LATINO ACTION NETWORK; NAACP NEW JERSEY STATE CONFERENCE; LATINO COALITION; URBAN LEAGUE OF ESSEX COUNTY; THE UNITED METHODIST CHURCH OF GREATER NEW JERSEY; [redacted] by her Guardian Ad Litem, COURTNEY WICKS; [redacted], by his Guardian Ad Litem, JENNIFER TORRES; [redacted], by his Guardian Ad Litem, RACHEL RUEL; [redacted], by her Guardian Ad Litem, YVETTE ALSTON-JOHNSON; [redacted], by his Guardian Ad Litem, YVETTE ALSTON-JOHNSON; [redacted], by her Guardian Ad Litem, RASHEEDA ALSTON; [redacted], by his Guardian Ad Litem, ANDREA HAYES; [redacted], by his Guardian Ad Litem, MARIA LORENZ; and [redacted], by his Guardian Ad Litem, ELIZABETH WEILL-GREENBERG, Plaintiffs, and PLEASANTVILLE BOARD OF EDUCATION and WILDWOOD BOARD OF EDUCATION, Intervenor-Plaintiffs, v.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION — CIVIL PART MERCER COUNTY VICINAGE DOCKET NUMBER: MER-L-1076-18 CIVIL ACTION

THE STATE OF NEW JERSEY; NEW JERSEY STATE BOARD OF EDUCATION; and ANGELICA ALLEN-MCMILLAN, Acting Commissioner, State Department of Education,	:
Defendants,	:
and	:
NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC.; BELOVED COMMUNITY CHARTER SCHOOL; ANA MARIA DE LA ROCHE ARAQUE; TAFSHIER COSBY; DIANE GUTIERREZ; CAMDEN PREP, INC.; KIPP COOPER NORCROSS, INC.; and MASTERY SCHOOLS OF CAMDEN, INC.,	:
Intervenor-Defendants.	:

STATE DEFENDANTS' BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ANDREW J. BRUCK
ACTING ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112
(609) 376-2960
Attorney for State Defendants

Christopher Weber (Attorney ID: 012122013)
Deputy Attorney General
christopher.weber@law.njoag.gov
On the Brief

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES

REGULATIONS

NEW JERSEY CONSTITUTION

COURT RULES

SECONDARY SOURCES

PRELIMINARY STATEMENT

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

But plaintiffs' claims that our system of public education, by its very nature, violates the constitution, is wholly unsupported by the record on which they rest. Rather than addressing the particular circumstances present in any one school or district, plaintiffs fashioned a statewide challenge based entirely on a limited set of data points relating to a limited number of school districts at a discrete point in time. Implicit in this argument is the suggestion that any apparent disproportion in the racial or socioeconomic composition of a small number of public school districts is sufficient, on its own, to find that the State has violated the constitution across the entire State.

That premise is unsustainable, and plaintiffs cannot prevail on their ambitious claims — laudable as their intentions might be.

As to their T&E claim, plaintiffs assert that the State defendants have allowed public schools to become segregated in some school districts, thus depriving every student in every district of their constitutional entitlement to T&E. But the plaintiffs cannot overcome the mismatch between the law and their scant evidence. Their theory is untenable because it ignores critical aspects of educational policy. Issues related to the provision of T&E have been litigated, legislated, and regulated by all three branches of government for decades. The goal of the State is and has always been to ensure that New Jersey's students receive a high-quality education so they can become meaningful participants in the marketplace and the broader community, and the Supreme Court's decisions applying the T&E clause have driven systemic changes to ensure that students receive such an education no matter where they live. To declare the entire system in violation of the T&E clause based on the limited subset of raw data offered here would be inconsistent with decades of case law focused on student outcomes and the means for improving them. Critically, plaintiffs do not allege or present any evidence that New Jersey's students are unprepared for entry into society on a statewide level. Thus, they cannot prevail on their T&E claim

under the well-developed law in this area. It is through this lens that all of plaintiffs' remaining claims must be viewed.

Plaintiffs' allegation that the State has violated the constitutional prohibition against segregation in New Jersey's schools also falls short. No court has allowed an anti-segregation clause claim to target the State's entire education system as de facto segregated, let alone suggested a coherent standard by which such a claim could be adjudicated. And, tellingly, neither have plaintiffs, who cannot agree amongst themselves or with their expert as to what it means for the education system to be segregated on a statewide basis. Nor have plaintiffs demonstrated that statewide segregation of the schools, under any definition, exists "because of" the State defendants. On this record, plaintiffs cannot prevail under the anti-segregation clause.

Plaintiffs' remaining claims — both constitutional and statutory — fail for similar reasons. Relying on a limited subset of data and an unsound notion of segregation, plaintiffs fail to establish that students are not receiving equal protection under the law. They have also failed to prove that the State defendants have violated the Civil Rights Act or the Charter School Program Act of 1996.

Educational policy is an especially intricate issue, matched only by its importance; and it is an issue that more appropriately lies with the Legislature. For that reason, the task before this

court would be all the more daunting if plaintiffs' claims were allowed to advance. The shortcomings of their legal theories are highlighted by the impracticability of the remedy — essentially obliterating the State's entire public school system — which cannot be divorced from the issue of liability. On the other hand, the reasons for granting summary judgment against plaintiffs are simple. They present extraordinarily vague claims seeking extraordinarily drastic relief based on an extraordinarily thin factual record.

The fundamental question before the court is whether, on this record, our entire public system of education violates the constitution. The answer must be no.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The plaintiffs in this matter are seven public school students and their parents,[2] along with five non-profit entities, and intervening plaintiffs, the Pleasantville and Wildwood Boards of Education. See Amended Complaint, ¶¶ 4-17. They bring this action against the collective State defendants — the State of New Jersey,

[1] Because they are closely related, the procedural history and counterstatement of facts are presented together for efficiency and for the court's convenience.

[2] Two plaintiffs — [redacted] by his guardian ad litem, Jennifer Torres; and [redacted], by her guardian ad litem, Rasheeda Alston — withdrew as parties in this matter by way of motion, which was granted on August 6, 2021. See 8/6/21 Order.

the State Board of Education, and the Commissioner of the Department of Education — based on the premise that all of New Jersey's public schools are unconstitutionally segregated on the basis of race and socioeconomic status. See generally ibid. They allege, citing to the racial composition of 23 of the State's 674 districts (as of 2015), id. at ¶¶ 23-29, 40, that the State defendants have violated the New Jersey Constitution's promise to provide all of the children of this State with T&E, its prohibition against segregation in the State's public schools, and its guarantee of equal protection under the law, id. at ¶¶ 65-77. From there, they assert additional constitutional and statutory causes of action against the State defendants. Ibid.

Plaintiffs' claims raise issues of significant constitutional dimension, particularly with respect to those provisions addressing T&E and the prohibition against segregation in New Jersey's public schools. We therefore begin with a factual and procedural history of this matter, before turning to a history of those provisions in order to place plaintiffs' claims within the appropriate legal and historical context.[3]

[3] The State defendants therefore submit this procedural history and counterstatement of facts as a supplement to, and in conjunction with, their statement of undisputed material facts pursuant to Rule 4:46-2(a). The State defendants incorporate by reference each and every statement of material fact set forth in their statement of undisputed material facts.

A. Procedural Background.

On May 17, 2018, plaintiffs filed a complaint against the State defendants, alleging that New Jersey's public and charter schools are de facto segregated state-wide by race, ethnicity and socioeconomic status. Complaint, ¶ 64; Amended Complaint, ¶ 64.[4]

On June 29, 2018, the State defendants filed a motion in lieu of an answer seeking to transfer the matter to the Commissioner of Education. State Defendants' 7/29/18 Motion to Transfer. On August 9, 2018, the court denied the motion without prejudice and ordered the State defendants to file an answer by August 31, 2018. 8/9/18 Order; Certification of Christopher Weber (Weber Cert.), Exhibit F, Transcript of 8/9/18 Proceedings, T48:25 to T49:3, T50:5-12.

In an effort to facilitate potential settlement, the court indefinitely suspended the State defendants' deadline to file an answer on September 20, 2018. 9/20/18 Case Management Order. However, on April 3, 2019, following extensive settlement discussions, plaintiffs advised the court that they were no longer interested in pursuing a mutual resolution. See Plaintiffs' 4/3/19 Correspondence.

[4] As noted above, on August 2, 2019, plaintiffs filed an amended complaint with corrected enrollment figures. The data cited in the amended complaint are not disputed.

On September 27, 2019, plaintiffs filed the instant motion for partial summary judgment, seeking a determination solely on the issue of liability.[5] Noting that there were threshold procedural questions regarding the appropriateness of bifurcating liability and remedy, the court ordered that the collective defendants should file any procedural objections to plaintiffs' motion by November 22, 2019. 10/17/19 Case Management Order.

The State defendants opposed plaintiff's motion and cross-moved to dismiss for failure to include indispensable parties. 11/22/19 Cross-Motion to Dismiss. The State defendants also argued that liability and remedy were inextricably intertwined and could not be bifurcated, and argued that the motion was premature prior to the exchange of discovery. Ibid. The court denied the State defendants' cross-motion on January 10, 2020, following oral argument. 1/10/20 Order. However, by that same order, the court denied plaintiffs' motion for summary judgment as premature pending an opportunity to exchange full discovery, and required plaintiffs to serve notice on all public school districts and charter schools throughout the State that this matter was pending. Ibid. Over the course of the next several months, various districts and charter schools were permitted to intervene. See, e.g., 4/15/20 Case Management Order.

[5] On October 4, 2019, plaintiffs submitted a second copy of its motion for partial summary judgment, which corrected the caption.

Since that time, the parties have engaged in discovery, and the court set a briefing schedule on plaintiffs' motion for partial summary judgment. 10/18/21 Order. Because the numbers set forth in plaintiffs' amended complaint are not disputed and plaintiffs have rested their case on those numbers, the matter is ripe for summary judgment. The State defendants not only oppose plaintiffs' motion, they now cross-move for summary judgment on all counts of the amended complaint.

B. Basic Structure of New Jersey's Public School System.

Generally, each municipality in New Jersey is considered to be a separate school district, N.J.S.A. 18A:8-1, although there are exceptions where districts either cease operations, splinter, consolidate, or regionalize. See generally N.J.S.A. 18A:8-1 to -51. School districts are governed by an appointed or elected board of education. See generally N.J.S.A. 18A:10-1 to -34. A district may also, through a vote by its eligible resident voters, choose to enter into regionalization or send-receive relationships with other districts. See generally N.J.S.A. 18A:9-1 to -11. But regardless of a district's classification or its arrangement with other districts, N.J.S.A. 18A:38-1(a) provides that every person in New Jersey between the ages of five and twenty is entitled to a free education if that individual is "domiciled within the school district." As discussed in more detail below, school district financing occurs through a combination of State aid and local levy

raised by municipalities for educational purposes. See generally N.J.S.A. 18A:7F-43 to -70. The determination of a district's budget, including the State aid and local contributions it receives, is influenced by local district governance and citizen participation from families domiciled within the district. See, e.g., N.J.S.A. 18A:7F-5; N.J.S.A. 18A:22-13.

Found within this basic framework are fundamental protections that all of New Jersey's students are entitled to under the State's constitution — including the right for their public schools to be free from segregation, and the Legislature's obligation to ensure that each and every student receives a T&E.

C. Brief History of the New Jersey Constitution's Anti-Segregation Clause.

In 1947, the State adopted a new Constitution that implemented widespread changes not only to the structure of the Executive and Judicial branches of the State, but also to the rights and privileges afforded to its residents. Among these new rights was an anti-discrimination and anti-segregation clause that states, in its entirety:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.
>
> [N.J. Const. art. I, ¶ 5 (anti-segregation clause).]

N.J.S.A. 18A:38-5.1 similarly declares it to be unlawful to exclude a child from public school on such bases:

> No child between the ages of four and 20 years shall be excluded from any public school on account of his [or her] race, creed, color, national origin, ancestry, or other protected category under [the New Jersey Law Against Discrimination (LAD)], or immigration status. A member of any board of education who shall vote to exclude from any public school any child, on account of his [or her] race, creed, color, national origin, ancestry, or other protected category under [the LAD], or immigration status shall be guilty of a disorderly persons offense.
>
> [N.J.S.A. 18A:38-5.1.[6]]

New Jersey's prior constitution was ratified in 1844. And while the 1844 Constitution contained a bill of rights, it did not refer to race. Rather, it prohibited the denial of civil rights only in the context of religious principles. N.J. Const. of 1844, art. I, ¶ 4. It was not until 1881 that the Legislature acknowledged race as a civil right when it enacted a law prohibiting school officials from denying a child entry to any public school on the basis of religion, nationality, or color. Bernard K. Freamon, The Origins of the Anti-Segregation Clause in

[6] A previous iteration of the statute was first enacted in 1881 (L. 1881, c. 149), and was later codified in the anti-segregation clause. Booker v. Bd. of Educ. of City of Plainfield, 45 N.J. 161, 174 (1965); Bd. of Educ. of Borough of Englewood Cliffs, Bergen Cnty. v. Bd. of Educ. of City of Englewood, Bergen Cnty. (Englewood Cliffs), 257 N.J. Super. 413, 452 (App. Div. 1992).

the New Jersey Constitution (Origins of the Anti-Segregation Clause), 35 Rutgers L. Rev. 1267, 1280 (2004). Nevertheless, many school districts, especially in South Jersey, remained segregated. Ibid.

Then, in 1884, the legislature passed the State's first civil rights act, guaranteeing equal access to public accommodations, theaters, and public conveyances. Id. at 1280-81. Despite these laws, segregation in public schools persisted and Black students were denied admittance to certain schools — even those they lived closest to — and were funneled into Black-only schools. This practice continued as late as three years prior to the 1947 Constitutional Convention. See, e.g., Hedgepeth v. Bd. of Educ. of Trenton, 131 N.J.L. 153 (Sup. Ct. 1944); Patterson v. Bd. of Educ. of Trenton, 11 N.J. Misc. 179 (Sup. Ct. 1933); Raison v. Bd. of Educ. of Berkeley Twp., 103 N.J.L. 547 (Sup. Ct. 1927).

This history of the anti-segregation clause sheds light on the Convention's intention to address racially-segregated schools that persisted in the face of express laws to the contrary. See Freamon, 35 Rutgers L. Rev. at 1267. The clause stems largely from the remarkable efforts of Oliver Randolph, a lawyer and the only Black delegate to the 1947 Constitutional Convention. Id. at 1268-69. Notwithstanding the law already on the books guaranteeing equal access to public schools by all schoolchildren in the State, "[t]he law was ignored and many school districts in South Jersey

remained segregated." Id. at 1280. Randolph sought to eliminate this kind of "de facto" segregation in the State by introducing a provision that would ban discrimination in public schools. Id. at 1297. He remarked to his fellow delegates that "state law relative to public schools prohibits discrimination on account of race. In spite of that law I dare say that every delegate here knows that there is separation on account of race, and only on account of race, practiced in the State of New Jersey at this time." Ibid. Randolph's impassioned insistence that the State Constitution address segregation on account of only race despite State law prohibiting it eventually led to the adoption of the anti-segregation clause. Id. at 1300-01.

