SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

PARENTS FOR EDUCATIONAL AND RELIGIOUS LIBERTY IN SCHOOLS; AGUDATH ISRAEL OF AMERICA; TORAH UMESORAH; MESIVTA YESHIVA RABBI CHAIM BERLIN; YESHIVA TORAH VODAATH; MESIVTHA TIFERETH JERUSALEM; RABBI JACOB JOSEPH SCHOOL; YESHIVA CH'SAN SOFER – THE SOLOMON KLUGER SCHOOL,

Petitioners,

For a Declaratory Judgment and a Judgment Pursuant to Article 78 of the Civil Practice Act and Rules

-against-

LESTER YOUNG JR., as Chancellor of the Board of Regents of the State of New York; and BETTY A. ROSA, as Commissioner of the New York State Education Department,

Respondents.

Index No. 907655-22

Hon. Christina L. Ryba

AMICUS BRIEF OF THE CENTER FOR EDUCATIONAL EQUITY, TEACHERS COLLEGE, COLUMBIA UNIVERSITY

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Center for Educational Equity ("CEE") at Teachers College, Columbia University, is a policy and research center that champions the right of all children to a meaningful opportunity to graduate from high school prepared for college, careers, and civic participation. CEE works in New York State and nationally to promote meaningful opportunities for all students to become capable citizens, to inform students of their right to a meaningful educational opportunity and to ensure that all schools are equipped to provide the resources, services, and supports necessary to make this happen.

CEE has undertaken substantial research to identify the specific knowledge, skills, experiences and values that students need to be prepared for capable citizenship. It is the convener of the DemocracyReadyNY Coalition, a collaboration of 30 diverse state-wide organizations committed to promoting effective civic preparation in all schools in New York State, public and private.

Michael A. Rebell, CEE's executive director, was co-counsel for the plaintiffs in *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893 (2003), in which the Court of Appeals held that all students in New York State have a constitutional right to the opportunity for a sound basic education and that, connection therewith, it is the schools' responsibility to provide all students with the skills necessary "to function productively as civic participants." *Id*. at 908. Rebell is also the author of FLUNKING DEMOCRACY: SCHOOLS, COURTS AND CIVIC PARTICIPATION (University of Chicago Press 2018), which discusses in detail the history and current status of education for civic participation in the United States.

Amicus submits this brief to emphasize that it is now bedrock New York constitutional law that *all* students in New York State – including students attending non-public schools – have a constitutional right to a meaningful opportunity to an education that prepares them to function

productively as civic participants. Because of the importance of effective implementation of New York State's "substantial equivalence" statutes, regulations and guidelines in upholding this right, *amicus* supports the respondents' position and respectfully submits that this petition be dismissed in its entirety.[1]

PRELIMINARY STATEMENT

Amicus curiae submits that the U.S. Supreme Court's holding in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) is dispositive of most of the claims that the petitioners have alleged in this case. In *Pierce*, the U.S. Supreme Court upheld the right of parents to send their children to private schools, but at the same time made clear that the state could impose basic regulations on such schools -----including religious schools ---- to ensure that their students would be properly prepared to function productively as capable citizens:

> No question is raised concerning the power of the state to regulate *all schools*, to *inspect, supervise and examine them, their teachers and pupils;* to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that *certain studies plainly essential to good citizenship must be taught*, and that nothing be taught which is manifestly inimical to the public welfare.

Pierce, 268 U.S. at 534 (emphasis added).

It is astounding that nowhere in their 45-page petition or their 36-page brief do the petitioners discuss or try somehow to distinguish *Pierce*,[2] a case that clearly holds that the religious rights of parents and parochial schools are in no way compromised by reasonable

[1] The views expressed in this brief do not necessarily represent the views of Teachers College, Columbia University

[2] Petitioners string cite Pierce at ¶130 of the Petition and on page 29 of their brief, misleadingly referring to it in passing, for the proposition that parents have a "protected right to control the upbringing and the education of their children," without any reference whatsoever to the U.S. Supreme Court's clear holding that reasonable regulation of religious schools does not compromise this right.

regulation by the state to ensure that students enrolled in private schools are prepared to be capable citizens.

In this brief, *amicus curiae* will discuss the relevance of *Pierce* to this case, and the reasons why *Packer Coll. Inst. v. Univ. of NY*, 298 N.Y. 184 (1948) does not bar imposition of the reasonable regulatory scheme at issue here. We respectfully submit that these two precedents, properly understood, demonstrate that most of the claims in the petition based on allegations of denial of religious liberty and improper legislative delegation are totally devoid of merit. *Amici* believe that the respondents' brief responds appropriately to the petitioners' allegations of improper administrative procedures, discrimination against the ultra-orthodox Yeshivas and their other strained First Amendment arguments.

