FILED
January 26, 2023
OFFICE OF APPELLATE COURTS

No. 22-0118

STATE OF MINNESOTA
IN SUPREME COURT

Alejandro Cruz-Guzman, as guardian and next friend of his minor children, *et al.*,

Plaintiffs-Appellants,

vs.

State of Minnesota, *et al.*,

Defendants-Respondents,

and

Higher Ground Academy, *et al.*,

Intervenors-Respondents.

BRIEF AND ADDENDUM OF PLAINTIFFS-APPELLANTS

SHULMAN & BUSKE PLLC
DANIEL R. SHULMAN (#100651)
126 N 3rd St, Suite 402
Minneapolis, MN 55401
Telephone: (612) 870-7410

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota
Kevin A. Finnerty (#0325995)
Deputy Attorney General

445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
Telephone: (651) 757-1058

ATTORNEYS FOR DEFENDANTS-RESPONDENTS

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(h)(3).

Plaintiffs-Appellants' Attorneys Cont.:

LATHROP GPM LLP
RICHARD C. LANDON (#0392306)
500 IDS Center, 80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 632-3000

THE SPENCE LAW FIRM, LLC
MEL C. ORCHARD III (Pro Hac Vice)
(WY Atty License Number 5-2984)
15 S. Jackson Street
Jackson, WY 83001
Telephone: (307) 733-7290

LAW OFFICES OF JOHN BURRIS
JAMES COOK (Pro Hac Vice)
(CA Atty License Number 300212)
7677 Oakport Street, Suite 1120
Oakland, CA 94621
Telephone: (415) 350-3393

TAFT, STETTINIUS, & HOLLISTER LLP
JACK Y. PERRY (#209272)
2200 IDS Center, 80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 997-8400

JOHN CAIRNS LAW, P.A.
John Cairns (#14096)
2751 Hennepin Avenue, Box 280
Minneapolis, MN 55408
Telephone: (612) 986-8532

NEKIMA LEVY-ARMSTRONG
(#335101)
1011 West Broadway Ave., Ste. 100
Minneapolis, MN 55411
Telephone: (612) 598-0559

ATTORNEYS FOR INTERVENORS-RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

LEGAL ISSUES INVOLVED

In its previous opinion in this case, this Court stated with reference to the Education Clause of the Minnesota Constitution, "It is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.' Minn. Const. art. XIII, § 1." *Cruz-Guzman v. State of Minnesota*, 916 N.W.2d 1, 10 n.6 (Minn. 2018). This appeal asks the Court to clarify the meaning of this statement, specifically whether the Court intended for federal equal protection jurisprudence to control litigation under the *sui generis* Minnesota Education Clause, which has no counterpart in the U.S. Constitution.

Both lower courts thought so in posing and answering a certified question, which now comes before this Court.

> **Issue 1**: **Is it necessary to prove intentional *de jure* segregation in order to establish that a racially segregated school system is not general, uniform, thorough, or efficient and therefore violates the Education Clause?**

Appellants ("Plaintiffs") raised the issue in the district court by moving for partial summary judgment on the ground that Respondents (collectively "the State") had violated the Education Clause by permitting and failing to remedy racial and socioeconomic segregation in the Minneapolis and St. Paul School Districts. The district court denied the motion, ruling that proof of intentional *de jure* segregation is required to prove a violation of the Education Clause. ADD. 33-34; Record ("R") Document ("Doc.") 371 at 17-18.

Because the issue is both important and doubtful, the district court certified for appeal, pursuant to Minn. R. Civ. App. P. 103.03(i), the question:

> Is the Education Clause of the Minnesota Constitution violated by a racially-imbalanced school system, regardless of the presence of *de jure* segregation or proof of a causal link between the racial imbalance and the actions of the state?

ADD. 5. Plaintiffs filed a timely notice of appeal on January 27, 2022. R. Doc. 375.

On September 26, 2022, the court of appeals answered the certified question, in the negative, requiring Plaintiffs to prove intentional *de jure* segregation to prevail on their Education Clause claim. ADD. 15-16; R. Doc. 384. *Cruz-Guzman v. State of Minnesota*, 980 N.W.2d 816, 827 (Minn. Ct. App. 2022).

Plaintiffs filed a timely Petition for Review in this Court on October 21, 2022. R. Doc. 385. This Court accepted review on December 13, 2022. R. Doc. 386.

Most apposite cases and constitutional provision:

Cruz-Guzman v. State, 916 N.W,2d 1 (Minn. 2018)

Skeen v. State, 505 N.W.2d 299 (Minn. 1993)

Bd. of Educ. of Sauk Ctr. v. Moore, 17 Minn. 412 (1871)

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1, 551 U.S. 701 (2007)

Minnesota Constitution, Education Clause, Art. XIII, § 1

Issue 2: **If *de jure* segregation is not required, what standard of causation, if any, is required to prove that a racially segregated school system violates the Education Clause?**

This issue arose in the district court in two contexts. Relying on principles of tort law, the district court concluded that if racial segregation is the claimed injury, Plaintiffs must prove that specific State action directly caused the segregation. ADD. 38-39; R. Doc. 371 at 22-23. The district court did not reach the issue of whether Plaintiffs must also prove that racial segregation caused students to receive an inadequate education, although the court cited cases from other jurisdictions to this effect. *Id*. The court of appeals reached neither issue. ADD. 1-16, R. Doc. 384, *passim*.

The State and Plaintiffs, however, in both the district court and on appeal, briefed the issue of whether Plaintiffs must prove that segregation caused an inadequate education. R. Doc. 355 at 17-18; R. Doc. 363 at 4-6; Appellants' Brief at 41-46; State Respondents' Brief at 23-25; Appellants' Reply Brief at 6-8. When this case returns to the district court, the court and the parties will need this Court's guidance on whether the Education Clause requires proof of causation and the applicable standard.

As noted, Plaintiffs filed a timely Petition for Review in this Court on October 21, 2022. R. Doc. 385, which this Court granted on December 13, 2022. R. Doc. 386.

Most apposite cases and constitutional provision:

Cruz-Guzman v. State, 916 N.W,2d 1 (Minn. 2018)

Skeen v. State, 505 N.W.2d 299 (Minn. 1993)

Bd. of Educ. of Sauk Ctr. v. Moore, 17 Minn. 412 (1871)

Minnesota Constitution, Education Clause, Art. XIII, § 1

STATEMENT OF THE CASE

1. Nature of the Case

Plaintiffs filed this injunctive class action on behalf of Minneapolis and St. Paul students on November 5, 2015, in Hennepin County District Court alleging violations of the Education, Equal Protection, and Due Process Clauses of the Minnesota Constitution—Article XIII, Section 1, Article I, Section 2, and Article I, Section 7, respectively. R. Doc. 1 at 1-2. Only the Education Clause violation is at issue in the appeal.

Plaintiffs' claims all arise from racial and socioeconomic segregation in Minneapolis and St. Paul Public Schools, for which they allege the State is responsible. The State collectively includes Respondents State of Minnesota, the Commissioner and State Department of Education, and the State House and Senate.

The district court allowed intervention by three charter schools and three parents (collectively "the Charter Schools") on February 2, 2016. R. Doc. 50. The

State and Charter Schools moved to dismiss the Complaint on numerous grounds, almost all of which the district court rejected. R. Docs. 110, 111. The State's motion asserting lack of subject matter jurisdiction allowed it to appeal of right to the court of appeals, which reversed, dismissing the case for lack of justiciability. R. Doc. 194. *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017).

This Court granted discretionary review, R. Doc. 196, and reversed the court of appeals. R. Doc. 198. *Cruz-Guzman v. State*, 916 N.W.2d 1 (2018). The Court held that claims under all three constitutional Clauses were justiciable as pleaded. In footnote 6 of its decision, the Court stated, "It is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.' Minn. Const. Art. XIII, § 1." *Id.*, at 10 n.6.

On remand to the district court, Plaintiffs obtained class certification. ADD. 3-4; R. Doc. 227; R. Doc. 239. The district court thereafter stayed the case through amended scheduling orders R. Doc. 252; R. Doc. 308; R. Doc. 321. while the parties engaged in two years of mediation. Plaintiffs and Respondent Minnesota Department of Education ("MDE") ultimately agreed to present a proposed bill to Respondents House and Senate that, if passed, would have ended the litigation.

The bill provided for metropolitan-wide desegregation/integration and magnet schools, with two distinct features: (1) there would be preferences for enrollment of underserved students based only on socioeconomic status ("SES"), not race; and (2) the bill preserved school choice for parents and students subject only to capacity constraints.[1] R. Doc. 346 at 30-31. The Legislature did not pass the bill in 2021.[2]

The parties therefore returned to court to proceed with the litigation. Plaintiffs filed a motion for partial summary judgment that the State had violated the Education Clause by permitting and failing to remedy racial and SES segregation in the Minneapolis and St. Paul Public School Districts. ADD. 4; R. Docs. 337, 345.