Our Supreme Court has been called upon from time to time to interpret and apply the anti-segregation clause — but in all of those matters, the issue arose in the context of alleged segregation within a single district or local community. The most notable cases are Booker, 45 N.J. 161, and Jenkins v. Morris Twp. Sch. Dist., 58 N.J. 483 (1971). In Booker, 45 N.J. at 163-65, a local school board, faced with a district whose schools were racially imbalanced, refused to adopt a plan to integrate the district's schools and instead promoted a voluntary integration plan. Applying the anti-segregation clause, the Supreme Court reversed the Commissioner's decision to allow the board to adopt one of three plans based on a perceived lack of authority to do

otherwise, and remanded the matter for the Commissioner to reconsider the petition. Id. at 181. The Court noted that the anti-segregation clause expresses "New Jersey's strong policy against racial discrimination and segregation in public schools." Id. at 174. And the Court tied the clause to prohibitions on de facto segregation. Id. at 174-75. The Court also noted that the pernicious effects of segregation could stem not just from "de jure" segregation but also other factors, and that Federal law did not preclude the State from addressing de facto segregation. Id. at 168-70.

Jenkins, 58 N.J. at 485-93, arose from proposed changes to the education system in Morris Township and Morristown. At the time of the litigation, the two municipalities had a century-long send-receive relationship where students from Morris Township (5 percent Black population) were sent to the Morristown High School (25 percent Black population). Id. at 487-89. Morris proposed removing its students from Morristown High School, which would have created greater racial disparities between the Morris and Morristown schools. Id. at 489-90. At the same time, the Morris Board of Education rejected a proposed merger of the school systems in the two communities after Morris voters voted in favor of separate school systems in a non-binding referendum. Id. at 491-92. The Commissioner criticized the Morris Board and noted that the proposed actions would lead to "the development of what may be

another urban-suburban split between [B]lack and white students," but he concluded that he lacked the power to prohibit the withdrawal of students or require the merger of the school systems. Id. at 493. The Court disagreed with the Commissioner's decision that he lacked the authority to deny the proposed dissolution. Relying in part on the anti-segregation clause, the Court held that "governmental subdivisions of the [S]tate may readily be bridged when necessary to vindicate state constitutional rights and policies." Id. at 500. The Court cited the clause as one of many examples of New Jersey's "history and vigor" of its policies against "racial discrimination and segregation in the public schools." Id. at 495; see also id. at 493, 496.

D. Brief History of the New Jersey Constitution's T&E Clause.

The New Jersey Constitution's educational requirement is incredibly complex and has evolved over decades of legislation and litigation. In order to address the sufficiency of plaintiffs' T&E claim, it is necessary to discuss the history of the clause and how it has been interpreted by the Court over time.

1. Enactment of the T&E Clause.

Our State Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J.

Const. art. VIII, § 4, ¶ 1 (T&E clause). The clause is rooted in the principle that all school age children within the State are entitled to a free public education. This constitutional requirement first appeared in 1875, through amendments to the 1844 Constitution. Robinson v. Cahill (Robinson I), 62 N.J. 473, 501 (1973) (citing N.J. Const. of 1844 art. IV, § 7, ¶ 6). The purpose of the 1875 amendment "was to impose on the [L]egislature a duty of providing for a through and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship[.]" Landis v. Ashworth, 57 N.J.L. 509, 512 (Sup. Ct. 1895).

The T&E clause continued through the adoption of the 1947 State Constitution, N.J. Const. art. VIII, § 4, ¶ 1, and our Supreme Court has interpreted its reach in a number of matters since then. Oftentimes, the Court has been called upon to interpret and apply the T&E clause in the context of challenges to school funding schemes.[7] But it has also been required to do so in the context of racial composition. See Jenkins, 58 N.J. 485-86; Petition for Authorization to Conduct a Referendum on Withdrawl

[7] See, e.g., Robinson I, 62 N.J. 473; Robinson v. Cahill (Robinson IV), 69 N.J. 133 (1975); Robinson v. Cahill (Robinson V), 69 N.J. 449 (1976); Abbott v. Burke (Abbott I), 100 N.J. 269 (1985); Abbott v. Burke (Abbott II), 119 N.J. 287 (1990); Abbott v. Burke (Abbott III), 136 N.J. 444 (1994); Abbott v. Burke (Abbott IV), 149 N.J. 145 (1997); Abbott v. Burke (Abbott V), 153 N.J. 480 (1998); Abbott v. Burke (Abbott XIX), 196 N.J. 544 (2008); Abbott v. Burke (Abbott XX), 199 N.J. 140 (2009).

of N. Haledon Sch. Dist. v. Passaic Cnty. Manchester Reg'l High Sch. Dist. (North Haledon), 181 N.J. 161 (2004).

2. The Supreme Court's Early Interpretation and Application of the T&E Clause.

As noted earlier, in 1971 the Supreme Court considered proposed changes to the send-receive relationship between the Morristown and Morris Township School Districts, which would have caused Morristown's public schools to overwhelmingly consist of only Black students. Jenkins, 58 N.J. 487-88. In addition to relying on the anti-segregation clause, the Court also rejected the Commissioner's interpretation of the limits of his statutory authority by pointing to the New Jersey Constitution's T&E clause. Id. at 494. The Court held that the T&E clause provided him with the power and responsibility to fulfill that constitutional mandate. Id. at 506. Applying that principle to the statutory framework at play, the Court noted that those "comprehensive enactments" vested the Department with the obligation and powers to "insure that [] facilities and accommodations are being provided and that the constitutional mandate is being discharged." Id. at 495 (quoting Bd. of Educ., E. Brunswick Twp. v. Twp. Council, E. Brunswick, 48 N.J. 94, 103-04 (1966)).

And the Court more recently addressed the T&E clause in the context of the North Haledon School District's attempt to withdraw from the Passaic County Manchester Regional High School District

pursuant to a specific statutory process under N.J.S.A. 18A:13-56. North Haledon, 181 N.J. 161. Although the Commissioner permitted the question to go to the voters of the district, and those voters approved the withdrawal, the Court overturned the decision and compelled Manchester Regional to stay intact. Id. at 165-73, 177-84. It found that North Haledon's withdrawal would violate students' constitutional right to the educational opportunities offered by a diverse learning environment. Id. at 177-84. Viewing the issue through the lens of the specific statutory framework from which the matter arose, the Court recognized that "racial imbalance resulting from de facto segregation is inimical to the constitutional guarantee of a thorough and efficient education." Id. at 177. Relying on Jenkins and Booker, it held that "[s]tudents attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures." Id. at 178. And it further explained that "racial balance and education are not 'isolated factors,' but 'different sides of the same coin[.]'" Ibid. (quoting Englewood Cliffs, 257 N.J. Super. at 464). It also acknowledged the unique and express statutory and regulatory obligations in this context of local boards and superintendents, as well as the Commissioner, to deny a petition for withdrawal if it would result in racial imbalance or "any other reason[.]" Id. at 179-81 (citing N.J.S.A. 18A:13-

56(b)(4); N.J.A.C. 6:3-7.1 to -7.2 (repealed 2005)).

3. The Supreme Court's Development of the T&E Clause Through Robinson and Abbott.

The Court also has a long history of addressing the wide reach of the T&E clause through its Robinson and Abbott decisions. In 1973, the Robinson I Court focused on disparities of per-pupil expenditures to find that the "State's then existing school funding plan violated the [T&E clause] of the State Constitution." Abbott XX, 199 N.J. at 180 (citing Robinson I, 62 N.J. 473). In the absence of any workable definition at the time of the content of constitutionally required T&E, and because the Legislature did not develop another "viable criterion for measuring compliance with the constitutional mandate[,]" the Court chose to interpret the T&E clause based on the disparity in per-pupil expenditures. Robinson I, 62 N.J. at 481, 512-16. In particular, the Court concluded the funding scheme at the time did not meet the T&E constitutional demand based on the "dollar input per pupil[,]" and emphasized that it dealt with the problem in those terms because the "dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate." Id. at 515-16; see also Abbott II, 119 N.J. at 348 (noting that the Robinson I Court was forced to interpret the T&E clause "based solely on the disparity of expenditures per pupil.").

The Legislature acknowledged the Court's concern about the lack of educational standards and included several "educational aims" and "ingredients" for T&E in the Public School Education Act of 1975 (1975 Act), N.J.S.A. 18A:7A-1 to -33 (repealed by L. 1996, c. 138). Robinson V, 69 N.J. 456-57 (citing N.J.S.A. 18A:7A-5 (repealed)). The 1975 Act included a list of ten "major elements" that essentially defined T&E. Id. at 456-57 (listing out the ten elements, citing N.J.S.A. 18A:7A-5 (repealed)).

The Court's interpretation and application of the T&E clause has further evolved through the Abbott litigation, which perfectly elucidates the multi-faceted nature of T&E and its delivery, and otherwise highlights the many aspects of schooling and its administration that must be entered into the T&E calculus. The matter began in 1985 when school children from Camden, East Orange, Irvington and Jersey City — the then-larger, urban school districts[8] — challenged the constitutionality of the 1975 Act. Abbott XX, 199 N.J. at 180-81 (citing Abbott I, 100 N.J. at 295-97). The plaintiffs did not contest the Legislature's definition of T&E, but rather the 1975 Act's funding as applied to them. Abbott II, 119 N.J. at 296-97, 349. The Court remanded the matter

[8] The school districts from the Abbott cases were later referred to as "Abbott districts" and eventually included thirty-one districts in the State. Abbott v. Burke (Abbott XXI), 206 N.J. 332, 406 (2011). Effective January 13, 2008, the Legislature eliminated the designation "Abbott district" and replaced it with a new designation, "SDA district." L. 2007, c. 260, § 39.

to the Commissioner of Education and a hearing occurred before the Office of Administrative Law (OAL). Abbott II, 119 N.J. at 297 (citing Abbott I, 100 N.J. at 298, 302).

Following the remand, the matter was heard before an administrative law judge (ALJ), the Commissioner, and the State Board of Education, and in Abbott II, the Court found that the 1975 Act was unconstitutional as applied to the plaintiffs. Id. at 295, 298-300. It held the 1975 Act should be "amended to assure funding of education in poorer urban districts at the level of property-rich districts[.]" Ibid. And it required the State to guarantee and mandate such funding and ensure the level of funding "be adequate to provide for the special educational needs of . . . [the] poorer urban districts in order to redress their extreme disadvantages." Ibid.

The Court deferred to the Legislature's definition of T&E as stated in N.J.S.A. 18A:7A-5 (repealed), but also adopted the Robinson I Court's declaration that T&E must equip a student with a minimum level of educational opportunity to become a "citizen and . . . a competitor in the labor market." Id. at 306 (quoting Robinson I, 62 N.J. at 515). It further found that T&E requires adequate facilities, and held that T&E means the "ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends." Id. at 363-64.

Since then, the Abbott plaintiffs have returned to the Court numerous times, raising T&E claims in a wide variety of contexts, and the Court has been called upon to address the many aspects in which T&E is delivered. See Abbott III, 136 N.J. at 447 (finding that the Quality Education Act, N.J.S.A. 18A:7D-1 to -37 (repealed by L. 1996, c. 138, § 85), did not pass constitutional muster because it did not "assure parity of regular education expenditures between special needs districts and more affluent districts"); Abbott IV, 149 N.J. at 161, 168 (finding the Comprehensive Educational Improvement and Financing Act (CEIFA), N.J.S.A. 18A:7F-1 to -34 (repealed in part, and amended in part, by L. 2007, c. 260),[9] "facially adequate as a reasonable legislative definition of a constitutional thorough and efficient education[,]" but declaring it unconstitutional as applied to districts with special needs because children residing in special needs districts required both educational content standards and adequate resources to ensure that T&E is being provided); Abbott V, 153 N.J. at 489,

[9] CEIFA provided substantive educational standards defining T&E: the Core Curriculum Content Standards (CCCS). The CCCS provided "achievement goals applicable to all students in seven core academic areas: visual and performing arts, comprehensive health and physical education, language-arts literacy, mathematics, science social studies, and world languages." Abbott IV, 149 N.J. at 161. Within the seven core academic areas were also "cross-content workplace readiness standards," which "incorporate career-planning skills, technology skill, critical-thinking skills, decision-making and problem-solving skills, self-management, and safety principles." Ibid.

527 (emphasizing the importance of connecting educational standards and adequate facilities to appropriate funding, and providing an expansive list of remedial measures, procedures, and safeguards needed to ensure children from the poorest districts received a constitutionally sufficient education);[10] see also State Defendants' Statement of Undisputed Material Facts (Defendants' SOUMF), ¶ 3; Weber Cert., Exh. C, Certification of Lucille Davy (Davy Cert.), ¶¶ 4-11.

E. The Development of the School Funding Reform Act of 2008.

In an effort to provide a funding formula that satisfied the T&E clause and the Court's Abbott mandates, in January 2008 the Legislature passed and the Governor signed into law the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -70, a new statewide school funding formula. Abbott XIX, 196 N.J. at 549. The SFRA was "designed to exceed the requirements necessary" to provide T&E, and built in a series of safety mechanisms to accomplish that goal. Abbott XX, 199 N.J. at 144, 147-48, 164; N.J.S.A. 18A:7F-44. When it enacted the SFRA, the Legislature declared that "[e]very child in New Jersey must have an opportunity for an education based on academic standards that satisfy constitutional requirements regardless of where the child resides,

[10] After Abbott V, the Court has been called upon over twenty times through the years by parties seeking enforcement, clarification, or relaxation of its mandate.

and public funds allocated to this purpose must be expended to support schools that are thorough and efficient in delivering those educational standards." N.J.S.A. 18A:7F-44(d).

In developing the SFRA, the Department consulted with people from various school districts across the State such as teachers, special education experts, administrators, including principals and superintendents, and school employees working in human resources, referred to as Professional Judgment Panels (PJPs). Defendants' SOUMF, ¶ 4; Davy Cert., ¶¶ 12-19; Weber Cert., Exh. G, Deposition Transcript of Lucille Davy (Davy Transcript), T15:3-13; see also Abbott XIX, 196 N.J. at 552-53; Abbott XX, 199 N.J. at 152; N.J.S.A. 18A:7F-44. The PJPs identified desired performance standards, developed prototypical model districts and used various experts to determine the resources needed to meet the performances standards. Defendants' SOUMF, ¶¶ 5-6; Davy Cert., ¶¶ 12-19; Davy Transcript, T15:3-13. The PJPs specifically addressed the additional supports and resources needed to educate children with special needs, children who are at risk because of poverty, and English language learners. Defendants' SOUMF, ¶¶ 5-6; Davy Cert., ¶¶ 12-19; Davy Transcript, T25:5-17.

