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1                   (The following takes place at 10:36.)  
2                   THE COURT: Good morning, you may be  
3 seated.  
4                   Is this up-to-date?  
5                   SPEAKER: Yes, Judge, I asked.  
6                   THE COURT: Okay, so they're just no other  
7 appearances.  
8                   SPEAKER: I asked.  
9                   THE COURT: Okay. I see more people than  
10 names. That's --  
11                   This is the matter of Latino Action  
12 Network, et al, versus the State of New Jersey, the New  
13 Jersey State Board of Education, and the Commissioner  
14 of Education of the State of New Jersey, and with  
15 intervenor defendants New Jersey Charter Schools  
16 Association, Beloved Community Charter School and  
17 several charter school parents. It's docket number  
18 MER-L-1076-18.  
19                   If I could have the appearances for the  
20 record, starting with counsel for the plaintiff.  
21                   MR. LUSTBERG: Good morning, Your Honor.  
22 Lawrence S. Lustberg, Gibbons P.C., on behalf of the  
23 plaintiffs.  
24                   MR. NOVECK: Good morning, Your Honor.  
25 Michael Noveck from Gibbons also on behalf of

1 plaintiffs.

2 MR. PLAWKER: Good morning, Your Honor.  
3 Roger Plawker, Pashuan, Stein, Walder and Hayden, on  
4 behalf of the plaintiffs.

5 THE COURT: Okay. And for the state  
6 defendants.

7 MS. SCHAFFER: Good morning, Your Honor.  
8 Melissa Dutton Schaffer, Assistant Attorney General, on  
9 behalf of the State defendants.

10 MR. JOSEPHSON: Good morning, Your Honor.  
11 Paul Josephson on behalf of defendant intervenors.

12 THE COURT: Okay. This matter comes before  
13 the court on the State defendants' cross motion which  
14 has been supported by the charter school intervenors to  
15 dismiss plaintiff's amended complaint, or in the  
16 alternative, to consider the defendant's procedural  
17 objections to the court's considering plaintiff's  
18 motion for partial summary judgment as to liability at  
19 this time.

20 Plaintiffs' motion for partial summary  
21 judgment as to liability was filed back in September,  
22 on September 27th of 2019, asking the court to find  
23 that the State defendants were liable for multiple  
24 constitutional and statutory violations that have  
25 allegedly resulted in extensive de facto segregation by

1 race, ethnicity and socioeconomic status in New Jersey  
2 public schools and charter schools.

3 In a previous discussion with counsel, the  
4 court determined to hear the procedural objections  
5 before considering the motion for judgment on  
6 liability, so it's the procedural objections that we're  
7 going to hear about this morning, and since it's the  
8 State's motion, we'll turn first to counsel for the  
9 State defendants.

10 MS. SCHAFFER: Thank you, Your Honor. I'd  
11 like to begin this morning by reinforcing that the  
12 State emphatically agrees that racial discrimination  
13 and segregation have no place in our public schools,  
14 and we wholeheartedly believe that a diverse student  
15 body is a critical factor in providing a high quality  
16 learning environment for all New Jersey students.

17 But plaintiff's theory in advancing this  
18 lawsuit and the manner in which they have pled their  
19 claims is so defective that the amended complaint  
20 should be dismissed. At the very least, their motion  
21 for summary judgment must be denied because bifurcation  
22 is not appropriate here and no discovery has yet been  
23 exchanged.

24 The State defendants seek relief today on  
25 three procedural grounds. First and most importantly,

1 because plaintiffs have pled a state-wide cause of  
2 action, the action cannot continue without the  
3 participation of each of the State's individual school  
4 districts who have a real and substantial interest in  
5 the disposition of this case. Under our court rules,  
6 joinder of the districts here is not discretionary, but  
7 mandatory.

8 Second, rendering partial summary judgment  
9 on the issue of liability alone is not appropriate in  
10 this case. Determining the State's liability for a  
11 constitutional violation in a vacuum without  
12 consideration of the availability and the feasibility  
13 of remedies would not only be a misuse of judicial  
14 resources, but would deprive the Court of the  
15 consideration of a robust record necessary for the  
16 disposition of a case of this magnitude.

17 Finally, at the very minimum, plaintiff's  
18 motion for partial summary judgment is premature, as  
19 the parties have not even commenced let alone completed  
20 discovery. Without the opportunity for discovery, the  
21 State is severely prejudiced in its defense of the  
22 claims, and the Court is left without a complete  
23 factual record.

24 Unless the Court prefers otherwise, I'll  
25 begin with the issues of joinder.

1 THE COURT: That's fine.

2 MS. SCHAFFER: Under Rule 4:28-1, the  
3 districts must be joined as parties here because they  
4 have an indisputable interest in the disposition of  
5 this case.

6 By design, plaintiff's amended complaint  
7 calls into question the entire system of public  
8 education throughout the State. For that reason, each  
9 individual school district has a direct and significant  
10 interest in how the case is adjudicated. Depriving  
11 them of the right to protect and defend that interest  
12 is contrary to the principle served by the joinder  
13 rule.

14 THE COURT: I know that your adversary has  
15 cited a number of cases, but including the Abbott v.  
16 Burke, Robinson v. Cahill, the school funding cases,  
17 the school districts were not required to be parties in  
18 those cases, and in many constitutional cases where the  
19 challenge is to state statutes, which is really one of  
20 the main aims of this is to invalidate certain  
21 residency requirements for public schools being bound  
22 by municipal boundaries, the courts have not required  
23 all affected districts to be, you know, to be included.

24 So, I mean, why here? Why is this  
25 different?

1 MS. SCHAFFER: So I think the distinction  
2 is in many of the cases relied on by plaintiffs,  
3 particularly Booker, Jenkins, and those lines of cases,  
4 the procedural posture of those cases by the time they  
5 got to the Court was very distinct than the procedural  
6 posture here, where those cases began before the  
7 Commissioner of Education where the districts were the  
8 parties at issue. And in addition to being parties,  
9 there was a very robust record developed before the  
10 commissioner so that before there was a determination  
11 of the constitutional violation or, you know, the  
12 issues at hand, the districts were, in fact, involved  
13 in those matters and were able to --

14 THE COURT: But those were single district  
15 or sending-receiving relationship situations. They  
16 weren't state-wide challenges, and so, I mean, in that  
17 sense, it is different. And certainly, Abbott, I mean,  
18 at times, I think there certainly was -- there were  
19 proceedings before the commissioner, but even going  
20 back to Robinson, it was the trial court that decided  
21 that in the first instance.

22 So there are many examples of  
23 constitutional challenges where millions of people can  
24 be affected, but they're not required because they have  
25 some interest to be an indispensable party. So, again,

1 I don't quite understand why it would be necessary  
2 here.

3 MS. SCHAFFER: So the distinction is that  
4 because the plaintiffs here have brought this  
5 state-wide action, and have alleged that because of  
6 what the State has done, the results of that have been  
7 a deprivation of constitutional rights throughout the  
8 State. And I think Your Honor raises a very important  
9 distinction in those other cases in that we were  
10 dealing with very discreet districts where the problems  
11 were brought, you know, in a manner that was contained  
12 before the commissioner on either send-receive or  
13 consolidation, regionalization.

14 Here, what plaintiffs are alleging is that  
15 the entire system of public education is  
16 unconstitutionally segregated, and so the difference is  
17 that the districts here have a real and direct interest  
18 in how that case is decided. Because even if the  
19 ultimate issue of liability is a judgment against the  
20 State, in essence it becomes a judgment against the  
21 districts as well. Because any judgment finding that  
22 there's been segregation in the schools would be  
23 premised directly upon the composition of the school  
24 districts themselves.

25 And so they absolutely have an interest in

1 the initial determination of liability. More  
2 important --

3 THE COURT: Well, you know what? They have  
4 an interest. I guess it's whether or not they're  
5 indispensable. I mean, the particular claims here go  
6 to the State statutes that define school district by  
7 municipal boundary. And so no local district can  
8 affect, you know, affect that, you know, that  
9 circumstance. Whereas the commissioner, the argument  
10 is, the commissioner and the State board have broad  
11 powers as recognized in Booker, Jenkins, North Haledon  
12 and so forth. They have broad powers to, you know, to  
13 enforce constitutional standards on a state-wide basis.

14 And since the individual districts don't,  
15 there's -- they don't have to be part of the, you know,  
16 of the litigation that's not seeking relief against  
17 them. I mean, that's their argument, but there is no  
18 statutory basis for the districts themselves to go  
19 beyond the district boundaries unless they are in a  
20 sending-receiving relationship or regional, all done  
21 under state statutes.

22 MS. SCHAFFER: Right -- well, so initially,  
23 nor can the commissioner do that as well. I mean, the  
24 commissioner is also bound by the current statutory  
25 framework within Title 18A. But --

1 THE COURT: Well, that's what they're  
2 challenging, exactly what they're challenging. And so  
3 they're saying if anyone can remedy it -- I mean,  
4 they're asking the Court to expand the power of the  
5 commissioner beyond what you -- I mean, what you say  
6 are its limitations.

7 I mean, you haven't gotten in -- you  
8 haven't deposed their motion for partial summary  
9 judgment because we're doing this first, but you have  
10 denied the -- you know, you filed an answer in which  
11 you have denied the -- their claims.

12 MS. SCHAFFER: Yes, yes.

13 THE COURT: But anyway, that's the context  
14 of all this.

15 MS. SCHAFFER: Yes, and I think that the --  
16 a couple things. So I think plaintiff's position that  
17 the State and the commissioner alone, because the  
18 commissioner has the ability to impose regulations on  
19 the district, that that suffices here, because any  
20 judgment can direct the commissioner to take care of  
21 whatever -- you know, to remedy the situation and then  
22 impose that on the district.

23 But I think that that position misconstrues  
24 the degree of the authority that the commissioner has  
25 over the districts. While the State agrees that the

1 commissioner enjoys broad powers and broad authority  
2 over the districts, the districts themselves are, are  
3 separate sue-and-be-sued entities. They have very  
4 unique and discreet interests, characteristics,  
5 demographics that the State is not in a position to  
6 articulate on their behalf.

7 And so the issue -- the State's joinder  
8 rule doesn't just look at whether or not the relief can  
9 be accorded among the existing parties. Our joinder  
10 rule goes further and requires that there need -- the  
11 parties must be joined if they have a substantial  
12 interest in the subject and are so situated that the  
13 disposition of the action in their absence as a  
14 practical matter can impede or impair their ability to  
15 protect their interests or leave the existing parties  
16 to the substantial risk of further litigation.

