature, fly in the face

---

Ware v. Valley Stream High School District, the Court analyzed on the merits (not as to justiciability) whether "denial of a total [religious] exemption" for students as to an AIDS-related curriculum "burdens their constitutional right of free exercise," ultimately reversing dismissal. 75 N.Y.2d 114, 122-31 (1989) (PDE-Br. 15).

[11] The declaration that Plaintiffs' constitutional and statutory rights have been violated is nothing like the subjects at issue in the political question cases on which PDE relies. *See* PDE-Br. 21.

[12] PDE sets-up a strawman in analogizing to federal court cases in which there was *no* "relief a [trial] [c]ourt] could appropriately fashion." PDE-Br. 19.

of this Court's holdings that "claims do not present a nonjusticiable controversy merely because the activity contemplated on the State's part may be complex and rife with the exercise of discretion." *Klostermann*, 61 N.Y.2d at 530.

The Appellate Division correctly reversed the justiciability-based dismissal.

II. THE APPELLATE DIVISION CORRECTLY HELD THAT EACH OF PLAINTIFFS' CAUSES OF ACTION STATE A CLAIM

A. The Appellate Division correctly concluded that Plaintiffs stated a claim under the Education Article

The Appellate Division correctly held that Plaintiffs' "amended complaint sufficiently alleges that State and City policies cause New York City public school students, particularly Black and Latinx students, to receive less than the sound basic education to which they are entitled by the Education Article." R.594; *see CFE II*, 100 N.Y.2d at 905, 919 (claim requires plaintiffs to plead the denial of a sound basic education and causation). Plaintiffs sufficiently alleged deficient educational outcomes ("outputs") caused by inadequate educational tools ("inputs") for City schoolchildren. R.594-97. No more was required at the pleading stage. *See CFE I*, 86 N.Y.2d at 318-19; R.596 (rejecting Defendants' challenges to certain inputs pleaded, as whether those "inputs cause[] New York City public school students to receive less than a sound basic education is a question of fact that can only be resolved after development of the record").

The Education Article guarantees all schoolchildren a right to a "sound basic education." *CFE I*, 86 N.Y.2d at 314. This Court has repeatedly defined that right by reference to outcomes: individuals prepared to "function productively as civic participants." *CFE I*, 86 N.Y.2d at 316; *CFE II*, 100 N.Y.2d at 905 (same); *Paynter v. State*, 100 N.Y.2d 434, 440 (2003) (same); *Aristy-Farer v. State*, 29 N.Y.3d 501, 505 (2017) (same). A sound basic education "conveys not merely skills, but skills fashioned to meet a practical goal: *meaningful civic participation in contemporary society*." *CFE II*, 100 N.Y.2d at 905 (emphasis added). This "purposive orientation for schooling" lies "at the core of the Education Article" and determines the substantive requirements thereunder. *Id.*; *see id.* at 931 ("The definition of a sound basic education must serve the future as well as the case now before us.").

Defendants' challenges to the Appellate Division's decision attempt to brush aside their own concessions that deficient outputs exist here, R.596, and the procedural posture of this case, *id.* (recognizing "question of fact" regarding causation). Instead, they seek this Court's creation of a novel bright-line rule that would limit the Education Article to a single potential input (insufficient funding)—irrespective of conceded deficient outputs and their causes. *See* City-Br. 28-30; State-Br. 29-30; PDE-Br. 23-29. This is contrary to the Education Article's text and this Court's precedent. Moreover, Defendants' arguments, if adopted, would have the Education Article bless separate but unequal two-tier educational systems by

permitting inferior inputs and outputs for different racial groups so long as funding was not the cause. The Court should affirm.

1. Defendants concede that Plaintiffs have pleaded deficient outputs, and a fact question is presented by whether the deficient inputs are proximate causes.

The Court's outcome-focused perspective in analyzing Education Article claims is significant because, as the Appellate Division recognized, Defendants never challenged that Plaintiffs sufficiently pleaded deficient outputs: "Plaintiffs have also adequately alleged 'outputs' that indicate New York City public schools fail to provide a sound basic education and defendants *do not dispute this allegation*. In fact, they are explicitly aware of it." R.596 (emphasis added); *see id.* (relying on "[t]he statistics concerning educational outcomes for Black and Latinx New York City public school students," including "[t]he disparity in graduation rates, access to competitive schools, conferral of Regents diplomas"); R.595 (citing statistics regarding same).[13]

---

[13] *See also* No. 152743/2021, NYSCEF Doc. No. 160 at 6 (acknowledging Plaintiffs plead output deficiencies regarding "school admissions, academic performance, and graduation rates"); R.18-19 ¶6 (admissions by the State and City Council, pre-litigation, regarding schools' failings). On appeal, the City has newly attempted to attack some pleaded outputs. *See, e.g.*, City-Br. 40, 42-44. The Appellate Division squarely rejected the City's maneuver. *See* R.596. This Court should similarly reject the City's attempt to raise waived issues on appeal. Regardless, as the Appellate Division properly found, Plaintiffs pleaded myriad deficient outputs, and Plaintiffs' allegations regarding *outputs* were anything but "terse." City-Br. 40 (quoting R.594 and implying that the Appellate Division made this statement about "student achievement 'outputs'" when the court in fact stated "[t]he complaint avers, tersely

In the face of these pleaded facts regarding the output failings relevant to a sound basic education, there is no serious path to a pleadings-based dismissal of the Education Article claim, as the Appellate Division recognized. *See* R.596. Defendants' arguments for dismissal, as they have all along, hinge on taking issue with certain of Plaintiffs' allegations of inadequate inputs in the schools. The complaint implicates a broad range of inputs, including teaching, physical facilities, and instrumentalities of learning. *See, e.g.*, R.593-96; *supra* pp.11-12; *infra* §II.A.1.b. Save for their meritless contention that the only colorable input for Education Article claims is funding (which does present a legal question), *see, e.g.*, City-Br. 28-30; State-Br. 29-30; PDE-Br. 23-30; *infra* §II.A.1.a, Defendants' attack on inputs alone means that they are simply challenging causation, *i.e.*, whether the allegedly deficient inputs are proximate causes of undisputedly deficient outputs. This is dispositive because the question of whether the allegedly deficient "inputs" caused students to receive a less than sound basic education is "a question of fact that can only be resolved after development of the record." R.596; *see, e.g.*, *Mirand v. City of N.Y.*, 84 N.Y.2d 44, 51 (1994) ("Proximate cause is a question of fact for the jury where varying inferences are possible[.]").

---

but adequately, that there are inadequate 'inputs' at such segregated unscreened schools"); *see, e.g.*, R.14-15 ¶3, R.16-19 ¶¶5-6, R.20-28 ¶¶8-16, R.44-46 ¶¶78-79, R.51-60 ¶¶86-99, R.63-68 ¶¶102-07, R.70-71 ¶¶111-12, R.78 ¶124; R.90-91 ¶151 (output allegations); *supra* pp.10-11.

a. Defendants are wrong that Education Article claims are somehow limited to funding-based grievances.

