SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INTEGRATENYC, INC.; 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.C. ex rel. Y.J.; A.M.; V.M. ex rel. J.M.; 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,

vs.

THE STATE OF NEW YORK; ANDREW M. CUOMO, 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 Chief Executive Officer of New York City; NEW YORK CITY DEPARTMENT OF EDUCATION; and MEISHA PORTER, as Chancellor of the New York City Department of Education,
Defendants,

and

PARENTS DEFENDING EDUCATION,
Proposed Intervenor-Defendant.

Index No. 152743/2021

Assigned to _____

MEMORANDUM OF LAW IN SUPPORT OF PARENTS DEFENDING EDUCATION'S MOTION TO INTERVENE AS A DEFENDANT

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INTRODUCTION

The strongest case for intervention as a defendant is when the movant is the plaintiff's "mirror-image"—when the plaintiff "claims that its members are being injured by [a] program" and the movant "claim[s] that [its] members will be injured by [the program's] invalidation." *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435, 440 (N.D. Ill. 1996).

That is precisely the case here. Plaintiffs are a nonprofit and parents with children in New York City's public schools; Movant is a nonprofit whose members include parents with children in New York City's public schools. Plaintiffs represent children who effectively want to end the City's gifted-and-talented elementary school programs ("G&T"), "specialized" public high schools, and other high school and middle school programs with selective admissions "screens"; Movant represents children who are enrolled in those programs, who attend those schools, or whose educational opportunities will otherwise suffer if Plaintiffs prevail. Plaintiffs believe the best way to achieve equality is to focus on race and to break the parts of the City's schools that are working; Movant believes the best way to achieve equality is to treat children equally, regardless of skin color, and to fix the parts of the City's schools that are broken.

Movant easily satisfies the test for intervention. It filed this motion rapidly. Its members have a vital interest in stopping Plaintiffs' attempt to upend their children's education. And Movant's intervention will provide an important perspective that will

otherwise go missing: the children who would be the victims of Plaintiffs' racially discriminatory attempt to overhaul public education. The motion should be granted.

BACKGROUND

New York City's gifted-and-talented programs and specialized schools are the crown jewel of American public education. Take the SAT, for example, where the average score nationally is a 1051. *2020 SAT Suite of Assessments Annual Report*, College Bd., bit.ly/2OUebde (last accessed Mar. 15, 2021). At Stuyvesant, the most selective specialized high school in the City, the vast majority of students score higher than a 1480. *Class of 2021 Profile*, Stuyvesant High Sch., bit.ly/3leLS5n (last accessed Mar. 15, 2021). And at Brooklyn Tech (another specialized high school, students beat the national average by nearly 300 points. *2018 College Profile*, Brooklyn Tech. High Sch., bit.ly/3bMsFow (last accessed Mar. 15, 2021).

Admission to the City's G&T programs and specialized high schools is based on merit; students who perform well are admitted regardless of race, sex, alienage, or socioeconomic status. Because academic talent cuts across all backgrounds, the City's G&T programs and other selective schools are powerful anti-poverty programs. Over 60% of the students at Brooklyn Tech and nearly half the students at Stuyvesant live in poverty. *Brooklyn Technical High School Graduation Rate Data: 4 Year Outcome as of August 2020*, N.Y. Dep't of Educ., bit.ly/3qN1nlZ (last accessed Mar. 15, 2021); *Stuyvesant High School Graduation Rate Data: 4 Year Outcome as of August 2020*, N.Y. Dep't of Educ., bit.ly/2Oz29WP (last accessed Mar. 15, 2021). Of the racial minorities who are offered

admission to the City's specialized high schools, 61% of Asian-American students live in poverty—as do 61% of African-American students and 53% of Latino students. *Specialized High Schools Proposal* 13, NYC Dep't of Educ. (June 3, 2018), on.nyc.gov/3qI1nni. Far from an "educational caste system," Compl. ¶133, the City offers these elite educational opportunities for free—a lifeline to low-income and immigrant families who cannot afford private school.