17 And that's really the prong that the State  
18 is relying on there, that second aspect where the  
19 districts have such an interest and are so situated  
20 that the disposition of this absence can in a practical  
21 matter impede their ability to protect their interests  
22 moving on.

23 So what the plaintiffs are asking the Court  
24 to do is lead the districts out of the case, not --  
25 deny them party status on the issue of liability, have

1 the Court determine that there's been constitutional  
2 violations, and then impose things upon the districts  
3 without ever allowing them to have an opportunity to  
4 present as a party what they feel is important for the  
5 Court to consider --

6 THE COURT: Well, I mean that --

7 MS. SCHAFFER: -- on that ultimate issue of  
8 liability.

9 THE COURT: Well, I mean that, that your  
10 adversary says that's speculative at this point. I  
11 mean, what they're asking, I think, in terms of remedy  
12 generally is that if liability is found, the Court  
13 refer to the commissioner, so the commissioner has the  
14 power and obligation, if liability were to be found, to  
15 work with the districts, although the commissioner has  
16 the ultimate, you know, the ultimate, would have the  
17 ultimate responsibility.

18 So I don't know that they would -- it's not  
19 clear that they would not be invited to, you know, to  
20 participate.

21 MS. SCHAFFER: But by the time -- so  
22 there's -- so I think, number one, there's a  
23 distinction between participation and party status,  
24 because the participation in the remedy phase, you  
25 know, they're sort of left with whatever the Court has



1 determined the liability on, and will only then be  
2 involved in what appropriate remedies, you know, the  
3 feasibility of remedies at that point.

4 THE COURT: Yeah, I mean, they haven't come  
5 in though. I mean, we have the Charter School  
6 Association that has come in to participate as a  
7 defendant and to file an answer denying the claims of  
8 the plaintiffs in regard to segregation at the charter  
9 schools. We don't have any school district that's done  
10 that.

11 MS. SCHAFFER: That's right, and they very  
12 well may not at this juncture have determined to move  
13 to intervene. But the standard for joinder is not  
14 discretionary. Intervention, you know, leaves it to  
15 the parties and the Court and the interested entities  
16 that want to participate.

17 But joinder is not about whether it's up to  
18 the parties or the potential parties or those that  
19 should be named as parties. It's a mandatory rule that  
20 if there is an identification of a person or entity  
21 that must be a party to the case, then the Court is, is  
22 required to join them.

23 And here, if I could just loop back to my  
24 response to Your Honor's first question, which is why  
25 is it not enough for them to participate in the

1 remedy -- excuse me, the remedy phase is because -- and  
2 this, again, sort of gets into the second point on  
3 bifurcation, because all of these issues are so  
4 intertwined, but the idea that the districts can come  
5 in and be heard at the remedy phase ignores the fact  
6 that remedy and feasibility of remedy, availability of  
7 remedy, district resources, you know, funding issues,  
8 that all of those aspects must be considered together  
9 with the strict issues of liability under the law, and  
10 that they will inform the Court as to the degree of  
11 liability on each of the separate counts, on all of the  
12 counts, and because of the inextricability of the  
13 issues of liability and remedy, that is even more  
14 reason why the districts have such a substantial  
15 interest here.

16 THE COURT: Can you play it out for me?  
17 Because, I mean, it's said -- you say that over and  
18 over and over in your brief, but I'm trying to get a  
19 practical sense of what it means, because as your  
20 adversary points out, you know, Booker found de facto  
21 segregation, and even though it came up from the  
22 commissioner to the, you know, to the appellate court,  
23 causation was not considered, you know, and you know,  
24 some of the other cases, you know, Jenkins, it's --  
25 they were focused on de facto segregation also, not on

1 causation, and they found liability in the absence of  
2 causation. So why wouldn't that be an appropriate  
3 framework for this case, which is also claiming de  
4 facto segregation?

5 MS. SCHAFFER: So setting aside the  
6 argument as to whether or not causation still must be  
7 considered with de facto segregation, what Booker and  
8 Jenkins and the rest of the line of cases did  
9 acknowledge is that even if they didn't look to the  
10 cause of the de facto segregation that they still  
11 considered the feasibility and reasonability of  
12 remedies.

13 Booker acknowledged that the right to an  
14 equal opportunity for education and the harmful  
15 consequences of segregation require that school boards  
16 take steps insofar as reasonably feasible to alleviate  
17 racial imbalance.

18 THE COURT: But that was to be done -- I  
19 mean, they had several plans they were looking at in  
20 Booker, but it didn't interfere with the finding of  
21 liability. I mean, it didn't seem to be linked in the  
22 way that you're saying it is necessarily linked in this  
23 case.

24 MS. SCHAFFER: But they were linked because  
25 by the time the Court made those findings, it had the

1 record before it. So when the Court acknowledged that,  
2 it was in the context of everything that had been  
3 presented by the districts, expert reports, you know,  
4 testimony, I mean, there was a record there.

5 And even if the issue of de facto  
6 segregation wasn't necessarily premised on all that,  
7 the Court heard everything holistically together,  
8 because you cannot extract the two from each other  
9 because there needs to be a consideration of the entire  
10 picture, particularly when you're dealing with a  
11 situation where it calls into question the entire  
12 system of public education throughout the State.

13 I mean, this case is very unique and  
14 different than all of the other cases that the  
15 plaintiffs have relied on in their briefs, and I think  
16 that's a very critical and important distinction here.  
17 And it's even more of a reason why the Court needs a  
18 full record and the context of everything that was  
19 going on in order to holistically decide liability and  
20 remedy.

21 THE COURT: Okay. And we sort of -- we've  
22 gotten -- I mean, it's sometimes hard to --

23 MS. SCHAFFER: Because they're so  
24 intertwined, yes, yes.

25 THE COURT: Well, I mean it's hard for

1 one -- some of the arguments certainly overlap. Is  
2 there anything else you want to say about indispensable  
3 parties?

4 MS. SCHAFFER: Yes, Your Honor. So I want  
5 to just stress that, again, you know, I think -- I  
6 think I made the point, but just to reiterate that, you  
7 know, again, the commissioner's ability to impose  
8 certain remedies on the district is a very different  
9 situation than the districts being able to participate  
10 fully as a party in the entire process here.

11 And the other, the other thing I just  
12 wanted to stress is circling back to the final prong of  
13 the joinder rule which talks about in the absence of  
14 the party, if it leads the existing party subject -- if  
15 it leaves the existing party subject to a substantial  
16 risk of multiple litigation down the road.

17 So if the districts are not able to  
18 participate fully as parties in this case, and there is  
19 ultimately remedies imposed upon them without having  
20 consideration, whatever it is that they think is  
21 important, the potential there, and the risk there for  
22 multiple lawsuits against the State in both, you know,  
23 the executive branch through the commissioner and also  
24 in the Law Division and Chancery Division of the  
25 Superior Court. I mean, there could be endless numbers

1 of challenges having to do with taxpayer rights, having  
2 to do with other constitutional rights that could  
3 potentially have been violated as a result of the  
4 remedy. And --

5 THE COURT: Well, the taxpayer rights, I  
6 mean the school district -- I mean, bringing the school  
7 districts in, I mean, they don't levy the taxes.

8 MS. SCHAFFER: So I misspoke.

9 THE COURT: I mean, the municipality --

10 MS. SCHAFFER: Not taxpayer rights, but the  
11 municipalities coming in or the school districts coming  
12 in and arguing because of the tax consequences or  
13 funding issues or --

14 THE COURT: Right, but I mean you're not  
15 saying we have to name every municipality.

16 MS. SCHAFFER: No, no, we are not  
17 suggesting that, Your Honor. Just the districts.

18 THE COURT: Okay. All right.

19 MS. SCHAFFER: But those types of lawsuits,  
20 you know, the State is at risk and the judicial system  
21 is at risk of having to adjudicate, you know,  
22 potentially hundreds of cases down the road. And for,  
23 you know, judicial economy and the idea of having a  
24 holistic adjudication of these matters is, you know,  
25 always in favor of having, you know, of indicating that

1 the mandatory joinder rule has been met here.

2 THE COURT: Despite how unwieldy it could  
3 be.

4 MS. SCHAFFER: And the State acknowledges  
5 that, you know, this is not -- calling in 585  
6 additional parties, the State acknowledges that that is  
7 a huge undertaking and is not ignorant of what that  
8 would mean for this case. But again, that is what  
9 we're left with because of the way that the plaintiffs  
10 have pled this case.

11 If their complaint was pled differently and  
12 focused on the, you know, particular districts whose,  
13 you know, rights have been violated by the State in  
14 some way, then we'd be talking about something very  
15 different, and we could potentially limit. But what  
16 the complaint looks like now, there's no way around the  
17 necessity for all 585 districts.

18 THE COURT: Okay.

19 MS. SCHAFFER: Okay. So then moving on to  
20 the issue of bifurcation, so while Rule 4:46-2, which  
21 the plaintiffs rely on, permits partial summary  
22 judgments, the rule does not speak to the question  
23 which is really at issue here, and that is does it  
24 serve, does bifurcation serve the interest of justice  
25 or efficiency -- does it serve the interest of justice

1 or efficiency to sever the issues of liability from  
2 remedy here. And the State feels very strongly that it  
3 absolutely does not. In fact, it does the opposite.

4 And we suggest that the Court should look  
5 to the standards in 4:38-2. It talks about separation  
6 of liability and damages or liability and remedy in  
7 terms of how cases can be tried. And there the Court  
8 looks to issues of confusion and time efficiency. And  
9 neither one of those principles would be served if  
10 those issues were severed here.

11 And rather than avoiding confusion,  
12 severance of those issues would actually cause  
13 confusion here. You know, the Court -- our Supreme  
14 Court has recognized that where issues of liability and  
15 damages are so intertwined that considering them  
16 separately would taint the potential ultimate decision  
17 on liability, it should not be severed.

18 THE COURT: I mean, some of those cases,  
19 you know, deal with, you know, tort cases --

20 MS. SCHAFFER: Yes, yes.

21 THE COURT: -- for example. And where the  
22 causation is in question -- some of them are medical  
23 malpractice cases, you know, was it this specialist,  
24 was it another specialist, was it the negligence of the  
25 hospital, was it the ambulance being delayed or not

1 responding in time. I mean, it could be a whole host  
2 of people in terms of causation, and I don't know that  
3 we have that.

