NO. A17-0033

State of Minnesota

In Court of Appeals

Tiffini Flynn Forslund, et al.,

Plaintiffs-Appellants,

v.

State of Minnesota, et al.,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

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Plaintiffs-Appellants ("Plaintiffs") respectfully submit this Reply Brief in further support of their appeal of the district court's order and judgment.

ARGUMENT

I. PRELIMINARY STATEMENT

The State's Opposition Brief ("Op. Br.") recasts Plaintiffs' claims, introduces facts not included among Plaintiffs' allegations, and dodges Plaintiffs' arguments. Most significant, the State fails to plausibly rebut the Supreme Court's holding that is the foundation of Plaintiffs' action: "[T]here is a fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides an ***adequate education*** to all students in Minnesota." *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993) (emphasis added). The State's arguments are ultimately unavailing because Plaintiffs' central allegation is unavoidable: The Legislature has impermissibly prioritized ironclad job security for chronically ineffective teachers above students' constitutional right to an "adequate education." A legislative preference cannot limit a constitutional right, *Grussing v. Kvam Implement Co.*, 478 N.W.2d 200, 203 (Minn. Ct. App. 1991), and certainly the Tenure Laws cannot "subordinat[e] the paramount rights … of the school children to those of the individual teachers." *State v. Bd. of Ed. of Duluth*, 7 N.W.2d 544, 555 (Minn. 1942). The district court's judgment must be reversed.

II. THE STATE MISAPPREHENDS PLAINTIFFS' CLAIMS

Plaintiffs allege that ironclad job security for chronically ineffective teachers is a legislated impediment to the State's constitutional duty to provide an adequate education to all students, and therefore a burden on their children's fundamental right to an

education system that "provides an adequate education to all students in Minnesota." *Skeen*, 505 N.W.2d at 315. Plaintiffs do *not* (as the State suggests) allege merely that the State has failed to provide "them an adequate education." Op. Br. 4. Plaintiffs seek a declaration that the Tenure Laws are unconstitutional and an injunction preventing their enforcement. Plaintiffs do *not* (as the State suggests) seek an advisory opinion ordering a certain "*type*" of education. *Id.* 31. These are key differences between Plaintiffs' action and *Cruz-Guzman*. The State contends the cases are the "same," *id.* 20-21, but Plaintiffs' action cannot be recast to suit the State's preferences. Instead, Plaintiffs' claims must be taken on their own terms. In sum, Plaintiffs' action follows a well-worn path to a well-tested remedy: Plaintiffs wield the constitution as a shield to protect their children from statutes that allegedly burden a constitutional right. The Court "cannot abdicate" its duty to assess whether a burden exists, and, if so, whether that burden is justified under a strict scrutiny analysis. *State v. Fairmont Creamery Co.*, 202 N.W. 714, 719 (Minn. 1925).

III. THE STATE'S "HISTORY OF TEACHER TENURE" IS NOT RELEVANT

The State's "history of teacher tenure in Minnesota" is intended to show that the Tenure Laws are "wise legislation." Op. Br. 5-7. This "history," however, is not among Plaintiffs' allegations, and is beyond the scope of review. Moreover, it is irrelevant to the task, which is to determine whether Plaintiffs allege a burden to their children's fundamental right to an adequate education. In making this prima facie assessment, the only question is whether the Tenure Laws impede the State's constitutional duty to provide an adequate education to all students. If the answers to this question is "yes," Plaintiffs set forth a claim for relief under the Education Clause, and the burden shifts to

the State to prove that the Tenure Laws are narrowly tailored to achieve a compelling government interest. *Skeen*, 505 N.W.2d at 315. Once the burden shifts, the strict scrutiny analysis may include the State's "history," but the cart cannot come before the horse.

IV. THE STATE AVOIDS PLAINTIFFS' ARGUMENTS

The State does not address Plaintiffs' contention that, for purposes of standing and justiciability, Plaintiffs' allegations are analytically indistinguishable from those in *Skeen*, satisfying the minimal requirements for seeking a declaratory judgment. The State also ignores Plaintiffs' arguments that the jurisdictional threshold is relaxed in declaratory judgment actions; that a constitutional duty presupposes a correlative constitutional right in the person for whom the duty is to be exercised; that when a plaintiff alleges a facial violation, the Court's focus shifts to the statutory scheme itself, not the plaintiff's individual circumstances; and that, under Minnesota law, courts must show particular solicitude to plaintiffs alleging deprivation of a constitutional right. The list goes on.

