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**OFFICE OF
APPELLATE COURTS**

ALEJANDRO CRUZ-GUZMAN, AS GUARDIAN
AND NEXT FRIEND OF HIS MINOR CHILDREN, ET AL.,

Appellants,

vs.

STATE OF MINNESOTA, ET AL.,

Respondents,

HIGHER GROUND ACADEMY, ET AL., INTERVENORS,

Respondents.

**BRIEF OF AMICUS CURIAE
CIRESI WALBURN FOUNDATION**

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INTEREST OF AMICUS CURIAE¹

The Ciresi Walburn Foundation (“Foundation”) is a nonprofit corporation established in 1998 pursuant to 26 U.S.C. § 501(c)(3), with an original endowment of \$30 million earned from fees in the Minnesota tobacco litigation. The current mission of the Foundation is to serve as a catalyst for creative, innovative, and societal-changing programs and policies to promote education and equitable opportunities for all of Minnesota’s children and youth.

The Foundation supports Minnesota children and youth from pre-K through college with grants to a variety of nonprofit organizations and community-based service groups. The Foundation also makes grants directly to all types of K-12 schools: traditional public schools (the largest current school grant is to the Robbinsdale Area Schools for a literacy program in grades 1 to 3), as well as public charter schools and private schools that are high-performing and enroll underserved populations.²

To date, the Foundation has awarded more than \$32 million in grants. As an endowed organization, the Foundation does not solicit funds from the public.

The Foundation has a public interest in this appeal because the implications and impact of the instant case will extend far beyond the parties themselves.

¹ No counsel for any party authored this brief in whole or in part. No party, aside from amicus curiae or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

² One of the Foundation’s past grantees was Friendship Academy for the Arts, an Intervenor in the present action.

INTRODUCTION AND SUMMARY OF ARGUMENT

Minnesota schools are among the worst in the nation for children of color. No doubt, the racial imbalance in many Twin Cities schools plays a role in this shameful state of affairs. But this is far from the only component to consider in the multifaceted analysis required to determine whether the fundamental right to an adequate education is fulfilled for all children under the Education Clause of the Minnesota Constitution. Indeed, in crucial respects, Appellants' single-lens focus on racial imbalance—framed in this appeal as an examination of demographic numbers—subordinates key elements of inquiry under the Education Clause, including, most surprisingly, basic academic proficiencies.

Appellants' approach would also limit the options of families of color to enroll their children in culturally affirming public charter schools that, in Appellants' terminology, are predominantly "Non-white." (Among Appellants' objections to these schools are that some of their webpages include segments written in Spanish.) Paradoxically, given the nature of this litigation, Appellants target as "segregated" nearly three times more charter schools chosen by families of color than chosen by White families. This includes even charter schools that outperform traditional public schools, where standardized test scores for students of color are shockingly low.

Clearly, this approach will not solve Minnesota's educational disparities—racial balancing as urged by Appellants does not equate to racial equity—and provide an adequate education for all of our state's children.

If Appellants wish to pursue a desegregation-only case there are, of course, well-established vehicles, namely, Equal Protection and Due Process causes of action (which they have pled but are not pursuing at this juncture). By instead attempting to pursue a claim under only the Education Clause, Appellants must be held to the fundamentals of that jurisprudence.³

Accordingly, Amicus respectfully requests that this Court affirm the Court of Appeals decision of September 26, 2022, which, in answering the certified question in the negative, effectively resulted in affirming the district court’s denial of Appellants’ motion for partial summary judgment.

STATEMENT OF FACTS

A. **Minnesota Schools Are Among the Worst in the Nation for Children of Color**

By virtually any measure, Minnesota schools are failing our children of color.

For on-time graduation rates, Minnesota ranked **47th out of 49** reporting states (and Washington, D.C.) for Black students; **48th out of 49** for Hispanic/Latino students; and **44th out of 45** for Indigenous students in 2019-20, the most recent national comparisons.⁴

³ Notably, footnote 6 of this Court’s justiciability decision in this case, about which much of this appeal revolves, was not in Section I of its opinion, addressing the Education Clause, but instead in Section II, addressing the Equal Protection and Due Process clauses. *Cruz-Guzman v. State of Minnesota*, 916 N.W.2d 1, 10 n.6 (Minn. 2018) (“*Cruz-Guzman I*”) (“It is self-evident that a segregated system of public schools is not ‘general,’ ‘uniform,’ ‘thorough,’ or ‘efficient,’” quoting the Education Clause, Minn. Const. art. XIII, § 1). Footnote 6 also cited to *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), which addressed *de jure* segregation imposed by state laws.

