No. 22-0118

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OFFICE OF APPELLATE COURTS

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-Appellees,

and

Higher Ground Academy, *et al.*,

Intervenors-Appellees.

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INTRODUCTION

> Minnesota schools are among the worst in the nation for children of color. No doubt, the racial imbalance in many Twin Cities schools plays a role in this shameful state of affairs.
>
> --Brief of Amicus Curiae Ciresi Walburn Foundation at 2.

The issue for this Court is whether *de facto* segregation[1] in a school system can ever violate the Education Clause of the Minnesota Constitution, Article XIII, Section 1. *De jure* segregation requires deliberate state action with the intent to segregate. *De facto* segregation requires neither. Plaintiffs respectfully submit that *de facto* segregation should by itself violate the Education Clause, because it is self-evident that a segregated school system is not general, uniform, thorough, or efficient, and thus does not provide an adequate education, as this Court said in its prior decision in this case. *Cruz-Guzman v. State of Minnesota*, 916 N.W.2d 1, 10, n.6 (Minn. 2018) ("*Cruz-Guzman I*").[2]

If a violation of the Education Clause based on *de facto* segregation requires proof of something more, amici have provided a roadmap of how other states,

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[1] *De facto* segregation is sometimes referred to as racial or socioeconomic status ("SES") imbalance. As in its opening Brief, Plaintiffs-Appellants ("Plaintiffs") will use the term "segregation" to refer to both *de jure* and *de facto* racial or SES imbalance.

[2] In their brief, Intervenors-Respondents (the "Charter Schools") refer to the court of appeals decision under review as "*Cruz-Guzman II*." Plaintiffs respectfully submit that this designation is more appropriate for this Court's decision in this appeal.

such as New Jersey, Connecticut, and California, have concluded that *de facto* segregation violates their constitutions' guarantees of public education. (*See*, *e.g.*, Ed. Law Center Br. at 9-12.)

Important to the Court's decision are two essentially undisputed facts. First, numerous schools in the Minneapolis and St.Paul Public School Districts are segregated by race and SES. Second, there is a long-standing and intractable achievement gap harming students of color ("SOC") and SES-disadvantaged students.

Amicus Ciresi Walburn Foundation ("Ciresi") states not only that "Minnesota schools are among the worst in the nation for children of color," but also that "No doubt, the racial imbalance in many Twin Cities schools plays a role in this shameful state of affairs." (Ciresi Brief at 2.) Ciresi supports its condemnation of Minnesota schools with 2022 test scores for Minneapolis and St. Paul Public School Districts, which show disparities between white students and SOC that Ciresi deems "extraordinary" and "so striking … that they appear to be typographical errors" to the "uninitiated." (*Id*. at 4-5.) Ciresi also shows how Minnesota ranks at the very bottom of states in graduation rates for SOC. (*Id*. at 3.)

With this preface, Plaintiffs reply to the briefs of the State and Respondents-Intervenors (the "Charter Schools"). As appropriate, Plaintiffs will

address the briefs of Amici for the Respondents, as they have done above with the Ciresi amicus brief.

REPLY TO BRIEF OF THE STATE

I. The State concedes that a violation of the Education Clause premised on segregation requires proof of neither State intent nor State causation of segregation.

As noted in Plaintiffs' opening brief, the State acknowledged below that the Education Clause does not require Plaintiffs to show intentional segregation by the State in the Minneapolis or St. Paul School Districts in order to establish a violation. (*See* State Respondents' Court of Appeals Brief at 26, n.20.) In its brief to this Court, the State goes even further:

> Appellants and amici devote considerable briefing to whether causation should be required to prove a violation of the Education Clause. ***State Respondents generally agree that neither traditional notions of causation nor intent are well suited to this unique constitutional claim, but that liability should at least be limited to issues over which the legislature has control.***

(State Br. at 36, n.21 (emphasis added).) The State now agrees that Plaintiffs need not even prove that the State caused or was responsible for the segregation.

