

QUESTIONS ON APPEAL

1. **Did the court below correctly rule that Chapter 45 of the Laws of 2010 did not violate the constitutional guarantees of equal protection?**

The lower court ruled incorrectly and its decision should be reversed.

2. **Did the court below correctly rule that Chapter 45 of the Laws of 2010 did not violate the constitutional guarantees of Freedom of Association?**

The lower court ruled incorrectly and its decision should be reversed.

3. **Did the court below correctly rule that being represented by a particular private organization could serve as the predicate for receiving financial benefits from the State?**

The lower court ruled incorrectly and its decision should be reversed.

4. **Did the court below correctly deny Plaintiffs-Appellants' motion for summary judgment and correctly grant Defendants-Respondents' and Defendant-Intervenor-Respondent's cross-motions for summary judgment?**

The lower court ruled incorrectly and it should have granted Plaintiffs-Appellants' motion for summary judgment.

5. **Should the court below have applied the legislature's severability clause in the statute to have stricken the "NYSUT" eligibility language and left the remainder of the statute in place, premising eligibility for the benefit upon meeting the criteria of being 55 years of age and having at least 25 years, but less than 30 years, of service credit in a public retirement system?**

The court below did not address this issue, but it should have followed the declared intent of the legislature.

6. **If a decision is reached after the August 31 deadline for qualified school district employees to retire has passed, what should the remedy be?**

As suggested by the Attorney General in their opposition to an expedited hearing schedule for the appeal, the remedy should be for the court to direct the TRS to accept applications after August 31 and provide the benefits of Chapter 45 to those employees who qualified prior to September 1, 2010.

PRELIMINARY STATEMENT

This is an appeal from the decision of Albany County Supreme Court, Hon. Kimberly A. O'Connor, denying Plaintiffs-Appellants' motion for summary judgment and granting Defendants-Respondents' cross-motion for summary judgment. The instant declaratory judgment action challenges the constitutionality of Chapter 45 of the Laws of 2010 which provides an early retirement incentive to certain public employees. Plaintiffs-Appellants contend that the statute is unconstitutional because it conditions eligibility for the early retirement benefit not on any functional, economic or geographic basis, but solely upon representation by one particular union, Defendant-Intervenor-Respondent New York State United Teachers ("NYSUT").

It will be shown that this highly unusual statutory scheme is violative of the constitutional guarantees of equal protection and freedom of association.

Turning to remedy, it will be demonstrated that the legislature was aware of the possibility of potential challenge to the law on equal protection grounds. The legislature inserted an extremely broad severability clause into the law that addresses anticipated challenges such as the instant one. The legislature unequivocally stated its intent that a court merely strike out the invalid section because the legislature declared "that this act would have been enacted even if such invalid provision had not been included herein."

Upon a judicial finding of unconstitutionality, this unambiguous declaration of legislative intent requires the court to strike the unconstitutional NYSUT

eligibility section and make the early retirement incentive equally available to all public employees who meet the other statutory qualifications.

Finally, the period for school district employees to retire and receive the early retirement incentive under Chapter 45 ends on August 31, 2010. Assuming the court holds the NYSUT eligibility section of the statute unconstitutional and strikes it pursuant to the severability clause, it is respectfully requested that the court toll the August 31 date, and order the TRS and ERS to continue to accept retirement applications from individuals represented by Plaintiffs-Appellants who otherwise met the statutory criteria. It is suggested that a 45 to 60 day tolling would be appropriate.

PARTIES

Plaintiff-Appellant Empire State Supervisors and Administrators Association (“ESSAA”) is a labor organization that represents approximately 3000 professional school employees, including: various titles within 8 NYCRR 30, which are teacher tenure area positions including teachers, school psychologists, and guidance counselors; as well as non-Part 30 administrative positions such as principals, assistant principals, directors; and various civil service titles. The court below found ESSAA had demonstrated that a number of its members met the qualifications for the 55/25 early retirement incentive, but for being represented by NYSUT, and would retire if the benefit was extended to them.

[R.12]

Plaintiff-Appellant Laraine Gegerson (“Gegerson”) is a tenured General Science and Biology 7-12 teacher, who is employed by the Baldwin Union Free

School District. Gegerson is also President of the Baldwin Supervisors Association (“BSA”), a bargaining unit comprised primarily of chairpersons who are tenured teachers who spend a majority of their time in the classroom and a minority performing supervisory duties. Gegerson and the members of her unit are paid on the basis of the teacher salary schedule plus a stipend.

Defendant-Respondent David A. Paterson, sued in his official capacity, is the Governor of the State of New York and has authority over the executive agencies of the State of New York.

Defendant-Respondent Thomas P. DiNapoli, is sued in his official capacity as the New York State Comptroller and Sole Trustee of the New York State and Local Retirement System (“ERS”). The ERS, *inter alia*, provides retirement benefits to most eligible government workers who are not educators.

Defendant-Respondent New York State Teachers’ Retirement System (“TRS”), *inter alia*, provides retirement benefits to “teachers” as that term is defined in statute.

