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NO. A16-1265

State of Minnesota

In Supreme Court

Alejandro Cruz-Guzman, as guardian and next friend of his minor children, et al.,

Plaintiffs-Petitioners,

vs.

State of Minnesota, et al.,

Defendants-Respondents,

and

Higher Ground Academy, et al.,

Intervenors.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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STATEMENT OF AMICUS[1]

Amicus curiae American Civil Liberties Union of Minnesota ("ACLU-MN") is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil liberties. It is the Minnesota state-wide affiliate of the American Civil Liberties Union and has more than 28,000 supporters. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions. Among those liberties is the fundamental right to an education free of segregation by race.

ACLU-MN supports the rights of Plaintiffs-Petitioners, whose brief does an excellent job of arguing the issues specific to them. But in this brief ACLU-MN offers a broader view of why the Court of Appeals erred when it used the non-justiciability and political-question doctrines to eviscerate Minnesotans' constitutionally-guaranteed fundamental right to an education free of segregation.

INTRODUCTION

Our government is a republic. "[R]epublican theory posits that government has an affirmative duty to cultivate the attributes of citizenship through education." Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & Educ. 93, 96 (1989) ("Hubsch"). Because our government functions through its citizens, the government must provide them with the capacity to perform their

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[1] No counsel for any party authored this brief in whole or in part. Only amicus curiae American Civil Liberties Union of Minnesota and its members, through the payment of their membership fees or other contributions, made any monetary contribution to the preparation or submission of this brief.

responsibilities. *Id.* "In sum, education is essential to self-government." *Id. See also Brown v. Bd. of Education*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship."); *Bd. of Education of the Town of Sauk Centre v. Moore*, 17 Minn. 412, 415 (1871) (the "object" of the Education Clause in the Minnesota Constitution "is to ensure 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"). Not surprisingly then, all 50 state constitutions recognize an affirmative obligation to educate their citizens, Hubsch at 96-97, and the Education Clause of the Minnesota Constitution imposes a duty on the Legislature expressly because the "stability of a republican form of government depends upon the intelligence of the people." Minn. Const. art. XIII, § 1.

The question presented here is whether the non-justiciability and political-question doctrines prevent Minnesota courts from determining whether the Legislature, by establishing a segregated system of education, has violated Minnesotans' fundamental rights of education, equal protection, and due process. ACLU-MN believes that the ability of courts to adjudicate these vital issues is basic and fundamental, and that this Court should reverse the Court of Appeals's decision.

ARGUMENT

The Court of Appeals's narrow view of the fundamental right to education ignores the broader importance of fundamental rights in the Minnesota Constitution and this Court's essential role and responsibility in safeguarding those rights. The text and history of the Minnesota Constitution, as interpreted and applied by this Court, establish that violations

of fundamental rights are not merely justiciable, but a reason why the judiciary exists. The right to education deserves as much protection from this Court as other fundamental rights that the Constitution guarantees. If that right exists—and it does—how can the courts be precluded from determining the nature of that right and deciding whether that right has been violated? The Constitution has charged the Legislature with establishing a system of education to make that fundamental right a reality. If the courts cannot enforce the Legislature's constitutional obligation to establish a "general and uniform system of education," that obligation will simply vanish. It will be as if art. XIII, § 1 were erased from the document.

I. Questions concerning fundamental individual rights are rarely, if ever, nonjusticiable political questions.

This Court's jurisprudence recognizes the importance the framers placed on individual rights. Unlike the U.S. Constitution, the Minnesota Constitution places its Bill of Rights at the beginning of the document, and many provisions offer rights and protections not found in its federal counterpart. Fred L. Morrison, *An Introduction To The Minnesota Constitution*, 20 Wm. Mitchell L. Rev. 287, 300 (1994) ("Morrison"). Other individual rights are found in articles X through XIII, including the fundamental right to education. *Id.* at 300-01. Still other individual rights, such as the right to privacy and other family and property rights, remain unenumerated, yet have been recognized for over half a century. *Id.* at 306-07 & n. 120. *See also State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) ("[W]e have not limited our finding of fundamental rights to those expressly stated in our constitution; this, of course, is consistent with the definition of fundamental rights."). Thus the framers and this Court have long recognized that "states are independently responsible for safeguarding

the rights of their citizens." *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (quotation omitted).

