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 Hon. Frank P. Nervo

Motion Seq. No. 2

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

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INTRODUCTION

The question before this Court is simple. Despite their various arguments about res judicata, inadequacy, and prejudice, the parties concede that "the fundamental question is whether 'the intervenor has a real and substantial interest in the outcome of the proceedings.'" City-Opp. (Doc. 53) 7; *accord* Pltfs.-Opp. (Doc. 52) 4. Movant represents parents whose children are currently enrolled in, or intend to apply to, the City's selective public schools and programs. Plaintiffs seek to eliminate those schools and programs and replace them with something entirely different. *Of course* Movant's members have a real and substantial interest in defending their children's education. The parents who joined Movant have no less interest in securing educational opportunities for their children than the parents who joined Plaintiffs.

Plaintiffs would likely agree if the shoe were on the other foot. Plaintiffs note that a "group much like" Movant is litigating a similar case in Boston. Pltfs.Opp.17-18. But Plaintiffs neglect to mention that, in the Boston case, the court *allowed* "various interest groups" to intervene as defendants. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos.*, 2021 WL 1422827, at *1 (D. Mass. 2021). The same law firm that represents Plaintiffs here represented the intervenors there. And the parallels between the two cases are striking:

- Like Movant, the Boston intervenors represented "'members whose children have currently pending applications'" to the city's selective public schools and a parent whose child "'intends to apply'" to those schools. Boston-Mot.7, Doc. 21, No. 1:21-cv-10330 (D. Mass. 2021), bit.ly/3wQWgEL.

- Like Movant, the Boston intervenors argued that their members have a "direct, private interest" in the case because they were currently "residing in the district and attending [city public] schools" and because they sought "their children's acceptance to and enrollment in a highly selective public school." Boston-Mot.17.

- And like Movant, the Boston intervenors wanted to press an additional argument that the city would not—namely, that ruling for the plaintiff would put the city in a position where it "risks violating federal and state anti-discrimination laws." Boston-Mot.18.

No neutral principle of law justifies treating this case differently. The intervention rules don't change based on the ideology of the group who seeks intervention.[1]

The issues in this case are contentious, important, personal, and emotional. Americans of good faith can disagree about why our schools are failing certain students and how best to tackle that problem. But no matter how the Court ultimately resolves Plaintiffs' claims, it should not allow one group of parents to remake the City's public schools without hearing from the dissenting parents whose children will suffer the consequences. This Court should allow Movant to intervene.

[1] Federal cases are "persuasive authority" in this Court because "CPLR 1012 and 1013 were 'modelled' after federal rules on intervention." *Adams v. N.Y.C.*, 2021 WL 274716, at *5 (N.Y. Sup. Ct.).

ARGUMENT

The parties oppose intervention on three main grounds. Plaintiffs contend that intervention would be "premature" because Movant's interests are supposedly limited to the "remedial" phase. The City argues that Movant lacks an interest in this case. And both parties argue that Movant cannot satisfy the requirements for intervention as of right. All three arguments fail.

I. Movant's intervention is not premature.

The parties do not argue delay or prejudice, in the traditional sense. Neither party claims that Movant waited too long to intervene. And the City does not allege *any* delay or prejudice. Plaintiffs do, but only because they assume that Movant's interests are limited to the "remedial" phase. Pltfs.-Opp.20-21. Plaintiffs are wrong; Movant contests liability in full. Plaintiffs single out one additional defense that Movant plans to raise, but that defense also goes to liability, not remedies. And even if that one defense were "remedial," that label would not be a reason to deny Movant intervention.

Plaintiffs' insistence that Movant is not concerned with liability is puzzling. Movant's brief could not have been clearer: "Movant will argue that *all* of Plaintiffs' claims lack merit," and "Movant will defend the City's policies against *each* of [Plaintiffs'] charges." Mot. (Doc. 6) 6, 13 (emphasis added). Indeed, Movant submitted a proposed answer, which denied each of Plaintiffs' key allegations, denied that Plaintiffs are entitled to "any relief," and denied that Plaintiffs' complaint "state[s] a claim." Proposed Answer (Doc. 5). While Movant will raise an "additional" defense that Defendants likely

won't, Mot.14, Movant will still raise all the ordinary defenses and will fully contest Plaintiffs' claims. Even Plaintiffs acknowledge that Movant "seeks to *join* Defendants in contesting liability." Pltfs.-Opp.13. The bulk of Plaintiffs' opposition thus rests on a false premise. Pltfs.-Opp.4-8, 19-21.

