SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter of

UNITED JEWISH COMMUNITY OF BLOOMING GROVE, INC., JOEL STERN, As Parent and Natural Guardian of K.S., M.S., R.S., B.S., and F.S., Infants Under the Age of Eighteen Years, and YITZCHOK EKSTEIN, As Parent and Natural Guardian of J.E., C.E., M.E., and P.E., Infants Under the Age of Eighteen Years,

Petitioners/Plaintiffs-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Case No. 534406 Practice Law and Rules and for Declaratory Relief Pursuant to Section 3001 of the Civil Practice Law Albany County and Rules

-against-

WASHINGTONVILLE CENTRAL SCHOOL DISTRICT and THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents/Defendants-Appellants.

AFFIRMATION OF ROBERT S. ROSBOROUGH IV

Case No.: 534406

Albany County
Index No.: 906129-21

ROBERT S. ROSBOROUGH IV, ESQ., under the penalties of perjury, affirms as follows:

1. I am a partner with Whiteman Osterman & Hanna LLP, counsel to Petitioners/Plaintiffs-Respondents United Jewish Community of Blooming Grove, Inc. ("UJC"), Joel Stern as Parent and Natural Guardian of K.S. and M.S. and R.S. and B.S. and F.S., Infants under the Age of Eighteen, and Yitzchok Ekstein, as Parent and Natural Guardian of J.E. and C.E. and M.E. and P.E, Infants under the

Age of Eighteen (collectively, "Petitioners") in the above-referenced action.

2. I respectfully submit this Affirmation in support of Petitioners' motion for an order (1) granting leave to reargue the Opinion and Order of this Court dated and entered on June 2, 2022 pursuant to CPLR 2221(d) and, upon reargument, affirming the Supreme Court judgment; or (2) alternatively, granting permission to appeal to the Court of Appeals pursuant to CPLR 5602(a)(1)(i) to review and determine whether the Opinion and Order of this Court dated and entered on June 2, 2022 was properly made. A copy of this Court's June 2, 2022 Opinion and Order with notice of entry is attached hereto as **Exhibit A**.

3. As an initial matter, this motion is timely. On June 2, 2022, counsel for Respondents/Defendants-Appellants served Petitioners, through NYSCEF, this Court's Opinion and Order together with notice of its entry. A copy of the NYSCEF receipt of the Court's Opinion and Order together with notice of its entry is attached hereto as **Exhibit B**.

4. On June 28, 2022, within 30 days of service of the order with notice of entry, Petitioners have served and filed this motion for leave to reargue and for leave to the Court of Appeals (*see* CPLR 5513[b]).

5. The record on appeal in this matter is available on the NYSCEF Docket at Dkt. Nos. 41-43.

6. As explained in more detail below, this Court overlooked and misapprehended several principles of law in deciding the appeal.

7. Initially, this Court overlooked and misapprehended legal principles in

finding that Education Law §3635 is vague, requiring an inquiry into the legislative intent.

8. In interpreting a statute, this Court's analysis must begin, and can end, with the plain language of the statute, which is the best evidence of the Legislature's intent. Where, as here, the language chosen is unambiguous, the plain meaning of the words used must control.

9. As Supreme Court held in this case, Education Law §3635 is clear and unambiguous mandating that public school districts "*shall*" provide transportation "for all children residing within the school district" from kindergarten through 12th grade, within certain distances. The statute requires transportation to be provided to nonpublic school students "to and from school," without limitation.

10. This Court's interpretation, however, creates an artificial ambiguity in the statute where none exists. This Court held that just because Education Law §3635 is not explicit about "when" the transportation must be provided, it requires an inquiry into legislative intent.

11. But the statute does provide the "when" by requiring transportation to be provided to and from the nonpublic schools. Nonpublic school students are denied that very right when the public schools choose not to provide transportation to and from school on non-statutory holiday days the nonpublic schools are open, but the public schools choose to be closed, like the days around Thanksgiving or after Christmas.

12. Indeed, the Legislature is not obligated to specify every possible

scenario in the statute or define every word, so long as the purpose and meaning of the statute and its core terms are clear, as is the case here. When Education Law §3635(1) requires that all students must be provided transportation to and from school, and the New York Constitution requires parity between public and nonpublic school students, the statute is not vague and must be construed in accord with its plain meaning—public school students received transportation every day their school is open for instruction during the normal school week and school year, and section 3635(1) guarantees nonpublic school students the same.