The State's concessions are entirely consistent with this Court's rulings in *Skeen v. State*, 505 N.W.2d 299, 313, 315, 318 (Minn. 1993) ("*Skeen*") and *Cruz-Guzman I*, that the Education Clause imposes a unique "mandate" on the

Legislature to establish a school system that is general, uniform, thorough, and efficient, and provides an adequate education to all Minnesota children.

The State's position in this appeal as to the requirements for proving an Education Clause violation is:

> Absent proving intentional discrimination that created a *de jure* segregated public school system, Appellants must prove (1) they have not received an opportunity to acquire an adequate education; and (2) that some aspect of the statewide system of public schools is responsible for this lack of opportunity. . . .

(State Br. at 36.) The State contends that, to date, "Plaintiffs have not even attempted to show either of these components." (*Id*.) To the contrary, Plaintiffs have produced undisputed demographic evidence and achievement test scores proving that SOC and SES-disadvantaged students in the Minneapolis and St. Paul School Districts are not receiving an adequate education, (*see* Appellants' Br. at 8-12), and Plaintiffs have identified other metrics by which they could demonstrate at trial the harms that segregation imposes on student education, such as the likelihood that children of color will be placed into special education programs, limited opportunities for intergroup contact and competency, and the impact of greater staff turnover, (*see, e.g.*, Compl. at ¶ 65).

To the extent that the State argues that test results and other academic measures are irrelevant because only the ***opportunity*** to receive an adequate

education matters, not whether students are in fact adequately educated, there are two answers.

First, it should be easier to show that segregation of any kind impairs the opportunity to receive an adequate education, because it deprives SOC and SES-disadvantaged students of the opportunity to attend school with classmates who have not been the object of discrimination and are not SES-disadvantaged, learn from such students as well as teachers, and form friendships and connections that can benefit them for the rest of their lives.

Second, the State's position directly contradicts the court of appeals decision in *Forslund v. State of Minnesota*, 924 N.W.2d 25 (Minn. Ct. App. 2019). The court in *Forslund* rejected the claim that something that interfered with the opportunity to obtain an adequate education (in *Forslund*, teacher tenure laws) could violate the Education Clause. According to the court, "a plaintiff cannot sustain a claim that the state is providing a constitutionally inadequate education without proving that the state is in fact providing a constitutionally inadequate education." *Id*. at 33-34. Plaintiffs have cleared this hurdle by undisputed evidence of test results and the intractable, longstanding achievement gap, which the Ciresi brief also acknowledges.

The only question left hanging, which Plaintiffs have addressed in their opening brief, is whether Plaintiffs must show that segregation caused or

contributed to their inadequate education, and if so, the nature and extent of the causation Plaintiffs must show. Here again the Ciresi amicus brief concedes, "No doubt, the racial imbalance in many Twin Cities schools plays a role in this shameful state of affairs." (Ciresi Br. at 2.)

II. The State makes the same error the district court made in predicting the remedy.

Repeatedly in its brief, the State claims that Plaintiffs are requiring courts to conclude that the Minnesota Constitution requires that schools must have a specific racial and SES makeup or demographic mix. (State Br. at 3-4, 15, 16, 18, 28 ("As set forth in Section II, Appellants seek to enshrine a particular mix of students as a constitutional requirement under the Education Clause."), 32, 34.)

Clearly, someone must make a determination whether there is a sufficient racial or SES imbalance in a school so that a court can conclude it is segregated. In fact, in its various incarnations, Defendant-Appellee Minnesota Department of Education ("MDE") has been doing just that for the past 45 years, since it enacted its first desegregation rule in 1978, which targeted both *de facto* and *de jure* segregation, and received the imprimatur of an Administrative Law Judge. *See* R. Doc. 288, Ex. 4 at P0000772, 774-77, Ex. 5 at P0005619, 5621-22, 5624. Plaintiffs have made known that they are satisfied with the court's using the same standards that the State itself has used in defining imbalance, with the single

exception of finding segregation where SOC or SES-disadvantaged students exceed 80 percent of a school's enrolment.

Once the court has made a determination that a school is segregated by race or SES in violation of the Education Clause and enjoins the violation, the court turns the matter back to the Legislature to craft a remedy to cure the violation. The court has answered the yes or no question properly within its jurisdiction in *Cruz-Guzman I*, and at that point judicial involvement ends, other than possibly hearing future challenges to the eventual remedy.

