To be Argued by:
J. Michael Connolly
(Time Requested: 20 Minutes)

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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.

REPLY BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Plaintiffs say they want to do right by New York City's schoolchildren and effectuate the equal protection principles embodied in state and federal law. But the "reforms" they seek would do neither; they would reduce the City's students to their racial identities and distribute—or withhold—academic opportunities on that basis. *Contra Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007) (plurality); *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 218 (2023). As Parents Defending Education has already explained, those demands run counter to the values of the very statutes and constitutional provisions on which Plaintiffs base their claims. PDE-Br.22-46.

Plaintiffs spill much ink revising and rehabilitating their claims, but they fail to address the most glaring flaws in their case. They insist their claims are justiciable, but they do not dispute that resolving those claims would require this Court to second-guess the professional judgment of education experts on matters of curriculum and school administration. They say the Education Article requires Defendants to do more to ameliorate the effects of alleged racism in some of the City's schools, but by their own admission, those problems affect only a few schools and have nothing to do with the State's funding scheme. They claim the City uses its selective admissions process for specialized schools to exclude certain minority students in violation of the Equal Protection Clause, but they still offer no proof of intentional discrimination beyond the mere fact of racial disparities and a strained view of the legislative history behind a 54-

year-old statute that merely codified longstanding admissions criteria. And they claim the City's use of standardized tests violates the New York State Human Rights Law, but their evidence for this assertion is the same flimsy conjecture they offer for their Equal Protection Claim and fails for the same reasons.

Plaintiffs have not presented a justiciable case, let alone a winning one. This Court should reverse the Appellate Division, dismiss Plaintiffs' complaint, and reject their attempt to inject race into New York City's merit-based school system.

ARGUMENT

I. Plaintiffs' claims are not justiciable.

Plaintiffs' claims are not fit for judicial resolution. At bottom, they want the court to substitute its own policy preferences for those of the elected branches. If their claims are successful, judges will turn into education czars, dictating curricula, admission standards, and employee recruitment policies for more than a thousand schools and a million students across New York City. Plaintiffs insist otherwise, but their argument rests on little more than the vague assertion that "cases involving racial discrimination are commonly heard by the courts." Plaintiffs-Br.17 (cleaned up). That is not enough to justify overriding the "professional judgment and discretion of those responsible for the administration of the public schools." *James v. BOE of City of N.Y.*, 42 N.Y.2d 357, 359 (1977).[1]

[1] Plaintiffs try to dodge the justiciability problem altogether, suggesting that Defendants have somehow forfeited the issue. *See* Plaintiffs-Br.19. But as Plaintiffs acknowledge, both the City and the State argued non-justiciability in their motions to

To start, Plaintiffs fail to grapple with many of the justiciability arguments raised in PDE's opening brief. *See* PDE-Br.10-21. They do not acknowledge, let alone dispute, the many decisions from New York courts holding that matters of education policy, including school funding and curriculum development, are committed to the discretion of the political branches, not the courts. *See* PDE-Br.15-16; *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) ("*CFE III*"); *James*, 42 N.Y.2d at 368; *N.Y. City Sch. Bds. Ass'n v. BOE of City Sch. Dist. of City of N.Y.*, 39 N.Y.2d 111, 121 (1976); *Price v. N.Y. City BOE*, 51 A.D.3d 277, 286 (1st Dep't 2008). As those decisions recognize, it would be "inappropriate" for a court to "displac[e]" the "elective officials charged with the management of the New York City public school system." *James*, 42 N.Y.2d at 368 (cleaned up).

It would also be "impossible." *Id.* Courts are "not well-equipped to second-guess" the decisions of experts in a field as "policy-laden" as education. *Bd. of Cnty. Comm'rs of Washington Cnty. v. U.S. Dep't of Transp.*, 955 F.3d 96, 99 (D.C. Cir. 2020); *see Harris v. Dutchess Cnty. Bd. of Co-op. Educ. Servs.*, 25 N.Y.S.3d 527, 534 (Sup. Ct. 2015) (describing the "public policy against courts second guessing the professional judgments and decisions of educators and school officials"). Indeed, at least one judge below appeared to recognize that judicial resolution of Plaintiffs' claims would be difficult,

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dismiss. Plaintiffs-Br.19. Plaintiffs therefore had "an opportunity to respond" to the argument. *Arthur Brundage Inc. v. Morris*, 174 A.D.3d 1088, 1089 (3d Dep't 2019). They did respond. Plaintiffs-MTD.Opp.19-22. And Supreme Court subsequently "consider[ed] th[e] issue on the merits." *Morris*, 174 A.D.3d at 1089; *see* R.8.

suggesting instead that the parties might "negotiate and [enter] a consent decree" if the case were allowed to proceed. Oral Arg., 2:20:02-21:02, *IntegrateNYC v. State*, 228 A.D.3d 152 (1st Dep't 2024), bit.ly/3EYX7wG. Yet Plaintiffs again refuse to confront this reality. They offer no explanation as to how a court might go about the task of evaluating alleged inequities in the school system. *See* PDE-Br.16. They certainly do not propose anything like a neutral, "judicially manageable" standard for the court to apply. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality); *see Montano v. Cnty. Legislature of Suffolk*, 70 A.D.3d 203, 211 (2d Dep't 2009) ("Justiciability … holds that Judges should decide only judicially manageable questions.") (cleaned up). And that omission is fatal for Plaintiffs: a court cannot question decisions made by education experts based on nothing more than the court's own policy preferences.

