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Plaintiffs,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

DOCKET NO. MER-L-001076-18

Civil Action

PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO THE STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

and

PLEASANTVILLE BOARD OF EDUCATION and WILDWOOD BOARD OF EDUCATION,

Intervenor-Plaintiffs,

v.

THE STATE OF NEW JERSEY; NEW JERSEY STATE BOARD OF EDUCATION; and LAMONT REPOLLET, Acting Commissioner, State Department of Education,

Defendants,

and

NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC.,; BELOVED COMMUNITY CHARTER SCHOOL; ANA MARIA DE LA ROCHE ARAQUE; TAFSHIER COSBY; DIANE GUTIERREZ; CAMDEN PREP, INC.; KIPP COOPER NORCROSS, INC.; and MASTERY SCHOOLS OF CAMDEN, INC.;

Intervenor-Defendants.

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INTRODUCTION

Plaintiffs' claims are simple: the State's own statistical data demonstrate that our public schools remain severely segregated on the basis of race and socioeconomic status. Indeed, New Jersey's schools are tragically – and embarrassingly – among the most segregated in the nation. Between the 2015-2016 and 2019-2020 school years, an average of 276,586 Black and Latino students (46.5% of all Black and Latino students) attended schools each year that were more than 90% non-White, and 377,547 Black and Latino students (63.5%) attended schools that were more than 75% non-White. Conversely, an average of 175,063 White students (28.9% of all White students) attended schools each year that were more than 80% White, and 244,177 White students (40.3%) attended schools that were more than 75% White. This is a fact that should not be accepted or tolerated and, as a matter of both constitutional and statutory law, the State is responsible for addressing it by taking appropriate steps to integrate its public schools.

When asked about this lawsuit in the final gubernatorial debate, Governor Philip D. Murphy confessed that "segregation exists, inequities exist." And yet, despite that admission, the Governor minimized the stakes of Plaintiffs' suit, recounting that "the [State's] defending [the instant suit] is a technicality, that's the obligation of the Attorney General. The Attorney

General doesn't have a choice."[1] That, of course, is not true: the State could, if it wished, take steps to address the problem identified in this lawsuit. But neither this administration nor any of its predecessors have done so. Instead, in a brief that is destined to be viewed by history as a remarkable document, harkening back to segregationist principles of "separate but equal," the State defends New Jersey's practices, making clear that, whatever its promises, it takes neither this case, nor the underlying problem that it seeks to address, at all seriously.

This is a sad and alarming abandonment of the egalitarian, desegregationist principles which New Jersey has consistently and appropriately announced as one of its jurisprudential bedrocks. Five decades ago, the New Jersey Supreme Court eloquently invoked those principles, making clear that "[o]ur own state's policy against racial discrimination and segregation in the public schools has been long standing and vigorous[.]" *Booker v. Bd. of Educ. of Plainfield*, 45 N.J. 161, 173 (1965). In outlawing *de facto* segregation, our Supreme Court sounded a hopeful tone:

> It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the state[] may not justly deprive the oncoming generation of the educational advantages which

[1] October 12, 2021 New Jersey Gubernatorial Debate, C-SPAN, at 31:30—33:00, *available at* https://www.c-span.org/video/?515129-1/jersey-gubernatorial-debate (last visited Jan. 16, 2022).

> are its due, and indeed, as a nation, we cannot afford standing by.
>
> [*Id.* at 171.]

Fifty-five years later, however, students in New Jersey continue to be segregated on the basis of race and socioeconomic status. Indeed, the State's own data reinforces this inevitable conclusion, and though it tries to nitpick the Plaintiff's statistical showing, it never offers alternative numbers. Worse, the State seeks to abandon decades of constitutional law by importing an element of "discriminatory intent" into the argument. But we in New Jersey refuse to accept even *de facto* segregation, as a matter of law, and we understand that, as our Supreme Court has specifically held, even well-educated students are deprived of a Thorough and Efficient Education if it occurs in a segregated setting. Moreover, as opposed to federal law, New Jersey has never accepted *de facto* segregation, and rightfully so: separation along racial and socioeconomic lines is harmful to our children and to the future of our State. Segregation denies students the opportunity to learn from and alongside those who come from different backgrounds. It limits our ability to see the humanity and complexity of people who on the surface may seem to be unlike us. And it stifles our ability to appreciate – rather than fear – racial and socioeconomic difference.

In its brief, the State rejects these fundamental principles. But doing so is not, as the Governor characterized it, some mere "technicality." Rather, these principles are the backbone of a State system committed to racial justice and substantive equality, and the State's rejection of their import is both troubling and regressive. Moreover, underlying those basic tenets of New Jersey law is a reality for New Jersey's children, including the Plaintiffs. For them, each year that passes is another in which they, and hundreds of thousands of other New Jersey public school students - of all races and backgrounds - are deprived of their constitutional rights to an education free from racial, ethnic, and socioeconomic isolation.

We must all commit to acting quickly to recognize and remedy this problem so that it cannot harm future generations of New Jersey students. Granting Plaintiffs' motion for partial summary judgment on liability will be a first step towards providing the educational environment that all of New Jersey's students deserve. Then, the truly hard work can start: finding a way to ensure that no student is deprived of a constitutionally sufficient public education, no matter their race, socioeconomic status, or zip code.

ARGUMENT

I. PLAINTIFFS PRESENT COMPELLING AND UNREFUTED STATISTICS DEMONSTRATING *DE FACTO* SEGREGATION IN NEW JERSEY'S PUBLIC SCHOOL SYSTEM.

A. Additional Demographic Data From the Last Five Years Only Confirm that New Jersey's Schools are Segregated by Race and Socioeconomic Status.

The undisputed data are clear: New Jersey's students attend schools that are racially and socioeconomically segregated.

The parties do not contest the accuracy of that data. Sb[2] 6 n.4 ("The data cited in the amended complaint are not disputed."); *id.* at 28 ("There are no material facts in dispute here and the matter is ripe for summary judgment."); Cb 1 ("Intervenor-Defendants acknowledge that Plaintiffs' case for liability relies exclusively on statistical facts that have been provided by the State Defendants."); Weber Cert., Exh. H., Deposition Transcript of Dr. Bari Anhalt Erlichson (Erlichson Dep.) 9:20-10:2; Weber Cert., Exh. J, Deposition Transcript of Dr. Nathan Barrett (Barrett Dep.) 69:15-20.[3] And the resulting showing, described at length

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[2] Throughout this brief, Plaintiffs use "Pb" to refer to Plaintiffs' September 27, 2019 Brief in Support of their Motion for Partial Summary Judgment; "Sb" to refer to the State Defendants' December 17, 2021 Brief in Support of its Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Partial Summary Judgment; "Cb" to refer to the Intervenor-Defendants New Jersey Charter Schools Association, et al.'s (the Charter School Intervenor-Defendants), December 17, 2021 Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment; and "Rb" to refer to Intervenor-Defendants Camden Prep, Inc., et al.'s (the Renaissance Schools Intervenor-Defendants) December 16, 2021 letter brief in opposition to plaintiffs' motion for partial summary judgment.

[3] For the Court's convenience, throughout this brief, in addition to the September 25, 2019 Certification of Dr. Ryan W. Coughlan, Plaintiffs rely on the exhibits attached to the December 17, 2021 Certification of Christopher Weber (Weber Cert.) submitted in support of the State Defendants' cross-motion.

in the Amended Complaint, *see* Am. Compl. ¶¶ 23-31, 40(A-H), establishes beyond any real dispute that an extreme percentage of Black and Latino public school students attend schools that cannot possibly be described as diverse. Thus, as of 2016-17 school year:

- 24.8% of Black public school students attended schools that consisted of more than 99% non-White students, while an additional 24.4% of Black public school students attended schools that consisted of between 90% and 99% non-White students. In the aggregate, in that year, upon which the Complaint in this matter relied, almost two-thirds (66.0%) of Black public school students attended schools that were more than 75% non-White. *Id.* ¶ 24.
- 14.3% of Latino public school students attended schools that were at least 99% non-White, and an additional 30.2% of Latino public school students attended schools that consisted of between 90% and 99% non-White students. In the aggregate, over six in ten (61.9%) Latino public school students then attended schools that were more than 75% non-White. *Id.* ¶ 25.
- Collectively, almost half (46.2%) of Black and Latino public school students attended schools that were more than 90% non-White, and 63% of Black and Latino public

school students attended schools that were more than 75% non-White. *Id.* ¶ 27.

- 31.3% of White students attended schools that were more than 80% White, and over four in ten (42.8%) attended schools that were more than 75% White. *Id.* ¶ 29.
- 37 of the State's 88 charter schools had student bodies that were 99% or more non-White, while 64 charter schools have student bodies that were more than 90% non-White. In 61 of 88 charter schools the Black and Latino population exceeded 80%, and in 54 the Black and Latino population exceeded 90%. In sum, over 72% of charter schools had fewer than 10% White students, while 46 charter schools had over 70% students who were qualified for free or reduced lunch. Certification of Dr. Ryan W. Coughlan (annexed to Plaintiffs' motion) (Coughlan Cert.) ¶ 21.

Plaintiffs' Amended Complaint and moving brief also compiled district-level data for eight counties demonstrating that New Jersey's public schools are segregated by both race and poverty when comparing districts within the same county.[4] Am. Compl. ¶ 40 (A-H); Pb 9-13. Essex County is illustrative. During the 2016-

[4] Plaintiffs measure students' poverty using the usual measure of students eligible for free or reduced lunch; Defendants do not dispute this is a fair measure of poverty. *See, e.g.*, Barrett Dep. 18:14-19:10.

2017 school year, four school districts in Essex County had student populations that were at least 90% non-White and at least 62% in poverty – East Orange (96.6% non-White; 62.9% poverty), Irvington (99.7% non-White; 85.7% poverty), Newark (92.1% non-White; 79.4% poverty), and Orange (99.7% non-White; 65.9% poverty). Am. Compl. ¶ 40(A); *see* Pb 9. But during the same school year, nine districts in the same county had at least 75% White students and fewer than 10% students living in poverty - North Caldwell Borough (90.3% White; 0% poverty), Fairfield Township (86.3% White; 2.7% poverty), West Essex Regional (86.2% White; 3.6% poverty), Cedar Grove Township (84.5% White; 2.4% poverty), Essex Fells Borough (81.6% White; 0% poverty), Caldwell-West Caldwell (81.6% White; 7.6% poverty), Verona Borough (79.8% White; 0% poverty), Roseland Borough (77% White; 2.6% poverty), and Glen Ridge Borough (75.3% White; 0.1% poverty), Coughlan Cert. ¶ 28, Exh. E; two additional districts had fewer than 10% of its students living in poverty - Millburn Township (1.2% poverty) and Livingston Township (1.6% poverty), *id.* ¶ 28, Exh. F. As Plaintiffs' moving brief describes, other counties show similar patterns of segregation. *See* Pb 8-13 (same analysis for Union, Passaic, Middlesex, Camden, Mercer, and Monmouth Counties).

Throughout its briefs, the State and Charter Defendants, rather than confronting this data, which so clearly but sadly demonstrate the endemic segregation in New Jersey's public

schools, choose instead to criticize Plaintiffs for providing data only from the 2016-2017 school year – the most recent data at the time Plaintiffs filed the Amended Complaint. *See, e.g.*, Sb 30; Cb 11. In doing so, Defendants almost entirely ignore that Plaintiffs have since provided additional data spanning the *five* most recent school years – from 2015-2016 to 2019-2020. *See* Weber Cert., Exh. T, Supplemental Certification of Dr. Ryan W. Coughlan (Coughlan Supp. Cert.). That is – again using the State's own data – Plaintiffs have supplemented the data cited in paragraphs 24, 25, 27, 29, 31 and 40(A-H) of the Amended Complaint. *See* Coughlan Supp. Cert. ¶¶ 3-8, Exhs. A-C.

The full extent of the State Defendants' response to these five-year averages is addressed in one footnoted sentence. Sb 30, n.13 ("This additional data does not cure the defect identified by the State defendants."); the Charter Defendants essentially ignore them. But those five-year data reveal similar, if not worse, levels of segregation:

- Between the 2015-2016 and 2019-2020 school years, there were an average of 208,470 Black public school students in New Jersey. Each year, an average of 54,108 Black students (26%) attended public schools that were over 99% non-White, and 48,389 Black students (23.2%) attended public schools that were between 90% and 99% non-White. In the aggregate, an average of 129,316 Black

students (62%) attended schools each year that were more than 80% non-White, while 137,977 Black students (66.2%) attended schools that were more than 75% non-White. Coughlan Supp. Cert ¶ 4(a), Exh. A (supplementing Am. Compl. ¶ 24).

- Between the 2015-2016 and 2019-2020 school years, there were an average of 386,224 Latino public school students in New Jersey. Each year, an average of 60,540 Latino students (15.7%) attended schools that were at least 99% non-White, and 112,953 Latino students (29.2%) attended schools that were between 90% and 99% non-White. In the aggregate, an average of 224,901 Latino students (58.2%) attended schools that were more than 80% non-White, and 239,570 Latino students (62.0%) attended schools that were more than 75% non-White. *Id.* ¶ 4(b), Exh. A (supplementing Am. Compl. ¶ 25).
- On a statewide basis, between the 2015-2016 and 2019-2020 school years, of the average 594,693 Black and Latino public school students each year, approximately 276,586 (46.5% of all Black and Latino students) attended schools that were more than 90% non-White, and 377,547 Black and Latino students (63.5%) attended schools that were more than 75% non-White. *Id.* ¶ 4(c), Exh. A (supplementing Am. Compl. ¶ 27).

- Between the 2015-2016 and 2019-2020 school years, there were an average of 606,553 White public school students in New Jersey. Each year, an average of 175,063 White students (28.9%) attended schools that were more than 80% White, and 244,177 (40.3%) attended schools that were more than 75% White. *Id.* ¶ 4(d), Exh. A (supplementing Am. Compl. ¶ 29).
- Between the 2015-2016 and 2019-2020 school years, an average of 72.4% of the State's charter schools had fewer than 10% White students, and 80.7% of charter school students attended schools that were more than 90% non-White. *Id.* ¶ 5, Exh. B (supplementing Am. Compl. ¶ 31).

Plaintiffs also provide five-year data corresponding to the district-level statistics discussed above and originally included in the Amended Complaint and moving brief. *Id.* ¶ 7(A-H), Exh. C; *see* Am. Compl. ¶ 40(A-H); Pb 8-13. Those data demonstrate that the demographics of those school districts are essentially identical to their 2016-2017 enrollment demographics.

However one views these statistics, the evidence is clear: under any reasonable definition, New Jersey's schools have been and remain segregated by race and socioeconomic status.