⁴ National Center for Education Statistics, *Common Core of Data, Table 1*, https://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2019-20.asp.

There are also extraordinary disparities between students of color and White students in standardized test scores, as reflected in the 2022 Minnesota Comprehensive Assessments (“MCAs”):

Minneapolis Public Schools ⁵

	Reading Proficiency	Math Proficiency
White	72.9%	62.2%
Black	17.9%	10.0%
Hispanic/Latino	19.8%	13.1%
Indigenous	21.9%	10.5%

St. Paul Public Schools ⁶

	Reading Proficiency	Math Proficiency
White	69.2%	55.9%
Black	21.2%	12.3%
Hispanic/Latino	24.3%	15.9%
Indigenous	27.5%	15.3%

⁵ Minnesota Department of Education, *Minnesota Report Card*, <https://rc.education.mn.gov/#mySchool/p--3>.

⁶ *Id.*

To the uninitiated, these gaps are so striking—for example, a difference of 55 percentage points between White and Black reading proficiencies in the Minneapolis public schools—that they appear to be typographical errors.

Moreover, it is not accurate, as some argue, that Minnesota’s achievement gaps are outsized due to relatively high scores for our White students as compared with other states. For example, on the standardized national test offering direct comparisons—called the Nation’s Report Card—Minnesota Black and Hispanic/Latino students scored below the national average in reading for their demographics.⁷ **Even in Mississippi, Black and Hispanic/Latino students scored higher in reading in 2022 than Black and Hispanic/Latino students in Minnesota.**⁸

Mississippi achieved these results through concerted legislative initiatives, beginning in 2013, that included training for teachers in scientifically-based reading instruction; reading coaches to support teachers; and early identification and remedial plans for K-3 students with reading difficulties. Miss. Code Ann. §§ 37-177-1-21 (West 2022).

If Mississippi can achieve these results, there is no reason why Minnesota—once known nationally as “a state that works,”⁹—cannot do so as well.

⁷ National Assessment of Educational Process, *The Nation’s Report Card, NAEP Data Explorer*, <https://www.nationsreportcard.gov/ndecore/xplore/NDE>.

⁸ *Id.*

⁹ *Minnesota: A State That Works*, TIME, Aug. 13, 1973, <https://content.time.com/time/subscriber/article/0,33009,907665-1,00.html>.

B. There Are Proven Interventions That Minnesota Has Failed to Fully Embrace to Address Our Opportunity and Achievement Gaps

The almost seven decades since the U.S. Supreme Court’s seminal decision in *Brown v. Board of Education* have demonstrated that there is no magic bullet for remediating educational inequities. But a number of interventions have been proven to result in significant impacts on academic achievement. Unfortunately, Minnesota has not fully embraced any of these initiatives:

- **Early childhood education**—Investments in early learning scholarships provide the highest return of any public expenditure. Yet there are an estimated 35,000 low-income children in our state still in need of access to quality early learning centers, ranking Minnesota in the bottom half of states for preschool access for three- and four-year-old children.¹⁰
- **High-quality tutoring**—Decades of research have consistently demonstrated that trained tutors can drive significant academic gains, especially for elementary students.¹¹

¹⁰ Beth Meloy, Madelyn Gardner, & Linda Darling-Hammond, Learning Policy Institute, *Untangling the evidence on preschool effectiveness: Insights for policymakers*, Jan. 2019; Art Rolnick & Todd Otis, *We need to fund the next Minnesota Miracle: Early childhood education*, MINNPOST, Sept. 1, 2021; National Institute for Early Education Research, *The State of Preschool Yearbook 2021, State Profiles, Minnesota*, https://nieer.org/wp-content/uploads/2022/04/Minnesota_YB2021.pdf.

¹¹ 87 Jens Dietrichson, et al., *Academic Interventions for Elementary and Middle School Students With Low Socioeconomic Status: A Systematic Review and Meta-Analysis*, Review of Educational Research, Apr. 2017, at 243–282.