Defendant-Intervenor-Respondent New York State United Teachers (“NYSUT”) is a union representing 600,000 individuals, 125,000 of whom are bus drivers, secretaries, bus monitors, teacher aides, security personnel and titles other than teacher or teacher assistant¹. [R. 233 & 254-5]

¹ NYSUT’s papers establish that it represents over 600,000 people [Allinger affidavit ¶2, R.254-5] and 79% of its members are teachers or teacher assistants [Chaykin affidavit ¶6, R. 233]. The remaining 21% equates to 126,000 people. This means that the legislature extended the incentive to up to 126,000 individuals who are represented by NYSUT and fall into some category of employee other than teacher. As shown *supra*, this other category includes titles such as bus driver, janitor, secretary, clerk, food service worker, security guard etc.

FACTS

On April 14, 2010, the Governor signed into law the challenged statute. The instant action was commenced on April 16, 2010. The statute allows certain public employees in the TRS and ERS who are at least 55 years of age and have at least 25 years of retirement system credit, and employed in public schools and certain other educational institutions, to retire without suffering the significant financial penalties that would otherwise apply to those members with less than 30 years of service who retire before age 62.

The statute limits eligibility for this early retirement incentive by adding as a precondition to eligibility for this benefit one single condition:

"Eligible employee" means a person who is a member of a retirement system, who is an employee of a participating employer and who holds a position represented by the recognized collective bargaining units affiliated with the **New York state united teachers employee organization** [sic] as certified by his or her employer, who makes an election under section five of this act.

[R. 73, emphasis added.]

The challenged statute allows only those employees represented by NYSUT to retire up to seven years early without financial penalties. This benefit is extended to any NYSUT member, regardless of title or duties. As acknowledged by NYSUT and demonstrated in the affidavit of John F. Sullivan, [R. 233,254-5 &37], NYSUT represents not merely teachers, but aides, monitors, secretaries, clerks, custodians, bus drivers, bus monitors, food service employees, and security employees. Employees in each of these non-teacher titles also receive the retirement incentive, but only if they belong to a NYSUT

bargaining unit. Employees with the same titles and duties who belong to a non-NYSUT bargaining unit are not eligible for the early retirement incentive.

As set forth in the affidavit of the NYSTRS General Counsel, Wayne Schneider [R. 213, ¶ 8], a person retiring at 55 with less than 30 years of service has his or her pension subject to a 27% reduction. Because of the early retirement incentive contained in Chapter 45, NYSUT represented public employees do not suffer this penalty. Non-NYSUT represented employees and employees who have chosen not to be represented by a union would continue to suffer the significant pension reduction if they chose to retire early. While the amounts of the early retirement incentive benefit will vary depending on the salary and years of service of an employee, the benefit clearly is financially significant. This is apart from the incalculable lifestyle benefit of being able to retire up to seven years early without financial penalty.

ARGUMENT

POINT I

THE DISPARATE TREATMENT OF PUBLIC EMPLOYEES SOLELY ON THE BASIS OF THE PRIVATE ORGANIZATION THAT REPRESENTS THEM VIOLATES EQUAL PROTECTION

Statutes which discriminate among public employees must have a rational basis for doing so. A statute subject to rational basis scrutiny is presumed to be constitutional, and the party challenging the statute bears the heavy burden of proving that there is no reasonably conceivable state of facts which rationally supports the distinction. D'Amico v. Crosson, 93 N.Y. 2d 29, 686 N.Y.S.2d 756 (1999), Weissman v. Evans, 56 N.Y.2d 458, 452 N.Y.S.2d 864 (1982).

However, when it comes to the financial treatment of public employees that discretion is not unlimited and there is a long line of cases which the court below ignored. These cases hold that it violates equal protection to treat public employees performing the same functions differently when they work in geographically proximate locations.

The Court of Appeals in Weissman v. Evans, *supra*, 56 N.Y.2d 458, 452 N.Y.S.2d 864 (1982) ruled that equal protection was violated when the State compensated a group of public employees in Nassau County who performed the same work as public employees in the same title in Suffolk County at a higher rate of pay. The controlling equal protection analysis was set forth as follows:

to meet the test of rationality, which all courts and parties here have agreed is appropriate to this case, it must appear that there is "some ground of difference having a fair and substantial relation to the object of the legislation" (Manes v Goldin, 400 F Supp 23, 29, *aff'd* 423 US 1068, *supra*).

To measure the present case by these principles, we now turn to Matter of Abrams v Bronstein (33 NY2d 488, 492), an equal protection case arising out of a compensation dispute, where the following test was suggested: after ascertaining "the basis of the classification involved and the governmental objective purportedly advanced... [t]he classification must then be compared to the objective to determine whether the classification rests 'upon some ground of difference having a fair and substantial relation' to the object for which it is proposed (Reed v. Reed, 404 U.S. 71, 76)."