The formula for calculating equalization aid under the SFRA carries with it certain critical characteristics to ensure sufficient funding for the provision of T&E. In particular, the SFRA is unitary, in that it applies the same funding principles to

all districts. Abbott XX, 199 N.J. at 152, 173-74; N.J.S.A. 18A:7F-44(g); Defendants' SOUMF, ¶¶ 7-10; Davy Cert., ¶¶ 20-23. It is also weighted, to ensure that the Department's equalization aid for each district is calculated based on the district's demographics. Abbott XX, 199 N.J. at 152; N.J.S.A. 18A:7F-44(d) and -53; Defendants' SOUMF, ¶¶ 7-10; Davy Cert., ¶¶ 20-23. And it is wealth-equalized, so that funding under the formula is a shared responsibility of each district and the State based on districts' relative property and income wealth. Abbott XIX, 196 N.J. at 557; Abbott XX, 199 at 154-55; Defendants' SOUMF, ¶¶ 7-10; Davy Cert., ¶¶ 20-23.

The latter characteristic is important to consider in this matter. A major component of each district's State aid — equalization aid received from the State — is calculated based on a district's ability to contribute toward its overall adequacy budget through its local contribution or "local fair share." N.J.S.A. 18A:7F-51 and -53; Abbott XX, 199 N.J. at 153. In other words, as a wealth-equalized formula, the SFRA anticipates that relatively wealthier municipalities (as measured by aggregate income and equalized property values) will contribute proportionally more on a local level to their districts' budgets than poorer municipalities, thus enabling the State to allocate school aid more equitably to needier districts (i.e., districts with a large proportion of low incomes, at-risk students, or

English language learners). See N.J.S.A. 18A:7F-44(d) (noting that the school funding formula "should provide State aid for every school district based on the characteristics of the student population and up-to-date measures of the individual district's ability to pay."); N.J.S.A. 18A:7F-45 and -51 (identifying bilingual and at-risk students, and students who live at or below the federal poverty guidelines, and providing additional funding for those students); see also Defendants' SOUMF, ¶¶ 7-10; Davy Cert., ¶¶ 20-23. Thus if a district's demographics undergo a large change — either through an influx or outflow of a particular socioeconomic demographic, or if there is a change in the overall wealth of the district — the amount of State aid flowing to the district will be adjusted accordingly.

Upon review of the constitutional sufficiency of the SFRA, the Court specifically recognized that "[t]he Legislature and Executive have made considerable efforts to confront the difficult question of how to address the education needs of at-risk pupils, no matter where those children attend school." Abbott XX, 199 N.J. at 172. The Court noted its "one goal has been to ensure that the constitutional guarantee of a thorough and efficient system of public education becomes a reality for those students who live in municipalities where there are concentrations of poverty and crime." Id. at 174. It declared that "[e]very child should have an opportunity for an unhindered start in life — an

opportunity to become a productive and contributing citizen to our society." Ibid. The Court applauded the legislative and executive branches of our State, and found they "enacted a funding formula that is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives." Id. at 175.[11]

F. The New Jersey Student Learning Standards.

The CCCS, which the Court found as a reasonable expression of constitutionally sufficient T&E in Abbott IV and Abbott XIX, are now known as the New Jersey Student Learning Standards (NJSLS). Defendants' SOUMF, ¶¶ 1, 11; Davy Cert., ¶¶ 26-34; see generally N.J.A.C. 6A:8-1.1 to -5.3. They outline the educational goals, the implementation of those goals, the assessment system to measure whether districts are achieving the educational goals established for T&E, and the State's graduation requirements. Defendants' SOUMF, ¶ 13; Davy Cert., ¶¶ 26-34; see generally N.J.A.C. 6A:8-1.1 to -5.3. They "describe what students should know and be able to do at various grade levels and in each core curriculum content area upon completion of a thirteen-year public school education." Defendants' SOUMF, ¶ 12; Davy Cert., ¶¶ 26-34; see generally N.J.A.C. 6A:8-1.1 to -5.3. The standards apply to preschool and K-12 schools, and include traditional subjects such as English

[11] In 2011, the Court reviewed SFRA as applied to SDA districts, and although it reaffirmed the constitutionality of the SFRA, it required the State to fully fund the SFRA as to SDA districts. Abbott XXI, 206 N.J. at 369-377.

language arts, mathematics, science, and social studies, and less traditional subjects such as career readiness, performing arts, and world languages. Defendants' SOUMF, ¶ 14; Davy Cert., ¶¶ 26-34; see generally N.J.A.C. 6A:8-1.1 to -5.3. Every five years, the standards are reviewed by panels of teachers, administrators, parents, students, and representatives from higher education, businesses, and the community. Defendants' SOUMF, ¶ 15; Davy Cert., ¶¶ 26-34; Davy Transcript, T28:21 to 29:16; see generally N.J.A.C. 6A:8-1.1 to -5.3. National standards, student needs, and research-based practices influence the standards. Defendants' SOUMF, ¶ 16; Davy Cert., ¶¶ 26-34; see generally N.J.A.C. 6A:8-1.1 to -5.3.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). An "issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. In order to determine "whether there exists a genuine issue with respect to a material fact[,]"

the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to a non-moving party . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). In other words, if the evidence presented is so one-sided that the moving party must prevail as a matter of law, "the trial court should not hesitate to grant summary judgment." Id. at 540.

When opposing summary judgment, the non-moving party may not simply allege any disputed fact. Id. at 529-30. Instead, the evidence must demonstrate a genuine issue of material fact, such that when viewed in a light most favorable to the non-moving party, the evidence would allow a rational factfinder to resolve the disputed issue in favor of the non-moving party. Id. at 529-30, 540. Facts that are insubstantial, "fanciful, frivolous, gauzy or merely suspicious" are insufficient to defeat summary judgment. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). In all, absent a genuine issue of material fact, summary judgment must be granted in favor of the moving party. Brill, 142 N.J. at 530.

There are no material facts in dispute here and the matter is ripe for summary judgment. Measured against the standard set forth

above, plaintiffs' motion must be denied and the State defendants are entitled to summary judgment as a matter of law.

ARGUMENT

Throughout their brief and amended complaint, plaintiffs raise a total a seven causes of action, the majority of which are grounded in the New Jersey Constitution. They primarily contend that the State defendants have violated the three portions of the Constitution that guarantee the provision of T&E in public schools, the prohibition of segregation in public schools, and equal protection under the law. Based on those three primary claims, plaintiffs also allege that the State defendants have violated the New Jersey Civil Rights Act, as well as a statute forbidding segregation of New Jersey's schools; and in a novel argument, they assert that their three constitutional claims meld together to create a new cause of action. Finally, they assert a cause of action under the Charter School Program Act of 1996.

All of plaintiffs' claims fall short on this record and must be dismissed as a matter of law.

POINT I

PLAINTIFFS HAVE FAILED TO ESTABLISH THAT NEW JERSEY'S STUDENTS ARE NOT RECEIVING A THOROUGH AND EFFICIENT EDUCATION.

In count three of their amended complaint, plaintiffs allege that the State defendants have allowed the State's public schools to become segregated on the basis of "race, ethnicity and poverty

. . . ," and thus have deprived its students of a thorough and efficient education, in violation of the New Jersey Constitution. Amended Complaint, ¶¶ 69-70. They argue that a comparatively small subset of public school districts (23 of 674 total districts)[12] are not sufficiently integrated, based on a snapshot from the 2016-2017 school year, and that this amounts to a statewide violation of the New Jersey Constitutional requirement that the State provide students with T&E. Id. at ¶¶ 22-29; see generally Certification of Ryan W. Coughlan (Coughlan Cert.) (annexed to plaintiffs' motion).[13]

Plaintiffs' limited statistical data points about diversity in some districts, during a limited period of time, are not enough to sustain their sweeping claim that the State's entire education system violates the T&E clause. The New Jersey Constitution provides the foundation for New Jersey's educational standards,

[12] As of the 2020-2021 school year, there are now 686 operating school districts and 599 total school districts in New Jersey. Defendants' SOUMF, ¶ 66; Department of Education, New Jersey Public Schools Fact Sheet, publicly available at https://www.nj.gov/education/doedata/fact.shtml#:~:text=New%20Jersey%20Public%20Schools%20Fact%20Sheet%20%20,%20%2087%20%2014%20more%20rows%20 (last visited Dec. 17, 2021).

[13] Though he originally focused solely on the 2016-2017 school year (see id. at ¶¶ 22-29; Coughlan Cert.), in his supplemental certification, plaintiffs' expert expanded his review to include analysis of five-year averages between 2015 and 2020. See generally Weber Cert., Exh. T, Supplemental Certification of Ryan W. Coughlan (Coughlan Supp. Cert.). This additional data does not cure the defect identified by the State defendants.

and all three branches of our government have made clear that there are several significant factors that must contribute to the delivery of T&E, including (but not limited to) funding of the public school system, adequate learning and performance standards, and of course racial diversity. It is through the T&E lens that all of plaintiffs' claims must be viewed because, at its core, the objective of both plaintiffs and the State defendants is to ensure that students receive T&E. Thus, because plaintiffs' limited data points provide an insufficient basis for concluding there is a statewide violation of the T&E clause, summary judgment must be granted in the State defendants' favor as a matter of law. Brill, 142 N.J. at 540.

A. Assessing the Provision of a Thorough and Efficient Education.

Determining whether a district is providing T&E requires a comprehensive review and holistic consideration of multiple factors. Counterstatement of Facts, Points D-F; Defendants' SOUMF, ¶¶ 17-26; Davy Cert.; ¶¶ 26-37. It begins with a review of students' access to, and participation in, the curricula and students' performance on State assessments. Defendants' SOUMF, ¶ 18; Davy Cert., ¶ 29. It also looks at the accountability model, or the Quality Single Accountability Continuum (QSAC), which measures, among other things, student growth and improvement, graduation rates, and performance trends. Defendants' SOUMF, ¶

19; Davy Cert., ¶ 34; Davy Transcript, T30:2 to T31:23. A district's provision of T&E is also measured by the education of students with special needs, English language learners, and low-income and at-risk students. Defendants' SOUMF, ¶ 20; Davy Cert., ¶ 30. The Department also reviews school culture, such as incidences of violence; vandalism; harassment, intimidation, and bullying; attendance; student removals; and substance use offenses. Defendants' SOUMF, ¶ 21; Davy Cert., ¶ 30.

Aside from these substantive considerations, the Department also looks at aspects of a district's delivery of education, such as class size, teacher and administrator education and experience, teacher retention levels, attendance, and student to staff ratios. Defendants' SOUMF, ¶ 22; Davy Cert., ¶ 31. Finally, the Department also considers the effectiveness and efficiency with which districts spend their State and local funds when implementing the State standards. Defendants' SOUMF, ¶ 23; Davy Cert., ¶ 32.

Without question, race is also a factor in the State's consideration of whether T&E is being delivered. Defendants' SOUMF, ¶¶ 24-27; Davy Cert., ¶¶ 35-37. The benefits that come from learning and associating with other students from diverse backgrounds are legion, and race is unquestionably a factor that is considered "in determining a district's capacity to provide quality education programs sufficient to satisfy the [T&E] mandate." Defendants' SOUMF, ¶¶ 24-27; Davy Cert., ¶ 35. But,

racial makeup of a school or district alone is not determinative of the issue — indeed, "there are students who are meeting the State's high performance standards" in districts with a predominantly homogeneous racial makeup, and there are also "student performance outcomes on State tests [that] reveal . . . significant achievement gaps . . . in several of the State's racially diverse districts." Defendants' SOUMF, ¶¶ 24-27; Davy Cert., ¶ 36; Davy Transcript, T36:16-24. Because of this, the State has taken steps both to "inhibit increased racial imbalance" and to "encourage greater diversity and integration." Defendants' SOUMF, ¶¶ 24-27; Davy Cert., ¶ 37. But again, measurement of whether a student is receiving T&E "involves a multi-variable and holistic review of many different factors[.]" Defendants' SOUMF, ¶¶ 24-36; Davy Cert., ¶ 37; North Haledon, 181 N.J. at 178.

B. Under This Framework, the State Defendants Are Entitled to Judgment on Plaintiffs' Claim Alleging a Statewide Violation of the T&E Clause.

As articulated above, the delivery of T&E is dependent upon several factors defined not just by the T&E clause, but by years of input from all three branches through legislation, regulation, and legal precedent. Curricula, student performance, the delivery of education, school culture, and a district's efficiency and effectiveness in spending and administration are all critical considerations when assessing whether a district is providing T&E. As the Court has recognized, the State must link funding to a

district's ability to adhere to the required educational standards. Abbott IV, 149 N.J. at 185-86.

Plaintiffs, however, rely on the racial and socioeconomic demographics of 23 of this State's 674 school districts, over a limited period of time,[14] to summarily conclude that all of New Jersey's schools are segregated, and that none of New Jersey's students are receiving T&E. That is simply not the appropriate method of determining whether T&E is being delivered. While the State defendants do not dispute the racial and socioeconomic demographics mentioned plaintiffs' motion, they do dispute the oversimplified contention that these facts are enough to establish, as a matter of law, that the State's entire education system denies students T&E, or that they would allow plaintiffs' claim to survive summary judgment.

Indeed, the Supreme Court has even acknowledged that "[n]ot every action that reduces the percentage of white students necessarily implicates the State's policy against segregation in the public schools[,]" and, importantly, that "it is not really possible to establish a precise point when a thorough and efficient education is threatened by racial imbalance." North Haledon, 181 N.J. at 183.[15] But generally, a claim for deprivation of T&E is

[14] See footnotes 12 & 13 above.

[15] Plaintiffs concede this point, but indifferently dismiss it is a "hypothetical question" not germane to this matter because of

viable only if a party can show that students are not being equipped for their "role[s] as citizen[s] and competitor[s] in the labor market." Abbott II, 119 N.J. at 313. Plaintiffs must assert significant educational deficiencies to state a T&E claim. See Stubaus v. Whitman, 339 N.J. Super. 38, 56 (App. Div. 2001) ("Because plaintiffs have not asserted any educational disparities, . . . Robinson I precludes plaintiffs from maintaining their action based on the T&E constitutional provision.").

Here, plaintiffs do not assert any statewide educational deficiencies in their complaint, nor have they offered any evidence of such deficiencies. They have not alleged (or proven) the districts referenced in their complaint cannot provide their children with curricula aligned with the NJSLS. They do not cite student performance or claim that districts do not have the resources or supports to provide T&E. They do not complain about facilities or cite overcrowded classrooms in support of their claim. They do not point to falling graduation rates or give examples of failing school culture to state their claim. Rather, they rely on a particularly limited subset of data — taken from a fraction of the State's districts, over a one- (or five-) year period — and claim that the racial and socioeconomic demographics

---

the "severity of the segregation" alleged in the amended complaint. Plaintiffs' Brief, pp. 23-24.

in that narrow window indicate a statewide deprivation of T&E. That is just not enough.

