UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

A.C., a minor, by her parent and guardian ad litem, Torrence S. Waithe, *et al*., *Plaintiffs*,	:	
v.	:	C.A. No. 1:18-cv-645 S
GINA RAIMONDO, in her official capacity as Governor, *et al*., *Defendants*.	:	

THE STATE EDUCATION DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR JOINT MOTION TO DISMISSS

Defendants, KEN WAGNER, in his official capacity as Commissioner of Education of the State of Rhode Island (the "Commissioner'), the RHODE ISLAND STATE BOARD OF EDUCATION (the "BOE"), and the COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION (the "Council" and collectively, the "Education Defendants"), submit the following in support of their joint motion to dismiss plaintiffs' complaint (the "Plaintiffs" and the "Complaint," respectively) for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) and/or for Plaintiffs' failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In this putative class action, Plaintiffs allege that the Education Defendants have "downgraded the teaching of social studies and civics" and thereby violated their rights under the Equal Protection, Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment, the Sixth and Seventh Amendments, as well as the Guarantee Clause of Art. 4, § 4 of the United States Constitution. *See* Complaint, ¶¶ 35-38 at 11-12. The putative class consists

of the "tens of thousands" of elementary and secondary school students in the State of Rhode Island who allegedly are not being provided proper instruction in civics and social studies. *See id*., ¶¶ 113-116 at 38-39.

According to Plaintiffs, Rhode Island must educate its children according to their own particular conception of educational adequacy, but then, not surprisingly, fail to explain precisely what they mean or to define its essential terms beyond stating the hortatory goal of preparing students:

> 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.

Complaint, ¶ 4 at 3-4.

Yet, the United States Supreme Court has emphasized not only that there is no fundamental right to education under the United States Constitution, *see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-44 (1973), but also that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). And the Court has made clear that local control means not only control over the amount of money allocated to public education, but also "the opportunity it offers to participate in the decision-making process that determines how those local tax dollars will be spent." *Rodriguez*, 411 U.S. at 49. And Rhode Island's Supreme Court has twice held that controversial public policy choices concerning what is taught in the public schools are within the plenary authority of the General Assembly. *See Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995) and *Woonsocket Sch. Comm. v. Chafee*, 89 A.2d 778, 791 (R.I. 2014).

Thus, if this Court were to accept Plaintiffs' invitation to function as a one-man board of education and unilaterally define educational adequacy according to their vague specifications, it not only would be directly contrary to binding legal precedent, it also would fly in the face of the decisions of Rhode Island's highest court, effectively unseat the Rhode Island Legislature and divest the State of its sovereign right to determine what is taught in its schools.

The Complaint should be dismissed as a matter of law under Rules 12(b)(1) and (b)(6). For one thing, Plaintiffs have simply sued the wrong parties. As will be discussed, Plaintiffs' description of the statutory responsibilities of the Education Defendants is overly broad. *See* Complaint, ¶¶ 28-30 at 9-10. In fact, it is the local school committees and other local educational agencies ("LEAs"),[1] not the Education Defendants, which has been vested by the Rhode Island General Assembly with the "entire care, control, and management of all public school interests of the several cities and towns." R.I. Gen. Laws § 16-2-9(a). For their part, the Education Defendants have fulfilled their statutory roles by establishing an ample regulatory framework, as well as necessary guidance, to help ensure that civics and social studies are an important part of the curricula in the State's elementary and secondary schools.

What Plaintiffs actually are claiming here is that certain LEAs – which they have not even specifically identified – have failed to properly implement relevant state statutory, regulatory and other guidance. And yet, as noted, none of these unnamed LEAs have been joined as parties, which, standing alone, deprives this Court of jurisdiction under the federal

[1] LEAs, which are not limited to school committees, are defined in the state's Basic Education Program Regulations (the "BEP") as:

> a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

Id., 200-RICR-20-10-1.5(R).

declaratory judgment statute. Moreover, even if these unnamed yet necessary parties were to be added, Plaintiffs' claims would be cognizable under state law rather than the federal Constitution, and therefore would be subject to the doctrine of administrative exhaustion.

Plaintiffs apparently share the illusion that school administrators and teachers in the State are in need of yet another lofty judicial statement of educational adequacy, an illusion that has been persistent in some circles[2] despite a legal landscape which, as noted by the Supreme Court of Nebraska, "is littered with courts that have been bogged down in the legal quicksand of continuous litigation." *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531, 731 N.W.2d 164, 183 (2007). This Court should not "wade into that Stygian swamp." *Id*.

The legal argument supporting the Education Defendants' Joint Motion to Dismiss will be addressed in Section III, *infra*, in the following order:

A. THE STANDARD OF REVIEW
(Discussed *infra* at 8-9).

B. THIS COURT LACKS SUBJECT MATTER JURISDICTION AND PLAINTIFFS LACK STANDING
(Discussed *infra* at 9-17).

1. Plaintiffs have misconstrued the Education Defendants' statutory duties, failed to name indispensable parties, and have in reality alleged state law claims that are subject to the doctrine of administrative exhaustion.
(Discussed *infra* at 11-13).

2. Plaintiffs fail to establish the essential elements of standing.
(Discussed *infra* at 13-17).

[2] It is not that often that plaintiffs' lawyers publicize their theory of the case well in advance of any filing, but that is the case here. *See, e.g.,* Michael A. Rebell, *Flunking Democracy: Schools Courts and Civic Participation* (hereinafter, "Flunking") (University of Chicago Press, 2018), ch. 7 at 151-189 and David V. Abbott and Stephen M. Robinson, *School Finance Litigation: The Viability of Bringing Suit in the Rhode Island Federal District Court*, 5 Roger Williams U. L. Rev. 441 (2000).

II. FACTS

The essential allegations of the Complaint are that:

> the state defendants have failed to provide the named plaintiffs and tens of thousands of other students in the state of Rhode Island 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.

Complaint, ¶ 4 at 3-4. And that this alleged failure:

> violates their constitutional rights under the Equal Protection [Count One], Due Process [Count Two] and Privileges and Immunities [Count Three] Clauses of the

> Fourteenth Amendment,[3] the Sixth and Seventh Amendments [Count Four],[4] the guarantee that they will live in a state with a republican form of government under Article Four, Section Four of the United States Constitution [Count Five],[5] as well as 42 U.S.C. § 1983.[6]

Id., ¶ 11 at 6. In support, Plaintiffs have made the general factual allegations that the Defendants have:

> (1) "downgraded the teaching of social studies and civics, focusing in recent decades on basic reading and math instruction and on the economic value of education to individual students." *Id*., ¶ 35 at 11;
>
> (2) "substantially neglected professional development of teachers in civics education." *Id*.;
>
> (3) "do not discuss social problems and controversial ideas [in social studies classes]." *Id*., ¶ 37 at 12;

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[3] Section 1 of the Fourteenth Amendment to the Constitution provides that:

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

[4] The Sixth Amendment provides that:

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., Amdt. 6. And the Seventh Amendment states that:

> [i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Id., Amdt. 7.

[5] The Guarantee Clause provides that:

> [t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

[6] Section 1983 provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

(4) provide inadequate "opportunities for students to participate in extracurricular activities, service learning, and actual and simulated political experiences" which "tend to be cut back or eliminated in times of fiscal constraint." *Id*.; and

(5) "failed to help students apply critical thinking to their use of new media." *Id*., ¶ 38 at 12.

By way of a remedy, Plaintiffs request that the Court enter an order:

(1) [d]eclaring that all students in the United States have a right under the Fourteenth Amendment, the Sixth and Seventh Amendments, and Article 4, Section 4 of the United State 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

(2) [e]njoining 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[; and]

(3) [a]warding plaintiffs their costs, disbursements, and reasonable attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 and any other applicable provisions of law.

Id. at 45-46.

III. ARGUMENT

A. THE STANDARD OF REVIEW

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Although a complaint "does not need

detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact). *Twombly*, 550 U.S. at 557 (citations omitted). However, the plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Id*. at 570.

In addition to the factual allegations in the complaint, a court may consider "matters of public record and facts susceptible to judicial notice." *United States ex rel. Winkelman v. CVS Caremark Corp*., 827 F.3d 201, 208 (1st Cir. 2016); *see also Giragosian v. Ryan*, 547 F.3d 59, 66 (1st Cir. 2008), quoting *In re Colonial Mortgage Bankers Corp*., 324 F.3d 12, 20 (1st Cir.2003) ("[w]hen ruling on a Rule 12(b)(6) motion to dismiss . . . [a] district court may also consider 'documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice.'").

B. THIS COURT LACKS SUBJECT MATTER JURISDICTION AND PLAINTIFFS LACK STANDING

As to federal question jurisdiction, the First Circuit has noted that:

> [g]enerally, a claim arises under federal law within the meaning of section 1331 if a federal cause of action emerges from the face of a well-pleaded complaint. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, [164], 118

> S.Ct. 523, 529 (1997); *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936); *BIW Deceived*, 132 F.3d at 831. With only a few exceptions—none of which pertain here—the well-pleaded complaint rule restricts the exercise of federal question jurisdiction to instances in which a federal claim is made manifest within the four corners of the plaintiffs' complaint.

Viqueira v. First Bank, 140 F.3d 12, 17 (1st Cir. 1998) (citations omitted). And the Circuit has emphasized that "[b]ecause federal courts are courts of limited jurisdiction, federal jurisdiction is never presumed. Instead, the proponent" – here, the Plaintiffs – "must carry the burden of demonstrating the existence of federal jurisdiction." *Id*. at 16, citing *Aversa v. United States,* 99 F.3d 1200, 1209 (1st Cir.1996); *Murphy v. United States,* 45 F.3d 520, 522 (1st Cir.1995).

As to the alleged jurisdiction under the federal declaratory judgment statute, the statute "contemplates a pragmatic approach to the determination of legal relations in a controversy between interested parties." *Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co*., 416 F.2d 707 (7th Cir. 1969). Thus, "[t]o avoid a partial disposition of a controversy, *all persons who have an interest in the determination of the questions raised in a declaratory judgment suit should be before the court*." *Id*. at 710 (emphasis added).

In addition, subject matter jurisdiction is conferred by the federal declaratory judgment statute only in a case of actual controversy. Absent such controversy, there is no jurisdiction, *see Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1936), and as will be discussed, there is no such actual controversy here. *See infra* at 11-13. As the Supreme Court has noted:

> the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Evers v. Dwyer, 358 U.S. 202, 203 (1958), quoting *Maryland Casualty Co. v. Pacific Coal & Oil*, 312 U.S. 270, 273 (1941).

1. Plaintiffs have misconstrued the Education Defendants' statutory duties, failed to name indispensable parties, and have in reality alleged state law claims that are subject to the doctrine of administrative exhaustion.

Here, although Plaintiffs have alleged that the Education Defendants have violated the federal Constitution, federal question jurisdiction is lacking because Plaintiffs' basic claim – i.e., that civics and social studies are not being taught properly – should have been made against the local school committees and other LEAs that actually are responsible for the civics and social studies curricula, and for the manner by which the subjects are taught in the elementary and secondary schools within their jurisdictions. (Discussed *infra* at 64-73).

Indeed, even if Plaintiffs are given leave to add the proper parties, their complaint should nonetheless be dismissed since the alleged "downgrad[ing of] the teaching of social studies and civics" and the "focusing in recent decades on basic reading and math instruction and on the economic value of education to individual students" which is the subject of the Complaint, *see id*., ¶ 35 at 11, would (if true), be the result of recent Congressional action, not the result of action taken by the Education Defendants and/or local school committees. After all, it was Congress, not the Education Defendants or LEAs, that passed the *No Child Left Behind Act* (the "NCLBA"), Pub L. No. 107-110, 115 Stat. 1425 (codified as amended at scattered sections of 20 U.S.C.),[7] and the federal *Race to the Top* program, *see* the *American Recovery and Reinvestment* Act of 2009, Pub L. No. 111-5, 123 Stat. (2009), mandated annual testing in reading and math in grades 3 through 8, and once again in grades 10 through 12, and provided some $4.35 billion to the states to incentivize the use of standardized tests in various contexts. *See generally* Mike

[7] The NCLBA was repealed and replaced in 2015 by the Every Student Succeeds Act ("ESSA") as part of Congress' reauthorization of the Elementary and Secondary Education Act of 1965 ("ESEA").

Johnston, *Regulation to Results: Shifting the American Education from Inputs to Outcomes*, Yale Law and Policy Review 20 (2011).

Indeed, Congress' role in public education in Rhode Island – which is linked to the state's acceptance of federal funds rather than any abrogation of the legal axiom that education is a local matter – highlights the fact that granting the relief sought by the Plaintiffs here would violate both the federal and state separation of powers doctrine. (Discussed *infra* at 42-49). And, as noted, standing alone, Plaintiffs' failure to join indispensable parties deprives this Court of jurisdiction under the federal declaratory judgment statute, which is governed by Fed.R.Civ.P. 19 concerning the required joinder of parties. *See Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 633-34 (1st Cir. 1989).[8]

Moreover, in the event local school committees and other responsible LEAs were added as parties, Plaintiffs would be required to exhaust available administrative remedies before attempting to invoke this Court's federal question jurisdiction. Thus, R.I. Gen. Laws § 16-39-1 provides that:

> [p]arties having any matter of dispute between them arising under any law relating to schools or education may appeal to the commissioner of elementary and secondary education who, after notice to the parties interested of the time and place of hearing, shall examine and decide the appeal without cost to the parties involved.

[8] Fed.R.Civ.P. 19 provides, in pertinent part, that:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Id. at (a)(1).

Id. The Commissioner's decision is then subject to an appeal to the Council, and eventually to the Superior Court. *See* R.I. Gen. Laws §§ 16-39-3 and 16-39-4.

The United States Supreme Court has noted that exhaustion of administrative remedies is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *see also Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006), citing *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 60–64 (1st Cir.2002) ("plaintiffs cannot circumvent other requirements of the IDEA, such as the requirement to exhaust administrative remedies, see 20 U.S.C. § 1415(l), merely by pleading under § 1983"); and *Richardson v. RIDE*, 947 A.2d 253, 259 (R.I. 2008) ("It is well settled that a plaintiff aggrieved by a state agency's action first must exhaust administrative remedies before bringing a claim in court.").

