To be Argued by:
J. Michael Connolly
(Time Requested: 30 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, 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.

BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT

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

CP COUNSEL PRESS (800) 4-APPEAL • (333498)

STATUS OF RELATED LITIGATION

Pursuant to Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) §§500.1(f) & 500.13(a), Parents Defending Education states that it is not aware of any related litigation as of the date of filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the 22 N.Y.C.R.R. §500.1(f), Parents Defending Education states that no such corporate parents, subsidiaries or affiliates exist.

TABLE OF CONTENTS

Status of Related Litigation i

Corporate Disclosure Statement ii

Table of Authorities v

Questions Presented 1

Jurisdictional Statement 2

Preliminary Statement 3

Background 5

I. The New York City school system. 5

II. Plaintiffs sue to demand racial considerations in the City's admissions policies, faculty hiring, and curricula. 7

III. Supreme Court dismisses Plaintiffs' claims, and the Appellate Division reverses. 8

Summary of Argument 9

Argument 10

I. Plaintiffs' claims are not justiciable. 10

A. Adjudicating Plaintiffs' claims would embroil the court in complicated policy judgments and turn the judiciary into an education czar. 12

B. The Appellate Division's contrary rationales are unavailing. 17

II. Dismissal was appropriate for the additional reason that Plaintiffs failed to state any claim upon which relief could be granted. 22

A. Plaintiffs' Education Article claim fails because the State has satisfied its obligation to adequately fund the City's schools. 22

1. The Education Article guarantees adequate school funding, not equal educational outcomes. 23

2. Plaintiffs have not alleged inadequate school funding. 25

3. The Appellate Division's contrary conclusion disregarded controlling authority from this Court. 30

B. Plaintiffs' Equal Protection claim fails because they have not alleged any facts supporting an inference of intentional discrimination. 33

1. The Equal Protection Clause covers only intentional discrimination, not disparate impacts. 33

2. Plaintiffs have not alleged any facts suggesting an intent to discriminate. 34

3. The Appellate Division erred by inferring discriminatory intent from disparate impacts. 38

C. Plaintiffs' claim under the New York State Human Rights Law fails because they have not alleged intentional discrimination. 41

1. The NYSHRL prohibits only intentional discrimination. 41

2. The Appellate Division's contrary conclusion failed to grapple with the statutory text and relied on inapposite precedent. 44

3. The Plaintiffs have not alleged intentional discrimination. 46

Conclusion 46

Certificate of Compliance 48

TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott v. Perez,
585 U.S. 579 (2018) 40

Al-Aulaqi v. Obama,
727 F. Supp. 2d 1 (D.D.C. 2010) 21

Alexander v. Choate,
469 U.S. 287 (1985) 43

Am. Dental Co-op, Inc. v. Att'y Gen. of State of N.Y.,
127 A.D.2d 274 (1st Dep't 1987) 22

Aristy-Farer v. State,
29 N.Y.3d 501 (2017) 24, 25, 26, 27

Baker v. Carr,
369 U.S. 186 (1962) 19

Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist,
57 N.Y.2d 27 (1982) ..... *passim*

Belk v. Charlotte-Mecklenburg Bd. of Educ.,
269 F.3d 305 (4th Cir. 2001) 35

Brennan Ctr. for Just. at NYU Sch. of Law v. N.Y. State Bd. of Elections,
159 A.D.3d 1301 (3d Dep't 2018) 21

Brnovich v. Dem. Nat'l Comm.,
594 U.S. 647 (2021) 40

Campaign for Fiscal Equity, Inc. v. State,
100 N.Y.2d 893 (2003) ..... *passim*

Campaign for Fiscal Equity, Inc. v. State,
8 N.Y.3d 14 (2006) 11, 14

Campaign for Fiscal Equity, Inc. v. State,
86 N.Y.2d 307 (1995) ..... *passim*

Chambers v. Old Stone Hill Rd. Assocs.,
303 A.D.2d 536 (2d Dep't 2003) 22

Curry v. N.Y. State Educ. Dep't,
163 A.D.3d 1327 (3d Dep't 2018) 17

DaimlerChrysler Corp. v. Spitzer,
7 N.Y.3d 653 (2006) 43

Fisher v. Univ. of Tex.,
570 U.S. 297 (2013) 36

Forrest v. Jewish Guild for the Blind,
3 N.Y.3d 295 (2004) 38

Gilligan v. Morgan,
413 U.S. 1 (1973) 19

Greater Birmingham Ministries v. Sec'y of State of Ala.,
992 F.3d 1299 (11th Cir. 221) 39

Gross v. FBL Fin. Servs., Inc.,
557 U.S. 167 (2009) 43

Husted v. A. Philip Randolph Inst.,
584 U.S. 756 (2018) 42

James v. Bd. of Educ. of City of N.Y.,
42 N.Y.2d 357 (1977) .....*passim*

Klostermann v. Cuomo,
61 N.Y.2d 525 (1984) 11

Missouri v. Jenkins,
515 U.S. 70 (1995) 18

Montano v. Cnty. Legislature of Cnty. of Suffolk,
70 A.D.3d 203 (2d Dep't 2009) 16

Montgomery-Costa v. City of New York,
894 N.Y.S.2d 817 (Sup. Ct. 2009) 15

Morgenthau v. Erlbaum,
59 N.Y.2d 143 (1983) 21

Myers v. Schneiderman,
30 N.Y.3d 1 (2017) 29, 33

N.Y. State Inspection, Sec. & Law Enf't Empls., Dist. Council 82, AFCME, AFL-CIO v. Cuomo,
64 N.Y.2d 233 (1984) .....*passim*

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 4, 36

Paynter v. State,
100 N.Y.2d 434 (2003) ..... *passim*

People v. N.Y. City Transit Auth.,
59 N.Y.2d 343 (1983) 33

People v. Roberts,
31 N.Y.3d 406 (2018) 42

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 35, 38, 39, 46

Price v. N.Y. City Bd. of Educ.,
51 A.D.3d 277 (1st Dep't 2008) 15

Pritchard v. Am. Airlines, Inc.,
708 F. Supp. 3d 861 (N.D. Tex. 2023) 16

Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo,
86 N.Y.2d 279 (1995) 24, 25, 32

Richardson v. Fiedler Roofing, Inc.,
67 N.Y.2d 246 (1986) 22

Roberts v. Health & Hosps. Corp.,
87 A.D.3d 311 (1st Dept' 2011) 11

Roberts v. Tishman Speyer Props., L.P.,
62 A.D.3d 71 (1st Dep't 2009) 42

Rucho v. Common Cause,
588 U.S. 684 (2019) 17, 19, 20

Scaggs v. N.Y. Dep't of Educ.,
2007 WL 1456221 (E.D.N.Y. May 16) 43

Sontag v. Bronstein,
33 N.Y.2d 197 (1973) 45

State Div. of Hum. Rights v. N.Y. City Dep't of Parks & Rec.,
38 A.D.2d 25 (1st Dep't 1971) 45

Stein v. 92nd St. YM-YWHA,
273 A.D.2d 181 (1st Dep't 2000) 43, 44

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,
600 U.S. 181 (2023) 4, 33, 36, 37

Totes-Isotonor Corp. v. United States,
594 F.3d 1346 (Fed. Cir. 2010) 38

United States v. Ghailani,
686 F. Supp. 2d 279 (S.D.N.Y. 2009) 19

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013) 42

Vieth v. Jubelirer,
541 U.S. 267 (2004) 16

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 34, 38

Walton v. N.Y. State Dep't of Corr. Servs.,
8 N.Y.3d 186 (2007) 22

Ware v. Valley Stream High Sch. Dist.,
75 N.Y.2d 114 (1989) 15

Weisberg v. Yellen,
2024 WL 3718265 (D. Conn. Aug. 7) 21

Statutes & Other Authorities:

29 U.S.C. § 794(a) 43

1971 N.Y. Laws Ch. 1212 § 1 ..... 39, 40

Am. Heritage Dictionary 42

N.Y. Civ. Prac. Law & R. 5602(b) 2, 9

N.Y. Const. art. I, § 11 33

N.Y. Const. art. XI, § 1 ..... 23, 30

N.Y. Educ. Law § 2590-h(1)(b) 39

N.Y. Exec. Law § 264(4) 43

N.Y. Exec. Law § 291(2) 41

N.Y. Exec. Law § 296(1)(a) 45

N.Y. Exec. Law § 296(4) 42, 43, 44, 45

N.Y. Exec. Law Article 52 14

Reema Amin & Christina Veiga, *Once again, few Black, Latino students admitted to NYC's prestigious specialized high schools*, Chalkbeat (Apr. 29, 2021) 6

QUESTIONS PRESENTED

1. Did Supreme Court correctly dismiss Plaintiffs' complaint on justiciability grounds, where adjudicating Plaintiffs' claims would require the court to second-guess education policy decisions committed to the discretion of the political branches? Yes.

2. In the alternative, should Plaintiffs' complaint be dismissed because Plaintiffs failed to state a claim under the Education Article, the Equal Protection Clause, and the New York State Human Rights Law? Yes.