B. The New Jersey Supreme Court Has Used Similar Statistical Measures in Determining *De Facto* Segregation.

Much of Defendants' arguments, throughout their briefs, amount to criticisms of Plaintiffs' data analysis. But as Plaintiffs explain more fully *infra*, Sections II.B. and III, the statistical showing here is far more exhaustive, and demonstrates even greater disparities than were found to amount to unconstitutional segregation in *Booker*, *Jenkins*, and *North Haledon*. That said, Plaintiffs here provide the same type of undisputed statistical data that our Supreme Court has repeatedly considered in determining whether *de facto* segregation exists and then finding that, in fact, it does. *See, e.g., In re Petition for Auth. to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist.*, 181 N.J. 161, 170-71 (2004) (evaluating the "negative impact on racial balance" by examining racial makeup of student population); *Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. 483, 487-88 (1971) (same); *Booker*, 45 N.J. at 166 (same). Nor, it should be emphasized, does any Defendant provide contrary data; instead, as mentioned above, they fully accept the accuracy of the data utilized by Plaintiffs which, after all, are the State's own data.

Nor are Defendants' attempts to poke holes in Plaintiffs' statistical showing correct, logical or even fair; they can be read only as attempts to obfuscate the segregated nature of New Jersey's public schools. First, the State criticizes Plaintiffs

for not providing data on each and every school district, and indeed, every single school, in New Jersey. Sb 66 ("While plaintiffs allege unconstitutional segregation in all of the State's school districts, they have not begun the detailed and necessary investigation and proofs for each and every school district that the courts in *Booker*, *Jenkins*, *Englewood Cliffs*, and *North Haledon* enjoyed."). But, of course, this argument completely ignores Plaintiff's compelling showing of the extensive data documenting *statewide* school segregation – including, as discussed *supra* Section I.A., statewide data for the five most recent school years. *See* Coughlan Supp. Cert ¶¶ 4-5, Exhs. A-B. And beyond that statewide data, Plaintiffs provide numerous examples of extreme school segregation, including for school districts in eight separate counties throughout the State. *See* Am. Compl. ¶ 40(A-H); Coughlan Supp. Cert. ¶ 7(A-H), Exh. C. The statewide nature of Plaintiffs' statistics is clear and what it shows is unquestionable; nor does the State provide any data to purportedly support its claim that New Jersey's schools are not unconstitutionally segregated. This is not a sufficient basis upon which to contest a motion for summary judgment – "the opponent must do more than simply show that there is some metaphysical doubt as to the material facts," *Triffin v. American Intern.* 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quotation omitted), much less so cross-move for such relief.

Next, the State contends that current levels of school segregation should be forgiven because "our State's demographics are rapidly evolving." Sb 46. In particular, the State worries that coming up with a remedy may be difficult because "the percentage of New Jersey's [W]hite population is declining, while the percentage of certain non-[W]hite populations is increasing." *Id.* at 55; *see id.* at 46-47. Of course, Plaintiffs do not dispute, and never have disputed, that the percentage of White residents in New Jersey is declining in comparison to other racial and ethnic groups. But the New Jersey Supreme Court, in *North Haledon*, made it perfectly clear that "demographic trend[s]" cannot be used as "an excuse" to fail to counteract segregation. *N. Haledon*, 181 N.J. at 183.

In that case, the North Haledon school district sought to withdraw its students from the Manchester Regional school district, which would have resulted in reducing the percentage of White students by either 9% and 9.4% (from an original 53.7%). *Id.* at 170-71. The Court acknowledged that the district already had seen a declining percentage of White students. *Id.* at 183 ("[I]n this case, demographic trends are contributing to a steady decrease in the number of [W]hite students attending Manchester Regional[.]"). Nonetheless, the Court held that "[r]ather than use the demographic trend as an excuse for approving [withdrawal], the Board should have considered the ameliorative effect of denying

[withdrawal] on the racial balance at Manchester Regional." *Ibid.* (citation omitted). In the end, the Court decried the Board of Review's "attitude of helplessness" in the face of changing demographics, *id.* at 175, and halted the withdrawal, *id.* at 184. The rule of law that emerged is that changing demographics are no excuse for segregation. Moreover, Plaintiffs' longitudinal data, spanning the time period from the 2015-2016 to 2019-2020 school years, undercuts any argument that the passage of time has in any way reduced segregation in New Jersey's schools. *See* Coughlan Supp. Cert. ¶¶ 2-5, 7-8, Exh. A-C.[5]

The State Defendants also criticize Plaintiffs' analysis for failing to consider diversity within racial and ethnic groups. Sb 56-57; 74-78. Plaintiffs acknowledge, of course, that there is diversity within, as well as between, racial groups; indeed, in some fundamental respect, every person is different, so the State's point is no more than a truism, but not relevant. The State's argument ignores the reality that neither the federal courts nor our courts ever have suggested that diversity within the Black or Latino communities can excuse the segregation of Black and Latino

[5] The State Defendants specifically cite the demographics of the Trenton, Irvington, and Orange school districts and contend that because there have been changes in demographics over the last five years, "any remedy would have to be reviewed and fundamentally altered on a yearly basis." Sb 46-47. But the State ignores that these districts remain almost entirely devoid of White students, *see* Coughlan Supp. Cert. Exh. C, and thus support, rather than undermine in any way, Plaintiffs' claims. The State also does not mention, let alone address, the numerous other districts within which demographics have not substantially changed - or segregation has intensified - since the 2015-2016 school year. *Ibid.*

people in schools or in other public facilities. Most significantly, the State's position is an effort to manipulate the word "diversity" in an obvious effort to simply ignore the history of school segregation in New Jersey and elsewhere, which in fact, has long separated White students from students of color – including *both* Black *and* Latino students. *See* Weber Cert., Exh. I, Deposition Transcript of Dr. Ryan W. Coughlan (Coughlan Dep.) 99:6-100:3 ("[T]he reality is here that schools are segregated when there is a population of [W]hite students who are separated or unevenly distributed from students of different races. . . . [T]here is still a segregation if you have a population of [W]hite students in the space and they are separated from students of other races. And there's a long really terrible history that's led to that."); 103:22-104:5 ("[T]here is a deep, dark history of segregating [B]lack people and there's another distinct deep, dark history of segregating Hispanic people. And while those two histories are not the same, there is overlap. And so when you concentrate those two [] groups of students in one place away from [W]hite people, that is directly attached to our history of segregation in this country.").[6]

[6] Among the states, New Jersey is unique in its extreme segregation of Black and Latino students. According to a November 2017 report published by Plaintiffs' expert, Dr. Ryan W. Coughlan, and other scholars, New Jersey has the sixth highest rate of segregation of Black students among the states, and the seventh highest with respect to Latinos. Am. Compl. ¶ 22, n.3 (citing Gary Orfield, Jongyeon Ee, & Ryan Coughlan, *New Jersey's Segregated Schools: Trends and Paths Forward* 6 (UCLA Civil Rights Project 2017), *available at* https://www.civilrightsproject.ucla.edu/research/k-12-education/ integration-

Nor does the State even attempt to point to the kind of intra-group data that it would use for the analysis that it claims should have occurred; ironically, of course, it cannot do so because it does not maintain that type of data. Thus, the State does not provide the very analysis which it claims is somehow required. Indeed, the absence of such data belies the State's claim of its importance. But most significantly, the data that the State does maintain relentlessly demonstrates the unrebutted and irrebuttable fact that New Jersey schools have long been, and remain, deeply segregated.

C. More Complicated Methods of Statistical Analysis are Not Necessary to Demonstrate *De Facto* Segregation, But Other Methods Similarly Confirm Such Segregation in New Jersey's Schools.

Plaintiffs' straightforward data demonstrate a truth clear to anyone who has spent time in New Jersey's schools, a reality that our Governor has admitted: "segregation exists."[7] But both the State and Charter Defendants, and particularly the Charter Intervenor-Defendants, contend that Plaintiffs should have used more "robust measures" of segregation, including more complex

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and-diversity/new-jerseys-segregated-schools-trends-and-paths-forward/New-Jersey-report-final-110917.pdf (last visited Jan. 16, 2022)).

[7] October 12, 2021 New Jersey Gubernatorial Debate, C-SPAN, at 31:30—33:00, *available at* https://www.c-span.org/video/?515129-1/jersey-gubernatorial-debate (last visited Jan. 16, 2022) (Governor Murphy, in response to a question about Plaintiffs' lawsuit: "The [State's] defending [the instant case] is a technicality, that's the obligation of the Attorney General, the Attorney General doesn't have a choice. But the bigger question is, do we accept that the legacy of slavery still exists in our state today? And the answer is overwhelmingly yes. . . . And segregation exists, inequities exist.").

statistical analyses. *See* Cb 13-17. But whatever measure is used – including the measures proposed by the State and Charter Defendants – the reality of segregation is impossible to ignore.

As discussed more fully *infra*, Section II.B., while the State seeks to manufacture a dispute of fact premised on the notion that Plaintiffs do not "define" segregation, the State – unsurprisingly – does not offer its own definition of segregation. Nor does it offer any statistics in support of its own motion for summary judgment seeking a judgment that it has fulfilled its obligation to ensure integrated public schools. Instead, the State argues that "[e]ven under a single-race definition of segregation . . . which is somewhat in line with Supreme Court precedent – plaintiffs fail to demonstrate rampant statewide segregation." Sb 58-59. In support of its contention, it points to numbers calculated by its expert, Dr. Bari Anhalt Erlichson, demonstrating that during the 2019-2020 school year, 85,827 New Jersey students attended a school comprised of 90% or more students of one race or ethnicity. Sb 59 (citing Weber Cert., Exh. A, Report of Dr. Bari Anhalt Erlichson (Erlichson Rep.) at 7). Even leaving aside that this data does not in any way account for the segregation of *non-White* students as a whole, or show how Plaintiffs' statistical showing is otherwise inadequate, it is shocking and disappointing that the State cites these statistics in an effort to show that our schools

are adequately *integrated*,[8] when they so obviously show the opposite.[9] Likewise, the State's expert inappropriately celebrates the fact that *only* 12.9% of the State's Hispanic students attend such extremely racially isolated schools. Erlichson Rep. at 7. But far from a reason for celebration, as the Governor seemed to understand, even under that extremely narrow definition of segregation, nearly 86,000 New Jersey students attend severely racially homogeneous schools, a constitutionally intolerable result. Nor, if the State believes its contention that only a modest number of students is affected by segregation, can it at the same time contend, as it ironically does, that New Jersey's problem of school segregation is too great to remediate.

The Charter Defendants, on the other hand, focus more on criticizing Plaintiffs' expert for not using other measures of segregation, specifically a Dissimilarity Index (DI) and Interaction Index (II), which consider so-called "geospatial" analyses.[10] *See* Cb 4. Despite acknowledging that "[n]either of

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[8] Dr. Erlichson testified that she had no opinion on whether it was a problem that nearly 86,000 students attend schools that are comprised of 90% or more students of one race. Erlichson Dep. 43:2-15 ("I didn't offer an opinion about that").

[9] The State also highlights that only 148 schools in the State meet this 90% threshold, which means that "only" 6.2% of New Jersey students – a total of 85,827 students - attend schools with 90% students of one race or ethnicity. Sb 59 (citing Erlichson Rep. at 7).

[10] As defined by the Charter Defendants' expert, DI measures "evenness": "DI measures the proportion of students from one group that would have to switch schools so that every school's racial proportion reflects that of the defined community. The DI is measured from 0 to 1 with 0 being completely integrated and 1 being completely segregated." Weber Cert., Exh. E, Affidavit of Dr. Nathan Barrett (Barrett Aff.) ¶ 16. II measures "exposure": II "measures the racial proportions in a defined community and considers how likely a student of

these measures are perfect tools for evaluating whether levels of racial imbalance in schools amounts to unconstitutional segregation," they argue that "when viewed in context, [DI and II] are arguably more useful to serve as a benchmark for setting school integration goals." *Id.* at 14. And yet, the Charter Defendants fail to discuss any of their expert's own DI and II measurements in their brief. Upon closer inspection, that omission is likely because (1) their expert never calculated any II measures; and (2) their expert's DI measures actually support Plaintiffs' claims. Thus, Dr. Nathan Barrett, the Charter Defendants' expert, explained that DI "measures the proportion of students from one group [*i.e.*, one race or ethnicity] that would have to switch schools so that every school's racial proportion reflects that of the defined community." Weber Cert., Exh. E, Affidavit of Dr. Nathan Barrett (Barrett Aff.) ¶ 16. In other words, DI "looks at the racial proportions in a defined community and then assesses how well each school mirrors the underlying proportion." Cb 14; *see* Barrett Aff. p. 24 ("Each school contributes to the dissimilarity index unless that school's proportion exactly matches that of the community."). Dr. Barrett, then, provides DI calculations for school districts with at least one charter school. Barrett Aff. Table A1.

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one race is likely to encounter a student of a different race within their school." *Id.* at ¶ 18.

Not only does Dr. Barrett's analysis not contradict the plain and undisputed State segregation data set forth in the Amended Complaint, but instead of weakening Plaintiffs' claims, Dr. Barrett's calculations serve only to highlight the extent to which N.J.S.A. 18A:38-1 (the "Residency Statute") is the primary driver of segregation in New Jersey's schools because Dr. Barrett defines the overall "community" from which students are drawn as a *school district*. Barrett Dep. 38:9-39:6; Barrett Aff. p. 25 (referring to his calculations of "New Jersey districts with at least 1 charter school"). As Dr. Barrett explains in his report:

> For example, documenting that a school's student population is comprised of 90% Black students and 10% White students without reference to the demographics of the community [*i.e.* school district] from which that school draws students can result in analyses and conclusions that are arbitrary. If, in the above example, the demographics of that community [*i.e.*, school district] are 90% Black and 10% White, then that school perfectly reflects the amount of integration present in the community from which it draws students. Thus, the school's contribution to the DI would be zero – or completely integrated.
>
> [Barrett Aff. ¶¶ 20-21.]

In other words, the Charter Schools' defense is that the demographics of individual schools within a single school district almost always match the demographics of the school district from which the schools draw students. But this is not only undisputed – it is the very underpinning for Plaintiffs' claims. Pb 33 ("[I]f

a public school student resides in a racially segregated community, then that student almost inevitably will have to attend a racially segregated school."); Am. Compl. ¶ 41 ("The fact of residential segregation, combined with district boundaries that track such segregation, and the attendance requirements of N.J.S.A. 18A:38-1 [*i.e.* the Residency Statute] yield segregation on the basis of race and socioeconomic class[.]").[11] Rather than rebut Plaintiffs' claims, then, the Charter Schools' calculations demonstrate the direct causal relationship between (1) arbitrarily drawn school district boundaries; (2) the Residency Statute's command that students only attend schools within those district boundaries; and (3) the resulting racial imbalance in individual schools within those districts. Dr. Barrett provides other data that similarly supports this causal link. He looked at five counties – Camden, Hudson, Essex, Passaic, and Mercer – and found that in each, "a small number of public schools enroll a disproportionate number of the White students who have chosen public school." Barrett Aff. ¶ 49. He continued, "[i]n each county, the top 10 percent of White enrolling schools accounts for a disproportionate segment of total White student enrollment – just like they do when you examine the

[11] Even within the school districts that Dr. Barrett examined, a number of districts displayed extremely high DI measures. In other words, even within these districts, individual schools do not match the district's overall demographics. *See* Barrett Aff., p. 26, Table A1 (.506 DI for Kearny School District; .680 for Newark School District;.601 for Paterson School District; .613 for Red Bank Regional School District); *see also* Coughlan Dep. 53:20-54:8 (explaining that, for DI, "above .6 is high" levels of segregation).

distribution of White public students enrolled within a particular New Jersey district." *Ibid.*; *see id.* at p. 23, Table 5. For example, he concludes that "in Essex County, almost half of White enrollment can be found in just 10 percent of the total schools in the entire county." *Id.* ¶ 50.