While claiming to speak for all "students of color," *e.g.*, Compl. ¶¶5-6, 9, 15-17, 45, Plaintiffs complain that Asian-Americans are a "predominant[]" percentage of students enrolled in G&T programs, *e.g.*, Compl. ¶¶8, 10, 61, 74, 114-15. But Asian-Americans are among the most impoverished demographics in the City. *See N.Y.C. Government Poverty Measure 2005-2016*, at 23 (May 2017), on.nyc.gov/3bQqnET. At Stuyvesant, for example, 90% of the students who qualify for free or reduced-price lunch are Asian-American. *See* Kim, *Stuyvesant Serves Needy Minorities*, N.Y. Daily News (Apr. 20, 2018), bit.ly/2Q2FVwV. More broadly, "the vast majority of Asian American families striving to enter [New York City's] specialized schools work low wages and often live at or below the poverty line." Chi'en, *The Invisible Minority: Asians in New York City*, Fox5NY (Mar. 1, 2021), bit.ly/3qJBBis. And Asians have been the victims of appalling discrimination in this country, from the Chinese Exclusion Act, to the internment of Japanese-Americans, to modern scapegoating over COVID-19. *E.g.*, Compl. ¶116. The timing of Plaintiffs' suit is especially unfortunate, as Asian-American communities are facing a

surge of anti-Asian hate crimes. *See* Ngo, *Biden Condemns 'Vicious' Hate Crimes Against Asian-Americans*, N.Y. Times (Mar. 11, 2021), nyti.ms/2Ozq20h.

This suit was initiated on March 19 (when Plaintiffs filed their corrected complaint) and was assigned an index number today. Plaintiffs are IntegrateNYC, a nonprofit membership organization, and several parents with students who attend City schools. Plaintiffs want this Court to force the City to hire more employees of color and to adopt a race-focused curriculum. But their main goal is to eliminate "the G&T middle and high school admissions screens currently in use." Compl. 79. Plaintiffs claim that these screens are illegal because more white and Asian-American students are admitted to G&T programs than Black and Latino students. It does not matter to Plaintiffs that the screens are strictly race-neutral, or that the City adopted them with no racially discriminatory intent. *See* Compl. 17 n.43. The disparate impact alone is supposedly enough.

Movant, Parents Defendant Education, is Plaintiffs' counterpart. Movant is a nationwide, nonpartisan, grassroots organization, whose members are primarily parents of school-aged children. Its mission is to prevent—through advocacy, disclosure, and, if necessary, litigation—the politicization of K-12 education. Movant has many members with children who are currently enrolled in, or will apply for, the City's G&T programs or selective schools, including the following:

- Parent A has a child in the fourth grade at a New York City public school. Her child is currently enrolled in a G&T program, and her child plans to apply to the City's specialized middle and high schools. Parent

A would be injured by the relief sought in Plaintiffs' complaint. Because of her child's ADHD, Parent A's child needs the specialized teaching and tailored education that she currently receives in G&T.

- Parent B has a daughter in the seventh grade at one of the City's selective intermediate schools. His daughter is currently enrolled in a screened program, and she plans to take the Specialized High School Admissions Test ("SHSAT") and apply to the City's specialized high schools as well as other selective programs that have historically been populated using objective criteria such as state test scores and grades. Parent B believes these schools' and programs' competitive admissions process, rigorous curriculum, and high-quality teachers substantially improve his daughter's education. He thus opposes Plaintiffs' requested relief.

- Parent C has a son in the eighth grade at a public school in the City. Her son recently took the SHSAT and is applying to the City's specialized high schools. Parent C believes her son will receive a better education at these competitive, academically rigorous schools—some of the very best in the country. Parent C agrees with Plaintiffs that the City's public schools are currently failing many students, but she disagrees with their proposed solution. The City should be working to improve its bad schools, not working to destroy its good ones (and thus depriving students like her son of world-class educational opportunities).

- Parent D has a daughter in the first grade and a three-year-old son. Both of his children plan to take the test and apply for G&T in City schools. Parent D opposes Plaintiffs' requested relief, which would eliminate or fundamentally alter his children's educational opportunities.

- Parent E has a son in a specialized high school in the City. She also has a daughter at a selective middle school in the City, who plans to apply for a specialized high school. Parent E sent her children to these schools precisely because they are competitive, selective, and challenging. Her children's education will suffer if Plaintiffs get their requested relief.

- Parent F has a seventh grader at a specialized high school in the City. Parent F believes his child's education is greatly improved by the selectivity of his school, and he opposes any efforts to change the school's admissions, curriculum, or staff.

Movant will argue that all of Plaintiffs' claims lack merit and will resist all of their requested relief. While Defendants might also contest liability, Movant will raise a defense that Defendants won't: This Court cannot award Plaintiffs' requested relief because that would *itself* violate the Equal Protection Clause (and other bans on intentional racial discrimination). Plaintiffs want this Court to strike down race-neutral metrics precisely *because* white and Asian-American students perform better than Black and Latino students. That is intentional racial discrimination, plain and simple. *See Ricci v. DeStefano*, 557 U.S. 557, 579 (2009); *id.* at 594-95 (Scalia, J., concurring). This race-based remedy could not possibly survive strict scrutiny. For K-12 schools, "'no State has any authority … to use race as a factor in affording educational opportunities among its citizens.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007). Defendants will not raise this defense, however, because it would constrain their own authority to engage in such decision-making.