We do, however, believe it necessary to bring to the Court's attention that throughout their petition and brief, the petitioners have set forth a series of partial facts or references that, as with their failure to even discuss the *Pierce* precedent, set up the issues in the case in a disturbingly misleading way. For example,

1. Petitioners state that 170,000 students in New York State attend Yeshivas (Pet. ¶35), and that "their graduates have succeeded in every professional field," (Pet. ¶ 2), without informing the Court that most of these yeshivas are orthodox or conservative Jewish schools that fully comply with the substantial equivalence laws by providing roughly a half day of intense religious education together with a half day of quality secular education. (*See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 344-45 (2d Cir. 2007.) The ultra-orthodox yeshivas that have been flouting the law constitute a small percentage of Jewish educational institutions.

2. Petitioners repeatedly belittle the significance of "non-core" secular subjects like patriotism, citizenship, and the history, meaning and significance of the provisions of the U.S. Constitution and the New York State Constitution (Pet. ¶ 73, 82,118), even though the New York Court of Appeals has specifically emphasized the importance of civic education and, indeed, has specifically held that the purpose of the state Constitution's guarantee of the opportunity for a sound basic education is to ensure that all students in New York State develop the skills they need to " eventually function productively as civic participants capable of voting and serving on a jury" *CFE v. State of New York* 86 N.Y. 2d 307,316 (1995); *CFE v. State of New York*, 100 N.Y. 2d 893, 905 (2003.)
3. Petitioners repeatedly distort the purpose and operations of the public school programs for English language learners and students in dual language programs. (Pet. ¶s 72,116; Brief, p. 21.) The aim of these programs is to transition non-English speaking students into English language competence and to promote bi-lingual language skills. No public schools operate, as do some of the ultra-orthodox schools, by conducting the overwhelming proportion of their lessons in a non-English language (Yiddish) and totally neglecting the English language capabilities of their students.
4. Much of petitioners' argument against the substantial equivalence requirements is, in essence, a claim that Ed. Law §§ 3204, 3210(2), 801, 801-a , the statutes that specifically require substantial equivalence and specify particular requirements like hours of instruction, competence of teachers, specific curricula like civics and history, health, etc. are unconstitutional. The Court of Appeals has clearly held, however, that

the validity of a legislative act is not subject to review in an Article 78 proceeding. *New York City Health & Hosps. Corp. v McBarnette*, 84 N.Y.2d 194, 203-204 (1994.) To the extent that their claims are part of a declaratory judgment action, their arguments are misleadingly framed as challenges to the validity of the new substantial equivalence regulations, rather than challenges to the long-standing statutes themselves.

Finally, it is clear that there is no proper basis for petitioners' request for a preliminary injunction. It is highly unlikely that they will prevail on the merits, they have made no showing of any immediate, irreparable harm (the school inspections called for by the regulations have not even begun, let alone officially determined that any of the petitioner schools in non-compliance), and any balancing of the equities should favor the children attending these schools and not the administrators and organizations asking for this relief. Furthermore, it is unnecessary and inappropriate to request a preliminary injunction in an Article 78 proceeding that involves no trial, no discovery and is, by its very nature, an expedited proceeding.

ARGUMENT

I. THE RESPONDENTS' "SUBSTANTIALLY EQUIVALENT" GUIDELINES FULLY COMPLY WITH THE UNITED STATES CONSTITUTION AND APPLICABLE U.S. SUPREME COURT DECISIONS.

The petitioners assert that under the First Amendment to the United States Constitution they have an absolute, untrammeled right to choose the instructional content of the education they provide to their students, and that the New York State legislature and educational officials

lack any constitutional authority to regulate what is taught in those schools. *See, e.g.* Pet, ¶¶s 131-138; Pet. Brief at pp.30-32.)

This position has no basis in federal constitutional law; in fact, the U.S. Supreme Court has specifically held that the state has the authority to impose "substantial equivalence" requirements on instruction in private schools. This issue was explicitly recognized and fully considered by the U.S. Supreme Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Pierce*, two private schools, a Catholic school and a military academy, challenged the constitutionality of an Oregon compulsory education law mandating that every child between the ages of eight and sixteen attend a public school. *Id.* at 530–531. The Court held that the statute was unconstitutional and enjoined its enforcement before it could take effect. *Id.* at 536.