JURISDICTIONAL STATEMENT

On July 18, 2024, the Appellate Division for the First Department granted Defendants' motions for leave to appeal the Appellate Division's May 2, 2024 order modifying Supreme Court's May 25, 2022 order dismissing Plaintiffs' claims. *See* R.579-80. This Court has jurisdiction under N.Y. Civ. Prac. Law & R. 5602(b). All arguments raised in this appeal were presented to and addressed by the courts below and are therefore preserved for this Court's review. *See* R.7-12, 582-608.

PRELIMINARY STATEMENT

New York City "has long been regarded as a leader in free public education." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982). Today, the City operates one of the largest school districts in the country, serving a diverse population of more than 1,000,000 students. As part of its commitment to quality public education, the City offers a variety of specialized programs for academically talented children, including "gifted" courses for elementary students and specialized schools for high school students. The City admits students to these programs and schools on a race-neutral basis, using standardized tests and academic records to award slots based purely on academic merit. And, as part of its commitment to equal opportunity, it has developed scholarship programs to help students from socioeconomically disadvantaged circumstances prepare for the admissions tests.

For Plaintiffs, however, that is not enough. In their eyes, this merit-based system of admissions is nothing short of a "racist caste system." R.30 ¶19. Not because it relies on race too much when it admits or rejects a student from a particular school—again, it doesn't use race at all—but because it doesn't use race *enough*. The City and the State are, on Plaintiffs' theory, responsible for "ameliorat[ing] the effects of racism and poverty." R.594. So they have asked the Court to replace the City's admissions policies with "race-conscious" ones. R.30 ¶19. But their racialized policy proposals don't stop there: they have also asked the Court to order changes to the City's curriculum to make it

more "culturally responsive," and they have demanded that the City hire more employees of color. R.95-96.

But reducing students to their racial identity and admitting (or denying) them on that basis runs counter to the goal—embodied in the U.S. Constitution's Equal Protection Clause—of a race-neutral classroom where students are evaluated as "individuals rather than solely as members of a racial group." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007) (plurality). It is also unlawful, as the U.S. Supreme Court reminded us just one year ago. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 218 (2023) ("[R]ace-based admissions systems" violate the "twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype.").

Supreme Court dismissed Plaintiffs' claims, and this Court should affirm that decision. Even setting aside the racial consequences, Plaintiffs' demands regarding school admissions, curriculum development, and teacher recruitment implicate policy issues "committed to the professional judgment and discretion" of the political branches. *James v. Bd. of Educ. of City of N.Y.*, 42 N.Y.2d 357, 359 (1977). It is not the role of the judiciary to second-guess those decisions. That's why New York courts have refrained from intervening in such disputes before and why Supreme Court deemed Plaintiffs' claims non-justiciable here. And even if Plaintiffs' claims *were* justiciable, they would fail anyway—the City and State have not discriminated against anyone and have fulfilled their obligation to provide a sound basic education to New York City students.

BACKGROUND

Plaintiffs sued the State of New York, the State Education Department, the New York City Department of Education, and various state and local officials in Supreme Court, New York County, seeking injunctive and declaratory relief. R.13-105. PDE intervened as a defendant. R.9-12. All Defendants moved to dismiss, and Supreme Court granted those motions. R.7-8. Plaintiffs appealed, and the Appellate Division reversed. R.582-608. The Appellate Division then granted Defendants leave to appeal to this Court. R.579-80.

I. The New York City school system.

New York City began providing free public education nearly 200 years ago, well before its counterparts across the State. *See Paynter v. State*, 100 N.Y.2d 434, 457-58 (2003) (Smith, J., dissenting). Today, the City's public school system encompasses more than 1,000 schools, serves more than 1,000,000 children, and employes more than 100,000 teachers and staff. *See Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 903-04 (2003) ("*CFE II*").

The City operates a variety of programs and specialized schools for academically and artistically talented students. Starting in elementary school, students can enroll in "Gifted & Talented" courses. R.20 ¶8. And in middle school, students can test into "screen[ed]" schools. R.22-23 ¶10. Both the Gifted & Talented courses and the screened middle schools select students based purely on academic merit; they do not consider an applicant's race. R.20-21 ¶8; R.22-23 ¶10; R.49-50 ¶84.

At the high school level, the City's academic offerings expand even more. The City operates more than 700 programs across more than 400 different schools. R.23-24 ¶11. Of those 400 schools, nine are "specialized high schools." R.24-25 ¶12; R.55-56 ¶94. Admission to eight of these specialized schools—like the Gifted & Talented courses and screened middle schools—is based on academic merit. R.55-56 ¶94. (The ninth school, LaGuardia High School of Music & Art, admits students based on an audition. R.55-56 ¶94.) Specifically, "the sole criterion for admission" is a student's score on the Specialized High School Admissions Test (the "SHSAT"), which is a "114-question exam consisting of English language arts and math items." R.55-56 ¶94. Any eighth-grade student in the City can take the SHSAT, R.55-56 ¶94, and—to ensure equal opportunity—the City offers scholarships for low-income students to use on test preparation, R.57-58 ¶96. The City also "facilitates the admission of low-income students to specialized high schools if their SHSAT scores are sufficiently close to the cutoff." R.59 ¶97.

New York City's schools are racially diverse, *see CFE II*, 100 N.Y.2d at 903-04, as are the students admitted to the City's gifted programs and specialized high schools. For example, per the sources cited in Plaintiffs' own complaint, more than 60% of admission offers in 2021 went to students of color. Reema Amin & Christina Veiga, *Once again, few Black, Latino students admitted to NYC's prestigious specialized high schools*, Chalkbeat (Apr. 29, 2021), perma.cc/RUJ3-35VD; *see also* R.60 ¶99 n.111.

II. Plaintiffs sue to demand racial considerations in the City's admissions policies, faculty hiring, and curricula.

In March 2021, Plaintiffs (various nonprofit organizations and a collection of New York City students) filed this action in the New York County Supreme Court. R.13, 31-43 ¶¶28-71. PDE, a membership organization with parent members whose children attend various New York City schools and take part in the City's Gifted & Talented programs and specialized high schools, intervened as a Defendant. R.9-12.

Plaintiffs raised three causes of action: (1) the New York Constitution's Education Article, (2) the New York Constitution's Equal Protection Clause, and (3) the New York State Human Rights Law. R.89-95 ¶¶147-67. Generally, Plaintiffs claimed that the City's admissions policies for its gifted programs and specialized schools create a "caste system" and "apartheid state." *See, e.g.*, R.20-21 ¶¶7-8; R.29-30 ¶¶18-19; R.45-46 ¶79; R.90 ¶151; R.93 ¶159. Plaintiffs acknowledged that the City's admissions policies are facially race-neutral but complained that black and Latino students secure disproportionately few admission offers because they tend to score lower than their white and Asian classmates on the City's admission tests. *E.g.*, R.91-92 ¶156. Plaintiffs' complaint also alleged that the City's supposedly "Eurocentric" curriculum perpetuated "Anti-darkness" and "antiblack racism." R.65-66 ¶104; R.69 ¶109 n.145; R.70 ¶110. And it attacked the City's teachers as too white. R.75-84 ¶¶118-35.

Plaintiffs sought injunctive and declaratory relief. R.13; R.95-96. They asked Supreme Court to invoke its "remedial authority to impose measures," whether "race-

neutral or race-conscious," to eliminate racial disparities in the City's school system. R.29-30 ¶19. Specifically, they demanded that Defendants (1) end their race-neutral admissions practices, including its academic "screens" like the SHSAT, (2) hire more teachers, administrators, social workers, and guidance counselors of color, and (3) adopt a more "culturally responsive" curriculum. R.95. Plaintiffs also asked the court to "[e]stablis[h] a system of accountability" to ensure Defendants are, among other things, increasing the number of employees of color and providing "sufficient mental health support to students." R.95.

III. Supreme Court dismisses Plaintiffs' claims, and the Appellate Division reverses.

PDE and the government Defendants moved to dismiss Plaintiffs' complaint because it failed to present a justiciable question and failed to state a claim on which relief could be granted. *See* PDE Mem. Law Supp. Mot. Dismiss Am. Compl., NYSCEF Doc. No. 121 (Sup. Ct. N.Y. Cnty. Aug. 3, 2021); City Mem. Law Supp. Mot. Dismiss Am. Compl, NYSCEF Doc. No. 131 (Sup. Ct. N.Y. Cnty. Aug. 3, 2021); State Mem. Law Supp. Mot. Dismiss Am. Compl, NYSCEF Doc. No. 160 (Sup. Ct. N.Y. Cnty. Sept. 13, 2021). Supreme Court granted those motions, concluding that Plaintiffs' complaint "present[ed] a nonjusticiable controversy." R.8. Plaintiffs, the court explained, "improperly" asked the court "to make educational policy by directing respondents [to] take certain actions regarding curriculum content, testing content, employment diversity, employment policies, admission policies, and disciplinary policies." R.8. "The

legislature, not the judiciary, is the proper branch of government to hear petitioners' prayers." R.8.

The First Department of the Appellate Division reversed. It reasoned that "a case may still be justiciable" even if the "court could not grant the full panoply of injunctive relief sought by plaintiffs," R.591, though it neglected to address Defendants' argument that—remedy aside—Plaintiffs' theory of liability would *itself* require the court to resolve non-justiciable policy questions, *see, e.g.*, PDE.App.Div.Br.15. The Appellate Division also concluded that Plaintiffs stated cognizable claims on all three causes of action: the Education Article, the Equal Protection Clause, and the New York State Human Rights Law. R.592-607. The Appellate Division granted Defendants leave to appeal to this Court. R.579-80; N.Y. Civ. Prac. Law & R. 5602(b).

