UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

A.C., et al.	:	
Plaintiff,	:	
	:	
v.	:	Case No.: 1:18−cv−00645−WES−PAS
	:	
Gina M Raimondo, et al.	:	Oral Argument Requested
Defendant.	:	30 minutes

PLAINTIFFS' MEMORANDUM
IN OPPOSITION TO THE JOINT MOTION TO DISMISS

Plaintiffs submit this memorandum in opposition to the joint motions to dismiss filed by defendants Gina Raimondo, ("the Governor"), Nicholas A. Mattiello and Dominick J. Ruggerio, (the "legislative leaders") in their official capacities; Ken Wagner in his official capacity as Commissioner of Education (the "Commissioner"), the Rhode Island State Board of Education (the "BOE"), and the Council on Elementary and Secondary Education (the "Council"). This single memorandum responds to the arguments set forth both in the brief filed by the Governor and the legislative leaders (ECF 25-1, referred to below as "Gov. Def. Br.") and in the brief filed by the Commissioner, the BOE and The Council (ECF 23-1, referred to below as "Edu. Def. Br.") in support of their motions.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The main issue this Court needs to decide is whether students have a right under the United States Constitution to an education that prepares them to function productively as civic participants and to exercise meaningfully their Fifteenth Amendment right to vote, their First Amendment rights to speak, to petition their governments and to participate in democratic processes, and their Sixth and Seventh Amendment rights to serve on a jury and be judged by a jury of their peers.

Forty-six years ago, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the United States Supreme Court specifically left open, to be decided in a future case and on the basis of appropriate evidence that was lacking in *Rodriguez*, the issue of what "quantum of education" may be necessary to exercise these constitutional rights. The deteriorating state of civic preparation in Rhode Island's schools and the contemporary challenges to our democratic institutions have brought these issues to the fore, and plaintiffs are asking this Court to now decide the critical issues that the Supreme Court left open in *Rodriguez*.

In *Rodriguez*, a case involving inequities in educational funding, the Supreme Court held in a 5-4 decision that, as a general matter education is not "a fundamental interest" and that, therefore, most claims of a denial of equal opportunity in the provision of educational services are not entitled to strict scrutiny analysis under the Equal Protection Clause of the Fourteenth Amendment. Three of the dissenting Justices however, stressed the importance of education for exercising First Amendment rights, "both as a source and as a receiver of information and ideas," and for exercising the constitutional right to vote and to participate in the political process. *Id*. at 113–14 (Marshall, J., dissenting); *See also id*. at 63 (Brennan, J., dissenting).

Justice Powell, writing for the majority, accepted the dissenters' basic perspective. After summarizing the arguments on this point, he stated that "***We need not dispute any of these***

propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote…" *Id.* at 36 (emphasis added).

He also held, however, that the Court would not have to consider these issues in the case at bar because:

> ***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***. . . . [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).

In other words, the plaintiffs in *Rodriguez*, who focused on issues involving the inequities in education funding in Texas, had not presented evidence that would allow the Court to consider the "quantum of education" that might be necessary for students to be prepared for the "meaningful exercise" of their constitutional rights. Plaintiffs in the present case have provided the evidence that was lacking in *Rodriguez*, and have set forth extensive specific allegations in their complaint regarding the elements of a basic education that would be necessary to exercise their constitutional rights in a meaningful and effective way, as well as the failure of current education policies and practices in Rhode Island to ensure the availability of this necessary "quantum of education." This Court should deny the motions to dismiss and allow plaintiffs to conduct discovery and present evidence at trial that Rhode Island's education system currently fails to provide plaintiffs the opportunity to obtain a constitutionally adequate basic education.

The consensus on this point between the *Rodriguez* majority and dissenters follows from a shared understanding of the precedential impact of the Court's landmark, unanimous holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), in which it stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

The *Brown* Court's emphasis on the importance of education "today" provided the justification for its reversal of the long-established precedent of *Plessy v. Ferguson*, 163 U.S. 537 (1896) that in a prior era had upheld the constitutionality of racial segregation.

In *Rodriguez*, the Court quoted in full the above passage from *Brown*, and affirmed that "Nothing this Court holds today in any way detracts from our historic dedication to public education. … But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." 411 U.S. at 30. Although denying fundamental interest status to claims that funding for education must equitable, the *Rodriguez* majority nevertheless did clearly indicate, as discussed above, that because of "the importance of education to our democratic society" and because education is the "very foundation of good citizenship," *Brown, supra* at 493, the "quantum of education" necessary for the meaningful exercise of the right to vote and the rights of speech and of full participation in the political process may constitute a "right which must be made available to all on equal terms."