The courts have consistently held public employees in geographically proximate locations performing essentially the same functions must be treated equally when it comes to financial benefits provided by the State. Weissman v. Bellacosa, 129 A.D.2d 189, 517 N.Y.S.2d 734 (2d Dep't 1987); Kendall v. Evans, 126 A.D.2d 703, 510 N.Y.S.2d 910 (2d Dep't 1987), *aff'd*, 72 N.Y.2d 963, 531

N.E.2d 294, 534 N.Y.S.2d 662 (1988), Schneider v. Ambach, 135 A.D.2d 284, 526 N.Y.S.2d 857 (3rd Dep't. 1988), Margolis v. New York City Transit Authority, 157 A.D.2d 238, 555 N.Y.S.2d 711 (1st Dep't, 1990).

In order to treat public employees who perform the same duties differently economically, there has to be a rational basis such a median home prices, cost of living etc., Barr v. Crosson, 95 N.Y.2d 164, 711 N.Y.S.2d 145 (2000); D'Amico v. Crosson, *supra*, 93 N.Y. 2d 29, 686 N.Y.S.2d 756 (1999).

In the instant case, public employees performing the identical functions in school districts within the same county are treated differently for the receipt of state provided economic benefits solely on the basis of the private organization which represents them in collective bargaining.

As a matter of background, “whether in any given school district supervisory and full-time classroom instructional staff belong to the same bargaining unit does not follow any consistent pattern, and is largely attributable to historical accident as to how the school professionals in the district first organized for collective bargaining purposes”, Schneider v. Ambach, 135 A.D.2d 284, 526 N.Y.S.2d 857 (3rd Dept. 1988).

The record in this case is replete with examples such historical accidents:

In the Massapequa Union Free School Districts chairpersons are tenured teachers who receive yearly annual appointments to serve a minority of their time as chairpersons and a majority as teachers. As chairpersons they are in a unit represented by ESSAA; if they aren't appointed in a given year, they return to a bargaining unit represented by NYSUT. However, at all times regardless of

which unit they are in, they are tenured teachers spending a majority of their time performing teaching duties and accruing seniority as teachers. [Nobile Affidavit R. 51-2].

In the Baldwin Union Free School District, a unit represented by ESSAA, the chairpersons are also tenured as teachers, not administrators, and spend a majority of their time teaching. They are compensated on the basis of the teacher salary schedule plus a stipend. Some chairpersons in surrounding districts are in the same bargaining unit as teachers; others are in separate bargaining units or the same bargaining unit as administrators. [Gegerson Affidavit R. 47-8]

Psychologist is a position that is a teacher tenure area title, not an administrative position [8 NYCRR 30.8]. In the North Babylon School District, the psychologists are members of a bargaining unit represented by ESSAA. In most surrounding school districts psychologists are members of bargaining represented by NYSUT. The duties of the psychologists are the same regardless of who represents them. [Reynolds affidavit, R. 55-6] In other Suffolk County school districts surrounding North Babylon, such as East Islip and West Islip, the psychologists are in the bargaining unit represented by NYSUT. [Saperstein summary judgment affirmation ¶ 9-10, R. 276-8, and exhibits 1 & 2 thereto, R. 283 & 284].

Psychologists in the Bellmore-Merrick Central High School District belong to a NYSUT represented bargaining unit and are compensated on the basis of the teacher salary schedule plus a stipend. Psychologists in the North Merrick

Union Free School District, which is a component of the Bellmore-Merrick Central High School District are represented by ESSAA, but are also compensated on the basis of the teacher salary schedule plus a stipend. [Saperstein summary judgment reply affirmation ¶ 22-26, R. 443-4]

Thus, under the Weisman v. Evans, *supra*, line of cases cited above, there is no rational basis for granting or withholding the financial benefit of the early retirement incentive to public employees performing identical functions in geographically proximate locations merely because the employee is represented by one private organization over a different private organization.

Members of the TRS must also be treated equally. Education Law §501(4) broadly defines “teacher” for purposes of TRS membership, as follows:

“Teacher” shall mean any regular teacher, special teacher, including any school librarian or physical training teacher, principal, vice-principal, supervisor, supervisory principal, director, superintendent...

Additionally, 21 NYCRR 5000.1(b), states: “All regularly employed (on a per annum basis) full-time teachers, as provided in subdivision 4 of Section 501 of the Education Law, shall be required to become members of the system” (emphasis added).

Every person who fits the statutory definition of “teacher” is required to join the TRS. Other school employees must join the ERS unless their title is specifically excluded. See Retirement and Social Security Law § 40(b)(1). Membership in both systems is divided into Tiers, based upon date of entry into the system. All members in the same Tier receive pensions on the same basis, using a formula, *inter alia*, based upon years of service and final average salary.

The benefits of retirement system members can only be reduced prospectively by the creation of new Tiers², which impact retirement system members hired after the date the law is enacted.

In Subway-Surface Supervisors Association v. New York City Transit Authority, 56 A.D.2d 53, 392 N.Y.S.2d 460 (2nd Dept. 1977), the Court recognized that the case law contains a “strict acknowledgment of the constitutional protection of pensions” and that “[a]ll employees similarly situated should be treated without discrimination.” Id. at 61. The instant law discriminates between similarly situated employees for pension purposes based upon the union that represents them, an irrational criteria, which violates equal protection.

As the United States Supreme Court held in Rinaldi v. Yeager, 384 U.S. 305, 307, 86 S.Ct. 1497 (1966):

The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out.