SUMMARY OF ARGUMENT

Supreme Court's decision dismissing Plaintiffs' claims was correct for two independent reasons. First, Plaintiffs do not present a justiciable controversy. As this Court has repeatedly explained, the judiciary should not intrude on matters of policy—including education funding and school administration. Those issues are committed to the discretion of the political branches, and second-guessing the decisions of education experts is not "consistent with the judicial function." *N.Y. State Inspection, Sec. & Law Enf't Empls., Dist. Council 82, AFCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 238 (1984) (quotation omitted). Disregarding that principle, Plaintiffs' requested remedies would turn

the court into an education czar and require New York City schools to secure judicial approval for everything from admissions tests to curriculum development.

Second, Plaintiffs fail to state any claim upon which relief can be granted. Their Education Article claim falters from the start, because they do not allege a "gross and glaring inadequacy" in the City's schools. *Levittown*, 57 N.Y.2d at 48. Nor do they allege that any such inadequacy is due to insufficient funding from the State. And their claims under the Equal Protection Clause and the New York State Human Rights Law fail because both provisions require evidence of *intentional* discrimination—not just disparate impact—and the City's admissions policies are emphatically race-neutral. Furthermore, the relief Plaintiffs seek would itself violate the equal protection guarantees of the State and Federal Constitutions by requiring the courts to dictate educational policy based on racial classifications.

ARGUMENT

I. Plaintiffs' claims are not justiciable.

New York's "pattern of government" separates the executive, legislative, and judicial functions, and it is "a fundamental principle" that each branch should be "free from interference … by either of the other branches" in the discharge of its powers. *N.Y. State Inspection*, 64 N.Y.2d at 239. For the judicial branch, this principle is effectuated through the doctrine of justiciability. The doctrine "encompasses discrete, subsidiary concepts including, *inter alia*, political questions, ripeness and advisory opinions,"

but at its core means that "the power of the judicial branch may only be exercised in a manner consistent with the judicial function." *Id.* at 238 (quotation omitted).

The judiciary will not, for example, "intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 324 (1st Dept' 2011) (cleaned up). As "political branches," the executive and legislature are equipped to handle "complex societal and governmental issues." *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) ("*CFE III*") (quotation omitted). But courts, on the other hand, are "ill-equipped" to review those decisions, *Roberts*, 87 A.D.3d at 323 (quotation omitted), because they involve discretionary judgments like the "allocation of resources and ordering of priorities," *N.Y. State Inspection*, 64 N.Y.2d at 239; *see also Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984) ("The paramount concern is that the judiciary not undertake tasks that the other branches are better suited to perform.").

And that is what Plaintiffs are asking the courts to do here. They demand a judicially managed overhaul of New York City's schools—everything from their admissions criteria to their curricula to their teacher demographics. *See* R.95. But these are all intensely discretionary and value-laden judgments that are best left to education experts and elected officials. Adjudicating them here would, as Supreme Court recognized below, eliminate any distinction between the judicial, executive, and legislative functions and convert the court into a school board. *See* R.8 (Supreme Court's recognition that

"[t]he legislature, not the judiciary, is the proper branch of government to hear petitioners' prayers.").

A. Adjudicating Plaintiffs' claims would embroil the court in complicated policy judgments and turn the judiciary into an education czar.

Plaintiffs generally allege that, in their view, New York City's schools have done an unsatisfactory job of ameliorating racial disparities among students. *See* R.15-16 ¶4. These failures, they say, are not only bad management, but *illegal*. And to remedy those illegalities, they ask this Court to intervene in and monitor decisions about what teachers to hire, how to train them, what students to admit, what to teach them, how to allocate funds to different schools, and many other details of the day-to-day administration of the City's schools. R.95-96. In other words, Plaintiffs ask the courts to supplant the City's and State's pedagogical and administrative judgments in favor of their own. But these are quintessential policy questions, and Supreme Court correctly determined that Plaintiffs' claims are non-justiciable for that reason.

1. Plaintiffs have never been shy about the incredible scope of their claims, or the fact that a decision in their favor would require the court to evaluate the relative wisdom of Plaintiffs' proposed admissions policies and curriculum compared to the City's current practices. For example, Plaintiffs repeatedly demand the City's admissions policy be scrapped in favor of a purportedly more equitable system. *Compare, e.g.*, R.27 ¶14 (discussing City's "fail[ure] to take action to eliminate" use of the SHSAT even though "policymakers … decry the [test's] outcomes"), *with* R.95 (listing "[e]limination"

of "high school admissions screens currently in use" as first request in prayer for relief). And in support of that request, they rely not on statutory or constitutional language, but the supposed wisdom of "[e]ducation experts" and the "widespread consensus among psychometricians." R.66 ¶105; R.24-25 ¶12.

Even worse, Plaintiffs demand not only specific policy changes, but also that the court appoint itself as perpetual monitor of the City's school system to ensure educational outcomes sufficiently equitable in Plaintiffs' eyes. The court, say Plaintiffs, must "[m]onito[r] and enforc[e]" the "schools' compliance with" Plaintiffs' preferred policies. R.95. The court should, according to Plaintiffs, supervise Defendants as they develop judicially-mandated plans to (1) recruit more teachers of color, (2) increase mental health resources available to students, (3) hire more social workers, and (4) address other "conditions that deny students a sound basic education." R.95-96. And before Defendants get started on any of that, they will have to prepare and submit for "Court approval" a plan identifying the steps they will take to achieve the above goals. R.96.

In sum, Plaintiffs demand nothing short of an overhaul—via judicial decree—of the State's largest school system. *See* Pls.App.Div.Br.30 n.6 (agreeing that their relief requires "institutional reform"); R.30 ¶19 (encouraging the court to "impose" any other educational "measures" it decides "the evidence may support").

2. As Supreme Court determined, Plaintiffs' legal theories and their requested remedies are obviously "[in]consistent with the judicial function." *N.Y. State Inspection*, 64 N.Y.2d at 238. The Court of Appeals has long recognized courts' "limited

capabilities" to "fashio[n] and then enforc[e] particularized remedies" in the education context. *Levittown*, 57 N.Y.2d at 39; *see also CFE III*, 8 N.Y.3d at 28 (warning courts to "tread carefully" in matters of policymaking, "particularly in a matter so vital as education financing"). And Plaintiffs' claims go well beyond those limits.

This Court has explained that, where state law vests "primary responsibility for administering" a public institution in another government official, the judiciary should refrain from overriding the official's policy judgments. *N.Y. State Inspection*, 64 N.Y.2d at 239-40. In *N.Y. State Inspection*, for example, an employee of the Department of Correctional Services sought an injunction to prevent the Governor from closing a state prison. *Id.* at 237-38. The employee argued that closing the prison would lead to overcrowding at other facilities and thereby endanger the prison employees. *Id.* But this Court held the employee's claim non-justiciable because, while it is "within the power of the judiciary to declare the vested rights of a specifically protected class of individuals," the courts cannot use that authority to override the decisions of political officials on "policy matters" that have been entrusted to their care. *Id.* at 239-40. And decisions about opening or closing prisons were statutorily entrusted to the Commissioner of the Department of Corrections. *Id.*

So too here. The responsibility for establishing and maintaining public schools in New York City is firmly vested in a Chancellor, the City Board of Education, and other bodies established by state law. *See generally* N.Y. Educ. Law Art. 52. The "courts may not," as Plaintiffs urge, "assume the exercise of educational policy vested by

constitution and statute in" those agencies "under the guise of enforcing [Plaintiffs'] vague educational public policy" preferences. *Price v. N.Y. City Bd. of Educ.*, 51 A.D.3d 277, 286 (1st Dep't 2008) (quotation omitted); *see also N.Y. State Inspection*, 64 N.Y.2d at 240 ("[A]ny consideration" by the courts of "policy matters [that] have demonstrably and textually been committed to a coordinate, political branch of government" would "constitute an *ultra vires* act.").

Especially because Plaintiffs' complaint centers on matters generally "committed to the professional judgment and discretion of those responsible for the administration of the public schools." *James*, 42 N.Y.2d at 359. Questions about how to allocate funds (above a minimum threshold) between different school services, which race-neutral admissions policy to adopt, which curriculum to teach, and which teachers or administrators to hire are all "questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena." *Id.* at 368 (quotation omitted); *see also Ware v. Valley Stream High Sch. Dist.*, 75 N.Y.2d 114, 122 (1989) (State and local authorities are "vested with wide discretion in the management of school affairs."). The "nub of the issue[s]" raised in Plaintiffs' complaint, in other words, "involve[s] the professional pedagogic judgment" of the City's school officials. *Montgomery-Costa v. City of New York*, 894 N.Y.S.2d 817, 826 (Sup. Ct. 2009). "It would be impossible for a court to oversee" the implementation of Plaintiffs' requested remedies—which would override the City's decisions on curriculum, staffing, and admissions—without encroaching on the domain of the "network of officials and boards, on both the local and State

level," empowered to decide these questions. *James*, 42 N.Y.2d at 368. That is why New York courts have refrained from intervening in such disputes before and why they should do so here.