The arguments that Plaintiffs *do* make fare no better. They say allegations of "racial discrimination" in the education context are "commonly heard by the courts." Plaintiffs-Br.17 (cleaned up). But the cases they cite for this proposition don't support justiciability here. *Campaign for Fiscal Equity*, for one, had nothing to do with racial discrimination. 100 N.Y.2d 893 (2003) ("*CFE II*"). The plaintiffs in that case alleged systemic failure across New York City's schools, not disparities between schools or between groups of students. *Id.* at 914; *see Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307, 315 (1995) ("*CFE I*") (claims of systemic failure are judicially manageable, but claims of "unevenness in … educational opportunities" are not). And in *James*, while this Court acknowledged that claims of *individual* racial discrimination are "judicially cognizable,"

it reached that conclusion precisely because such claims present "discrete law issues … wholly apart from matters of policy." 42 N.Y.2d at 365-66. Here, by contrast, Plaintiffs have not alleged any acts of individual discrimination. They are instead seeking broad "institutional reform." Plaintiffs-App.Div.Br.30 n.6; *see* PDE-Br.12-13. And as *James* itself concluded, attacks on a school's "general course of conduct" are not justiciable. 42 N.Y.2d at 368.

Plaintiffs also repeat the Appellate Division's contention that, even if their proposed remedies would embroil the courts in discretionary policy decisions, the *merits* of their claims are nevertheless justiciable. Plaintiffs-Br.19-22. But this Court's decisions say otherwise. Claims are deemed non-justiciable—including at the motion-to-dismiss stage—if the plaintiff fails to propose a judicially manageable remedy. *See N.Y. State Inspection, Sec. & Law Enf't Empls. v. Cuomo*, 64 N.Y.2d 233, 237-39 (1984) (granting motion to dismiss because the petitioners "call[ed] for a remedy which would embroil the judiciary in the management and operation of the State correction system"); *cf. U.S. Bank N.A. v. Nelson*, 36 N.Y.3d 998, 1011 (2020) (Wilson, J., concurring) (justiciability is a "threshold" question).[2]

[2] Plaintiffs misunderstand *N.Y. State Inspection*. They say the decision does not support consideration of a remedy's justiciability at the motion-to-dismiss stage because it "was an appeal from a court-imposed injunction, putting the *remedy*'s justiciability squarely at issue." Plaintiffs-Br.20 n.10. But that is only half true. The case involved a simultaneous appeal from (1) an order granting a preliminary injunction and (2) an order denying the defendants' motion to dismiss based on concerns about the remedy's justiciability. 64 N.Y.2d at 238. And this Court resolved the appeal by vacating the injunction and ordering the lower court to *grant* the Defendants' motion to dismiss. *Id.* at

Caselaw to the contrary is nowhere to be found. Plaintiffs have not identified a single case deeming a claim justiciable notwithstanding the absence of a judicially manageable remedy. *Klostermann* and *CFE I*, on which Plaintiffs chiefly rely, do not help them. Neither decision held that remedial concerns are irrelevant at the motion-to-dismiss stage. *Contra* Plaintiffs-Br.20. If anything, *Klostermann* suggests the opposite; the Court there engaged the merits of the defendants' justiciability arguments and simply concluded that the proposed remedy was in fact justiciable. 61 N.Y.2d 525, 535-37 (1984). And in *CFE I*, the parties did not raise the issue of remedy in the first place. 86 N.Y.2d at 316 n.4.

Regardless, PDE also argued that the merits of Plaintiffs' claims are non-justiciable. PDE-Br.18. And on this point, Plaintiffs have no response. Resolving the merits of their claims, like enforcing their requested remedies, would require the court to upset the City's "professional pedagogic judgment" about which of many legitimate policy options—on matters ranging from admissions to hiring to curricula—produces the best results for the City's schoolchildren. *Montgomery-Costa v. City of New York*, 894 N.Y.S.2d 817, 826 (Sup. Ct. 2009); *see also Curry v. N.Y. State Educ. Dep't*, 163 A.D.3d 1327, 1330 (3d Dep't 2018) (issues on which "reasoned judgment … could typically produce different acceptable results" are non-justiciable). Indeed, Plaintiffs fail to explain how such

238, 241. If Plaintiffs were correct that a remedy's justiciability is irrelevant at the motion-to-dismiss stage, then the decision would have simply vacated the preliminary injunction and left the remedial question for another day. But Plaintiffs are wrong.

an inquiry is even practicable. Will the trial court conduct an audit of the school system? Will it tally the racial backgrounds of the City's 100,000 school employees to determine if they are sufficiently diverse? R.14-15 ¶3; R.46-47 ¶80. Will it interrogate them about their views on race in America to decide if they are equipped to, in Plaintiffs' words, "combat structural racism"? Plaintiffs-Br.29. Will it weigh competing opinions from educational experts about the wisdom of merit-based versus race-conscious admissions? R.29-30 ¶19. Will it compare the City's curriculum against a curriculum proposed by Plaintiffs and decide which it prefers? R.65-67, ¶¶104-06.