Moreover, as became clear in the deposition of Plaintiffs' expert, Dr. Ryan W. Coughlan, although he concluded that such measures were unnecessary in order to establish segregation given the compelling statistics described above, Coughlan Dep. 66:18-67:6 ("This data is just so abundantly clear that the schools in New Jersey are segregated. When you don't manipulate the data with any kind of algorithm or equation, when you just present the clear, raw data of the proportions of students in these different demographic groups, you could see that there's clear unevenness of the demographics between school districts. And so there was no reason in this space to go into more complex measures such as proportionality score, a dissimilarity index, an interaction index, an exposure index."), he in fact compiled this type of data in a published report using a Proportionality Score similar to Dr. Barrett's DI. *See* Caminiti Cert., Exh. F (Paul L. Tractenberg & Ryan W. Coughlan, *The New Promise of School Integration and the Old Problem of Extreme Segregation: An Action Plan for New Jersey*

to Address Both 23-29, 85 (May 2018) (2018 Coughlan Report)).[12] Indeed, this report, which appeared on Plaintiff's expert's CV, and was provided to the Defendants, was raised extensively during the State and Charter Defendants' deposition of Plaintiffs' expert. *See, e.g.*, Coughlan Dep. 52:16-53:19, 99:6-104:5, 158:9-161:11, 169:21-175:15; *see also* Erlichson Dep. 48:14-19 ("I have not reviewed that [report]."); Barrett Dep. 43:11-45:10 ("I did not read that one."). And it shows high levels of disproportionality when comparing the demographics of individual schools and districts on the one hand to the demographics of the county in which a school or district is located, as well as to the State as a whole. 2018 Coughlan Report at 24 (51.4% of New Jersey's schools are either somewhat or highly disproportional to their county demographics; 75% of schools are somewhat or highly disproportional to the State's demographics; 43.2% of New Jersey's school districts are either somewhat or highly disproportional to their county demographics; 76.3% of school districts are somewhat or highly disproportional to the State's demographics). Thus, the

[12] There are two primary differences between the DI measure cited by the Charter Schools' expert and the Proportionality Score used by Plaintiffs, both of which demonstrate the advantages of the latter measure. First, the Proportionality Score considers "the proportion of a student population in a given space that needs to be exchanged in order to achieve proportionality across *all* racial and ethnic subgroups in a larger geographic area." 2018 Coughlan Report at 85 (emphasis added). In other words, while DI measures how many students of *one* race or ethnicity need to switch schools to achieve proportionality, the Proportionality Score measures how many students of *all* races and ethnicities would need to switch. And second, the Proportionality Score looks at multiple levels of geographical communities – including schools, districts, counties, and the state as a whole – which Dr. Barrett's DI does not. *See id.* at 23-29.

Proportionality Score – precisely the type of measure to which the Charter Schools' expert refers – far from supporting the Defendants' argument, demonstrates precisely that integrated schools would be possible if the Residency Statute did not stand in the way. *See* Coughlan Dep. 190:1-7 ("I can certainly point to what a dissimilarity score says about New Jersey or what an isolation score says about New Jersey. They all say that the schools are segregated.").

But, as the Plaintiffs' expert pointed out, although this measure would, as the record now before the Court shows, confirm the data already provided by Plaintiffs, that data alone is more than sufficient to establish the reality that confronts the Court: however it is measured, New Jersey's school system, one in which for example, approximately half of all Black students attend schools that are at least 90% non-White and approximately two-thirds attend schools that are at least 75% non-White (with like data for Hispanic students), is deeply and tragically segregated.

II. THE STATE DEFENDANTS ARE LIABLE FOR VIOLATING N.J. CONST. ART. I, ¶ 5 (FIRST COUNT) AND N.J.S.A. 18A:38-5.1 (FIFTH COUNT).

Given these statistics, in the First Count of the Amended Complaint Plaintiffs allege that the State Defendants are in violation of Article I, Paragraph 5 of the New Jersey Constitution. Am. Compl. ¶¶ 65-66; *see* Pb 16-28. That constitutional provision explicitly prohibits racial discrimination in New Jersey's public

schools: "No person shall be . . . segregated . . . in the public schools, because of religious principles, race, color, ancestry or national origin." N.J. Const. art. I, ¶ 5. As the State Defendants correctly recount in their brief (Sb 9-12), beyond this constitutional provision, the State Legislature, by statute, prohibited racial discrimination in public schools over 140 years ago. *L.* 1881, *c.* 149. That provision is now codified as N.J.S.A. 18A:38-5.1, which states, in no uncertain terms, that "[n]o child between the ages of four and 20 years shall be excluded from any public school on account of his race, creed, color, national origin, ancestry, or other protected category under [N.J.S.A. 10:5-12], or immigration status." That statute forms the basis for the Fifth Count of Plaintiffs' Amended Complaint. Am. Compl. 73-74; *see* Pb 44-45.

Defendants acknowledge - as they must - the weight of Article I, Paragraph 5 and N.J.S.A. 18A:38-5.1. Taken together, these provisions (1) prohibit *de facto* segregation in New Jersey's public schools; and (2) impose on the State Defendants, including the Commissioner and the State Board, the responsibility of preventing such segregation. *See* Sb 11-12. Defendants also acknowledge - again, as they must – the New Jersey Supreme Court's long history of applying the broad combined mandate of the anti-segregation clause and statutory provision. *See id.* at 12-14. Yet, despite this powerful command, and the State's own data demonstrating the

clear picture of segregation in New Jersey's public schools, the State denies the reality of the segregation that is so obvious to anyone who looks at the data and thus seeks to minimize the Supreme Court's robust case law prohibiting *de facto* segregation in New Jersey's public schools, deploying a series of unmeritorious arguments intended to distract the Court from that reality.

A. The State Defendants' Attempts to Draw Distinctions Between the Current State of School Segregation and the Facts of *Booker* and *Jenkins* Only Highlight the Need for Statewide Liability.

Initially, the State Defendants contend that Plaintiffs seek "an extraordinarily novel application of the anti-segregation clause," apparently because Plaintiffs seek a finding that New Jersey's public school students face segregation, and that the State Defendants are liable for failing to ameliorate it. *See* Sb 40. In doing so, the State Defendants attempt to distinguish this case from both *Booker*, 45 N.J. 161, and *Jenkins*, 58 N.J. 483.

Thus, the State Defendants describe *Booker* and *Jenkins* as cases in which there was "segregation within a single school district, or in uniquely-entwined communities." Sb 41. They then argue that, because these cases addressed the problem of segregated schools within one geographical area, Article I, Paragraph 5 and N.J.S.A. 18A:38-5.1 cannot be applied, under *Booker* and *Jenkins*, to find the State Defendants liable for failing to prevent segregation throughout New Jersey's schools. But the State's

argument rests on a fundamental misunderstanding of Plaintiffs' claims and a shaky retelling of the applicable case law.

First, in order to support their argument, the State Defendants have no choice but to mischaracterize the scope of the liability sought by Plaintiffs. Throughout their brief, they frame Plaintiffs' claims as requesting a judgment that "all of New Jersey's schools are unconstitutionally segregated." *See, e.g.*, Sb 5, 40, 55, 66. But that, of course, is not Plaintiffs' claim at all: Plaintiffs do not anywhere allege that every single individual school or each and every school district is segregated. In fact, Plaintiffs acknowledge that there are schools throughout the State that exemplify the integrated learning environment required by the State Constitution. Plaintiffs' simple - and essentially unrefuted - claim is that the State's system of public schools as a whole has for decades allowed unconstitutional *de facto* segregation of students on the basis of race and socioeconomic status, despite the State Defendants' duties (and powers) to prevent its occurrence. In their desire to avoid a judgment against them, notwithstanding a reality that they cannot and really do not deny, the State Defendants thus seek to undermine the broad scope of the constitutional and statutory mandates here at issue.

And in order to do so, the State Defendants simply ignore that which our Supreme Court first made clear in *Booker* – and has

reaffirmed in subsequent cases: that the scope of the State's obligation to remedy *de facto* segregation is directly tied to the extent of the unconstitutional segregation. That is, although the claims in *Booker* considered the State's liability with regard to segregation in one particular district, the Court took great pains to speak in the clearest possible terms about the State's broad obligation to prevent and remedy segregation throughout the State's schools:

> It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. *But in the meantime the state[] may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by*.
>
> [*Booker*, 45 N.J. at 171 (emphasis added).]

The Commissioner made a similar argument in *Jenkins*, a case that considered *de facto* segregation within *multiple* school districts. *See* 58 N.J. at 493. The *Jenkins* Court, however, rejected that argument out of hand, first observing that "[w]hen dealing with *de jure* segregation the crossing of district lines has of course presented no barrier whatever." *Id.* at 499. Thus, after reaffirming that the New Jersey Constitution also prohibits *de facto* segregation, *id.* at 497, the *Jenkins* Court concluded that geographic boundaries provide no barrier to finding liability, *id.* at 500-01. In doing so, the Court employed expansive language to

describe the State's fundamental constitutional obligation to prevent and remedy *de facto* segregation encompassing *multiple* school districts:

> It seems clear to us that, similarly, governmental subdivisions of the state may readily be bridged when necessary to vindicate state constitutional rights and policies. This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere; but it does entail suitable measures of power in our State authorities for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation.
>
> [*Id.* at 500-01.]

In an effort to deny responsibility for the obvious problem presented by Plaintiffs' Amended Complaint, rather than resolutely moving to a process of solving that problem, the State Defendants apparently seek to blame individual school districts, against whom, they have previously argued, Plaintiffs should assert their claims.[13] Nor would such an argument have any merit: it is the State and not individual school districts that has created and continues to perpetuate the circumstances that have led to *de facto* segregation. *See, e.g., In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J.

[13] *See, e.g.*, State Defendants' November 22, 2019 Brief in Support of Cross-Motion to Dismiss and Procedural Opposition to Plaintiffs' Motion for Summary Judgment at 8 ("Because Plaintiffs chose to allege statewide liability and a statewide remedy, each and every school district in the state must be joined in this matter.").

316, 319 (2000) ("The providing of public education in New Jersey is a state function."). As Plaintiffs have consistently argued, the school districts simply educate the students that reside within their arbitrarily drawn boundaries. The State Defendants' actions – including their continued application of the Residency Statute, N.J.S.A. 18A:38-1 – dictate each district's demographics. *See also* N.J.S.A. 18A:8-1; N.J.S.A. 18A:38-25.[14] Accordingly, the State and the State Defendants are liable for the ensuing results, in the form of *de facto* segregation in New Jersey's schools. *See Sheff v. O'Neill*, 678 A.2d 1267, 1289 (Conn. 1996) (relying on trial court's finding that the state's school residency statute was "[t]he single most important factor that contribute[s] to the present concentration of racial and ethnic minorities in Hartford" and holding the residency statute unconstitutional as applied).

Even more importantly, New Jersey's school districts lack the significant constitutional powers and duties granted to and possessed by the State Defendants. Indeed, the state Supreme Court has made clear in each case considering school segregation that it is the State Defendants who are constitutionally responsible for

[14] The Residency Statute, N.J.S.A. 18A:38-1, is further reinforced by N.J.S.A. 18A:8-1 ("Each municipality shall be a separate local school district except as otherwise provided in this chapter and except that each incorporated village shall remain a part of the district in which it is situated at the time of its incorporation."); and N.J.S.A. 18A:38-25 ("Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.").

preventing and are empowered and obligated to remedy segregation in New Jersey's schools. As the Supreme Court made clear in *North Haledon*, "[t]he Commissioner not only had the power, but also the duty, to act" to address segregation in New Jersey's public schools. 181 N.J. at 181; *see also Jenkins*, 58 N.J. at 507 (The Commissioner has "many broad supervisory powers designed to enable him, with the approval of the State Board of Education, to take necessary and appropriate steps for fulfillment of the State's educational and desegregation policies in the public schools." (citations omitted)); *Booker*, 45 N.J. at 173-74 ("[O]ur Commissioner of Education has been vested with broad power to deal with the subject" of school segregation.).

The *Abbott* school funding litigation is instructive: throughout the lengthy history of that case, the Supreme Court has never made individual districts responsible for remedying funding inequalities, an issue – just like *de facto* segregation – outside the control of individual school districts. *See, e.g.*, *Abbott v. Burke* (*Abbott II*), 119 N.J. 287, 384-85 (1990) (requiring the Legislature, State Board, and Commissioner to remedy constitutional violation of T&E clause for funding of urban school districts); *see also Robinson v. Cahill (Robinson I)*, 62 N.J. 473, 508-09 (1973) (finding that in the school funding context, "[i]t is also plain that the ultimate responsibility for a thorough and

efficient education was imposed upon the State. This has never been doubted.").

Indeed, the irony of the State's argument is striking: under the State's theory, the more widespread the violation of constitutional rights, the less likely they should be vindicated. In other words, the State Defendants claim that despite the overwhelming data that the State's public school system suffers from widespread *de facto* segregation, and the undisputed and indisputable truth that the State Defendants have the constitutional power and obligation to prevent and remedy such segregation, because the constitutional harm is so expansive, and a remedy would require novel solutions, this Court cannot and should not act.[15] This is not only wrong, but is a disheartening and alarming contention by the State, which should instead accept and then fulfill its responsibility to address the problem clearly

[15] In *Covington v. North Carolina*, 270 F. Supp. 3d 881 (M.D.N.C. 2017) (three-judge court), the court encountered "one of the most widespread racial gerrymanders ever held unconstitutional by a federal court." *Id.* at 896-97. The panel explained that after "[c]onceding the broad scope of their constitutional violation, Legislative Defendants argue that the sheer number of districts the General Assembly must redraw to cure its constitutional violation weighs against compelling the State to conduct a special election." *Id.* at 892. The court, of course, found this argument untenable, and explained that "[a]ccepting Legislative Defendants' argument would be tantamount to concluding that the *more* widespread the constitutional violation and the *more* pervasive the injurious effects of that violation, the *less* license courts have to remedy that violation." *Ibid.* (emphases in original). The court later found that there was not enough time to order a special election, *id.* at 901, but in doing so, reaffirmed that "the scope of permissible remedies increases as the constitutional violation becomes more extensive," and "conclude[d] that the substantial number of legislative districts that must be redrawn to remedy the sweeping constitutional violation weighs in favor of ordering a special election [*i.e.* remedying the constitutional violation]." *Id.* at 892.

raised by this lawsuit. The State's effort to instead deny reality and avoid its constitutional role should not be countenanced. The widespread *de facto* segregation that affects so many of New Jersey's schools and separates students of all backgrounds requires a finding of liability consistent with the extent of the constitutional violation.