A decade after *Rodriguez*, the Court re-iterated its emphasis on the importance of education in *Brown*, and stated explicitly how that emphasis should be reconciled with its

holding in *Rodriguez*. In *Plyler v. Doe*, 457 U.S. 202, 221 (1982), the Court held that although generally speaking education is not a fundamental interest for equal protection purposes, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." For this reason, in *Plyler*, the Court applied a "heightened" equal protection review, *id.* at 238 (Powell, J. concurring), rather than the usual rational relationship analysis. Justice Blackmun, concurring in *Plyler*, added that certain educational interests "must be accorded a special place in equal protection analysis." *Id.* at 232-233. (Blackmun, J. concurring). Plaintiffs submit that their right to an education that prepares them for the meaningful exercise of constitutional rights is such an interest that that should be accorded "a special place in equal protection analysis."

In *Rodriguez,* the Supreme Court did not examine whether education was a fundamental right as a matter of substantive due process. For that reason, and because of new evidence that has emerged in the past 46 years regarding the "deep roots" that education (especially education for civic preparation), has in the "Nation's history and traditions," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), and the even greater importance of education for civic preparation has today than it did in the past, plaintiffs also argue that this Court should declare that education for capable citizenship is a fundamental substantive right under the Due Process Clause of the Fourteenth Amendment.

Since the significant constitutional issues raised by this case are a matter of first impression for the federal courts, plaintiffs have also set forth, in addition to their equal protection and substantive due process arguments, additional and alternative claims under the Privileges and Immunities Clauses of the Fourteenth Amendment, and the Republican Guarantee Clause of Art. IV § 4 of the Constitution. The unique status and central importance of education

for civic preparation today and throughout American history, as well as significant developments in recent Supreme Court rulings, provide a credible basis for this Court to consider applying to the facts of this case one or both of these historically neglected legal doctrines.

As will be discussed in further detail in Part VII of this brief, starting with *Brown v. Board of Education*, 347 U.S. 483 (1954) and continuing to date, the federal and state courts have dealt extensively, appropriately, and successfully with implementing remedies in numerous cases dealing with education issues. Because this case involves relatively non-controversial issues of civic preparation which do not require extensive judicial monitoring or oversight, plaintiffs have requested a limited declaratory judgment remedy that would require the defendants to treat civic preparation as a constitutional priority but, at the same time, would grant them maximum discretion to develop and implement the actual policies and practices needed to accomplish that end.

Defendants raise a number of procedural issues that plaintiffs address at the outset of this brief. Defendants' claim that local school districts and local municipalities are necessary parties to this action fundamentally misconstrues both the nature and import of the allegations set forth in the Complaint and the applicable law regarding joinder of necessary parties. Although the local school authorities are responsible for the-day-to day operations and administration of education in the schools under their charge, this case involves not these local matters, but major statewide education policies that are established and enforced by the governor, the legislature, the commissioner and the other state education officials.

Plaintiffs clearly have standing because a) they have alleged abundant concrete and particularized facts concerning the harms they suffer by not receiving the quantum of education necessary for the meaningful exercise of their constitutional rights; b) there is a direct causal

connection between these injuries and numerous actions and inactions of the defendants; and c) these injuries would adequately be addressed if the relief requested in the Complaint were to be granted.

The standard of review for a Rule 12(b) (6) motion to dismiss is clear. As the brief of the governor and the legislative leaders aptly summarized it, "In evaluating whether a plaintiff's claims are entitled to relief, the court must accept as true all well-pleaded facts and indulge all reasonable inferences in plaintiff's favor;" and plaintiffs must set forth factual allegations "sufficient to raise a right to relief above a speculative level on the assumption that all allegations in the Complaint are true (even if doubtful in fact)." Gov. Def. Br. at 5. *See also*, Edu. Def. Br. at 8-9. Plaintiffs accept the statements of the standard of review set forth in the defendants' briefs.

Therefore, since plaintiffs have clearly set forth ample concrete factual allegations in the Complaint, accepting all of these facts as true, the only matters that the court needs to decide on these motions are the legal issues of whether there is, indeed, a right to an education adequate for civic preparation under the U.S. Constitution. If the Court agrees that there is such a right, the motions to dismiss should be denied and plaintiffs should be permitted to proceed to trial to submit evidence regarding the "quantum of education" necessary for the meaningful exercise of constitutional rights and to substantiate the claim that the individual plaintiffs and the class they represent are currently being denied the opportunity for such an education.