The district court denied the motion in an Order filed December 6, 2021. ADD. 17-41; R. Doc. 371 at 1-2. The court several times in the opinion stated a need for appellate guidance regarding this Court's previous decision, particularly footnote 6. The district court certified for immediate appeal as important and doubtful the question:

---

[1] The House bill, H.F. 2471, 92nd Minn. Leg. 2021-2022, is available at: https://www.revisor.mn.gov/bills/bill.php?f=HF2471&b=house&y=2021&ssn=0. The Senate bill, S.F. 2465, 92nd Minn. Leg. 2021-2022, is available at: https://www.revisor.mn.gov/bills/bill.php?f=SF2465&y=2021&ssn=0&b=senate.

[2] Neither house has yet passed the bill.

> Is the Education Clause of the Minnesota Constitution violated by a racially-imbalanced school system, regardless of the presence of *de jure* segregation or proof of a causal link between the racial imbalance and the actions of the state?

ADD. 24; R. Doc. 371 at 23-25. The district court would not grant Plaintiffs' motion without an affirmative answer to its question from an appellate court. *Id*.

Plaintiffs filed a timely appeal of the district court's decision. R. Doc. 375.

On appeal, the court of appeals issued a for publication decision answering the district court's decision in the negative. ADD. 16; R. Doc. 384; *Cruz-Guzman v. State of Minnesota,* 980 N.W.2d 816, 827 (Minn. Ct. App. 2022).

Plaintiffs timely petitioned this Court for review, R. Doc. 385, which this Court granted on December 12, 2022. R. Doc. 386.

2. Statement of Facts

This appeal is from the affirmance of the district court's denial of Plaintiffs' motion for partial summary judgment that the State violated the Education Clause by "by instituting, maintaining, permitting, and failing to correct public schools segregated by race and socio-economic status in the Minneapolis and St. Paul Public School Districts." ADD. 13-16, R. Doc. 384 at 13-16; ADD. 18, R. Doc. 371 at 1; R. Doc. 1 at 1-2.

a. Racial and Socioeconomic School Segregation

In its order denying the motion for partial summary judgment, the district court observed in its "Summary of Material Undisputed Facts,"

> 18. Plaintiffs present data regarding the racial and socio-economic make-up of students in Minneapolis and St. Paul public schools and the overrepresentation of students of color in relation to the demographics of the districts for which they provide a public-school education. This disproportional representation will hereinafter be called "racial imbalance."
>
> 19. The existence of this racial make-up and imbalance against district demographics is not disputed.

ADD. 21, R. Doc. 371 at 5.[3] Although the district court's order does not identify these "not disputed" facts, they are important for this Court's consideration.

They include:

1. For the 2019-20 school year, the public schools of the City of Minneapolis were approximately 63 percent SOC and 54 percent free or reduced lunch ("FRL"). R. Doc. 348, Ex. 1, ¶ 21.[4]

2. For the 2019-20 school year, the public schools of the City of Saint Paul were 79 percent SOC and 66 percent FRL. *Id*.

---

[3] The district court declined to characterize so-called "racial imbalance" as "segregation," because "the word 'segregated' often connotes an intentional policy of separating races, or other protected classes." ADD. 19 at 3, n. 7.

When Plaintiffs use the term "segregation" or any of its derivatives, however, Plaintiffs are referring to schools that have a population of students of color ("SOC") or students disadvantaged by SES that exceeds by 15 or 20 percent the percentage of the same students in the district as a whole, regardless of what caused the imbalance. The 15 percent standard comes from the MDE's own desegregation/integration rule in effect from 1978 to 1999. The 20 percent variance standard became effective when the MDE implemented the current rule. Plaintiffs apply these standards, which the MDE itself devised, whether the segregation is *de jure* or *de facto*. The only exception Plaintiffs advocate is that a court should deem segregated any school once its SOC or SES-disadvantaged students reach 80 percent.

[4] Free or reduced lunch ("FRL") is a common proxy for SES-disadvantaged.

3. For the 2019-20 school year, SOC comprised approximately 36 percent of Minnesota's public school population, and children receiving FRL comprised approximately 32 percent of Minnesota's public school population. *Id*.

4. For the 2019-20 school year, the school age populations in a number of suburban school districts surrounding or contiguous to the Minneapolis and Saint Paul public school districts were predominantly white, with a lesser incidence of FRL students. *Id*. at ¶ 23.

R. Docs. 346 at 4, 5; 348 at 2, Ex, 1 at 6-16.

With the State's knowledge, for the 2020-21 school year, the Minneapolis Public School District had 23 schools with more than 80% SOC. All of these schools had more than 70% FRL students. At the same time, Minneapolis had 12 schools with fewer than 40% SOC, all of which had fewer than 36% FRL students. R Doc. 348 at 2, Ex, 1 at 6-16.

For the same school year, the St. Paul Public School District had 36 schools with at least 80% SOC, of which 28 had at least 90% SOC. Of these schools all but four had at least 70% FRL students. St. Paul also had five schools with at least 53% white students. *Id*., at 8-9.

For the same school year, the seven-county Twin Cities metro-area had 81 charter schools with at least 95% SOC, of which 46 were 100% SOC, while there were at the same time 28 charter schools at least 75% white. *Id*., at 9-12.

Segregation by race and SES in the Twin Cities metropolitan area public schools has been increasing for over two decades. In the 26 years from 1995 to

2021, the number of schools in the Twin Cities metropolitan area made up of more than 90 percent SOC increased by more than 12 times, from 11 to 144. The number of SOC in highly segregated schools rose by more than 22 times (from 1,863 to 49,782), a percentage increase from 2.4 to 23 percent. *Id*. at ¶ 52.

b. The Achievement Gap

In addition to these undisputed demographics, Plaintiffs presented undisputed data showing the large and intractable achievement gap between white students and SOC.

Between 2014 and 2021, neither segregation nor achievement gaps in the Minneapolis Public Schools appreciably changed, other than worsening. Of the 23 Minneapolis schools with over 80% SOC enrollment in the 2020-21 school year, 19 exceeded 80% SOC enrollment in 2014, before this lawsuit began. Of those 19 schools, seven increased their SOC enrollment from 2014 to 2021. In St. Paul, 30 of the 36 schools exceeding 80% percent SOC enrollment in 2021 were also above 80% in 2014, and 18 had increased SOC enrollment. R. Doc. 348 at 2, Ex. 1 at 18-20; R. Doc. 363 at 7-10; R. Doc 356, Ex. 3, at 4-17.

During roughly the same time period, there was no appreciable closing of the achievement gap, and in some instances, worsening. The undisputed results of standardized achievement tests for Blacks, Hispanics, Native Americans, and

Whites in the Minneapolis and St. Paul Public School Districts, and also Minnesota students state-wide, from 2014 and 2019, show the following:

PROFICIENCY CHANGES 2014 TO 2019

Test Type	*2014*	*2019*
MINNEAPOLIS PUBLIC SCHOOLS		
MPS White Reading	77.7%	78%
MPS White Math	76.1%	76%
MPS White Science	70%	71.1%
MPS Black Reading	23.2%	25%
MPS Black Math	22.7%	19%
MPS Black Science	12.5%	13%
MPS Hispanic Reading	24.3%	30%
MPS Hispanic Math	31%	26%
MPS Hispanic Science	18.5%	21%
MPS Nat. Amer. Reading	22.9%	24%
MPS Nat. Amer. Math	22.9%	17%
MPS Nat. Amer. Science	16.6%	17%
ST. PAUL PUBLIC SCHOOLS		
SPPS White Reading	72%	73%
SPPS White Math	67%	64%
SPPS White Science	64.2%	65%
SPPS Black Reading	25.2%	25%
SPPS Black Math	24.4%	17%
SPPS Black Science	14%	13%
SPPS Hispanic Reading	29%	30%
SPPS Hispanic Math	28.5%	26%
SPPS Hispanic Science	21.7%	18%
SPPS Nat. Amer. Reading	35%	32%
SPPS Nat. Amer. Math	29.4%	11%

SPPS Nat. Amer. Science	21%	18%
STATEWIDE PROFICIENCY RESULTS		
Statewide Reading All	58.8%	60%
Statewide Math All	60.5%	56%
Statewide Science All	53.4%	51%

The foregoing numbers, none of which the State disputes, conclusively show that SOC and SES-disadvantaged students in the Minneapolis and St. Paul Public Schools Districts are not receiving an adequate education, and have not for an unconscionably long time. R. Doc. 348, Ex. 1 at 19-20; R. Doc. 365 at 20-30.[5]

c. The Role of the State

The racial and socioeconomic segregation in the Minneapolis and St. Paul Public School Districts could not have occurred without State action and consent. The record contains a paper trail of extensive State knowledge, approval, and measures to perpetuate segregation, the authenticity of which is undisputed. R.

[5] The most recent MDE data available for SES-disadvantaged students (referred to as ("Free/Reduced Price Meals" students) is from 2016 due to the pandemic. It shows on a state-wide basis 29.4% reading at grade level and 21.4% doing math at grade level. Available at: https://rc.education.mn.gov/#northStarAchievement/orgId--999999000000__groupType--state__year--2022__nscomparisonline--FOC_NONE__categories--FRP__p--5. For the Minneapolis School District, the numbers are worse: 15.3% for reading and 8.5% for math. Available at: https://rc.education.mn.gov/#northStarAchievement/orgId--30001000000__groupType--district__year--2022__nscomparisonline--FOC_NONE__categories--FRP__p--5. For the St. Paul School District, the numbers are 19.6% for reading and 11.8% for math. Available at: https://rc.education.mn.gov/#northStarAchievement/orgId--10625000000__groupType--district__year--2022__nscomparisonline--FOC_NONE__categories--FRP__p--5. The State is not educating these children.