Pierce was the critical U.S. Supreme Court decision establishing the relationship between the state and religious and independent private schools. At the end of the nineteenth century, most states began adopting compulsory education laws, and by 1918, education was compulsory in every state in the Union. Some nativist groups sought to expand the scope of the compulsory education laws to require all students to attend *only* public schools, a position that, in essence, would have meant the closure of all private schools. One such effort culminated in a ballot initiative adopted by Oregon in 1922 mandating that every child aged eight to sixteen attend a public school. The sanctions for noncompliance were draconian: if parents did not send their child to a public school, they were subject to fines and a jail term of two to thirty days for each day of delinquency. 1923 Ore. Laws ch.1, p.9.

The case presented the Supreme Court with a difficult dilemma. On the one hand, the state clearly had a legitimate interest in ensuring that the rapidly increasing number of immigrant children – and all children – receive an education preparing them to function productively as

American citizens. On the other hand, Catholics and other religious groups had a strong claim under the First Amendment that they were entitled to promote their own religious and other values. These plaintiffs also asserted that the private students' parents had a due process "liberty" claim – that is, that they were constitutionally entitled to educate their children in schools providing instruction consistent with their values and beliefs.

The Court reached a Solomonic resolution of this dilemma. It upheld the right of parents to send their children to private schools, but at the same time served notice that the state could impose basic regulations on such schools to ensure that students would be properly prepared to function productively as capable citizens:

> *No question is raised concerning the power of the state to regulate all schools, to inspect, supervise and examine them, their teachers and pupils;* to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that *certain studies plainly essential to good citizenship must be taught*, and that nothing be taught which is manifestly inimical to the public welfare.

Pierce, 268 U.S. at 534 (emphasis added).[3]

Mark Yudof, an education law scholar and former Chancellor of the University of California, described the subtle balance involved in this "*Pierce* compromise" as representing "a reasonable accommodation of conflicting pressures":

> The state may make some demands of private schools in satisfaction of compulsory schooling laws, but those demands may not be so excessive that they transform private schools into public schools managed and funded by the private sector. The integrity of the communications and socialization processes

[3] Regarding the Petitioners' implication that enforcement of the substantial equivalence law and regulations infringe on their First Amendment rights to freedom of expression, the U.S. Supreme Court has made clear that: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Empl. Div. v. Smith*, 494 U.S. 872, 878-879 (1990).

> in private school and families remains intact, while the state's interest in producing informed, educated and productive citizens is not sacrificed.

MARK YUDOF, WHEN GOVERNMENT SPEAKS 230 (1982).

Here, the petitioners distort the Supreme Court's holding in *Pierce* by mentioning its holding that the parents had a right to send their children to a private religious school, but totally omitting any mention of the counter veiling aspect of the *Pierce* compromise; *i.e.*, the state's authority to reasonably regulate the private schools to ensure that they are properly preparing their students for capable citizenship.

In the decades since *Pierce*, most states, like New York, have adopted "substantial equivalence" laws and regulations to implement their authority and responsibility to reasonably regulate non-public schools in order to ensure that "studies plainly essential to good citizenship must be taught." *Pierce*, 268 U.S. at 534. The U.S. Supreme Court summarized the state of compliance with its *Pierce* ruling as of 1968 as follows:

> Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.*

Bd. of Educ. v. Allen, 392 U.S. 236, 245-247 (1968) (emphasis added; footnotes omitted).[4]

[4] The petitioners also misrepresent Wisconsin v. Yoder, 406 U.S. 205 (1972), by citing it for the proposition that parents have a constitutional right to "provid[e] a religious upbringing for their children" (Pet.¶ 179) without stating that Yoder was a challenge to the number of years of the state's compulsory education requirement, not to any substantial equivalence requirements for the years that students did attend school. The Supreme Court allowed this rare exemption from the length of the compulsory education requirement only because of the special circumstances of the Amish community that wished to

Misleading.

The U.S. Supreme Court has also repeatedly reaffirmed the critical role that schools play in educating students to become capable citizens in a number of other cases. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[The] schools are educating the young for citizenship."); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (schools are where the "fundamental values necessary for the maintenance of a democratic political system" are conveyed.); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.") (Brennan, J., concurring); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.").

Because the "substantially equivalent" guidelines do not infringe on any of Petitioners' rights as guaranteed by the United States Constitution, their claims for injunctive and declaratory relief should be dismissed.

