No. 22-0118

FILED
April 26, 2022
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA
IN COURT OF APPEALS

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.

APPELLANT'S BRIEF AND ADDENDUM

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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).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

LEGAL ISSUE INVOLVED

Issue 1: Is the Education Clause of the Minnesota Constitution violated by a racially-imbalanced or socioeconomically-imbalanced school system, regardless of the presence of *de jure* segregation or proof of a causal link between the racial or socioeconomic imbalance and the actions of the state?[1]

The issue was raised *sua sponte* by the trial court pursuant to Minn. R. Civ. App. P. 103.03 by certifying this question for review in the court's December 6, 2021, Order Denying Plaintiffs' Motion for Partial Summary Judgment, ADDENDUM ("ADD.") 2, 24-25. The court raised the issue in response to the briefing by Plaintiffs-Appellants ("Plaintiffs") in support of their motion for partial summary judgment. R. Doc. 346, 363.

The trial court's ruling was that, without appellate court guidance, it could not find that a "racially-imbalanced school system" violated the Education Clause when there was no *de jure* segregation and no "proof of a causal link between the racial imbalance and the actions of the state." ADD. 2, 24-25.

The issue was preserved for appeal by the court's Minn. R. Civ. App. P. 103.03 certification. *Id*. Plaintiffs also filed a timely notice of appeal on January 27, 2022. Record ("R") Document ("Doc.") 375.

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[1] Plaintiffs added the terms "socioeconomic" and "socioeconomically" to the court's question because Plaintiffs' motion papers sought partial summary judgment on the ground that not only racial segregation, but also socioeconomic segregation, of the Minneapolis and St. Paul Public School Districts violated the Education Clause of the Minnesota Constitution. R. Doc. 346, 363.

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[2]

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[2] The question certified by the district court necessarily subsumes a number of other issues, which will be treated in the discussion of the court's question. These include:

A. Because the Education Clause mandates that the Legislature must provide for a general, uniform, thorough, and efficient system of public schools, *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993), and because "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*, 916 N.W.2d 1, 10 n.6 (Minn. 2018), does the Education Clause of the Constitution require Respondents (collectively "the State") to remedy a system of public schools segregated by race or socioeconomic status regardless of how the system came into existence, regardless of whether the State or anyone else intended to create such a system, or regardless of whether State caused or contributed to such segregation?

B. If a "causal link" is required, how is it defined and what is the standard of proof for such cause?

C. Are Respondents "free to devise race-conscious measures to address the problem" of racial segregation in Minnesota public schools, as authorized by Justice Kennedy in his controlling concurring opinion in *Parents Involved in Community Schools v. Seattle School Dist. 1*, 551 U.S. 701, 788-89 (2007)?

D. Does *Parents Involved in Community Schools v. Seattle School Dist. 1*, 551 U.S. 701, 788-89 (2007), forbid the State of Minnesota from

Issue 2: Are Plaintiffs entitled to summary judgment and injunctive relief on the ground that the State violated the Education Clause by causing or contributing to racial and socioeconomic segregation in the Minneapolis and St. Paul Public School Districts on the basis of undisputed evidence of the State's (1) adoption of the current desegregation/integration rule, and (2) permitting these Districts to adopt neighborhood school attendance zones.

Plaintiffs raised the issue in the trial court in their motion for partial summary judgment and briefing on the motion. R. Docs. 345, 346 at 15-31, 39-50.

The district court denied the motion on the ground that the court found material issues of disputed fact regarding the State's intent and causation of segregation. ADD. 18-23.

The issue was preserved for appeal by Plaintiffs' timely filing of a notice of appeal on January 27, 2022. R. Doc. 375.

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

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implementing measures to reduce racial segregation, absent a finding of intentional de jure discrimination?

STATEMENT OF THE CASE

This is an appeal from a case in Hennepin County District Court assigned to Judge Susan M. Robiner. ADD. 3-4. It is a civil class action brought by parents on behalf of students enrolled in the Minneapolis and St. Paul Public School Districts for proscriptive and affirmative injunctive relief by reason of the Respondents-Appellees (collectively "the State") permitting segregation by race and socioeconomic status in these School Districts in violation of the Education Clause of the Minnesota Constitution, Article XIII, Section 1, the Equal Protection Clause of the Minnesota Constitution, Article I, Section 2, and the Due Process Clause of the Minnesota Constitution, Article I, Section 7. R. Doc. 1 at 1-2. The Education Clause is the only clause at issue in this appeal.

Plaintiffs filed their Complaint on November 5, 2015. The Court allowed intervention by Intervenors-Respondents, three charter schools and three parents of charter school children ("the Charter Schools") on February 3, 2016. The State and Charter Schools moved to dismiss on numerous grounds, almost all of which the court rejected. ADD. 4. Because the State asserted lack of subject matter jurisdiction, it was able to appeal of right to the Court of Appeals, which reversed and dismissed the case on the ground of lack of justiciability, holding that courts lacked jurisdiction to decide issues of educational adequacy. *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017).

The Supreme Court granted discretionary review and reversed the Court of Appeals. *Cruz-Guzman v. State*, 916 N.W.2d 1 (2018). The Supreme Court held that claims under all three 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. 4. The district court thereafter stayed the case while the parties engaged in two years of mediation, which resulted in an agreement with Respondent Minnesota Department of Education ("MDE")[3] to present a proposed bill to the Legislature 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) school choice for parents and students would be preserved subject only to capacity

[3] During the time period relevant to this lawsuit, the educational administrative agencies in Minnesota at times consisted of 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, the various incarnations of state educational administration will be referred to by a single appellation, "MDE."

constraints. The Legislature did not pass the bill in 2021. ADD. 5; R. Doc. 346 at 30-31.

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. 5; R. Docs. 337, 345.

The District Court denied the motion in an Order filed December 6, 2021. ADD 1-25. The Court several times in the opinion stated a need for guidance from the appellate courts as to the meaning of the Supreme Court's decision, most specifically footnote 6. In its decision, the district court denied Plaintiffs' request for injunctive relief and certified for immediate appeal as important and doubtful 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?" *Id.*, at 23-25. The district court indicated it could not grant Plaintiffs' motion without an affirmative answer to is question from an appellate court.