Doc. 356, Ex. 3, cover letter at 1, Responses at 19-44; R. Doc. 346 at 15-31; R. Doc. 347, Exs. 1-58, 60-73; R. Docs. 287-291, 293-294.

This undisputed evidence shows two primary State actions that produced segregation: substitution of a new desegregation/integration rule for the existing rule, and permitting the Minneapolis and St. Paul School Districts to return to neighborhood schools from less segregated schools. Both occurred when the State knew or was on notice that these changes would increase racial and socioeconomic segregation.

Origins of the current desegregation rule

(1) In 1972, the Minnesota Federal District Court found that the Minneapolis School District had intentionally segregated its schools. It ordered the District to desegregate under a decree that remained in effect until June 8, 1983, at which time the schools had desegregated. *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972). R. Doc. 287, Exs. 1-2 (R. Doc. 288).[6]

[6] R. Doc. 287 is an affidavit of counsel identifying attached Exhibits 1 through 78. Because of their volume, the exhibits themselves required six additional filings. These are, in R. Doc. order, not necessarily exhibit number order: R. Doc. 288 (Exs. 1-15); R. Doc. 289 (Exs. 33-41); R. Doc. 290 (Exs. 16-32); R. Doc. 291 (Exs. 68-78); R. Doc. 293 (Exs. 42-58); and R. Doc. 294 (Exs. 59-67). This Brief cites in parentheses the R. Doc. containing the exhibit or exhibits referenced after the exhibit numbers.

(2) The MDE[7] monitored the desegregation of the Minneapolis School District under the State's 1978 desegregation rule, which prohibited any school from varying from its district's racial demographics by more than 15 percent, with a desired limit of no more than 50 percent SOC. *Id.*, Exs. 1-2, 5 at P0005619.

(3) The required Statement of Need and Reasonableness ("SONAR") for the 1978 rule stated that "the Department of Education is not constitutionally prohibited from regulating de facto segregation." The Hearing Examiner's Report approving the rule specifically noted that "the Legislature intended to regulate de facto segregation." *Id.*, Ex. 4 at P0000772, 774-777, Ex.5 at P0005619, 5621-22, 5624.

(4) By 1988, however, changing demographics in Minneapolis schools had made future compliance with the desegregation rule's limits on SOC enrollment increasingly difficult without participation from suburban districts. For the next two years, suburban and city districts explored possibilities for inter-district desegregation. *Id.*, Ex.6 at P0001972-74, Exs. 7-8, Ex. 9 at P0002038.

[7] During the time period relevant to this lawsuit, the educational administrative agencies in Minnesota at various times included the State Board of Education and the Department of Education, which at one time was also known as the Department of Children, Families, and Learning, which then again became the Department of Education, which today is the sole state administrative agency for education. For simplicity's sake, these various incarnations are referred to by a single appellation, "MDE."

(5) In 1989, the MDE created a Desegregation Policy Forum, which appointed a task force to identify issues to be addressed. The task force concluded that segregation, whether *de jure* or *de facto*, required desegregation/integration on an inter-district basis. *Id.*, Ex. 10 at P0002040, 2051-54.

(6) The result was an MDE effort to craft a new desegregation/integration rule during 1990-94, producing a series of drafts. Each draft defined segregation as "intentional or unintentional separation of learners of color or staff of color within a building or school district." The evolving drafts also required inter-district desegregation among city and suburban districts. *Id.*, Exs. 11-15 (R. Doc. 288), Exs. 16-18, Ex. 19 at P0002377, Ex. 20 at P0002114, P0002118 (R. Doc. 290).

Initial attempts to craft a new desegregation rule

(7) In 1993, the Legislature passed a law directing the State Board of Education to convene a Round Table "to recommend changes in the desegregation rule to better fulfill the promise of equal educational opportunity articulated in the landmark United States Supreme Court case of *Brown v. Board of Education.*" The bill required that topics for discussion by the Round Table "shall at minimum include … methods for preventing resegregation in urban districts, including metropolitan wide desegregation approaches." *Id.*, Ex. 28 at P0002192 (R. Doc. 290).

(8) In February 1994, the Round Table issued a report to the MDE and Legislature recommending inter-district desegregation that would be voluntary for parents and students, but mandatory for urban and suburban school districts. The report defined segregation as "intentional or unintentional separation of learners of color or staff of color within a building or school district." The MDE at that time "strongly endorse[d]" the Round Table's recommendations, which were part of drafts for a new 1995 rule. *Id.*, Ex. 30, Ex. 31 at P0000839, P0000841, P0000847-48, P0000849-53, Ex. 32 at P0002362, Ex. 19 (R. Doc. 290), Ex. 33 at P0002422-23, P0002425-26, P0002432 (R.Doc. 289).

(9) Resistance to these features of the proposed new rule arose in late 1994 with Robert Wedl, then MDE Assistant Commissioner and later Commissioner from November 1996 to January 1999. Wedl's view, which never changed, was that the Department would support only voluntary desegregation. Wedl stated that parent choice, "including neighborhood schools, could be a part of a successful plan even though such a plan resulted in schools with high student of color attendance." Wedl maintained this position even though repeatedly warned and advised that the State's policies would cause resegregation in the Minneapolis and St. Paul School Districts. *Id.*, Ex.34 at P0002867, P0002872-73, Exs. 35-36 at P0002370-71, P0002390-92, Ex. 37 at P0002410, P0002412, Ex. 39 at P0002558, Ex.40 at P0002630-31 (R. Doc. 289).

(10) In a memo of March 22, 1995, Wedl stated, "If, through parent choice, school sites would have high percentages of learners of color, such schools would not be considered to be segregated." By November, he was proposing to the Commissioner that segregation should be defined only as intentional. *Id*., Ex. 39 at P0002558, Ex. 40 at P0002630-31.

(11) Other supporters of Wedl's opposition to mandatory inter-district desegregation to remedy *de facto* segregation included the Center for the American Experiment and Republican Legislators, both of which issued public reports. *Id*., Ex. 38 at P0002441-46 (R. Doc. 289), Ex. 42 at P0002591, Ex. 43 (R. Doc. 293).

(12) On December 12, 1995, the Minneapolis School District petitioned the State Board of Education for a waiver from the current 15% desegregation rule to allow the District to return to neighborhood schools, the effect of which would be to resegregate the schools, as Wedl recognized. The District based its waiver application on its claimed ability to improve student achievement through increased parent involvement at neighborhood schools. *Id*., Ex. 44 (R. Doc. 293).

MDE reverses course on new desegregation rule

(13) At this point, the MDE requested assignment of legal counsel from the office of the Attorney General. The lawyer seconded to the MDE was Assistant Attorney General Cindy Lavorato, who assumed responsibility for reversing the

Department's prior course of action, implementing Wedl's views, and drafting and securing passage in 1999 of the current desegregation rule, which has resulted in the resegregation of the Minneapolis and St. Paul Districts. *Id.*, Ex. 45 at P0005730-31, P0005746, Ex. 46, Ex. 47 at P0002401, P0002403-06, Ex. 48-58, Ex. 53 at P0002650, P0002653, Ex. 58 at P0002815 (R. Doc. 293), Exs. 60-66, Ex. 67 at P0006470-513, P0006517-26, P0006528-36, P0006552-53, P0006558-61 (R. Doc. 294), Ex. 68-69 (R. Doc. 291).

(14) Lavorato first handled the Minneapolis waiver request for return to neighborhood schools. At a December 21, 1995, hearing, she advised the Board of Education that she was there to create an appropriate record to justify the waiver. At the hearing, Matthew Little, representing the Minneapolis NAACP and the Minnesota Minority Education Partnership, opposed the waiver because it would resegregate Minneapolis schools. On March 13, 1996, the Board granted the waiver, despite knowing its effect would be resegregation. *Id.*, Ex. 45 at P0005730-31, P0005746-47, Ex. 46, Ex. 51 (R. Doc. 293).

(15) Lavorato then drastically revised the proposed desegregation/integration rule on January 3, 1996. The new draft defined segregation to be only "the intentional act or acts by a school district which has [*sic*] the purpose of causing students to attend particular programs or schools within the district on the basis of their race." An internal edit showed that the

words "and/or foreseeable effect" were deleted after the word "purpose," and the definition expressly exempted a concentration of "learners of color" "not the result of intentional acts by districts," and "a concentration of learners of color [that] has occurred as the result of informed choices by parents." Inter-district, metro-wide desegregation was no longer compulsory, and could occur only on a voluntary basis. These features remained through successive drafts, and are part of the final rule approved in 1999, still in effect today. *Id.*, Ex. 47 at P0002401-06, Exs. 53-57 (R. Doc. 293), Ex. 66 at P00002860, Ex. 67 at P0006528-36, P0006552-53 (R. Doc. 294), Ex. 68-69 (R. Doc. 291).