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educate their high school age students in agricultural rather than academic skills. The Court also specifically found that the Amish led an isolated rural life, did not vote, did not "accept public welfare" *Id* at 222, and had minimal interaction with the larger society. By way of contrast, the ultra-orthodox schools that deny substantially equivalent education to thousands of students in New York State are mostly located in dense urban areas, vote extensively in local, state and national elections (*see* note 6, *infra*,) seek and accept substantial public education and welfare assistance (*see*, Eliza Shapiro and Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush With Public Money* N.Y. Times, Sep't 12, 2022) and have many interactions with the larger society. Finally, although it allowed a minimal exception from the compulsory education laws for the Amish plaintiffs, the Supreme Court explicitly stated that "Nothing we hold is intended to …..limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance….." *Id* at 236.

II. THE "SUBSTANTIALLY EQUIVALENT" REGGULATIONS ARE REQUIRED BY THE NEW YORK STATE CONSTITUTION.

Article XI §1 of the New York State Constitution requires the state to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." The Court of Appeals has held that this provision requires the state to "ensure the availability of a 'sound basic education' to all its children." *Campaign for Fiscal Equity ("CFE") v. State of New York,* 100 N.Y. 2d 893, 902 (2003). The Court also explicitly linked its definition of a "sound basic education" to *civic preparation,* stating that a "sound basic education" should provide all students "the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants." *Id*. at 908. *See also CFE v. State of New York,* 86 N.Y.2d 307, 316 (1995) (sound basic education consists of "skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury"); *Aristy-Farer v. State,* 29 N.Y.3d 501, 505 (2017) ("The sound basic education guaranteed by the Constitution requires the State to afford students the 'opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.'").

The plaintiffs' core claim in *CFE* was that the state's system for financing public education was depriving their schools of the resources needed to provide them an opportunity for a sound basic education as guaranteed by the New York State Constitution. After holding that plaintiffs had stated a valid claim, the Court of Appeals determined that it was necessary to examine in depth what the constitutional phrase "sound basic education" means in practical terms. Accordingly, it remanded the case to the trial court and instructed Justice DeGrasse to determine, among other things, the types of skills that students need to function productively as

civic participants, and whether the state was providing an opportunity for students to develop these skills. *Id*. at 317-18.

Following a lengthy trial, Justice DeGrasse issued a comprehensive decision holding that the state's school funding system violated the sound basic education requirement of N.Y. Const. Art. XI § 1. *CFE v. State of New York*, 187 Misc.2d 1, 99 (Sup. Ct. N.Y. Cty. 2001). In his thorough and scholarly opinion, Justice DeGrasse also discussed the types of skills students need to develop in order to function productively as civic participants:

> Productive citizenship means more than just being *qualified* to vote or serve as a juror, but to do so capably and knowledgeably. It connotes civic engagement. An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming, to name only a few. Ballot propositions in New York City, such as a charter reform proposal that was on the Ballot in November 1999, can require a close reading, and a familiarity with the structure of local government. Similarly, a capable and productive citizen doesn't simply show up for jury service. Rather she is capable of serving impartially on trials that may require learning unfamiliar facts and concepts and new ways to communicate and reach decisions with her fellow jurors.

Id. at 14 (emphasis in original).

Beginning with a "unanimous recognition of the importance of education in our democracy," the New York Court of Appeals roundly affirmed Justice DeGrasse's determination that "productive citizenship means more than just being *qualified* to vote or serve as a juror, but to do so capably and knowledgeably – to have skills appropriate to the task." *CFE*, 100 N.Y.2d at 901, 906 (internal citations and quotation marks omitted) (emphasis in original). The court also flatly rejected the notion that civic skills were acquired at a particular grade level, stating that "the mandate of the Education Article for a sound basic education should not be pegged to the eighth or ninth grade, or indeed to any particular grade level. In *CFE* we pointed to voting and jury service because they are civic responsibilities *par excellence*." *Id*. at 906-07. In

framing its determinations, the Court of Appeals also made explicit that a sound basic education means one which affords students "the opportunity for a meaningful high school education" and "prepares them to function productively as civic participants." *Id*. at 908.

The Court of Appeals made clear in *CFE* that Art XI § 1 of the New York State Constitution requires the legislature to "ensure the availability of a 'sound basic education' to *all* its children" whether they attend public or non-public schools. *CFE*, 100 N.Y.2d at 902 (emphasis added). The legislature, being aware of this mandate, specifically stated in its 2018 amendment to Education Law Section 3204(2)(ii-v) (the "Felder Amendment"), that although non-public schools covered by that amendment would be accorded some flexibility in the manner in which they choose to develop critical analytic skills in their students, ultimately, *the outcome of the education provided in those schools must "result in a sound basic education***.**" N.Y. Educ. Law § 3204(2)(iii) (emphasis added).

