UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

N.C. ex rel. YIATIN CHU; CHINESE AMERICAN CITIZENS ALLIANCE OF GREATER NEW YORK; INCLUSIVE EDUCATION ADVOCACY GROUP; and HIGHER WITH OUR PARENT ENGAGEMENT,

Plaintiffs,

v.

BETTY A. ROSA, in her official capacity as Commissioner of Education for the State of New York,

Defendant.

No. 1:24-cv-00075-DNH-CFH

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the accompanying declaration of Erin E. Wilcox, and Plaintiffs' Opposition to Defendant's Motion to Dismiss, Plaintiffs, by and through their attorneys, will move the Court, before the Hon. David N. Hurd, at the United States District Court, Northern District of New York, Utica, New York, on a date and time to be scheduled by the Clerk of Court, for an Order denying Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint, ECF No. 28.

Dated: May 24, 2024.

Respectfully submitted,

/s/ Erin E. Wilcox

DAVID J. HOFFA*
Ariz. Bar No. 038052
Pacific Legal Foundation
3241 E. Shea Blvd., Suite 108
Phoenix, AZ 85028
Telephone: (916) 419-7111
dhoffa@pacificlegal.org

ERIN E. WILCOX*
Cal. Bar No. 337427
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
ewilcox@pacificlegal.org

**Pro Hac Vice*

William A. Jacobson, Esq.*
James R. Nault, Esq.*
Equal Protection Project of the
Legal Insurrection Foundation
18 Maple Ave., #280
Barrington, RI 02806
Telephone: (401) 246-4192
contact@legalinsurrection.com
jnault@legalinsurrection.com

Counsel for Plaintiffs

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

Only one factor prevents Plaintiff N.C. and her co-plaintiffs' children from being eligible for New York's Science and Technology Entry Program (STEP): their race. If N.C. and her compatriots were black, or Hispanic, or American Indian, or Alaskan Native, their grades and state residency would automatically qualify them to apply for a summer or academic-year enrichment program at colleges and universities around the state. That is the relief they seek here—to be treated the same as black, Hispanic, or Native American children, with access to the STEP program not subject to a family income test. Instead, under the current statutory and regulatory scheme, N.C. and the others must satisfy an additional family income requirement that *only* applies to Asian American or white students.

Defendant Rosa would have this Court believe that the only available remedy is to subject black, Hispanic, Native American, and Alaskan Native children to the family income test as well, which would effectively rewrite the STEP statute in a way the legislature never intended and Plaintiffs do not seek. Defendant does not get to pick and choose the relief in order to defeat standing. There is relief sought to which Plaintiffs are legally entitled and which would remedy the discrimination, and that is enough for standing.

Defendant also pretends that passing the family income test eliminates the discrimination, but that is legally wrong. The Supreme Court has long held that "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). That is why Jennifer Gratz, Abigail Fisher, and the many Asian-American students recently rejected by Harvard never had to show they would have been admitted to the University absent the racial discrimination. *See Gratz v. Bollinger*, 539 U.S. 244, 260-62 (2003); *Fisher v. Univ. of Texas*

at Austin, 570 U.S. 297 (2013); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 198-201 (2023). This is the exact injury N.C. suffers due to STEP's racial preferences, and it is an injury that members of parent organizations can "validly claim on behalf of their children." *Parents Involved*, 551 U.S. at 719. Defendant's motion to dismiss should be denied.

FACTUAL BACKGROUND

STEP

First enacted in 1985, STEP is intended to "assist eligible students in acquiring the skills, attitudes and abilities necessary to pursue professional or pre-professional study in post-secondary degree programs in scientific, technical and health-related fields." N.Y. Educ. Law § 6454(2); FAC, ECF No. 28 ¶ 12. Through STEP, colleges and universities around the state receive taxpayer-funded grants to operate summer and academic-year programs for middle and high school students interested in science, technology, and health-related fields. ECF No. 28 ¶ 16. To be eligible for STEP, students must either be "secondary school students who are either economically disadvantaged or minorities historically underrepresented" in the target fields. N.Y. Educ. Law § 6454(1)(b); ECF No. 28 ¶ 13.