The Appellate Division correctly rejected Defendants' suggestion that Education Article claims are cognizable only if premised on inadequate funding. R.591-92. Defendants' attempt to engraft this limitation is contrary to the language of the constitutional provision itself and this Court's precedent. To begin, the Education Article states that "[t]he legislature shall provide for the maintenance and support of free common schools, wherein all the children of this state may be educated." N.Y. Const. art XI, § 1. Neither this language nor the legislative history limits Education Article claims solely to funding.

Defendants attempt to premise their funding-only argument on a strained reading of cases that on their face are directly contrary to Defendants' limited view of the Education Article. *See, e.g.*, City-Br. 38-39. Even decades after this Court first addressed Education Article cases premised on funding deficiencies causing the lack of a sound basic education, *see, e.g.*, *Levittown*, 57 N.Y.2d at 39 n.4; *CFE I*, 86 N.Y.2d at 312, it, as the Appellate Division recognized, "has never articulated such a constrained view" of inputs necessary to state a claim, and "if Education Article challenges unrelated to...funding methods were categorically not justiciable,[14] the Court of Appeals has had numerous opportunities to say so." R.591-92.

[14] Defendants have vacillated between trying to make this funding-only construction sound in justiciability or failure to state a claim. It goes to the scope of the cause of

Instead, this Court has done the contrary. For example, this Court has repeatedly emphasized that its precedent does not "delineate the contours of all possible Education Article claims." *Aristy-Farer*, 29 N.Y.3d at 511 (quoting *Paynter*, 100 N.Y.2d at 441). Indeed, in *Paynter*, it acknowledged that funding deficiencies were just one of many potential avenues for pursuing relief, dismissing claims there because there was "no assertion that these [poor educational] results are caused by any deficiency in teaching, facilities or instrumentalities of learning, *or* any lack of funding." 100 N.Y.2d at 440 (emphasis added).[15] Thus, as the Appellate Division correctly recognized, the Education Article's focus is on ensuring proper "'resources'—financial or otherwise." R.592 (quoting *N.Y. Civ. Liberties Union v. State*, 4 N.Y.3d 175, 180 (2005) ("*NYCLU*")).

Beyond that, as Defendants have acknowledged, *CFE I* set out a "template" for assessing Education Article inadequacies, including inputs that the Court deemed "essentials" within the following categories: "teaching," "curricula," "instrumentalities of learning," and "physical facilities and classrooms." 86 N.Y.2d

---

action (a merits issue) and thus is properly addressed through failure to state a claim, as Defendants now appear to recognize. *See, e.g.*, City-Br. 28, 30 (listing funding among elements to state a claim); State-Br. 29-30 (same).

[15] Irreconcilable with this passage of *Paynter* and the Court's articulation of the causation requirement more generally, Defendants would effectively read the claim's elements to include a *double*-causation requirement, *i.e.*, (1) limited funding must cause the complained-of inputs, and then (2) the complained-of inputs in turn cause the outputs. Nothing supports this.

at 317; *see id.* at 319 (plaintiffs sufficiently pleaded "inadequacies in physical facilities, curricula, number of qualified teachers, availability of textbooks, [and] library books"). Furthermore, the Court has subsequently recognized cognizable inputs beyond the categories it initially framed, finding in *Aristy-Farer*, for example, plaintiffs' allegations of "deficient inputs (a lack of qualified teachers and principals, low levels of support staff, outdated curricula, unsuccessful English as a Second Language programs, overly large class sizes, lack of basic materials such as textbooks and chalk, a reduction in after-school and summer programs, and inadequate and unclean buildings and facilities)" were sufficient to state a claim. 29 N.Y.3d 511 at 514-15; *see also Davids v. State*, 159 A.D.3d 987, 987-88 (2d Dep't 2018) (finding a cognizable Education Article claim premised on input of "permit[ting] ineffective teachers to remain within New York's public schools"). It is not surprising that the scope of potential inputs that may potentially cause the lack of a sound basic education would be broad insofar as ensuring "meaningful civic participation" must draw on a multi-faceted set of skills, and success in achieving as much is impacted by numerous factors. *See* R.595 ("*CFE II* expanded the definition of a sound basic education and contemplated that the requisite skills for meaningful civic participation might involve more than basic academic skills (which are skills tied to traditional inputs)[.]").

There is, in short, no basis for attempting to limit Education Article claims to complaints about funding deficiencies.

b. Plaintiffs pleaded numerous input-related failings.

While nothing about the categories of inputs listed in *CFE I*'s template is exclusive, Plaintiffs allege myriad inadequate inputs that fall squarely within that framework. *See supra* pp.11-12. That is, in addition to broadly alleging that the racially discriminatory channeling pervasive in the system and resulting segregation have deprived students of all racial backgrounds of meaningful ability to engage in the modern City's democratic society and specially harm Black and Latino/a students who disproportionately experience woeful measurable outcomes (*e.g.*, graduation rates), Plaintiffs allege specific deficiencies in, *inter alia*, physical facilities, instrumentalities of learning, teaching and staffing, and curriculum. *See id.*

As the Appellate Division summarized, Plaintiffs, among other things, "cite[d] the dearth of adequate teaching materials; the overabundance of large class sizes; the absence of sports, arts, and other extracurricular programs; and the parlous physical state of school buildings," and identified the schools' failures related to "teaching materials," "recruitment policies," and "training for all teachers to combat structural racism." R.594-95; *cf.* City-Br. 36 (acknowledging that Plaintiffs "allege inadequate facilities and instrumentalities of learning," but asserting those

allegations "are too vague and conclusory to state a cause of action"[16]). Furthermore, while causation is a classic factual question, even on this motion to dismiss record, the Appellate Division acknowledged that policies and research from the City and State supported causal inferences related to the inputs Plaintiffs pleaded. *See* R.595-96; R.595 (noting that, even as to curricular and support/services inputs that the court deemed "novel," "the State's and City's own policies certainly acknowledge the importance of" those inputs); R.595 n.10 (citing State's research that measures for which Plaintiffs advocated "can lead to improved student achievement").[17]

In sum, Plaintiffs' allegations both parallel and are more extensive than input allegations that this Court has repeatedly held sufficient under the Education Article. *See CFE I*, 86 N.Y.2d at 319; *Aristy-Farer*, 29 N.Y.3d at 514-15.[18] Whether the

---

[16] The charge is baseless, but, if the City were correct, the remedy would be leave to re-plead, not the dismissal that Defendants purport to seek on appeal.

[17] In addition to relying on the City and State's own materials, Plaintiffs substantiate their allegations by relying on nationally recognized authorities (and published literature) in fields including curricula, teaching, and psychometrics. *E.g.*, R.13-15 ¶3, R.66 ¶105, R.73-74 ¶¶114, 116.

[18] The City's attempt to analogize the circumstances alleged here to those triggering dismissal in *Paynter*, *see* City-Br. 35-36, is wrong given the City's admission (*id.* at 36 (quoted *supra* at pp.29-30)) that Plaintiffs have alleged recognized input failings. *Compare Paynter*, 100 N.Y.2d at 437-38 ("[P]laintiffs here claim no inadequacy of teaching, facilities or instrumentalities of learning"); *id.* at 438 ("Plaintiffs do not…allege that the substandard academic performance in their schools stems from any lack of funds *or inadequacy in the teaching, facilities or instrumentalities of learning*...." (emphasis added)); *see* R.598 (recognizing those distinctions). The attempted analogy fails for additional reasons, including that *Paynter* involved "allegations of academic failure alone," 100 N.Y.2d at 441, not the "meaningful

deficient outputs that everyone admits that Plaintiffs have sufficiently alleged are caused by the deficient inputs presents a quintessential fact question. Thus, the Appellate Division properly recognized that the appropriate next step here is "development of the record," not dismissal. R.596.