Most telling, the State fails to plausibly distinguish the Supreme Court's holding that is the foundation of Plaintiffs' claims: "[T]here is a ***fundamental right***, under the Education Clause, to a "general and uniform system of education" which provides ***an adequate education to all students in Minnesota***. In evaluating a challenge to such a fundamental right, this court must employ the strict scrutiny test." 505 N.W.2d at 315. The State closes its eyes, but Plaintiffs' arguments do not go away.

V. PLAINTIFFS HAVE NOT WAIVED THEIR ARGUMENTS

The State asserts that Plaintiffs forfeit the following arguments by having failed to raise them to the district court: (1) For the political question analysis, *Skeen* provides a

manageable standard by which to assess Plaintiffs' claims, requiring the State to maintain a school system that generates "an adequate level of education which meets all state standards," *Skeen*, 505 N.W.2d at 315; (2) For the standing analysis, the district court should have considered ripeness and standing sequentially under the relaxed standards reserved for declaratory judgment actions; and (3) For purposes of assessing the merits of Plaintiffs' claims, *Skeen* requires the State to maintain a school system providing "an adequate level of education which meets all state standards" and that statutes impeding this constitutional obligation burden students' fundamental right to an adequate education, *see id.* Op. Br. 21, 23 & n.6, 35. The State is wrong.

Plaintiffs did not waive their argument that *Skeen* provides the standard by which to assess whether the Tenure Laws operate as Plaintiffs allege, providing ironclad job security to chronically ineffective teachers. Waiver presupposes the opportunity to present an argument. In their opening brief, Plaintiffs highlighted this holding of *Skeen* to differentiate their claims from those in *Cruz-Guzman*, where this Court applied *Baker v. Carr*, 369 U.S. 186 (1962), to rule that the political question doctrine foreclosed review. *See Cruz-Guzman v. State*, 892 N.W.2d 533, 539 (Minn. Ct. App. 2017). *Cruz-Guzman* was decided after the district court issued its judgment in this case and is the first and only published Minnesota case applying the *Baker* factors to a Minnesota political question analysis.[1] Not surprisingly, the *Baker* analysis does not appear in the record

[1] This Court has referenced the *Baker* factors in two unpublished decisions. *See Minn. Break the Bonds Campaign v. Minn. State Bd. of Inv.*, No. A12-0945, 2012 WL 5476166, at *4 (Minn. Ct. App. Nov. 13, 2012); *Moore v. Hennepin Cty. Bd. of Comm'rs*, No. C6-90-1901, 1991 WL 15436, at *1 (Minn. Ct. App. Feb. 12, 1991). *State ex rel.*

below: The Defendants did not cite *Baker* in their dismissal papers; the district court did not rely on *Baker* to determine that Plaintiffs' action is not justiciable. Lacking a prior opportunity to address *Baker's* requirement of "judicially discoverable and manageable standards," 369 U.S. at 217, Plaintiffs cannot be faulted for proactively differentiating *Cruz-Guzman's* analysis in their opening brief. In any event, a well-established exception to the waiver doctrine provides that the Court may consider arguments if they are plainly dispositive and do not unfairly disadvantage the other side. *Richter v. Progressive Preferred Ins. Co.*, No. A09-1621, 2010 WL 2266076, at *2 (Minn. Ct. App. June 8, 2010). As recognized in *Cruz-Guzman*, whether judicially discoverable standards exist for resolving Plaintiffs' claims is a dispositive issue, and certainly does not disadvantage the State, thus triggering the exception to the waiver rule. *Id.*

Plaintiffs also did not forfeit their argument that the district court's standing analysis went awry because it failed to first assess whether Plaintiffs' declaratory judgment action is "ripe" and "justiciable." Plaintiffs argued to the district court that it must first assess whether Plaintiffs allege a "justiciable controversy" before determining whether Plaintiffs have "standing." Consolidated Opposition to Defendants' Motions to Dismiss ("Cons. Opp.") 29-31. After drawing this distinction, Plaintiffs addressed the same three-factor test for "ripeness" discussed in their opening brief on appeal. *Id.* Plaintiffs' justiciability arguments here merely refine arguments made to the district court and focus on the same allegations presented below, thus permitting review. *In re Kremer*

Sviggum v. Hanson, a published decision, cited *Baker* for the rule that justiciability requires "judicially manageable standards for resolving a dispute," but then devoted its analysis to issues of standing and mootness. 732 N.W.2d 312, 321 (Minn. Ct. App. 2007).

v. Kremer, 827 N.W.2d 454, 461 (Minn. Ct. App. 2013).

