No. A17-0033

STATE OF MINNESOTA

IN COURT OF APPEALS

Tiffini Flynn Forslund, et al.,
Appellants,

vs.

State of Minnesota, et al.,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

FISHMAN HAYGOOD, L.L.P
James R. Swanson (LA #18455)
Alysson L. Mills (LA #32904)
Jesse C. Stewart (LA #36282, PHV)
201 St. Charles Ave., Suite 4600
New Orleans, Louisiana 70170-4600
(504) 586-5252

BASSFORD REMELE
A Professional Association
Lewis A. Remele, Jr. (MN #90724)
Frederick E. Finch (MN #29191)
Kate L. Homolka (MN #395229)
100 South Fifth Street, Suite. 1500
Minneapolis, Minnesota 55402-1254
(612) 333-3000

NEKIMA LEVY-POUNDS (#335101)
2901 Lyndale Avenue North
Minneapolis, Minnesota 55411
(612) 210-3731

Attorneys for Plaintiffs/Appellants

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

Alethea M. Huyser (No. 0389270)
Assistant Solicitor General
Jason Marisam (No. 0398187)
Assistant Attorney General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1243 (Voice)
(651) 282-5832 (Fax)
alethea.huyser@ag.state.mn.us
jason.marisam@ag.state.mn.us

Attorneys for Defendants/Respondents State of Minnesota, Governor Mark Dayton, Department of Education, and Commissioner Brenda Cassellius

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

STATE COURT CASES

STATUTORY AUTHORITIES

STATE RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

ARGUMENT

Appellants' argument amounts to a simple policy preference for non-tenured employment of teachers, despite their attempts to dress the issues up as constitutional claims. The Minnesota Supreme Court's decision in *Cruz-Guzman v. State*, 916 N.W.2d 1 (Minn. 2018), explicitly held that Minnesota's Education Clause is not a vehicle for policy debates or policy change. *Id.* at 8-9 ("To be sure, we have long held that matters of educational policy are matters that fall within legislative authority.") (quoting *Curryer v. Merrill*, 25 Minn. 1, 5 (1878)). For this reason, political question jurisdiction is still lacking in this case. Appellants are also without standing because they do not allege any cognizable and fairly traceable harm.

Appellants' claims also fail on the merits. *Cruz-Guzman* did not involve a facial challenge to a state law, whereas this case does. Despite Appellants' allegations, the tenure law on its face does not require districts to retain ineffective teachers. Rather, it facially provides for dismissal of ineffective teachers, and Appellants concede that most teachers employed under Minnesota's tenure law are effective. As such, Appellants cannot show that Minnesota's tenure law is unconstitutional in all applications, which is the standard they must meet to prevail on their facial constitutional challenge.

Nor do Appellants allege a viable claim under the Education Clause standard articulated by the Supreme Court. In *Cruz-Guzman*, the Supreme Court reaffirmed the "right to a general and uniform system of education that is thorough and efficient, that is supported by sufficient and uniform funding, and that provides an adequate education to all students in Minnesota." *Cruz-Guzman*, 916 N.W.2d at 11 (citing *Skeen v. State*,

505 N.W.2d 299, 315 (Minn. 1993)). But Appellants do not allege that Minnesota lacks a well-funded, general and uniform system. Appellants also do not allege facts that could support a claim that their educations are constitutionally inadequate. As the District Court concluded in addressing Appellants' arguments: "Nowhere does Plaintiffs' Amended Complaint allege that Minnesota's system of education fails to meet . . . basic [educational] requirements, much less that teacher tenure laws are causing the system to fall short." Add. at 80.

Appellants' claims are non-justiciable and otherwise fail as a matter of law.

