20-1998

To Be Argued By:
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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CONNECTICUT PARENTS UNION,
Plaintiff-Appellant

v.

MIGUEL A. CARDONA, in his capacity as Commissioner, Connecticut State Department of Education, ALLAN B. TAYLOR, in his official capacity as Chairperson of the Connecticut State Department of Education's Board of Education, NED LAMONT, in his official capacity as Governor of Connecticut, WILLIAM TONG, in his official capacity as Connecticut Attorney General,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Connecticut Parents Union ("CTPU") brought this case alleging that Connecticut law and practice concerning interdistrict magnet schools violated, *inter alia*, the Equal Protection Clause. CTPU therefore asserted "arising under" federal jurisdiction. *See* 28 U.S.C. § 1331. The District Court (Underhill, J.) dismissed the complaint because CTPU lacks Article III standing.

On June 23, 2020, CTPU filed a timely notice of appeal. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

On August 19, 2020, Defendant-Appellee Connecticut Commissioner of Education issued interdistrict magnet schools reduced-isolation standards that altered the practices challenged by CTPU. Specifically, Connecticut no longer penalizes interdistrict magnet schools for any failure to meet reduced isolation standards. *See infra*. Accordingly, in addition to lacking standing, CTPU's claims are now moot. *See Lamar Adver. of Penn, LLC v. Town of Orchard Park,* 356 F.3d 365, 376-79 (2d Cir. 2004).

STATEMENT OF THE ISSUES

1. Whether CTPU has standing to challenge laws and policies regarding Connecticut's interdistrict magnet schools outside of the Hartford region where CTPU merely expends time and resources in opposition to the aforementioned laws and policies?
2. Whether the "reduced isolation" standards (RIS) promulgated by the Commissioner of Education after the District Court decision renders the Plaintiff's claims moot where the RIS provide that "there shall not be any negative consequences" for any Connecticut interdistrict magnet school that does not meet the reduced isolation standard?

COUNTER STATEMENT OF THE CASE

CTPU was established in 2011. *See* Appellant's Appendix (hereafter "A.A.") 29, ¶4. At that time, Connecticut law already included racial standards applied to its non-Hartford interdistrict magnet schools. Public Act 02-7 of the Connecticut General Assembly May Special Session (May 2002) added a 75% racial standard for

interdistrict magnet schools that began operations after July 1, 2005.[1] CTPU brought this lawsuit on February 20, 2019.

Currently eight school districts and five Regional Education Service Centers in Connecticut operate host interdistrict magnet schools in accordance with Connecticut law supporting "racial, ethnic and economic diversity." Conn. Gen. Stat. § 10-264*l*(a).

CTPU alleges that the RIS promulgated by the Commissioner on October 23, 2017 ("2017 Memorandum") pursuant to Conn. Gen. Stat. § 10-264*l* violates the Equal Protection Clause. Those standards required non-Hartford area interdistrict magnet schools[2] to enroll at

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[1] Under Public Act 02-7 pre-July 1, 2005 interdistrict magnets were held only to an 80% residency requirement. At the time CTPU filed suit all interdistrict magnets were subject to a residency and racial standard pursuant to Public Act 17-172 and the Commissioner's then standards.

[2] Conn. Gen. Stat. § 10-264*l*(a) provides in pertinent part:

> For the purposes of this section "an interdistrict magnet school program" means a program which (i) supports racial, ethnic and economic diversity, (ii) offers a special and high quality curriculum, and (iii) requires students who are enrolled to attend at least half-time. . . . For the school years commencing July 1, 2017, and July 1, 2018, the governing authority for each interdistrict magnet school program shall (I) restrict the number of students that may enroll in the school from a participating district to seventy-five per cent of the total school enrollment, and (II) maintain a total school

least 25% "reduced isolation" ("RI") students. A.A. 15. RI students were defined by the Commissioner as anyone who is "any combination other than Black/African American or Hispanic." A.A. 15. CTPU alleges that the RIS "in effect creates a 75% cap on Black and Hispanic students at every interdistrict magnet school in Connecticut"[3] in violation of the Equal Protection Clause. A.A. 15. The 2017 Memorandum permitted the Commissioner with the authority to "impose a financial penalty on the operator . . . . of an interdistrict magnet school that does not meet the RIS for two consecutive years . . . ." A.A. 27. CTPU alleges that an interdistrict magnet school in New Haven failed to "maintain the mandated 75% cap on Black and Hispanic student enrollment" and "faced sanctions in excess of $100,000." A.A. 16.