Pointing to racial disproportionality in some districts cannot alone establish a statewide violation of the T&E clause. Indeed, to reduce a T&E violation to just race or socioeconomic status would wholly ignore the educational standards created by the Legislature and the Department, and affirmed by our Supreme Court. In New Jersey, there are school districts that are predominantly of a single race, which perform at high levels. Defendants' SOUMF, ¶ 28; Davy Cert., ¶¶ 36-37; Davy Transcript, T36:16-19. There are also school districts that are diverse, where achievement gaps among students exist. Defendants' SOUMF, ¶ 29; Davy Transcript, T36:20-24. Attending a diverse school district alone does not mean a child will master the NJSLS. Defendants' SOUMF, ¶ 30; Davy Transcript, T37:1-3. The SFRA ensures that every district will receive sufficient funding to ensure the provision of T&E no matter where the child lives. Abbott XX, 199 N.J. at 175; see also Defendants' SOUMF, ¶¶ 4-10; Counterstatement of Facts, Point E. Accordingly, plaintiffs have failed to allege anything that would allow their T&E claim in count three to proceed.

Notably, the Abbott cases acknowledged and addressed the racial and socioeconomic disparities in the poorer, urban districts, and chose to address those disparities through

supplemental supports and additional funding to provide those programs. The Court has been fully cognizant of public schools' demographics, and of the racial and socioeconomic disparities within the large, urban districts (see Abbott IV, 149 N.J. at 177-79; Abbott II 119 N.J. at 391), and acknowledged that the "case brings the constitutional obligation into sharp focus as it applies to the urban poor[,]" Abbott II, 119 N.J. at 391. It recognized the special socioeconomic challenges faced by the poorer, urban districts. Abbott IV, 149 N.J. at 178. And it is because of the unique obstacles faced by the poorer, urban districts that the Court issued its decisions in Abbott II, Abbott III, and Abbott IV. Overall, it found the districts needed additional funding and special, supplemental programs to correct the constitutional deprivation. Abbott IV, 149 N.J. at 179-180.

The State has addressed the concerns expressed through the Abbott decisions through the development of educational standards and funding. Plaintiffs' claim implies that the racial and socioeconomic demographics of a school district dictates educational outcomes. But the Court found that the SFRA provides funding for every district to offer its students T&E. Abbott XX, 199 N.J. at 174-75. The SFRA also specifically addresses bilingual and at-risk students, and students who live at or below the federal poverty guidelines, N.J.S.A. 18A:7F-45, and provides additional funding for those students, N.J.S.A. 18A:7F-51. Our Legislature

has already provided a remedy to ensure students receive sufficient funding for the provision of T&E no matter where they live, and our Court has upheld that remedy.

Plaintiffs suggest that because our Court has indicated that racial imbalance could impede the provision of T&E, they need only prove the existence of a disparity to prevail. Plaintiffs' Brief, pp. 38-39. They rely on North Haledon to support this claim, but they are wrong. In North Haledon, 181 N.J. at 164, the District petitioned to withdraw from Manchester Regional under the process set forth in N.J.S.A. 18A:13-56. Pursuant to that process, the Board of Review permitted the District's petition to go to the voters, who approved the District's withdrawal, and the Commissioner established the date of withdrawal. North Haledon, 181 N.J. at 171-73. The Appellate Division reversed the decision, and the Supreme Court affirmed, finding the Board of Review and the Commissioner had to consider racial impact when reviewing the petition. Id. at 176, 183, 186. The Court noted the governing regulations required review of the racial impact on the remaining, regional district when a district requests a withdrawal. Id. at 179-80. The Court focused on the specific statutory process before it and noted the regulations reinforced its conclusion. Id. at 179-80.

North Haledon does not support plaintiffs' argument that racial imbalance deprives a student of T&E. That matter addressed

a unique context and addressed a specific statutory process — the withdrawal of one school district from a regional district. And although North Haledon discussed the impact of racial imbalance, it never held that racial imbalance alone deprives a child of T&E. Id. at 177. Rather, the Court recognized that it is impossible to establish a "precise point when a thorough and efficient education is threatened by racial imbalance." Id. at 183. More importantly, nowhere in North Haledon does the Court reject or overrule the years of precedent defining all that constitutes T&E. Therefore, North Haldeon does not support plaintiffs' unprecedented claim, let alone support their entitlement to summary judgment.

For these reasons, plaintiffs are not entitled to summary judgment, their claim under the T&E clause fails, and summary judgment should be entered for the State defendants on count three of the amended complaint.

POINT II

PLAINTIFFS HAVE FAILED TO DEFINE "SEGREGATION" UNDER THE LAW OR OTHERWISE ESTABLISH THAT THE STATE DEFENDANTS ARE LIABLE FOR RACIAL IMBALANCE IN NEW JERSEY'S SCHOOLS.

In counts one and five of their amended complaint, plaintiffs again allege that the State defendants have allowed the State's public schools to become segregated on the basis of "race, ethnicity and poverty . . . ," this time in violation of the New Jersey Constitution and a cognate statute's prohibition against

segregation in the State's public schools. Amended Complaint, ¶¶ 65-66, 73-74. They essentially argue that racial imbalance in 23 of 674 school districts, during a period of only one or five school years,[16] by definition means that all of New Jersey's schools are unconstitutionally segregated.

Plaintiffs seek an extraordinarily novel application of the anti-segregation clause, one unsupported by the history of the clause itself or the case law interpreting it. While the anti-segregation clause has previously been used to target segregated schools that persisted despite laws to the contrary, or segregated schools in a single district or a small number of districts with an existing send-receive or regional relationship, plaintiffs ask this court to use the clause to make a wholesale, statewide declaration that New Jersey's schools are unconstitutionally segregated.

The issue is not as simple as plaintiffs suggest. The State defendants do not, and have never, disputed the numbers offered by plaintiffs. That is not the problem. The problem is that on close examination, plaintiffs' action is based on a premise embedded with overwhelming nuance and uncertainty, from both a legal and practical perspective, such that they cannot possibly prevail on their claims. Their argument overlooks the fact that even the

[16] See footnotes 12 & 13 above.

definition of "segregation" brings with it significant challenges, and it assumes without support that those imbalances are "because of" actions by the State defendants. It ignores the State's rapidly evolving demographics and population shifts. No court in this State has grappled with the issue presented here; and on the limited record to which plaintiffs have chosen to confine themselves, no finding of a statewide violation of the anti-segregation clause can be sustained. Indeed, for this court to even consider the issue, a comprehensive record containing a district-by-district analysis of the State's 674 districts would need to be developed and carefully contemplated. Accordingly, summary judgment must be granted in the State defendants' favor as a matter of law. Brill, 142 N.J. at 540.

A. Our Courts Have Never Applied the Anti-Segregation Clause in a Statewide Context.

The only cases to substantively tackle the anti-segregation clause issue make clear that, in addition to prohibiting overt or de jure segregation, the clause prohibits de facto segregation in situations where race has already been identified as the driving force of segregation within a single school district, or in uniquely-entwined communities (i.e., regionalized and indistinct neighboring districts, or districts with a send-receive relationship). And it should be noted from the outset that those types of relationships are governed by specific statutes that

control or directly affect important aspects of the districts' operations — such as local governance and taxation.

The first such case was Booker, 45 N.J. at 163-68, discussed above, which considered a single, established school district and a proposed redrawing of attendance areas that would have increased racial imbalances in that district. The Supreme Court took pains to emphasize that its decision entailed no break with the practice of sending students to schools in the area where they reside, and that desegregation efforts prompted by the anti-segregation clause still had to be conducted in accordance with practical considerations. The Court announced its intention that its decision sought to "achiev[e] the greatest dispersal consistent with sound educational values and procedures." Id. at 180. In implementing a plan to desegregate the Plainfield schools, the Court cautioned that "[c]onsiderations of safety, convenience, time economy and the other acknowledged virtues of the neighborhood policy must be borne in mind. Costs and other practicalities must be considered and satisfied." Ibid. Id. at 163.

By contrast, here plaintiffs compare all of the State's districts, across each corner of the State, and allege that the State should have somehow taken action to prevent families living in those districts from either living where they live or sending their children to their local schools. See Amended Complaint, ¶¶ 22-29, 65-77. Plaintiffs have not offered any plan — as had been

proposed in Booker — let alone one that this court could employ with the confidence to ensure the preservation of educational values and procedures, or to consider the substantial benefits and practicalities of apportioning students to public schools in the same general area where they reside.

When a legal action has implicated the anti-segregation clause, the Supreme Court has never applied the clause beyond the confines of a particular district or community that was the subject of the legal challenge. Nor has it applied the clause without the benefit of a robust administrative record made below for the district sought to be declared illegally segregated, which plaintiffs adamantly argue is not necessary. There is nothing in the Booker opinion that would suggest otherwise. The only other case to deal more than passingly with the anti-segregation clause — Jenkins — confirms the limited geographic scope of review in that matter, and how extraordinary plaintiffs' proposed application of the clause is here.

In Jenkins, 58 N.J. at 501, also discussed above, the Court held that the Commissioner had the power to cross district lines to avoid de facto segregation where "there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations." The Supreme Court relied upon the anti-segregation clause to hold that, in order to ameliorate or prevent

segregation, the Commissioner could block the severance of a send-receive relationship. But in doing so, it also delineated the clause's limited scope and effect. It began its opinion emphasizing the unique relationship between the two municipalities at issue in the case: "the Town [Morristown] and the Township [Morris] have remained so interrelated that they may realistically be viewed as a single community, probably a unique one in our State." Id. at 485. The intertwined nature of the communities is part of what prompted the Court to note that its decision "does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere." Id. at 500. Importantly, action by the Commissioner to prevent local segregation was appropriate in Jenkins because "there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations." Id. at 501.

This is in stark contrast to the present matter, which implicates not just "multiple communities" but every single school district in the entire State. The Jenkins Court repeatedly emphasized that the case before it involved only a single community, which readily distinguishes and reveals its inapplicability to the present matter. The fact that the case dealt with a single community with deep historical ties also meant that the proposed merger of the school systems presented no

"impracticalities." Recall that even in cases alleging localized segregation, the Court has explained that racial imbalances must be eliminated to the fullest extent possible within the framework of effective educational procedures, Booker, 45 N.J. at 170, 177, and a constitutional violation exists only where there is a "feasible" solution to such imbalance, Jenkins, 58 N.J. at 505-07 (emphasis added).

Impractical does not even begin to describe the task at hand before this court and the State defendants, should plaintiffs prevail. There is no statewide instant fix. The entire education system in New Jersey would have to be razed to the ground and then rebuilt brick by brick — figuratively and most likely literally as well. A new system for apportioning students would have to be devised and implemented, taking into account performance trends, class sizes, parental choice, housing patterns, and of course racial and socioeconomic factors (including racial subgroups, see Points II.B and III.B.1). A new means of raising revenue and appropriations would have to be created and enforced. Our laws pertaining to residency, district governance, and funding would need to be revised. Certain districts would face an exodus of students, while others would endure a deluge — necessitating new resources and infrastructure, which will also impact the school funding formula and how much State aid each district receives.

Moreover, our State's demographics are rapidly evolving. See Defendants' SOUMF, ¶ 67; Weber Cert., Exh. A, Bari Anhalt Erlichson, Ph.D, Data Analysis of Public School Enrollment, School Years 1998-99 through 2019-20 (Erlichson Report), pp. 3-5; Weber Cert., Exh. H, Deposition Transcript of Bari Anhalt Erlichson (Erlichson Transcript), T24:16 to T26:2; Weber Cert., Exh. I, Deposition Transcript of Ryan W. Coughlan (Coughlan Transcript), T93:2 to T98:7, T203:4 to T204:6. And therefore, any statewide remedy would likely become obsolete almost immediately, requiring ongoing and continuous statewide reorganizations. The assignment of students would have to be constantly reevaluated because demographics continuously and rapidly change.

Consider, for example, that from the 2015-2016 school year to the 2019-2020 school year, Trenton School District's Black student population decreased by 16.2 percent, its Hispanic student population increased by 16.8 percent, and its student population living in poverty decreased by 15.1 percent. Defendants' SOUMF, ¶ 81; Coughlan Supp. Cert., Exh. C, p. 12. During the same school years, the Irvington School District's Black student population decreased by 6.1 percent, its Hispanic population increased by 6 percent, and its student population living in poverty decreased by 19 percent. Defendants' SOUMF, ¶ 82; Coughlan Supp. Cert., Exh. C, p. 1. And in the Orange School District, the Hispanic population increased by 10.4 percent, and its students living in

poverty increased by 11.4 percent. Defendants' SOUMF, ¶ 83; Coughlan Supp. Cert., Exh. C, p. 2. Thus, student demographics change so rapidly and significantly within school districts that any remedy would have to be reviewed and fundamentally altered on a yearly basis.

Also, any remedy would have to take into consideration the fact that the cause for racial imbalance in one district (e.g., housing patterns) might be entirely different from the cause of racial imbalance in another (e.g., private school placement). Those causes would necessarily have practical effects on any proposed remedy. More than that, it would have to take into account the fact that a statewide remedy is being implemented to cure isolated imbalances; in fact, such a remedy could even harm other districts and actually cause racial imbalance or a decline in educational standards and performance. And the remedy would need to take into account its effects on the hundreds of districts other than the twenty-three identified by plaintiffs, spanning across the State's diverse urban, suburban, and rural landscapes — effects like funding sources, transportation time and cost, feasibility of extracurricular activities, impact on parent volunteer participation, and more. Accordingly, plaintiffs'

speculative remedies, Amended Complaint, ¶¶ 47-57, are just that: they present surface ideas and little more.[17]

The Court in Jenkins, 58 N.J. at 505, was reassured by the fact that merging the school systems "would not significantly involve increased bussing or increased expenditures since most of the schools within the Town and Township are located near their boundary line." It could grant relief because splitting the Morris and Morristown school systems "could be readily avoided without any practical upheavals" and "the record indicates . . . that merger would be entirely 'reasonable, feasible and workable.'" Ibid. (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1, 31 (1971)). This court enjoys no such luxury. Even the Englewood Cliffs case, which insisted that a single community was not a prerequisite for the Commissioner to cross district lines, dealt with the proposed severance of a send-receive relationship between two neighboring districts, and the regionalization of only three nearby school districts. Englewood Cliffs, 257 N.J. Super. at 422-25. Plaintiffs' requested relief goes far beyond even that contemplated by the Appellate Division in that matter.

[17] Moreover, it should be noted that the Supreme Court of the United States has read the Fourteenth Amendment to limit a State's ability to remedy de facto school segregation through overt racial balancing. Parents Involved in Cmty. Schs. v. Seatle Sch. Dist. No. 1 (Parents Involved), 551 U.S. 701 (2007).

Simply put, to the extent that plaintiffs have identified problems with the educational system in New Jersey that they believe need to be addressed, use of the anti-segregation clause in this manner is not a viable solution — neither legally nor practically. These issues are more appropriately addressed through legislative action and/or available administrative processes, with the input of experts and members of the affected communities.

B. Plaintiffs Cannot Demonstrate Unconstitutional Segregation in New Jersey's Public Schools Because They Have Not Articulated a Consistent or Viable Definition of Segregation.

