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STATE OF MINNESOTA
IN SUPREME COURT
A22-0118

Alejandro Cruz-Guzman, as guardian and next friend of his minor children; Me'Lea Connelly, as guardian and next friend of her minor children; Izreal Muhammad, as guardian and next friend of his minor children; Roxxanne O'Brien, as guardian and next friend of her minor children; and Diwin O'Neal Daley, as guardian and next friend of his minor children,

Appellants,

v.

State of Minnesota; Minnesota Department of Education; Dr. Brenda Casselius, Commissioner Minnesota Department of Education; Minnesota Senate; and Minnesota House of Representatives,

State-Respondents,

and

Higher Ground Academy; Mohamed Abdilli; Friendship Academy of the Arts; Sharmaine Russell; Paladin Career and Technical High School; and Rochelle LaVanier,

Intervenor-Respondents.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

THE DISTRICT COURT'S DECEMBER 6, 2021 "CERTIFIED QUESTION"

> "Is the Education Clause of the Minnesota Constitution violated by a racially imbalanced school system,[1] regardless of the presence of [(1)] *de jure* segregation[2] or [(2)] proof of a causal link between the racial imbalance and the actions of the state?"

(Bracketed information added).

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[1] While "[t]he district court expressly refrained from defining those terms[,] . . . [Appellants] used the terms 'segregated' and 'segregation' to describe public schools in Minneapolis and St. Paul [(1)] in which the percentage of students of color exceeds the district-wide average by more than 15 or 20 percent **or** [(2)] in which the percentage of students of color is less than 20 percent or more than 60 percent of the student body at that school (notwithstanding district-wide averages of 63 percent and 79 percent, respectively)." *Cruz-Guzman v. State*, 980 N.W.2d 816, 825 (Minn. App.) (*Cruz-Guzman II*) (emphasis and bracketed information added), *review granted* (Minn. Dec. 13, 2022). And, consistent with the definition of segregation within their January 11, 2019 certified "class" (Doc.239 at 17 ¶3 ("a school with less than 20% or more than 60% minority students or students eligible for free-or-reduced price meals")), Appellants' definition of segregation for their August 11, 2021 dispositive motion is exclusively defined by the latter definition (Doc.345 at 2 ¶(3)). As a result, "[Appellants'] means of identifying schools that they consider segregated (and, thus, the district court's means of identifying racially imbalanced schools) differs from the United States Supreme Court's use of the term 'racial imbalance'." *Cruz-Guzman II*, 980 N.W.2d at 825 (emphasis and bracketed information added) (citing to *Freeman v. Pitts*, 503 U.S. 467, 474 (1992) ("a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole" (emphasis added)) and *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749 (2007) (*Parents Involved*) (Thomas J., concurring) ("the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large" (emphasis added))).

[2] "The United States Supreme Court has used that term to describe 'segregation resulting from intentional state action directed specifically to the . . . schools,' *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 205-06 (1973), and, more specifically, the practice 'of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race,' *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5-6 (1971)." *Cruz-Guzman II*, 980 N.W.2d at 825.

ANSWERS BELOW:

(1) The district court answered in the negative (*Cruz-Guzman II*, No. 27-CV-15-19117 (Minn. 4th Jud. Dist. Dec. 6, 2021 Order) (Appells.Add.39-41, Memo. §II(D))); and

(2) The court of appeals answered in the negative (*Cruz-Guzman II*, 980 N.W.2d at 827).

CHRONOLOGICALLY LISTED KEY AUTHORITIES:

(1) Minn.Const. art. XIII §1 (1858);

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

(3) *Curryer v. Merrill*, 25 Minn. 1 (Minn. 1878);

(4) *Associated Schs. of Indep. Dist. No. 63 v. Sch. Dist. No. 83*, 142 N.W. 325 (Minn. 1913);

(5) *State ex rel. Smith v. City of St. Paul*, 150 N.W. 389 (Minn. 1914);

(6) *Brown v. Board of Education*, 347 U.S. 483 (1954);

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

(8) *Parents Involved*;

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

(10) *Forslund v. State*, 924 N.W.2d 24 (Minn. App. 2019); and

(11) *Cruz-Guzman II*.

STATEMENT OF THE CASE AND FACTS

A. THE THREE SETS OF PARTIES

1. Appellants

"Appellants are [(1)] Alejandro Cruz-Guzman [(Cruz-Guzman)], as guardian and next friend of his minor children; [(2)] Me'Lea Connelly [(Connelly)], as guardian and next friend of her minor children; [(3)] Ke'Aundra Johnson [(Johnson)], as guardian and next friend of her minor child; [(4)] Izreal Muhammad [(Muhammad)], as guardian and next friend of his minor children; [(5)] Roxxanne O'Brien [(O'Brien)], as guardian and next friend of her minor children; [(6)] Diwin O'Neal Daley [(Daley)], as guardian and next friend of his minor children; [(7)] Lawrence Lee [(Lee)], as guardian and next friend of his minor child; and [(8)] One Family One Community, a Minnesota nonprofit corporation." *Cruz-Guzman I*, 916 N.W.2d at 5 n.1 (bracketed information added). But, on January 11, 2019, "Lee, Johnson, and One Family One Community [were] dismissed . . . ; all [five of the] other [Appellants] [were] appointed as class representatives." Doc.239 at 17 ¶2 (bracketed information added).

2. State-Respondents

"State-Respondents" means "[R]espondents [(1)] State of Minnesota [(State)], [(2)] the Minnesota Senate [(Senate)] [and] the Minnesota House of Representatives [(House)] [(collectively, the Legislature[3])], [and] [(3)] the Minnesota Department of

[3] Per Minn.Stat. §645.01, subd. 3, "'Legislature' means the senate and the house of representatives of the state of Minnesota."

Education [(MDE)] and Dr. Brenda Cassellius, the Commissioner of Education [(MDE Commissioner Cassellius)[4]] (collectively, the State)." *Id*. at 5 (bracketed information added).[5]

3. Intervenor-Respondents

"The [I]ntervenor[-Respondents] in the district court are three charter schools in Minneapolis and Saint Paul and parents of students who attend those charter schools: [(1)] Higher Ground Academy [(HGA)], [and] Mohamed Abdilli, [(2)] Friendship Academy of the Arts [(FAA)], [and] Sharmaine Russell, [and] [(3)] Paladin Career and Technical High School [(Paladin)], and Rochelle LaVanier [(collectively, Intervenors)]." *Id*. at 5 n.2 (bracketed information added).

B. APPELLANTS' NOVEMBER 5, 2015 COMPLAINT

1. Appellants' constitutional claims against the State

This Court previously described, as follows, Appellants' constitutional claims against the State:

> 1. "Appellants assert that the State has violated its constitutional duty under the Education Clause of the Minnesota Constitution, Minn.

[4] Per Minn.Stat. §15.01, MDE is a "designated" executive branch "department[] of the state government." And, per Minn.Stat. §15.06, subd. 1, then-Governor Mark Dayton "appoint[ed]" MDE Commissioner Casselius.

[5] The Office of the Attorney General (AG) herein represents both (1) the Legislature and (2) MDE. But, as discussed below, the Legislature and MDE have had throughout this litigation "a directly adverse conflict of interest" on key components of Appellants' Education Clause claim. As such, there is a "serious" ethical issue with the AG's joint representation of them. Minn.R.Prof.Conduct 1.7; *In re Disciplinary Action Against Coleman*, 793 N.W.2d 296, 305 (Minn. 2011) ("[a] directly adverse conflict of interest is more serious than a material limitation conflict in terms of the potential impact on the lawyer's duties of loyalty and independent judgment to both clients" (emphasis added)).

Const.art. XIII, §1" (*Cruz-Guzman I,* 916 N.W.2d at 6 (emphasis added)); and

2. "Appellants contend that in addition to failing to fulfill its constitutional duty under the Education Clause, the State has violated the Equal Protection and Due Process Clauses of the Minnesota Constitution, Minn.Const. art. I, §§2, 7" (*id.* (emphasis added)).

As described by this Court, Appellants' constitutional claims are based upon their allegations that the State is both "[(1)] enabling school segregation and [(2)] depriving students of their fundamental right to an adequate education." *Id.* (emphasis and bracketed information added).

2. Appellants' factual support for their constitutional claims

This Court described, as follows, Appellants' complaint-alleged factual support for their constitutional claims against the State:

> The complaint contains copious data demonstrating a "high degree of segregation based on race [(as measured by students of color (SOC))] and socioeconomic status [(SES)] [(as measured by qualifying for free or reduced lunch (FRL))]" in Minneapolis and Saint Paul public schools. The public schools in Minneapolis and Saint Paul that [A]ppellants' children and other school-age children attend are "disproportionately comprised of [SOC] and students living in poverty [(receiving FRL)], as compared with a number of neighboring and surrounding schools and districts." These segregated [(">80 Percent" SOC and/or FRL)] and "hyper-segregated" [(">95 Percent" SOC and/or FRL)] schools have significantly worse academic outcomes in comparison with neighboring schools and suburban school districts in measures such as [(1)] graduation rates; [(2)] pass rates for state-mandated Basic Standards Tests; and [(3)] proficiency rates in [(a)] math, [(b)] science, and [(c)] reading. Appellants describe these racially and socioeconomically segregated schools as "separate and unequal" from "neighboring and surrounding whiter and more affluent suburban schools" and detail the extensive harms of racial and socioeconomic segregation.[6]

[6] This Court further described, as follows, Appellants' complaint allegations regarding "segregation":

> Appellants highlight several practices by the Minneapolis and Saint Paul public schools, other school districts, charter schools,[7] and the State as c*ontributing* [*(a/k/a 'causally related')*] *to* [(1)] school segregation and [(2)] inadequate educational outcomes. The practices include boundary decisions for school districts and school attendance areas[8]; the formation of segregated charter schools and the decision to exempt charter schools from desegregation plans[9]; the use of federal and state desegregation funds for other purposes; the failure to implement effective desegregation remedies; and the inequitable allocation of resources.

> [Appellants] assert [(1)] that students are "confined to schools that are separate and segregated," [(2)] that "such schools are separate and unequal," and [(3)] that the State "ha[s] engaged in or permitted" that "have caused or contributed to the segregation of the Minneapolis and Saint Paul public schools." The complaint contains numerous facts that specifically support [Appellants'] claims of segregation.

Cruz-Guzman I, 916 N.W.2d at 10 (emphasis and bracketed information added).

[7] Even though this Court noted that its "decision [denying the State's Rule 19 argument] has no impact on the right of school districts and charter schools to move to intervene" (*Cruz-Guzman I*, 916 N.W.2d at 14 n.8 (bracketed information added)), neither (1) the "school districts," including the Minneapolis and St. Paul public school districts, nor (2) the "charter schools" in Minneapolis and St. Paul, other than Intervenors, did so.

[8] As more precisely described by the dissent in *Cruz-Guzman I*, 916 N.W.2d at 20 n.7 (Anderson, J. and Gildea, C.J., dissenting), "[A]ppellants claim that open-enrollment policies, see Minn.Stat. §124D.03 (2016), . . . are causally related to the alleged inadequacy asserted in their claims." (Emphasis added); Doc.1 at 12-13 ¶¶27-28; *id.* at 16 ¶32.