> enrollment that is in accordance with the reduced-isolation setting standards for interdistrict magnet school programs, developed by the Commissioner of Education pursuant to section 10-264r.

[3] In a separate action CTPU's counsel represented a group of plaintiffs who challenged Connecticut laws governing the Hartford area interdistrict magnet schools. *See Robinson v. Wentzell,* No. 18-cv-274-SRU, 2019 U.S. Dist. LEXIS 41355, 2019 WL 1207858 (D. Conn 2019). The *Robinson* parties stipulated to a dismissal after the Hartford area magnet schools switched to a socioeconomic (race neutral) admissions standard.

CTPU bases its claim of constitutional injury/standing on an allegation that Connecticut law and policy "compels CTPU to expend a significant amount of time and resources opposing the unconstitional cap" at the expense of engaging in other activities, such as testifying before the Connecticut Board of Education on school safety issues or supporting special needs students at IEP meetings. A.A. 17, 29-30.

CTPU is seeking, *inter alia*, (1) a declaratory ruling that the state laws governing the makeup of the interdistrict magnet schools violates the Equal Protection Clause, and (2) an injunction preventing the Defendants from "using race in future interdistrict magnet school enrollment decisions." A.A. 21-22.

The District Court decision dismissing CTPU's complaint was issued by Judge Underhill on May 26, 2020 and is available at 2020 WL 2735705 and 2020 U.S. Dist. LEXIS 91298. The District Court dismissed CTPU's complaint because "CTPU has failed to plead organizational standing because it has not plausibly alleged that it suffered an injury 'fairly traceable' to [Public Act 17-172] or to the actions of the defendants." A.A. 41.

On August 19, 2020 the Commissioner of Education issued a new memorandum (hereafter "August 2020 Memorandum") pursuant to Conn. Gen. Stat. § 10-264r. The August 2020 Memorandum replaced the 2017 Memorandum. Critical to this appeal, the new memorandum contained a section entitled "Waiver" which provided in pertinent part: "[i]f an interdistrict magnet school does not meet the applicable RIS standard promulgated by the Commissioner, there shall not be any negative consequences for any school, school operator, or the State Department of Education." *See* Doc. 50 at 5-6.

On September 22, 2020 the Defendants-Appellees filed an unopposed motion to supplement the record containing the August 2020 Memorandum. Doc. 50. Plaintiffs-Appellants did not object to the motion but do not necessarily agree with its legal significance. On September 23, 2020 the motion to supplement was referred to the merits panel. Doc. 53.

SUMMARY OF ARGUMENT

Plaintiff-Appellant CTPU challenges Connecticut law and policy regarding the racial composition of Connecticut's non-Hartford region interdistrict magnet schools. The gravamen of CTPU's challenge is to

the RIS issued by the Connecticut Commissioner of Education in 2017 pursuant to Conn. Gen. Stat. § 10-264r. *See* A.A. at 24-27. Those standards defined the term "reduced isolation" ("RI") and provided that non-Hartford region interdistrict magnet schools met the RIS if, *inter alia*, RI students constituted at least 25 percent of the total school enrollment. *Id.* The 2017 Memorandum also permitted the Commissioner to "impose a financial penalty on the operator . . . . of an interdistrict magnet school that does not meet the RIS for two consecutive years." A.A. 27. CTPU argues that the RIS constitutes a "statewide racial quota" by which "Black and Hispanic students are denied admission to interdistrict magnet schools in favor of white and Asian students." A.A. 17. CTPU argues that the "statewide racial quota" violates the Equal Protection Clause of the Fourteenth Amendment. A.A. 19.

On August 19, 2020 – after the Plaintiff's filed their notice of appeal and appellate brief – the Commissioner issued the August 2020 Memorandum pursuant to Conn. Gen. Stat. § 10-264r. The August 2020 Memorandum replaced the 2017 Memorandum. Critical to this appeal, the new memorandum contained a section entitled "Waiver"

which provided in pertinent part: "[i]f an interdistrict magnet school does not meet the applicable RIS standard promulgated by the Commissioner, there shall not be any negative consequences for any school, school operator, or the State Department of Education." *See* Doc. 50 at 5-6.