Both the district court and now the State are making the same errors in their speculation about any remedy running afoul of federal equal protection jurisprudence as well as violating separation of powers under the Minnesota Constitution.

First, like the district court, the State fails to appreciate that the controlling opinion in *Parents Involved in Community Schools v. Seattle School Dist. 1*, 551 U.S. 701 (2007), is the concurring opinion of Justice Kennedy, not what the State refers to as the "majority" opinion. (State Br. at 24.) The controlling nature of a concurrence like Justice Kennedy's opinion has been repeatedly acknowledged by the Supreme Court and other authorities. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *see* J. Harvie

Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 Harv. L. Rev. 158, 170 (2007).

Second, Justice Kennedy's controlling opinion did not reject state considerations of race in achieving school diversity. After saying, "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 788, Justice Kennedy went on to add:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.… Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.

Id. at 789 (internal citation omitted).[3]

Like the district court, the State also assumes that any remedy must be race-based, despite the fact the State, through the MDE, itself has agreed with Plaintiffs on a bill in which there is no student assignment based on race; admission preferences exist only for SES-disadvantaged students; and parent choice remains essentially unchanged, subject only to capacity constraints.

III. The remedy for segregation need not violate the Minnesota or United States Constitution.

The State also argues that any remedy must violate the Separation of Powers Clause of the Minnesota Constitution, Article III, Section 1, because allegedly the court must decide an appropriate demographic mix of students, and thereby impermissibly make educational policy. In fact, the court need not decide anything on its own in this regard. Instead, the court can follow the numbers and standards determined by the executive branch, specifically the MDE, which has been making educational policy over the last 45 years, through

[3] By parenthetical insertions in quoting from the dissent of Justice Stevens, the State implies that the Supreme Court has "rejected" its decisions in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Bustop, Inc v. Bd. of Educ. of City of Los Angeles*, 439 U.S. 1380 (1978). (State Br. at 24 fn.10.) The Court has never overruled these or expressly "rejected" these decisions, which Justice Stevens found "entirely loyal to Brown." *Parents Involved*, 551 U.S. at 802-03 (Stevens, J., dissenting).

promulgation and administration of desegregation/integration rules, also made at the direction of the legislature.

The MDE in this regard first adopted a 15 percent variance as establishing racial imbalance in 1978 in its first desegregation/integration rule, which it then increased to 20 percent in the current rule adopted in 1998. The court is free to adopt either without violating separation of powers.[4]

In addition, Plaintiffs believe that there must be a percentage at or above which a court can decide schools are segregated or imbalanced by race or SES as compared with either schools in their own district or schools in adjoining districts. As distinct from making educational policy, this is simply fact-finding. The proposed bill agreed to by Plaintiffs and the MDE provides for determining racial imbalance with respect to both same district schools and schools in adjoining districts.

The State also erroneously concludes, as did the district court, that any remedy would violate the Equal Protection Clause of both the federal and state constitutions because it must involve race-based student assignment. This is

[4] In the district court, the MDE took the rather surprising position that it adopted these variance numbers "as an educational policy response to address matters about which the Education Clause is silent," and not "as a *constitutional* threshold." R. Doc. 355, (State Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment) at 13 (emphasis in original).) Certainly, the MDE did not mean to admit or imply that it had adopted unconstitutional standards.

demonstrably wrong for several reasons. First, as mentioned, the proposed bill crafted by MDE and Plaintiffs bases student assignment on SES, not race. The bill sorts students in each census block by four SES factors: (1) median household income; (2) percent of home ownership; (3) percent of single-parent households; and (4) average educational attainment of population.[5] This is constitutionally permissible. As Justice Kennedy's controlling concurrence in *Parents Involved* makes clear, even certain generalized race-based measures remain available to state actors.