Such "complex" inquiries are best "left to the discretion of the political branches." *Campaign for Fiscal Equity v. State*, 29 A.D.3d 175, 185-86 (1st Dep't 2006), *aff'd* 8 N.Y.3d 14. Which is why this Court has consistently refused to entertain claims that merely "question … the educational wisdom" of policies "within the power" of school officials to enact. *N.Y. City Sch. Bds. Ass'n*, 39 N.Y.2d at 121. The Court should do the same here.

II. Plaintiffs fail to state any claim upon which relief could be granted.

Alternatively, Plaintiffs' case should 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. Their Education Article claim does not allege glaring inadequacies, district-wide insufficiency, or inadequate state funding, as required by this Court's precedents. And their Equal Protection and NYSHRL claims fail at the starting gate because they have alleged nothing to support an inference of

intentional discrimination, and courts have rejected their requests for liability based on disparate impact alone.[3]

A. Plaintiffs fail to state an Education Article claim.

Plaintiffs expend much effort rehabilitating their Education Article claim. They belabor supposed "deficient outputs" from the City's schools: alleged racial disparities in graduation rates, academic honors, and admission to selective schools. Plaintiffs-Br.22-25. But the Education Article does not require schools to equalize educational outcomes for students. *Paynter v. State*, 100 N.Y.2d 434, 439 (2003). It targets only the most severe lapses in educational quality. *See Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 47 (1982) (requiring only "minimal acceptable facilities and services"). Accordingly, in addition to deficient outputs, this Court has consistently required Education Article plaintiffs to show three things: (1) that deficient outputs are the result of gross and glaring inadequacies in the school district, (2) that those inadequacies are district-wide, and (3) that the inadequacies are caused by insufficient state funding. Plaintiffs fail on all three counts.

1. The Education Article requires the "legislature" to "provide for the maintenance and support of a system of free common schools." N.Y. Const. art. XI, §1. This Court has interpreted that provision as a mandate for the State to provide a "sound

[3] Plaintiffs argue in passing that Defendants' failure-to-state-a-claim arguments were not preserved for appeal because Defendants did not cross-appeal Supreme Court's judgment. Plaintiffs-Br.14 n.6. For the reasons previously explained, this argument is meritless. *See* PDE-Br.22 n.1.

basic education." *Levittown*, 57 N.Y.2d at 48. But this obligation simply establishes a "constitutional floor" for the quality of public schools. *CFE I*, 86 N.Y.2d at 315. In other words, the State does not have to maximize educational opportunities for its students; it need only appropriate whatever funds are necessary for "minimal acceptable facilities and services." *Levittown*, 57 N.Y.2d at 47. Beyond that minimum, decisions about the amount and allocation of education funds are left to the discretion of the elected branches. *Id.* at 48.

To ensure they do not intrude upon that discretion, courts require plaintiffs to show that poor educational outcomes are the result of "gross and glaring inadequac[ies]" in the school district's facilities, resources, or curricula—*i.e.*, deficient "inputs." *Id.*; *Paynter*, 100 N.Y.2d at 440; *Aristy-Farer v. State*, 29 N.Y.3d 501, 510 (2017). This is a demanding test. As all agree, Plaintiffs must allege deficiencies so severe that students cannot learn even the most basic skills necessary to "function productively" as citizens. *CFE I*, 86 N.Y.2d at 316; *see* PDE-Br.25-26; Plaintiffs-Br.23. Yet Plaintiffs' allegations fall far short of that bar.

Of course, like every school district, the City has room for improvement. And it *is* improving. *See, e.g.*, PDE-Br.6 (noting the City's scholarship programs designed to increase socioeconomic diversity at its specialized schools). Plaintiffs have a wish list of changes they would like the City to adopt. *See* Plaintiffs-Br.25, 29-31. But even accepting their allegations about the district's shortcomings, Plaintiffs make no effort to explain how the district's inputs are so deficient as to be grossly and glaringly inadequate. *See*

PDE-Br.26-29. They complain, for example, about the vaguely "parlous physical state of school buildings," Plaintiffs-Br.29, but do not explain how those physical deficiencies prohibit student learning. Nor do they assert "a measurable correlation between building disrepair and student performance." *CFE II*, 100 N.Y.2d at 911. They complain that the City has not recruited a sufficiently diverse set of teachers or trained them to "combat structural racism," Plaintiffs-Br.29, but do not allege that the City's teachers lack the training or materials necessary to teach "basic" subjects like "reading, writing, mathematics, science, and social studies." *CFE I*, 86 N.Y.2d at 317. Even the Appellate Division, which otherwise accepted Plaintiffs' expansive reading of the Education Article, described their allegations of inadequate inputs as "ters[e]." R.594.

At bottom, Plaintiffs offer little more than the conclusory assertion that the City's supposedly "discriminatory" practices "have deprived students of" a "meaningful ability to engage in the modern City's democratic society." Plaintiffs-Br.29. But that "bare legal conclusio[n]" cannot survive a motion to dismiss. *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017) (cleaned up).