The legislature, regents and commissioner have acted appropriately and legally in enacting a series of statutes and regulations geared to ensuring that all non-public schools in the State are, indeed, providing all of their students the opportunity for a sound basic education that will prepare them to function productively as civic participants, as mandated by the New York Constitution and New York common law interpreting and applying it. The regulations that are the subject of this litigation are especially appropriate and timely since, as will be discussed in more detail in the next section of this brief, the commissioner had recently discovered that a number of the ultra-orthodox yeshivas in New York have been denying their students any instruction whatsoever in American history, civics, science and other subjects that the students clearly will need in order to make informed judgments as voters and jurors.

The regulations, therefore, are wholly in sync with the New York Constitution as it relates to education and the Court of Appeals' decisions interpreting and applying it.

III. MANY ULTRA-ORTHODOX YESHIVAS ARE NOT PROVIDING THEIR STUDENTS A MEANINGFUL OPPORTUNITY FOR A SOUND BASIC EDUCATION.

Many ultra-orthodox Yeshivas in New York fail to provide their students with even the most basic knowledge, skills, experiences and democratic values needed for meaningful civic participation. The New York City Department of Education recently investigated more 28 ultra-orthodox Yeshivas – schools that presumably are members of petitioners Agudath Israel of America and Torah Umesorah. The investigation revealed that only two of the 28 yeshivas are offering secular education that is considered "substantially equivalent" to classes found in the city's public schools. A recent detailed investigation by the New York Times found that

> Most of the Hasidic boys schools offer reading and math just four days a week, often for 90 minutes a day, and only for children between the ages of 8 and 12. Some discourage further secular study at home. "No English books whatsoever," one school's rule book warns. Often, English teachers cannot speak the language fluently themselves.

Eliza Shapiro and Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush with Public Money* N.Y. TIMES, Sep't 12, 2022, available at https://www.nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html

Because these students only receive an elementary exposure to English and math and no instruction whatsoever in history, civics, social studies, economics, science and other core subjects, [5] clearly they are not receiving the sound basic education which is their right under the

[5] The Times' investigation found that "Only nine schools in the state had less than 1 percent of students testing at grade level in 2019, the last year for which full data was available. All of them were Hasidic boys' schools." *Id.* Yeshiva students are taught in Yiddish, and occasionally in Hebrew and Aramaic. Women receive slightly more secular education than men (because women are not religiously obligated to

New York Constitution. These schools, therefore, are failing fully to provide their students with any semblance of the kind of education necessary to prepare them for capable citizenship. According to a major 2011 report, *Guardian of Democracy: The Civic Mission of Schools* (prepared by the Civic Mission of the Schools, a coalition of more than 50 civic-oriented organizations including the American Bar Association, the co-chair of which was former Supreme Court Justice, Sandra Day O'Connor), effective preparation of students for civic participation requires, at a minimum: (1) basic civic knowledge in government, history, law, and democracy; (2) verbal and critical reasoning skills; (3) social and participatory experiences; and (4) responsible character traits and acceptance of democratic values and dispositions. *See Campaign for the Civic Mission of Schools*, 16-18.

Of particular concern is the fact that most of these children lack an understanding of even the most fundamental concepts of American government, structures, and processes. "Democratic citizenship is all but impossible if citizens fail to understand basic concepts such as separation of powers, federalism, individual rights, and the role of government." *Id*. at 16. And without a working knowledge of critical disciplines such as history, geography, economics, and science, students cannot understand or assess issues of public policy, critically analyze one-sided or false information, or intelligently engage with others who share differing political and social views. *See CFE v. State of New York*, 86 N.Y.2d 307 (1995); *CFE v. State of New York*, 100 N.Y.2d 893 (2003); *CFE v. State of New York*, 187 Misc.2d 1 (Sup. Ct., N.Y. Cty. 2001); *Campaign for*

study Jewish texts). However, because women are expected to become homemakers, extensive academic education for them is also discouraged and is not taken seriously.

the Civic Mission of Schools, *supra* at 16 (2011); Martha Nussbaum, NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES (2010).[6]

Because the New York City chancellor directly informed respondent commissioner of education of these facts, it is clear that the regents not only had the authority, but also the constitutional duty, to issue the regulations at issue in these actions ensuring that the long-standing New York State substantial equivalency requirements are effectively enforced in non-public schools in New York City and throughout the State.