- **Science-based literacy instruction, with explicit phonics**—The science is clear: We know how to teach kids to read. Yet too many Minnesota classrooms are using long-discredited methods of instruction.¹²
- **Increasing teacher diversity**—Research shows that having just one Black teacher in elementary school leads to increased graduation rates and college enrollment for Black students.¹³
- **Accountability for failing schools**—A failing school—whether a traditional public school or a public charter school—should not be granted an unlimited license to leave behind its students, for year after year, without consequences.¹⁴

In addition, empowering families of color to choose higher performing and/or culturally affirming charter schools rooted in students’ lived experiences and heritages—

¹² 61 G. Reid Lyon & Vinita Chhabra, *The Science of Reading Literature*, The Association for Supervision and Curriculum Development (ASCD), Mar. 1, 2004; Emily Hanford, *Hard Words: Why aren’t kids being taught to read?*, American Public Media, Sept. 10, 2018, <https://www.apmreports.org/episode/2018/09/10/hard-words-why-american-kids-arent-being-taught-to-read>; Peter Hutchinson, *Writing on the wall: The kids can’t read*, STAR TRIBUNE, Dec. 26, 2022.

¹³ Ulrich Boser, *Teacher Diversity Revisited*, Center for American Progress, May 4, 2014, <https://www.americanprogress.org/article/teacher-diversity-revisited/>.

¹⁴ Susanna Loeb & David Figlio, *School accountability*, in 3 Handbook of the Economics of Education, at 383–423 (E. A. Hanushek, S. Machin, & L. Woessmann, eds. 2011); David Osborne, *Reinventing America’s Schools: Creating a 21st Century Education System* (Bloomsbury Publishing Plc 2017).

the rare bright spots in educational opportunity for their children in the Twin Cities— should also be part of the solution.

ARGUMENT

I. THE EDUCATION CLAUSE OF THE MINNESOTA CONSTITUTION MANDATES A MULTIFACTORED ANALYSIS

The Education Clause of the Minnesota Constitution states:

The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

Minn. Const. art. XIII, § 1.

As recognized by this Court, this provision provides a fundamental right to an “adequate education.” *Skeen v. State*, 505 N.W.2d 299, 313, 315-16 (Minn. 1993); *Cruz-Guzman I*, 916 N.W.2d at 11. *Skeen* also discussed some of the elements of an adequate education, quoting at length from a West Virginia decision:

Legally recognized elements in this definition are development in every child to his or her capacity of (1) **literacy**; (2) **ability to add, subtract, multiply and divide numbers**; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Skeen, 505 N.W.2d at 310-11 (emphasis added), quoting *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (interpreting the phrase “thorough and efficient system”).

There are, of course, additional elements to an adequate education, including school financing, at issue in *Skeen*. Moreover, as this Court has “not had many occasions to interpret or apply the Education Clause,” *Cruz-Guzman I*, 916 N.W.2d at 8, there are surely other elements, not yet considered, that should be encompassed. For example, while racial imbalance was hardly foremost on delegates’ minds when the Education Clause was promulgated in 1857, there can be little doubt that this issue may be incorporated in the constitutional analysis. However, this cannot be done to the exclusion—or even detriment—of other aspects of an adequate education, including, as noted above, academic proficiency. *Skeen*, 505 N.W.2d at 310–11; *see also Cruz-Guzman I*, 916 N.W.2d at 12 (“Of course, **some level of qualitative assessment is necessary** to determine whether the State is meeting its obligation to provide an adequate education.... The very act of defining the terms used in the Education Clause and **determining whether the constitutional requirements have been met inevitably requires a measure of qualitative assessment.**”) (emphasis added).

Despite this guidance from *Skeen* and *Cruz Guzman I*, Appellants here are proceeding on a theory that, to a remarkable degree, disregards academic proficiencies. *See infra* Section II.A.

In addition, Appellants’ theory of the case would significantly limit the power of families of color to choose which schools are best suited to their children’s needs. This would be a shattering setback for families desperate to escape the traditional public schools that do not, by any definition, provide an adequate education. Especially given the among-the-worst-in-the-nation status of our state, Amicus respectfully submits that the rights of

these families to choose culturally affirming schools where their children can thrive should also be an element in the determination of an adequate education. *See* Minn. Stat. § 120A.22, subd. 1 (2022) (“The parent of a child is primarily responsible for assuring that the child acquires knowledge and skills that are essential for effective citizenship.”) This is also matter of racial equity, which should certainly be an additional—and fundamental—element in the analysis of an adequate education.

II. APPELLANTS’ NUMBERS-ONLY APPROACH LEADS TO ILLOGICAL AND UNJUST RESULTS

A. Appellants’ Theory of the Case Defines Adequate Education Without Regard to School Performance

Integration and diversity are essential aspirations with undeniable benefits. But there are real-world consequences to pursuing an education claim based on only demographic numbers, with no other considerations or elements of proof.