4 I mean, I understand the case law says what  
5 you say it says, but how do you -- how do you -- how do  
6 you bring those concepts into the setting, you know,  
7 that we have, you know, the context --

8 MS. SCHAFFER: Sure.

9 THE COURT: -- that we face here.

10 MS. SCHAFFER: I think that the same  
11 principles would apply in this case, because trying to  
12 decide the issue of liability in a vacuum, particularly  
13 based on the --

14 THE COURT: Now you say "vacuum." Okay.  
15 There are undisputed statistics, so in that sense,  
16 there's no vacuum. And so it's been unclear to me --

17 MS. SCHAFFER: Uh-hum.

18 THE COURT: -- and I think bifurcation  
19 spills over into the discovery, it's been unclear to me  
20 what else you say is necessary, because we have this --  
21 we have the statistics. You know, it's not -- you  
22 know, it's somewhat unusual to have all the statistics  
23 agreed to by the parties, but frankly, the plaintiffs  
24 expert used all the Department of Education statistics.

25 MS. SCHAFFER: Yeah.

1 THE COURT: So it's not a vacuum in that  
2 sense.

3 MS. SCHAFFER: Uh-hum.

4 THE COURT: What's been put before me in  
5 the motion for liability by plaintiffs is their expert  
6 certification explaining how he got to the assertions,  
7 I think, that are the basis for the amended complaint.

8 So, you know, so we have that. So when you  
9 say vacuum, vacuum, vacuum, I'm not sure what you are  
10 going to produce. And even though you've seen their  
11 certifications since the end of September and the  
12 amended complaint, you know, for what, a couple of  
13 years, I don't know what it is you are going to have  
14 your expert say. I mean even general topics, I don't  
15 know.

16 And the brief was vague other than to say  
17 you want the opportunity for expert, expert discovery.  
18 The reply brief had a little bit more, but part of it  
19 was we want you to look at causation, so maybe you can  
20 flush it out for me.

21 MS. SCHAFFER: Sure. So, okay, it's hard  
22 to stand here today and say exactly what our experts  
23 would say because we have, because we were sort of  
24 provided with this motion without having notice that  
25 they have even retained this expert, without having the

1 expert be identified or have any idea what the expert  
2 was going to suggest.

3 And so, you know, at a minimum, the State  
4 has, has a right to consult with and retain experts  
5 that would be able to offer potentially -- and again, I  
6 don't know, this is sort of crossing over a little bit  
7 into the merits, which I'm really careful not to do  
8 today, but that could potentially say that the data  
9 that has been presented by itself, you know, doesn't  
10 necessarily equal constitutional violation. And it  
11 doesn't equal constitutional violation for these  
12 reasons.

13 And we have not been -- you know, we have  
14 not had the opportunity to do that. And again, it's  
15 the reasons that are lacking here. And when I say the  
16 bifurcation between liability and remedy, I think  
17 there's two, two concepts of remedy that kind of maybe  
18 we're interchanging, and one is that once there's been  
19 a finding that there's been a violation of the  
20 Constitution, you know, there can be a directive for  
21 the State to remedy the problem.

22 But in order to find liability, there also  
23 has to be consideration of the context of this raw  
24 data. And maybe at the end of the day the raw data is  
25 what it is. But the State has not had an opportunity

1 to present what it feels the Court should be  
2 considering in making that call.

3 And if there is a different way to receive  
4 the data and if there's -- you know, the plaintiffs  
5 have only given the Court what they believe the Court  
6 needs to make the determination, and the State -- you  
7 know, whether or not, again, staying away from the  
8 merits, whether or not that does satisfy an equal  
9 constitutional violation, we don't know. But the  
10 reason why it can't be decided at this stage is because  
11 the Court needs to have all of the relevant  
12 information. Even if after considering it --

13 THE COURT: I guess I'm just struggling as  
14 to what that might be even in categories.

15 MS. SCHAFFER: Yeah, okay. So categories  
16 would be --

17 THE COURT: That's -- I mean, that's  
18 something concrete. I know you don't have -- you have  
19 not identified an expert. You have a lot of experts at  
20 the Department of Education you could have been talking  
21 to.

22 MS. SCHAFFER: Right.

23 THE COURT: But I just was trying to get  
24 something more concrete. So you want statistics and  
25 data, I mean --

1 MS. SCHAFFER: So --

2 THE COURT: -- certainly can be interpreted  
3 differently by different parties. I mean, the  
4 certification of Mr. Coughlan goes in great detail as  
5 to how he tried to remove any discretion, and he  
6 explained how he utilized the statistics. I mean, some  
7 of them are -- I think he went back to the 2010 census,  
8 because the 2020 census hasn't been taken yet, and he  
9 wasn't comfortable with the American Community Survey,  
10 you know, I don't know if it's annual updates or  
11 whatever.

12 MS. SCHAFFER: Uh-hum.

13 THE COURT: But he then did extrapolate to  
14 address concerns about whether or not the years since  
15 he looked at the data would change -- have much of an  
16 impact on his conclusions. And he has given an opinion  
17 that no, there would not be much of an impact on his  
18 conclusions.

19 Is that the kind of thing that you want  
20 to --

21 MS. SCHAFFER: Absolutely.

22 THE COURT: -- have an expert take a look  
23 at?

24 MS. SCHAFFER: Absolutely, absolutely, Your  
25 Honor. And that's just one example.

1 THE COURT: Okay, give me some more.

2 MS. SCHAFFER: So other examples -- I mean,  
3 we -- so defendants don't have a right to even issue  
4 contention interrogatories. I mean, when you look at  
5 the amended complaint, there is still so many -- I  
6 mean, we're entitled to ask very specific questions  
7 about what they're alleging, because some aspects of  
8 their amended complaint are still so vague, it's  
9 somewhat unclear exactly what they're suggesting. So  
10 we're --

11 THE COURT: Well, can you give me some  
12 examples with that? I mean, as to remedy, it is  
13 definitely unclear, but not so much -- I mean, as to  
14 liability, they're focusing on the statutes that  
15 require school attendance within municipal boundaries,  
16 because the -- you know, you have quite a number of  
17 schools, and they've laid it out in their complaint  
18 that are overwhelmingly minority, 90 percent or more,  
19 some 99 percent or more.

20 So, I mean, that's, you know, that's what  
21 they've highlighted.

22 MS. SCHAFFER: So, for example, what is  
23 still unclear though is are they suggesting that that  
24 statute should be, you know, is unconstitutional as to  
25 every district in the state, that that statute results

1 in unconstitutional segregation in every school  
2 district? Are they arguing that that statute is only  
3 unconstitutional as to the certain districts that they  
4 have indicated are allegedly segregated? Are they  
5 suggesting that the statute should be struck down in  
6 its entirety? Are they suggesting that the statute  
7 should somehow be applied in a manner that -- that the  
8 statute can stay, but will be applied in a manner that  
9 is constitutional? All of those things are unclear.

10 They also reference other, you know, sort  
11 of state conditions. I can't even say state action,  
12 but conditions of the State such as housing patterns  
13 and things like that that have contributed and led to  
14 de facto segregation. But it's unclear if they're  
15 challenging the housing statutes, or if they're just  
16 saying that the condition of segregation in school  
17 constitutes, you know, the State's violation of the  
18 Constitution. So there's --

19 THE COURT: And is there anything -- you  
20 know, I mean, it is a broad-based challenge, and it  
21 also seeks, you know, makes claims about socioeconomic  
22 status, and I don't know what the research is on  
23 socioeconomic status.

24 MS. SCHAFFER: And there hasn't been any,  
25 you know, put forth by plaintiffs other than, again,

1 the data about how many students meet the particular  
2 standard, but --

3 THE COURT: And in terms of constitutional  
4 concerns, we have Booker and Jenkins, but in the school  
5 setting, is there, you know, has socioeconomic status  
6 been identified as an equivalent certain or basis for  
7 segregation in New Jersey case law?

8 MS. SCHAFFER: Not that I'm aware of. I  
9 mean, the Abbott line of cases certainly deals with the  
10 socioeconomic status of students and indicates that the  
11 level of socioeconomic status in certain districts can  
12 impede their ability to receive a thorough and  
13 sufficient education, which has been remedied through  
14 the Abbott remedies of resources and things of that  
15 nature.

16 But there's no case law in New Jersey that  
17 suggests that socioeconomic status in school districts,  
18 like, you know, a percentage of lower income -- excuse  
19 me -- students in particular districts equals a  
20 constitutional violation.

21 THE COURT: And is that another reason that  
22 you need to have discovery?

23 MS. SCHAFFER: Absolutely, because that's  
24 not something that we -- that the State would be able  
25 to respond to purely on the law. I mean, again, we



1 would have to have experts to opine on that to educate  
2 the Court on the issues and be able to have, you know,  
3 a full record developed on those issues. It's not just  
4 whether or not case law exists. It's what the research  
5 is. You know, we have -- we need the opportunity to  
6 have an expert present that, have an expert report,  
7 engage in full and robust, you know, depositions, I  
8 mean all of that, particularly in a case of this  
9 magnitude, Your Honor.

10 THE COURT: Okay. In terms of discovery,  
11 we sort of hit on it.

12 MS. SCHAFFER: Yeah.

13 THE COURT: And but, you know, the Court  
14 rules allow summary, or partial summary judgment to be  
15 brought early in the process. Often, the same  
16 objection that you've raised is raised when that  
17 happens, and that is that we need discovery. But I  
18 guess I've been pushing, pressuring -- you know,  
19 pressing you in terms of the bifurcation as to what  
20 discovery you need, because the case law, you know,  
21 says you can't just say we want discovery --

22 MS. SCHAFFER: Right.

23 THE COURT: You have to explain what that  
24 is, and it seems like, at least in terms of  
25 bifurcation, you've been telling me the kinds of

1 discovery that you need and that you think is warranted  
2 here. Is there anything you want to add to that?

3 MS. SCHAFFER: Just that, again, you know,  
4 because of the fact that we also feel strongly that the  
5 districts are mandatory parties here, there would be  
6 discovery that we would want to get from the districts  
7 regarding, you know, additional data, additional, you  
8 know, potentially test scores, you know, whatever, you  
9 know, whatever their policies are, particular  
10 individual policies within the schools. You know, we  
11 have the right to explore all of that sort of  
12 potentially relevant information with the districts as  
13 well and the charter school defendants.

14 So it's not just what discovery we need  
15 from plaintiffs, but there's other discovery that we  
16 need from other parties in this case so that the record  
17 can be fully developed here.