IV. THE REGULATIONS DO NOT VIOLATE NEW YORK'S CONSTITUTIONAL BAN ON DELEGATING LEGISLATIVE AUTHORITY TO AN ADMINISTRATIVE AGENCY.

A. Respondents' Actions Were Fully Consistent With The Delegation Requirements Of *Packer Collegiate.*

The regulations issued by the regents that are the subject of this proceeding do not violate New York's constitutional ban on delegating legislative authority to an administrative agency. Under well-established legal principles, a regulation can only be invalidated on anti-delegation grounds if the underlying statute provides the agency with "no standards or limitations of any sort." *Packer Coll. Inst. v. Univ. of NY*, 298 N.Y. 184, 189 (1948). That is clearly not the case here: the Legislature provided extremely specific "standards" and "limitations" regarding

[6] Hasidim in New York have historically high voting rates, and their communities are known to form powerful voting blocs. For instance, in 2013, New York Times reported that Hasidic Jews made up a prime voting bloc in areas of Borough Park, Williamsburg, and Crown Heights in Brooklyn, and are "known to vote with near unanimity." *See* Ford Fessenden and Josh Keller, *The Voting Blocks of New York City*, New York Times, September 6, 2013, http://www.nytimes.com/newsgraphics/2013/09/06/voting-blocs. Moreover, Hasidim in certain New York communities apparently vote without exercising independent decision making; according to one Hasidic man, "[w]e make a bloc vote. Whatever they say, we vote. It's not for us to decide. The [supervising body] decides." *See* Uriel Heilman, *The Hasidic Bloc Vote, Bernie and Hillary's Empire State of Mind and Other NY Campaign Notes (JTA April 12, 2016)*, https://www.jta.org/2016/04/12/news-opinion/politics/the-hasidic-bloc-vote-bernie-and-hillarys-new-york-state-of-mind-and-other-notes-from-the-ny-primary-campaign. As a result, to the extent that graduates of these Hasidic Yeshivas *do* engage in political activities, such as voting, they are affecting the larger social and political world they are taught so little about.

substantial equivalency in Education Law Sections 3204 (2), 3210(2), 801, 801-a, and other statutes.

In *Packer*, a private school sued to declare an education statute and the regulations promulgated thereunder unconstitutional. The challenged statute required that no private school could establish or maintain a nursery school, kindergarten or elementary school giving instruction in certain subjects "unless the school is registered under regulations prescribed by the board of regents." *Id*. at 189. The statute, in other words, simply said that the private school must be registered and left it up to the regents and the state education department to determine, on their own and without any guidance whatsoever, what those regulations should be. The commissioner of education, in turn, then developed regulations for these schools in a legislative vacuum. [7]

The regulations were struck down because the statute left the entirety of the legislative process in the hands of unelected administrative officials and thus violated Section 1 of Article III of the New York State Constitution, which provides that "The legislative power of this State shall be vested in the Senate and Assembly." The Court of Appeals put it thus:

> The . . . statute is . . . patently unconstitutional as being an attempted delegation of legislative power [because it] is nothing less than an attempt to empower an administrative officer, the State Commissioner of Education, to register and license, or refuse to register and license, private schools, under regulations to be adopted by him, *with no standards or limitations of any sort*.

[7] The regulations would have required, among other things: "that the program, curriculum and financial resources of the school must meet standards to be approved by the commissioner; that the qualifications of the teachers shall be up to those of the public school; that the number of children per teacher shall not be too large for proper education; that there shall be adequate equipment and space, adequate provisions for health and sanitation and fire escapes, adequate opportunities for 'parent education' and adequate record-keeping; that the schools shall be in session approximately the same number of days as the public schools; and that no school shall be registered if it puts out "misleading advertising." *Id* at 191.

Id. at 189 (emphasis added).