This is demonstrated by Appellants pursuing their motion for partial summary judgment by discounting the most fundamental aspect of an adequate education: can students read and write and add and subtract? As the district court stated:

In this motion, **Plaintiffs have *not* advanced their theory**, still present in their pleadings, **that racially-imbalanced schools result in such poor academic outcomes** that they violate the state’s Education Clause. Instead, they proceed on their alternative theory that the existence of racial imbalance alone violates the Education Clause—**regardless of any effect on outcomes**, regardless of the State’s role in creating the imbalance, and regardless of the State’s intent.

Dist. Ct. Order Denying Pls.’ Mot. for Partial Summ. J., Dec. 6, 2021 (“Dist. Ct. Order Denying Pls.’ Mot.”), Doc. 371 at 23 (emphasis added).

Thus, **any impact of racial balancing on academic achievement is not at issue** at the present time. Nor was this issue presented by the district court in the question certified for appeal.¹⁵

This demographics-only theory of the case can lead to illogical results. For example, would a racially balanced school with reading and math proficiencies in the single digits provide an adequate education? Conversely, would a school with ninety-five percent Black enrollment but proficiency rates that far surpass state averages—and chosen by Black parents—fail the adequacy test? Appellants, in fact, answered this question themselves, stating in an earlier motion that, while they believe there is at least a dispute as to comparative outcomes, **“Whether charter schools match or out-perform traditional public schools is ... not a material issue of fact if the schools are segregated, as they in fact are.”** Pls.’ Resp. to Defs-Intervenors’ Mot. for Summ. J., March 25, 2019, Doc. 282 at 32-33 (emphasis added).

This is a startling admission in an educational adequacy case.

¹⁵ Appellants largely averted this issue in their motion for partial summary judgment other than to point out that the Minneapolis and St. Paul school districts are racially imbalanced and that there is also an intractable achievement gap, which, of course, does not by itself establish a causal relationship. In addition, the record on the effect of diversity on academic achievement is not fully developed, with expert discovery yet to be completed. Doc. 371 at 19-20.

B. Appellants’ Theory of the Case Would Allow the Legislature to Enact a Remedy Without Regard to Other Factors That Impact an Adequate Education

To be sure, this litigation is not at the remedy phase and, if and when that time comes, the responsibility passes to the Legislature. *Cruz-Guzman I*, 916 N.W.2d at 9. But resolution of the liability issue—the “yes or no” answer to the question of whether education is adequate, *id.*—can induce a legislative response. If the only issue is a demographic count, then Appellants’ “syllogism,” as the district court called it, sends a signal that the remedy could also be a numbers exercise. *See* Dist. Ct. Order Denying Pls.’ Mot., *supra* Doc. 371 at 9; *see also id.* at 18 (“It does not matter that Plaintiffs insist that they are not asking this Court to impose any remedy but merely asking the Court to declare a violation has occurred, enjoin it, and direct Defendants to ‘comply.’... **[W]hether explicitly or implicitly, Plaintiffs are asking this Court to order Defendants to eliminate the challenged racial imbalances.**”) (emphasis added).

In short, if the sole guidance from this Court were to be an unadorned “yes” answer to the certified question, the concomitant message to the Legislature would be that a numbers-only racial balancing—without consideration of academic achievement and potentially jeopardizing culturally affirming charter schools—is the only action required to achieve compliance with the constitutional mandate.

C. Appellants' Theory of the Case Targets Public Charter Schools Chosen by Families of Color

In past years, it has too often been the case that families of color have borne the brunt of desegregation efforts, with, for example, the hardships of busing falling disproportionately on Black students. In the present case, Appellants also tread down this path by targeting charter schools that serve primarily students of color.

Appellants began their attack on charter schools in their Complaint. Doc. 1 at ¶ 29 (“Defendants have also permitted and approved the formation of numerous charter schools segregated by race and socioeconomic status ..., which have **foreseeably promoted and exacerbated segregation....**”) (emphasis added); *id.* at ¶30 (“[D]efendants have permitted and approved a policy of **intentional segregation among charter schools.**”) (emphasis added). In addition, Appellants’ Prayer for Relief swept charters within its scope by requesting an order that Defendants “remedy the violations of law set forth hereinabove,” which include the allegations against charter schools. *Id.*, Prayer for Relief at ¶ C.

In their Complaint, Appellants also designated as “segregated” charter schools in the Twin Cities that enroll either predominantly “Non-white” or predominantly White students. *Id.* at ¶ 29. Subsequently, Appellants listed **eighty-one charters** with predominantly (ninety-five percent or more) students of color and **twenty-eight charters** with predominantly (seventy-five percent or more) White students. Appellants’ Br. and Addendum, Minn. Ct. App., April 26, 2022, at 8; *see also* Doc. 348, Ex. 1 at 13-16. In other words, Appellants are **targeting almost three times more charters with predominantly students of color than with predominantly White students**, which is all

the more striking considering that the metropolitan area is majority White (and that Appellants used a lower percentage threshold for identifying predominantly White charter schools as compared to charters with predominantly students of color).