Appellants appeal from the Order and Judgment entered. R. Doc. 375.

STATEMENT OF FACTS

A. Racial & Socioeconomic School Segregation

This appeal is from 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." R. Doc. 345 at 1.

In its order denying the motion, the 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. 5. The district court's order does not identify these "not disputed" facts, which should be highlighted for this Court's review:

> 1. For the 2019-20 school year, the public schools of the City of Minneapolis were approximately 63 percent children of color and 54 percent free or reduced lunch ("FRL"). R. Doc. 348, Ex. 1, ¶ 21.
>
> 2. For the 2019-20 school year, the public schools of the City of Saint Paul were 79 percent children of color and 66 percent FRL. *Id*.

> 3. For the 2019-20 school year, children of color 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% Students of Color ("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 socioeconomic status 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 students of color increased by more than 12 times, from 11 to 144. The number of students of color in those highly segregated environments rose by more than 22 times (from 1,863 to 49,782), a percentage increase from 2.4 percent to 23 percent. *Id.* at ¶ 52.

B. The Achievement Gap

In addition to these undisputed demographic statistics, Plaintiffs presented undisputed data showing the large and intractable achievement gap between white and SOC. Since 2014 and 2021, neither segregation nor achievement gaps in the Minneapolis Public Schools appreciably changed, other than to become worse in some respects. Of the 23 Minneapolis schools with over 80% SOC enrollment in 2020-21, 19 exceeded 80% SOC enrollment in 2014, just 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 standard achievement tests for Blacks, Hispanics, Native Americans, and

Whites in the Minneapolis and St. 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%

R. Doc. 348, at 2, Ex. 1, at 20; R. Doc. 356, Ex. 3, cover letter at 1, Responses to Plaintiffs' Request for Admissions ("Responses"), at. 4-17; R. Doc. 365, Ex. 1, at 6-41.

C. The Role of the State

Plaintiffs also presented of extensive documentary evidence, the authenticity of which is undisputed, showing how the State contributed to and tolerated the racial and socioeconomic segregation of the Minneapolis and St. Paul Public School Systems. R. 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. Doc. 283-294, R. Doc. 287, Exs. 9-15; R. Doc. 283, Exs. 1-58, 60-73.

This undisputed evidence demonstrates two primary mechanisms that contributed to segregation: substitution of a new desegregation/integration rule for the existing rule, and permitting Minneapolis and St. Paul to return to neighborhood schools from more integrated district-wide schools. Both occurred when the State knew or was on notice that these changes would increase racial

and SES segregation in the Minneapolis and St. Paul Public School Districts, which, as shown above, in fact occurred prior to the filing of the lawsuit on November 5, 2015.

Here is the evidence in chronological order:

(1) The Minnesota Federal Court found in 1972 that the Minneapolis School District had intentionally segregated its schools and 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. 283, Ex. 1.

(2) The MDE monitored the desegregation of the Minneapolis School District under the State's 1978 desegregation rule, which prohibited any variance from a district's racial demographics of more than 15 percent, with a desired limit of no more than 50 percent minority students. R. Doc. 283, Exs. 1, 2, 6 at P0001972.

(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 noted that "the Legislature intended to regulate de facto segregation," and approved the new rule. *Id.*, Ex. 4 at P0000772, 774-777, Ex.5 at P0005619, 5621-22, 5624

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

(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, 2042.

(6) The result was an effort to craft a new desegregation/integration rule in the early 1990s, producing a series of drafts by the MDE of a new proposed rule through 1994. Each draft defined segregation as "intentional or unintentional separation of learners of color or staff of color within a building or school district." The drafts also required inter-district desegregation by city districts and suburban districts. *Id*., Exs. 11-19, Ex. 20 at P0002114, P0002118.

(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 metropolitanwide desegregation approaches." *Id*., Ex. 28.

(8) In February, 1994, the Round Table issued a report to the MDE and the Legislature recommending inter-district desegregation that would be voluntary for parents and students, but mandatory for urban and suburban school districts, so as to eliminate segregation, defined in the report as "intentional or unintentional separation of learners of color or staff of color within a building or school district." The MDE "strongly' endorsed the Round Table's recommendations, which were part of drafts for a new 1995 rule. *Id*., Ex. 30, Ex, 31 at P0000839, P00008416-41, Ex. 32, Ex. 19, Ex. 33.

(9) Resistance to the features of the proposed new rule arose in late 1994 with Robert Wedl, then MDE Assistant Commission and subsequently Commissioner from November 1996 to January 1999. Wedl's position, which never changed, was that the Department would support only voluntary desegregation. Wedl said 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, Exs. 35-36, Ex. 37 at P0002410, Ex. 39 at P0002558, Ex.40 at P0002630-31, Ex. 48.

(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 conservative Center for the American Experiment and Republican Legislators, both of which aired their views in public reports. *Id*., Ex. 38 at P0002441-46, Ex. 42 at P0002591, Ex. 43.

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

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

responsibility for reversing the Department's prior course of action, implementing the views of Wedl, and authoring and securing passage in 1999 of the current desegregation rule, which has resulted in the resegregation of the Minneapolis and St. Paul School Districts. *Id*., Ex. 45 at P0005730-31, P0005746, Ex. 46, Ex. 47 at P0002401, P0002403-06, Ex. 48-58, Ex. 53 at P0002650, 2653, Ex. 58 at P0002815, Exs. 60-66, Ex. 67 at P0006470-513, 6517-26, 6528-29, 6530-36, 6552-53, 6558-61Ex. 68-69, Ex. 28; R. Doc. 287, Exs. 9-14.