(16) On March 2, 1996, Wedl and Commissioner Marcia Gronseth forwarded to the MDE a February 29 draft of the revised Rule defining only intentional discrimination as segregation, eliminating compulsory inter-district desegregation, setting difficult standards for proof of intentional segregation, and exempting neighborhood schools. *Id.*, Ex. 48 (R. Doc. 293).

(17) Counsel for the NAACP publicly reacted to the altered rule by calling it "an invitation to segregate." Other community organizations also told the MDE that the revised rule would cause resegregation, among them the Education & Housing Equity Project, the St. Paul Public Schools, the Urban Coalition, the Minnesota Minority Education Partnership, and the Catholic Charities Office of Social Justice. The University of Minnesota Law School

Institute on Race and Poverty lodged similar objections. *Id.*, Exs. 49 at P0002648-49, 50 at P0005756 (R. Doc. 293), Exs. 60-63 (R. Doc. 294).

(18) In an April 2, 1997, draft, Lavorato exempted charter schools from the rule. This exemption remains. *Id.*, Ex. 58 at P0002815 (R. Doc. 293).

(19) By early November 1997, Lavorato had begun work on the SONAR required for approval of the new rule (Minnesota Rule, Parts 3535.0100 to 3535.0180) by an Administrative Law Judge. The SONAR for the hearing beginning January 20, 1999, was 203 pages, as compared with the 14-page SONAR for the existing rule it would replace. *Id.*, Exs. 64 at P0002719, 65 at P0002824-25 (R. Doc. 294).

MDE's justification for adoption of the new rule

(20) The SONAR stated that the purpose of the rule was to "recognize that there are societal benefits from schools that are racially integrated as the result of the voluntary choice of parents and students, while also recognizing that many factors beyond the control of the commissioner and the control of districts, including housing, jobs, and transportation, can impact the ability to racially integrate schools." *Id.*, Ex.67 at P0006528-29. This was an obvious effort to exempt the State from any responsibility for desegregation.

(21) The SONAR revealed that the new rule raised the variance for a racially identifiable school to 20 from 15 percent; exempted charter schools;

defined segregation as intentional with a "purpose of causing a student to attend or not attend particular programs or schools within the district on the basis of the student's race and that causes a concentration of protected students at a particular school"; and did not include racially identifiable schools "providing equitable occupational opportunities." *Id*., Ex 67 at P0006530-36.

(22) The SONAR primarily justified the new rule on the claimed basis that federal law precluded State desegregation efforts without a showing of intentional segregation motivated by racial animus. It claimed, "there is a serious question whether the imposition of a strict numerical definition of segregation, followed by the use of a race-based remedy, such as student assignments based solely on race, or racial quotas at schools, would be sustained." It based these 1999 conclusions on a 1995-96 "extensive review of caselaw … conducted by the attorney general's office at the direction of the State Board of Education." *Id*., Ex. 67 at P0006509-13, 6517-26.

(23) The SONAR also represented that the need for a new Rule resulted from "A review of current education and sociological literature regarding the effect of desegregation/integration on students." This was a one-sided, incorrect description of the existing literature, relying heavily on work by known opponents of desegregation, with a history of providing "expert" testimony on behalf of school districts fighting desegregation lawsuits: David Armor and

Christine Rossell, who had been retained by the State as paid advocates for the new rule. *Id.*, Ex. 67 at P0006510, 6558-67 (R. Doc. 294); R. Doc. 283 at ¶ 14, Exs. 11 at P0006185-86, P0006197-6200, 12 at P0003914-16, 13 at P0001286-89 (R. Doc. 286).[8]

(24) The SONAR represented that "the legislature did not give the State Board of Education the authority to order cross-district busing." In fact, the Legislature in 1993 had passed the bill directing the MDE to create the Round Table, which "shall at minimum include … methods for preventing resegregation in urban districts, including metropolitan wide desegregation approaches." The Round Table then produced a proposed new desegregation rule including compulsory metro-wide desegregation, which the Legislature approved. R. Doc. 287, Ex. 28 (R. Doc. 290), Ex, 67 at P0006508 (R. Doc.294); R. Doc. 283 at ¶ 13.

(25) The MDE adopted the rule after ALJ approval on March 19, 1999. Thereafter, it repeatedly cautioned racially identifiable school districts, including Minneapolis, not to use "race-based measures" to desegregate. R. Doc. 287, Ex.70 at P0002931 n. 3, Ex. 71 at P0005839 n. 1 (R. Doc. 291).

[8] R. Doc. 283 is the affidavit of Professor Myron Orfield. The Exhibits to the affidavit were too voluminous for inclusion in R. Doc. 283 and were filed in R. Docs. 284-86.

Return to neighborhood schools

(26) In 2011, the MDE permitted the St. Paul School District to return to neighborhood schools, although there were community objections and notice to the St. Paul School District that the result would be increased segregation and resegregation. *Id.*, Exs. 72, 73.

(27) Under the current rule, schools in the Minneapolis and St. Paul School Districts have resegregated and remain segregated by race and SES. *See supra*, Section 2.a.

(28) From 1995 to the present, the MDE has found no school or district to have engaged in intentional segregation. R. Doc 356, Ex. 3 at 33. Instead, the MDE has turned a blind eye to substantial evidence of such discrimination, admitting internally, "In reality, it is very unlikely that MDE would ever make public statements that districts were intentionally segregating…. Even when we had a situation under [former Commissioner] Alice Seagren where a district was redlining trailer court kids to send them to school past 5 other closer schools, all the work at MDE to push the district in another direction was behind the scenes." R. Doc. 365, Ex. 3 at MDE0067730.

(29) Freed from all constraints of desegregation or integration, charter schools in the seven-county metropolitan area have become heavily segregated by race and SES, including white-segregated and non-SES-segregated charters, to

an even greater degree than the Minneapolis and St. Paul School Districts. *See supra*, Section 2.a.

(30) The Legislature has so far declined the most recent opportunity to correct Defendants' violation of the Education Clause by failing to pass the education reform bill crafted by Plaintiffs and the MDE, which provides no preferences based on race and preserves parent and student choice in school selection. R. Doc. 356, Ex. 3 at 42-44.

SUMMARY OF ARGUMENT

There are two questions for this Court to address. The first is whether school segregation by race can ever violate the Education Clause of the Minnesota Constitution, Art. XIII, § 1, without a showing that the State intentionally created *de jure* segregation. If the answer is yes, the second question asks the Court to identify and define any causation requirement Plaintiffs must prove to show *de facto* segregation is responsible for students' failure to receive an adequate education.

The answer to the first question should be yes: a showing of intentional *de jure* segregation imposed by the State is not necessary to violate the Education Clause, although it is sufficient. *De facto* segregation can also violate the Education Clause. The answer to the second question should be that *de facto* segregation coupled with poor academic performance by SOC or SES-

disadvantaged students, such as exists here, should be sufficient in and of itself to show a violation of the Education Clause.

Both the district court and the court of appeals erred in holding that a violation of the Education Clause based on segregation requires a showing of intentional *de jure* segregation by the State. In so ruling, they impermissibly imposed federal equal protection jurisprudence on interpretation of the Education Clause, which is *sui generis* for Minnesota and appears nowhere in the United States Constitution or U.S. Supreme Court equal protection decisions. The lower courts' rulings ignore and misconstrue this Court's precedents interpreting and applying the Education Clause, even in the prior decision in this case.

Both lower courts also failed adequately to address the issue of causation between *de facto* segregation and an inadequate education. The district court fixated instead on causation and intent required to show *de jure* segregation. The court of appeals basically ignored the issue, except by implication when it stressed repeatedly that:

> the ultimate question under the Education Clause is "whether the Legislature has violated its constitutional duty to provide a general and uniform system of public schools that is thorough and efficient, and ensure[s] a regular method throughout the state, whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic."

ADD. 14, 15.

All parties and both lower courts agree that *de jure* segregation in itself is sufficient to show a *per se* violation of the Education Clause. Plaintiffs believe that the undisputed facts set out in the above Statement of the Case are sufficient to show *de jure* segregation as a matter of law entitling Plaintiffs to summary judgment that the State has violated the Education Clause. If this Court agrees, it need not address the issues of *de facto* segregation and causation.

In addition, both Plaintiffs and the State agree that a violation of the Education Clause premised on segregation does not require a showing of intent by the State, *i.e.*, *de jure* segregation. *De facto* segregation can also violate the Education Clause without any showing of intent when students are receiving an inadequate education. Where Plaintiffs and the State differ is on the requirement and nature of causation. The State sees proof of causation between segregation and inadequacy of education to be essential.

Plaintiffs believe that the existence of *de facto* segregation is sufficient to find a violation of the Education Clause when a substantial continuing achievement gap exists between white students and SOC or SES-disadvantaged students, such as exists in the Minneapolis and St. Paul School Districts. In the event this Court imposes a causation requirement between *de facto* segregation and an inadequate education, this Court should first determine whether a claim for equitable relief for violation of the Education Clause is a tort claim. If so, the

definition of cause should be proximate cause. If not, the definition should include foreseeability of harm from failure to comply with a constitutional mandate.

Finally, this Court should reverse both the court of appeals and district court and remand to the district court.

ARGUMENT

Construction of the Education Clause and its requirements is a question of law for the court. The scope of review is therefore *de novo*. *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 41-42 (Minn. 2009).