Given the record below, it is not surprising that the district court characterized Appellants' position as putting charter schools at **“front and center of th[e] problem.”** Doc. 64, Ex. 12 at 1, 41 (emphasis added). The district court also concluded that, “If Plaintiffs prevailed, **Plaintiffs clearly envision that charter schools would be subject to remedies** to eradicate segregation....” Dist. Ct. Order Granting Intervention, Feb. 2, 2016, Doc. 50 at 3 (emphasis added). This is regardless of whether the charter schools enroll predominantly students of color—and are chosen by families of color—and regardless of whether students are succeeding in these schools.¹⁶

¹⁶ In the district court, Appellants agreed with the judge's assessment that their Complaint **“sends the message loudly and clearly that charter schools are part of the problem.”** Doc. 64, Ex. at 40 (emphasis added). **“It certainly does,”** replied Appellants' counsel. *Id.* (emphasis added). In the Court of Appeals, however, Appellants attempted to moderate their position, stating that, “Plaintiffs did not sue the Charter Schools, have asserted no cause of action against them, and seek no relief from them.” Reply Br. of Pls.-Appellants, Minn. Ct. App., June 7, 2022, at 1 n.1. While it is true that Appellants did not sue charter schools, the full record belies their effort to depreciate their stance.

III. THE IMPORTANCE OF PUBLIC CHARTER SCHOOLS CHOSEN BY FAMILIES OF COLOR

A. Families of Color Are Disproportionately Choosing Public Charter Schools

Charter schools in Minnesota offer options to families who, among other things, live in districts or neighborhoods with failing traditional public schools and who do not have the means to send their children to private schools. Charters are not-for-profit public schools that **may not charge tuition** and must **accept all students** who apply, with a lottery when there are more applicants than seats (with limited exceptions, including that enrollment preferences may extend to siblings of enrolled students). Minn. Stat. § 124E.06, subd. 3(g); Minn. Stat. § 124E.11, subds. (b) and (c) (2022).

Given their otherwise dismal educational options, it is little wonder that Twin Cities families of color are disproportionately choosing charter schools. In large part, the fact that Appellants' lists of "segregated" schools includes more charters with predominantly students of color than White charters reflects that more families of color choose to leave traditional public schools that do not meet their needs. Thus, charter schools statewide **"served significantly larger percentages of minority students,"** as well as students eligible for **free or reduced-price lunch** and students with **limited English proficiency**. Office of the Legislative Auditor, *Evaluation Report: Charter Schools*, at 9-10 (June 2008) (emphasis added). Similarly, the exodus of students from traditional public schools in Minneapolis **"is most pronounced among Black students."** Beth Hawkins, *Downsize*

Schools? . . . With Enrollment Down, Minneapolis & St. Paul Split on How to Spend Covid Relief Funds, THE 74, Nov. 29, 2021 (emphasis added).¹⁷

There are varied reasons for families of color gravitating to charter schools that reflect their demographics. One is academic excellence. Another is to escape unwelcoming environments, low expectations, and lackluster academic programing in some traditional public schools and, instead, enroll their children in schools that promote a sense of pride and belonging.

Clearly, this is a different situation than presented in *Brown v. Board of Education*, where state laws restricted parent choice by mandating racially segregated schools. Today, parents of color have the freedom—but are not required—to choose culturally affirming charter schools for their children. This is not to disregard the benefits of integration. But it is a gross simplification to insist that racial balancing is the only solution for families of color, especially for families who, best knowing their children, choose an alternate path.

One size does not fit all; different children have different needs, and some learning environments are better suited to some children than others. Indeed, it is far-fetched to imply that these families are **violating their own constitutional rights** by voluntarily selecting schools that serve predominantly children of color.

¹⁷ Some students leaving the Minneapolis district enroll in charter schools. Others enroll in suburban districts under Minnesota’s statewide enrollment options program. *See* Minn. Stat. § 124D.03 (2002). If Minneapolis wants to stem these exits, the answer is not to eliminate better choices for families of color; the answer is for the district to improve its schools.