I. IN SUING THE STATE OFFICIALS RESPONSIBLE FOR ENACTING AND ENFORCING MAJOR EDUCATIONAL POLICIES, PLAINTIFFS HAVE JOINED ALL NECESSARY PARTIES

The defendants argue that plaintiffs have failed to join local officials who, they assert, are indispensable parties in this action. They state that local school committees and other local educational agencies ("LEAs") are responsible for "the manner by which the subjects are taught

within their jurisdictions," Edu. Def. Br. at 11, and they claim that these local committees and LEAs are vested with the "entire care, control and management of all public school interests of the several cities and towns." Gov. Def. Br. at 25.

This position fundamentally misconstrues the allegations set forth in the Complaint and the applicable law regarding joinder of necessary parties. Although the local school authorities are responsible for the-day-to day operations and administration of education in the schools under their charge, major education policies to which all schools must adhere are established and enforced by the governor, the legislature, the commissioner and the other state education officials.

FRCP Rule 19(a)(1) provides in relevant part that:

> A person must be joined as "required 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.

None of these conditions apply in the present case. The Complaint challenges policies, actions and inactions of the state defendants, and not of LEAs. As a result, complete relief may be obtained by an order addressed to the existing parties. Further, no local school committees have claimed an interest relating the subject of this action, and no decision in this case would, as a practical matter, impede any local school committees' ability to protect any of their interests.

In reviewing a Rule 19 motion, the Court must keep in mind that "this Rule aims to achieve a practical objective . . . . When applying Rule 19(b), the court will ask whether it is so important, in terms of efficiency or fairness, to join this person that, in the person's absence, the suit should not go forward at all." *Pujol v. Shearson American Express, Inc.*, 877 F.2d 132, 134 (1st Cir. 1989). In the present case, not only is the participation of the LEAs unnecessary, but involving them in the case would undermine judicial efficiency in resolving the core constitutional issues presented by this case and render the litigation "fruitlessly complex or unending" *Id*.

While the defendants argue in terms of the "architecture of local control," Edu. Def. Br at 64-72, the central fact for the issues raised by the Complaint is that in Rhode Island, "the General Assembly's power over public school interests [is] 'plenary'" and that "article 12 [of the Rhode Island Constitution] vests in the General Assembly sole responsibility in the field of education." *Pawtucket v. Sundlun*, 662 A.2d 40, 56-57 (R.I. 1995).[1] The General Assembly has delegated to the Council on Elementary and Secondary Education and the Commissioner of Education (and through the Commissioner, the Rhode Island Department of Education ("RIDE")) substantial authority over the development of educational regulations and standards and over implementation and compliance with the education statutes and the regulations and standards. These statutory responsibilities include the following:

1. The Council on Elementary and Secondary Education:

    a. Exercises general supervision over all elementary and secondary public and nonpublic education in the state (R.I.G.L. § 16-60-4(a)(3));

[1] R.I. Const. art. XII, § I provides that "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."

b. Maintains the Rhode Island Department of education (R.I.G.L. § 16-60-4(a)(6));

c. Enforces the provisions of all laws relating to elementary and secondary education (R.I.G.L. § 16-60-4(a)(9)(vii)).

2. The Commissioner:

a. Implements the broad policy as it pertains to the goals and objectives established by the board of education (§ 16-60-6(4));

b. Is responsible for the administration of policies, rules and regulation in regard to the entire field of elementary and secondary education not specifically granted to any other department, board or agency (§ 16-60-6(11))

The General Assembly has also directed the education defendants to take specific actions in regard to civic preparation, including directives to "…. develop and adopt a set of grade level standards K-12 in civics education no later than August 31, 2007…." R.I.G.L. § 16-22-2.[2]

Pursuant to this legislative authority, the Council has enacted regulations further defining the authority and responsibility of state education agencies and the responsibility of local education agencies to comply with state directives, and it has promulgated the Basic Education Program ("BEP"), 200-RICR-20-10, which "is regulatory in nature and, as such has full force of law." BEP § 1.1.1(C). Under the BEP, the Council is responsible for establishing "substantive and measurable standards and requirements for curriculum, instruction and assessment systems" among other things. BEP § 1.1.2(A)(2). The Department is also responsible for, among other things, providing "systems with the capacity and resources to enable LEAs to meet state expectations." BEP § 1.1.3(B)(1)(b).