2. Plaintiffs fail to establish the essential elements of standing.

Article III of the United States Constitution limits the jurisdiction of federal courts to "cases or controversies." U.S. Const. art. III, § 2. The purpose of Article III is to limit federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Valley Forge Christian Coll. v. Ams. United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). The Supreme Court has emphasized that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Three

elements comprise the "irreducible constitutional minimum" of Article III standing, *Lujan*, 504 U.S. at 560: "[a] an injury in fact, [b] a sufficient causal connection between the injury and the conduct complained of, and [c] a likelihood that "the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (internal quotations omitted). To be sufficient for purposes of standing, an injury must be "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations, citations, and footnote omitted).

a. "Injury in Fact"

Although Plaintiffs recite that some students have not achieved an "adequate" education in civics and social studies, the Complaint does not describe any *specific* injury that is unique to any particular class representative. In the absence of such "concrete and particularized" allegations, there is no factual basis in the Complaint to conclude that any of the class representatives have been personally harmed in any way distinct from the generalized harm alleged to the "tens of thousands" who allegedly have been deprived of an adequate education in civics and social studies.

b. The "Traceability Requirement"

"The traceability requirement for Article III standing means that the plaintiff must demonstrate a causal nexus between the defendant's conduct and the injury." *Chevron Corp. v. Donziger*, 2016 WL 4173988 at *38 (2d Cir. Aug. 8, 2016). This requirement focuses on whether the injury was "the consequence of the defendants' actions" or whether it was "attributable to the 'independent' acts of some other person not before the court." *Simon v. E. Kentucky Welfare Rights Org*., 426 U.S. 26, 45 (1976); *see also Chevron Corp*., 2016 WL

4173988 at *38, quoting *Lujan*, 504 U.S. at 560. While plaintiffs need not show that the State's actions were the proximate cause of the injury, they must provide a factual basis to demonstrate a causal nexus between the two. *Rothstein v. UBS AG*, 708 F.3d 82, 91–92 (2d Cir. 2013).

Here, Plaintiffs have failed to show the required nexus. As noted and as will be discussed in greater detail, the General Assembly has vested the "entire care, control, and management of all public school interests of the several cities and towns . . . in the school committees of the several cities and towns." R.I. Gen. Laws § 16-2-9(a). Thus, it is the local school committees and other responsible LEAs, not the Education Defendants, which are responsible for curricula, for the specific teaching methods employed in their classroom, and for the professional development of the teachers. (Discussed *infra* at 64-73). Yet, as noted, no LEA has been joined as a defendant. Moreover, Plaintiffs have not shown how the Education Defendants have failed to fulfill their legal duties or explained why they should be legally responsible for whatever injury Plaintiffs are claiming.

c. Redressability

To satisfy the "redressability" prong of Article III standing Plaintiffs must demonstrate that they "personally would benefit in a tangible way from the court's intervention." *Chevron Corp.*, 2016 WL 4173988 at *39, quoting *Warth*, 422 U.S. at 508. That requires Plaintiffs to show a "non-speculative likelihood" that the asserted injury will be remedied by the requested relief. *Coalition of Watershed Towns v. United States EPA*, 552 F.3d 216, 218 (2d Cir. 2008). It must be "likely" that the relief will redress the injury, and not "merely speculative." *Id.; see Cortlandt St. Recovery Corp. v. Hellas Telecommunications, S.A.R.L*, 790 F.3d 411, 417 (2d Cir. 2015).

Here, Plaintiffs rely upon precisely the kind of speculative outcomes that cannot confer

standing. The Supreme Court repeatedly has declined "to endorse standing theories that require guesswork as to how independent decision-makers will exercise their judgment." *Clapper v. Amnesty Intern.*, 568 U.S. 398, 414-15 (2013). In particular, the Court has made clear that the redressability prong of Article III standing is not satisfied when it "depends on how legislators respond" to a court order invalidating a particular statute, especially when it "requires speculating" about what policies the legislature will prioritize in the future and how it will disperse scarce public resources to advance those policy goals. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). That is because "the decision of how to allocate [public funds] is the very epitome of a policy judgment committed to the broad and legitimate discretion of lawmakers, which the courts cannot presume either to control or to predict." *Id.* at 345 (quotation marks omitted).

Simply put, "[f]ederal courts may not assume a particular exercise of this state fiscal discretion in establishing standing," and "a party seeking federal jurisdiction cannot rely on such [s]peculative inferences" for that purpose. *Id.* at 346 (quotation marks omitted). This limitation is fatal to Plaintiffs' standing here. As noted by the Court in *Rodriguez*, "[o]n even the most basic questions in this area the scholars and educational experts are divided." *Id.* at 42.

Finally, the Supreme Court has emphasized that the standing requirement "is built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Lujan,* 504 U.SD. at 560-61. Consequently, a Court's standing inquiry must be "especially rigorous" when it is asked to nullify or compel an action by the political branches of government. *Clapper*, 568 U.S. at 414. That is especially true when, as here, the challenge is to the actions of a State's political branches, as the

federalism concerns in such cases counsel in favor of even more judicial restraint. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 2.5.2 at 60-62 (2d ed.2002) (The constitutional standing requirement promotes separation of powers among the different branches of government, the system of federalism which leaves certain authority to state governments). Ultimately, as will be discussed, it simply is not this Court's place to resolve the complicated and debatable questions of educational policy and funding that are at the heart of this case.

C. PLAINTIFFS HAVE FAILED AS A MATTER OF LAW TO STATE EITHER AN EQUAL PROTECTION OR DUE PROCESS CLAIM UNDER THE FOURTEENTH AMENDMENT
(First and Second Causes of Action)

1. The Historical Context

As much as the Founding Fathers might have valued education, the fact remains that education is nowhere mentioned in the federal Constitution.[9] Indeed, "[t]here was no federal or state-run school system anywhere in the United States as late as 1830." *See* Barry Friedman &

[9] It is interesting to note that Jefferson, the Founding Father who is probably most associated with promoting education, had views on the subject which were less than egalitarian, as Justice Lederberg noted in *Pawtucket v. Sundlun*, 662 A.2d 40, 55 (R.I. 1995):

> 'Thomas Jefferson believed as truly in a "natural aristocracy" as did John Adams." John Dewey, *Freedom and Culture* 63 (1939). Jefferson saw education as benefiting primarily those who had the capacity to benefit most by it:
>
> > I do most anxiously wish to see the highest degrees of education given to the higher degrees of genius, and to all degrees of it, so much as may enable them to read & understand what is going on in the world, and to keep their part of it going on right: for nothing can keep it right but their own vigilant & distrustful superintendence.
>
> Letter from Thomas Jefferson to Mann Page (Aug. 30, 1795), in *Thomas Jefferson Writings*, at 1030 (Merrill D. Peterson ed. 1984). Furthermore, Jefferson envisioned two distinct educational systems, based in part on wealth:
>
> > It is highly interesting to our country, and it is the duty of its functionaries, to provide that every citizen in it should receive an education proportioned to the condition and pursuits of his life. The mass of our citizens may be divided into two classes—the laboring and the learned.
>
> Letter from Thomas Jefferson to Peter Carr (Sept. 7, 1814), in *id*. at 1348.

Id. at 55, n. 7.

Sara Solow, *The Federal Right to an Adequate Education*, 81 Geo. Wash. L. Rev. 92, 117 (2013) (citing Frederick M. Binder, *The Age of the Common School*, 1830–1865, at 20 (1974)).

It was the states, not the federal government, which has always been responsible for public education. The Education Clause in the Rhode Island Constitution dates to 1842, *see Sundlun*, 662 A.2d at 47, and by the time the Fourteenth Amendment to the federal Constitution was ratified in 1868, eighty-one per cent (81%) of the states had constitutionalized the right to education. Indeed, in an amended Reconstruction Act, Congress expressly conditioned re-admission to the Union upon the inclusion of a right to education in a state's constitution. *See* Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 Stan. L.Rev. 735, 783-790 (2018).

The Rhode Island General Assembly did not mandate that municipalities support public schools until 1882, *see Chafee*, 89 A.2d at 788-89, yet by 1888, "most state legislatures had created centralized, administrative infrastructures to oversee public education." *See* Friedman and Solow, 81 Geo.Wash.L.Rev. at 124, citing Paul L. Tractenberg, *Education,* in *3 State Constitutions for the Twenty-first Century*, at 245 (G. Alan Tarr & Robert F. Williams eds., 2006). Summarizing the primary role of the states in public education, one commentator noted that:

> [p]ublic high schools came into their own in the last quarter of the nineteenth century, and from 1890 to 1930, enrollments in public high schools doubled each decade. All states currently provide free public elementary and secondary schools. By 1918, every state had enacted compulsory schooling laws, and most states began to seriously enforce such laws during the 1920s and 1930s. The constitutions of all states contain provisions supportive of state-provided education. At least thirty-eight states had constitutions containing such provisions during the nineteenth century. Most of the current state constitutions go much further and affirmatively obligate state governments to provide public education, while no less than twenty-nine state constitutions boasted such affirmative obligations before 1900. The history and tradition resulting from the practices and laws of the states for over a century have established that the 'principle of free,

> mass public schooling . . . has been accepted as a given by virtually all of the social classes and groups in the United 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. L. Rev. 552, 586 (1992) (footnotes omitted).

At present, all fifty states include education provisions in their constitutions that recognize a constitutional duty to provide a free public school education through a system of state-funded common schools. *See* Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore, Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights are Deeply-Rooted in a Modern-Day Consensus of the States?*, 94 Notre Dame L. Rev. 49, 144 and n. 482 (2018). Indeed, it has always been understood that the source of any affirmative legal right to education in the United States would be located in a state law or constitution.

The Supreme Court has opined that education "is perhaps the most important function of state and local governments," ranking "at the very apex" of a State's sovereign responsibilities. *Wisconsin v. Yoder*, 406 U.S. 205, 213 ((1972); *see also Flagg Bros. v. Brooks*, 436 U.S. 149, 163–64 (1978) and *id*. at 173 (Stevens J., dissenting) (classifying public education as one of several sovereign functions of the States). And although the Supreme Court has recognized that it was "doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 493 (1954), the Court was under no illusion that the federal government had any legal obligation to provide a child with an education under the federal Constitution. Instead, the Court in *Brown* saw its role as ensuring that "[s]uch an opportunity, *where the state has undertaken to provide it*," is a right

that was "made available to all on equal terms." *Id*. (emphasis added). As noted by one commentator:

> [a]s *San Antonio v. Rodriguez* made abundantly clear, there is no federal right to an education. In the absence of such a federal right, the state's obligation becomes far more crucial. The duty of educating a citizenry has been implicitly entrusted to the states, and states that do not properly control the disaggregation, consolidation, and reorganization of their school districts are ignoring that moral-political responsibility. *Brown v. Board* [*of Educ. of Topeka*, 347 U.S. 483, 493 (1954)] states that, 'Such an opportunity [to receive an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' [citing *id*. at 493]. That instruction is primarily directed at state legislatures, for educating their citizenries has long been considered an important state interest. [citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)].

Brennan, *Whiter and Wealthier, "Local Control" Hinders Desegregation by Permitting School District Secessions*, 52 Colum. J.L. & Soc. Probs. 39, 80 (2018).

In short, it is beyond dispute that public education is a core sovereign function of the States. Indeed, the Supreme Court has often expressed concern over excessive federal intrusion into public education in terms that implicate separation of powers as well as the Tenth Amendment,[10] discussed *infra* at 42-49, and as noted, has emphasized that:

> *[n]o single tradition in public education is more deeply rooted than local control over the operation of schools*; *local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia*, 407 U.S. at 469. Thus, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'

Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (emphasis added); *see also Rodriguez*, 411 U.S. at 44, 50 (making clear that decision in plaintiffs' favor would force the court to invalidate

[10] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend X.

the education structures of many states); *see also id*. at 30 (protecting those "rights reserved to the States"); and *id*. at 39 (education is "a service performed by the State"). As noted by the Seventh Circuit, "[v]irtually every judicial body that has commented on the matter has acknowledged the need for broad discretionary powers in local school boards." *Zykan v. Warsaw Community School Corp*., 631 F.2d 1300, 1305 (7th Cir. 1980).[11]

Finally, it should be noted that the United States Constitution has traditionally been considered as a collection of negative rights protecting against governmental intrusion, rather than a statement of affirmative rights to be enforced. And while the Supreme Court has consistently recognized the importance of public education, it has not often departed from this basic analytical framework. As the Court noted in *DeShaney v. Winnebago County Dept. of Social Servs*., 489 U.S. 189 (1989):

> [t]he [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text . . . . [The purpose of the Clause] was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid . . . . If the Due Process Clause does not require the State to provide its citizen with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.

[11] Citing *Cary v. Board of Education*, 598 F.2d 535 (10th Cir. 1979); *East Hartford Education Assn. v. Board of Education*, 562 F.2d 838 (2d Cir. 1977) (en banc); *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council, District 25 v. Community School Board*, 457 F.2d 289 (2d Cir. 1972), certiorari denied, 409 U.S. 998, 93 S.Ct. 308, 34 L.Ed.2d 260, *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), certiorari denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 491; *Pico v. Board of Education*, 474 F.Supp. 387 (E.D. N.Y.1979); *Right to Read Defense Committee of Chelsea v. School Committee of Chelsea*, 454 F.Supp. 703 (D.Mass.1978); *Mercer v. Michigan State Board of Education*, 379 F.Supp. 580 (E.D.Mich.1974), affirmed, 419 U.S. 1081, 95 S.Ct. 673, 42 L.Ed.2d 678; and *Parducci v. Rutland*, 316 F.Supp. 352 (M.D.Ala.1970).

Id. at 1002-03; *see also Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.) (Posner, J.), *cert. denied*, 465 U.S. 1049 (1983), citing, *inter alia*, *Harris v. McRae*, 448 U.S. 297, 318 (1980) ("the Constitution is a charter of negative rather than positive liberties"). Yet here, Plaintiffs' legal theory of the case hinges largely upon the willingness of this Court to do just that.

2. *Rodriguez* is controlling as to both the equal protection and substantive due process claims.
(First and Second Causes of Action)

Rodriguez involved a class action brought on behalf of poor, Mexican-American families in San Antonio, Texas, who resided in school districts having a low property tax base. Plaintiffs alleged that Texas's reliance on local property taxation to fund public education caused substantial inter-district disparities in per-pupil expenditures that favored more affluent citizens in violation of their rights under the Equal Protection Clause. *See Rodriguez*, 411 U.S. at 6.

In reversing the three-judge District Court that had found the Texas school-financing system unconstitutional under equal protection, the Court in *Rodriguez* first held that the plaintiff class was not "suspect" since, *inter alia*, the putative class:

(a) had not been defined with reference to either "any definable category of 'poor' people" or with an "*absolute deprivation of education*." *See id*. at 25 (emphasis added);[12] and

(b) "[was] not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *See id*. at 28.

[12] *See id*. at 21-22, distinguishing *Griffin v. Illinois*, 351 U.S. 12 (1956) and its progeny (invalidating state laws that "prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process"); *Douglas v. California*, 372 U.S. 353 (1963) (establishing an indigent defendant's right to court-appointed counsel on direct appeal); *Williams v. Illinois*, 399 U.S. 235 (1970) and *Tate v. Short*, 401 U.S. 395 (1971) (striking down criminal penalties that subjected indigents to incarceration simply because of their inability to pay a fine); and *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating the Texas filing-fee requirement for primary elections).

The Court then made clear that education was not a "fundamental right, in the sense that it is among the rights and liberties protected by the Constitution," *see id*. at 29, emphasizing that:

> [i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
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> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.