IV. The State does not satisfy the Education Clause simply by establishing a statewide system of schools.

The State takes the position that once it sets up a statewide system of schools, it has satisfied its mandate under the Education Clause regardless of how those schools operate and perform. (State Br. at 19 ("Critically, the word that follows 'general and uniform' is 'system.' As this Court made clear in *Skeen*, 'system' refers to statewide characteristics of the education program, not anything on the district or smaller level.").)

As this Court made clear in this case, however,

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[5] 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.

> We cannot fulfill our duty to adjudicate claims of constitutional violations by unquestioningly accepting that whatever the Legislature has chosen to do fulfills the Legislature's duty to provide an adequate education. If the Legislature's actions do not meet a baseline level, they will not provide an adequate education.

Cruz-Guzman I, 916 N.W.2d at 13. In illustrating this point, the Court quoted the Connecticut Supreme Court's observation in *Sheff v. O'Neill* that a government cannot fulfill its duty to provide an adequate education by "herd[ing] children in an open field to hear lectures by illiterates." *Id.* This analogy applies equally to the State's argument that adequacy of the system of education should only be evaluated on a statewide scope. It cannot be that the Education Clause is only violated if *every* district in the state is herding students into a field to be taught by illiterates, or that the legislature has no duty to correct those districts that do.

The State admits that the legislature has a policy "promoting local control of education" and "has determined that educational decisions are best left to locally elected school boards, who are closest to the children they serve." (State Br. at 33.) The constitutional responsibility to provide a general, uniform, thorough, and efficient, system of public schools that furnish an adequate education, however, rests ultimately with the legislature, which it cannot delegate without recourse to other branches of government, state subdivisions, or local authorities.

A single example makes this clear. If a local district intentionally segregates its schools to create an inadequate education for SOC or SES-disadvantaged students, the legislature must remedy the violation. There is universal agreement among the parties and the courts of this State that *de jure* segregation in a school district violates the Education Clause. According to the State's definition of the Education Clause, however, the legislature would not have to do anything to remedy this situation unless it was occurring statewide.

This cannot be the law. As with the example from *Sheff* of illiterates teaching students in an open field, the legislature cannot avoid its constitutional mandate by simply arguing that not all students throughout the state have been denied an adequate education.

V. This Court is free to interpret the Education Clause to prohibit *de facto* segregation.

As Plaintiffs point out in their opening brief, other State Supreme Courts, such as those in Connecticut, New Jersey, and California have interpreted their Education Clauses to prohibit *de facto* segregation. (Appellants' Br. at 37, 48-49.) The State tries to distinguish the Connecticut and New Jersey cases by asserting that both states had amended their constitutions to contain an antidiscrimination clause that prohibited *de facto* school segregation. (State Br. at 23-24.)

Neither clause, however, specifically mentions *de facto* segregation, as the Court will see from reading the text. In both the Connecticut and New Jersey

cases, the courts interpreted the clauses to support their conclusions to construe the state's Education Clause as prohibiting *de facto* segregation because they considered the effects of *de facto* segregation on schoolchildren to be comparable to the effects of *de jure* segregation. *Sheff v. O'Neill*, 678 A.2d 1267, 1280-81 (Conn. 1996)[6]; *Jenkins v. Morris Tp. School Dist.*, 279 A.2d 619, 627 (N.J. 1971).

Clearly, this Court can find that Minnesota has a policy and interest in eliminating segregation at least equally as strong as that of Connecticut and New Jersey. The Court can construe the Education Clause as prohibiting *de facto* as well as *de jure* segregation, in light of the *sui generis* nature of the Education Clause and the absence of any analog in the United States Constitution.

Such a ruling would be entirely consistent with the State's own argument that it is committed to achieving integration. The State stresses that "[i]t has voluntarily and affirmatively pursued integration as a matter of public policy, initially through administrative rules and, since 2013, also in statute." (State Br. at 4.) Citing Minn. Stat. § 124D.861, the State further offers:

> The "Achievement and Integration for Minnesota" program is established to pursue racial and economic integration and increase student academic achievement, create equitable educational opportunities, and reduce academic disparities based on students' diverse racial, ethnic, and economic backgrounds in Minnesota public schools.