2. The State and the City are proper defendants.

At the motion to dismiss stage, Plaintiffs must simply allege a "causal link" between Defendants' actions and the lack of a sound basic education. *CFE I*, 86 N.Y.2d at 318; *see id.* (finding dissent's "extended causation discussion" to be "premature given the procedural context of this case"). Plaintiffs meet this burden so long as they provide "a clear articulation of [Defendants'] asserted failings." *NYCLU*, 4 N.Y.3d at 180. The Appellate Division correctly concluded that Plaintiffs did so. R.596-98.

The City and State both disclaim responsibility for the failures of the schools. State-Br. 20-26; City-Br. 29-32. But, as the Appellate Division concluded, "[t]he

---

civic participation" requirement later announced in *CFE II*, and, as the Appellate Division recognized, *Paynter* was premised on "residence-based placement" unique to Monroe County, whereas the policies and practices implicated here cause students of color to "attend 'more segregated and lower performing schools than they would if their place of residence alone determined school placement.'" R.598.

PDE does no better in trying to wedge the circumstances here into *Levittown*, where plaintiffs did not even allege the denial of a sound basic education. 57 N.Y.2d at 38; *see CFE I*, 86 N.Y.2d at 314 (claim in *Levittown* failed because "plaintiffs advanced no claim of a deprivation of 'minimal acceptable facilities and services' or 'a sound basic education'").

State and City's efforts to blame each other do not support dismissal." R.597. Indeed, "[t]aken together, the State and City's arguments lead to the nonsensical result that no government entity is responsible for a sound basic education." *Id.* Beyond being nonsensical, such a result would be contrary to law. As this Court has recognized, such finger-pointing "more properly concern[s] the apportionment of responsibility among various government actors than causation." *CFE II*, 100 N.Y.2d at 920.

The State argues that, because the City is responsible for the day-to-day operations of City schools, the State is absolved of its constitutional obligation to ensure that those schools satisfy the Education Article. State-Br. 20-26. This Court rejected such an argument in *CFE II*. 100 N.Y.2d at 921-22. Nonetheless, the State expends many pages describing the educational responsibilities that it has delegated to the City. State-Br. 20-26.

This does not trigger a different result. It is uncontested that the State "utilize[s] a statutory system" of delegation, *Levittown*, 57 N.Y.2d at 46, and *CFE II* credited the point the State urges here—the State is not "responsible[]...for the day-to-day operation of the schools"—before concluding that the State could not avoid its constitutional obligations on that basis. 100 N.Y.2d at 904, 922. As this Court explained, the State's attempt to pin responsibility on City decisionmakers "fails for a...basic reason": "both the Board of Education and the City are 'creatures or agents of the State,' which delegated whatever authority over education they

wield." *Id.* at 922; *see also City of N.Y. v. State*, 86 N.Y.2d 286, 289-90 (1995) ("[M]unicipal corporate bodies...are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents."). Notwithstanding these delegations, statewide "oversight of the public school system" stands "vested in the Regents." *CFE II*, 100 N.Y.2d at 904. Thus, despite the State's attempt to cabin its Education Article responsibility to funding, "the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights." *Id.* at 922. This Court should reject the State's renewed invitation to have it ignore "the simple constitutional principle that the State has ultimate responsibility for the schools." *Id.* at 924.[19]

The City, too, is legally responsible. Although the State bears "ultimate responsibility" for constitutional compliance, its responsibility coexists with the City's own legal obligation to carry out the responsibilities delegated to it in comportment with constitutional mandates. *NYCLU*, 4 N.Y.3d at 182. Because, as a practical matter, the State cannot manage the day-to-day functioning of every school within every district, "the Education Article enshrine[s] in the Constitution a state-

[19] Plaintiffs are not seeking to affirmatively enforce the Education Framework, so the State is wrong that Plaintiffs must commence a CPLR Article 78 proceeding. State-Br. 25-26.

local partnership" pursuant to which the State vests considerable authority in local governments to manage the operations of their schools. *Paynter*, 100 N.Y.2d at 442.

The City is obligated, pursuant to the State's delegation, to ensure that the day-to-day educational services it provides to its students comply with the mandates of the Education Article. *Cf. NYCLU*, 4 N.Y.3d at 182. The City's attempts to escape accountability by relying on *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440 (1979), is mistaken several times over. *See* City-Br. 29-30. *Donohue*'s reference to the "duty flowing directly from a local school district" (City-Br. 30 (quoting 47 N.Y.2d at 443)) was limited to a discussion of whether the Education Article created a claim for "compensatory damages" against the municipality. 47 N.Y.2d at 443; *see id.* at 442 ("This appeal poses the question whether a complaint seeking monetary damages for 'educational malpractice' states a cause of action cognizable in the courts."). It did not involve a claim regarding a municipality's and the State's combined District-wide shortcomings or prospective remedies for such, and did not consider the "state-local partnership" that later decisions have explicitly recognized. The City—as an agent of the State—must ensure that schools provide a sound basic education.

Because the complaint pleads (1) the denial of a sound basic education as reflected in numerous uncontested outputs and (2) causation from numerous inputs,

the Appellate Division correctly held that Plaintiffs state a claim. *CFE I*, 86 N.Y.2d at 316-18; *CFE II*, 100 N.Y.2d at 905; *Aristy-Farer*, 29 N.Y.3d at 517.

B. The Appellate Division correctly concluded that Plaintiffs stated a viable Equal Protection claim under the New York Constitution

The Appellate Division determined that Plaintiffs sufficiently alleged a violation of their right to equal protection under the New York Constitution due to the hyper-segregation of City schools resulting from standardized testing, which then yields dire outcomes for protected classes of students. R.598-603 & n.11; *see generally* N.Y. Const. art. I, § 11 ("[N]o person shall be denied the equal protection of the laws of this state or any subdivision thereof."). As the complaint detailed, *see supra* pp.6-10, racial segregation begins with admission to G&T programs and continues through the admissions processes for screened middle and high schools, with the separate tracks resulting in fewer opportunities and more negative outcomes for students of color. *See* R.600 ("Plaintiffs essentially argue that the education afforded Black and Latinx students in New York City public schools is unequal by design"); R.601 (testing at issue).

To state an Equal Protection claim "based upon a disproportionate impact upon a suspect class requires establishment of intentional discrimination." *CFE I*, 86 N.Y.2d at 321 (citing *inter alia, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (U.S. 1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976)); *accord* R.598-99; *see also Myers v Schneiderman*, 30 N.Y.3d 1, 13 (2017)

(equal protection guarantees under State and United States Constitutions "are coextensive") (*quoted in* R.598).

As was true in the Appellate Division, "Defendants do not challenge the existence of the [disparate] impacts which are, as alleged here, severe." R.601; *see also, e.g.*, R.520 (Regents' recognition that "[t]he statistics [regarding, *inter alia*, disparate outcomes experienced by Black and Latino/a students] are as frightening as they are familiar"). Instead, they contest only whether "plaintiffs sufficiently pleaded intent." R.601.