The August 2020 memorandum has altered the standards applicable to Connecticut's interdistrict magnet schools. The Commissioner of Education will no longer impose a financial penalty on schools that do not meet the RIS. Without a penalty imposed by the State of Connecticut, there is no longer any state action allegedly violating the Constitution and subject to perspective relief. Thus, even if CTPU has standing, CTPU's claims are moot. *See Lamar Advert. of Penn, LLC*, 356 F.3d at 376-79.

CTPU asserts it has Article III standing because it "spend[s] significant resources to counteract the effect of the racial quota, helping parents navigate the magnet school landscape, hosting community forums, and at the same time advocating for the repeal of the law." CTPU Brief 7. CTPU is not asserting the rights of any students or parents who would or could attend Connecticut interdistrict magnet

schools. CTPU's plenary vision of Article III standing would effectively eviscerate the law of standing. Deeply held opposition views manifested in forums and other similar activities are not injuries-in-fact for Article III purposes. This court has never held that such opposition activities cloak an organizational plaintiff otherwise uninvolved with the challenged state law with the requisite constitutional injury. In fact, this court recently made clear in a similar challenge to school entrance policies in New York City "expenditure of monetary resources on advocacy" does not "demonstrate[] an injury sufficient to secure injunctive relief." *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 788 Fed. Appx. 85, (Mem)–86 (2d Cir. 2019). *See infra.*

ARGUMENT

I. CTPU Lacks Standing To Challenge Connecticut's Interdistrict Magnet Schools' Law And Policy

CTPU is an advocacy group that seeks to establish constitutional injury solely on the basis of expending time and resources in opposition to well established Connecticut law regarding the racial makeup of interdistrict magnet schools. To allow CTPU standing on this basis would greatly expand Circuit precedent regarding organizational

standing and would allow any interest group unsuccessful with the political process standing to challenge any law with which it disagreed, so long as it expended time and resources in opposition to that *existing* law.

A. Legal Standard

To establish constitutional standing a plaintiff must satisfy three elements: (1) it must have personally suffered an injury in fact that is both concrete and particularized and actual or imminent; (2) there must be a causal connection between Plaintiff's injury and the challenged statute; and (3) it must be likely, and not merely possible or speculative, that the injury will be redressed by a favorable decision. *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 175 (2d Cir. 2006).

However, it has long been the rule in this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983. *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973).

With respect to an organization such as CTPU, in order to establish standing *as an organization,* the organization must establish the following three elements: "(i) an imminent 'injury in fact' to itself as

an organization (rather than to its members) that is 'distinct and palpable'; (ii) that its injury is 'fairly traceable' to enforcement of the [law at issue]; and (iii) that a favorable decision would redress its injuries." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109-10 (2d Cir. 2017).

The Supreme Court has held that an organization can show injury in fact by demonstrating that there has been a "perceptible impairment" of an organization's activities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). However, "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

Additionally, when "a party seeks review of a prohibition prior to its being enforced, 'somewhat relaxed standing' rules apply." *Id.* at 110 (quoting *Nat'l Org. for Marriage, Inc. v. Walsh,* 714 F.3d 682, 689 (2d Cir. 2012)).

The District Court concluded that CTPU had failed to establish the second element for organizational plaintiffs – that its injury was fairly traceable to Connecticut interdistrict magnet school law or policy.

A.A. 41. The District Court found that CTPU is "not the object" of Connecticut law "and the complaint does not allege that parents whose children were impacted by the Act were forced to seek assistance from CTPU." A.A. 43. The District Court also distinguished CTPU from the plaintiffs in *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) and *Nnebe v. Daus*, 644 F.3d 147. 150 (2d Cir. 2011). A.A. 44-45. Finally, the District Court held that the holdings of two recent Second Circuit decisions did not inform the causation analysis because they concerned the first prong of standing, injury. A.A. 45.

B. CTPU Lacks Constitutional Injury

CTPU was formed in 2011, well after the State of Connecticut required that the Department of Education establish interdistrict magnet school programs which "support[] racial, ethnic and economic diversity." Public Act 02-7. Passed in 2002, Public Act 02-7 required interdistrict magnet schools in operation after July 1, 2005 to maintain a school enrollment of not more than seventy-five percent "racial

minorities."[4] Accordingly, the "somewhat relaxed" rules of standing discussed in *Centro* do not apply.