Finally, Plaintiffs did not waive their argument that "*Skeen* defines adequacy [as] a requirement that for all students, schools must 'meet all state standards.'" *See* Op. Br. 35. This argument is a novel issue of first impression; is dispositive of Plaintiffs' claims; and (again) refines Plaintiffs' arguments to the district court, where Plaintiffs contended that their claims "fit within the scope of the Education Clause as interpreted by *Skeen*" because (1) "*Skeen's* reasoning makes clear that a child's fundamental right to education is not simply the right to basic foundation funding"; (2) "*Skeen* clarifies that the measure of an 'adequate' education system properly includes whether it develops 'every child to his or her capacity of' academic achievement"; and (3) "Plaintiffs expressly allege that the Challenged Statutes … force 'children into classrooms taught by ineffective teachers unable to provide students with basic tools to achieve academic benchmarks." Cons. Opp. 17-18. Again, this argument fits a number of well-established exceptions to the waiver doctrine, thus permitting review. *See Richter*, 2010 WL 2266076, at *2.

VI. THE STATE'S REMAINING ARGUMENTS ARE NOT PERSUASIVE

A. *Cruz-Guzman* does not bar Plaintiffs' claims and does not overrule *Skeen's* holding that the Education Clause guarantees all students the opportunity to obtain an "adequate education."

The State insists that *Cruz-Guzman* decided this case in absentia by determining that "the Education Clause … does not establish a constitutional claim related to educational quality." Op. Br. 16. Not so. The *Cruz-Guzman* Court examined "the constitutional underpinnings of ***respondents'*** asserted right to an adequate education," determining that the political question doctrine barred review because "***respondents'***

inadequate-education claims inevitably require[d the Court] to define the relevant qualitative standard." *Cruz-Guzman*, 892 N.W.2d at 537-40 (emphasis added). But the Court went no further: Indeed, it stated that when judicially discoverable and manageable standards exist for measuring an Education Clause challenge, the Court "would have no difficulty concluding that th[e] case presents a justiciable controversy." *Id.* at 540. As explained in Plaintiffs' opening papers (and reiterated below), Plaintiffs' action does not suffer the same flaws as *Cruz-Guzman* and is justiciable even if *Cruz-Guzman* was not.

Moreover, the State is quite clearly incorrect when it invokes *Cruz-Guzman* to argue that Minnesota's students are not entitled to education of a certain quality. *See* Op. Br. 14-16. In *Skeen*, the Minnesota Supreme Court expressly held that "there is a fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides ***an adequate education to all students***." *Skeen*, 505 N.W.2d at 312 (emphasis added). The *Skeen* Court reiterated this constitutional guarantee multiple times, and the *Skeen* plaintiffs' concession that the existing system provided an adequate education meeting all state standards was integral to its determination that the Education Clause claim failed. *Id.* at 312, 318. *Skeen* cannot be disregarded: It supersedes all prior Education Clause jurisprudence and sets the course for Education Clause jurisprudence to follow. Only the Supreme Court may narrow the scope of students' fundamental right to an "adequate education." Until such time, the State (and this Court) must accept *Skeen's* admonishment that the Education Clause guarantees a school system that "provides an adequate education to all students in Minnesota." *Id.* at 315. Anything else is a radical departure from traditional notions of judicial authority.

B. *Baker v. Carr* dictates that Plaintiffs' claims are justiciable.

The *Baker* factors are not implicated by Plaintiffs' claims and therefore Plaintiffs' action *cannot* be dismissed under the political question doctrine. *Baker*, 369 U.S. at 217.

1. The Legislature does not act within its discretion when it enacts laws impeding the State's "constitutional duty" to maintain a school system providing "an adequate education to all students."

The State contends that "the plain language of the Minnesota Constitution charges the legislature … with determining an appropriate way to meet" the State's constitutional obligations under the Education Clause. Op. Br. 19. This is unobjectionable as far as it goes. It does not follow, however, that the Judiciary cannot address allegations that the Legislature has erected a legal impediment to the State's constitutional duty to maintain a school system providing an adequate education to all students. To the contrary, it is expressly the role of the judiciary to determine whether the Legislature has "transgresse[d] its constitutional limits." *Fairmont Creamery*, 202 N.W. at 719. Plaintiffs challenge laws which, they allege, impede the State's constitutional duty. This is exactly the kind of action the judiciary was intended to decide. *Id.*; *see* Minn. Const. art. III, § 1.