I. UNDER *CRUZ-GUZMAN*, APPELLANTS' CLAIMS REMAIN NON-JUSTICIABLE.

A. Appellants' Claims Seek Policy Change, and Therefore Run Afoul of the Political Question Doctrine.

In *Cruz Guzman*, the Minnesota Supreme Court faced the question of whether a court has jurisdiction to consider a claim that schools in Minnesota were segregated in violation of the Education Clause of the Minnesota Constitution. The Court recognized that "[t]here is no dispute that the Minnesota Constitution assigns to the Legislature responsibility for establishing a public school system." 916 N.W.2d at 8 (citing Minn. Const. art. XIII, § 1; *Bd. Of Educ. of Minneapolis v. Erickson*, 295 N.W. 302, 303 (Minn. 1940)). The Court recognized this as a "mandate," which the Court had a role in ensuring was met. *Id.* at 9. As such, the Court held that the determination of whether or not the system of education failed to meet its obligation to provide a sufficiently-funded "general and uniform system" to provide for an adequate education was justiciable. *Id*.

In doing so, however, the Court recognized the limitations on the types of claims it would consider. "To be sure," the Court explained, "we have long held that matters of educational policy are matters that fall within legislative authority." *Id.* at 8 (citing *Curryer*, 25 Minn. at. 5). *See also id.* at 9 ("[S]pecific determinations of educational policy are matters for the legislature."); *id.* ("Appellants stress that their complaint 'does not actually ask the court to institute any specific policy.'").

The Court's reasoning is consistent with prior jurisprudence regarding claims involving education policies and methods—including for educational malpractice—which have long been recognized as not justiciable by Minnesota courts. For example, in *Curryer*, the plaintiff objected to a law requiring students to buy new text books, the expense of which he claimed would burden education. In denying the claim, the Minnesota Supreme Court explained:

> The whole question, also, of the necessity or expediency of any particular measure, with reference to this matter, is one of legislative and not judicial cognizance. In the absence of any constitutional prohibition, the whole matter of the establishment of public schools, the course of instruction to be pursued therein, how they shall be supported, upon what terms and conditions people shall be permitted to participate in the benefits they afford—in fine, all matters pertaining to their government and administration—come clearly within the range of proper legislative authority.

Curryer, 25 Minn. at 4. *See also Skeen*, 505 N.W.2d at 318-19 (recognizing that the legislature is the proper venue for debates about education policy, not the courts); *Erickson*, 295 N.W. at 303-304 (holding that the Education Clause requires the establishment of a general and uniform system of public schools, and emphasized that the specific "method by which these objectives were to be accomplished was left to

legislative determination"); *Assoc. Schs. of Ind. Dist. No. 63 v. Sch. Dist. No. 83*, 142 N.W. 325, 327 (Minn. 1913) (decision of legislature as to how to direct topics of instruction, and when to charge tuition, in schools is "not a judicial question" because it is a "question of legislative policy and not of power"); *Alsides v. Brown Inst. Ltd.*, 592 N.W.2d 468, 473 (Minn. App. 1999) (educational malpractice claims not justiciable).[1]

Just as in *Curryer*, Appellants' concern with tenure laws "raises a question of legislative discretion and policy only, and not one of power." *Curryer*, 25 Minn. at 2. Neither *Cruz-Guzman* nor any prior case of Minnesota's appellate courts, have suggested a viable education clause claim for such a claim. To the contrary, it is clear that policy judgments of this kind are left to the legislative branch, and are not a matter for the courts.

B. Appellants' Complaint Fails to Establish Standing.

This Court also lacks jurisdiction over Appellants' claims because they cannot establish the requisite standing. This issue was not raised in *Cruz-Guzman*, and therefore

[1] In an effort to avoid this result, Appellants attempt to frame their case as requiring only a "yes or no" question. *See Cruz-Guzman*, 916 N.W.2d at 9. But resolving Appellants' claims in the manner they seek requires more than just determining whether Minnesota's system and funding of education provides a baseline adequacy. *Id.* at 12. Determining whether tenure laws are the cause of any alleged unconstitutional inadequacy would require the court to weigh numerous policy considerations, such as: how should society define or judge effective teaching; if considering student performance, what myriad other factors may affect student outcomes and how should those be weighed in analyzing teacher performance; and does eliminating tenure affect a school's ability to attract, retain, and compensate quality teachers?

the decision does not affect either the analysis underlying the district court decision, Add. 69-73, or set forth in Respondents' Brief at 22-27.