B. Families of Color Are Exercising Their Autonomy by Choosing Public Charter Schools for a Variety of Reasons

1. Academic excellence

Appellants’ indiscriminate targeting of charter schools includes schools attended by predominately students of color that outperform their traditional district counterparts. The following chart demonstrates two charter school success stories—Hennepin Schools in Minneapolis (which is on Appellants’ list of “segregated” schools) and Global Academy in New Brighton (which is not on Appellants’ list but enrolls ninety percent students of color)—as reflected in the most recent state MCAs:

MCA Proficiency Rates for Black Students ¹⁸

	Global Academy	Hennepin Schools	Minneapolis Public Schools	St. Paul Public Schools
Reading Proficiency	50.8%	42.5%	17.9%	21.2%
Math Proficiency	32.3%	31.6%	10.0%	12.3%

Thus, even while Hennepin Schools and Global Academy continue to strive for improvement, their proficiency rates for Black students are currently two to three times higher than for Black students in the Minneapolis and St. Paul district schools.

¹⁸ Minnesota Department of Education, *supra* note 5.

The demographics of these schools are also instructive:

	Student Demographics ¹⁹			
	Global Academy	Hennepin Schools	Minneapolis Public Schools	St. Paul Public Schools
Black	86.3%	89.5%	30.6%	24.6%
Hispanic/Latino	0%	10.5%	17.3%	14.4%
Asian	3.2%	0%	3.8%	30.0%
White	10.1%	0%	38.5%	21.7%
Free/Reduced-Price Meals	81.1%	> 90%	48.2%	61.5%
English Learner	43.2%	56.5%	16.9%	28.8%
Special Education	7.4%	11.3%	17.0%	16.1%

In sum, Hennepin Schools has an enrollment of virtually 100 percent students of color, with predominantly Black students, and Global Academy is also predominantly Black, with a White enrollment of only about ten percent. (As required of all charter schools, these schools cannot select their students based on race. Minn. Stat. § 124E.11, subd. (b) (2022).) Notably, both of these charters also overwhelmingly enroll students qualified to receive free- or reduced-price lunches (a barometer of family income), and their percentages of English learners is also remarkably high—for example, over half of

¹⁹ *Id.*

the students at Hennepin Schools—yet, despite these challenges, they consistently rank among the best academic performers for students of color in the region.²⁰

How do these charter schools beat the odds? Most importantly, the schools use strategic interventions proven to lead to improved academic outcomes. *See supra* Statement of Facts, Section B.²¹ In each school, literacy instruction is aligned to the research on how children learn to read. Each school also uses tutoring for additional academic support. Hennepin Schools hosts an early childhood education program that comports with kindergarten readiness standards. The schools also employ engaging curriculum in line with grade-level standards that is culturally inclusive and facilitates rich interactions in the classrooms. Finally, the schools promote a rigorous culture of accountability. As the Hennepin Schools website states:

We are relentlessly committed to student achievement.... We use clear and concrete measures to determine achievement. When we fail, we take responsibility and look to develop better and more effective methods.... We are united by our shared mission, by the urgency of the calling, and by our relentless pursuit of academic achievement for all. ²²

It is true that these schools are exceptions and outshine most charters and traditional public schools serving predominantly students of color. But for Appellants to refuse to acknowledge the importance of these charters in the bleak educational landscape of the

²⁰ Global Academy and Hennepin Schools are grantees of the Ciresi Walburn Foundation.

²¹ *See also* Global Academy, *About Us*, <https://www.globalacademy.us/page/3033>; Hennepin Schools, *Our Approach*, <https://www.hennepinschools.org/about/our-approach>.

²² Hennepin Schools, *supra* note 21.

Twin Cities—to put at risk the model of success of even one higher-performing school—is to underscore their willingness to depreciate academic achievement, notwithstanding the teachings of *Skeen* and *Cruz Guzman I*.

For schools that do not so clearly rise above the rest, it can be difficult to draw an accurate comparison between charters and traditional public schools due to the multitude of factors that impact academic achievement. The Office of the Legislative Auditor noted this challenge in its 2008 report on charter schools. This report found that, in general, “Minnesota charter schools did not perform as well as district schools” on the state’s standardized assessments. Office of the Legislative Auditor, *Charter Schools*, *supra* at 13. However, “when we took into account **region**, percentage of **minority students**, percentage of students **eligible for free or reduced-price lunch**, and student **mobility rates**, the differences between charter and district school student performance were minimal.” *Id.* (emphasis added).