Defendants do not dispute that the Appellate Division correctly identified the controlling legal principles governing intent. Specifically, "[d]etermining intent or purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" R.599 (quoting *Arlington Heights*, 429 U.S. at 266). "'Quite obviously, discrimination is rarely admitted' and thus, it is rarely susceptible to direct proof." R.599 (quoting *Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 619-611 (2d Cir. 2016)). Thus, to determine intent, courts may inquire into "[t]he 'impact of the official action,'" "'[t]he historical background of the decision...particularly if it reveals a series of official actions taken for invidious purposes,' '[t]he specific sequence of events leading up to the challenged decision' including when there is a sudden change, '[d]epartures from the normal procedural sequence,' '[s]ubstantive departures,' and '[t]he legislative or administrative

history…especially where there are contemporary statements by members of the decisionmaking body.'" R.599 (quoting *Arlington Heights*, 429 U.S. at 265-68); *see also CFE I*, 86 N.Y.2d at 320 (discussing factors). Additionally, "[t]he foreseeability of a segregative effect, or adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance, is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." R.600 (cleaned up) (quoting *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1227 (2d Cir. 1987)). And "in assessing intent, Plaintiffs need only show that a discriminatory purpose has been a motivating factor" for the Defendants' actions, not that it was the "dominant" or "primary" factor. *Arlington Heights.*, 429 U.S. at 265 (cleaned up).

Defendants challenge the Appellate Division's conclusion that the facts that Plaintiffs pleaded relevant to these factors gave rise to an inference of intent. *See, e.g.*, City-Br. 3, State-Br. 40, PDE-Br. 37-38. But, as detailed below, Defendants' attack is largely a straw man, and one implicating factual (not legal) issues. That is, Defendants focus on arguing that a different reading of the legislative history of the Hecht-Calandra Act—which Plaintiffs alleged and the Appellate Division credited as providing indication of overt discriminatory intent——should be credited on a motion to dismiss record and deemed to somehow foreclose Plaintiffs' claim. *See* City-Br. 47-51, State-Br. 38-45, PDE-Br. 39-40. But the Appellate Division rightly

concluded, at this stage, Plaintiffs receive "the benefit of all favorable inferences which may be drawn from their pleading," R.601, and, regardless, cited multiple factors supporting an inference of discriminatory intent, *see* R.601-02 (crediting, *inter alia*, allegations supporting "disparate impact," "the legislative history of the Hecht-Calandra Act, the timing of its enactment, the contemporaneous statements of its co-sponsor," as well as Defendants' adherence to discriminatory testing *for decades* without change).[20]

1. The Appellate Division properly credited the extent of the disparate impact on Black and Latino/a students in finding an inference of discriminatory intent.

As just previewed, the Appellate Division properly credited that disparate impact in and of itself supports finding discriminatory intent, especially where the disparities, as the court acknowledged, are "severe." *See* R.601 ("t]he alleged disparate impact…'provides an important starting point"). Here, the pleaded statistical evidence of segregation and adverse consequences are "stark." *Arlington*

[20] The State's and PDE's suggestions that the Appellate Division *only* relied on Hecht-Calandra are wrong. *See* PDE-Br. 39 ("the Appellate Division rested its conclusion entirely on its evaluation of the Hecht-Calandra Act"); State-Br. 42 ("The Appellate Division was wrong (R.601-602) to rely on the statements of a single legislator…as sufficient evidence of discriminatory intent."); *cf.* City-Br. 48 (acknowledging that the Appellate Division credited other factors, but still focusing arguments on why the circumstances surrounding Hecht-Calandra should be construed differently).

Heights, 429 U.S. at 266; *see also* R.596 (relying on "[t]he statistics" showing disparate impacts); *supra* pp.6-11.

This is precisely the type of record, particularly on a motion to dismiss, in which the disparities significantly help support an inference of discriminatory intent. *See, e.g.*, *Yonkers Bd. of Educ.*, 837 F.2d at 1226-27 (finding discriminatory intent where, *inter alia*, among Yonkers's elementary schools in which 61% of all students were white, more than 75% of the schools were either more than 80% minority or more than 80% white, and 92% of minority students attended just 10 of the schools); *Floyd v. City of N.Y.*, 813 F. Supp. 2d 417, 434, 451 (S.D.N.Y. 2011) (relying on statistics showing extreme disparate impacts in finding fact issue regarding discriminatory intent associated with the City's stop and frisk policies), *on reconsideration*, 813 F. Supp. 2d 457 (S.D.N.Y. 2011).

2. The Appellate Division properly credited that the Hecht-Calandra Act provides evidence of overt discrimination.

As to the Hecht-Calandra Act, far from "rely[ing] on the statements of a single legislator," *see* State-Br. 42, the Appellate Division correctly recognized, based on the extensive facts that Plaintiffs pleaded without the benefit of discovery, that "the legislative history of the Hecht-Calandra Act, the timing of its enactment, and the contemporaneous statements of its co-sponsor are also factors that support an inference of segregative intent." R.601. Hecht-Calandra mandated the use of a single standardized test (the SHSAT) as the sole criterion for admission to these elite

institutions. R.588 n.7 ("[a]dmission to the Bronx High School of Science, Stuyvesant High School and Brooklyn Technical High School and such similar further special high schools which may be established shall be solely and exclusively by taking a competitive, objective and scholastic achievement examination" (quoting Education Law § 2590-g(12)(b)(1997) (incorporated by reference into Education Law § 2590-h(1)(b)))).

Before discussing the specific enactment, broader context is useful. The Hecht-Calandra Act's introduction and enactment occurred when resistance, including in New York, was building to integration efforts post-*Brown v. Board of Education of Topeka*, 348 U.S. 886 (U.S. 1954), and as protest movements drew on the unfulfilled promise of *Brown*. *See, e.g.*, John Kucsera et al., New York State's Extreme School Segregation, at 19-20 (Mar. 2014), *available at* https://www.nysed.gov/sites/default/files/kucsera-new-york-extreme-segregation-2014.pdf (discussing, *inter alia*, 1964 school boycotts during nearly 500,000 children stayed home to protest segregation and City's relaxation of desegregation plans; City's failure to implement desegregation plans; and litigation against the City in the 1970s over segregation).

