No. 20-2082

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

A.C., a minor, by her parent and Guardian ad litem, Torrence S. Waithe, *et al*.,
Plaintiffs/Appellants

v.

GINA RAIMONDO, in her official capacity as Governor, *et al*.,
Defendants/Appellees

On Appeal from an Order of the
United States District Court for the District of Rhode Island

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BRIEF OF APPELLANTS, A.C. ET AL.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

As provided in Local Rule 34(a), Plaintiffs/Appellants request that the Court set this matter down for oral argument for at least 15 minutes per side. Because this case raises a number of major constitutional issues of first impression, and the appeal involves issues and arguments that may be new to this Honorable Court, counsel respectfully request that up to 30 minutes per side be allowed for oral argument so that the parties can have the opportunity to address thoroughly all questions the Court may have after reading the briefs.

JURISDICTIONAL STATEMENT

Plaintiffs/Appellants originally brought this action in the United States District Court for the District of Rhode Island pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiffs' action for declaratory and injunctive relief is alleged pursuant to 28 U.S.C. §§ 2201, 2202, and is authorized by 42 U.S.C. § 1983. This Court has jurisdiction of this case pursuant to 28 U.S.C.A. § 1291. The Notice of Appeal was filed on Nov. 10, 2020. The appeal is from a final judgment dismissing the case on the merits.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. What is the "quantum of education" students need for the effective exercise of First Amendment freedoms, the intelligent utilization of the right to vote, full participation in the political process, and the exercise of other important constitutional rights in order to trigger strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment?
    A. Would the defendants' failure to provide students basic civic knowledge, civic skills, civic experiences and civic values satisfy even the lesser rational relationship standard of review?
2. Is education for capable citizenship a fundamental substantive right under the Due Process Clause of the Fourteenth Amendment?

3. In light of the District Court's finding that "educating our children on civics, the rule of law, and ….what America means," is necessary for the survival of our constitutional democracy, Add. 17, does the Defendants' failure to provide Plaintiffs an adequate civics education violate the Republican Guarantee Clause of Art. IV, § 4 of the U.S. Constitution?
4. Is an education adequate to prepare students for capable citizenship one of the rights guaranteed under the "Privileges or Immunities" clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Plaintiffs, 14 students attending public schools in various districts throughout the State of Rhode Island and their parents and guardians ad litem, brought this case as a class action in the United States District Court for the District of Rhode Island. They allege that various state officials have failed to provide them and other similarly situated students with "an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social, and political systems sufficiently to make informed choices, and to participate effectively in civic activities." App. 20-21, ¶ 4. In a 55-page decision issued on October 13, 2020, the District Court, Smith, J., dismissed the Complaint, holding that Plaintiffs did not

raise claims recognized by the U.S. Constitution. Accordingly, this appeal raises solely constitutional issues.

SUMMARY OF ARGUMENT

Plaintiffs/Appellants are Rhode Island public school students and their parents who allege that the state defendants have failed to provide them and other similarly situated students with an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, exercising free speech rights and participating effectively in civic activities. The District Court agreed that they presented a proper equal protection claim, since they had alleged that students in some other Rhode Island schools were receiving such an education. Add. 49-50.

The District Court dismissed their Complaint, holding that "there is no constitutional right to any civics education." Add. 54. The Court took this position despite its apprehension that "American democracy is in peril," Add. 5, 6-12, its concern about "the erosion and collapse of [constitutional] norms across the American landscape," Add. 7, and its conclusion that the "first defence" against the degeneration of democracy is a compulsory civics education that provides a "thorough understanding of the institutions and practices of the democratic order and the government it licenses." Add. 13 (quotation omitted).

This appeal seeks this Court's review of the following equal protection issues: 1) whether students have a fundamental interest in being provided a basic civics education that will prepare them to effectively exercise their constitutional rights to the exercise of free speech, the intelligent utilization of the right to vote, full participation in the political process, and other important constitutional rights, and 2) if so, what is the "quantum of education" students need for the effective exercise of these constitutional rights.

Forty-eight years ago, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the United States Supreme Court held that for most purposes, education is not a fundamental interest that triggers strict scrutiny analysis, but it left open the question of whether, nevertheless, the specific right to an education that prepares them adequately to exercise important constitutional rights does constitute a fundamental interest.

The plaintiffs in *Rodriguez* focused on issues involving inequities in education funding, and, therefore, they did not present evidence that would allow the Supreme Court to consider whether the civic content of the education that they were receiving prepared them to exercise constitutional rights. Plaintiffs in the present case, however, have set forth extensive specific allegations in their Complaint regarding the "quantum of education" necessary to exercise these important constitutional rights.

The District Court agreed that the Supreme Court had left these questions open for future resolution. Add. 36-37. It held, however, that Plaintiffs' claim here would trigger strict scrutiny review only if they alleged a "complete denial of education," Add. 51, or an education that is "totally inadequate." Add. 36. The decision below did not explain specifically what either of these terms meant, although it implied that the requisite standard might be met by an education that provided students foundational reading and writing skills. Add. 44. It did make clear, however, that, in any event, "*there is no constitutional right to any civics education*" Add. 54 (emphasis added).

Given that the constitutional question the Supreme Court left open for resolution in *Rodriguez* was what "quantum of education" is necessary *"to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."* 411 U.S. at 37 (emphasis added), Plaintiffs submit that this standard cannot possibly be met by an education that provides *no civics education whatsoever*. Therefore, it was reversible error for the lower court to dismiss the complaint before holding a trial to determine, based on actual facts, how an education that lacks any civics content whatsoever could constitute the "quantum of education" needed to exercise important constitutional rights.

A decade after *Rodriguez*, the Supreme Court reiterated its statements in *Brown v. Bd of Educ.*, 347 U.S. 483, 493 (1954) that "[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. ... It is the very foundation of good citizenship," and stated explicitly how this emphasis on the pre-eminent importance of education should be reconciled with its holding in *Rodriguez*. In *Plyler v. Doe*, 457 U.S. 202, 221 (1982), the Court held that although, as a general matter, education is not a fundamental interest for equal protection purposes, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." For this reason, in *Plyler*, the Court applied a "heightened" equal protection review rather than the usual rational relationship analysis, *id. at* 238 (Powell, J. concurring), to the question of whether undocumented immigrant children had a constitutional right to a public education.

The *Plyler* Court stated, in words that equally apply to the facts in the present case, that "education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when [students] *are denied the means to absorb the values and skills upon which our social order rests.*" *Id.* at 221 (emphasis added). Plaintiffs argue, therefore, that

even if their claims are not entitled to strict scrutiny review, they should receive the "heightened scrutiny" applied in *Plyler*. That standard requires the state to demonstrate a "substantial interest," rather than merely a rational justification for their failure to provide Plaintiffs an adequate civics education. Id. at 217-18.

Even under the less demanding rational relationship standard for equal protection review, Defendants' failure to provide the plaintiffs a minimal civics education would not pass muster. There is, in fact, no rational relationship between denying children access to civics education and maintaining local control of education in Rhode Island. Plaintiffs here are not asking Defendants to operate local schools, to dictate curricula, or to revamp local financing structures; instead, they ask only that Defendants exercise their existing supervisory authority, which they have applied in numerous other areas of education, to ensure that civics education is a high priority for Rhode Island's schools.

In *Massachusetts v. U.S. Dept. of Health and Human Servs.,* 682 F. 3d 1, 9-10 (1st Cir. 2012), this Court discussed a number of cases in which the Supreme Court invalidated under rational basis review state actions for which the justifications "seemed thin, unsupported or impermissible." The State's actions and inactions here which have, as alleged in the Complaint, among other things, eliminated requirements for civics courses, allowed a reduction in the time devoted to social studies and civics, and failed to accept any responsibility for monitoring

the teaching of civics, history, and social studies throughout the state, are similarly irrational and unsupportable.

In *Rodriguez,* the Supreme Court did not examine whether education was a fundamental interest as a matter of substantive due process. In the 48 years since *Rodriguez*, it has become, if possible, even more clear and compelling that civics education has "deep roots" in the "Nation's history and traditions." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). What is more, recent events, including the January 6, 2021 violent storming of the Capitol by a mob motivated by a fundamental misunderstanding of the Congressional role in counting electoral votes, only emphasize further the Constitutional importance of a judicial declaration that education for capable citizenship is a fundamental interest entitled to strict scrutiny review under the Due Process Clause of the Fourteenth Amendment. The future stability of our nation's democratic institutions may depend upon such a declaration.

The District Court specifically stated that "education as a civic ideal is no doubt deeply rooted in our country's history." Add. 47. Nevertheless, it dismissed Plaintiffs' substantive due process claim after abruptly concluding, without explanation, that "[t]o the extent that education generally has been recognized as a 'right', whether constitutional or statutory (as opposed to a civic value), it has been located in *state* laws or constitutions." *Id.* (emphasis added). Analysis of the

history of the adoption of public education systems in the nineteenth century by virtually all of the states makes clear, however, that education was, and is, a *national* right, and the fact that all of the states have acknowledged the critical importance of education, and especially of civics education, underscores, rather than undermines, the status of education as a *national* tradition.

Because the significant constitutional issues raised by this case are a matter of first impression for the federal courts, plaintiffs have also set forth additional and alternative claims under the Republican Guarantee Clause of Art. IV, § 4 of the Constitution, and the Privileges or Immunities Clauses of the Fourteenth Amendment. The current concern for the maintenance of America's democratic institutions and traditions, the unique status and central importance of education for civic preparation today and throughout American history, and significant developments in recent Supreme Court rulings provide a credible basis for this Court to consider applying one or both of these historically neglected legal doctrines to the facts of this case. The District Court, however, rejected both of these claims in a single footnote reference, Add. 47, n.25, without providing any explanation for its decision.

Starting with *Brown v. Board of Education*, *supra*, and continuing to date, the federal and state courts have dealt extensively, appropriately, and successfully with implementing remedies in numerous cases dealing with public education.

Because this case involves relatively non-controversial issues of civic preparation that do not require extensive judicial oversight, Plaintiffs have requested only a limited declaratory judgment remedy. Their request for relief would require the Defendants to treat civic preparation as a constitutional priority, while at the same time allowing them maximum discretion to develop and implement the actual policies and practices needed to accomplish that end.

ARGUMENT

I. BECAUSE PLAINTIFFS HAVE A RIGHT TO AN EDUCATION THAT PREPARES THEM FOR CAPABLE CITIZENSHIP, THEIR EQUAL PROTECTION CLAIMS ARE ENTITLED TO HEIGHTENED SCRUTINY.

A. Plaintiffs' Claims Should Receive Strict Scrutiny Review.

Plaintiffs have alleged that the defendants are denying them and other members of the class they represent an education that is adequate to prepare them to function productively as civic participants, even though such an education is being provided to other students in the state. Among other things, the Complaint alleges that the Defendants have eliminated requirements for civics courses (App. 35-36, ¶¶ 54-55); allowed the amount of time devoted to social studies and civics in K-12 schools to decline (App. 38-39, ¶¶ 64, 66); established an educational accountability program that focuses exclusively on reading, math and science while neglecting civics, history, social studies and economics (App. 38, ¶ 62);

failed to include any requirements for civic preparation in their teacher preparation requirements (App. 38, 43, ¶¶ 61, 80); and failed to ensure that the plaintiffs are being properly taught the kind of media skills they need to distinguish accurate from false information on the internet and social media. (App. 43-45, ¶¶ 81-82, 84-85).

The District Court held that the Plaintiffs had standing to sue, had joined the necessary parties, and that the issues raised in the Complaint are justiciable. Add. 19-25. It held that under the applicable standard of review, the Court must "accept the well-pleaded factual averments [in the Complaint] and indulg[e] all reasonable inferences in the [plaintiff's] favor." Add. 18. The Court below also held that the Complaint alleged sufficient facts to establish disparate treatment for purposes of this motion, since the Complaint compared Plaintiffs' "'substantially deficient' schools with 'a small number of schools in the state that currently are providing their students an education sufficient to prepare them for capable citizenship in accordance with the requirements of the Constitution of the United States.'" Add. 49-50.

The central equal protection issue presented by this case is the definition of the "quantum of education" that students need to effectively exercise their constitutional rights to vote and to exercise free speech. *San Antonio Indep. Sch. Dist. v. Rodriguez*, *supra,* 411 U.S. at, 35-36. The Supreme Court held in

Rodriguez that claims of unequal treatment regarding education funding do not constitute "fundamental interests" entitled to strict scrutiny review. *Id*. at 37-40. As the District Court held, however, the *Rodriguez* Court did "leave the door open, if only a crack," for future consideration of whether claims that schools are denying students the "opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" are entitled to heightened scrutiny. Add. 36-37 (internal quotation omitted).[1]

The District Court's decision provided an eloquent analysis of why today "American democracy is in peril," Add. 5, 6-12, expressing concern about "the erosion and collapse of [constitutional] norms across the American landscape," Add. 7, and agreeing that the "first defen[s]e" against the degeneration of democracy is a compulsory civics education that provides a "thorough understanding of the institutions and practices of the democratic order and the government it licenses." Add. 12-13. Nevertheless, the District Court defined the "quantum of education" necessary to exercise effectively constitutional rights in

[1] Every other federal court that has considered this question has also agreed that the Supreme Court did leave such an opening. *See Gary B. v. Snyder*, 329 F. Supp. 3d 344, 363 (E.D. Mich., 2018) ("The Court is left to conclude that the Supreme Court has neither confirmed nor denied that access to literacy is a fundamental right. The Court must therefore cautiously take up the task"); *Gary B. v. Whitmer*, 957 F.3d 616, 644 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (Mem.) (6th Cir. 2020) (while no general right to education exists, the Supreme Court has specifically distinguished and left open "whether a minimally adequate education is a fundamental right").

narrow terms, specifically holding that Plaintiffs would have a fundamental interest that would trigger strict scrutiny review only if they had alleged a "complete denial of education" (Add. 51) or an education that is "totally inadequate" *Id*. at 36. The Court specifically held that "there is no constitutional right to any civics education." Add. 54. *See also* Add. 44 (not even in a "minimum civics education").

Plaintiffs respectfully submit that the District Court's exceedingly narrow holding regarding the "quantum of education" necessary to exercise constitutional rights constituted reversible error because it 1) misread the applicable language in *Rodriguez*, 2) provided no explanation of how a right to a level of education sufficient to exercise important constitutional rights can totally omit "any civics education" and 3) decided this matter on a motion to dismiss, without reviewing any evidence on the kind and extent of education ("quantum of education") that students need to effectively exercise important constitutional rights.

1. In *Rodriguez*, the Supreme Court Left Open the Key Question of What is the "Quantum of Education" Necessary to Effectively Exercise Important Constitutional Rights.

The "quantum of education" issue in *Rodriguez* resulted from a colloquy between the majority and the dissenters in this close 5-4 decision. Justices Marshall and Douglas, dissenting, argued that even if, as a general matter, education is not a fundamental constitutional interest, nevertheless, because of "the close relationship between education and some of our most basic constitutional values," the amount

of education necessary to prepare students to exercise certain constitutional rights must merit heightened scrutiny. *Rodriguez,* 411 U.S. at 111 (Marshall, J, dissenting). In particular, Justice Marshall stressed the importance of education for exercising First Amendment rights "both as a source and as a receiver of information and ideas" and for exercising the constitutional rights to vote and to participate in the political process. *Id*. at 112–14.[2] *See also id.* at 63 (Brennan, J., dissenting) ("Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment").

In response, the majority acknowledged that "We need not dispute" that "[t]he electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate," *id*. at 36, that "[t]he 'marketplace of ideas' is an empty

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[2] Justice Marshall further stated:

> Of particular importance is the relationship between education and the political process. Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operations of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation.

Id. at 113 (footnotes and internal citations omitted).

forum for those lacking basic communicative tools," *id.* at 35, or that education "is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote," *id*. at 35. Nevertheless, it held that further consideration of this issue could not appropriately be undertaken on the record before it because the plaintiffs had not presented evidence that would establish that Texas's system of education "fail[ed] to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation." *Id.* at 37. Arguably, the District Court's extremely narrow reading of the scope of the opening left for further consideration by *Rodriguez* could be supported by two phrases that appear in the majority opinion in *Rodriguez*. At one point the majority opinion stated that the Supreme Court has never guaranteed citizens "the *most effective* speech or the *most informed* electoral choice," 411 U.S. at 36 (emphasis added), while at another point, the Court indicated that the *Rodriguez* plaintiffs might have prevailed if they had demonstrated an "absolute denial of educational opportunities to any of its children." *Id. at* 37. Read in context, however, these isolated phrases cannot sustain the District Court's narrow reading of the key Supreme Court precedent.

The entirety of the *Rodriguez* majority's response to the arguments by the appellees and the dissent that education is "essential to the effective exercise of

First Amendment freedoms and to intelligent utilization of the right to vote" reads as follows:

> We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.
>
> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

411 U.S. at 36-37 (footnotes omitted).

In its succinct explanation of why it was rejecting the idea that even a "minimal civics education" is necessary for the exercise of constitutional rights, the District Court quoted the first of these paragraphs of the *Rodriguez* decision, but not the second. Add. 45. Omitting the second paragraph implies that the issue

being addressed in *Rodriguez* was whether students were entitled to an education that would prepare them for "the most effective" speech or to be "the most informed" voters, and that the federal courts should not intervene into state decisions involving such matters. However, since Justice Marshall and the other dissenters spoke of "effective" speech and voting capacity but never asserted that students were entitled to *"the most effective*" speech or voting capacity, the *Rodriguez* majority's statement in the first paragraph should logically be read to frame the discussion in terms of a basic, rather than a maximal, right to a civics education.[3] Thus, in the second quoted paragraph, the majority addressed directly the actual issue raised by the dissent by stating that they do not dispute the dissenters' premise that some non-maximum level of education is necessary to exercise constitutional rights, but the exact contours of that level was not ripe for decision in *Rodriguez*, since the plaintiffs in that case had not presented substantial evidence regarding the requisite "quantum of education." [4]

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[3] *See*, *Rodriguez,* 411 U.S. at 115 (Marshall, J. dissenting) ("With due respect, the issue is neither provision of the most effective speech nor of the most informed vote").

[4] The District Court's holding that Rodriguez did "leave the door open" for future consideration of the appropriate level of education necessary to exercise constitutional rights, Add. 36-37, implicitly acknowledged the importance of this second paragraph that contained the "quantum of education" phrase and that the statements in the first paragraph did not definitively resolve the issues raised by the dissent. Moreover, as the District Court itself acknowledged, the Supreme Court explicitly stated years later that *Rodriguez* had not foreclosed analysis of what non-

When these two paragraphs of the majority opinion are properly read together, they hold as follows:

1. There is no dispute between the majority and the dissenters that education is "essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."
2. This does not mean, however, that citizens have a constitutional right to develop "the most effective speech or the most informed electoral choice."
3. Some "identifiable quantum of education" may be deemed a "constitutionally protected prerequisite" to the exercise of First and Fifteenth Amendment rights.
4. However, on the *Rodriguez* record, there was no evidence that the schools the plaintiff students attended were failing to provide them "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."