In other words, any comparison must account for the fact that a higher percentage of students in charter schools face additional barriers to academic success. This led to a “key limitation” in the Auditor’s report. *Id.* at 14. The report relied on point-in-time test results, such as the state MCAs, instead of tests that measure growth in student performance over the course of a year. As the Auditor noted, this fails to measure success where students enter the school year behind grade level but make notable progress over the course of the year. Thus, **assessments that measure academic growth “may better reflect the relative impact and success of a school,”** the Auditor concluded. *Id.* at 31 (emphasis added). In

short, the academic success of charter schools may be underestimated due to the failure to account for growth in student academic achievement during the school year.²³

2. Culturally affirming environments

Charter schools that are not among the elite in academic performance nevertheless offer families of color an important option for their children. Standardized test scores, although a crucial assessment factor, are not the only measure of a school's success.

As a result, many Twin Cities families look for additional features, including a culturally affirming environment, where their children can flourish. Nekima Levy Armstrong, a prominent social justice activist, former president of the Minneapolis chapter of the NAACP, and a Twin Cities parent,²⁴ testified as follows in a hearing on the state's proposed desegregation rule:

I have concerns about the proposed integration rule to charter schools in general but to culturally specific charter schools in particular. And part of that has to do with what I believe is a false analysis that's being applied to culturally specific charter schools that tends to consider those schools to be segregated schools.

This flies in the face of civil rights history and also the fact that we have Historically Black Colleges and Universities around the country that are specifically **designed to affirm, enrich, and enhance the educational experiences of African-Americans** who we know have faced historical discrimination throughout our time in this country....

[A]s African-American parents, we have very limited choices in terms of where we can send our children to make sure that their identity is being affirmed, that they are learning about heritage, and that ... they are in environments in which they feel that their humanity is being respected....

²³ One assessment of academic growth used by a number of Minnesota charter schools is the Northwest Evaluation Association's Measure of Academic Progress ("NWEA MAP").

²⁴ Ms. Armstrong is now one of the attorneys for the Intervenors in this action.

And I can't imagine as a parent not having those choices available to me, and **it's disappointing when you have primarily white people who are holding themselves out as experts who have never raised a Black child....**

That is a constant challenge that parents of color face in the state of Minnesota, and somehow **some people feel that if you magically place children of color next to white kids in class, that their outcomes are automatically going to be improved.**

Doc. 256 at 110-11 (emphasis added).

As reflected in this testimony, the fact that students of color can learn as well, or better, when surrounded by other students of color is demonstrated by the success of Historically Black Colleges and Universities ("HBCUs"). Similar to culturally affirming charter schools, HBCUs offer benefits that Black students don't typically experience in traditional educational settings, including an environment that inspires self-reliance, empowerment, and Black excellence. Although HBCUs enroll only nine percent of Black undergraduates, these schools have educated **eighty percent of the nation's Black judges; forty percent of Black members of Congress; and seventy-five percent of Blacks with doctorate degrees.**²⁵

Nevertheless, it is clear that Appellants, while not demanding outright closure, seek to compel culturally affirming charter schools to change their successful approach for

²⁵ Erica L. Green, *Why Students Are Choosing H.B.C.U.s: '4 Years Being Seen as A Family'*, THE NEW YORK TIMES, June 11, 2022; Tyra Wheeler-Zubia, *Examining Institutional Effectiveness at Historically Black Colleges and Universities*, Association for Higher Education Effectiveness, Feb. 25, 2021.

students who have been historically less well served. This would eliminate the very reason many families of color choose to enroll their children in these schools.²⁶

Indeed, in discovery, Appellants cited as objectionable some of the very attributes at the core of these charters' successes, and, in the process, demonstrated the extremes to which they have taken their arguments. In answers to interrogatories, Appellants examined the websites of various charter schools and listed their criticisms in a chart labeled, "Charter Schools That Market Themselves As Segregated." Appellants' grievances—in **Appellants' attorneys' own words**—included: "Website says all the right things about being open to all students and free from discrimination based on race, etc. **Photos** tell a different story"; "**[D]iscuss[es] challenges these [immigrant] students face**"; "Video of African-American and Hispanic parents and **photos of colored [sic] students**"; "Also