The State responds by again seeking to distinguish this case from *Jenkins*, this time with regard to the scope of the remedy. In particular, they emphasize that in *Jenkins*, the Court ordered a remedy that it hoped would avoid "impracticalities" and was limited to "a single community." Sb 44 (citing *Jenkins*, 58 N.J. at 501). Indeed, throughout its brief, the State argues that *Booker* and *Jenkins*, and by extension application of the anti-segregation clause of the State Constitution, should be limited to cases in which comparatively less complicated remedies were at issue, and thus are not relevant here. Accordingly, the State Defendants complain that "impractical does not even begin to describe the task at hand before this court and the State defendants, should plaintiffs prevail." *Id.* at 45.

With this argument, the State Defendants attempt yet again to divert from Plaintiffs' current motion for partial summary judgment on *liability*, instead focusing on the question of remedy, an issue not now before the Court. In doing so, the State ignores that the Court has rejected the State's repeated, but ultimately

incorrect, arguments against the bifurcation of liability and remedy, and in fact allowed this motion to proceed as it now does, with even the State Defendants arguing that issues of liability are ripe for decision on the merits. *Id.* at 28 ("There are no material facts in dispute here and the matter is ripe for summary judgment.").

But leaving aside the State's prior, unsuccessful objection to bifurcation, this aspect of the State's argument really amounts to taking a disappointing and even shocking position: that even though there is a constitutional right, that right may be denied because arriving at a remedy will be difficult. This formulation runs contrary to centuries of constitutional jurisprudence – including in the school desegregation context. Indeed, such an argument would surely have surprised Chief Justice John Marshall and all of the other jurists who have steadfastly pronounced that a remedy is defined by the scope of the right at issue, not the other way around. As Chief Justice Marshall wrote in *Marbury v. Madison*, there "is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress." 5 U.S. 137, 163 (1803) (quotations omitted); *see id.* at 166 ("[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it

seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."). Chief Justice Marshall went further, making clear that judicial review of executive action and inaction is necessary "where the law has established no specific remedy, and where in justice and good government there ought to be one." *Id.* at 169 (quotation omitted). As the Chief Justice wrote, in laying one of the cornerstones of our democracy, "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will [not] deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163.

Since *Marbury*, the United States Supreme Court has repeatedly affirmed this maxim as the basis for American constitutional jurisprudence. *See, e.g.*, *Owen v. Independence*, 445 U.S. 622, 651 (1980) ("How uniquely amiss it would be, therefore, if the government itself - the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct - were permitted to disavow liability for the injury it has begotten." (quotation omitted)); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.").

Perhaps more compellingly, this principle was the very basis for the disavowal of "separate but equal," and the rejection of segregation that the State of New Jersey now seeks to ignore, citing the difficulty of addressing the problem. Thus, in *Brown I*, the United States Supreme Court held that school integration was required by the Fourteenth Amendment. *See Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."). In doing so, the Court was undaunted by the difficulty of deriving a remedy for the constitutional violation at issue, noting that "because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity"; the Court determined to hold additional argument on remedy. *Id.* at 495-96. In other words, the Court found violations of the constitutional right at issue, despite the obvious complexities and uncertainties involved in desegregating America's public schools in the 1950s. Later, in *Brown II*, the Court required that, notwithstanding those complexities and uncertainties, the constitutional requirement of integration must be accomplished:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities

have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision [*i.e. Brown I*]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. . . . To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will

> also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.
>
> [*Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299-301 (1955).]

See also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (explaining that when confronted with unconstitutional school segregation, "the nature of the violation determines the scope of the remedy").

And, in interpreting the provisions of the 1947 Constitution, our state Supreme Court has articulated an even more robust requirement that our State's courts vindicate rights guaranteed under the Constitution, no matter the difficulty in finding a constitutionally appropriate remedy. In *Robinson v. Cahill (Robinson IV)*, 69 N.J. 133 (1975), when confronting school funding inequities, the Court provided the fundamental holding that become its lodestar for nearly 50 years with regard to the remedying of disparities between New Jersey's schools:

> The need for immediate and affirmative judicial action at this juncture is apparent, when one considers the confrontation existing between legislative action, or inaction, and [a] constitutional right. When there occurs such a legislative transgression of a right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort.

> However delicate that duty may be, we are not at liberty to surrender, or ignore, or to waive it. We have mentioned inaction as well as action in importing constitutional violation[.]
>
> [*Id.* at 146-47 (quotation omitted).]

That where there is a statewide violations of constitutional rights, then, they must be vindicated, despite the remedial complexities, was further enshrined in New Jersey law by the *Mount Laurel* line of cases. In *Mount Laurel I*, the Court set forth, for the first time, a constitutional requirement that municipalities' land use regulations provide opportunities for low and moderate income housing, despite the fact that "[t]he implications of the issue presented [were] indeed broad and far-reaching, extending much beyond [the] particular plaintiffs and the boundaries of [the] particular municipality." *S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel I)*, 67 N.J. 151, 158 (1975). And in *Mount Laurel II*, the Court made clear that where there is the violation of a constitutional right, there must be a remedy – undermining the State's radical argument here that such a violation should be ignored because the remedy would be difficult to derive and implement:

> [U]nless an appropriate remedy is formulated to redress a violation of [constitutional] rights, our Constitution embodies rights in a vacuum, existing only on paper. If it is plain, and it is, that unless we require the use of affirmative measures the constitutional guarantee that protects poor people from

> municipal exclusion will exist only on paper, then the only appropriate remedy is the use of affirmative measures.
>
> [*S. Burlington Cty. NAACP v. Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 270-71 (1983) (quotations omitted).]

Over time, in both *Mount Laurel* and *Abbott*, the New Jersey Supreme Court has overseen modifications of remedies to ensure that those remedies in fact serve to vindicate the constitutional rights at issue. At no point has the Court ever shrunk from its obligation in that regard or sought to dilute or negate those rights simply because this process might be difficult. The State, however, invites such timidity now. The Court should reject that unprecedented and truly remarkable position.

In the context of school segregation, the New Jersey Supreme Court has made clear both the significance and the broad scope of the right at issue in this case: "New Jersey's abhorrence of discrimination and segregation in the public schools is not tempered by the cause of the segregation. Whether due to an official action, or simply segregation in fact, our public policy applies with equal force against the continuation of segregation in our schools." *Englewood on the Palisades*, 164 N.J. at 324 (citing *Booker*, 45 N.J. 161).[16] And, as Plaintiffs described in

[16] Even before the ratification of the modern New Jersey Constitution, New Jersey courts rejected efforts to circumvent the statutory prohibition – later re-codified as N.J.S.A. 18A:38-5.1 - against school segregation. *See, e.g.*, *Pierce v. Union Dist. Sch. Trs.*, 46 N.J.L. 76, 78 (Sup. Ct. 1884) (applying statute to prohibit denial of admission of biracial student into public school), *aff'd*, 47

their moving brief, Pb 20-23 – a proposition with which the State cannot and does not take issue – the State Defendants, and particularly the Commissioner, have been granted the powers necessary to carry out their constitutional responsibility to identify and remedy *de facto* segregation. *See, e.g.*, *Englewood on the Palisades*, 164 N.J. at 324 ("We have exhorted the Commissioner to exercise broadly his statutory powers when confronting segregation, whatever the cause." (citation omitted)); *N. Haledon*, 181 N.J. at 181 (To prevent school segregation, "[t]he Commissioner not only had the power, but also the duty, to act[.]"); *Jenkins*, 58 N.J. at 507 (The Commissioner has "many broad supervisory powers designed to enable him, with the approval of the State Board of Education, to take necessary and appropriate steps for fulfillment of the State's educational and desegregation policies in the public schools." (citation omitted)); *Booker*, 45 N.J. at 173-74 (The Commissioner has "broad power to deal with the subject" of school segregation.).

Perhaps most significantly, in *North Haledon*, the Court made clear that the State Board of Review's "attitude of helplessness,"

N.J.L. 348 (E. & A. 1885); *Raison v. Bd. of Educ. of Berkley Twp.*, 103 N.J.L. 547, 548-49 (Sup. Ct. 1927) (applying statute to prohibit denial of admission of Black student into public school); *Patterson v. Bd. of Educ. of Trenton*, 11 N.J. Misc. 179, 179 (Sup. Ct. 1933) (rejecting prohibition on interracial use of public school swimming pool), *aff'd*, 112 N.J.L. 99 (E. & A. 1934); *Hedgepeth v. Bd. of Educ. of Trenton*, 131 N.J.L. 153, 154 (Sup. Ct. 1944) (prohibiting school board from failing to assign students to school nearest to them because of race). Whatever the context, a violation of the right to attend integrated schools mandate a remedy, which the Court has never hesitated to impose.

181 N.J. at 175, was "difficult to comprehend," *id.* at 182, and contrary to "the constitutional imperative to prevent segregation in our public schools," *id.* at 181. Yet, the State re-states that "attitude of helplessness" here. In order not to undermine, or at least ignore, the very foundation of our democratic system of government, by requiring courts to look the other way in the face of constitutional violations, the Court should reject this approach.

Here is the bottom line: however widespread the constitutional violation at issue, and however burdensome it will be to craft a remedy to that violation, the Court may not, as the State proposes, simply ignore it. That has never been the law of this State. *See Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 196 (1961) ("[J]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence. The judicial obligation to protect the rights of individuals is as old as this country." (citations omitted)). It should not become the law now, and cannot, without doing grave damage to the most fundamental principles that we, as Americans and especially as New Jerseyans, hold dear.

B. Under Any Definition of *De Facto* Segregation, New Jersey's Schools are Unconstitutionally Segregated.

The State Defendants next protest that Plaintiffs "have failed to articulate a single, clear, coherent definition of

segregation." Sb 49. Thus, instead of addressing its own data, which so clearly demonstrate the pervasive nature of the *de facto* segregation of New Jersey's schools, the State Defendants assert that because Plaintiffs do not provide an acceptable one-sentence definition of segregation, they have no recourse.

But, as the State Defendants acknowledge, even our Supreme Court has not set a precise statistical threshold that can be used to define segregation in all circumstances. Indeed, the Court has specifically stated that "it is not really possible to establish a precise point" at which segregation crosses the line into unconstitutional impermissibility. *N. Haledon*, 181 N.J. at 183 (citing *Booker*, 45 N.J. at 180); *see Booker*, 45 N.J. at 179-80 (rejecting the Commissioner and State Board's view that desegregation should be ordered only for a school that was "entirely or almost entirely [Black]," and holding that while there was not a precise numerical metric that would define segregation in all circumstances, a school could certainly be considered segregated where the Black population "may be well above 50 per cent but well below the Commissioner's and State Board's [suggested] 100 per cent or nearly 100 per cent"). And yet, despite not establishing a specific statistical threshold – *i.e.*, without providing the definition that the State argues somehow dooms this lawsuit – the New Jersey Supreme Court has repeatedly found conditions to constitute unlawful *de facto* segregation in

cases with much less egregious racial imbalance than the undisputed figures here establish. Under any reasonable definition, New Jersey's schools are segregated.

Nor does the State seriously argue otherwise or offer any definition of segregation that would not be satisfied by its own data. Indeed, it has cross-moved for summary judgment, asking the Court to find, as a matter of law, that New Jersey's schools are not segregated. To the contrary, both the State's expert and that of the Charter Schools expressly declined to offer the very definition that they argue the Plaintiffs have failed to provide. *See* Erlichson Dep. 21:14-15 ("So I did not put forward my definition of segregation."); 24:5-8 (Q: "And as we sit here right now, you don't have a suggestion as to what an appropriate way of calculating segregation would be; is that right?" A: "I do not."); 28:3-6 ("I wouldn't take issue with the characterization that there are many ways of calculating whether or not segregation is present."); 30:14-22 (Q: "Do you have an opinion as to what a good measure [of segregation] would be, even if not the best?" A: "I have not opined on that."); 40:14-21 ("I haven't put forth a definition personally."); Barrett Dep. 47:7-21 ("I can't speak to whether it would be segregation in the legal sense . . . and what measure that would be from a legal sense."); 55:21-23 ("There's so many measures of segregation[.]"). Instead, the State Defendants spend their time criticizing the subjective definitions of

segregation provided by the individual Plaintiffs' parents, and the lay representatives of Plaintiffs Urban League of Essex County, Latino Action Network, and Latino Coalition, and argue that Plaintiffs' legal claims are somehow dubious because these lay plaintiffs provided varying definitions of the term "segregation." Sb 51-52. A truly nonsensical and even outrageous strategy, the State thus contends that there is no segregation because laypeople cannot provide a consistent definition for a legal term that the State's expert also fails to define, even as that expert apparently concludes that the level of racial imbalance that the State's data shows is acceptable.

Indeed, after criticizing Plaintiffs' statistical analysis (while not denying the underlying calculations or providing analyses of their own), *id.* at 54-57, the State argues that "[e]ven under a single-race definition of segregation . . . which is somewhat in line with Supreme Court precedent - plaintiffs fail to demonstrate rampant statewide segregation," *id.* at 58-59. In support of their contention, they point to numbers calculated by their expert, Dr. Bari Anhalt Erlichson, demonstrating that in the 2019-2020 school year, 85,827 New Jersey students attended a school composed of 90% or more students who identify as one race or ethnic group. *Id.* at 59 (citing Erlichson Rep. at 7). Shockingly, the State appears to contend that these statistics show that schools are adequately *integrated*, although none of its experts was willing

to so testify. *See* Erlichson Dep. 43:4-15 (State expert stating that she "didn't offer an opinion" on whether the fact that nearly 86,000 students attend schools that are comprised 90% or more of students of one race was a problem). Of course, they show precisely the opposite.

Indeed, it is alarming that, in its effort to minimize the devastating reality of segregation that Plaintiffs' Amended Complaint demonstrates, the State argues that just 148 schools have 90% or more students that identify as one race or ethnicity – *i.e.*, "only" 6.2% of New Jersey students attend such schools. Sb 59. But leaving aside that this measure employs an odd definition of diversity indeed, even this number should be of concern to our State government. Nor should the State's expert celebrate, as she does, the fact that only 12.9% of the State's Hispanic students attend such racially isolated schools. Erlichson Rep. at 7. Under any definition of segregation – including the unnecessarily restrictive definition offered by the State Defendants – these numbers compel this Court to find a violation of Article I, Paragraph 5 and N.J.S.A. 18A:38-5.1.

Of course, Plaintiffs are indisputably correct that, in order to evaluate whether *de facto* segregation exists in New Jersey, our Supreme Court looks to statistics that establish the racial makeup of schools. *See N. Haledon*, 181 N.J. at 170-71 (evaluating the "negative impact on racial balance" by examining racial makeup of

student population); *Jenkins*, 58 N.J. at 487-88 (same); *Booker*, 45 N.J. at 166 (same). Plaintiffs have accordingly moved for partial summary judgment based on precisely the same type of statistical facts, drawn from the State's own data, and admitted to be accurate by the Defendants. And, as Plaintiffs describe in their moving brief, Pb 23-27, the segregation detailed in the Amended Complaint is more severe and widespread than were the conditions the Court found unconstitutional in both *Booker* and *Jenkins*.