CTPU relies principally that four cases from this court (*Ragin, Nnebe, Centro* and *N.Y. State Citizens' Coal. For Children v. Poole*, 922 F.3d 69, 75 (2019)) have "established a broad view" of the Supreme Court's "injury-in-fact holding" in *Havens* and that under those cases CTPU has established standing. A.A. 21. CTPU's reliance is misplaced.

This court appears to have first applied *Havens* in the *Ragin* case in 1993. *Ragin* was, like *Havens*, a case brought under the Fair Housing Act, 42 U.S.C. § 3604(c). *Ragin* therefore involved a straight-forward – indeed parallel – application of the Supreme Court's standing analysis in *Havens*. Judge Miner explained the holding in

[4] In 1996 the Connecticut Supreme Court ruled that the Hartford school system was segregated in violation of the Connecticut Constitution. *See Sheff v. O'Neill*, 238 Conn. 1 (1996). "The state's response to the Supreme Court's decision was swift." *Sheff v. O'Neill*, 45 Conn. Supp. 630, 634 (Conn. Super. 1999). In 1997 the Connecticut General Assembly began passing laws intended to address the issues discussed by the Connecticut Supreme Court in the *Sheff* decision. *See id.* at 635. The General Assembly passed laws and programs intended to address "racial, ethnic and economic isolation" throughout Connecticut. *Id.* at 636. "The structure for the operational funding of interdistrict magnet schools is designed to encourage racial and ethnic diversity." *Id.* at 640.

Havens as follows: "The Court held that a perceptible impairment of a housing organization's ability to provide counseling and referral services constituted an actionable injury in fact." *Ragin,* 6 F.3d at 905. The *Ragin* court applied the holding of *Havens* and concluded that the plaintiff had been "forced" to "devote significant resources to identify and counteract" the advertising practice at issue, to "the detriment of their 'efforts to [obtain] equal access to housing through counseling and referral services." *Id.* at 905 (citing *Havens*, 455 U.S. at 379).

Nnebe was a case brought pursuant to 42 U.S.C. § 1983 and involved a challenge to the NYC Taxi and Limousine Commission policy that suspended a taxi driver's license without a hearing if the driver was charged with a certain crime. 644 F.3d at 150. The *Nnebe* court applied the "perceptible injury" standard espoused in *Havens* to the organizational plaintiff's claims. However, the panel made clear that it was not adopting a perceptible injury analysis that allowed "organizations to 'manufacture' standing by bringing a suit." *Id.* at 157. The *Nnebe* court explained that the plaintiff organization "far from trolling for grounds to litigate, has allocated resources to assist drivers only when another party – the City [of New York] – has initiated

proceedings against one of its members." *Id.* at 157-58. It was on the basis of this specific and unique relationship between the union and the challenged conduct that the court based a finding of injury:

> The Alliance brings this suit so that when it expends resources to assist drivers who face suspension, it can expend those resources on hearings that represent bona fide process. That is an interest specific to [the organizational plaintiff], independent of the interest of individual drivers in their licenses.

Id. at 158.

As the District Court found, in both *Ragin* and *Nnebe* there was a direct connection between the challenged conduct and the organization's mission that caused injury to the organization. CTPU lacks that connection to the challenged interdistrict magnet school laws. CTPU argues that Connecticut's interdistrict magnet school law and policy "compels" it to expend resources and time that it would otherwise spend on its other activities. However, the existing magnet school laws and policy do not compel such a reaction. Rather, CTPU is, by its own definition, a group that seeks "to advocate for equal educational opportunity for all children in Connecticut." A.A. 17-18. Under CTPU's view of injury, there is virtually no education-related law in Connecticut that they would not have standing to challenge. CTPU is an advocacy

group and therefore does not have the same relationship to the challenged conduct that the organizational plaintiffs had in *Ragin* and *Nnebe*.

Similarly, the *Centro* case does not support CTPU's argument. *Centro* involved a First Amendment challenge to a town Ordinance which "principally imposed the following restriction":

> It shall be unlawful for any person standing within or adjacent to any public right-of-way within the Town of Oyster Bay to stop or attempt to stop any motor vehicle utilizing said public right-of-way for the purpose of soliciting employment of any kind from the occupants of said motor vehicle.

