SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION – THIRD DEPARTMENT

No. 534406

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., InfantsUnder 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,

-against-

WASHINGTONVILLE CENTRAL SCHOOL DISTRICT and THE NEW YORK STATE EDUCATION DEPARTMENT,
Respondents/Defendants-Appellants.

BRIEF *AMICUS CURIAE* OF AGUDATH ISRAEL OF AMERICA IN SUPPORT OF PETITIONERS/PLAINTIFFS-RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America, founded in 1922, is a leading advocate for the interests of the Orthodox Jewish community, with offices, chapters and affiliated synagogues throughout the country. Among its many functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States.

Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in amicus curiae briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general.

One of Agudath Israel's roles in this connection is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor— perhaps the critical factor—in ensuring Jewish religious identity and continuity. The overwhelming majority of Agudath Israel's constituents choose to send their children to the approximately 750 Orthodox Jewish day schools across the country that collectively educate over 260,000 students. In New York State alone there are approximately 500 Orthodox Jewish elementary and high

schools that educate over 160,000 students. There are altogether over 1,700 nonpublic elementary and high schools in New York State that educate some 420,000 students.

The transportation services at issue in this case are of special interest to our constituents. Orthodox Jewish life revolves around an annual cycle of religious holidays, including the eight-day Festival of Pesach (Passover) in the Spring and eight-day Festival of Succos in the Fall. Jewish schools are closed during those and other holidays, and consequently are open when public schools are closed, including certain days in early September, late June and the last week of December.

Children need school buses on those days just as much as they do when the public schools are open. Indeed, their need for transportation on those days often is more acute. During the last week of December, for example, many Orthodox Jews assume extra workplace responsibilities so that their colleagues may attend to their own commitments, making it especially challenging for these parents to get their children safely to and from school.

When school districts fail to provide transportation on those days, children face the very education, health and safety issues that the Legislature had determined to avoid through passage of Section 3635. Agudath Israel therefore submits this amicus brief in support of the decision below holding

that Section 3635 of the Education Law requires noncity school districts to provide transportation services to private school children on days when public schools are not in session.

STATEMENT OF ISSUES

Section 3635 of the Education Law requires school districts to provide:

> Sufficient transportation facilities . . . for all the children residing within the school district to and from the school they legally attend. . .. Such transportation shall be provided for all children [residing a certain distance from their schools]."

1. Whether the court below correctly concluded that the requirement that school districts provide "all the children residing within the school district" with sufficient transportation to transport them "to and from the school they legally attend" really applies to "all the children," including children attending school on days when public schools are closed?

The *amicus curiae* respectfully submits that the answer is yes.

2. Whether the State Education Department has proffered a reasonable interpretation of Section 3635 by proposing to interpret the term "sufficient" to mean of low quality, such that the mandated transportation services may be even *in*sufficient to achieve the statutory directive to provide transportation to all children legally attending their schools?

The *amicus curiae* respectfully submits that the answer is no.

3. Whether the plain meaning of Section 3635 creates an absurd result by requiring school districts to transport private school children to school when public schools are closed, when the purpose of the statute is to protect equally each child's educational, health and safety needs by providing transportation to all children who are legally attending their schools?

The *amicus curiae* respectfully submits that the answer is no.

4. Whether informal agency guidance or the legislative history of a later-enacted statute should be employed to alter the clearly expressed directive of Section 3635, which produces the reasonable and intended outcome of transporting all children to and from school in order to protect the children's health, safety and educational needs?

   The amicus curiae respectfully submits that the answer is no.

SUMMARY OF ARGUMENT

Under the plain terms of section 3635, school districts must provide all qualified children, public and nonpublic alike, with sufficient transportation to get to and from the schools they lawfully attend. The statute is clear and unambiguous. It requires that transportation be "sufficient" to transport "all the children in the district to and from the school they legally attend." It twice expresses the command that districts "shall provide" such transportation to all children. The lower court therefore correctly concluded that the plain language of the statute requires school districts to provide transportation services to private school children when children are in legal attendance, even on those few days when public schools are closed.