18 THE COURT: Okay. Anything else? I'll  
19 give you a chance to respond after we hear from  
20 plaintiff's counsel. Anything else you want to say  
21 now?

22 MS. SCHAFFER: Not at this time, Your  
23 Honor. Thank you.

24 THE COURT: Okay. We'll hear from  
25 Mr. Josephson as to the charter school issues. Are you

1 arguing for the --

2 MR. JOSEPHSON: I'd like to defer to my  
3 colleague, Miss Scruggs to speak to the charter school  
4 issues, Your Honor.

5 THE COURT: Okay. You know, she didn't  
6 sign the sign-in sheet.

7 MR. JOSEPHSON: I'm sorry, Your Honor.

8 THE COURT: That's okay. You were the one,  
9 I think, that filed the briefs.

10 MR. JOSEPHSON: Yes.

11 THE COURT: Okay. Has she made a notice of  
12 appearance?

13 MR. JOSEPHSON: We have, and we signed the  
14 pro hac order for her, Your Honor.

15 THE COURT: Yeah, okay. I just couldn't  
16 recall.

17 MS. SCRUGGS: Thank you, Your Honor.  
18 Again, my name is Lisa Scruggs. I'm with Duane Morris  
19 on behalf of the intervenors, and we submitted a letter  
20 brief with -- and a reply letter brief to lay out our  
21 procedural objections as well.

22 I just wanted to highlight a little bit  
23 more on the last question you were discussing with the  
24 State defendants' counsel on what kind of discovery  
25 would be needed. We believe that on the charter school

1 (indiscernible) particular, this whole question with  
2 regard to segregative effect is specifically brought to  
3 the fore and is required, required some additional  
4 discovery.

5 So in addition to wanting to depose the  
6 expert that's been identified by the plaintiff, we  
7 would also be looking to, to discover additional  
8 evidence around the existing studies and research and  
9 case law around segregative effect of charter schools  
10 in New Jersey.

11 We believe that we would want to present  
12 our own expert on that subject to provide the Court  
13 with additional information regarding whether the  
14 commissioner has been meeting that obligation to  
15 examine segregative effect when charter schools are  
16 established, but in addition to that, look at other  
17 studies that have been conducted around this question.

18 THE COURT: Yeah, I mean it's required that  
19 he look at the segregative effect. I mean, certainly,  
20 what is it, the Engelwood and Clifton Charter School  
21 cases, the Supreme Court has certainly said it, and I  
22 think the commissioner as part of the -- it's part of  
23 the process of review of charter schools.

24 MS. SCRUGGS: Correct. When reviewing  
25 establishment of charter schools, the maintenance or

1 renewal of them, that is a question that is, that the  
2 commissioner is required to examine. And there appears  
3 to be the allegation that that part of what is not  
4 happening is a significant examination of that.

5 THE COURT: Well, I know they're looking,  
6 too, at the fact that the statutory and regulatory  
7 scheme gives priority to students who live in the  
8 district, and that in the school district where the  
9 charter is located, so the fact that the vast majority  
10 of charter schools are located in urban areas, they  
11 have statistics that show many of those charter schools  
12 have, you know, very high percentage of minority  
13 students.

14 MS. SCRUGGS: And certainly, the statistics  
15 that are shown with regard to charter schools are not  
16 dissimilar from what you see in some of the districts.  
17 I think one of the things that we would want to point  
18 out and would further press as part of the discovery  
19 process is the kind of cherry picking that happened  
20 with regard to the certification presented by  
21 plaintiff's experts. Because in addition to having the  
22 districts that you talk about, the public charter  
23 schools that you talk about that are located in areas  
24 and communities that are overwhelmingly racially  
25 isolated, and so the schools that are there tend to

1 reflect that racial isolation, you also, though, have  
2 public charter schools who are specifically designed  
3 and utilize benefits embedded into the charter law to  
4 be diverse. They're specific designed schools that are  
5 called intentionally diverse or diverse by design  
6 charter schools that utilize some of the pieces of the  
7 charter law that provide that autonomy to pull from  
8 multiple school districts, and of course, that is  
9 additional evidence that we would want to explore as  
10 part of the discovery process and present that evidence  
11 to the Court.

12 THE COURT: Okay, thank you.

13 We'll hear from Mr. Lustberg.

14 MR. LUSTBERG: Thank you. Judge, I'm going  
15 to step to the podium just because I have a little  
16 cold.

17 THE COURT: You're always welcome.  
18 wherever counsel is more comfortable is fine with me.

19 MR. LUSTBERG: Thank you, Your Honor. So,  
20 no matter how important a case is, and this is a very  
21 important case, we have to go back to the rules, and to  
22 the specific language of the rules.

23 And so with regard initially to  
24 indispensable parties, I'd really like to direct Your  
25 Honor's attention to the rule upon which the State

1 relies in moving -- and let's be clear what they're  
2 moving for, in moving to dismiss our case.

3 They cite and rely upon Rule 4:28-1, but  
4 Rule 4:28-1 by its terms provides that a --  
5 specifically provides that if a person is subject to  
6 service and meets the criteria of the rule, they shall  
7 be joined as a party to the action, that a dismissal is  
8 only appropriate under the terms of that rule when that  
9 party cannot be served. That language could, literally  
10 could not be clearer.

11 4:28-1a, persons to be joined if feasible.  
12 A person who is subject to service of process -- and  
13 for purposes of this discussion, Your Honor, a person  
14 would refer to the districts, right? A person who is  
15 subject to service of process shall be joined as a  
16 party to the action if, in the person's absence,  
17 complete relief cannot be accorded among those already  
18 parties; or two, the person claims an interest in the  
19 subject of the action and so forth.

20 But let's -- and I'll come back to each of  
21 those two criteria. But let's -- just for purposes of  
22 this discussion, the relief that they seek is  
23 dismissal. The relief that the rule provides is  
24 mandatory joinder.

25 And so their motion as it's phrased, at

1 least, has to be denied unless the Court were to find  
2 under 4:28-1b that a person who should be joined  
3 pursuant to A can't be served with process, and then  
4 there's other criteria that are required, even under  
5 those circumstances, which, by the way, are not  
6 applicable either.

7 But so in the first instance, the motion to  
8 dismiss is, you know, not -- no insult to my friend Ms.  
9 Schaffer, but it's frivolous. There's no basis that  
10 they've set forth to dismiss the action, which is the  
11 relief that they seek, absolutely none.

12 So then let's go to what I guess they're  
13 really asking for, which is the mandatory joinder of  
14 588 school districts in this matter. And there, too, I  
15 would respectfully refer the Court to the language of  
16 the rule.

17 So the language of the rule under 4:28-1  
18 says this: A person who is subject to service -- so  
19 let's assume that the districts are -- shall be joined  
20 as a party to the action if: One, in the person's  
21 absence, complete relief cannot be accorded among those  
22 already parties.

23 Respectfully, they have not shown how the  
24 relief that we seek cannot be -- cannot be accorded  
25 among those already parties. We have sought relief

1 against the State.

2 AS Your Honor has pointed out, we rely upon  
3 state constitutional provisions and state statutory  
4 provisions. We have sued state defendants. Our  
5 argument is -- and it's an argument that at least at  
6 one point, the State seemed to agree with us on,  
7 although they've changed their mind on that -- that  
8 the, that only the State can provide. It's only the  
9 commissioner who has the power and the authority and  
10 the obligation to remedy and to prevent the segregation  
11 of the sort that we have, that is the basis of our  
12 complaint.

13 So there's no question that at the end of  
14 this case, an order could be entered that would provide  
15 for complete relief as between those parties. But  
16 there's another alternative, and this was -- this is  
17 the alternative that the State seems to be focused on.  
18 When I say seems to be focused on, the very first  
19 sentence of Miss Schaffer's presentation was today that  
20 the districts have an indisputable interest, is what  
21 she said, in this matter. And we agree.

22 The districts absolutely will be affected  
23 by the remedy in this case. Most of what's in their  
24 brief with regard to the interest of the districts, the  
25 fact that they will be impacted in some way by -- at

1 the remedial phase of this case, we take no issue with  
2 whatsoever.

3 But let's look again at the language of the  
4 rule. That prong says the person claims -- the person,  
5 that is the districts claim an interest in the subject  
6 of the action. Well, the one thing this Court for sure  
7 does not have before it is any claim by any district.  
8 That does not exist.

9 And this case, respectfully, Judge, has  
10 been around now for a while, and at no time have a  
11 number of things happened. At no time, unlike the  
12 charter schools, has a single district moved to  
13 intervene based upon, particularly, the Court's ruling  
14 with regard to the charter schools last time, where it  
15 broadly construed what an interest has to -- should --  
16 it is for purposes of intervention. It was sort of an  
17 open invitation for any district who wanted to  
18 intervene. In fact, Your Honor said that to us. You  
19 said, you know, you've -- you know, you have to live  
20 with the fact, plaintiffs, that you've brought a  
21 state-wide action. And so any of these districts could  
22 intervene.

23 Even with that clearly stated, open  
24 invitation, not one district has come forward, and in  
25 its brief, the state says, well, you know, there's

1 financial considerations and so forth and so on. There  
2 may be reasons why certain districts might not want to  
3 intervene. But not one to come forward? It's really a  
4 remarkable position.

5 And the State says it's irrelevant, but it  
6 isn't irrelevant under the rule. Because under the  
7 rule, the districts have to make that claim. So with  
8 regard to mandatory joinder, it simply hasn't happened.

9 There's a second thing that hasn't  
10 happened. If the State feels that they -- that it's  
11 the district's fault that any of this has occurred,  
12 then the State has had every ability to file third  
13 party complaints against the relevant districts. They  
14 haven't done that either.

15 And then the third thing --

16 THE COURT: I mean, I think in their -- I  
17 don't know, was it the reply brief where they do say  
18 that the districts share responsibility. I think I saw  
19 that.

20 MR. LUSTBERG: Correct, Your Honor. I  
21 mean, they -- that's sort of their position. But at  
22 the same time, if they think that, then their view  
23 would be -- and this happens in litigation, this Court  
24 knows better than anybody -- this happens in litigation  
25 all the time, that a defendant gets sued and they say

1 you know what, it's really not my fault. It's somebody  
2 else's fault. And what do they do? They bring them  
3 into the case. They file a third party complaint.  
4 They could have done that. The State hasn't done that  
5 either. They have not brought in a single district.