(14) Lavorato's first involvement occurred in connection with the Minneapolis waiver request to be allowed to return to neighborhood schools. At a December 21, 1995, hearing on the waiver request, she advised the Board of Education that she was there to create an appropriate record "so that in the eventuality it's challenged someday there'll be a record of what the deliberation was, what the justification was, and why the decision was made." At the hearing, Matthew Little, representing both the Minneapolis NAACP, and the Minnesota Minority Education Partnership opposed the waiver on the ground that it would resegregate the Minneapolis schools. On March 13, 1996, the Board granted the waiver, despite knowing it would resegregate the Minneapolis School District. R. Doc. 283, Ex. 45 at P0005730-31, 5746, Ex. 46.

(15) Following the waiver hearing on December 21, 1995, Lavorato prepared a drastic revision of the proposed desegregation/integration rule on

January 3, 1996. The new draft altered the definition of segregation to make it "the intentional act or acts by a school district which has 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 excluded 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 or metro-wide desegregation was no longer compulsory, and could occur only on a voluntary basis. Only intentional segregation was prohibited. These principles remained through successive drafts, and are part of the final rule approved in 1999 and in effect today. *Id.*, Ex. 47 at P0002401-06, Exs. 53-58, Ex. 66 at P00002860, Ex. 67 at P0006528-36, P0006552-53, Ex. 68-69.

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

(17) From 1995 to the present, there has been no school or district that the State has found to have engaged in intentional segregation. R. Doc 356, Ex. 3 at 33.

(18) The NAACP publicly reacted to the altered rule by calling it "an invitation to segregate." Other Community organizations also informed the Board and Department of Education that promulgation of the revised rule would cause and perpetuate resegregation, rather than prevent it or remedy existing segregation. These included 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 expressed similar objections. R. Doc. 283, Exs. 49-50, 60-63.

(19) In an April 2, 1997, draft of the proposed rule, Lavorato excluded charter schools from the operation of the rule. This exclusion has remained in the rule. *Id*., Ex. 53 at P0002653.

(20) By early November, 1997, Lavorato had begun work on the SONAR required for approval of the proposed new rule (Minnesota Rule, Parts 3535.0100 to 3535.0180) by an Administrative Law Judge. The SONAR submitted for the hearing before the Judge that commenced on January 20, 1999, was 203 pages, as

compared with the 14-page SONAR for the existing rule it would replace. *Id.*, Exs. 58, 64-65.

(21) The SONAR stated 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.

(22) The SONAR noted that the new rule raised the variance for a racially identifiable school to 20 percent from 15 percent; exempted charter schools from the rule; 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. Separate thus became equal in Minnesota.

(23) 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 stated that "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*., at P0006509,6470-513, 6517-26.

(24) 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." As will be shown, this was a one-sided, incorrect description of existing law. The SONAR relied heavily on work by known opponents of desegregation, with a history of providing "expert" testimony on behalf of school districts fighting desegregation lawsuits, in particular David Armor and Christine Rossell, who had been retained by the State as paid advocates for the new rule. *Id*., at P0006510, 6558-67; R. Doc. 284 at ¶10, Exs. 10-14.

(25) The SONAR stated 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. 283, Ex. 28, Ex, 67 at P0006508; R. Doc. 287 at ¶ 13.

(26) After ALJ approval of the new rule on March 19, 1999, the Department adopted the rule. Thereafter, the Department of Education repeatedly cautioned racially identifiable school districts, including Minneapolis, not to use "race-based measures" to desegregate. R. Doc. 283, Ex.70 at P0002931 n. 3, Ex. 71 at P0005839 n. 1.

(27) In 2011, the Department of Education 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.[4]

(28) 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 A.

(29) Freed from all constraints of desegregation or integration, charter schools in the seven-county metropolitan area have become heavily segregated by

[4] At fn. 9 of its Order, the district court correctly observed that the cited exhibits did not show notice to the State of the likely resegregation of St. Paul Schools from a return to neighborhood schools. ADD. 6. This was Plaintiffs' mis-citation. The cited documents do, however, show notice to the St. Paul School District of the increase in segregation from what it was proposing to do and in fact did with this effect.

race and SES, including white-segregated and non-SES-segregated charters, to an even greater degree than the Minneapolis and St. Paul School Districts. *Id*.

(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 sponsored 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

The Education Clause of the Minnesota Constitution, Art. XIII, § 1, 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.

Schools in the Minneapolis and St. Paul Public School Districts are segregated—in the district court's terminology "imbalanced"—by race and SES. This has been a longstanding condition, which has not appreciably improved over time. In addition, there has been an intractable achievement gap between white students and SOC.

The Minnesota Supreme Court has said, "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*, 916 N.W.2d 1, 10 n.6 (Minn. 2018). The definition of "self-evident" is "obvious and therefore not needing any explanation." OneLook Dictionary Search: https://www.onelook.com/?w=self-evident&ls=a.

In *Skeen v. State*, 505 N.W.2d 299,313 (Minn. 1993), the Minnesota Supreme Court held, "While a fundamental right cannot be found "[a]bsent constitutional mandate," [*San Antonio Indep Sch. Dist. v.*] *Rodriguez*, 411 U.S. [1] at 33, 93 S.Ct. at 1296 [U.S. 1973], the Education Clause is a mandate, not simply a grant of power." 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.

Because schools in Minneapolis and St. Paul are segregated by race and SES, they are self-evidently not general, uniform, thorough, or efficient, and the State, in particular the Legislature, has failed to perform its mandate under the Education Clause to establish and maintain a general, uniform, thorough, and efficient system of public schools. It has therefore violated the Education Clause,

and Plaintiffs are entitled to judgment as a matter of law directing that the Legislature cure the violation.

The district court erred in denying the Plaintiffs' motion for partial summary judgment. It improperly disregarded evidence of SES segregation. It improperly failed to consider the State's own definitions of segregation. It improperly required proof of *de jure* segregation and causation of segregation by the State in the absence of appellate direction that such proof was unnecessary. It failed to give due weight to the mandatory nature of the Education Clause. It misperceived and misapplied federal equal protection precedents allowing States to regard school diversity as a compelling state interest and to act accordingly. It improperly treated Plaintiffs' Education Clause claim as a tort claim requiring proof of proximate cause, when a much more apposite comparison is contract law and breach of a legal obligation by a party's failure to perform. It improperly disregarded undisputed evidence that the State intentionally caused and contributed to racial and SES segregation in the Minneapolis and St. Paul School Districts.

