CASE NO. A17-0033

STATE OF MINNESOTA
IN COURT OF APPEALS

Tiffini Flynn Forslund, et al.,

Appellants,

v.

State of Minnesota State of Minnesota, et al.,

Respondents.

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OPENING STATEMENT

The Minnesota Supreme Court's recent decision in *Cruz-Guzman v. State*, 916, N.W.2d 1 (Minn. 2018), is a watershed moment for the state's schools.[1] In that decision, the Supreme Court established that the Education Clause creates rights and duties that can be judicially enforced.

But *Cruz-Guzman* did not establish that all claims arising from the Education Clause are equally justiciable, regardless of content. Its holding relies on the particular pleadings in that case. In fact, language in *Cruz-Guzman* suggests that, in some instances, Education Clause claims might give rise to serious separation-of-powers problems.

The present case is such an instance. This Court should heed the guidance of the Supreme Court and affirm the trial court's dismissal. In doing so, it should recognize that the specific relief sought by the Appellants raises nonjusticiable political questions.

ARGUMENT

I. The Minnesota Supreme Court in *Cruz-Guzman* Clarified Important Limits to Education Clause Claims.

All fifty state constitutions include language related to education and the establishment of public schools. *See, e.g.*, Will Stancil and Jim Hilbert, *Justiciability of State Law School Segregation Claims*, 44 Mitchell Hamline L. Rev. 399, 403 (2018). Litigation of these clauses has been a relatively frequent occurrence for decades. Separation-of-powers concerns almost inevitably arise in such litigation, and Minnesota

[1] The brief was prepared by *amici curiae* and counsel. No monetary contribution was provided for preparation or submission of the brief. Institutional affiliations of amici curiae are included for identification purposes only.

has been no exception in this regard. This question recently played out in the *Cruz-Guzman* case, in which plaintiffs asserted that racial and economic segregation in Minnesota public schools created several violations of the Education Clause.

The Minnesota Supreme Court has left no doubt that education policymaking is the prerogative of the state legislature. This principle was established as early as 1878:

> That the proper education of all its citizens vitally concerns the permanent prosperity and public welfare of the state is not controverted. Whatever provision, therefore, may be necessary to the attainment of this end, it is clearly within the jurisdiction of the legislature, as the representative of the sovereign law-making power of the state, to make, subject only to such restrictions as are imposed upon the exercise of the power by the fundamental law.

Curryer v. Merrill, 25 Minn. 1, 5 (1878).

However, in *Cruz-Guzman*, the Supreme Court confirmed that the legislature's discretion to set education policy is bounded by the Education Clause – and that those boundaries can be policed by the courts. The Supreme Court in that case held that while "specific determinations of educational policy are matters for the Legislature, it does not follow that the judiciary cannot adjudicate whether the Legislature has satisfied its constitutional duty." 916 N.W.2d at 9. Instead, the Supreme Court fully embraced its role as the final guarantor of these constitutional obligations.

With two equal branches assigned adjacent roles – that of creating education policy, and that of ensuring that education policy is constitutionally sufficient – questions about the appropriate separation of powers are likely, if not unavoidable. Without standards to maintain the wall between these two functions, the judiciary could quickly find itself usurping legislature functions. For instance, it is conceivable that litigants

could seek to sharply constrain the legislature's policymaking latitude by arguing that the adoption of particular educational policies are, in fact, part of the state's constitutional duty under the Education Clause. There is no inherent reason that such litigation must necessarily be restricted to major, far-reaching elements of school policy. Parties could conceivably litigate everything from employment practices to textbook choices to school lunch menus as part and parcel of the state's constitutional duties.

In their attempt to yoke the legislature to constitutional requirements, while preserving an appropriate degree of legislative discretion, courts in Minnesota and elsewhere have experimented with limiting principles. One potential limiting principle is to forbid courts from delving too deeply into issues which require the application of a qualitative or normative standard. The Court of Appeals briefly adopted this reasoning in *Cruz-Guzman*, holding the plaintiffs' claims a nonjusticiable political question, in part because they required the judiciary to define and apply a "qualitative standard." *Cruz-Guzman v. State*, 892 NW.2d 533, 538 (Minn. Ct. App. 2017).[2] But the Minnesota Supreme Court rejected that approach. It noted that "some level of qualitative assessment is necessary to determine whether the State is meeting its obligation to provide an adequate education." 916 N.W.2d at 12. The Supreme Court's conclusion was forceful and unambiguous: "We will not shy away from our proper role to provide remedies for

[2] In reaching this conclusion, the Court of Appeals applied factors for determining political questions from *Baker v. Carr*, 369 U.S. 186 (1962). Concern over a qualitative standard echoes the second factor, "a lack of judicially discoverable and manageable standards." *Id.* at 216. In *Cruz-Guzman*, Minnesota Supreme Court explicitly declined to follow *Baker*. 916 N.W.2d at 8 n.4.

violations of fundamental rights merely because education is a complex area." *Id.*

Instead, *Cruz-Guzman* holds that Education Clause plaintiffs can avoid usurping legislative authority by focusing tightly on the presence or absence of a constitutional violation, rather than seeking specific policy changes from the state:

> Providing a remedy for Education Clause violations does not necessarily require the judiciary to exercise the powers of the Legislature. Appellants stress that their complaint "does not actually ask the court to institute any specific policy." Rather, their prayer for relief asks the district court to find, adjudge, and decree that the State has engaged in the claimed constitutional violations.