2. Plaintiffs' claims do not require the Court to make policy.

The State objects that this case requires the Court to define "thorny issues such as teacher effectiveness and educational adequacy." Op. Br. 20. Not true. Minnesota's measure of teacher effectiveness is already defined in law. And (again), because Plaintiffs are not demanding a particular type of education, but instead allege only that the Tenure Laws impede the State's constitutional duty to provide an adequate education to all students under *any* qualitative standard required by the Education Clause, the Court does

not need to define "effectiveness" and "adequacy" to decide Plaintiffs' claims.

3. Manageable standards exist to evaluate Plaintiffs' claims.

The State contends that Plaintiffs' claims fail because "[t]he Court is without law or standards to guide an inquiry into educational quality and teacher efficacy." Op. Br. 21. This protest rings hollow. *Skeen* states that a constitutionally adequate education system is one that "meets all state standards" for "all students." *Skeen*, 505 N.W.2d at 315. This is the standard. Plaintiffs allege that the Tenure Laws are unconstitutional precisely because they impede the State from achieving this standard.

The State further protests that this standard is "unworkable" because it would "imbue every state statute and regulation related to education with constitutional significance." Op. Br. 21-22. Not so. Only laws impeding the State's constitutional duty to maintain a public school system providing an adequate education to all students would run afoul. For example, if the State adopted a new law requiring all teachers to achieve ratings of "Effective" or "Exemplary" or face discharge, Plaintiffs would have no basis to allege that such law burdened students' fundamental right to an adequate education.

C. Plaintiffs have standing.

1. Plaintiffs' constitutional injuries are not "hypothetical."

The State insists that Plaintiffs cannot satisfy the "injury-in-fact" requirement because the harms alleged are "hypothetical," not "actual concrete harm[s] … caused by a State Defendant." Op. Br. 23. *Id.*[2] The State is mistaken on multiple levels. First, the

[2] The State also criticizes Plaintiffs for having "cite[d] aggregate, district-wide data" showing dramatic disparities in educational opportunities in Minnesota, which it contends

State again misapprehends Plaintiffs' claim: Plaintiffs are not seeking relief for having been taught by ineffective teachers; Plaintiffs are seeking relief from a statutory scheme that burdens students' fundamental right to an adequate education. As evidenced by *Skeen* and by numerous constitutional challenges in other contexts, a state-imposed impediment to a constitutional guarantee is a cognizable constitutional "injury-in-fact." *E.g.*, *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 336-40 (Minn. 2011) (ordinance created an injury-in-fact by making it easier to obtain administrative search warrants, burdening Minnesota's constitutional guarantee against unreasonable searches); *Spannaus*, 295 N.W.2d at 652 n.1 (statute created an injury-in-fact by requiring Independent candidates to swear they would not accept support from any political party, burdening the First Amendment right of political association); *cf. Skeen*, 505 N.W.2d at 313-15 (statutes resulting in funding disparities between school districts established an injury-in-fact triggering merits review under the Education Clause).

Second, the State simply ignores Plaintiffs' allegations that their children *have* been assigned to ineffective teachers, and have suffered concrete harms as a result. *E.g.*, AC ¶ 28 ("J.C. and D.C. have been assigned to an ineffective teacher who impedes their

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"is not traceable to the State … and is insufficient to establish an injury-in-fact." Op. Br. 23. Again the State is confused. Plaintiffs cite this data to show that the State has fallen short of its constitutional duty to maintain a "'general and uniform system of education' which provides an adequate education to ***all*** students in Minnesota," *Skeen*, 505 N.W.2d at 315 (emphasis added), not to establish Plaintiffs' standing to pursue their children's constitutional claims. As explained in Plaintiffs' opening papers, standing is satisfied because Plaintiffs seek to vindicate their children's "interest" in an adequate education, which, under *Skeen*, is obviously within "the zone of interests" protected by the Education Clause. *Minn. Fifth Cong. Dist. Indep.-Republican Party v. State ex rel. Spannaus*, 295 N.W.2d 650, 652 n.1 (Minn. 1980) [hereinafter "*Spannaus*"].

equal access to the opportunity to receive a uniform and thorough education … . Indeed, J.C. and D.C. transferred from the St. Paul Public Schools to the West St. Paul-Mendota Heights-Eagan Area schools following experiences with ineffective teachers.").