As this description makes clear, the state's assessment program provides a critical

[2] Although the education defendants have adopted social studies standards that include these items, the Complaint alleges that these standards are inadequate (Compl. ¶¶ 58 and 59) and that the education defendants fail to properly enforce them (Compl. ¶¶ 60, 67).

resource in determining whether LEAs comply with state standards. Each year, Rhode Island public school students take a state-designed test in the areas of literacy and mathematics. These assessments provide a clear way to measure whether LEAs or individual schools are meeting state standards in these academic subjects. In contrast, civics education and social studies are not assessed; therefore LEAs' performance in this area is a "black box" and the state has no way to monitor compliance with its standards and/or to enforce compliance to the extent that LEAs and/or individual schools fail to comply. This fundamental flaw in the State's regulatory architecture makes it practically impossible for the state officials to meet their statutory and Constitutional duty to monitor and enforce compliance with the standards they develop.

While the State's failure to monitor or assess LEAs' programs in civics education is by itself a significant Constitutional defect in its program, the poverty of the State's civics program comes into full relief when compared to its monitoring and management of the LEAs' literacy and mathematics programs.[3]

The State's statutory framework emphasizes the importance of literacy and mathematics throughout every child's elementary and secondary education in specific and rigorous ways that provide an instructive contrast to civics education. The Rhode Island Literacy and Dropout Prevention Act, R.I.G.L. § 16-67, for example, begins with this "Declaration of Policy":

> The State of Rhode Island is committed to equal education opportunity for all citizens. To ensure the fulfillment of this commitment, all persons must have the opportunity to acquire the skills of literacy: basic reading, writing, speaking, listening and mathematics skills.

§ 16-67-1. The Act goes on to mandate the development of a specific "literacy program" at all

[3] Plaintiffs offer this description of the additional components of the State's literacy and mathematics programs to compare and contrast the absence of these State initiatives with regard to civic education. With that said, plaintiffs do not concede the adequacy of the State's literacy and mathematics programs that, for example, display other significant deficiencies, such as inadequate support for English language learners and/or supports for children in poverty and underfunded LEAs.

schools, including supplementary instruction by grade as follows:

> (A) *Intensive development in literacy.* Kindergarten through grade three (3).
> (B) *Early intervention in literacy*. Grades four (4) through six (6).
> (C) *Remediation in literacy*. Grades seven (7) through eight (8).
> (D) *Intensive remediation in literacy*. Grades nine (9) through twelve (12).

§ 16-67-2 (emphasis in original).

The Council's regulations continue this emphasis, seeking to "ensur[e] grade level literacy and numeracy for all secondary Rhode Island students," 200-RICR-20-10-2.2. The regulations specifically require LEAs to "ensure student proficiency by providing access to a guaranteed and viable curriculum, monitoring each student's progress toward proficiency in literacy and numeracy, and providing sufficient academic, career, and personal/social supports to ensure that all secondary students become proficient." 200 RICR 20-10-2.2. LEAs must assess each student in literacy and numeracy and identify each student in need of additional diagnostic assessment and instructional support. *Id.*, § 2.2.1(A). The regulations require LEAs to "initiate interventions for every student functioning below expected performance" based on these assessments (§ 2.2.2(A)) and to document interventions and supports in each student's individualized learning plan (§ 2.2.2(B)).

The state defendants also have created a pathway for state intervention and even state-level management of LEAs or schools whose students do not demonstrate sufficient proficiency in literacy or mathematics as measured by the State's assessments. In R.I.G.L. § 16-7.1-5(a), the General Assembly authorized the Board of Regents (the Board of Education's predecessor) to develop regulations for "intervention and support for failing schools" under which

> If after a three (3) year period of support there has not been improvement in the education of students as determined by objective criteria to be developed by the board of regents, then there shall be progressive levels of control by the department of elementary and secondary education over the school and/or district

> budget, program, and/or personnel. . . . If further needed, the school shall be reconstituted.

To implement this program, the Board of Regents promulgated regulations in 2010 entitled "Protocol for Interventions: Persistently Lowest-Achieving Schools" 200-RICR-20-5-25 (since repealed), which defined "lowest achieving schools" eligible for State intervention upon the student's test scores in literacy and mathematics in the elementary and middle grades, and upon these two assessments and graduation rates for high schools. No such program was developed for civics or social studies, in no small part because the state does not even assess achievement in these subjects. Compl. ¶ 56. (Note in this regard that the mandated report cards in Rhode Island include extensive information regarding student progress in reading and math but no information about student performance in civics, history, or social studies. Compl. ¶ 62.[4])

While literacy and mathematics are important skills for students to possess, the state's focus on them, when combined with unfunded mandates and resource constraints, has had the consequence of diminishing the ability of school districts and schools to provide civics education that can meet the state's already-inadequate standards in that area.[5] By creating this impossible

[4] The education defendants' own brief sets forth additional evidence and admissions that confirm the low priority of civic preparation in Rhode Island. For example, on pages 69-70 of their brief, the education defendants describe in detail the "latest strategic plan" that defendant Council published in 2015. They list the five distinct "priorities" in their vision for education for the following five years, none of which are related to civic preparation. In addition, they cite the fact that in 2016, the General Assembly commissioned the education defendants to "undertake a comprehensive study of the alignment of core curricula used by various school districts throughout the state," "the main objective of which was to determine a unified approach for education and development of workforce skills," but the document makes no mention whatsoever of civic participation skills. *Id.* at 71.