[9] As more precisely described by the dissent in *Cruz-Guzman I*, 916 N.W.2d at 20 n.7 (Anderson, J. and Gildea, C.J., dissenting), "[A]ppellants claim that . . . the exemption of charter schools from particular desegregation efforts, see Minn.Stat. §§124D.861; 124D.03, subds. 1-2 (2016), are causally related to the alleged inadequacy asserted in their claims." (Emphasis added); Doc.1 at 13-16 ¶¶29-31. The Legislature's latest iteration of its school "desegregation efforts," which is found in Minn.Stat. §§124D.861-.862's 2013 Achievement and Integration for Minnesota Act (2013 AIM Act), continues to, as finally determined by an administrative law judge (ALJ) (Doc.220, Ex.33; Doc.58 at xxxiv-xxxv), intentionally "exempt" charter schools therefrom.

Cruz-Guzman I, 916 N.W.2d at 5-6 (emphasis and bracketed information added). Notably, the first two of this Court's listing of Appellants' complaint-identified "several practices . . . *contributing [(a/k/a 'causally related')] to* [(1)] school segregation and [(2)] inadequate educational outcomes" — *i.e.*, "open-enrollment policies" and the "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts") — are key components to the Legislature's "parent choice policy." Doc.32, Ex.4 at 18-19.

Though disagreeing on the justiciability thereof, the dissent in *Cruz-Guzman I*, 916 N.W.2d at 17 and 22 (Anderson, J. and Gildea, C.J., dissenting) similarly summarized, as follows, Appellants' complaint allegations:

> Taking the allegations of the complaint as true, as we must at this stage of the litigation, there is no question that the educational performance of the Minneapolis and Saint Paul schools identified in the complaint is appalling.
>
> * * *
>
> Undeniably, the complaint paints a disturbing picture of some [(1)] segregated and [(2)] underperforming schools in and around the Twin Cities.

(Emphasis of bracketed information added).

3. The "limited" scope of Appellants' requested "remedy"

On July 8, 2016, the district court ordered that "any remedy would be limited to those affected [Appellants] — *i.e.* Minneapolis and St. Paul public school students." Ints.Add.7 ¶19 (emphasis and bracketed information added). And, on July 20, 2016, the district court denied Appellants' July 15, 2016 Minn.Gen.R.Prac. 115.11 request for reconsideration "argu[ment] that the Court improperly stated that any remedy resulting from this lawsuit would be limited to Minneapolis and St. Paul public school students."

Doc.118 at 1 ¶3(emphasis added). Appellants have not challenged the district court's nearly seven year old order limiting the scope of their requested "remedy."

C. APPELLANTS' JANUARY 11, 2019 MATERIAL NARROWING OF THEIR CONSTITUTIONAL CLAIMS WITH THEIR "CLASS" CERTIFICATION

1. Appellants' "class" was determined by their definition of "segregation" based just on individual school-by-school demographics

As ruled by the district court,

[Appellants'] class is defined as follows:

> All children who are enrolled during the pendency of this action in a school in [(1)] the Minneapolis Public Schools, Special School District No. 1, or [(2)] the St. Paul Public Schools, Independent School District 625 that is racially or socioeconomically imbalanced as defined herein: a school with less than 20% or more than 60% minority students or students eligible for free-or-reduced price meals.

Doc.239 at 17 ¶3 (emphasis and bracketed information added).

2. Appellants' commitment to their "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability"

In approving of Appellants' "class," the district court described, as follows, Appellants' commitment to their "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability":

> If one accepts [Appellants'] allegations, as the Court must, they have articulated a common solution 'capable of class-wide resolution.' They allege that various policies enacted by [the State] [that] have resulted in *de facto* segregation — a condition [(1)] that itself represents an inadequate education and further [(2)] that desegregation contributes to an achievement gap for some students which constitutes another facet of the claimed inadequate education.[9] The proposed class-wide resolution is to order [the State] to desegregate their schools.[10]

> [9] Put another way, poor academic performance is not a required element of injury under [Appellants'] theory of liability. It is an injury [Appellants] associate with segregated school environments but it is not the sole wrong. [Appellants] allege that a segregated school environment itself, without more, is a wrong. They do so relying on settled law that *de jure* segregated schooling violates equal protection. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal" and violate the Equal Protection Clause"). Of course, the parties dispute the applicability of this precedent and the elements necessary to find [the State] liable for this *de facto* segregation. But that issue is not in front of the Court on this motion.
>
> [10] *See* Complaint, at 38 (Prayer for Relief includes ordering [the State] to provide [Appellants] with a desegregated education).

Doc.239 at 11 (emphasis and bracketed information added).

D. THE RELEVANT FACTS REGARDING INTERVENORS

1. The district court's reasons for granting and re-affirming its grant of Intervenors' intervention

Though they are public schools in Minneapolis and St. Paul (Minn.Stat. §124E.03 ("[a] charter school is a public school and is part of the state's system of public education")), Intervenors are within neither (1) the Minneapolis or St. Paul public school districts nor (2) Appellants' "class." Consistent, however, with this Court's express allowance for such "interven[tion]" by "charter schools" (*see* above n.7 (bracketed information added) (quoting *Cruz-Guzman I,* 916 N.W.2d at 14 n.8)), the district court explained, as follows,

why it, nevertheless, initially granted and then later re-affirmed its grant of Intervenors' intervention despite Appellants' aggressive opposition thereto:[10]

> (1) "[I]f [they] prevailed, [Appellants] clearly envision that charter schools would be subject to remedies to eradicate segregation since charter schools are public schools" (Ints.Add.3 ¶5 (emphasis and bracketed information added)); and
>
> (2) "[Appellants] envision — despite their protestations that they are not attacking charter schools — that charter schools would be subject to remedies to eradicate segregation since charter schools are public schools" (*id.* ¶4 (emphasis and bracketed information added)).

Indeed, to punctuate the threat posed by Appellants' "challenge" to the statutory "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts") (*Cruz-Guzman I*, 916 N.W.2d at 6; *id.* at 20 n.7 (Anderson, J. and Gildea, C.J., dissenting)), the district court further ruled that "Intervenors have presented evidence that they have a bona fide legal interest that could shortly be affected in a highly prejudicial manner (*i.e.*, extinction)." Ints.Add.30 ¶4 (emphasis added)).

The district court otherwise orally explained that the "complaint sends the message loudly and clearly that charter schools are part of the problem" (Doc.64, Ex.12 T.40 (emphasis added); *id.*, Ex.12 T.20 (same)), adding that the complaint describes the charter schools as "front and center of th[e] problem" (*id.*, Ex.12 T.41 (emphasis and bracketed

[10] Besides unsuccessfully (1) opposing Intervenors' December 23, 2015 Minn.R.Civ.P. 24.01 notice of intervention (Doc.33), (2) opposing Intervenors' December 28, 2015 Minn.R.Civ.P. 24.03 motion to intervene (Doc.40) and (3) moving on February 23, 2016 to dismiss Intervenors' answer and counterclaim (Doc.54), Appellants unsuccessfully moved on July 25, 2016 for sanctions against Intervenors for their pursuit of their counterclaim (Docs.120-21; Ints.Add.36).

information added)). And, reinforcing the same, the district court later explained that "charter schools are in a unique situation because they're really very much on the front lines [as they're] likely to be materially impacted by any remedy that the State would employ should there be a ruling in favor of [Appellants]." Doc.256, Ex.A T.72 (emphasis and bracketed information added).

2. Intervenors proved that they and other nearly "all-minority schools can [academically] succeed"

Intervenors are not formal "class" representatives thereof. They are, however, demographically representative of Appellants' complaint-identified 35 currently-operational SOC and/or FRL "hyper-segregated" (or "hyper-imbalanced") charter schools in Minneapolis and St. Paul. Doc.1 at 13-15 ¶29; Doc.358 at xii n.5.

FAA is one of the complaint-identified 22 SOC and/or FRL "hyper-segregated" (or "hyper-imbalanced") charter schools in Minneapolis, and it has "99%" SOC and "91%" FRL. Doc.1 at 13-15 ¶29. For context, "the public schools of the City of Minneapolis are 66 percent [SOC] and 64 percent [FRL]." *Id.* at 7-8 ¶22 (bracketed information added).

HGA is one of the complaint-identified 13 SOC and/or FRL "hyper-segregated" (or "hyper-imbalanced") charter schools in St. Paul, and it has "100%" SOC and "97%" FRL. *Id.* at 13-15 ¶29. For context, "the public schools of the City of St. Paul are approximately 78 percent [SOC] and 72 percent [FRL]." *Id.* at 7-8 ¶22 (bracketed information added).

Despite being complaint-defined as racially and socioeconomically "hyper-segregated" (or "hyper-imbalanced") (*id.* at 13-15 ¶29), FAA and HGA have objectively proven their more than "[]adequate educational outcomes" (Doc.358 at xiv-xv). They did

so based on their students' "average" "Academic Performance" on MDE's Report Cards in "reading," "math" and "science" relative to the "averages" of both (1) the "Minneapolis School District" and the "St. Paul School District," respectively, and (2) "MN statewide." *Id*. Appellants' counsel has, in fact, admitted to FAA and HGA's academic adequacy. Doc.256, Ex.A T.83 (Intervenors are "[k]illing it. . . . There are exceptions").

FAA and HGA are, moreover, not the only complaint-identified 35 SOC and/or FRL "hyper-segregated" (or "hyper-imbalanced") charter schools in Minneapolis and St. Paul which support former MDE Commissioner Cassellius' publicly-pronounced "belie[f] that all-minority schools can [academically] succeed." Doc.1 at 3 ¶5 (emphasis and bracketed information added). Rather, citing to the *Star Tribune*'s 2014 "Beating the Odds" article, Appellants highlight in their complaint that former MDE Commissioner Cassellius proclaimed that "'[t]here are some spectacular stories out there of schools [academically] beating the odds.'" *Id.* (emphasis and bracketed information added). And, as summarized therein,

> Twin Cities charter schools [(inclusive of several, like FAA and HGA, from the complaint-identified 35 SOC and/or FRL "hyper-segregated" (or "hyper-imbalanced") charter schools in Minneapolis and St. Paul)] dominated the list of public schools who are having the highest impact for low-income students, based on the Minneapolis Star Tribune's 2014 "Beating the Odds" list which was published today. Nine out of 10 schools cited for the highest Math scores are charter schools and eight out of 10 of the highest Reading scores are charter schools.

Doc.65, Ex.18 (emphasis and bracketed information added). Appellants thus concede that "[t]hese students so concentrated in certain Minneapolis and Saint Paul schools are capable

of learning and performing at an adequate educational level, as measured by widely accepted standards." Doc.1 at 3 ¶5 (emphasis added).