Even Movant's additional defense—which, again, is only one argument that Movant plans to raise—goes to liability, not remedies. Movant will argue that, if New York law credits Plaintiffs' theory of liability, then that law is unconstitutional. As explained, Plaintiffs cite no evidence of discriminatory *intent*; their claims turn entirely on supposed disparate *impacts*. *E.g.*, Compl. (Doc. 1) ¶¶18 n.43, 56, 73. But except in unusual circumstances not alleged here, disparate impact is not racial discrimination. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). In fact, reforms that are adopted "because of [a] statistical disparity based on race" engage in "express, race-based decisionmaking" that itself constitutes racial discrimination. *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009). Because New York is "prohibited from discriminating on the basis of race," neither its laws nor its courts can "mandat[e] that third parties … discriminate." *Id.* at 594 (Scalia, J., concurring); *see Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). This argument is an indictment of Plaintiffs' theory of *liability*: It is not a criticism of particular remedies that Plaintiffs might receive, but an argument that Plaintiffs are entitled to *no remedies*. As Movant

explained, this defense goes to Defendants' "liability" and squarely responds to "all of Plaintiffs' claims." Mot.6, 13.[2]

Plaintiffs apparently disagree with this defense, but their counterarguments are irrelevant for purposes of this motion. A motion to intervene is no place to adjudicate the merits. To resolve a motion to intervene, courts assume that the movant's defenses are meritorious, unless they are "frivolous on their face." *Oneida Indian Nation of Wis. v. New York*, 732 F.2d 261, 265 (2d Cir. 1984). Far from frivolous, Movant's defense presents "'difficult'" questions, as Plaintiffs concede. Pltfs.-Opp.21, 7; *accord Inclusive Cmtys.*, 576 U.S. at 543, 540; Barakat, *Suit Alleging Admissions Discrimination Moves Forward in Va.*, Wash. Post (May 21, 2021), wapo.st/3vUhNN0. These difficult questions will not delay or prejudice this case because they are purely legal and because they merely respond to claims that Plaintiffs themselves raise. Mot.6. Indeed, Plaintiffs' brief shows that they have a detailed response already prepared. Pltfs.-Opp.15-18.

Instead of avoiding these difficult issues, Plaintiffs' theory of liability steers the Court straight into them. So the question is not whether these issues will be decided.

[2] Though it should go without saying, Movant's argument is not that "white and certain Asian students" are "intellectually superior." Pltfs.-Opp. 15. The point is that, because the challenged policies are race neutral, any disparate impacts are not attributable *to Defendants. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Proj., Inc.*, 576 U.S. 519, 542 (2015). And "discard[ing] test results" simply because they do not "obtain[a] preferred racial balance" is illegal race-based decisionmaking. *Ricci*, 557 U.S. at 582. Plaintiffs' offensive strawperson of Movant's argument—one that comes straight from Supreme Court precedent—is disappointing.

Cf. Pltfs.-Opp.8. The question is whether they will be decided with briefing and argument.

Even if Plaintiffs were right that Movant's defense is "remedial," that observation would be no reason to deny intervention. For one, Movant still plans to contest liability, so the Court could simply grant intervention on the condition that Movant reserves its additional defense for the remedial stage. *See Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 2020 WL 1432213, at *8 (S.D.N.Y.) (noting that courts can place reasonable limits on intervention but declining to do so); *St. Joseph's Hosp. Health Ctr. v. N.Y. Dep't of Health*, 224 A.D.2d 1008, 1009 (4th Dep't 1996) (striking two improper affirmative defenses in the intervenor's proposed answer instead of denying intervention altogether).