Thus, in *Booker*, the Court rejected the Commissioner's and State Board's argument that desegregation should be ordered only if a school was "entirely or almost entirely [Black]." 45 N.J. at 178. Instead, the Court held that while there was no precise statistical definition that can define segregation in every instance, a school would certainly be segregated if the Black student population "may be well above 50 per cent but well below the Commissioner's and State Board's [suggested] 100 per cent or nearly 100 per cent." *Id.* at 179-80. Likewise, in *Jenkins*, a dispute that arose from the Commissioner's failure to prevent the withdrawal of Morris Township students from Morristown High School, the Court explained that if the withdrawal occurred Morristown High School's Black student population would increase from about 14% to 56% by 1980. 58 N.J. at 488. The Court held that that under those circumstances, the Commissioner was empowered to prevent the proposed withdrawal "if he finds such

course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools." *Id.* at 508. Moreover, Plaintiffs' moving brief also recounts that courts in New York, California, and Connecticut have found unlawful school segregation when confronted with similar statistical proofs. Pb 24-26 (discussing *Vetere v. Mitchell*, 251 N.Y.S.2d 480, 482 (N.Y. App. Div. 1964) (considering a district with three schools: one with 75% Black students, and two with approximately 14% Black students), *aff'd*, 206 N.E.2d 174 (N.Y. 1965), *cert. denied*, 382 U.S. 825 (1965); *Crawford v. Bd. of Educ.*, 551 P.2d 28, 31-32 (Cal. 1976) (finding *de facto* segregation in the Los Angeles Unified School District where "a substantial proportion of the district's schools had student populations of either 90 percent or more minority students or 90 percent or more [W]hite students"); and *Sheff*, 678 A.2d at 1287) (finding *de facto* segregation when "94.5 percent of the children in the Hartford public school system were members of minority groups").

Despite the State Defendants' attempts to argue that a more extensive record is required here, Sb 62-67, in fact, Plaintiffs provide more detailed data than was considered by the Court in either *Booker* or *Jenkins*, *see* Pb 23-27. In those cases, the determination of liability was fairly easy; it was determining remedy that was the more challenging endeavor. The same is true in this case: there is no dispute concerning the facts of racial

imbalance, while Plaintiffs admit that the remedy for this constitutional problem will be complex, likely requiring a process that will involve many stakeholders, including the Legislature, education experts, and the Courts. *See, e.g.*, Pb 1-2 ("Plaintiffs propose that the matter of remedy will be the subject of future discovery and litigation (or, perhaps, the result of productive settlement negotiations, once the matter of liability has been decided)."); *id.* at 52 ("Although that judgment will not fully resolve the case, it will permit the parties to focus on the complicated, but vitally important, work of crafting a remedy that will desegregate the state's schools and fulfill the state Constitution's mandate that all public school students attend fully integrated schools."). But that is precisely why a finding of liability should come before remedy – to assure that that process takes place, following a finding that it is constitutionally required.

C. The State Defendants' Attempt to Argue that There is No State Action Ignores Their Own Actions, Inactions, and Constitutional Duties.

Somewhat in passing, the State Defendants argue that the plain language of Article I, Paragraph 5 requires Plaintiffs to demonstrate an "element of causation" linking the State Defendants to the State's currently segregated schools, and accordingly, that Plaintiffs have "fail[ed] to point to any state action giving rise to liability." Sb 60. In doing so, the State Defendants argue,

Plaintiffs render superfluous the "because of" language in the anti-segregation clause, *id.* at 60-61, which provides that "[n]o person shall be . . . segregated . . . in the public schools, *because of* religious principles, race, color, ancestry or national origin," N.J. Const. art. I, ¶ 5 (emphasis added).[17]

Putting aside the State's troubling and ill-advised attempt to engraft upon the phrase "because of . . . race" an unprecedented intent requirement that the language – a preposition introducing a series of constitutionally suspect classes – does not support, the State studiously ignores that the New Jersey Supreme Court has consistently held that "New Jersey's abhorrence of discrimination and segregation in the public schools is not tempered by the cause of the segregation. *Whether due to an official action, or simply segregation in fact*, our public policy applies with equal force against the continuation of segregation in our schools." *Englewood on the Palisades*, 164 N.J. at 324 (emphasis added) (citing *Booker*, 45 N.J. 161). And again, the Court has repeatedly "exhorted the Commissioner to exercise broadly [their] statutory powers when confronting segregation, *whatever the cause*." *Ibid.* (emphasis added) (citing *Jenkins*, 58 N.J. at 506-07); *see Booker*, 45 N.J. at 173-74, 178 (remanding to the Commissioner for further

[17] Of course, N.J.S.A. 18A:38-5.1 uses different language, providing, in part: "No child between the ages of four and 20 years shall be excluded from any public school on account of his race, creed, color, national origin, ancestry, or other protected category under [N.J.S.A. 10:5-12], or immigration status." The State, however, ignores this statutory language almost entirely.

consideration in light of the office's "broad power to deal with the subject of" *de facto* school segregation, and noting the Commissioner's authority to "prescribe a plan of his own").

In other words, although it seeks to deny it, the State Defendants have an *affirmative* obligation to act to prevent and remedy *de facto* segregation. *See, e.g.*, *Jenkins*, 58 N.J. at 493 (holding that "[t]he Commissioner's flat disavowal of power despite the compelling circumstances may be sharply contrasted with the sweep of our pertinent constitutional and statutory provisions and the tenor of our earlier judicial holdings" (citing, among other sources, N.J. Const. art. I, ¶ 5)); *id.* at 507 ("In *Booker* we held that the Commissioner had the responsibility and power of correcting *de facto* segregation or imbalance which is frustrating our State constitutional goals." (citing *Booker*, 45 N.J. at 178)); *see Englewood on the Palisades*, 164 N.J. at 328 ("The constitutional command to prevent segregation in our public schools superimposes obligations on the Commissioner when he performs his statutory responsibilities under the Charter School Act." (citation omitted)).[18]

Throughout their troubling briefs, the State and Charter Defendants reject this responsibility, contending that the State

[18] *See also Sheff*, 678 A.2d at 1280 ("In summary, under our law, which imposes an affirmative constitutional obligation on the legislature to provide a substantially equal educational opportunity for all public schoolchildren, the state action doctrine is not a defense to the plaintiffs' claims of constitutional deprivation.").

Defendants cannot be held liable for the State's segregated schools because benign and uncontrollable factors "such as voluntary housing patterns," "parental choice in the selection of private schools," Sb 60, or "private decisions made by families and students on where to live and attend school," Cb 19, have caused the severe racial imbalance our State's schools confront today. According to the State Defendants, Plaintiffs "allege that the State should have somehow taken action to prevent families living in those [segregated] districts from either living where they live or sending their children to their local schools." Sb 42. In fact, the opposite is true: far from seeking to dictate where families should reside, Plaintiffs' position – solidly grounded in the Constitution – is that the State Defendants should have taken actions to ensure that parents living in segregated school districts *may* send their children to integrated public schools outside their arbitrarily drawn school district boundaries, so that students can derive the undisputed benefits of a constitutionally adequate learning environment.

That said, and although the cause of *de facto* segregation is irrelevant to the constitutional inquiry here, it is worth taking a moment to note that Defendants wilfully ignore decades of federal and state policies that intentionally discriminated against people of color and people in poverty, including redlining and blockbusting neighborhoods. That resulted in wide scale

separation of White and wealthy residents from people of color and those in poverty, a phenomenon well known to the State, as the Complaint alleges. *See* Am. Compl. ¶¶ 35-38. Importantly, the Residency Statute, N.J.S.A. 18A:38-1,[19] has frozen into place the effects of these discriminatory housing practices, and hardened the racial isolation that results in New Jersey's arbitrarily-drawn school districts. *See, e.g.*, *Booker*, 45 N.J. at 168 (discussing how "segregation in fact, though not through official policy, results from long standing housing and economic discrimination and rigid application of neighborhood school districting"); *id.* at 166 (recounting the Commissioner's finding that "the cause of the concentration of the [Black] population in particular schools was to be found in patterns of housing resulting from a constellation of socio-economic factors" (quotation omitted)); *see also Mount Laurel I*, 67 N.J. at 170 ("[O]ver the years Mount Laurel has acted affirmatively to control development and to attract a selective type of growth and that through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and has used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons." (quotations

[19] *See also supra* n.14 (noting that N.J.S.A. 18A:8-1 and N.J.S.A. 18A:38-25 reinforce the Residency Statute's effects).

omitted)); *Jenkins*, 58 N.J. at 497, 99 ("It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the state[] may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by." (quoting *Booker*, 45 N.J. at 170-71)). Here, given its undisputed knowledge of the fact of segregated schools, the State's failure to act can only be viewed as knowingly perpetuating the intricate latticework of decades of public and private exclusions based on geography.

Take, for example, the town of Fanwood, New Jersey. In his canonical work *The Color of Law*, Richard Rothstein describes the process by which Black residents were often denied access to homes in White and middle-class neighborhoods – including in New Jersey. Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 66 (2018). He recounts – as emblematic of widespread residential segregation – that in 1941, a New Jersey realtor representing a new development in Fanwood, a suburban town twenty miles from Newark, attempted to sell twelve properties to middle-class Black applicants. *Ibid.* All had good credit ratings, and banks were willing to issue mortgages upon approval of the Federal Housing Administration (FHA). *Ibid.* Yet, when the FHA declared that "no loans will be given to colored

developments," the banks declined to issue the mortgages to those otherwise eligible applicants. *Ibid.*[20]

Although the State seeks to ignore or deny it, there can be no real question but that the effects of those discriminatory residential policies are locked in by the Residency Statute. During the 2016-2017 school year, the Scotch Plains-Fanwood School District had 69.9% White students, 7.8% Black students, and 9.3% Hispanic students; 6% of the District's students received free or reduced-price lunch. Coughlan Cert. ¶ 29, Exh. F; *see* Pb 11. On the other hand, during the same school year, twenty miles northeast, the Newark School District averaged 7.9% White students, 44.3% Black students, and 46.4% Hispanic students; 79.4% of Newark District's students during that time received free or reduced lunch. Am. Compl. ¶ 40(A); *see* Coughlan Supp. Cert. ¶ 7(A) (providing similar five-year averages).

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[20] Rothstein also describes housing discrimination in Camden, Mahwah, and Mount Laurel. Rothstein, at 129, 174-75, 205; *see also Mapping Inequality: Redlining in New Deal America*, University of Richmond, *available at* https://dsl.richmond.edu/panorama/redlining (last visited Jan. 16, 2022) (detailing historical Home Owners' Loan Corporation (HOLC) maps that reveal redlining of neighborhoods across the United States – including in Atlantic, Bergen, Camden, Essex, Hudson, and Mercer Counties).

It was not until 1977 that the New Jersey Legislature enacted a statutory scheme aimed at ameliorating redlining. *L.* 1977, *c.* 1 (enacted as N.J.S.A. 12:16F-1 to -11); *cf. Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 983 (3d Cir. 1980) ("The statute was designed to prohibit the arbitrary denial of mortgage loans on the basis of property location, to encourage the availability of mortgage capital for neighborhoods generally denied it, and to provide state officials with the information necessary to assess the statute's effectiveness.").

The segregation is obvious, as is the cause, however irrelevant. The solution is, however, complex – but we must find one in order to be a constitutionally compliant regime. A finding of liability will begin that process; a denial of liability will consign the next generations of students of color to continue to suffer the effects of discrimination, even as it denies all of our children – regardless of race or socioeconomic status - the documented benefits of diverse learning environments.

III. THE STATE DEFENDANTS ARE LIABLE FOR VIOLATING THE THOROUGH AND EFFICIENT EDUCATION CLAUSE, N.J. CONST. ART. VIII, § 4, ¶ 1 (THIRD COUNT).

In the first paragraph of its brief, the State Defendants strike an appropriately constructive tone:

> The importance of attending a diverse school environment cannot be overstated. The experience of being immersed in a racially and socioeconomically diverse school is, indeed, a critical ingredient in the life of every child. The State recognizes the innumerable benefits of exposure to different racial, cultural, and socioeconomic backgrounds, and acknowledges that there is unquestionably room to improve the current system to further that goal in the context of its constitutional obligation to provide every student in New Jersey with a thorough and efficient education (T&E).
>
> [Sb 1.]

But by the time they address the merits of Plaintiffs' T&E claim, Count Three of the Amended Complaint, Am. Compl. ¶¶ 69-70, the State Defendants dramatically shift their tenor, arguing that Plaintiffs' claim fails as a matter of law. In addressing

Plaintiffs' claim under the T&E clause, the theme of the State's argument is that, because T&E analysis requires a holistic weighing of factors to determine whether there is a constitutional violation, integration is but one factor to be considered in determining constitutionality. In the State's words, "there are several significant factors that must contribute to the delivery of T&E, including (but not limited to) funding of the public school system, adequate learning and performance standards, and of course racial diversity." Sb 31. And if this were not explicit enough, the State goes on to make clear that, regardless of the other constitutional provisions, discussed above and below, that must be considered by the Court, "[i]t is through the T&E lens that all of plaintiffs' claims must be viewed because, at its core, the objective of both plaintiffs and the State Defendants is to ensure that students receive T&E." *Ibid*.

This is a shocking argument, for at least two reasons. First, it simply ignores the decision of the New Jersey Supreme Court in *North Haledon* that *de facto* segregation – in and of itself, and regardless of other considerations – is a per se violation of T&E. And second, ignoring Plaintiffs' statistical showing, it fundamentally argues that so long as New Jersey's schools are otherwise providing a quality education, it matters not that they are segregated – in other words that "separate but equal" is not, over six decades after *Brown*, constitutionally problematic.

With regard to the first of these problems, the State devotes all of two short paragraphs to discussing the state Supreme Court's seminal case on the intersection of T&E and segregation, Sb 38-39, in which the Court held that students cannot receive a constitutionally sufficient thorough and efficient education when learning in a segregated environment. Thus, in *North Haledon*, the Supreme Court made absolutely clear, if it was not before, that "[w]e consistently have held that racial imbalance resulting from *de facto* segregation is inimical to the constitutional guarantee of a thorough and efficient education."[21] *N. Haledon*, 181 N.J. at 177 (citing N.J. Const. art. VIII, § 4, ¶ 1; *Jenkins*, 58 N.J. at 499; *Booker*, 45 N.J. at 171; *Morean v. Bd. of Educ. of Montclair*, 42 N.J. 237, 242–43 (1964); *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood*, 257 N.J. Super. 413, 464-65 (App. Div. 1992)). This is because, said the Court, integration is necessary for students to receive a constitutionally sufficient education: "Students attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures." *Id.* at 178 (citing *Jenkins*, 58 N.J. at 499; *Booker*, 45 N.J. at 170–71). In other words, "racial balance and education are not isolated

[21] Tellingly, when asked about this quotation from *North Haledon* during her deposition, the State Defendants' expert, Dr. Erlichson, stated that "I don't fully agree with it," before admitting that she was not familiar with the case. Erlichson Dep. 50:12-51:21.

factors, but different sides of the same coin." *Ibid.* (quotations omitted). And charter schools, too, must provide all elements of a thorough and efficient education. *In re Renewal TEAM Acad. Charter Sch.*, 247 N.J. 46, 69 (2021) (observing that "[t]he choice to include charter schools among the array of public entities providing educational services to our pupils is a choice appropriately made by the Legislature so long as the constitutional mandate to provide a thorough and efficient system of education in New Jersey is satisfied" (quoting *Englewood on the Palisades*, 164 N.J. at 323)).