Interested students must apply for admission to STEP, but applicants do not compete for admission on a level playing field. STEP's regulations treat applicants differently based on race and ethnicity. Black, Hispanic, Native American, and Alaskan Native students are eligible for STEP regardless of their family's income level. 8 NYCRR § 145-6.5(a). All other students, including Plaintiff N.C. and the children of members of Plaintiffs Chinese American Citizens Alliance of Greater New York (CACAGNY), Higher with Our Parent Engagement (HOPE), and the Inclusive Education Advocacy Group (IEAG) (collectively, Organizational Plaintiffs), are not

eligible for STEP unless they first prove that their families are economically disadvantaged. N.Y. Educ. Law § 6454(1)(b). The New York State Education Department's published income eligibility criteria for STEP defines economically disadvantaged as "a member of a household where the total annual income of such household is equal to or less than 185 percent of the amount under the annual United States Department of Health and Human Services poverty guidelines for the applicant's family size for the applicable year." ECF No. 28 ¶ 14 (quoting 8 NYCRR § 27-1.1(b)(1)).

Plaintiffs

Plaintiff N.C. is a seventh grader who is represented by her mother, Yiatin Chu. N.C. wants to apply for admission to the Summer 2024 STEP program at New York University and meets the program's academic and residency requirements. ECF No. 28 ¶ 7. If N.C. were black, Hispanic, Native American or Alaskan Native, that would be the end of the inquiry. She would be eligible for STEP based on meeting those requirements alone. But because N.C. is Asian American, she must additionally prove she is economically disadvantaged. Due to this race-based differential treatment, N.C. is ineligible for STEP. *Id*.

Plaintiff CACAGNY is a New York City nonprofit with a mission to empower Chinese Americans by advocacy for Chinese American interests based on the principles of fairness and equal opportunity, and guided by the ideals of patriotism, civility, dedication to family and culture, and the highest ethical and moral standards. ECF No. 28 ¶ 8. CACAGNY's membership includes parents of New York City schoolchildren, and the organization represents the interests of both these parents and their children. *Id*.

Plaintiff IEAG is a New York City grassroots parent organization whose mission is to fight discriminatory eligibility and admissions practices that restrict applicants based on race or

ethnicity. ECF No. 28 ¶ 9. IEAG's members are the parents of New York City schoolchildren, and the organization represents the interest of both these parents and their children. *Id*.

Plaintiff HOPE is a New York City nonprofit organization with a mission to help Chinese American parents in the New York City, particularly first-generation immigrants, understand the educational opportunities available to their children and offer guidance in navigating the application process for those opportunities. ECF No. 28 ¶ 10. HOPE also supports members whose children experience bullying and provides translation services to empower parents and grandparents to engage with their children's schools. *Id*.

STANDARD OF REVIEW

Defendant moves to dismiss this case under Federal Rule of Civil Procedure 12(b)(1). On a motion to dismiss for lack of subject matter jurisdiction, courts must "accept all of the plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Starr v. Georgeson S'holder, Inc.*, 412 F.3d 103, 109 (2d Cir. 2005) (citation omitted). When, as here, a motion under Rule 12(b)(1) is based solely on the complaint and attached exhibits, the plaintiff bears no evidentiary burden, and the court must evaluate whether those documents "allege facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue." *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). However, the court "may resolve disputed factual issues by reference to evidence outside the pleadings, including affidavits." *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007).

ARGUMENT

I. Plaintiffs Have Article III Standing

A. Plaintiff N.C. has standing

N.C. is a minor represented in this lawsuit by her parent and guardian, Yiatin Chu. ECF No. 28 ¶ 7. Parents may bring suit on behalf of their minor children. Fed. R. Civ. P. 17(c)(1)(a); *B.C. v. Mount Vernon Sch. Dist.*, 660 Fed. Appx. 93, 95-96 (2d Cir. 2016) (mothers had standing to assert § 1983 claim on behalf of their minor children); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir. 2001) ("Parents generally have standing to assert the claims of their minor children."), *cited by Horton v. Bd. of Educ. of the Sherburne-Earlville Cent. Sch. Dist.*, No. 5:15-cv-00782, 2016 WL 2354266, at *2 (N.D.N.Y. May 4, 2016). To establish Article III standing, N.C. must demonstrate (1) an "injury in fact" (2) that is "fairly traceable" to the defendant and (3) redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). At the pleading stage, a plaintiff's general factual allegations of injury resulting from the defendant's conduct are sufficient. *Id.* at 561. N.C. has adequately pled all three elements of standing in this case.