868 F.3d at 107. Two organizations brought suit challenging the Ordinance. The organizational plaintiff's mission was to

> end the exploitation of Latino immigrant workers on Long Island and to achieve socioeconomic justice by promoting the full political, economic and cultural participation of those workers in the communities in which they live. . . . [The organizational Plaintiff] furthers its mission with the participation of Latino immigrant workers on Long Island through community organizing, legal support, education, leadership development, and building worker cooperatives.

Id. at 110 (internal quotation marks and citations omitted). By a split decision a panel of this court concluded that the organizational plaintiffs had organizational standing in three separate ways.

The *Centro* majority first found that Article III injury was established because the ordinance itself interfered with the Plaintiff organizations' ability to meet with workers at day laborer sites and provide them services. *Id.* at 111. *Having already found that the organizational Plaintiff established standing on this basis*, the majority then proceeded to analyze whether standing could also be established based on expending resources in order to challenge the Ordinance. The majority concluded that – as a result of the first finding – the organization would then have to use its resources to reach the workers through alternative methods. *Id.* at 110 ("Relatedly, it is also clear that the Ordinance will force Workplace to divert money from its other current activities to advance its established organizational interests (i.e., if the laborers are dispersed, it will be more costly to reach them)."

In dissent, Judge Jacobs argued that both organizational plaintiffs lacked standing under existing Second Circuit and Supreme Court precedents. With respect to the "diversion of resources" standing argument Judge Jacobs concluded that the organizational plaintiff had failed to show the requisite injury, despite evidence in the record that

members of the organization had expended resources against the Ordinance. *Id.* at 121.

Centro is readily distinguished from this case. First, the *Centro* majority explained that its ruling on standing was based on a "somewhat relaxed" standard because the plaintiff was "seek[ing] review of a prohibition *prior to its being enforced*." *Id.* at 110 (emphasis added). CTPU's challenge here is to existing Connecticut law concerning Connecticut's interdistrict magnet schools. Currently eight school districts and five Regional Education Service Centers in Connecticut operate host interdistrict magnet schools in accordance with state law supporting "racial, ethnic and economic diversity." Conn. Gen. Stat. § 10-264*l*(a).

Second, the holding of *Centro* is that if a challenged law forces an organization to expend resources to counteract "activity that harms its . . . . core activities," 868 F.3d at 110-11, it may have standing but the expenditure of resources must be a result of the harm to the core activity (in *Centro* its services to workers). The holding that "[o]nly a 'perceptible impairment' of an organization's ability to provide services to further its mission is necessary to constitute an actionable injury in

fact" is not met here because CTPU has not and cannot show how the interdistrict magnet school diversity ratio impacts its provision of services which then results in a diversion of resources.

Unlike in *Centro*, the state statutes challenged by CTPU here – which concern diversity in Connecticut's interdistrict magnet schools – do not interfere with CTPU's ability to meet with, lecture and organize against Connecticut's magnet school laws. CTPU's "core activities" are to "advocate on behalf of the educational rights of children" and "to serve as a support system to connect parents and families in Connecticut with educational resources." A.A. 28-29. Nothing in the challenged magnet school statutes impedes such advocacy or outreach. In *Centro* the organizational plaintiff spent money to combat an Ordinance that would have harmed its very ability to "reach" the laborers they sought to reach in order to further their mission. 868 F.3d at 110. Here, the challenged statutes themselves do not combat CTPU's "core activities."

Indeed, CTPU's central complaint in this case is that the state statutes concerning diversity in interdistrict magnet schools violate the Equal Protection Clause. CTPU comparison of the magnet school

statutes to the Ordinance in *Centro* is unfounded. Such a comparison would be proper if Connecticut passed a law, as in *Centro*, interfering with CTPU's ability to organize and educate parents regarding CTPU's positions. The challenged magnet school statutes do no such thing.

Rather, CTPU seeks to establish Article III injury merely on the basis of policy disagreements with existing law. This is wholly distinct from the injury established in *Centro*. Simply put, in *Centro* there was a far greater injury connection between the Ordinance and the organizational plaintiff. The *Centro* majority held that the organizational plaintiff "has shown that the Ordinance threatens the requisite 'perceptible impairment' of its activities and thus imposes concrete injuries for purposes of federal jurisdiction." *Id.* at 111.