3. Many attribute these charter schools' above-discussed academic successes to their "'culturally-affirming' environments in which to learn"

As it relates to the above-discussed objectively-proven and admitted to academic successes at several of the complaint-identified 35 SOC and/or FRL "hyper-segregated" (or "hyper-imbalanced") charter schools in Minneapolis and St. Paul, including at FAA and HGA, many charter school "[a]dvocates say that [their academic] success is due to [their] unique and culturally sensitive education strategies" — *i.e.*, "'culturally-affirming' environments in which to learn." Doc.64, Ex.11 at 8 (emphasis and bracketed information added).[11] These charter school proponents explain this position as follows:

> They deny that charter schools targeting specific races or ethnicities are illegal or unjust. Rather, they say, these schools provide students with "culturally-affirming" environments in which to learn.
>
> Bill Wilson[12] founded one such "culturally-affirming" charter in St. Paul – known as [HGA]. Though [HGA's] student body is more than 90 percent East African immigrant and low-income, it's one of the highest performing schools in the region. Advocates say the school's success is due to its unique,

[11] *See also* Rafiq R. Kalam Id-Din II, "Black Teachers Matter. School Integration Doesn't," *Star Tribune*, May 4, 2017; The Editorial Board, "A Misguided Attack on Charter Schools," *NY Times*, October 13, 2016.

[12] Besides "found[ing]" HGA in 1998 (Belcamino, Kristi, "St. Paul civil rights leader and education Bill Wilson dies at 79," *Twin Cities Pioneer Press*, Dec. 29, 2019), Wilson, who died on December 28, 2019, was "a civil rights activist, educator and the first African American elected to the St. Paul City Council" (*id.*). Wilson also "serv[ed] as Commissioner of the Department of Human Rights under Gov. Wendell Anderson and Gov. Rudy Perpich." *Id.*

> and culturally sensitive education strategies.[13] "I know people who brought this lawsuit against the [S]tate use the word 'desegregation' but let's find the intentional action," Wilson says. "I won't call this segregation, I won't call it racial isolation, because it's not true."
>
> "It's false analysis that's being applied to culturally specific charter schools, that tends to consider those schools to be segregated," testified N[e]kima Levy [Armstrong (Armstrong)],[14] the [former] president of the Minneapolis NAACP chapter. "That flies in the face of civil-rights history and also the fact that we have historically black colleges and universities [(HBCUs)] around the country that are specifically designed to affirm, enrich, and enhance the educational experiences of African Americans who we know have faced historical discrimination throughout our time in this country."[15]

Id., Ex.11 at 7-8 (emphasis and bracketed information added).

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[13] *See, e.g.*, Doc.65, Ex.20 at 1 ("Charter schools, which are publicly financed but independently run, were conceived as a way to improve academic performance. But for immigrant families, they have also become havens where their children are shielded from the American youth culture that pervades large district schools" (emphasis added)).

[14] Besides being the former "president of the Minneapolis NAACP chapter" (*Twin Cities Business*, https://tcbmag.com/tcb-100-people/nekima-levy-pounds/), Armstrong is a "former University of St. Thomas law professor" and "[d]uring a tense summer of civil unrest, [she] was regarded by public safety officials as one of the few Black community leaders with standing to calm tensions" (*id*).

[15] *See, e.g.*, Doc.65, Ex.21 at 1 (with regard to HBCUs, "their outcomes are clear: despite enrolling approximately nine percent of all African American students attending four-year institutions, they produce [(1)] 16 percent of all African American bachelor's degrees and [(2)] 27% of African American bachelor's degrees in STEM fields" (emphasis and bracketed information added)).

E. BY AND THROUGH — IN PART — THE AG, MDE'S THREE-STEP ATTACK DURING AND WITHIN THIS LITIGATION ON ONE ASPECT OF THE LEGISLATURE'S "PARENT CHOICE POLICY" — *I.E.*, ITS "EXEMPT[ION] [OF] CHARTER SCHOOLS FROM DESEGREGATION PLANS" (OR "FROM PARTICULAR DESEGREGATION EFFORTS")

First, suspiciously-coordinated with Appellants' November 5, 2015 filing of their constitutional claims against the State, MDE contemporaneously initiated in early 2015 an administrative rulemaking proceeding to, among other things, otherwise eliminate by administrative rule the Legislature's "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts"). *Cruz-Guzman I*, 916 N.W.2d at 6; *id.* at 20 n.7 (Anderson J. and Gildea, C.J., dissenting). But, on March 21, 2016, Chief ALJ Tammy L. Pust adopted ALJ Ann C. O'Reilly's March 11, 2016 93-page single-spaced report (ALJ Report), which disapproved of MDE's proposed administrative rule as *ultra vires* because it found that the Legislature continued with its 2013 AIM Act to intentionally "exempt" charter schools from its school desegregation requirements. Doc.220, Ex.33; Doc.358 at xxxiv-xxxv. And, per Minn.R. 1400.2240, subp. 8, MDE thus withdrew its proposed administrative rule. *See* https://education.mn.gov/MDE/ContentArchive/PROD046651.

Second, because of (1) the above-discussed ALJ Report, which ruled against MDE's proposed administrative rule to, among other things, eliminate the Legislature's "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts"), and (2) MDE's above-discussed resulting withdrawal of its proposed administrative rule, the AG had an indisputable obligation, as counsel to the

Legislature, as well as MDE, to defend the Legislature's "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts"). *In re Lord*, 97 N.W.2d 287 (Minn. 1959) (bracketed information added). The AG has not, however, done so, and it is not doing so. Instead, besides its finding that — as represented therein by the AG — "[t]he state actor took no position at [Appellants' 2016] motion to dismiss [Intervenors] stage" (Ints.Add.48 (bracketed information added)), the district court found the AG to have, as follows, (1) not even "responded except [on behalf of MDE]" to defend the constitutionality of this "exemption" and (2) only defended the constitutionality of this "exemption" on behalf of MDE "tepidly nearly to a fault" (*id.* 48-49).

Third, following 18 months of district court-ordered, good faith mediation amongst all of the parties before two mediators exclusively retained and paid for by the AG (*i.e.*, Judy Mares-Dixon and former Hennepin County District Court Judge Pamela G. Alexander), Intervenors were involuntarily removed by the AG-retained mediators therefrom without approval from the district court. Doc.334. Then, the AG, solely on behalf of MDE's and directly against Intervenors' interests, negotiated a proposed legislative settlement agreement of this litigation with Appellants. HF2471; SF2465. And, despite Appellants' demonstrably false and repeated representation thereof as "preserv[ing] school choice for parents and students subject only to capacity constraints" (Appells.Sup.Ct.Br. at 6, 24 ¶(30) ("preserves parent and student choice in school selection") and 38-39 ("retains present choice subject only to school capacity constraints")), the proposed legislative settlement agreement would, if enacted, effectively eliminate "culturally-affirming" charter

schools (CiresiWalburnFoundationAmicusBr. at 23 n.26). But, presumably because it directly contravened the Legislature's (1) "parent choice policy" (Doc.347, Ex.1 at 27-33) and (2) intention with its 2013 AIM Act to continue to "exempt" charter schools from its school desegregation requirements (Doc.220; Doc.358 at xxxiv-xxv), MDE's AG-negotiated proposed legislative settlement agreement of this litigation with Appellants did not even get a substantive hearing before the Legislature (Doc.334).

F. APPELLANTS' AUGUST 11, 2021 DISPOSITIVE MOTION CONTINUES WITH THEIR MATERIALLY NARROWED CONSTITUTIONAL CLAIMS

1. Appellants' dispositive motion exclusively addressed their "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability"

On August 11, 2021, Appellants' amended motion for partial summary judgment was, in full, as follows:

> Pursuant to Minn.R.Civ.P. 56, Appellants above-named, by and through their undersigned attorneys, hereby move for partial summary judgment
>
> > (1) finding, adjudging, and decreeing that [the State] above-named have violated the Education Clause of the Minnesota Constitution, Article XIII, Section 1, 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;
> >
> > (2) ordering [the State] forthwith to cease all such violations; and
> >
> > (3) ordering [the State] to remedy such violations and conform to the mandate of the Education Clause to provide a non-segregated general, uniform, thorough, and efficient system of public schools in the Minneapolis and St. Paul Public School Districts.

Doc.345 at 1-2 ¶¶(1)-(3) (emphasis added). In other words, Appellants' dispositive motion was exclusively based on their "school segregation" *vis-à-vis* their "inadequate educational

outcomes" "theory of liability." *Id*. And, they therein sought, consistent with their above-discussed "proposed class-wide resolution . . . to order [the State] to desegregate their schools" (Doc.239 at 11 (bracketed information added)), to "order[] [the State] . . . to [(1)] cease all such violations; and . . . [(2)] remedy such violations and . . . provide a non-segregated general, uniform, thorough, and efficient system of public schools in the Minneapolis and St. Paul Public School Districts" (Doc.345 at 1-2 ¶¶(2)-(3) (emphasis and bracketed information added)).

2. Consistent with their dispositive motion, Appellants' "grounds for [their] motion" were exclusively based on their "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability"

Appellants' "grounds for [their] motion" were, in full, as follows:

The grounds for [Appellants'] motion include the following:

> (1) The Education Clause of the Minnesota Constitution, Article XIII, Section 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."
>
> (2) In *Cruz-Guzman v. State* [*I*], 916 N.W.2d 1, 10 n.6 (Minn. 2018), the Minnesota Supreme 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." This is now the law of the case in this action. *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989); *Westbrook State Bank v. Johnson*, 407 N.W.2d 688, 689 (Minn. App. 1987).
>
> (3) Th[e] [district] [c]ourt in its Amended Order Granting [Appellants'] Motion for Class Certification as Modified, p. 10, defined "the class of persons who experienced the alleged

injury" as "all children who are enrolled during the pendency of this action in a school in [(a)] the Minneapolis Public Schools, Special School District #1, or [(b)] the St. Paul Public Schools, Independent School District #625, that is racially or socio-economically imbalanced as defined herein: a school with less than 20% or more than 60% minority students or students eligible for free-or-reduced price meals."

(4) As of the 2018-2019 school year—the last full school year prior to the disruption of the COVID-19 pandemic, the Minneapolis School District had 23 schools with more than 80% non-white students and more than 60% free-or reduced price meals students (also known as free-or-reduced price lunch students ("FRL students")). Seventeen of those schools were at least 90% non-white, and 21 were at least 70% FRL. The St. Paul School District had 35 schools that were at least 80% non-white, of which 34 were at least 70% FRL. At the same time, the Minneapolis School District had 12 schools with fewer than 40% non-white students and FRL students, of which seven were at or below 20% FRL students; and St. Paul had five schools with fewer than 50% non-white students and 40% FRL students.

(5) For the same time period, the Twin Cities greater metropolitan had 181 charter schools, of which 94 had at least 90% non-white students. Of these 94 schools, 52 had 100% non-white students and at least 60% FRL students. At the same time, there were 29 charter schools with fewer than 25% non-white students, of which 25 had fewer than 26% FRL students.[16]

(6) By any definition, the schools in paragraphs 4 and 5, *supra*, were segregated on the basis of race, SES, or both.