²⁶ In 2021, Appellants and the Minnesota Department of Education ("MDE"), in an effort to settle this litigation, submitted to the Legislature a proposed bill that would have significantly impacted charter schools serving predominantly students of color. The bill, introduced but not passed, would have required "**identifiable charter schools**," defined as charters serving more than eighty percent "historically underserved students" (i.e., **students of color, Indigenous students, and students in poverty**) and charters with enrollment of historically underserved students with a greater than twenty percent variance of the school district average (at the same grade level(s)), to develop plans to "**increase the racial and socioeconomic diversity of the student body**," with "**measurable goals to eliminate the identifiable status of the school within three years**." HF 2471, § 1, subd. 7; § 3, subds. 3(b)(4), 5(a), and 5(b)(1), 92nd Leg., Reg. Sess. (Minn. 2021) (emphasis added). Despite this language, Appellants stated in their Petition to this Court that their bill "does not require race-based student assignment." Pls.-Pet'rs' Pet. for Rev., Oct. 21, 2022, at 8. In their Petition, Appellants further stated that "school choice for parents and students [would be] limited only by capacity constraints." *Id.* at 5. However, for students of color interested in attending culturally affirming charter schools 1) their seats could be awarded to White students through "a weighted or controlled choice lottery or ... other **enrollment strategies that would increase the diversity of the student body**," HF 2471, § 3, subd. 5(b)(1) (emphasis added), and 2) these charters—and therefore the choice of these charters—would no longer exist as currently constituted.

written in Spanish”; “Link to ‘Beating the Odds’: charts showing school leads in math and reading”; “News about open house also written in Spanish”; “ELS information also written in Hmong”; “Choice to view website in Spanish”; and “Offers Spanish language instruction.” Pls.’ Resp. to Intervenors’ First Set of Interrogs., Answers to Interrog. 4 (d) and (e), Doc. 220, Ex. 34 at 10-12; Schedule A to Answers to Interrog. 4(d) and (e), Doc. 291, Ex. 74 at 1-5 (emphasis added).

Appellants also identified as objectionable a number of quotes taken directly from charter schools’ websites, including:

- “Rigorous Academics—‘No Gaps Here!’ ... Positive Adult Culture—‘Let’s Stay Together!’”
- “[S]erves a population overwhelmingly from immigrant families who come from homes where English is not the first language.”
- “We have Beat the Odds, for the second year in a row!!”
- “[E]stablished to provide a rigorous American education for children in a culturally sensitive environment ... while allowing them to retain their unique cultural heritage.”
- “One School, Many Nations.... Many of our students are recent immigrants and refugees and come from many countries including Ethiopia, Djibouti, Togo, Uganda, Iraq, Kuwait, Somalia, Mexico, and Ecuador.”
- “[I]nvites young adults from diverse communities.... Offers Indian Education Program, including Dakota & Ojibwe Studies.... [S]tudents and staff represent a variety of cultures, including African American, Caribbean, European American, Hawaiian/Pacific Islander, Hmong, Indian, Latino, Liberian, Mexican, Native American (including Cherokee, Dakota, Ho-Chunk, Lakota, Ojibwe, Navajo), Puerto Rican, Somali.”

- “[A] personalized learning model that closes the vast college-and career-readiness gap that confronts economically disadvantaged youth in the Twin Cities.”
- “Challenging our students to gain more knowledge of the world we live in and to become more aware of the cultures around us. Celebrating the diversity of our community.”
- “[T]argets young people who have not been successful in other schools.”

Id.

Certainly, families of color in the Twin Cities would be all the more disadvantaged if deprived of the choice of schools that meet the above descriptors. Our community, too, would be lessened by a loss of the richness of this diversity.

C. Public Charter Schools Are Subject to Equal Protection and Due Process Claims for Intentional Discrimination

Parent choice is, of course, not without limits. Among other things, a charter school that intentionally discriminates is subject to state and federal Equal Protection and Due Process claims. *See* Minn. Const. art. I, §§ 2, 7; U.S. Const. amend. XIV, §1. These are the constitutional provisions specifically aimed at addressing claims of discrimination but which Appellants have chosen not to pursue at the present time.

CONCLUSION

There are no easy answers to remedying Minnesota’s opportunity and achievement gaps and putting our state on the path to providing, at a minimum, an adequate education for all of our children. But there are proven interventions, many of which have not been

fully embraced in this state, as well as existing options—including public charter schools chosen by families of color—that can help narrow the disparities.

Integration should also be included in the mix of educational reforms, but not at the cost sought to be imposed by Appellants. A school system that is racially balanced by the numbers but fails to take into account, and even subverts, other essential elements of the constitutional inquiry cannot fulfill the constitutional mandate.

In the end, these are the profound implications of Appellants’ theory of the case as framed in this appeal, which loses sight of the fundamental values of academic achievement and racial equity.

Dated this 25th day of January 2023. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this document conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, in that it was produced in 13-point, proportionally spaced typeface utilizing Microsoft Word 365 and contains 6,232 words, including headings, footnotes, and quotations.

Dated this 25th day of January 2023. By: Michael V. Ciresi
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