Skeen is in the mainstream of this tradition. This Court in *Skeen* held that "the right to education is *sui generis*" and that the Minnesota Constitution includes a "fundamental right" 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) (quotation omitted).

This Court has an independent responsibility to safeguard the protections embodied in the Minnesota Constitution, a responsibility that takes on special significance in the absence of a corresponding federal right. *See State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004); *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005) (this Court is the "first line of defense for individual liberties"). Because education is not a fundamental right under the federal constitution, *Kahn*, 701 N.W.2d at 830, this Court is the not simply the first line of defense for that right, but the only line.[2] As with other fundamental rights, purported violations of that right merit strict judicial scrutiny. *Skeen*, 505 N.W.2d at 315.

This history demands rejecting efforts to use the "political-question doctrine" to eviscerate the judiciary's power to protect fundamental rights. "According to a conventional view, issues characterized as political questions 'concern matters as to which departments of government other than the courts, or perhaps the electorate as a whole, must have the final

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[2] Although citizens may have recourse through the ballot box in some circumstances, such recourse loses force when state action particularly impinges on the rights of minorities.

say.'" Nat Stern, *The Political Question Doctrine In State Courts*, 35 S.C. L. Rev. 405, 405 (Winter 1984) (quoting Laurence Tribe, *American Constitutional Law* 72 (1978)) ("Stern").

The dangers of allowing the political-question doctrine to cripple the courts' ability to protect fundamental rights are no less than those espoused by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). "[I]t is a general and indisputable rule, that where there is a legal right, there is also a remedy . . . whenever that right is invaded" and it is "emphatically the province and duty of the judicial department to say what the law is." *Id.* at 163, 177, 2 L.Ed. 60. Thus when the Legislature "transgresses its constitutional limits the courts must say so, for they must ascertain and apply the law, and a statute not within constitutional limits is not law." *State v. Fairmont Creamery Co.*, 162 Minn. 146, 157, 202 N.W. 714, 719 (1925).

Similarly, when the litigation presents a question whether executive action is within the constitution, "both the subject of inquiry and the duty of decision are at once and automatically removed from the executive to that of judicial action and duty." *Rockne v. Olson*, 191 Minn. 310, 313, 254 N.W. 5, 7 (1934). *See also Minn. State Bd. of Health by Lawson v. City of Brainerd*, 308 Minn. 24, 40 n.5, 241 N.W.2d 624, 633 n.5 (1976) ("Authority to determine the constitutionality of laws resides in the judiciary."). No proposition is more thoroughly settled. *Rockne*, 191 Minn. at 313, 254 N.W. at 7.

Using the political-question and non-justiciability doctrines to evade the judiciary's responsibility to protect fundamental rights is wrong when applied to a single fundamental right, including the right to education. It is even worse to eviscerate not just one right (say, education) but two more fundamental rights, equal protection and due process. Here, the

Court of Appeals not only attached the anchor of non-justiciability to Plaintiffs'-Petitioners' claims under the Education Clause, it allowed that anchor to drag down Plaintiffs'-Petitioners' separate and independent equal protection and due process claims, when those claims were not even properly before it. Doing so abdicated the court's responsibility to protect, not just one, but three fundamental rights.

In sum, violations of fundamental rights are not matters in which the legislative or executive branch "has the final say." Therefore, this Court should forcefully reject the argument that cases involving fundamental individual rights are not justiciable *See* Stern at 419 ("State courts emphatically resist claims of nonjusticiability in cases involving individual rights . . . ."). This is true of all fundamental rights, including the fundamental right to a "general and uniform system of education which provides an adequate education to all students in Minnesota." *Skeen*, 505 N.W.2d at 315 (quotation omitted).

II. Violations of the fundamental right to education present justiciable, rather than political, questions.

The Court of Appeals was wrong to hold that the Education Clause "textually" commits the right to education to the Legislature. *Cruz-Guzman v. State*, 892 N.W.2d. 533, 539 (Minn. Ct. App. 2017). More than a century ago, this Court held that the Education Clause is not a grant of power to the Legislature, but is instead a mandate from the people of Minnesota that imposes a duty upon the Legislature. *Assoc. Sch. of Indep. Dist. No. 63 of Hector, Renville Cty. v. Sch. Dist. No. 83 of Renville City*, 122 Minn. 254, 258, 142 N.W. 325, 327 (1913). *See also Skeen*, 505 N.W.2d at 313. That duty is "to establish a general and uniform system of public schools," Minn. Const. art. XIII, § 1, and it must not permit a segregated system of education.