For all these reasons, this Court should reverse the district court and remand with directions to enter partial summary judgment for the Plaintiffs.

ARGUMENT

This appeal involves review of a question of law certified by the district court in denying a motion for partial summary judgment pursuant Minn. R. Civ. App. P. 103.03(i). The scope of review is therefore de novo. *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 41-42 (Minn. 2009).

A. A Violation of the Education Clause Requires Neither *De Jure* Segregation Nor State Causation of Segregation for Plaintiffs to Be Entitled to Relief.

1. History of the Education Clause in the Minnesota Supreme Court.

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. The Supreme Court in *Skeen v. State*, 505 N.W.2d at 313, held that this clause imposes a mandate. The Court observed that the Education Clause is unique in the Minnesota Constitution in its imposition on the Legislature of a "mandate" to provide a general, uniform, thorough, and efficient system of public schools:

> However, the Education Clause not only contains language such as "shall" but in fact places a "duty" on the legislature to establish a "general and uniform system" of public schools. This is the only place in the constitution where the phrase "it is the duty of the legislature" is used. This, combined with the sweeping magnitude of the opening sentence of the Education Clause—"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"—provides further support for holding education to be a fundamental right.

> Thus, on balance, we hold that education is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate. While a fundamental right cannot be found '[a]bsent constitutional mandate,' [*San Antonio Indep Sch. Dist. v.*] *Rodriguez*, 411 U.S. [1] at 33, 93 S.Ct. at 1296 [U.S. 1973], the Education Clause is a mandate, not simply a grant of power.

Skeen, 505 N.W.2d at 313.

More than establishing a mandate for the Legislature, the Court in *Skeen* further held that the Education Clause provides a fundamental right to an adequate education. *Id*. at 315 ("In this case, the available evidence suggests that the right of the people of Minnesota to an education is *sui generis* and that 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."). To define the attributes of an adequate education, *Skeen* looked to other cases both inside and outside of Minnesota. For example, quoting from its earlier decision in *Bd. of Educ. of Sauk Ctr. v. Moore*, 17 Minn. 412, 416 (1871), the Court noted that "[t]he object [of these provisions] 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. And quoting at length from the West Virginia Supreme Court, *Skeen* noted that a "thorough and efficient" system of education

> . . . develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.
>
> 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 859, 877 (W. Va. 1979).

The Court in *Skeen* looked to state-law authorities because, in contrast to Minnesota law, the United States Constitution contains no education clause and confers no right to an education, let alone a fundamental right to an adequate education. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33, 37-38 (1973). Nor has the U.S. Supreme Court developed a body of jurisprudence establishing the elements of an adequate education, as has the Minnesota Supreme Court.

The Minnesota Supreme Court took the next step in establishing the contours of the Education Clause in a previous appeal in this very case, when it said in footnote 6, "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*, 916 N.W.2d at 10 n.6. As support for this statement, the Court cited only the Education Clause itself. The Court made this statement in response to a contention by the dissent: "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." *Id*. Thus, the Court found it to be "self-evident" that a claim of school segregation was a claim that the Legislature had failed to establish and maintain a general, uniform, thorough, and efficient system of public schools in violation of the Education Clause.

In the sentence immediately following citation of the Education Clause, the Court states, "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* [*v. Board of Education*], 347 U.S. [483] at 495, 74 S.Ct. 686 [(1954)]." *Id*. Although the State contends that the citation to *Brown* requires that only *de jure* segregation can violate the Education Clause, the Minnesota Supreme Court has never made such a ruling. Its citation of *Brown* in *Cruz-Guzman* was specifically to reinforce the justiciability of a school segregation claim, not to limit it.

2. The district court erred in requiring proof of *De Jure* Segregation or Intent to Segregate.

a. Requiring intent or *de jure* Segregation is inconsistent with the mandate in the Education Clause.

That the Education Clause is a mandate to provide a general, uniform, thorough, and efficient system of public schools negates any requirement of *de jure* segregation or a showing that the State has intended to create segregation. As noted, unlike the Minnesota Constitution, the United States Constitution provides no right to an education. Federal school desegregation cases thus do not arise from failure to provide a constitutional entitlement. They instead arise under the Equal Protection Clause of the 14th Amendment, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Thus, an Equal Protection claim requires proof of state action depriving the plaintiff of equal protection of the law. In other words, the state must have done something that causes the plaintiff to receive unequal treatment under the law.

In contrast, the Education Clause of the Minnesota Constitution is not a prohibition against the State taking harmful action; it is a mandate requiring the State ***to take action*** to establish and maintain a general, uniform, thorough, and efficient system of public schools. The State either does what the mandate requires, or it does not. A violation of the Education Clause occurs when the

State fails to meet the mandate—more specifically when the Legislature fails to establish and maintain a general, uniform, thorough, and efficient system of public schools. As the Supreme Court has said, a segregated public school system is self-evidently none of these. When the State is required to do something and fails to do it, the State's reason for not performing its mandate should be irrelevant.

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 in general, uniform, thorough, and efficient public schools.

Moreover, the State conceded in the district court that the Education Clause contains nothing to require intent as an essential element of a claim for its violation:

> Plaintiffs contend the Education Clause does not contain an intent requirement. State Defendants agree, to the extent the Court considers the Legislature's obligation under the Education Clause to establish "a general and uniform system of public schools" that provides students with the opportunity to receive an adequate education.

R. Doc. 355 at 9. Indeed it does not.

It does not because, as the Supreme Court held in *Skeen*, the Clause embodies a "mandate," found nowhere else in the Constitution, requiring the State to establish a "general and uniform system of public schools" with sufficient funding to render them "thorough and efficient." 505 N.W.2d at 313. There are no circumstances in which the Education Clause relieves the State of this duty. If the State fails to comply with its mandate, it cannot avoid responsibility by showing that it did not *intend* to establish a school system that is not general, uniform, thorough or efficient, or that it accidentally failed to establish such a school system, or that it had other more important matters to address. There are no excuses provided by the Constitution. The Legislature either does or it does not establish a school system that is general, uniform, thorough, and efficient. A segregated system is none of these, as the Supreme Court has said. Intent is therefore irrelevant.