I. A Violation of the Education Clause Based on Segregation Does Not Require a Showing of *De Jure* Segregation.

The Education Clause, by its express language, requires the State, through the Legislature, to establish a general, uniform, thorough, and efficient system of public schools. This Court recognized in *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993), that that this clause not only imposes a unique mandate on the Legislature, but also creates a fundamental right to an adequate education. This important constitutional protection in Minnesota has no parallel in the U.S. Constitution.

In the Court's previous decision in this case, it stated that "[i]t is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient,'" as required by the Education Clause. *Cruz-Guzman v. State*, 916 N.W.2d at 10 n.6. Both the district court and the court of appeals below

held, however, that this "self-evident" observation is true only of intentional *de jure* segregation. The district court and court of appeals both held that, absent proof of *de jure* segregation, the Legislature's failure to address racial and socioeconomic segregation in the Minneapolis and St. Paul School Districts is not a violation of the Education Clause. Such a conclusion disregards the unique mandate of the Education Clause and improperly imputes to it the distinguishable jurisprudence of the Equal Protection Clause, which prohibits unlawful conduct rather than mandates legislative action.

A. The Education Clause Is Broader than Federal Equal Protection Law in the Rights It Provides and Protects.

In their reading of footnote 6 to require proof of *de jure* segregation to establish a violation of the Education Clause, both lower courts engrafted federal equal protection jurisprudence as controlling authority for construing a state constitutional provision that has no counterpart in the federal constitution. This analysis is inappropriate where the rights conferred by the Minnesota Constitution are different from and greater than those conferred by the federal constitution.

This Court has explained that differences between the state and federal constitutions can and do provide greater protections in Minnesota. In *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005), the Court noted that it "can and will interpret our state constitution to afford greater protections of individual civil

and political rights than does the federal constitution." *Id.* at 828. This is especially true "when we determine that our state constitution's language is different from the language used in the U.S. Constitution or that state constitutional language guarantees a fundamental right that is not enumerated in the U.S. Constitution." *Id.* Indeed, it is significant that the case cited for this proposition in *Kahn* was actually *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993), where the Court first held that an adequate education is a fundamental right under the Minnesota Constitution, even though not under the U.S. Constitution.

The Court's words could not be more appropriate to this case. Here, as in *Skeen*, the Minnesota Constitution differs markedly from the U.S. Constitution in having an Education Clause, which has no federal counterpart and provides a fundamental right to an adequate education, while the U.S. Constitution fails to provide a right for even a basic education. *Compare Skeen*, 505 N.W.2d at 313 (Minn. 1993), *with San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

Additionally, as this Court said in *Skeen*, "the Education Clause is a mandate, not simply a grant of power." 505 N.W.2d at 313. The definition of "mandate" is "an authoritative command or instruction." *American Heritage Dictionary of the English Language*, https://www.ahdictionary.com/word/search.html?q=mandate. The adjectival form of mandate is "mandatory,"

meaning "Required or commanded by authority; obligatory." *Id.*, https://www.ahdictionary.com/word/search.html?q=mandatory.

The mandate to provide an adequate education flows from the language of the Education Clause itself, Art. XIII, § 1, which provides,

> 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.

The Legislature must thus establish a general and uniform system of public schools, sufficiently funded to be thorough and efficient, so as to provide an adequate education.

Aside from the fundamental right in Minnesota that has no federal counterpart, there is also an extremely important qualitative difference between a violation of federal equal protection law and a violation of Minnesota's Education Clause. The Equal Protection Clause of the Fourteenth Amendment is essentially a prohibition: "… nor shall any State … deny to any person within its jurisdiction the equal protection of the laws." An equal protection violation requires the State to do something, ***to take action***, to treat people differently. A violation of the Education Clause, however, arises ***not from action, but from inaction***, the failure of the State to provide something the Education Clause

mandates—an adequate education in a general, uniform, thorough, and efficient system of public schools.

This leads inevitably to the conclusion that under the Education Clause, it is irrelevant whether the Legislature intended or caused the system of public schools not to be general, uniform, thorough, and efficient, or to provide an adequate education. The Legislature either does or doesn't satisfy its mandate. If it doesn't, then it must fix it. It doesn't matter why it failed, or whether it intended or caused the failure.[9]

B. The State—and Initially, the District Court—Admit that Intent Is Not Required for a Violation of the Education Clause.

The State actually agrees with Plaintiffs on the issue of intent. In briefing before the court of appeals, the State conceded that the Education Clause does not require a showing of the State's intent to segregate or discriminate in order to prove a violation:

> State Respondents agree with Appellants and the district court that the Education Clause does not contain an intent requirement. The Legislature has a duty to establish a system that provides children

[9] The existence of a fundamental right reinforces the conclusion that intent is irrelevant, as federal law generally requires no showing of intent for interference with a federally-recognized fundamental constitutional right, such as the right to vote or free speech. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Reynolds v. Sims,* 377 U.S. 533, 561-63, 568 (1964); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). The same should be true for violation of the Education Clause, which conveys a fundamental right to an adequate education.

> with the opportunity to obtain an adequate education. Therefore, even if the Legislature has good motives, it fails to comply with the Education Clause if it fails in its duty.

State Respondents' Brief at 26, n.20. This concession is both significant and entirely correct.

The State's reference to the district court's agreement on this point is partly accurate. In its decision, the district court initially agreed that it would be inappropriate to construe the Education Clause to be congruent with federal equal protection law in requiring discriminatory intent to segregate. The district court recognized that this Court's previous decision in this case

> never stated or even suggested that this Court should be bound by federal Equal Protection precedent in construing a *state constitutional clause that has no federal analog*. Consequently, this Court rejects the arguments advanced by Defendants and Defendant-Intervenors that it must necessarily apply Equal Protection jurisprudence, and specifically the intent requirement summarized in *Washington v. Davis, supra,* as it attempts to discern the proper elements of Minnesota's Education Clause violation.

ADD. 33, R. Doc. 371 at 14. The district court further added that it was not "sound reasoning" to subject Plaintiffs' Education Clause claim to Equal Protection jurisprudence because it guarantees a set of rights to Minnesota students that do not exist under federal law. "Those rights should not rise or fall on the federal jurisprudence that develops around a wholly different right contained in a wholly different constitution." ADD. 34, at 14.

In the very next paragraph, however, the district court reversed itself and nevertheless imposed the Equal Protection Clause's requirement of *de jure* segregation on Plaintiffs' Education Clause claim. The court mistakenly concluded that such a requirement was necessary to avoid creating an impermissible conflict with the Equal Protection Clause by student assignment based on race, which the court assumed was the only available remedy for the alleged violation. *Id.* ("[I]ntentional segregation, i.e. *de jure* segregation, must be established before an Education Clause violation can be found because to do otherwise on this record would create an Equal Protection violation and violate the Supremacy Clause.") The court's reasoning fails to support its conclusion.

C. Attempts to Remedy Segregated Schools Do Not Violate the Equal Protection Clause.

In justifying the *de jure* segregation requirement, the district court reasoned that "the presence of racial imbalance alone" could not be enough to violate the Education Clause because "then the only properly tailored remedy is a remedy that redistributes students by race within the targeted school systems to eliminate the racial imbalance." ADD. 33. The court, citing *Parents Involved in Community Schools v. Seattle School Dist. 1*, 551 U.S. 701, 725–33 (2007), concluded that such a remedy for racial imbalance was impermissible because "[t]hat remedy, in the absence of a finding of intentional state-sponsored segregation,

violates the Equal Protection clause of the 14th Amendment because it is necessarily race-conscious." *Id.*

The district court's reasoning is demonstrably wrong for at least three reasons: (1) it misreads the *Parents Involved* case on which it relies; (2) it assumes a remedy—reassignment by race—that is not necessary; and (3) the district court did not have authority to speculate regarding the remedies the Legislature will adopt to remedy the imbalance.

1. The District Court Misreads *Parents Involved*.

First, *Parents Involved in Community Schools v. Seattle School Dist. 1*, 551 U.S. 701, 725–33 (2007), does not support the district court's conclusion that race-conscious assignment is prohibited by the Equal Protection clause. To the contrary, Justice Kennedy's controlling opinion in that case expressly states that it is permissible to consider racial composition in the administration of public schools.

In citing *Parents Involved*, the district court incorrectly points to the opinion of the four Justices voting for reversal. But *Parents Involved* is a case in which the Supreme Court split 4-4, with Justice Kennedy filing a separate opinion concurring in part and concurring in the judgment. Because Justice Kennedy's concurring opinion is the tie-breaker in the case, it must be regarded as the controlling opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a

fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (following and quoting from *Marks v. U.S.* at 193). Commentators have recognized that the controlling opinion in *Parents Involved* is Justice Kennedy's. *See* J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 Harv. L. Rev. 158, 170 (2007) ("As the narrowest rationale in support of the prevailing judgment, the Kennedy opinion becomes the controlling one and the subject of close scrutiny for educators and lawyers alike.").

Justice Kennedy's opinion directly contradicts the district court's statement that race-based student assignment is impermissible. Justice Kennedy expressly acknowledges the ability of states to consider and act to redress so-called *de facto* school segregation: "In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." 551 U.S. at 789.