2. Regardless of severity, deficiencies in the school system violate the Education Article only if they permeate an entire district. *See* PDE-Br.25-27. That's because the Education Article obliges the State to maintain a public school system, *see* N.Y. Const. art. XI, §1 (requiring "[t]he *legislature*" to fund public education) (emphasis added), and the State is responsible for funding school districts, not individual schools, *Aristy-Farer*, 29 N.Y.3d at 511. "[C]laims premised on failures in individual schools" therefore fail to

state an Education Article violation. *Id.* at 510. The lapses in educational opportunity must be "district-wide." *N.Y. Civ. Liberties Union v. State*, 4 N.Y.3d 175, 181 (2005); *see CFE II*, 100 N.Y.2d at 914 (the Education Article is concerned with "systemic failure").

Despite this well-established rule, Plaintiffs make no effort to allege district-wide failures. In fact, their entire case is predicated on the *opposite* claim: that only *some* of the City's schools suffer from inadequate resources or facilities. *See* Plaintiffs-Br.1 (alleging "children are sorted into superior and inferior schools"); Plaintiffs-Br.11-12 (compiling allegations from Plaintiffs' complaint about deficient inputs at certain "unscreened schools" with greater minority representation). And even among these supposedly "inferior" schools, Plaintiffs identify only a handful with (allegedly) seriously deficient facilities. *See* PDE-Br.26-27. But the Education Article has no "egalitarian component." *Reform Educ. Fin. Inequities Today v. Cuomo*, 86 N.Y.2d 279, 284 (1995). It does not require the State to ensure that a school district eliminates every disparity in educational opportunity. *See Aristy-Farer*, 29 N.Y.3d at 506, 510-11.

That should end Plaintiffs' case. They try, however, to circumvent this bright-line rule by arguing that, because the State has delegated some of its education authority to the City, it is itself responsible for the City's shortcomings (including its alleged failure to adequately manage individual schools), so Plaintiffs need not allege a district-wide failure. Plaintiffs-Br.32-33. But that argument has been expressly rejected by this Court. *See NYCLU*, 4 N.Y.3d at 181. For good reason: compelling the State to "rectify the failings of individual schools" would "subvert the important role of local control

and participation in education." *Id.* at 181 (cleaned up). "The Education Article enshrine[s] … a state-local partnership in which" the residents of a local school district have the right to "make the basic decisions on funding and operating their own schools." *Id.* at 181-82 (cleaned up).

Plaintiffs rely on *CFE II* to argue otherwise, but they read too much into that case. *See* Plaintiffs-Br.32-33. *CFE II* simply notes that, if a "systemic failure" is caused by a school district's mismanagement of State-allocated funds, then that failure is attributable to the State as well. 100 N.Y.2d at 914, 922 (noting that "the State remains responsible" for such "failures of its agents"). But it certainly does not relieve plaintiffs of their obligation to allege a systemic (district-wide) failure in the first place. Indeed, in later cases, this Court has admonished plaintiffs for reading *CFE II* in such a manner. *See NYCLU*, 4 N.Y.3d at 182 (explaining that *CFE II* does not abrogate the usual rule "that a district-wide failure be pleaded"). The plaintiffs in *CFE II* did, in fact, plead a district-wide failure. 100 N.Y.2d at 914. And Plaintiffs here have the same burden.

3. Finally, Plaintiffs resist this Court's repeated instruction that plaintiffs must connect alleged deficiencies in the local school district to a flaw in the State's funding system.[4] *See CFE I*, 86 N.Y.2d at 318 (requiring "a causal link between the present

[4] Plaintiffs complain that "Defendants would effectively read" the Education Article 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." Plaintiffs-Br.27 n.15. But it is not Defendants who crafted that requirement; it is *this Court*. In *CFE II*, the Court explained that plaintiffs must "establish a correlation between funding and educational opportunity" (*i.e.*, show that "increased funding can

funding system and any proven failure to provide a sound basic education"); *Paynter*, 100 N.Y.2d at 440; *Aristy-Farer*, 29 N.Y.3d at 506-07; *Maisto v. State*, 196 A.D.3d 104, 111-12 (3d Dep't 2021). Plaintiffs have never alleged a connection between insufficient state funding and deficiencies in the City's school system. Nor do they try to draw such a connection in their brief. That is fatal for their claim.

Plaintiffs disagree, of course. They argue that Education Article claims can be premised on any deficient "input." Plaintiffs-Br.26-28. But that view has no support in this Court's decisions, which have never found a violation based on anything other than a flaw in the State legislature's funding scheme. Plaintiffs point to *Aristy-Farer*, Plaintiffs-Br.27-28, but the challengers in that case specifically "allege[d] a causal link between inadequate state funding and the failure of two school districts to provide a sound basic education." 29 N.Y.3d at 515. Plaintiffs' argument is also belied by the history of the Education Article itself. (Notably, although PDE explored the history of the Education Article in its opening brief, *see* PDE-Br.23-25, Plaintiffs refuse to engage that history at all.) The Education Article, that history shows, was born of the "free school movement." *Paynter*, 100 N.Y.2d at 459 (Smith, J., dissenting). It was adopted specifically to ensure that every community had the necessary resources to maintain a public school and to relieve parents of the obligation to pay teacher salaries and other expenses in

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provide better teachers, facilities," and other inputs) *and* show "that such improved inputs [in turn] yield better student performance." 100 N.Y.2d at 919.

exchange for enrolling their children. *Id.* at 459-60. In other words, the Article was about *funding* from the very beginning.