For another, the intervention rules do not draw sharp lines between liability and remedies. They simply ask whether the movant has an interest "in the *outcome* of this litigation." *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (1st Dep't 2010) (emphasis added). Even in cases where "the intervenors' most significant interests will emerge only if and when th[e] case gets to a remedial stage," intervention is warranted because "at least part of the intervenors' interest is in preventing the case from ever getting that far by demonstrating that there has been no [legal] violation at all." *Daunt v. Benson*, Doc. 30, No. 1:20-cv-522 (E.D. Mich. 2020), bit.ly/3g3LhRH. Plaintiffs' authorities say nothing to the contrary. They all involve insurance companies whose rights were expressly limited by contractual subrogation

clauses. *E.g.*, *Humbach v. Goldstein*, 229 A.D.2d 64, 68 (N.Y. 1997). This is not an insurance dispute about subrogation; Movant's defenses directly address the issues already before the Court.

II. Movant's members have a real and substantial interest.

The parties rightly concede that the only relevant question is whether Movant has "a real and substantial interest" in the outcome of this case. As the City puts it, the real-and-substantial interest test is "widely accepted," "almost uniformly use[d]," and "the fundamental question." City-Opp.10. The specific requirements for intervention as of right and permissive intervention thus have "little practical significance." *Yuppie Puppy*, 906 N.Y.S.2d at 235; *accord* City-Opp.7; Pltfs.-Opp.4. And when "the intervenor has a direct and substantial interest in the outcome of the proceeding," arguments about "judicial efficiency and fairness to the original litigants" are "outweighed." *Piers v. Board of Assess. Review of Niskayuna*, 209 A.D.2d 788, 789 (3d Dep't 1994).

Movant's members—parents with children who currently attend City schools—plainly have a real and substantial interest in this case. In fact, it is hard to imagine intervenors whose interests would be *greater*. To quote the Boston intervenors, Movant's members are "established residents of a public school district" whose families will be "impacted" by a "change to the selective admission policies." Boston-Mot.13-14. Plaintiffs' effort to "upturn the [City's] selective admissions process" would "necessarily impact" the ability of Movant's members to keep or obtain "admission at these selective schools." Boston-Mot.14. This "direct, private interest in the[ir] children's acceptance

to and enrollment in a highly selective public school [is] on par with the alleged interest of Plaintiff's members." Boston-Mot.17.

These interests are not speculative. As the City stresses, Plaintiffs' suit would "have the Court eliminate" the City's "hundreds of … screened schools and programs," as well as "virtually all DOE programs and schools" that use competitive admissions. City-Opp. 5. While admission to these programs and schools is difficult, Parents A, B, E, and F have children who are *already* enrolled in them. Mot.4-5. Plaintiffs nowhere deny that their suit would affect these students too. Mot.10 (quoting Compl. ¶8). Parents C, D, and E, moreover, have children who have applied or will apply to these programs and schools. Mot.5. True, they might not get in (though, Parent E's child has gotten into a selective school once before). But they have a real and substantial interest in stopping Plaintiffs from eliminating their *opportunity* to even try. *See Adams*, 2021 WL 274716, at *6 (intervenors have a legitimate "'interest in increased access to educational opportunity'"); *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (intervenors have a legitimate "interest in gaining admission").

What's speculative is not the interest of Movant's members, but the City's argument that Plaintiffs' "complete reorganization" and "enormously wide-ranging transformation" of the City's public schools would somehow *not* harm Movant's members. City-Opp.13, 8. Movant's members do not want any "reorganization" or "transformation" of the City's selective schools and programs; these programs are currently succeeding in providing a world-class education to students and lifting families out of

poverty. Mot.2-3. It requires no expert analysis to conclude that their elimination would harm Movant's members and their children. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 340 (2003) (observing that a school's shift away from grades and standardized tests would cause "a dramatic sacrifice" in "academic quality"). If Plaintiffs are correct, then the City's existing policies are illegal and cannot stand; the specific remedies that this Court orders would not affect *whether* Movant's members are harmed, but only *how much*.[3]

While Plaintiffs promise they only want to eliminate "racially discriminatory" admissions criteria, City-Opp.13 n.5, that limitation is meaningless because Plaintiffs' definition of "racially discriminatory" includes anything that results in a disparate impact. *See* Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1612 (2019) ("Disparate impacts are ubiquitous"). And the City's current policies are *not* racially discriminatory. *Cf.* Pltfs.-Opp.19-20. A ruling for Plaintiffs thus would require Defendants to eliminate programs that Movant believes are lawful and beneficial—a classic basis for intervention. *E.g.*, *Cavages, Inc. v. Ketter*, 392 N.Y.S.2d 755, 757 (4th Dep't 1977) (intervenor could defend school policy and program); *SFFA v. Univ. of Tex. at Austin*, 2021 WL 1846593, at *4 (W.D. Tex.) (intervenors could defend admissions policy).