In Police Benevolent Ass'n of the N.Y. State Troopers, Inc. v. Bennett, 477 F.Supp.2d 534 (N.D.N.Y. 2007), several members of the New York State Police, along with their bargaining unit, brought an action against defendants including the New York State and Local Retirement System. The plaintiffs were of

² Tier status is based upon membership date and new Tier benefits only affect those hired after the date of its enactment. Tier I members have a membership date prior to July 1, 1973 (Education Law §440(a), 2 NYCRR 325.2(a)). Tier II members include those with a date of membership between July 1, 1973 and July 26, 1976 (2NYCRR § 325.2(b)). Tier III members include those with a date of membership between July 27, 1976 and September 1, 1983 (Education Law §§ 500(a), 520, 2 NYCRR 325.2(c) and Tier IV those hired after September 1 1983 through the recently (2010) adopted Tier V, who by definition cannot have 25 years of service (2 NYCRR § 325.2(d)).

mandatory retirement age under Retirement and Social Security Law § 381-b. However, that section had been suspended pursuant to an executive order allowing state police to remain employed beyond mandatory retirement age.

The action alleged that, while plaintiffs were forced to retire pursuant to the terms of § 381-b, other members of the retirement system were allowed to continue their employment under the executive order, thus the executive order was being selectively enforced among similarly-situated parties. The Court agreed, finding that plaintiffs' action for violation of equal protection under the Fourteenth Amendment would be allowed to stand. The Court stated that plaintiffs, as individual members of a retirement system, were "similarly situated" to other members of the retirement system for constitutional purposes, and that the plaintiffs had "sufficiently stated their claims because they have alleged that defendants intentionally and irrationally treated them differently from others similarly situated." 477 F.Supp.2d 543. See also, Gruen v. County of Suffolk, 187 A.D.2d 560, 590 N.Y.S.2d 217 (2nd Dept. 1992) (non-union managerial employees who had traditionally been granted benefits similar to unionized employees had valid equal protection claim when county resolution reduced their death/retirement benefits while the same benefits for the other employees were unaffected).

Based on the foregoing, it is submitted that there is no constitutionally permissible basis for allowing some public employee pension participants who retire early to suffer 27% pension reduction, while others do not, simply because they are represented by NYSUT.

In order to find a rational basis to uphold the statute, the court below found: “NYSUT affiliated locals are a reasonable proxy for teachers.” [R. 20] Apart from the shocking fact that this appears the first time a court has ruled eligibility for public employees to receive state funded benefits can be premised upon being represented by a particular private organization, this conclusion is flawed for a number of reasons.

Initially, in the legislative record [R. 186] the bill’s sponsor Assemblyman Peter Abbate stated the bill was not aimed at teachers but employees represented by NYSUT regardless of function:

Well, the difference is to make it clearer, some people would ask if there are principals, if there other administrations [sic] included, some are and some are not and there are people as I said, school board employees sometimes can be considered. In certain districts whether it’s janitorial services or other things can be members of the bargaining unit for the New York State Teacher’s Association so in some cases they might not be actual teachers but they are represented by the bargaining units of them. They will be in the field of education only.

The defects of proxy designation theory are also exposed by NYSUT’s papers which state that 21 percent (more than 126,000 members) of its members are not teachers. Of the remaining members, NYSUT only states they are both teachers or teacher assistants without any breakdown; is it 50%-50% or some different percentage? The Defendant-Intervenor-Respondent does not say. [R.233] Thus, the percentage of NYSUT members who are teachers was not even established in the record to serve as a factual basis for the court’s determination.

Moreover if “NYSUT” meant “teachers”, as the court conjectured, the early retirement incentive would have been limited to the members of the TRS. All teachers must belong to the TRS. (21 NYCRR 5000.1(b), *supra.*) No teachers belong to the ERS. Yet the statute explicitly included the ERS and NYSUT represents 126,000 ERS members. This is consistent with the legislative record, that the bill was aimed at NYSUT members, and inconsistent with the lower court’s unsubstantiated *theory* that the legislature was unable to define the term “teacher” other than by reference to a union.

NYSUT as proxy for teachers suffers from an additional constitutional infirmity. NYSUT as a union can only represent teachers in districts where a majority of the teachers have chosen to organize. The teachers in those districts identified in the record who have exercised their First Amendment right not to organize cannot be represented by NYSUT, and therefore are excluded from receiving the early retirement incentive as a direct result of their constitutionally protected decision not to organize. [R. 233]. Therefore, such a proxy designation would be unconstitutional on First Amendment grounds. [This point is covered in detail in Point II, *infra.*]

The court’s “NYSUT means teachers” theory is the sole grounds upon which it found a rational basis to uphold the constitutionality of the statute in the face of the equal protection challenge. As that theory itself is inherently flawed, not rational and self-contradictory, it cannot stand, and once it fails the constitutionality of the statute can no longer be upheld.