13. In any event, even if this Court decided to inquire into the legislative intent, it misapprehended and overlooked that Education Law §3635(1) was intended to be a *remedial* statute, which must be construed broadly to fully effectuate its broad remedial purpose (*see Matter of Scanlan v Buffalo Pub. School Sys.*, 90 NY2d 662, 671 [1997]). If the legislative history is in any way unclear, the statute should be construed to serve its remedial purpose—here, to provide equal transportation to nonpublic school students.

14. This Court, in misapprehension of this legal principle and Court of Appeals decision in *Scanlan*, relied on Education Law §3635(2-a), which only applies to New York City, and then cherry-picked pieces of legislation that were meant to *restrict* the broad remedial mandates of Education Law §3635(1), in order to determine that the Legislature could not have intended for nonpublic school students to have the same rights to transportation as public school students.

15. When the legislative history is viewed as a whole, and the statute's

remedial purpose is considered, as is required, it is clear that the Legislature intended to guarantee equal transportation for nonpublic school students on days when their schools are in session during the regular school week and school year. That was precisely the purpose of the 1939 statute in the first place, to ensure that nonpublic school students would always have a way to get to their schools of choice. As the Legislature acknowledged, the choice to send children to nonpublic schools is meaningless otherwise.

16. Indeed, the legislative history shows that when the Legislature intended to limit the equal transportation guarantee for nonpublic school students, including by imposing distance limitations or requiring parents to make a formal request for transportation to their children's non-public schools each year, it did so *expressly*.

17. Thus, this Court misapplied and misapprehended the legal principles of statutory interpretation when it relied on Education Law §3635(2-a) and restrictions to Education Law §3635 in deciding what the legislative intent was.

18. Finally, this Court misapprehended the principles of law and fact when it held that "Supreme Court's broad view of the statute . . . would lead to unreasonable results."

19. There is nothing unreasonable in requiring the District to provide equal transportation to public and nonpublic school students, as is required by the statute. Indeed, not providing nonpublic school students with equal transportation will lead to inequitable, impractical and unreasonable results, as it places a burden

on students and parents to find alternative transportation methods.

20. Even if there is any additional burden, the Legislature has specifically chosen to place it on central school districts' shoulders rather than on the parents who choose to send their children to nonpublic schools (*see* Education Law §3635[1][a]). The Legislature has specifically provided that the District, through State aid and the taxes levied on its taxpayers, including Petitioners, must bear the costs to provide transportation to all school children.

21. And any additional administrative burden on the school districts is minimal—because the public schools are already running these transportation routes on days when they are open, they only need to do so on a few extra non-holiday days that they are choosing to be closed during the normal school year when the non-public schools are open. That minimal administrative burden is certainly not a justification for reading section 3635(1) contrary to its plain language that guarantees nonpublic school students transportation to and from school, without limitation.

22. Alternatively, at a minimum, this Court should grant Petitioners' leave to appeal to the Court of Appeals as the issues presented here are matters of first impression that will have an immense statewide impact. Indeed, this Court's order necessarily affects every single nonpublic school student and parents throughout the State, who have to arrange alternative transportation when their public schools choose not to provide the transportation that the statute requires.

23. Notably, this Court itself has acknowledged that this is a novel

complex statutory interpretation issue that has important statewide ramifications. And so too have the State Education Department and Washingtonville Central School District.

24. In opposing Petitioners' motions to vacate the automatic stay of Supreme Court's preliminary injunction and final judgment, SED specifically argued that doing so would "disrupt school districts' transportation planning across the State" (Affirmation of Beezly J. Kiernan, dated Sept. 13, 2021, App Div Case No. 533923, NYSCEF Dkt. No. 17, ¶ 32).

25. The School District agreed: "it is inevitable that in the event this Court vacates the statutory stay provided by CPLR 5519(a)(1) with regard to the executory directives issued to the District by the lower court through its November 18, 2021 Decision, Order and Judgment, school districts throughout the State of New York – which have reasonably relied upon the decision of the Commissioner of Education in *Appeal of David C. Brautigam* and the NYSED's consistent guidelines issued over almost three decades – will now be subjected to demands of nonpublic schools and the parents of their students throughout the State for, and be compelled to promptly provide, transportation for nonpublic school students on any days upon which their nonpublic schools are open, even though the public schools are closed" (Affirmation of Mark C. Rushfield, dated Dec. 2, 2021, App Div Case No. 534406, NYSCEF Dkt. No. 32, ¶ 11).

26. Whether nonpublic school children have equal transportation to schools, or whether they have to be left waiting at a bus stop for a bus that never

shows up and rely on their communities to find alternative transportation methods to get them to school – will have an impact on every family in the state who chooses to send their children to nonpublic schools and on our public education system as a whole.