Plaintiffs also have not proposed anything approaching a workable standard that the court could use to either determine Defendants' liability or evaluate their compliance with Plaintiffs' suggested remedial orders. Courts apply legal rules, not policy considerations. *Cf. Pritchard v. Am. Airlines, Inc.*, 708 F. Supp. 3d 861, 869 (N.D. Tex. 2023) ("The rule of law is a law of rules."). So, as the U.S. Supreme Court has stressed, they must have a standard in hand that is both "judicially manageable" and "relevant" to the alleged violation to render a claim justiciable. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004); *see also Montano v. Cnty. Legislature of Cnty. of Suffolk*, 70 A.D.3d 203, 211 (2d Dep't 2009) ("Justiciability … holds that judges should decide only judicially manageable questions.") (cleaned up). But Plaintiffs' claims of unfairness are nothing of the sort. *E.g.*, R.16 ¶5 (alleging that "institutional racism" includes "unfair policies and practices"); R.39 ¶61 (urging "an equitable culture and culturally responsive curriculum"); R.48 ¶82 ("school discipline is not fairly applied across all racial groups"). How racially proportionate must the City's admissions statistics be, for example, to pass legal muster? How much time must teachers devote to non-Eurocentric subjects to make a curriculum "culturally responsive?" What kind of "inputs," R.594, and in what quantity, must the State provide before it is absolved of responsibility for unequal educational outcomes under the Education Article? Plaintiffs' grievances offer "no basis whatever to guide

the exercise of judicial discretion" on these points. *Rucho v. Common Cause*, 588 U.S. 684, 716 (2019).

At bottom, Plaintiffs "call for a remedy which would embroil the judiciary in the management and operation of [the City's school] system." *N.Y. State Inspection*, 64 N.Y.2d at 239. Their proposals to change admissions standard, hire different teachers, and teach different subjects are one "specific" set of answers to questions on which reasonable people can and do disagree. *See Curry v. N.Y. State Educ. Dep't*, 163 A.D.3d 1327, 1330 (3d Dep't 2018) (explaining that issues on which "reasoned judgment could typically produce different acceptable results" are generally non-justiciable). If Plaintiffs want their schools to adopt those proposals, then they should advocate for that change through the political process, not demand it through the courts.

B. The Appellate Division's contrary rationales are unavailing.

The Appellate Division disagreed and deemed Plaintiffs' claims justiciable. But its rationale for that conclusion erred in at least three ways.

1. First, the Appellate Division held that the Education Article empowers plaintiffs to challenge not just the State's method for funding public schools but *any* policy that fails to "ameliorate the effects of racism and poverty." R.591-92, 594. For reasons explained in more detail below, *see infra* 22-32, that is wrong: the Education Article was enacted to ensure the availability of free education by requiring the State to adequately fund public schools, and the State has more than satisfied that obligation here. The Education Article is *not* a broad guarantee that the State will affirmatively ameliorate

disparities produced by other factors like socioeconomics or demographics. *See Levittown*, 57 N.Y.2d at 47.

2. Second, the Appellate Division, like Plaintiffs, argued that, because a court need not consider the scope of a plaintiff's requested remedy in order to decide the merits of a claim, a claim may be justiciable even if the court cannot order the requested relief. R.591; *see also* Pls.App.Div.Br.11-16. But that, too, is incorrect.

To start, the Appellate Division's position is a pivot from Plaintiffs' arguments before the superior court, where they "invoke[d] th[e] Court's remedial authority to impose measures … on the State and City" that would eliminate alleged racial disparities. R.30 ¶19. Plaintiffs' theories of liability and the scope of its remedies, in other words, were necessarily intertwined. And Plaintiffs' theories of liability, no less than their remedies, rest on policy arguments. They criticize the day-to-day administration of schools writ large in New York City—admissions, resource allocation, and curricula—rather than individual acts of supposed discrimination. *See James*, 42 N.Y.2d at 365-66, 368 (contrasting allegations of targeted discrimination, which are justiciable, from complaints about a school's "general course of conduct," which are not). And such issues of education policy are committed to the executive and legislative branches, not the courts. *See Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) ("[S]taffin[g] and educational decisions," along with "administrative oversight and monitoring," are "functions [that] involve a legislative or executive, rather than a judicial, power.").

In any event, the argument is wrong. The merits of a claim *and* potential remedies both have a role to play in the justiciability analysis. As the U.S. Supreme Court has explained, justiciability asks whether "the duty asserted can be judicially identified and its breach judicially determined, *and whether protection for the right can be judicially molded*." *United States v. Ghailani*, 686 F.Supp.2d 279, 290 (S.D.N.Y. 2009) (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962)). That latter consideration—asking whether the court can craft a judicial resolution for the dispute—necessarily involves consideration of the proposed remedy.

In *Gilligan v. Morgan*, 413 U.S. 1 (1973), for example, the U.S. Supreme Court deemed a claim non-justiciable because the plaintiff failed to show that there was "any relief a District Court could appropriately fashion." *Id.* at 5. Especially relevant here, the Court rejected the plaintiff's suggested remedy (restraining the Governor of Ohio from deploying National Guard troops to quell campus protests) because, as here, it would require the court to use its "judicial power to assume *continuing regulatory jurisdiction* over the activities of the Ohio National Guard." *Id.* (emphasis added). And the courts had no business involving themselves in such "complex," "subtle, and professional decisions." *Id.* at 10. Notably, in *Gilligan*, the Court deemed the case non-justiciable even after assuming the claim was "true and could be established by evidence," *id.* at 5, undermining Plaintiffs' contention here that justiciability can be established based on liability alone. And in *Rucho v. Common Cause*, 588 U.S. 684 (2019), the Court announced that partisan gerrymandering claims are categorically non-justiciable precisely because

the only available remedy (redrawing electoral maps to "fairly" allocate political power between the parties) presented a host of "justiciability conundrums." *Id.* at 709.

The cases on which the Appellate Division relied do not show otherwise. *See* R.591. In *James v. Board of Education of the City of New York*, this Court made the obvious observation, in passing, that *specific* claims of discrimination in *individual* hiring decisions are regularly "heard by our courts." 42 N.Y.2d at 365-66. But the decision went on to reject the plaintiff's claim as non-justiciable precisely because it demanded not an individual correction but a change to a school's "general course of conduct" in how it administers student exams. *Id.* at 368. And *that* (a general, rather than individual, change) is what Plaintiffs seek here. Then, in *Campaign for Fiscal Equity, Inc. v. State*, the Court—responding to an argument that the Education Article was merely a "hortatory" suggestion rather than a mandate—held that the Article does in fact impose an enforceable duty on the State and the courts are responsible for "adjudicating the nature of that duty." 86 N.Y.2d 307, 315 (1995) ("*CFE I*"). The decision did *not*, however, hold that courts have the authority to adjudicate mere policy disputes couched in the Education Article's language, let alone disputes where the plaintiff has not proposed an actionable remedy. *Contra* R.591.

3. Third, the Appellate Division reasoned that, even if the justiciability analysis requires accounting for a plaintiff's requested remedies, Plaintiffs' claims are nevertheless justiciable because they request declaratory relief. R.592. But declaratory relief cannot save the Plaintiffs' case because declaratory relief is subject to the same jurisdictional

limits (including justiciability) as any other equitable relief. *See Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 148 (1983) ("The jurisdictional impediments to obtaining declaratory judgment are virtually coextensive with those to any normal lawsuit …."). Indeed, issuing a declaratory judgment about the adequacy of the City's curriculum, the demographics of its teachers, or the permissibility of its admissions tests would embroil the court in precisely the same policy disputes that an injunctive order would.

Which explains why courts regularly find claims non-justiciable even when the plaintiffs request a declaratory judgment. *E.g.*, *Brennan Ctr. for Just. at NYU Sch. of Law v. N.Y. State Bd. of Elections*, 159 A.D.3d 1301, 1303-04 (3d Dep't 2018) (dismissing request for declaratory judgment regarding the applicability of campaign contribution limits to LLCs because "the Legislature has conferred the authority to make directions pertaining to campaign financing practices upon" the Board); *Weisberg v. Yellen*, 2024 WL 3718265, at *1-4 (D. Conn. Aug. 7) (dismissing request for declaratory judgment regarding the Treasury Department's authority to default on public debts because budgetary policy is a political question committed to the executive branch); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 12, 44-52 (D.D.C. 2010) (dismissing request for declaratory judgment regarding the propriety of military action against American citizens because national security is a political question committed to the executive branch). And in any event, regardless of the relief sought, Plaintiffs' liability arguments themselves present non-justiciable and non-manageable questions. *See infra* 36-37.

II. Dismissal was appropriate for the additional reason that Plaintiffs failed to state any claim upon which relief could be granted.