6 And respectfully, they haven't done that  
7 for a good reason. Because this, what has occurred  
8 here is their responsibility. It is their  
9 responsibility to prevent segregation. It is not only  
10 within the broad, general powers of the commissioner  
11 and the state board of education of the State to do it,  
12 but as we've pointed out in the cases, some of which  
13 Your Honor referenced earlier, it is specifically the  
14 power of those, of the commissioner in the Department  
15 of Education and the State, and the Board of Education,  
16 to employ those remedies. They're the ones who can do  
17 it. And so that's why no district has been brought in.  
18 This is no coincidence.

19 And the charter schools obviously felt that  
20 they wanted to come in. They did. The Court allowed  
21 it. A district could do that.

22 Here's the third thing that hasn't happened  
23 in addition to the fact there's been no third party  
24 complaint and no motion to intervene. And we pointed  
25 this out in our brief, which is when the State

1 answered, they were obligated by Rule 4:5-1, if it  
2 really meant it, to quote, disclose in a certification  
3 the names of any non-parties who shall be joined in the  
4 action pursuant to Rule 4:28, the very rule upon which  
5 they rely here. They filed an answer, and they did  
6 not, as they are required to do by the rules of this  
7 Court no matter how important the case is, to include  
8 that pleading.

9 So in the absence of a motion to intervene,  
10 in the absence of a third party complaint, in the  
11 absence of the simple -- and they could easily have  
12 listed those districts that they thought were  
13 indispensable parties under 4:28. They haven't done  
14 it. This motion should be denied. There is literally  
15 no basis for it. And there's really no basis for it  
16 because of the fundamental nature of the case we  
17 brought.

18 Your Honor has emphasized this to me in  
19 this and other cases, that plaintiff gets to decide who  
20 to sue. And the law is pretty clear that it -- that we  
21 don't have to sue those people who we don't want to sue  
22 unless these very, very strict requirements are met.  
23 And they haven't been met here, and so accordingly,  
24 respectfully, their -- the State's motion to dismiss,  
25 for sure, and to join parties should be denied.

1 Let me just add one other thing with regard  
2 to that, and I won't beat this dead horse. Which is it  
3 does matter that adding 588 districts would make this  
4 matter unwieldy. We get into this a little bit in our  
5 brief, but there's a little bit of history here. The  
6 Cogdell case, which the state really relies on  
7 tremendously, was provided for not only -- for  
8 mandatory party joinder.

9 In Olds v. Donnelly, the Supreme Court  
10 rolled that back. And in rolling it back, they said  
11 they were doing that because the notion of mandatory  
12 party joinder, precisely what the State is asking for  
13 here, would "complicate, prolong and increase the cost  
14 of litigation."

15 It has followed, and in the case law, it  
16 has followed, that those are legitimate considerations  
17 for a court like Your Honor to consider in deciding  
18 whether to mandate joinder of certain parties. That  
19 matter is something that is within your discretion.

20 But those factors are important ones, and  
21 in this case, respectfully, unwieldy would only begin  
22 to describe what would happen. I mean, I'm not sure  
23 there's a court -- I'm not sure this courtroom or any  
24 other courtroom in the state could accommodate a case  
25 with 588 individual districts.

1 But let's be clear. That's what they've  
2 asked for. Now, they say, well, that's your fault,  
3 because you did a -- you know, you brought a state-wide  
4 case.

5 We brought a state-wide case because it's  
6 the State that's responsible for the problem, it's the  
7 State that's empowered to address the problem, and it's  
8 the State that if and when we get to a remedial phase,  
9 should propose, along with us -- and the Court may have  
10 to order it -- an appropriate relief.

11 That's what this case is about. And let me  
12 again say, as we said in our brief, that at that stage,  
13 there is no doubt that districts may be impacted to  
14 such an extent that they wish to participate. And  
15 while, of course, we can't gaze into our crystal balls  
16 and say exactly how we would respond to every single  
17 application that could be made, based upon the law of  
18 the case, this Court's ruling with regard to the  
19 charter schools, I think, would be very difficult for  
20 us to oppose the participation of a district whose  
21 interests would be impacted. Because to go back to my  
22 very first sentence, and then I'll shut up on this  
23 point, the -- we do not dispute that districts will be  
24 affected, but the law is clear. The mere fact that  
25 somebody will be affected -- and we've cited those

1 cases to the Court -- does not mean that they must be  
2 joined.

3 Imagine what our legal system would be like  
4 if that was the case. Courts like Your Honor enter  
5 rulings all the time that have broad impact. Think  
6 about how our system would bog down if in every case  
7 every single person had to be identified or every  
8 single entity had to be identified that was going to be  
9 impacted, and they had to be mandatorily joined.

10 THE COURT: well, we have class action  
11 provisions for plaintiffs, but there isn't -- I don't  
12 think there's an equivalent for --

13 MR. LUSTBERG: well, there are defense  
14 classes that I've seen. But -- and there's no doubt  
15 that this rule exists, and it exists for a reason. But  
16 the conditions that the, you know, that exist in the  
17 rule are strict ones, and they're strict ones for a  
18 reason. Because if mandatory joinder were to be the  
19 rule rather than the exception, if it were to be -- to  
20 occur in every single case where somebody's interests  
21 were going to be affected, then the system would -- it  
22 would break down.

23 And so it's the rare case where mandatory  
24 joinder takes place. And I don't know statistically if  
25 it's rare, but those requirements are real, and they're



1 strict, and they have to be obeyed. And the State has  
2 not addressed them. They -- other than to say, and  
3 they've said it at least 150 times. If I -- I tried to  
4 do a word count on the word "interest" in their papers,  
5 that the districts have an interest. We don't  
6 disagree. They do have an interest in this matter.  
7 But the question is does that interest rise to the  
8 level where mandatory joinder is required, and  
9 respectfully, Your Honor, it does not.

10 So, unless the Court has other questions,  
11 I'll move on to the other two areas.

12 with regard to proceeding in a bifurcated  
13 manner -- and I think Your Honor is a hundred percent  
14 correct that this bleeds over, to a certain extent, to  
15 the discovery issue.

16 The -- it is important, once again, to look  
17 to the rules. The rule that the State relies on is a  
18 rule that has to do with trials, and bifurcated trials  
19 do have some costs to them at times that, you know,  
20 that it can be inefficient to do things separately when  
21 it would be more efficient because of the overlap of  
22 issues and witnesses and the like to try cases  
23 together.

24 But I've seen many cases where liability is  
25 established, and Your Honor used medical malpractice as

1 an example, great example, and damages on something  
2 else.

3 But a lot of times, by the way, bifurcation  
4 is denied in those cases because the same expert who is  
5 opining on the standard of care also is opining on  
6 damages, and so in those cases, so that it's a nuanced,  
7 careful determination that a court makes when it has  
8 all the facts before it.

9 Here, though, we're not -- this is -- this  
10 is not a matter of bifurcating a trial. This is a  
11 matter of moving for partial summary judgment. And as  
12 Miss Schaffer conceded, you know, summary judgment,  
13 partial summary judgment is a well accepted practice.  
14 It is not the case, truly not the case, that courts  
15 have to move for summary judgment in whole or not at  
16 all.

17 And so the real question comes down to the  
18 question that Your Honor asked, which is, are the  
19 liability and remedy phases, to use the State's  
20 language, inexorably intertwined. By the way, they  
21 cite a case for that, but in the case, it says  
22 inexorably indivisible.

23 And that's important, because this can be  
24 divided here. You asked the State over and over in  
25 what regard are these issues so intertwined in the

1 sense that in what regard does remedy have anything, or  
2 relief have anything whatsoever to do with liability.

3           Respectfully, I don't think, Judge, that  
4 you got an answer to that question. And there's a  
5 reason why you didn't get an answer to that question,  
6 because it has nothing do with it. It is not the law  
7 that the scope of relief determines whether there's  
8 liability. It would be a radical proposition.

9           It would also be a proposition that would  
10 fly in the face of just about every desegregation case  
11 that has come down the pike, and not just the New  
12 Jersey Turnpike, but turnpikes in other states as well.

13           The fact of the matter is that this means  
14 of proceeding, of determining liability first and then  
15 moving onto remedy is not the least bit unusual. It  
16 could not be more common. It could not be more  
17 appropriate. It is the way that these cases are done,  
18 and they're done because it's an orderly way to  
19 proceed.

20           And let me explain in part why it's such an  
21 orderly way to proceed. Because when people of  
22 goodwill get together to talk about how to fix a  
23 problem, they come up with pretty good and interesting  
24 and often attractive options. But they don't do that  
25 often until they have to. And they have to once a

1 judgment of liability is entered.

2           It's also the case, as Miss Schaffer  
3 pointed out, and I think Your Honor alluded to as well  
4 by mentioning cases like Abbott and Robinson, and of  
5 course, I should have mentioned that you're quite  
6 right, of course, that those cases were cases against  
7 the State, and individual districts were not parties,  
8 to go back to my last argument.

9           But in those cases, and in, likely, here,  
10 once a decision has been made with regard to liability,  
11 it may well fall upon the legislature to at least take  
12 the first crack at it. But parties will get together  
13 and come up with creative, important, attractive  
14 solutions with regard to remedy at that point. Other  
15 stakeholders, maybe districts, may want to come into be  
16 heard with regard to remedy.

17           The remedial phase will be complicated and  
18 important. But we don't get there until liability is  
19 determined. And it makes so much sense from an  
20 efficiency perspective to determine liability,  
21 especially here where, as the Court has pointed out,  
22 our fundamental showing is about statistics.

23           So that brings us to discovery. And I  
24 really don't have a lot more to say. I'll address a  
25 couple of the Court's questions and a couple of the

1 State's answers. But I don't have a lot more to say  
2 beyond what Your Honor's observation was, which was  
3 this happens all the time. And I've been on both sides  
4 of it. I mean, sometimes, you know, you face a motion  
5 for summary judgment from the other side before  
6 discovery, and it's not an answer to say I want to take  
7 discovery, because you have to identify what specific  
8 discovery you need.

9 And respectfully, I listened as hard as I  
10 could, and I did not hear any specific discovery that  
11 they need. I heard Miss Schaffer say they want to give  
12 us contention interrogatories, interrogatories that I  
13 should note typically come at the end of a case where  
14 we are required to set forth our legal theory. But she  
15 did not in any place show why that legal theory is not  
16 adequately set forth in the complaint. And frankly, I  
17 don't know that we have a lot to add to what's in the  
18 complaint.