The State and Intervenors have countered this by claiming that the Supreme Court was relying on federal school segregation case law when it said, "It is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.' Minn. Const. art. XIII, § 1." This argument, however, fails to recognize that under federal case law developed well after *Brown v. Board of Education* in the early 1970s, the U.S. Supreme Court drew the

distinction between *de jure* and *de facto* segregation and held that the subject matter jurisdiction of federal courts included ***only*** the power to remedy the former, which required a showing of intent to discriminate on the basis of race. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974). This requirement of intent under Federal law is attributable to the nature of the Equal Protection clause, noted above.

Under federal case law, however, where neither federal nor state governments are required to provide an education, federal courts can entertain suits only when the federal or state governments have taken action to prevent plaintiffs from obtaining an education by denying them equal protection or due process of law under the Fifth or Fourteenth Amendment. There must be some type of intentional government action to invoke federal jurisdiction to remedy denial of or interference with an education. By contrast, in Minnesota, the cause of action arises from government inaction in not providing a general, uniform, thorough, or efficient system of public schools in accordance with the mandate of the Education Clause.

b. Minnesota has the right to remedy *de facto* school segregation under Federal law.

Minnesota has also expressly recognized and approved the right of the State to remedy *de facto* school segregation. On September 19, 1978, Minnesota Hearing Examiner George Beck approved the State's 15 percent desegregation

rule, which defined segregation to exist "when the minority composition of the pupils in any school building exceeds the minority racial composition of the entire district by more than 15%." R. Doc. 283, Ex. 5 at P0005619. More significant, the Hearing Examiner's Report found that "the Legislature intended to regulate *de facto* segregation," and that the new Rule was therefore appropriate in doing so and within the grant of the enabling statute. *Id*. at P0005621-22, P0005624. The State may have since walked away from this position with the 1999 Rule, but the 1978 Hearing Examiner's report has never been called in question by any court since its issuance.

It also accords with both federal and state court precedents. 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*.

Nor is *Swann* an isolated, one-off decision recognizing that States are free to do what federal courts cannot. *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*)). Subsequent decisions from the Court similarly acknowledged a State's ability to do "more" than required by the Fourteenth Amendment without conversely violating the Fourteenth Amendment. *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).

As recently as 2007, Justice Kennedy made substantially the same point in his concurring opinion breaking a 4-4 tie in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). *See id.* at 789 ("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."). The US Department of Education and Department of Justice have similarly recognized that states have the right to consider the racial composition of schools in a guidance document issued on December 2, 2011:

> When race-neutral approaches would be unworkable to achieve their compelling interests, school districts may employ generalized race-based approaches. Generalized race-based approaches employ expressly racial criteria, such as the overall racial composition of neighborhoods, but do not involve decision-making on the basis of any individual student's race. For example, a school district could draw attendance zones based on the racial composition of particular neighborhoods, as well as on race-neutral factors such as the average household income and average parental education level of particular neighborhoods within the school district. All students within those zones would be treated the same regardless of their race.

U.S. DEPARTMENT OF EDUCATION AND DEPARTMENT OF JUSTICE, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS, *available at:* https://www2.ed.gov/

about/offices/list/ocr/docs/guidance-pse-201111.html (last visited Apr. 11, 2022).

Similarly, courts in other states have recognized their power to deal with *de facto* school segregation in ensuring effective implementation of their Education Clauses. The Supreme Court of New Jersey explained:

> When the Supreme Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), 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 [*v. Board of Ed. of City of Plainfield, Union County*, 212 A.2d 1 (N.J. 1965)], 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 619, 627 (N.J. 1971); *accord In re Petition For Authorization To Conduct A Referendum On Withdrawal Of North Haledon School Dist. From Passaic County Manchester Regional High School*, 854 A.2d 327, 336-38 (N.J. 2004). The Supreme Court of Connecticut similarly concluded:

> The fact that the legislature did not affirmatively create or intend to create the conditions that have led to the racial and ethnic isolation in the Hartford public school system does not, in and of itself, relieve the defendants of their affirmative obligation to provide the plaintiffs with a more effective remedy for their constitutional grievances.

Sheff v. O'Neill, 678 A.2d 1267, 1280 (Conn. 1996); *accord Crawford v. Bd. of Educ.*, 551 P.2d 28, 30, 41-42 (Cal. 1976).

Although the United States Supreme Court has required discriminatory intent in cases challenging school segregation under the Equal Protection Clause of the United States Constitution, the Court has also recognized that segregation comes in two varieties: *de jure*, segregation created by law or other state action; and *de facto*, segregation created allegedly by happenstance, such as housing patterns. It is only the former that federal law condemns, even though Justices as philosophically different as William O. Douglas and Lewis F. Powell, Jr., found the distinction meaningless. *Milliken v. Bradley,* 418 U.S. at 761-62 (Douglas, J., dissenting); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 219-24 (1973) (Powell, J., concurring in part and dissenting in part).

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); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*(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/how-twin-cities-housing-rules-keep-the-metro-segregated/600081529/ (last

visited Apr. 11, 2022). The Fifth Circuit made this explicit in *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142 (5th Cir. 1972), where it observed that it was "clear today beyond peradventure that the contour of unlawful segregation extends beyond statutorily mandated segregation to include the actions and policies of school authorities which deny to students equal protection of the laws by separating them ethnically and racially in public schools." *Id.* at 148

c. The district court erroneously concluded that a remedy for *de facto* segregation would in turn violate the Equal Protection clause.