Despite bringing a suit alleging statewide de facto racial segregation in all of New Jersey's school districts, plaintiffs have failed to articulate a single, clear, coherent definition of segregation. In fact, plaintiffs' individual concepts of what constitutes unconstitutional segregation wildly differ and none of their proffered concepts align with their own expert's definition. The ostensible definition set forth by plaintiffs' expert, and incorporated into their amended complaint and motion for partial summary judgment — essentially measuring a school's white student population against its non-white population — is problematic in several respects and inconsistent with the definition used in cases interpreting the New Jersey Constitution's clause prohibiting segregation in public schools.

Neither the anti-segregation clause nor N.J.S.A. 18A:38-5.1 offer a definition of what constitutes segregation, or at what point racial imbalances or disparities in public schools violate the anti-segregation clause. And the Supreme Court has not provided a definition of segregation under the anti-segregation clause, though it has identified segregation that violates the provision in a pair of cases. However, those early cases applying the anti-segregation clause — cases cited favorably and frequently by plaintiffs — dealt with situations where schools in a single district were entirely or mostly segregated by a single race.

In Booker, 45 N.J. at 163-64, the Court considered a petition asserting that the Plainfield School District was racially imbalanced, which included a school where the population was over 95 percent Black and where other schools had Black populations well over 50 percent. And in Jenkins, 58 N.J. 483, as described above, the Supreme Court considered proposed changes to the send-receive relationship between the Morristown and Morris Township School Districts, which would have caused Morristown's public schools to overwhelmingly consist of only Black students. In both of these cases, the "segregation" could be readily identified, and defined as students of a single race being concentrated into specific schools — i.e., all-Black schools or all-white schools.

Turning to this matter, through their depositions plaintiffs do not present a consistent definition of segregation. For

instance, Francis Argote-Freyre, the Director of plaintiff Latino Coalition, defines segregation as "when you have districts that are eighty, ninety percent of one particular community[,]" but "I don't know that there's a magical point at which you could say that segregation exists." Defendants' SOUMF, ¶ 33; Weber Cert., Exh. K, Deposition Transcript of Francis Argote-Freyre (Argote-Freyre Transcript), T12:4-22, T23:21 to 24:15. Vivian Cox Fraser, President and Chief Executive Officer of plaintiff Urban League of Essex County (Urban League), offered at least two definitions of segregation: one where school districts "do[] not reflect the demographics of the State or racial diversity in the State," Weber Cert., Exh. L, Deposition Transcript of Vivian Cox Fraser (Cox Fraser Transcript), T27:15-17; and another where a school district is "overwhelmingly just one race," id. at 27:22-23. See Defendants' SOUMF, ¶ 34. Christian Estevez, President of plaintiff Latino Action Network (LAN), defined segregation as a great difference between the diversity or makeup of the general area and the racial makeup of the school located in that area. Defendants' SOUMF, ¶ 35; Weber Cert., Exh. M, Deposition Transcript of Christian Estevez (Estevez Transcript), T20:23 to 21:11. He testified that LAN defines segregation as "when a group of students are separated from other groups of students[,]" but would not say there is a bright-line rule where a school becomes segregated. Defendants' SOUMF, ¶ 36; Estevez Transcript, T7:22-23, T18:23 to

19:5, T20:6-10. Thomas Puryear, a representative for plaintiff State Conference of the NAACP, stated that he did not know the NAACP's definition for integration, and further elaborated that the NAACP's position was that a certain percentage of students in a school system does not define integration or segregation, but rather that the focus was "access to quality education." Defendants' SOUMF, ¶¶ 37-39; Weber Cert., Exh. N, Deposition Transcript of Thomas Puryear, T15:7-11, T46:7 to T47:23. The guardian ad litem plaintiff-parents also provided their own widely varying definitions of segregation. See Defendants' SOUMF, ¶¶ 40-48; Weber Cert., Exh. O, Deposition Transcript of Yvette Alston-Johnson, T35:21 to T36:25; Weber Cert., Exh. P, Deposition Transcript of Andrea Hayes, T19:7-11; Weber Cert., Exh. Q, Deposition Transcript of Maria Lorenz, T43:10-15; Weber Cert., Exh. R, Deposition Transcript of Rachel Ruel, T50:3 to T52:6, T55:10-12; Weber Cert., Exh. S, Deposition Transcript of Elizabeth Weill-Greenberg, T34:1 to T35:12.

Plaintiffs' amended complaint and motion for partial summary judgment offer even more definitions of segregation in New Jersey schools — and they are premised upon the percentage of enrolled white students in relation to the percentage of enrolled non-white students. See Amended Complaint, ¶¶ 24-28; Plaintiff's Statement of Undisputed Material Facts (Plaintiffs' SOUMF), ¶¶ 2-14. Adding to the confusion, their expert defined "segregation" as "[u]neven

distribution of individuals based on some defined characteristic, like race or socioeconomic status." Coughlan Transcript, T49:25 to T50:2. But in measuring whether segregation exists, he uses a similar analysis comparing white versus non-white. See, e.g., Coughlan Cert., ¶ 21; Coughlan Supp. Cert., ¶¶ 4-5.

Virtually every expert who opined on the subject, however, stated (or admitted) that the definition of segregation is uncertain and highly subjective. See Defendants' SOUMF, ¶¶ 31-32, 49-51; Erlichson Report; Erlichson Transcript, T26:11-22, T55:21-25, T68:16 to T75:7; Weber Cert., Exh. E, Affidavit of Nathan Barrett (Barrett Aff.), ¶¶ 11-34 (noting there are as many as twenty different ways of measuring or defining segregation, based on a variety of factors); Weber Cert., Exh. J, Deposition Transcript of Nathan Barrett (Barrett Transcript), T55:21-25, T68:16 to T75:7 (generally explaining subjectivity of assessment of segregation levels); Coughlan Transcript, T61:3 to T64:16 (admitting there are twenty ways of measuring segregation), T67:1-6 (acknowledging the many different measures that could have been employed to measure segregation), T53:23 to T57:10 (explaining that there any many different ways of measuring segregation), T61:3 to T62:20 (same, and noting that there are more than twenty measures of segregation).

Now plaintiffs ask this court to rule, as a matter of law, that New Jersey's schools are unconstitutionally segregated,

without offering a single, consistent, coherent definition of segregation. That is simply not viable. This court cannot find that a particular school district, let alone every district, is unconstitutionally segregated when plaintiffs cannot agree that there is one universal understanding of what that means. For example: consider a municipality whose racial composition is 90 percent Black, and whose public school population is also 90 percent Black. Under the definition of segregation offered in the amended complaint and in plaintiffs' expert certifications, that school would be considered segregated. But using the definition offered by plaintiffs Urban League and LAN (proportionality to the racial composition of the general area), then that school would not be considered segregated.[18] This is precisely why plaintiffs are not entitled to summary judgment and cannot prevail on their claims.

But even if plaintiffs were to settle on the white versus non-white definition set forth in the amended complaint, motion,

[18] Plaintiffs' expert concedes that in some New Jersey communities, the student population of a given school district mirrors the racial demographics of the overall community. See Defendants' SOUMF, ¶ 68; Coughlan Transcript, T70:12-71:4. In fact, he estimates that about 25 percent of New Jersey's students attend school districts in which the student body is "relatively proportional to the overall demographic of the states." Defendants' SOUMF, ¶ 69; Coughlan Transcript, T156:2-6. He conceded these schools were "relatively diverse." Defendants' SOUMF, ¶ 70; Coughlan Transcript, T160:5.

and expert certifications, that definition is problematic and cannot support a finding that all of New Jersey's schools are unconstitutionally segregated. To begin with, reliance on a certain balance between white and non-white students — and plaintiffs fail to delineate where that balance is achieved — ignores that the percentage of New Jersey's white population is declining, while the percentage of certain non-white populations is increasing. See Defendants' SOUMF, ¶ 71; Erlichson Report, pp. 3-5; Erlichson Transcript, T22:1-12, T24:16-25. According to the 2020 Census, New Jersey's white population fell from 59.3 percent in 2010 to 51.9 percent in 2020. Defendants' SOUMF, ¶¶ 72-75; Erlichson Report, p. 3; Erlichson Transcript, T22:1-12, T24:16-25. And the numbers of white students enrolled in the State's public schools continues to fall, with only 42 percent of students enrolled in public school in New Jersey identifying as white. Defendants' SOUMF, ¶¶ 72-75; Erlichson Report, p. 4; Erlichson Transcript, T22:1-12, T24:16-25. The reality is that there is only a finite number of white students in public schools in New Jersey that could possibly be distributed among its public schools — and that number is declining. Defendants' SOUMF, ¶¶ 72-75; Erlichson Transcript, T22:1-12, T24:16-25; see also Barrett Transcript, T65:10-66:6 ("The available students from which I can draw is directly influenced by how other schools draw from that pool of students."). If unconstitutional segregation is defined

as a school district falling below a particular percentage of white students, then New Jersey faces a future in which public schools are segregated no matter what remedies are put in place.

Another problem with plaintiffs' white versus non-white definition of segregation is that it completely ignores the diversity inherent in "non-white" populations. For instance, plaintiffs cite the school district in Woodlynne Borough, Camden County, as an example of a segregated school because, for the 2016-2017 school year, it had a white population of 6.5 percent and a non-white population of 93.5 percent. Plaintiffs' SOUMF, ¶ 12. However, the Woodlynne School District's non-white population was 9.1 percent Asian, 52.9 percent Hispanic, and 28.4 percent Black, making it remarkably diverse in terms of its racial makeup. Ibid. Plaintiffs' own filings are replete with similar examples. See, e.g., id. at ¶ 7 (Newark City public school's non-white population being 0.8 percent Asian, 46.4 percent Hispanic, and 44.3 percent Black); ¶ 9 (Roselle's public schools' non-white population being 1.2 percent Asian, 39.1 percent Hispanic, and 56.6 percent Black; and ¶10 (Paterson's public schools' non-white population being 4.9 percent Asian, 68.2 percent Hispanic, 22.1 percent Black). In his supplemental certification, plaintiffs' expert cites similar examples where school districts' Black and Hispanic populations have similar percentages. See Coughlan Supp. Cert., ¶ 7 (citing

nearly equal Black and Hispanic populations in Newark, Orange, Roselle, Camden, Trenton, and Asbury Park public schools).

Plaintiffs' grouping of various racial and ethnic identities into simply "non-white" also ignores subgroups of each race that provide even more diversity. There are various subgroups of students who identify as Hispanic or Latinx, including students whose heritage descends from different countries and cultures. See Defendants' SOUMF, ¶¶ 54-65; Erlichson Transcript, T34:5-17; see also Point III.B.1 (discussing wide range of diversity within Black, Latinx/Hispanic, and Asian communities). Plaintiffs' expert admits as much by saying it is "fair" to say that the data he relied on would not account for any subgroups in the Latinx/Hispanic racial category. Defendants' SOUMF, ¶ 55; Coughlan Transcript, T90:17-22. Even for students identifying as Black there are culturally and/or ethnically diverse subgroups — e.g., African, Caribbean, and South American immigrants; multi-generational African-Americans; and as noted by plaintiffs' expert, a growing Haitian population in the State. See Defendants' SOUMF, ¶ 57; Coughlan Transcript, T88:2 to T93:1, T99:15-25; Erlichson Transcript, 34:11-14; Point III.B.1.

When asked, plaintiffs' expert was forced to concede that his reports failed to account for the vast diversity within racial categories, and that there is diversity within racial subgroups. See Defendants' SOUMF, ¶ 56; Coughlan Transcript, T88:2 to T93:1,

T99:15-25. The Booker court emphasized the need for children to live and learn in "multiracial and multi-cultural communities." Id. at 170. Plaintiffs are at a loss to explain how a school district that contains significant populations of Black, Latinx and Hispanic, and Asian students — even if it has a smaller percentage of white students — is not a diverse, multiracial, or multi-cultural environment.

Not only have plaintiffs failed to offer the court a single, consistent, coherent definition of segregation, the definition they most frequently lean on is problematic because it depends on a certain percentage of white students being present in a public school when the State's white population and white public school population is declining, and because it ignores the diversity inherent in multiple non-white racial and ethnic groups and subgroups learning together. As mentioned above, the Supreme Court has focused its application of the anti-segregation clause to those districts that have schools made up almost entirely of a single race or ethnic group. This is different from the definition of segregation set forth by plaintiffs, in which multiple non-white racial groups can be illegally segregated together in certain schools or districts.

Even under a single-race definition of segregation — the definition that some plaintiffs have set forth, and which is somewhat in line with Supreme Court precedent — plaintiffs fail to

demonstrate rampant statewide segregation. Based on the 2019-2020 school year enrollment data for New Jersey's public schools, 85,827 students out of 1,357,829 attended a school comprised of at least 90 percent of a single race or ethnic group, which was only approximately 6.2 percent of the entire public school student population that year. See Defendants' SOUMF, ¶ 76; Erlichson Report, p. 7. In terms of how many schools are comprised of at least 90 percent of a single race or ethnic group, 148 out of 2,503 fit that criterion, approximately 5.9 percent. Defendants' SOUMF, ¶ 77; Erlichson Report, p. 8. Of those 148 schools, 18 had Black student populations of at least 90 percent, which were located in only three school districts (East Orange, Newark, and Trenton). Defendants' SOUMF, ¶ 78; Erlichson Report, p. 8. 69 schools had Hispanic student populations of at least 90 percent, located in 15 school districts. Defendants' SOUMF, ¶ 79; Erlichson Report, p. 9. And 61 schools had white student populations of at least 90 percent across 46 school districts. Defendants' SOUMF, ¶ 80; Erlichson Report, p. 10. Given the relatively small number of schools throughout the State that consist almost entirely of a single race or ethnic group, a statewide declaration of unconstitutional segregation would not just be improper, it would accomplish nothing.

C. Plaintiffs Cannot Show That the State Defendants Violated the Anti-Segregation Clause Because They Have Not Shown That State Action Led to Racial Imbalance in New Jersey's Public Schools.

Because the definition of segregation in this context is so amorphous, the operative language in the anti-segregation clause becomes that much more important. As mentioned, the plain language of the clause provides that "[n]o person shall be . . . segregated . . . in the public schools, because of religious principles, race, color, ancestry or national origin." N.J. Const., art. I, ¶ 5 (emphasis added). Plaintiffs have failed to show that any State action occurred resulting in a racial imbalance, or that such racial imbalance is not because of some other factor (such as voluntary housing patterns, or parental choice in the selection of private schools). By alleging that the State defendants are liable for unconstitutional segregation, but failing to point to any state action giving rise to liability, plaintiffs have eliminated the element of causality created by the "because of" language in the anti-segregation clause.

Plaintiffs seek a declaration that the State is responsible for unconstitutional segregation in all of New Jersey's public schools. See, e.g., Amended Complaint, ¶ 1 ("The State has been complicit in the creation and persistence of school segregation because it has adopted and implemented laws, policies, and practices that require, with very limited exceptions, students to

attend public schools in the municipalities where they live."); Plaintiffs' Brief, p. 1 ("Those statistical facts alone are sufficient for this Court to find Defendants liable for segregation in the State's public schools."). But to prevail, plaintiffs need to articulate what actions the State took that resulted in unconstitutional segregation for each school district in the State. While the State Legislature may have passed laws requiring students to attend schools in the districts where they reside, the State has not and cannot dictate where residents of the State live or move. Therefore, the necessary chain of causation is absent, and there cannot be liability on the part of the State defendants.