[3] The City offers no support for its assertion that Movant must submit detailed "affidavits" or "expert declarations" about the educational harms of "Plaintiffs' requested changes." City-Opp.13. Intervention motions are not mini-trials. Courts instead assume the movant's defense is meritorious, *Oneida Indian*, 732 F.2d at 265, and accept as true the factual assertions in the movant's motion, proposed answer, and accompanying declarations, *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820-21 (9th Cir. 2001).

Christa McAuliffe—a federal case that this Court has deemed "insightful"—is directly on point. *Adams*, 2021 WL 274716, at *5-6. The plaintiffs there challenged the City's "admissions process for the eight specialized New York City public high schools." 2020 WL 1432213, at *1. The proposed-intervenors were organizations and parents representing "a current specialized high school student," middle-schoolers "with increased chances of admission to the specialized high schools," and other students in the City's public schools. *Id.* at *2-3. These movants sought to "'vigorously defend'" the existing admissions policy, including by raising an additional defense that the City likely wouldn't. *Id.* at *3, *7. The district court granted intervention. *Id.* at *8 & n.9. The court found that the represented students had a "'direct, substantial, and legally protectable'" interest in "'increased access to educational opportunity, which is directly impacted by this challenge to the [existing admissions policy].'" *Id.* at *4. If the challenged policy "were to end as a result of this litigation," then the movants' interests "would be impacted." *Id.* So too here.

Another reason why the parties' doubts about Movant's interests are a nonstarter here is because they apply equally *to Plaintiffs*. The parties do not dispute that Movant is Plaintiffs' "mirror image." Mot.1. Both Plaintiffs and Movant represent parents with children in the City's public schools, but they share opposite views on the legality of the current policies. This Court could not deem it too speculative that this case will harm Movants without also deeming it too speculative that this case will benefit Plaintiffs. The way out of this thicket is not to effectively decide, on a motion to intervene, that

"Plaintiffs lack standing." *Adams*, 2021 WL 274716, at *9. It is to recognize that Movant plainly has an interest in this case because it stands "on the same footing" as Plaintiffs. *Id.* at *6-7; *e.g.*, *Virginia v. Ferriero*, 466 F. Supp. 3d 253, 257-58 (D.D.C. 2020).

The City's remaining arguments are subtle criticisms of Movant's organization, not objections to intervention. The City claims that Movant's mission is "vague," that its members are "unidentified," that some of Movant's members might oppose this lawsuit, and that Movant never explains how many members it has in New York City. City-Opp.16. The City even questions whether Movant *existed* before it moved to intervene. City-Opp.3.

These criticisms have no basis in fact. A simple public-records search would show that Movant was incorporated on January 21, 2021—two months before it moved to intervene. Neily-Aff. ¶6. Though Movant had its "public launch" on March 30, the public launch was not the day that Movant was formed; it was the day that Movant introduced its already formed organization to the "public." Neily-Aff. ¶7. Well before it moved to intervene, Movant had incorporated, applied for tax-exempt status with the IRS, built a substantial organization, received donations, and enlisted members—including Parents A, B, C, D, E, and F. Neily-Aff. ¶7; Saffran-Affirm. (Doc. 3) ¶4. The only reason that Parents A-F are "unidentified," moreover, is because they fear retaliation and want to protect their minor children. Neily-Aff. ¶18; *see New York v. U.S. Dep't of Commerce*, 2019 WL 190285, at *74 n.48 (S.D.N.Y.), *aff'd in relevant part*, 139 S. Ct. 2551.

The parents on Plaintiffs' side are likewise proceeding under pseudonyms, with no objection from the City.