The district court's decision below failed to consider this body of authority allowing states to address *de facto* segregation. The court instead improperly concluded that if it did not require a showing of *de jure* segregation, it would require the State to violate the Equal Protection Clause of the Fourteen Amendment:

> The Court first considers what Plaintiffs are asking this Court to do by this motion. They are asking the Court to find an Education Clause violation based on the presence of racial imbalance alone. To repeat, that is the only wrong they are litigating in this particular motion. If this is the only wrong, then the only properly tailored remedy is a remedy that redistributes students by race within the targeted school systems to eliminate the racial imbalance. That 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. This issue was settled in *Parents Involved in Community Schools v. Seattle School Dist. 1*, 551 U.S. 701, 725–33 (2007).

ADD. 17.

In doing so, the court misread Plaintiffs' motion papers and *Parents Involved*. In *Parents Involved*, the Supreme Court split 4-4, with Justice Kennedy filing a separate opinion concurring in part and concurring in the judgment. The district court cites only to the opinion of the four Justices voting for reversal. Because Justice Kennedy's concurring opinion is the tie-breaker in the case, it should be regarded as the controlling opinion. *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); *see also*, 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.").

As shown, Justice Kennedy expressly acknowledged 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. The district court erred in misreading *Parents Involved* and failing to consider Justice Kennedy's controlling concurring opinion, as well as the other federal cases cited above.

Even beyond this error, the district court was wrong in concluding that any remedy would necessarily involve student allocation and assignment on the basis of race. The 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, however, completely ignored this aspect of the Plaintiffs' motion. The word "socioeconomic" appears just once in the court's decision,[5] as does the word "socioeconomically."[6] 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

[5] "Plaintiffs present data regarding the racial and socio-economic [*sic*] 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." ADD. 5

[6] "Plaintiffs allege that Defendants have violated the Education Clause of the Minnesota Constitution, the Equal Protection Clause of the Minnesota Constitution, and the Due Process Clause of the Minnesota Constitution, as well as the Minnesota Human Rights Act, 6 by failing to provide an adequate education due to practices and policies that create racially and socioeconomically segregated public schools in the Minneapolis and St. Paul School Districts." ADD. 3.

segregation through pupil reassignment, regardless of its also alleviating racial segregation. There is simply no authority that prohibits reassignment based on SES.

Indeed, 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 based on race, and retains parent choice subject only to school capacity constraints. R. Doc. 356, Ex. 3 at 42-44. The district court was wrong to ignore this aspect of Plaintiffs' motion and the established law permitting states to remedy school desegregation.

3. The district court erred in requiring proof of State causation for an Education Clause violation.

The district court also erred in finding a causation requirement for Plaintiffs' Education Clause claim. The court principally relied on three things: (1) the Court of Appeals Decision in *Forslund v. State*, 924 N.W.2d 25 (Minn. Ct. App. 2019), ADD. 15; (2) a New York State intermediate appellate court decision, *Maisto v. State*, 196 A.D.3d 104, 149 N.Y.S.3d 599 (N.Y. App. Div. 2021), ADD. 21-22; and (3) the court's own analysis that Plaintiffs' Education Clause claim was essentially a tort claim, thereby requiring proof of causation, ADD. 22. None of these three requires causation as an essential element of Plaintiffs' Education Clause challenge to racial and SES segregation.

In *Forslund*, the plaintiffs' claim was that teacher tenure statutes "'impinge on' or 'burden' their children's right to an adequate education." 924 N.W.2d at 35. Plaintiffs did not contend or prove that they were receiving an inadequate education; in fact, they asserted they were not required to do so. *Id*., at 34-35. The court of appeals rejected this, holding that plaintiffs had to prove they were actually receiving an inadequate education because of the tenure statutes. *Id*.

In deciding *Forslund*, the court of appeals purported to be construing and applying the Supreme Court's decision in *Cruz-Guzman*. *Id*. at 28. Although the Supreme Court in *Cruz-Guzman* summarized allegations in Plaintiffs' Complaint that the State had caused or contributed to racial and SES segregation in the Minneapolis and St. Paul School Districts, 916 N.W.2d at 5-6, the opinion does not identify causation as a requirement of an Education Clause claim. Whereas the *Forslund* plaintiffs did not contend that they were actually receiving an inadequate education, the *Cruz-Guzman* plaintiffs do, because they are attending schools segregated by race and SES. The Minnesota Supreme Court said such schools were self-evidently not general, uniform, thorough, or efficient. 916 N.W.2d at 10 n. 6. Further, the *Forslund* plaintiffs had singled out one particular practice that they claimed "burdened" their ability to receive an adequate education without showing how it caused an inadequate education. Here, Plaintiffs claim that the racial and SES segregation of their schools constitutes an

inadequate education in and of itself. The Minnesota Supreme Court apparently agreed in *Cruz-Guzman*.

The *Maisto* case from New York State also is not on point because it is not a racial or SES segregation case. Instead, it is a case in which the plaintiffs claimed that the State "had not appropriated sufficient funds to enable the subject school districts to offer students a sound basic education." *Maisto*, 196 A.D.3d at 112, 149 N.Y.S.3d at 605. The district court here incorrectly characterized the case when it said, "This case is useful because, like the case at bar, it is an adequacy-of-education case, rather than the more common funding cases brought under state education clauses." ADD. 21. In *Maisto*, the court required the plaintiffs to show (1) they were underfunded; (2) they were not receiving a sound basic education; and (3) there was "a causal link between the present funding system and any proven failure to provide a basic education system." *Maisto*, 196 A.D.3d at 111-12, 149 N.Y.S.3d at 604-05.

Here, as noted, racial and SES segregation in itself denies Plaintiffs an adequate education. To hold otherwise is in effect to say that separate can be equal. Plaintiffs do not believe that the Minnesota Supreme Court intended to open this door when it said, "It is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.' Minn. Const. art. XIII, § 1."

The district court below also justified the causation requirement by analogizing Plaintiffs' Education Clause claim to a common law tort claim requiring proof of causation of injury.