In both Booker and Jenkins, the Court agreed that there was an identifiable government action that caused a constitutional violation — or in other words, there was segregation "because of" State action. Moreover, in interpreting and applying the anti-segregation clause, our Court has noted that its decisions do not abrogate the so-called neighborhood policy or home rule principles. See, e.g., Jenkins, 58 N.J. at 500 ("This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere."); Booker, 45 N.J. at 170 ("This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in

segregation in fact.") (quoting Barksdale v. Springfield Sch. Comm., 237 F. Supp. 543, 546 (D. Mass. 1965)).

And as demonstrated in Point II.B (and Point III.B.1 below), the definition of segregation in this context — particularly where there are allegations of de facto rather than de jure segregation — is highly subjective. See Defendants' SOUMF, ¶¶ 31-51; Erlichson Report; Erlichson Transcript, T26:11-22, T55:21-25, T68:16 to T75:7; Barrett Aff., ¶¶ 11-34; Barrett Transcript, T55:21-25, T68:16 to T75:7; Coughlan Transcript, T61:3 to T64:16, T67:1-6, T53:23 to T57:10. Add in the fact that the State's demographics are rapidly evolving (see Defendants' SOUMF, ¶¶ 67; Erlichson Report, pp. 3-5; Erlichson Transcript, T24:16 to T26:2; Coughlan Transcript, T93:2 to T98:7, T203:4 to T204:6), and the concept of segregation becomes even more elusive — eliminating any chance that the plaintiffs can prove that racial imbalance exists "because of" the State defendants. As such, the State defendants cannot be liable as a matter of law for segregation in New Jersey's public schools in violation of the anti-segregation clause.

D. Plaintiffs Have Failed to Establish the Comprehensive Record Necessary to Sustain Their Anti-Segregation Clause Claim.

Even if plaintiffs had put forth a workable standard for adjudicating claims of statewide segregation, they could not meet that standard on the limited record they present. New Jersey's courts have applied the anti-segregation clause only in cases with

significantly greater procedural and administrative backgrounds than the present case involves. The Supreme Court only applied the anti-segregation clause with a precipitating case or controversy focused on a specific community, and with a well-developed factual record. Previous cases arose from concrete plans that would impact racial imbalances in specific schools or districts that were considered and decided by the Commissioner. The cases all had extensive records developed from investigations and testimony conducted by hearing examiners, outside consultants or experts, or ALJs.

The present matter has no such comparable procedural background or administrative record. Instead, plaintiffs rely on limited, raw demographic information from several years ago to support its declaration that illegal statewide segregation exists in New Jersey's public schools. They fail to appreciate that our courts have never evaluated whether the statewide public school system is unconstitutionally segregated by race and socioeconomic status (let alone by relying on data restricted to only twenty-three districts, from one school year). And to do so now in the absence of adequate proofs is unjustified.

In Booker, 45 N.J. at 163, the local board of education appointed a lay advisory committee to conduct a thorough investigation and draft a report in response to protests over racial imbalance. Ibid. The board of education then retained a

team of specialists in the fields of education, sociology, psychology, and zoning to issue a report on the racial compositions of the district and the schools. Id. at 163-64. The head of the team of specialists recommended two plans to reduce the racial imbalance, which the board declined to adopt. Id. at 164. A group of students and parents filed a petition with the Commissioner to address the board's refusal to address the racial imbalance. Id. at 164-65. The Commissioner considered the record below, including submissions filed in response to the petition, but ultimately left the decision to adopt a plan to address racial imbalance to the local board. Id. at 165-67. The State Board of Education affirmed the Commissioner's decision, and petitioners appealed to the courts. Id. at 168. In turn, the Court was especially mindful of the "numerous factors to be conscientiously weighed by the school authorities" when developing "a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures." Id. at 180.

Likewise, the Jenkins case, described above, arose from petitioners' efforts to have the Commissioner take steps to prevent the termination of the send-receive relationship between Morris and Morristown, and to compel a merger of the two municipalities' school systems. Jenkins, 58 N.J. at 485. Morristown commissioned several expert reports on the history of the two municipalities and the current and projected racial demographics of the

municipalities and their school systems. Id. at 486-87, 491. Hearings were conducted by a hearing examiner who gathered information and testimony. Id. at 487-91. The findings of the hearing examiner were adopted by the Commissioner and incorporated into his decision. Id. at 487. These findings included specific disadvantages of the proposed elimination of the send-receive relationship and advantages of the school system merger. Id. at 489-91. The Commissioner ultimately concluded that he lacked authority to grant any relief. Id. at 493. On appeal, the Supreme Court specifically noted that it could make its decision because it had the benefit of "a record which overwhelmingly points educationally towards a single regional district rather than separate local districts." Id. at 505.

More recent cases that relied on Booker and Jenkins have similar procedural backgrounds involving specific plans, detailed investigations, and petitions to the Commissioner or the Department's Board of Review. See, e.g., North Haledon, 181 N.J. at 165-72 (involving a proposal to withdraw a school district from a regional high school following a committee review and recommendation, an investigation and report on the effects of withdrawal by the county superintendent of education, public comments, and a petition to withdraw made to the Commissioner and sent to the Board of Review that was granted in a written decision); Englewood Cliffs, 257 N.J. Super. at 422-25 (involving

a petition to the Commissioner to sever a send-receive relationship, and a decision of the Commissioner following ninety-nine days of hearings before an ALJ of the OAL, and a "voluminous" record).[19]

While plaintiffs allege unconstitutional segregation in all of the State's school districts, they have not begun the detailed and necessary investigation and proofs for each and every school district that the courts in Booker, Jenkins, Englewood Cliffs, and North Haledon enjoyed. Instead, plaintiffs merely use demographic statistics devoid of any deeper analysis or context, in only a handful of cherry-picked districts and schools. See Defendants' SOUMF, ¶¶ 49-51; Barrett Transcript, T34:1-4 ("[T]he review itself is limited because if you're simply posting just school level demographics. That is limited."). In preparing his certification, plaintiffs' expert looked at only a very limited set of data, namely enrollment files for only one school year and some census data from 2010. Defendants' SOUMF, ¶¶ 49-51; Coughlan Transcript,

[19] See also Abbott I, 100 N.J. at 297-300 (where the Court held, given the complex issues at stake, that an administrative record should first be developed, and noting that the "presence of constitutional issues and claims for ultimate constitutional relief does not . . . preclude resort in the first instance to administrative adjudication."); Abbott II, 119 N.J. at 296-300 (describing the proceedings before the ALJ, Commissioner, and State Board of Education). This court acknowledged as much when it denied the State defendants' motion to transfer the matter to the Commissioner without prejudice. 8/9/18 Order; Transcript of 8/9/18 Proceedings, T48:25 to T49:3, T50:5-12.

T38:1-39:7. He used no other data or analysis in making his determination that segregation existed in every single New Jersey school district, summarily declaring there was "no reason in this space to go into more complex measures such as a proportionality score, dissimilarity index, an interaction index, an exposure index." Defendants' SOUMF, ¶¶ 49-51; Coughlan Transcript, T67:1-4.

Furthermore, in each prior case applying the anti-segregation clause, concrete plans existed to address the racial imbalances. Booker, 45 N.J. at 164; Jenkins, 58 N.J. at 490-91. Such a procedural posture is absent here. Indeed, these issues have never been raised before the Commissioner of Education, where a factual record could be developed that may give rise to appropriate and tailored remedies. Instead, plaintiffs have opted to avoid that lengthy and complex undertaking and instead seek a finding of liability in the absence of a factual framework, leaving the burden of determining a viable remedy on the State.

For these reasons, plaintiffs are not entitled to summary judgment, their claim under the anti-segregation clause and N.J.S.A. 18A:38-5.1 fails, and summary judgment should be entered for the State defendants on counts one and five of the amended complaint.

POINT III

PLAINTIFFS HAVE FAILED TO ESTABLISH THAT NEW JERSEY'S STUDENTS ARE NOT RECEIVING EQUAL PROTECTION UNDER THE LAW.

In count two of their amended complaint, plaintiffs allege that the State defendants have allowed the State's public schools to become segregated on the basis of "race, ethnicity and poverty . . . ," and thus have violated the New Jersey Constitution's equal protection clause. Amended Complaint, ¶¶ 67-68. It bears repeating that plaintiffs focus on the demographic composition of 23 of the State's 674 districts from the 2016-17 school year,[20] and extrapolate those numbers to allege that the State defendants have violated notions of equal protection. Plaintiffs have once again failed to adequately establish that the State defendants have violated the Constitution.

The New Jersey Constitution states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
>
> [N.J. Const. art. I, ¶ 1.]

While the provision does not expressly provide for equal protection of the laws, it has been interpreted to protect against the unequal

[20] See footnotes 12 & 13 above.

treatment of individuals who should be treated alike. Englewood Cliffs, 257 N.J. Super. at 472. In other words, our Supreme Court has construed that language to "embrace" the fundamental guarantee of equal protection under the law. Lewis v. Harris, 188 N.J. 415, 442 (2006).

Plaintiffs argue here that the facially-neutral statute providing free public school for students domiciled within the district, N.J.S.A. 18A:38-1, violates equal protection by discriminating on the basis of race and socioeconomic status. Plaintiffs' Brief, pp. 32-36. Both prongs of that claim are fundamentally flawed. First, even under the broad protections afforded by the New Jersey Constitution, disparate impact alone is insufficient to sustain an equal protection claim. Second, even if plaintiffs' claims could clear that threshold bar, their claims fail as a matter of law when analyzed under the controlling balancing test.

When considering a constitutional challenge to a legislative enactment, a court must initially presume that the enactment passes constitutional muster. Lewis, 188 N.J. at 459. That presumption of constitutionality can be rebutted "only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 285 (1998) (citation and internal quotations omitted). Courts give deference to a legislative enactment unless it is

"unmistakably shown to run afoul of the Constitution." Lewis, 188 N.J. at 459; see also Town of Secaucus v. Hudson Cnty. Bd. of Taxation, 133 N.J. 482, 492-93 (1993), cert. denied sub nom., 510 U.S. 1110 (1994) (statute invalid only if "clearly repugnant to the constitution").

A. Plaintiffs' Equal Protection Challenge of the Residency Statute Cannot Be Sustained by a Showing of Disparate Impact Alone.

If the challenged statute is facially neutral, as it is here, "disparate impact is an insufficient basis for relief under our equal protection doctrine." N.J. State Conference-NAACP v. Harvey, 381 N.J. Super. 155, 161 (App. Div. 2005). A mere showing of disparate impact — absent any allegation of impermissible bias or invidious discrimination — is, as a matter of law, incapable of sustaining a claim that a statute violates equal protection under the New Jersey Constitution. See Greenberg v. Kimmelman, 99 N.J. 552, 580 (1985). Moreover, while our Supreme Court has recognized that, in appropriate cases, rigorous statistical analysis can be used to prove an allegation of improper racial bias, disparate impact on its own does not supplant the need to at least allege systemic bias or discriminatory intent. See State v. Marshall, 130 N.J. 109, 204, 209, 214 (1992) (considering whether statistical evidence sufficiently supported a showing of racial or ethnic bias in sentencing).

Here, plaintiffs rely on Marshall to suggest that statistical evidence is sufficient to establish a claim of discrimination, but importantly, they make no allegation of discriminatory intent or systemic bias of the kind at issue in Marshall. In Marshall, the Court considered whether capital sentencing decisions were influenced by impermissible racial bias under the Capital Punishment Act. Id. at 209-10. That differs greatly from the instant matter — the crux of plaintiffs' theory is not that the statute at issue permits bias, but rather that the statutory scheme has had a disparate impact despite there being no intentional act of the State defendants. Plaintiffs' Brief, pp. 32-36. The failure to allege any invidious discrimination or systemic bias here is fatal to plaintiffs' equal protection claim. See Marshall, 130 N.J. at 204, 214; see also Rutgers Council of AAUP Chapters v. Rutgers State Univ., 298 N.J. Super. 442, 453 (App. Div. 1997) ("In New Jersey when a statute is facially neutral, as here, even if it has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only if the Legislature intended to discriminate against the class."). For that reason alone, the State defendants are entitled to summary judgment on count two.

B. Plaintiffs Cannot Demonstrate an Equal Protection Violation Under the Applicable Balancing Test Because of the Flawed Framing of Their Legal Arguments and the Important Public Need for the Residency Requirement Under N.J.S.A. 18A:38-1.

Plaintiffs generally advance two principal arguments that the State's residency requirement under N.J.S.A. 18A:38-1 violates equal protection. First, they allege that the residency requirements result in racial segregation in New Jersey public schools. Second, they allege that the same statute results in socioeconomic segregation within schools. Both arguments fail to satisfy the applicable balancing test established under this State's equal protection jurisprudence.

Courts analyzing an equal protection-based challenge under the State constitution must weigh three factors: "the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction." Lewis, 188 N.J. at 443-44. "The test is a flexible one, measuring the importance of the right against the need for the governmental restriction." Id. at 443. The ultimate goal of the analysis is to "weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary." Robinson I, 62 N.J. at 492. While New Jersey's equal protection analysis "differs in form from the federal tiered approach, the tests weigh the same factors and often

produce the same results." Sojourner A. v. Dep't of Human Servs., 177 N.J. 318, 333 (2003).

1. Plaintiffs Fail to Identify an Established Right at Issue.

Under the first prong of equal protection analysis (the nature of the right at stake, Lewis, 188 N.J. at 443-44), plaintiffs' argument that the residency statute creates racial discrimination rests upon a novel interest, and is based on an arbitrary and reductive definition of diversity. Specifically, plaintiffs define the interest in diversity purely in terms of the percentage of white students in a given school. See, e.g., Plaintiffs' Brief, pp. 34. While our courts have long recognized the importance of diversity in the education context, see, e.g., Jenkins, 58 N.J. at 499, plaintiffs cite no case finding a violation of equal protection based on an interest in attending a school with a sufficient percentage of white students. Moreover, their analysis improperly characterizes Black and Latinx students as a single racially and culturally homogeneous group. See, e.g., Amended Complaint, ¶ 27 (treating Black and Latinx students in the aggregate). While all parties recognize the importance of receiving a diverse education, plaintiffs' arguments paint with far too broad a brush. They ignore diversity within groups considered to be non-white.

By way of example, as discussed in Point II.B above, they pay short shrift to the diverse cultures, languages, and places of origin captured under the umbrellas of "Black" and "Latino." See Defendants' SOUMF, ¶¶ 54-65; Erlichson Transcript, 34:5-17; Coughlan Transcript, T88:2 to T93:1, T99:15-25. When asked, plaintiffs' expert was forced to concede this, as well as the fact that his reports failed to account for the vast diversity within racial categories. Defendants' SOUMF, ¶¶ 55-56; Coughlan Transcript, T88:2 to T93:1, T99:15-25. More pointedly, plaintiffs' treatment of Black and Latinx students as racially and culturally homogeneous ignores the myriad of backgrounds that each of those groups encompass.