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[16] Paragraph ¶(5), which was incorporated — as well — into paragraph ¶(6), was devoted entirely to charter schools throughout "the Twin Cities greater metropolitan" area. Doc.345 at 3 ¶¶(5)-(6). Thus, as long-before anticipated by the district court (*see* Facts §D(1)), Appellants' "grounds" for their dispositive motion were not "limited" to their "class," which was restricted to the non-charter "public schools in the Minneapolis and St. Paul Public School Districts" (Doc.345 at 1-2 ¶¶(1) and (3); *see also* Appells.Sup.Ct.Br. at 23-24 ¶(29)).

> (7) The State, and in particular the Legislature, consisting of [Respondents] Minnesota House of Representatives and Minnesota Senate, have a mandate to establish a general, uniform, thorough, and efficient system of public schools. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993).
>
> (8) By instituting, maintaining, permitting, and failing to correct schools segregated by race and SES, the State of Minnesota, and in particular the [Respondents] Minnesota House of Representatives and Minnesota Senate, have violated the Education Clause of the Minnesota Constitution, thereby entitling [Appellants] to the relief sought by this motion. *Cruz-Guzman* [*I*][,] [916 N.W2d] at 9-12.

Id. at 2-3 ¶¶(1)-(8) (emphasis and bracketed information added). In other words, Appellants' "grounds" were exclusively based on their "school segregation " *vis-à-vis* their "inadequate educational outcomes" "theory of liability."

3. Also, consistent with their dispositive motion and their "grounds" therefore, Appellants' two-part support for their motion was exclusively based on their "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability"

Appellants' August 11, 2021 dispositive motion was otherwise supported by (1) the State and Intervenors' then-unanswered July 27, 2021 86 Requests for Admission from Appellants (*id.* at 4; *compare* Doc.346 at 4-31 §IV ¶¶1-86 *with* Doc.343 (Exhs.Y-Z 1-86)) and (2) the opinions of Appellants' two designated, though as-yet not judicially recognized, "experts" — *i.e.*, Will Stancil (Stancil) and Myron Orfield (Orfield)[17] (Doc.346 at 4). But,

[17] In this appeal, Stancil and Orfield are not just Appellants' designated "experts." Rather, Stancil is counsel for amicus curiae "Minnesota Law Professors," and Orfield is one of the "Minnesota Law Professionals."

consistent with their (1) complaint allegations,[18] (2) discovery answers[19] and (3) prior representations[20] and briefing[21] to the district court, Appellants' two-part "support" therefore was, like their dispositive motion and their "grounds" therefore, based exclusively on their "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability."

G. APPPELANTS' ALLEGED PROOF OF THE LEGISLATURE'S COMPLAINED OF "SEVERAL PRACTICES . . . *CONTRIBUTING [(A/K/A 'CAUSALLY RELATED')] TO* [(1)] SCHOOL SEGREGATION AND [(2)] INADEQUATE EDUCATIONAL OUTCOMES"

1. Appellants' lack of *any* relevant "causal" proof

Even though "the Education Clause . . . imposes an explicit 'duty' on the Legislature" (*Cruz-Guzman I,* 916 N.W.2d at 9) and the first two of Appellants' complaint-identified "several practices . . . *contributing [(a/k/a 'causally related')] to* [(1)] school segregation and [(2)] inadequate educational outcomes" were with regard to the Legislature's "parent

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[18] Doc.1 ¶69; *id.* ¶2.

[19] *See, e.g.*, Doc.220, Ex.34 (Interr.1(a)); *id.*, Ex.34 (Interr.2(a)); *id.*, Ex.34 (Interr.12); *id.* Ex.34 (Interr.7); *id.*, Ex.34 (Interr.2(c)); *id.*, Ex.34 (Interr.2(d)).

[20] Doc.256, Ex.A T.80-81 (Appellants' counsel: "the performance of the kids in the schools is not relevant because the harm is segregation [(or 'imbalance')], and the Supreme Court says it is self-evident ... that a segregated education is not general, uniform, thorough or efficient. So, regardless of how they did, if they got a segregated [(or 'imbalanced')] education, they did not get an adequate education" (emphasis and bracketed information added)); *id.*, Ex.A T.81 (district court: so "the performance of the kids in the school is irrelevant . . . [because] a segregated [(or 'imbalanced')] school environment is *ab initio* inadequate regardless of performance" (emphasis and bracketed information added)).

[21] *See, e.g.*, Doc.78 at 18.

choice policy" (*id.* at 5-6 (emphasis and bracketed information added); *id.* at 20 n.7 (Anderson, J. and Gildea, C.J., dissenting)), Appellants' only identified "causal" proof for their partial summary judgment motion was with regard to two of MDE's long-ago actions. These two long-ago actions were "[(1)] [MDE's 1999] enact[ment] [of] the new desegregation rule and [(2)] [MDE's 1996 and 2011, respectively,] granting [of] waivers to allow Minneapolis and St. Paul to return to neighborhood schools" (Appells.COABr.at 52 (bracketed information added); Appells.Sup.Ct.Br. at 13-24). Yet, other than that (1) MDE's enactment of its "new desegregation rule" in 1999 and (2) its "grant[] [of] waivers" in 1996 and 2011 had to be authorized by the Legislature in order to be valid (Doc.220, Ex.33 at 1-3), Appellants conspicuously say nothing about, let alone substantiate, the Legislature's role therein. In other words, Appellants' "causal" proof of the legislative branch's violation of its "duty" under the Education Clause was based on the very long ago actions of the executive branch without regard to the actions of the legislative branch.

Appellants also did not, as shown above in their "grounds" (Doc.345 at 2-3 ¶¶(1)-(8)) and their two-part support (*id.* at 4) for their August 11, 2021 dispositive motion, even try to argue for their complaint-identified "several practices . . . *contributing [(a/k/a 'causally related')] to* [(1)] school segregation and [(2)] inadequate educational outcomes." Appellants' striking omission was, however, knowing and intentional because "the premise built into [their] motion" is "that [racial and socioeconomic] segregation [(or imbalance)]

itself creates an inadequate education" without regard for "educational outcomes." Appells.Add.36-39, Memo. §II(C)(iv) (bracketed information added) (citing Doc.363 at 6).

2. Appellants' five resulting "causal" proof deficiencies

a. "CAUSAL" PROOF DEFICIENCY NO. 1: Appellants' lack of proof of their complaint-alleged "several practices . . . *contributing [(a/k/a 'causally related')] to* [(1)] school segregation and [(2)] inadequate educational outcomes"

(1) No proof of their complaint-alleged "several practices . . . *contributing [(a/k/a 'causally related')] to* **school segregation**"

Though they described the racial and socioeconomic demographics of the complaint-identified 35 SOC and/or FRL "hyper-segregated" (or "hyper-imbalanced") charter schools in Minneapolis and St. Paul, including FAA and HGA (Doc.1 at 13-15 ¶29), and the complaint-identified 58 SOC and/or FRL "segregated" (or "imbalanced") district schools in Minneapolis (*id.* at 7-8 ¶23) and St. Paul (*id*. at 9-10 ¶25), Appellants did not even try to prove that these racial and socioeconomic demographics were "caused" by (1) one or more of the complaint-identified (a) "several practices . . . *contributing to* school segregation" (*Cruz-Guzman I*, 916 N.W.2d at 5-6), including the first two of which that were with regard to the Legislature's "parent choice policy" (*id.*; *id.* at 20 n.7 (Anderson, J. and Gildea, C.J., dissenting)), or (b) "the numerous policies alleged to result in continued segregation in *Cruz-Guzman* [*I*]" (*Forslund*, 924 N.W.2d at 34) *vis-à-vis* (2) the district court's identification of the "many potential alternative or contributory causal agents" (Appells.Add.38, Memo. §II(C)(iv)). Indeed, underscoring the need for such a "causal" showing, the district court found that "[Appellants] themselves, in their expert

submissions,[22] discuss some of the intransigent contributors to racially-imbalanced schools, including [(1)] housing and [(2)] poverty patterns, and [(3)] in the case of charter school enrollment and open enrollment, the fact that parents opt into these schools, eliminating the control of the [S]tate to determine the racial make-up of the student applicant pool." *Id*. (emphasis and bracketed information added). The district court explained as follows:

> In short, there is no consensus on what causes non-diverse, racially-imbalanced schools. Most would likely agree that the "cause" is a Hydra-headed monster that includes the actions and decision of [the State] as well as actions and decisions beyond [the State's] control.

Id.39, Memo. §II(C)(iv) (emphasis and bracketed information added).

(2) No proof of their complaint-alleged "several practices . . . *contributing [(a/k/a 'causally related')] to* . . . **inadequate educational outcomes**"

Though they generally described the "inadequate educational outcomes" in the "Minneapolis and St. Paul public schools" (Doc.1 at 16-21 ¶¶36-47), Appellants did not even try to prove that these "inadequate educational outcomes" were "caused" by the racial and socioeconomic "segregation" (or "imbalance") at these particular schools (*id*.). And the need for such "causal" proof is supported by (1) Intervenors' above-discussed proof that "all-minority schools can [academically] succeed" and (2) the below-discussed opinion of highly-reputed education researcher David Armor (Armor) from George Mason University. Doc.256, Ex.C.

[22] Docs.280-94; Doc.346 at 4; Docs.347-48.

Armor opined, in relevant part, as follows:

> There is a lack of consensus in social science research on whether racial diversity has a [(1)] positive, [(2)] educationally significant, and [(3)] consistent impact on academic outcomes for SOC in regular K-12 public schools. More specifically, there is no consensus on whether school desegregation can significantly close the [academic] achievement gap between white and SOC.

Id., Ex.C at 1 (emphasis and bracketed information added). With regard to "the impact of racial diversity in charter schools" on "educational outcomes," Armor further opined as follows:

> The findings of desegregation studies, as discussed in the previous section, apply to students in charter schools. There is no reason to expect that simply desegregating charter schools (while keeping the same programs) would increase SOC academic outcomes or reduce achievement gaps.
>
> * * *
>
> While not all charter schools actually produce such high outcomes, the important lesson of the KIPP and NYC charter studies is that high concentrations of SOC are not a barrier to high achievement. In fact, since the successful charters in these studies generally have instructional programs with longer school days and more class time in academic topics, they may be a more cost effective way to reduce the SOC-white gaps by focusing resources on disadvantaged students instead of on all students.