If Plaintiffs obtain their requested relief, Movant's members will suffer immediate and substantial harms. If the criteria for G&T programs are changed, many of their children (who qualified under those criteria) will be denied these valuable programs. And if admissions, curriculum, and staffing decisions are made on grounds other than merit, Movant's members believe the quality of their children's current education and future opportunities will decline. Movant's members also believe their children should be judged based on their individual merit, not defined as members of a racial group or blamed for the collective sins of others, and thus oppose Plaintiffs' desire to inject more

race-based decision-making into the City's schools. Movant therefore seeks this Court's leave to intervene as a defendant.

ARGUMENT

In New York, intervention is "liberally allowed." *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (1st Dept. 2010). "Distinctions between intervention as of right and discretionary intervention are no longer sharply applied"; whether intervention is sought "as a matter of right under CPLR 1012(a) or as a matter of discretion under CPLR 1013 is of little practical significance." *Id.* (citing Siegel, *N.Y. Practice* §178 (4th ed.)); *Roman Catholic Diocese of Brooklyn v. Christ the King Reg'l High Sch.*, 164 A.D.3d 1394, 1396 (2d Dept. 2018). A "timely motion to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings." *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1327 (4th Dept. 2018) (citing *Wells Fargo Bank, N.A. v. McLean*, 70 A.D.3d 676, 6778 (2d Dept. 2010); and *In re Norstar Apts. v. Town of Clay*, 112 A.D.2d 750, 750-51 (4th Dept. 1985)). Movant plainly has such an interest and, in any event, satisfies each requirement for intervention as of right under CPLR 1012(a) and permissive intervention under CPLR 1013.

I. Movant is entitled to intervene as of right.

Movant has a right to intervene if its motion is "timely," it "is or may be bound by the judgment," and the "the representation of [its] interest by the parties is or may be inadequate." *Roman Catholic Diocese*, 164 A.D.3d at 1395; *see* CPLR 1012(a). All of that is true here.

A. This motion is timely.

This motion is indisputably "timely." CPLR 1012(a). Movant filed it the same day the index number was assigned, before Defendants entered an appearance, and well before Defendants' answer is due. *Cf. Moon v. Moon*, 6 A.D.3d 796, 798-99 (3d Dept. 2004) (motion filed five months after complaint was timely); *Halstead v. Dolphy*, 70 A.D.3d 639, 640 (2d Dept. 2010) (motion filed four years after complaint was timely).

Although Movant could not have filed its motion any faster, the number of days that expired is irrelevant anyway. Intervention "may occur at any time, provided that it does not unduly delay the action or prejudice existing parties." *Id.* A motion to intervene "should not be denied as untimely" unless parties to the proceeding can show "prejudice resulting from delay in seeking intervention." *Norstar*, 112 A.D.2d at 751. No prejudice is possible here. Nothing has happened yet in this case; Movant will not "introduce extraneous factual issues," *St Joseph's Hosp. Health Ctr. v. Dep't of Health*, 637 N.Y.S.2d 821, 823 (4th Dept. 1996); and Movant will follow whatever deadlines govern the parties.

B. Movant "may be bound by the judgment" because it has a real and substantial interest at stake in this litigation.

While CPRL 1012(a) asks whether the movant "is or may be bound by the judgment," many courts read this requirement liberally. (Read strictly, intervention would be impossible because a party is *never* bound when the representation of its interest was inadequate. *See* Wright & Miller, 7C Fed. Prac. & Proc. Civ. §1903 (3d ed.).) Courts often hold that a movant "may be bound by the judgment" when it has a "real and

substantial interest in the outcome of the proceedings." *See, e.g.*, *Jones*, 158 A.D.3d at 1327; *Yuppie Puppy*, 77 A.D.3d at 201; *Berkoski v. Bd. of Trustees of Inc. Vil. of Southampton*, 67 A.D.3d 840, 843 (2d Dept. 2009); *Dalton v. Pataki*, 5 N.Y.3d 243, 277-78 (2005). Although such a movant "would not be directly bound by a judgment, as it was neither served with process nor was it a party to the court proceeding," it has a right to intervene because ruling for the plaintiffs "would effectively force [the movant] to comply with the court's judgment." *Romeo v. N.Y. State Dep't of Educ.*, 39 A.D.3d 916, 917 (3d Dept. 2007). Eliminating the City's current G&T and other screened programs, after all, would make it impossible for Movant to sustain those programs; and it is the children that Movant represents, not Defendants, that will be forced to leave these programs if Plaintiffs prevail.