27. The current status quo, when the District fails to provide nonpublic school students with equal transportation as public school students, places a huge burden on parents, disadvantages those students who attend parochial schools, such as Petitioners, and could lead to students missing school and getting behind in their programs of study.

28. It is hard to imagine a case more worthy of a grant of leave to appeal to the Court of Appeals than this one.

PROCEDURAL HISTORY

29. UJC is a not-for-profit community organization that provides support services for Jewish families throughout Orange County, New York (R61).

30. Petitioners Joel Stern and Yitzchok Ekstein are members of UJC, reside within the District, and send their children to nonpublic Hasidic Jewish religious schools in the Village of Kiryas Joel to foster the children's Jewish faith (R61-R62). Petitioners' residences are more than 2 miles, but less than 15 miles, from the nonpublic schools that their children attend, and their children are thus statutorily entitled to transportation to their nonpublic schools at the District's expense (R62).

31. Generally, throughout the school year, the District transports

Petitioners' children to their nonpublic schools, as required under the Education Law, but only on days when the District is open for instruction (R63).

32. The District has repeatedly denied Petitioners' requests to provide transportation on days the District is closed, despite the fact that Petitioners have repeatedly informed the District that its mandatory, statutory transportation obligation continues even on those days (R62, 64).

33. UJC was therefore forced to commence this proceeding seeking, among other things, that the Court declare that Education Law §3635(1) requires central school districts, such as the District here, to provide transportation to all nonpublic school students on all days when their nonpublic schools are open for instruction during the school year and compelling the District to provide all nonpublic students transportation accordingly (R58-R74).

34. UJC moved for a preliminary injunction to ensure that the required transportation for nonpublic school students would begin on August 30, 2021 when the student Petitioners had their first day of school (R109-R113; R167-R295). Respondents separately cross-moved to dismiss the Petition (R114-R166).

35. In a Decision and Order entered August 26, 2021, Supreme Court, Albany County (Lynch, J.) granted Petitioners a preliminary injunction compelling the District to comply with its statutory duty under Education Law §3635(1)(a) (R296-R309).

36. Supreme Court held that Petitioners had a likelihood of success on the merits because, on its face, the language of Education Law §3635(1)(a) guarantees

"all the children" who meet the grade level and mileage limitations transportation to and from school, without regard to whether the school they attend is private or public (R305-R306; *see* Education Law §3635[1][a]). The Court also held that section 3635(1)(a) does not condition the school districts' obligation to provide transportation to nonpublic school students on the districts being open (R306). In a separate order entered September 10, 2021, Supreme Court denied Respondents' cross motions to dismiss (R310-R313).

37. Respondents separately appealed the August 26, 2021 Supreme Court preliminary injunction order to this Court, which invoked an automatic stay of enforcement under CPLR 5519(a)(1) and deprived all nonpublic school students in the District of the statutorily guaranteed transportation for the first day of school on Monday, August 30, 2021. SED appealed and the District moved for permission to appeal the September 10, 2021 Supreme Court order, which this Court granted.

38. Respondents thereafter answered the Petition (R314-R324 [District's answer]; R325-R337 [SED's answer]).

39. Following joinder of issue, Petitioners moved for summary judgment on their claims for declaratory relief and a permanent injunction (R754-R758). The District opposed the motion (R763-R775), and SED cross-moved for summary judgment (R848-R854).

40. In a Decision, Order, and Judgment entered November 18, 2021, Supreme Court (1) granted Petitioners' motion for summary judgment, (2) denied SED's cross motion for summary judgment, (3) declared that "Education Law

§3635(1) requires the Washingtonville Central School District to provide transportation to all nonpublic school students on all days when their nonpublic schools are open for instruction, regardless of whether the public schools are open," and (4) granted a permanent injunction compelling the District to do so (R3-R19).

41. Supreme Court reasoned that the plain language of section 3635(1)(a) was clear and entitled nonpublic school students to transportation in parity with public school students—that is, transportation on all days during the school year when the nonpublic schools are open for instruction. The Supreme Court judgment thus declared SED's Transportation Rules and the District's transportation policy that had permitted central school districts to deny transportation to nonpublic school students on days when the public schools were closed invalid, as in violation of the requirements of Education Law §3635(1).

42. Respondents appealed the November 18, 2021 Supreme Court judgment.

43. In an Opinion and Order entered June 2, 2022, this Court reversed the Supreme Court judgment, holding that Education Law §3635 (1) (a) permits, but does not require, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools are closed. Thus, this Court declared that the District is not required to transport nonpublic school students on days when its public schools are closed, and that SED's Transportation Rules, to the effect that school districts outside New York City are permitted, but not required, to transport nonpublic school students on days when

public schools are closed, are valid.