Id. at 33-35, citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, (1972); and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).[13] At the same time, the Court repeatedly recognized the Court's "historic dedication to public education," *id*. at 30, which it reiterated had "lost none of its vitality." *Id*. at 30.

a. Equal Protection

In a recent Michigan case, the Court dismissed an equal protection claim brought on behalf of the children attending public schools in Detroit who alleged that because of their race they had been denied access to literacy and/or even a "minimally adequate" education. *See Gary B. v. Snyder*, 329 F.Supp.3d 344 (E.D. Mich. 2018). The Court noted that:

> [t]he Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.' *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985) (citing *Plyler*, 457 U.S. at 216). A plaintiff must therefore adequately plead that the government treated him or her 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a

[13] And noting that "*Skinner* applied the standard of close scrutiny to a state law permitting forced sterilization of 'habitual criminals.' Implicit in the Court's opinion is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution," citing *Roe v. Wade*, 410 U.S. 113, 152 (1973).

> 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) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 299 (6th Cir. 2006)).

329 F.Supp.3d. at 367. And in *Snyder*, the Court held that:

> [a]lthough the Complaint clearly establishes that Plaintiffs' schools predominantly serve children of color—four of the five schools are at least 97% African American and the fifth is 31.1% African-American and 64.2% Latino, ECF 1, PgID 62–63, ¶ 90—it makes no claim about the relevant comparator schools. The only specific reference to the racial makeup of other schools is to Grosse Pointe, which has not experienced the relevant state interventions. *Id.* at 6 n.2. The Complaint opines that the conditions in Plaintiffs' schools 'would be unthinkable in schools serving predominantly white, affluent student populations,' *id*. at 5, ¶ 1, but it does not state any instance where Defendants intervened in a school with a different racial makeup and treated that school disparately. Without this type of comparison, the Complaint fails to state a claim that Defendants have classified or otherwise differently treated Plaintiffs on account of race.

Id.

A similar point was made by a California appeals court when considering whether plaintiffs had stated a cognizable equal protection claim by alleging that a number of state statutes concerning the hiring and firing of teachers "create[d] an oversupply of grossly ineffective teachers" in schools attended by an "unlucky subset of students" in two groups, i.e., Group 1 (an "unlucky subset" of students within the population of students at large) and Group 2 (poor and minority students). *See Vergara v. State of California*, 246 Cal.App.4th 619, 646 (Ct. App, Second Dist., Div. 2, as modified on May 3, 2016), review denied Aug. 22, 2016. When deciding whether "the unlucky subset of students comprising Group 1 was "a sufficiently identifiable group for purposes of an equal protection action" the Court in *Vergara* noted that:

> . . . the unlucky subset is not an identifiable class of persons sufficient to maintain an equal protection challenge. Although a group need not be specifically identified in a statute to claim an equal protection violation (*see Butt, supra*, 4 Cal.4th 668, 673, 15 Cal.Rptr.2d 480, 842 P.2d 1240; *Somers v. Superior Court* (2009) 172 Cal.App.4th 1407, 1414, 92 Cal.Rptr.3d 116), group members must have some pertinent common characteristic other than the fact that they are

> assertedly harmed by a statute (see *Altadena Library, supra*, 192 Cal.App.3d 585, 590–591, 237 Cal.Rptr. 649; *Guardino, supra*, 11 Cal.4th 220, 258, 45 Cal.Rptr.2d 207, 902 P.2d 225).
>
> The defining characteristic of the Group 1 students, who are allegedly harmed by being assigned to grossly ineffective teachers, is that they are assigned to grossly ineffective teachers. Such a circular premise is an insufficient basis for a proper equal protection claim. (*See Nelson v. City of Irvine* (9th Cir. 1998) 143 F.3d 1196, 1205 [dismissing an equal protection claim as "tautological" when the defining characteristic of the alleged class harmed was that they were allegedly harmed].) To avoid this circularity, a group must be identifiable by a shared trait other than the violation of a fundamental right.

Id. As to Group 2, consisting of poor and minority students, the Court held that:

> [i]t is clear that the challenged statutes here, by only their text, do not inevitably cause poor and minority students to receive an unequal, deficient education. With respect to students, the challenged statutes do not differentiate by any distinguishing characteristic, including race or wealth.

Id. at 649.

Here, although Plaintiffs claim a violation of equal protection and have identified certain discrete groups in their Complaint – i.e., (a) African-American, Latino and students from low-income families, *see* Complaint, ¶ 76 at 24-25, ¶ 92-93 at 30 and ¶104 at 33-34; (b) English language learners ("ELLs"),[14] *see id*., ¶¶ 110-111 at 36-37; (c) students with special needs, *see id*., ¶ 67 at 22; and (d) students in private schools, *see id*., ¶ 74 at 24 – Plaintiffs do not claim that members of these groups are treated any differently than the "tens of thousands" of students whom they allege are in school districts that allegedly deprive them of "a meaningful opportunity to obtain the degree of education that is necessary to prepare them" to be capable citizens. *See* Complaint, ¶ 116 at 38-39. Plaintiffs' failure to plead the unequal treatment which is the basis of

[14] The state's *Regulations Governing the Education of English Language Learners* defines an ELL as a student:

(1) whose first language is not English or who speaks a variety of English, as used in a foreign country or U.S. possession, that is so distinct that ELL instruction is necessary,
(2) who is now learning English, but
(3) who has not yet attained enough proficiency in English to allow him or her to fully profit from content area instruction conducted only in English.

Id., 200-RICR-20-30-3.2.A.1.a.

the Equal Protection Clause is fatal, and their equal protection claim (Count One) should be dismissed for that reason alone.

Moreover, since *Rodriguez,* the Supreme Court has shown no inclination to define a suspect class in the absence of the "*absolute deprivation of education.*" *See* 411 U.S. at 25 (emphasis added). Thus, the First Circuit has affirmed that "aside from outright exclusion, the Supreme Court continues to employ rational basis review for classifications that burden the educational opportunities for a non-suspect class." *See Sanchez,* 454 F.3d at 33 (citing *Kadrmas v. Dickinson Pub. Sch*., 487 U.S. 450, 459 (1988).

In *Plyler v. Doe,* 457 U.S. 202, 221 (1982), the Court reversed a Fifth Circuit decision upholding a Texas statute that withheld state aid for the education of children not legally admitted into the United States. *See* 457 U.S. at 206, 226. In doing so, the Court held: (a) that "illegal aliens" were not part of a suspect class, *see id*. at 219, n. 19; and (b) that "[p]ublic education [was] not a 'right' granted to individuals by the Constitution." *See id*. at 221, citing *Rodriguez,* 411 U.S. at 35. The Court applied an intermediate standard of review which was more stringent than the rational basis test, which requires merely that the State show that "the classification at issue bears some fair relationship to a legitimate public purpose. *See id*. at 216. The Court, while eschewing the standard applicable in cases applying "strict scrutiny," *see id.* at 216-17, held that Texas had to establish that the classification made by the challenged statute "may fairly be viewed as furthering a substantial interest of the State." *Id*. at 217-18, n. 16,[15] and 226.

Plyler, however, does not stand for the proposition that any law arguably impairing a child's ability to receive someone's idea of an adequate education is subject to heightened

[15] Citing *Craig v. Boren*, 429 U.S. 190 (1976) and *Lalli v. Lalli*, 439 U.S. 259 (1978).

scrutiny. The *Plyler* Court made clear that intermediate level review was justified not merely because: (a) education was distinguishable "from other forms of social welfare legislation" due to its "importance . . . in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child . . ." *Id.* at 221; but more significantly, because (b) the challenged statute "impose[d] its discriminatory burden on the basis of a legal characteristic over which children" – who were "special members" of a "'shadow population' of illegal migrants" – had "little control." *Id*. at 218-219, 220. Thus, the *Plyer* Court did not *sub silentio* overrule *Rodriguez's* express holdings that: (a) there is no fundamental right to education the deprivation of which could subject a law to heightened scrutiny; and (b) the deprivation of educational opportunities is not subject to heightened scrutiny simply because that impact falls on students in poor districts. *Rodriguez*, 411 U.S. at 28-29, 33-34, 37-39, 42-44, 54, 56-59.

The Supreme Court and Second Circuit have both made clear that *Plyler* cannot be extended "beyond the 'unique circumstances' that provoked its 'unique confluence of theories and rationales.'" *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 142 (2d Cir. 1992), quoting *Kadrmas*, 487 U.S. at 459.[16] *Plyler* permits heightened scrutiny only when a state: (a) deliberately discriminates against an identifiable class of students; (b) because of the illegal acts of their parents; and (c) in a manner that deprives the students of *all* educational opportunities. 457 U.S. 202, 216-24.

In *Papasan v. Allain*, 478 U.S. 265 (1986), school children and local officials brought suit challenging Mississippi's distribution of income derived from certain lands that had been

[16] Those cases that have applied heightened scrutiny are in accord, and bear slight resemblance to the facts here. *See, e.g., Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001) (applying heightened scrutiny to law that specifically targeted citizen children of illegal immigrants, because of the illegal acts of their parents, and in a manner that permanently deprived those citizen children of crucial prenatal care); *Hispanic Interest Coalition of Alabama v. Gov. of Alabama*, 691 F.3d 1236, 1245-48 (11th Cir. 2012) (applying heightened scrutiny to law that "target[ed] the population of undocumented school children in Alabama," based on the illegal acts of their parents, in a manner that prevented those children from seeking or obtaining any form of public education).

deeded to the State by the Chickasaw Indian Nation, i.e., the Chickasaw Cession Lieu Lands, that were to be devoted to the maintenance of the public schools located therein. Plaintiffs alleged a violation of equal protection, claiming that the State's distribution of the income was in violation of its statutory obligations and had resulted in "a disparity in the level of school funds from Sixteenth Section lands that are available to the Chickasaw Cession schools as compared to the schools in the remainder of the State." *See* 478 U.S. at 269-273.

The Court in *Papasan* noted that in *Rodriguez*, the Court had "declined to apply any heightened scrutiny based either on wealth as a suspect classification or on education as a fundamental right." *See id*. at 283-84. And referring to *Pyler*, the Court in *Papasan* noted that "the Court [had] not . . . measurably change[d] the approach articulated in *Rodriguez*. It reiterated that education is not a fundamental right and concluded that undocumented aliens were not a suspect class." *Id*. at 285, citing *Pyler*, 475 U.S. at 223–224.

In *Kadrmas*, the Court affirmed the dismissal of an equal protection challenge to the constitutionality of a state statute permitting some school districts to charge a user fee for bus transportation to school. *See* 487 U.S. at 452-53. Justice O'Connor made clear that:

> [w]e 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. *See, e.g., Harris v. McRae*, 448 U.S. 297, 322–323(1980); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). Nor have we accepted the proposition that education is a 'fundamental right,' like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual's access to it. *See Papasan v. Allain*, 478 U.S. 265, 284, (1986); *Plyler v. Doe, supra*, 457 U.S., at 223; *San Antonio Independent School Dist. v. Rodriguez*, supra, 411 U.S., at 16, 33–36.

487 U.S. at 458. After emphasizing that "'we have not extended th[e] holding [in *Pyler*] beyond the 'unique circumstances,'" *see id*. at 459, citing Pyler, 457 U.S. at 239 (Powell, J., concurring),

that provoked its "unique confluence of theories and rationales," *see id*., citing *Pyler*, 457 U.S. at 243 (Burger, C.J., dissenting), the Court in *Kadrmas* noted that:

> [u]nlike the children in that case [*Pyler*], Sarita Kadrmas has not been penalized by the government for illegal conduct by her parents. *See* [*Pyler, 457* U.S.] at 220; *id*., at 238, (Powell, J., concurring). On the contrary, Sarita was denied access to the school bus only because her parents would not agree to pay the same user fee charged to all other families that took advantage of the service. Nor do we see any reason to suppose that this user fee will 'promot [e] the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.'

Id. at 459, citing *Pyler,* 457 U.S. at 230.

Thus here, Plaintiffs have not identified a suspect class. In any event, as one scholar has correctly pointed out, "[t]he most federal equal protection can do is enforce equity at the level of quality a state itself has already recognized," and thus "an equal protection approach based on state standards may have little if any effect." Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 Wm. & Mary L. Rev. 1343, 1391 (2010).

b. Substantive Due Process

The First Circuit has noted that "[p]rocedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process ensures that such state action is not arbitrary and capricious." *See Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994). The Circuit has explained that:

> [t]he substantive component of due process protects against 'certain government actions regardless of the fairness of the procedures used to implement them.' *Daniels v. Williams*, 474 U.S. 327, 331 (1986). *See also Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir.1991) (comparing substantive due process to procedural due process) (citing *Monroe v. Pape*, 365 U.S. 167, 171–72 (1961)). There are two theories under which a plaintiff may bring a substantive due process claim. Under the first, *a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment*. *Pittsley*, 927 F.2d at 6 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Under the second, a

> plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state's conduct 'shocks the conscience.' *Id.* at 6 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 531 (1st Cir. 1995) (emphasis added). Presumably, Plaintiffs here will invoke the first of the two theories.[17]

Yet, as noted, the Supreme Court squarely held in *Rodriguez* that there is no fundamental right to education under the United States Constitution, *see* 411 U.S. at 29-44, never mind what Plaintiffs here might consider to be an "adequate" education in civics and social studies. In doing so, the Court made clear that public education is a sovereign function of the States, and that it implicates a number of complicated policy choices that are for the State legislatures to make. The Court refused to allow federal courts to interfere with those local decisions under the guise of a "fundamental" right to education that is neither stated nor implied in the Constitution. And the Court has affirmed *Rodriguez's* holding on more than one occasion – *see, e.g., Plyler*, 457 U.S. at 221, 223, *Papasan*, 478 U.S. at 284, and *Kadrmas*, 487 at 466 n.1 – and the First Circuit did so in 2006. *See Sanchez*, 454 F.3d at 33, citing *Rodriguez. Rodriguez* is thus controlling law, and this Court is bound to follow it, which is fatal to Plaintiffs' claim.

Here, the crux of Plaintiffs' substantive due process claim appears to be premised upon their argument that *Rodriguez* "raised, but failed to provide an answer to, the question of whether students have a fundamental right under the Fourteenth Amendment to the opportunity of an education that provides them "'the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.'" *See* Complaint, ¶ 1 at 2, citing *Rodriguez*, 411 U.S. at 37. The language in *Rodriguez* relied upon by the Plaintiffs, however,

[17] Whatever they may think of the Education Defendants, it seems unlikely that Plaintiffs will attempt to satisfy the second test and argue that their conduct was "'truly outrageous, uncivilized, and intolerable.'" *See Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 15-16 (1st Cir. 2011), quoting *Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir.1999).

does not support so broad a reading. Rather, it makes clear that the Court was speculating, for argument's sake, about whether an "absolute denial" of education violated a Constitutional right, and then contrasted that hypothetical with the actual facts before it, where plaintiffs not only failed to allege such an "absolute denial," but also had not even established that the Texas's method of financing public education had failed "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.