[6] The citation to the *Sheff* case at page 49 of Plaintiffs' opening brief has an error. The jump cite should be 1280-81, not 1270. Plaintiffs apologize for the error.

Id. at 5.

This Court should take the State at its word. Including *de facto* segregation within the scope of the Education Clause will undoubtedly assist the State in implementing this important and laudable objective. Indeed, in 1978, the MDE specifically sought to remedy *de facto* segregation in its original desegregation/integration rule, which the Hearing Examiner approved. *See* R. Doc. 288, Ex. 4 at P0000772, 774-777, Ex.5 at P0005619, 5621-22, 5624.[7]

REPLY TO BRIEFS OF CHARTER SCHOOLS AND AMICI

I. Parent choice is an important interest, but does not trump remedying unlawful school segregation.

An obvious takeaway from the Charter Schools' brief is that they believe that parent choice is the paramount interest, the *summum bonum* in education in

[7] As noted in Plaintiffs' opening brief at 37, 48-49, the California Supreme Court also ruled that its Education Clause prohibited *de facto* segregation because the Court found its deleterious effects comparable to those of *de jure* segregation. *Crawford v. Bd. of Educ.*, 551 P.2d 28, 30, 41-42 (Cal. 1976). California voters subsequently ratified an amendment to the constitution nullifying the decision. *Crawford v. Board of Education of City of Los Angeles*, 458 U.S. 527 531-32 (1982).

Minnesota, at least insofar as the Legislature is concerned.[8] It is not. The most important consideration is whether the school system is providing a general, uniform, thorough, and efficient education that results in an adequate education. If eliminating segregation and implementing integration is necessary to achieve this in the view of the State, parent choice must also give way.

The Charter Schools' freedom of choice argument is far from new. In the first two decades following *Brown*, proponents of segregation repeatedly made this argument, and courts repeatedly rejected it. *Green v. County Sch. Bd. of New Kent County, Va.*, 391 US. 430, 439-42 (1968); *Kemp v. Beasley*, 389 F.2d 178, 181-82 (8th Cir. 1968) ("*Kemp II*"); *Kemp v. Beasley*, 352 F.2d 14, 21-22 (8th Cir. 1965) ("*Kemp I*"); *Kelley v. Altheimer, Arkansas Public Sch. Dist. No. 22*, 378 F.2d 483, 488-89 (8th Cir. 1967).

Parent choice to decide where their children attend school has limits and is subordinate to State public policies and interests, including the preservation and

[8] The Charter Schools repeatedly refer (at least 19 times) to a so-called "Legislature's 'parent choice policy'" in their brief. Although the term is used within quotation marks—suggesting, inaccurately, that the words appear somewhere in the record and are attributed to the legislature—there is no such policy to Plaintiffs' knowledge, and none of the Charter Schools' citations provides support that any such policy exists. This issue is important because the Charter Schools' position implicitly, if not explicitly, is that the Minnesota Legislature has decided that parent choice trumps all other considerations in educating Minnesota's children. Plaintiffs dispute this as a matter of fact and law.

maintenance of diversity in public education. Notwithstanding its past policies and practices, the State has a compelling interest in eliminating segregation by race and socioeconomic status in its public schools. Parent choice is not permitted to interfere with the State's ability to pursue that interest.[9]

The United States Supreme Court and lower federal courts have repeatedly held that so-called freedom of choice plans are unconstitutional if they perpetuate segregation or interfere with efforts at desegregation. *E.g.*, *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. at, 439-441 (1968). The same applies to charter schools. *Berry v. Sch. Dist. of City of Benton Harbor*, 56 F. Supp. 2d 866, 870-71 (W.D. Mich. 1999).

In the *Green* case, the school board was using its freedom of choice plan to allow parents to evade a desegregation court order. Although not condemning freedom of choice plans as *per se* unlawful, the Court proscribed the school board's plan for thwarting efforts to desegregate Kent County schools. The Court concluded:

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[9] Similarly, the brief of amici Ed-Allies, *et al*., argues that "parental choice" for students of color to attend culturally affirming schools should not be treated the same as *de jure* segregation. (Ed-Allies Br. at 7-10.) But the Ed-Allies brief does not discuss, let alone justify, why this "parental choice" should be permitted to interfere with the State's ability to address the harm imposed on the many Twin Cities students that did not "choose" their schools to be segregated by race or SES imbalance.