Finally, for purposes of pursuing a declaratory judgment action, increased risk of harm establishes a constitutional injury-in-fact provided the plaintiff shows that the law in question "*is about to be*[] applied to his disadvantage." *McCaughtry*, 808 N.W.2d at 338 (emphasis added; quotation marks omitted). All children are compelled to attend school, Minn. Stat. § 120A.34, and the State has expressed an unyielding commitment to enforce the Tenure Laws, making it a certainty that students will be assigned to classrooms occupied by chronically ineffective teachers. This is enough to satisfy the constitutional injury-in-fact requirement. *McCaughtry*, 808 N.W.2d at 338-41 (plaintiffs' claims established injury-in-fact prior to any residential searches taking place).

2. Plaintiffs expressly allege a causal link to the State's actions.

The State contends that Plaintiffs cannot establish a causal link between the Tenure Laws and their children's constitutional injuries because Plaintiffs "do not allege that they suffered harm as a result of [State action]," and because "the challenged statutes expressly provide school districts discretion on teacher personnel decisions." Op. Br. 25. The State misses the mark. First, Plaintiffs expressly allege that "continued employment of ineffective teachers in Minnesota's public schools is the natural consequence" of the Challenged Statutes, and that these laws "inevitably … conflict" with their children's fundamental right to an adequate education. *Id.* ¶¶ 71-72. In other words, the Tenure Laws *themselves* establish the burden independent of any action by local administrators.

The Tenure Laws are enacted by the Legislature and enforced by the Executive, each a creature of the State. Thus, the alleged injury is directly traceable to the State's conduct. *Skeen*, 505 N.W.2d at 308 (alleged injuries caused by funding laws traceable to State).

Second, the State points in the wrong direction when it contends that these laws "provide[] for teacher dismissal for performance- or disciplinary-based reasons." Op. Br. 26. The alleged unconstitutional burden imposed by these laws is a function of the inordinate time, energy, and resources required to negotiate the discharge process. Plaintiffs allege that the discharge hurdles cannot be completed within a school year, and that a single school year assigned to an ineffective teacher causes enduring harm. Thus, necessarily, the Tenure Laws elevate a legislative preference for protecting ineffective teachers over students' fundamental constitutional right to an adequate education. A legislative preference cannot limit a constitutional right. *Grussing*, 478 N.W.2d at 203.

3. Enjoining the Tenure Laws will relieve the burden alleged.

The State contends that Plaintiffs' constitutional injury cannot be relieved by court order because "there is no guarantee that, absent the challenged laws, Appellants would never again receive an 'ineffective teacher.'" Op. Br. 26. The State is misguided. Even if an injunction cannot remove all ineffective teachers from schools, it can eliminate legal barriers to discharging ineffective teachers, extinguish a statutory impediment to the State's constitutional duty to provide an adequate education to all students, and vindicate students' correlative fundamental right to an adequate education. This satisfies redressability for purposes of seeking a declaratory judgment. Minn. Stat. § 555.12; *see Mass. v. E.P.A.*, 549 U.S. 497, 526 (2007).

D. Plaintiffs allege that the Tenure Laws burden students' right to an adequate education in every instance.

The State argues that Plaintiffs' facial claim fails because "the laws on their face provide for dismissal of ineffective … teachers," and because Plaintiffs "admit that the statute … is constitutional" as applied to effective teachers Op. Br. 28-30. The State is wrong. Again, the constitutional burden imposed by these laws is a function of the prohibitive time and resources required to negotiate mandatory discharge hurdles, which hurdles result in chronically ineffective tenured teachers remaining in classrooms long after their ineffective performance is known. The result is always the same for students: Whether a principal pursues (or avoids) discharge proceedings, students' fundamental constitutional right to an adequate education is burdened by the ironclad job security guaranteed to chronically ineffective teachers under the Tenure Laws.

Further, the State mischaracterizes Plaintiffs' position regarding the Tenure Laws as they relate to *effective* teachers. Plaintiffs do not concede that the statutes are constitutional; Plaintiffs contend that for purposes of deciding their claims, the "effective teacher" example is inapposite because the provisions at issue *do not apply* to effective teachers. An effective teacher cannot be discharged for ineffective performance.

E. Plaintiffs' Education Clause claim is properly pleaded and viable.

1. Plaintiffs allege that the Tenure Laws burden students' fundamental right to an adequate education, as that right is defined in *Skeen*.