There is, of course, a reference to the "absolute denial of education" in the second paragraph of the quoted passage. That reference, however, must be

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maximum level of education is necessary to exercise constitutional rights by citing *Papasan v. Allain*, 478 U.S. 265 (1986). Add. 37. There, the majority emphasized the central significance of the second quoted paragraph by stating that "The Court [in *Rodriguez*] did not, however, foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote.]" 478 U.S. at 284 (ellipsis in original).

understood in the context of the *Rodriguez* case that dealt with claims of inequities in educational funding in which no credible evidence of a lack of sufficient civics education had been presented. Accordingly, the allusion to an "absolute denial of education" must be referring to the obvious point that if students were denied all education, *ipso facto*, they would be denied an adequate civics education, but since they were concededly receiving *some* education (albeit less than their peers in the neighboring affluent district), the relative question of whether they were receiving a sufficient amount of civics education could not be answered on the *Rodriguez* record.

Based on the context, then, the majority's colloquy with the dissent in *Rodriguez* was merely restating the position the Court had expressed a year earlier in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There, in discussing the compelling importance of education, Chief Justice Burger, writing for the majority, stated that "we accept" the proposition that "as Thomas Jefferson pointed out early in our history, . . . *some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system* if we are to preserve freedom and independence." *Id.* at 221 (emphasis added). Even assuming *arguendo* that the colloquy between the majority and the dissenting Justices in *Rodriguez* was ambiguous, the language in *Yoder* was clear: the issue left open by both *Rodriguez* and *Yoder* is what degree of education is necessary to *prepare*

students for capable citizenship, and the requisite "quantum" must provide some level of education in civics and constitutional values.

2. The Requisite "Quantum of Education" Must Include Some Degree of Civics Education.

As discussed above, the District Court held that it would apply strict scrutiny review of Plaintiffs' fundamental interest in education only if Plaintiffs alleged a "complete denial of education," Add. 51, or an education that is "totally inadequate," Add. 36, and it held in no uncertain terms that "there is no constitutional right to any civics education," Add. 54. Each of these holdings was cryptic and conclusory. On its face, the holding that only "a complete denial of education" may be the standard is inconsistent with the Supreme Court's specification that "some identifiable quantum of education" is constitutionally required.

The alternative indication that the standard should be a "totally inadequate education" indicates that some very minimal, low quality education would be acceptable. Presumably, the District Court would join with the Connecticut jurists who posited that it would not pass constitutional muster for a town to "herd children in an open field to hear lectures by illiterates." *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell,* 295 Conn. 240, 353, 990 A.2d 206, 275 (Conn. 2010) ((Schaller, J. concurring) (quoting *Horton v. Meskill,* 172 Conn. 615, 659, 376 A.2d 359, 379 (Conn. 1977) (Loiselle, J. dissenting)). What low level of

learning above this extreme example would be acceptable, the District Court did not specify.

The District Court did, however, discuss repeatedly and with seeming approval the decision of the three-judge panel in *Gary B. v. Whitmer*, 957 F.3d 616, 642 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (2020)[5] which held that the requisite "quantum of education" was a "foundational level of literacy," Add. 38 (quoting *Gary B.*, 957 F.3d at 659). Perhaps, by these references, the District Court meant to imply that its definition of a "totally inadequate" education would be one that denied students the basic level of functional literacy described by the *Gary B.* panel.

If that was the District Court's implied meaning, it would signify that an education that taught students some minimal literacy skills but did not include any instruction whatsoever in such areas as American history, social studies, economics or civics (and perhaps also no instruction in areas like science, or the arts) could meet the standard. In fact, the District Court explicitly stated that its decision should be read that way when it specifically held that the necessary

[5] The Sixth Circuit vacated the *Gary B.* panel decision when it ordered the case to be reheard *en banc*. The parties then settled, and the Sixth Circuit dismissed the case as moot. Despite the vacatur, the District Court found value in applying the Sixth Circuit panel's substantive due process analysis concerning the relationship of education to the exercise of core constitutional rights in an equal protection framework. The District Court took this step because it, unlike the Sixth Circuit panel, did not find a problem with identifying "comparator" school districts.

quantum did not include "any civics education," Add 54, and that if there is a difference between functional literacy and "a minimum civics education," Plaintiffs are not entitled to the latter. Add. 44-45. The Court further stated that "while it is clearly desirable — and even essential, as I argue in the Introduction — for citizens to have a deeper grasp of our civic responsibilities and governing mechanisms and American history, this is not something the U.S. Constitution contemplates or mandates." Add. 45.

However, in *Rodriguez*, the Supreme Court left open the question of what "quantum of education" is needed *"to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."* 411 U.S. at 37 (emphasis added). Plaintiffs submit, therefore, that this standard cannot possibly be met by an education that provides *no civics education whatsoever*. Surely, to understand and exercise the right to vote, to speak freely and to participate in the political process, "Students require a grasp and appreciation of their nation's history, fundamental tenets and democratic processes," Frederick M. Hess, *Foreword* to *Teaching America: The Case for Civic Education* xiv (David Feith ed., 2011). If America is to move beyond the extreme polarization that currently plagues our political culture, which manifested itself in a violent attack on the seat of American government on January 6, 2021, it is also essential that schools teach the next

generation values of democratic toleration and civic discourse, *see* Cass R. Sunstein, *Going to Extreme: How Like Minds Unite and Divide* (2009), and that instruction in "media literacy," *i.e*. how to distinguish accurate from inaccurate information on the internet and social media, is essential. *See, e.g.*, Joseph Kahne and Benjamin Bowyer, *Educating for Democracy in a Partisan Age: Confronting the Challenges of Motivated Reasoning and Misinformation,* 54 Am. Ed. Res. J. 3 (2017).

Indeed, there is a consensus among educators regarding the basic framework for a minimum civics education. To maintain our constitutional system of democratic self-government, civics education must include basic civic knowledge, civic skills, civic experiences and civic values. *See, e.g.,* Campaign for the Civic Mission of the Schools et al., *Guardian of Democracy: The Civic Mission of Schools* 26-34 (2011); Lisa Guilfoile & Brady Delander, *Six Proven Practices for Effective Civic Learning* (2014); Elizabeth Whitehouse, Paul J. Baumann & Jan Brennan, *State Civic Education Toolkit*, 10-13 (2017); Laura S. Hamilton, Julia H. Kaufman and Lynn Hu, *Preparing Children and Youth for Civic Life in the Era of Truth Decay* 21-23 (2020).

The Supreme Court itself has alluded to the importance of many of the specific kinds of knowledge, skills, experiences, and values that that plaintiffs claim constitute the "quantum of education" required for civic preparation in

paragraphs 54-96 of their Complaint. *See* App. 35-49. For example, the Court has emphasized the importance of exposing students to a market place of ideas, controversies, and opposing viewpoints, *see, e.g., Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) ("[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members"), and the importance of basic knowledge of, and experience in, how our governmental institutions function. *Id.* at 876 (Blackmun, J., concurring) ("the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs").

The Supreme Court has also underscored the importance of analytic skills and democratic deliberation. See *Weiman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J. & Douglas, J., concurring) ("Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens"), and the need for schools to inculcate basic civic values, specifically including the values of tolerance and civility toward those with differing views. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (schools must inculcate the "fundamental values necessary to the

maintenance of a democratic political system . . . [which] must, of course, include tolerance of divergent political and religious views").[6]

As noted above, the District Court quoted with approval language from the vacated *Gary B*. panel decision that held that the requisite quantum of education was "basic literacy," meaning the ability to read "road signs and other posted rules," or "voter registration form[s]," or "a summons sent through the mail." Add 44; *Gary B.*, 957 F.3d at 652-53. However, Plaintiffs submit that "basic literacy" cannot be the standard for the "*meaningful* exercise" of constitutional rights, *Rodriguez*, 411 U.S. at 36 (emphasis added), or for "*full participation* in the

[6] Education is also critical for preparing students to function productively as jurors — which, as the Supreme Court has stated, is, "with the exception of voting, for most citizens, . . . their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Incompetent jurors pose a threat to the functioning of our democratic system:

> In the criminal context, defendants' lives and liberty depend upon the jury verdict. . . . In civil cases, millions—and sometimes billions—of dollars depend upon the jury verdict. . . . Along a different vein, accurate juror decision making is a predicate to a public perception of fair decision making. Inaccurately determined facts, misunderstood jury instructions, and other jury errors erode the perception that the litigants to a lawsuit truly received their day in court.

Steven L. Friedland, *Competency and Responsibility of Jurors in Deciding Cases,* 85 Nw. U.L. Rev. 190, 194-95 (1990).

political process. *Id.* at 37 (emphasis added).[7] Knowing how to read and write is essential but not sufficient for exercising constitutional rights. Basic civic knowledge, skills, experiences, and values are also critical pre-requisites.

The New Hampshire Supreme Court, in considering the parameters of an "adequate" education as required by its state constitution, made this obvious point: "Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas." *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192, 635 A.2d 1375, 1381 (N.H. 1993). *See also, e.g., Rose v. Council for Basic Ed.*, 790 S.W.2d 186, 212 (Ky. 1989) (school system must have as its goal providing students "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization," as well as "sufficient knowledge of economic, social and political systems to enable the student to make informed choices," and "sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation").

[7] The District Court itself acknowledged that "compulsory education in civics (along with compulsory voting) is a critical step that could be crucial in reconfiguring the place of politics in the national community." Add. 13.

3. The Requisite "Quantum of Education" Cannot Be Determined on a Motion to Dismiss.

Plaintiffs in the present case have set forth detailed allegations asserting the essential elements of the "quantum of education" that is necessary for students to effectively exercise their constitutional rights, and the extent to which many of Rhode Island's schools are failing to provide such an education. This is precisely the type of evidence that was lacking in *Rodriguez,* and it was reversible error for the District Court to dismiss their complaint without developing a factual record that would allow it to determine whether, as a matter of fact, Defendants have denied Plaintiffs the constitutionally-mandated amount of civics education.

Surely, the facts that only 23 percent of high school students throughout the nation are proficient in basic civic knowledge and skills, as measured by the National Assessment of Educational Progress, (App. 21, ¶ 5), and that "only 30 percent of U.S. millennials agree that it's 'essential…to live in a democracy,'" Neil Gorsuch, *A Republic If You Can Keep It* 28 (2019), indicate that for many, if not most, American students, the civics education they are receiving today is below any reasonable definition of the quantum of education they need to exercise important constitutional rights. Lacking a trial record, the District Court was not in a position to determine whether the quantum of civic knowledge, civic skills, civic experiences and civic values that Plaintiffs allege they have been denied violates the requisite constitutional standard.

As noted above, the Supreme Court has made clear that students are entitled to an education that prepares them for "the effective exercise of First Amendment freedoms and … intelligent utilization of the right to vote," *Rodriguez*, 411 U.S. at 35, but they are not entitled to "the most effective speech or the most informed electoral choice." *Id.* at 36. Determining what is a non-maximum, but adequate, civics education is analogous to the question of determining what is an "appropriate public education" for students with disabilities that the Supreme Court faced in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). There, Justice Rehnquist, writing for the majority, held that students with disabilities were entitled to receive more than the same services as non-disabled students, but less than an education that would "maximize each handicapped child's potential." *Id*. at 199-200. The appropriate middle ground, the Court held, was an education that would allow each student with a disability to "achieve passing marks and advance from grade to grade." *Id. at* 204; s*ee also*, *Endrew F. v. Douglas Co. Sch. Dist.,*137 S. Ct. 988, 1001 (2017) (appropriate education must be more than "merely more than de minimis"); *Doe v. Bd. of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 459-60 (6th Cir. 1993) (student is entitled to a "serviceable Chevrolet," but not a "Cadillac").

Accordingly, here the District Court needs to determine what is a non-maximum but "adequate" level of civic knowledge, civic skills, civic experiences

and civic values that students need in order to be properly prepared to exercise effectively their constitutional rights. A court cannot properly make such a determination on a motion to dismiss before the parties have had an opportunity to submit evidence regarding each of these critical areas.[8] Plaintiffs respectfully submit, therefore, that this Court should reverse the District Court's dismissal and remand the case to the District Court to hold a trial to identify and define the quantum of civics education that is necessary to prepare students to exercise important constitutional rights, to determine whether the state has failed to provide the defined quantum of education to the Plaintiff students and the class they represent, and, if the state has not provided that quantum of education, to determine whether the Defendants can present a narrowly tailored, compelling justification for any such failure.

B. Plyler v. Doe Entitles Plaintiffs to a Heightened Standard of Review.

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court struck down a state statute and district policy that barred children of undocumented immigrants from attending Texas' public schools. In doing so, the Court made clear that

[8] The District Court itself stated that "*Rodriguez* leaves Plaintiffs here without a viable claim, but the call is closer than Defendants suggest, and closer than one might conclude on first pass." Add. 31. If assessing the content of the necessary "quantum of education" is, indeed, a close call, that determination should not be made on a motion to dismiss, thereby denying this Court an evidentiary record for its own analysis of this key, "close" question.

Rodriguez should not be read to totally preclude application of heightened scrutiny to claims of a denial of equal educational opportunity. The District Court here, however, rejected the relevance of *Plyler* to the current facts because it opined that *Plyler's* combination of immigration and education issues presented "unique circumstances." Add. 52.

Plyler is, however, a relevant precedent for the current case because that decision made clear that education is more important than other governmental services, and that some claims of a denial of equal educational opportunity must be given more than minimal rational relationship review:

> Public education is not a "right" granted to individuals by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Id. at 221 (emphasis added).

The *Plyler* court then applied that heightened concern for educational opportunity by holding that the challenged exclusion policy must be justified "by a showing that it furthers some substantial state interest" and not merely a "rational relationship" to a legitimate state interest. *Id.* at 230. In invalidating the state's

policy under this standard,[9] the Court stated, in words that equally apply to the facts in the present case, that "education has a fundamental role in maintaining the fabric of our society . . . [w]e cannot ignore the significant social costs borne by our Nation when [students] *are denied the means to absorb the values and skills upon which our social order rests.*" *Id.* at 221 (emphasis added).

In his concurring opinion in *Plyler*, Justice Blackmun emphasized that there can and should be exceptions to *Rodriguez*'s general holding that education is not a fundamental constitutional interest:

> I believe the Court's experience has demonstrated that the Rodriguez formulation does not settle every issue of "fundamental rights" arising under the Equal Protection Clause. Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States, and Rodriguez does not stand for quite so absolute a proposition. To the contrary, Rodriguez implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis.

Id. at 232-233.

Justice Blackmun's point applies directly to the present case. If any aspect of education justifies an exception to *Rodriguez*'s fundamental interest analysis, it is the need to ensure that all students are adequately prepared for capable citizenship.

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[9] Specifically, the Court held that the state's rationales for its exclusionary policy (preserving educational resources for its lawful residents, impact on other students, and the possibility that these students might move out of state after receiving a state-funded education) were "wholly insubstantial in light of the costs involved to these children, the State, and the Nation." *Id.* at 230.

For all the reasons set forth in the preceding subsection, Plaintiffs believe that their claims should be accorded strict scrutiny review. In the alternative, however, based on the *Plyler* precedent, at the very least, their claims are entitled to heightened "substantial interest" scrutiny. Here, as in *Plyler,* the state is precluding many students from participating in our "civic institutions" and is impeding their ability to "contribute . . . to the progress of our nation." *Id.* at 223. Plaintiffs contend that if the District Court were to hold a trial on the merits of the Complaint, then whatever rationales the state defendants might put forward to justify the inadequate civic preparation they are providing to many Rhode Island students will likely also fail to qualify as a "substantial state interest" in light of the significant danger to the maintenance of our democratic system that inadequate civic preparation poses for the state and for the nation.

In dismissing Plaintiffs' heightened scrutiny claim, the District Court held that "Civics education, in the end, is not a "fundamental interest," so Defendants' conduct does not deserve heightened scrutiny." Add. 52. But even assuming *arguendo* that civics education is not a fundamental interest entitled to strict scrutiny pursuant to *Rodriguez,* that should not preclude consideration of whether *Plyler's* heightened "substantial interest" standard, rather than a rational basis

analysis, should be applied in this case.[10] The District Court provided no explanation for its assumption that a negative ruling regarding Plaintiffs' right to strict scrutiny, *ipso facto*, foreclosed application of a "substantial interest" analysis.

C. Plaintiffs Are Entitled to Present Evidence Showing That Defendants' Failure to Provide Them Adequate Civics Education Would Not Even Survive a Rational Relationship Review.

After deciding that Plaintiffs were not entitled to strict scrutiny or heightened scrutiny analysis of their claims, the District Court applied the rational relationship standard to their allegations and decided that the Complaint should be dismissed. This dismissal denied Plaintiffs an opportunity to present evidence that could establish that, even under rational relationship analysis, they have been denied equal protection of the laws.

The District Court justified this abrupt dismissal by citing several inapposite cases in which the Supreme Court had rejected claims for "charging for school bus service," and for a "fundamental right to play intercollegiate hockey." Add. 54. Surely, however, civic preparation for exercising major constitutional rights raises more significant issues, the denial of which require more substantial governmental

[10] The Supreme Court has also applied such an intermediate "substantial interest" standard in other types of equal protection cases. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be *substantially related* to achievement of those objectives.") (emphasis added).

justification, than do school bus transportation fees or a right to play intercollegiate hockey. As the District Court itself eloquently stated, this case is about the "need to educate our younger generation, the ones who will . . . ultimately be responsible for the success or failure of American democracy for generations to come." Add. 12.

The District Court also invoked the mantra of "local control," the rationale that the Supreme Court applied in *Rodriguez* to find that Texas's school funding program met the rational relationship standard. *See Rodriguez*, 411 U.S. at 49-55. But the state policy at issue in this case is not, as it was in *Rodriguez*, the devolution of education funding to local property taxes (a matter in which, as the Supreme Court noted, "even more than in other fields, legislatures possess the greatest freedom in classification." *Id. at* 41.) Instead, the policy at issue here is Rhode Island's failure to ensure that civics education is adequately provided to all of the state's children. In contrast to *Rodriguez*, where the claim sought to overhaul the balance between state and local school funding, the relief sought in this case would work within the existing statutory and regulatory system that divides power between central and local education officials in Rhode Island. Within that system, the state defendants already have substantial authority, to "exercise general supervision over all elementary and secondary public and nonpublic education in the state" (R.I. Gen. Laws § 16-60-4(a)(3)) and to administer "policies, rules and

regulations . . . with relation to the entire field of elementary and secondary education" (R.I. Gen. Laws § 16-60-6(11)). *See also* Add. 21-22. Plaintiffs here assert that the defendants should exercise this existing supervisory authority to ensure that civics education is a high priority for all Rhode Island's schools. The District Court itself has acknowledged that the defendants have the authority to do that: "the General Assembly does hold oversight authority over education in Rhode Island, as well as the ability to set priorities and implement them." Add. 22, n.15.