The Court of Appeals was insistent that while an agency is free to regulate non-public schools, it cannot do so via a blank check written by the Legislature. It was the utter silence in the statute regarding guiding principles that led the court to invalidate the school regulations. The Court of Appeals, to make the point, repeated its reasoning throughout the opinion; the regulations were invalid because:

- The Legislature failed to "set out standards or tests by which the qualifications of the schools might be measured." *Id*. at 189.
- The Legislature failed "even in most general terms" to set out "what the subject matter of the regulations is to be." *Id*.
- "It is impossible [to know] what aspects or activities of the schools were to be governed by the regulations, much less what the regulations were to accomplish, or what were to be their limits." *Id.*
- "Only the wildest guessing could give us any idea of what the Legislature had in mind." *Id*.
- "The Legislature [failed to] set bounds to the field, and [failed to] formulate the standards which shall govern the exercise of discretion within the field." *Id*.
- There was no "clearly delimited field of action" and no "standards for action therein." *Id*.
- "It is here impossible to discover what authority was intended to be turned over [by the Legislature]." *Id*. at 190.
- "The commissioner was left 'without check or guidance' to do what he will with these schools[.]" *Id*.
- The statute did not furnish the administrators with "'rules and principles'" for guidance. *Id*.
- "[W]e cannot find in [the statute], or around it, express or implied, any standards at all." *Id*. at 191.

All of the cases interpreting and applying *Packer* in the last seventy-one years have noted what the Court went out of its way to emphasize; namely, that regulations are constitutional if they flow from a statute which provides the agency with guidelines and standards. *See, e.g., Natl. Psychological Assn. for Psychoanalysis, Inc. v. Univ. of NY***,** 18 Misc. 2d 722, 728 (Sup. Ct., N.Y. Cty. 1959) (agency regulations governing certification of New York therapists was not constitutionally invalid because "[the statute] prescribe[s] ample standards and limitations to govern the exercise of the power of certification"); *Gilmartin v. Lipson*, 34 Misc. 2d 998, 1001 (Sup. Ct., Nassau Cty. 1962) ("*Packer* [was] concerned with the constitutionality of delegating legislative powers to administrative bodies without sufficient standards to guide, control or limit the administrative bodies."); *Jokinen v. Allen*, 15 Misc. 2d 124, 173 (Sup. Ct, Nassau Cty. 1958) (statute did not unlawfully delegate legislative power to administrative agency charged with registering kindergartens because the statute "describe[d] what job must be done, who must do it, and what is the scope of his authority" and therefore the regulations were valid).[8]

The Court's reasoning in upholding the educational regulations at issue in *Jokinen* deserve special attention. In that case, the regulations required that non-public kindergartens must, among other things, have "teachers whose training is substantially equivalent to that of public school teachers"; an "adequate curriculum and teacher-pupil ratio;" and "a yearly term substantially equivalent in length to that required of public schools." *Id*. As in these actions, the regulations at issue in *Jokinen* dealt with "substantially equivalent" education. The Court upheld the regulations because:

[8] The court in *Jokinen* did invalidate one provision of the regulations which favored the admission to public school first grades of students from registered kindergartens as being arbitrary and discriminatory, but not on grounds of improper delegation.

> Where 'standards are provided [in the statute] which, though stated in general terms, are capable of a reasonable application and are sufficient to limit and define the board's discretionary powers,' the delegation of such powers to the administrative official by the Legislature is lawful.

Id. (citations omitted).

B. The Education Law Provides The State Education Department With Standards And Guidance On How To Implement The "Substantially Equivalent" Education Requirements.

Applying the constitutional maxims summarized above to the regulations, it is clear that the Legislature did not unconstitutionally delegate legislative authority to the regents and the state education department (the "SED").

First, Education Law § 3204 – unlike the statute in *Packer* – is replete with standards and guidance that the SED must follow when promulgating regulations to achieve the statute's goals. The statute provides that students who meet the compulsory education requirements by attending "elsewhere" than in a public school, *i.e.* at a non-public school, must obtain a "substantially equivalent" education that a student would receive "at the public schools of the city or district where the minor resides." N.Y. Educ. Law § 3204(2). The statute also spells out the specific subjects that public schools must teach and for which non-public schools must provide substantially equivalent instruction. These include:

1. "Instruction may be given only by a competent teacher." N.Y. Educ. Law § 3204(2)(i).

2. For the first eight years, "instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science." N.Y. Educ. Law § 3204(3)(a)(1); and

3. For the high school years, "instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and

> established by the constitution of the United States." N.Y. Educ. Law § 3204(3)(a)(2).

In addition, N.Y. Education Law Section 801(2) provides that:

> The regents shall prescribe *courses of instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York* and the amendments thereto, to be maintained and followed in all of the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, in the eighth and higher grades, shall attend upon such instruction.
>
> *Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools in grades or classes corresponding to the instruction in the eighth and higher grades of the public schools shall attend upon such courses.* If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils in the public schools of the city or district in which such pupils reside.