In so stating, Justice Kennedy followed a well-established body of case law. Since 1971, the United States Supreme Court has recognized the right of local authorities voluntarily to integrate and desegregate public schools,

regardless of whether segregation is *de jure* or *de facto*. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Supreme Court was explicit in recognizing the compelling interest and ability of States to achieve diversity in public schools without regard to whether there has been intentional segregation. The Court distinguished the plenary powers of State government from the limited powers of federal courts to compel state action:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities….

Id. at 16. The Court's discussion concludes with the observation that "absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Id*.

Swann was one of five cases argued together and decided the same day. *Id*. at 5, n.1; *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Davis v. Bd. of Sch. Comm'rs of Mobile Cty.*, 402 U.S. 33 (1971); *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971). Two of these decisions expressly make the same point. *North Carolina State Bd. of Educ.*, 402 U.S. at 46 ("As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and

continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy."); *McDaniel*, 402 U.S. at 41-42 ("In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.'" (citing *Swann*)).

Later decisions from the Court similarly acknowledge a state's ability to do "more" than required by the Fourteenth Amendment without violating equal protection. *See Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 535-36, 544 (1982); *Bustop, Inc v. Bd. of Educ. of City of Los Angeles*, 439 U.S. 1380, 1382-83 (1978) (Rehnquist, J., denying application for stay).

In finding that the State has the obligation and power to remedy so-called *de facto* segregation, this Court would also not be the first state supreme court so to hold. Other state supreme courts that have done so include:

- **New Jersey**: *Jenkins v. Morris Tp. School Dist.*, 279 A.2d 619, 627 (N.J. 1971); *accord Petition for Authorization to Conduct a Referendum on the Withdrawal of N. Haledon Sch. Dist. from the Passaic County Manchester Reg'l High Sch. Dist.*, 854 A.2d 327, 336-38 (N.J. 2004);
- **Connecticut**: *Sheff v. O'Neill*, 678 A.2d 1267, 1280 (Conn. 1996); and
- **California**: *Crawford v. Bd. of Educ.*, 551 P.2d 28, 30, 41-42 (Cal. 1976).

In summary, both Supreme Court precedent and decisions from other state supreme courts confirm that attempts to remedy segregated schools do not violate the Equal Protection Clause if they take race into consideration.

2. Assignment of Students by Race Is Not a Necessary Remedy.

The second error the district court made in requiring *de jure* segregation was assuming that any relief would necessarily involve student assignment on the basis of race. Plaintiffs' motion expressly asked the court to grant partial summary judgment not only on the basis of racial segregation, but also on the basis of SES segregation. The court ignored this aspect of the motion. The words "socioeconomic" and "socioeconomically" appear just once in the court's decision. ADD. 19, 21; R. Doc. 371 at 3, 5.

Even if the U.S. Supreme Court were to overrule Justice Kennedy's concurrence and all of the other cited federal authorities, state courts and legislatures would still be able to remedy SES segregation through pupil reassignment, regardless of its also alleviating racial segregation. There is simply no authority that prohibits student assignment based on SES.[10]

The proposed legislation agreed to by Plaintiffs and MDE would do just this under a plan that sorts all children by SES, assigns no student to a school

---

[10] See comments of Justice Thomas during oral argument on October 31, 2022, in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199: "I don't think it's arguable that Harvard is socioeconomically diverse. But -- at least it doesn't appear that way. But it seems -- and that would not have a constitutional problem if you did it socioeconomically." Transcript p. 43. Available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_g314.pdf.

based on race, and retains parent choice subject only to school capacity constraints. R. Doc. 356, Ex. 3 at 42-44; *see* fn. 1, *supra*. The district court was wrong to ignore this aspect of Plaintiffs' motion and the established law permitting states to remedy school desegregation, as well as the relief agreed on by Plaintiffs and the MDE in this case.

3. The District Court Exceeded Its Authority in Speculating as to the Relief.

In its prior decision in this case, this Court was precise in delineating the district court's authority and jurisdiction. The district court exceeded that authority in presuming that the Legislature could only craft a remedy requiring race-based student assignment. This presumption was beyond the court's prerogative, as this Court's prior decision makes clear:

> Providing a remedy for Education Clause violations does not necessarily require the judiciary to exercise the powers of the Legislature. Appellants stress that their complaint "does not actually ask the court to institute any specific policy." Rather, their prayer for relief asks the district court to find, adjudge, and decree that the State has engaged in the claimed constitutional violations. Although appellants have also asked the district court to permanently enjoin the State "from continuing to engage in" the claimed constitutional violations and to order the State to "remedy" those violations, they "have consistently acknowledged that it is not the court's function to dictate to the Legislature the manner with which it must correct its constitutional violations."

Cruz-Guzman v. State, 916 N.W.2d at 9. This Court explained that the function of the district court was "to answer a yes or no question—whether the Legislature

has violated its constitutional duty to provide 'a general and uniform system of public schools' that is 'thorough and efficient.'" *Id.* The court "is not required to devise particular educational policies to remedy constitutional violations." *Id*.

In fact, the proposed bill submitted to the legislature by Petitioners and the Department of Education does not require race-based student assignment. *See* fn. 1, *supra*. The district court erred in speculating on the Legislature's ability to craft a remedy.

D. The Court of Appeals Erred in Holding that *De Facto* Segregation by Itself Cannot Support an Education Clause Violation.

In addition to the district court's errors addressed above, the court of appeals decision was also wrong in requiring intent for an Education Clause violation based on segregation. The court of appeals, like the district court, improperly concluded that the placement of this Court's observation in footnote 6 by itself indicated that the Court was transporting Equal Protection jurisprudence into the Education Clause. Despite this, however, the court of appeals implicitly conceded that *de facto* segregation can violate the Education Clause if students are not receiving an adequate education, which undermines its exclusive insistence on *de jure* segregation. Initially, considering that *de facto* segregation results in much the same evil as *de jure* segregation, there is good reason for this Court to rule that *both* can violate the Education Clause.

1. Both the District Court and Court of Appeals Failed to Properly Construe Footnote 6 in This Court's Prior Decision.

Both the court of appeals and district construed footnote 6 in this Court's prior decision in this case to refer only to *de jure*, *i.e*. intentional, segregation. ADD. 13-14, 32-33; R.Doc. 384 at 13-14; R. Doc. 371 at 13-14. There are compelling reasons to find that the footnote also covers *de facto* segregation.

The full text of footnote 6 is as follows:

> The dissent concedes that a claim of segregated schools is justiciable, but maintains that appellants' claims are not "traditional" segregation claims and therefore the claims are not justiciable. It is self-evident that a segregated system of public schools is not "general," "uniform," "thorough," or "efficient." Minn. Const. art. XIII, § 1. Regardless of whether the context is a "traditional" segregation claim or a different type of claim, courts are well equipped to decide whether a school system is segregated, and have made such determinations since *Brown*, 347 U.S. at 495, 74 S. Ct. 686.

916 N.W.2d at 10 n. 6.

The text that results in the footnote states: "Claims based on racial segregation in education are indisputably justiciable. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495, 74 S. Ct. 686, 98 L. Ed. 873 (1954)." *Id*. at 10. This sentence appears in the first paragraph of section II of the decision, which discusses Plaintiffs' claims under the Equal Protection and Due Process Clauses of the Minnesota Constitution. *Id*.

Because Section II of the opinion is about Equal Protection and Due Process claims, the district court and court of appeals assumed that, in the absence of guidance from a higher court, they could not read footnote 6 as going beyond traditional federal equal protection jurisprudence, which restricts federal court remedial powers to only intentional *de jure* segregation. ADD. 13-14, 32; R. Doc. 384 at 13-14; R. Doc. 371 at 13.

The district court concluded, "There is no logical support for concluding that the *Cruz-Guzman* Court was using the term "segregation" more broadly than *Brown* and its progeny – i.e. state-sponsored intentional segregation." *Id*. The court of appeals based its refusal on its practice on "the many occasions on which this court has refrained from expanding existing caselaw on the ground that the 'task of extending existing law falls to the supreme court . . . , but it does not fall to this court.'" *Id*. Neither court's conclusion was correct.

First, close analysis of the text and context of footnote 6 refutes their conclusions.

Following the sentence saying, "It is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient,'" this Court cites only a single authority in support of its statement—***the Education Clause***, Minn. Const. Art. XIII, § 1, ***not*** *Brown v. Board of Education*. The very next sentence addresses justiciability: "Regardless of whether the context is a

'traditional' segregation claim or a different type of claim, courts are well equipped to decide whether a school system is segregated, and have made such determinations since *Brown*, 347 U.S. at 495, 74 S. Ct. 686." The Court thus cites *Brown* only to support justiciability, not to support its interpretation of the Education Clause—that "It is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.'" Further, use of the term "self-evident" is extremely strong language highlighting the scope and importance of the Education Clause.

It is also arguably significant that the statement using the terms of the Education Clause appears in a footnote and not in the main text. If this Court intended its statement about segregation to be part of federal equal protection jurisprudence, one would expect it to appear in the main text. By setting the statement in a footnote, however, a reader can reasonably infer that the Court was addressing only the Education Clause, not equal protection law.