Recent studies affirm the growing diversity among persons who self-identify as "Black." See, e.g., Point II.B above; Defendants' SOUMF, ¶¶ 57-62; Pew Research Center, The Growing Diversity of Black America (Mar. 25, 2021);[21] Nielsen, African-Americans Are Increasingly Affluent, Educated and Diverse (Sept. 17, 2015);[22] Erlichson Report; Erlichson Transcript, 34:5-17; Coughlan Transcript, T88:2 to T93:1, T99:15-25. Contrary to plaintiffs'

[21] https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america/ (last visited Dec. 17, 2021).

[22] https://www.nielsen.com/us/en/insights/article/2015/african-americans-are-increasingly-affluent-educated-and-diverse/ (last visited Dec. 17, 2021).

implicit suggestion, Black Americans include nuanced and diverse ethnic and cultural backgrounds. For example, since 2000 alone, the number of Black immigrants to the United States has doubled. See Defendants' SOUMF, ¶¶ 57-62; Pew Research Center, The Growing Diversity of Black America. Among those groups, roughly 46 percent of Black immigrants were born in Caribbean nations, while roughly 42 percent are from African countries. Defendants' SOUMF, ¶¶ 57-62; Pew Research Center, The Growing Diversity of Black America. 12 percent of Black immigrants come from other parts of the world. Defendants' SOUMF, ¶¶ 57-62; Pew Research Center, The Growing Diversity of Black America.

Similarly, the term "Latinx" captures diverse groups with distinct cultural identities and languages, originating from all across Latin America. Erlichson Transcript, T34:5-17. Plaintiff Latino Action Network's own website recognizes this fact — highlighting that its mission is to "unit[e] New Jersey's Diverse Latino Communities . . . ."[23] See Defendants' SOUMF, ¶¶ 54-55. In fact, studies suggest that the majority of individuals considered Hispanic and Latinx prefer to self-identify by country of origin rather than as Hispanic or Latinx; and roughly seven out of ten do not recognize a shared common culture among Hispanics and Latinx persons in the United States. Defendants' SOUMF, ¶¶ 54-55; Pew

[23] https://www.lanfoundation.org/ (last visited Dec. 17, 2021).

Research Center, When Labels Don't Fit: Hispanics and Their Views of Identity (Apr. 4, 2021); Erlichson Transcript, T34:6-17.[24]

Even plaintiffs and their expert concede the diversity among people identifying as Black and Latinx. See, e.g., Defendants' SOUMF, ¶¶ 52-62; Coughlan Transcript, T88:2 to T93:1, T99:15-25 ("if you have a single group of all [B]lack students, there is diversity there. You can say that there is other kinds of diversity if you put [B]lack and Hispanic students together."); Cox Fraser Transcript, T34:3-23 ("Yeah, I don't necessarily define [B]lack, but it could be, you know, it could be native African American, it could be Jamaican American. It could be not, it could be any number of ethnicities within black. But, I would say that people tend to identify themselves and we use those categories in order to do the reporting that we do." And further remarking "Yeah, families tend to self-identify and as I indicated the category generally tends to say Hispanic, you know, nonwhite or white Hispanic. They break those up and that's generally based on families on their ancestry, national origin, where they're from or who their, how their family self-identifies."); Argote-Freyre Transcript, T28:16 to T29:23 ("Obviously, Latino is an ethnic construct which, you know, recently in census data -- or, I should

[24] https://www.pewresearch.org/hispanic/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity/ (last visited Dec. 17, 2021).

say in the last thirty, forty years -- has been determined by some folks to be a race, so forth. But, there's clearly an identifiable group of people that identify as Latinos. Some folks consider it a race, some folks do not. Obviously, African-Americans clearly identify in that way." And further stating "we don't have a written definition of what [B]lack is. People identify themselves as [B]lack, and we take them at their word.").

In the same vein, Asian-Americans present a growing segment of this State's population. For example, since 2010, New Jersey's Asian-American population has grown by nearly a third. United States Census Bureau, New Jersey Population Topped 9 Million Last Decade (Aug. 25, 2021).[25] Today, more than one in ten New Jersey residents are of Asian descent, ibid., which plaintiffs largely ignore. What's more, like the diversity among and within the Black and Latinx communities noted above, Asian-Americans come from countries all across East Asia, Southeast Asia, and the Indian subcontinent. Robert Gebeloff, Denise Lu, and Miriam Jordan, Inside the Diverse and Growing Asian Population in the U.S., N.Y. Times (Aug. 21, 2021);[26] United States Census Bureau, About the

[25] https://www.census.gov/library/stories/state-by-state/new-jersey-population-change-between-census-decade.html (last visited Dec. 17, 2021).

[26] https://www.nytimes.com/interactive/2021/08/21/us/asians-census-us.html (last visited Dec. 17, 2021).

Topic of Race (last revised Dec. 3, 2021).[27] Painting an even more nuanced picture, roughly 17% of the Asian-American population nation-wide identify as multiracial or Hispanic-Asian. Pew Research Center, Key facts about Asian Americans, a diverse and growing population (Apr. 29, 2021).[28] Not only do these individuals represent scores of separate and distinct cultures and languages, but they also come from diverse socio-economic, cultural, and educational backgrounds. Ibid.; Erlichson Transcript, T35:2-10; see also United States Census Bureau, About the Topic of Race. These facts further underscore the need for a more nuanced view of race, ethnicity, and diversity than that proposed by plaintiffs.

But plaintiffs, through their amended complaint, brief, and expert certifications, have failed to account for these important nuances. Their race-based claim hinges on a novel legal interest grounded in reductive labels of white versus non-white. In light of the changing demographics of this State and the United States as a whole, the definitions plaintiffs use to anchor their equal protection analysis regarding race are dubious at best. See Parents Involved, 551 U.S. at 723 (rejecting a "limited notion of

[27] https://www.census.gov/topics/population/race/about.html (last visited Dec. 17, 2021).

[28] https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/ (last visited Dec. 17, 2021).

diversity" which viewed race "exclusively in white/nonwhite terms"); see also Point II above.

Plaintiffs' socioeconomic-based claims similarly fail to clearly articulate an interest that supports their equal protection argument. While they cite case law noting potential equal protection violations based on wealth-based classifications, that is not what is alleged here. Plaintiffs' Brief, pp. 31. Both Bearden v. Georgia, 461 U.S. 660 (1983), and State v. Joe, 228 N.J. 125 (2017), involved the disparate treatment of individuals who could not afford bail or fines. In both cases, individuals were potentially subject to disparate treatment because of their lack of wealth. Here, plaintiffs have not alleged any wealth-based disparate treatment, nor have they provided any proofs to substantiate such a claim. They have failed to identify a cognizable interest that is restrained by the residency statute.

Rather, this case is more similar to Robinson I. There, the Supreme Court rejected an argument that school funding based on geography violated equal protection because it discriminated against students in districts with low real property ratables. Id. at 480. In part, the Court cautioned against such an expansion of equal protection, as it would essentially apply to all manner of interests and services provided by local governments or agencies. Id. at 482. The same reasoning controls here.

2. Plaintiffs Identify Only a Narrow Sample of Districts Allegedly Impacted by the Residency Requirement Statute.

Moving next to the second prong of equal protection analysis (the extent to which the challenged statutory scheme restricts that right, Lewis, 188 N.J. at 443-44), plaintiffs essentially rely on a narrow, unrepresentative set of raw data to support their theory that the residency statute broadly restricts the right to a diverse education across the State. Even setting aside the problems with the asserted interest noted above, at best plaintiffs' data makes a narrow showing regarding only 23 of the State's 674 school districts. That already-unrepresentative slice of data is narrowed even further because plaintiffs rely solely on data from a single year.[29]

What is clear from the data is that in the vast majority of cases, the residency requirement does not result in segregation of the sort plaintiffs allege. And in addition to the deficiency in plaintiffs' claims, recall that the Court has repeatedly emphasized the importance of preserving home rule. Jenkins, 58 N.J. at 500; Booker, 45 N.J. at 170. Thus, the residency statute cannot be interpreted in the manner suggested by plaintiffs. To do otherwise would run counter to the long-held notion that home rule should be preserved, and would also, among other things,

[29] See footnotes 12 & 13 above.

undermine the need to preserve local accountability to the voters of a given district. The mismatch between the limited data relied upon and the scope of the statutory challenge is underscored even further when considering the important public need served by the residency requirement.

3. There Is a Strong Public Need for the Residency Requirement.

Under the third prong of equal protection analysis (the public need for the statutory restriction, Lewis, 188 N.J. at 443-44), because the residency requirement forms a fundamental basis for the mechanism for funding public schools in this State, the statute serves an important public need which is not outweighed by the limited data presented by plaintiffs.

At its core, N.J.S.A. 18A:38-1 requires free public school for any person domiciled within the school district. Built on that backdrop, public schools are funded primarily by local real property taxes, augmented by State and Federal aid. See Point I and Counterstatement of Facts, Point E; N.J.S.A. 18A:7F-43 to -70. Moreover, district governance and citizen participation from families domiciled in a given district heavily influence the district's budget. See, e.g., N.J.S.A. 18A:7F-5; N.J.S.A. 18A:22-13. That level of direct participation significantly impacts how education is delivered to students within the district.

Here, plaintiffs ask to upset the core statewide funding mechanism for public schools based on a number of isolated districts in a single school year. Even adopting their fundamentally flawed framework for segregation, they cannot demonstrate that the limited demographic imbalance cited would justify eviscerating the principal mechanism for funding and governing public schools statewide.

For these reasons, plaintiffs are not entitled to summary judgment, their equal protection claim fails, and summary judgment should be entered for the State defendants on count two of the amended complaint.

POINT IV

PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THERE IS SUCH THING AS A CONSTITUTIONAL AMALGAMATION IN THE EDUCATION CONTEXT.

In count four of their amended complaint, plaintiffs claim that the New Jersey Constitution's T&E clause, anti-segregation clause, and equal protection clause "should be construed together and collectively interpreted in light of each other" to create a new cause of action. Amended Complaint, ¶¶ 71-72. There is no basis to conclude that separate, well-settled constitutional provisions can suddenly — after decades of existence, interpretation, and application — coalesce into newly formed rights or causes of action. That is particularly true here, where

specific constitutional protections already exist in the public school space.

By way of example, a citizen does not have a new right or enhanced constitutional protections because the police happen to be conducting a warrantless search under the Fourth Amendment, while simultaneously being subjected to interrogation and potential self-incrimination under the Fifth Amendment — each asserted claim or constitutional protection would need to be separately addressed under the appropriate standard of scrutiny. See, e.g., State v. Carty, 170 N.J. 632, 649-51 (2002) (noting distinction between Fourth and Fifth Amendment protections and the separate treatment they receive). Plaintiffs ask this court to take the opposite approach, but provide no legitimate basis for doing so. Plaintiffs' Complaint, ¶¶ 71-72; Plaintiffs' Brief, pp. 40-43. None of the cases from New Jersey cited by plaintiffs support the notion that specific constitutional provisions can be stacked upon one another to create entirely new, unwritten constitutional provisions or enhanced protections. On the contrary, in all of them, the Court simply happened to include separate analyses of the T&E and anti-segregation clauses. But separate constitutional provisions have never been interpreted or consolidated to create new constitutional rights in the education context in New Jersey.

In North Haledon, 181 N.J. at 177 n. 5, the Court acknowledged its history of rejecting segregation in the State's public schools, and noted in dicta, in a one-sentence footnote, that L. 1881, c. 149 was later codified into the anti-segregation clause. It then separately noted that racial imbalances resulting from segregation are "inimical to the constitutional guarantee of [T&E]." Id. at 177. And in Jenkins, 58 N.J. at 494-96, the court did indeed view the "history and vigor of the State's policy in favor of a thorough and efficient public school system" as being matched with its "policy against racial discrimination and segregation in the public schools." Id. at 495. And it further noted at the anti-segregation clause plays an equally important role in combatting the elimination of racial segregation in schools. Id. at 496.

Of course, none of this is controversial. But the North Haledon Court certainly did not read the T&E clause, the anti-segregation clause, or any other clause of the Constitution together, or even in pari materia with each other, to create new rights or apply new theories of constitutional law. The very same conclusion must be reached with respect to Jenkins — the Court did not meld the T&E and anti-segregation clauses together to create a new constitutional right.

"The Judiciary 'has the obligation and the ultimate responsibility to interpret the meaning of the Constitution.'" N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 591 (2020)

(quoting State v. Lunsford, 226 N.J. 129, 153 (2016)). "When called on to do so, courts must apply the provisions of the constitution in a way 'that serves to effectuate fully and fairly [their] overriding purpose.'" Ibid. (quoting State v. Trump Hotels & Casino Resorts, Inc., 160 N.J. 505, 527 (1999)).

Here, the T&E clause, the anti-segregation clause, and the equal protection clause are all powerful (and indispensable) tools, in and of themselves, for combatting the scourge of segregation and discrimination. But they each employ well-settled standards of scrutiny, developed through decades of litigation, interpretation, and application. Independent and specific constitutional provisions need not be fused together to create entirely new, unwritten constitutional provisions or enhanced protections. Cf. Rosenberg v. Town of N. Bergen, 61 N.J. 190, 199-200 (1972) (holding that "[t]he Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed." (emphasis added)). Instead, courts must do exactly what the Court did in Jenkins and North Haledon, and apply those provisions independently.[30]

[30] Plaintiffs have also significantly misconstrued In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010). In that matter, the Court simply reiterated the long-understood principle that separately-enacted statutes should be read in "pari materia" in order to avoid inconsistent application of the law. Ibid. That is a far cry from affirmatively using decades-old constitutional provisions to create entirely new rights or causes of action.

And to the extent certain constitutional rights have been interpreted to allow novel causes of action in this State or others,[31] that has not occurred in the educational context in New Jersey. See Jenkins, 58 N.J. at 494-96; North Haledon, 181 N.J. at 177 n. 5. Nor would such a drastic course of action need to be invoked here — plaintiffs have at their disposal, and have cited as a cause of action, a number of powerful and specific constitutional provisions that are rife with decades of robust guidance from our courts. The fact that plaintiffs have failed to present a viable legal theory and an adequate record to establish a violation of any of these separate provisions does not warrant the creation of a previously unheard-of constitutional right tailor-made to allow them to prevail in their otherwise deficient lawsuit.

Plaintiffs' reliance on case law outside of New Jersey is equally unavailing. In Bd. of Educ. of Kanawah v. W.V. Bd. of Educ., 639 S.E.2d 893, 899 (W.V. 2006), the court held that a constitutionally sufficient thorough and efficient education had

[31] See Plaintiffs' Brief, p. 41; see also In re Quinlan, 70 N.J. 10, 39-40 (1976) (recognizing a fundamental right to privacy as guaranteed by the United States Constitution, though not explicitly mentioned). But importantly, the difference between Quinlan and this matter is that the right to be free from segregation, the right to T&E, and the right to equal protection under the law are already expressly delineated in the New Jersey Constitution and recognized by our courts. Thus, a novel cause of action or newly created right is wholly unnecessary.

to be provided in an equal and uniform manner, and it separately noted that equal protection analysis would apply where "discriminatory classification [is] found in the State's educational financing system . . . ." Similarly, in Sheff v. O'Neill, 678 A.2d 1267, 1281-82 (Conn. 1996), the Court did consider the interplay between Connecticut's equivalent of our anti-segregation and T&E clauses, but expressly observed that they had "independent constitutional significance[,]" and it did not create a new constitutional right out of the two.