Moreover, although *Rodriguez* held local control to be a legitimate state interest for the purposes of rational basis review, the District Court's passing reference to that holding ignores the fact that the nature of "local control" itself has changed significantly since *Rodriguez* was decided. Specifically, the governmental authorities in Rhode Island have adopted numerous statutes, regulations and standards in recent decades in areas other than civics education that have substantially curtailed the authority of the local school officials regarding curricular, instructional, accountability and graduation requirements. *See, e.g.* R.I. Gen. Laws § 16-67-1 *et seq*. (requiring all school districts to adopt a specific "literacy program").[11] S*ee also* Barry Friedman and Sara Solow, *The Federal Right*

[11] The regulations adopted to enforce this act, 200-RICR-20-10-2.2, specifically require local educational authorities (LEAs) to "ensure student proficiency by providing access to a guaranteed and viable curriculum, monitoring each student's progress toward proficiency in literacy and numeracy, and providing sufficient academic, career, and personal/social supports to ensure that all secondary students

to an Adequate Education, 81 Geo. Wash. L. Rev. 92, 121-148 (2013) (discussing the substantially increased control of local educational policy by state and federal laws, regulations and standards in recent decades); Gail L. Sunderman, *Evidence of the Impact of School Reform on Systems Governance and Educational Bureaucracies in the United States*, 34 Rev. of Research in Education 226 (2010) (same).

To meet constitutional requirements, the state's failure to provide adequate civics education must be rationally related to the protection of a legitimate state interest. Given that the state is already choosing to engage in substantial, robust oversight of local education policy in areas such as literacy and numeracy, the marginal extra "local control" that is arguably gained by allowing local districts to fail to promote civics education is negligible – clearly this is not the same "local

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become proficient." 200-RICR-20-10-2.2. LEAs must assess each student in literacy and numeracy and identify each student in need of additional diagnostic assessment and instructional support. *Id.* at § 2.2.1(A). The regulations also require LEAs to "initiate interventions for every student functioning below levels of expected performance" based on these assessments, and to document interventions and supports in each student's individualized learning plan. *Id.* at §§ 2.2.2(A)-(B). No such detailed regulations and accountability requirements exist to ensure that local school districts properly instruct their students in American history or other areas of civics education.

control" interest that was at stake in *Rodriguez*, where the entire structure of the state's education finance system was on the line.[12]

The District Court also held, in a conclusory manner, that defendants' neglect of civics education cannot be considered "arbitrary and irrational." Add. 55. But there is no reasonable justification for the defendants' decisions in recent decades to eliminate requirements for civics courses (App. 35-36, ¶¶54-55); to allow the amount of time devoted to social studies and civics in K-12 schools to decline (App. 38-39, ¶¶64, 66); to fail to monitor the implementation of their own social studies frameworks (App. 37, ¶59); to fail to include any requirements for civic preparation in their teacher preparation requirements (App. 38, 43, ¶¶61, 80); to neglect totally monitoring and accountability regarding civics, history, social studies, and economics (App. 38, ¶62); and to fail to ensure that the plaintiffs are

[12] In addition, the means the state has chosen to supervise local control in Rhode Island, enforcing statutes and regulations regarding literacy and numeracy, but providing no accountability for local practices regarding civics education, is blatantly irrational. As three of the dissenting Justices stated in *Rodriguez*: "Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture." 411 U.S. at 68 (White, J., Brennan, J. and Douglas, J., dissenting).

being properly taught the kind of media skills they need to distinguish accurate from false information on the internet. (App. 43-45, ¶¶ 81-82, 84-85). [13]

Traditionally, state defendants have prevailed in rational relationship cases because they have put forth credible justifications for challenged state policy decisions. However, where, as here, the justifications for a state's policy are arbitrary or irrational, the Supreme Court has applied the rational relationship standard with what commentators call the "rational relationship standard 'with bite,'" *see, e.g.,* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 759-60 (2011) and plaintiffs have prevailed. *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating Alaska's policy of providing a monetary "dividend," stemming from windfall oil revenues to its residents in accordance with the number of years that each individual had lived in the state); *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) (Burger, C.J. concurring) (stating that the denial of civil service benefits to veterans who were not state residents at the time they entered the armed services was irrational).

[13] Moreover, if the interest the state is claiming to promote by this choice is "local control," the state's policy of denying students access to a basic civics education is clearly arbitrary and irrational, since an adequate civics education is a prerequisite for providing local residents the ability to participate effectively in local decision-making, including school district affairs and such basic civic participation as selecting and running for local school committees.

This Court has recognized the significance of this trend. In *Massachusetts v. U.S. Dept. of Health and Human Services,* 682 F. 3d 1, 10 (1st Cir. 2012), the Court stated that: "In a set of equal protection decisions, the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible." The cases this Court cited in this regard were*: U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973)*, City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) and *Romer v. Evans*, 517 U.S. 620 (1996). As was true for the plaintiffs in those cases, the current Plaintiffs, though not constituting a "suspect class," do largely represent historically unpopular or historically disadvantaged groups, as the District Court specifically acknowledged, *see* Add. 52-53, and, as discussed above, the state's justifications for denying them adequate civics education are "thin, unsupportable or impermissible."[14]

In sum, although Plaintiffs respectfully submit that strict scrutiny is the appropriate equal protection standard to apply to the facts of this case, the District

[14] Assuming *arguendo* that the Court does not accept Plaintiffs' arguments regarding the application of *Plyler*'s "heightened" substantial interest standard discussed in the previous subsection, the importance of civics education and its relationship to major constitutional values would, at the least, justify applying the rational relationship test "with bite" to the facts of the present case.

Court's decision to grant the motion to dismiss should also be reversed and the case remanded for a trial in order to allow the parties to present evidence on whether Defendants' actions and inactions in regard to civic preparation would fail to pass muster even under rational relationship analysis.

II. INADEQUATE CIVIC PREPARATION CONSTITUTES A DENIAL OF SUBSTANTIVE DUE PROCESS

A. *Education for Citizenship Has Deep Roots in Our Nation's History and Traditions.*

In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court articulated the standard that should be applied to determine whether plaintiffs have a substantive due process right to an education that prepares them adequately for civic participation:

> [T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion)]; *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut,* 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).[15]

[15] *See also, e.g., Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment) ("[Case law reflects] continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society"); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) ("Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'");

The District Court applied the Glucksberg standard and agreed that education for citizenship is "deeply rooted in this Nation's history and tradition," stating: "Education, and particularly civics education, has been a fundamentally important value throughout our nation's history because it is the foundation of an informed citizenry that can effectively participate in a republican form of government." Add. 26. The Court also appeared to implicitly agree with the *Gary B.* panel that there may be a substantive due process right to an education that provides students a "foundational level of literacy," Add. 44-45, 38, but the Court dismissed Plaintiffs' substantive due process claim here by holding, with virtually no explanation, that to the extent that education or civics education has been considered a right, "it has been located in state laws or constitutions." Add. 47.

There is no basis for the District Court's assumption that education, and especially civics education, has not been a national value throughout American history. On the contrary, education, and, in particular, civics education, was of critical importance to the nation's founders and has been a core American value and tradition ever since the Constitution was adopted. The founders who wrote the Constitution explicitly recognized that the experiment in mass democracy that they

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Obergefell v. Hodges, 135 U.S. 644, 664 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries").

were founding and the Republic they sought to maintain could not survive without an educated citizenry.[16]

Thomas Jefferson believed that education was necessary to combat the ignorance he believed was the foe of self-government,[17] stating "If a nation expects to be ignorant --and free-- in a state of civilization, it expects what never was and never will be."[18] Benjamin Franklin spoke of the importance of educating Americans to be vigilant democratic citizens, stating: "Democratic citizens must cultivate certain personal virtues to be sure, but they must also become aware of the social preconditions of liberty, and learn to recognize the threats to it."[19] "'If

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[16] Of course, when the Constitution was adopted, the states generally limited the right to vote to white men who owned land. The vast expansion of the franchise over time has now entitled individuals of both genders and all races and income levels to vote and to participate fully in civic and political life. The rise of technology, the internet and social media have all increased the level of cognitive skills and knowledge of political and social systems that individuals need to exercise free speech, to vote and to undertake other forms of civic participation.

[17]Dorothea Wolfson, Thomas Jefferson, *The Founders' Almanac: A Practical Guide to the Notable Events, Greatest Leaders & Most Eloquent Words of the American Founding* 77, 89-90 (Matthew Spalding ed., 2002).

[18] Thomas Jefferson, Letter to Colonel Charles Yancey, January 6, 1816, in The Founders' Almanac, *supra,* note 17, at 149.

[19] Steven Forde, Benjamin Franklin, in *The Founders' Almanac*, *supra*, note 17, at 56-57.

the common people are ignorant and vicious,' [Benjamin] Rush concluded, 'a republican nation can never be long free.'"[20]

Most of the original thirteen states established various forms of public schooling and many of them included calls for schooling in their state constitutions, *see, e.g.* Mass. Const., Pt. 2, Ch. 5, § 2 (1780). The founders' commitment to broad-based education was also reflected in Congress' stipulation in the Northwest Ordinance of 1785 that each new town set aside "the lot No. 16 … for the maintenance of public schools within the said township." *Papasan v. Allain,* 478 U.S. 265, 268 (1986).

Public schooling became systemic and universal in most states starting in the 1830s when the combination of rapid industrialization, population growth, mobility, and immigration fueled a broad-based "common school" movement to implement a free public school system dedicated to moral education and good citizenship. Carl Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (1983). Horace Mann, the initiator of the common school movement, reiterated the founders' understanding that mass schooling was necessary for the survival of American democracy. He stated that, "Under a republican government, it seems clear that the minimum of this education can

[20] Alan Taylor, *The Virtue of an Educated Voter*, Am. Scholar, 18-27, (Autumn, 2016)

never be less than such as is sufficient to qualify each citizen for the civic and social duties he will be called to discharge" (quoted in R. Freeman Butts, *The Civic Mission in Education Reform* 104–05 (1989)).

In short, although education was not universal and systemic at the time of the establishment of the Constitution or by 1830, the link between education and the maintenance of a democratic society was firmly established even in those early years. Justice Blackmun acknowledged that education, and particularly, civics education, was already "deeply rooted in the Nation's history and tradition," when he wrote that "Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government." *Bd. of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring; citations omitted).

Defendants argued below that to be "deeply rooted in the Nation's history and tradition" education would have needed to be universally available to all students beginning in 1789 when the Constitution was adopted. To the contrary, in this case, the constitutional right that plaintiffs claim here is not a right to an education for all purposes, but a right, pursuant to the Fourteenth Amendment, to those components of an education that prepare students specifically to exercise

important constitutional rights, and especially "First Amendment freedoms and [the] intelligent utilization of the right to vote." *Rodriguez,* 411 U.S. at 35.

In regard to these essential rights, Plaintiffs maintain that the critical points in time for commencing an historical analysis should be 1865 (when the Thirteenth Amendment was adopted), 1868 (when the Fourteenth Amendment was enacted), 1870 (when the Fifteenth Amendment extending the right to vote to all citizens was added to the U.S. Constitution) and 1925 (when the Supreme Court first held that the First Amendment was applicable to the states by being implicitly incorporated into the due process clause of the Fourteenth Amendment). *See Gitlow v. New York*, 268 U.S. 652, 630 (1925) (holding that free speech guarantees of the First Amendment apply to the states).[21]

In other words, when reviewing the centrality of education for meaningful exercise of constitutional rights to free exercise of speech, to political participation and to vote, the critical fact is that "[t]he constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system"

[21] The Reconstruction amendments make it clear that the rights to speak and to vote in our democracy are inherently linked to education. In the words of Frederick Douglass, "Education . . . *means* emancipation. It means life and liberty. It means the uplifting of the soul of men into the glorious light of truth, the light by which men can only be made free." Frederick Douglass, *The Blessings of Liberty and Education* (1894). The identity between access to education and emancipation from slavery into democratic participation, could not be more deeply rooted in this country's history.

McDonald v. City of Chicago, 561 U.S. 742, 754 (2010). And it is clear that by 1868, education was deeply rooted in the Nation's history and traditions: 36 out of 37 states "imposed a duty in their constitutions on state government to provide a public-school education." Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 108 (2008). Prior to Reconstruction, virtually none of the southern states required universal public education, but Congress conditioned readmission to the Union on inclusion in each state constitution of a provision guaranteeing public education. Derek W. Black, *The Fundamental Right to Education*, 94 Notre Dame L. Rev. 1059, 1090-95 (2019). *See also Williams ex rel. J.E. v. Reeves,* 954 F.3d 729, 732-33 (5th Cir. 2020) (discussing specific requirements of the Mississippi Readmission Act). Both the Reconstruction Congress and the Southern state conventions that adopted these educational provisions in their constitutions understood that the main purpose of these requirements was to ensure that each of these states would be "fully republican in form and, thus, fit to be included in the Union." Black*, supra,* at 1090.[22]

[22] "Voting and education held this unique position because of their centrality to a republican form of government itself. In proposing a robust mandatory system of public education, the South Carolina convention's committee on education, for instance, explained that education 'is the surest guarantee of the . . . preservation of the great principles of republican liberty.' This sentiment was so widely shared

Significantly, by 1875, every state in the union but one had a clause in its constitution calling for universal public education, *Id.* at 1094;[23] in the century following the enactment of the Fourteenth Amendment, 13 new states sought admission to the Union, and every single one included an education mandate in its constitution. *Id.* at 1093. Since 1918, education has become compulsory for all children in all states. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Nw. U. L. Rev. 550, 586 (1992).

The District Court agreed that, at least by 1868, education was deeply rooted in "the nation's history and traditions," since it cited with approval the Calabresi and Agudo article referenced above, as well as the significance of the fact that "In the post-Reconstruction era, Congress conditioned southern states' re-admission to the Union on the inclusion of a right to education in their state constitutions." Add.

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across the state conventions that the decision to constitutionally commit states to the creation of education systems generated almost no debate at all. When the question of the mandate arose, delegates simply affirmed that education was necessary for a republican form of government, and uneducated citizens could not carry out their basic duties to the state." Black, *supra*, at 1091.

[23] Connecticut was the lone holdout, although it did have a constitutional clause calling for the funding of education, and it finally enacted a constitutional amendment requiring public education in 1965. Black, *supra* at 1094. The education clause in Rhode Island's Constitution, Art. XII, dates back to 1842.

28-29. And, as noted above, the District Court specifically stated that "education as a civic ideal is no doubt deeply rooted in our country's history," Add. 47, but then, abruptly concluded, without explanation, that "To the extent that education generally has been recognized as a 'right', whether constitutional or statutory (as opposed to a civic value), it has been located in state laws or constitutions." *Id*.

The District Court was, of course, correct in stating that education has been a constitutional right under virtually every state constitution since 1868, but it drew the wrong inference from this fact. Instead, precedent requires this court to view the uncontested fact that virtually all state constitutions and statutes long recognized civics education as a *state right* as a significant indication that education has been sufficiently well-established in American history and traditions to be considered a *national right.* The only citation the District Court provided to support its holding that education should not be considered a national right at Add. 47 was an opaque reference to a discussion of the benefits of local control of education in *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Of course, schools have always been operated by local school boards throughout American history, but that fact sheds no light on larger question here as to whether students attending those schools have a right under the Fourteenth Amendment to receive an education that prepares them for capable citizenship from those local schools, and

that civics education is important not only for their personal benefit but also for the viability and maintenance of American democracy itself.

The relevant citations on that point should be to the several Supreme Court cases that, in interpreting national rights under the U.S. Constitution, directly rely on patterns of analogous rights written into state constitutions. *See, e.g., Timbs v. Indiana,*139 S. Ct. 682, 688 (2019) (stating that "in 1868 upon ratification of the Fourteenth Amendment . . . the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines [for criminal offenses]"), *Town of Greece v. Galloway*, 572 U.S. 565, 609 (2014) (Thomas, J., concurring) (assessing understandings of the First Amendment establishment clause at the time of the adoption of the Fourteenth Amendment by reviewing language in state constitutions as of 1868), *McDonald v. City of Chicago,* 561 U.S. 742, 777–78 (2010) (plurality opinion) (noting that "[t]he right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified"). *See also*, Friedman and Solow, *supra*, at 133 ("[T]he Supreme Court frequently relies on evolving state practices to identify due process rights"),[24] John Paul Stevens, *The Other Constitutions:*

[24] Friedman and Solow also explain that the Supreme Court "also relies on evolving federal practice to discern commitments so deeply engrained in American consciousness that they must be recognized as de facto constitutional," and describe in detail how over the past half century the involvement of Congress and the U.S. Department of Education in educational issues has deepened, and

How State Judiciaries Can Set an Example for the Federal Judiciary, N.Y. Rev. of Books (Dec. 6, 2018) ("[S]tate judiciaries can set an example for the federal judiciary and ultimately persuade it to endorse rights that they have recognized and that should have prevailed as a matter of federal law for decades.").

In sum, all of the relevant historical evidence, as acknowledged by the District Court itself, conclusively demonstrated that education to prepare students for citizenship has been well-established in the nation's history and traditions, and the fact that part of the proof of that deep-seated recognition is the long-standing universal inclusion of education clauses in the state constitutions supports, rather than refutes, the conclusion that education for citizenship should be considered a substantive due process right under the U.S. Constitution.

B. Education for Citizenship Is Implicit in the Concept of Ordered Liberty.

In addition to being deeply rooted in the Nation's history and traditions, education for capable citizenship is also "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"

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culminated in the bipartisan enactment of the No Child Left Behind Pub. L. 107-110,115 Stat. 1425 **(**2002), which underscored "Congress's intent to deliver what it had come to believe was a core duty of the federal government: ensuring that every child receives an adequate education." Friedman and Solow, *supra,* at 133, 144. *See also*, Every Student Succeeds Act of 2015, 42 U.S.C.S. § 6301 ("The purpose of this subchapter is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps").

Glucksberg, 521 U.S. at 721. In light of the January 6, 2021, desecration of the United States Capitol by an unruly mob, the relationship between civics education and "the concept of ordered liberty" takes on a new and more urgent meaning.

The Supreme Court has specifically recognized "the importance of education in maintaining our basic institutions," and it stated that **"**education has a fundamental role in maintaining the fabric of our society," *Plyler,* 457 U.S. at 221. This point has also been understood by policymakers in all 50 states who have established universal systems of education and enacted compulsory education laws because of their recognition of the criticality of education for maintaining "ordered liberty" in the Nation's democratic institutions.