There is good reason to reach this conclusion. First, as this Court has said, it is free to interpret the Minnesota Constitution to provide more protection to its citizens than is available under the U.S. Constitution. *Kahn v. Griffin*, 701 N.W.2d at 828. This is especially appropriate when, as here, there is no right to an education in the U.S. Constitution. This Court has stated in *Skeen* ***v.*** *State*, " … the right of the people of Minnesota to an education is sui generis and … there is a

fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides an adequate education to all students in Minnesota." *Skeen,* 505 N.W.2d at 315.

Not only is obtaining an adequate education a fundamental right, but also the Legislature has a mandate to provide it under the Education Clause—the only mandate in the Minnesota Constitution. *Id*., at 313.

The prefatory language of the Education Clause makes clear the paramount importance of the Clause: "***The stability of a republican form of government depending mainly upon the intelligence of the people*** …" If a segregated system of schools is failing to develop the intelligence of students of color or SES-disadvantaged students, it should not matter whether the segregation is *de facto* or *de jure* in view of what is at stake, the stability of a republican form of government in Minnesota.

This Court will of course say whether it meant segregation in footnote 6 to cover both *de jure* and *de facto* segregation. The lower courts' parsing and analysis of footnote 6, however, are unconvincing in their limiting the footnote to *de jure* segregation.

2. The Court of Appeals Implicitly Found that *De Facto* Segregation Can Violate the Education Clause.

After dismissing footnote 6 as a basis for an affirmative answer to the certified question, the court of appeals did its own analysis to reach the answer.

The predicate for its analysis was a composite of this Court's decisions in *Board of Educ. of Sauk Ctr. v. Moore*, 17 Minn. 412, 416 (1871), *Skeen*, and this case. In *Sauk Center*, this Court stated that the "object" of the Education Clause "is to insure a regular method throughout the state whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic." In *Skeen*, as noted, this Court found a legislative mandate to provide students with an adequate education. In its prior opinion in this case, this Court emphasized that the education must be general, uniform, thorough, and efficient.

> Three times the court of appeals recited as its guiding mantra,
>
> > The ultimate question under the Education Clause is "whether the Legislature has violated its constitutional duty to provide a general and uniform system of public schools that is 'thorough and efficient, and ensure[s] a regular method throughout the state, whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic."

ADD. 14, 15; R. Doc. 384 at 14, 15. Plaintiffs have no reason to disagree that this is the ultimate question in an Education Clause challenge. Relying on this, the court of appeals concluded that *de jure* segregation is not necessary to prove a violation of the Education Clause, but is sufficient *per se* to do so, according to the court's reading of footnote 6. *Id*. at 14-15.

Continuing, the court of appeals decided that *de facto* segregation is neither necessary nor sufficient for a violation of the Education Clause. *Id*. at 15-16.

Plaintiffs take issue with the second point. As discussed in the following section, Plaintiffs believe that under the Education Clause, given the long-standing achievement gap, *de facto* segregation should violate the Education Clause.

The court's paradigm implicitly concedes that if children are not receiving an adequate education that will fit them to discharge intelligently their duties as citizens of the republic, then *de facto* segregation may be sufficient to violate the Education Clause, provided there is some nexus with educational deficiencies. As the court of appeals acknowledges, if children are not receiving an adequate education, the Legislature has failed to comply with its mandate and has violated the Education Clause. This should be true regardless of whether this failure occurs in *de jure* or *de facto* segregated schools. Therefore, *de facto* segregated schools can violate the Education Clause just as can *de jure* segregated schools. The question that remains is whether, unlike with *de jure* segregation, a violation premised on *de facto* segregation requires proof of a causal connection with the education's inadequacy, and if so, what is the nature of this causal element.

3. This Court Should Treat *De Facto* Segregation in the Minneapolis and St. Paul School Districts the Same as *De Jure* Segregation.

Given the high purpose of the Education Clause, this Court should make clear that *de facto* segregation by race or SES violates the Education Clause, if it has not already done so in footnote 6. *A fortiori*, this should be true when

students of color or SES-disadvantaged students are demonstrably not receiving an adequate education.

Whether students are receiving an adequate education is a matter this Court has well considered. It has also established standards for making this determination, beginning with *Sauk Center* and culminating with *Skeen* and its prior decision in this case. In *Skeen*, this Court not only reaffirmed the requirement of *Sauk Center* that the purpose of education "is to insure a regular method throughout the state whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic," 505 N.W.2d at 310; it also cited and quoted with approval the language of *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979):

> 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 (quoting *Pauley v. Kelly*, 255 S.E.2d at 877).

When these elements, acknowledged in *Skeen*, are applied in this case, it is clear how segregation has deprived students of an adequate education, regardless of whether it was *de jure* or *de facto*.

Years of standardized test scores in Minnesota show that Minnesota's public schools are failing to meet the needs of children of color—the great majority of whom attend segregated schools—whose test scores are disproportionately lower than their white peers. Their education is thus inadequate and cannot meet the adequacy standards established by this Court. Although the lower courts claim that the citation to *Brown* requires that only *de jure* segregation can violate the Education Clause, this Court has never made such a ruling. Its citation of *Brown* in footnote 6 was specifically to reinforce the justiciability of a school segregation claim, not to limit it.

As mentioned above, State Supreme Courts in New Jersey, Connecticut, and California have found their Education Clauses permit state action to remedy *de facto* segregation, essentially because it results in much the same evils as *de jure* segregation, while its remediation confers the same benefits. As the New Jersey Supreme Court said,

> When the Supreme Court in *Brown v. Board of Education of Topeka* struck down segregated schools, it recognized that they generate a feeling of racial inferiority and result in a denial of equal educational opportunities to the Negro children who must attend them. However, as we said in *Booker*, while such feeling and denial may appear in intensified form when segregation represents official policy, they also

> appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting.

Jenkins v. Morris Tp. School Dist., 279 A.2d at 627 (cleaned up); *see also Booker v. Board of Education, Plainfield*, 212 A.2d 1, 6 (N.J. 1965) ("The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs.").

The Connecticut Supreme Court reached a similar conclusion in *Sheff v. O'Neill*, 678 A.2d at 1270, as did the California Supreme Court in *Crawford v. Board of Education*, 551 P.2d at 30.

Finally, the facts recited above demonstrate that it had long been Minnesota's policy to take action to remedy *de facto* segregation. It was not until the 1999 adoption of the current desegregation rule that this policy changed. This Court's ruling should encourage such remedies, not insulate the Legislature from liability absent proof of intentional *de jure* segregation.

Although federal equal protection law condemns only *de jure* segregation, Justices as philosophically different as William O. Douglas and Lewis F. Powell, Jr., found the distinction between *de jure* and *de facto* meaningless. In his opinion

concurring in part and dissenting in part to *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 219-24 (1973), Justice Powell explained:

> I concur in the Court's position that the public school authorities are the responsible agency of the State, and that if the affirmative-duty doctrine is sound constitutional law for Charlotte, it is equally so for Denver. I would not, however, perpetuate the de jure/de facto distinction nor would I leave to petitioners the initial tortuous effort of identifying 'segregative acts' and deducing 'segregative intent.'

Id., at 224 (Powell, J., concurring in part and dissenting in part). Similarly, a year later in *Milliken v. Bradley*, Justice Douglass observed in his dissent that "there is so far as the school cases go no constitutional difference between de facto and de jure segregation." *Milliken v. Bradley,* 418 U.S. 717, 761-62 (1974) (Douglas, J., dissenting).

With regard to housing segregation, usually cited as the *de facto* cause of school segregation, scholars agree that the distinction is meaningless, because housing segregation would not exist but for government action, even here in the Twin Cities. *See* Myron Orfield & Will Stancil, *Neo-Segregation in Minnesota*, 40 Minn. J.L. & Ineq. 1 (2022) (R. Doc. 347, Ex. 1); Chad Montrie, *Whiteness in Plain View: A History of Racial Exclusion in Minnesota*, Minnesota Historical Society Press (2022); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, Norton (2017); *see also*, Mary Jo Webster & Michael Corey, *How Twin Cities Housing Laws Keep the Metro Segregated*," Star-Tribune Aug. 7, 2021; *available at*: https://www.startribune.com/howtwin-cities-

housing-rules-keep-the-metro-segregated/600081529/ (last visited January 5, 2023); Twin Cities Public Television, *Jim Crow of the North* Season 1, Episode 20, (Nov. 28, 2018) (a history of racial covenants in Hennepin County). Collectively, these authorities set out in detail the role of national, state, and local authorities in creating racial segregation in housing over more than 150 years, with local scholars documenting its creation in Minnesota and the Twin Cities Metro area.

The evil of both *de jure* and *de facto* segregation is the same: denial of a general, uniform, thorough, efficient, and adequate education on a racial basis. The courts of this state should treat them the same—as a violation of the Education Clause.

II. If This Court Requires a Showing that *De Facto* Segregation Has Caused Students to Receive an Inadequate Education, the Court Must Decide Whether or Not Plaintiffs' Claim for Violation of the Education Clause Is a Tort Claim and Provide Guidance Accordingly.

The issue of the appropriate definition of causation, if any, is purely an issue of law and therefore subject to *de novo* review in this Court. *Hoffman v. N. States Power Co.*, 764 N.W.2d at 41-42.