The Legislature has discretion to choose the specific means or method to fulfill its constitutional duty. But the existence of that discretion does not preclude judicial review. "What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter . . . that has been specifically delegated to some other department or particular officer of the government, with discretionary power to act." *In re McConaughy*, 106 Minn. 392, 415, 119 N.W. 408, 417 (1909). For example, the courts do not control whether the Legislature chooses to pass a law or to submit a proposed constitutional amendment to the people. *Id.* But the Legislature may exercise the powers delegated to it only so long at it observes the laws, and only so long as it acts within the limits conferred by the Constitution as established by the courts. *Id.*; *Fairmont Creamery Co.*, 162 Minn. at 157, 202 N.W. at 719 ("The Legislature does not define the constitutional limits of its legislative powers, nor ultimately can it decide them."). Departing from or disregarding the law subjects the Legislature to "the restraining and controlling power of the people, acting through the judiciary; for it must be remembered that the people act through the courts, as well as through the executive or the Legislature." *In re McConaughy*, 106 Minn. at 416, 119 N.W. at 417.

This Court has already so ruled with respect to the Education Clause. In *Curryer v. Merrill*, 25 Minn. 1, 3 (1878), this Court recognized legislative discretion but asserted its authority to decide the constitutionality of the Legislature's acts made pursuant to the Education Clause. Accordingly here, Plaintiffs'-Petitioners' allegations that the system of education established by the Legislature violates the fundamental right to education, and constitutes a breach of its constitutional duty, are proper subjects of judicial review.

III. Court intervention is needed to halt the ongoing resegregation of Minnesota schools.

This Court has long viewed its powers as commensurate with its constitutional appointment to settle the law. *O'Ferrall v. Colby*, 2 Minn. 180, 189 (Minn. 1858). A brief history of educational segregation in Minnesota underscores the essential role of Minnesota courts in guaranteeing education free from segregation by race. That history shows that by any measure the Legislature's desegregation efforts have failed; in 2017, Minneapolis and Saint Paul schools are segregated on the basis of both race and socioeconomic status.

The promise of *Brown v. Board of Education* came to Minnesota in the early 1970s, when the Minnesota Board of Education ("Board") first promulgated desegregation and integration policies that it implemented using administrative rules. 5 Minn. Code of Agency Rules § 1.0620 (1973). In 1971, a federal lawsuit charged the Minneapolis School District with *de jure* segregation. *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972). The federal district court found the district had intentionally maintained or increased racial segregation in Minneapolis public schools. *Id.* The court ordered the district to implement a desegregation plan to limit to 35 percent the proportion of "minority" students in any one school. *Id.* at 810. The court retained jurisdiction to oversee the desegregation plan and required semiannual reports. *Id.* at 811.

By the late 1970s, the combination of court intervention and action by the Board had achieved a demonstrable reduction in the segregation of Minneapolis public schools. *School Desegregation in Minneapolis, Minnesota*, A Staff Report of the United States Commission on Civil Rights, U.S. Commission on Civil Rights (May 1977) ("Commission Report"). The

Commission Report found that the Minneapolis desegregation plan had largely achieved its goal.

In 1977 and again in 1978, the Minneapolis school district unsuccessfully sought to be released from the court's decree and supervision. *Booker v. Special Sch. Dist. No. 1*, 451 F. Supp. 659 (D. Minn. 1978), *aff'd* 585 F.2d 347 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (July 2, 1979). The federal court ultimately released the Minneapolis School District from its desegregation order in 1983. *See* John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 Hamline J. Pub. L. & Policy 337, 381 & n. 268 (Spring 1996). The court released the district, in part, because it assumed the desegregation rules would be enforced. *Id.* That same year saw the codification of school desegregation rules in Minnesota Rules Chapter 3535, which largely adopted those put in place during the court's supervision.