CTPU's plenary vision of Article III standing would effectively eviscerate the law of standing. *See Centro*, 868 F.3d at 121 (Jacobs, dissenting)("mere organizational opposition does not constitute organizational injury.") No doubt scores of Connecticut citizens oppose various laws and many have spent time and money opposing them, lobbying for changes, holding rallies, and the like. Such is our democratic process. However, such deeply held opposition views alone

are not injuries-in-fact for Article III purposes. To allow Article III standing based on merely allocating resources in opposition to state law would be a marked step further than the holding in *Centro*. Even more importantly, such a decision would, as Judge Jacobs warned, "swallow Article III limitations." *Id.* at 123 (Jacobs, J., dissenting). Not only would such a ruling alter existing standing law, it has the potential to flood the federal courts with challenges to nearly any law.

CTPU also relies on this court's decision in *Poole*. As with *Centro*, the majority in *Poole* found that an organizational plaintiff had established standing where it had "alleged violations of [federal law] had cost it hundreds of hours in the form of phone calls from aggrieved foster families." *Poole*, 922 F.3d at 75. *Poole* does not require a different result here. The holding in *Poole* is fully consistent with Judge Glasser's summary of the governing law in *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215 (E.D.N.Y. 2019) and does not require a different result.

As explained by Judge Glasser in applying Second Circuit law on organizational standing, "[a]t most, these cases stand for the proposition that an organization that provides social services, such as

counseling, referrals and legal advocacy, suffers a cognizable injury in fact where the defendant's conduct, if allowed to persist, would either raise the cost of providing those services . . . . or require the plaintiff to divert resources away from its normal operations to mitigate the adverse effects of the defendant's conduct, thereby reducing the total quantity of services that it can provide." *Id.* at 232. Furthermore, Judge Glasser explained "[b]y contrast, courts have been reluctant to extend this doctrine to organizations engaged primarily in social advocacy. This reluctance is grounded in language from *Havens* itself, which recognized that standing cannot be asserted based on a mere 'setback to the organization's abstract social interests.'" *Id.* citing *Havens*, 455 U.S. at 379.

Additionally, allowing CTPU to litigate the makeup of magnet schools throughout the state would contravene the Supreme Court's explanation – as noted by Judge Jacobs in his *Centro* dissent – that "the decision to seek [judicial] review . . . . be placed in the hands of those who have a direct stake in the outcome" and not "in the hands of concerned bystanders, who will use it simply as a vehicle for the

vindication of value interests." *Id.* at 119-120 (Jacobs, J., dissenting) quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

The right to attend "free public elementary and secondary schools" in Connecticut applies only to students.[5] Article VIII, § 1 of the Connecticut Constitution; *see Connecticut Coalition for Justice in Education Funding v. Rell*, 327 Conn. 650 (2018); *Sheff v. O'Neill*, 238 Conn. 1, 25 (1996)("state has an affirmative constitutional obligation to provide all public schoolchildren with a substantially equal educational opportunity"); *Horton v. Meskill*, 172 Conn. 615, 648-49 (1977)("in Connecticut, elementary and secondary education is a fundamental right, that pupils in the public schools are entitled to the equal enjoyment of that right. . . ."); *Carrubba v. Moskowitz*, 274 Conn. 533, 550-2 (2005) (parents, whose interests are not adverse to their child's, have standing as "next friend."); Conn. Gen. Stat. § 10-186(a) ("Each local or regional board of education shall furnish, by transportation or otherwise, school accommodations so that each child five years of age

[5] The state action of which the Plaintiff complains relates to the composition of certain Connecticut public schools. Under the Connecticut Constitution the General Assembly is explicitly tasked with implementing the right to "free public elementary and secondary schools . . . . by appropriate legislation." Conn. Const., Article VIII, § 1.

and over and under twenty-one years of age who is not a graduate of a high school or technical high school may attend a public school . . . ."); Conn. Gen. Stat. § 10-184 ("each parent or other person having control of a child five years of age and over and under eighteen years of age shall cause such child to attend a public school .. . .").

CTPU is the quintessential "concerned bystander," seeking to change the law to conform to its vision. By its own representation, CTPU is not asserting the rights of any students or parents who would or could attend Connecticut interdistrict magnet schools. See Doc. 35 at 3.