Id., Ex.C at 4-5 (emphasis added); *see also id.*, Ex.D at 12-14.

b. "CAUSAL" PROOF DEFICIENCY NO. 2: Appellants' proof of their complaint-alleged "several practices . . . *contributing [(a/k/a 'causally related')] to* . . . inadequate educational outcomes" would, as it relates to charter schools, otherwise have to, but did not, factor in the charter schools' unique statutory protections *vis-à-vis* the district schools

The charter schools are, unlike the district schools, separately formed and run corporate non-profits with independent boards and required MDE-approved "authorizers." Minn.Stat. §§124E.06-.07. And, unlike the district schools which are subject to MDE's

district-wide academic accountability and enforcement but not subject to individual, school-by-school academic accountability and enforcement, each of the charter schools is — because each is required to be a stand-alone entity — subject to individual school-by-school academic accountability and enforcement from both MDE and its authorizer. Minn.Stat. §§124E.06 (required satisfaction of the "application criteria in section 124E.06," which includes student performance standards), .10, subds. 1(a)(7) and 3(b) (compliance with the terms of their requisite contract with their "authorizer," which includes "the criteria, processes, and procedures that the authorizer will use to monitor and evaluate the . . . academic performance") and .10, subd. 4(b) ("termination of charter school contract" for "failure to demonstrate satisfactory academic achievement for all students, including the requirements for pupil performances in the contract"). For example, each of the charter schools is, as illustrated by FAA and HGA, required to enter into an academic performance contract with its authorizer. *See, e.g.*, Docs.256-59, Exhs.F-J. And, per its required authorizer contract, each of the charter schools is, as illustrated by FAA and HGA, regularly subject to both (1) the required one-year, three-year and five-year academic performance reviews by MDE and its authorizer (*id.*) and (2) the corresponding academic accountability and enforcement of their contractual requirements by MDE and their authorizer (*id.*), including — most notably — the ultimate sanction of school termination.

Moreover, unlike with the students and their parents at the district schools who have no such remedies, the students and their parents at the charter schools have legislatively-

authorized meaningful remedies against these charter schools to ensure that they are, per the above-discussed protections, providing their students with "[]adequate educational outcomes." The charter school students and their parents are statutorily-authorized to, for example, (1) file a complaint with the charter school's authorizer, who has the authority to unilaterally terminate the charter school if the school fails "to demonstrate satisfactory academic achievement for all students" (Minn.Stat. §124E.10, subd. 4(b)(1) (emphasis added)), or (2) file a complaint with the MDE Commissioner, who has, as well, the authority to terminate a charter school if the school has a history of "failure to meet pupil performance requirements, consistent with state law" (*id.*, subd. 4(c)(1) (emphasis added)).

These unique statutory protections for the students and their parents at charter schools are critical because Appellants formally admitted that what is required to satisfy the educational "adequacy" requirement under Minnesota's Education Clause is the following:

> The Constitution requires . . . that [the State] guarantee and ensure that all students receive an adequate education that provides them with the ***opportunity*** to attain specified educational outcomes, test scores, or other objective standards of performance."

Doc.259, Ex.L (RFA 1) (underlining and bracketed information added). And, yet, the only way to "guarantee and ensure that all students receive an adequate education that provides them with the ***opportunity*** to attain specified educational outcomes, test scores, or other objective standards of performance" is to require, as is statutorily prescribed for charter schools alone, both (1) individual school-by-school academic accountability and (2) meaningful individual school-by-school enforcement tools.

c. <u>"CAUSAL" PROOF DEFICIENCY NO. 3</u>: Appellants' lack of proof of the Legislature's "parent choice policy," including its "open-enrollment policies" (Minn.Stat. §124D.03) and "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts") "*contributing [(a/k/a 'causally related')] to* [(1)] <u>school segregation</u> and [(2)] <u>inadequate educational outcomes</u>"

(1) <u>No proof of the Legislature's "parent choice policy" "*contributing [(a/k/a 'causally related')] to* **school segregation**"</u>

As it relates to the "causal link" between (1) the "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts") and (2) the "current racial imbalance" at these "exempt" charter schools, the district court previously found "caus[ation]" to be materially in dispute. Ints.Add.43; Doc.358 at 13 (bracketed information added). And Appellants did <u>not</u>, then or since, even try to prove that (1) the Legislature's "parent choice policy," including its "open-enrollment policies" (Minn.Stat. §124D.03) and "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts") (*Cruz-Guzman I*, 916 N.W.2d at 6; *id.* at 20 n.7 (Anderson, J. and Gildea, C.J., dissenting)), *vis-à-vis* (2) the district court identified "many potential alternative or contributory causal agents" thereto such as "housing and poverty patterns" (Appells.Add.38, Memo. §II(C)(iv)) was "*contributing [(a/k/a 'causally related')] to* <u>school segregation</u>."

(2) No proof of the Legislature's "parent choice policy" "*contributing [(a/k/a 'causally related')] to . . .* **inadequate educational outcomes**"

Appellants also did not, then or since, even try to prove that (1) the Legislature's "parent choice policy," including its "open-enrollment policies" (Minn.Stat. §124D.03) and "exempt[ion] [of] charter schools from desegregation plans" (or "from particular desegregation efforts") (*Cruz-Guzman,* 916 N.W.2d at 6; *id.* at 20 n.7 (Anderson, J. and Gildea, C.J., dissenting)), *vis-à-vis* (2) the court of appeals' recognized "number of variables influenc[ing] whether education is adequate" (*Forslund,* 924 N.W.2d at 34 (bracketed information added)) was "*contributing [(a/k/a 'causally related')] to . . .* inadequate educational outcomes."

d. "CAUSAL" PROOF DEFICIENCY NO. 4: Appellants' discovery answers admitted to their lack of proof of their complaint-alleged "several practices . . . *contributing [(a/k/a 'causally related')] to* [(1)] school segregation and [(2)] inadequate educational outcomes" because they declined to acknowledge, let alone "control[] and isolate[]," contributing "factors and variables other than segregation by race and socioeconomics"

Appellants were asked in discovery to "[i]dentify and explain in detail and with specificity how the above-identified factors and variables other than 'segregation [(or imbalance)] by race and socioeconomic status' were controlled and/or isolated so that [they] could evaluate and determine the impact of just 'segregation [(or imbalance)] by race and socioeconomic status' on the [academic] 'achievement gap' for these groups of students." Doc.220, Ex.34 at 17 (Interr.11 (emphasis and bracketed information added)). But, because they had refused to acknowledge, let alone "identify and explain," such

"factors and/or variables other than segregation by race [or] socioeconomic status" (*id.*, Ex.34 at 8-9 (Interr.2(c)-(d))), Appellants refused, as well, to "explain in detail and with specificity how" these unacknowledged and unidentified other "factors and variables . . . were . . . evaluate[d]" (*id.*, Ex.34 at 17-18 (Interr.11) (bracketed information added)).

e. "CAUSAL" PROOF DEFICIENCY NO. 5: Appellants' discovery answers otherwise conceded that their arguably-required showing of a "causal link" between (1) "poverty rates between white and black students' schools" and (2) the academic "achievement gap" was nothing more than a "correlat[ion]," "impli[cation]" or "suggest[ion]"

Appellants merely identified without substantiation the alleged "single most powerful correlat[ion]," "impli[cation]" or "suggest[ion]" between (1) "poverty rates between white and black students' schools" and (2) the academic "achievement gap." *Id.*, Ex.34 at 18 (Interr.11 (emphasis and bracketed information added)). But, in describing this "correlat[ion]" between (1) "poverty rates between white and black students' schools" and (2) the academic "achievement gap" to be the "single most powerful," Appellants implicitly acknowledged, as well, the existence of "correlat[ions]" between other factors and the academic "achievement gap." *Id.* Moreover, Appellants' express "impli[cation]" to be drawn from the alleged "correlation" is simply "that high-poverty schools are, **on average**, much less *effective* than lower-poverty schools." *Id.* (emphasis added). And Appellants' express "suggest[ion]" from this "correlat[ion]" is notably just "that strategies that reduce the differential exposure of black, Hispanic, and white students to poor classmates **may** lead to meaningful reductions in academic achievement gaps." *Id.* (emphasis added).

Confirming the obvious influence on educational outcomes of a multitude of other "factors," the University of Minnesota's recent academic "achievement gap" analysis "look[ed] at a variety of factors that might explain the[] success" of the "states that are performing well on 8th-grade reading and math tests," including "[(1)] demographics, [(2)] school funding, and [(3)] strength of teacher unions," "without finding a firm determining factor." Doc.259, Ex.N at 25 (bracketed information added); *id*., Ex.N at 25-27 (analysis of each of these three "factors"). And the analysis "[u]ltimately . . . look[ed] at public policies, which seem to have made the difference" in the states that were successful in reducing the academic achievement gap. *Id*., Ex.N at 25 (emphasis added); *id*., Ex.N at 27-28 (highlighting the apparently successful "public policies" adopted by Texas, Georgia, Massachusetts and New Jersey). Notably, despite Appellants' exclusive "causal" reliance on racial and socioeconomic "segregation" (or "imbalance"), none of these academic performance "difference"-making "public policies" included the requirement for racial and socioeconomic "integration" (or "balance"). *Id*., Ex.N at 27-28.

H. APPELLANTS' ALLEGED PROOF OF THE LEGISLATURE'S "DISCRIMINATORY INTENT" IN ALLOWING THE "SEVERAL PRACTICES . . . *CONTRIBUTING [(A/K/A 'CAUSALLY RELATED')] TO* SCHOOL SEGREGATION"

While they maintain that they need not prove the Legislature's "discriminatory intent" in allowing the "several practices . . . *contributing [(a/k/a 'causally related')] to* school segregation" (Appells.COABr.at 29-32; Appells.Sup.Ct.Br. at 31-33), Appellants' Supreme Court Brief at 13-24 ¶¶(1)-(30) and their above-identified two "experts" for their August 11, 2021 dispositive motion rely for their proof of the Legislature's alleged

"discriminatory intent" on MDE's 1999 administrative rule making changes to its school integration requirements. Doc.345 at 4; M. Orfield and W. Stancil, "Neo-Segregation in Minnesota," *Minn. Journal of Law & Inequality* (Feb. 2022). Per Appellants' "expert" opinions therein (*id.*), including Orfield's recently published article (D. Schulz & M. Orfield, "Former Minnesota Attorney General Humphrey put politics before people and exacerbated the state's educational achievement gap," *Minn. Post* (Dec. 5, 2022)), these administrative rules prove the Legislature's "discriminatory intent" in allowing the "several practices . . . *contributing [(a/k/a 'causally related')] to* school segregation" because they were designed to and did comply with the allegedly "unethical" "legal memorandum" commissioned by the then-MDE Commissioner Robert Wedl (Wedl) and drafted by then-Minnesota Assistant Attorney General Cindy Lavorato (Lavorato) at the "politically" self-motivated direction of then-Minnesota Attorney General Hubert ("Skip") Humphrey (Humphrey) and his then-Deputy Attorney General Lee Sheehy (Sheehy).

Besides being (1) enacted over two decades ago and (2) after an ALJ reviewed and approved thereof without there being a judicial challenge thereto, MDE's 1999 administrative rulemaking constitutes the executive branch's, not the legislative branch's, conduct. And, as discussed below, Appellants' attempted transformation of their disagreement with the fully-transparent and easily-defended "legal memorandum" for the administrative rule into a basis for this Court's finding of the Legislature's "discriminatory intent" simply cannot be countenanced by this Court.