During the three decades since the federal court released the Minneapolis school district from supervision, educational segregation has returned to Minneapolis. In 1993 the Legislature repealed some of the desegregation rules. 1993 Minn. Laws, ch. 224, art. 12, § 39 at 1197. At the same time, the Legislature authorized the Board to make "rules relating to desegregation," but prohibited the Board from amending the existing rules without specific authority. *Id.* at 1187. In 1995, the Legislature enacted the first Integration Revenue Statute providing "targeted-needs revenue" for programs established under a desegregation plan. Minn. Stat. § 124.312 (Supp. 1995) (later renumbered to Minn. Stat. § 124D.86).

Following an extensive rulemaking process, new desegregation/integration rules were approved and adopted in 1999 ("1999 Rules"). *See In re Proposed Adoption of Rules Related to Desegregation, Minn. R. Parts 3535.0100 to 3535.0780*, Dkt. No. 09-1300-10448 (Mar. 19, 1999);

24 Minn. Reg. 77 (July 6, 1999). The 1999 Rules were proposed, in part, because of a desire to promote racial integration without requiring schools or districts to maintain any particular degree of "racial balance." Minnesota Dept. of Education, *Statement of Need and Reasonableness, In re Proposed Rules Relating to Desegregation: Minnesota Rules Chapter 3535* (Nov. 24, 1998).[3] The Integration Revenue Statute was amended several times between 1999 and 2012, but the 1999 Rules were not. Minnesota Dept. of Education, *Statement of Need and Reasonableness, Proposed Rules Governing Achievement and Integration for Minnesota for Minnesota Rules, Chapter 3535* (Nov. 5, 2015) at 9.[4]

In 2005, the Office of Legislative Auditor ("OLA") evaluated the state's Integration Revenue Program[5] and found it lacking. Minnesota Office of the Legislative Auditor Summary Report (Nov. 2005).[6] Specifically, the OLA found that (i) racial concentration had increased in some school districts that had participated in the program; (ii) the Department of Education had not provided consistent or required oversight; (iii) certain program expenditures were "questionable;" (iv) neither the state nor the school districts had adequately addressed the results of the program; and (v) the program provides "disincentives for districts to achieve racial balance among their schools." *Id.*

Partly in response to the OLA's report, the Legislature passed in 2013 the Achievement and Integration for Minnesota Act, Minn. Stat. §§ 124D.861 *et seq.* ("AIM Act"). Unlike its predecessor, which focused only on racial integration, the AIM Act focuses

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[3] Available at https://www.leg.state.mn.us/lrl/sonar/sonar

[4] Available at https://www.leg.state.mn.us/lrl/sonar/sonar

[5] As established under the Integration Revenue Statute and the 1999 Rules.

[6] Available at http://www.auditor.leg.state.mn.us/ped/2005/integrev.htm.

on student achievement, racial integration, and economic integration, and it placed limits on the use of "integration revenue." Minn. Stat. § 124D.861. The 1999 Rules remain in effect and proposed changes were rejected in March 2016 by the Office of Administrative Hearings.[7]

Today, Minneapolis and Saint Paul schools are more segregated than in the 1970s. *See generally* Institute on Metropolitan Opportunity, *Why Are the Twin Cities So Segregated?* (Feb. 2015) at 6.[8] These changes reflect deliberate choices by the co-ordinate branches of government and their political subdivisions. *See generally id.* That is why it is so important for Minnesota courts to resist calls to abdicate their constitutional responsibility to end segregated education in Minnesota. It is not hyperbole to say that the stability of our republican government depends on it.

CONCLUSION

Few would deny the pernicious, obstinate nature of segregation. Fewer still would deny that the Minnesota Constitution guarantees an education free from segregation by race. Questions involving the fundamental right to education—including the system established by the Legislature in furtherance of that right—are justiciable. To hold otherwise would be to abandon the people of Minnesota, whose Constitution guarantees their fundamental and individual rights. This Court, the very institution our framers established to protect those rights, should not shirk its responsibility to do so now.

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[7] *In re Proposed Rules of the Dept. of Education Governing Achievement and Integration, Minnesota Rules Ch. 3535*, OAH 65-1300-32227 (Mar. 21, 2016). Available at https://mn.gov/oah/assets/1300-32227-education-achievement-and-integration-rule-report_tcm19-194466.pdf.

[8] Available at https://www.law.umn.edu/institute-metropolitan-opportunity/school-integration-and-segregation.

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I hereby certify that 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 3,079 words. This brief was prepared using Microsoft Word 2010.

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