The court below spent a great deal of time trying to distinguish Schneider v. Ambach, 135 A.D.2d 284, 526 N.Y.S.2d 857 (3rd Dep't. 1988), which held it was unconstitutional to treat public employees differently for the provision of state provided financial benefits solely on whether they were in the same bargaining unit as full-time classroom teachers, e.g., NYSUT. The court in Schneider held:

The uncontradicted facts alleged in the complaint and plaintiffs' affidavits establish that a significant number of plaintiffs and the members of the educators' organizations they represent are certified and tenured as teachers and actually teach several classes daily in addition to their supervisory duties as, e.g., departmental chairpersons and administrative assistants. Again, according to the uncontested averments in plaintiffs' papers, the duties performed by plaintiffs and their members are substantially identical to those performed by supervisory and administrative personnel in other nearby, if not adjoining, school districts in the same counties, who are eligible for EIT salary benefits solely because of membership in the same bargaining units as full-time classroom teachers in those districts. Plaintiffs' submissions also support the inference, equally uncontroverted, that whether in any given school district supervisory and full-time classroom instructional staff belong to the same bargaining unit does not follow any consistent pattern, and is largely attributable to historical accident as to how the school professionals in the district first organized for collective bargaining purposes.

Based upon the foregoing facts, plaintiffs have prima facie established a denial of equal protection. The record is devoid of any functional, economic or geographic basis for discriminating between plaintiffs and other supervisory and administrative professionals who are similarly situated in all material respects, except for the latter's inclusion in teachers' organization bargaining units, nor has defendant demonstrated that this distinction bears any rational connection to the primary objectives of the EIT legislation to relieve the economic hardship of underpaid educators without increasing the financial burden of school districts (see, Matter of Burrows v. Board of Assessors, 98 AD2d 250, 255, *mod* 64 NY2d 33, see also, Weissman v. Evans, 56 NY2d 458, 464-466) The regulation is facially invalid in dictating a discriminatory distribution of finite, predetermined apportionments based upon a criterion irrelevant to any plausible statutory purpose. Thus, it cannot be justified as a response to

budgetary constraints through the process of objective, necessarily imperfect line-drawing which only produces inequities in some individual cases (*cf.*, United States R. R. Retirement Bd. v. Fritz, 449 US 166; Matter of Tolub v. Evans, 58 NY2d 1, 8-9, appeal dismissed 460 US 1076). Moreover, historical differences among school districts in the organization of supervisory professionals for collective bargaining purposes is insufficient as a matter of law to establish a rational basis for the distinction in eligibility for EIT salary benefits made by the regulation (see, Weissman v. Evans, *supra.*, at 464).

While Schneider dealt with an administrative regulation, not a statutory enactment, its underlying rationale, consistent with Weisman v. Evans, *supra*, was that public employees who perform the same jobs in the same geographic areas cannot be treated differently by the State for purposes of economic benefits. The underlying “EIT” statute in Schneider was aimed at raising the salaries of underpaid teachers.

After the regulations in Schneider *supra* were invalidated, the Commissioner of Education came up with new regulations that premised eligibility for EIT monies on being compensated on a teacher salary schedule. Those new regulations were upheld by the Court of Appeals in Schneider v. Sobol, 76 N.Y.2d 309, 559 N.Y.S.2d 221 (2000). The court held that since the statute was aimed at raising teacher salaries, those employees including administrators who were not compensated as teachers could be excluded from the statute.

Thus, had Chapter 45 been written stating eligibility was for teachers, not administrators, the rationale employed by the court below may have been persuasive. However, the inclusion of 126,000 ERS non-teacher NYSUT members belies the argument that NYSUT was used by the legislature to mean

teachers. Nor can the discrepancy of 126,000 people be explained away as mere “imperfect line-drawing which only produces inequities in some individual cases”. Schneider v. Ambach, *supra*, 135 A.D.2d at 289.

Moreover, even had Chapter 45 been written conditioning eligibility upon being a teacher, under the holdings of both Schneider cases, teachers such as Gegerson or Reynolds nonetheless would be eligible for the benefit, and the decision below erroneous.

This court may take judicial notice of the fact that the legislature regularly passes laws involving schools and teachers. Education is one of the major areas of concern to the legislature. The Education Law comprises an entire volume of laws. In every statute heretofore enacted in the history of New York State, the legislature was able to define teacher without having to use a private organization as a reference for a class of employees.

If the legislature modified the tenure law (Education Law 3012) to read that NYSUT represented employees who served for three years would be eligible for tenure, would the court below have concluded NYSUT meant “teacher”?

Could the legislature change the recall statues (Education Law 3013) to provide that NYSUT represented employees exsessed from their positions are entitled to preferred recall rights?

If the decision below is upheld, it opens the door to just such legislative changes by a union that is the largest single lobbyist in New York State, outspending Goldman Sachs by a 4 to 1 ratio. [Sullivan affidavit ¶ 14-15, R. 40-1]

Finally, the court's proxy theory, conditioning retirement benefits on union affiliation, is per se irrational and contrary to public policy in that the Taylor Law forbids unions from negotiating "any benefits provided by or to be provided by a public retirement system". Civil Service Law § 204(4).