Nevertheless, the State asserts – without any citations to case law – that racial isolation is simply one factor to be considered along with a host of other factors in order to determine whether students receive a thorough and efficient education. In doing so, they rely heavily on – apparently as legal authority – their expert, Lucille E. Davy. Sb 31-33, 36. Davy, who served as DOE Commissioner from 2005-2010, explains that "[a]ssessment of whether a district is providing a constitutionally adequate education involves a holistic view of many factors that together reveal whether a student has the opportunity to access a thorough and efficient education." Weber Cert., Exh. C, Certification of Lucille E. Davy (Davy Cert.) ¶ 8; *see* Sb 31-33. Davy and her successors, the current State Defendants, then cite a bevy of elements to be included in this "holistic" review, including

student growth and improvement, graduation rates, performance trends, school culture, class size, teacher retention levels, and how districts spend their funding. Sb 31-33 (citing Davy Cert. ¶¶ 26-37). As for integration, the State Defendants and Davy agree only that "[w]ithout question, race is also a factor in the State's consideration of whether T&E is being delivered." *Id.* at 32 (citing Davy cert. ¶¶ 35-37).[22]

The State Defendants boil their argument down to the following premise: "While the State defendants *do not* dispute the racial and socioeconomic demographics mentioned [in] plaintiffs' motion, they *do* dispute the oversimplified contention that these facts are enough to establish, as a matter of law, that the State's entire education system denies students T&E[.]" *Ibid.* (emphasis in original). Indeed, the State Defendants take time to note that Plaintiffs do not "assert any statewide education deficiencies" or that school districts "cannot provide their children with

[22] In her deposition, Davy acknowledged that case law obligated the Commissioner to proactively eliminate segregation in the New Jersey public schools. Weber Cert., Exh. G, Deposition Transcript of Lucille E. Davy (Davy Dep.) 11:13-12:4. But she refused to address the Supreme Court decision in *North Haledon*. *See generally* Davy Dep. 39:3-45:8 (Q: "So just to be clear, do you believe that students in segregated schools can obtain a constitutional Thorough and Efficient education even though they are in segregated schools?" A: "That is not an area that I was retained by the state to opine on. And I am – I'm not giving an expert opinion on that"); ("I did not read *[North Haledon]*, and I'm not going to say anything about it without looking at it."); ("I did not review *[North Haledon]* to prepare for today's deposition. And I am not going to respond to that question without reading the case, looking at the context, etc. And beside that, I was not – I'm not hired by the state, I'm not retained to be an expert on that issue."); ("I am not opining on that question from a legal perspective. I told you what my observations were, and I'm going to leave it at that.").

curricula aligned with the NJSLS [*i.e.* New Jersey Student Learning Standards]." *Id.* at 35. Moreover, the State Defendants recount, Plaintiffs fail to "cite student performance," "claim that districts do not have the resources or supports to provide T&E," "complain about facilities," or "cite overcrowded classrooms." *Ibid.*

This argument, plain and simple, amounts to a contention that, despite attending racially segregated schools, New Jersey students can nevertheless receive a constitutionally adequate education. Indeed, if there were any doubt that this is their position, the State Defendants make it more explicit: there is no T&E violation – despite the admitted racial imbalances – because "'there are students who are meeting the State's high performance standards' in districts with a predominantly homogeneous racial makeup, and there are also 'student performance outcomes on State tests [that] reveal . . . significant achievement gaps . . . in several of the State's racially diverse schools.'" *Id.* at 33 (quoting Davy Cert. ¶ 36).[23] The State Defendants later repeat:

[23] Davy repeated this claim in her deposition. *See* Davy Dep. 35:2-37:19 ("I'm not an expert for the state on this question of diversity and segregation. My experience showed me that there are lots of schools where students are predominantly of a single race where children are achieving at extremely high levels, graduating and going to college. Conversely, I have seen many examples of diverse school districts where the achievement gap between [W]hite and Asian and [B]lack and Hispanic students are just completely unacceptable. They are huge gaps. And so what my experience in studying data as Commissioner particularly showed me that merely being in a diverse district did not mean that a child was going to have the opportunity to master the Core Curriculum Content Standards.")

> In New Jersey, there are school districts that are predominantly of a single race, which perform at high levels. There are also school districts that are diverse, where achievement gaps among students exist. Attending a diverse school district alone does not mean a child will master the NJSLS. The SFRA [School Funding Reform Act] ensures that every district will receive sufficient funding to ensure the provision of T&E no matter where the child lives. Accordingly, plaintiffs have failed to allege anything that would allow their T&E claim in count three to proceed.
>
> [*Id.* at 36 (citations omitted).]

This argument is a truly shameful echo of the "separate but equal" arguments that, one would have thought, would have no currency in New Jersey in 2022. After all, in *Brown I*, the question presented to the Supreme Court was: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" 347 U.S. at 493. In addressing this question, the State of Kansas and the Topeka Board of Education, opposing the plaintiffs' efforts to overturn *Plessy v. Ferguson*, 163 U.S. 537 (1896), argued that maintaining a segregated system of public schools for Black and White school children was consistent with the Fourteenth Amendment because the schools were "separate but equal." The defendants claimed to the *Brown* Court, in arguments that the State adopts almost verbatim here, that the status quo was acceptable in Topeka because the lower court had found

> specifically that there is no material difference in the physical facilities in colored and white schools; that the educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to, but are comparable with those in the white schools; and that the courses of study followed in the two groups of schools are identical, being that prescribed by state law. Also, it was found that colored students are furnished transportation to the segregated schools without cost to the children or their parents. No such transportation is furnished to the white children in the segregated schools.
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> [Brief for Appellees, *Brown I*, 347 U.S. 483, 1952 U.S. S. Ct. Briefs LEXIS 25 at *7-8.]

The *Brown* Court, in one of the great precedents in the history of our nation, resoundingly rejected this argument, holding "that in the field of public education the doctrine of 'separate but equal' has no place" because "[s]eparate educational facilities are inherently unequal." 347 U.S. at 495.[24] And our state Supreme Court took this holding one step further, consistent with its tradition of interpreting the New Jersey Constitution more broadly than its federal counterpart, holding that even *de facto* separation of students on the basis of race and ethnicity violates the State Constitution. Nearly a decade after *Brown I and II*, the state

[24] The State Defendants' expert, Dr. Erlichson, after agreeing that *Brown I* held that the doctrine of separate but equal was unconstitutional, went on to revert to a discussion of resources – the very point that was rejected in the *North Haledon* case with which she disagreed: "one of the initial difficulties was the – that the correlation between separate but unequal was so great. So there was a tremendous differential in resources. And so we have a slew of federal policy intended to make up differences in resources across schools," and that Davy "obviously would be the right person to talk about how New Jersey addressed that." Erlichson Dep. 54:13-55:23; *see id.* 50:12-51:21.

Supreme Court observed in *Booker* that the same harms identified by the *Brown* Court also applied when students were subject to *de facto* segregation because the same injuries "appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting." 45 N.J. at 168-69; *see also Jenkins*, 58 N.J. at 499 (stating that any form of segregation, whether *de facto* or *de jure*, denies "educational advantages which are [students'] due" (quotation omitted)); *Morean*, 42 N.J. at 243 (finding that "racial imbalance . . . though fortuitous in origin, presents much the same disadvantages as are presented by [*de jure*] segregated schools" (citations omitted)); *Englewood on the Palisades*, 164 N.J. at 324 ("New Jersey's abhorrence of discrimination and segregation in the public schools is not tempered by the cause of the segregation. Whether due to an official action, or simply segregation in fact, our public policy applies with equal force against the continuation of segregation in our schools." (citation omitted)).

In essentially arguing that "separate but equal" can carry the day here in New Jersey in 2022, though it could not in Kansas in 1954, the State Defendants make two fundamental errors. First, they pay little attention to, and thus dramatically understate, the immense benefits for students attending racially and socioeconomically diverse schools, including gains unable to be

measured by comparing school funding or charting student test scores. As Chief Justice Poritz made clear for a unanimous Court in *North Haledon*, "[s]tudents attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures." 181 N.J. at 178 (citations omitted). And Justice Jacobs similarly described the value of students learning within "multi-racial and multi-cultural communities" nearly four decades earlier in *Booker*:

> In a society such as ours, it is not enough that the 3 R's [reading, writing, and arithmetic] are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous school populations and point to the disadvantages of homogeneous student populations[.]
>
> [45 N.J. at 170-71.][25]

Second, and perhaps more fundamentally, the State fails to appreciate the role of integration in the T&E calculus. It is not

[25] That the State understates the importance of integration to the T&E analysis was made clear by its expert Davy, who, in her deposition, testified that when developing the SFRA, racial diversity "wasn't considered as an important factor or one that needs to be considered in developing the formula." Davy Dep. 42:9-45:8; *see also* Erlichson Dep. 53:23-54:12 ("To my knowledge, the state board has not adopted composition of schools as part of T&E.").

merely one factor, to be considered alongside all of the others in that equation. To the contrary, under the New Jersey Supreme Court's precedents, the factors identified by the State Defendants – including integrated schools, as well as equitable funding and adequate curricula, for example – are each *independently necessary* to provide students with a Thorough and Efficient Education. The seminal T&E litigation, *Abbott v. Burke*, has made clear that there are a number of "factors" that must be independently satisfied in order for the State to fulfill its T&E obligations. Thus, of course, the focus in *Abbott* has always been on the equitable distribution of school funding. *Abbott v. Burke (Abbott XXI)*, 206 N.J. 332, 340 (2011) ("In sum, the Abbott plaintiffs have been the long-standing beneficiaries of specific judicial remedial orders, which were entered to correct proven constitutional deprivations that the State was unable to correct on its own, and which specifically directed the method by which the amount of funding to their school districts was to be calculated and provided by the State."). But there are other requirements – for example, adequate physical facilities, expanded curricula and content standards, and the provision of early childhood education - that are each independently necessary as well. *See, e.g.*, *Abbott II*, 119 N.J. at 362 ("A thorough and efficient education also requires adequate physical facilities." (citation omitted)); *Abbott v. Burke (Abbott IV)*, 149 N.J. 145, 186 (1997) ("[W]e continually have noted that

adequate physical facilities are an essential component of that constitutional mandate."); *id.* at 167-68, 176-77 (finding that curriculum content standards (CCCS) – which include nine subject areas - met the T&E constitutional floor, but that the school funding provisions (CEIFA) were constitutionally insufficient); *Abbott v. Burke (Abbott V)*, 153 N.J. 480, 508 (1998) ("The Court directs the Commissioner to exercise his power under N.J.S.A. 18A:7F-6b and -16 to require all Abbott districts to provide half-day pre-school for three- and four-year olds.").

In the same way, the *North Haledon* Court focused on the T&E clause's prohibition of *de facto* segregation, and specifically held that it is a necessary – although Plaintiffs agree, not sufficient – element of a Thorough and Efficient Education, just as are equal educational funding and the provision of early childhood education. 181 N.J. at 178 ("We know that racial balance and education are not 'isolated factors,' but 'different sides of the same coin[.]'" (quoting *Bd. of Educ. of Englewood Cliffs*, 257 N.J. Super. at 464)). And, as set forth above, were it otherwise, "separate but equal" would be a constitutionally permissible regime in New Jersey, *Brown v. Board of Education* notwithstanding. Thus, even to the limited extent to which the State pays lip service to the benefits of diverse school environments, *see* Sb 1 ("The importance of attending a diverse school environment cannot be overstated. The experience of being immersed in a racially and

socioeconomically diverse school is, indeed, a critical ingredient in the life of every child."); Davy Dep. 35:2-5; *see also* Barret Aff. ¶ 57; Barrett Dep. 32:19-33:3, 81:17-23, they simply fail to recognize that it is not just one factor in the analysis, but a fundamental requirement of New Jersey constitutional jurisprudence.

This reality emerges clearly from the *North Haledon* decision itself. In that case, the proposed withdrawal of North Haledon students from the Manchester Regional school district would have reduced the percentage of White students in the regional schools by between 9% or 9.4%, 181 N.J. at 170-71, modest numbers in comparison to those at issue here. Based on those statistics alone, the Court found a violation of T&E because "withdrawal by North Haledon will deny the benefits of the educational opportunity offered by a diverse student body to both the students remaining at Manchester Regional and to the students from North Haledon." *Id.* at 184.[26] In doing so, the Court emphasized the essential importance of integrated educational settings. Pointing out that "we have not yet found a way to ensure that 'children of all races learn to live with and respect each other in school at an early age,'" 181 N.J. at 179 (quoting *Bd. of Educ. Of Englewood Cliffs*,

[26] The Court reached this conclusion notwithstanding the fact that North Haledon's stated desire to withdraw was not motivated by racial animus, but rather financial strain. *See N. Haledon*, 181 N.J. at 185.

257 N.J. Super. at 464), the Court – presaging this lawsuit - cited to New Jersey's dismal performance in this regard: "as a State, we are losing ground. New Jersey ranks fifth in the nation in the percentage of [B]lack students attending ninety to one hundred percent minority schools, and fourth in the nation in respect of [H]ispanic students." *Ibid.* (citing Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare* 27-28 (Harvard Civil Rights Project 2004) ("Orfield and Lee"), *currently available at* https://civilrightsproject.ucla.edu/research/k-12-education/ integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf (last visited Jan. 16, 2022)).

In so concluding, the Court cited a study which found that during the 2001-2002 school year, 50.8% of Black students and 41.8% of Latino students in New Jersey attended schools that were 90% or more non-White. Orfield and Lee at 27. This level of racial imbalance, the *North Haledon* Court found, was plainly inconsistent with T&E. *See* 181 N.J. at 179. Tracking this exact mode of statistical analysis, and analyzing current enrollment data, Plaintiffs have now demonstrated that the equivalent racial isolation currently exists in New Jersey's schools. During the 2016-2017 school year, 49.2% of Black students and 44.5% of Latino students attended schools that were 90% or more non-White. Am. Compl. ¶¶ 24-25. And from the 2016-2017 to 2019-2020 school years,

on average, 49.2% of Black students and 44.9% of Latino students attended schools that were 90% or more non-White. Coughlan Supp. Cert. ¶ 4(a-b). That is to say, between 2016-2017 and 2019-2020, an average of 276,586 (46.5%) of 594,693 Black and Latino students in New Jersey each year attended schools that were more than 90% non-White. *Id.* ¶ 4(c). The lack of progress since the study discussed in *North Haledon* is striking.