In fact, the Court in *Rodriguez* expressly rejected the premise of Plaintiffs' Complaint here, i.e., that education is a fundamental right and/or that the federal Constitution guarantees some minimally adequate level of education because it is essential to the exercise of other rights guaranteed by the Constitution, and 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.

Complaint, ¶ 4 at 3-4. Thus, the *Rodriguez* Court noted that plaintiffs:

> . . . insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.
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>
> A similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

Rodriguez, 411 U.S. at 35-36 (footnotes omitted). In rejecting the argument, the Court noted that:

> . . . 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.*

Id. at 36-37 (emphasis added).[18] Thus, in a recent Connecticut case, plaintiffs alleged that state law effectively denied access to magnet and charter schools to poor and minority students, who were thus forced to attend severely underperforming schools." *See Martinez*, 350 F.Supp.3d at 79-80. In dismissing the claim, the Court made clear that:

> [i]n *Rodriguez*, the Supreme Court did not leave the door open for federal courts to recognize a fundamental right to a minimally adequate education. To the contrary, the Court rejected the idea of a fundamental right to education, without parsing how effective or adequate the education might be, because such a right is not guaranteed in the Constitution. *See Rodriguez*, 411 U.S. at 37. Moreover, in

[18] As was recognized in a 2000 article co-authored by one of Plaintiffs' attorneys here, *Rodriguez* held that:

(1) Education is not a fundamental right explicitly or tacitly guaranteed by the Federal Constitution;
(2) Wealth is not a suspect classification, therefore the poor do not represent a suspect class;
(3) Cases alleging merely relative, as opposed to absolute, deprivation of educational benefits will be gauged on a mere 'rational basis' standard;
(4) Local control of public education is a legitimate state interest;
(5) Inequities exist in public schools, but that is an issue for legislative action, not judicial intervention.

Abbott and Robinson, 5 Roger Williams U. L. Rev. at 450 (2000).

> *Plyler*, the Court cited *Rodriguez's* holding for that proposition. *Plyler*, 457 U.S. at 221.

Id. at 91.

Plaintiffs' emphasis on the *dicta* in Supreme Court cases recognizing the importance of education, *see, e.g*., Complaint, ¶ 3 at 3, citing *Brown*, 347 U.S. at 493, rather than supporting their theory of the case, merely illustrates their conflation of a subject's importance and its status as a source of a fundamental right, a conflation which the Court expressly rejected in *Rodriguez*. *See* 411 U.S. at 35.

In *Papasan*, the Court did observe in *dicta* that the *Rodriguez* Court:

> 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].' *Id.*, at 36 [footnote omitted]. Given the absence of such *radical denial of educational opportunity*, it was concluded that the State's school financing scheme would be constitutional if it bore 'some rational relationship to a legitimate state purpose.'

Id. at 284 (emphasis added). And in *Papasan*, the Court concluded, again in *dicta*, that "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.

However, Plaintiffs here have not come close to alleging the "*radical denial of educational opportunity*" referenced in *Rodriguez* and *Papsan,* and in any event, the *dicta* in *Papasan* relied upon by Plaintiffs is not reflected in the language actually employed by Justice Powell in *Rodriguez.* It therefore is not surprising that the invitation to overrule *Rodriguez* has repeatedly been declined, not only by the Supreme Court and the First and Second Circuits, but by each and every federal court that has had the opportunity to do so. Most recently, this has included the District of Connecticut, *see Martinez*, 350 F.Supp.3d at 90-91 (dismissing claim that

state's charter school law violated plaintiffs' fundamental right to substantial equality of educational opportunity, holding that it "cannot grant the plaintiffs the relief they seek . . . without being inconsistent with *Rodriguez* . . . "[b]ecause there is no fundamental right to substantial equality of educational opportunity under the Equal Protection Clause"), and the Eastern District of Michigan. *See Snyder,* 329 F.Supp.3d. at 366 (holding that Due Process Clause does not "demand that a State affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy").[19] As has been pointed out by at least one scholar, the substance of the *dicta* relied upon by Plaintiffs here "is thin" and "consists primarily of laudatory statements and assumptions, not reasoned doctrinal building blocks for a fundamental right." Black *supra*, 70 Stan L. Rev. at 758 (footnotes omitted).

The Supreme Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Com. of Massachusetts*, 291 U.S. 97, 105 (1934). More recently, in cases not involving public education, the Court explained that:

> [t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries.

[19] *See also Angstadt v. Midd-W. Sch. Dist*., 377 F.3d 338, 343 (3d Cir. 2004) (citing *Rodriguez* and noting that "the right to education is not constitutionally protected" while dismissing claim that not allowing student in cyber charter school to participate in interscholastic basketball violated his rights under either the First or Fourteenth Amendment); *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000) (applying rational basis test to decision to expel student for weapons possession and denying Defendants' motion for summary judgment while noting that "the Supreme Court has held explicitly that the right to attend public school is not a fundamental right for the purposes of due process analysis," citing *Rodriguez*); and *see generally* Daniel S. Greenspan, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. Rev. 755, 778-79 (2008) (discussing the composition of the current Court and its disposition toward affirming *Rodriguez*).

Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015);[20] *see also Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (fundamental rights are only those "objectively, deeply rooted in this 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."); *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting) (collecting cases). At the same time, the Court historically has been:

> 'reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.' *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). By granting an asserted right the imprimatur of 'fundamental' under the due process clause, the court 'to a great extent, place[s] the matter outside the arena of public debate and legislative action.' *Glucksberg*, 521 U.S. at 720. Errantly done, the liberty protected by the Due Process Clause can be 'subtly transformed' into a court's policy preferences—however well-intentioned the preferences may be. *Id*. (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977)). For this reason, fundamental rights are few and courts seldom recognize new ones. *Seal*, 229 F.3d at 575 (noting also that the Supreme Court has specifically cautioned against 'judicial interposition in the operation of the public school system[s]').

Snyder, 329 F.Supp.3d. at 363-64.

In *Michael H. v. Gerald D.*, 491 U.S. 110, 112 (1989), the Court held that a California statute which created a legal presumption that a child born to married woman living with her husband was the child of the marriage if the husband was not impotent or sterile did not violate the substantive due process rights of the putative natural father. *See* 491 U.S. at 122-123. In

[20] In *Obergefell*, Justice Kennedy held that the right to marry was a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Justice reasoned that: "the Court has long held the right to marry is protected by the Constitution," *id*. at 2598, as (a) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy. *Id*. at 2599; (b) "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U.S., at 485 . . ." Id. at 2599-2600; (c) "the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id*. at 2600; and (d) "this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order." *Id*., citing *Maynard v. Hill*, 125 U.S. 190, 211.

considering how to determine what fundamental rights were deserving of protection under the doctrine of substantive due process, Justice Scalia noted that:

> [i]n an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society [foootnote omitted]. As we have put it, the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.). Our cases reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society....' *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

Id. at 122.

Yet, whether under Justice Kennedy's approach to fundamental rights in *Obergefell* or Justice Scalia's differing formulation in *Michael H*., it is clear that rather than being "deeply rooted" in the federal Constitution, any right to education has always been located in a *state* law or constitution. (Discussed *supra* at 17-22). Indeed, *Rodriguez* devoted five pages to expressly rejecting the argument that education was "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *see* 411 U.S. at 30-35, and nothing in *Obergefell* or *Gerald D*. suggests that the Court has changed course. No matter how Plaintiffs attempt to re-characterize their claim, they simply ignore the clear instruction in *Rodriguez* that the fact that a subject may be "important" does not *ipso facto* mean that there is a fundamental right to its attainment, *see* 411 U.S. at 35, and thus unmistakably ask this Court to overrule *Rodriguez*. As noted by one commentator, those (like Plaintiffs here) who rely upon substantive due process in support of a greater federal role in education would "require the Court to reverse itself with regard to education as a fundamental right." *See* Black, 51 Wm. & Mary L. Rev. at 1385; *see also Parker v. Hurley*, 514 F.3d 87, 102-03 (1st Cir. 2008) (recognizing that although substantive due process rights have been recognized in the context of the right to marry and the right to

procreate, they were not relevant to claims that curriculum materials intended to encourage respect for gay persons violated Plaintiffs' right to raise children as they saw fit).

In summary, in order to find either a suspect class or a fundamental right to education and apply any standard of review more stringent than the rational basis test, this Court would have to overrule *Rodriguez* and ignore binding precedent from the First Circuit, something which obviously is precluded under the doctrine of *stare decisis*. As the Supreme Court has noted, "*stare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard v. United States*, 514 U.S. 695, 711 (1995), citing *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991). In *Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co*., 215 F.3d 136 (1st Cir. 2000), Judge Selya, citing *Hubbard,* emphasized that:

> [w]e do not gainsay that the principle of *stare decisis* forms an integral part of our system of justice. Withal, that system is not only precedent-based but also hierarchical. When emergent Supreme Court case law calls into question a prior opinion of another court, that court should pause to consider its likely significance before giving effect to an earlier decision.
>
> * * *
>
> Let us be perfectly clear. We value finality, stability, and certainty in the law . . .

Id. at 142.[21]

[21] And although the First Circuit noted that "*stare decisis* is neither a straightjacket nor an immutable rule" and is subject to exceptions, *see id*., none of the exceptions apply here since: (a) there has been no subsequent announcement that *Rodriguez* has been "contradicted by controlling authority," *id*.; nor (b) is this one of "those relatively rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." *Id*.

3. The action of the Education Defendants' easily pass muster under the applicable rational basis test.
(First and Second Causes of Action)

In the absence of either a suspect class or a fundamental right, the same rational-basis test would be applicable to both Plaintiffs' equal protection and substantive due process claims. *See Cook v. Gates*, 528 F.3d 42, 49 n.3 (1st Cir. 2008) ("Where no protected liberty interest is implicated, substantive due process challenges are reviewed under the rational basis standard"); *Medeiros v. Vincent*, 431 F.3d 25, 33 (1st Cir. 2005) ("the same [rational basis] analysis to both substantive due process and equal protection challenges"); *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 976 n.7 (1st Cir. 1989) ("the type and kind of scrutiny applied, and the result, would be no different on either" due process or equal protection theories). And the First Circuit has opined that rational basis review "'is a paradigm of judicial restraint,'" *Gonzalez-Colon, supra*, 660 F.3d at 15-16 (quoting *FCC v. Beach Comm's, Inc*., 508 U.S. 307, 314, (1993), and has explained that under the rational basis test, "'[n]either the wisdom nor actual efficacy of the legislative judgment is before us.'" *Baker v. City of Concord*, 916 F.2d 744, 749 (1990) (quoting *Montalvo–Huertas*, 885 F.2d at 981).

Here, as most recently in *Martinez* and *Snyder*, there is no need to go beyond the pleadings stage to conclude that the Education Defendants' actions in establishing a statutory and regulatory framework for the guidance of the school committees, local administrators and teachers actually responsible for teaching civics and social studies in the state's elementary and secondary schools were neither arbitrary nor irrational. (Discussed *infra* at 66-73).

D. PLAINTIFFFS' CLAIMS ARE BARRED UNDER THE SEPARATION OF POWERS, FEDERAL ABSTENTION AND POLITICAL QUESTION DOCTRINES

1. State Education Adequacy Cases Outside Rhode Island

If there is anything to be gleaned from the plethora of cases outside Rhode Island that have challenged educational adequacy it is that more often than not, the results were not what plaintiffs had intended. Yet here, Plaintiffs ignore the cautionary tale told by the many who – although successfully convincing state courts elsewhere to weigh-in on controversial public policy choices concerning what is taught in the public schools – did not achieve the expected results, a tale which one commentator likened to a Russian novel: "long, tedious, and everyone dies in the end." *See* Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 Harv. J. on Legis. 499, 499 (1991).

Most scholars categorize education reform cases as consisting of three waves:

> The first wave of litigation occurred in both state and federal courts and included *Rodriguez*. The primary theory was that school funding inequities, caused by variations in local property wealth, violated the Equal Protection Clause of the Federal Constitution. At the heart of this first wave of litigation was the notion that all students are roughly equal, should be treated as equal, and are entitled to absolute equity in resources. The California Supreme Court initially ruled in favor of the plaintiffs based on this theory in *Serrano v. Priest* before the U.S. Supreme Court rejected the theory in *Rodriguez*.
>
> The second wave of litigation came in response to *Rodriguez*. The litigation was premised on notions of equity similar to those in the first wave, but advocates based their claims on untested state equal protection and education clauses, rather than federal equal protection. Relying on state law, advocates returned to the California Supreme Court, which then held that even if an inequitable education system does not violate the U.S. Constitution, it violates the state equal protection clause.[22]

[22] Citing *Serrano II*, 557 P.2d at 951-52 and discussing *Robinson v. Cahill* (Robinson I), 303 A.2d 273, 295 (N.J. 1973; *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 71 (Wash. 1978); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); and *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 484-85 (N.Y. App. Div. 2001)

* * *

> This third wave of litigation is generally characterized as a pursuit of 'educational adequacy.' Courts faced with this litigation must determine exactly what type of education a state constitution or statute requires the state to deliver. The earliest cases fleshed out an adequate education in only the broadest terms, making the right difficult to enforce.[23]

Black, 51 Wm. & Mary L. Rev. at 1360-1365 (2010); *see also* William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 Educ. Pol'y 376, 378 (1994). And now there is a fourth wave consisting of cases challenging state labor law regulating the teaching profession. *See, e.g.*, *Vergara v. State of California*, 246 Cal.App.4th 619, 646 (Ct. App, Second Dist., Div. 2, as modified on May 3, 2016), review denied Aug. 22, 2016.

The decisions have been divided, with about half finding that a state public school financing system was unconstitutional under the State's constitution for one reason or another,[24] and half (including Rhode Island) declining to do so under a variety of rationales.[25] One commentator has observed that:

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[23] Citing *Robinson v. Cahill (Robinson I)*, 303 A.2d 273, 295 (N.J. 1973); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978).