> The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school.

Id. at 431.

The Eighth Circuit similarly addressed the "freedom of choice" argument as an attempt to evade desegregation efforts in the *Kemp* case. The court observed that:

> It becomes judicial hypocrisy to approve a plan which simply continues the status quo under the guise that the segregation is no longer coerced. Where "freedom of choice" does not implement, or produce meaningful advance toward the ultimate goal of a racially integrated school system, it cannot be said to work in the constitutional sense.

Kemp II, 389 F.2d at 181-82.

Finally, if parent choice is to trump every other educational policy, then there can be no justification for limiting the choice of parents to send their children to white nationalist schools. Is Minnesota willing to enter this looking-glass world?

II. Charter schools generally underperform traditional public schools.

The Charter Schools and Ciresi each provide examples of two high-performing charter schools that outperform many public schools. Two of these schools are Respondents-Intervenors; the two Ciresi selects are both recipients of

its funding. These are four out of 181 charter schools in Minnesota, 2.2 percent.[10] Plaintiffs do not dispute the achievements of these four charters and commend them for it. Nonetheless, what they have achieved is not typical of Minnesota charter schools, which generally perform significantly below the performance of traditional public schools.

A study conducted by the Institute of Metropolitan Opportunity ("the Institute") of the University of Minnesota Law School in 2017[11] found that charter elementary schools underperform traditional schools in math and reading after controlling for school demographics and characteristics. In the most recent school year included in that study, 2014-15, charter pass rates were 9.3 percentage points lower in math and 6.2 percentage points lower in reading. These disparities were generally the same over the preceding five years. R. Doc. 364, Supplemental Declaration of Will Stancil, Ex. A at 1-3. The study also found that only a moderate degree of integration for highly segregated, so-called "culturally affirming" charter schools would enable them to match the performance of traditional public schools. *Id*. at 3-4.

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[10] *See* MINNESOTA DEPT. OF EDUC., CHARTER SCHOOLS, https://education.mn.gov/MDE/fam/cs/.

[11] INST. ON METRO. OPPORTUNITY, MINNESOTA SCHOOL CHOICE PROJECT, PART I: SEGREGATION AND PERFORMANCE (2017), https://law.umn.edu/sites/law.umn.edu/files/metro-files/imo-mscp-report-part-one-segregation-and-performance.pdf_0.pdf.

A more recent analysis conducted by the Institute shows student poverty reading and math proficiency rates for both Twin Cities elementary charter schools and traditional public schools for the 2021-22 school year. Generally, predicted proficiency declines as poverty increases. In graphs, the study shows that for math 57 percent of traditional public schools exceed predicted performance, while only 26 percent of Charter Schools do. Three of the four schools touted by the Charter Schools and Ciresi exceed predicted results. Intervenor Friendship Academy falls slightly below.[12]

In student poverty reading proficiency for 2021-22, predicted performance again declines as student poverty increases. Here 49 percent of traditional public schools exceed predicted reading proficiency, while only 36 percent of charter schools do. Reading performance for the four touted charter schools shows basically the same results as for math, with only Friendship Academy falling below predicted results.[13]

Another reason to question claims of charter school superiority to traditional public schools is the absence of longitudinal data, which would follow students at SOC and SES imbalanced charter schools for decades to

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[12] The Institute has updated graphs with the most recent data, which is available at: https://law.umn.edu/sites/law.umn.edu/files/2023-03/mn_testing2021charts_0.pdf.

[13] *Id*.

compare their life outcomes with those of SOC and SES-disadvantaged students who were able to attend integrated schools for all or part of their schooling. There are significant longitudinal studies for the latter students, which show the lifelong benefits of integration as well as the harms of segregation. Rucker C. Johnson, *Children of the Dream: Why School Integration Works*, Basic Books (2019); Sean F. Reardon, *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps,* Stanford Center for Education Policy Analysis, CEPA Working Paper No. 19-06, available at: https://drive.google.com/file/d/1TyiSn9_1pobs9VksMu4jJENKZ3Yokj1r/view.