In conclusion, the court's "NYSUT means teacher" theory is neither rational nor supportable by evidence. Employing the rational basis test required for equal protection cases, the instant statute, which premises eligibility for receipt of a valuable economic benefit upon the union that represents the particular employee, cannot pass constitutional scrutiny because (a) it treats public employees performing the same duties in the same geographic area differently for no rational reason, and (b) it treats members of the TRS and ERS differently for no rational reason.

POINT II

FREEDOM OF ASSOCIATION IS A FUNDAMENTAL RIGHT AND GOVERNMENTAL INFRINGEMENTS ON THIS RIGHT ARE SUBJECT TO STRICT SCRUTINY WHICH REQUIRES THE INVALIDATION OF THE NYSUT ELIGIBILITY REQUIREMENT

As demonstrated above, Chapter 45 premising eligibility for the early retirement incentive upon being represented by a particular union could not survive constitutional muster under the rational basis test associated with equal protection analysis. It clearly cannot survive the strict scrutiny test associated with First Amendment challenges.

Freedom of association is a fundamental right guaranteed by the First and Fourteenth Amendments. Healy v. James, 408 U.S. 169, 181, 92 S.Ct. 2338

(1972); Piscottano v. Murphy, 511 F.3d 247, 268 (2nd Cir, 2007). Inherent in this right of free association is the freedom to refrain from association with a particular group, including a union. See, Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S.Ct. 1782 (1977). Put another way, “[f]reedom of association . . . plainly presupposes a freedom not to associate.” Roberts v. United States Jaycees, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984).

Thus, Plaintiffs-Appellants’ right to affiliate or not affiliate with an association such as NYSUT, without governmental influence or coercion, is a fundamental right protected under the First Amendment.

Furthermore, the Taylor Law explicitly gives public employees in New York State “the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.” Civil Service Law §202 (emphasis added). Courts have consistently held that the right thus conferred by the Taylor Law invokes constitutional prohibitions on interference with the First Amendment right of freedom of speech and association. Board of Ed., Central School Dist. No. 1 of Town of Grand Island, Erie County v. Helsby, 37 A.D.2d 493, 326 N.Y.S.2d 452. (4th Dept 1971) (public education employment may not be adversely affected based on the exercise of the right of free association).

Thus, there are two interrelated First Amendment problems with Chapter 45, both of which were ignored by the court below. The first is that employees who have exercised their constitutional right not to unionize, including teachers in a number of named school districts in the state which have opted not to form

unions [Chaykin affidavit ¶5, R.233], are by virtue of that choice automatically excluded from the ability to retire up to seven years early without suffering a 27% pension reduction. This is a per se First Amendment violation. Aboud v. Detroit Bd. of Ed., *supra*, 431 U.S. 209, 97 S.Ct. 1782 (1977).

The next First Amendment defect is that New York State is telling public employees, whether tenured teachers such as Gegerson, psychologists such as Reynolds, or bus drivers or secretaries, that if they want to get preferential State treatment, in this case a pension up to 27% greater than they would otherwise be entitled to receive, they should be represented by NYSUT. This is a fundamental governmental infringement of these individuals' First Amendment rights no different than the State granting a 27% greater tax deduction to members of one church over another church.

As an additional point, the papers submitted by both NYSUT and the Governor's office acknowledge that Chapter 45 was a political reward to NYSUT for providing political support the Governor's initiative in creating Tier V. This is political patronage.

The standard of review for statutory infringements on this fundamental freedom is one of strict scrutiny. In Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729 (1990), the Court addressed an executive order by a Governor that favored those who supported his party with political rewards.

Writing for the majority, Justice Brennan stated that the very perception of favoritism based on support for a political party was enough to have a significant chilling effect on the Petitioner's First Amendment rights of association. Justice

Brennan then set forth the relevant standard for scrutiny of the executive order as follows: “[u]nless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms.” *Id.* at 74. See also, Price v. New York State Bd. of Elections, 540 F.3d 101, 109 (2nd Cir 2008) (statutory measures which severely burden the right of free association are subject to strict scrutiny); Roberts v. U.S. Jaycees, 468 U.S. 623 (encroachments on freedom of association “may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms”).

The Statute in question is as offensive to the First Amendment as the executive order involved in Rutan. In Rutan, the Petitioners needed to demonstrate that the implementation of the executive created favoritism based on membership in the Republican Party. In the instant case, the Plaintiffs face no such obstacle, as the Statute on its face applies only to NYSUT affiliates to the exclusion of every other union as well as to the exclusion of those not unionized. NYSUT is an entity that spent over four million dollars lobbying in Albany in 2008. [R.41] Patronage based upon money, or political support, is no less offensive than patronage based upon political party.

Why should public employees be denied the ability to retire up to seven years early, solely because they chose to affiliate with a union that did not spend millions of dollars in Albany or did not support the Governor’s political agenda? This audacious prerequisite significantly infringes upon the Plaintiffs’ fundamental

right of free association. Such favoritism for a particular group (which group, as in the case of Rutan, wields enormous political influence) must be closely scrutinized under the strict scrutiny standard expressed in Rutan.

Thus, in order to uphold Chapter 45, the Defendants-Respondents would need to show that inclusion of only NYSUT-affiliated employees serves a compelling state interest that cannot be achieved through less restrictive means. In the obvious absence of such compelling state interest the statute must be declared unconstitutional.