19 The statistics that our expert,  
20 Mr. Coughlan, talked about are, in fact, part of the  
21 complaint as well. But so this is a complaint that was  
22 done with great care and effort really to move things  
23 along so that there wouldn't be a lot in dispute, and I  
24 should note that we went through a process with the  
25 State that before we filed our amended complaint, they

1 took issue with some of our numbers. We met with them,  
2 or corresponded with them. We agreed upon some of  
3 those numbers. We amended the complaint to accord with  
4 their understanding of what those numbers were in an  
5 effort to avoid just this sort of dispute, so we could  
6 get to liability, get past it, if the Court determines  
7 that those numbers amount to liability -- and that's  
8 what the summary judgment motion will be about -- and  
9 then go on to remedy a problem that should not exist  
10 one day longer than, than it does, if it's not -- if  
11 the Court finds that it's unconstitutional.

12 So other than the discussion that you had  
13 with counsel with regard to socioeconomic status, I  
14 don't think that there's a single question that has  
15 been raised that requires discovery.

16 And even with regard to socioeconomic  
17 status, I have two observations. Observation number  
18 one is one that really flows from what one of Miss  
19 Schaffer's answers to your question, which is, you  
20 know, she said, well, we want to get information from  
21 the various districts.

22 They can get that any time they want. The  
23 districts are instrumentalities of the State. The  
24 State collects data from them. The State has the  
25 ability to get all that information. They don't need

1 discovery from us or from anybody else. It's their  
2 data. There's literally no discovery that's required.

3 Now, if they want to take that discovery  
4 and put it in a certification in an effort to oppose  
5 our motion for summary judgment, as this Court knows,  
6 that's what happens on motions for summary judgment.  
7 And so that's what I would say with regard to  
8 socioeconomic status. If they see that -- if they want  
9 to move to partial summary judgment themselves with  
10 regard to socioeconomic status, because we haven't  
11 adduced enough information, then they can do that.

12 It's bewildering me as to what possible  
13 discovery they would need, because this case, the  
14 statistical part of this case, is based entirely on  
15 their numbers and numbers that are in their possession.  
16 They have not identified a single thing that they could  
17 ask us.

18 We have, by contrast said, look, to the  
19 extent that you want to ask questions, I'm not really  
20 sure what they would be, but if you want to ask  
21 questions of our expert, we will produce him promptly.

22 And Your Honor, we would produce him  
23 promptly. Although I would note that his identity has  
24 been known to them for some time now. They have not  
25 noticed a deposition. They have not taken us up on our

1 invitation in our papers filed now a couple of months  
2 ago to schedule a deposition. I mean, that could have  
3 all been done already.

4 There doesn't appear to be a great deal of  
5 urgency to the State's position in this regard, and  
6 that, candidly, is tragic. Because this is something  
7 that we should all be focused on and focused on ending  
8 as quickly as possible, as opposed to stretching it out  
9 with motions to dismiss that are completely without  
10 basis, and on efforts to stall the proceedings and to  
11 complicate them as opposed to expediting them and  
12 making them move along to a place where we can address  
13 this really pressing issue. Thank you.

14 THE COURT: Okay, anything else, Miss  
15 Schaffer?

16 MR. LUSTBERG: No, Your Honor.

17 THE COURT: Are you done with everything,  
18 or no?

19 MR. LUSTBERG: I'm -- I mean, I'm done with  
20 what I have to say. I'm more than happy, of course, to  
21 answer any questions that the Court has.

22 THE COURT: No, thanks.

23 MR. LUSTBERG: Okay.

24 THE COURT: I'm okay.

25 Anything else you want to say, Miss

1 Schaffer?

2 MS. SCHAFFER: Just a few follow-up points,  
3 Your Honor. I'll be quick.

4 I just have to follow-up on Mr. Lustberg's  
5 last statement, because -- and it's probably not  
6 necessary, but I feel compelled. But to suggest that  
7 we're deliberating stalling this case by filing a  
8 motion that was openly discussed and agreed to the last  
9 time we were before this Court is disingenuous.

10 And so while the motion was filed in  
11 September, since then, we have had a motion for, you  
12 know, the charter school's motion to intervene which  
13 had to be dealt with. We wanted to determine whether  
14 or not they would be added as a party. When we were  
15 before Your Honor on that argument is when we discussed  
16 scheduling of the State's response to the motion for  
17 partial summary judgment, where it was Your Honor's  
18 suggestion that we deal with this procedurally first,  
19 and in the meantime, we haven't continued to  
20 necessarily propound discovery because we're waiting to  
21 see where Your Honor is going, how Your Honor is going  
22 to rule on our motion. So I just feel compelled to  
23 address that last unnecessary statement by  
24 Mr. Lustberg.

25 So, and just to circle back on a couple

1 things, you know, Mr. Lustberg suggested that the State  
2 has failed to meet the standard for the joinder rule,  
3 and I just wanted to stress that we absolutely have  
4 not, and that what he is focusing on is only the  
5 interest aspect. And while he agrees that they all  
6 have interests, which, you know, I think is an  
7 important point, that that interest, what the important  
8 part is that the interest is so strong and the parties  
9 are so situated, the districts are so situated, that a  
10 judgment in this case without their ability to be a  
11 party would impede their ability to, to meaningfully  
12 defend and address those interests and rights. It's  
13 not just their interests, but they have rights at stake  
14 here. And so we did, I believe that we have met that  
15 standard.

16 And the second part of the rule is that --  
17 it says, Or that it would leave the existing party  
18 subject to substantial risk of multiple litigation.  
19 And again, I think I spoke to that issue, and I won't  
20 say anything more on that.

21 I also want to clarify that, you know,  
22 while we have sought dismissal for failure to name  
23 indispensable parties, I don't -- I just want to make  
24 sure that the Court understands, we're not suggesting  
25 that dismissal is mandatory if the plaintiffs are

1 willing to name the districts as parties, or Your Honor  
2 orders that the districts be named as parties. But the  
3 failure for them -- the point is the failure for them  
4 to be, to have party status here would mandate a  
5 dismissal of the complaint, and the case cannot move  
6 forward without their participation as parties.

7 And I just want to address, Mr. Lustberg  
8 indicated that the parties, in order to be -- I'm  
9 sorry, the districts, in order to be joined as parties,  
10 have to affirmatively claim the interest. That's not  
11 supported by any case law. In fact, you know, there's  
12 cases that suggest that the whole point is that the  
13 right and the interest just has to be known and  
14 established, and that's why the Court has the power to  
15 mandate that they actually be pulled in as parties.  
16 They do not have to affirmatively wave a flag saying we  
17 have an interest here. And I think that's an important  
18 distinction.

19 As to the argument that we sort of waived  
20 our right to raise this issue because we did not file a  
21 certification identifying the parties in accordance  
22 with Rule 4:5-1, I think that's an argument that puts  
23 form over substance. That rule also allows there to be  
24 a continuing identification of the parties, or to the  
25 extent that the Court feels that we need to satisfy

1 that, we are certainly willing to do that. And I also  
2 note that we did identify the failure to name  
3 indispensable parties as an affirmative defense in our  
4 answer to the amended complaint.

5 As to the bifurcation issue, again, I think  
6 the important thing here is that plaintiffs are the one  
7 that have the burden to convince the Court why the two  
8 issues should be dealt with separately, and why it  
9 would, for the interest of -- in the interest of  
10 justice and time, why it makes sense, and I think based  
11 upon the dialogue between Your Honor and I when I was  
12 arguing earlier, sufficiently satisfied the reasons why  
13 it does not make sense here to address the two issues  
14 separately. And for that reason, you know, the motion  
15 should be -- the motion should not be considered by the  
16 Court at this time.

17 And then finally with the discovery issues,  
18 you know, as to the -- I disagree with Mr. Lustberg. I  
19 think we did both in our papers, and here today I added  
20 additional clarification, and I believe satisfied Your  
21 Honor's questions about what specific discovery we feel  
22 would be necessary. So I think we have met that  
23 standard.

24 And particularly with the socioeconomic  
25 status issues, this is not just a matter of receiving

1 data from the school districts. I mean, as we already  
2 discussed, you know, the State really is entitled to  
3 its own expert on those issues.

4 And I just want to conclude with the fact  
5 that for the Court to move forward and decide liability  
6 on summary judgment motion before there has been  
7 discovery of the parties and a robust record developed  
8 would be a substantial deviation from anything, from  
9 any type of case of this magnitude that a court has  
10 issued in this state. To find that the entire system  
11 of public education in the State of New Jersey is  
12 unconstitutionally segregated based on a record that  
13 has not, you know, based on the fact that there's been  
14 no discovery, and is only on data alone, it would be a  
15 huge deviation from the cases that have been issued in  
16 this state before that, before this time.

17 So I urge Your Honor to allow the discovery  
18 to continue and also urge Your Honor to order that the  
19 school districts be a party to this case and that both  
20 the issue of liability and remedy be kept together so  
21 that the Court can review all relevant information in a  
22 holistic way.

23 THE COURT: Okay. Thank you.

24 Anything from the charter schools?

25 Anything else? No.

1 MR. JOSEPHSON: No, we would just  
2 reiterate, I guess, just briefly we would reiterate  
3 that we did lay out the discovery that we believe is  
4 necessary, and they involve both expert and factual  
5 discovery with regard to the claims around what the  
6 commissioner's obligations are and whether those  
7 obligations have been met with regard to looking at  
8 segregated effect when charter schools are established  
9 and reviewed.

10 THE COURT: Okay, thanks.

11 You thought it was a momentous -- just a  
12 bottle of water. Thank you, Jeff.

13 First, I want to thank counsel today for  
14 the argument and for their written decisions -- all the  
15 written papers that I've received, their written  
16 arguments. As usual, they're very helpful to the Court  
17 in framing the issues and assisting me in determining  
18 how to rule on the motions before the Court. This is a  
19 very significant and far reaching case, and it merits  
20 very careful consideration by the Court.

21 The plaintiffs are a group of non-profit  
22 corporations dedicated to civil rights advocacy and  
23 parents of racially diverse minors currently enrolled  
24 in the New Jersey public schools and represented by  
25 family members as their guardians ad litem.

1 And plaintiffs have named the State, the  
2 State Board of Ed and the Commissioner of Education as  
3 defendants, and they collectively oversee and govern  
4 New Jersey's public school system which consists of  
5 more than a million students in more than 2,000 public  
6 schools in excess of 500 school districts in the state.

7 And the complaint is very detailed in terms  
8 of the statistics regarding racial, ethnic and  
9 socioeconomic student populations, and really focuses  
10 on the significant number of schools where the students  
11 are -- fall into minority racial and ethnic categories  
12 and also have low socioeconomic backgrounds.