Even if Plaintiffs' claims were justiciable, that would not save their case. As PDE explained both in the Supreme Court and before the Appellate Division, Plaintiffs' case should also be dismissed because they have not stated an adequate claim under New York's Education Article, the Equal Protection Clause, or the New York State Human Rights Law. PDE Mem. Law Supp. Mot. Dismiss Am. Compl., NYSCEF Doc. No. 121 (Sup. Ct. N.Y. Cnty. Aug. 3, 2021); PDE.App.Div.Br.36-67; *see also Walton v. N.Y. State Dep't of Corr. Servs.*, 8 N.Y.3d 186, 197 (2007) ("[T]his Court may consider alternative legal grounds raised at but not addressed by" the lower courts.) (quotation omitted).[1]

A. Plaintiffs' Education Article claim fails because the State has satisfied its obligation to adequately fund the City's schools.

First, Plaintiffs fail to state a claim under the New York Constitution's Education Article. That Article directs "[t]he legislature" to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be

[1] In the Appellate Division, Plaintiffs argued that Defendants' failure-to-state-a-claim arguments were not preserved for appeal because Defendants did not cross-appeal the superior court's judgment. App.Div.Reply.Br.10-13. Not so. Appellees may defend—and appellate courts may affirm—a favorable judgment on any ground supported by the record. *See Am. Dental Co-op, Inc. v. Att'y Gen. of State of N.Y.*, 127 A.D.2d 274, 279 n.3 (1st Dep't 1987) ("An appellate court need not rely on the rationale articulated in the court of original jurisdiction to affirm a decision."). Regardless, an appellate court has jurisdiction to consider questions of law even if raised for the first time on appeal. *See Richardson v. Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 250 (1986); *Chambers v. Old Stone Hill Rd. Assocs.*, 303 A.D.2d 536, 538 (2d Dep't 2003). And the exercise of that discretion would be especially warranted where, as here, the Appellate Division itself addressed the issue and final resolution of the issue by this Court could spare years of potential litigation.

educated." N.Y. Const. art. XI, §1. And that requirement is satisfied so long as the Legislature allocates sufficient funding to provide "minimal acceptable facilities and services" in the relevant schools. *Levittown*, 57 N.Y.2d at 47. The Education Article does *not* guarantee equal outcomes or require race-conscious policies in public education. *Id.* Because Plaintiffs allege only unequal outcomes rather than inadequate funding, their claim fails.

1. The Education Article guarantees adequate school funding, not equal educational outcomes.

Added to the New York Constitution in 1894, the Education Article was the work of the "free school movement." *Paynter*, 100 N.Y.2d at 449, 459-60 (Smith, J., dissenting). Before the Article's adoption, local communities were responsible for a significant portion of the funds needed to operate their schools. *See id.* at 457 ("Each town was required to raise an amount equal to their allocation" from the state government.). And parents in particular were obligated to cover the cost of teacher salaries—called the "rate bill"—when state and local funds were insufficient. *Id.* Indigent families could seek an exemption from the rate bill, but many were "unwilling to be publicly adjudged indigent" and simply opted to keep their children out of school. *Id.* at 459-60.

The cost of public school, in other words, "had the effect of keeping thousands of children away from the common schools." *Id.* at 459. And the free school movement sought to address this problem by establishing fully State-supported public schools. *Id.* at 457, 459-60. That effort resulted in various statutory improvements—like the

elimination of the rate bill in 1867—and eventually the Education Article in 1894. *Id.* at 460-64.

As this history shows, while the Education Article ensures a "sound basic education," it does so specifically by requiring the Legislature to provide adequate *funding* for public schools in New York. *Levittown*, 57 N.Y.2d at 47-48. It establishes a a constitutional floor, guaranteeing whatever funds are needed for "minimal acceptable facilities and services." *Id.* at 47; *see also Paynter*, 100 N.Y.2d at 440 (explaining that claims under the Education Article must focus on the State's "funding system"). The Article does not *additionally* require the State (or the City) to allocate its funding or any other resources in a way that ensures "equal educational opportunities in every school district" or among all students. *Paynter*, 100 N.Y.2d at 439; *see also Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo*, 86 N.Y.2d 279, 284 (1995) ("[A] study of the history of the Article [does not] reveal" an "egalitarian component" or "an intent to preclude disparities … in relative educational opportunities among the State's school districts."). The constitutional guarantee, in other words, is "minimal acceptable facilities and services," *Levittown*, 57 N.Y.2d at 47, not equal outcomes for every student. *See Aristy-Farer v. State*, 29 N.Y.3d 501, 506 (2017) (explaining that the Article is not concerned with "unevenness of educational opportunity" per se) (cleaned up).

In light of the Article's particular focus on funding inadequacies, this Court has held that plaintiffs claiming a violation of the Education Article must prove two things. First, they must show a "'gross and glaring inadequacy' in their schools." *Paynter*, 100

N.Y.2d at 439 (quoting *Levittown* 57 N.Y.2d at 48). Above this constitutionally guaranteed minimum, variations in the quality of education "fall within the purview of the legislature, not the courts." *Aristy-Farer*, 29 N.Y.3d at 510. Second, once a plaintiff has proven a grossly and glaringly inadequate education, he must show that the alleged inadequacy is "causally connected to the funding system." *Paynter*, 100 N.Y.2d at 440.

2. Plaintiffs have not alleged inadequate school funding.

Plaintiffs' Education Article claim fails on both prongs. They have not alleged a gross and glaring inadequacy in their schools or that any such inadequacy, if there were one, is causally connected to the State's funding system.

A. Gross and glaring inadequacy, as the name suggests, is a demanding test. To meet that bar, plaintiffs must show that students in the challenged school district cannot learn "the basic literacy, calculating, and verbal skills necessary to … eventually function" as responsible citizens. *Id.* at 439-40 (quotation omitted). And that failure must be "systemic," not incidental or concentrated among a subset of students. *CFE II*, 100 N.Y.2d at 914. Nor is the plaintiff's burden satisfied by alleging that one school within a district receives fewer resources than another school. Plaintiffs must show "district-wide failures caused by inadequate state funding" because the State is responsible for allocating money to districts, not individual schools. *Aristy-Farer*, 29 N.Y.3d at 510-11 (quotation omitted). "[E]ven a claim of extreme disparity," between schools or between districts, "cannot demonstrate … gross and glaring inadequacy." *R.E.F.I.T.*, 86 N.Y.2d at 284 (quotation omitted). So long as students within the district are receiving the

constitutional minimum, "inequality"—though regrettable—is of no legal consequence. *Aristy-Farer*, 29 N.Y.3d at 510.

Proving grossly inadequate education, moreover, generally requires more than poor educational outcomes. Allegations that students in a district perform poorly on exams or otherwise fail to meet educational standards are of minimal value in proving inadequate educational opportunities because "a myriad of factors influence student performance." *Paynter*, 100 N.Y.2d at 440 (quotation omitted). Instead, this Court has generally determined inadequate education by looking to: whether the school provides "adequate physical facilities and classrooms" that "provide enough light, space, heat, and air to permit children to learn"; whether students have access to "minimally adequate instrumentalities of learning" like desks, chairs, and pencils; and whether children receive "minimally adequate teaching of reasonably up-to-date basic curricula." *Id.* (quotations omitted).

Plaintiffs here come nowhere close to alleging that New York City schoolchildren lack such essentials. Only a single paragraph of Plaintiffs' complaint touches on physical facilities. *See* R.61 ¶100. And that paragraph does not claim that students lack the necessary "light, space, heat," or "air" necessary to learn. It merely asserts that some of the City's schools are "poorly maintained" or close to large roads. R.61 ¶100. That is a far cry from the glaringly inadequate facilities this Court has found to violate the Education Article in previous cases. *See, e.g.*, *CFE II*, 100 N.Y.2d at 911 n.4 (schools lacked sufficient classroom space to conduct classes and some schools entirely lacked

specialized educational spaces like laboratories). Plus, the paragraph alleges these deficiencies are present in only a handful of the City's more-than-1000 schools. R.61 ¶100. It therefore fails to satisfy the Education Article's "district-wide" or "systemic failure" requirements. *CFE II*, 100 N.Y.2d at 914; *see also Aristy-Farer*, 29 N.Y.3d at 510-11 (explaining that the State is responsible for funding districts, not individual schools).

Plaintiffs' allegations regarding curricula and teachers fail for much the same reason—they simply do not allege conditions that fall below the minimum requirements guaranteed by the Education Article. Plaintiffs complain, for example, that New York City schools do not follow, in their words, "a culturally responsive curriculum." *E.g.*, R.66 ¶104. But the Education Article simply requires the State to provide enough funding for "*minimally* adequate teaching of *reasonably* up-to-date basic curricula." *CFE I*, 86 N.Y.2d at 317 (emphases added). It does not guarantee the most up-to-date and "inclusive curriculum." R.67 ¶107. Nor does it require local schools to adopt curricula developed by the State. *Contra* R.65 ¶104. Similarly, Plaintiffs fault the City for failing to recruit a more racially diverse set of teachers. *E.g.*, R.14-15 ¶3; R.46-47 ¶80. But the Education Article does not impose racial quotas in teacher hiring; instead, it guarantees sufficient funds to hire "personnel adequately trained to teach" basic academic subjects like reading and mathematics. *CFE I*, 86 N.Y.2d at 317. And Plaintiffs have nowhere alleged that the City's teachers fail to meet that minimal bar.