As the Appellate Division recognized, and as pleaded and supported by ample historical evidence, *see, e.g.*, R.92, the Legislature mandated the SHSAT in order to

undermine the City's efforts to integrate schools. *See* R.601-02.[21] That is, in February 1971, faced with specialized high school populations that were 90% white, Chancellor Dr. Harvey B. Scribner, with the support of Mayor John V. Lindsay, announced a commission to evaluate whether admissions testing was "culturally biased" against Black and Puerto Rican students. *See* Bill Jacket at 3, Assembly Mem. in Supp.; Bill Jacket at 21 (Letter from Mayor Lindsay to Governor Rockefeller (June 14, 1971): "[i]t has been alleged that the competitive method for ascertaining admission to these schools discriminates against Black and Puerto Rican applicants"). Within months, legislators introduced the bill that became the Hecht-Calandra Act, targeting the City's potential integration efforts. Consistent with the Appellate Division's recognition that "historical background" "sequence," and "sudden change" in practice all provide touchstones under the *Arlington Heights* approach, *see* R.599; *supra* p.36-37, the Appellate Division found it "notabl[e]" that "the Hecht-Calandra Act was passed within seven months of the Chancellor's

[21] Indeed, the SHSAT is unvalidated, R.57 ¶95, and, in any event, is a highly unusual practice in the context of educational practice nationwide, *see, e.g.*, R.25 n.32. The pedagogical foundation for this exclusive benchmark for admissions was questioned from the outset. For example, "[t]he New York City Board of Education strongly oppose[d] th[e] bill." Educ. Law, Bill Jacket, L 1971, ch. 1212 ("Bill Jacket"), at 29 (Peter A. Piscitelli, Legislative Representative, N.Y. City Bd. of Educ., Mem. in Opp'n (May 4, 1971)). So did the New York City bar, noting, *inter alia*, "it attempts to establish, by legislative fiat and without prior investigation, an exclusive admission procedure *whose intrinsic merit has been seriously questioned*." Bill Jacket at 45 (Assoc. of the Bar of the City of N.Y. Letter to Hon. Michael Whiteman, Executive Chamber (June 11, 1971) (emphasis added).

announcement of a commission to evaluate whether admissions testing was 'culturally biased,'" R.601. Furthermore, the court recognized that the Act's co-sponsor explicitly stated that the Act was necessary "to protect specialized high schools from 'the continued threat' of 'political pressure groups' and from [Chancellor Scribner] who [had] placed 'another cloud over the heads of the specialized high schools by appointing a committee to investigate the schools and their admission procedures.'" R.602 (citation omitted); *see* R.126. That provided further support for "plaintiffs' theory that the Hecht-Calandra Act was passed to thwart the commission's efforts." R.602.[22]

The inferences of discriminatory intent that the Appellate Division credited were recognized contemporaneously—and more pointedly—with the enactment of Hecht-Calandra. For instance, the New York Times' front page reported in May 1971: "Sponsored by *a white cross section* of Democrats, Republicans, Conservatives and Liberals, the bill was drawn to defend against a special study initiated by the city's school Chancellor, Dr. Harvey B. Scribner, to look into charges that the four schools were 'culturally biased' against blacks and Puerto Ricans."

[22] That the Legislature injected itself into the minutiae of admissions to City schools (a particular subset of schools, no less) is itself remarkable. *See* R.599 (recognizing the significance of "departures" from "procedural" and "substantive" norms under *Arlington Heights*). Even more so in a case in which the State insists it leaves management of schools up to the municipalities. *See* R.597 (discussing State's "efforts to blame" the City); *see also* State-Br. 23.

R.568 (emphasis added). Legislators opposing the measure openly charged that it was "racist," *id.*, and an original co-sponsor stated "many of my colleagues [think the bill is discriminatory], and so I respect their wishes and vote in the negative," R.569.[23]

Moreover, as the Appellate Division recognized, Plaintiffs allege that the Hecht-Calandra Act was part of a broader pattern of actions that perpetuated racial segregation in the City's public schools. *See* R.586 ("single standardized test" for G&T); R.586-87 (discussing use "with no pedagogical basis" of "testing-based sorting that [Defendants] know excludes students of color"); R.588 ("historical background"); R.601-02 ("discriminatory testing" more broadly). Even so, the Appellate Division's treatment of the subject was understated. For instance, on the heels of Hecht-Calandra's single-test admissions model for high schoolers, the City adopted another unvalidated single-test model—for *kindergarteners*—for admission to G&T programs, which themselves were created to prevent white flight from the

[23] Legislators and commentators have recently recognized the same thing. "[Hecht-Calandra] was racist then [when enacted] and it's racist now." N.Y. State Assembly Standing Committee on Education, Public Hearing, Specialized High Schools, at 64 (Assembly Member Barron) (May 10, 2019), https://nystateassembly.granicus.com/MinutesViewer.php?view_id=8&clip_id=5117&doc_id=af69c1d7-8c4c-11e9-848a-0050569183fa; *id.* at 119-20 (Assembly Member Simon "why this was mandated by the state" is "troubling). *See also, e.g.*, Jim Dwyer, *Decades Ago, New York Dug a Moat Around its Specialized Schools*, N.Y. Times (June 8, 2018), https://www.nytimes.com/2018/06/08/nyregion/about-shsat-specialized-high-schools-test.html.

City's public schools. *See* Educ. Law, Bill Jacket, L 1982, ch. 740, Report of the Committee on Education; R.49-50 ¶¶84-85 & nn.76-77. In response to fears of white exodus, the G&T program created a safely segregated space and a racially discriminatory pipeline to the City's best schools. *See, e.g.*, *id.*; R.586-87; Somini Sengupta, *New York's Chancellor Seeking Wider Access to Gifted Program*, N.Y. Times (Feb. 28, 1997) (quoting the Schools Chancellor as saying "many minority and immigrant students are being shut out of programs for gifted children").

The Appellate Division had many reasons, extending far beyond statements by Hecht-Calandra's co-sponsor, to find the Act and other testing-based measures support an inference of discriminatory intent. *See* R.601-02; *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 210-11 (U.S. 1973) ("reject[ing] any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'"). This is particularly so where the SHSAT has proven wildly successful in stymying integration of the specialized high schools for decades. *Cf.* City-Br. 47-48 (the City had lobbied the State to "scrap the SHSAT as a requirement for admissions to the specialized schools").

Nothing to which Defendants point demonstrates otherwise, particularly in the posture of a motion to dismiss. After artificially narrowing the focus to legislative history regarding Hecht-Calandra rather than taking on the full suite of discriminatory inferences that stem from the Act *and* other test-based admissions policies that the Appellate Division credited, *see* R.601, Defendants merely emphasize that the SHSAT is facially neutral. *See, e.g.*, PDE-Br. 39-40; State-Br. 42-43. This does not support dismissal, factually or legally. On the law, the core principle of *Arlington Heights* and its progeny is that a race-neutral policy does not alone disprove intent, especially, as here, where there are multiple indications that the policy was adopted with a discriminatory purpose. *See, e.g.*, *Arlington Heights*, 429 U.S. at 266.[24] On the facts, Defendants continue to ignore, *inter alia*, the allegations that the Hecht-Calandra-mandated test has never been validated and suffers from cultural bias—and the enactment was in direct response to the City's then-efforts to study cultural bias in the existing admissions test. *E.g.*, R.602; R.60. At bottom, as the Appellate Division recognized, Defendants' position depends on

[24] *Chinese Am. Citizens All. of Greater N.Y. v. Adams*, 116 F.4th 161, 171 (2d Cir. 2024) ("In the decades since *Arlington Heights*, we have repeatedly re-affirmed that 'a facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect.'"); *Mhany Mgmt.*, 819 F.3d at 607-08 (affirming equal protection verdict for plaintiffs based on allegedly discriminatory zoning policies, concluding that the "historical background" supported a finding of intent where "racial discrimination has historically been a problem" in the municipality at issue); *Davis v. City of N.Y.*, 959 F. Supp. 2d 324, 362 (S.D.N.Y. 2013) (similar).

seeking to have fact questions resolved and favorable inferences drawn in Defendants' favor, which, of course, is entirely improper in this posture. R.601.