The State Education Department ("SED") nevertheless has advanced a different interpretation of the statute. In its interpretation, school districts need to provide transportation to private school students only as an adjunct to the services provided to their public-school peers. Put another way, SED has created an

artificial, almost two-tier hierarchy within the statute's requirement of services to "all children." There are "upper tier" public school children, who receive unqualified transportation to school to maintain their health and safety, and "lower tier" nonpublic school children who only receive transportation services contingent upon when their "upper tier" public school peers receive it. To SED, a school district may require private school children to walk to school when their schools are open during the last week of December, because the district made school bus service available to them when their schools were closed during the last week of September.

To reach this conclusion, SED proposes to revise the plain terms of Section 3635 by replacing the statutory term "sufficient" with the term "adequate" and then applying a secondary meaning of that term – with the purported effect that a statute requiring that "sufficient" services be provided to transport all children to their schools is satisfied even when services are insufficient for that purpose. The Court below properly concluded that SED's proffered interpretation was not reasonable, and it should not be adopted by this Court.

SED also argues that the plain meaning of the statute should not be applied because providing children with transportation to and from private schools would place an "onerous obligation on school districts." Yet the rules of statutory construction do not allow a Court to alter the plain meaning of the statute simply

because an agency disagrees with the outcome. Instead, the plain meaning governs unless the outcome would undermine the statute's very purposes. Here, the plain meaning of Section 3635 advances the Legislature's stated purpose of providing transportation services to all children who need it, public and private alike, in order to protect their life, health, safety and educational opportunities. SED may believe it unreasonable to protect the health and safety of private school children travelling to and from their school on days that public schools are closed. That is not the view of the State, however, which passed a Constitutional amendment to permit it, or of the Legislature, which enacted Section 3635 to command it. SED's preferred policy objectives are not a basis on which to subvert the clearly expressed will of the Legislature that school districts must provide transportation to all children in lawful attendance of their schools.

Finally, SED advances its own informal guidance and the legislative history of later-enacted legislation in support of its interpretation. But where legislation is clear on its face, and produces an outcome consistent with the purposes for which it was enacted, external materials cannot be used to alter its plain meaning. Accordingly, the statue should be enforced as written, and the lower court's decision affirmed.

ARGUMENT

THIS COURT SHOULD ADOPT THE PLAIN MEANING OF SECTION 3635 BY WHICH SCHOOL DISTRICTS MUST PROVIDE TRANSPORTATION SERVICES SUFFICIENT FOR ALL CHILDREN TO ATTEND SCHOOL ON DAYS WHEN THEY ARE IN LAWFUL ATTENDANCE.

"The literal language of a statute is generally controlling unless the plain intent and purpose of a statute would otherwise be defeated." *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018) (citations and quotations omitted). "Where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the statute's enactment, courts may resort to legislative history." *Id.*

Here, as Supreme Court held, the plain meaning of Section 3635 clearly requires school districts to provide services sufficient to transport all children to and from the schools that they lawfully attend, even when public schools are closed (Point A, below). Providing such transportation to all children who need it is a policy choice that fulfills the very purposes for which the Legislature enacted Section 3635; it therefore does not produce an absurd or unreasonable outcome contrary to the purposes of the statute that would justify revising the statutory text (Point B, below). SED's informal guidance, and legislative materials related to a later-enacted bill, cannot be used to subvert the Statute's plain meaning (Part C, below). Accordingly, the Court should apply the plain meaning of the statute and

uphold the lower court's determination.

A. The Plain Terms of Section 3635 Require School Districts to Provide Transportation Services Sufficient for All Children to Attend School on Days When They Are in Lawful Attendance.