Plaintiffs, by contrast, would read the Education Article to require the State to alleviate nearly every barrier to academic success, whether funding-related or not. *See* Plaintiffs-Br.27-28 (arguing that the Article creates "many potential avenues for relief" based on a "broad" set of deficient inputs). But the State is not constitutionally obligated to tackle every one of the "manifold" factors that might contribute to "academic failure." *Paynter*, 100 N.Y.2d at 441. As long as it provides "adequate resources," it "satisfies its constitutional promise under the Education Article." *Id.*

4. The gaps in Plaintiffs' complaint—their failure to allege gross and glaring inadequacies, their failure to allege district-wide deficiencies, and their failure to allege a connection to the State's funding scheme—mean their claim must fail as a matter of law. *Maisto*, 196 A.D.3d at 111-12 (collecting cases and summarizing elements of an Education Article claim). They cannot reduce these *pleading* failures to "question[s] of fact" and use the appeal's "procedural posture" as a crutch to hobble through a motion to dismiss, Plaintiffs-Br.23, 25, because there is no evidence—nor do Plaintiffs hypothesize any evidence—that could convert their insufficient allegations into a winning claim. *Myers*, 30 N.Y.3d at 11 (when a plaintiff's allegations do not "fit within any cognizable legal theory," their claims can be dismissed "without … factual development") (cleaned up). In other words, even assuming that all of Plaintiffs' allegations are *true*, they still have not pleaded a violation of New York's Education Article.

B. Plaintiffs fail to state an Equal Protection claim.

On this claim, too, Plaintiffs say the parties agree on the law and that any remaining disputes are factual in nature and can be resolved only on a full record. *See* Plaintiffs-Br.36-38. But Plaintiffs misapprehend PDE's arguments and misunderstand the law. They claim, for instance, that "Defendants do not dispute that the Appellate Division correctly identified the controlling legal principles governing intent." Plaintiffs-Br.36; *but see* PDE-Br.38-39. That is only half right. The Appellate Division correctly stated that "discriminatory intent or purpose" is a necessary element of equal protection claims, R.598-99, but it conflated Plaintiffs' pleading burden (a question of law) with their burden of proof at the motion-to-dismiss stage (questions of fact). True, a plaintiff need not prove every alleged fact in his complaint to survive a motion to dismiss, but he must *allege* specific facts that, if proven, would amount to a legal violation. *See Eccles v. Shamrock Cap. Advisors, LLC*, 42 N.Y.3d 321, 343 (2024) ("[C]onclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss.") (cleaned up). Plaintiffs have alleged no such facts, and the Appellate Division's failure to apply the correct standard was legal error. *See* PDE-Br.33-41.

Moreover, the remedy Plaintiffs seek would itself violate the Constitution. Their Equal Protection claim is premised on the Defendants' alleged failure to "equalize … outcomes," R.91-92 ¶156, and they seek an order that "require[s] Defendants" to "*eliminate* and remedy … *disparate impacts*," R.95 (emphasis added). They specify that these

remedial measures should be "race-conscious," if necessary. R.29-30 ¶19. Put differently, the "disparate impact" Plaintiffs want to "eliminate" is the outsized proportion of Asian and white students enrolled in the City's specialized schools. Plaintiffs do not deny that they seek to racially balance the City's specialized schools; their only response is that they are open to an order that achieves this goal through race-neutral means, if the court so chooses. *See* Plaintiffs-Br.50 n.27. But as the Second Circuit recently reiterated—in a case involving New York's specialized schools—any intentional attempt at racial balancing would flout the Equal Protection Clause, even if achieved through facially race-neutral means. *See Chinese Am. Citizens All. of Greater N.Y. v. Adams*, 116 F.4th 161, 171 (2d Cir. 2024).

1. Plaintiffs have not pleaded intentional discrimination.

Stripped from its rhetoric, Plaintiffs' Equal Protection claim turns on three factual assertions: First, students of some races are overrepresented in the City's specialized schools while students of other races are comparatively underrepresented. *See* Plaintiffs-Br.38-39. Second, the City has used objective, standardized test scores as the criteria for admission to its specialized schools for more than a century, and the State legislature passed the Hecht-Calandra Act to preserve the testing-based criteria in 1971 when City leaders considered changing it. *See* Plaintiffs-Br.39-47; *C.K. v. Tahoe,* 211 A.D.3d 1, 4 (3d Dep't 2022) (recounting the history of standardized tests in specialized schools). Third, the City and State are "aware" that disparities in admission rates exist and that admissions decisions are dictated by standardized score performance. *See* Plaintiffs-Br.48-51.

None of these assertions—independently or together—gives rise to an Equal Protection claim.

Disparities. Plaintiffs insist that "disparate impact in and of itself supports finding discriminatory intent," but courts have repeatedly rejected that argument. Plaintiffs-Br.38. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Chinese Am. Citizens All.*, 116 F.4th at 172 (cleaned up). In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, invoked by Plaintiffs and the Appellate Division, the United States Supreme Court held that disparities "*may* provide an important starting point" for an "inquiry" into intentional discrimination, but courts still must "look to other evidence." 429 U.S. 252, 266 (1977) (emphasis added); *see* Plaintiffs-Br.38; R.601. As explained below, the facts alleged by Plaintiffs "d[o] not carry [them] beyond this starting point." *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994). "'[T]he Fourteenth Amendment guarantees equal laws, not equal results,' and '*purposeful* discrimination is the condition that offends the Constitution.'" *Id.* (emphasis added).