[24] *See Abbeville County School Dist. v. State*, 410 S.C. 619 (2014); *Columbia Falls Elementary School Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005); *Hoke County Board of Ed. v. State*, 599 S.E.2d 365 (N.C. 2004); *Campaign for Fiscal Equity v. State*, 801 N.E. 2d 326, 330 (NY 2003); *Lake View School Dist. No. 25 v. Huckabee*, 91 S.W.2d 472 (Ark. 2002); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Claremont School Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Campbell County School Dist. v. State*, 907 P.2d 1238 (Wyo. 1995); Bismark Public School Dist. v. State, 511 N.W.2d 247 (N.D. 1994); *McDuffy v. Secretary*, 615 N.E.2d 516 (Mass. 1993); *Tennessee Small School Syst. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684 (Mont.1989); *Rose v. Council for Better Educ*, 790 S.W.2d 186 (Ky.1989); *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex.1989); *Pauley v. Bailey, 324 S.E.2d 128 (W.Va. 1984); DuEree v. Alma School Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), cert. denied, 449 U.S. 824 (1980); *Pauley v. Kelley*, 255 S.E.2d 859 (W.Va. 1979); *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Horton v. Meskill*, 376 A.2d 359 (Ct. 1977); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) cert. denied, 414 U.S. 976 (1973); and *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

[25] *See Chaffee, supra*, 89 A.3d at 793; *Lobato v. State*, 304 P.3d 1132 (Colo. 2013); *Carr v. Koch*, 981 N.E.2d 326 (Ill. 2012); *Davis v. State*, 804 N.W.2d 618 (S.D. 2011); *Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009); *Pendleton School Dist. 16R v. State*, 200 P. 3d 133 (Or. 2009); *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. 2009); *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 731 N.W.2d 164 (Neb. 2007); *Oklahoma Education Assoc. v. State*, 158 P.3d 1058 (Okla. 2007); *Maryland State Board of Ed. v. Bradford*, 875 A.2d 703 (Md. 2005); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); *Pennsylvania Assoc. Riral and Small Schools v. Ridge*, 737 A.2d 246 (Pa. 1999); *Matanuska-Susitna Borough School Dist v. State*, 931P. 2d 391 (Alaska 1997); *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400 (Fla. 1996); *School*

> [s]tate courts' analyses of their equality guaranty provisions fit into three distinct categories. First, some state courts follow federal equal protection doctrine without deviation.[26] Second, other state courts use the federal levels of scrutiny framework, but have developed their own independent analyses as to what constitutes a fundamental right or suspect classification.[27] Third, a few state courts reject all aspects of the federal approach and develop their own independent frameworks and analyses.[28]

William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Litigation*, 75 Va. L. Rev. 1639, 1670-71 (1989).

Here, Plaintiffs underlying theory is premised upon the illusion that what the schools really need is yet another grandiose judicial statement defining educational adequacy. Yet, creating and then attempting to judicially define and enforce a federal constitutional right to what Plaintiffs' believe is a minimally adequate education would, as one commentator noted, "provide a legislative shortcut for those who have the means to bring such complex litigation," and "risks

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Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854 (Me. 1995); *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988); *Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, 746 P.2d 1135 (Okla.1987); *Board of Educ, Levittown v. Nyquist*, 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359 (1982); appeal dism'd, 459 U.S. 1138 (1983); *Hornbeck v. Somerset County Bd. of Educ*., 295 Md.2d 597, 458 A.2d 758 (1983); *Luian v. Colo. State Bd. of Educ*., 649 P.2d 1005 (Colo.1982); *McDaniel v.. Thom*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Board of Educ. v. Walter*, 58 Ohio St .2d 368, 390 N.E.2d 813 (1979), cert. denied, 444 U.S. 1015 (1980); *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973).

[26] Citing Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex.L.Rev. 1195, 1219 (1985), citing cases from Arizona, Arkansas, Michigan, Minnesota, New Hampshire, North Dakota, Pennsylvania, and Washington, *id.* at 1219 n. 160, while noting that Williams also cites Minnesota and North Dakota cases as following federal analysis but using independent standards. *See id.* at 1219 n. 161.

[27] Citing Williams, *supra* at 1219 and noting that "the California Supreme Court is probably the best example of this. *See, e.g., Crawford v. Board of Educ*., 17 Cal.3d 280, 551 P.2d 28, 130 Cal.Rptr. 724 (1976) (school busing to achieve desegregation required even though there was no evidence of intentional discrimination), aff'd, 458 U.S. 527 (1982). In the school finance reform context, *see Serrano v. Priest*, 18 Cal.3d 728, 557 P.2d 929, 135 Cal.Rptr. 345 (1976) (en banc) (holding that discrimination in educational opportunity on the basis of district wealth involves a suspect classification and that education is a fundamental interest), cert. denied, 432 U.S. 907 (1977) (*Serrano II*). And Thro notes that "a further example, dealing with an independent state definition of rational, is provided by *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983) ("[E]ven without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts").

[28] Citing Williams, *supra*, at 1219-21, and *Robinson v. Cahill*, 62 N.J. 473, 492, 303 A.2d 273, 282, cert. denied, 414 U.S. 976 (1973) (Robinson I) (refusing to use the federal or any other test of fundamentality and instead developed its own framework for assessing education in the state equality context).

advancing the political agenda of a few rather than fostering a democratic consensus derived, at least in theory, from the policy preferences of many citizens." *See* Note, *The Misguided Appeal of a Minimally Adequate Education* (hereinafter, "*Misguided*"), 130 Harv. L.Rev. 1458, 1473 (2017).

2. The Separation of Powers, Federal Abstention and Political Question Doctrines

The Supreme Court has emphasized that:

> [t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, § 1, declares: 'All legislative Powers herein granted shall be vested in a Congress of the United States.' Article II, § 1, vests the executive power 'in a President of the United States of America,' and Art. III, § 1, declares that 'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'

Buckley v. Valeo, 424 U.S. 1, 124 (1976). And the Court has explained that:

> [a]lthough not 'hermetically' sealed from one another, *Buckley v. Valeo, supra*, 424 U.S., at 121, 96 S.Ct., at 683, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. *See Hampton & Co. v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624 (1928). When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.

I.N.S. v. Chadha, 462 U.S. 919, 951-52 (1983). And in his concurring opinion in *Chadha*, Justice Powell wrote that:

> [f]unctionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 433, 97 S.Ct. 2777, 2785, 53 L.Ed.2d 867 (1977); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. *See Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S., at 587, 72 S.Ct., at 866–867 (1952); *Springer v. Philippine Islands*, 277 U.S. 189, 203, 48 S.Ct. 480, 482–483, 72 L.Ed. 845 (1928).

462 U.S. at 961-62 (Powell, J., concurring).

In addition, there are two federal abstention doctrines that are applicable here: (a) *Buford* abstention. *See Burford v. Sun Oil Co*., 319 U.S. 315 (1943); and (b) *Pullman* abstention. *See Railroad Commission of Texas v. Pullman Co*., 312 U.S. 496 (1941). As to *Burford* abstention, the First Circuit has explained that:

> [t]he *Burford* doctrine is a set of variegated responses built around a central theme. 'The fundamental concern in Burford is to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution.' *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir.1998). *Burford* itself involved a due process clause challenge in a federal court to a drilling permit issued by the Texas agency charged with responsibility for such regulation. The Supreme Court endorsed abstention.

Sevigny v. Employers Ins. of Wausau, 411 F.3d 24, 27 91st Cir. 2005). The Circuit has held that the *Burford* abstention doctrine states that federal courts:

> must decline to interfere with proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import ...'; or (2) where the 'exercise of federal review ... would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'
>
> [*New Orleans Pub. Serv, supra*], 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814). As we have explained, *Burford* abstention is concerned with avoiding the 'awkward circumstance of turning the federal court into a forum that will effectively decide a host of detailed state regulatory matters, to the point where the presence of the federal court, as a regulatory decision-making center, makes it significantly more difficult for a state to operate its regulatory system.' *Bettencourt*, 904 F.2d at 779 (quoting *Bath Memorial Hosp. v. Maine Health Care Fin. Com'n*, 853 F.2d 1007, 1012 (1st Cir.1988)).

Guillemard-Ginorio, 585 F.3d at 523-224. And the Circuit has noted that under the *Pullman* abstention doctrine:

> federal courts may abstain from deciding a case when a state court's resolution of unclear state law would obviate the need for a federal constitutional ruling. Because the federal court's decision in these circumstances 'cannot escape being a

> forecast rather than a determination,' abstention is justified to 'avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.' [citing *Pullman, supra,* 312 U.S. at 499–500]. In this way, the *Pullman* abstention doctrine serves the dual aims of avoiding advisory constitutional decision-making, as well as promoting the principles of comity and federalism by avoiding needless federal intervention into local affairs. See 17A Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 4242 (1988).

Pustell v. Lynn Public Schools, 18 F.3d 50, 53 (1994). In *Pustell,* the First Circuit invoked *Pullman* abstention when declining to exercise jurisdiction over a constitutional challenge to a Massachusetts statute that mandated that school authorities make a home visit before approving a plan of home schooling. *See id*. at 53-54. Citing the "needless friction" with state and local policies that might result if it were to decide the federal constitutional claims, *see id*. at 54, the Circuit also emphasized in *Pustell* that its decision to abstain was:

> . . . affected by another consideration. Although federal courts are capable of resolving state law issues, educational policy is a matter of particularly local concern. *See Care & Protection of Charles,* [399 Mass. 324, 504 N.E.2d 592, 598 (1987)] (noting that the details of educational policy adopted by the Massachusetts state legislature historically have been left to the control of the people in each municipality). The question of what information local school officials need in order to evaluate whether homeschoolers are being educated adequately is best resolved by those closer to the issue than federal court judges.

Id. at 54; *see also Harpswell Coastal Academy v. Maine School Administrative District No 75 (Topsham),* 2015 WL 7194934 (November 16, 2015) at *7 ("A federal court is less likely to retain jurisdiction if the state law question involves a matter of state or local concern" such as education); and *Guiney v. Roache,* 833 F.2d 1079 (1st Cir. 1987) ("[s]ometimes Pullman abstention is appropriate because the federal claim is "entangled in a skein of state law that *must* be untangled before the federal case can proceed." (citation omitted)).

In *Baker v. Carr,* 369 U.S. 186 (1962), the Court set forth six independent factors to review in determining whether a nonjusticiable political question has been raised:

> (1) 'a textually demonstrable constitutional commitment of the issue to a coordinate political department'; or (2) 'a lack of judicially discoverable and manageable standards for resolving it'; or (3) 'the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion'; or (4) 'the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government'; or (5) 'an unusual need for unquestioning adherence to a political decision already made'; or (6) 'the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

Vieth v. Jubelirer, 541 U.S. 267, 277–78, (2004) (quoting *Baker*, 369 U.S. at 217); *see also Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C.Cir.2005) ("To find a political question, we need only conclude that one factor is present, not all."). And it is clear that claims that present a political question must be dismissed. *See* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3534.3 (2007).

The factors set forth in *Baker v. Carr* overlap with those pertinent to the separation of powers and federal abstention doctrines, and their application here illustrate why this Court should not exercise jurisdiction. Thus, as to factor (1), the Education Clause in the Rhode Island Constitution provides a "a textually demonstrable constitutional commitment of the issue to a coordinate political department," as was made clear by the Rhode Island Supreme Court when it twice held that matters of education policy are within the plenary authority of the General Assembly. See *Chaffee*, 89 A.2d at 791; *Sundlun*, 662 A.2d 57. (Discussed *infra* at 59-64).

As to factors (2) or (3) – i.e., "a lack of judicially discoverable and manageable standards for resolving [the case] and "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion" – micromanaging the public school curricula is not a role for which the Courts are institutionally suited. As Justice O'Connor noted in her concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70 (1995):

> [u]nlike Congress, which enjoys "'discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' "

> *Croson, supra*, 488 U.S., at 490, 109 S.Ct., at 720 (quoting *Katzenbach v. Morgan, supra*, 384 U.S., at 651, 86 S.Ct., at 1724), federal courts have no comparable license and must always observe their limited judicial role. Indeed, in the school desegregation context, federal courts are specifically admonished to 'take into account the interests of state and local authorities in managing their own affairs,' *Milliken v. Bradley*, 433 U.S. 267, 281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977) (*Milliken II*), in light of the intrusion into the area of education, 'where States historically have been sovereign,' *United States v. Lopez*, 514 U.S. 549, 564, 115 S.Ct. 1624, 1632, 131 L.Ed.2d 626 (1995), and 'to which States lay claim by right of history and expertise," id., at 583, 115 S.Ct., at 1641 (Kennedy, J., concurring).

Id. at 113; *see also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'").[29]

And as to factors (4), (5) or (6) – i.e., "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," the "need for unquestioning adherence to a political decision already made," or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" – even the dissenting opinion in *Campaign for Quality Education v. State of California* recognized that "the Constitution does not mandate particular curriculum or instructional methods" and "'the curriculum and courses of study are not constitutionally prescribed [but] ... are details left to the Legislature's discretion [and] ... do not constitute part of the system but are merely a function of it.'" 246 Cal. App. 4th at 909 (Pollak, Acting P.J., dissenting). As the First Circuit has noted:

[29] Quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932).

> [p]ublic schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents. *Cf. Morse v. Frederick*, 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (students' First Amendment free speech rights versus interest in administering schools without encouragement of illegal drug use); *Hennessy v. City of Melrose*, 194 F.3d 237 (1st Cir.1999) (public school's interest in implementing its curriculum versus student teacher's interest in expressing opposition to abortion and homosexuality); *Zykan ex rel. Zykan v. Warsaw Cmty. Sch. Corp*., 631 F.2d 1300, 1304 (7th Cir.1980) (students' First Amendment 'freedom to hear' under *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), versus school's interest in limiting exposure to materials that might harm intellectual and social development); *see also Lyng*, 485 U.S. at 452, 108 S.Ct. 1319 ('The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.').

Hurley, 514 F.3d at 107. The same could be said with respect to the judicial attempt to define educational adequacy, which is an invitation to endless litigation, as many states have discovered. *See Lobato*, 216 P. 3d at 41 (noting that: (a) "the New Jersey Supreme Court has struggled for more than two decades to define what constitutes a 'thorough and efficient' education under its constitution;" (b) "The Texas Supreme Court has addressed whether its school finance system is 'efficient' under its education clause six times since 1989;" and (c) "[d]espite 'issuing four decisions in this case over the past nine years,' the Alabama Supreme Court conceded that 'the pronouncement of a specific remedy "from the bench" would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature."). Indeed, attempts to define educational adequacy under state constitutions have been all over the map. *See infra* at 57-59.

In *Wright v. Council of Emporia*, 407 U.S. 451 (1972), the Court found educational, as well as societal, value in locally-governed school districts, noting that:

> [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. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. *Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot.* A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns.

Id. at 478 (emphasis added). And in *Rodriguez*, the Court recognized that:

> [i]n part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.'[footnote omitted]. No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

411 U.S. at at 49-50.

Yet here, Plaintiffs urge this Court to simply ignore the "single tradition" of local control of education so consistently applied by the courts. Indeed, Plaintiffs ask the Court for an order, *inter alia*:

> [e]njoining 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 . . .

Complaint at 45-46. This would require the Court to dictate fundamental policy choices—about which there is much debate—regarding the content of public education. Any such order would

substantially interfere with the clear pronouncement by Rhode Island's highest court that the proper forum for consideration of matters of educational adequacy such as raised by Plaintiffs "is the General Assembly, not the courtroom." *Sundlun, supra*, 662 A.2d at 58. Thus, it is "difficult to imagine a case having a greater potential impact on our federal system." *Rodriguez*, 411 U.S. at 44.