> This Court rejects Plaintiffs' assertion that the existence of the claimed injury (here, racial imbalance) displaces the need to prove causation. It is antithetical to basic legal principles. Individual causes of action for constitutional violations are in the nature of tort claims. *Carey v. Piphus*, 435 U.S. 247, 254–55 (1978). The law of torts serves to redistribute the costs of an injury from the injured party to the person properly to blame. A causal link between the injury and the tortfeasor's action is a root principle. It is not fair to exact damages from a tortfeasor unless they are to blame; i.e. they caused the injury. And in the unusual circumstance where an injured party is entitled to equitable specific relief, it would make no sense to demand that a tortfeasor change or stop certain behaviors unless it were shown that those behaviors contributed to the injury. The same is true here.

ADD. 22.

There are numerous problems with this analysis. First, the claimed injury is not just "racial imbalance," but also SES imbalance. Second, *Carey*, the case relied upon by the district court, was a case brought under 42 U.S.C. § 1983 for damages from allegedly unlawful suspensions without procedural due process, not a state law Education Clause claim. In other words, school officials had done something allegedly causing injuries to plaintiffs. In this case, however, Plaintiffs allege that the State has failed to do something it was under a mandate to deliver. The holding of *Carey* has nothing to do with the issues of this case:

> In this case, brought under 42 U.S.C. § 1983, we consider the elements and prerequisites for recovery of damages by students who were

> suspended from public elementary and secondary schools without procedural due process. The Court of Appeals for the Seventh Circuit held that the students are entitled to recover substantial nonpunitive damages even if their suspensions were justified, and even if they do not prove that any other actual injury was caused by the denial of procedural due process. We disagree, and hold that in the absence of proof of actual injury, the students are entitled to recover only nominal damages.

435 U.S. at 248.

Carey 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).

A much more apt analogy for an Education Clause claim than tort law is the law of contracts, 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 be delivered, or the system of public schools not to be general, uniform, thorough, or efficient. The promisor must be required to keep the 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. It 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.

The district court's insistence on causation is misplaced and wrong when the State permits and fails to remedy racial or SES school segregation.

B. Undisputed Evidence Proved Racial and SES Segregation, Inadequate Education, and the State's Responsibility for the Segregation in Minneapolis and St. Paul School Districts.

1. Racial and SES segregation in the Minneapolis and St. Paul public schools.

Without providing specifics, the district court acknowledged that Plaintiffs had provided undisputed evidence of racial and SES make-up of students in Minneapolis and St. Paul public schools. ADD. 5, ¶¶ 4-5.[7] The undisputed record shows that for the 2020-21 school year, Minneapolis district-wide had 63% SOC students and 54% SES students (measured as qualifying for FRL). Of these schools, 23 were at least 80% SOC. All 23 had at least 70% SES students. R Doc. 348 at 2, Ex. 1 at 6-16.

[7] The court stated, "The existence of this racial make-up and imbalance against district demographics is not disputed." As noted, the court improperly failed to acknowledge the undisputed evidence of SES segregation and importance in the Plaintiffs' Education Clause claim.

For the same time period, St. Paul district-wide had 79% SOC and 66% SES students. There were 36 St. Paul schools with more than 80% SOC, of which 28 were at least 90% SOC and 24 at least 70% SES students. *Id*.

On September 19, 1978, the MDE obtained approval for a new desegregation rule that was intended to remedy both *de facto* and *de jure* segregation. The new rule defined segregation as a variance of at least 15% of SOC in a school above the percentage of SOC in the entire district. R. Doc. 283, Exs. 4, 5 at P0005619. This rule remained in effect for over 20 years until the current rule was adopted on March 19, 1999. The current rule, which defines segregation as only *de jure*, requires a 20% variance of SOC in a school above the district-wide percentage of SOC in the entire district. *Id*., Ex 67 at P0006530-36.

For the 2020-21 school year, all 23 Minneapolis schools with more than 80% SOC would have been found racially segregated under both the old rule's 15% variance and the current rule's 20% variance. Nineteen of the 23 schools would have been segregated by SES under the 15% variance, and 18 under the 20% variance.

St. Paul might have fared somewhat better for this time period. Only 13 of its 36 schools with over 80% SOC would have been considered racially segregated under the 15% rule, and only one under the current 20% rule. On the other hand, 28 of these St. Paul schools had enrollment of at least 90% SOC. It is

inconceivable that such schools would not be identified as racially segregated. In terms of SES, 17 of the St. Paul schools would have been segregated by SES under the 15% rule, and 10 under the 20% rule.

This is undeniably racial and SES segregation, or imbalance as the district court preferred to say. More importantly, this is not Plaintiffs' definition of segregation. It is the State's. The State cannot now be heard to say after almost 45 years that these schools are not segregated by race and SES, when the Stat itself has defined what constitutes segregation.

2. Failure to receive an adequate education.

The segregation numbers speak for themselves. Plaintiffs submit that the very existence of racial and SES segregation establishes that schools and the education they provide are definitionally inadequate under the *Cruz-Guzman* decision: "It is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.' Minn. Const. art. XIII, § 1." 916 N.W.2d at 10 n.6.

Nonetheless, if more is required, undisputed evidence of student performance over time proves the point. The district court's decision says nothing about this evidence. What it clearly shows, however, is an achievement gap between white students and SOC that is substantial, long-term, and intractable. R. Doc. 348 at 2, Ex. 1 at 20; R. Doc. 356, Ex. 3, cover letter at 1,

Responses at 4-17; R. Doc. 365, Ex. 3 at 6-41. Over the same time, racial and SES segregation have shown virtually no improvement and have in many instances worsened. *Id*.

The response of the district court was to require that Plaintiffs prove that the State was the cause of the segregation. ADD. 22-23. One serious problem with the court's ruling is that the court does not specify the type or degree of causation required of Plaintiffs. The law recognizes all types and degrees of cause: proximate cause; but-for cause; primary cause; significant cause; contributing factor, etc. Without such definition, not only the parties, but also the court, are at sea in future proceedings.