The District Court understood and acknowledged this point, as it quoted a passage from the *Gary B*. panel decision that stated: "If 'ordered liberty' means anything, it would seem at least as likely to include informed civic participation (such as voting, political speech and association, running for office, jury service and so forth), as marriage." Add. 48, quoting *Gary B*., 957 F.3d at 653. Nevertheless, the District Court dismissed Plaintiffs' claims based on the "ordered liberty" dimension of substantive due process, even as it acknowledged that this claim "does have some appeal." Add. 48.

The only justification the District Court cited for this dismissal was that "while the *Gary B*. opinion admirably articulated the theory, this now vacated

opinion is too thin a reed to support the even more tenuous argument in favor of finding civics education a liberty both fundamental and traditionally protected." *Id*. Plaintiffs agree that since the *Gary B*. panel decision was vacated, it does not provide a viable precedent for this position, but Plaintiffs did not rely on *Gary B*. (and did not even cite the panel decision in their brief below) to support their position on this point. Rather, Plaintiffs rely on *Glucksberg, Plyler, Obergefell v. Hodges,* 576 U.S. 644, 669-70 (2015), and other Supreme Court precedents that have stressed the importance of the concept of "ordered liberty" in the application of the Due Process Clause, as well as the understandings of the drafters of the U.S. Constitution and the Reconstruction Congress (*see* discussion, *supra,* at 41) and of numerous state constitutions (*see* discussion, *infra,* at 62) that effective civics education is critical for "maintaining the fabric of our society." *Plyler*, 457 U.S. at 221.[25] The District Court did not specifically consider any of these precedents and arguments in dismissing Plaintiffs' Substantive Due Process claim.

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[25] Note, *e.g*., in this regard, Art. XII § 1 of the Rhode Island Constitution, which provides:

> Duty of general assembly to promote schools and libraries**.** — The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services. (Emphasis added.)

C. *In Modern Times, Preparing Students for Capable Citizenship Has Become an Urgent Priority.*

The Supreme Court has also made clear that "rights come not from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." *Obergefell*, 576 U.S. at 671-72. The District Court also did not consider this aspect of the substantive due process jurisprudence in its opinion. Certainly, in modern times, the centrality of education in general, and, specifically, its relevance to preparing students for capable citizenship in our increasingly complex and information-rich society, has grown substantially.

Since 1973, parties across the country have brought lawsuits challenging the equity and adequacy of education in at least 45 of the 50 states, Michael A. Rebell, *Flunking Democracy: Schools, Courts and Civic Participation* 51 (2018), and 32 of those states' highest courts have specifically held that preparation for capable citizenship is the prime purpose or one of the prime purposes of education, while the other 18 state highest courts have not explicitly spoken to this issue. *Id.* at 57. Many of these courts have discussed in detail the specific knowledge, skills, experiences and values that students need today for civic participation. *Id.* at 57-61.[26] Yale Law School professor Jack M. Balkin has explained the significance of

[26] Plaintiffs have prevailed in 60 percent of these cases. Moreover, many state courts have recognized that their state constitutional education clauses contain

this broad-based recognition and enforcement of a right to education by the majority of state courts: "When lots of different states from different parts of the country agree that these rights deserve protection, they are more likely to be rights with special constitutional value that all governments are supposed to protect." Jack M. Balkin, *Living Originalism* 210 (2011). *See also Glucksberg*, 521 U.S. at 716-18 (reviewing recent state statutes and positions regarding the legality of assisted suicide for terminally ill patients); *Obergerfell*, 576 U.S. at 662-63 (referring to the significance of the fact that "there has been extensive litigation in state and federal courts," regarding single sex marriage and specifically listing in an appendix the dozens of cases that had discussed the issue).

Over the past 48 years, the federal government has also increasingly recognized the importance of providing adequate educational opportunities to all children for the nation's democratic functioning, economic competitiveness, and ultimately our national security.[27] It has taken substantial actions to improve the

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substantive guarantees to an adequate education, even if in the particular case they held that the plaintiffs had not provided sufficient evidence to establish that the right had been violated. *See*, www.schoolfunding.info for historical overview and current information about the status of the state court litigations. Rhode Island, however, is one of the states in which the state supreme court has held that there is no right to education under the state constitution. *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778 (R.I. 2014).

[27] *See* A Nation at Risk: The Imperative for Educational Reform (1983) (report of a Presidential commission); *The Equity and Excellence Commission, For Each and*

quality of education nationwide by convening a major national Presidential summit in 1989 involving the governors and education commissioners of all 50 states to deal with these challenges,[28] and then enacting a series of major statutory initiatives to try to improve the quality of the nation's schools. See, e.g., the Goals 2000 Education Achievement Act,[29] the No Child Left Behind Act in 2001, and the Every Student Succeeds Act in 2015. And the political events of the past few years have dramatically demonstrated how important it is to "educate our young people on civic values and institutions," Add. 13, as the District Court decision has so powerfully shown.

Indeed, education is of such central importance to the nation's economic competitiveness and to maintaining our democratic institutions that the Supreme Court's dicta in *Brown v. Board of Education* that a state might hypothetically choose to deny all of its children access to public education[30] has become an anachronism. It is inconceivable today that any state would entirely dismantle its

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Every Child-A Strategy for Education Equity and Excellence, (2013) (report of a congressionally-authorized commission).

[28] *See* Patrick J. McGuinn, *No Child Left Behind and the Transformation of Federal Education Policy, 1965-2005* 51, 60 (2006)

[29] Pub. L. No. 103-227, 108 Stat. 125 (1994).

[30] "Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms." *Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954) (emphasis added).

compulsory education system and create and perpetuate not merely the "*subclass* of illiterates within [its] boundaries," that the Court decried in *Plyler,* 457 U.S. at 230, (emphasis added), but an entire younger generation of illiterates and civic incompetents that would result from such an abolition of education.

Judicial recognition of fundamental rights protected by the Fourteenth Amendment is rare—and appropriately so. But the depth of the link between education and democracy throughout American history is unique, and the deep roots of civics education in the Nation's history and tradition, its central importance to the maintenance of ordered liberty in our democratic society, and the increased emphasis on education by both the states and the federal governments in the twentieth and twenty-first centuries make clear that "the 'traditions and conscience' of the country, reflected in our laws and practices over the 150 years from the 1830s through the 1980s, [established] that the constitutional right to an adequate education is evident." Friedman and Solow, *supra*, at 121.[31]

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[31] The defendants argued below that plaintiffs are seeking "an affirmative right" to education, but that the United States Constitution has traditionally been considered a collection of "negative rights." Because the District Court denied Plaintiffs' substantive due process claim, it decided that "This Court need not enter this fray." Add. 48, n.26. Although the federal Constitution does emphasize "negative" rights, the text of the Constitution, and many rights upheld by the Supreme Court, also contain affirmative "positive" rights. As Professor Tribe has noted:

> Even within our largely individualistic and negative constitutional scheme, however, there are exceptional rights that the constitutional text itself expresses in affirmative form. For example, the sixth

III. A RIGHT TO AN EDUCATION ADEQUATE FOR CAPABLE CITIZENSHIP IS NECESSARY TO GUARANTEE A REPUBLICAN FORM OF GOVERNMENT

The District Court set forth an eloquent and compelling argument for why "American democracy is in peril," Add. 5, 6-12. It describes the polarization of our politics and "the erosion and collapse of [democratic] norms across the American landscape" Add. 7, and wonders "if the American experiment can survive it all." Add. 9-10. The decision agrees with a noted scholar that the "first defence" against the degeneration of democracy is a compulsory civics education that provides a "thorough understanding of the institutions and practices of the democratic order and the government it licenses." Add. 12-13. The Court then concludes its extensive exposition concerning the perilous state of our Republic by asserting that:

> This is what it all comes down to: we may choose to survive as a country by respecting our Constitution, the laws and norms of political and civic behavior, and by educating our children on civics,

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> amendment guarantees to 'the accused' the right to 'enjoy . . . a speedy and public trial, by an impartial jury.' . . . These commands obviously entail recognition of positive and not merely negative rights.

Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330, 332 (1985). Tribe also cites Supreme Court rulings that require affirmative government actions to enable citizens to exercise their right to vote and that require assistance of counsel for those who cannot pay for a lawyer themselves in criminal cases or divorce proceedings. *Id.* at 334. He states that "access to basic education may well be of the same character." *Id.*

> the rule of law, and what it really means to be an American, and what America means. Or, we may ignore these things at our and their peril.

Add. 17.

However, despite this deep concern for the survival of American democracy and the strong belief in the importance of civics education for correcting this perilous course, the District Court decision brusquely rejected, in a conclusory footnote, Add. 47, n.25, Plaintiffs' claims that the Defendants' failure to provide them an adequate civics education threatened the state's "Republican Form of Government" that is guaranteed under Article IV, section 4, of the United States Constitution. Given its own justifiable concerns regarding the current threats to the viability and even survival of American democracy, the Court should have given serious consideration to the relevance of the Republican Guarantee clause at this point in our nation's history, even if in the past, the federal courts have shied away from invoking this provision. The events of January 6, 2021 further highlight the importance of this claim.

On its face, the language of Article IV § 4 would seem to prohibit "any tendencies in a state that might deprive its people of republican government," William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 1 (1972). The clause has, however, been largely ignored for the past two centuries, primarily because of the Supreme Court's hoary holding in *Luther v. Borden*, 48 U.S. 1 (1849). There, the Court was asked to validate the legitimacy of the sitting

government in Rhode Island whose *bona fides* was being challenged. The Court held that it was for Congress, and not the federal courts, to determine the legitimacy of a state government. *Id.* at 35.

This decision has sometimes been read to mean that all issues concerning the Constitution's republican guarantee are "political questions" that are not suitable for judicial resolution. As Professor Balkin has explained, however, the case does not actually stand for such a broad proposition. Rather, it holds only that claims involving federal recognition of the legitimacy of a state government are best determined by the political branches. Balkin, *supra*, at 241 (2011).

In *Baker v. Carr*, 369 U.S. 186, 228-29 (1962), the Supreme Court undertook an extensive review of past cases that had held claims raised under the Republican Guarantee Clause to be non-justiciable and concluded that "it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' and no other feature, which could render them nonjusticiable." This holding implies that a Republican Guarantee Clause claim that does not raise "political questions" of the type the Court delineated in *Baker* would be justiciable. Indeed, the Supreme Court later specifically referred to the fact that it had considered the clause to be justiciable in some early cases and looking ahead stated

that "perhaps not all claims under the Guarantee Clause present non justiciable political questions." *New York v. United States*, 505 U.S. 144, 185-86 (1992).[32]

Plaintiffs here claim that the state's failure to provide them with an adequate education to prepare them for capable citizenship presents an appropriate issue for consideration under the Republican Guarantee Clause. Certainly, the question of whether the maintenance of a Republican form of government requires an education system that prepares students for the meaningful exercise of constitutional rights does not raise any political questions. Plaintiffs do not allege that Rhode Island's state government or any state agencies are illegitimate or that any of the structures of state government need to be altered. Rather, the claim is that these duly constituted state agencies need to properly carry out their responsibilities to ensure that the school system the state has established satisfies students' rights to an education that prepares them to function productively as civic participants.

The Republican Guarantee Clause can and should be "regarded as a protector of basic individual rights and should not be treated as being solely about

[32] In *New York v. United States*, the Court also cited a number of books and articles that advocated invoking the clause in various situations. *Id. at* 185. *See, e.g.,* John Hart Ely, *Democracy and Distrust* 118 (1981) ("[I]t seems likely that this unfortunate doctrine-that all Republican Form cases are necessarily cases involving political questions-will wholly pass from the scene one of these days.").

the structure of government." Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable,* 65 U. Colo. L. Rev. 849, 851 (1994). For Chemerinsky, the primary individual rights that the Clause was meant to protect were, in fact, the rights to vote, to exercise free speech and to engage in political participation. *Id*. at 868-69. *See also* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 U. Minn. L. Rev. 513, 559-60 (1962) (Republican Guarantee Clause should be interpreted today to require universal free public education).

The Republican Guarantee Clause should also be seen as a communal right to a stable, and responsible democratic government. *See, e.g*., Wiecek, *supra*, at 302 (The Republican Guarantee Clause "can remove conditions in the structure of state governments, in their functioning or in the social institutions of the people that threaten republican government"); *Plessy v. Ferguson*, 163 U.S. 537, 563-64, (1896) (Harlan, J., dissenting) (racial segregation is "inconsistent with the guarantee given by the Constitution to each State of a republican form of government").

Applying the Republican Guarantee Clause to claims of inadequate education is, in fact, consistent with the intent of the Founders. As discussed in Section II, above, they recognized the centrality of education to the preservation and proper functioning of our democratic society, and that schooling would need to

play a central role in "the deliberate fashioning of a new republican character, rooted in the American soil . . . and committed to the promise of an American culture." Lawrence A. Cremin, *American Education: The National Experience* 1783-1876 (1980).

During the Reconstruction era, Congress made clear that an adequate education system was a *sine qua non* of republican government by requiring that the rebellious southern states could not be readmitted to the union unless and until their state constitutions included a clause guaranteeing all children a free public education:

> [T]he legislative history of the Reconstruction Act reveals that as a condition of readmission to the Union, Congress expected states to provide for education in their constitutions. . . . [B]oth the Reconstruction Act and Article IV of the federal Constitution required states to adopt republican forms of government. . . . Members of Congress believed that education was inherent in a republican form of government. Without public education, the masses would lack the capacity to engage in democratic self-government and would instead be subject to domination by the elite class. Thus, any state constitution failing to provide for public education would have been subject to congressional disapproval.

Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 Stan. L. Rev. 735, 742-43 (2018) (footnotes omitted).

The constitutions that most of the northern and western states adopted in the nineteenth century also directly linked education to the viability of a republican form of government. For example, the constitution of Minnesota, adopted in 1857,

explicitly proclaims: "The *stability of a republican form of government depending mainly upon the intelligence of the people*, it is the duty of the legislature to establish a general and uniform system of public schools." Minn. Const. art. XIII, § 1 (emphasis added). *See also, e.g.,* S. Dak. Const. art. VIII, § 1 (1889) ("*[t]he stability of a republican form of government depending on the morality and intelligence of the people*, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools . . .") (emphasis added); Ark. Const. art. XIV, § 1 (1874) ("*[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government*, the State shall ever maintain a general, suitable and efficient system of free public schools. . . .") (emphasis added).

The broad extension of the franchise beyond the limited domain of white male property owners that prevailed at the time the Constitution was enacted requires that today all citizens must be well prepared to vote intelligently, to understand and analyze critically the glut of information that they receive daily from the media and the Internet, and to participate actively in a range of civic affairs. As Justice Neil Gorsuch aptly put it, "History teaches what happens when societies fail to pass on civic understanding and come to disdain civility. Civilization crumbles." Gorsuch, *supra*, at 20.

The only authority that the District Court cited in its footnote for its dismissal of plaintiffs' Republican Guarantee Clause claim was this Court's decision in *Largess v. Supreme Judicial Court of Massachusetts*, 373 F.3d 219 (1st Cir. 2004), Add. 47, n. 25. *Largess*, however, did not speak to the issues raised by the current complaint, and this Court explicitly stated there that "[w]e do not purport to spell out the entire scope or meaning of the Clause's guarantee of a republican form of government." 373 F.3d at 226. In *Largess*, members of the Massachusetts legislature were asking the federal courts to invalidate the same sex marriage decision of the Massachusetts Supreme Judicial Court. Thus, the case presented the same type of highly charged separation of powers and political question issue that the United States Supreme Court had explicitly held to be inappropriate for federal judicial review in *Luther* and *Baker*. This Court repeatedly denominated the issue in *Largess* as a "separation of powers" matter. *Id*. at 226-28. Furthermore, in *Largess*, this Court specifically rejected the defendants' position that "Guarantee Clause claims are *always* non-justiciable…" and stated that "resolving the issue of justiciability in the Guarantee Clause context may also turn on the resolution of the merits of the underlying claim." *Id.* at 225.

If a lack of adequate civics education is putting American democracy in peril, as the District Court acknowledged, then surely it is appropriate to allow Plaintiffs to proceed to trial in order to present evidence regarding the extent of the

inadequacy of civics education in Rhode Island and how the state's flawed approach to civics education threatens the immediate and long-term survival of our republican form of government. The relationship between adequate civics education and the Republican Guarantee Clause has never been considered by the U.S. Supreme Court, or by any other federal court; it is an important issue of first impression that should be considered on remand with a full evidentiary record and should not have been dismissed offhand at this early stage.

IV. A RIGHT TO AN EDUCATION ADEQUATE FOR CAPABLE CITIZENSHIP SHOULD BE DEEMED A "PRIVILEGE OR IMMUNITY" OF UNITED STATES CITIZENSHIP

The District Court also dismissed Plaintiffs' claims under the Privileges or Immunities Clause in the same footnote in which it swept aside their Republican Guarantee claim, Add. 47, n.25. This part of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. One of the oddities of American legal history is that the Privileges or Immunities Clause, which, according to most scholars, was meant to provide important national rights for the newly-freed slaves and all other citizens (in 1868, "privileges" and "immunities" were both synonyms for rights. Balkin, *supra*, at 210) has been rarely invoked in modern times. *See, e.g.*, Goodwin Liu, *Education, Equality and National Citizenship*, 116 Yale L.J. 330, 349 (2006).

Education was one of the substantive rights the framers of the Privileges or Immunities Clause had in mind. This was substantiated by the fact that a right to education was set forth in the constitutions of thirty-six of the thirty-seven states, accounting for 92 percent of the U.S. population, in existence in 1868 when the Fourteenth Amendment was ratified. Stephen G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Tex. L. Rev. 7, 108 (2008).[33] *See also,* William E. Forbath, *Class, Caste and Equal Citizenship*, 98 Mich. L. Rev. 1, 26 (1999) ("Citizenship demanded suffrage; and the independence of the freedmen's ballots required material foundations. That entailed not only equal rights to contract and own property, but also to public education and training").

Despite the framers' clear intent, however, a century and a half ago, in *Slaughter-House Cases*, 83 U.S. 36 (1873), the Supreme Court interpreted the clause in very narrow terms. The five to four majority decision held that citizenship of the United States included only the rights explicitly set forth in the federal Constitution plus such matters as a citizen's right to be able to "'come to

[33] The Supreme Court relied on findings of this same study in a recent case considering the constitutionality of a state's seizure and forfeiture of a criminal suspect's vehicle. *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (citing finding in Calabresi & Agudo article that constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines at the time of the passage of the Fourteenth amendment.).

the seat of government to assert any claim he may have upon that government, to transact any business he may have with it . . .'" *id.* at 79 (quoting *Crandall v. Nevada*, 73 U.S. 35, 44 (1867)), and "the right to use the navigable waters of the United States, however they may penetrate the territory of the several States." *Slaughter-House Cases*, *id*.