Lavorato's "legal memorandum" at issue was, in fact, both factually and legally accurate. First, contrary to Appellants' demonstrably false factual description thereof, Lavorato has since clarified as follows:

> 1. Nowhere in the State's attached 1999 [Statement of Need and Reasonableness (SONAR) for the new administration rule on "integration"] did the State take the position that "there is no compelling interest in integration." Not once; *not ever*.
>
> 2. The 1999 SONAR was addressing whether the rules being proposed could encourage districts to assign students to schools based on their race in the absence of a finding of intentional segregation. The SONAR concludes that the "[l]egal commentary suggests that the need for diversity in higher education classrooms **is not likely to be found a compelling state interest which justifies race-based assignments**. It is also not likely in the K-12 setting." 1999 SONAR at 17 (emphasis added).

Doc.256, Ex.D at 3 ¶¶1-2 (bracketed information added). Second, contrary to Appellants' demonstrably false legal description thereof, Lavorato has also since clarified as follows:

> 3. And, despite Professor Orfield's oratory to the contrary, this "[l]egal commentary" proved to be accurate. Professor James Ryan of the Harvard Law school came to the following same conclusion about race-based assignments after the *Parents Involved* case was decided:
>
> > What seems clearly **impermissible**, absent some truly extraordinary (**impossible**?) showing of necessity, **is "to classify every student on the basis of race and to assign each of them to schools based on that classification**."

Id., Ex.D at 3 ¶3; *see also id.*, Ex.B at 8-11. Indeed, in *Parents Involved*, 551 U.S. at 736, the U.S. Supreme Court ruled that "[t]he distinction between [(1)] segregation by state action and [(2)] racial imbalance caused by other factors has been central to our jurisprudence in this area for generations." (Emphasis and bracketed information added).

Emphasizing that it was "not resounding evidence of segregative intent" (Appells.Add.35 (emphasis added)), the district court explained that "Lavorato was advising against a draft of the new rule that prohibited and sought to remedy *de facto* segregation because she believed it would run afoul of the Equal Protection clause of the 14th Amendment" (*id.* (emphasis added)). And, punctuating the legitimacy of Lavorato's "belie[f]," it was, in fact, because of what Appellants' counsel admittedly described as those so-called "changes in the law" under *Brown*'s progeny, as well as his perception of "the character of [the Minnesota Federal District Court] bench," that he "specifically avoided" filing Appellants' constitutional claims in federal court. Doc.32, Ex.9 at 1.

I. THE ADDITIONAL PROBLEMS WITH THE FRAMEWORK OF AND PROCEDURAL POSTURE FOR THE DISPOSITIVE MOTION AND THUS THE CERTIFIED QUESTION

1. "FRAMEWORK" PROBLEM: Appellants' contradictory definitions of racial and socioeconomic "segregation" (or "imbalance")

Appellants' August 11, 2021 dispositive motion sought to render constitutionally infirm the non-charter "public schools in Minneapolis and St. Paul School Districts" which are racially and socioeconomic "segregated" (or "imbalanced") using a definition therefor (Doc.346 at 17 ¶(3) ("a school with less than 20% or more than 60% minority students or students eligible for free-or-reduced price meals")) that contravenes their own prior unretracted definitions thereof (Doc.256, Ex.A T.92-94). That is, Appellants' definition of racial and socioeconomic "segregation" (or "imbalance") for their partial summary judgment motion (Doc.346 at 17 ¶(3)), which is taken from their "class" definition (Doc.239 at 17 ¶3), is tied to the SOC and FRL demographics of each individual school

without regard for whether such demographics are (1) "significantly disproportionate to the make up of the community" (Doc.256, Ex.A T.92-93 (emphasis added)), (2) "within plus or minus of 15 percent representing the demography of the city" (*id.*, Ex.A T.92-93 (emphasis added)) or (3) "15 percent greater than the district-wide average" (Doc.346 at 15 ¶15 (emphasis added)). Thus, while the district court found "that [they] have offered three variant definitions" (Appells.Add.40 n.16, Memo. §II(D) (emphasis and bracketed information added)), Appellants actually "offered [four] variant definitions," and the definition relied upon herein "differs from the United States Supreme Court's use of the term 'racial imbalance'" (*see* above at 1 n.1).

2. "PROCEDURAL POSTURE" PROBLEM: Appellants' premature filing of their August 11, 2021 dispositive motion

Per the district court's then-applicable (but since indefinitely stayed (Doc.381)) June 15, 2021 Amended Scheduling Order (Doc.336), the parties' fact discovery was not to close until over five months after the September 13, 2021 hearing on Appellants' August 11, 2021 dispositive motion (*id.* at 2 ¶E1), and the parties' expert discovery was not to close until over six and one-half months after the September 13, 2021 hearing thereon (*id.* at 2 ¶F4). Thus, because (1) "[the State] and []Intervenors both filed the required affidavit pursuant to Minn.R.Civ.P. 56.04" (Appells.Add.36 n.15, Memo. §II(C)(iv) (bracketed information added)) and (2) "[s]ince [Appellants'] motion is supported by expert submissions" (*id.*36, Memo. §II(C)(iii) (bracketed information added)), the district court ruled that "it is proper for the Court to allow [the State and Intervenors] to support

counterarguments with expert testimony" (*id.*), thus precluding its ruling in favor of Appellants.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO

On appeal from summary judgment, the standard of review is de novo. *Visser v. State Farm Mut. Auto. Ins. Co.*, 938 N.W.2d 830, 832 (Minn. 2020). And, because they are questions of law, a certified question is, as well, reviewed de novo. *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005).

II. THERE ARE, IN DESCENDING ORDER OF OBVIOUSNESS, AT LEAST SEVEN REASONS WHY THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE[23]

A. REASON NO. 1: Relying on the plain language of Minnesota's Education Clause and this Court's precedent thereon, the court of appeals *implicitly* in *Forslund* and *explicitly* in *Cruz-Guzman II* answered the certified question in the negative

Since *Cruz-Guzman I* issued on July 25, 2018, the court of appeals has, based on this Court's precedent, twice rejected Appellants' argument that "racial imbalance" without more violates the Minnesota Constitution's Education Clause. Within six months of *Cruz-Guzman I* issuing, the court of appeals did so implicitly in *Forslund*. And, less than four years after *Forslund*, the court of appeals did so explicitly in *Cruz-Guzman II*.

[23] Even though (1) the court of appeals rejected Appellants and the State's separate requests to "reformulate the certified question" (*Cruz-Guzman II*, 980 N.W.2d at 822-23) and exclusively answered the certified question presented to it (*id.* at 827) and (2) this Court's December 13, 2022 Order specifically granted "review of the decision of the Court of Appeals" without reformulating the certified question, Appellants' opening brief audaciously seeks to, nevertheless, "reformulate" the certified question. Because the certified question is what is exclusively before this Court (*see F. & H. Inv. Co. v. Sachman-Gilliland Corp.*, 232 N.W.2d 769, 772 (Minn. 1975); *Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 30 (Minn. 1998)), Intervenors will address the certified question, not Appellants' reformulation thereof.

1. ***Forslund***

In *Forslund*, 924 N.W.2d at 34, the court of appeals, on remand from this Court for reconsideration in light of *Cruz-Guzman I*, held as follows:

> Based on [(1)] the supreme court's analyses in *Cruz-Guzman* [*I*] and *Skeen*, and given [(2)] the positive nature of the right created by the Education Clause,[24] we conclude that, to establish a violation of the Education Clause, a plaintiff must demonstrate that the legislature has failed or is failing to provide **an adequate education**.

(Emphasis and bracketed information added). And, based on *Skeen*, the court of appeals recognized that "an adequate education" is determined by either (1) "me[e]t[ing] or exceed[ing] the educational requirements of the state" or (2) "meet[ing] the basic educational needs of all districts" (*id.* (quoting *Skeen*, 505 N.W.2d at 302-03, 312)) — *i.e.*, "[]adequate educational outcomes" (*Cruz v. Guzman*, 916 N.W.2d at 5-6).

The court of appeals explained, as follows, its holding:

> Presumably, a number of variables influence whether education is adequate. Such variables might include [(1)] the financing system challenged in *Skeen*, [(2)] the numerous policies alleged to result in continued segregation in *Cruz-Guzman* [*I*], or [(3)] the challenged statutes alleged in this case to result in the retention of ineffective teachers [in *Forslund*]. When an Education Clause claim is based on one or more of these variables, a plaintiff needs to prove facts to establish that those variables are actually resulting in an inadequate education.

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[24] Because the "Education Clause is the only section of the Minnesota Constitution that imposes an explicit 'duty' on the Legislature" (*Cruz-Guzman I*, 916 N.W.2d at 9), "[t]he Education Clause thus creates a positive right — the right to have the government do something — that is distinguishable from the negative rights guaranteed by other provisions of the United States and Minnesota Constitutions — the rights to have the government *not* do something" (*Forslund*, 924 N.W.2d at 33-34 (emphasis in original)).

Id. at 34 (emphasis and bracketed information added). And the court of appeals reiterated, as follows, its holding:

> In other words, a plaintiff cannot sustain a claim that the [S]tate is providing a constitutionally inadequate education without proving that the [S]tate is in fact providing a constitutionally inadequate education.

Id. at 34-35 (emphasis and bracketed information added).

The court of appeals further recognized in *Forslund,* 924 N.W.2d at 35, that, though the *Forslund* plaintiffs' "theory of liability . . . is that the challenged statutes 'impinge on' or 'burden' their children's right to an adequate education," their "amended complaint nominally alleges the deprivation of the right to a uniform and thorough education." (Emphasis added). And the *Forslund* plaintiffs' argument "that, to prevail on their Education Clause claims, they need only 'prove that effective teaching *is* part of the fundamental right to a baseline level, adequate education'" (*id.* at 35 n.11) is — even down to their italicization of "is" — strikingly similar to Appellants' argument that, "since segregation *is* the Education Clause violation, they have established injury and 'no further inquiry' regarding causation is necessary" (Appells.Add.26, Memo. §II(B)(i) (quoting Doc.363 at 6)).

Consistent, then, with Appellants' admissions (Appells.COABr. at 42), the court of appeals, in discussing Appellants' very same "certain causes" (or "several practices") now before it, both (1) recognized the "causation" requirement for an Education Clause claim and (2) rejected any exception thereto. *Forslund,* 924 N.W.2d at 33-35. And, regardless of whether such "causal" proof sounds in contract or tort (Appells.Sup.Ct.Br. at 51-57),

Appellants must, therefore, prove "inadequate educational outcomes," which they have not even tried to do.