N.C. satisfies the age, residency, and academic eligibility requirements for STEP. ECF No. 28 ¶ 7. But since N.C. is Asian American, she must satisfy an additional family income requirement that black, Hispanic, Native American, and Alaskan Native students do not. *Id*. N.C.'s "injury in fact" is being forced to compete in STEP's race-based system that puts her at a disadvantage. *Parents Involved*, 551 U.S. at 719; *see also N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (in context of a set-aside program, injury in fact is inability to compete on an equal footing); *City of Richmond v. J.A. Croson*

Co., 488 U.S. 469, 493 (1989) (set-aside plan "denies certain citizens the opportunity to compete" for percentage of public contracts based on race).

In *Parents Involved*, the Court rejected the argument that plaintiffs' injuries were too speculative because the children had not yet applied for and been rejected from their chosen Seattle high schools, holding that the eventual outcome "does not eliminate the injury claimed." 551 U.S. at 718-19. Likewise, whether or not N.C. would ultimately be selected for a STEP program does not eliminate her injury; she is still prevented from competing on an equal footing with applicants of other races. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) ("The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing.") (internal quotation omitted). Defendant does not dispute that N.C.'s injury is fairly traceable to Defendant, and N.C.'s injury will be redressed by a favorable decision from this Court that levels the playing field by removing the barrier that prevents N.C. from being treated the same as black, Hispanic, Native American, or Alaskan Native STEP applicants.

B. Organizational Plaintiffs have associational standing

An organization has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Faculty v. New York Univ.*, 11 F.4th 68, 75 (2d Cir. 2021). Defendant challenges only the first prong of the *Hunt* test, but Plaintiffs CACAGNY, HOPE, and IEAG nonetheless satisfy all three.

i. Organizational Plaintiffs' members have standing to sue in their own right

To establish the first *Hunt* prong, an organization must show that at least one member has

> (1) suffered an injury-in-fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Faculty, 11 F.4th at 75 (internal quotations omitted); *Lujan*, 504 U.S. at 560-61.

In an equal protection claim, being forced to compete in a race-based system that may prejudice the plaintiff is an injury that parent members of a plaintiff organization "can validly claim on behalf of their children." *Parents Involved*, 551 U.S. at 719. In *Parents Involved*, the Court held that an association of parents had standing to challenge a race-based school assignment system because its members "have children in the district's elementary, middle, and high schools," and those children "may be 'denied admission to the high schools of their choice when they apply for those schools in the future.'" *Id*. at 718 (internal record citations omitted). The Court rejected the argument that the association's members' injury was too speculative because their children had not yet been rejected from their chosen high schools. *Id*. at 718-19; ECF No. 32-2 at 9. Instead, the Court recognized that even if the association's members' children were ultimately admitted to their high schools of choice, that *still* did not eliminate the injury of being forced to compete in a race-based system. *Id*.

Like the parent association in *Parents Involved*, the Organizational Plaintiffs seek declaratory and injunctive relief on behalf of their members whose children may be denied admission to a public program because of their race. ECF No. 28 at 11 (Prayer for Relief); *Parents Involved*, 551 U.S. at 718. The Organizational Plaintiffs are injured because when their members' children apply to STEP, they will be treated differently than black, Hispanic, Native American, or Alaskan Native applicants in a system that may prejudice them. ECF No. 28 ¶¶ 23-26; *Parents*

Involved, 551 U.S. at 719. This injury is one that the parent members of Organizational Plaintiffs can "validly claim on behalf of their children." *Parents Involved*, 551 U.S. at 719.

Defendant does not challenge the traceability of Organizational Plaintiffs' standing. On redressability, a decision from this Court prohibiting the use of racial classifications in STEP admissions would put the Organizational Plaintiffs' members' children on the same footing as black, Hispanic, Native American, and Alaskan Native applicants—remedying Plaintiffs' injury of being forced to compete in a race-based system. Organizational Plaintiffs do not ask this Court to admit their members' children to STEP programs, nor do they request additional burdens be imposed on black, Hispanic, Native American, or Alaskan Native applicants.[1] Instead, Organizational Plaintiffs simply ask for the removal of the barrier preventing applicants of other races from being treated the same as black, Hispanic, Native American, or Alaskan Native applicants. ECF No. 28 at 11 (Prayer for Relief); *see Heckler v. Mathews*, 465 U.S. 728, 740 (1984) ("[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.") (internal quotation marks and emphasis omitted).

ii. The interests at issue in this case are germane to Organizational Plaintiffs' purposes

Though Defendant does not challenge the second *Hunt* prong, it is easily met in this case. The germaneness element's

> proper inquiry at the pleading stage is . . . a limited one: A court must determine whether an association's lawsuit would, if successful, reasonably tend to further the general interests that individual members sought to vindicate in joining the

[1] Defendant erroneously assumes that the only remedy available in this case is to impose STEP's economic disadvantage requirement on all applicants. *See* ECF No. 32-2 at 6. Plaintiffs' injury would also be remedied by eliminating the economic disadvantage requirement—the criterion that treats applicants differently based on their race—altogether.