Nor have Plaintiffs made any effort to show that these allegedly deficient "inputs" correspond in any way to sub-par "outputs." *CFE II*, 100 N.Y.2d at 912. They

simply allege, in conclusory fashion, that "segregated existences predictably lead to unequal, unjust, and intolerable outcomes." R.47 ¶81. But that bare conclusion on its own does not support the "inference" of a "meaningful correlation" between (purportedly) insufficiently diverse teachers and curricula, on the one hand, and poor academic performance, on the other. *CFE II*, 100 N.Y.2d at 912.

In reality, Plaintiffs' allegations resemble the allegations rejected by this Court in *Paynter* and *Levittown*. In *Paynter*, the plaintiffs argued that de facto segregation in their school district, caused by a combination of school residency requirements and nonresident tuition requirements, "correlate[d] with substandard academic performance." 100 N.Y.2d at 438. And the State should be liable under the Education Article, the plaintiffs argued, because they had "taken no affirmative measures to ameliorate" those conditions. *Id.* But this Court rejected that "novel theory" because the plaintiffs, by their own admission, did not allege that the substandard academic performance was due to lack of state funding. *Id.* Likewise, in *Levittown*, the plaintiffs alleged that "property-rich districts" could provide "enriched educational programs" while "property-poor districts" could not. 57 N.Y.2d at 36. Those allegations were again insufficient, said this Court, because "educational unevenness above th[e] minimum standard" is not actionable under the Education Article. *Id.* at 38.

So too here: Plaintiffs attack not the lack of necessary minimum funding, but disparate academic performance that—they say—is caused by racial segregation in New York's schools. They fault the State for failing to diversify classrooms, failing to adopt

a more "culturally responsive curriculum," and failing to achieve racial parity in staffing. R.45-46 ¶79; R.48-49 ¶¶82-84; R.65-66 ¶104; R.75-76 ¶¶118-19; R.90 ¶151. But these allegations of "unevenness," *Levittown*, 57 N.Y.2d at 38, say nothing about whether the State has allocated sufficient funding to the City's schools. Their "novel theory," in other words, bears "no relation to the discernable objectives of the Education Article." *Paynter*, 100 N.Y.2d at 442.

B. Even if Plaintiffs *had* alleged gross and glaring inadequacies in the City's schools, their claim would still fail because inadequacy alone does not violate the Education Article. A plaintiff must also allege a causal connection between those inadequacies and the Legislature's school funding policies. *Id.* at 440. That is because, while "[t]he causes of academic failure may be manifold, including such factors as the lack of family supports and health care," the Education Article does not guard against all such obstacles. *Id.* at 441.[2] It simply ensures that lack of state funding is not the cause of a student's failure to obtain an education. *Id.*

Plaintiffs, of course, allege in conclusory terms that Defendants' "policies and practices … cause the denial of a sound basic education to New York City schoolchildren." R.17 ¶5; *see also* R.91 ¶152 (similar). But that "bare legal conclusio[n]" need not be accepted as true. *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). And even if it were,

[2] Plaintiffs themselves suggest many alternative explanations for the alleged disparities among New York City schoolchildren. They note, for example, that students have "disparate familial resources," R.20 ¶8, and that some "affluent families … pay handsomely" to give their children a leg up on test preparation, R.22-23 ¶10.

it does not establish that poor academic performance in the City's schools is attributable to a lack of "maintenance and support" from the Legislature. N.Y. Const. art. XI, §1. Rather, Plaintiffs allege that New York City schoolchildren are denied a "sound basic education" because "New York City's public education system is" supposedly "suffused with … racism." R.17 ¶5. No reference is made to funding. Even the complaint's one paragraph alleging that a handful of the City's schools are "poorly maintained" does not say that failure is the result of inadequate state funding. R.61-62 ¶100.

Because these allegations fail to suggest a "meaningful correlation" between students' poor academic performance and constitutionally inadequate funding, the claim must fail. *CFE II*, 100 N.Y.2d at 912; *see also Paynter*, 100 N.Y.2d at 438-39 (dismissing an Education Article claim for exactly that reason).

3. The Appellate Division's contrary conclusion disregarded controlling authority from this Court.

The Appellate Division reached a contrary conclusion, blessing Plaintiffs' Education Article claim, only by disregarding a series of controlling decisions from this Court. First, the Appellate Division expanded the definition of a "sound basic education" to demand much more from the State and City than the minimal inputs this Court has previously required. A sound education, in the Appellate Division's eyes, requires not just competent teachers and adequate spaces for classroom instruction, but also "certain inputs to ameliorate the effects of racism and poverty." R.594. "These include curricular change … towards more inclusive teaching materials," "recruitment policies

that attract more Black and Latinx teachers and administrators, and training for all teachers to combat structural racism." R.594-95.

But this Court has never required such "novel inputs," as the Appellate Division described them. R.595. Instead, it has consistently defined the "sound basic education" requirement to cover a list of "essentials": minimally competent teachers, a basic curriculum, and the spaces and tools absolutely necessary for academic instruction. *Paynter*, 100 N.Y.2d at 440 (quoting *CFE I*, 86 N.Y.2d at 317). And it has repeatedly *rejected* calls to adopt more rigorous standards for a "sound basic education," as the Appellate Division did here, because such standards, though laudable, go beyond the minimum required by the Education Article. In both *CFE I* and *CFE II*, for example, this Court declined to adopt "the more detailed standards established by the Board of Regents and Commissioner of Education" because those standards "exceed notions of a minimally adequate or sound basic education." *CFE II*, 100 N.Y.2d at 907 (quoting *CFE I*, 86 N.Y.2d at 317). "[P]roof that schools do not comply with such standards," therefore, "may not, standing alone, establish a violation of the Education Article." *Id.* (quoting *CFE I*, 86 N.Y.2d at 317); *contra* R.595 & n.10 (Appellate Division faulting the City for failing to adopt Board of Regents policies).

Second, in going beyond the "essentials" required by the Education Article, the Appellate Division effectively imposed an *affirmative obligation* on the State and City "to ameliorate the effects of racism and poverty." R.594. And this Court has squarely rejected such an interpretation of the Education Article. *See Paynter*, 100 N.Y.2d at 438

(declining to adopt plaintiffs' argument that a school district must "tak[e] … affirmative measures to ameliorate" the effects of "segregation … by race and economic status"); *R.E.F.I.T.*, 86 N.Y.2d at 284 (observing that the history of the Education Article belies any notion that it has "an egalitarian component" or "an intent to preclude disparities").

Third, even accepting for the sake of argument the Appellate Division's conclusion that Plaintiffs allege gross inadequacies in the City's schools, the Appellate Division *nowhere* concluded that those inadequacies were caused by the State's funding practices. *Contra CFE I*, 86 N.Y.2d at 318. In fact, in faulting Defendants for failing to alleviate "racism and poverty," the Appellate Division expressly attributes students' poor academic performance to *those* factors and not the State's funding practices. R.594.

In sum, the Appellate Division simply repeated—and condoned—the plaintiffs' errors in *Paynter* and *Levittown*. In those cases, the plaintiffs faulted their schools for supposedly failing to confront the harmful downstream effects of racial segregation and income inequality. *Paynter*, 100 N.Y.2d at 438; *Levittown*, 57 N.Y.2d at 36. As this Court said, however, the "failure to mitigate demographic factors that may affect student performance" has nothing to do with "a lack of education funding." *Paynter*, 100 N.Y.2d at 438-39; *see also Levittown*, 57 N.Y.2d at 38 (similar). The Appellate Division made the same mistake here, and it should receive the same correction.

B. Plaintiffs' Equal Protection claim fails because they have not alleged any facts supporting an inference of intentional discrimination.

Plaintiffs also claim that the City's admissions policy for its selective schools violates the Equal Protection Clause of the New York Constitution. R.91-93 ¶¶153-59. And here too they fall short. The essence of their allegation is that Defendants' choice to maintain race-neutral admissions tests—rather than admit students based on race to achieve proportional admissions—constitutes discrimination. But even if Defendants' use of standardized testing causes some minority students, like Asians, to be overrepresented and others to be underrepresented, that at most shows a disparate impact, and the Equal Protection Clause prohibits only intentional discrimination. *People v. N.Y. City Transit Auth.*, 59 N.Y.2d 343, 350 (1983). Under that standard, Plaintiffs' claim fails. Moreover, Plaintiffs' requested remedy for this disparate impact is *disparate treatment*, rather than race neutrality—a "solution" this Court can never bless. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 218 (2023).

1. The Equal Protection Clause covers only intentional discrimination, not disparate impacts.

The New York Constitution's Equal Protection Clause says that "[n]o person shall be denied the equal protection of the laws of this state." N.Y. Const. art. 1, §11. That guarantee is "coextensive with the rights protected under the Federal Equal Protection Clause." *Myers*, 30 N.Y.3d at 13. So, like its Federal equivalent, the New York Equal Protection Clause prohibits only "purposeful discrimination." *N.Y. City Transit Auth.*, 59 N.Y.2d at 350. Disparate impact alone is not enough to render official action

unconstitutional. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *see also id.* (Plaintiffs must show that "invidious discriminatory purpose was a motivating factor").

In *CFE I*, for example, allegations that "the State's educational funding methodology ha[d] a disparate impact upon African-American and other minority students," without more, were not enough to state an Equal Protection Clause claim. 86 N.Y.2d at 321.