Id. at 9. The Supreme Court explicitly described the issue before it in *Cruz-Guzman* as "a yes or no question—whether the Legislature has violated its constitutional duty." *Id.* It notes with favor that the *Cruz-Guzman* plaintiffs had "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." *Id.* On the contrary, those plaintiffs sought a declaration from the court that the harm they experienced – in that case, racial and economic segregation – did indeed run afoul of the Education Clause. Upon receiving such a declaration, the plaintiffs would ask the district court to "permanently enjoin the State 'from continuing to engage in' the claimed constitutional violations and to order the State to 'remedy' those violations." *Id.* In short, the Supreme Court suggested it allowed *Cruz-Guzman* to proceed because its plaintiffs complained of a constitutional violation, but did not seek a specific remedy. The legislature would retain its freedom to set educational policy, though that freedom would be channeled by constitutional obligations.

The *Cruz-Guzman* holding is compatible with the Supreme Court's earlier Education Clause decisions. In *Skeen v. State*, 505 N.W.2d 299, plaintiffs argued that inequality in the state's school funding scheme violated of the Education Clause. The Supreme Court found that the inequality did not rise to the level of a constitutional violation. *Id.* at 320. While the Supreme Court in *Skeen* admitted that it may be possible "to devise a fairer or more efficient system of educational financing," it held that "any attempt to devise such a system is a matter best left to legislative determination." *Id.* at 318-19. Once again, *Skeen*'s holding preserves the legislature's policymaking role.

Neither *Skeen* nor *Cruz-Guzman* address a circumstance where plaintiffs seek a detailed remedy from the courts, potentially intruding on matters "best left to legislative determination." *Id.*

II. Appellants' Claims Raise Severe Separation-of-Powers Concerns.

In the case at hand, and in contrast to *Cruz-Guzman* and *Skeen*, Appellants are seeking specific, enumerated changes to state education policy.[3] For the reasons discussed below, the relief sought by Appellants resurrects separation-of-powers concerns, and thus, justiciability concerns, that were inapplicable to the earlier cases.

A. Appellants Do Not Clearly Identify a Constitutional Violation to Be Remedied, and Their Prayer for Relief Usurps Legislative Authority.

First, while Appellants' Amended Complaint alleges that Minnesota's education system is beset by ineffective teaching and opportunity gaps, it does not appear to

[3] Specifically, Appellants are seeking to overturn certain enumerated sections of Minn. Stat. § 122A.40 and Minn. Stat. § 122A.41, which together govern several aspects of teacher hiring and firing in Minnesota.

directly assert that the education provided to Appellants is itself unconstitutionally deficient. Unlike the plaintiffs *Cruz-Guzman*, Appellants do not frame these deficiencies as a "yes or no question" about the constitutionality of a specific condition, but instead spin out an assortment of ongoing problems in Minnesota schools, mostly related to the composition of the teacher workforce. 916 N.W.2d at 9. Also unlike the *Cruz-Guzman* plaintiffs, Appellants are not seeking to "permanently enjoin the State 'from continuing to engage in' . . . claimed constitutional violations" – indeed, it is far from clear what, exactly, those violations would be, although they seem to relate broadly to teacher effectiveness and turnover. *Id.*

Put bluntly, it is unclear from the Amended Complaint whether Appellants believe their exposure to ineffective teaching rises to the level of a constitutional violation. But an Education Clause claim requires precisely that assertion. *Cruz-Guzman* makes clear that plaintiffs have a right to seek redress of constitutional violations. However, outside of constitutional questions, litigants cannot rely on the Education Clause to force the legislature to enact arbitrary changes to Minnesota's education system, simply because those litigants believe a superior alternative might exist. The courts' role is identifying and remedying constitutional violations, not serving as a last-chance legislator for parties whose policy arguments fall on deaf ears elsewhere.

To the extent that Appellants' pleadings do clearly raise a "yes or no question" regarding the constitutionality of Minnesota's system of public schools, they are restricted to a single policy – the tenure system. Appellants argue that these laws are unconstitutional, facially and as applied. The justification for this assertion is, in essence,

that teacher tenure statutes contribute to the welter of teacher-related problems identified in the complaint. Thus, they argue, the Constitution mandates these laws be struck down.

It is not inconceivable that a specific statute could run afoul of the Education Clause, if the statute was the direct cause of a constitutional violation. For instance, it is conceivable that the *Cruz-Guzman* segregation claims, in substantially similar form, could be brought against a hypothetical statute that required racial segregation of schools. As long as such a statute remained, it would be impossible for the state to desegregate its schools. Repealing such a statute would be a *sine qua non* for any remedy.