Finally, comity suggests that this Court should decline jurisdiction. As one commentator has concluded:

> [t]here is an obvious appeal to the idea that a robust constitutional right to education--one that guarantees a minimally adequate education--may provide a solution to the seemingly intractable puzzle of school reform. [footnote omitted]. Nevertheless, the rise of adequacy litigation involving more substantive matters of education policy affirms that this appeal is misguided. As courts and commentators have long observed, [footnote omitted] not only is the judiciary poorly prepared to assess the merits of competing education policies, but it also lacks the democratic legitimacy and structural authority to address the difficult political questions that educational-adequacy litigation tends to raise.[footnote omitted]. While one of these concerns standing alone might not justify judicial abdication in such matters, the unique confluence of these factors as they pertain to public education--coupled with the degree to which education litigation increasingly turns on complex, non-legal, and policy-oriented questions--counsels, perhaps now more than ever, in favor of judicial restraint.

Misguided, 130 Harv. L. Rev. at 1467.

3. Plaintiffs' remaining claims are nothing more than additional transparent attempts to effect an end-run around *Rodriguez* and basic constitutional doctrines.

Little time need be spent addressing Plaintiffs' remaining claims that the Sixth or Seventh Amendment and/or the Guarantee Clause of Art. 4, § 4 are the sources of a fundamental federal constitutional right to education and/or that Plaintiffs have stated a claim under 42 U.S.C. § 1983.

a. The Fourteenth Amendment's Privileges and Immunities Clause
(Third Cause of Action)

Justice Thomas has opined that the Supreme Court "all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter–House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1872)." *Saenz v. Rose*, 526 U.S. 489, 521-22 (1999) (Thomas, J., dissenting). Yet, Plaintiffs' attorney here has suggested that the Clause nonetheless "may provide an alternate or additional constitutional basis for the Court to hold that there is a federal right to education." *See Flunking*, note 2, *supra*, at 160-163, citing Justice Thomas' dissenting opinion in *Saenz,* Stephen G. Calabresi and 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 (2008), and Goodwin Liu, *Education, Equality and National Citizenship,* 116 Yale L.J. 330 (2006).[30] The fact that support for the proposition is limited to a dissenting opinion and legal commentary highlights the total lack of actual legal precedent for the proposition, this despite the number of educational funding, adequacy and equity cases that have been decided.

In any event, as Justice Thomas noted in his dissenting opinion in *Saenz,* in the *Slaughter–House Cases*:

> [t]he Court reasoned that the Privileges or Immunities Clause was not intended 'as a protection to the citizen of a State against the legislative power of his own State.' *Id*. at 74. Rather the 'privileges or immunities of citizens' guaranteed by the Fourteenth Amendment were limited to those 'belonging to a citizen of the United States as such.' *Id.* at 75. The Court declined to specify the privileges or immunities that fell into this latter category, but it made clear that few did. *See id*. at 76 (stating that 'nearly every civil right for the establishment and protection of which organized government is instituted,' including 'those rights which are fundamental,' are not protected by the Clause).

[30] The Clause is quoted at note 3, *supra*.

526 U.S. at 521-22 (Thomas, J., dissenting). In *Saenz*, the Court held that California's durational residency requirement for welfare eligibility was a violation of the "right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State to travel." *See id*. at 503-04. In dissent, Justice Thomas relied upon Justice Bushrod Washington's landmark opinion in *Corfield v. Coryell*, 6 F.Cas. 546 (No. 3,230) (CCED Pa. 1825), emphasizing that:

> Washington rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits (such as the right to harvest oysters in public waters) that a State chooses to make available. Instead, he endorsed the colonial-era conception of the terms 'privileges' and 'immunities,' concluding that Article IV encompassed only fundamental rights that belong to all citizens of the United States. [footnote omitted]. *Id*. at 552.

526 U.S. at 551-552.

Calabresi and Agudo note that in *Washington v. Glucksberg*, 521 U.S. 702 (1997), a case decided two years prior to *Saenz*, the Supreme Court showed "some sympathy" to the notion that the Clause "protects both enumerated and unenumerated rights *so long as those rights are deeply rooted in history and tradition*." 87 Tex. L. Rev. 7 (emphasis added).[31] The authors then emphasize that "[n]inety-two percent of all Americans in 1868 lived in states whose constitutions imposed this duty on state government," a fact which they find "striking because we have no such right, at least explicitly, in our federal Constitution," *id*. at 109-110, and conclude that "[a] right to a public-school education is thus *arguably* deeply rooted in American history and tradition and is implicit in the concept of ordered liberty." *Id.* at 109 (emphasis added).

[31] In *Glucksberg*, the Court held that under the Due Process Clause, fundamental rights are only those "objectively, deeply rooted in this 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." 521 U.S. at 720-21

However, the conclusion that the federal Privileges and Immunities Clause was originally intended to support a federal constitutional right to education flies in the face of the fact that, as discussed: (a) while the great majority of state constitutions had an education clause in 1868, laws mandating that towns provide for public education were not enacted until well after 1868; (b) it has always been understood that education was a core function of the states, and that the source of any affirmative legal right to education in the United States would be located in a state law or constitution; and (c) if there had been a federal constitutional right to education, Congress would have had no need to require that States include the right in their constitutions as part of its amended Reconstruction Act. And unlike with respect to voting – the right to which was ensured by the passage of the Fifteenth Amendment – there was no need to guarantee any right to education because it already had been guaranteed under state constitutions. (Discussed *supra* at 17-22).

Moreover, constitutionalizing a fundamental right to a very particular type of education would violate the separation of powers doctrine and the Tenth Amendment (quoted at note 10, *supra*). Yet, as noted by Calabresi and Agudo, "seventy-two percent of the pre-1855 and 84% of the post-1855 [state] constitutions had separation-of-powers provisions," and "in 1868 when the Fourteenth Amendment was ratified, an Article V, three-quarters consensus of the states supported the idea that Americans had a fundamental right to a government of separated powers." *Id*. at 104. Maybe that's why Liu concluded that any invigorated concept of national citizenship to be derived from the Privileges and Immunities Clause was not intended to create a judicially-enforceable right to education. Indeed, at the outset of his article, Liu makes crystal clear that:

> . . . my thesis is chiefly directed at Congress, reflecting the historic character of the social citizenship tradition as 'a majoritarian tradition, addressing its

> arguments to lawmakers and citizens, not to courts.' [footnote omitted]. Whatever the scope of judicial enforcement, the Constitution--in particular, the Fourteenth Amendment--speaks directly to Congress and independently binds Congress to its commands. Thus the approach to constitutional meaning I take here is that of a 'conscientious legislator' [footnote omitted] who seeks in good faith to effectuate the core values of the Fourteenth Amendment, including the guarantee of national citizenship.

Liu, 116 Yale L.J. at 339. And in the conclusion to his article, Liu explains why the courts should not be attempting to define and enforce educational adequacy, noting that:

> [a]t a policy level, many issues merit further inquiry. How much education is really adequate, and how should adequacy be measured? What level of resources can be considered adequate, and how should that level change over time? Does adequacy by today's standards entail additional opportunity beyond elementary and secondary education in both directions, i.e., preschool and higher education? [footnote omitted]. Must effective adequacy reforms address not only education resources but also non-resource factors such as accountability, efficiency, and choice? [footnote omitted] These questions call for careful analysis informed by research and best practices. Moreover, because the meaning of adequacy depends on social context, policy solutions will reflect more than technical considerations. They will reflect socially situated judgments about the prerequisites of equal citizenship in the contemporary life of the nation.

Id. at 410-11.

b. The Sixth and Seventh Amendments and the Federal Jury Selection and Service Act of 1968, (Fourth Cause of Action)

The stated purpose of the Jury Selection and Service Act of 1968, 28 U.S.C.A. § 1861, *et seq*., is that (a) "all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." *Id.* at §1861; and (b) all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose." *Id*. The Act provides that "[t]he chief judge of the district court . . . shall determine solely on the basis of information provided on the juror qualification form and other competent evidence

whether a person is unqualified for, or exempt, or to be excused from jury service," *id*. at § 1865(a), and:

> in making such determination the chief judge of the district court . . . *shall deem any person qualified* to serve on grand and petit juries in the district court unless he—
>
> (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
>
> (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
>
> (3) is unable to speak the English language;
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
>
> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

Id. at (b) (emphasis added).

Nothing in the Act or in the Sixth or Seventh Amendments evidence Congressional intent to create a fundamental right to education.[32] Indeed, if anything, the Act undermines Plaintiffs' adequacy argument by equating mandatory eligibility for jury service, not with Plaintiffs' ill-defined notion of educational adequacy, but rather simply with the ability to speak the English language and "to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form." *See* 28 U.S.C. § 1865(b) (quoted above). Plaintiffs citation to *Duncan v. Louisana*, 391 U.S. 145 (1968) and *Powers v. Ohio*, 499 U.S. 400, 407 (1991), *see* Complaint, ¶ 49 at 17, while reminding us that "the guarantees of jury

[32] The Sixth and Seventh Amendments are quoted at note 4, *supra*.

trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered," *see Duncan*, 391 U.S. at 155, is unavailing.

In *Duncan*, the Court held that the defendant was entitled to a jury trial under the Sixth and Fourteenth Amendments, notwithstanding that he was sentenced to serve only 60 days in parish prison and to pay fine of $150, *see* 391 U.S. at 158, and in *Powers*, the Court held that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges under the Equal Protection Clause, whether or not defendant and excluded jurors share same race. *See* 499 U.S. at 410. Nether case is even vaguely relevant to the Plaintiffs' attempt to transmute the unquestioned constitutional right to a jury trial into a constitutional right to a particular type of education.

c. The Republican Form of Government Guarantee Clause in Article Four, Section Four (Fifth Cause of Action)

The Supreme Court has noted, "in most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States*, 505 U.S. 144, 184 (1992).[33] The Court explained that this view:

> . . . has its origin in *Luther v. Borden*, 7 How. 1, 12 L.Ed. 581 (1849), in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that 'it rests with Congress,' not the judiciary, "to decide what government is the established one in a State." *Id*., at 42. Over the following century, this limited holding metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.' *Colegrove v. Green*, 328 U.S. 549, 556, 66 S.Ct. 1198, 1201, 90 L.Ed. 1432 (1946) (plurality opinion).

Id. More recently, the First Circuit held that:

[33] The Clause is quoted at note 5, *supra*.

> [t]he first portion of the Clause is only implicated when there is a threat to a 'Republican Form of Government.' 'Republican' is commonly defined as 'of, relating to, or having the characteristics of a republic: having the form or based on the principles of a republic.' *Webster's Third New International Dictionary* 1928 (1993). 'Republic,' in turn, is defined as 'a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law.' *Id*.; *see also Oxford English Dictionary* (2d ed.1989) (defining 'republic' as '[a] state in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a king or similar ruler'). The Guarantee clause does not require a particular allocation of power within each state so long as a republican form of government is preserved. Indeed, the forms of each state government at the time of the adoption of the Constitution varied in terms of separations of powers, *see* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo–Federalist Approach*, 81 Cornell L.Rev. 393, 408–11 (1996), and are each presumed to have been 'Republican' within the meaning of the Guarantee Clause, *see Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175–76, 22 L.Ed. 627 (1874). If there is any role for federal courts under the Clause, it is restricted to real threats to a republican form of government.

Largess v. Supreme Judicial Court for State of Massachusetts, 373 F.3d 219, 1226-27 (1st Cir. 2004). The Circuit went on to explain that in *New York*, the Court "affirmed that the Guarantee Clause (if claims under it are justiciable at all) is only offended in highly limited circumstances. It held that there was no possible violation of the Clause in that case because the states retained 'the ability to set their legislative agendas' and 'state government officials remain[ed] accountable to the local electorate.'" *Id*. at 228-29, citing *New York*, 505 U.S. at 185.

As has been discussed, Plaintiffs' claims here implicate the political question doctrine. *See supra* at 42-49. They are not somehow made justiciable by the mere invocation of the Guarantee Clause, especially since Plaintiffs' claim that the failure to properly teach civics and social studies will someday render it impossible to "maintain a republican form of government," *see* Complaint, ¶ 133 at 44-45, is not supported by any specific factual claims relating to the State's form of government, but rather is premised upon factually unsupported speculation about future events.

d. 42 U.S.C. § 1983
(First, Second, Third and Fourth Causes of Action)

By its plains terms, a condition precedent to any cause of action under § 1983 requires some "deprivation" of one of the "rights, privileges, or immunities secured by the Constitution and laws." *Id.*[34] And since, for all the reasons discussed above, Plaintiffs have not pled facts establishing any such deprivation, there is no viable cause of action under the Section.

E. THE CONTOURS OF ELEMENTARY AND SECONDARY EDUCATION IN RHODE ISLAND

1. Rhode Island's Education Clause and the Unsuccessful Legal Challenges to the State's Education Funding Formula

Not all state constitutional education clauses are the same. As noted by the Supreme Judicial Court of Massachusetts:

> [t]he more directive Constitutions were enacted far later than the education clause in the Massachusetts Constitution. *See, e.g.*, art. 8, § 4, of the New Jersey Constitution ('The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years'). *See also* art. 9, § 1, of the Florida Constitution (declaring "a paramount duty" of State 'to make adequate provision ... by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of ... other public education programs that the needs of the people may require'); § 183 of the Kentucky Constitution ('The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State'): art 6, § 2, of the Ohio Constitution (Legislature 'shall make provisions, by taxation, or otherwise as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State'); art. 9, § 1 of the Washington Constitution (declaring Legislature's duty to make 'ample provision for the educations of all children 'the paramount duty of the State').

Hancock, 822 N.E.2d at 1154, n. 30. That being said, it appears that, as noted by the Colorado Court of Appeals, state courts faced with the task of interpreting education clauses in their constitutions have reached very different conclusions, many of which appear to be based less

[34] The Section is quoted at note 6, *supra*.

upon the relevant text, than upon "policy choices and value judgments." *See Lobato v. State*, 216 P.3d 29, 39 (Colo. 2008).[35]

Yet, all such provisions should be interpreted using the same rules of construction. As the Court noted in *Campaign for Quality Education v. State of California*, 246 Cal.App.4th 896 (2016):

> Chief Justice Marshall, in *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824), speaking of the federal constitution, says '[the framers], and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said [*id*. at p. 188];' " and, earlier, in *Sturges v. Crowninshield*, 17 U.S. 122, 4 Wheat. 122, 4 L.Ed. 529 (1819), Chief Justice Marshall says 'although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words.' 17 U.S. at p. 202, 4 Wheat. at p. 202. And, more recently, in *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), the high court, in addressing the contours of a federal constitutional substantive due process claim, said that '[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field' [citation] lest the liberty protected ... be subtly transformed

[35] *Compare, e.g., Rose v. Council for Better Education*, 790 S.W.2d 186, 212 (Ky. 1989) and *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545, 615 N.E. 2d 516 (1993) (holding that a constitutionally adequate, or "efficient" education included several specific "capabilities" in each of the major content areas); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982) and *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997) (defining the guaranteed level of education as being a "sound basic education"); *Robinson v. Cahill* (Robinson I), 303 A.2d 273, 295 (N.J. 1973) and *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (requiring a "minimally adequate education."); *CFE 1, supra*, 655 N.E.2d at 661 (equating a sound basic education with "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury") with *Campaign for Quality Education v. State of California*, 246 Cal.App.4th 896 (2016) (sections 1 and 5 of article IX of the state constitution "do not provide for an education of 'some quality' that may be judicially enforced by appellants"); *see also Bonner v. Daniels*, 907 N.E.2d 516, 521 (Ind. 2009) ("The phrases "general and uniform," "tuition ... without charge," and "equally open to all" do not require or prescribe any standard of educational achievement that must be attained by the system of common schools. The Clause says nothing whatsoever about educational quality."); *Lobato, supra*, 216 P. 3d 29, 38 (terms "thorough" and "uniform" in Colorado Constitution "does not provide a standard to determine whether there is a qualitative educational guarantee"); Committee for Educ. Rights v. Edgar, 174 Ill.2d 1, 672 N.E.2d 1178, 1191 (Ill. 1996) ("What constitutes a "high quality" education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards."); *Campbell County School Dist. v. State*, 907 P.2d 1238, 1258 (Wyo. 1995) (" . . . educational philosophy and needs change constantly, we believe the language of those education article provisions [in the requiring 'a complete and uniform system of public instruction' . . . and 'a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state' . . . must not be narrowly construed."); and *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 731 N.W.2d 164, 179 (Neb. 2007) ("We interpret the paucity of standards in the free instruction clause as the framers' intent to commit the determination of adequate school funding solely to the Legislature's discretion, greater resources, and expertise.").