[5] The education defendants claim that the downgrading of the teaching of social studies and civics in recent years is a result of Congressional actions. Ed Def Br. at 11-12. The federal authorities' requirements for accountability data in reading and math did not, however, preclude state officials from ensuring that schools also treat civic preparation as an educational priority. Indeed, as specifically alleged in ¶¶ 68-71 of the Complaint, federal law and regulations under the Every Student Succeeds Act ("ESSA"), 20 U.S.C.A § 6301 et seq. (2015), expressly permit states to adopt "quality student academic assessments" in other areas such as social studies and civics. Although some states have included these areas in their priority planning, the ESSA plan that Rhode Island filed in March 2018 did not include any

situation, the Department of Education violates its own duties under the Basic Education Plan, under which RIDE should "fulfill[] its leadership role" by carrying out, among others, the function of "providing systems with the capacity and resources to enable LEAs to meet state expectations." 200 RICR-20-10, § 1.1.3(B)(1).

As alleged in the Complaint (¶¶ 62-66), school districts with limited instructional time and resources find it necessary to shortchange civics education to comply with the State's specific and rigorous mandates in literacy and mathematics. While wealthier school districts such as North Kingstown may have additional local resources available to support a robust civics program (*see* Compl. ¶¶ 112-15), many other school districts lack that extra capacity and find it necessary to cannibalize civics and other academic programs in order to comply with the State's literacy and mathematics mandates. A wealthy school district may be able to overcome the failure of State-level standards and supervision to provide elements of an adequate civics education despite the state-level failures, *Id.*, but this does not mean that a poor school district is a necessary defendant just because it is not wealthy.

It is the duty of the education defendants to adequately enforce the laws, regulations and standards regarding education—including, of course, the "quantum" of education related to civic preparation. The thrust of plaintiffs' position as set forth in repeated specific allegations in the Complaint is that the state defendants have not adopted *sufficient* policies and standards to ensure that the full "quantum" of education necessary for civic preparation in the 21st century is being made available to all students in Rhode Island, and that they have failed to *enforce* many of the policies and standards that they have adopted. Thus, it is the states' actions and inactions,

commitments to improve instruction or accountability in social studies and civics. Compl, ¶ 71; *see also* ¶¶ 56, 62, 63.

stemming from their statutory and regulatory duties—and not operations at the local school level—that are being challenged in this complaint and, therefore, LEAs and local school committees are not necessary parties.

II. PLAINTIFFS HAVE ESTABLISHED ALL OF THE NECESSARY ELEMENTS FOR STANDING

The parties agree that the requirements for standing are concisely set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) and that they require the plaintiffs to plead (1) an injury in fact; (2) a causal connection between the injury and the defendants and (3) a prayer for relief that will redress the injury pled. Plaintiffs have met each of these criteria.

A. Plaintiffs Have Pled an Injury in Fact Based on Concrete and Particularized Allegations

All of the plaintiffs have alleged that the state defendants have failed to carry out their responsibilities under the United States Constitution to provide them a meaningful opportunity to obtain an education adequate to prepare them to be capable citizens. Compl. ¶¶ 1 and passim. The defendants assert that in pleading this "generalized harm" of deprivation of an "adequate education in civics and social studies,"[6] the plaintiffs have failed to plead a "specific" violation of a legally protected interest. Edu. Def. Br at 14. Defendants' position conflates the sufficient pleading of injury in fact with a requirement that a fundamental right to an education adequate for the meaningful exercise of their constitutional rights be already established by the federal courts. However, "in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. Envtl. Prot. Agency*, 320

[6] Defendants have mischaracterized plaintiffs' claim. Plaintiffs seek the "quantum of education" necessary for the meaningful exercise of their constitutional rights, *Rodriguez*, 411 U.S. at 36, which they allege includes civic knowledge, civic skills, civic experiences and civic values, and not merely instruction in "civics and social studies."

F.3d 228, 235 (D.C.Cir. 2003). *See also Warth v. Seldin*, 422 U.S. 490, 502 (1975) (Holding that for purposes of standing, the claimed state action "would be adjudged violative of . . . constitutional and statutory rights"); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006) (en banc) ("For purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing.").