There are two issues of causation in this case. The first is whether a violation of the Education Clause premised on segregation requires proof that the State intentionally caused the segregation. As shown, Plaintiffs and the State agree a violation of the Education Clause does not require proof that the State

intentionally caused segregation. Even the district court agreed, until it reversed itself in the erroneous belief that the only possible remedy for racial segregation was student assignment based on race in violation of federal equal protection law. The court of appeals never really confronted the issue, except to say that *de jure* segregation was sufficient to violate the Education Clause, while *de facto* segregation was not.

The other causation issue is whether Plaintiffs must show that *de facto* segregation is a cause of their receiving an inadequate education. This is an issue that arose in the court of appeals decision in *Forslund v. State*, 924 N.W.2d 25, 34-35 (Minn. Ct. App. 2019). In *Forslund*, the court of appeals held that because a number of variables could cause students to receive an inadequate education, "When an Education Clause claim is based on one or more of these variables, a plaintiff needs to prove facts to establish that those variables are actually resulting in an inadequate education." *Id*. The court of appeals unfortunately did not provide a definition of the type of causation required. Moreover, as in *Skeen*, the *Forslund* plaintiffs gave away their chance of prevailing by conceding that they were receiving an adequate education. *Id*.

In its decision in this case, the court of appeals failed to discuss *Forslund*'s treatment of causation altogether. The district court, however, summarized the holding in *Forslund*: "While this opinion [*Forslund*] does not address intent at all,

it expressly addresses causation. It holds that a plaintiff must establish that the challenged policy, rule, or statute actually causes a constitutionally inadequate education." ADD. 32; R.Doc. 371 at 16. Then the district said nothing further about this type of causation, focusing instead solely on whether Plaintiffs needed to show that the State caused segregation.

If this Court decides that violation of the Education Clause based on *de facto* segregation requires Plaintiffs to make a showing that segregation causes them to receive an inadequate education, the parties and lower courts will need guidance on the nature of the requisite causation.

A. The District Court Incorrectly Analogized This Case to a Tort Claim.

This Court's determination of causation is complicated by the issue of whether a claim for violation of the Education Clause sounds in tort, or something closer to equitable specific performance of a contract or quasi-contract. If the former—tort—there are a number of possible forms of causation. To name a few, there is but-for causation; substantial contributing factor; proximate cause; direct cause; and dominant cause.

The district court likened this lawsuit to an action in tort requiring proof of causation, citing *Carey v. Piphus*, 435 U.S. 247, 254–55 (1978). ADD. 38; R. Doc. 371 at 22. That case, however, was a lawsuit for damages brought under 42 U.S.C. § 1983 for violation of plaintiffs' right to procedural due process. *Id.*, at 248. This

case is a suit for only equitable relief requiring the State to perform its obligations and comply with its mandate under the Education Clause, which has no counterpart in the U.S. Constitution.

The *Carey* case says nothing about causation of injury as a prerequisite for equitable relief, and the district court lacks authority to support its assertion that causation is required for equitable relief. In fact, it is not required under U.S. Supreme Court precedent. It has long been the rule that where there has been a civil rights or constitutional violation but no injury, a plaintiff is still entitled to nominal damages, *e.g.*, $1, ***and injunctive relief***. *Du Bois v. Kirk*, 158 U.S. 58, 66 (1895); *Lefemine v. Wideman*, 133 S. Ct. 9, 10-12 (2012).

If this Court concludes that Plaintiffs' claims do properly sound in tort, Plaintiffs respectfully suggest that proximate cause is the appropriate standard, if one is required. In other words, as this Court said "long ago" in defining proximate cause, the defendant's conduct must be "a material element or a substantial factor in bringing about" the plaintiff's injury. *Frederick v. Wallerich*, 907 N.W.2d 167, 180 (Minn. 2018), citing *Osborne v. Twin Bowl, Inc.*, 749 N.W.2d 367, 372 (Minn. 2008) (quoting *Peterson v. Fulton*, 192 Minn. 360, 256 N.W. 901, 903 (1934)).

B. Plaintiff's Claim More Properly Sounds in Contract or Quasi-Contract.

A much more apt analog for an Education Clause claim than tort law is the law of contract or quasi-contract, where a promisor is under an obligation to provide something—here a mandate to establish and maintain a general, uniform, thorough, and efficient system of public schools—and fails to do so. It does not matter whether the promisor caused the promised benefit not to occur, or the system of public schools not to be general, uniform, thorough, or efficient. The promisor must be required to keep its promise and deliver.

A hypothetical will suffice. Suppose a rural school district suffers a natural disaster that reduces its schools to rubble, such as an earthquake or tornado. The school district then does nothing to rebuild its schools. Is the Legislature no longer required to reconstitute the schools because it did not cause their destruction? The question answers itself.

In addition, there is evidence that the State itself does not consider suits brought to redress Constitutional injuries to be tort claims. Minnesota Statute § 554.03, part of the State's so-called anti-SLAPP law, provides, "Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes ***a tort or a violation of a person's constitutional rights***." (emphasis

added.) There would have been no need to mention constitutional rights if the Legislature considered their violations to be a tort.

C. The Court Should Determine that Reasonable Foreseeability is a Relevant Consideration for the State's Actions.

Another reason why principles of tort are inapposite for the Court's consideration of causation in this case is that proximate cause does not account for whether a result is reasonably foreseeable to the actor (although an unforeseen intervening cause may be relevant to determining negligence.) *Dellwo v. Pearson*, 107 N.W.2d 859, 861 (Minn. 1961) ("Although a rigorous definition of proximate cause continues to elude us, nevertheless it is clear, in this state at least, that it is not a matter of foreseeability."). Because the Minnesota Constitution places an affirmative obligation on the Legislature to provide an adequate education to Minnesota students, it should be liable for any failure that was foreseeable through its failure to comply with its mandate.

If claims to redress constitutional violations through equitable relief are not torts, then foreseeability is a permissible element of causation. In this regard, the State touts the efforts it has made to eliminate segregation and promote integration, *e.g.*, appropriating since 1988:

> more than $1.9 billion to support school integration, including approximately $167 million for the upcoming FY22-23 biennium. During that time, the Legislature appropriated nearly $400 million to both the Minneapolis and Saint Paul school districts to support integration activities, in addition to desegregation transportation aid.

R. Doc. 355 (State Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment) at 6. If so, in those 35 years, both racial and SES segregation and the achievement gap between SOC and white students have not improved and have mostly worsened. After all this time and money, SOC and SES-disadvantaged students are undeniably and disproportionately still receiving an inadequate education.

Albert Einstein is reputed to have said, "The definition of 'insanity' is doing the same thing over and over again and expecting different results." The State is not insane. Given the results, it knew and could foresee that whatever it was doing and however much it was spending, it was not remedying segregation, the achievement gap, or the failure of SOC and SES-disadvantaged students to receive an adequate education, and that it would therefore continue to violate the Education Clause if it continued to do exactly what it had been doing. Under a foreseeability standard, the State has clearly violated the Education Clause in light of its obligations.

CONCLUSION

On the basis of the foregoing arguments and authorities, Plaintiffs respectfully request this Court to reverse the decision of the court of appeals, and to hold that *de facto* segregation is sufficient to violate the Education Clause because it is self-evident that a segregated system of public schools is not

general, uniform, thorough, or efficient, and is therefore not adequate. Alternatively, Plaintiffs respectfully request that this Court reverse the court of appeals, and hold that *de facto* segregation is sufficient to violate the Education Clause if it causes students to receive an inadequate education according to the definition of causation urged by Plaintiffs.

Dated: January 26, 2023

Respectfully submitted.

/s/ Richard C. Landon
Daniel R. Shulman (#100651)
Shulman & Buske PLLC
126 North Third Street, Suite 402
Minneapolis, MN 55401
Telephone: (612) 870-7410
Facsimile: (612) 870-7462
dan@shulmanbuske.com

Richard C. Landon (#0392306)
Lathrop GPM
80 South Eighth Street
500 IDS Center
Minneapolis, MN 55402
Telephone: (612) 632-3429
Facsimile: (612) 632-4429
richard.landon@lathropgpm.com

Mel C. Orchard, III (Pro Hac Vice)
WY Attorney License Number 5-2984
The Spence Law Firm, LLC
15 S. Jackson Street
Jackson, WY 83001
Telephone: (307) 733-7290
Facsimile: (307) 733-5248
orchard@spencelawyers.com

James Cook (Pro Hac Vice)
CA Attorney License Number: 300212
Law Offices of John Burris
7677 Oakport Street, Suite 1120
Oakland, CA 94621
Telephone: 415-350-3393
james.cook@johnburrislaw.com

COUNSEL FOR PLAINTIFFS-PETITIONERS

CERTIFICATE OF DOCUMENT LENGTH

The undersigned counsel for Plaintiffs-Petitioners certify that this document contains 13,447 words, including heading, footnotes and quotations, and is in compliance with the requirements of Minn. R. App. P. 118 subd. (2).

Dated: January 26, 2023

Counsel for Plaintiffs-Petitioners

/s/ Richard C. Landon
LATHROP GPM
80 South Eighth Street
500 IDS Center
Minneapolis, MN 55402
Telephone: (612) 632-3429
Facsimile: (612) 632-4429
richard.landon@lathropgpm.com