Forslund's required proof that the "variables" caused "inadequate educational outcomes" is, moreover, no outlier. Rather, other than Appellant's inapposite case law,[25] every other state appellate court decision has likewise required such a "causal" showing for a claim under its state's Education Clause. *See, e.g., Maisto v. State*, 149 N.Y.S.3d 599, 604-05 (N.Y. Sup. Ct. 3d App. Div. 2021) ("'a causal link between [(1)] the present funding system and [(2)] any proven failure to provide a sound basic education' must be shown" (emphasis and bracketed information added)); *William Penn School District v. Penn. Dep't*

[25] In *Sheff v. O'Neill*, 678 A.2d 1267, 1281 (Conn. 1996), the Connecticut Supreme Court recognized that Connecticut's Education Clause required "the state to take further remedial measures" as to the "existence of extreme racial and ethnic isolation in the public school system." But Connecticut's Education Clause has, unlike Minnesota's Education Clause, what the Connecticut Supreme Court described as a "highly unusual provision in article first, § 20, that prohibits segregation not only indirectly, by forbidding discrimination, but directly, by the use of the term 'segregation.' The section provides in relevant part: 'No person shall be denied the equal protection of the law *nor be subjected to segregation* or discrimination . . . because of race [or] . . . ancestry.'" *Id.* at 1281-82 (underlining and bracketed information added; italics in original). Similarly, New Jersey has recognized an obligation to "prevent segregation in [its] public schools" (*see In re Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. From Passaic Cnty. Manchester Reg'l High Sch.*, 854 A.2d 327, 339 (N.J. 2004)) based largely on its Education Clause, which similar to Connecticut's Education Clause, provides, unlike Minnesota's Education Clause, that "[n]o person shall . . . be segregated . . . in the public schools" (N.J. Const. art. I, ¶5) and "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools" (*id.*, art. VIII §IV, ¶1). And *Crawford v. Bd. of Educ.*, 551 P.2d 28 (Cal. 1976), is misplaced because it was decided before California added art. I §31 to its Constitution, which has been recognized as invalidating "racial balancing" (*see Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275, 1286 (2002)).

of Educ., 587 M.D. 2014, 2023 WL 1990723, at *4 (Pa. Commw. Feb. 7, 2023) (concluding "the current system of funding public education has disproportionately, negatively impacted students who attend schools in low-wealth school districts"); *Davis v. State*, 804 N.W.2d 618, 641 (S.D. 2011) ("[w]e are unable to conclude that [(1)] the education funding system (as it existed at the time of trial) fails to correlate to [(2)] actual costs or with adequate student achievement to the point of declaring the system unconstitutional" (emphasis and bracketed information added)). Indeed, in a strikingly similar Education Clause claim brought against the State of New York based on "an abundance of terrible educational results" allegedly "caus[ed] . . . [by] the demographic composition of the school district in which they reside," the claim was similarly dismissed due to its lack of proof of causation. *Paynter v. State*, 100 N.Y.2d 434, 440-43 (N.Y. App. 2003) (emphasis added).

2. *Cruz-Guzman II*

In *Cruz-Guzman II*, 980 N.W.2d at 827, the court of appeals pointedly did not, as Appellants represented, "hold[] that only intentional *de jure* segregation can violate the Education Clause." Appells.PFR at 2; Appells.Sup.Ct.Br. at 2 ("requiring Plaintiffs to prove intentional *de jure* segregation to prevail on their Education Clause claim"). Instead, the court of appeals, expressly relying upon *Cruz-Guzman I*, held that "[a] racially imbalanced school system . . . , by itself, is not a violation of the Education Clause of the Minnesota Constitution" even if it was (1) "caused by *de facto* segregation" or (2) "state action contributed to the racial imbalance." *Cruz-Guzman II*, 980 N.W.2d at 826.

The court of appeals explained that, based on (1) the "ultimate question under the Education Clause" (*id.* at 827) and (2) "the scope of footnote 6 of the supreme court's prior opinion in this case," which it concluded was limited to "intentional, *de jure* segregation" (*id.*), "proof of a racial imbalance among schools within a school district or school system due to *de facto* segregation is *not sufficient* to establish a violation of the Education Clause of the Minnesota Constitution" (*id.*). And, as to "a racially imbalanced school system caused by intentional, *de jure* segregation of the type described in *Brown*," the court of appeals similarly ruled that, because "the ultimate question under the Education Clause is 'whether the Legislature has violated its constitutional duty to provide a general and uniform system of public schools that [(1)] is thorough and efficient, and [(2)] ensure[s] a regular method throughout the State, whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic'" (*id.* (emphasis and bracketed information added) (quoting *Cruz-Guzman I*, 916 N.W.2d at 9)), "proof of a racial imbalance among schools within a school district or school system due to intentional, *de jure* segregation of the type described in *Brown is not necessary* to prove a violation of the Education Clause of the Minnesota Constitution" (*id.*).

Succinctly stated, the court of appeals simply reaffirmed that Minnesota's Education Clause is about ensuring "[]adequate educational outcomes," not "racial balance."

B. REASON NO. 2: This Court's footnote 6 in *Cruz-Guzman I* did *not,* as Appellants argued, rule that "such schools" — *i.e.*, "[public] schools in [Minneapolis and St. Paul] segregated by race and SES" — "were self-evidently not general, uniform, thorough, or efficient"

In trying to avoid proof of their complaint-identified "several practices . . . *contributing [(a/k/a 'causally related')] to* [(1)] school segregation and [(2)] inadequate educational outcomes," Appellants argued below that, with regard to their complaint-identified "[public] schools [in Minneapolis and St. Paul] segregated by race and SES" (Appells.COABr. at 42 (bracketed information added)), "[t]he Minnesota Supreme Court said such schools were self-evidently not general, uniform, thorough, or efficient" (*id.* (emphasis added) (citing *Cruz-Guzman I,* 916 N.W.2d at 10 n.6)). This was demonstrably false.

In both (1) quoting from Minn. Const. art XIII §1 and (2) citing to *Brown,* 347 U.S. at 495, this Court in its ruling on the "justiciability" of Appellants' Equal Protection and Due Process Clauses claims plainly and unambiguously noted that "[i]t is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'through' or 'efficient.'" *Cruz-Guzman I,* 916 N.W.2d at 10 n.6 (emphasis added). But, contrary to Appellants' argument, this Court did not rule therein that the "[public] schools [in Minneapolis and St. Paul] segregated by race and SES" constituted such "a segregated system of public schools." In fact, this Court could not have made such a complex, fact-intensive ruling on its Minn.R.Civ.P. 12.02(e) review. This is because such "a motion to dismiss … serves an extremely limited function" as "[t]he only factual information presented is that which is

disclosed by the pleadings as a whole." *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963) (emphasis and bracketed information added)).

Moreover, given the required showing of intentional, *de jure* segregation for such a finding of "segregation" under the Equal Protection Clause (*Brown*, 347 U.S. at 495), this Court would not have implicitly eliminated this required showing for purposes of an Education Clause claim in a footnote in its "justiciability" analysis under the Equal Protection and Due Process Clauses. Rather, when it pronounces such dramatic changes in constitutional law, this Court does so explicitly and with the requisite explanation therefore. *See, e.g.*, *Cruz-Guzman II*, 980 N.W.2d at 826 ("[t]his prudential principle is especially appropriate in a case such as this one, given the supreme court's primary role in interpreting the state constitution"); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 26-32 (Minn. 1995) (extending right of privacy to cover right to abortion funding for those on public assistance)*; Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 829-35 (Minn. 1991) (extending right to counsel under Minnesota Constitution beyond that required under federal law based on Minnesota's long tradition of expansive protection of fair trial rights). This is especially true given this Court's otherwise thorough review in *Cruz-Guzman I*, 916 N.W.2d at 8-10 of its very limited Education Clause jurisprudence.

C. REASON NO. 3: The plain language of Minnesota's Education Clause, as confirmed by Appellants' formal discovery admission, requires proof that the "variable" at issue is "actually resulting in an inadequate education" — *i.e.*, "inadequate educational outcomes"

Minn. Const. art. XIII §1 plainly provides that "it is the duty of the legislature to establish a general and uniform system of public schools." And Appellants' formally

admitted in discovery that "[t]he Constitution requires . . . that [the State] guarantee and ensure that all students receive an adequate education that provides them with the ***opportunity*** to attain specified educational outcomes, test scores, or other objective standards of performance." Doc.259, Ex.L (RFA 1) (underlining and bracketed information added). Minnesota's Education Clause is, in other words, plainly and admittedly about the Legislature's "duty" to provide "[]adequate educational outcomes," not its "duty" to provide a "racially balanced" school. Indeed, because a "racially imbalanced" school is, per *Forslund*, 924 N.W.2d at 34, but one of "a number of variables influenc[ing] whether education is adequate," Appellants "need[] to prove facts to establish that th[is] variable[] [is] actually resulting in an inadequate education" (*id.* (emphasis and bracketed information added)) — *i.e.*, "inadequate educational outcomes" (*Cruz-Guzman*, 916 N.W.2d at 5-6) or, per Appellants' formal discovery admission, not being "provide[d] . . . with the ***opportunity*** to attain specified educational outcomes, test scores, or other objective standards of performance" (Doc.259, Ex.L (RFA 1) (underlining added)).

This conclusion is consistent with this Court's recognition in *Cruz-Guzman I*, 916 N.W.2d at 12, that, "[o]f course, some level of **qualitative assessment** is necessary to determine whether the State is meeting its obligation to provide an adequate education" (emphasis and bracketed information added), adding that "[t]he very act of [(1)] defining the terms used in the Education Clause and [(2)] determining whether the constitutional requirements have been met inevitably requires a measure of **qualitative assessment**" (*id.* (emphasis and bracketed information added)). The dissent similarly described this

"Herculean task to the parties and the district court" as the "district court . . . be[ing] asked to **pass judgment on plans, perhaps many plans**, extending over many years, to assure that an 'adequate' education is provided to students." *Id.* at 22 (Anderson, J. and Gildea, C.J., dissenting) (emphasis and bracketed information added).

D. REASON NO. 4: "Racial imbalance" (or "segregation") without more does *not* prove "inadequate educational outcomes"

Intervenors, though racially and socioeconomically "hyper-segregated" (or "hyper-imbalanced"), have proven — through (1) their students' objectively-measured, publicly-recognized and Appellants' counsel's admitted to academic performance (*see above* Facts §D(2)), (2) the students' of other racially and socioeconomically "hyper-segregated" (or "hyper-imbalanced") charter schools objectively-measured and publicly-recognized academic performance (*id.*) and (3) a qualified expert opinion (*id.*) — that a "racial imbalanced school environment," even one that is racially and socioeconomically "hyper-segregated" (or "hyper-imbalanced"), does not necessarily "cause" "inadequate educational outcomes." Intervenors have also proven that, unlike district schools, charter schools are subject to legislatively-prescribed school-by-school academic accountability measures, such as the MDE and their authorizer required one-year, three-year and five-year performance reviews per their agreed upon contractual requirements (*see above* Facts §G(2)(b)), with real enforcement tools, such as school termination, that ensure that they either (1) produce "[]adequate educational outcomes" or (2) subject themselves to termination (*id.*). Stated otherwise, there is a 30-year old legislative scheme for ensuing "[]adequate educational outcomes" at charter schools. And, because it is focused entirely

on producing "[]adequate educational outcomes" for the very same at-risk students at issue with this lawsuit and not "racial balance," the Legislature continued with its 2013 amendment to intentionally exclude charter schools from its school desegregation requirements. *See* above n.9.