44. Petitioners now make this motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals.

POINT I: THIS COURT SHOULD GRANT PETITIONERS' MOTION FOR REARGUMENT AS IT OVERLOOKED AND MISAPPREHENDED CRITICAL PRINCIPLES OF STATUTORY INTERPRETATION

45. A motion for leave to reargue is appropriate to challenge "law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]).

46. Here, this Court overlooked and misapplied applicable principles of statutory interpretation in its Opinion and Order, holding that Education Law § 3635 (1) does not require central school districts to provide transportation to nonpublic school students on all non-holiday days during the normal school week and school year that the nonpublic schools are open for instruction. Therefore, this Court should grant Petitioners reargument and, upon reargument, affirm the Supreme Court judgment.

A. *The Court Misapplied and Misapprehended Controlling Legal Principles In Holding That Education Law §3635 Is Vague*

47. This Court misapprehended controlling legal principles in holding that Education Law §3635 is vague.

48. This Court concluded:

> Inasmuch as the statute is silent as to when transportation must occur, and acknowledging the parties' conflicting interpretations – each of which is at least arguably persuasive, with both sides claiming that their interpretation treats all

> children equitably – we find that the legislative intent on this point cannot be gleaned from the statutory text alone, and therefore an examination of the legislative history is required (*see Matter of Shannon*, 25 NY3d 345, 352 [2015]; *People v Ballman*, 15 NY3d 68, 72 [2010]).

(Ex. A, p. 5).

49. This approach to the interpretation of the statute misapprehends and misapplies the necessary principles of statutory interpretation.

50. In interpreting a statute, this Court's analysis must begin, and can end, with the plain language of the statute (*see Matter of Theroux v Reilly*, 1 NY3d 232, 239 [2003] ["When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent."]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000] ["Of course, the words of the statute are the best evidence of the Legislature's intent."]).

51. Where, as here, the language chosen is unambiguous, the plain meaning of the words used must control (*see Jones v Bill*, 10 NY3d 550, 554 [2008] ["As a general proposition, we need not look further than the unambiguous language of the statute to discern its meaning."]; *Riley*, 95 NY2d at 463; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

52. This Court must apply 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" (*Hernandez v State of New York*, 173 AD3d 105, 111 [3d Dept 2019] [internal quotations and citation omitted]). In other words,

"[w]hen th[e] language is clear and leads to no absurd conclusion, the words must be accorded their plain and ordinary meaning" (*id.*). Moreover, a statute "must be construed as a whole and its various sections must be considered together and with reference to each other" (*id.*).

53. Here, the plain meaning of Education Law §3635(1) is clear and demonstrates the legislative intent for the statute.

54. Education Law §3635(1)(a) states, in relevant part:

> Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for *all the children residing within the school district to and from the school they legally attend*, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of fifteen miles, the distances in each case being measured by the nearest available route from home to school. *The cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district.*

(emphasis added).

55. The statute clearly provides that a central school district "*shall*" provide transportation for "*all* the children" who live within the District, attend grades kindergarten through twelve, and attend a school within the applicable

mileage restrictions (Education Law §3635[1][a] [emphasis added]).

56. Section 3635(1) does not differentiate between nonpublic and public school students, and the Legislature's choice to use the broad and expansive term "all the children" in Education Law §3635(1), "without qualification or restriction, was a deliberate one" (*Hernandez*, 173 AD3d at 112).

57. Section 3635(1) unambiguously provides that "all the children" shall be given transportation "to and from the school they legally attend" (Education Law §3635[1][a]).

58. That wording provides the "when" that this Court mistakenly held was missing. Central school districts must provide transportation for nonpublic school students "to and from school." That means even if the public schools choose to be closed on non-holiday days, transportation must still be provided to nonpublic school students to and from their schools. Indeed, no exceptions are made to that mandate, unlike the statutory language that the Legislature chose to apply to the optional transportation provided by the city school districts (*see id.* §3635[2-a]).

59. The Legislature's purposeful choice to require central school districts to provide transportation to nonpublic school students on all days when their nonpublic schools are open for instruction, as is provided to public school students, must be respected, not simply cast aside for convenience.

60. Because the plain language of Education Law §3635(1) is unambiguous, this Court did not need to resort to an examination the legislative history to determine the Legislature's intent (*see Matter of Walsh v New York State*

Comptroller, 34 NY3d 520, 524 [2019] ["Where the statutory language is unambiguous, a court need not resort to legislative history"]; *Matter of Auerbach v Board of Educ. of City School Dist. of City of New York*, 86 NY2d 198, 204 [1995]; *see also e.g. Matter of Whitfield v Avent*, 192 AD3d 1250, 1252 [3d Dept 2021] [applying the plain language of the statute and noting that although the Court did not need to look further than the statutory language, the legislative history confirmed the interpretation]).