Plaintiffs' Complaint alleges both extensive denials of basic constitutional rights as well as "concrete and particularized" allegations regarding the specific harms these denials impose on the plaintiffs. These include:

- a failure to provide meaningful instruction in civics (Compl. ¶ 67);
- instruction by inadequately trained teachers (Compl. ¶ 80);
- inadequate instruction in media literacy (Compl. ¶¶ 82-84);
- a lack of sufficient up-to-date books, software and other materials for providing appropriate instruction in civics (Compl. ¶¶ 65, 83);
- a reduction in the time spent on instruction in civics and social studies (Compl. ¶ 66);
- inadequate opportunities for involvement in activities that provide civic experiences, including but not limited to, service learning and extracurricular activities (Compl. ¶¶ 88, 90-93);
- inadequate instruction for civic preparation for English language learners, especially in verbal and critical analytic skills (Compl.¶¶ 76, 108-112); and
- a failure to provide appropriate instruction in civics and history for students with disabilities, geared to their needs (Compl. ¶ 67(d)).

B. Plaintiffs Have Pled a Causal Connection Between the Plaintiffs' Injury and Defendants' Conduct

As was discussed more fully in section I of this brief, education policies regarding civic preparation are established and enforced by the Governor, the legislature, the Commissioner and other state education officials in Rhode Island. Plaintiffs have alleged with specificity the

defendants' failure to adopt adequate statutes, regulations, and standards to ensure that students throughout the state are provided an opportunity to obtain the quantum of education they need for meaningful exercise of their constitutional rights, Compl. ¶¶ 10, 59, 61, 65, 72, 95, 103-104, and to enforce properly those statutory requirements and standards that they have adopted. Compl. ¶¶ 60, 62-66, 68, 72, 74, 79, 84, 85, 91, 96.

Plaintiffs tie the allegations of their injuries directly to the actions and inactions of the state and education defendants. For example:

- Rhode Island students are not required by the state defendants to take any civics courses (Compl. ¶ 55);
- The state defendants do not require that civics, social studies or American government be examined, assessed or otherwise prioritized in the public schools (Compl. ¶ 56);
- The state defendants have not adopted civics standards that conform to current professional and national standards (Compl.¶¶ 58, 59);
- The education defendants have left the position of statewide social studies coordinator vacant for over six years (Compl. ¶ 60);
- Rhode Island's teacher certification requirements do not include knowledge or training in civics or American government, nor does the Rhode Island Department of Education require or offer professional development in these areas (Compl. ¶ 61);
- The statutory and regulatory framework for education accountability calls for accountability for student results only in reading, math and science, specifically omitting any monitoring or accountability in the areas of civics, history, social studies and economics (Compl. ¶ 62);
- The state-required tests, "school report cards," and state-imposed accountability systems for "failing schools" do not measure or address civics or social studies in any way (Compl. ¶¶ 63-67); and
- The Every Student Succeeds Act plan that Rhode Island state officials have filed with the federal government contain no commitments or priorities in the area of civics, history, economic or social studies (Compl. ¶¶ 68-71).

Defendants seek to displace their responsibilities for ensuring proper civic preparation for all Rhode Island's public school students onto local school committees; however, the

accountability, testing, teacher training and licensing and curricular standards, as pled in the Complaint, are all properly lodged at the state level with the named defendants.

C. Relief from the Court Would Remedy Plaintiffs' Injury

The Education defendants' final argument is that the plaintiffs should be denied standing because it is "merely speculative" that "the asserted injury will be remedied by the requested relief." Edu Def. Br at 15. They rely for this proposition primarily on a taxpayer standing case, *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332 (2006).

The relief that plaintiffs request is that the Court 1) declare that all students have a right under the U.S. Constitution to a meaningful educational opportunity adequate to prepare them to be capable voters and jurors and 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) require the defendants to adopt such laws, regulations policies and practices as are necessary to provide them meaningful educational opportunities that will prepare them to be capable civic participants and to exercise effectively all of their constitutional rights. Compl. at 45-46.

These remedies are not "speculative," and their implementation will provide concrete benefits to the plaintiff class. For example, if the Court provides the requested relief, Defendants will need to revise their educational priorities and develop appropriate standards geared to providing the individual plaintiffs and members of the class reasonable opportunities for, among other things, effective instruction in civics and media literacy by teachers who are well-trained in these activities, appropriate standards and accountability devices for assessing their progress in these areas, and a range of experiences that will involve them in democratic activities and

learning democratic values. These are concrete benefits that will directly remedy the injuries outlined in the Complaint.