Parents A-F and Movant's other members joined with full knowledge of Movant's mission, and they specifically support Movant's participation in this lawsuit. Neily-Aff. ¶10; Saffran-Affirm. ¶4. This lawsuit is not just germane to Movant' mission; it strikes at the very heart of why Movant was formed. Neily-Aff. ¶9; Saffran-Affirm. ¶3. "This is the first case in the nation," according to Plaintiffs, "to seek a constitutional right to an anti-racist education." Shapiro, *Lawsuit Challenging N.Y.C. School Segregation Targets Gifted Programs*, N.Y.T. (Mar. 9, 2021), nyti.ms/3chd7sD. "Antiracist" is the language of critical race theory, a political ideology that divides children into racial blocs, attributes all problems in society to race, and labels even neutral policies "racist." *Understanding Woke Jargon*, PDE, bit.ly/2S3783U. Consistent with this ideology, Plaintiffs' lawsuit seeks racial quotas for teachers, new curriculum rooted in critical race theory, and the elimination of neutral, academic criteria based on inaccurate definitions of "racism." Suffice it to say, Movant's members are not "conflict[ed]" about their opposition to this lawsuit. City-Opp.16.

Aside from being inaccurate, the City's criticisms of Movant also have nothing to do with intervention. (Notably, this section of the City's brief stops citing caselaw; the City provides no case where a court cited these concerns as a reason to deny intervention.) Movant does not need "standing" to intervene *as a defendant*. City-Opp.16-17; *see Harris v. Wu-Tang Prods., Inc.*, 2006 WL 1677127, at *3 (S.D.N.Y.). Even if Movant

needed standing, the key question would be whether "at least *one* of its members would have standing to sue" in her own right, not *all* members or even *most* members. *Hartford/N. Bailey Homeowners Ass'n v. Zoning Bd. of Appeals of Amherst*, 63 A.D.3d 1721, 1722 (N.Y. 2009) (emphasis added). Associations like Movant "need not specify" its standing members by name. *Dental Soc. of State v. Carey*, 61 N.Y.2d 330, 334 (1984). And the fact that Movant has members who "will be directly impacted if Plaintiffs prevail in this litigation … distinguishes [it] from the advocacy groups in … *Berkoski*," who "were activists and nothing more." *Adams*, 2021 WL 274716, at *6.

Finally, even if Movant's interest were a close call, this Court should still grant permissive intervention. Courts who deny intervention abuse their discretion when the movant has a real and substantial interest, *In re UBS Fin. Servs., Inc.*, 2007 WL 4152240, at *5-6 (N.Y. Sup. Ct.), but the inverse is not true. Because the text of CPLR 1013 contains no "interest" requirement, courts have "broad discretionary powers to grant intervention even in the absence of direct interest." *In re Petroleum Rsch. Fund*, 155 N.Y.S.2d 911, 914 (Sup. Ct. 1956); *accord Adams*, 2021 WL 274716, at *3-4.

Exercising that discretion would be appropriate here. Neither party denies that Movant's intervention "will provide an important perspective that will otherwise go missing." Mot.1-2. As the court explained in *Christa McAuliffe*, Movant represents "children directly impacted by the [challenged] program," which is "a unique perspective and 'will greatly contribute to the Court's understanding of this case.'" 2020 WL 1432213, at *8 n.9. Permissive intervention is thus appropriate because Movant "will

undoubtedly contribute 'to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'" *Id.*

III. Movant also satisfies the criteria for intervention as of right.

Although permissive intervention is the simplest way to resolve this motion, Movant also satisfies the requirements for intervention as of right. Under CPLR 1012(a)(2), Movant can intervene if it "*may be* bound by the judgment" and if its interest "*may be* inadequate[ly]" represented by the parties. (Emphases added.) Both conditions are satisfied.

Bound by the Judgment: The parties insist that only movants in privity to one of the parties (and thus bound by res judicata) can intervene as of right. But Plaintiffs quickly admit that this rule would make intervention impossible. Pltfs.-Opp.10 n.3. CPLR 1012(a)(2) also requires inadequate representation, and nonparties are never bound when their interests are inadequately represented. Mot.8.