13 And the statistics, as mentioned by, you  
14 know, by plaintiff's counsel and as clear from the  
15 answer filed by the State, the statistics are all based  
16 on data that's collected by the Department of  
17 Education. And so there isn't a vacuum in that sense.  
18 We have a treasure trove of statistics, and now backed  
19 up by the certification of Ryan Coughlan. I referred  
20 to him as Mr. Coughlan, but he has a Ph.D. and has  
21 focused a lot of his professional career on de facto  
22 segregation in urban schools.

23 And the plaintiffs, though, have brought a  
24 very broad challenge, a state-wide challenge, not only  
25 to the alleged de facto segregation throughout the

1 state schools, but also in the, in the charter schools.  
2 And in the relief that they seek, they're seeking an  
3 injunction against the continued assignment of public  
4 school students, including charter school students,  
5 solely on the basis of municipal attendance boundaries  
6 and mandating that the legislature and the Commissioner  
7 of Education and the State Department of Education  
8 adopt replacement assignment methodology to address and  
9 remediate racial segregation in New Jersey's public  
10 schools, including charter schools.

11 And this is a case, in my view, anyway, a  
12 case of, a case of first impression in the sense that  
13 the earlier cases that we've been referred to, the  
14 Booker -- Booker dealt with a single district which was  
15 Plainfield and de facto segregation in Plainfield,  
16 which the Court ordered the commissioner to effect a  
17 remedy in cooperation with the school district. And  
18 Jenkins dealt with a sending-receiving relationship in  
19 Morristown in Morris County, where the court said --  
20 again, the Supreme Court of New Jersey said that there  
21 was a single, a single community, and the -- so the  
22 regional aspect, I mean the state-wide aspect is  
23 something that has not been determined certainly by the  
24 state Supreme Court.

25 But the state Supreme Court in the context



1 of a series -- in the context of a case involving  
2 Engelwood, Engelwood Cliffs and Tenafly had a very  
3 strong Appellate Division decision that's been cited  
4 several times by the plaintiffs, and that's at 257 N.J.  
5 Super. 413, an Appellate Division decision going back  
6 to 1992. Because in that case, Engelwood was seeking  
7 the imposition of a regional school district, and they  
8 wanted to include Tenafly which had not been part of  
9 the sending-receiving relationship. And so in the  
10 Appellate Division decision that was issued by then  
11 Judge Long, she said that the commissioner, found that  
12 the commissioner had power to order cross-border  
13 regionalization.

14 But the Supreme Court of New Jersey, while  
15 it affirmed that decision, they specifically said we  
16 are not ruling on the issue of regionalization. And as  
17 far as I can tell, that's the last statement of the New  
18 Jersey Supreme Court on anything beyond the municipal  
19 borders unless you have a single community, or unless  
20 you have a sending-receiving relationship, or in North  
21 Haledon, unless you have an existing regional high  
22 school.

23 And you know, the Court said there in  
24 reaching the conclusion that the commissioner had his  
25 rights to do a regionalization study, we find it

1 unnecessary to consider whether the state Board of  
2 Education has the authority to require regionalization  
3 in this case or whether a Court may require  
4 regionalization as a judicial remedy. That's one of  
5 the judicial remedies that's sought here, not on a  
6 specific district basis, or like Sheff, which was  
7 Hartford, you know, that's one of the main cases  
8 plaintiffs rely on was one school district and the  
9 surrounding area with a very detailed record as to one  
10 district, not the Cruz case in Minneapolis and St.  
11 Paul. This is a state-wide challenge saying the entire  
12 way in which New Jersey public school and charter  
13 school education as delivered is unconstitutional.

14 And our Supreme Court, you know, has said,  
15 we emphasize our affirmance of the state board decision  
16 to undertake a regionalization study should not be  
17 taken to express or imply any view of the Court on the  
18 administration or judicial power to require  
19 interest-district regionalization.

20 So the plaintiffs here are seeking  
21 extraordinary relief, which doesn't mean they can't do  
22 it, they're seeking extraordinary relief. But I just  
23 want to emphasize that that's the context which the  
24 Court has to view this case. The Booker, the Jenkins,  
25 all the things that are relied upon by the plaintiffs

1 don't answer the question for relief, in my view, at  
2 least at this point, that has been put before me by the  
3 plaintiffs.

4 You know, when you look at the entire,  
5 entire scope of what happened in the Engelwood case, it  
6 lasted about 20 years, I think, the first -- maybe back  
7 to the 80s and then going on up to, you know, Supreme  
8 Court, subsequent Supreme Court decision.

9 They did a regionalization study and  
10 determined that it would not be -- there would not be  
11 an imposition of mandatory regionalization in that  
12 district upon a very, very extensive record.

13 The Appellate Division upheld the  
14 conclusion of the commissioner of education in that  
15 case, and the Supreme Court -- what the commissioner  
16 did in that case was to say voluntary programs are what  
17 is, what is -- is the best way to do this, because  
18 there's so much pushback when there's mandatory  
19 imposition of remedies on individual school districts.

20 And so after all that time, there was a  
21 voluntary program was what was adopted by the  
22 commissioner, and Engelwood really fought it. And in  
23 the Supreme -- the Appellate Division upheld the  
24 voluntary program, and the Supreme Court affirmed the  
25 Appellate Division except that the commissioner had

1 said it was Engelwood's ultimate responsibility, and  
2 the Supreme Court said no, sort of underscoring what  
3 plaintiffs are saying here, no, it's the commissioner's  
4 responsibility to make sure that this voluntary program  
5 addresses the, addresses the issue.

6 But, you know, there was a comment in the  
7 Supreme Court's decision noting that, you know, sort of  
8 after all these years, it was the Department of  
9 Education and Engelwood's joint efforts with, at that  
10 point, Bergen County Technical School, they were  
11 creating essentially a magnet program, would constitute  
12 a constructive and positive outcome for this  
13 protracted, contentious and important litigation, and  
14 at the same time, through the -- through this  
15 cooperative effort provide an enhanced educational  
16 environment at the Dwight Morrow High School, which was  
17 really the center of this, and which all students could  
18 pursue their educational goals and realize their  
19 educational potential.

20 So I just have to say that, you know, when  
21 I'm looking at this lawsuit, I have all of the language  
22 of Jenkins and Booker and North Haledon and Engelwood  
23 in mind. But I just felt that it was extremely  
24 important to underscore what plaintiffs are seeking  
25 here, because they are asking to do it with no

1 discovery, with no record other than statistics, and  
2 the statistics they present are very powerful. But I  
3 don't have much more of a context in which to view  
4 statistics.

5 Now it's a very different situation, but I  
6 went through about a 43-day trial hearing all sorts of  
7 statistics based upon the census data and American  
8 community service data in the affordable housing  
9 context, and there were differences about what the  
10 statistics say and how they're handled, which is why I  
11 picked up on Mr. Coughlan's opinion that even though he  
12 used 2010 statistics, he did an analysis to suggest  
13 they were still reliable.

14 But that's the kind of thing I think should  
15 not be relied upon by a Court without giving the other  
16 side an opportunity to comment, comment or produce some  
17 sort of expert, you know. I'm not sure what -- what  
18 might come, but I'm very concerned about proceeding to  
19 momentous liability determination with no chance for  
20 defendants state or charter school to put forth an  
21 appropriate discovery process, give them an opportunity  
22 to, to at least tell the Court what they think is  
23 important to decide the very significant liability  
24 issues in this case. But I think I'm getting ahead of  
25 myself.

1 First of all, I'm not going to dismiss  
2 the -- dismiss this case for failure to join  
3 indispensable parties. The school districts clearly  
4 are subject to service of process, and so dismissal is  
5 not appropriate. If I thought that the school  
6 districts had to be defendants in this case, I would  
7 order them to be mandatorily joined. But I don't -- I  
8 don't believe that every school district in the state  
9 needs to be joined or that the rule requires it.

10 The court rule itself notes that the person  
11 claims an interest in the subject of the action and is  
12 so situated that disposition in his absence as a  
13 practical matter would impede that person's ability to  
14 protect that interest or leave them subject to  
15 substantial risk of incurring inconsistent obligations.

16 Even though the, you know, the State argues  
17 that every district is potentially affected here and  
18 plaintiffs and the Court agree with that, I don't find  
19 that it translates into requiring every school district  
20 to be joined.

21 Constitutional litigation deals with very  
22 significant issues and can affect millions, millions of  
23 people, and they don't all, don't all need to be  
24 joined. And even though you can, you can argue over  
25 what it means, that the person claims an interest, we

1 don't have any school district that's come forward, and  
2 there may be many reasons, only some of which had been  
3 suggested by the State, by the State defendants'  
4 counsel, and you know, would it impede the ability of  
5 the school districts to protect their interest?

6 well, a lot of that really has to do with  
7 what are the powers and the authority of the State, the  
8 State parties versus the school districts. And it's  
9 only the State parties that if the Court were to grant,  
10 you know, were to find liability and grant partial  
11 motion for summary judgment, it's only the State  
12 entities that can effectuate a remedy, including the  
13 legislature.

14 And so the way the statutory scheme is set  
15 up, the plaintiffs, I think, they certainly  
16 deliberately sued only the, only the state government,  
17 and I've allowed the charter schools to come into -- a  
18 charter school and an association to represent the  
19 charter school, the charter school interests.

20 when you look into the party joinder rule,  
21 it's really a fact sensitive analysis. You get into  
22 issues regarding entire controversy, and the State's  
23 concern that if I don't mandate the inclusion as  
24 parties of all the districts, there could be subsequent  
25 litigation, and it would be -- it would be inefficient.

1 I have some concerns about that as well as  
2 the state's concern that municipality -- not municipal  
3 school systems, school districts could add to the  
4 Court's consideration of the issues in this case. They  
5 may very -- school districts may very well have  
6 information or positions that would be important for  
7 the Court to consider at the liability stage.

8 But I'm not going to dismiss the case for  
9 failure to name the school districts. I'm also -- even  
10 though it's not -- it's not a New Jersey case, one of  
11 the cases that's been cited by the plaintiffs comes  
12 from Minnesota, the Minneapolis-St. Paul school  
13 district. That was Cruz Guzman v. State, 916 Northwest  
14 2d 1, Minnesota Supreme Court, 2018.

15 And there, even though it was just a few  
16 districts, the Court found that it was not necessary to  
17 include them when the relief -- there could be complete  
18 relief between the plaintiffs and the defendants in  
19 that case.