In *DaimlerChrysler Corp., supra,* the Supreme Court stated that abolishing a challenged tax credit, the potential remedy in that case, would be "speculative" and would not "redound to the benefit of the taxpayer" because there was little likelihood that legislators would pass along the supposed increased revenue in the form of tax reductions:

> A taxpayer plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings 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."

547 U.S. at 344-345 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

In the present case, however, a remedial order from this Court would necessarily result in direct, concrete benefits to the individual plaintiffs and the members of their class. Furthermore, Plaintiffs do not need to show that they will all become fully competent in civic knowledge, skills experiences and values if successful in their claims. As the District Court for the Eastern District of Michigan recently held in a case asserting the right to an opportunity to learn literacy, "It may be that some students unfortunately do not become [civically prepared] – even with the benefit of all the measures Plaintiffs demand. But if they are given access to it, then the injury alleged by Plaintiffs would be redressed." *Gary B. v. Snyder*, 329 F.Supp.3d 344, 356 (E.D. Mich. 2018).[7]

[7] Defendants also assert that Plaintiffs lack standing to assert claims based on their right to be properly prepared for jury service. Gov. Br at 18-19. They argue that the student plaintiffs do not have a personal stake in being deprived of a jury of their peers because no jury has been empaneled for these plaintiffs at this time. This argument misconstrues the plaintiffs' claims in Count 4. All of the individual plaintiffs and members of the plaintiff class have standing to raise questions concerning the right to an education that prepares them to function productively as civic participants, and "voting and jury service . . . are the civic responsibilities *par excellence." Campaign for Fiscal Equity v. State of New York*, 801 N.E. 2d 326, 331

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

A. Plaintiffs' Claims Should Receive Strict Scrutiny Review

Plaintiffs have alleged that the defendants are denying them and other members of the class they represent an education that is adequate to prepare them to function productively as civic participants, even though such an education is being provided to other students in the state. Because the allegations in the Complaint involve the plaintiffs' ability to exercise major constitutional rights, which clearly involve fundamental constitutional interests (*see, e.g.*, *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (since the right to vote is "preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized")), their claims are entitled to strict scrutiny analysis by the Court.

Defendants in their motions to dismiss incorrectly summarize the Supreme Court's holding in *Rodriguez* as an unequivocal determination that education can never constitute a fundamental interest for equal protection purposes. Neither brief, however, joins issue with

(N.Y. 2003) (emphasis in original). More specifically, those individual plaintiffs and class members who are English language learners and students with disabilities may be totally denied access to jury service because under the Jury Selection and Service Act of 1968, 28 U.S.C. A § 1861. *et seq.*, individuals who are "unable to speak the English language" are deemed not qualified to serve on grand and petit juries. *Id.* at 1865(b)(3). Plaintiffs have specifically alleged that education of English language learners in Rhode Island is so deficient that many members of the class may be precluded from jury service for that reason. Compl. ¶¶ 107-111, 131. Exclusion of Latinos or other subgroups of the community also deprives the plaintiffs and members of the class of their Sixth and Seventh Amendment rights to be tried in all criminal and civil cases by a jury of their peers reflecting the community at large. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 407 (1991) (articulating a right to be tried by a jury whose members are selected by nondiscriminatory criteria).

plaintiffs' major claim that the *Rodriguez* court carved out for future consideration the issue of whether the subset of education that prepares students to exercise in a meaningful way major constitutional rights—like voting, free exercise of speech and petitioning the government—should be considered a fundamental interest.

Justices Marshall and Douglas, dissenting from the Court's general holding in *Rodriguez*, argued that because of "the close relationship between education and some of our most basic constitutional values," *Rodriguez*. at 111 (Marshall, J, dissenting), education geared to preparing students to exercise constitutional rights must be deemed a fundamental interest. Justice Marshall stressed the importance of education for exercising First Amendment rights, "both as a source and as a receiver of information and ideas" and for exercising the constitutional rights to vote and to participate in the political process. *Id*. at 112–13.[8] *See also id.* at 35 ("The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools. Likewise, . . . 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"); *Id.* at 63 (Brennan, J., dissenting) ("Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.")

[8] Justice Marshall further stated:

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

Id. at 113 (footnotes omitted).