Movant has a "real and substantial" interest here. In fact, its interest is at least as great as Plaintiffs'. Like Plaintiffs, Movant's members have children who do or will attend public middle and high schools in the City. Those parents have a fundamental interest in securing a quality education for their children. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (recognizing the "supreme importance" of education and a parent's right "to give his children education suitable to their station in life"); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (recognizing parents' "right, coupled with the high duty, to recognize and prepare [children] for additional obligations"). No neutral principle gives Plaintiffs an interest in challenging the City's

policies but denies Movant an interest in defending those policies (and vindicating their right to be free from race-based policies).

And the stakes for Movant's parents are stark. It's bad enough that Plaintiffs want to end programs before the parents' children have an opportunity to apply. But Plaintiffs also want to change the eligibility rules for "students already in the system." Compl. ¶8. Many of Movant's parents have children who *currently* benefit from the programs that Plaintiffs seek to fundamentally transform. This case is thus a direct assault on their educational opportunities. Movant has a right to intervene to stop these direct and substantial harms. *See, e.g.*, *Cavages, Inc. v. Ketter*, 392 N.Y.S.2d 755, 757 (4th Dept. 1977) (when plaintiff brought suit to shut down a student group, the president of the student group had a right to intervene)

C. Defendants do not adequately represent Movant's interests.

Finally, CPLR 1012(a)(2) asks whether "the representation of the [movant's] interests by the parties is or may be inadequate." This requirement is satisfied whenever the movant's interests are "not identical" to the parties' interests. *N.Y. State Pub. Emp. Relations Bd. v. Bd. of Ed. of City of Buffalo*, 46 A.D.2d 509, 513 (4th Dept. 1975); *see also State ex re. Field v. Cronshaw*, 139 Misc. 2d 470, 472 (Sup. Ct. Nassau Cty. 1988) ("Inadequacy of representation is generally assumed when the intervenor's interest is divergent from that of the parties to the suit."). Even when a movant's interests are generally "aligned" with a party's interests, *Roman Cath. Diocese*, 164 A.D.3d at 1396, the movant

need only establish that its interests "'may'" not be adequately represented, *Romeo*, 39 A.D.3d at 918.

Plaintiffs obviously do not represent Movant's interests, and Defendants do not adequately represent those interests either. As then-Judge Merrick Garland explained, courts "often conclude[] that governmental entities," like Defendants, "do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003). "[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [private movant] merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001). Acting on behalf of their offices, the City and State, and all New York citizens, Defendants have "a range of interests likely to diverge from those of the intervenors," *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993)—including "the expense of defending the current [laws] out of [public] coffers," *Clark v. Putnam Cty.*, 168 F.3d 458, 461-62 (11th Cir. 1999), "the social and political divisiveness" of the issue, *Meek*, 985 F.2d at 1478, "their own desires to remain politically popular and effective leaders," *id.*, and even the interests of Plaintiffs, *In re Sierra Club*, 945 F.2d 776, 779-80 (4th Cir. 1991). This tension is not hypothetical; as Plaintiffs note, the City is internally conflicted about whether it wants to defend its existing G&T programs. *See* Compl. ¶¶8, 60.

For this reason, Movant will raise a defense that Defendants will not—that the race-based remedies Plaintiffs seek would themselves violate the Equal Protection

Clauses. *See* Proposed Answer 11. Defendants will not make this argument because they will not want to constrain their *own* discretion to adopt race-based policies, either generally or as a result of this litigation. Thus, "intervention is required to insure complete litigation of [Movant's] interests." *N.Y. State Pub. Emp. Relations Bd.*, 46 A.D. at 513.

II. Alternatively, Movant is entitled to permissive intervention.

Even if Movant were not entitled to intervention as of right, this Court should grant them permissive intervention. Permissive intervention is appropriate when a movant submits a "timely motion" and has "a claim or defense" that shares "a common question of law or fact" with the main action. CPLR 1013.

Once a proposed intervenor meets these basic threshold requirements, New York courts "are liberal in [their] allowance" of permissive intervention. *Jiggetts v. Dowling*, 21 A.D.3d 178, 185 (1st Dept. 2005) (Andrias, J., dissenting in part) (citing Siegel, *N.Y. Practice* §178); *see also In re: UBS Fin. Servs., Inc.*, 17 Misc. 3d 1131(A), at *5 (Sup. Ct. N.Y. Cty. 2007) (explaining that permissive intervention is "liberally allowed, in order to give the intervening party an opportunity to protect its interest[s]" (citing *In re: Teleprompter Manhattan CATV Corp. v. Bd. of Equalization & Assessment*, 34 A.D.2d 1033 (3d Dept. 1970))).