61. This Court's finding that Education Law §3635(1) is vague because it does not specify "when" the transportation must be provided is contrary to these controlling legal principles.

62. Under the law of this State, a statute is not vague if it fails to define a word or specify its application to every possible scenario, that would be an impossible burden for the Legislature to sustain (*see e.g. Foss v City of Rochester*, 65 NY2d 247, 253 [1985] [holding that Real Property Tax Law § 305 was not vague because it permits fractional assessments to be made without specifying a fraction]; *People v Arroyo*, 3 Misc 3d 668, 672 [Crim Ct, Kings Cty 2004] ["A statute is not vague merely because it fails to define a word or term"]; *New Amber Auto Serv., Inc. v New York City Envtl. Control Bd.*, 163 Misc 2d 113, 118 [Sup Ct, NY Cty 1994] [holding that 15 RCNY § 31–53(a) is not vague because it fails to set out in writing complainant's standard of proof at the hearing]).

63. Indeed, Education Law §3635(1) does not specify the exact technical specifications of "transportation facilities" that must be provided. But it did provide

that all children must be provided transportation to and from school. Equality is what was intended. And the Legislature did not need to specifically provide that that transportation must run from September 1 to June 30, or specify that the nonpublic school students are still entitled to transportation to and from school on non-holiday days when the public schools choose to be closed, to guarantee that they receive the same transportation that public school students receive.

64. Here, the Legislature adopted a statute that expressly, clearly and unambiguously mandates that "all the children" shall be given transportation "to and from the school they legally attend" (Education Law §3635[1][a]). How specifically that mandate is implemented (i.e. what time the children are picked up, whether there is a single pickup or drop off point, and in what kinds of transportation facilities) is up to the District. However, the District cannot violate this clear and express mandate by failing to provide transportation to nonpublic school students, as it did here, simply because it chooses not to open on days when it is not statutorily required to be closed.

65. Thus, this Court erred in holding that Education Law §3635 is vague and requires an inquiry into the Legislature's intent.

B. *Even if Inquiry Into the Legislative Intent is Appropriate, This Court Misapprehended Legal Principles in Reviewing Legislative History*

66. Petitioners have outlined the legislative history of adoption of section 3635(1) in detail in their Respondents' Brief, *Statutory Background* Section, which is incorporated by reference herein, and is available at NYSCEF Dkt. No. 58.

67. What is clear from this history is the Legislature's intent to guarantee equal transportation for nonpublic school students on days when their schools are in session during the regular school week and school year.

68. Notably, Education Law §3635(1) was adopted as a *remedial* statute to implement the constitutional amendment to allow the Legislature to "provide for the transportation of children to and from any school or institution of learning" (NY Const art XI, § 3).

69. As a remedial statute, it should be construed "broadly" to effectuate its purpose – to provide equal transportation to all school students (*see Matter of Scanlan*, 90 NY2d at 676 ["Remedial statutes, of course, should be construed broadly so as to effectuate their purpose"]).

70. The broad purpose of Education Law §3635 is also evident by subsequent amendments to the statute.

71. Since adoption of Education Law §3635(1), whenever the Legislature sought to limit the transportation rights provided under section 3635(1), it did so expressly.

72. For example, in 1960, the Legislature limited the scope of the transportation mandate under Education Law §3635(1) to students who reside within a certain mileage of the school district (L 1960, ch 1074, § 1 ["1960 Amendment"]).

73. In 1961, the Legislature further limited the scope of the mandate by clarifying that (1) door-to-door transportation from home to a nonpublic school was

not required; (2) parochial school students only had the right to transportation to the nearest parochial school of a particular denomination; and (3) city school districts are not required to provide transportation to students (*see* L 1961, ch 959, § 1 ["1961 Amendment"]; Mem to the Governor from Louis J. Lefkowitz, Attorney General, Bill Jacket, L 1961, ch 959, at 8 ["One of the amendments in the above bill is to explicitly exclude city school districts from any mandatory requirement to provide transportation"]).

74. Notably, throughout the many times that the Legislature amended Education Law §3635(1) since it was adopted in 1939, the Legislature has *never added any language* that permits non-city school districts to refuse to provide the mandatory transportation for nonpublic school students on days when the public schools are closed (*see* Education Law §3635[1][a]).

75. That legislative omission can only be viewed as intentional, for had the Legislature intended to create that exception to the mandatory transportation that section 3635(1)(a) guarantees on days when the public schools are closed, it was "free . . . to draft appropriately worded legislation" that did so expressly (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209 [1976]; *see also e.g. Hernandez v State of New York*, 173 AD3d 105, 112 [3d Dept 2019]).