The State insists that Plaintiffs' Education Clause claim fails because Plaintiffs seek to vindicate a certain "*type*" of education, whereas even under *Skeen* the Education Clause only guarantees "a minimum of educational opportunities." Op. Br. 31-32

(quotation marks omitted). But, again, Plaintiffs wield the Education Clause as a shield, precisely for the purpose of protecting their children from laws impeding the State's duty to provide all students "a minimum of educational opportunities." Even under the State's interpretation of *Skeen*, Plaintiffs' claims are properly alleged. In any event, the State's position that it has satisfied its constitutional duty by providing a "'general and uniform' … system of public schools" regulated by universal statutes (including the Tenure Laws) cannot be squared with *Skeen's additional* requirement that the same system must provide "an adequate education to all students in Minnesota." *Skeen*, 505 N.W.2d at 315.[3]

2. Plaintiffs allege causation.

The State asserts that Plaintiffs' Education Clause claim also fails "because they did not allege facts showing causation." Op. Br. 33. Oddly, the State supports this argument by quoting Plaintiffs' allegation that the Tenure Laws "protect ineffective teachers with the consequence that many children are denied their fundamental right to a uniform and thorough education." Op. Br. 33 (quoting AC ¶ 23). The State discounts this allegation as "conclusory," *id.*, but Plaintiffs' complaint is replete with additional allegations establishing (1) ineffective teachers cause immediate harm to students' academic prospects; (2) ineffective teachers exist in Minnesota's public schools; and (3)

[3] Separately, the State argues that Plaintiffs' Education Clause claim fails even if the Education Clause requires "a basic concept of adequacy" because Plaintiffs do not allege harms falling below this threshold. Op. Br. 33. The State ignores Plaintiffs' allegations that one-third of Minnesota fourth-graders cannot meet academic proficiency standards; a majority of high school graduates are unprepared for college; significant achievement gaps exist across subgroups; and that their children are among those whose education is jeopardized. AC ¶¶ 6-15, 27-30, 159-63. Taken as true, these allegations establish that the State is failing its constitutional duty to maintain a school system providing an adequate education to *all* students in Minnesota. *Skeen*, 505 N.W.2d at 315.

the Tenure Laws always provide ironclad job security to chronically ineffective teachers, thus impeding the State's ability to maintain a school system that provides an adequate education to *all* students. There is no basis to object that Plaintiffs fail to allege causation.

F. Plaintiffs' Equal Protection Clause claim is properly pleaded and viable.

1. Plaintiffs' claims unquestionably involve a fundamental right.

The State insists that Plaintiffs' Equal Protection "claims do not involve a fundamental right" because the Education Clause guarantees only "a 'general and uniform system of education," not the right "to be taught entirely only by certain teachers." Op. Br. 36-37. Again, the State misapprehends Plaintiffs' claims: Plaintiffs do not claim an affirmative right to *effective* teachers; Plaintiffs seek protection against laws providing ironclad job security to chronically *ineffective* teachers. Under *Skeen*, students' "fundamental right" to an "adequate education" is expressly within the "zone of interests" protected by the Education Clause. *Spannaus*, 295 N.W.2d at 652 n.1 As explained in Plaintiffs' opening brief—which, again, the State ignores—the Tenure Laws burden this fundamental right, thus providing the predicate for Plaintiffs' equal protection claim.

2. Plaintiffs' allegations establish disparate impact.

The State contends that Plaintiffs' fundamental right equal protection claim fails because Plaintiffs "have disavowed their claims based on suspect class," and because, in any event, Plaintiffs have not alleged "proof of discriminatory intent." Op. Br. 37-38. The State is wrong on the law. First, Minnesota law provides two types of disparate impact challenges: A plaintiff may seek invalidation of a statute under the Equal Protection Clause on the basis that it unjustifiably burdens a suspect class, *or* on the basis that it

unjustifiably burdens a fundamental right. *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn. 2014). These two theories are conceptually distinct: A plaintiff alleging a suspect class claim must show disparate impact *and* discriminatory intent, whereas impact alone is sufficient to establish a fundamental right claim (intent is irrelevant). *R.D.L.*, 853 N.W.2d at 133 (irrespective of intent, a law that "impinges on fundamental rights … must meet strict scrutiny"); *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008) (same). If the conditions for either theory exist, "strict scrutiny will apply, and the state will have to prove that the statute is necessary to a compelling government interest." *Skeen*, 505 N.W.2d at 312.