3. State Causation of Minneapolis and St. Paul School Segregation.

The record here presents at least two significant, undisputed instances in which the actions of the State clearly caused or contributed to an increase in segregation, as well as impeding efforts to desegregate. The district court failed to give this undisputed evidence its due weight. Instead of treating this evidence as proof of causation, the court improperly shifted the issue to whether the evidence established the State's intent to segregate, not whether the State caused or contributed to racial or SES segregation, which it clearly did.

The first instance involved proceedings of the Board and Department of Education in crafting the current desegregation rule. The impetus for the new

rule was the increase of SOC and SES students in Minneapolis and St. Paul in the late 1980's, which threatened to make the 15% rule unworkable without suburban participation. The process of developing a new rule began in the first half of the 1990's. The first drafts of the proposed new rule defined segregation as both *de jure* and *de facto*, permitted inter-district desegregation between the Twin Cities and the suburbs, required suburban districts to participate with the Minneapolis and St. Paul districts, and did not exempt charter schools. R. Doc. 283, Ex. 6 at P0001972, Exs. 7-9, Exs. 11-19.[8] In the midst of these efforts, top administrators in the MDE, assisted by seconded counsel from the Attorney General's office, wrested away control of the project, and changed it so that (1) the definition of segregation was limited to de jure segregation only; (2) inter-district desegregation was possible only on a voluntary basis; (3) suburban districts were under no compulsion to participate; and (4) charter schools were exempt from the rule. *Id.*, Ex. 34 at P0002867; Exs. 35-36; Ex. 37 at P0002410; Ex. 40 at P0002630-31; Ex. 45 at P0005730-31; Ex. 47 at P0002401, P0002403-06; Ex. 48; Exs. 53-58; Ex 67.[9]

[8] See in particular Ex. 15 at P0002223; Ex. 16 at P0002245; Ex. 17 at P0002294-95; Ex. 18 at P0002323-24.

[9] See in particular Ex. 53 at P0002650, P0002653; Ex. 58 at P0002815; Ex. 67 at P0006528-36, P0006552-53.

The MDE Assistant Commissioner, who became Commissioner from November 1996 to January 1999, led the initiative for the rule changes, although he knew that the changes to the rule would result in increased segregation in inner city schools. *Id.*, Ex. 34 at P0002867; Exs. 35-36; Ex. 37 at P0002410 ("Parent choice to schools [sic], 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."); Ex. 40 at P0002558 ("If, through parent choice, school sites would have high percentages of learners of color, such schools would not be considered to be segregated."), P0002630-31.) MDE was also on notice that that the new rule would foster segregation and re-segregation as numerous community organizations, scholars, and concerned citizens warned and complained of the rule's effects. *Id.*, Exs. 49-50; Exs. 60-63; Ex. 68.

The second instance was MDE's approval in 1996 of a request from the Minneapolis Public School District for a waiver from the 15% rule so that the District could return to neighborhood schools, despite both notice to and knowledge by the District and MDE that the result would be segregation and re-segregation of Minneapolis public schools, which in fact has occurred, as shown above. *Id.*, Exs. 44; Ex. 45 at P0005730-31, P0005746; Ex. 46; Exs. 51-52. In 2011, the MDE also permitted the St. Paul Public School District to return to neighborhood

schools, although the District was on notice that the result would be increased segregation. *Id*., Exs. 72-73.

Since the adoption of the current rule in 1999, the MDE has never found a Minnesota school or school district to have engaged in intentional segregation. R. Doc. 365, Ex. 3 at 33. This does not mean, however, that this has not occurred. See R. 365, Ex. 2, February 6, 2015, email from MDE Ombudsperson Cindy Jackson to MDE Commissioner Brenda Cassellius, Document Nos. MDE0067730-33:

> State rule is supposed to allow MDE to determine whether a district intentionally segregated a site. In reality, it is very unlikely that MDE would ever make public statements that districts were intentionally segregating. Questions remain on whether it would be better handled by federal civil rights laws. Even when we had a situation under [former MDE 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.

There is thus undisputed evidence in this record of the State's engaging in conduct that directly caused and contributed to racial and SES segregation in the Minneapolis and St. Paul Public School Districts. Certainly, there is undisputed evidence that in enacting the new desegregation rule and granting waivers to allow Minneapolis and St. Paul to return to neighborhood schools, the State had notice and knowledge that the consequence would be increased segregation. The law has long presumed that actors

intend the foreseeable consequences of their actions. *Tann v. United States*, 127 A.3d 400, 445 n. 26 (D.C. 2015); *Milton v. Johnson*, 79 Minn. 170, 175, 81 N. W. 842 (Minn. 1900); *Jones v. Swanson*, 341 F.3d 723, 732 (8th Cir. 2003) ("In other words every person is presumed to intend the consequences of his own voluntary acts."); *Meyers v. City of Cincinnati*, 728 F.Supp. 477, 481 (S.D. Ohio 1990); *Kebede v. Hilton*, 580 F.3d 714, 716 (8th Cir. 2009). Here, the consequences were not just foreseeable, but actually foreseen and even known to eventuate by those responsible for the new rule and the neighborhood school waivers.

The district court was wrong to find that there were disputed issues of fact on whether the State caused and was responsible for racial and SES segregation in Minneapolis and St. Paul Schools, even if causation was an essential element of an Education Clause claim.

CONCLUSION

On the basis of the foregoing arguments and authorities, Plaintiffs respectfully ask this Court to reverse the district court's denial of Plaintiffs' motion for partial summary judgment and direct the district court to enter summary judgment finding that the State has violated the Education Clause of the Minnesota Constitution, enjoining the State from continuing the violation, and ordering the State to remedy the violation. It is indeed self-evident that a segregated system of schools is not general, uniform, thorough, or efficient and

therefore violates the Education Clause. This applies whether the segregation is *de jure* or *de facto*, and whether or not the State has caused or contributed to the segregation.

Dated: April __, 2022.

Respectfully submitted.

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STATE OF MINNESOTA
IN COURT OF APPEALS

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.

CERTIFICATION OF LENGTH OF DOCUMENT

APPELLATE COURT
CASE NO. 22-0118

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Dated: April __, 2022.

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