The first two sentences of Education Law Section 3635 establish a clear legislative mandate requiring districts to provide transportation services to all children sufficient to transport them to and from school when they are in lawful attendance. The relevant sentences are set out below.[1]

The first sentence specifically requires that "sufficient" transportation facilities be provided for the purpose of transporting children "to and from the school they legally attend." It directs that these services are to be provided to "all the children," without regard to the schools they attend. It also provides a justification for the mandate, which is that students may need such transportation "because of the remoteness of the school to the child, or for the promotion of the

[1] "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." Education Law, § 3635, subd. 1.a.

child's best interest." It commands school district performance through the word "shall," which is "mandatory not precatory." *Cty. of Niagara v. Shaffer*, 201 A.D.2d 786, 787–88 (1994).

This plain meaning is reinforced by the second sentence of Section 3635. That sentence provides that "[s]uch transportation shall be provided for all children" living a specified distance from their schools. The second sentence confirms that school districts must provide the transportation described in the prior sentence—transportation "to and from the school they legally attend"—to "all children" who meet the stated distance criteria.

These plain terms confirm that the Legislature's intention was not only that districts generally must provide a system of school transportation, but also that individual children residing in the school district are invested with an enforceable right to the transportation services mandated by the statute. *See Bd. of Ed. of Cornwall Cent. Sch. Dist. v. Nyquist,* 61 A.D.2d 132, 134 (3rd Dept. 1978) (child legally attending school within the meaning of section 3635 has enforceable right to transportation by district); *Martin v. Brienger*, 49 Misc. 2d 130, *aff'd*, 26 A.D.2d 772 (2nd Dept. 1966) (issuing mandamus directing school district to transport child to and from parochial school).

SED devotes but a single paragraph of its brief to the interpretation of the text of section 3635. *See* Brief for Defendant State Education Department (Doc

No. 44) ("SED Brief") at 19. In that paragraph, SED argues that the term "sufficient" in the first sentence of that section should be interpreted to mean "adequate;" and that the term "adequate" qualifies the statutory directive so that it need not always be met. This argument is the only textual basis advanced by SED for why districts need not comply with the otherwise clear statutory directive. *See* SED Brief at 19-21.

SED's proffered interpretation of the term "sufficient" is inconsistent with its plain meaning, however. As SED acknowledges, the term "sufficient" means "of such quality, number, force, or value as is necessary for a given purpose." SED Brief at 19, *quoting* Black's Law Dictionary (11th ed. 2019). Under this definition, and in common usage, the term "sufficient" does not itself measure the quality of an item, but instead relates an item to its identified purpose. *See, e.g., Sufficient*, Merriam-Webster Online Dictionary (defining "sufficient" as "enough to meet the needs of a situation or a proposed end" or "being a sufficient condition") *available at* https://www.merriam-webster.com/dictionary/sufficient. In the case of Section 3635, transportation services must be "sufficient" for the identified purpose of transporting "all the children residing within the school district to and from the school they legally attend."

SED proposes instead to interpret the statute by replacing the term "sufficient" with the term "adequate" (a term which Black's Law Dictionary and

other dictionaries use to define "sufficient"). Unlike the term "sufficient," however, the term "adequate" also can refer to something that is of low quality. The term "sufficient" does not carry this meaning.[2]

SED distorts the meaning of Section 3635 by applying the "low quality" sense of adequate to the statute. It distorts it again by asserting that services may therefore be of such low quality that they need not even satisfy the statutory directive. Thus does SED propose to transform the term "sufficient" so that it means "even insufficient." It is not surprising that the lower court expressed incredulity at this proffered statutory interpretation. *See* R35.