Other district judges in this Circuit have taken a similar view of the "diversion of resources" argument and have rejected the argument that CTPU makes here. *See, e.g., Young Advocates for Fair Educ.*, 359 F. Supp. 3d at 232 ("At most, [cases like *Centro*] stand for the proposition that an organization that provides social services, such as counseling, referrals and legal advocacy, suffers a cognizable injury in fact where the defendant's conduct, if allowed to persist, would either raise the cost of providing those services. . . . or require the plaintiff to divert resources away from its normal operations to mitigate the

adverse effects of the defendant's conduct, thereby reducing the total quantity of services that it can provide"); *Ctr. for Food Safety v. Price*, No. 17-CV-3833 (VSB), 2018 U.S. Dist. LEXIS 155794 at *14, 2018 WL 4356730 (S.D.N.Y. Sept. 12, 2018) ("to allow standing based on these allegations alone would mean that an entity that spends money on an issue of particular interest to it would have standing, which would in turn contravene the principle that an entity's 'mere interest in a problem' cannot support standing."); *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 190 (S.D.N.Y. 2017) ("Here, [the organizational plaintiff] fails to allege either that Defendant's actions have impeded its ability to perform a particular mission-related activity, or that it was forced to expend resources to counteract and remedy the adverse consequences or harmful effects of Defendant's conduct . . . . [The organizational plaintiff] alleges that the time, money, and attention it has diverted to this litigation from other projects have placed a significant drain on its limited resources. But such an allegation, by itself, is insufficient to establish an injury in fact.")

As Judge Glasser explained in *Young Advocates*, these rulings are "consistent with the prevailing rule in the District of Columbia Circuit, which hears numerous challenges to federal power by interested lobbying groups and therefore may be regarded as a persuasive authority in this area of law." 359 F. Supp. 3d. at 234. Once again, CTPU lacks such a required connection to Connecticut interdistrict magnet school laws.

CTPU is therefore arguing for an expansion of Circuit precedent with respect to organizational standing. This court should refrain from extending organizational standing in a manner that would provide standing to scores of parties that have policy differences with state laws. *See Citizens for Responsibility & Ethics in Washington*, 276 F. Supp. 3d at 191 ("If [an organizational plaintiff] could satisfy the standing requirement on this basis alone, it is difficult to see how any organization that claims it has directed resources to one project rather than another would not automatically have standing to sue.")

Indeed, this Court recently issued a decision regarding standing in a similar challenge brought by CTPU's counsel. In *Christa McAuliffe Intermediate Sch. PTO, Inc.*, 788 Fed. Appx. 85, a panel of this court

heard an appeal from a group of plaintiffs (including three organizational plaintiffs) challenging Mayor deBlasio's proposed changes to entrance methods for New York City's eight specialized high schools. The plaintiffs sought a preliminary injunction prohibiting the defendants from implementing the challenged changes.

The district court concluded that the organizational plaintiffs had standing based on the "perceptible impairment" test, citing *Ragin*. The district court found that the organizational plaintiffs "have all expended resources outside of this litigation organizing public events, speaking to press, and lobbying officials to combat the proposed changes to the . . . . program." *Christa McAuliffe Intermediate Sch. PTO, Inc. v. deBlasio,* 364 F. Supp. 3d 253 (S.D.N.Y. 2019). Because the district court denied plaintiffs' request for a preliminary injunction, plaintiffs appealed.

On appeal, this Court held that the organizational plaintiffs lacked standing because "*even if* the organizations have standing to assert claims on their own behalf, they have not demonstrated an injury sufficient to secure injunctive relief, since their purported injury – expenditure of monetary resources on advocacy against the City's change to its specialized high school admissions process – is entirely

retrospective." 788 Fed. Appx. at 85. This Court so held even though the plaintiffs arguing in their briefs and at oral argument that their purported injury was ongoing. *See* 19-550-cv, Doc. 70 at 16 n.4 ("the declaration makes clear that the PTO's efforts did not stop upon enactment"), oral argument held on December 11, 2019 at 31:00 ("The declarations that we submitted in February at the district court, they clearly outline that our expenditures and opposition . . . . are ongoing" and "they will continue as long as this program is in place. . . .")