76. Since 1961, the Legislature has largely chosen to *expand* the scope of the remedial transportation mandate in Education Law § 3635(1), and to solidify the right to transportation for nonpublic students (*see* L 1974, ch 755; Bill Jacket, L

1974, ch 755, at 2 [increasing the mileage parameters to cover more nonpublic school students]; L 1981, ch 960; Bill Jacket, L 1981, ch 960; L 1990, ch 718, § 1; NY Session Law Serv. 718 [McKinney 1990] [designating central pickup points for nonpublic school students and mandating transporting students from the pickup points to nonpublic schools]; L 1978, ch 453; Bill Jacket, L 1978, ch 453 [eliminating the 1961 clause restricting parochial students' transportation to the nearest available parochial schools of their denomination]; L 1978, ch 719; Bill Jacket, L 1978, ch 719 [removing a non-city school district's ability to deny a late transportation request if a reasonable explanation was given for the lateness]).

77. This Court, however, chose to ignore the remedial nature of the statute and its broad effect and purpose, which is supported by its legislative history of placing *only express limitations* upon the mandatory rights of nonpublic school students to transportation to and from school under section 3635(1)(a).

78. Rather, this Court focused on the 1985 amendment that added section 3635(2-a), which applies only to the optional transportation that city school districts may choose to provide under section 3635(1)(c), and does not address the Legislature's intention when it adopted the mandatory transportation obligation under section 3635(1)(a) (*see People v Barnes*, 26 NY3d 986, 989-990 [2015] ["In light of the statute's plain language, we decline defendant's invitation to consult the legislative history of a *different* statute"]).

79. In 1985, the Legislature amended Education Law §3635 to add a new Education Law § 3635(2-a), which required New York City school districts to

"provide transportation to nonpublic schools for a maximum of five alternative days on which the public schools are scheduled to be closed" (Bill Jacket, L 1985, ch 906, at 8; *see* L 1985, ch 906 ["1985 Amendment"]). The 1985 Amendment provided that the alternative days would need to be agreed to in advance and were limited to specifically enumerated holidays (Bill Jacket, L 1985, ch 906). The purpose of the 1985 Amendment was to "authorize the transportation of nonpublic school students in New York City for up to five (5) days on which the public schools [were] scheduled to be closed," to "enable the nonpublic schools to carry on a full educational program without being penalized for scheduling a limited number of school days to meet the special needs of the nonpublic schools" (*id*. at 8).

80. The 1985 Amendment only applies to New York City school districts, however, and does not apply to central school districts, like the District here. Notably, the 1985 Amendment did not change the text of Education Law § 3635(1), or otherwise alter the mandatory obligations of central school districts to provide transportation to nonpublic school students.

81. This Court stated that the reason for this revision was to "expand the number of required transportation days, and not to limit a previously unrestricted transportation obligation" (Ex. A, p. 5).

82. In light of the prior amendments to section 3635(1)(a) and the legislative history underlying them, which show that the Legislature intended a broad remedial transportation guarantee for nonpublic school children, notwithstanding any burden that would be placed on the school district, any

revision to the language of section 3635(1)(a) clearly would have imposed a significant *limitation* on the rights of the nonpublic school students, and not an expansion (*see* Respondents' Brief, *Statutory Background*; Bill Jacket, L 1974, ch 755, at 9 [noting that "the right to attend a nonpublic school is meaningless if the pupil has no way of getting to and from school" and the "cost of providing the transportation, while high, is much less than the cost of educating the pupils"]). When the Legislature has done that previously, it was always done expressly.

83. The Legislature's rejection of the proposed limitation of central school district's obligations to transport nonpublic school students, to only two days (rather than all non-holiday school days) when the public schools are closed, therefore, can only be viewed as a reaffirmation of the Legislature's prior intent that nonpublic school students should receive transportation to and from school each day that their schools are open for instruction.

84. Indeed, to the extent the amendment was proposed to expand the nonpublic school students' rights, the Legislature could have easily concluded that no language regarding non-city school districts was needed, because the existing language already requires those school districts to provide transportation on the non-holiday days when nonpublic schools are open but the school districts are closed, and no further limitation of that obligation was intended.[1]

[1] This interpretation of the Legislature's intent is in line with the subsequent history of the 1985 Amendment. Notably, since 1985, the Legislature has twice expanded the list of eligible days off and holidays, and added another provision that, at times, allows nonpublic schools up to ten days of transportation on days when the city school district is closed (L 1996, ch 474, §§ 91, 92; 1996 McKinney's

85. Regardless of the supposed intent, however, the proposed amendment to the central school district's transportation obligations was never adopted, and therefore is not persuasive (*see Clark v Cuomo*, 66 NY2d 185, 190-191 [1985] ["Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" (quotation marks omitted)]).