Because of the very narrow interpretation by the Supreme Court majority in *Slaughter-House Cases*, the Privileges or Immunities Clause has rarely been invoked by litigants or applied by the federal courts.[34] Nor has the Supreme Court reconsidered the anachronistic *Slaughter-House* holding in light of the important recent scholarship that has examined the framers' intent and has undermined many of that opinion's legal assumptions over the past 150 years.[35]

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[34] The Court has occasionally invoked the Clause in certain cases dealing with the right to pursue a common calling, as discussed in *McBurney v. Young*, 569 U.S. 221, 226 (2013), the sole case cited by the District Court, Add. 47, n.25, for the fact that the Clause has rarely been invoked in the past, a point that the Plaintiffs are not disputing.

[35] "Virtually no serious modern scholar-left, right, and center-thinks that this is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631, n.178 (2001). It is also worth noting that the Justices who decided the case in 1873 apparently had ante-bellum views regarding slavery and were disinclined to interpret the Fourteenth Amendment in a manner that would enhance the rights of the newly-freed black citizens, whose needs were the immediate concern of the Amendment's drafters. *See* Richard L. Aynes, Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627 (1994).

Two members of the current Supreme Court have, however, specifically called for such a reconsideration. Two decades ago, Justice Clarence Thomas dissented in *Saenz v. Roe,* 526 U.S. 489 (1999), a case in which the Court majority, for the first time in a century, did invoke the Privileges and Immunities Clause, but limited its applicability to interstate travel, the sole national right the Court had articulated in the *Slaughter-House Cases*. Justice Thomas objected to the Court's failure to reconsider the ancient *Slaughter-House* precedent. He wrote that "the Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter–House Cases*. . . . Unlike the majority, I would look to history to ascertain the original meaning of the Clause." *Saenz,* 526 U.S. at 521-22. *See also*, *McDonald v. City of Chicago,* 561 U.S. 742, 813-14 (2010) (Thomas, J. concurring) (discussing at length the history of the enactment and ratification of the Privileges or Immunities Clause).

Recently, Justice Thomas reiterated this position in his concurrence in *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019):

> Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

(Thomas, J., concurring). On this occasion, Justice Gorsuch also wrote a concurrence in which he endorsed Justice Thomas's view. *Id.* (Gorsuch, J.,

concurring). And just last year, Justice Thomas again invoked the Privileges and Immunities Clause in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Thomas, J. concurring) ("I would accept petitioner's invitation to decide this case under the Privileges or Immunities Clause.").

Should Justices Thomas and Gorsuch, or the Supreme Court as a whole, apply the Privileges or Immunities Clause to the issues raised by this case, the right to an education adequate to exercise constitutional rights would surely stand out as one of the pre-eminent "privileges" of national citizenship. The vital role of education for capable citizenship in American life historically and even more extensively in our own times, as discussed in the previous sections, supports this conclusion.

V. DECLARING THAT THERE IS A CONSTITUTIONAL RIGHT TO AN EDUCATION ADEQUATE FOR CAPABLE CITIZENSHIP IS AN APPROPRIATE EXERCISE OF JUDICIAL AUTHORITY

Although the District Court acknowledged that the decision to dismiss the complaint was closer than one might conclude on first pass," Add. 31, the opinion never fully explained why the Court ultimately made this choice. The decision did, however, allude to "the limits of federal courts in solving certain social inequities," Add. 30-31, a theme that was developed at some length in the dissent to the *Gary*

B. panel decision, to which the District Court decision did refer with a degree of approval. Add. 46.[36]

The District Court's reference to the limits of the power of the federal courts to grant the type of remedy that the Plaintiffs seek is puzzling since the Court had earlier brushed aside similar arguments that had been made by the Defendants below by stating that "[T]he Court disagrees with the suggestion that this case requires "micromanaging the public school curricula" . . . and neither does Plaintiffs' prayer for relief "invit[e] . . . endless litigation" while impeding on the Legislature's discretion. . . . " Add. 25.

Historically, federal courts have issued two types of decrees in cases calling for educational reform. Some cases, such as *Brown v. Bd of Educ.,* 349 U.S. 294 (1955) ("Brown II"), have led to fundamental restructuring of institutions, often under close judicial supervision. In other cases, however, the courts have issued declaratory judgments that have clarified constitutional responsibilities and served as catalysts that induced policy makers to make necessary changes without involving the courts in extensive, on-going monitoring and oversight regimes. For example, in *Lau v. Nichols*, 414 U.S. 563, 568 (1974), the Court simply declared

[36] At the same time that it praised the *Gary B*. dissent as being "well-reasoned," the District Court also stated that the majority opinion in *Gary B*. "makes a compelling argument grounded in history, precedent, constitutional interpretation, and public policy." Add. 46.

that non-English-speaking Chinese students were being denied "a meaningful opportunity to participate in the educational program," and left it to the state and the school authorities to decide how this discrimination should be remedied. The parties in *Lau* then entered into a consent agreement that settled the case.

The *Lau* decision also motivated Congress, the federal Office of Civil Rights, and many states to adopt a number of important statutes, regulations and guidelines that led to the development of a range of instructional practices for meeting the needs of English language learners. *See*, *e.g.,* U.S. Department of Health, Education, and Welfare, Office for Civil Rights, "The Lau Remedies," (1975); Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 et seq. (1976).

Other Supreme decisions regarding public education have also resulted in declaratory judgments that eschewed extensive judicial oversight. *See, e.g*., *Goss v. Lopez*, 419 U.S. 565 (1975) (declaratory judgment that students were entitled to basic due process protections before being suspended from school); *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) (declaratory judgment upholding school district's right to restrict "vulgar speech and lewd conduct" in school activities); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (declaring that religiously-oriented organizations were entitled to hold activities on school premises); Justin Driver, *The Schoolhouse Gate: Public Education, The Supreme*

Court and the Battle for the American Mind 18-19 (2018) ("the judiciary's long-standing and deep-seated involvement" with cases dealing with public education complicates the view "that judges should avoid engaging with schools").

This case clearly falls into the category of declaratory judgment, "catalyst" cases that do not involve the courts in overseeing extensive structural reforms. Plaintiffs seek a declaratory judgment that would re-establish civic preparation as a priority responsibility for all schools in Rhode Island. The Plaintiffs are not asking for any specific affirmative injunctive relief from the Court. Thus, the entire substantive request for relief in the Complaint is for the Court to issue a judgment:

> a. Declaring that all students in the United States have a right under the Fourteenth Amendment, the Sixth and Seventh Amendments, and Article IV, Section 4, of the United States Constitution, and under the Jury Selection and Service Act of 1968, to a meaningful educational opportunity adequate to prepare them to be capable voters and jurors, to exercise effectively all of their constitutional rights, including the right to speak freely, to participate effectively and intelligently in a democratic political system and to function productively as civic participants in a democratic society; and
>
> b. Enjoining the defendants, their successors in office, agents and employees from failing to adopt such laws, regulations policies and practices as are necessary to ensure that the individual plaintiffs and the members of the plaintiff class are provided meaningful educational opportunities adequate to prepare them to be capable voters and jurors, to exercise effectively all of their constitutional rights, including the right to exercise effectively their rights to speak freely, to participate effectively and intelligently in a democratic political system and to function productively as civic participants in a democratic society.

See App. 62-63 (prayer for relief).

This formulation leaves entirely to state policymakers and educators the substantive decisions about how the goal of preparing students adequately to be capable citizens would be accomplished. In other words, the specifics of the statutes, regulations, educational policies, instructional methods, and accountability systems that might need to be developed and implemented would be left entirely to the discretion of the state and local officials. As the District Court rightly pointed out, the state Defendants "could, if directed by a federal court, make civics education a priority," Add. 21

The District Court noted that since the time that *Rodriguez* was decided, "the arc of the law" has swung in a more conservative direction. *See* Add. 5; *see also* Add. 33 (referring to the "newly-minted conservative Court" that decided *Rodriguez*.) Civic preparation, however, is a non-controversial, non-partisan issue to which virtually all policymakers and educators pledge allegiance. For example, the Campaign for the Civic Mission of Schools that produced the *Guardian of Democracy* report, which, like the current complaint, calls for a meaningful civics education that includes civic knowledge, civic skills, civic experiences, and civic values, *supra* at 26-34, was headed by former Supreme Court Justice Sandra Day O'Connor and former Congressman Lee Hamilton. Its steering committee included seventy organizations that spanned the ideological spectrum from the American

Enterprise Institute to Rock the Vote, and included the American Bar Association as well as all of the leading education and civic organizations. *See id*. at 45.

The Rhode Island defendants, like officials in many other states, probably agree that civics education is important. The reason they have failed to ensure that the Plaintiffs and most other students in their state actually receive an adequate civics education, however, is the pressure of competing priorities, and the inertia of daily responsibilities that inhibit them from re-considering priorities and revising traditional approaches to civics education to meet 21st century needs. A declaratory judgment from a federal court will galvanize them to do so.

In undertaking this "catalyst" role, federal courts would not be "usurping" the proper powers of the executive and legislative branches; rather they would be undertaking a fully appropriate separation of powers role. The two books that the decision below referenced in its passing discussion of the limitations of litigation and the courts, Add. 4, in fact, both support this conclusion:

> We should look at each branch as one of three institutions that must work together to secure certain goals in our society. Within that framework of checks and balances and separation of powers, the judiciary may be unique in its capacity to address issues and change background norms, assumptions and opportunities for changes that other institutions and actors may be unable to suggest themselves. However, once the Court has acted, and facing the claim of a constitutional duty, these other institutions and actors may be more free to act on civil rights or other issues than they were in the past.

David Schultz and Stephen E. Gottlieb, Legal Functionalism and Social Change: A Reassessment of Rosenberg's *The Hollow Hope* 169, 189, in *Leveraging the Law: Using the Courts to Achieve Social Change* (David Schultz, ed. 1998); *see also*, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 32 (1991) ("Courts, then, may be effective producers of significant social reform when their decisions are announced in a political context of broad elite and popular support for the issue or right in controversy").

Preparing students to function productively as civic participants is quite different from other areas of social policy or even other areas of educational policy in which judges have been asked to intervene. Judges are not inexpert "generalists" in this area, *see* Driver, *supra*, at 18. As Chief Justice John Roberts recently stated, "By virtue of their judicial responsibilities, judges are necessarily engaged in civic education." 2019 Year-End Report on the Federal Judiciary 2 (Dec. 31, 2019).[37] The Chief Justice also emphasized the critical contemporary importance of

[37] Former Justice Sandra Day O'Connor has argued that improving civics education would have a positive impact on the functioning of the judiciary: "Civic Education is the best way to combat the erosion of public confidence in the judiciary and the threats to judge's independence and integrity. Our independent judiciary will only survive if the public understands it and works to preserve it as a meaningful part of our constitutional framework." Justice Sandra Day O'Connor, "The Democratic Purpose of Education: From the Founders to Horace Mann to Today" in *Teaching America: The Case for Civic Education* 3, 8 (David Feith, ed., 2011).

improving civics education: "In our age, when social media can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is ever more vital." *Id*. And he noted that "The judiciary has an important role to play in civic education." *Id*.

The specific "important role" for the judiciary that Chief Justice Roberts spelled out in his Year-End Report was the positive impact that judges can have in utilizing courthouses as forums for civics education. Certainly, he was not addressing the legal questions raised by this case as to whether students have a constitutional right to an adequate civics education. But his remarks do underscore the fact that civics education is an area about which judges have relevant experience and special knowledge. The point that is relevant to this case is that applying that experience and knowledge to prod educators and policymakers to carry out their appropriate responsibilities in preparing students for capable citizenship would advance, rather than impede, the proper functioning of the separation of powers.

CONCLUSION

For all of these reasons, this Court should reverse the decision below, declare that there is a right to an adequate civics education under the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment and under Article IV, section 4, of the U.S. Constitution and remand

the case to the District Court to determine the "quantum of education" necessary for an adequate civics education and whether Defendants have denied the Plaintiffs and members of their class of their rights to such an education.

Dated: January 25, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2021, a copy of this filing was filed electronically and is available for viewing and downloading on the Court's CM/ECF system, and that counsel for Appellees is an ECF Filer who will in the ordinary course receive a Notice of Docket Activity with respect to this brief as provided in Local Rule 25.0(e)(2).

/s/ Samuel D. Zurier

Certificate of Compliance with Fed. R. App. P. 32(a)(5) – 32(a)(7)

I hereby certify that this Brief complies with the word limit of Fed. R. App. P. 32(a)(7), as modified by this Court's Order of December 21, 2020 allowing an oversize brief of up to 19,000 words. At the time of filing, my software indicated a total count of 18,821 words.

I also certify this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman font, 14 points.

/s/ Samuel D. Zurier

ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

A.C., a minor by her parent and guardian ad litem, et al., Plaintiffs, v. GINA RAIMONDO, et al., Defendants.	C.A. No. 18-645 WES

OPINION AND ORDER

WILLIAM E. SMITH, District Judge.

I. Introduction[1]

Several Rhode Island public school students have filed a putative class action in this Court through their guardians or parents, alleging violations of their constitutional rights because the State of Rhode Island (the "State") is not providing them with an adequate civics education. They are residents of Rhode Island enrolled in public schools across the state in grades

[1] Before the Court are two Motions to Dismiss Plaintiffs' Complaint. Ken Wagner in his official capacity as Commissioner of Education of the State of Rhode Island, the Rhode Island State Board of Education, and the Council on Elementary and Secondary Education ("Education Defendants") filed a Motion to Dismiss. ("Ed. Defs.' Mot."), ECF No. 23. Defendants Gina Raimondo, Nicholas A. Mattiello, and Dominick J. Ruggerio ("Government Defendants") also filed a separate Motion to Dismiss ("Gov't Defs.' Mot."), ECF No. 25. Plaintiffs filed an objection to both Motions in one filing ("Pls.' Opp'n"), ECF No. 28, and Defendants filed separate replies, ECF Nos. 34 and 35.

seven through twelve, as well as one preschool-aged student who will eventually be enrolled in public school. See Compl. ¶¶ 13-25. Some Plaintiffs have received English Language Learner ("ELL") services or special education services from the Providence Public Schools. Id. ¶¶ 14, 17, 21.

These students allege that various public officials have failed to provide them and other similarly situated students with "an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social, and political systems sufficiently to make informed choices, and to participate effectively in civic activities." Id. ¶ 4. The students contend that this failure violates their constitutional rights under the Equal Protection, Privileges and Immunities, and Due Process Clauses of the Fourteenth Amendment; the Sixth and Seventh Amendments and the Jury Selection and Service Act; and the Republican Guarantee Clause of Article Four. Id. ¶ 11-12.

They claim that Defendants have "downgraded the teaching of social studies and civics, focusing in recent decades on basic reading and math instruction" and have also "neglected professional development of teachers in civics education." Id. ¶ 35. In addition to the total lack of, or at least inadequate, civics instruction, they also point to "limited opportunities for student involvement in co-curricular and extracurricular

activities", the elimination of "library media specialists", "no opportunities for field trips to the state legislature, city council, or courts", "no or very limited options . . . for student participation in school governance or school affairs, [and] no or very limited school newspapers, school sponsored speech and debate or moot court activities." Id. ¶¶ 84, 88, 90.

By way of remedy, the students ask this Court to "[d]eclar[e] that all students in the United States have a right under the [Constitution] . . . to a meaningful educational opportunity" that will adequately prepare them to be "capable" voters and jurors, as well as to exercise all of their constitutional rights and function as "civic participants in a democratic society[.]" Id. at 45-46. Plaintiffs also ask this Court to "[e]njoin[] the defendants . . . from failing to adopt such laws, regulations[,] policies and practices as are necessary to ensure" that those educational opportunities are provided. Id.

This is an ambitious lawsuit. It asks this Court to declare rights that have not been recognized by the Supreme Court of the United States, or, with a single exception, any other federal court in recent history. There is a long tradition of efforts like these designed to use litigation to rectify wrongs, redirect government priorities, and pursue public policy objectives that, for one reason or another, have not been achieved through legislative or executive action. Indeed, policies involving education have been

the subject of some of the most important litigation in the country's history. The use of litigation for these purposes, however, is certainly not without controversy. See generally Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991); David A. Schultz, Leveraging the Law: Using the Courts to Achieve Social Change (1998).

Earlier this year, a divided panel of the U.S. Court of Appeals for the Sixth Circuit[2] issued a compelling and scholarly opinion, with an equally compelling dissent, finding that there is in fact a fundamental right to a "basic" adequate education, and specifically a "foundational level of literacy", in the U.S. Constitution's substantive due process guarantee. Gary B. v. Whitmer, 957 F.3d 616, 642 (6th Cir. 2020), vacated 958 F.3d 1216 (2020). The Gary B. case concerned a challenge to the adequacy of the education provided in the Detroit public school system. Id. at 620-21. For the reasons explained below, as strong a case as the Gary B. majority panel makes that there is, in fact, a

[2] After the Sixth Circuit panel issued its opinion, the full court voted sua sponte to rehear the case en banc, vacating the panel opinion. See Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020). The court thereafter dismissed the case as moot after receiving word the parties had settled. Appellants' Mot. to Dismiss the Case as Moot, Gary B. v. Whitmer, Nos. 18-1855/1871 (6th Cir. 2020). Thus, the Gary B. panel opinion is effectively a legal nullity. While this Court recognizes this fact, it is nonetheless a vigorous exposition of the competing points of view surrounding the primary issues in this case. For that reason, the decision is discussed throughout this Opinion.

substantive due process right to a basic education from a historical and policy point of view, it is insufficient to deflect Defendants' Motions here.

It is true that the Supreme Court has sent mixed messages about education over the decades; and while the Court's occasionally opaque statements about education may be due to the shifting ideological bent of the Court, the arc of the law in this area is clear. So, there is little doubt that Plaintiffs' claims must be dismissed. But while this lawsuit must be dismissed, it is worth pausing, before explaining why, to acknowledge the importance of Plaintiffs' effort here. This case does not represent a wild-eyed effort to expand the reach of substantive due process, but rather a cry for help from a generation of young people who are destined to inherit a country which we — the generation currently in charge — are not stewarding well. What these young people seem to recognize is that American democracy is in peril. Its survival, and their ability to reap the benefit of living in a country with robust freedoms and rights, a strong economy, and a moral center protected by the rule of law is something that citizens must cherish, protect, and constantly work for. We would do well to pay attention to their plea. At the same time, there is a lot for the student Plaintiffs to learn from this case. The path of Supreme Court holdings that leads inevitably to the conclusion that this case must be dismissed is

a civics lesson all its own, one worth contemplating as well in these fraught times. It is a path not just of the law in the abstract, but, to paraphrase Justice Holmes, of practical experience.[3]

A. Democracy in Peril

In recent years, scholars and commentators have warned of the impending threats to democracy in the United States and around the world. In How Democracies Die, Professors Steven Levitsky and Daniel Ziblatt of Harvard describe democratic regimes across the world that have fallen to authoritarian rule, including Venezuela, Hungary, Peru, Ecuador, Turkey, and more. Steven Levitsky and Daniel Ziblatt, How Democracies Die 2-6 (2018). The authors describe four key indicators of authoritarian behavior: "1. Rejection of (or weak commitment to) democratic rules of the game; 2. Denial of the legitimacy of political opponents; 3. Toleration or encouragement of violence; 4. Readiness to curtail civil liberties of opponents, including media." Id. at 23-24. Levitsky and Ziblatt describe numerous norms of political behavior that keep the American democratic system in place, the so-called "guardrails of democracy". See id. at 97-117. These rules of the game are not written into our Constitution but are the unwritten — and universally understood — norms of behavior that allow us to

[3] See Oliver Wendell Holmes, The Path of the Law, 10 Harvard L.R. 457 (1897).

govern and to be governed. See id. Two of the most crucial, they argue, are mutual toleration (i.e., the idea that rivals can agree to disagree and not let every difference become a fight to the death) and institutional forbearance (i.e., the notion that political leaders will not use every drop of their power under the law to achieve their goals if to do so would violate the spirit of the law). See id. at 102-17. (A prominent historical example of institutional forbearance is the unwillingness of even popular presidents like Washington, Jefferson, Jackson, and Grant to seek a third term in office before the passage of the Twenty-Second Amendment). See id. at 107-09. The authors describe the erosion and collapse of these norms across the American landscape. See id. at 145-203. It is both these hallmarks of democracy and concomitant democratic norms that, in effect, Plaintiffs here suggest are missing from the civics education of our young people — not just education about the mechanisms of our democratic system, but its spirit; about what it means to be an American and even what America means.