> association and whether the lawsuit bears a reasonable connection to the association's knowledge and experience.

Bldg. & Constr. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 149 (2d Cir. 2006). The Second Circuit has endorsed "the importance of a reading of the germaneness requirement that does not unduly confine the occasions on which associations may bring legal actions on behalf of members," and noted that "it is highly unlikely the second prong of germaneness was meant to set a narrow perimeter of centrality of purpose." *Id.* at 147 (brackets and quotation omitted).

This case seeks to vindicate Asian-American students' interest in their equal protection rights and this interest is germane to all three Organizational Plaintiffs' purposes. ECF No. 28 ¶¶ 3-4, 27-34. CACAGNY's "mission is to empower Chinese Americans by advocacy for Chinese-American interests based on the principles of fairness and equal opportunity," and the organization "represents the interests of both [member] parents and their children." ECF No. 28 ¶ 8. IEAG's mission is "to fight discriminatory eligibility and admissions practices that restrict applicants based on race or ethnicity," and the organization "represents the interests of both . . . parents and their children" in New York City. ECF No. 28 ¶ 9. HOPE's "mission is to help Chinese-American parents in the New York City area, particularly those who are first-generation immigrants, understand the educational opportunities available to their children and offer guidance in navigating the application process for those opportunities." ECF No. 28 ¶ 10. Each Organizational Plaintiff's mission more than satisfies the "undemanding" requirement of "mere pertinence between litigation subject and organizational purpose" for the second *Hunt* prong. *Bldg. & Constr. Trades*, 448 F.3d at 148 (citation omitted).

iii. Individual participation of Organizational Plaintiffs' members is not required

The participation of individual CACAGNY, HOPE, or IEAG members in this lawsuit is not required for either the claim asserted or the relief requested. *Hunt's* third prong is not mandated by Article III but is instead part of prudential standing limitations. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996). Individual participation is not necessary when prospective relief, such as a declaration or injunction, is requested, because "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Id.* at 553-54. That is categorically different than claims for damages where there is a risk that the organizational plaintiff will "lack[] detailed records or the evidence necessary to show the harm with sufficient specificity." *Id.* at 556; *see also New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp.*, 798 F.3d 125, 130-31 (2d Cir. 2015). Additionally, cases that raise pure questions of law do not require individual participation. *Int'l Union, United Auto., Aerospace & Agric., Implement Workers of Am. v. Brock*, 477 U.S. 274, 287-88 (1986).

Here, Organizational Plaintiffs seek only prospective declaratory and injunctive relief and this case poses a pure question of law regarding the constitutionality of STEP's race-based eligibility criteria. ECF No. 28 ¶¶ 27-34; *id.* at 11 (Prayer for Relief). The participation of individual members is not required.

II. Defendant Wrongly Demands Additional Standing Requirements

Attempting to cloud Plaintiffs' straightforward standing, Defendant raises additional hurdles it claims Plaintiffs must clear in order to show Article III standing. None are required.

A. Plaintiffs are not required to apply for STEP to demonstrate injury in fact

Defendant first claims that Plaintiffs' equal protection injuries are mere "generalized grievances" because Plaintiffs "are not qualified to apply for STEP even in the absence of the challenged legislation." ECF No. 32-2 at 8-9. Defendant misunderstands both the nature of an "injury in fact" in a forward-looking equal protection claim and the discriminatory treatment at issue in this case.

Plaintiffs' injury is the inability to compete on an equal footing by having to meet an additional family income threshold that applicants of other races do not—not whether they can secure a spot in a STEP program. *See Parents Involved*, 551 U.S. at 719. If N.C. or the Organizational Plaintiffs' members' children were black, Hispanic, Native American, or Alaskan Native, there would be no barrier to their qualification for STEP. As the Court held in *Northeastern Florida*,

> [w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

508 U.S. at 666. Though Defendant repeatedly claims that Plaintiffs were not "qualified" to apply to STEP and that only one child "even *attempted to complete* a STEP *application*," this misses the point. ECF No. 32-2 at 8 (emphasis in original). It is precisely because STEP discriminates against white and Asian American applicants—it *disqualifies* them—that Plaintiffs bring this civil rights lawsuit. ECF No. 28 ¶¶ 23-26. Plaintiffs are not required to allege that they have applied to STEP because their injury is "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *N.E. Fla.*, 508 U.S. at 666.