Despite these arguments, this Court concluded that plaintiffs "have not demonstrated an injury sufficient to secure injunctive relief." 788 Fed. Appx. at 85; *see also Knife Rights, Inc. v. Vance,* 802 F.3d 377, 387 (2d Cir. 2015)(a party seeking prospective relief "cannot rely on past injury to satisfy the injury requirement but must also show a likelihood that [it] will be injured in the future.")

Such is the case here. CTPU has failed to demonstrate any sort of injury sufficient to enjoin the admissions standards for the numerous interdistrict magnet schools in Connecticut.

II. Because the August 2020 RIS Memorandum Eliminated Financial Penalties, CTPU's Claims are Moot.

After the District Court dismissed this action and after the CTPU filed its brief in this appeal, the Commissioner issued the August 2020 Memorandum concerning RIS. On September 22, 2020 the State Defendants filed a motion with this court to make the August 2020 Memorandum a part of the Record on Appeal.[6] Doc. 50. As discussed below, the August 2020 Memorandum removed any penalties for interdistrict magnet schools that do not meet the RIS and thus renders CTPU's claims as moot.

"The voluntary cessation of allegedly illegal conduct usually will render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Lamar Adver. of Penn, LLC*, 356 F.3d at 375 (internal quotations and citations omitted). "[C]onstitutional challenges to statutes are routinely found moot when a statute is

[6] The August 2020 Memorandum is publicly available here: http://portal.ct.gov/-/media/SDE/Strategic-Planning/Interdistrict Magnet Schools Reduced-Isolation Standards.pdf.

amended." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir. 1992)(citing *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989)).

The August 2020 Memorandum has rendered CTPU's claims moot. Conn. Gen. Stat. § 10-264r provides that, *inter alia,* the Commissioner "shall develop reduced-isolation setting standards for interdistrict magnet school programs" and define the term RI student. In other words, state law delegates to the Commissioner the task of defining which students are counted as RI and what penalty, if any, to impose for a school's failure to achieve those standards. Thus, the gravamen of CTPU's claims are based not on statutory law, but the Commissioner's standards. At the time CTPU filed its lawsuit and prior to the August 2020 Memorandum the Commissioner required that interdistrict magnet schools ensure that at least 25% of their enrollment be comprised of RI students. A.A. 15. Furthermore, the Commissioner was empowered to impose financial penalties on operators that did not mee the RIS for two consecutive years. A.A. 27.

The August 2020 Memorandum altered these requirements and penalties. Most importantly, the August 2020 Memorandum provides a

waiver for interdistrict magnet schools that do "not meet the applicable RIS standard promulgated by the Commissioner." The Commissioner has therefore removed the financial penalty provision at the heart of CTPU's challenge. *See* A.A. 16 ("For failing to maintain the mandated 75% cap on Black and Hispanic student enrollment, [Dr. Cortlandt V.R. Creed Health & Sports Sciences High School] faced sanctions in excess of $100,000.") CTPU alleges in its complaint that the Defendants' "act under color of state law in developing, implementing and administering the 75% cap on Black and Hispanic students who may attend Connecticut interdistrict magnet schools." A.A. 19. To the extent that CTPU challenges the State for enforcing what it calls a "cap," that enforcement mechanism is no longer in place. This is the type of "voluntary cessation of allegedly illegal conduct" that renders a case moot. *Lamar Adver. of Penn, LLC*, 356 F.3d at 375.

Furthermore, there is no "reasonable expectation" that the Commissioner will reimplement the old requirements. As explained *supra*, the State of Connecticut has already moved to race neutral standards in the Hartford area interdistrict magnet schools. *See* note 3 *supra*. That action, coupled with the Commissioner's August 2020

Memorandum, demonstrate the State of Connecticut's policy moves toward race neutral enrollment decisions in its magnet schools.

Finally, since CTPU does not allege and the State does not in fact conduct the lotteries for the interdistrict magnet schools, it cannot be said that the Defendants are in any meaningful way enforcing the so-called cap.

CONCLUSION

Because the August 2020 Memorandum has provided a waiver of penalties for interdistrict magnet schools that do not meet the Commissioner's RIS standards this appeal should be dismissed as moot. Alternatively, because CTPU has failed to show constitutional injury it is respectfully requested that the decision of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 6087 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

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Dated: October 20, 2020

CERTIFICATION OF SERVICE

I hereby certify that on this 20th day of October, 2020, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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