20 As I said, under the regulatory structure,  
21 the school districts are under the regulatory control  
22 of the State Board of Ed and the commissioner, and so  
23 they're not in a position to have any authority to, to  
24 accept they're -- want to pursue sending-receiving or  
25 something like that, they certainly can do that. But

1 they don't have any authority over the kind of relief  
2 that's sought, that's sought in, sought in this case.

3 But I am concerned that we don't have any  
4 school districts here, and if I -- so -- and I am  
5 concerned about the State, you know, the State's  
6 position that, you know, that not having the districts  
7 here could lead to a problem later, but, you know, the  
8 court rule regarding mandatory party joinder looks at  
9 what can happen if you don't join and the absence of an  
10 unjoined party. And one of the things that the note  
11 says, and that there's some cases to back it up, is  
12 that failure to be formally joined is not fatal when  
13 adequate notice is provided to the parties.

14 There are a couple of cases cited, In Re  
15 Mallon, 232 N.J. Super. 249, Appellate Division case  
16 where certification was denied at 117 N.J. 166; Toll  
17 Brothers v. West Windsor Township, 334 N.J. Super. 77,  
18 Appellate Division from 2000, with certification denied  
19 at 168 N.J. 295 from 2001.

20 So I don't know why we don't have any  
21 school district here. I think it would be, you know,  
22 certainly would broaden, could possibly broaden what is  
23 to be put before the Court on these important issues,  
24 but I don't know if the school districts, in fact, know  
25 about the litigation. They may very well. I don't

1 know if they know that a liability, summary judgment  
2 motion has been pending in which the, the Court is  
3 asked to invalidate assignment of pupils by municipal  
4 boundaries. I don't know that they know that. And I  
5 think it's important that they be notified.

6 So I'm going to require that the plaintiffs  
7 provide just notice, not service of a complaint,  
8 nothing like that, just a notice to every school  
9 district and every charter school in the State of New  
10 Jersey.

11 I've drafted a notice. I'm going to hand  
12 it out to counsel to take a look at and give me some  
13 comments next week if they're, you know, if you want to  
14 propose some revisions to it. The idea is just to let  
15 them know.

16 But because it would be a significant  
17 undertaking to become an intervenor, I am going to  
18 afford them, the school districts, to file motion for  
19 intervention by March 20th. They've got to --  
20 obviously, these are public bodies. They don't --  
21 often the school boards have to consider and, you know,  
22 vote on certain things. It's not the easiest or  
23 quickest process.

24 whether or not anyone, any district will  
25 move to intervene, I don't know. But at least if

1 they're on notice, they can't come back, or at least  
2 there will be a very -- they will not have the same  
3 kind of argument that the State is concerned about  
4 under -- when not joining them as parties.

5 But I think it would be, it would be very  
6 unwieldy to have 500 something districts. I'm not -- I  
7 don't believe, as I said, for the reasons I've already  
8 given, I don't believe they are indispensable. And  
9 so -- but I do think notice is important so that we  
10 then can proceed either with the participation of some  
11 school districts or not.

12 You know, I think it is notable that no  
13 district, no school district has moved to intervene.  
14 Maybe none will, but I think it's important to provide  
15 the, you know, to provide the notice.

16 In terms of this bifurcation of liability  
17 and remedy, I -- to me it's premature to decide it,  
18 because we haven't had discovery, and I'm going to  
19 authorize discovery by the parties, but after  
20 discovery, I mean, motions for summary judgment come  
21 all the time after discovery, and at that point, there  
22 will be whatever record the State thinks is important  
23 for the Court to look at. And if at that point it's  
24 clear that liability is necessary, I don't -- you know,  
25 the plaintiffs can renew their -- I'll have their --

1 certainly I'll have their current papers, but at that  
2 point, summary judgment would be, you know, would be on  
3 a fuller record. And, you know, trial bifurcation to  
4 me, we're so far from that at this point, it seemed to  
5 me, to, you know, as I said to be premature.

6 But the one thing that I am convinced about  
7 is that given the nature of this case and the remedy  
8 and the case law, it's important to give the State and  
9 the charter schools the opportunity to engage in  
10 discovery and to provide expert reports and to take the  
11 deposition of the expert that the plaintiffs have put  
12 forward. Whether plaintiffs want to simply note or  
13 provide a notice that, of the certification of  
14 Mr. Coughlan and the attachments are his expert report,  
15 that was sort of quibbling, you know, we don't have an  
16 expert report, we just have a certification. The  
17 plaintiffs have said that's what we're relying on. If  
18 that's what they want to continue to rely on, that's  
19 fine. But I'm going to require the counsel to consult  
20 with each other and to provide the Court, if they  
21 can -- I'm not sure they'll be able to -- but if they  
22 can, to provide a proposed discovery schedule to the  
23 Court.

24 I understand I'm inviting these, you know,  
25 other school districts and charter schools to move to

1 intervene, but I don't want to hold up the case in this  
2 regard, so I'd like to have the existing counsel by  
3 January 31st, either you can give me a consent order  
4 for a discovery schedule, or competing proposals with a  
5 letter explaining why you think I should adopt your,  
6 your discovery schedule.

7 I mean, one of the things I was sort of  
8 struck by was the citation of, you know, by plaintiffs  
9 of, you know, a case where the Supreme Court had --  
10 Supreme Court of New Jersey had noted that statistics  
11 may, in fact, be sufficient for liability. It was a  
12 case Mr. Lustberg was involved in, State v. Marshall,  
13 130 N.J. 109 from 1992.

14 And in the plaintiff's brief, they noted  
15 that -- or they made the argument that discrimination  
16 in violation of the state constitution's equal  
17 protection guarantee, unlike it's federal counterpart,  
18 can be satisfied by statistical data alone, and they  
19 relied on State v. Marshall, 130 N.J. 109. And so that  
20 was one of the precedents they relied on to encourage  
21 the Court to authorize going right to summary, the  
22 partial summary judgment on liability.

23 But there wasn't a complete quote of the  
24 Marshall case, because what the -- what the Supreme  
25 Court said in Marshall is that if a Court concludes

1 that the statistical evidence is so deviant as to  
2 compel a conclusion of substantial significance, the  
3 Court must then look to the circumstances surrounding  
4 that statistical showing to determine its full  
5 constitutional import. That was a piece that was left  
6 out. And to me, it just says that I've got to look at  
7 the circumstances surrounding, you know, surrounding  
8 these statistics, give the defendants the chance to  
9 expand the record before the Court looks at the  
10 liability issue.

11 And so just for a recap, the Court will  
12 deny the motion to dismiss the case, require notice --  
13 you know, I'll give out this proposed notice you can  
14 look at, and I just would ask you to get me any  
15 suggestions you have for changes by January 17th. And  
16 then the notices by certified mail, return receipt  
17 requested should then go out to the districts by  
18 January 27th. And we'll see if anything comes of it.

19 But if nothing comes of it, and no  
20 districts come forward, then, as I said, the State will  
21 have that argument of notice if anything -- any lawsuit  
22 is brought against them subsequently.

23 This is just for the attorneys, and it's  
24 just a draft, nothing signed. So you can take a look  
25 at it, and then let me know, as I said, by January

1 17th.

2 The motion in terms of bifurcation is  
3 denied as premature, and the, you know, the motion to  
4 defer consideration of the plaintiffs' application for  
5 partial summary judgment as to liability will be, to  
6 defer is granted pending the, you know, pending  
7 completion of discovery.

8 The consent order for discovery should  
9 include, certainly, periodic case management  
10 conferences by telephone at least every two months.

11 So we'll get that order out. Thanks again  
12 for your cooperation.

13 MR. LUSTBERG: Your Honor, can I just ask  
14 one clarifying question to the Court? And maybe -- and  
15 your answer may be that this is what we should talk  
16 about, and that's fine.

17 But so with regard to the discovery  
18 schedule, that does require us to think about whether  
19 we're just talking about liability or liability and  
20 remedy. Because if, if we're dealing with discovery  
21 with regard to remedy, that's a whole, you know, that  
22 is a much larger, and I think we've admitted, more  
23 complicated set of issues.

24 So are you looking for -- I guess I'm  
25 asking, is the Court looking for a schedule that we

1 arrive at just with regard to liability issues?

2 THE COURT: Well, they claim that they're  
3 indivisible, so I'm not going to decide that now.

4 MR. LUSTBERG: Okay.

5 THE COURT: They claim that causation is  
6 critical for liability, and so, you know -- so, you  
7 know, I'm not sure. I mean I'm not sure where it's  
8 going to go. At this point, I'm not going to limit it,  
9 but -- you're not going to get to remedy unless you  
10 establish liability.

11 MR. LUSTBERG: Obviously.

12 THE COURT: They've made certain  
13 arguments --

14 MR. LUSTBERG: Uh-hum.

15 THE COURT: -- that you need to look at the  
16 possibility of certain remedies as part of liability,  
17 and so I'm not going to foreclose them from that  
18 argument, but, you know, in term -- it would make no  
19 sense to spend an inordinate amount of time trying to  
20 decide remedies at this stage, but I don't want to  
21 foreclose them from addressing causation, or you know,  
22 to the extent that you're talking about  
23 regionalization, I don't want to foreclose them from  
24 that being part of what I consider.

25 There's one other thing that I mentioned --



1 I didn't mention, but I thought of when I was giving  
2 the quotation from the Supreme Court's Engelwood III, I  
3 think it's called, and that is that discovery -- I  
4 don't know how long it's going to take. You'll give me  
5 a schedule.

6 I would encourage you to go back to the  
7 negotiation table. That's how the 20-year dispute over  
8 Engelwood and Engelwood Cliffs was ultimately resolved.

9 You gave up -- I think you had good faith  
10 efforts, and I'm not going to force you to go to  
11 mediation. I just would say that the plaintiffs are  
12 very intent in moving as quickly as possible, and to  
13 not engage the State after you've heard these  
14 arguments, after you've heard some of my concerns, I  
15 think might be short-sighted.

16 You'll have time now to do that while the  
17 discovery process was going on. I just would encourage  
18 it, you know. I don't know where it would go, but  
19 that's ultimately what, you know, how -- at least as  
20 far as I know in terms of published cases -- was the  
21 last word on the Engelwood-Tenafly situation.

22 Any way, thank you all very much.

23 MR. LUSTBERG: Thank you.

24 MS. SCHAFFER: Thank you, Your Honor.

25 (The matter concluded at 12:23.)

1 CERTIFICATE

2  
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