Nor are plaintiffs required to take futile actions like applying to STEP to secure Article III standing. *See Williams v. Lambert*, 46 F.3d 1275, 1280 (2d Cir. 1995) (where petition would be

summarily dismissed, "such a futile gesture" is not a "prerequisite for adjudication in federal court"). IEAG's declaration demonstrates that for at least one STEP program, an Asian-American applicant could not even complete an application because of her race, while a similarly situated black or Hispanic applicant would have encountered no such barrier. ECF No. 28 ¶ 9.

Plaintiffs are far from a "general population of individuals affected in the abstract by the legal provision [under] attack," as Defendants allege. ECF No. 32-2 at 9 (citing *Carney v. Adams*, 592 U.S. 53, 58 (2020)). Unlike the general population, these children want to and have tried to apply for STEP. ECF No. 28 ¶¶ 7-10. Unlike the general population, these children satisfy the residency, age, and academic requirements for STEP. *Id*. And unlike the general population, who presumably do not qualify for STEP for a host of reasons, these children do not qualify for STEP *solely* because of their race. ECF No. 28 ¶ 7; ECF No. 28-1 ¶ 9; ECF No. 28-2 ¶ 9; ECF No. 28-4 ¶ 9; ECF No. 28-3 ¶ 7.

In the absence of STEP's racial preferences, N.C. and the Organizational Plaintiffs' members' children would qualify for STEP based upon their age, residency, and academic credentials alone—just as black, Hispanic, Native American, and Alaskan Native children do now. All have attested that but for this discriminatory barrier, they are able and ready to apply for admission to a STEP program. Nothing more is required.

B. Organizational Plaintiffs' declarants are not required to allege personal injury to themselves

Completely ignoring *Parents Involved*—which Defendant never mentions in her Motion—Defendant next contends that the Organizational Plaintiffs lack associational standing because their adult declarants cannot *themselves* apply to STEP and so lack an injury "to their own legally protected interests" that affects them "in a personal and individual way" sufficient to support Article III standing. ECF No. 32-2 at 12 (internal quotations omitted).

In an action challenging an equal protection violation acted upon children, it is irrelevant and frankly nonsensical to demand that the adult members of a plaintiff organization are themselves injured by the complained-of law or policy. The parent members in *Parents Involved* were not required to be eligible for admission a Seattle high school to prove injury—the injury under the Equal Protection Clause was "being forced to compete in a face-based system that may prejudice the plaintiff"—and the Court specifically noted that injury was one the parent members "can validly claim on behalf of their children." 551 U.S. at 719; *see also Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023), *cert. denied*, 2024 WL 674659 (Feb. 20, 2024) (no requirement that parent members of plaintiff organization be personally injured by school admission policy); *Boston Parent Coal. for Academic Excellence Corp. v. Sch. Comm. for City of Boston*, 89 F.4th 46 (1st Cir. 2023), *petition for cert. pending*, No. 23-1137 (filed Apr. 17, 2024) (same).

Further, the cases Defendant cites in support of this heightened injury in fact requirement are inapposite, as none arise in the relevant contexts of associational standing or claims brought on behalf of minor children. ECF 32-2 at 12-13. For instance, *Rynasko v. New York Univ.*, 63 F.4th 186 (2d Cir. 2023), was a putative class action breach of contract claim brought by a parent on behalf of an adult child; *Harty v. West Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 2022), involved an Americans with Disabilities Act claim brought by an individual; *Fulani v. Bentsen*, 35 F.3d 49 (2d Cir. 1994), was an election and tax law case brought by an individual; and *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), was a Title VIII case concerning the Article III standing of individual respondents, not organizations. *In re Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), at least included an organizational plaintiff, but in this Establishment Clause case the plaintiffs denied standing were *individuals* whose injury was "discomfiture at watching the

government allegedly fail to enforce the law with respect to a third party"—a far cry from an equal protection lawsuit against a law that directly impacts the children of Plaintiff Organizations' members. *Id*. at 1025.

Nor are Plaintiffs attempting to bring claims "on behalf of one person arising from a violation of another person's rights," as Defendant contends. ECF No. 32-2 at 13. Plaintiffs' First Amended Complaint nowhere asserts that this case raises claims by parents on their own behalf. To the contrary, the First Amended Complaint expressly names N.C. as a Plaintiff whose claims are brought by her mother Yiatin Chu on her daughter's behalf, ECF No. 28 ¶¶ 4, 7, and also plainly states that the Organizational Plaintiffs' members "are devoted to fighting for equal opportunity in education *on behalf of their school-age children*," leading to "this civil rights action to *vindicate these children's equal protection rights*." ECF No. 28 ¶ 4 (emphasis added).