Finally, this Court should reject, as did the Appellate Division, any effort by Defendants to obtain dismissal by finger-pointing at each other. Completely ducking its own role in G&T and other screened-school admissions at issue, *see* R.601, the City says it cannot be blamed for what occurs at the specialized high schools because the Hecht-Calandra Act is State-imposed. *See* City-Br. 47-48. In response to this same argument, the Appellate Division correctly recognized that even the motion to dismiss record shows that the City retains significant discretion related to the SHSAT. *See* R.597 ("[T]he City…develops curriculum and testing content (including revising the SHSAT and maintain a Discovery program for admission of disadvantaged students)."). Moreover, the City's attempt to evade responsibility ignores its own exclusive role in *expanding* the impact of the test-only admissions policy at specialized high schools. The Hecht-Calandra Act originally mandated test-based admissions for three specific schools—Stuyvesant, Bronx Science, and Brooklyn Tech—and "such similar further special high schools which may be established," R.56 n.95 (quoting statute). But the City chose to create or designate five other schools as specialized high schools (as opposed to making them ordinary

or even screened schools), thereby cementing the SHSAT as the lone admissions criterion for them.[25]

No better are the State's attempts to shirk its substantial specialized high school admissions-related culpability by finger-pointing at the City's role in day-to-day implementation of local education policies, including the administration and content of the SHSAT. *See* State-Br. 39-40. Straying far from the pleaded facts and without having introduced documentary evidence, *see* CPLR 3211(a)(1), the State asserts that the City has the authority to choose the organization that prepares the SHSAT examination and to modify the type of examination given and its contents. *See* State-Br. 40. Even if all of this were so (and properly presented in this posture), (i) the State has foisted that admissions requirement on City schoolchildren, and (ii) as the Appellate Division correctly held in the context of the Education Article, the State cannot absolve itself of responsibility for the discriminatory impacts of local education policies simply by delegating day-to-day operations to local entities. R.597.

[25] Regardless, there is no question about the City's role in test-based admissions for G&T programs, screened middle schools, etc., which the Appellate Division also relied upon in finding an inference of intent.

3. The Appellate Division properly credited Defendants' adherence to challenged testing, despite the known and foreseeable segregative impact.

The Appellate Division properly found that the foreseeability of the segregative effect of Defendants' continued adherence for decades to (highly unusual and unvalidated, *see supra* p.41 & n.21) testing that leads to grossly disparate results supports an inference of discriminatory intent. R.600. As it recognized, courts have repeatedly found that the foreseeability of a segregative effect, or adherence to a particular policy with knowledge of its effects, supports an inference of discriminatory intent. *See Columbia Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (U.S. 1979); *Yonkers Bd. of Educ.*, 837 F.2d at 1227.

At the threshold, use of single tests—especially ones that are unvalidated—as the exclusive mechanisms for admissions into the G&T programs and the specialized high schools alone supports an inference of intent given that these practices epitomize "departures from the normal." *Arlington Heights*, 429 U.S. at 267; *accord* R.599 ("substantive departures"); *see, e.g.*, R.25 ¶12 n.32 ("'Test scores alone should never be used as the sole basis for including...or excluding any student from" specialized educational programming) (quoting Am. Educ. Research Ass'n et al., *Standards for Educational and Psychological Testing* 187 (2014)); R.20-21 ¶8 n.17; R.24-26 ¶12; R.50-51 ¶85 n.79; R.95 (discussing those tests, and quoting article reporting that "[e]xperts say the single-exam admissions process for such young

children is an extremely unusual practice that may be the only one of its kind nationwide").

Not only is this unusual, but Defendants have adhered to the "testing-based sorting that they know excludes students of color from equal educational opportunities." R.78 ¶28 n.53 (citing N.Y. Appleseed, *Within Our Reach: Segregation in NYC District Elementary Schools and What We Can Do About It* [hereinafter "N.Y. Appleseed"] at 10–13 (2013), https://nyappleseed.org/wp-content/uploads/First-Briefing-FINAL-with-Essential-Strategies-8_5_13.pdf); *see* R.92 ¶157; N.Y. Appleseed 10–13.[26]

Even in more recent years, Defendants have acknowledged the existence of racial disparities and the need for reform. As noted *supra* p. 36, the State has publicly acknowledged that the disparities that Black and Latino/a students face are "frightening as they are familiar." And the City has similarly admitted that "wide scale changes" were "needed to address the racial disparities in who has access to

[26] Despite PDE's relentless efforts to frame the narrative as such, not all Asian students fare better under the current system. *See* N.Y. Appleseed (discussing segregation for Asian students); R.20-21 ¶¶8-9 & nn.21-22; Jaclyn Zubrzycki, *Study: Asian Students Uncounted, Underserved in N.Y.C. Schools Not all 'model minorities'*, EducationWeek (Feb. 22, 2012), https://www.edweek.org/leadership/study-asian-students-uncounted-underserved-in-n-y-c-schools/2012/02 ("The report from the coalition and the Pumphouse Projects, a New York-based consulting firm that specializes in education justice, human rights, and economic policy issues, says that 95 percent of the city's Asian-American and Pacific-American students do not attend the most-selective public schools and face the same challenges as many other low-income, immigrant, and minority students.").

[G&T] programs." City-Br. 50-51. These acknowledgments are not merely a recognition of past issues but an admission that current practices continue to perpetuate segregation and negative resulting effects.

That there have been some measures taken, such as the City's DREAM Program and the Discovery Program, that allegedly were aimed at—but failed to succeed in preventing, let alone materially changing—segregation does not change things. *See* City-Br. 12; PDE-Br. 50. The Appellate Division correctly recognized that "even when remedial efforts are taken, it is still possible to infer intent based on 'the inadequacy' of those efforts." R.603 & n.12 (noting that these programs are still structured around the SHSAT, the very test alleged to be unsound and biased). Against a backdrop where single-test methods were employed to keep Black and Latino/a students out, it should not be surprising that slight remedial efforts have not ended, or meaningfully reduced, persistent segregation.[27]

---

[27] Without any basis in the record, PDE suggests that Plaintiffs' claims should be rejected because they purportedly necessarily seek race-conscious remedies and "*disparate treatment*, rather than race neutrality." PDE-Br. 33, 36 (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 218 (2023)). Not only does PDE's argument put the cart before the horse (discussion of remedies is premature), but (i) Plaintiffs have underscored that "race-neutral remedies are readily available, particularly as to school admissions," Pls.' Reply-Br. 25 n.15, No. 2022-02719, ECF Doc. 36 (1st Dep't); R.30 ¶19 (seeking "measures—whether race-neutral or race-conscious as the evidence may support"); *see also*, *e.g.*, *Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Boston*, 89 F.4th 46, 62 (1st Cir. 2023) (upholding Boston's facially neutral school selection plan), *cert. denied*, No. 23-1137, 2024 WL 5036302 (U.S. 2024), and (ii) anyhow, race-conscious remedies may be appropriate where racial discrimination has been shown,

Today, Defendants remain "on notice" and "aware" of racial segregation and the severely unequal race-based outcomes. *See Davis*, 959 F. Supp. 2d at 362-63 (crediting allegations that the City "was fully aware of residents' public complaints about its racially discriminatory trespass enforcement activities…but failed to take adequate steps to address those complaints, leading to an inference that it intended the racially discriminatory practices to continue"). As pleaded at length, Defendants have been aware of these issues but consistently failed to right those wrongs. *See, e.g.*, R.18 ¶6 (increased segregation in 2021, notwithstanding new policies); R.60 ¶99; R.65-68 ¶¶104-07. Such awareness, coupled with Defendants' failure to take adequately address these disparities, further supports the inference of intent.