Plaintiffs' allegations, even if accepted as true, do not amount to purposeful discrimination. While Plaintiffs assert throughout their complaint that Defendants acted intentionally or knowingly, *see* R.29 ¶18; R.47 ¶81, R.59 ¶98; R.91-92 ¶¶155, 157, those assertions merely allege that Defendants acted "intentionally" *to run the school system* (as one must). They are not allegations that Defendants acted intentionally *to discriminate*. For example, Plaintiffs criticize Defendants for "intentionally maintain[ing] and

sanction[ing] this system," R.29 ¶18, "intentionally fail[ing] to take sufficient action … to address the egregious inequalities" highlighted in their complaint, R.47 ¶81, and "intentionally refus[ing] to dismantle, root and branch," what they characterize as a "racialized channeling system," R.60 ¶98; *see also* Plaintiffs-Br.46-47 ("[T]he City chose to create or designate five other schools as specialized high schools … thereby cementing the SHSAT as the lone admissions criteria for them."). But nowhere do they allege that Defendants themselves were motivated by the race or ethnic background of the student bodies at City schools or that they intentionally created racial disparities "with that very purpose in mind." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 883 (4th Cir. 2023). That alone dooms their claim. Plaintiffs' liberal use of adverbs cannot transform a disparate-impact claim into a claim for intentional and invidious discrimination.

Hecht-Calandra. Plaintiffs lean heavily on the Hecht-Calandra Act of 1971 to try to paper over the defects in their Equal Protection claim as pleaded. Unsurprisingly, Plaintiffs dedicate more space to unrelated societal events ("the broader context") than to "discussing the specific enactment" made by the legislature. Plaintiffs-Br.40. According to Plaintiffs, "'the legislative history of the Hecht-Calandra Act, the timing of its enactment, and the contemporaneous statements of its co-sponsor'" are "'factors that support an inference of segregative intent'" when the legislature passed the Act. Plaintiffs-Br.39 (quoting R.601). Again, Plaintiffs are long on conclusory allegations but short on specifics. "[T]his lack of specificity [is] fatal to plaintiffs' cause of action." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

Plaintiffs' contentions about the purported legislative history of the Act and the opinions of the bill's opponents when it was passed cannot save their claim. *See* Plaintiffs-Br.42-44. As PDE previously explained—and Plaintiffs do not contest—Plaintiffs have not alleged "that the legislature as a whole was imbued with racial motives." *Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2350 (2021). Plaintiffs cannot rely on legislative history to support their Equal Protection claim for this reason alone. Plaintiffs' assertions about the "sequence of events" leading to the law's passage are likewise irrelevant, even if true. Plaintiffs claim that the seven-month time span between City officials' announcement of a plan to "evaluate" the use of standardized testing and the legislature's enactment of Hecht-Calandra is evidence that the law was passed to "thwart" the City's efforts. *See* Plaintiffs-Br.40-41. Assuming that accusation to be true, Plaintiffs still do not allege any facts that connect standardized testing with invidious racial discrimination.

Contra Plaintiffs and the Appellate Division, Hecht-Calandra did not represent a "'sudden change' in practice." Plaintiffs-Br.41 (quoting R.599). The law merely preserved the admissions criteria that had already been in use for decades, or, in the case of Stuyvesant, since 1904. *See* Francis X. Clines, *Assembly Votes High School Curbs*, N.Y. Times (May 20, 1971), bit.ly/41o2gXI ("The bill mandates the present competitive examinations as the basic admissions procedure for the schools."); *Tahoe*, 211 A.D.3d at 4. If anything, the law improved the status quo and *reduced* the likelihood of

discrimination by requiring the SHSAT to be "open to each and every child in the City of New York." 1971 N.Y. Laws Ch. 1212 §1; PDE-Br.39-40.

Finally, Plaintiffs' near-exclusive reliance on a 54-year-old law to support their Equal Protection claim—while ignoring subsequent reenactments of the law, changes to the test-based criteria it authorizes, and adjustments to the SHSAT itself—encapsulates the threadbare nature of their claim. Plaintiffs now acknowledge these intervening events and concede that Defendants' stated reason for enacting these measures was to increase access to G&T programs and ensure that students from all socioeconomic backgrounds can compete for admission. *E.g.*, Plaintiffs-Br.49-50. Yet Plaintiffs insist that these efforts "do[] not change things" because they "failed to succeed in preventing" unequal outcomes and "are still structured around the SHSAT." Plaintiffs-Br.50. In other words, Plaintiffs' real grievance in this case is not with Defendants' intentions, but with educational outcomes.

Awareness. Unable to show any facts that could prove Defendants intentionally designed the City's specialized school system for discriminatory purposes, Plaintiffs try to redefine the playing field. They suggest that proof of discriminatory intent is unnecessary if disparities were a "foreseeable" outcome of Defendants' actions or if Defendants became aware of disparities and did not resolve them. Plaintiffs-Br.47. Plaintiffs' novel theory of liability flips the burden of proof and presumes Defendants guilty of constitutional violations based on outcomes alone. But "[d]iscriminatory purpose"

requires more than "awareness of consequences." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (cleaned up).