Among other things, Appellants have not established any concrete harm caused by a State Defendant, Resp.'s Br. at 23; Appellants have not alleged the students have suffered any individual or particularized harm, and their concerns about the "risk" of future teacher assignments is speculative, *id.* at 24; Appellants' allegations of statistical injuries are not fairly traceable to tenure laws, and any alleged chain of causation alleged is too attenuated to support standing, *id.* at 24-25; and an injunction against tenure laws would not, by Appellants own admission, remove ineffective teaching, *id.* at 25.

II. APPELLANTS' CLAIMS FAIL AS A MATTER OF LAW.

In addition to the myriad reasons set forth in Respondents' Brief at 27-42, the decision in *Cruz-Guzman* underscored why Appellants' constitutional claims necessarily fail as a matter of law.

A. Appellants' Claims Are All Facial and Fail Because the Challenged Laws Are Not Unconstitutional in All Applications.

Cruz-Guzman did not involve a facial challenge to a state law, whereas Appellants seek only facial relief—the invalidation of the tenure statute. Even assuming Appellants' claims are justiciable, they are not able to meet the "heavy burden of proving that the [challenged laws are] unconstitutional in all applications." *McCaughtry v. City of Red Wing* ("*McCaughtry II*"), 831 N.W.2d 518, 522 (Minn. 2013); *accord United States v. Salerno*, 481 U.S. 739, 745 (1987) (a facial challenge is "the most difficult challenge to

mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

Appellants cannot satisfy this heavy burden because the laws *on their face* provide for dismissal of ineffective and underperforming teachers. *See* Resp.'s Br. at 27-30; Minn. Stat. §§ 122A.40, subds. 9, 13; 122A.41, subd. 5; *see also* Minn. Stat. §§ 122A.40, subd. 8; 122A.41, subd. 5 (requiring districts to conduct regular teacher evaluations, identify underperforming teachers, and to remedy performance issues, including with dismissal if appropriate). *See also Vegara v. State*, 209 Cal.Rptr.3d 532, 554–558 (Cal. Ct. App. 2016) (holding that a similar constitutional challenge to California tenure laws failed because the laws provided for school district discretion and therefore did not inevitably cause the harms the Appellants alleged).

B. Appellants' Education Clause and Equal Protection Claims Are Without Merit Because Tenure Laws Are General and Uniform.

In *Cruz-Guzman*, the Supreme Court reaffirmed the "right to a general and uniform system of education that is thorough and efficient, that is supported by sufficient and uniform funding, and that provides an adequate education to all students in Minnesota." *Cruz-Guzman*, 916 N.W.2d at 11 (citing *Skeen*, 505 N.W.2d at 315). *See also* Minn. Const. art. XIII, § 1. As discussed *supra* at Section I, Appellants do not allege a violation of such a right. Rather, they challenge a general and uniform educational policy with which they disagree.

Cruz-Guzman is the latest in a line of Minnesota Supreme Court cases recognizing that the rights protected by the Education Clause refer to the education system and do not

extend to specific education policies, even where those policies might impact educational quality and outcomes. *See Curryer*, 25 Minn. at 1 (rejecting challenge to statute that regulated textbook purchases for public schools); *State ex rel. Klimek v. Otter Tail County*, 283 N.W. 397, 398 (Minn. 1939) (rejecting challenge to fees associated with transportation to and from school because the Constitution only requires a general and uniform education system, and the "legislature has complied with the mandate of the constitution by enacting the laws under which our present school system is organized"); *Erickson*, 295 N.W. at 303-04 (rejecting challenge to city charter levy limits); *Skeen*, 505 N.W.2d at 315 (finding claim failed because the fundamental right to a general and uniform system of education "does not extend to the *funding* of the education system, beyond providing a basic funding level to assure that a general and uniform system is maintained") The Court in *Cruz-Guzman* did not overturn or call into question this precedent, which mandate dismissal of Appellants' claims.