Nor, by the way, as the *North Haledon* Court held, are the benefits of a more integrated system limited to students of color. 181 N.J. at 178 ("[W]hite students relegated to homogeneous schools also are disadvantaged because they too are denied the opportunity for social and educational development in an atmosphere in which children with differences learn to celebrate and not fear them." (quotation omitted)). And in fact, White students, too, are racially isolated in New Jersey's schools: on average, between the 2015-2016 and 2019-2020 school years, 175,063 (28.9%) White students attended schools each year that were more than 80% White and 244,177 (40.3%) attended schools that were more than 75% White. Coughlan Supp. Cert. ¶ 4(d).

For this reason as well, the undisputed statistical facts demonstrate current patterns of segregation far worse than those present in *North Haledon* in 2004. And taken together, Plaintiffs have now proven violations of the T&E clause's prohibition on racially imbalanced schools, for which Defendants are, under *North*

Haledon, and indeed, *Brown I & II*, liable. In the words of the *North Haledon* Court, "[w]e have paid lip service to the idea of diversity in our schools, but in the real world we have not succeeded." 181 N.J. at 179. Finding liability on Plaintiffs' Count Three is an important step in ensuring that each New Jersey student receives the integrated educational environment that the T&E clause guarantees.

IV. THE STATE DEFENDANTS' FAILURE TO PREVENT RACIAL AND SOCIOECNOMIC SERGREGATION IN NEW JERSEY'S PUBLIC SCHOOLS VIOLATES THE STATE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION (SECOND COUNT).

The Second Count of Plaintiff's Amended Complaint asserts that the State Defendants' failure to prevent racial and socioeconomic segregation in New Jersey's public schools violates the State Constitution's guarantee of equal protection. Am. Compl. ¶¶ 67-68. As Plaintiffs describe in their moving brief, Pb 28-29, the state Supreme Court has "construed the expansive language of Article I, Paragraph 1 to embrace th[e] fundamental guarantee" of equal protection, which "protect[s] against injustice and against the unequal treatment of those who should be treated alike." *Lewis v. Harris*, 188 N.J. 415, 442 (2006) (quotation and citation omitted). The State and Charter Defendants raise a number of objections to Plaintiffs' equal protection claim – mostly centering on Plaintiffs' assertion that the Residency Statute, N.J.S.A. 18A:38-1, is unconstitutional as applied.

A. Plaintiffs' Statistical Proofs Alone Demonstrate a Violation of the State Constitution's Equal Protection Guarantee.

First, both the State and Charter Defendants errantly contend that a finding of disparate impact is not sufficient to find an equal protection violation. Sb 70-71; Cb 17-20. In doing so, both twist the importance of *State v. Marshall*, 130 N.J. 109 (1992). In *Marshall*, the state Supreme Court encountered claims of disparities in capital sentencing that, it was asserted, were related to the race of the defendant and/or the race of the victim. *Id.* at 207. The *Marshall* Court flatly rejected *McCleskey v. Kemp*, 481 U.S. 279 (1987), a case in which the United States Supreme Court found that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *McCleskey*, 481 U.S. at 312; *Marshall*, 130 N.J. at 207. Instead, our Supreme Court, in *Marshall*, made clear that "[t]his Court cannot refuse to confront those terrible realities." 130 N.J. at 209. In doing so, it explained that

> [w]e have no doubt that the people of New Jersey would not tolerate a system that condones disparate treatment for [B]lack and [W]hite defendants or a system that would debase the value of a [B]lack victim's life. Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing.

> We have encouraged the Attorney General, as the chief law enforcement officer of the State of New Jersey, to exercise his undoubted authority to instill uniformity in charging and prosecuting practices throughout the state. We realize the differing attitudes in counties and the jurisdictional concerns. If the system fails to eliminate unconstitutional disparities, that failure should not be because of hesitancy to invoke authority currently conferred on the Attorney General.
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> [*Id.* at 214-15 (citations omitted).]

The *Marshall* Court also provided a number of guidelines to determine whether equal protection principles are violated based on statistical showings:

> If a court concludes that the statistical evidence is so deviant as to compel a conclusion of substantial significance, the court must then look to the circumstances surrounding that statistical showing to determine its full constitutional import. The constitutional importance of the statistical showing depends in part on the degree of subjectivity involved in the selection mechanism. The more discretionary the selection process, the more concern for bias. In addition, courts consider the time period over which violations are alleged to have occurred, and, finally, courts will look at the State's efforts to deal with the problem of potential bias.
>
> [*Id.* at 212 (citation omitted).]

The Court made clear that the focus must be "to examine over time whether those [disparate] effects are systemic." *Id.* at 213.[27]

[27] Last term, in *State v. Andujar*, 247 N.J. 275 (2021), the state Supreme Court considered claims that the jury selection process is tainted by unconstitutional *implicit* racial bias. The Court, looking to the State Constitution's equal protection principles, cautioned that "implicit bias is no less real and no

Consistent with the *Marshall* Court's guidance, Plaintiffs provide objective data – published by the State – that clearly demonstrate the severe racial imbalance in the State's schools. *See supra* Section I. Rather than "subjective," this data is unaltered by complicated formulas or other statistical modeling methods. It presents the plain and objective truth: New Jersey's schools are segregated. And what's more, in response to the State Defendants' complaints that Plaintiffs only looked at the 2016-2017 school year, Plaintiffs provided an updated certification that provides objective data over *five* years – from 2015-2016 to 2019-2020. *See generally* Coughlan Supp. Cert.

The State Defendants also claim that Plaintiffs' "failure to allege any invidious discrimination or systemic bias here is fatal to plaintiffs' equal protection claim." Sb 71. But, in fact, Plaintiffs' entire set of claims alleges system-wide discrimination over a period of many decades. *Compare, e.g.*, Am. Compl. ¶ 35 ("State officials have been on notice of New Jersey's extreme school segregation for nearly half a century."), *and* Coughlan Supp. Cert. (calculating five-year demographic averages from 2015-2016 to 2019-2020), *with Marshall*, 130 N.J. at 213

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less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination." *Id.* at 303; *see also State v. Dangcil*, 248 N.J. 114, 146 (2021) (requiring the Administrative Office of the Courts to "begin collecting jurors' demographic information" to "prevent[] potential underrepresentation and irregularities from the hybrid [jury] process and other facially neutral selection procedures" that could violate the State Constitution).

(courts' focus must be "to examine over time whether those [disparate] effects are systemic"). Indeed, that is why, beyond the Commissioner's statutory obligations, Plaintiffs' seek a judgment against the State Defendants, including the Commissioner, and not against individual school districts, on Equal Protection grounds as well.[28]

And even if some showing of intent is required, the State Defendants' willful blindness to the *de facto* segregation in New Jersey's schools, of which they and their predecessors have been on notice for so long, demonstrates the requisite intent. The data relied upon by Plaintiffs has been posted on the State's website for years. And the state Supreme Court has – for decades – placed the State Defendants on notice of their constitutional obligation to ensure integrated schools. *See, e.g.*, *Team Acad.*, 247 N.J. 46; *Englewood on the Palisades*, 164 N.J. 316; *N. Haledon*, 181 N.J. 161; *Jenkins*, 58 N.J. 483; *Booker*, 45 N.J. 161. And yet,

[28] Ignoring the significance of *Marshall*, the State Defendants cite *Greenberg v. Kimmelman*, 99 N.J. 552, 580 (1985); *N.J. State Conference-NAACP v. Harvey*, 381 N.J. Super. 155, 161 (App. Div. 2005); and *Rutgers Council of AAUP Chapters v. Rutgers State Univ.*, 298 N.J. Super. 442, 453 (App. Div. 1997), for the puzzling proposition that disparate impact is insufficient to demonstrate an equal protection violation under the State Constitution, particularly when the challenged statute is facially neutral. Sb 70-71. In both *Harvey* and *Rutgers*, the Appellate Division cited to *Greenberg*, a case decided seven years *before Marshall*, and which relied on *federal* precedent considering the *federal* equal protection clause. *See Greenberg*, 99 N.J. at 580 (citing *Massachusetts v. Feeney*, 442 U.S. 256, 274-75 (1979); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)). But in *Marshall*, the state Supreme Court explicitly diverged from federal equal protection precedent, stating that "[t]his Court cannot refuse to confront those terrible realities" demonstrating disparate impact, even absent "purposeful discriminatory intent." 130 N.J. at 208-09.

the State Defendants can point to no actions that they or their predecessors have taken to counteract this severe racial imbalance, despite their own data demonstrating *de facto* segregation and their undisputed constitutional obligations to prevent and remedy such segregation. Under these circumstances, the State's failure to act, though unnecessary for Plaintiffs to prevail on this point, cannot but be viewed as intentional.[29]

B. Plaintiffs Have Demonstrated that the *De Facto* Segregation in New Jersey's Schools Violates the State Constitution's Equal Protection Guarantee.

As the State Defendants recognize, equal protection analysis applies a "flexible" test, "measuring the importance of the right against the need for the governmental restriction." *Lewis*, 188 N.J. at 443 (citation omitted). The test involves "the weighing of three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction." *Ibid.* (citations omitted). Ultimately, "[u]nless the public need justifies statutorily limiting the exercise of a claimed right, the State's

[29] The Connecticut Supreme Court similarly determined that the state was on notice of segregation and nevertheless failed to act with enough force to meet its constitutional mandate. *See Sheff*, 678 A.2d at 1280 ("The state had ample notice of ongoing trends toward racial and ethnic isolation in its public schools, and indeed undertook a number of laudable remedial efforts that unfortunately have not achieved their desired end. The fact that the legislature did not affirmatively create or intend to create the conditions that have led to the racial and ethnic isolation in the Hartford public school system does not, in and of itself, relieve the defendants of their affirmative obligation to provide the plaintiffs with a more effective remedy for their constitutional grievances.").

action is deemed arbitrary." *Id.* at 443-44 (citation omitted). Here, Plaintiffs clearly satisfy each element of that three-part test.

First, despite the State Defendants' protestations, Plaintiffs have clearly identified the established right at stake: the right to an education in a racially and socioeconomically integrated environment free of *de facto* segregation. *See* Pb 29-32; *Lewis*, 188 N.J. at 443 (Step One: "the nature of the right at stake"). The State Defendants reply that Plaintiffs ask this Court to recognize a "novel interest . . . based on an arbitrary and reductive definition of diversity," and then repeat their general objections to Plaintiffs' statistical showings. Sb 73; *see supra* Section I. But the notion that the State views the interests here at stake as "novel" is alarming in and of itself: the right to education in an integrated environment has been established and reaffirmed over decades of precedent, including here in New Jersey. *See, e.g.*, *Team Acad.*, 247 N.J. 46; *Englewood on the Palisades*, 164 N.J. 316; *N. Haledon*, 181 N.J. 161; *Jenkins*, 58 N.J. 483; *Booker*, 45 N.J. 161. And based on any statistical measure, Plaintiffs have demonstrated that New Jersey's schools are *de facto* segregated based on race and socioeconomic status. *See supra* Section I; Section II(B).

That said, Plaintiffs acknowledge that their equal protection claim based on socioeconomic status raises a more novel question

for New Jersey courts. However, the State Defendants' assertion that "plaintiffs have not alleged any wealth-based disparate treatment, nor have they provided any proofs to substantiate such a claim," Sb 79, is simply not true. The Amended Complaint frames Plaintiffs' claims as targeting both race-based and socioeconomic *de facto* segregation. *See, e.g.*, Am. Compl. ¶ 46 ("In sum, racial and socioeconomic segregation denies hundreds of thousands of public school students the well-known benefits of a diverse education."); *id.* ¶ 68 ("Segregation on the basis of race, ethnicity and poverty in New Jersey's public schools violates New Jersey's constitutional guarantee of equal protection of the laws, found in New Jersey Constitution, Art. I, ¶ 1."). And Plaintiffs have highlighted statistics clearly showing that New Jersey's schools are broadly segregated along socioeconomic lines. *See, e.g.*, Section I; Pb 31-32; Am. Compl. ¶ 40(A-H); Coughlan Cert. ¶¶ 28-35, Exhs. E-F; Coughlan Supp. Cert. ¶ 7, Exh. C.

Second, Plaintiffs have demonstrated how the Residency Statute, N.J.S.A. 18A:38-1, directly causes district-level segregation. *See* Pb 32-35; *Lewis*, 188 N.J. at 443 (Step Two: "the extent to which the challenged statutory scheme restricts that right"). In short, if a student resides in a racially or socioeconomically segregated district, he or she will be forced to attend a racially or socioeconomically segregated school. Indeed, this is not seriously disputed: the State Defendants do not

contest that the Residency Statute requires students to attend schools located within their districts. *See* Sb 80-81. Instead, the State rehashes its criticism that "at best Plaintiffs data makes a narrow showing regarding only 23 of the State's 674 school districts." *Id.* at 80. But, as explained *supra* Section I, Plaintiffs demonstrate that these segregated school districts (which include many schools each) are located within diverse counties throughout the state that have other comparable school districts that are primarily White and wealthy. *See* Pb 9-13. In other words, district- and county-level data demonstrate the widespread nature of segregation by district, despite New Jersey's counties having diverse student bodies in the aggregate. *See ibid.* (comparing school districts in Essex, Union, Passaic, Middlesex, Camden, Mercer, and Monmouth Counties); *compare* Coughlan Supp. Cert. ¶¶ 7(A-H), Exh. C, *with* Coughlan Cert. ¶¶ 22-25, Exhs. E-F. And yet again, the State Defendants offer no data in support of their contention. Meanwhile, the Charter Defendants' expert provided data that provides logical, and powerful, support for Plaintiffs' claim that the Residency Statute bakes in racial separation based on district boundaries. He looked at five counties – Camden, Hudson, Essex, Passaic, and Mercer – and found that in each, "a small number of public schools enroll a disproportionate number of the White students who have chosen public school." Barrett Aff. ¶ 49. He continued, "[i]n each

county, the top 10 percent of White enrolling schools accounts for a disproportionate segment of total White student enrollment – just like they do when you examine the distribution of White public students enrolled within a particular New Jersey district." *Ibid.*; *see id.* at Table 5. For example, he concludes that "in Essex County, almost half of White enrollment can be found in just 10 percent of the total schools in the entire county." *Id.* ¶ 50. In sum, however the data is presented, it is clear that the Residency Statute determines where students attend school – and because of the Statute, many students are forced to attend racially and socioeconomically segregated schools.