We are a society that is polarized as much as any time in our history; we live in echo-chambers of cable television news shows, Twitter feeds, and YouTube videos. And political leaders, driven further and further to their extremes by their increasingly

extremist constituencies, appear more willing to break through the soft guardrails of democracy to achieve their ends.[4]

Even as this Opinion was being prepared, the President tweeted that perhaps the presidential election should be delayed because of perceived "voter fraud". This prompted a swift and strong rebuke from all quarters,[5] including from one prominent conservative legal scholar who called this behavior fascistic, and deserving of immediate impeachment and removal from office. See Steven G. Calabresi, Trump Might Try to Postpone the Election. That's Unconstitutional. (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/trump-delay-election-coronavirus.html. Perhaps such an extreme suggestion by the President momentarily stiffened the guardrails of democracy; but the existential problem of creeping authoritarianism will not

[4] See generally Cass Sunstein, Going to the Extremes: How Like Minds Unite and Divide (2009).

[5] See, e.g., Alexander Bolton, McConnell rebuffs Trump suggestion, says election will be held 'on time', The Hill (July 30, 2020, 1:09 PM), https://thehill.com/homenews/senate/509806-mcconnell-rebuffs-trump-suggestion-says-election-will-be-held-on-time; Amy Gardner et al., Trump encounters broad pushback to his suggestion to delay the Nov. 3 election, The Wash. Post (July 30, 2020, 8:35 PM), https://www.washingtonpost.com/politics/trump-floats-idea-of-delaying-the-november-election-as-he-ramps-up-attacks-on-voting-by-mail/2020/07/30/15fe7ac6-d264-11ea-9038-af089b63ac21_story.html; Zeke Miller & Colleen Long, Trump floats idea of election delay, Sununu says no way, Concord Monitor (July 30, 2020, 3:15 PM), https://www.concordmonitor.com/Trump-floats-November-election-delay-Sununu-says-no-way-35483941.

subside after one Tweet storm. In the aftermath of the killing of George Floyd in Minneapolis, and with a global pandemic rocking the economy, families, and every aspect of our social and cultural lives, the country is riven with dissention and violence. Murder and violent crimes are increasing in large metropolitan areas.[6] And basic public health protocols, like wearing face masks in public places, have become political litmus tests leading to more infection spread and death. And worse yet, forces of anarchy and political desperation cynically stoke these fires of division to pursue or retain power. As we watch all this unfold in real time before our eyes — shootings of protestors and federal security guards; federal troops using extreme tactics; passers-by screaming racial epithets at a man peacefully holding a Black Lives Matter sign[7]; burning and vandalizing of courthouses (just to name a few) — one could reasonably wonder if the American experiment can

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[6] See, e.g., Paul G. Cassell, Explaining the Recent Homicide Spikes in U.S. Cities: The 'Minneapolis Effect' and the Decline in Proactive Policing, Federal Sentencing Reporter (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690473; see also John Eligon, Shaila Dewan and Nicholas Bogel-Burroughs, In the Wake of Covid-19 Lockdowns, a Troubling Surge in Homicides, N.Y. Times (Aug. 11, 2020, updated Aug. 24, 2020), available at https://www.nytimes.com/2020/08/11/us/homicides-crime-kansas-city-coronavirus.html; Michael Barbaro, A Surge in Shootings, The Daily (Aug. 24, 2020).

[7] See Holding a Black Lives Matter Sign in America's Most Racist Town (July 27, 2020), https://www.youtube.com/watch?time_continue=2&v=ltmlvk9GAto&feature=emb_logo.

survive it all. As historian Anne Applebaum, in her new book Twilight of Democracy: The Seductive Lure of Authoritarianism, says,

> It might be a turning point. Maybe my children and their friends — all of our friends, and all of us, really, who want to go on living in a world where we can say what we think with confidence, where rational debate is possible, where knowledge and expertise are respected, where borders can be crossed with ease — represent one of history's many cul-de-sacs. We may be doomed, like glittering, multiethnic Habsburg Vienna or creative, decadent Weimar Berlin, to be swept away into irrelevance. It is possible that we are already living through the twilight of democracy; that our civilization may already be heading for anarchy or tyranny, as the ancient philosophers and America's founders once feared; that a new generation of clercs, the advocates of illiberal or authoritarian ideas, will come to power in the twenty-first century, just as they did in the twentieth; that their visions of the world, born of resentment, anger, or deep, messianic dreams, could triumph. Maybe new information technology will continue to undermine consensus, divide people further, and increase polarization until only violence can determine who rules. Maybe fear of disease will create fear of freedom.

Anne Applebaum, Twilight of Democracy: The Seductive Lure of Authoritarianism 185-86 (2020). Or, Applebaum wonders, perhaps the pandemic will be a tipping point toward global cooperation, recognition of the importance of science and rejection of hucksters, liars, and demagogues. See id. at 186. Either way, it will be a choice.

Across the political spectrum, while sounding the alarm regarding the perilous state of our country in this moment, many see reason to hope. But survival of our democracy, as they point out, will not happen just because we want it to; we will have to work for it, struggling not only against the haunting ghosts of our nation's past, but against new forces of illiberalism, anti-intellectualism, and authoritarianism — from social media trolls, to conspiracy theories like Q-Anon,[8] to Russian interference in our election,[9] and even the siren call of nostalgia for the good old days.[10] Our leaders must, of course, do this by respecting the rules of the game and the rule of law and appointing judges who, to paraphrase Chief Justice John Roberts, are neither Republican nor Democrat, but women and men doing their level best to follow

[8] See Adrienne LaFrance, The Prophecies of Q, The Atlantic (June 2020), https://www.theatlantic.com/magazine/archive/2020/06/qanon-nothing-can-stop-what-is-coming/610567/.

[9] See generally Report of the Select Committee on Intelligence, United States Senate, On Russian Active Measures Campaigns and Interference in the 2016 U.S. Election Volume 5: Counterintelligence Threats and Vulnerabilities, https://www.intelligence.senate.gov/sites/default/files/documents/report_volume5.pdf; see also Catherine Belton, Putin's People: How the KGB Took Back Russia and Then Took On the West (2020); Anne Applebaum, A KGB Man to the End, The Atlantic (Sept. 2020), https://www.theatlantic.com/magazine/archive/2020/09/catherine-belton-putins-people/614212/.

[10] See generally Yuval Levin, The Fractured Republic: Renewing America's Social Contract in the Age of Individualism (2017).

the rule of law; and, to bring it back home to this case — we need to educate our younger generation, the ones who will inherit the mess we are making and ultimately be responsible for the success or failure of American democracy for generations to come.

B. Correcting Course

Larry Diamond, a senior fellow at the conservative Hoover Institution and prolific author and commentator on politics and the future of democracy, notes,

> Political scientists know quite a bit about the conditions that make democracy more likely to thrive. One key condition is wealth, but not just any form of it. . . . [W]hen countries become wealthy through the gradual expansion of private enterprise, small businesses, and the rule of law, a far healthier dynamic takes hold. Income and wealth are more fairly distributed. Levels of education and knowledge steadily rise. Social capital grows alongside financial capital. The landscape becomes thick with professional associations, interest groups, unions, cultural organizations, anticorruption watchdogs, mass media, and universities. Under such conditions, these different groups may clash, even intensely, over policies, but they will respect one another's right to exist. . . . Education is particularly key here. When people are educated at least through high school, it broadens their outlook on life. They become more tolerant of differences and nuances. This inclines them to become more active, informed, and rational citizens, and thus restrains them from being seduced by extremists.

Larry Diamond, Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition, and American Complacency 30-31 (2020).

And, to put an even finer point on it, as A.C. Grayling, Professor of Philosophy at the New College of Humanities in London, argues in Democracy and Its Crisis that compulsory education in civics (along with compulsory voting) is a critical step that could be crucial in reconfiguring the place of politics in the national community. Grayling argues:

> No form of democracy can protect itself either from degenerating into ochlocracy or being hijacked by a hidden oligarchy – of money, big business, the arms industry, partisan groups intent on hijacking the system for their own benefit only – unless the enfranchised are informed and reflective. The first defence against both is a thorough understanding of the institutions and practices of the democratic order and the government it licenses. This means understanding the constitution, the political process, the extent and limits of legislative and executive competence, the responsibilities and role of the enfranchised themselves, and the political opportunities of the populace as a whole.

A.C. Grayling, Democracy and Its Crisis 161 (2017). The call for reform is coming not only from the scholarly community and think tanks. Leaders of the judicial branch too have signaled the need for civic leaders (including federal judges and court staff) to help educate our young people on civic values and institutions. For example, Chief Justice Roberts devoted his most recent annual Year-End Report on the Federal Judiciary to this challenge, saying,

> [W]e have come to take democracy for granted, and civic education has fallen by the wayside. In our age, when social media can instantly spread rumor and false information on a grand

> scale, the public's need to understand our government, and the protections it provides, is ever more vital. The judiciary has an important role to play in civic education, and I am pleased to report that the judges and staff of our federal courts are taking up the challenge. By virtue of their judicial responsibilities, judges are necessarily engaged in civic education. As Federalist No. 78 observes, the courts "have neither FORCE nor WILL, but merely judgment." When judges render their judgments through written opinions that explain their reasoning, they advance public understanding of the law.

2019 Year-End Report on the Federal Judiciary 2 (Dec. 31, 2019), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf.

The Chief Justice went on to discuss how courts and judges do more than just publish opinions; indeed, many courts, including this District, devote thousands of hours to teacher education, online and written course materials, and efforts to bring students into the courthouse to observe proceedings and meet with lawyers, judges, and court personnel. Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit has been another judicial leader in this effort. He has created a learning center in the Thurgood Marshall U.S. Courthouse, convened a conference of judges and court staff to facilitate collaboration on civics education, and developed a program on the subject.[11] And there is more. As

[11] See Justice for All: Courts and the Community, https://justiceforall.ca2.uscourts.gov/ (last visited October 9, 2020).

Chief Justice Roberts points out, from retired Justice Sandra Day O'Connor's iCivics non-profit, to individual judges who volunteer their time as tutors, to the National Constitution Center in Philadelphia replete with interactive exhibits and videos,

> Civic education, like all education, is a continuing enterprise and conversation. Each generation has an obligation to pass on to the next, not only a fully functioning government responsive to the needs of the people, but the tools to understand and improve it.

See 2019 Year-End Report on the Federal Judiciary 3-4.

These efforts point out how concerned members of the judiciary are about the erosion of the civic values and norms described above. As the third branch, with neither the power of the purse nor an army to compel compliance, the judiciary relies entirely upon the public's respect for our democratic institutions and the rule of law. When that respect crumbles, the guardrails fail and democracy dies. To avoid this fate, we must not only teach our young people the mechanics of our civic institutions, but why they matter in the context of American democracy. That is, we must do the hard work of confronting our national history and how it informs who and what we are as a nation.

As historian Jill Lepore writes in her short book, This America: The Case for the Nation (a follow up essay to her much heralded one-volume history of the United States, These Truths), "Nations, to make sense of themselves, need some kind of agreed-

upon past. They can get it from scholars or they can get it from demagogues, but get it they will." Jill Lepore, This America: The Case for the Nation 19-20 (2019). As she recounts, historians in recent times have shied away from writing about the history of the nation with its institutional slavery, Indian wars, segregation, misguided foreign wars and the like for "fear of complicity — complicity with the atrocities of U.S. foreign policy and complicity with regimes of political oppression at home." Id. at 119. When the real historians fade from the front, the demagogues move in. The most popular "history" books in recent years are written by the likes of disgraced cable television commentator Bill O'Reilly whose "Killing" books ("Killing Lincoln", and so on) have sold millions of copies.

Lepore makes the case that historians must return to the study of America as a nation, a task filled with difficulty because our history is so full of contradiction and dysfunction. "But the United States, rebuked by all those left out of its vision of the nation, began battling that contradiction early on, and has never stopped. In the United States, the nation is the battle." Id. at 42. If we are to resist effectively the renewed calls to a dangerous nationalism and authoritarianism, if we are to save the notion of American democracy, then we must embrace a new Americanism, one based in history and values and shared experience:

> This America is a community of belonging and commitment, held together by the strength of our ideas and by the force of our disagreements. A nation founded on universal ideas will never stop fighting over the meaning of its past and the direction of the future. That doesn't mean the past or future is meaningless, or directionless, or that anyone can afford to sit out the fight. The nation, as ever, is the fight.
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> A new Americanism would rest on a history that tells the truth, as best it can, about what W. E. B. DuBois called the hideous mistakes, the frightful wrongs, and the great and beautiful things that nations do. It would foster a spirit of citizenship and environmental stewardship and a set of civic ideals, and a love of one another, marked by benevolence and hope and a dedication to community and honesty. Looking both backward and forward, it would know that right wrongs no man.

Id. at 136-37.

This is what it all comes down to: we may choose to survive as a country by respecting our Constitution, the laws and norms of political and civic behavior, and by educating our children on civics, the rule of law, and what it really means to be an American, and what America means. Or, we may ignore these things at our and their peril. Unfortunately, this Court cannot, for the reasons explained below, deliver or dictate the solution — but, in denying that relief, I hope I can at least call out the need for it.

II. Legal Standard

When, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, "dismissal for want of jurisdiction is based solely on the complaint", courts must "accept the well-pleaded factual averments contained therein and indulg[e] all reasonable inferences in the [plaintiff's] favor." Gordo-Gonzalez v. United States, 873 F.3d 32, 35 (1st Cir. 2017) (internal citation and quotation marks omitted). Similarly, a motion to dismiss under Rule 12(b)(6) requires courts to view the facts contained in the pleadings in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. See Perez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008). To survive the motion, however, a plaintiff must present "factual allegations that 'raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Put another way, "[w]hile detailed factual allegations are not required, 'a formulaic recitation of the elements of a cause of action' is not sufficient." DeLucca v. Nat'l Educ. Ass'n of Rhode Island, 102 F. Supp. 3d 408, 411 (D.R.I. 2015) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). The same is true of a motion brought pursuant to Rule 12(b)(7), see McCaskill v. Gallaudet Univ., 36 F. Supp. 3d 145, 151 (D.D.C.

2014), through which a party may move to dismiss for failure to join an indispensable party.

III. Discussion

A. Jurisdiction[12]: Joinder, Standing, and Nonjusticiable Political Question

Defendants first raise three flaws they say require dismissal: failure to join necessary parties, failure to demonstrate standing, and the presence of a nonjusticiable political question. But, for the most part, none do.

Defendants challenge the Court's jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201-2, saying Plaintiffs have not joined the necessary parties under Rule 19 of the Federal Rules of Civil Procedure. Defendants argue that Plaintiffs' allegations should have been made against "the local school committees and other [Local Educational Agencies ("LEAs")] . . .

[12] In passing, the Education Defendants also ask the Court to decline to exercise its jurisdiction based on two abstention doctrines. See Ed. Defs.' Mot. 42-43. They first argue Burford abstention is appropriate because the Court, in deciding this case, is interfering with a state administrative scheme. See generally Burford v. Sun Oil Co., 319 U.S. 315 (1943); see also Ed. Defs.' Mot. 43. Next they try Pullman abstention, arguing that, in accordance with this doctrine, "state court[] resolution of unclear state law would obviate the need for a federal constitutional ruling", and so this Court should not weigh in. See Pustell v. Lynn Pub. Sch., 18 F.3d 50, 53 (1st Cir. 1994) (citing Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)). But really neither theory translates to this case; as Plaintiffs point out, no state administrative agency procedure is at play and there is no open issue of state law, meaning neither theory applies, and abstention is not warranted. See Pls.' Opp'n 64.

that actually are responsible for the civics and social studies curricula, and for the manner by which the subjects are taught in . . . schools within their jurisdictions." Ed. Defs.' Mot. 11. The Education Defendants[13] also challenge Plaintiffs' Article III standing to bring suit, and particularly whether Plaintiffs sufficiently show redressability. Id. at 15-17; see Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (explaining that the requested relief "must be 'likely', as opposed to merely 'speculative', and provide redress for the alleged injury).

i. Joinder

To begin, Defendants fundamentally mischaracterize the thrust of Plaintiffs' Complaint, which alleges that the failure to properly prepare students to meaningfully participate in a democratic and civil society is a failure at the State level. While Plaintiffs do point to various local issues such as the lack of civics-related field trips or individual school newspapers, their underlying claim is grounded in the State Defendants' failure to make civics education a priority. See Compl. ¶ 35 (alleging that "[p]olicy makers and educators, including the defendants in this case, have downgraded the teaching of social studies and civics"); id. ¶ 112 (describing a "small number of schools in the

[13] While the Government Defendants argue Plaintiffs lack standing only as to Count IV, see Gov't Defs.' Mot. 18-19, the Education Defendants argue Plaintiffs lack standing as to all counts, see Ed. Defs.' Mot. 13-17.

state . . . [where] educators have chosen to make education for capable citizenship a high priority").