E. REASON NO. 5: This Court would have to ignore its *Cruz-Guzman I*-recognized directive that "specific determinations of educational policy are matters for the Legislature," *not* the judiciary

The Legislature's "parent choice policy" authorizes parents — notably, those parents with SOC and/or FRL in public schools in Minneapolis and St. Paul — to choose, for example, "culturally-affirming" charter schools, such as FAA in Minneapolis and HGA in St. Paul. And, because many parents with SOC and/or FRL in public schools in Minneapolis and St. Paul have, in fact, chosen these "culturally-affirming" charter schools, such as FAA and HGA, due to their "cultural affirmance," these schools have, as illustrated by FAA and HGA, higher percentages of SOC and/or FRL relative to demographically "comparably-situated" district schools in Minneapolis and St. Paul, respectively.

Yet, despite the demonstrated popularity of the Legislature's "parent choice policy," especially amongst parents with SOC and/or FRL in public schools in Minneapolis and St. Paul who have chosen "culturally-affirming" charter schools such as FAA and HGA, and the above-demonstrated academic success at several of these "culturally-affirming" charter schools in Minneapolis and St. Paul such as FAA and HGA, Appellants' Education Clause claim, per their arguments for their August 11, 2021 dispositive motion and their arguments for answering the certified question in the affirmative, asks for the Education Clause to be

interpreted so as to require (1) the Legislature's racial and socioeconomic "integration" policy as most recently iterated in its 2013 AIM Act, exclusive — however — of its intentional continuation therein of the "exemption" of charter schools therefrom (Doc.220, Ex.33; Doc.358 at xxxiv-xxxv), to *per se* trump (or invalidate) (2) the Legislature's "parent choice policy" (Doc.347, Ex.1 at 27-33). And, to try to emphasize the righteous superiority of their "educational policy" preference, Appellants and their "experts" Stancil and Orfield have uber-aggressively labeled any opponents to the Legislature's "integration" policy over the Legislature's "parent choice policy," including (1) Intervenors, (2) Intervenors' counsel and (3) Intervenors' consulting expert, as "segregationists" and "neo-segregationists." Doc.347, Ex. 1 at 31-33. More specifically, Appellants accuse Intervenors and other "culturally affirming" charter schools as being "segregation academies, whether white or of color" (Doc.78 at 13 n.11 (emphasis added)), adding that those running these schools "are heavily invested in perpetuating the system of segregation that provides their livelihood" (*id.* at 10 (emphasis added)). Indeed, because they — in the late 1990's — dared to disagree with Appellants' "educational policy" preference for the Legislature's "integration" policy over the Legislature's "parent choice policy," Stancil and Orfield add to their broad list of "neo-segregationists" (1) Wedl, who was MDE's Commissioner from 1995-99 (Doc. 347, Ex. 1 at 24, 31-33), and (2) MDE's legal counsel during Wedl's tenure as the MDE Commissioner — *i.e.*, (a) Lavorato (*id*. at 23, 25, 30-31), (b) Humphrey (*id.* at 22) and (c) Sheehy (*id.* at 23). Setting aside the deep personal offensiveness of such accusations against so many well-meaning people, including several of whom who are

persons of color and others who are prominent civic leaders, Appellants' argument ignores this Court's above-discussed repeated insistence in *Cruz-Guzman I*, 916 N.W.2d at 9, that the district court is not being asked to make "specific determinations of educational policy" or "devise particular educational policies."

Related thereto, Appellants' "educational policy" preference argument also ignores — even more importantly — the wishes of the very same parents with SOC and/or FRL in public schools in Minneapolis and St. Paul that Appellants purport to be trying to protect with their "class" action. Indeed, because the racial and socioeconomic "balance" which they seek to have enshrined as a constitutionally-prescribed "fundamental right" is undermined by the Legislature's "parent choice policy," Appellants' argument would, as illustrated by the actual contents of their proposed legislative settlement agreement with MDE (CiresiWalburnFoundationAmicusBr. at 23 n.26), eliminate the Legislature's "parent choice policy," including the Legislature's "open enrollment" and intentional continuation with the 2013 AIM Act of the "exemption" of charter schools from the State's desegregation requirements. And this would effectively ban "many of [the charter schools in Minneapolis and St. Paul that] are based on themes that naturally draw students of a certain racial or ethnic heritage" — *i.e.*, "culturally-affirming" charter schools such as FAA and HGA. Doc.32, Ex.4 at 18-19 (bracketed information added).

As early as 2010, Lavorato anticipated and publicly warned about, as follows, this conflict between these legislatively-enacted "educational policies":

> In fact, the entire "choice movement," which actually had its origins in the State of Minnesota, would have to be revamped or even scrapped, because

> giving parents a choice often means that racial balance is disrupted or even thwarted. Is this policy outcome we, in this state, agree with? Will this actually help the underserved students who are being bused?[26] These are matters on which reasonable people can surely differ.

Id. at 19 (emphasis and bracketed information added). And, despite this conflict being between two legislatively-enacted "educational policies," Appellants dismiss the Legislature's "parental choice policy" as a "segregationist canard." Doc.78 at 18. They explain that, "when Intervenors couch their position in terms of parental freedom of choice, they are merely dredging up an old, threadbare, repeatedly discredited argument, which even the State cannot make in good conscience." *Id.* Fatally, however for Appellants, the State, through the AG is, as discussed above (*see* above at 4 n.5), ethically required to "make [this argument] in good conscience," and this Court is precedentially required to accept this argument because it is a legislatively-enacted "educational polic[y]."

F. REASONING NO. 6: This Court would have to render Intervenors, as well as several of the other racially and/or socioeconomic "hyper-segregated" (or "hyper-imbalanced") charter schools, constitutionally infirm under the Education Clause even though they undisputedly provide their students with "[]adequate educational outcomes"

This Court's adoption of racial segregation (or "imbalance") without more as a violation of Minnesota's Education Clause would render Intervenors, as well as several of the other racially "hyper-segregated" (or "hyper-imbalanced") charter schools,

[26] Doc.64, Ex.11 at 1 (Appellants "seek[] a metro-wide integration plan to satisfy what they argue is the [S]tate's constitutional obligation to prevent segregated schooling" by race and SES (emphasis added)). This same situation is repeating itself under Connecticut's ongoing desegregation order. Kersten, Katherine, "Busing Redux?" *Thinking Minnesota* (Winter 2019) at 30-31.

constitutionally infirm thereunder even though they undisputedly provide their students with "[]adequate educational outcomes." Intervenors' provision to their students of "[]adequate educational outcomes" is, as shown above, proven by (1) MDE's standardized academic testing results for these charter schools, (2) the *Star Tribune*'s annual publication of the objective proof that Intervenors, as well as several of the other racially "hyper-segregated" (or "hyper-imbalanced") charter schools, are "Beating the Odds" and (3) Appellants' counsel's in-court admission that Intervenors are academically "killing it."

Yet, when pointedly questioned by court of appeals Judge Matthew E. Johnson as to whether, "[u]nder [Appellants'] theory [of liability] and [Appellants'] interpretation of footnote 6, are [Intervenors] segregated in a manner described in footnote 6" simply because they are racially and socioeconomic "hyper-segregated" (or "hyper-imbalanced"), Appellants' counsel answered, consistent with ¶(5), as incorporated — as well — into ¶(6), of their "grounds" for their August 11, 2021 dispositive motion (Doc.345 at 3 ¶¶(5)-(6)), with a plain and unambiguous "yes."[27] With this answer, Appellants confirmed that, with their "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability," "poor academic performance is not a required element of injury under [Appellants'] theory of liability." Doc. 239 at 11 n.9.

[27] https://www.mncourts.gov/CourtOfAppeals/OralArgumentRecordings/ArgumentDetail.aspx?rec=2073 at 47:27-40.

G. REASON NO. 7: This Court would have to effectively order the Legislature to adopt "a race-conscious remedy [which] would place [the State] squarely in front of the propeller blade of an Equal Protection claim"

Despite Appellants' conclusory denials thereof (Appells.Sup.Ct.Br. at 38-39), this Court's adoption of racial segregation (or "imbalance") without more as a violation of Minnesota's Education Clause would necessarily require as a curative measure the Legislature's enactment of a metrowide interdistrict racial redistribution of students in direct violation of the state and federal Equal Protection Clause. The district court thus ineluctably "concluded that it cannot issue such an order in the absence of *de jure* segregation; because[,] without [requiring a showing of] *de jure* segregation, a race conscious remedy would place [the State] squarely in front of the propeller blade of an Equal Protection claim" (Appells.Add.34, Memo. §II(C)(ii) (emphasis and bracketed information added)) — *i.e.*, "a remedy for a violation of the Education Clause would require the re-assignment of students based on race" (*id.*33, Memo. §II(C)(ii)).

The court of appeals explained that "[t]he district court's analysis is based in part on [(1)] the premise that a remedy for a violation of the Education Clause would require the re-assignment of students based on race and [(2)] the premise that such a remedy is permitted by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution only as a remedy for intentional segregation." *Cruz-Guzman II*, 980 N.W.2d at 821 (bracketed information added). And, though they "'have consistently acknowledged that it is not the court's function to dictate to the Legislature the manner with which it must correct its constitutional violations'" (*Cruz-Guzman I*, 916 N.W.2d at 9),

Appellants' "proposed class-wide resolution" and their August 11, 2021 dispositive motion sought to, respectively, (1) "order [the State] to desegregate their schools" (Doc.239 at 11) and (2) "order[] [the State] forthwith to . . . provide a non-segregated . . . system of public schools" (Doc.345 at 1-2 ¶¶(2)-(3)). Indeed, because it necessarily follows therefrom, Appellants' counsel has, as well, publicly admitted that Appellants are "seeking a metro-wide integration plan to satisfy what they argue is the [S]tate's constitutional obligation to prevent segregated schooling." Doc.64, Ex.11 at 1.

CONCLUSION

With their nearly all SOC and FRL student bodies, Intervenors highlight the Achilles heel with Appellants' request that this Court establish a "fundamental right" to "racially balanced" schools under Minnesota's Education Clause. That is, under Appellants' "school segregation" *vis-à-vis* their "inadequate educational outcomes" "theory of liability," "[]adequate educational outcomes" would be subordinate to "racial balance," thus causing "culturally-affirming" charter schools, such as FAA and HGA, with objectively-proven academic success to be constitutionally infirm. That would be anathema to Minnesota's Education Clause. Instead, consistent with the plain language of and purpose for the Education Clause, this Court should reaffirm that the Legislature's "duty" thereunder is to ensure "[]adequate educational outcomes," not "racial balance," and thus answer the certified question in the negative.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Intervenor-Respondents certify that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13-point, proportionately-spaced typeface utilizing Microsoft Word 2007 and contains 13,982 words, including headings, footnotes and quotations.

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CERTIFICATION

In compliance with this Court's March 20, 2020 Order, no paper copies of this brief will be filed with the Court. I hereby certify that, should the Court request a paper copy of this brief, the content of the accompanying paper brief will be identical to the electronic version filed and served, except for any binding, colored cover, or colored back.

DATED: February 24, 2023

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