Nowhere in either of those decisions did the courts create a new universe of constitutional protections. Instead, they prudently harmonized the constitutional provisions at issue. And plaintiffs admit the limits of their argument, suggesting only that other states have "read" independent constitutional provisions "in tandem." Plaintiffs' Brief, p. 42. Yet they ask this court to combine multiple, separate, and distinct constitutional provisions, with the goal of creating an entirely new pathway to relief. This is unprecedented and unsupported in our courts' jurisprudence.

For these reasons, plaintiffs are not entitled to summary judgment, they have failed to establish a new constitutional claim, and summary judgment should be entered for the State defendants on count four of the amended complaint.

POINT V

BECAUSE PLAINTIFFS CANNOT PREVAIL ON ANY OF THEIR CONSTITUTIONAL CLAIMS, AND BECAUSE THE STATE DEFENDANTS ARE NOT "PERSONS" AMENABLE TO SUIT, THEIR CLAIM ALLEGING A VIOLATION OF THE CIVIL RIGHTS ACT ALSO FAILS.

In count seven of their amended complaint, plaintiffs claim that the State defendants' alleged "violations of the New Jersey Constitution also violate" the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-2. Amended Complaint, ¶¶ 78-79. This claim fails for two independently sufficient reasons.

First, plaintiffs' CRA claim fails for the same reasons that their constitutional claims fail. The CRA, like its federal counterpart in 42 U.S.C. § 1983, was created as the statutory "remedy for the violation of substantive rights found in our State Constitution and laws." Tumpson v. Farina, 218 N.J. 450, 474 (2014). But because the State defendants are entitled to summary judgment on plaintiffs' constitutional claims under counts one through four of the amended complaint, so too are they entitled to summary judgment on count seven. In particular, plaintiffs allege that the State defendants have violated the CRA; but since the State defendants are entitled to summary judgment on all of

plaintiffs' T&E clause, anti-segregation clause, and equal protection clause claims, their CRA claim cannot advance.

In pertinent part, the CRA creates a private cause of action for:

> [a]ny person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law.
>
> [N.J.S.A. 10:6-2(c)].

Here, for the reasons stated in Points I, II, and III, plaintiffs have failed to demonstrate any violation of the State Constitution or laws of this State. And because each constitutional claim fails on its own, their CRA claim must also be dismissed — even if plaintiffs have articulated a cognizable right under the CRA. See Harz v. Borough of Spring Lake, 234 N.J. 317, 331-32 (2018) (providing multi-step test for identifying a cognizable right under the CRA).

Second, plaintiffs' CRA claim must fail because both State and federal courts have consistently held that neither the State nor its officials acting in their official capacities are "persons" amenable to suit under the CRA. See Brown v. State, 442 N.J.

Super. 406, 425-26 (App. Div. 2015) (holding that the State is immune from suits for either damages or injunctive relief brought under the CRA because it is not a "person" under the statute), rev'd on other grounds, 230 N.J. 84 (2017).

For these reasons, plaintiffs are not entitled to summary judgment, their claim under the CRA fails, and summary judgment should be entered for the State defendants on count seven of the amended complaint.

POINT VI

PLAINTIFFS CANNOT ESTABLISH THAT THE STATE DEFENDANTS VIOLATED THE CHARTER SCHOOL PROGRAM ACT, OR THAT THE ACT IS UNCONSTITUTIONAL.

In count six of their amended complaint, plaintiffs allege that "segregation by race and poverty in New Jersey's charter schools" violates the Charter School Program Act of 1996 (CSPA), N.J.S.A. 18A:36A-1 to -18. Amended Complaint, ¶¶ 75-77. Their claim is relatively vague and, ultimately, must suffer the same fate as the remainder of their claims. Plaintiffs devote little attention to count six in their amended complaint, see Amended Complaint, ¶¶ 30-34, 75-77; and their brief does no better, concluding only that the Commissioner "has permitted" charter schools to become segregated, see Plaintiffs' Brief, p. 46. On the one hand, they claim that the CSPA itself, in conjunction with municipal demographics, causes segregation, Amended Complaint, ¶ 31; but on the other hand, they allege that the Commissioner has

violated the CSPA and is responsible for racial imbalance, id. at ¶ 32, Plaintiffs' Brief, p. 46. It is thus difficult to discern whether they challenge the CSPA itself, or whether they challenge the action(s) or inaction of the State. Count six fails either way.

As to their attack on the CSPA, recall that statutes are granted a presumption of constitutionality that can be rebutted "only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt." Hamilton Amusement Ctr., 156 N.J. at 285. Courts give deference to a legislative enactment unless it is "unmistakably shown to run afoul of the Constitution." Lewis, 188 N.J. at 459; see also Town of Secaucus, 133 N.J. at 492-93 (statute invalid only if "clearly repugnant to the constitution").

When it enacted the CSPA, the Legislature intended to provide an alternative to traditional public schools by encouraging the establishment of charter schools. N.J.S.A. 18A:36A-2 and -3(b); In re Englewood on the Palisades Charter Sch. (Englewood on the Palisades), 164 N.J. 316, 321, 336 (2000); In re Red Bank Charter Sch. (Red Bank), 367 N.J. Super. 462, 478 (App. Div. 2004); Educ. Law Ctr. ex rel. Burke v. N.J. State Bd. of Educ. (Burke), 438 N.J. Super. 108, 113 (App. Div. 2014); In re Grant of Charter to Merit Prep. Charter Sch. of Newark (Merit Prep.), 435 N.J. Super. 273, 281 (App. Div. 2014). Indeed, the Legislature has explained

that "the establishment of a charter school program is in the best interests of the students of this State[,]" and thus it is "the public policy of this State to encourage and facilitate the development of charter schools." Burke, 438 N.J. Super. at 113 (quoting N.J.S.A. 18A:36A-2); see also N.J.S.A. 18A:36A-3(b) (Commissioner "shall encourage the establishment of charter schools in urban districts"); Englewood on the Palisades, 164 N.J. at 336 (describing "legislative will to allow charter schools and to advance their goals"); Red Bank, 367 N.J. Super. at 478 (highlighting Legislature's goal of promoting "comprehensive educational reform by fostering the development of charter schools"); Merit Prep., 435 N.J. Super. at 281 (Legislature explicitly stated its objectives to give the Commissioner "broad authority to grant charters").

Against this backdrop, plaintiffs have utterly failed to articulate or prove how the CSPA is illegal or otherwise leads to "intense racial and socioeconomic segregation . . . ." Amended Complaint, ¶ 31. The plain language of the CSPA itself provides comprehensive protections against discrimination and segregation, thus eliminating any merit to plaintiffs' attack on the CSPA's plain language:

> A charter school shall be open to all students on a space-available basis, and shall not discriminate in its admission policies or practices on the basis of intellectual or athletic ability, measures of achievement or

> aptitude, status as a person with a disability, proficiency in the English language, or any other basis that would be illegal if used by a school district; however, a charter school may limit admission to a particular grade level or to areas of concentration of the school, such as mathematics, science, or the arts. A charter school may establish reasonable criteria to evaluate prospective students which shall be outlined in the school's charter.
>
> [N.J.S.A. 18A:36A-7.]

And additional safeguards have been developed and implemented by the Legislature to counterbalance any segregative effects that may potentially occur as a result of charters. Red Bank, 367 N.J. Super. at 471-72. The CSPA mandates that charter schools, "to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population including racial and academic factors." N.J.S.A. 18A:36A-8(e). Moreover, charter school admission is voluntary — application is made at the discretion of the parent and the student on a space-available basis, and preference for enrollment is given to students who reside in the district of residence. N.J.S.A. 18A:36A-7 and -8. A level of autonomy is also built into the system — students have the option to enroll in either district schools or in charter schools. They are given the option of indicating a preference for either charter schools or traditional public schools, and are permitted to withdraw from a charter school at any time. N.J.S.A. 18A:36A-9.

Tellingly, our Supreme Court has reviewed the CSPA and expressly "upheld [its] constitutionality, finding that '[t]he choice to include charter schools among the array of public entities providing educational services to our pupils is a choice appropriately made by the Legislature so long as the constitutional mandate to provide a thorough and efficient system of education in New Jersey is satisfied.'" In re Renewal TEAM Acad. Charter Sch. (TEAM Acad.), 247 N.J. 46, 69 (2021) (quoting Englewood on the Palisades, 164 N.J. at 323 (citing Robinson I, 62 N.J. at 508-09, 509 n. 9)).

But leaving aside plaintiffs' relatively specious suggestion that the CSPA itself is somehow illegal or otherwise the cause of segregation, they also suggest that the Commissioner is causing segregation in her application of the CSPA. Not so.

The racial impact of a charter applicant on the district of residence is a critical consideration for the Commissioner. See TEAM Acad., 247 N.J. at 71, 79-80; In re Proposed Quest Acad. Charter Sch. (Quest Acad.), 216 N.J. 370, 377, 388 (2013); Englewood on the Palisades, 164 N.J. at 329. More than that, she is fully cognizant not just of a charter school's effect on the local district's demographics, but also of each charter school's respective demographics within its own walls. "The constitutional command to prevent segregation in our public schools superimposes obligations on the Commissioner when he [or she] performs his [or

her] statutory responsibilities under the [CSPA]." Englewood on the Palisades, 164 N.J. at 329. It is therefore not disputed that the Commissioner is obligated to "vigilantly seek to protect a district's racial/ethnic balance" throughout the life of a charter school — both in its initial application process and when reviewing its renewal. Red Bank, 367 N.J. Super. at 472.

It is within this framework that the Commissioner is required to "consider the racial impact from the perspective of the charter school's proposed pupil population, as well as the effect that loss of the pupils to the charter school would have on the district of residence of the charter school." Englewood on the Palisades, 164 N.J. at 327; see also TEAM Acad., 247 N.J. at 70. But the "form and structure" of the analysis is left to the Commissioner's discretion. Id. at 329. And, importantly, "[t]he mere fact that the demographics of the charter schools do not mirror the demographics of the District does not alone establish a segregative effect." In re Team Acad. Charter Sch., 459 N.J. Super. 111, 128 (App. Div. 2019), aff'd as modified, 247 N.J. 46. (citing Red Bank, 367 N.J. Super. at 476-77).[32]

The Commissioner must therefore:

[32] Moreover, while the Commissioner may be required to act when a district's ability to provide T&E "is threatened by racial imbalance," North Haledon, 181 N.J. at 183, the Supreme Court of the United States has made clear that the Fourteenth Amendment limits a State's ability to remedy de facto school segregation through overt racial balancing, Parents Involved, 551 U.S. 701.

> [a]ddress the impact of the charter school's approval, renewal or amendment on racial segregation in the district of residence. The Commissioner should also address the impact of the charter school's approval, renewal or amendment on the demographic composition of the district of residence with respect to two groups of students of particular concern to the Legislature, students with disabilities and students who are English language learners.
>
> [TEAM Acad., 247 N.J. at 79 (citing N.J.S.A. 18A:36A-7 and -16(e)(5)).]

The Department has promulgated regulations to ensure that the Commissioner carries out the duty to "assess the student composition of a charter school and the segregative effect" that a charter school may have on the district of residence. See N.J.A.C. 6A:11-2.1(j) ("Prior to the granting of [a] charter, the Commissioner shall assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence."); N.J.A.C. 6A:11-2.2(c) ("On an annual basis, the Commissioner shall assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence."); N.J.A.C. 6A:11-4.4(a) (requiring charter schools to submit to the Commissioner "the number of students by grade level, gender and race/ethnicity from each district selected for enrollment from its initial recruitment period for the following school year[,]" and providing further guidance on initial recruitment periods); see

also TEAM Acad., 247 N.J. at 70-71 (discussing other regulatory obligations of the Commissioner when conducting assessments of charter schools); Red Bank, 367 N.J. Super. at 471-72 (discussing statutory and regulatory obligations of the Commissioner when conducting assessments of charter schools).

Stated differently, measures have been taken to protect against any segregative effects of a charter school's enactment or expansion — both with respect to its effect on its surrounding district(s), and in and of itself. Good faith recruitment efforts, non-discriminatory enrollment policies, and family autonomy and student enrollment preferences are also essential ingredients in the Commissioner's calculus — something plaintiffs' own expert concedes as legitimate. Defendants' SOUMF, ¶ 84; Coughlan Transcript, T208:24 to T209:18 (agreeing that "[w]ith the right support, choice can strongly foster diversity and increase options for students living in areas where the existing schools are weak"). They were built into the CSPA by the Legislature to serve a vital purpose, namely the protection against segregative effects. Thus, "[a]ssuming the school's enrollment practices remain color blind, random, and open to all students in the community," parents must be given the latitude to decide whether or not to enroll, and segregative effects "cannot be attributed solely to the school." Red Bank, 367 N.J. Super. at 478.

Using the framework approved in TEAM Acad., Red Bank, Quest Acad., and Englewood on the Palisades, the Commissioner conducts a holistic examination of the demographics of a charter school and its district, and makes a finding as to whether the operations of a school would exacerbate racial imbalance. As in Red Bank, 367 N.J. Super. at 477-78, successful charter schools cannot be faulted for developing attractive educational programs while simultaneously engaging in active recruitment efforts to appeal to a diverse cross-section of New Jersey's student population. To conclude otherwise would contravene the Legislature's stated purpose of the CSPA, which is to promote education reform "by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public school classroom." Burke, 438 N.J. Super. at 113 (quoting N.J.S.A. 18A:36A-2); see also N.J.S.A. 18A:36A-2 and -3(b); Red Bank, 367 N.J. Super. at 477-78; Englewood on the Palisades, 164 N.J. at 321, 336; Merit Prep., 435 N.J. Super. at 281.

To be sure, the Commissioner is required to take action to prevent the exacerbation of segregation. But no causation or exacerbation of segregation has been shown by plaintiffs such that the CSPA has been violated by the State defendants, or that the CSPA itself is the cause. The record is devoid of evidence that the charter schools are siphoning minority or non-minority

students from New Jersey's schools, or that purported racial imbalances either within charter schools or within their districts, were the result of the practices of the CSPA's plain language or the State defendants.

For these reasons, plaintiffs are not entitled to summary judgment, their claim under the CSPA fails, and summary judgment should be entered for the State defendants on count six of the amended complaint.

CONCLUSION

For all of these reasons, plaintiffs' motion for partial summary judgment must be denied, the State defendants' cross-motion for summary judgment must be granted, and plaintiffs' amended complaint must be dismissed with prejudice.

Respectfully submitted,

ANDREW J. BRUCK
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/Christopher Weber
Christopher Weber
Deputy Attorney General

Date: December 17, 2021