In focusing entirely on parents' inability to sue on their own behalf for violations of their minor children's rights, Defendant fails to even mention that parents can sue on behalf of their minor children for violations of these children's rights.[2] Defendant's cited cases are no help; all stand for the principle that parents cannot sue on their *own* behalf for violations of their minor children's rights, not that parents cannot sue on their minor children's behalf for violations of the minor children's rights. *See T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11 CV 5133(VB), 2012 WL 860367, at *3 (S.D.N.Y. Feb. 27, 2012) (mother brought claims both on her own behalf and on behalf of her daughter for injuries allegedly sustained by the daughter; court

[2] The closest Defendant comes to broaching the topic of parental representational standing is in a footnote recognizing that Yiatin Chu is a representative plaintiff in this case on behalf of her daughter, N.C. ECF No. 32-2 at 16 n.4. Far from addressing the obvious counterargument that parents can sue on behalf of their children when the children's constitutional rights are allegedly violated, Defendant attempts to spin Chu's representational standing as a lack of "standing to sue in [her] own right" under *Hunt*'s first prong. Such a strained reading of *Hunt* was rejected by the Supreme Court in *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 8-10 (1988).

dismissed mother's claims because she could not base a § 1983 action on her own behalf for injuries allegedly sustained by her daughter, but allowed some of daughter's claims to move forward with mother as representative); *Kaminski v. Comm'r of Oneida Cnty. Dep't of Soc. Servs.*, 804 F. Supp. 2d 100, 104-05 (N.D.N.Y. 2011) (mother lacked standing to raise claims under § 1983 on her own behalf for alleged constitutional injuries to her children only because her parental rights had been terminated, not because parents cannot sue on behalf of their children as a general matter); *Bliss v. Putnam Valley Cent. Sch. Dist.*, No. 7:06-cv-15509, 2011 WL 1079944, at *3 (S.D.N.Y. Mar. 24, 2011) (father lacked standing to bring a § 1983 claim on his own behalf for alleged injuries sustained by his daughter because she was not a minor or otherwise incapacitated at the time the suit commenced; had she been a minor then father could have brought § 1983 claim on her behalf); *Horton v. Bd. of Educ. of the Sherburne-Earlville Cent. Sch. Dist.*, 5:15-cv-00782, 2016 WL 2354266, at *2-3 (N.D.N.Y. May 4, 2016) (court dismissed the parents' § 1983 claims to the extent the parents raised the claims on their own behalf for alleged harms to their son because he was not a minor when the suit commenced, but also recognized that parents can raise § 1983 claims on behalf of their minor children); *H.B. v. Monroe Woodbury Cent. Sch. Dist.*, No. 11-cv-5881, 2012 WL 4477552, at *18-19 (S.D.N.Y. Sept. 27, 2012) (court dismissed § 1983 claims brought by parents only "[t]o the extent that [they] have asserted federal claims on their own behalf" based upon harms allegedly suffered by their minor child, while recognizing that "parents may sue on behalf of their minor child.");[3] *Morgan v. City of New York*, 166 F. Supp. 2d 817, 819 (S.D.N.Y. 2001) (mother's § 1983 claims dismissed because they were brought on her own behalf, not on behalf of her minor daughter who allegedly suffered constitutional injuries).

[3] The Court also spent considerable ink evaluating the claims raised on the child's behalf under a full-fledged FRCP 12(b)(6) analysis rather than dismissing them for lack of standing under FRCP 12(b)(1). *H.B.*, 2012 WL 4477552, at *8-18.

Contrary to Defendant's intent, the above cases actually support the Organizational Plaintiffs' associational standing by recognizing that parents may sue as representatives of their minor children for § 1983 violations of their children's rights.