Defendants have the authority to implement policy and educational priorities, and could, if directed by a federal court, make civics education a priority. See R.I. Const. Art. 12 § 1 (recognizing "[t]he diffusion of knowledge, as well as virtue among the people" as "essential to the preservation of their rights and liberties," and that it is the State's responsibility to "promote public schools and . . . secure to the people the advantages and opportunities of education"); see also R.I. Gen. Laws §§ 16-97-1, 16-97-1.2 (describing the creation of the State Board of Education as successor to the Board of Regents); R.I. Gen. Laws §§ 16-60-2, 16-60-4 (outlining the "powers and duties" of the Council on Elementary and Secondary Education, including to "formulate broad policy to implement the goals and objectives established and adopted by the board of regents; [and] to adopt standards and require enforcement"). The Rhode Island education authorities also retain control over assessing whether the LEAs are complying with State standards,[14] and thus can ensure that the stated policies

[14] The General Assembly has delegated authority over educational standards to the Council on Elementary and Secondary Education and the Commissioner of Education, and the Council has in turn promulgated the Basic Education Program ("BEP") which assesses whether the LEAs are complying with State education standards. See Pls.' Opp'n 6-14.

are implemented and enforced.[15] See Pls.' Opp'n 12-13 (arguing that Defendants have failed to adequately assess the performance of the LEAs' programs in civics education and social studies, compared to the more rigorous statewide assessment of students' literacy and math skills).[16]

Thus, since Plaintiffs' Complaint is directed at the broad, policy-making authority of the State Defendants, the LEAs are not required parties under Rule 19(a)(1).[17]

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[15] The fact that the General Assembly previously directed the Board of Regents to develop and adopt grade level standards for civics education by August 31, 2007, does not support Defendants' argument. R.I. Gen. Laws § 16-22-2; see also State Defs.' Mot. 25. Rather, it reinforces the fact that the General Assembly does hold oversight authority over education in Rhode Island, as well as the ability to set priorities and implement them.

[16] Defendants argue that it would be difficult to implement a remedy requiring civics education due to lack of measurable standards. This is a red herring. While the Court need not decide the appropriate remedy, it is clear that standards could be identified. For example, a test like the U.S. citizenship test could be used, or the already-existing National Assessment of Educational Progress ("NAEP") Civics Assessment. See U.S. Citizenship and Immigration Services, Civics (History and Government Questions for the Naturalization Test, www.uscis.gov/sites/default/files/document/questions-and-answers/100q.pdf; see also National Assessment of Educational Progress (NAEP Civics Assessment), www.nces.ed.gov/nationsreportcard/civics; Wisconsin Civics Graduation Requirement, https://dpi.wi.gov/social studies/laws/civics.

[17] And, in light of this conclusion, the Court need not address Defendants' claim that, if the "local school committees and other responsible LEAs" are added to the case, Plaintiffs fatally failed to exhaust administrative remedies as to them pursuant to R.I. Gen. Laws § 16-39-1. Ed. Defs.' Mot. 12; see Gov't Defs.' Mot. 25-26 n.7.

ii. Standing

Plaintiffs have sufficiently alleged facts demonstrating standing for most of their claims: they have pleaded specific injuries with concrete allegations of the denial of civics education and the specific harms these denials impose on Plaintiffs, see Compl. ¶¶ 65-67, 80-84, 88, 90-93; and a connection between Defendants' alleged failure to adopt and enforce statutes and regulations requiring civics education and Plaintiffs' claimed injuries, see id. ¶¶ 103-6, 108-16. See Lujan, 504 U.S. at 560-61.

Moreover, Plaintiffs have sufficiently alleged that their requested remedy — a declaration and injunction directing Defendants to honor that right — would "likely" provide redress for their injury, and thus have demonstrated standing to sue. See Lujan, 504 U.S. at 561 (noting that "on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim") (internal citation and quotation marks omitted).

Plaintiffs, however, have not adequately pleaded an injury with respect to Count IV, which alleges violations of the following: the Sixth and Seventh Amendments, and the Jury Selection and Service Act. They allege Defendants violate these

> by failing to prepare plaintiffs to be eligible for and to serve effectively on federal and state juries, and have also

> thereby denied all named plaintiffs and members of the plaintiff class their rights to be tried in all criminal and civil cases by a jury of their peers selected at random from a fair cross section of the community.

Compl. ¶ 131. But Plaintiffs fail to plead a present injury; instead, in defending the claims, Plaintiffs refer only to wholly hypothetical harms. See Pls.' Opp'n 18-19 n.7. This is of course inadequate. See Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc., 958 F.3d 38, 47 (1st Cir. 2020) ("The injury must either have happened or there must be a sufficient threat of it occurring to be actual or imminent.").

iii. Nonjusticiable Political Question

Last, the Education Defendants attempt to characterize this action as a nonjusticiable political question, see Ed. Defs.' Mot. 44-45, but none of the relevant considerations, see Baker v. Carr, 369 U.S. 186, 217 (1962) (listing considerations), weigh in favor of that conclusion. For example, "[Baker's] first decisional factor", which deserves "dominant consideration", weighs "whether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment." Com. of Mass. v. Laird, 451 F.2d 26, 31 (1st Cir. 1971) (quoting Baker, 395 U.S. at 521). Here, the Education Defendants do not persuasively point to any such commitment.

And none of the other considerations support this result either; the Court disagrees with the suggestion that this case requires "micromanaging the public school curricula", see Ed. Defs.' Mot. 45-46 (arguing in support of the second and third Baker considerations), and neither does Plaintiffs' prayer for relief "invit[e] . . . endless litigation" while impeding on the Legislature's discretion, see Ed. Defs.' Mot. at 46-47 (arguing in support of the fourth, fifth, and sixth Baker considerations). This is thus not a nonjusticiable political question, and the Court, having dispelled these threshold arguments, proceeds to consider the heart of this case.

B. Fourteenth Amendment and Civics Education

i. Brief Historical Background

There can be little doubt that education has been regarded as an important civic responsibility from the time of the country's founding. George Washington, in his farewell address, famously penned by Alexander Hamilton, said:

> Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

George Washington's Farewell Address, 1796; see also Ron Chernow, Alexander Hamilton 505-08 (2004); One Last Time on Hamilton

Broadway Cast Recording (Atlantic 2015), https://open.spotify.com/album/1kCHru7uhxBUdzkm4gzRQc.

Education, and particularly civics education, has been a fundamentally important value throughout our nation's history because it is the foundation of an informed citizenry that can effectively participate in a republican form of government. In her book Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights 73-74 (2013), Emily Zackin explains that the Founders shared Plaintiffs' concerns:

> Anxiety about the character of the citizenry originated with the American Revolution itself and the sense that the new republic was engaged in a dangerous experiment, which required an educated citizenry . . . . [P]ublic education in America has long been, and continues to be, understood not only as a means of elevating the individual and preparing him for the responsibilities of citizenship, but also of protecting the republic itself.

This is why, she explains, the education reform movement "often focused on the social value of school systems, rather than (or in addition to) the individual's claim on society." Id. at 74.

But despite the Founders' importuning to future generations regarding the need for an educated citizenry, public schools were not established nationwide until the mid-1800s. The genesis of public schools in America can be traced to mass immigration from Europe in the early to mid-1800s. Irish immigrants, eager to

preserve both their faith and nurture their communities, formed parochial schools in their parishes. And German immigrants, who arrived in greater numbers, but who were less destitute, suffered less prejudice, and tended to move further inland, similarly built German churches and schools. All of this, points out Jill Lepore in These Truths, contributed to the growing movement to establish taxpayer-supported elementary schools known as "common schools." Jill Lepore, These Truths 209 (2018).

Lepore recounts how the common school movement was animated by the desire to assimilate disparate cultures and build civic awareness and moral responsibility:

> Much of the movement's strength came from the fervor of revivalists. They hoped that these new schools would assimilate a diverse population of native-born and foreign-born citizens by introducing them to the traditions of American culture and government, so that boys, once men, would vote wisely, and girls, once women, would raise virtuous children. "It is our duty to make men moral," read one popular teachers' manual, published in 1830. Other advocates hoped that a shared education would diminish partisanship. Whatever the motives of its advocates, the common school movement emerged out of, and nurtured, a strong civic culture.

Id. at 210. During this period of the emergence of common schools, it was the states, often at the heavy-handed encouragement of the federal government, that began to recognize that education was not just an important civic goal, but indeed a right.

Judge Jeffrey Sutton, an appellate judge on the U.S. Court of

Appeals for the Sixth Circuit, in his book 51 Imperfect Solutions: States and the Making of American Constitutional Law, recounts the history of the common school movement this way:

> At the founding, there were no statewide systems of public schools, and if there were schools at all, they were privately run or haphazardly organized at the local level. Sparked by the leadership of Horace Mann and the "Common Schools" movement he launched in Massachusetts, States in the mid-nineteenth century began to authorize their cities and counties to organize schools that would offer free public education. In the words of Mann: "Education then, beyond all other devices of human origin, is a great equalizer of the conditions of men — the balance wheel of the social machinery." To that end, many States amended their constitutions, requiring the legislature (in the words of many a state constitution) to create a "thorough and efficient" system of public schools.

Jeffrey Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 27 (2018) (internal citations omitted).

By 1868, thirty-six out of thirty-seven states "imposed a duty in their constitutions on state government to provide a public-school education." Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 108 (2008). In the post-Reconstruction era, Congress conditioned southern states' re-admission to the Union on the inclusion of a right to

education in their state constitutions.[18] Zakin, supra, at 75.

Both sides in this litigation argue that this history supports their positions: Plaintiffs see it as evidence that by 1868 education was "deeply rooted in the Nation's history and traditions", while Defendants argue that when it comes to education, the "deeply rooted tradition" was one of local control, as it was the state constitutions that included the right to education, not the U.S. Constitution.[19] See Ed. Defs.' Mot. 18; see also Pls.' Opp'n 40-41.

ii. Is Education a Fundamental Right under the U.S. Constitution?[20]

Is education, and more specifically "civics education", a fundamental right under the U.S. Constitution? In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court stated that "[e]ducation, of course is not among the rights afforded explicit protection under our Federal

[18] However, a proposal to require every state's constitution to guarantee the establishment of a free school system as a condition for readmission to the Union was narrowly defeated. Zakin, supra, at 75.

[19] The Court disagrees with the Government Defendants that Plaintiffs pleaded only conclusory allegations necessitating dismissal as to them. See Gov't Defs.' Mot. 27.

[20] Plaintiffs, as they must, assert that civics education is fundamentally grounded in the U.S. Constitution; because this conclusion is imperative for both the equal protection and substantive due process claims, the Court analyzes its foundation in the Constitution before turning to each claim's nuances.

Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. 1, 36 (1973) (emphasis added). Plaintiffs attempt to work around this plain statement by pointing to dicta in the majority's opinion that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the individual's right to speak and to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short . . . ." Pls.' Opp'n 2 (quoting Rodriguez, 411 U.S. at 36-37). Plaintiffs say the Court did not address, and left for another day, the question of whether a subset of basic education — civics education — is guaranteed by the Constitution; they say that they have presented in their Complaint the evidence that was lacking in Rodriguez — "evidence that would allow the Court to consider the 'quantum of education' that might be necessary for students to be prepared for the 'meaningful exercise' of their constitutional rights." Id.

As the discussion below reveals, the Rodriguez decision represents either (or perhaps both) the tip of the spear of a more ideologically conservative Supreme Court majority, largely erected by President Richard Nixon that continues to the present day; or, it was a predictable and sensible ruling grounded in principles of textualism, recognizing both the traditional role of state and local governments in developing educational policy and the limits

of federal courts in solving certain social inequities. In any event, Rodriguez leaves Plaintiffs here without a viable claim, but the call is closer than Defendants suggest, and closer than one might conclude on first pass.

In Brown v. Board of Education, the Supreme Court famously and unanimously held that a system of "separate but equal" education is unconstitutional. 347 U.S. 483, 493, 495 (1954). One might reasonably ask how is it that the Court that said in Brown, "education is perhaps the most important function of state and local governments", and called education a "right which must be made available to all on equal terms", 347 U.S. at 493 (emphasis added), could hold as it did in Rodriguez. The first answer is that it was not the same Court — not by a long shot.

The plaintiffs in Rodriguez brought their action against the San Antonio school district at a time when the legal tide was rising in favor of finding education to be a fundamental right under the U.S. Constitution — in cases brought challenging educational disparities on both substantive due process and equal protection grounds, with the equal protection challenges claiming poverty as a suspect classification. See Adam Cohen, Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America 94-95 (2020). For example, one of the most highly respected judges of the time, Judge Skelly Wright of the D.C. Circuit, in 1967, said that the Equal Protection Clause did not

permit rich and poor students to be "consigned to separate schools." Id. at 94; see also Hobson v. Hansen, 269 F. Supp. 401, 496 (D.D.C. 1967).[21] The California Supreme Court, in Serrano v. Priest, 5 Cal. 3d 584, 589 (1971), found education to be a fundamental right under California's constitution; and a federal district court in Minnesota, in a funding suit very similar to Rodriguez, Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971), found for the plaintiffs, stating:

> It is not the "importance" of an asserted interest which alone renders it specially protected . . . . Education has a unique impact on the mind, personality, and future role of the individual child. It is basic to the functioning of a free society and thereby evokes special judicial solicitude.

Hatfield, 334 F. Supp. at 875.

Thus, it was perhaps not a surprise that the special three-judge district court in Texas hearing Rodriguez, and relying heavily on Brown, handed the Rodriguez plaintiffs a resounding, unanimous victory in December 1971. Rodriguez v. San Antonio Independent Sch. Dist., 337 F. Supp. 280, 281 (W.D. Tx. 1971), j. rev. by San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). The three-judge panel found both that education was a fundamental interest and that distinctions based on wealth were suspect classifications necessitating "strict scrutiny", the

[21] Judge Wright sat by designation in the District Court.

highest level of judicial review, requiring the government to prove that its discrimination served a "compelling state interest." Id. at 282-83.

The district court's Rodriguez decision was widely seen as a harbinger of a post-Brown revolution that could reach far beyond education. The Wall Street Journal ran a story that warned ominously that the decision could launch a "revolution" that could "reshape the face of America" to remake housing,[22] welfare, and health care. Cohen, supra, at 98-99 (citing Frederick Andrews, School Ruling Is Seen Changing the Nature of U.S. Cities, Suburbs, Wall Street Journal (Mar. 13, 1972)). It was in this context that the Supreme Court granted the petition to hear the appeal from the three-judge district court's decision. But the Supreme Court that was to hear that appeal was a very different Court from the one that decided Brown, having evolved from the "Warren Court" to the "Burger Court".[23] It was this newly-minted conservative Court that was poised to deal with the "education revolution" represented by the lower court decisions in Rodriguez and other cases.

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[22] Such a revolution in housing segregation and discrimination was indeed something to be feared in certain quarters, as recounted by Richard Rothstein in The Color of Law: A Forgotten History of How Our Government Segregated America (2017).

[23] For an interesting discussion of how President Nixon managed to appoint four justices and change the direction of the Court for decades, see Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court.

But even as the Supreme Court in Rodriguez seemingly put a stop to the education rights revolution as a matter of federal constitutional law, reform litigation accelerated in the states under state constitutions; an approach explicitly suggested by Justice Marshall in his impassioned dissent. See 411 U.S. at 133 n.100.

While some commentators like Adam Cohen see the Rodriguez decision as an abdication by an ideologically transformed Supreme Court of the civil rights revolution in education sparked by Brown, see Supreme Inequality 100-10, other commentators view it more positively in historical context — as both predictable and correct from a constitutional and policy point of view. Judge Sutton, for example, argues that Rodriguez was a catalyst for state-law-based civil-rights litigation and ultimately education policy innovation:

> Like it or leave it, Rodriguez unleashed school-funding innovation throughout the country that continues to this day. And whether one welcomes the state court lawsuits that followed Rodriguez or thinks them a blight on state separation of powers, the Rodriguez coda puts the lie to the notion that the federal courts have a monopoly on progressive decision making.
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> One can fairly wonder whether the reforms developed by fifty state legislatures and required by twenty-eight state supreme courts over the last forty-five years would have been as far-reaching if the Rodriguez Court had not

> shifted the spotlight on this issue to the States.

Sutton, supra, at 33-37.

University of Chicago Law School professor Justin Driver in his recent book The School-House Gate: Public Education, the Supreme Court, and the Battle for the American Mind, argues that with the passage of time this result in Rodriguez seems less surprising:

> The passage of time, however, renders it less astonishing that Rodriguez lost his claim, and more astonishing that he managed to secure the votes of four Supreme Court justices in the first instance. Although the Court briefly contemplated serious engagement with issues of economic inequality during the 1960s, that moment now appears quite removed from the perspective of modern mainstream liberal constitutionalism. If the issue of school-funding discrepancies were to arrive at the current Supreme Court, it seems entirely plausible that challengers to those measures would find not a single justice who agreed that the Constitution prohibits arrangements resembling those contested in Rodriguez.

Justin Driver, The School-House Gate: Public Education, the Supreme Court, and the Battle for the American Mind 326 (2018). Indeed, Driver recounts that even prominent "legal liberals" such as then-state senator and University of Chicago Law School lecturer Barack Obama and then-professor and now California Supreme Court Justice Goodwin Liu expressed agreement with Rodriguez's fundamental holding that public school financing disputes were the province of state and local governments and/or Congress, but not

the federal courts. Id. at 326-27.

On the one hand, Rodriquez can be viewed through the political prism, as Cohen argues, as reflecting the dramatic shifts that presidential appointments to the Supreme Court can have on the direction of the law. It can also be seen, however, as argued by Judge Sutton and Professor Driver, as a sensible recognition of the limits on the authority of federal courts and a catalyst of innovation and reform in the states. And, in fact, it may be both.

The more salient questions for purposes of the pending motions, however, are: just how far reaching is the Court's holding in Rodriquez? And does it extend to challenges like the ones presently before the Court? It is clear beyond much question, as discussed above, that the Supreme Court in Rodriguez closed the door on most challenges to school financing systems on equal protection and/or substantive due process grounds. But Justice Powell was careful to leave the door open, if only a crack, to a future challenge to an education program that was totally inadequate:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where — as is true in the present case — no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal

> skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Rodriguez, 411 U.S. at 37. This, combined with Justice Marshall's impassioned dissent, left some reason to believe the Court (or a future Court) would be open to the right kind of challenge.

And as subsequent education cases worked their way up, the Court took pains to reemphasize that its holding in Rodriguez did not close the door to every possible claim of a constitutional protection for education. In its 1986 decision in Papasan v. Allain, 478 U.S. 265 (1986), the Court said "[a]s Rodriguez and Plyler indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." Id. at 285. Similarly, in Plyler v. Doe, 457 U.S. 202 (1982), the Court found that denial of public education to undocumented children did not even survive rational basis review. Id. at 223-24. Education advocates focused on this language as an indication that the right case could recapture the promise of Brown: the vague suggestion by Justice Powell that a minimally adequate education might, in fact, be a fundamental right, especially if that education could be tied to individuals' ability to exercise other constitutionally guaranteed rights, such as the right to speech, vote, run for office, and the like. But the question, of course,

was just how bad did an education have to be to trigger a constitutional violation? Education advocates thought they found the answer to that question, and a test case, in Detroit.