The disparate impact claim at issue here is a fundamental right equal protection claim: Students assigned to chronically ineffective teachers are burdened by the Tenure Laws; students assigned to effective teachers are not. In other words, only students taught by chronically ineffective teachers experience a burden to their fundamental right to an adequate education because the statutory provisions at issue serve only to protect ineffective teachers. And because Plaintiffs allege a fundamental right equal protection claim, they are not required to show discriminatory intent. *R.D.L.*, 853 N.W.2d at 133.[4]

3. Rational basis review does not apply.

Strict scrutiny applies to Plaintiffs' claims upon proof of that the Tenure Laws impinge students' fundamental right to an adequate education, shifting the burden to the State to produce *evidence* that the Tenure Laws are constitutionally justified.

[4] Regardless, as explained in the opening brief, Plaintiffs adequately allege intent.

G. Each of the State Defendants is a proper party to this case.

The State concedes that the Commissioner is a proper defendant. Op. Br. 41. So too are the others. The State of Minnesota is the guarantor of students' constitutional right to an education system that provides an adequate education to all students. *Skeen*, 505 N.W.2d at 313; *State ex rel. Bd. of Educ. of City of Minneapolis v. Erickson*, 251 N.W. 519, 521 (Minn. 1933) ("[T]his court so frequently has affirmed the doctrine that the maintenance of the public schools is a matter of state and not of local concern that it is unnecessary further to review the authorities at this date."). Flowing from a "constitutionally imposed 'duty' is its jural correlative, a correspondent 'right' permitting control of another's conduct." *Skeen*, 505 N.W.2d at 313 (quotation marks omitted). As the constitutional guarantor, the State is a proper party to defend claims that it has erected an impediment to fulfilling its duty to provide an adequate education to all students.[5]

The DoE fulfills the provisions of the Minnesota Education Code. Minn. Stat. § 120A.02, subd. (b). Pursuant to state law, the DoE publishes the teacher evaluation rubric rating teachers "Exemplary," "Effective," "Development Needed," or "Unsatisfactory." *Id.* §§ 122A.40, subd. 8(b)(3), 122A.41, subd. 5(b)(3). Fifty-five percent of Minnesota's districts use the DoE's evaluation plan (or a variation of it). As developer of the State's teacher evaluation rubric, the DoE is also a proper defendant.

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[5] The State invokes *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995) to insist otherwise. *Quinones*, however, addressed an as-applied challenge, prompting the U.S. Seventh Circuit to observe that "[a] person aggrieved by the application of a legal rule does not sue the rule *maker*." *Id.* at 277. Here, by contrast, Plaintiffs allege a facial challenge—i.e., precisely the circumstances requiring Plaintiffs to "sue the rule *maker*," as they have done by suing the State. *See id.*

The Governor is the State's chief executive and is constitutionally required to "take care that the laws be faithfully executed." Minn. Const. art. V, § 3. The Governor's oversight includes the Tenure Laws, and therefore he is also a proper defendant.

H. No additional parties are required to decide Plaintiffs' claims.

Finally, the State insists that Plaintiffs' claims must fail because Plaintiffs have not joined all "nonparty school districts and teachers." Op. Br. 41-42. The suggestion is that every Minnesota school district and teacher must be made a defendant in order to seek a declaration that the Tenure Laws are unconstitutional. This is not the law. A plaintiff pursuing a facial constitutional challenge may seek a declaratory judgment against the progenitor of the law *regardless* whether the judgment may affect third parties.[6] *See Skeen*, 505 N.W.2d at 302 (plaintiffs properly pursued claims against State despite having failed to join "the three largest metropolitan school districts, Minneapolis, St. Paul, and Duluth"); *Spannaus*, 295 N.W.2d at 652 n.1 (plaintiffs properly pursued claims against State despite having failed to join a single "independent candidate"); *see also McCaughtry*, 808 N.W.2d at 336-40 ("nine landlords and two tenants" properly pursued claims against city despite having failed to join all remaining landlords and tenants).