2. Plaintiffs have not alleged any facts suggesting an intent to discriminate.

Plaintiffs and the Appellate Division both acknowledge that the Equal Protection Clause requires a discriminatory purpose. *See* App.Div.Reply.Br.21; R.598-99. So Plaintiffs argue that the City adopted and enforces its admissions standards with an intent to exclude black and Latino students from its selective schools. R.92 ¶157. Plaintiffs' own allegations, however, show the *opposite*.

A. The City's challenged admissions policies are facially race-neutral. Every student, regardless of race, is given the opportunity to take the same merit-based tests, and admission is determined by performance on that test. R.20 ¶8; R.22-23 ¶10; R.49-50 ¶84. Likewise, the City's gifted program and specialized schools are open to students of all races. R.20-23 ¶¶8, 10-11; R.52-55 ¶¶88-90, 93. No test and no program is limited to students of particular races. *See* R.55-56 ¶94 (conceding that "[t]he sole criterion for admission" to the City's specialized high schools "is a student's rank-order score on the

SHSAT, a two-and-a-half-hour, 114-question exam consisting of English language arts and math items").

Plaintiffs nowhere allege that the City maintains a racial criterion for admission to any of its selective programs. Instead, they note that, under the City's plainly race-neutral policies, students of different races have achieved different results. *See* R.91-92 ¶156. The *effect* of the race-neutral admissions policies, Plaintiffs argue, is to "segregat[e] large swaths of students of color" and "mar[k] students of color with badges of inferiority" when they are denied admission to their preferred high school. R.90 ¶151. And the fact that white and Asian students tend to perform better on the City's tests, and therefore secure admission at disproportionate rates, constitutes "superior" treatment in Plaintiffs' eyes. R.90 ¶151. This, they say, creates a "caste system" within the school district because "white and certain Asian students" test into selective programs while "predominantly Black and Latinx" students are enrolled in "general education." R.20-22 ¶¶8-10.

Of course, effect is not intent. And Plaintiffs' observations about divergent outcomes do not undermine the fact that the policy itself is emphatically race-neutral. The "settled rule" is "that the [Equal Protection Clause] guarantees equal laws, not equal results." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979); *see also Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 330 (4th Cir. 2001) ("[T]he Fourteenth Amendment guarantees equal protection but not equal outcomes."). In other words, because

Plaintiffs concede that the City's test is race-neutral and applied uniformly to students of all races, they fail to state a claim under the Equal Protection Clause.

B. In fact, despite their heavy-handed rhetoric decrying the City's supposed "caste system," it is *Plaintiffs* who seek to treat students differently based on race. They demand that the City replace its race-neutral policies with a system of race-based admissions that would assign students to schools based chiefly on the color of their skin. *See* R.29-30 ¶19 (asking for "race-conscious" "remedial measures"); R.92 ¶156 (demanding that the City "equalize … outcomes"). But policies that assign benefits based on race are always odious and, in this case, would be unlawful.

Reducing students to their race and assigning them to academic programs based on that criterion alone is fundamentally at "cross-purposes" with the goal "that students see fellow students as individuals rather than solely as members of a racial group." *Parents Involved*, 551 U.S. at 733. Placing students "on racial registers … demeans us all." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring) (quotation omitted). And there is simply no "authority" for using "race as a factor in affording educational opportunities among … citizens." *Parents Involved*, 551 U.S. at 747. Which is why, just one year ago, the U.S. Supreme Court confirmed that racial balancing in school admissions violates the guarantees of the Equal Protection Clause. *SFFA*, 600 U.S. at 213. Admissions programs, explained the Court, "may *never* use race as a stereotype or negative." *Id.* (emphasis added). Even if "well intentioned and implemented in good faith," race-based admissions cannot survive strict scrutiny. *Id.* And that includes efforts

designed to "avoid the underrepresentation of minority groups" by giving them a leg up in the admissions process. *Id.* at 216.

The race-balancing that Plaintiffs' disparate impact theory would entail runs right up against the Supreme Court's commands. Because school admissions are "zero-sum," *SFFA*, 600 U.S. at 218, Plaintiffs' demand that the City adjust the balance of "Black and Latinx students" admitted relative to "white and Asian students" means that some students will inevitably have their race count against them in the admissions process. *E.g.*, R.22-23 ¶10; R.29-30 ¶19; R.45 ¶79; R.60 ¶99; *SFFA*, 600 U.S. at 218-19 ("A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."). That policy—unlike the City's current race-neutral admissions practice—constitutes intentional and invidious racial discrimination. And it "lack[s] a logical end point." *SFFA*, 600 U.S. at 221 (quotation omitted). If, as Plaintiffs argue, the City cannot employ race-neutral admissions criteria if it knows those criteria will produce racially disparate outcomes, then it will be forced to conduct racial balancing in perpetuity to ward off that result. But "outright racial balancing" with no end in sight is "patently unconstitutional." *Id.* at 223 (cleaned up).

In other words, Plaintiffs' disparate impact theory turns the commands of the Equal Protection Clause on their head, and their requested relief would itself discriminate based on race. That claim cannot prevail.

3. The Appellate Division erred by inferring discriminatory intent from disparate impacts.

The Appellate Division held that Plaintiffs "sufficiently pleaded intent in connection with their equal protection challenge to the" "standardized admissions tests." R.601. In reaching this conclusion, however, the Appellate Division embraced the errors in Plaintiffs' argument, holding that the City acted with discriminatory intent merely by maintaining a race-neutral admissions system that did not admit students of different races in equal numbers. *See* R.600-02. The City "knew about" the "segregative effect" of its test, said the Appellate Division, "yet continued to adhere to it." R.602.

But the presence of a disparate impact, on its own, does not give rise to an inference of discriminatory intent. *See Feeney*, 442 U.S. at 279 ("Discriminatory purpose … implies more than intent as volition or intent as awareness of consequences.") (quotation omitted); *Totes-Isotonor Corp. v. United States*, 594 F.3d 1346, 1356 (Fed. Cir. 2010) ("It is well established that disparate impact standing alone does not establish a violation of equal protection.") (citing *Vill. of Arlington Heights*, 429 U.S. at 264-65). Particularly when the defendant has offered a "legitimate, independent," and "nondiscriminatory" rationale for the challenged policy. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 306 (2004). Here, for instance, the City's admissions tests are plainly designed to evaluate a student's academic talent and ability to succeed in more rigorous educational environments. *See* R.55-56 ¶¶93-94. In other words, even if the City maintained its admissions policy "in spite of" the policy's "adverse effects upon" minority students, there is no

reason to believe it maintained the policy "*because of*" those effects. *Feeney*, 442 U.S. at 279 (emphasis added).

Beyond the mere fact of disparate outcomes, the Appellate Division rested its conclusion entirely on its evaluation of the Hecht-Calandra Act, a half-century-old law. *See* R.601-02. If anything, though, the Hecht-Calandra Act *undermines* the Appellate Division's conclusion, as it specifically requires race-neutral admissions policies for selective public schools in New York. *See* 1971 N.Y. Laws Ch. 1212 §1 (providing that admission to selective New York schools shall be determined "solely and exclusively by taking a competitive, objective and scholastic achievement examination, which shall be open to each and every child in the city of New York"); N.Y. Educ. Law §2590-h(1)(b) (incorporating the Hecht-Calandra Act). The Appellate Division accepted Plaintiffs' contention that the Hecht-Calandra Act was actually "designed to exclude Black and Latinx students from specialized high schools," R.601-02, but that assertion is not enough to show intentional discrimination *here*, for two reasons.

First, the Appellate Division's premise is flawed. It concluded that the Hecht-Calandra Act was racially motivated based largely on a single statement from *one* of the Act's co-sponsors, who argued that the law would protect specialized high schools from political pressure groups and education authorities who planned to investigate the City's admissions policies for cultural bias. R.602. But "determining the intent of [a] legislature is a problematic and near-impossible challenge," *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 221), and statements from a single legislator

shed little light on the motivations of "the legislature as a whole," *Brnovich v. Dem. Nat'l Comm.*, 594 U.S. 647, 689 (2021). And the actual text of the Act is plainly nondiscriminatory, demanding "objective" standards applied consistently to "each and every child." 1971 N.Y. Laws Ch. 1212 §1.

Second, even if the motivations of the New York Legislature in 1971 could be reliably ascertained, they say nothing about the motivations of the Legislature, or the City officials who administer the admissions tests, *today*. Which is why courts are hesitant to set aside "the presumption of legislative good faith" based on "a finding of past discrimination." *Abbott v. Perez*, 585 U.S. 579, 603 (2018). The errors of the past "cannot, in the manner of original sin, condemn governmental action," like a race-neutral admissions policy, "that is not itself unlawful." *Id.* (quotation omitted). Courts, therefore, should not "fli[p]" the normal evidentiary burden—and require government officials to prove *non*-discriminatory motives—on the basis of "past discrimination" alone. *Id.* at 604.

That is especially true here, where intervening events—the City's admissions test has undergone multiple revisions since the Hecht-Calandra Act, been evaluated by outside consulting firms, and supplemented by preparation and scholarship programs designed to assist low-income students preparing for the test, R.57-59 ¶¶95-97—attenuate any possible connection between the City's admissions policy as it was practiced a half-century ago and the City's admissions policy as it is practiced today.