C. Economic disadvantage is not a prerequisite for redressability

Finally, Defendant incorrectly contends that a favorable decision from this Court would not redress Plaintiffs' injury because if STEP's racial preferences were struck down, the family income requirement would still disqualify all Plaintiffs. ECF No. 32-2 at 5-6. Defendant again fails to understand that Plaintiffs are excluded from STEP because of their race, not their family income; if N.C. and the other children were black, Hispanic, Native American, or Alaskan Native their family income would be irrelevant. Because STEP offers preferential treatment based on race, any applicant who is not a member of those four preferred races—economically disadvantaged or not—would have standing to raise an equal protection challenge. *See Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1016 (D.C. Cir. 1997) (noting that a business development program applicant's injury stems from the fact that the "*entire* [business development] program—which injures [applicant] by foreclosing business opportunities—is infected by unconstitutional race consciousness"); *see also Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (noting that plaintiff "clearly has standing" to bring lawsuit challenging the use of race as one of many factors in admissions decisions). Defendant essentially demands that Plaintiffs allege that they "would have obtained the benefit" of admission to STEP in order to bring their equal protection claim—which is precisely what the Supreme Court held is not required in this type of challenge. *N.E. Fla.*, 508 U.S. at 666.

Further, family income is not the gatekeeper of an equal protection claim for racial discrimination. In this case, the question of economic disadvantage does not even arise until after

applicants clear STEP's racial preference. ECF No. 28 ¶¶ 18-22. Since Plaintiffs' challenge is to the antecedent question of whether STEP's racial preference violates applicants' right to equal protection, they need not allege economic disadvantage to bring their claims.[4] This Court should permit all Plaintiffs to proceed with their claims.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

Dated: May 24, 2024.

Respectfully submitted,

/s/ Erin E. Wilcox

DAVID J. HOFFA*
Ariz. Bar No. 038052
Pacific Legal Foundation
3241 E. Shea Blvd., Suite 108
Phoenix, AZ 85028
Telephone: (916) 419-7111
dhoffa@pacificlegal.org

**Pro Hac Vice*

ERIN E. WILCOX*
Cal. Bar No. 337427
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
ewilcox@pacificlegal.org

William A. Jacobson, Esq.*
James R. Nault, Esq.*
Equal Protection Project of the
Legal Insurrection Foundation
18 Maple Ave., #280
Barrington, RI 02806
Telephone: (401) 246-4192
contact@legalinsurrection.com
jnault@legalinsurrection.com

Counsel for Plaintiffs

[4] Plaintiffs maintain that a showing of economic disadvantage is unnecessary for Article III standing, but in the event this Court rules such a showing is required, Plaintiffs may seek leave to amend their Complaint.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

N.C. ex rel. YIATIN CHU; CHINESE AMERICAN CITIZENS ALLIANCE OF GREATER NEW YORK; INCLUSIVE EDUCATION ADVOCACY GROUP; and HIGHER WITH OUR PARENT ENGAGEMENT, Plaintiffs, v. BETTY A. ROSA, in her official capacity as Commissioner of Education for the State of New York, Defendant.	No. 1:24-cv-00075-DNH-CFH **DECLARATION OF ERIN E. WILCOX**

I, Erin E. Wilcox, declare as follows:

1. I am an attorney admitted to limited practice before this Court and engaged in the practice of law with Pacific Legal Foundation, attorneys for Plaintiffs N.C. ex rel. Yiatin Chu, Chinese American Citizens Alliance of Greater New York, Inclusive Education Advocacy Group, and Higher with Our Parent Engagement (Plaintiffs) in connection with the above-captioned matter. This declaration is submitted pursuant to Local Rule 7.1(b)(2) in support of Plaintiffs' Opposition to Defendant's Motion to Dismiss.

2. The New York Science and Technology Entry Program (STEP) is intended to serve "eligible students," which are defined as "secondary school students who are either economically disadvantaged or minorities historically underrepresented" in science, technical, and health-related fields. N.Y. Educ. Law § 6454(1)(b), (2). Applicants who are black, Hispanic, Native American, or Alaskan Native are considered underrepresented minorities under regulations promulgated

pursuant to STEP. 8 NYCRR § 145-6.5(a). Applicants who do not meet these racial requirements must qualify as "economically disadvantaged" by proving a family income below state-established thresholds. ECF No. 28 ¶ 14.

3. Plaintiffs filed their First Amended Complaint on April 5, 2024, ECF No. 28, alleging that the Science and Technology Entry Program's (STEP) use of racial and ethnic classifications, N.Y. Educ. Law § 6454(1)(b) and 8 NYCRR 145-6.5(a), violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. ECF No. 28 ¶ 32. Plaintiffs seek declaratory and injunctive relief prohibiting Defendant Rosa from enforcing the use of racial classifications and criteria in N.Y. Educ. Law § 6454(1)(b) and 8 NYCRR 145-6.5(a). ECF No. 28 at 11 (Prayer for Relief).