For this reason, every court to consider this theory has rejected it. *See, e.g.*, *Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir. 1983) ("[T]hat a particular action has a foreseeable adverse impact … is insufficient to establish discriminatory intent."); *Coal. for TJ*, 68 F.4th at 883 ("[P]roving discriminatory intent requires more than sheer 'awareness of consequences.'"); *Spurlock v. Fox*, 716 F.3d 383, 399 (6th Cir. 2013) ("[I]n the absence of any explicit racial classification or proof of discriminatory intent, the line between 'awareness' and 'embracing' is almost impossible to draw."). This Court should do the same. In short, "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation." *Columbus BOE. v. Penick*, 443 U.S. 449, 464 (1979). Plaintiffs' complaint does not allege more. Disparities in outcomes, awareness of the disparities, and conjecture about a 1971 law that changed nothing are all Plaintiffs have to offer. Accordingly, their Equal Protection Claim fails as a matter of law. *Cf. Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1227 (2d Cir. 1994) ("Most important, [Plaintiff] makes only conclusory allegations that the members of the Town Board were motivated by racial animus and fails to point to any evidence of such motivation.").

2. Plaintiffs do not meaningfully dispute that their requested remedy requires racial classifications and racial balancing.

As the Second Circuit recently observed about the City's specialized schools, "admission is a zero-sum game in that admitting more students from a particular

demographic means admitting fewer students from other demographics." *Chinese Am. Citizens All.*, 116 F.4th at 171; *see SFFA*, 600 U.S. at 218-19. As explained, Plaintiffs' fundamental grievance in this case is with the racial makeup of the City's specialized schools. That is why Plaintiffs are unsatisfied with the various adjustments Defendants have made to increase opportunities for disadvantaged students across the board. *See supra* 9, 20. In Plaintiffs' view, those efforts "d[o] not change things" because they did not alter the racial demographics of the specialized schools. Plaintiffs-Br.50.

Plaintiffs' complaint leaves no doubt about the nature of relief they request: they want the Court to "impose measures—whether race-neutral or race-conscious as the evidence may support—on the State and City" to "eliminate … disparate impacts." R.30 ¶19. The complaint is equally clear that eliminating disparate impacts, in Plaintiffs' view, involves "equaliz[ing] … outcomes" and putting "measures in place to overcome or even offset the existing advantages accrued by the predominantly white and certain groups of Asian students." R.91-92 ¶¶156-57. That is textbook racial balancing, and it would be "patently unconstitutional" for any court to order it. *SFFA*, 600 U.S. at 223 (cleaned up). It would also put the district's federal funding at risk. *See Dear Colleague Letter – SFFA v. Harvard*, U.S. Dep't of Educ. (Feb. 14, 2025), bit.ly/Dear-Colleague-SFFA-Letter ("It would … be unlawful for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity."). Simply put, there is no "authority … to use race as a factor in affording educational opportunities among [a state's] citizens." *Parents Involved*, 551 U.S. at 747.

Plaintiffs do not deny that they seek this form of relief. Other than a glib statement that "discussion of remedies is premature," *but see supra* 5-6, Plaintiffs' only responses to this argument are that they are open to "race-neutral remedies" in addition to race-conscious ones and that "race-conscious remedies may be appropriate where racial discrimination has been shown." Plaintiffs-Br.50 n.27. The first response ignores that racial balancing does not become acceptable simply because a decisionmaker achieves it through pretextual, "race-neutral" means. *Chinese American Citizens Alliance* is directly on point. On appeal from summary judgment, the Second Circuit held that the City would be liable for violating the equal protection rights of Asian students if the evidence established that the City's new eligibility rules for the Discovery Program were designed to reduce the number of Asians in specialized schools. 116 F.4th at 172-74. Plaintiffs' second response is foreclosed by Supreme Court precedent forbidding remedial programs that inflict de facto punishments on innocent third parties who were neither perpetrators nor beneficiaries of the discrimination the program seeks to remedy. *E.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 87 (1995).

C. Plaintiffs fail to state a New York State Human Rights Law claim.

In the education context, the standard for violations of the NYSHRL mirrors the standard for equal protection violations. *See* PDE-Br.41-42. Disparate impact alone is insufficient; plaintiffs must allege intentional discrimination. Thus, Plaintiffs' NYSHRL claim fails for the same reason that their Equal Protection claim fails: they have not alleged that Defendants denied them access to educational facilities because

of their race. *See supra* 16-21; *see also* Plaintiffs-Br.52, 57 (conceding that intentional discrimination claims under NYSHRL and Equal Protection Clause rise and fall together). Unable to overcome this glaring omission, Plaintiffs spend most of their efforts arguing that intent is irrelevant because disparate impact provides a basis for their NYSHRL claim by itself. Plaintiffs concede, as they must, that this Court has never recognized that theory. The Court should not start now.