The plain terms of the first sentence of Section 3635 require that school districts provide "sufficient" services to transport "all the children residing within the school district to and from the school they legally attend." The second sentence commands the same in even simpler terms: "such transportation shall be provided for all children." SED's proffered interpretation in which districts need not provide the required transportation services is unreasonable and should not be

[2] By way of example, in the sentence: "The associate's job performance was adequate," the term "adequate" expresses a value judgement about the associate's job performance. The performance was not terrible, but also was not very good. In contrast, the term "sufficient" does not similarly express a measure of quality. It is meaningless to say that an associate's job performance was "sufficient," without also specifying an objective against which sufficiency can be measured (e.g., sufficient to make partner, sufficient to earn a bonus, sufficient to be promoted, etc.).

adopted by the Court.

B. Providing Transportation to All Children to and from the Schools They Legally Attend Is the Express Purpose of the Statute, Not an Absurd Outcome of It.

As described above, courts will not alter the literal language of a statute unless the plain intent and purpose of a statute would otherwise be defeated, such as by producing absurd or unreasonable consequences that are contrary to the purpose of the statute's enactment. *Anonymous v. Molik*, 32 N.Y.3d 30 (2018).

In its brief, SED does not identify any internal contradiction or absurdity in the text or scheme of Section 3635. Instead, it argues that requiring a district to provide transportation to all children, as required by the statutory text, would unduly burden school districts. It then concludes, *ipse dixit*, that "[t]he Legislature could not have intended to impose such an onerous obligation on school districts." SED Brief at 21. SED offers no citations in support of this conclusion. *See id.*

SED is thus arguing *not* that application of the plain terms of Section 3635 would subvert its purposes, but that application of its plain terms would accomplish the statutory purposes too effectively. As the plain terms of the statute make clear, the Legislature's purpose in enacting Section 3635 was to protect the health and safety of all school children and to advance their educational needs. *See* Education Law, 3635 subd. 1.a. ("[s]ufficient transportation . . .. 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*") (emphasis added). A statute that fully effectuates its own purposes is not absurd. *See Matter of Auerbach v Board of Educ. of City School Dist. of City of New York*, 86 N.Y.2d 198, 204 (1995) ("[r]esort to legislative history will be countenanced only where . . . a literal construction would lead to absurd or unreasonable consequences that are *contrary to the purpose of the enactment*;" striking down regulatory exception to pension benefits rule that was without statutory basis) (emphasis added).

The Legislature's intention to benefit all school children equally, without regard to the school he or she attends, is confirmed by the legal background against which Section 3635 was enacted. In *Judd v. Board of Educ.*, 278 N. Y. 200 (1938), the Court of Appeals struck down a predecessor statute to Section 3635. It held that even though services under the legislation were to be provided to children, not schools, the legislation violated the Blaine Amendment provision of the State Constitution.[3]

[3] The Court of Appeals subsequently rejected the reasoning of *Judd* in upholding the State's provision of textbook aid to nonpublic school students. *See Bd. of Ed. of Cent. Sch. Dist. No. 1, Towns of E. Greenbush Rensselaer Cty. v. Allen*, 20 N.Y.2d 109, 115, (1967), *aff'd sub nom. Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).)

Judd galvanized opposition in the Legislature and among voters, and they quickly amended the Blaine Amendment to clarify that "the legislature may provide for the transportation of children to and from any school or institution of learning." N.Y. Constitution, Article XI, Section 3. The Legislature then immediately amended the Education Law to impose a mandatory requirement that school districts provide transportation services to all children residing in the school district. Chapter 365, Laws of 1939.

Thus, as even this brief history makes clear, the Legislature's intention in enacting Section 3635 was to ensure that all children received transportation to and from their schools, without regard to whether the schools were private or public. The principle of equal treatment of all children was central to its enactment. The plain-meaning interpretation of Section 3635 that Petitioners advance seeks to effectuate the very purposes for which it was enacted.

There is nothing absurd or unreasonable about a State law that requires school districts to protect children by providing them with a safe and convenient means of travel to and from the school they are legally attending. Such a law not only serves to protect the health and safety of hundreds of thousands of students statewide, but also reduces traffic congestion and eliminates unnecessary carbon emissions. While SED complains about the costs, the State spends billions of dollars on public school education, but only less than one percent of that amount is

devoted to the nearly fifteen percent of children attending nonpublic school throughout the State.