(emphasis added). *See also* N.Y. Educ. Law § 801(1) (requiring the Regents to prescribe "courses of instruction in patriotism, citizenship, and human rights issues, with particular attention to the study of the inhumanity of genocide, slavery (including the freedom trail and underground railroad), the Holocaust, and the mass starvation in Ireland from 1845 to 1850, *to be maintained and followed in all the schools of the state*") (emphasis added).

An amendment to Section 3204, adopted in 2018 and codified as Section 3204(2)(ii)-(v) (the "Felder Amendment') exempts certain non-public schools – which are defined in terms that appear to apply only to the ultra-orthodox Hasidic yeshivas – from some of the specific subject requirements, like those relating to hygiene, and physical training. However, these schools are not exempt from the core academic requirements since the statute requires these schools at the elementary level to "provide[] academically rigorous instruction that develops critical thinking

skills in the school's students" and that for students at the elementary and middle schools to obtain a "substantially equivalent" education, they must receive:

- "English instruction that prepares them to read and to use that information to construct written essays";
- math instruction that prepares them to "solve real world problems";
- history instruction that prepares them to "identify and explore important events in history, to construct written arguments using the supporting information they get from primary source material, demonstrate an understanding of the role of geography and economics in the actions of world civilizations, and an understanding of civics and the responsibilities of citizens in world communities," and
- science instruction that teaches them to "to gather, analyze and interpret observable data to make informed decisions and solve problems mathematically, using deductive and inductive reasoning to support a hypothesis, and how to differentiate between correlational and causal relationships.

Id.

The Felder Amendment provisions applicable to high school students call generally for instruction in "critical thinking," without citing specific subject areas. However, the amended section then concludes by stating that instruction of high school students in these schools must ultimately "result in a sound basic education." As discussed above in Sections II and III of this brief, the Court of Appeals made clear in its *CFE* opinions that "sound basic education" is a substantive requirement that incorporates learning in the broad range of subject areas that are needed to prepare students to function productively as civic participants. Thus, as the regents rightly assumed in issuing their substantial equivalence regulations that students in the Hasidic yeshivas covered by the Felder Amendment must also receive instruction at the high school level in English, American history, and civics, as well as economics, science and all other subjects that are necessary for a "sound basic education."

In sum, the substantial equivalence requirements that the legislature has delineated in the various education law provisions clearly contain "standards or tests by which the qualifications of the schools might be measured." *Packer,* 298 N.Y. at 189. Unlike in *Packer,* the regents and the SED were not given a blank check to write any and all regulations that they saw fit. The statute, including the Felder Amendment, contains lanes into which the regents and the SED must stay. The Legislature provided in *detailed* terms "what the subject matter of the regulations is to be." *Id*. Far from being "impossible," it is plainly stated "what aspects or activities of the schools were to be governed by the regulations" as well as "what the regulations were to accomplish [and] what were to be their limits." *Id.* By setting forth the goals and elements of a substantially equivalent education for the Petitioners' elementary, middle and high school students, no "wildest guessing" is needed to "give [a court] [the] idea of what the Legislature had in mind."

C. <u>The Regulations Are Neither Arbitrary, Capricious Nor Unreasonable</u>.

"The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious." *Matter of Consolation Nursing Home v. Commissioner of N.Y. State Dept. of Health*, 85 N.Y.2d 326, 331 (1995). To meet the Court's standard, a petitioner seeking to invalid the regulations must show that they are "so lacking in reason" that they are "essentially arbitrary." *Kuppersmith v. Dowling,* 93 N.Y.2d 90, 96 (1999).

The bar for a petitioner to meet this standard is extremely high. This is because "the separation of powers doctrine gives the Legislature considerable leeway in delegating its regulatory powers" to an administrative agency to "administer the law as enacted by the Legislature." *Boreali v. Axelrod,* 71 N.Y.2d 1, 9-10 (1987). Because an agency is a "creature of

the Legislature," it "is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication." *Matter of City of New York v. State of N.Y. Commn. on Cable Tel.*, 47 N.Y.2d 89, 92 (1979). Agencies are, therefore, permitted to adopt regulations that go beyond the text of its enabling legislation, as long as those regulations are consistent with the statutory language and underlying purpose. *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib*., 2 N.Y.3d 249, 254 (2004).

Seen through this prism, the regulations clearly pass constitutional muster. They cannot in any way be considered "arbitrary" or "capricious." The regulations are carefully crafted to apply objective criteria to the reviews of the various non-public schools in order to ensure that all students attending non-public schools, religious or otherwise, are provided a substantially equivalent education.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to deny the petitioners' request for a preliminary injunction and to dismiss the petition.

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