86. Thus, this Court impermissibly used the history of section 3635(2-a) to vary the plain language that the Legislature chose to command central school district to provide transportation to nonpublic school student to and from school, in violation of legal principles of statutory interpretation (*see Commonwealth of N. Mariana Is. v Can. Imperial Bank of Commerce*, 21 NY3d 55, 62 [2013] [a court "cannot read into the statute that which was specifically omitted by the legislature"]; *see also Makinen v City of New York*, 30 NY3d 81, 88 [2017] ["Even if the NYCHRL was intended to be more protective than the state and federal counterparts, and even if its legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation, the NYCHRL still must be interpreted based on its plain meaning." (cleaned up)]).

87. This Court's conclusion that the Legislature has not intervened, by way of any statutory amendment, to correct SED's longstanding interpretation of

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Session Law News of NY, ch 474 [A11335]; L 1997, ch 34, § 1; 1997 McKinney's Session Law News of NY, ch 34 [A6298–A]; L 2005, ch 424, § 1, eff. Sept. 1, 2005; 2005 McKinney's Session Law News of NY, ch 424 [A8398–A/S5423–A]). None of those amendments, however, apply to central school districts or otherwise affect the mandatory transportation required under section 3635(1)(a).

Education Law §3635 (Ex. A, p. 6) similarly misapprehends legal principles. None of the proposed bills that were not passed by the Legislature specifically reference SED's interpretation of section 3635(1), and this Court cannot simply assume that the Legislature knew about the interpretation and acquiesced to it, without such evidence (*see Roberts v Tishman Speyer Properties, L.P.*, 13 NY3d 270, 287 [2009] [declining to infer that "the Legislature's inactivity in the face of DHCR's interpretation of the statute constitutes its acquiescence thereto" because "at the time the Legislature most recently considered the statute, there is no indication that the specific question presented here—that DHCR's interpretation is improper and conflicts with the plain language of the statute—had been brought to the Legislature's attention"]).

88. Rather, it is this Court's role to interpret the laws of this State and give appropriate effect to the legislative intent while ensuring the equal rights of all individuals (*see generally Campaign for Fiscal Equity, Inc. v State*, 100 NY2d 893, 904 [2003] ["Courts are, of course, well suited to adjudicate civil and criminal cases and extrapolate legislative intent. They are, however, also well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights" (internal citation omitted)]).

89. SED has been inequitably and illegally applying Education Law § 3635, and preventing nonpublic school students' access to equal transportation facilities to and from their schools. This unequal application of the statute is

exactly what this Court is called to review.

90. This Court therefore misapprehended its role in stating that it is up to the Legislature to intervene in the application of its unambiguous statute.

C. *This Court Misapprehended Law In Holding That Supreme Court's Interpretation of The Statute Would Lead To "Unreasonable Results"*

91. This Court held that

> We reject Supreme Court's broad view of the statute . . . because it would lead to unreasonable results (*see People ex rel. McCurdy v Warden, Westchester County Corr. Facility*, 36 NY3d 251, 262 [2020]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 255 [2019]). To be sure, the Legislature could not have intended to require school districts to transport nonpublic school students in the summer, on weekends, on state or federal holidays, or on days when public schools are closed for weather-related or other emergency reasons, none of which would be foreclosed by Supreme Court's interpretation.

(Ex. A, pp. 6-7).

92. The Court misapprehended legal principles in holding that interpreting Education Law § 3604 as requiring school districts to transport nonpublic school students to and from school on days when the public schools are closed would lead to "unreasonable results."

93. The Court's interpretation of the statute actually unjustifiably grants central school districts a windfall, as a practical matter.

94. For example, the District is relieved from providing transportation to the student Petitioners on 20 days during the normal school year when the District's schools are open, because Petitioners' nonpublic schools are closed in

observance of religious holidays (R108, R170, R268-R269). Thus, Petitioners' request for transportation to their nonpublic schools did not ask the District to provide any more transportation days than it already provides to public school students. Petitioners merely sought transportation, which the District has contracted with a private transportation company to provide (R177-R179), on different instructional days based on the differences in the nonpublic schools' calendars.

95. Thus, this is not an additional burden on the District.

96. And even if it was, it is a burden that the Legislature has specifically chosen to place on central school districts' shoulders rather than on the parents who choose to send their children to nonpublic schools (*see* Education Law §3635[1][a] ["The cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district."]).