Plaintiffs primarily highlight this Court's recognition of disparate impact claims in employment cases and argue there is "no reason" to take a different approach to education claims. Plaintiffs cite a smattering of cases in support of this proposition but glide past key distinctions in each. For instance, Plaintiffs emphasize that this Court "unequivocally stated" in *People v. N.Y. City Transit Authority* that "a disparate impact upon a protected class of persons violates the Human Rights Law," but they omit the qualifying language the court applied to that statement. *Compare* Plaintiffs-Br.53, *with* 59 N.Y.2d 343, 348 (1983) ("[a]n *employment practice* neutral on its face and in terms of intent which has …"). More importantly, Plaintiffs fail to mention that *New York Transit Authority* was decided in 1983, and that the legislature amended the NYSHRL to include public school districts in 2019. The legislature did so after this Court held that the NYSHRL as originally written did not apply to public schools because the text plainly stated that the law's purpose was "to eliminate and prevent discrimination in *employment*." *N. Syracuse Cent. Sch. Dist. v. New York State Div. of Hum. Rts.*, 19 N.Y.3d 481, 494 (2012) (cleaned up).

Plaintiffs' reliance on a similar statement in *Sontag v. Bronstein*, decided in 1973, suffers from the same timeline problem. *See* Plaintiffs-Br.53 (citing 33 N.Y.2d 197, 200-01 (1973)). Likewise, Plaintiffs cite *Margerum v. City of Buffalo* for the proposition that the Court "recognize[d] the prospect that [a] municipality [c]ould be subject to disparate-impact liability," but *Margerum* too was an employment case, and the Court's discussion of prospective "disparate-impact liability" referred to pending *federal* litigation for intentional discrimination under the Equal Protection Clause. Plaintiffs-Br.53 (citing 24 N.Y.3d 721, 732 (2015)). Finally, Plaintiffs observe that the First Department recognized an "age discrimination-based disparate impact claim" in *Bennett v. Time Warner Cable*, without grasping that the relevant distinction is not between types of discrimination claims but between types of defendants. Plaintiffs-Br.53 (citing 138 A.D.3d 598, 599 (1st Dep't 2016)).

Plaintiffs display similar confusion when responding to PDE's textual arguments. They vigorously object to PDE's explanation of the differences between subsections 296(1)(a) and 296(4), PDE-Br.43-44, but attack positions PDE has not taken, *see* Plaintiffs-Br.53-55. For the sake of clarity, PDE argues that subsection 296(4) applies only to intentional discrimination because it forbids "deny[ing]" someone "the use of" school facilities because of his race, and the act of denying someone necessarily requires a decision by the actor. Put differently, the punishable activities under subsection 296(4) are "the defendant's *decision* to exclude" someone from a school environment, PDE-Br.43, or to "*permit* the harassment of any student or applicant," §294(4) (emphasis

added), both of which are intentional acts. The relevant text in subsection 296(1)(a), in contrast, focuses on the employee's right to access workplaces free from broadly discriminatory policies, like "terms, conditions, or privileges of employment," and therefore does not contain the intent element found in subsection 296(4). *See* PDE-Br.43.

Plaintiffs puzzlingly accuse PDE of using a "Trojan Horse" maneuver to persuade this Court to overrule prior decisions holding that disparate impact serves as the basis for NYSHRL liability—under subsection 296(4)—in the employment context. Plaintiffs-Br.55. But Plaintiffs' case has nothing to do with employment discrimination, and subsection 296(4) is not at issue here. PDE is simply making a straightforward textual argument that the Appellate Division erred by conflating the distinct NYSHRL standards for schools and workplaces. The legislature worded the employment and education provisions of the law differently, and the legislature's design must be respected. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposefully in the disparate inclusion or exclusion.") (cleaned up).

Nor does PDE argue that the threshold is higher under 296(4) than 296(1)(a) because the former includes race as a but-for cause of discrimination, but the latter does not. *See* Plaintiffs-Br.55 (claiming that PDE "excises '*because of* an individual's … race' from (1)(a)" because that "very text" purportedly "permits disparate impact liability for both"); Plaintiffs-Br.54 (claiming PDE made a "fatal concession" by stating "that

subsection 4's use of 'by reason of' is synonymous with 'because of,' the phrase used in subsection 1(a)"). Indeed, race is a "but-for" element of all racial discrimination allegations, regardless of the location or nature of the alleged discrimination. Again, the relevant distinction flows from the particular actions each section forbids. *See supra* 25-26.

Finally, Plaintiffs do not contest that the Appellate Division's expansion of disparate-impact liability to specialized school enrollment figures will have "drastic implications" for the City's ability to manage its school system. PDE-Br.45. The logic of the Plaintiffs' interpretation of the NYSHRL—which, again, the Appellate Division accepted without analyzing the text of the statute, *see* PDE-Br.44—is such that any student who is denied entry to a specialized school could sue for admission under the NYSHRL if there are any statistical disparities in the racial makeup of the student body, even if the student was never a victim of discrimination and the school makes admissions decisions using race-neutral criteria. This theory of liability is so expansive that even lottery-based admissions systems that randomly selected applicants to specialized schools via lottery could be considered "discrimination" under the NYSHRL if the conditions above are satisfied. *See* PDE-Br.45-46.

CONCLUSION

The Court should reverse the Appellate Division and dismiss the complaint.

Dated: March 3, 2025

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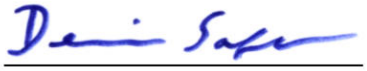

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