Of course, it is not for this Court to balance the costs and benefits of providing nonpublic school children with transportation to and from their school on days when public schools are closed. That is a decision for the Legislature. The Legislature has determined, through the plain text of Section 3635, that all children are entitled to receive transportation services when they are in lawful attendance of their schools. It thus has determined that when it comes to transportation, nonpublic school students should be treated equally with their public-school peers, and not as mere adjuncts. While SED may oppose such a policy, and think private school children undeserving of school bus services, the Legislature's determination that such services must be provided in order to protect children's health, safety and educational needs is eminently reasonable, and not at all absurd. In these circumstances, the plain meaning of the Statute must apply.

C. Informal Guidance and Legislative History May Not Be Referenced to Alter the Plain Meaning of the Statutory Text.

SED also argues that the Court should defer to its preferred interpretation because its informal guidance has long been in place, and because certain legislative materials related to later-enacted legislation supports its interpretation. The materials relied upon by SED cannot be referenced to alter the plain meaning

of the statutory text.

SED cites to *Greater N.Y. Taxi Ass'n v. New York City Taxi & Limousine Comm'n*, 25 N.Y.3d 600 (2015), for the proposition that where an agency has promulgated regulations, a court can infer "to some degree" that the legislature approves of the agency's interpretation. SED Brief at 24. *Greater N.Y. Taxi*, and the cases to which it cites, however, do not address the question of statutory interpretation, but of unlawful delegation of powers. *See id.* (legislature's longstanding deference to agency regulations of taxicab standards, and failure to consider matters at issue, contribute to conclusion that agency had not usurped the legislative role).

In contrast, on matters involving statutory interpretation, the lower court properly concluded that "[d]eference to agency interpretation charged with enforcing a statute is not required when an issue is one of pure statutory analysis." R. 28 (*quoting Suffolk Reg'l Off-Track Betting Corp. v. New York State Racing & Wagering Bd.*, 11 N.Y.3d 559, 567 (2008). Accordingly, SED's informal guidance is not a basis on which to alter the plain meaning of Section 3635.

Similarly, SED points to certain legislative materials underlying the 1985 amendments to Section 3635, and seeks to use them as a basis for altering the plain meaning of the text. It argues that the legislative materials shed light on the 1985 Legislature's interpretation of the original statute.

But as the Court below held, legislative history may not be used to alter the plain meaning of a statute. R32-33; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 120, Comment at 242 ("[w]here the legislative language is clear, there is no occasion for examination into extrinsic evidence to discover legislative intent; only where legislative language is ambiguous is the consideration of extrinsic evidence warranted."); *Davila v. State*, 183 A.D.3d 1164, 1167 (3rd Dept. 2020) (same). This general rule applies even when legislative history might inform interpretation of *contemporaneously* enacted legislation. *Id.* It certainly applies to SED's counterintuitive argument that, through deliberation of 1985 legislation intended (in SED's telling) to increase transportation services to private school students, the Legislature unknowingly reduced such rights by negating the plain meaning of the 1938-enacted Statute.

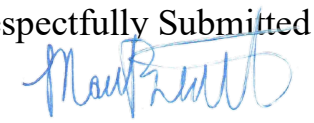
By its plain terms, Section 3635 requires school districts to transport "all the children residing within the school district to and from the school they legally attend." The plain terms of the statute advance the Legislature's objective of protecting the health, safety and educational needs of all children, regardless of the schools they attend. The secondary materials advanced by SED may not be referenced to alter the plain meaning of this clear and reasonable statute.

CONCLUSION

For the foregoing reasons, this court should affirm the Decision, Order and Judgment of the Court below.

Dated: February 28, 2022

Respectfully Submitted



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