> into the policy preferences of the members of this Court [citation].' *Id*. at p. 720, 117 S.Ct. 2258.

Id. at 897-98.

Applying the above rules of construction to the Rhode Island Constitution, the Rhode Island Supreme Court has twice properly declined the invitation to define educational adequacy. Both cases involved a challenge to the State's education funding formula. In the first such challenge, filed in the early '90s, three Rhode Island cities – along with various students, parents, taxpayers and local government representatives – sought a declaratory judgment that the state's method of financing public education violated the Education Clause of the Rhode Island constitution, as well as its Equal Protection and Due Process Clauses. *See Sundlun,* 662 A.2d at 43.

Article 12, section 1 of the Rhode Island Constitution, the "Education Clause," provides as follows:

> 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.

Id. And like its federal counterpart, the Rhode Island Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws." Art. 1, § 2.

As the Rhode Island Supreme Court noted in *Sundlun*, "[t]he trial justice began his analysis of the Education Clause by acknowledging that there is no constitutional right to an education under the Constitution of the United States, and that 'if a constitutional right to an education attaches to the privilege of citizenship, it does so under the Constitution of each

state.'" 662 A.2d at 54. Then, by idiosyncratically interpreting the word "promote" in the Education Clause, the trial justice held that the Clause guaranteed the right to an "'equal, adequate and meaningful" education.'" *Id*.[36] On appeal, the state Supreme Court reversed, noting that:

> . . . the word 'promote' in article 12, section 1, does not mean 'found' or 'establish.' The meaning of the word in its historical context clearly precludes such a definition, first, because the towns themselves 'founded' or 'established' their public schools, not the General Assembly, and, second, because the State Constitution of 1842 did not require the founding or establishing of a public school in every town. The historical evidence demonstrates that since the time article 12 was adopted, the establishment of schools has been left to the local communities although financial and other assistance were provided by the state.
>
> As for the remaining language of article 12, as we noted *ante*, a more comprehensive or discretionary grant of power is difficult to envision. Article 12, section 1, refers to 'all means which ***it*** [the General Assembly] may deem necessary and proper to secure to the people the advantages and opportunities of education." (Emphasis added.) No standard or authority has been assigned to a coordinate branch of government to review the General Assembly's performance in fulfillment of its constitutional duties in this regard. ***The education clause leaves all such determinations to the General Assembly's broad discretion to adopt the means it deems 'necessary and proper' in complying with the constitutional directive.***

Id. at 56 (emphasis added). The *Sundlun* Court grounded its decision upon the separation of powers doctrine while noting that the adequacy standard adopted by the trial justice, i.e., the right to receive an "equal, adequate, and meaningful education," was "not susceptible of judicial management." *See id*. at 58.

As to the stated equal protection claim, the Court reiterated that:

> . . . plaintiffs have alleged that their right to education has been compromised because of their districts' diminished financial ability. The United States Supreme Court has long held that the right to an education is a not a fundamental right afforded protection under the Federal Constitution, *Rodriguez*, 411 U.S. at 35, and as discussed *supra*, education is not generally a judicially-enforceable right

[36] The language was derived from a report that had been issued by The 21st Century Education Commission, which was created by the General Assembly and directed to design a plan to meet the educational needs of the state. Its report, *Educating All Our Children*, was issued in March 1992.

> under article 12, section 1, of our State Constitution. Moreover, wealth is not a suspect classification for purposes of an equal-protection analysis. *Maher v. Roe*, 432 U.S. 464, 471 (1977). Therefore, the proper standard of review by this court is minimal scrutiny.

Id. at 60. The Court then upheld the state's school financing system, noting that:

> [u]nder the minimal-scrutiny standard of review, a funding system must be upheld if it is rationally related to a legitimate state interest. The defendants asserted that the preservation of local control over education is a legitimate state interest, and we agree. The United States Supreme Court has recognized that '[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.'

Id. at 61-62, citing *Milliken*, 418 U.S. at 741–42.[37]

Almost a decade later, two of the three municipal plaintiffs in *Sundlun* again challenged the state's method of funding public education. This time, plaintiffs cited to a series of amendments to the state constitution that were approved by the electorate in 2004 (the "Separation of Powers Amendments'). The Amendments "clearly established, for the first time in Rhode Island's history, three separate and distinct departments of government," *Woonsocket v. Chafee, supra*, 89 A.3d at 790, and in the process, repealed the Continuing Powers Clause at Art. 6, § 10 which the *Sundlun* Court had identified as "'a knowing and an express endorsement of the Legislature's primacy over education.'" *Id*. at 791, citing *Sundlun*, 662 A.2d at 50.

The *Chafee* Court, however, rejected plaintiffs' argument that its decision in *Sundlun* depended upon the Continuing Powers Clause, noting that:

> [o]ur prior case law reveals that the Education Clause has always been interpreted in a manner that grants the General Assembly broad discretion in carrying out its constitutional duty to promote public education in Rhode Island, and this interpretation has not been based on the Continuing Powers Clause. *See, e.g., Brown v. Elston*, 445 A.2d 279, 285 (R.I.1982) (reaffirming that article 12 'vests

[37] The *Sundlu*n Court did not address the plaintiffs' claims under the due process clause, noting that "nothing in either the Superior Court's decision or its written memorandum decision and judgment speaks to any due process issues." 662 A.2d at 43, n. 3.

> the State Legislature with sole responsibility in the field of education'); *Coventry School Committee v. Richtarik*, 122 R.I. 707, 712, 411 A.2d 912, 914 (1980) (reiterating that public education is the responsibility of the General Assembly, and that school committees act as agents of the state when discharging their responsibilities); *Members of Jamestown School Committee v. Schmidt*, 122 R.I. 185, 195, 405 A.2d 16, 21–22 (1979) (holding that article 12, section 1 permits the state to provide programs for busing students to nonpublic schools); *Royal v. Barry*, 91 R.I. 24, 31, 160 A.2d 572, 575 (1960) (stating that article 12, section 1 'expressly and affirmatively reserves to the [L]egislature sole responsibility in the field of education'). Thus, while the separation of powers amendments did effect substantial changes in the structure of our government, they did not impair the General Assembly's broad discretion in adopting 'all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education * * *.' R.I. Const. art. 12, sec. 1 (emphasis added).

Id. at 791-92. And finally, the *Chafee* Court rejected plaintiffs' substantive due process claims, concluding that "[a]lthough the plaintiffs spare no ink in outlining the alleged inadequacies of the 2010 funding formula, they do not present facts to suggest that this legislative enactment is devoid of any "substantial relation to the public health, safety, morals, or general welfare." *Id*. at 794-95, citing *East Bay Community Development Corp. v. Zoning Board of Review of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006) (quoting *Cherenzia v. Lynch*, 847 A.2d 818, 826 (R.I.2004)).

Significantly, the plaintiffs in both *Sundlun* and *Chaffee* alleged that Rhode Island's method of funding public education violated their rights under both the federal and state constitutions. *See Sundlun*, 662 A.2d at 56-57, 60, 63 and *Chafee*, 89 A.2d at 791. As noted, in *Sundlun,* the Court explained that the trial justice's conception of educational adequacy, i.e., the right to receive an "equal adequate, and meaningful education," was "not susceptible of judicial management." *See* 662 A.2d at 58. The Court emphasized that "[w]hat constitutes an appropriate education or even an 'equal, adequate, and meaningful' one, 'is not likely to be divined for all time even by the scholars who now so earnestly debate the issues,'" *id*. at 58, quoting *Rodriguez, supra*, at 43, and went on to hold that:

> [b]ecause we believe the proper forum for this deliberation is the General Assembly, not the courtroom, we decline to endorse the trial justice's plan that requires the people of this state
>
> > 'to turn over to a tribunal against which they have little if any recourse, a matter of such grave concern to them and upon which they hold so many strong, though conflicting views. If their legislators pass laws with which they disagree or refuse to act when the people think they should, they can make their dissatisfaction known at the polls. * * * The court, however, is not so easy to reach * * * nor is it so easy to persuade that its judgment ought to be revised.'

Id., quoting *Seattle School District No. 1 of King County v. State*, 90 Wash.2d 476, 563–64, 585 P.2d 71, 120 (1978) (Rosellini, J., dissenting). That holding was later affirmed in *Chafee. See id*. at 791.

Rhode Island is hardly alone in holding that separation of powers precludes the courts from intruding upon legislative authority over education.[38] And many other state courts of appeal have emphasized that the question of educational adequacy is "'inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion'" which is "'close to the hearts of all individuals in [the State].'" *Campaign for Quality Education v. State of California*, 246 Cal.App.4th 896, 911 (2016),

[38] *See, e.g., Oklahoma Education Assoc. v. State*, 158 P.3d 1058, 1066 (Okla. 2007) ("the important role of education in our society does not allow us to override the constitutional restrictions placed on our judicial authority."); *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009) ("To the extent that an individual student may have a right, entitlement, or privilege to pursue public education, any such right derives from the enactments of the General Assembly, not from the Indiana Constitution."); *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 731 N.W.2d 164, 181 (Neb. 2007) ("the relationship between school funding and educational quality requires a policy determination that is clearly for [Nebraska's] legislative branch"); *Ex parte James*, 836 So.2d 813, 818 (Ala. 2002) ("judicial intrusion would represent a jurisprudential divergence with other state courts, who . . . have refused to become involved with school-funding matters, acknowledging, as we do today, such matters to be purely legislative in nature"); *Marrero v. Commonwealth*, 739 A.2d 110, 114 (Pa. 1999) (affirming that such matters are "exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government"); *Abbeville County School Dist. v. State*, 515 S.E.2d 535, 541 (S.C. 1999) (refusing to "usurp the authority of [the legislative branch] to determine the way in which educational opportunities are delivered to the children of [South Carolina]" or to allow "the courts of this State to become super-legislatures"); *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 407 (Fla. 1996) ("The judiciary must defer to the wisdom of those who have carefully evaluated and studied the social, economic, and political ramifications of this complex issue—the legislature."); and *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) ("the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.").

quoting *Committee for Educ. Rights v. Edgar*, 174 Ill.2d 1, 672 N.E.2d 1178, 1191 (Ill. 1996). Yet, as noted by the California and Illinois courts, any determination by a court as to "'the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present'" while "'[m]embers of the general public . . . would be obliged to listen in respectful silence.'" *Id.*

Here, Plaintiffs have further complicated the task of defining educational adequacy by grounding the assumption upon which their Complaint is based – i.e., that students in elementary and secondary schools in Rhode Island are not being adequately prepared to function as citizens – upon various broad generalizations made about the nation's students as a whole in a variety of outdated national reports. *See* Complaint, ¶¶ 5-6 at 9-10 (citing 2014 results of the National Assessment of Educational Progress and certain conclusions reached by the Campaign for the Civic Mission of the Schools et al., *Guardian of Democracy: The Civic Mission of Schools* (2011); ¶¶ 36-42 at 11-14 (cherry-picking the findings in a variety of outdated national reports and studies).

2. The Architecture of Local Control

In 2012, the Rhode Island Board of Education (the "BOE") became the statutory successor to the former Board of Regents (the "Regents") pursuant to the Rhode Island Board of Education Act, P.L. 2012, ch. 241 (effective June 15, 2012), and all the powers and/or duties previously granted and/or delegated to the Regents by the General Assembly were granted and/or delegated to the BOE. *See* R.I. Gen. Laws § 16-97-1(b). The BOE, whose seventeen public members are appointed by the Governor with the advice and consent of the Senate, *see id*., was then reorganized into two new entities, and effective June 19, 2014, it consists of the Defendant

Council as well as the Council on Postsecondary Education, which were "made successor to all powers, rights, duties, and privileges formerly belonging to the . . . Regents." *See* §§ 16-59-1(a) and 16-60-1(a), respectively, as amended by P.L. 2014, ch. 145, art. 20.

The eight (8) members of the Defendant Council are appointed from the BOE by the Governor, with the Chair of the BOE serving on the Council in a voting, *ex-officio* capacity. R.I. Gen. Laws § 16-60-2(a). The Council has been authorized by the Legislature: (a) "[t]o adopt standards and require enforcement and to exercise general supervision over all elementary and secondary public and nonpublic education in the state . . ." R.I. Gen. Laws § 16-60-4(a)(2); and (b) to maintain a department of elementary and secondary education ("RIDE"). *See id*. at (a)(6).

RIDE's Commissioner, who serves as the Council's chief executive officer as well as RIDE's chief administrative officer, R.I. Gen. Laws § 16-60-6, has been invested with broad interpretative and enforcement powers and duties, as well as adjudicatory powers and duties exercised pursuant to the state's Administrative Procedures Act (the "APA"), including:

(a) jurisdiction over "any matter of dispute. . . arising under any law relating to schools or education . . ." R.I. Gen. Laws §§ 16-39-1 and 16-39-3.1;

(b) a "duty" to "decide such controversies as may be appealed . . .from decisions of local school committees." R.I. Gen. Laws §§ 16-1-5(10) and 16-60-6(9)(viii); and

(c) power to decide "petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency" under the APA. R.I. Gen. Laws § 42-35-8.

However, the grant of plenary power over education to the General Assembly emphasized in *Sundlun* and *Chaffee* is checked and balanced by the State Constitution's express recognition of municipal home rule in Article XIII, the express intention of which was "to grant and confirm to the people of every city and town in this state the right of self government in all local matters." *Id*. at § 1. Thus, the Legislature's delegation of enumerated powers to the

Education Defendants must be interpreted *in pari materia* with the Home Rule Amendment, which is reflected in the fact that the Legislature has vested the "entire care, control, and management of all public school interests of the several cities and towns . . . in the school committees of the several cities and towns." R.I. Gen. Laws § 16-2-9(a).[39] In addition, R.I. Gen. Laws § 16-2-16 provides that school committees:

> shall make and cause to be put up in each schoolhouse rules and regulations for the attendance and classification of the pupils, for the introduction and use of textbooks and works of reference, and for the instruction, government, and discipline of the public schools, and shall prescribe the studies to be pursued in the schools, under the direction of the department of elementary and secondary education.