As the parties ultimately acknowledge, New York courts do not adopt this self-defeating interpretation of the intervention rules. Courts either deem the requirements of CPLR 1012(a)(2) "not important" and ask only whether the movant has a "real and substantial interest." *E.g.*, *Plantech Hous., Inc. v. Conlan*, 74 A.D.2d 920, 921 (2d Dep't 1980). Or they read "bound by the judgment" to include cases where the movant "would not be *directly* bound" but would be "effectively force[d] to comply" with an adverse judgment. *E.g.*, *Romeo v. N.Y. Dep't of Edu.*, 39 A.D.3d 916, 917 (3d Dep't 2007)

(emphasis added); *Roman Cath. Diocese of Brooklyn v. Christ the King Reg'l High Sch.*, 164 A.D.3d 1394, 1396 (2d Dep't 2018).

This Court should do the same. If Plaintiffs succeed in eliminating the challenged programs, then Movant's members will be effectively forced to comply with that judgment—the programs, after all, will *no longer exist*. Neither party disputes this basic point. As the court observed in *Christa McAuliffe*, it is no answer to say that "'[t]his action will have no *res judicata* effect'" on Movant's members because "'they may bring a separate suit against DOE.'" 2020 WL 1432213, at *4. Absent intervention, Movant's members "have no other avenue to *defend* the [challenged policies]," since they could not "appeal or otherwise contest [this Court's] decision." *Id.* (emphasis added); *accord Adams*, 2021 WL 274716, at *8. And if Movant's members could sue the City for complying with this Court's judgment—*i.e.,* if this Court's judgment would violate their constitutional rights—that only proves Movant's members have a real and substantial interest in this case.

Inadequate Representation: Both parties understate the inherent conflict of interest between public officials like Defendants and private citizens like Movant. Mot.11. Plaintiffs note that Movant and Defendants both oppose this suit, Pltfs.-Opp.12-13, but every intervenor joins one side of the dispute or the other; the relevant question is not the movant's legal position but whether the parties adequately represent its "interest." *Roman Cath.*, 164 A.D.3d at 1396. Like their federal counterparts, New York courts recognize that "'the government's representation of the public interest generally cannot

be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation.'" *Adams*, 2021 WL 274716, at *8. Here, for example, the City must weigh its desire to defend the challenged policies against the costs of litigation, the need for certainty, and even the interests of *Plaintiffs* (who they also represent). Given Defendants' awkward '"position"' in the middle of this dispute, Movant's '"burden of showing inadequacy of representation is satisfied." *Id.*

The conflict here is more than just inherent. Defendants' opposition to Plaintiffs' suit has always been lukewarm. In 2021, DOE attempted to cancel the City's G&T testing contract. Compl. ¶¶8, 60. In 2018, Mayor de Blasio proposed wholesale changes to the specialized schools' admissions process. Harris, *De Blasio Proposes Changes to New York's Elite High Schools*, N.Y.T. (June 2, 2018), nyti.ms/3uo57ME. In 2019, the City actually changed the admissions process to the detriment of Asian Americans. Fa, *De Blasio's Obsession with Racial Balance in Schools Has a Clear Victim: Asian Students*, The Hill (Oct. 21, 2020), bit.ly/3yM90hK. And when this lawsuit was filed, DOE gave a statement expressing its support for '"bold, unprecedented steps to advance equity in our admissions policies.'" Shapiro, *supra*. Even in its papers, the City argues that Plaintiffs' changes might not be harmful, City-Opp.13, and objects only to "the judicial branch" imposing these changes, City-Opp.6—cold comfort given Defendants' power to settle the case.

The City also provides no assurance that it will advance Movant's equal-protection defense. It even boasts that Movant "cannot possibly know what Defendants will argue in this litigation." City-Opp.10. But this "silence" from the "City Defendants" must be "construe[d] … in Proposed Intervenors' favor." *Adams*, 2021 WL 274716, at *8. Defendants will not raise Movant's argument because it would open them up to potential liability. Their natural "reticen[ce] to present all colorable contentions" is sufficient to prove inadequate representation. *Christa McAuliffe*, 2020 WL 1432213, at *7.

CONCLUSION

The Court should grant the motion to intervene.

Dated: June 4, 2021

Respectfully Submitted,

/s/ Dennis J. Saffran

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CERTIFICATE OF COMPLIANCE

This reply complies with the word-count limit of §202.8-b(a) of the Uniform Civil Rules because it has 4,187 words, excluding the parts that can be excluded.

/s/ Dennis J. Saffran