However, as this example suggests, using the Education Clause to directly challenge a specific law requires a close nexus between the unconstitutional condition and the challenged statute. If the relationship between a statute and an unconstitutional condition is more attenuated – if a particular statute is merely a *factor* in a constitutional violation – it is plausible that other remedies exist, which address the constitutional violation while preserving the original statute. *Cruz-Guzman* establishes that it is the legislature's prerogative to choose among potential remedies.

Appellants' complaint fails to establish a strong nexus between the challenged tenure statutes and the alleged teacher workforce problems. For instance, as noted by the district court, the tenure statutes have broad applicability in Minnesota schools, including in districts that Appellants' own complaint seems to acknowledge are higher-performing.

This leads to the second core defect of the Appellants' claim, which is that it trespasses into the legislature's policymaking role by seeking to institute "specific policy." In their Amended Complaint, all of Appellants' twelve claims and their prayer

for relief seek only one outcome: the striking of Minnesota's teacher tenure laws. Although the Complaint presents reduced teacher effectiveness as the rationale for this remedy, its assertions related to teacher quality are only ever raised as an intermediary step towards this narrow objective. Moreover, although Appellants' pleadings continually assert that teacher ineffectiveness produces subpar education, their complaint does not evince any willingness to allow the legislature to explore alternative means of addressing teacher ineffectiveness. Instead, Appellants remain singularly focused on tenure laws.

To pick one example out of many, Appellant's Amended Complaint describes a process whereby staff turnover in schools with many low-income students results in higher concentrations of ostensibly ineffective teachers at those schools. Amended Complaint at ¶ 116, 117. However, there are a variety of potential policy solutions to this problem, some of which extend or build upon the existing tenure law. Possibilities include revamped educator hiring, expanded training, or increased personnel funding. But Appellants' claims would not allow the state to even consider these alternatives.

Policymaking is often about tradeoffs. Legislators may choose to accept harms caused by a particular policy, in order to obtain equal or greater benefits. Even when required to reduce those harms, they may opt to institute a second, remedial policy, rather than do away with the original statutory scheme. But Appellants' facial challenge to Minnesota's teacher tenure laws permits no such legislative discretion. Appellants seek to require the legislature to respond to a general, broadly stated set of concerns over teacher effectiveness by taking a single path of Appellants' own choosing.

In doing so, Appellants raise severe separation-of-powers concerns. *Cruz-Guzman*

clearly indicates that educational policymaking has been, and remains, the remit of the legislature. The existence of a constitutional violation limits the legislature's policymaking discretion, but it does not eliminate it. A particular set of plaintiffs may encourage a particular remedy, for practical or political reasons. But, ultimately, it is not the plaintiffs' role to dictate the exact manner in which the legislature resolves an identified constitutional violation.

B. Subsequent Filings Do Not Resolve These Defects.

Appellants and their *amici* have filed supplemental briefs for this proceeding. These filings covertly alter the gravamen of Appellants' complaint. In these briefs, Appellants argue that "[t]he core of [their] Complaint is their allegation that effective teaching is embodied in students' fundamental right to a 'baseline level,' 'adequate education.'" Appellants' Supplemental Brief at 6. Similar assertions are made elsewhere.

These claims notwithstanding, the Appellants' Amended Complaint – and the trial court's decision – remain grounded in a challenge to a specifically delineated set of teacher employment practices. Prior to this proceeding, there is no indication that Appellants have directly asserted that teacher ineffectiveness, rather than teacher tenure laws, infringed on Minnesota's fundamental right to an education. Nor do the supplemental filings of Appellants or *amici* suggest that the earlier claims were poorly plead, or otherwise originally intended to extend to a full range of factors that determine teacher effectiveness. Instead, this appears to be an attempt by Appellants to modify their claim at the appellate stage, sublimating the tenure issue for as long as possible and thereby smuggling their original complaint past separation-of-powers concerns raised in

the trial court's dismissal and in *Cruz-Guzman*.

CONCLUSION

Appellants rely heavily on *Cruz-Guzman*'s holding that Education Clause claims are justiciable. But the present case raises justiciability issues beyond those raised in *Cruz-Guzman*. That case does not stand for the proposition that all Education Clause claims are inherently justiciable, no matter how intrusive onto legislative authority.

The Appellants' prayer for relief in this case is inherently legislative in character. In order to indirectly address ambiguous harms, Appellants seek to reverse a detailed and longstanding educational policy decision already made by the legislature. Appellants give the legislature no say in the matter; no deliberation or horse-trading is permitted. The Supreme Court spoke favorably about the limited claims and narrow constitutional focus of the plaintiffs in *Cruz-Guzman*. This is precisely the case *Cruz-Guzman* was not: litigants deploying the Education Clause not to vindicate their constitutional rights but to adopt a policy they could not implement through appropriate, political means. The Court of Appeals should affirm the district court and dismiss the case as nonjusticiable.

Respectfully Submitted,

Dated: October 12, 2018

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CERTIFICATE OF BRIEF LENGTH

I hereby confirm this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 2,632 words. This brief was prepared using Microsoft Word 2010.

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