Third, there is no convincing reason for the Residency Statute's command that students attend schools only within their district of residence. Pb 35-36; *Lewis*, 188 N.J. at 443 (Step Three: "the public need for the statutory restriction"). It is telling that the State Defendants devote so little time to defending the necessity of the Residency Statute. *See* Sb at 81-82. In a few short paragraphs, they argue that the statute "forms a fundamental basis for the mechanism for funding public schools in this State." *Id.* at 81. But the State has adjusted school funding formulas countless times over the decades, often on order of the New Jersey Supreme Court. The State Defendants also argue that "families domiciled in a given district heavily influence the district's budget," and "[t]hat level of direct participation

significantly impacts how education is delivered to students within the district." *Ibid.* But there is no reason to believe that parents will be other than just as engaged – if not more so – if their children attend an integrated and diverse school, as opposed to a racially imbalanced one based on arbitrary district lines, whether that school is located within the same municipality or a nearby one.

In that regard, the State Defendants also invoke New Jersey's tradition of home rule, which they say is a "long-held notion that . . . should be preserved." *Id.* at 80-81. Although it is usually true that courts must "liberally construe[]" laws "in . . . favor" of the authority of local governments, N.J. Const. art. IV, § 7, ¶ 11, Paragraph 11 "is not . . . an independent source of municipal power." *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75, 93 (2020). And, most important, "where municipal power to act exists, municipal action cannot run contrary to statutory or constitutional law." *Ibid.* Here, as Plaintiffs demonstrate, the *de facto* segregation within New Jersey's schools violates multiple separate constitutional provisions – including the anti-segregation clause, the T&E clause, and equal protection principles. In fact, it is the Residency Statute that arrests

power from localities, constraining their ability to diversify their own student bodies.[30]

In sum, the Residency Statute must fall in light of the constitutional guarantee of racially and socioeconomically integrated schools embodied, as well, in our Equal Protection guarantee.

V. THE COLLECTIVE INTERPRETATION OF THE STATE CONSTITUTION'S PROVISIONS REGARDING SEGREGATED SCHOOLS PROVIDES AN INDEPENDENT BASIS FOR HOLDING THE STATE DEFENDANTS LIABLE FOR *DE FACTO* SEGREGATION (FOURTH COUNT).

Plaintiffs have established that the State Defendants are liable for violating each of the three constitutional provisions identified in the first three counts of the Amended Complaint: N.J. Const. art. I, ¶ 5 (anti-segregation clause) (Count One); N.J. Const. art. I, ¶ 1 (equal protection) (Count Two); and N.J. Const. art. VIII, § 4, ¶ 1 (T&E clause) (Count Three). And, of course, Plaintiffs agree with the State Defendants that "the T&E clause, the anti-segregation clause, and the equal protection clause are all powerful (and indispensable) tools, in and of themselves, for combatting the scourge of segregation and discrimination." Sb 85; *see id.* at 86 ("[P]laintiffs have at their disposal, and have cited as a cause of action, a number of powerful

[30] It is true that schools may accept non-resident students, N.J.S.A. 18A:38-3(a), but this statute, which has been in effect for many years, *see L.* 1967, *c.* 271, has not had the systemic desegregative effect that the facts described above demand; that kind of remedy demands a statewide solution overseen by the Commissioner, who is alone empowered to approve district consolidation even if two districts wish it, N.J.S.A. 18A:13-34.

and specific constitutional provisions that are rife with decades of robust guidance from our courts.").

Nonetheless, the State opposes Plaintiffs' Fourth Count of the Amended Complaint, Am. Compl. ¶¶ 71-72, contending that Plaintiffs seek to "stack[] upon one another" these independent constitutional rights "to create entirely new, unwritten constitutional provisions or enhanced protections," Sb 83; Sb 87 (Plaintiffs "have failed to establish a new constitutional claim."). Plaintiffs, though, do not seek the establishment of any new right or cause of action. Instead, Plaintiffs simply seek recognition that these three independent constitutional provisions prohibiting segregation in public schools should also be read collectively to further fortify the broad prohibition on *de facto* segregation in New Jersey's public schools.

In doing so, and contrary to the State's position, Plaintiffs do not seek anything novel; it is well-established that courts may consider the collective import of rights. *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. Penn. L. Rev. 1067, 1130 (2016) ("Some constitutional cases really do implicate the protections of multiple clauses at the same time. The resolution of those cases . . . often benefits from a decisional approach that accords significance to that fact."); Robert F. Williams, *The Law of American State Constitutions* 354 (2009) ("In a variety of circumstances, state courts have interpreted a state

constitutional clause in light of, or together with, another provision.").

Indeed, the New Jersey Supreme Court has previously relied on multiple constitutional provisions in finding conditions that constituted *de facto* segregation. *See N. Haledon*, 181 N.J. at 177, 178 n.5 (citing both the T&E clause and anti-segregation clause); *Jenkins*, 58 N.J. at 494-96 (same). As have other states. *See* Pb 42-43 (citing *Sheff*, 678 A.2d at 1281-82 (holding that "the scope of the state's constitutional obligation to provide a substantially equal educational opportunity is informed and amplified by the highly unusual provision" prohibiting segregation based on race or ancestry); *id.* at 1281 n.29 (comparing Connecticut constitutional prohibition on segregation to N.J. Const. art. I, ¶ 5); *Bd. of Educ. of Kanawha v. W.V. Bd. of Educ.*, 639 S.E.2d 893, 899 (W.V. 2006) (holding that state constitutional guarantee of thorough and efficient education mandates strict scrutiny analysis under state equal protection clause)). The State Defendants, however, argue that these cases are not persuasive because "[n]owhere in either of those decisions did the courts create a new universe of constitutional protections." Sb 87. But, as should be clear by now, Plaintiffs seek only to vindicate rights already clearly established under other provisions of the State Constitution, as interpreted by the state Supreme Court.

The State Defendants also ignore the long history whereby appellate courts, right up to the United States Supreme Court, have read constitutional provisions in a collective fashion to further protect rights. *See* Pb 41 (citing *Obergefell v. Hodges*, 576 U.S. 644, 672-73 (2015); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 492 U.S. 872, 881 (1990); *Bearden v. Georgia*, 461 U.S. 660, 665 (1983); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 318 U.S. 479, 484 (1965)).

In this case, Plaintiffs have demonstrated that New Jersey's public schools violate the State Constitution's broad and powerful prohibition on segregation based on race and socioeconomic status. Accordingly, this Court should grant judgment for Plaintiffs on Count Four of the Amended Complaint.

VI. *DE FACTO* SEGREGATION IN CHARTER SCHOOLS VIOLATES THE CHARTER SCHOOL PROGRAM ACT, AND THE STATE DEFENDANTS ARE LIABLE FOR THAT VIOLATION (SIXTH COUNT).

Count Six in Plaintiffs' Amended Complaint alleges that the State Defendants – and particularly the Commissioner – have violated the Charter School Program Act and its implementing regulations. Am. Compl. ¶¶ 75-77. That is, the Commissioner has permitted charter schools to operate with racially imbalanced student bodies, and those schools have, as a result, exacerbated the statewide segregation problem to which Plaintiffs have pointed. The fault does not lie primarily with the State's charter schools, which are uniquely positioned to be a part of the solution

to New Jersey's segregation problem. But those schools are, today, a manifestation of the State's systemically segregated schools, which because they are themselves segregated, further entrench the segregation throughout the State's schools.

From the 2015-2016 to 2019-2020 school years, an average of 72.4% of the State's charter schools had fewer than 10% White students, and 80.7% of charter school students attended schools that are more than 90% non-White. Coughlan Supp. Cert. ¶ 5, Exh. B. In other words, during that five-year period, on average, of the 49,221 students who attended charter schools each year, 39,706 attended schools with fewer than 10% White students. *Id.* at Exh. B. As an example, during the 2019-2020 school year, of the 20,251 students enrolled in Essex County's charter schools, 65.44% were Black, 32.79% were Hispanic, and only 0.35% were White; 81.18% of students were in poverty. *Id.* at ¶ 6.[31]

But instead of confronting these clear statistical showings of segregation within New Jersey's charter schools with potential solutions, the State Defendants instead list a host of vigorous statutory provisions and regulations that require charter schools to be integrated learning environments. Sb 92-98 (citing, among others, N.J.S.A. 18A:36A-7; N.J.S.A. 18A:36A-8(e); N.J.A.C. 6A:11-

[31] By contrast, the Census Bureau estimates that, as of April 1, 2020, Essex County's population was 41.9% Black, 23.8% Hispanic, and 30.2% White. *See Quick Facts: Essex County, New Jersey*, United States Census Bureau, *available at* https://www.census.gov/quickfacts/fact/table/essexcountynewjersey/POP010220 (last visited Jan. 16, 2022).

2.1(j); N.J.A.C. 6A:11-2.2(c); N.J.A.C. 6A:11-4.4(a)). That is true; these are powerful mandates. And the State is also correct that since *Booker*, the state Supreme Court has consistently reaffirmed the Commissioner's statutory duties to take all reasonable steps to alleviate racial isolation, including in charter schools. Sb 94-95; *see, e.g.*, *Englewood on the Palisades*, 164 N.J. at 328 ("The constitutional command to prevent segregation in our public schools superimposes obligations on the Commissioner when he performs his statutory responsibilities under the Charter School Act." (citations omitted)); *ibid.* ("The Commissioner's obligation to oversee the promotion of racial balance in our public schools to ensure that public school pupils are not subjected to segregation includes any type of school within the rubric of the public school designation."); *In re Red Bank Charter Sch.*, 367 N.J. Super. 462, 471-72 (App. Div. 2004) (recounting that the Commissioner must "vigilantly seek to protect a district's racial/ethnic balance" first "during the charter school's initial application," and then throughout its "continued operation, and charter renewal application" (citations omitted)). In particular, the Commissioner must ensure that charter schools enroll a diverse student body. *Englewood on the Palisades*, 164 N.J. at 328 ("Obviously, if a charter school were to recruit systematically only pupils of a particular race or national origin, the Commissioner would be obliged to stop that activity and, if

necessary, to revoke the approval of a charter school engaging in such tactics."); N.J.S.A. 18A:36A-7 ("A charter school . . . shall not discriminate in its admission policies or practices on . . . any other basis that would be illegal if used by a school district[.]").

Plaintiffs obviously do not dispute the strength of these statutory and regulatory schemes; instead, Plaintiffs' contention is that the State Defendants have nevertheless – contrary to the Charter School Program Act and its implementing regulations – allowed the State's charter schools to remain segregated.[32] And this is not simply a matter of statute. As the state Supreme Court has made clear, "[t]he constitutional command to prevent segregation in our public schools superimposes obligations on the Commissioner when he performs his statutory responsibilities under the Charter School Act." *Ibid.* (citation omitted).

The State Defendants assert that, pursuant to these robust dictates, "measures have been taken to protect against any segregative effects of a charter school's enactment or expansion – both with respect to its effect on its surrounding district(s),

[32] As the Renaissance School Intervenor-Defendants recognize, *see* Rb 7, the Urban Hope Act, N.J.S.A. 18A:36C-1 to -19, is generally subject to the "laws and regulations that govern charter schools," N.J.S.A. 18A:36C-7(h), which include the requirement to prevent segregation, *see Englewood on the Palisades*, 164 N.J. at 328.

Plaintiffs also note that the Renaissance School Intervenor-Defendants failed to file "a responding statement either admitting or disputing each of the facts in the movant's [*i.e.*, Plaintiffs'] statement." *Rule* 4:46-2(b).

and in and of itself." Sb 97. With respect to individual schools that may or may not be true, a matter that is oft-litigated. *See, e.g.*, *TEAM Acad.*, 247 N.J. at 79 (the Commissioner, when determining applications for charter approvals and renewals, "should address the impact of the charter school's approval, renewal or amendment on racial segregation in the district of residence"); *Red Bank*, 367 N.J. Super. at 471 ("[T]he Commissioner is required to monitor and remedy any segregative effect that a charter school has on the public school district in which the charter school operates." (citations omitted)). But the statistics show that, over all, charter schools exacerbate existing racial imbalances, and that the Commissioner has allowed this segregation to take place. In fact, last term, the state Supreme Court strongly rebuked the Commissioner for completely failing to weigh racial balance – as is required by the same statutes, regulations, and case law cited by the State Defendants - concerning seven separate charter schools. *See TEAM Acad.*, 247 N.J. at 79 ("[T]he Commissioner's decisions granting renewals or amendments to the seven respondent charter schools did not include any reference to the charter schools' potential impact on racial segregation in the district schools, much less the careful consideration of that issue that *Englewood* requires. The decisions are therefore deficient." (citations omitted)).

It is true that New Jersey's segregated charter schools are largely a symptom of the widespread racial separation of students throughout New Jersey's public school system. In other words, charter schools themselves are – like public school districts – simply educating the students within their district boundaries. They are part of an overall school ecosystem that maintains segregated schools. And yet, as they currently stand, New Jersey's charter schools are unquestionably segregated in violation of the Charter School Program Act, its implementing regulations, and the State Constitution. Accordingly, Plaintiffs are entitled to summary judgment on Count Six of the Amended Complaint.

VII. THE STATE DEFENDANTS' LIABILITY ON SEVERAL CONSTITUTIONAL AND STATUTORY GROUNDS SUBJECTS THEM TO LIABILITY UNDER THE NEW JERSEY CIVIL RIGHTS ACT, N.J.S.A. 10:6-2 (SEVENTH COUNT).

The State Defendants offer two challenges to Plaintiffs' claim under the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-2. First, the State argues that because Plaintiffs' constitutional claims are unsupported, the CRA claim must also fail. Sb 88-89. But, for the reasons provided in Plaintiffs' motion brief and further explained above, Plaintiffs are entitled to summary judgment on their constitutional and statutory claims, and thus, on their CRA claims as well. Second, the State contends that neither the State nor its officers acting in their official capacities are "persons" under the CRA. *Id.* at 89-90. For that broad proposition, the State cites *Brown v. State*, 442 N.J. Super.

406, 425-26 (App. Div. 2015), which was later reversed by the state Supreme Court on other grounds, 230 N.J. 84 (2017). In *Brown*, the plaintiff sued both the State and an individual police officer after police conducted a search of her home without a warrant. 442 N.J. Super at 410. Significantly, although the appellate court upheld the trial court's dismissal of plaintiff's CRA claim against the State, *id.* at 426, it remanded her CRA claim against the police officer for a trial on damages, *id.* at 427-28. And here, of course, Plaintiffs bring their claims against the Commissioner, as well as against the State and State Board. Am. Compl. ¶¶ 18-20. Accordingly, Plaintiffs should be granted summary judgment on their CRA claim as to the Commissioner, based on the constitutional violations alleged in the Amended Complaint.

CONCLUSION

For the reasons described in Plaintiffs' moving brief, as amplified above and as will be further discussed at the oral argument on this matter, Plaintiffs respectfully request that the Court grant their motion for partial summary judgment and enter a judgment of liability against the State Defendants on all counts of the Amended Complaint. All parties acknowledge that judgment on liability will not fully resolve this case, but it will allow the parties to move forward to explore a remedy that ensures that which the *Booker* Court established over five decades ago: *de facto* segregation in our public schools must not continue.