POINT III

THE SEVERABILITY PROVISION OF SECTION 7 OF CHAPTER 45 REQUIRES THAT THE APPROPRIATE REMEDY IS TO STRIKE THE STATUTE'S NYSUT ELIGIBILITY PROVISION

Section 7 of the challenged statute provides as follows:

If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. **It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included therein.**

[R. 74, emphasis added.]

This severability provision dictates that the appropriate remedy, based upon a finding that the statute is unconstitutional because of the NYSUT eligibility provision, is to strike that NYSUT limitation and leave the remaining language of the statute intact.

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature” Patrolmen's Benevolent Assn. v. City of New York, 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544; *see also*, Riley v. County of Broome, 95 N.Y.2d 455, 463, 719 N.Y.S.2d 623; Longines-Wittnauer v. Barnes & Reinecke, 15 N.Y.2d 443, 453, 261 N.Y.S.2d 8. “As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.” Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 968. “[I]f the language of a statute is plain and unambiguous, there is neither need nor warrant to look elsewhere for its meaning. *See, e.g.,* Meltzer v. Koenigsberg, 302 N.Y. 523, 525; Town of Putnam Valley v. Slutzky, 283 N.Y. 334, 343; McCluskey v. Cromwell, 11 N.Y. 593, 601-602”. “In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning” Tompkins v. Hunter, 149 N.Y. 117, 122-123, 43 N.E. 532; *see also*, Matter of Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 667 N.Y.S.2d 327.

Nonetheless, Defendants-Respondents Paterson and DiNapoli alone argued before the court below that this provision is not to be read literally. Both Defendant-Respondent TRS and Defendant-Intervenor-Respondent NYSUT argued the severability clause must be applied as written and as urged by Plaintiffs-Appellants.

Defendants-Respondents Paterson and DiNapoli argued the legislative wording was of no importance and argued that the prevalence of severability clauses meant this one was of no particular import. However, while many statutes do contain severability provisions, the specific wording of Section 7 is significantly different from the severability clauses cited by the Governor and the Comptroller. None of those clauses contains language stating “[i]t is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included therein”, which evidences a further-reaching legislative intent than the others cited.

Significantly, the record establishes that the legislature was aware of a possible equal protection challenge to Chapter 45. Therefore, the “specific intent” language indicates how the legislature intended relief to be crafted by the courts in the event that such a challenge were to be successful. As stated in the affidavit of Stephen Allinger submitted by NYSUT [R. 258-61, at ¶¶ 17-22], the New York State School Boards Association (“NYSSBA”) anticipated that the limitation of the statute’s applicability to NYSUT members would lead to constitutional challenges and recommended the inclusion of all TRS members within its scope.³

As explained in the Allinger affidavit at ¶¶ 9-11 [R. 256-7], Chapter 45 is the result of a legislative “deal” made with NYSUT in exchange for NYSUT’s

³ The NYSSBA recommended “two prompt amendments to [the bill]: (1) Include all members of the New York State Teachers’ Retirement System, not just members of a collective bargaining unit represented by New York State United Teachers. By excluding other members if the TRS, the bill opens up **equal protection issues and could potentially lead to delays due to legal action.**” Emphasis added. [R. 259]

support for the Tier V legislation passed under Chapter 504 of the Laws of 2010. It is submitted that, in accordance with their deal with NYSUT, the legislature enacted the retirement incentive statute with the NYSUT eligibility limitation in place, but plainly stated a legislative intent for that limitation to be stricken in the foreseeable case that Chapter 45's constitutionality were to be challenged.

None of the cases relied upon by the Defendants-Respondents Paterson and DiNapoli before the court below involved language such as that found in Section 7. For example:

CWM Chemical Services, L.L.C v. Roth, 6 N.Y.3d 410 (2006) involved a severability provision which, like the common severability provisions discussed above, did not include a "specific intent" clause.

New York State Superfund Coalition, Inc. v. New York State Department of Environmental Conservation, 75 N.Y.2d 88 (1989) did not involve a statute, but a regulation promulgated by the Department of Environmental Conservation. The severability provision (see 75 N.Y.2d at 94) was similar to the common severability provisions cited by d Defendants-Respondents Paterson and DiNapoli and unlike section 7 of Chapter 45.

National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991) likewise did not involve a statute but a town ordinance. As in the case of New York State Superfund Coalition, the severability provision in the ordinance (see 942 F.2d 149n.3) was like the common severability provisions discussed above and unlike the section 7 of Chapter 45.

The statute at issue in Association of Surrogates & Supreme Court Reporters v. New York, 778 F. Supp. 210, 213 (S.D.N.Y. 1991) did not even contain a severability provision. Indeed, the court observed "...the issue of severability was not even contemplated." By contrast, the severability provision here provides a precise statement of legislative intent.

Defendants-Respondents Paterson and DiNapoli argued before the court below that application of Section 7 would open the door to extensive judicial "re-writing" of legislation. Not only is this without merit, but rather, ignoring the legislature's specific wording, placed in the statute based upon a foreseeable and predictable event, would constitute judicial re-writing of legislation.