C. Plaintiffs' claim under the New York State Human Rights Law fails because they have not alleged intentional discrimination.

Finally, Plaintiffs claim that Defendants' policies violate the education provisions of the New York State Human Rights Law. R.93-95 ¶¶160-67. Initially, Plaintiffs claimed two violations: (1) that Defendants have "permit[ed] the systematic harassment of students" in the City's schools "on account of their race" and (2) that selective admissions programs at the City's schools discriminate against black and Latino students. R.94 ¶¶164-65. But Supreme Court and the Appellate Division agreed that Plaintiffs' harassment claim fails because they have not alleged that the City or State even *knew* about any incidents of harassment in the City's schools. R.605. The Appellate Division resurrected Plaintiffs' discrimination claim, however, concluding that they adequately alleged "they were denied access to the City's facilities by reason of their race." R.606.

That conclusion was error. Like the Equal Protection Clause, the education provisions of the NYSHRL cover only *intentional* discrimination, not disparate impacts. No court, including this one, has held otherwise. And Plaintiffs have not alleged anything suggesting that the State or City of New York intentionally denied *any* students access to educational opportunities based on their race.

1. The NYSHRL prohibits only intentional discrimination.

The NYSHRL guarantees the "opportunity to obtain education … without discrimination because of … race." N.Y. Exec. Law §291(2). To enforce that guarantee, the law makes it "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."

Id. §296(4). Critically, however, this prohibition applies only when a defendant *intentionally* excludes a student from educational opportunities on account of his race. It does not cover disparate impact claims. The statute's text and on-point caselaw both make that clear.

Start with the text. *See People v. Roberts*, 31 N.Y.3d 406, 418 (2018) ("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.") (quotation omitted). The NYSHRL makes it unlawful for an educational institution to "deny the use of its facilities … *by reason of* [a student's] race." N.Y. Exec. Law §296(4) (emphasis added). The phrase "by reason of," as it is ordinarily used, means "because of." *Reason*, Am. Heritage Dictionary (visited Oct. 31, 2024), perma.cc/25NW-6X8J; *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013); *Roberts v. Tishman Speyer Props., L.P.*, 62 A.D.3d 71, 81 (1st Dep't 2009). And "because of" denotes but-for causation. *Nassar*, 570 U.S. at 350; *see also Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 769 (2018) ("by reason of" demands at least "but-for caus[ation]"). In other words, when an action is taken "by reason of" a protected characteristic, it means the characteristic "was the 'reason' that the [defendant] decided to act." *Nassar*, 570 U.S. at 350 (quotation omitted). So a statute that imposes liability for actions taken "by reason of" a protected characteristic—like the NYSHRL does—requires "discriminatory motive." *Id.* at 348.

That is especially true where, as here, the law focuses on the defendant's *decision* to exclude rather than the fact of exclusion itself. Section 296(4) of the NYSHRL specifies that a violation is committed when the "educational institution … den[ies]" a student "by reason of his race." N.Y. Exec. Law §296(4). That language requires a "causal relationship" between the protected trait (in this case, race) and the discriminatory decision. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (quotation omitted). Other statutes, by contrast, focus on the excluded individual and so do not require proof of discriminatory motive. *See, e.g.*, 29 U.S.C. §794(a) (Rehabilitation Act, providing that "[n]o otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from … any program or activity receiving Federal financial assistance"); *Alexander v. Choate*, 469 U.S. 287, 295-97 (1985) (explaining that such language targets "action that discriminate[s] by effect as well as by design"). Put differently, §264(4)'s focus on the discriminat*or*, rather than the discriminat*ed*, confirms its intent requirement.

When the statutory text is "unambiguous," a court may simply give effect to its "plain meaning." *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006). But if text were not enough, relevant caselaw confirms that §296(4) requires proof of intent. In *Scaggs v. N.Y. Dep't of Educ.*, 2007 WL 1456221 (E.D.N.Y. May 16), the district court straightforwardly denied the plaintiffs' §296(4) claim because they "failed to allege that any actions against them were taken out of discriminatory animus." *Id.* at *21. And in *Stein v. 92nd St. YM-YWHA*, 273 A.D.2d 181 (1st Dep't 2000), the court permitted a

plaintiff's disability discrimination claim under §296(4) to move forward because the defendant "made no showing that there were facts within its knowledge that would have justified" expelling the child from its nursery school, which justified the inference that the plaintiff was expelled *because of* her disability. *Id.* at 182. On the other side of the ledger, by contrast, there are no decisions imposing liability under §296(4) based on a disparate impact.

2. The Appellate Division's contrary conclusion failed to grapple with the statutory text and relied on inapposite precedent.

The Appellate Division's contrary conclusion, finding discrimination based on disparate impacts, was wrong for at least three reasons.[3] First and most importantly, the court failed to grapple with the statute's text. It did not even *try* to explain how a disparate impact test coheres with statutory language covering only denials made "by reason of" race, even though textual arguments to the contrary were the main focus of Defendants' briefing. *See* R.605-07, City.App.Div.Br.51, PDE.App.Div.Br.61-64.

Second, in lieu of textual analysis, 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

[3] The Appellate Division held in the alternative that Plaintiffs *did* allege discriminatory intent in their NYSHRL claim, "for the same reasons that they sufficiently allege discriminatory intent in connection with their Equal Protection claim," i.e., they allege that the City was aware its admissions policies produced disparate outcomes for different races. R.606. But knowledge of disparate outcomes, as explained above, is not enough to prove discriminatory intent. *See supra* 38-40.

to a different category of defendants. *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"). To the extent those cases shed any light on the NYSHRL's education provision, they *undermine* Plaintiffs' case rather than help it. Far from embracing a broad disparate impact theory of liability, those decisions simply confirm that an employer has engaged in discrimination when they apply hiring standards that, though neutral on their face, "exclude virtually" everyone in a protected category and "serve no job related purpose." *State Div. of Hum. Rights v. N.Y. City Dep't of Parks & Rec.*, 38 A.D.2d 25, 28 (1st Dep't 1971); *see also Sontag v. Bronstein*, 33 N.Y.2d 197, 200-01 (1973) (substantially same). Such standards, after all, are "inherently discriminatory." *N.Y. City Dep't of Parks & Rec.*, 38 A.D.2d at 28 (quotation omitted). And that hardly describes the City's practices: its specialized schools and selective admissions tests do not exclude all or virtually all black and Latino students, *see* R.60 ¶99, and they plainly serve an education-related purpose. Regardless, this Court has never endorsed a disparate impact theory of liability in the education context, and it should not do so now.

Third, the Appellate Division's conclusion has drastic implications for the City's ability to use *any* race-neutral criteria when assigning students to schools. On the Appellate Division's logic, any student denied admission to a selective New York City school based on a policy that does not admit students of different races in proportional

numbers—which is to say, nearly *every* policy—would have an NYSHRL claim, regardless of whether the admissions policy screens for academic merit, athletic talent, or any other race-neutral criterion. *See* R.602 (finding fault where the City allegedly "knew" that an admissions test had a "segregative effect" but continued it anyway). Whatever the NYSHRL does, it surely does not abolish all admissions tests and specialized schools sub silentio.

3. The Plaintiffs have not alleged intentional discrimination.

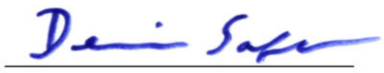
Evaluated under the correct standard, Plaintiffs' NYSHRL allegations clearly fall short. They have not made any non-conclusory allegation that Defendants intentionally denied any student access to the City's schools on the basis of race. *See supra* 33-36. On the contrary, they concede that the City's admissions policies are facially race-neutral and uniformly administered. *See supra* 6, 34-35; R.55-56 ¶94 (acknowledging that a student's test performance is the "sole criterion" for admission).

The Appellate Division again permitted Plaintiffs to show discriminatory intent through disparate impact. *See* R.606. But, as with Plaintiffs' Equal Protection claim, that was error; "[d]iscriminatory purpose" requires more than "awareness of consequences." *Feeney*, 442 U.S. at 279 (quotation omitted).

CONCLUSION

For the reasons stated above, this Court should reverse the Appellate Division's order and affirm the dismissal of Plaintiffs' complaint.

Dated: November 4, 2024



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

J. Michael Connolly
James F. Hasson
Paul R. Draper
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

Counsel for Parents Defending Education

CERTIFICATE OF COMPLIANCE

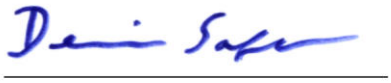
Pursuant to 22 N.Y.C.R.R. §500.13(c)(1), I hereby certify that, that according to the word count feature of the word processing program used to prepare this brief, the total word count for all printed text in the body of the brief, excluding the material omitted under Rule 500.13(c)(3), is 11,390 words. The foregoing was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface: Garamond

Point Size: 14

Line Spacing: Double

Dated: November 4, 2024



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 November 4, 2024

deponent served the within: **BRIEF FOR INTERVENOR- DEFENDANT-APPELLANT**

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 November 4, 2024

Mariana Braylovskiy

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

T. Heath

Job# 333498

SERVICE LIST:

Melissa Colon-Bosolet, Esq.
Eamon P. Joyce Esq.
SIDLEY AUSTIN LLP
Attorney for Respondents
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
mcolon-bosolet@sidley.com

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