97. The Legislature has specifically provided that the District, through State aid and the taxes levied on its taxpayers, including Petitioners, must bear the costs to provide transportation facilities to all school children. Any additional financial burden on the District, therefore, is not a basis upon which to disregard the plain language construction of section 3635(1) (*see Scanlan*, 90 NY2d at 677 [rejecting "significant fiscal implications" as a basis to choose a different construction of the statute]).

98. As a practical matter, this Court's interpretation of the statute has

created an unequal two-tiered system of transportation that denies nonpublic school students the same rights that are guaranteed to public school students. For public school students, the bus comes to bring them to and from school every day that their schools are open for instruction. For nonpublic school students, however, they are denied transportation, leaving their parents burdened with finding a different way to school, whenever the public schools choose to be closed. That is not an equitable and practical outcome, as this Court suggests.

POINT II: THIS COURT SHOULD ALTERNATIVELY GRANT PETITIONERS LEAVE TO APPEAL TO THE COURT OF APPEALS

99. Alternatively, and at a minimum, the Court should grant Petitioners leave to appeal because the Court's Opinion and Order presents a novel issue of statewide public importance – whether Education Law § 3635(1)(a) requires central school districts to provide transportation to all nonpublic school students on all days their nonpublic schools are open for instruction, regardless of whether the public schools are open.

100. The constitutional provisions governing leave to appeal to the Court of Appeals provide that "[s]uch an appeal shall be allowed when required in the interest of substantial justice" (NY Const., Art. VI, § 3[6]; *see also* CPLR [a] [1] [i]).

101. Leave to appeal to the Court of Appeals should be granted where, as here, the issues presented are "novel or of public importance . . . or involve a conflict among the departments of the Appellate Division" (22 NYCRR 500.22 [b] [4]).

102. This Court has recognized that this issue is novel, includes complex issues of statutory interpretation, and has important statewide implications (Ex. A,

pp. 3-7).

103. As explained above, this case involves complex issues of statutory interpretation that are appropriate for the Court of Appeals to review and decide.

104. Additionally, this case has significant statewide implications.

105. Transportation to and from school is an essential part of a child's education. For many, busing provided by the public school district is the only way nonpublic school students can get to their schools. Many parents' work schedules prevent them from bringing their children to school each day. Many other parents may have only one car that they have to take to get to work. Still others have children of different ages attending nonpublic schools in different locations, so it is impossible to get each child to school at the same time.

106. In the current status quo, the District has adopted transportation policies, in contravention of section 3635(1)'s mandate, that treat nonpublic school students differently than their public school counterparts.

107. While public school students receive transportation to school every day that their school is in session during the school year, nonpublic school students do not. They are only provided transportation when the public schools are open, under Respondents' policies. If the nonpublic schools choose to follow a different school calendar than the public schools—as many do based on the observation of religious holidays—their students are denied transportation they are required to receive under section 3635(1) on the many days when the public schools are closed, but the nonpublic schools are open.

108. For example, Hasidic Jewish religious schools in the Village of Kiryas Joel do not close for the District's recesses on the day before and after Thanksgiving, the days around Christmas, and the February recess. These are not federal or state holidays and, yet, the District refuses to provide transportation on those days merely because it chooses to be closed.

109. Leave to appeal to the Court of Appeals should be granted to allow that Court to settle this issue statewide in accord with Education Law §3635(1)'s plain meaning and broad remedial purpose.

110. Indeed, it is difficult to imagine a case that is more worthy of the Court of Appeals' review to ensure that all children have equal transportation to and from school.

111. Therefore, this Court should grant Petitioners' leave to appeal to the Court of Appeals.

CONCLUSION

112. For the foregoing reasons, Petitioners/Plaintiffs-Respondents United Jewish Community of Blooming Grove, Inc. ("UJC"), Joel Stern as Parent and Natural Guardian of K.S. and M.S. and R.S. and B.S. and F.S., Infants under the Age of Eighteen, and Yitzchok Ekstein, as Parent and Natural Guardian of J.E. and C.E. and M.E. and P.E, Infants under the Age of Eighteen (collectively, "Petitioners") respectfully request that this Court issue an order (1) granting reargument of the Opinion and Order of this Court dated and entered on June 2, 2022 pursuant to CPLR 2221(d), and upon reargument affirming the Supreme

Court judgment; (2) alternatively, granting permission to appeal to the Court of Appeals pursuant to CPLR 5602(a)(1)(i) to review and determine whether the Opinion and Order of this Court dated and entered on June 2, 2022 was properly made and entered; and (3) granting such other and further relief as this Court deems just and proper.

Dated: June 28, 2022

Robert S. Rosborough IV