Courts have consistently stated that, as a general rule, where a statute is partially invalid, the offending portion should be stricken and the balance preserved. See Waste Recovery Enter. LLC v. Towns of Unadilla, 294 A.D.2d 766 (3rd Dept. 2002), cert. denied, 542 U.S. 904 (2004); Califano v. Westcott, 443 U.S. 76, 89 (1976) (in cases involving discriminatory statutes, "extension, rather than nullification, is the proper course"). Thus, the general rule in favor of preservation of legislative enactments favors invocation of Section 7.

In this case, the argument in support of severability is even more compelling. The Court in Matter of Westinghouse Elec. Corp v. Tully, 63 N.Y.2d 191, 196 (1984) stated that the test for whether an invalid provision should be stricken leaving the remainder of a statute intact is "[w]hether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether" [emphasis

added]. It is clear that, with respect to Chapter 45, partial invalidity was foreseen by the legislature and that their wish was for the removal of the offending portion, not the striking of the entire statute.

Defendants-Respondents Paterson and DiNapoli have tendered arguments based upon the unanticipated costs of expanding the scope of the retirement incentive. However, for the reasons that follow, those arguments are without merit.

As demonstrated by the affidavit of Richard Young, the Teachers' Retirement System's actuary, the \$13.2 million annual cost included in the fiscal note to Chapter 45 was based upon the **entire** potential universe of TRS members who could conceivably benefit from Chapter 45, not just TRS members in positions represented by NYSUT collective bargaining units. [R. 335-49]

Thus, the hundreds of thousands of NYSUT members and the 3,000 ESSAA members were all factored into the \$13.2 million dollar costs. Including Plaintiffs-Appellants in the statute will not change the anticipated cost of the law.

Of course, costs are normally at stake in retirement benefit litigation. Yet the Courts have consistently applied the law despite the fiscal outcomes that such adherence produces. See e.g., Weingarten v. Board of Trustees, 98 N.Y.2d 575 (2002) (holding the statutory term "salary" includes per session earnings); Doctors' Council v. NYCERS, 71 N.Y.2d 669 (1988) (holding part-time employees must be permitted to join the retirement system); Birnbaum v. NYSTRS, 5 N. Y.2d 1 (1958) (holding the retirement system could not change

the mortality tables used to calculate member annuities even though longevity had significantly increased).

Defendants-Respondents Paterson and DiNapoli raised another baseless argument before the court below regarding the language in Section 2 of Chapter 45, which include the statement that nothing in the statute “shall be construed to create an expectation of a future or continuing retirement benefit for any public employee who is not eligible to receive and qualify for the retirement benefits herein”. As set forth in the affirmation of Wayne Schneider, General Counsel to the TRS, the legislative findings stated do not bear on the remedy of expansion of the statute to all TRS members. That statement is necessitated by the New York State Constitutional guarantee against abrogation of pension rights of public employees and was intended to make it clear that the retirement incentive was a temporary measure and not a permanent change to the pension systems.

[Schneider affirmation, ¶ 8-18, R. 344-48]

In conclusion, the constitutional defect in Chapter 45, the premising of eligibility for the benefit on NYSUT affiliation was foreseen by the legislature, which drafted a targeted severability clause, which the court should apply.

POINT IV

THE AUGUST 31 RETIREMENT DATE SHOULD BE EQUITABLY TOLLED FOR OTHERWISE QUALIFIED EMPLOYEES REPRESENTED BY PLAINTIFFS-APPELLANTS

When government acts unconstitutionally or illegally and denies individuals benefits the remedy is to make them whole for their loss. Brown v. Wing, 241 A.D.2d 956, 663 N.Y.S.2d 1025, (4 Dept. 1997); Beame v. DeLeon, 87

N.Y.2d 289, 639 N.Y.S.2d 272. (1995). In the case of Chapter 45, the effective date for retirements for school employees is August 31. It is not anticipated this court will rule by August 31 or with sufficient time to inform those eligible of their entitlement to the benefits of Chapter 45.

The courts have long recognized the doctrine of equitable tolling to protect the rights of those who have suffered by virtue of unconstitutional or illegal actions by government. See, Bowen v. City of New York, 476 U.S. 467, 106 S.Ct. 2022 (1986); Dixon v. Shalala, 54 F.3d 1019 (2nd Cir. 1995). To do otherwise would be to leave those individuals whose constitutional rights were violated without a remedy, when one can readily be granted.

Moreover, as only Plaintiffs-Appellants initiated litigation prior to August 31, it is appropriate to limit the equitable tolling only to those employees represented by Plaintiffs-Appellants or any other organization that may challenge the litigation prior to August 31. Cohen v. Pearl River Union Free School District, 51 N.Y.2d 256, 434 N.Y.S.2d 138 (1980).

CONCLUSION

The NYSUT eligibility clause in Chapter 45 must be stricken as violative of both equal protection and Freedom of Association. The remedy should be severing the offending clause from the statute and extending the time to apply to retire for those employees represented by Plaintiffs-Appellants and any other

organization that challenges the statute prior to August 31, 2010, together with such other and further relief as the court deems proper.

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