* * *

The Appellate Division correctly found that Plaintiffs sufficiently pleaded an Equal Protection claim. Plaintiffs pleaded facts demonstrating the existence of many established factors for finding discriminatory intent under the *Arlington Heights* framework. Whether the competing inferences that Defendants urge on appeal are ultimately supported by the *evidence* and more persuasive is for another day.

---

see R.30 ¶19.

C. The Appellate Division correctly held that Plaintiffs stated a claim against the City under the NYSHRL

The Appellate Division correctly held that Plaintiffs stated a NYSHRL claim against the City premised on the denial of access to facilities. R.606-07. The Appellate Division concluded that Plaintiffs sufficiently pleaded intent, R.606, and that the claim was cognizable under a disparate-impact theory, R.606-07. The City and PDE fail to show otherwise.

1. Plaintiffs pleaded disparate impacts in access to educational facilities, which is cognizable under the NYSHRL, and pleaded intentional discrimination anyhow.

There is no question that Plaintiffs pleaded that there are gross disparate impacts in how Black and Latino/a students are allowed to access particular educational facilities, namely, G&T programs, screened schools, and specialized high schools. *See, e.g.*, R.587-90; *supra* pp.6-10. Instead, the City and PDE primarily contend that the Appellate Division erred by holding that disparate impact claims are cognizable under the NYSHRL. *See* City-Br. 56-62; PDE-Br. 41-46. They are wrong, and it would not matter if they were right because the Appellate Division also correctly held that Plaintiffs sufficiently pleaded discriminatory intent. *See* R.606; *supra* §II.B (discussing intent).

There is simply no indication that disparate impact claims are foreclosed under the NYSHRL. Instead, everything indicates the opposite.

First, this Court's precedent should shut the door on the City's and PDE's arguments. As the Appellate Division recognized, *see* R.606, this Court has unequivocally stated: "a disparate impact upon a protected class of persons violates the Human Rights Law." *People v. N.Y.C. Transit Auth.*, 59 N.Y.2d 343, 348 (1983), *accord Sontag v. Bronstein*, 33 N.Y.2d 197, 200-01 (1973); *see also Margerum v. Buffalo*, 24 N.Y.3d 721, 732 (2015) (recognizing the prospect that municipality would be subject to disparate-impact liability). The City and PDE, as they did below, try to sweep away these precedents because they did not arise in the education context but instead were issued in employment cases. *See* City-Br. 56-57; PDE-Br. 44-45. However, as the Appellate Division recognized, that is a distinction without a difference. There is "no reason to limit a disparate impact claim to employment cases" and "[t]he analysis should be the same whether the alleged discrimination required to secure employment or whether it is required to secure admission to the City's prime educational opportunities which leads to employment." R.606-07; *see also, e.g.*, *Bennett v. Time Warner Cable, Inc.*, 138 A.D.3d 598, 599 (1st Dep't 2016) (recognizing age discrimination-based disparate impact claim).

Second, applying this Court's cases recognizing disparate impact liability under other NYSHRL contexts makes sense here because, as the Appellate Division recognized, there is no material textual difference between the NYSHRL provisions

governing employment and use of facilities. R.607. The two instead echo one another. *See id.*; Exec. Law § 296(1)(a) ("It shall be an unlawful discriminatory practice...[f]or an employer...because of an individual's...race...to refuse to hire or employ or to bar or to discharge from employment such individual"); *id.* § 296(4) ("It shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified…by reason of his race").

The City has no real answer to this problem. It instead spends pages dodging the statutory text. *See* City-Br. 54-59. Meanwhile, PDE admits that subsection 4's use of "by reason of" is synonymous with "because of," the phrase used in subsection 1(a). *See* PDE-Br. 42 (collecting authorities recognizing that the two phrases have the same meaning); *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 768 (U.S. 2018) ("'[B]y reason of' is a 'quite formal' way of saying 'because of.'") (cleaned up, citation omitted). Given that this Court already has held that subsection (1)(a) permits disparate impact claims, *supra* pp.52-53, this should be a fatal concession.

But PDE seeks to brush aside those cases and re-write subsection (1)(a), stating:

> the Appellate Division (and Plaintiffs) relied on a series of inapposite decisions from the employment context. *See* R.606. But those decisions construed a different part of the NYSHRL that applies a different prohibition. *Compare* N.Y. Exec. Law §296(1)(a) (prohibiting all "discriminat[ion] against … an individual" by employers in hiring, termination, or terms, conditions or privileges of employment') *with id.*

> §296(4) (making it unlawful for an educational institution to "deny the use of its facilities…by reason of…race").

PDE-Br. 44-45. That is, PDE excises "*because of* an individual's…race" from (1)(a)—the very text that brings subsection (1)(a) into harmony with subsection (4)'s "by reason of" language and therefore permits disparate impact liability under both.

PDE seemingly does so as a Trojan Horse. PDE's position is that a statute employing "by reason of" race forecloses a disparate impact claim and requires intentional discrimination. *See, e.g.*, PDE-Br. 42 ("[A] statute that imposes liability for actions taken 'by reason of' a protected characteristic—like the NYSHRL does—requires 'discriminatory motive.'"). Thus, given PDE's earlier admission that "because of" is synonymous with "by reason of," PDE is seeking nothing less than to have this Court overrule its prior precedents recognizing disparate impact liability under the NYSHRL's subsection that uses "because of."

The Court should reject that attempt, just as the U.S. Supreme Court rejected an identical argument regarding "because of" language, holding that disparate impact claims are viable under the Fair Housing Act (FHA). *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 535 (U.S. 2015). There, defendants argued (and the dissent agreed) that the language "because of race" foreclosed disparate-impact liability. *See id.* at 548 (Alito, J., dissenting) ("to take action against an individual because of a protected trait plainly requires discriminatory intent") (cleaned up). However, the majority held that the FHA

permitted disparate impact liability, recognizing that "[b]oth Title VII and the ADEA contain identical 'because of' language, and the Court nonetheless held those statutes impose disparate-impact liability." *Id.* at 535. This Court should likewise continue to recognize such liability.

When the City finally gets around to the statutory text, while not facially seeking to extinguish disparate impact liability under the NYSHRL altogether, it ignores that "because of" and "by reason of" are synonymous. *See* City-Br. 60. It instead attempts to eke out an argument that subsection 296(4) is most analogous to federal antidiscrimination laws Title VI and Title IX, which do not recognize disparate impact liability. *See* City-Br. 58-59. *But see id.* at 58 (acknowledging this Court's statement in *Margerum*, 24 N.Y.3d at 731, that NYSHRL's standards are "in most instances identical to title VII [which permits disparate impact liability] and other federal law"). This argument is newly raised on appeal, which is telling. The argument makes little sense insofar as neither Title VI nor Title IX uses the "by reason of" construction, as the City admits. *See* City-Br. 58 (Title VI uses "on the ground of race").