In Gary B., a panel of the Sixth Circuit took up the challenge of the reform advocates and found there is a fundamental right to a "basic" education in the U.S. Constitution, and specifically a "foundational level of literacy" necessary for participation in our country's democracy. 957 F.3d at 642, 649 (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)). The panel opinion, now vacated, articulated a theory promoted by Plaintiffs here, that Rodriguez did not foreclose the plaintiffs' claim:

> [W]hile Rodriguez rejected a general right to education on the grounds that no one is guaranteed the most effective or intelligent political participation . . . the right asserted by Plaintiffs in this case is far more fundamental. The degree of education they seek through this lawsuit – namely, access to basic literacy – is necessary for essentially any political participation.

Gary B., 957 F.3d at 652. In Gary B., "[t]he core of Plaintiffs' complaint is that they are forced to 'sit in classrooms where not even the pretense of education takes place, in schools that are functionally incapable of delivering access to literacy.'" Id. at 661.

To emphasize its underlying thesis, the Gary B. majority panel traced the Supreme Court's education decisions and specifically the interrelationship of public education and race discrimination

in America. The key linkage the panel focused on is this: education is key to the ability of citizens to effectively participate in a democratic society; the Court said as much in Brown and has reiterated the point over the years. For example, in Plyler, the Court said:

> Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests. [A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. . . . In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Plyler, 457 U.S. at 221 (citations and quotation marks omitted). And recognition of this undeniable truth in turn means that suppression of education on the basis of race is a means of denying the full franchise of citizenship to that group. Plyler held that

denial to a discrete group, undocumented children, represented an "affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." Id. at 221-22.

But of course the Court's education equity cases, from Brown through Rodriguez, Plyler, and Papason (and others), only reaffirmed the fundamental holding of Brown articulated above in Plyler: the denial of educational opportunities on the basis of race or other discrete classifications is a violation of the promise of equal protection — not a finding that some specific quantum of education is itself a fundamental right guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments. That bridge, the panel wrote, is one the Court has refused to cross, but has never torn down.

The panel then set forth the argument for finding literacy education to be a fundamental right, an argument with contours broadly sketched in a law review article from 2013 by Barry Friedman and Sara Solow, The Federal Right to an Adequate Education, 81 Geo. Wash. L. Rev. 92 (2013). The argument is grounded in the history demonstrating the importance of education in the country's evolution; the connection between literacy and enfranchisement (or disenfranchisement) based on race; and the relationship of literacy and participation in democratic society

to the concept of "ordered liberty". See Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969)).

The Gary B. panel was careful not to sweep too broadly, noting that it is not just the economic and social disadvantage resulting from poor literacy that transforms the denial of education into a due process violation. See 957 F.3d at 652 ("[T]he Constitution does not provide judicial remedies for every social and economic ill." (quoting Maher v. Roe, 432 U.S. 464, 479 (1977)). Rather, the panel said, the U.S. Constitution protects a basic level of minimum education that plausibly provides access to literacy, enabling one to participate in democratic society.

> Effectively every interaction between a citizen and her government depends on literacy. Voting, taxes, the legal system, jury duty — all of these are predicated on the ability to read and comprehend written thoughts. Without literacy, how can someone understand and complete a voter registration form? Comply with a summons sent to them through the mail? Or afford a defendant due process when sitting as a juror in his case, especially if documents are used as evidence against him?
>
> Even things like road signs and other posted rules, backed by the force of law, are inaccessible without a basic level of literacy. In this sense, access to literacy "is required in the performance of our most basic public responsibilities," Brown, 347 U.S. at 493, as our government has placed it "at the center of so many facets of the legal

> and social order," Obergefell, 135 S. Ct. at 2601; see also Steven G. Calabresi & Michael W. Perl, Originalism and Brown v. Board of Education, 2014 Mich. St. L. Rev. 429, 552 ("At a minimum, children must be taught to read so they can read the laws for themselves — a task that many of the Framers would have thought was fundamental.").

Id. at 652-53.

Moreover, the panel noted, our concept of ordered liberty also rests on an aspiration for equality, and it has long been recognized that quality education is the path to achieve it:

> Beyond the fact that a basic minimum education is essential to participation in our political system, there is another reason why access to literacy is implicit in the ordered liberty of our nation. "[T]hat education is a means of achieving equality in our society" is a belief "that has persisted in this country since the days of Thomas Jefferson." Hunnicutt v. Burge, 356 F. Supp. 1227, 1237 (M.D. Ga. 1973) (citing Godfrey Hodgson, Do Schools Make a Difference?, Atlantic, Mar. 1973, at 35). In this sense, education has historically been viewed as a "great equalizer": regardless of the circumstances of a child's birth, a minimum education provides some chance of success according to that child's innate abilities. See, e.g., David Rhode et al., The Decline of the "Great Equalizer," Atlantic, Dec. 19, 2012 (quoting Horace Mann, politician and education reformer, in 1848, and Arne Duncan, Secretary of Education, in 2011); Roslin Growe & Paula S. Montgomery, Educational Equity in America: Is Education the Great Equalizer?, Prof. Educator, Spring 2003, at 23 (discussing Mann and the history of the "great equalizer" concept).

Id. at 654.

The Gary B. opinion is probably the most compelling, modern judicial exposition of the argument that a certain "quantum" of education may in fact be a fundamental right protected by due process guarantees. But it is not the first. Justice Marshall in his impassioned dissent in Rodriguez elegantly articulated the indisputable relationship between education and the exercise of political rights and responsibilities (it deserves to be quoted at length):

> Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), speaks of the right of students "to inquire, to study and to evaluate, to gain new maturity and understanding . . ." Thus, we have not casually described the classroom as the "'marketplace of ideas.'" Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable."
>
> Of particular importance is the relationship between education and the political process. "Americans regard the public schools as a most vital civic institution for the preservation

> of a democratic system of government." School District of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation. A system of "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." Williams v. Rhodes, 393 U.S. 23, 32 (1968).

Rodriguez, 411 U.S. at 112-13 (Marshall, J., dissenting). While Justice Marshall was writing about the fundamental role of education in the equal protection context, his plea is just as compelling with respect to the due process analysis. Thus, the Gary B. panel stood on the broad shoulders of Justice Marshall in reaching its conclusion.

It is difficult to disagree with the premise that education, and particularly literacy, is critical to participation in democratic society, the exercise of First Amendment rights, as well as to the voting franchise enshrined in Article I, Section 2 and the Seventeenth Amendment of the Constitution. The Gary B. judges found it so compelling as to invoke the protections of the due process guarantee. And Plaintiffs here hope to take that argument the next mile by requiring a minimum civics education in the public schools.

But there is a difference. The examples cited by the court in Gary B. to illustrate why literacy is imperative for citizen participation in a functioning democracy — voting, taxes, jury duty, even reading road signs — are all indeed "inaccessible without a basic level of literacy" — but they are not wholly inaccessible without civics education. See 957 F.3d at 652-53; see also id. at 649 (recognizing "every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political process"). So, while it is clearly desirable — and even essential, as I argue in the Introduction — for citizens to have a deeper grasp of our civic responsibilities and governing mechanisms and American history, this is not something the U.S. Constitution contemplates or mandates.

The Rodriguez Court specifically addressed this point:

> The Court has long afforded zealous protection against unjustifiable government interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.

411 U.S. at 35-36.[24]

There is much to admire in the Gary B. panel opinion. It makes a compelling argument grounded in history, precedent, constitutional interpretation, and public policy. It has the spirit of Justice Marshall's Rodriguez dissent in its sail. And while its fate, most likely, if it had been heard en banc or eventually by the Supreme Court, was to be overturned for the reasons explained above and in the equally well-reasoned dissenting opinion, it stands as a significant articulation of the importance of education to our democracy. And given where we are today in our society, as discussed in the Introduction above, it is a view worthy of serious consideration. But whatever the merits of the Gary B. panel opinion, the question before this Court is, assuming it was correct, can the holding be stretched to include a right to civics education? The answer to that question is, regrettably, no.

iii. Substantive Due Process

With this unavoidable conclusion, Plaintiffs' case crumbles. Substantive due process "specially protects those fundamental

[24] Similarly, the Rhode Island Supreme Court has rejected two challenges to the State's method of financing public education, finding that it does not violate the Education Clause of the Rhode Island Constitution, nor the Equal Protection and Due Process Clauses of the U.S. Constitution. See City of Pawtucket v. Sundlun, 662 A.2d 40, 42-43 (R.I. 1995); see also Woonsocket v. Chafee, 89 A.3d 778, 790-93 (R.I. 2014).

rights and liberties which are, objectively, deeply rooted in [our] Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]" Glucksberg, 521 U.S. at 720-21 (internal citations and quotation marks omitted). Precedent clearly dictates that, while education as a civic ideal is no doubt deeply rooted in our country's history, there is no right to civics education in the Constitution.[25] Id. at 721 (directing that fundamental rights should be "careful[ly] descri[bed]"). To the extent that education generally has been recognized as a "right", whether constitutional or statutory (as opposed to a civic value), it has been located in state laws or constitutions. See Miliken v. Bradley, 418 U.S. 717, 741-42 (1974).

Neither is education for capable citizenship "implicit in the

[25] For this same reason, Plaintiffs' Privileges and Immunities claim comes up short. See McBurney v. Young, 569 U.S. 221, 226 (2013) ("[W]e have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are fundamental.") (internal citation and quotation marks omitted). Likewise, their claim under the Republican Guarantee Clause of Article Four also lacks merit, see Largess v. Supreme Judicial Court for State of Mass., 373 F.3d 219, 227 (1st Cir. 2004) ("If there is any role for federal courts under the Clause, it is restricted to real threats to a republican form of government."); its cryptic nature is not an invitation to invoke it arbitrarily. Id. at 226 ("John Adams himself, twenty years after ratification of the Constitution, confessed that he never understood what the Guarantee Clause meant and that he believ[ed] no man ever did or ever will.") (internal citation and quotation marks omitted) (alteration in original).

concept of ordered liberty",[26] Glucksberg, 521 U.S. at 720-21, though this conclusion does have some appeal. The Gary B. panel's determination that there is a fundamental right to literacy education was based on its view that literacy is essential to participation in our political system, and has historically been viewed as a "great equalizer" among rich and poor and between races. 957 F.3d at 654. It is, as a result, "implicit in the concept of ordered liberty". Id. Like the Supreme Court's finding regarding marriage in Obergefell v. Hodges, 576 U.S. 644, 681 (2015), also a right not mentioned in the Constitution, the panel in Gary B. viewed literacy as critical to the maintenance of a vibrant and value-centered civic society.

If "ordered liberty" means anything, it would seem at least as likely to include informed civic participation (such as voting, political speech and association, running for office, jury service and so forth), as marriage. See Gary B., 957 F.3d at 653. But, in the end, while the Gary B. opinion admirably articulated the theory, this now vacated opinion is too thin a reed to support the even more tenuous argument in favor of finding civics education a liberty both fundamental and traditionally protected. Defendants'

[26] Like the judges in the vacated Gary B. panel opinion and dissent, see 957 F.3d at 656-59, 662-68, the parties in this case spend some time debating the issue of whether substantive due process can ever recognize an affirmative right, and whether the right Plaintiffs ask for here is positive or negative in nature. This Court need not enter this fray.

conduct thus solicits only rational basis review which, as explained below, it survives.

iv. Equal Protection

Left now is Plaintiffs' equal protection claim. "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." Ctr. for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011) (internal quotation marks and citation omitted).

To demonstrate disparate treatment — "the threshold element", id. (internal quotation marks and citation omitted), of this claim — Plaintiffs allege only that low-income students are treated disparately; specifically, Plaintiffs say North Kingstown (a relatively affluent Rhode Island school district) students are being prepared for civic participation through the district's course offerings and other attendant opportunities. See Compl. ¶¶ 112-15. And, they say, discovery may reveal other affluent districts with sufficient civic-geared studies, while they are not receiving the same. See Pls.' Opp'n 34. Defendants respond that Plaintiffs doubly failed to properly plead disparate treatment and to identify an appropriate class. See Harron v. Town of Franklin, 660 F.3d 531, 537 (1st Cir. 2011) (recognizing that, in alleging

an equal protection claim, a plaintiff must "identify . . . putative comparators"); see also Gov't Defs.' Mot. 20. The Court is satisfied that Plaintiffs have alleged facts highlighting relevant comparator schools. See Compl. ¶¶ 112-15 (in the context of civics education, comparing Plaintiffs' "substantially deficient" schools with "a small number of schools in the state that currently are providing their students an education sufficient to prepare them for capable citizenship in accordance with the requirements of the Constitution of the United States").

But the claim fails anyway. First, the Supreme Court has recognized the "synergy" between the Due Process Clause and the Equal Protection Clause: "[e]ach concept — liberty and equal protection — leads to a stronger understanding of the other." Obergefell, 576 U.S. at 673. True here too, and, in this case, they fail together. See Medeiros v. Vincent, 431 F.3d 25, 32 (1st Cir. 2005), abrogated on other grounds (noting that where the plaintiff "alleged an infringement of a fundamental right, both claims were subject to 'strict scrutiny' analysis" but "[o]therwise, both claims were governed by the 'rational basis' standard of review"). Absent interference with a "fundamental right" or discrimination against a "suspect class", see Plyler v. Doe, 457 U.S. 202, 216-17 (1982), Defendants' conduct need only survive rational basis review, which it easily does. See id. at 216. ("In applying the Equal Protection Clause to most forms of

state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.").

Seeking to avoid this end, Plaintiffs again argue that some "quantum of education" necessary to prepare students to "effectively exercise their constitutional rights" is a "fundamental interest" and cite to Plyler v. Doe[27] where the Supreme Court applied intermediate scrutiny.[28] But, as discussed above, Plyler's holding was based on the total deprivation of education to a discreet subset of children (undocumented children); not the deprivation of a subset of education to all, or most, children. 457 U.S. at 221-22. Plyler may have presented the situation the Rodriguez Court anticipated — the complete denial of education that rose to the level of an equal protection violation — but the allegations Plaintiffs bring here do not. What's more, cases

[27] Plaintiffs also cite Brown v. Board of Education, 347 U.S. at 493, for the role of education as "the very foundation of good citizenship." Pls.' Opp'n 2-3. While Brown described education as "perhaps the most important function of state and local governments", at its heart, Brown was about racial segregation and discrimination in public education. It was not about the total denial of education or a subset of education, but rather the axiom that "where the state has undertaken to provide [education]", it must be "made available to all on equal terms." Brown, 347 U.S. at 493.

[28] The Court did not use the word "intermediate" but stated that "the State must demonstrate that the classification is reasonably adapted to the purposes for which the state desires to use it." Plyler, 457 U.S. at 226 (internal citation and emphasis omitted).

following Plyler have declined to extend its holding beyond its "unique circumstances." See, e.g., Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs, 962 F.2d 136, 142 (2d Cir. 1992) (quoting Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459 (1988)). Civics education, in the end, is not a "fundamental interest", so Defendants' conduct does not deserve heightened scrutiny.

Second, Plaintiffs have failed to adequately define a "suspect class" that would beg strict scrutiny (or anything approaching it). Plaintiffs pleaded at least four discrete groups of students, including (a) African-American, Latino, and students from low-income families, Compl. ¶¶ 76, 92-93; (b) English language learners ("ELLs"), id. ¶¶ 110-11; (c) students with special needs, id. ¶ 67; and (d) students in private schools, id. ¶ 74. Missing, however, is any allegation of unequal treatment as to these groups, a fatal shortcoming Plaintiffs admit. See Pls.' Opp'n 35 n.20. The closest Plaintiffs get to a suspect classification is sketching one that evokes wealth and poverty. Cf. Pls.' Obj. 13 (addressing joinder, and explaining that wealthier school districts' funds may enable them to meet State literacy and mathematics mandates and also develop a civics program, but less affluent districts lack that dual capability). But Plaintiffs seem in their papers to disclaim a wealth-based classification, saying "[a]lthough the lack of proper civic preparation in Rhode Island does have a greater detrimental impact on many poor and minority students

. . . , [P]laintiffs in this case have not defined the [P]laintiff class in terms of race, income or ELL status." Pls.' Opp'n 35 n.20. In any event, as discussed at length above, the Supreme Court has declined to recognize poverty as a suspect class.

Plaintiffs' argument is the same as one that the Supreme Court has rejected multiple times — that the system of funding public education through local property taxes violates the Equal Protection Clause. See Papasan, 478 U.S. at 288 ("The rationality of the disparity in Rodriguez . . . rested on the fact that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding[.]"); see also Kadrmas, 487 U.S. at 458 ("We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny.").

Without grounds for scrutiny with more bite, Plaintiffs are left to carry the "heavy burden" of demonstrating that the State's actions (i.e., establishing a regulatory framework for guidance of school committees, local administrators, and teachers to teach civics) have no rational relationship to a legitimate government objective, and therefore are arbitrary and irrational. See Rodriguez, 411 U.S. at 40. "Equal protection claims tested by this rational basis standard, famously called by Justice Holmes the 'last resort of constitutional argument[]', rarely succeed."

Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 9 (1st Cir. 2012) (internal citation omitted).

To start, if there is no constitutional right to any civics education, then it is unlikely (if not impossible) that Rhode Island's decision not to provide "adequate" civics education is irrational or arbitrary. See Kadrmas, 487 U.S. at 461-62 (finding no constitutional violation in charging for school bus service, where the Constitution does not require that such bus service be provided at all); see also Spath v. Nat'l Collegiate Athletic Assoc., 728 F.2d 25, 28 (1st Cir. 1984) (finding "no fundamental right to education", and therefore "[no] fundamental right to play intercollegiate hockey"). But Rhode Island also has a legitimate interest in maintaining local control over its education system, as the State's control allows it to ensure an education for each child and delegate responsibility to local authorities over that education's implementation; to that end, several provisions of the Rhode Island General Laws show the importance legislators placed on vesting control and management of education with local school committees. See, e.g., R.I. Gen. Laws § 16-2-9(a)(1)-(26); § 16-2-6; § 16-22-2; Rodriguez, 411 U.S. at 49 ("The [state] system of school finance is responsive . . . . While assuring a basis education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level."). The Rodriguez Court stated that

"[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society . . . [l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." 411 U.S. at 49 (quoting the majority and dissenting opinions of Wright v. Council of the City of Emporia, 407 U.S. 451, 458, 478 (1972)). As pleaded, Plaintiffs cannot show Defendants' actions are arbitrary or irrational, and therefore they readily satisfy rational basis review.

IV. Conclusion

Plaintiffs should be commended for bringing this case. It highlights a deep flaw in our national education priorities and policies. The Court cannot provide the remedy Plaintiffs seek, but in denying that relief, the Court adds its voice to Plaintiffs' in calling attention to their plea. Hopefully, others who have the power to address this need will respond appropriately. For the reasons discussed above, this Court GRANTS both Defendants' Motions to Dismiss Plaintiffs' Complaint, ECF Nos. 23 and 25.

IT IS SO ORDERED.

William E. Smith
District Judge
Date: October 13, 2020