Appellants' Supplemental Brief argues that *Cruz-Guzman* supports their position, noting that the government " 'may not herd children in an open field to hear lectures by illiterates' to fulfill its duty to provide an education." App.'s Supp. Br. at 6 (quoting *Cruz-Guzman*, 916 N.W.2d at 12). Minnesota law, on its face, plainly requires teacher qualifications and performance that bear no resemblance to such a description. Instead, Minnesota requires education, assessment and testing, and licensure before any teacher may be hired. *See, e.g.,* Minn. Stat. §§ 122A.15-.184; Minn. R. Chapter 8710. *See also* Minnesota Professional Educator Licensing and Standards Board, https://mn.gov/pelsb/. Minnesota law also requires assessment and teacher improvement efforts, and provides

school districts authority to terminate or remove any teacher for cause, including for poor teaching. Minn. Stat. §§ 122A.40, subds 8, 9, 13 (allowing discharge for inefficiency in teaching); 122A.41, subd. 5, 6 (same). *See also* Resp.'s Br. at 7-8.

Furthermore, Appellants' argument that they have a viable claim because they allege that tenure laws "burden" their right to an adequate education fundamentally misunderstands the *Cruz-Guzman* decision. *See* App.'s Br. at 7-8. As discussed above, *Cruz-Guzman* relies on, and does not overturn, longstanding precedent interpreting Minnesota's Education Clause. And in its prior cases, the Minnesota Supreme Court has repeatedly rejected claims that asserted some law or educational policy was burdening a student's education, whether the objection was to laws requiring the purchase of certain textbooks, *Curryer*, 25 Minn. 1; or permitting fees to be charged for transportation, *State ex rel. Klimek*, 283 N.W. at 398; or establishing certain levies and funding, *Erickson*, 295 N.W. at 303-04 and *Skeen*, 505 N.W.2d at 315. The Court in *Cruz-Guzman* not only affirmed this precedent, it acknowledged that 25 years earlier it had recognized that the "the existing system," which at that time included a tenure-based teacher employment system, "continue[d] to meet the basic educational needs of all districts" and did not violate the Education Clause. 916 N.W.2d at 8 (quoting *Skeen*, 505 N.W.2d at 312).

Moreover, Appellants' Amended Complaint does not allege any facts to support a claim that Minnesota's tenure laws cause a system of education that is not sufficiently funded, not sufficiently uniform, or that otherwise fails to meet any basic or baseline requirements of adequacy. *See Cruz-Guzman* at 8-9, 11; Resp.'s Br. at 34-35 (referring

to standards for adequacy referenced in the *Skeen* case, which discussed needs for minimum standards for teachers, minimum school days, education on literacy, math, and civics, etc.); *see also id.* at 9 (noting that Minnesota student test scores rank high nationally).

Finally, tenure laws do not implicate the same concerns as the alleged racial segregation at issue in *Cruz-Guzman*. Teacher tenure has been part of Minnesota's general system of education for almost a century. *See McSherry v. City of St. Paul*, 277 N.W. 541 (Minn. 1938). The Minnesota Supreme Court has repeatedly recognized that teacher tenure laws, far from being a suspect feature of the system, provide "stability, certainty, and permanency of employment on the part of those who had shown by educational attainment and by probationary trial their fitness for the teaching profession." *Berland v. Special Sch. Dist. No. 1, Minneapolis*, 314 N.W.2d 909, 811–12 (Minn. 1981) (quoting *McSherry*, 277 N.W. at 544).

Because Minnesota's teacher tenure laws are part of an education system that applies generally and uniformly to the public schools, the laws do not violate the fundamental right to a general and uniform system, as that right has been delineated by the Minnesota Supreme Court.

CONCLUSION

For the reason stated herein, as well as in the previously-filed Respondents' Brief, Respondents respectfully request the Court affirm the district court on all grounds.

Signature on following page.

Dated: October 10, 2018

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/ **Alethea M. Huyser**
ALETHEA M. HUYSER
Assistant Solicitor General
Atty. Reg. No. 0389270

JASON MARISAM
Assistant Attorney General
Atty. Reg. No. 0398187

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1243 (Voice)
(651) 282-5832 (Fax)
alethea.huyser@ag.state.mn.us

ATTORNEYS FOR RESPONDENTS