In fact, "[w]here a prospective intervenor has a real or substantial interest in the outcome of the case, it is an abuse of discretion to deny intervention." *UBS Fin. Servs.*, 17 Misc. 3d 1131(A), at *5. If a proposed intervenor establishes a "real and substantial interest" in a case, permissive intervention is warranted unless it "will unduly delay the

determination of the action or prejudice the substantial rights of any party." *Roman Catholic Diocese*, 164 A.D.3d at 1396.

These criteria all favor permissive intervention here.

First, this motion is timely. As explained, Movant sought intervention at a nascent stage of this case, and its participation will add no delay beyond the norm for multiparty litigation. *Supra* I.A.

Second, Movant's defenses share many common questions with the claims and defenses raised by the parties. Plaintiffs challenge the City's policies under Article XI, section 1 of the New York Constitution, Compl. 73-74; Article I, section 11 of the New York Constitution, Compl. 75-77; and the New York State Human Rights Law, Compl. 77-78. Movant will defend the City's policies against each of these charges. *See* Proposed Answer 9-10. Movant will also argue that Plaintiffs' requested relief would itself violate the federal Equal Protection Clause—a defense that "squarely respond[s]" to all of Plaintiff's claims. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002).

Third, as demonstrated above, Movant has a "real and substantial" interest in the outcome of this case. *Supra* I.B. A "real and substantial interest" exists when a movant can show it would be "adversely affected" by an outcome in the case. *Town of Southold v. Cross Sound Ferry Servs.*, 256 A.D.2d 403, 404 (2d Dept. 1998). In *Berkoski*, for example, the plaintiffs sought to enjoin a community's decision to set aside certain park land for immigrant day-laborers, and two day-laborers sought permissive intervention to assert First Amendment defenses. The court held that the intervenors had real and

substantial interests in the outcome of the case because they would have lost access to the park if the plaintiffs succeeded. *Berkoski*, 67 A.D.3d at 843. As in *Berkoski*, Movant will lose access to vital opportunities if this Court grants Plaintiffs' requested relief.

As an organizational intervenor, Movant also has a real and substantial interest in this litigation because its mission is closely linked to the policies being litigated. *See Prometheus Realty v. City of N.Y.*, 2009 NY Slip Op. 30273[U], at *4-5 (Sup. Ct. N.Y. Cty. 2009). Parents Defending Education works to stop the growing politicization of K-12 schools, including the introduction of race-based admissions, curriculum steeped in critical race theory, and other policies that inject politics and ideology into the classroom against parents' wishes. Like the intervenors in *Prometheus Realty*, then, Movant should be granted permissive intervention because its mission is to protect parents and students from precisely what Plaintiffs seek. *Id.*

Fourth, and finally, Movant's participation will not possibly prejudice any party. *See supra* I.A. This case hasn't even started: Defendants have not entered an appearance, let alone filed an answer; Plaintiffs filed their complaint less than a week ago; and the parties have not engaged in any discovery or filed any dispositive motions. While Movant will raise additional legal defenses to Plaintiffs' claims, those defenses present pure questions of law and address only issues that Plaintiffs themselves raised. *See, e.g.*, *Berkokski*, 67 A.D.3d at 842-44 (granting permissive intervention to raise First Amendment defense not raised by village); *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) (explaining that plaintiffs "can hardly be said to be prejudiced

by having to prove a lawsuit [they] chose to initiate"). Plaintiffs will not be prejudiced because they "will have a full opportunity, in their … brief[s], to counter any such legal arguments." *United States v. Philip Morris USA Inc.*, 2005 WL 1830815, at *5 (D.D.C. July 22, 2005).

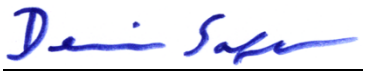
In short, every factor relevant to permissive intervention favors Movant's participation. That's not surprising: It would be unconscionable for litigation that attempts to take educational opportunities away from thousands of New York children to proceed *without* the participation of the parents of those very children.

CONCLUSION

The Court should grant Movant's motion and allow Parents Defending Education to intervene as a defendant in this case.

Dated: March 22, 2021

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word-count limit of §202.8-b(a) of the Uniform Civil Rules because it has 3,915 words, excluding the parts that can be excluded.