VII. THE STATE'S AMICI ADDRESS ISSUES NOT BEFORE THE COURT

The State's amici analyze aspects of the Tenure Laws which, they contend,

[6] This rule is consistent with the Declaratory Judgment Act's "remedial" purpose "to afford relief from uncertainty and insecurity with respect to rights." Minn. Stat § 555.12. This purpose would be subverted if a plaintiff seeking to challenge the constitutionality of a statute had to join every party conceivably impacted by a judgment in her favor. Moreover, as noted below, it is nonsensical to require all school districts and teachers in the State to defend against Plaintiffs' *facial* challenges when such parties do not create state law, and are bound to obey it. Cons. Opp. 37-38 & n.23.

promote educational welfare. They also point to other factors that they assert contribute to Minnesota's failure to maintain a school system providing an adequate education to all students. While these considerations may be relevant to the ultimate analysis of whether the Tenure Laws are narrowly tailored to a compelling government interest, they are irrelevant to the question presently before the Court—i.e., whether the Tenure Laws impede *in any way* the State's ability to provide an adequate education to all students.

Finally, a correction: In their brief, Education Minnesota and the Minnesota Association of Secondary School Principals assert that under the Tenure Laws "[a]ll districts … have the discretion, if the performance problems are concerning enough, not to allow for a remediation period and move forward on an immediate discharge action." Brief of Amici Curiae Education Minn. & Minn. Ass'n of Secondary School Principals, at 19. However, the provisions that amici contend allow for "immediate discharge" are triggered by "immoral conduct," "willful neglect of duty," or "gross inefficiency which the teacher has failed to correct," *not* chronically ineffective performance. *See* Minn. Stat. §§ 122A.40, subd. 13, 122A.41, subd. 6. A principal seeking to discharge a teacher for chronically ineffective performance alone must always navigate the "*super* due process" hurdles that Plaintiffs allege burden students' fundamental right to an adequate education, AC ¶ 88. *See id.* §§ 122A.40, subds. 8(b) & 9(1), 122A.40, subds. 5(b) & 6(b)(3).

VIII. THE COURT SHOULD HAVE GRANTED PLAINTIFFS' REQUEST TO AMEND

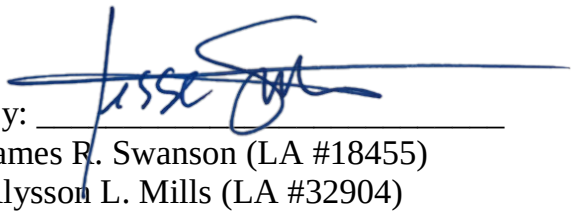
The State defends the district court's dismissal with prejudice, despite Plaintiffs' express request to amend, arguing that Plaintiffs "never moved to amend" and amendment "would have been futile because of the jurisdictional defects." Op. Br. 42-43.

As explained, the State's asserted "jurisdictional defects" are not persuasive and therefore futility cannot be a basis for denying Plaintiffs' request to amend. Moreover, the authority cited by the State to argue that Plaintiffs must "move" to amend is distinguishable: Each involved a damages action between private parties without any prospect that dismissal would abet "government overreaching." *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980). By contrast, Plaintiffs' action involves constitutional claims, requiring the State to "demonstrate the *complete* frivolity of the complaint before dismissal under Rule 12.02 is proper." *Id.* at 33. Moreover, in *Gomez v. Wells Fargo Bank*, the plaintiffs had already amended twice and failed to even request leave to amend prior to dismissal with prejudice. 676 F.3d 655, 665 (8th Cir. 2012). In *St. James Capital Corp. v. Pallet Recycling Assocs. of N. Am*, the plaintiffs' proposed amendment would have added a new claim that lacked basis in fact. 589 N.W.2d 511, 517 (Minn. Ct. App. 1999). These factors do not apply here. Instead, the district court dismissed Plaintiffs' constitutional claims without acknowledging Plaintiffs' request to amend and without explanation for why amendment should be denied. Given the special solicitude required for claims alleging constitutional violations, the Court abused its discretion by failing to allow Plaintiffs an opportunity to amend. *Elzie*, 298 N.W.2d at 33.

CONCLUSION

For these reasons, and those stated in their Opening Brief, Plaintiffs respectfully reiterate their request that the district court's order and judgment be reversed.

Dated: May 11, 2017 **FISHMAN HAYGOOD, L.L.P.**



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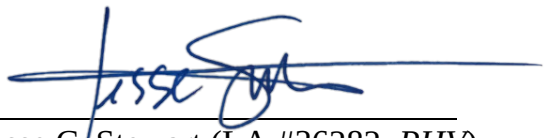
CERTIFICATION OF LENGTH

I hereby certify that this Appellants' Brief conforms to the requirements of applicable rules, is produced with a proportional 13-point font, and the length of this document is 5,700 words. This document was prepared using Microsoft Word 2010.



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