Therefore, there is no indication that the Legislature in using "by reason of" curtailed the use of disparate impact liability any more than it did in using "because of" in a statute this Court already has held permits disparate impact liability.

In fact, despite the City's reliance on statutory history (albeit without acknowledging that subsection 4 tracks subsection 1(a)), *see* City-Br. 60-61), the City ignores the most relevant example. In 2019, the Legislature made explicit that the NYSHRL "shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed." Exec. Law § 300.

Finally, even if disparate impact was unavailable, the Appellate Division correctly held the NYSHRL claim was cognizable "for the same reasons that [Plaintiffs] sufficiently allege discriminatory intent in connection with their Equal Protection claim." R.606; *see supra* §II.B.

2. Plaintiffs adequately pleaded discriminatory denials of admissions to City schools and programs.

The Appellate Division correctly concluded that Plaintiffs pleaded discriminatory denials of admissions to City schools and programs. *See* R.606. The City newly contends that Plaintiffs' "allegations that they were denied access to certain schools and academic programs are entirely conclusory," noting that the complaint "does not allege that *any* of the 14 individual plaintiffs were denied access to a City school or academic program." City-Br. 54-55. This argument is waived and meritless anyway.

On waiver, the City did not identify this purported pleading deficiency in either its motion to dismiss briefing or its appeal below, despite that it could "have been obviated or cured by [additional] factual showings" in Supreme Court. *See Rivera v. Smith,* 63 N.Y.2d 501, 516 n.5 (1984) (new argument cannot be raised in this Court in such circumstances).

Moreover, the argument is baseless. It improperly seeks to impose a heightened pleading standard. *Contra*, *e.g.*, *Eccles v. Shamrock Cap. Advisors, LLC*, 42 N.Y.3d 321, 342 (2024) ("On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction"); *Tax Equity Now N.Y. LLC v. City of N.Y.*, 42 N.Y.3d 1, 12 (2024) (similar). It also ignores the allegations about the organizational Plaintiffs, which plead precisely such denials of elementary, middle and high school admissions. *See, e.g.*, R.36-42 ¶¶49-50, 59, 70 (alleging members who have "been rejected from" specialized high schools and screened schools as a result of the complained-of practices).

The three cases the City cites do not help it. *See* City-Br. 55-56. It invokes *Brown v. Albert Einstein College of Medicine of Yeshiva University*, 172 A.D.2d 197, 197-98 (1st Dep't 1991), but, as the Appellate Division correctly noted, *Brown* was not dismissed because of the sufficiency of the plaintiff's allegations of age discrimination. R.605-06. Rather, "the undisputed facts indicate that his academic

performance was below the accepted standard for admission," a standard not challenged, let alone as discriminatory. *Brown*, 172 A.D.3d at 197.

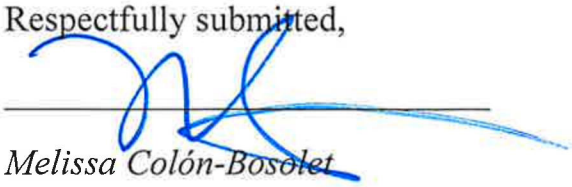
The City also cites *Dasrath v. Ross Univ. Sch. of Med.*, 2008 WL 11438041 at *9 (E.D.N.Y. Aug. 6, 2008) and *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) for the proposition that "bare legal conclusions with no factual specificity…are not enough to state a cause of action under section 296(4)[.]" City-Br. 55-56. But the federal pleading standard in *Dasrath* is inapplicable here. And this case is nothing like *Godfrey*, which dismissed conclusory allegations that an executive order "ha[d] resulted and [would] continue to result in the illegal disbursement of County funds" as insufficient because plaintiffs "did not identif[y] any specific impact that the Executive Order has had on any public employee or private individual in Westchester County." 13 N.Y.3d at 373. Here, Plaintiffs claim denial of admissions to the City's schools and programs as a result of the tests excluding individuals otherwise "academically qualified." *See, e.g.*, R.36-42 ¶¶49-50, 59, 70.

CONCLUSION

For these reasons, this Court should affirm the Appellate Division's order reinstating Plaintiffs' complaint against the City and State.

Dated: February 3, 2025
New York, New York

Respectfully submitted,



Melissa Colón-Bosolet

PEER DEFENSE PROJECT
Sarah Medina Camiscoli
sarah@peerdefense.org
40 Rector Street, Floor 9
New York, NY 10006
Telephone: (347) 670-4332

PUBLIC COUNSEL
Mark D. Rosenbaum (of the bar of the State of California) *pro hac vice* pending
Amanda Mangaser Savage (of the bar of the State of California) *pro hac vice* pending
mrosenbaum@publiccounsel.org
asavage@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: (213) 385-2977

SIDLEY AUSTIN LLP
Melissa Colón-Bosolet
Eamon P. Joyce
Karma O. Farra
Ernesto R. Claeyssen
Natalie T. Jean
mcolon-bosolet@sidley.com
ejoyce@sidley.com
kfarra@sidley.com
eclaeyssen@sidley.com
njean@sidley.com
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 839-5300

SIDLEY AUSTIN LLP
Carter G. Phillips (of the bar of the District of Columbia) *pro hac vice* forthcoming
cphillips@sidley.com
1501 K Street N.W.
Washington, DC 20005
Telephone: (202) 736-8000

Counsel for Plaintiffs-Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to 22 N.Y.C.R.R. §§ 500.13(c)(1) and (c)(3), I hereby certify that, according to the word count feature of the word-processing system used to prepare the brief, the total word count for all printed text in the body of the brief, inclusive of point headings and footnotes and exclusive of the statement of related litigation, corporate disclosure statement, the table of contents, the table of cases and authorities, the statement of questions presented, this certificate of compliance, and the proof of service, contains 13,906 words.

Respectfully submitted,

Melissa Colón-Bosolet
Counsel for Plaintiffs-Respondents

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 3, 2025

deponent served the within: **BRIEF FOR PLAINTIFFS-RESPONDENTS**

upon:

SEE NEXT PAGE FOR SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 3, 2025

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

Job# 332127

SERVICE LIST:

Philip W. Young Esq.
Muriel Goode-Trufant, Esq.
Acting Corporation Counsel
of the City of New York
Attorney for City Appellants
100 Church Street
New York, New York 10007
(212) 356-2375 or -0817
phyoung@law.nyc.gov

Mark S. Grube, Esq.
Office of the Attorney General
of the State of New York
Attorney for State Appellants
28 Liberty Street
New York, New York 10005
(212) 416-8028
mark.grube@ag.ny.gov

Dennis J. Saffran
38-18 West Drive
Douglaston, New York 11363
(718) 428-7156
djsaffranlaw@gmail.com

J. Michael Connolly
James F. Hasson
Paul R. Draper
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
Tel.: (703) 243-9423
mike@consovoymccarthy.com
Attorneys for Intervenor-Defendant-Appellant