Id.

3. State Law, Regulations and Guidance Regarding the Teaching of Civics and Social Studies

In Rhode Island, as in California and in most states, "'the curriculum and the courses of study included in the common state curriculum are not prescribed by the Constitution, but are details left to the discretion of the Legislature,'" and " '[t]hey do not constitute a part of the system, but are simply a function of that system.'" *Campaign for Quality Education v. State of California,* 246 Cal.App.4th 896, 907 (2016) (citation omitted).

[39] These broad powers are often reflected in various Home Rule Charters. For example, under the Providence Charter, the Providence School Board is empowered:

(a) To determine and control all policies affecting the administration, maintenance and operation of the public schools;
(b) To provide rules and regulations for the use, operation and maintenance of public school properties;
(c) To appoint a superintendent of schools to serve as the chief administrative agent of the school board;
(d) To establish the compensation for said superintendent; [and]
(e) To appoint and remove all school department employees and fix their salaries within limits established by appropriation of the city council for the school department.

Providence Home Rule Charter, § 706. In all but two of the local and regional school districts, school committee members are elected. In the two exceptions, i.e., Providence and Woonsocket, the members are appointed by the Mayor. *See* Providence City Charter at § 701; Woonsocket City Charter at Chapter XIV, § 2(a).

Thus, as noted, the "entire care, control, and management of all public school interests of the several cities and towns" has been entrusted to "the school committees of the several cities and towns," R.I. Gen. Laws § 16-2-9(a), and as will be explained, school curricula is largely within the domain of local school committees. That being said, school committees are required to work within certain statutory parameters, and have been provided with guidance, and the General Assembly has empowered the Defendant Council:

> (a) To approve a master plan implementing the broad goals and objectives for elementary and secondary education in the state that have been established by the board of education. These goals and objectives shall be expressed in terms of what men and women should know and be able to do as a result of their educational experience. The council on elementary and secondary education shall continually evaluate the efforts and results of education in the light of these objectives;
>
> (b) To adopt standards and require enforcement and to exercise general supervision over all elementary and secondary public and nonpublic education in the state as provided in subsection (a)(8) of this section. The council on elementary and secondary education shall not engage in the operation or administration of any subordinate committee, local school district, school, school service, or school program, except its own department of elementary and secondary education, and except as specifically authorized by an act of the general assembly . . .
>
> * * *
>
> (c) To approve the basic subjects and courses of study to be taught and instructional standards required to be maintained in the public elementary and secondary schools of the state;
>
> * * *
>
> (d) To enforce the provisions of all laws relating to elementary and secondary education;
>
> * * *
>
> (e) To exercise all other powers with relation to the field of elementary and secondary education within this state not specifically granted to any other department, board, or agency, and not incompatible with law, which the council on elementary and secondary education may deem advisable . . .

R.I. Gen. Laws § 16-60-4. As the Rhode Island Supreme Court has noted that:

> [t]he General Assembly delegated to the Board of Regents for Elementary and Secondary Education (Board of Regents) the responsibility of defining the

> mandated minimum program, and the Board of Regents in turn directed the Rhode Island Department of Education (RIDE) to prepare a Basic Education Program Manual (BEP [ ]) in the 1980s. The BEP [ ] set forth a basic educational program that was to be available to each student, regardless of where in the state the student attended school.

Chaffee, 89 A.3d at 782-83. The BEP now mandates that:

> [e]ach LEA shall ensure that the coherent and coordinated K-12 curriculum for social studies includes coursework designed to develop:
>
> (a) Student knowledge, skills, and attitudes as indicated in the GSEs for Civics & Government and Historical Perspectives/Rhode Island History;
>
> (b) Student understanding of how the world operates in this interconnected era through geography, political science, and economics; and,
>
> (c) Student understanding of human behaviors, beliefs, ideologies, cultures, and backgrounds through history, sociology, anthropology, and other related social sciences.

See id., 200-RICR-20-10-1.2.1(F).

Significantly, in 2005, the General Assembly "recognize[d] the importance of a citizenry well educated in the principles of democracy as enunciated in the constitutions of the state of Rhode Island and the United States," R.I. Gen. Laws § 16-22-2, and thus directed the Board of Regents for Elementary and Secondary Education (now, the Council):

> . . . to develop and adopt a set of grade level standards K-12 in civics education no later than August 31, 2007. These standards shall include, but not be limited to, the history of the state of Rhode Island, representative government, the rights and duties of actively engaged citizenship, and the principals of democracy. These civic education standards shall be used in the public schools of this state beginning in kindergarten and continuing through to and including grade 12. No private school or private instruction shall be approved for the purposes of chapter 19 of this title unless the course of study shall make provision for instruction substantially equivalent to that required by this chapter for public schools.

Id. Based upon the recommendations of a committee of educators, RIDE adopted specific grade span expectations ("GSEs") in 2008 for "Civics and Government" as well for "Historical

Perspective/Rhode Island History." The Civics and Government GSE's provide specific curriculum guidance for topics that include, *inter alia*: (a) the authority and power of the U.S. government, (b) democratic values and principles, (c) citizens' rights and responsibilities, and (d) political systems and political processes.[40]

In addition, the former Regents, collaborating with teachers, parents, community agencies, administrative and policy makers throughout the state, developed a "comprehensive education strategy," including a system for "school accountability for learning and teaching." *See* R.I. Gen. Laws §§ 16-7.1-1 to -19 (colloquially referred to as "Article 31"). The Regents, and now the Defendant Council, have promulgated regulations in a host of areas involving public education,[41] and on August 24, 2015, the Council published its latest strategic plan. *See* Council

[40] The GSE's and explanatory material is publicly available on the RIDE website at http://ride.ri.gov/InstructionAssessment/CivicsSocialStudies.aspx

[41] In addition to the aforementioned BEP and a protocol for intervention in "persistently lowest–achieving" schools, *see Protocol for Intervention: Persistently Lowest-Achieving Schools*, 200-RICR-20-2-55, these include:

(a) Regulations concerning: the Length of the School Day, Physical Restraint, Board Meetings, Appeals and Equal Employment Opportunity, School Construction, Cooperative Service Agreements Among School Districts, Education of Homeless Children and Youth, Education of English Language Learners, Secondary School, Alternate Route to Certification Programs, Rhode Island Grade Span Expectations for Civics & Government and Historical Perspectives/Rhode Island History, Standards for Educational Leadership in Rhode Island, Rhode Island Extended School Year Standard, Nutrition Criteria for RI School Food Service Programs, Teacher Competency in English, Specific Learning Disability Eligibility Criteria, Education of Children with Disabilities, Charter Schools, Preschool and Kindergarten Programs, Career and Technical Education in Rhode Island, Virtual Learning Education in Rhode Island and Rhode Island High School Equivalency Program;

(b) Certification of Educators in Rhode Island, including requirements for certificates in Early Childhood, Early Childhood Special Educator, Elementary Teaching, Secondary Teaching, Special Subjects, Reading Specialist/Consultant, Reading Supervisor/Director, Special Educator - Elementary and Middle Level, Special Educator of Students Who Have Severe/Profound Disabilities, Special Educator - Deaf/Hard of Hearing, Special Educator-Blind/Partially Sighted, Administrator of Special Education, School Counselor, Supervisor of School Counselors, English as a Second Language Specialist, School Social Worker, School Nurse Teacher, School Psychologist, Speech/Language Pathologist, Secondary Principal, Administrator of Curriculum/Instruction, Superintendent of Schools, and Elementary Principal, Secondary Principal, Vocational Education Teacher; and

(c) Requirements for endorsements in English as a Second Language, Elementary, Early Childhood, Special Education, Secondary English and Foreign Language Teachers, English as a Second

on Elementary and Secondary Education, *2020 Vision for Education: Rhode Island's Strategic Plan for PK-12 & Adult Education, 2015-2020* (August 24, 2015) (the "Strategic Plan"). Of note, the Strategic Plan was the result of an extensive consultation process:

> For the first prototype, the community team reviewed the data from an 11,000 person survey to write the core values intended to form the foundation for the plan. These values are a set of beliefs with profound and enduring meaning, are visible in every aspect of the plan, and should become visible in our education system itself.
>
> The second prototype included revisions to the values based upon hundreds of comments. In addition, the community team conducted over 100 stakeholder interviews and using the insights from those interviews, developed a first draft of the six priority areas that bring focus and organization to the plan.
>
> The third prototype included revisions to prototype two based upon hundreds of additional comments. In addition, the staff and community team completed over 50 hours of interviews with local, state, and national experts based upon these interviews, developed the first draft of implementation strategies for each of the six priority areas.
>
> The fourth prototype and the final draft included revisions based upon another two final rounds of prototype publication and feedback. In addition, over a dozen state, local, and national experts came to Rhode Island and joined the community team for a full day of plan revision and development. The combination of these many experts and over 1,000 Rhode Islander citizen participants resulted in the plan you are reading today.

Strategic Plan at 9. The priorities emphasized in the Strategic Plan included:

(a) Focused training for educators working in urban schools so as to increase recruitment and retention of educators in underrepresented and hard-to staff fields and diversity of the educator workforce and improve mutually beneficial, collaborative partnerships between educator preparation programs and local education agencies. *See id*. at 17;

(b) Promot[ing] the use of high-quality health and educational screening of young children and the distribution of family-friendly information about early childhood development, participate in the coordination and streamlining of multi-agency oversight of early learning programs across Rhode Island and advocate for and allocate resources in order to expand

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Language Endorsement for Subject Content Area Teachers, Adapted Physical Education, Bilingual-Bicultural, Driver Education and Middle School.

access to high-quality pre-kindergarten to families and youth with the greatest need. *See id*. at 20-21;

(c) Develop[ing] standards for social and emotional learning in kindergarten through grade 12 and recommend curriculum and best-practice approaches for meeting these standards and adopt cultural competency standards and promote a statewide understanding of those standards. *See id.* at 29-30;

(d) Promot[ing] the expansion of dual-language and world language programming and promote bi-literacy for all students. *See id*. at 31; and

(e) Manag[ing] the school-construction program to promote cost efficiency, space utilization, and asset protection to maximize investments and minimize state and municipal indebtedness. *See id.* at 41.

In addition, the General Assembly has enacted a plethora of laws recognizing the importance of civics and history and the importance of teaching the subjects in the State's elementary and secondary schools.[42] Moreover, in 2016, the General Assembly commissioned the BOE and the Commissioner to "undertake a comprehensive study of the alignment of the core curriculum used by the various school districts throughout the state," the main objective of which was to "determine a unified approach for education within and across the state that encompasses the education and development of workforce skills, of our youth and adult learners, from kindergarten through the graduation of college or the entrance into the workforce." R.I. Gen. Laws § 16-97-9.

[42] *See, e.g.*, R.I. Gen Laws § 16-22-2 ("The General Assembly recognizes the importance of a citizenry well educated in the principles of democracy as enunciated in the constitutions of the state of Rhode Island and the United States" and "directs the board of regents for elementary and secondary education to develop and adopt a set of grade level standards K-12 in civics education no later than August 31, 2007"); R.I. Gen Laws § 16-22-10 ("The school committees of the several cities, towns, and school districts shall provide for students of the senior class in high school a course of instruction and demonstration in the operation of a voting machine, and of the manner of casting a valid ballot."); R.I. Gen Laws § 16-2.1-1, *et seq*. creating a permanent commission to be known as the Rhode Island Permanent Commission on Civic Education); R.I. Gen Laws § 16-93-1, *et seq*. (documenting the long history of measures demonstrating concern for civic education, of which genocide education should be a component, and directing that the Holocaust and genocide education should be provided in secondary schools); R.I. Gen Laws § 16-103-1, *et seq*. (regulating student social media privacy); and R.I. Gen Laws § 16-109-1, *et seq*. (protecting student journalists' freedom of expression); *see also* R.I. Gen Laws § 16-67-1, *et seq*. (Rhode Island Literacy and Dropout Prevention Act).

In response, RIDE conducted a survey of all public educators in Rhode Island in December of 2016 to gather input and assess needs in curriculum, professional learning, and school leadership convened an internal team and "conducted stakeholder outreach, consulted with other professionals in the organization, researched best practices, and compared other state approaches, including Massachusetts, to offer recommendations that will benefit educators and students in our state." *See* the Unified Approach to Statewide Education Report Commissioned by R.I. Gen. Laws § 16-97-9 by RIDE's Division of Teaching and Learning dated July, 2017 at 5. The Report recommended the following five (5) strategies:

> Strategy 1: Develop a consistent curriculum in English language arts and math.
>
> Strategy 2: Enable districts to create or identify high-quality materials and plan for implementation.
>
> Strategy 3: Commit to ongoing and relevant professional learning so that teachers have the content and instructional practices necessary to implement the curriculum.
>
> Strategy 4: Use protocols to continuously improve practices and curriculum based on reviews of student work, assessment data, and classroom observations.
>
> Strategy 5: Support current leaders and identify teacher leadership roles for shared leadership.

Id. at 7-8. And finally, the Council promulgated regulations concerning *Secondary Design: Middle and High School Learning Environments and the Rhode Island Diploma System* (the "Secondary School Regs."), which provide that:

> A. LEAs shall formally adopt coursework graduation requirements that apply to all students within the LEA and require successful completion of at least twenty courses.
>
> B. The twenty courses must include demonstration of proficiency, as defined by the LEA and aligned with appropriate high school content standards in

the six core content areas: English language arts, math, science, social studies, the arts, and technology.

1. All courses shall be aligned to state adopted high school standards or locally adopted national standards in those content areas for which there are no state standards.
2. All courses must be of sufficient scope and rigor to allow students to achieve high school level proficiency, as determined by the LEA.
3. Successful completion of a course shall include demonstration of the knowledge, skill, and competencies outlined in the course learning objectives.

C. The twenty courses must include the following content-area courses:

1. Four courses of English language arts;
2. Four courses of mathematics;
3. Three courses of science; and,
4. Three courses of history/social studies.
5. Pursuant to LEA policies and applicable state law, the additional six required courses are presumed to include, but not limited to world languages, the arts, technology, physical education, and health.

Id., 200-RICR-20-10-2.3.1.

Thus, it is evident that the Education Defendants have established an ample regulatory framework, as well as necessary guidance, to ensure that civics and social studies are an important part of the curricula in the State's elementary and secondary schools, and equally evident that as a result, the rational basis test would be passed.

IV. CONCLUSION

For all the above reasons, the Education Defendants' Joint Motion to Dismiss should be granted.

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,

By their attorney,

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Dated: March 20, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum was filed with the court pursuant to its mandated electronic filing system and also was provided by electronic mail to the following counsel of record on this 20th day of March, 2019:

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