4. Plaintiff N.C. is a seventh-grader who is represented in this lawsuit by her mother, Yiatin Chu. ECF No. 28 ¶ 7. N.C. is a New York resident, in good academic standing with a GPA above 80 in English, math, and science, as well as overall, and is able and ready to apply for admission to the summer 2024 STEP program at New York University. *Id*. However, because N.C. is Asian American, her race makes her ineligible for this program. *Id*.

5. Plaintiff Chinese American Citizens Alliance of Greater New York (CACAGNY) is a New York City nonprofit with a mission to empower Chinese Americans. ECF No. 28 ¶ 8. CACAGNY's members include parents of New York City schoolchildren and the organization represents the interests of both these parents and their children. *Id*. Through a declaration, CACAGNY member Yiatin Chu stated her understanding that if her seventh-grade daughter was not Asian American, but instead was black, Hispanic, Native American, or Alaskan Native, then her daughter would be eligible to apply for STEP regardless of her family's income level, and it is her belief that STEP's eligibility requirements discriminate against Asian American applicants like

her daughter because of her race. Ex. A, ECF No. 28-1 ¶¶ 9-10. CACAGNY member Chien Kwok's tenth-grade son meets the residency and academic requirements for the summer and fall 2024 STEP programs at New York University and is able and ready to apply, but like Ms. Chu's daughter is ineligible due to his race. ECF No. 28 ¶ 8. Through a declaration, Mr. Kwok stated his understanding that if his son was not Asian American, but instead was black, Hispanic, Native American, or Alaskan Native, then he would be eligible to apply to STEP regardless of his family's income. Ex. B, ECF No. 28-2 ¶ 9. Mr. Kwok believes that the STEP student eligibility requirements discriminate against Asian American applicants like his son. *Id*. ¶ 10.

6. Plaintiff Inclusive Education Advocacy Group (IEAG) is a New York City grassroots parent organization whose mission is to fight discriminatory eligibility and admissions practices that restrict applicants based on race or ethnicity. ECF No. 28 ¶ 9. Through a declaration, an IEAG member stated that her eleventh-grade child attempted to apply for the summer 2023 STEP program at CUNY Baruch College but was unable to complete the application because her race made her ineligible. Ex. C, ECF No. 37 ¶ 7. This member's eighth-grade child is a New York resident, in good academic standing with a GPA above 80 in English, math, and science, and is ready and able to apply to admission to STEP sessions at New York University and CUNY Baruch College for summer 2024, but is ineligible due to his race. ECF No. 18 ¶ 9. The IEAG member stated her understanding that if her children were black, Hispanic, Native American, or Alaskan Native instead of Asian American, they would be eligible to apply to STEP regardless of their family's income, and STEP's student eligibility requirements discriminate against applicants like her children because of their race. Ex. C, ECF No. 37 ¶¶ 8, 14-15.

7. Plaintiff Higher with Our Parent Engagement (HOPE) is a New York City nonprofit organization with a mission to help Chinese-American parents in the New York City area,

particularly first-generation immigrants, understand the educational opportunities available to their children and offer guidance in navigating application processes. ECF No. 28 ¶ 10. HOPE also supports members whose children experience bullying and provides translation services to empower parents and grandparents to engage with their children's schools. *Id*. HOPE member Yifang Chen's sixth-grade son meets the residency and academic requirements for the fall 2024 STEP program at New York University and is willing and able to apply, but cannot because of his race. *Id.* Through a declaration, Ms. Chen stated her understanding that if her son were black, Hispanic, Native American, or Alaskan Native instead of Asian American, he would be eligible to apply to STEP regardless of his family's income. Ex. D, ECF No. 28-4 ¶¶ 9-10.

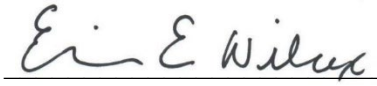
8. Plaintiffs allege that because of their race and ethnicity, N.C. and CACAGNY, IEAG, and HOPE members' children are excluded from consideration for STEP unless they can demonstrate economic disadvantage, which is a requirement that applicants who are black, Hispanic, Native American, or Alaskan Native are never required to meet. ECF No. 28 ¶ 25.

9. On April 19, 2024, Defendant filed a motion to dismiss Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1). ECF No. 32.

10. As set forth in Plaintiffs' memorandum of law in opposition to Defendant's motion to dismiss, all Plaintiffs have Article III standing and Defendant's motion to dismiss should be denied.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 24th day of May, 2024, at Austin, Texas.



Erin E. Wilcox