Until Charter Schools also produce such studies, their claims of superiority remain only anecdotal.

III. All schools should be culturally affirming for all cultures of their students.

The Charter Schools, Ciresi, and the Ed-Allies amici, all stress that charter schools try to be "culturally affirming," which usually is applied to schools that are almost entirely SOC or some other identifiable group. The subtext of this is that it is acceptable for these charter schools to be racially or otherwise imbalanced or segregated because they provide a nurturing, accepting, and understanding environment that diverse or segregated traditional public schools do not or cannot provide.

In reality, of course, every school should be culturally affirming for every culture represented in its student body. This is a desideratum every school should strive to reach. It is not, however, a justification for charter schools to opt out of the state policy of school diversity. Nor have the great majority of charter schools shown it to be effective in providing an adequate education.

IV. The bill to which Plaintiffs and the MDE agreed seeks to accomplish much more than integration.

Ciresi has acknowledged racial imbalance in Twin City schools, "which are among the worst in the nation for children of color." Ciresi concedes, "No doubt, the racial imbalance in many Twin Cities schools plays a role in this shameful state of affairs." (Ciresi Br. at 2.) Plaintiffs and the MDE have agreed on legislation that would accomplish desegregation without race-based student assignment or limiting parent choice. Ciresi criticizes the Plaintiffs-MDE bill for not doing more to ensure an adequate education for students.

Ciresi lists a series of additional "proven interventions that Minnesota has failed to fully embrace to address our opportunity and achievement gaps," which Plaintiffs and the MDE have allegedly failed to include. These include: early childhood education; high quality tutoring; science based literacy instruction, with explicit phonics; increasing teacher diversity; and accountability for failing schools. (*Id*. at 6-7.)

Aside from letting the perfect become the enemy of the good, Ciresi has failed to understand that many of these interventions are already in the Plaintiffs-MDE bill. Schools that are imbalanced with "historically underserved students"[14] must develop a "culturally responsive teaching, learning, integration, and inclusion program." Sec. 124F.03. The plans for the program must include "evidence based strategies" for "curricula and programming that has been shown to enhance academic outcomes for historically underserved students"; recruitment and retention of culturally competent teachers who have received anti-bias training as teachers of color and indigenous teachers; multi-tiered systems of student support; family engagement; and drop-out prevention strategies. *Id*., Sec. 124F.03, Subd. 4.

There are detailed provisions for "accountability and enforcement" by MDE. *Id*., Sec. 124F.03, Subd. 6. The MDE also is to collect and analyze longitudinal data on numerous measures of student and school performance. *Id*., Sec. 124F.05, Subd. 4. The bill also provides for implementation of a magnet school program designed to achieve integration and student achievement. *Id*., Sec. 124F.06.

[14] Defined as "students of color, indigenous students, and students in poverty." Bill Sec. 124F.01, Subd. 7

Finally, the MDE "must develop a repository of evidence-based strategies that focuses on improving outcomes and eliminating disparities for historically underserved students," including increasing teachers of color and indigenous teachers, full-service community schools, and equitable disciplinary processes. The MDE must also develop and maintain a web-based information system that can include numerous measures of performance as well as "preschool enrollment and participation data in prekindergarten through grade 5." *Id.*, Sec. 124F.07.

These provisions may not satisfy all of Ciresi' s concerns, but they are a start and not the last word.

CONCLUSION

On the basis of the foregoing arguments and authorities, and those in their opening brief, Plaintiffs respectfully ask this Court to reverse the court of appeals, hold that *de facto* segregation can violate the Education Clause under such conditions, if any, as this Court may define, and remand this case to the district court for further proceedings.

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Respectfully submitted.

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CERTIFICATE OF DOCUMENT LENGTH

The undersigned counsel for Plaintiffs-Petitioners certify that this document contains 5,367 words, including heading, footnotes and quotations, and is in compliance with the requirements of Minn. R. App. P. 118 subd. (2).

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