Justice Powell, speaking for the majority, acknowledged that "We need not dispute" that "[t]he electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate" *Id*. at 36, or that education "is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote," *Id*. at 35. However, a detailed analysis of whether "some identifiable quantum of education[9] is a constitutionally protected prerequisite to the meaningful exercise of either right," *Id*. at 36-37, could not be undertaken in *Rodriguez* because the plaintiffs there had not presented evidence to indicate that Texas' system of education "fail[ed] to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation." *Id.* at 37.[10]

The acceptance by both the majority and the dissenting justices in *Rodriguez* of the proposition that "some identifiable quantum of education" may be "a constitutionally protected pre-requisite" to the meaningful exercise of important constitutional rights, *Id*. at 36, essentially re-stated a similar position the Court had expressed a year earlier in *Wisconsin v. Yoder*, 406 U.S.

[9] The Supreme Court's core holding in *Rodriguez* was that *relative* differences in educational funding would not trigger strict scrutiny, but it also stated at several points that it might rule differently in a fiscal equity case "if a State's *financing system* occasioned an *absolute denial* of educational opportunities." *Id.* at 37 (emphasis added); *see also Id.* at 25. Although an "absolute deprivation of education" *Id.* at 25, would be the relevant standard in a future potential fiscal equity case, in a case like the present one—which instead responds to the open question on education for civic preparation—the relevant inquiry is whether plaintiffs have been denied the "quantum of education" or certain "basic minimal skills [that are] necessary for the enjoyment of the rights of speech and of full participation in the political process." *Id.* at 36-37.

[10] The education defendants' brief quotes this section at length but fails to address Plaintiffs' key point that this colloquy indicates that the justices agreed to leave open for decision in a later case the key issue of what quantum of education may be necessary for students to be able to exercise basic constitutional rights later. Edu. Def. Br. at 32. *See also*, Gov. Br. at 10-11. At another point, the defendants reference the Supreme Court's statement 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." Gov. Br. at 15, *quoting* 411 U.S. at 36. But Plaintiffs in the present case are arguing for a basic level of education necessary to exercise constitutional rights, *not* a level of education related to "the most effective speech or the most informed electoral choice."

205 (1972). There, in discussing the compelling importance of education, Chief Justice Burger, writing for the majority, stated that "we accept" the proposition that "as Thomas Jefferson pointed out early in our history, . . . *some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system* if we are to preserve freedom and independence." *Id.* at 221 (emphasis added). Furthermore, thirteen years after *Rodriguez* was decided, Justice White, writing for the majority, explicitly reiterated that that "The Court [in *Rodriguez*] did not, however, foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either the right to speak or the right to vote." *Papasan v. Allain*, 478 U.S. 265, 284 (1986).[11]

Plaintiffs here have set forth detailed allegations that explicitly define the "quantum" of education that is necessary for civic preparation, and the extent to which many of Rhode Island's schools are failing to provide it. This is precisely the type of evidence that was lacking in *Rodriguez* and the issue is now ripe for a decision by this Court.[12]

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[11] In a later case, Justice Marshall also noted that:

> The Court therefore does not address the question whether a State constitutionally could deny a child access to a minimally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. That question remains open today.

Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting) (internal citations omitted). *See also*, 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. 550, 567 (1992) ("The language signifies that the *Rodriguez* decision does not preclude the Court from finding a positive constitutional right to education on another occasion. Thus, the status of the right under the Federal Constitution remains an open question.").

[12] In *Gary B. v. Snyder*, 329 F.Supp.3d 344 (E.D. Mich., 2018), plaintiffs have also asked the Court to consider the "quantum of education" that is necessary for adequate civic preparation. That complaint's allegations presented evidence focusing on the basic literacy skills necessary to exercise constitutional rights, Hon. Stephen J. Murphy III, agreed that in *Rodriguez*, the Supreme Court left this issue open for future consideration based on an appropriate evidentiary record. He stated: "The Court is left to conclude that the Supreme Court has neither confirmed nor denied that access to literacy is a fundamental right. The Court must therefore cautiously take up the task." *Id.* at 363. In doing so, however, Judge Murphy granted the defendants' motion to dismiss on substantive due process grounds, but did not opine on the major equal protection issues because he ruled that the plaintiffs in that case had not established "appropriate comparators for an equal-protection claim." *Id.* at 367. The plaintiffs in this cases have alleged "appropriate comparators" by claiming that students in North Kingstown and other affluent schools districts

In deciding what "quantum" of education is necessary to prepare students for civic participation, this Court will need to consider the types of knowledge, skills, experiences, and values that constitute a minimally adequate education for preparing students to function productively as civic participants. Whatever the specific elements of the "quantum of education" that the Court may determine after trial, plaintiffs submit that it will include much more than the basic literacy skills that are the focus of the claims in *Gary B. v. Snyder,* 329 F.Supp.3d 344, *supra*.

In holdings establishing a right to education under their state's' constitutions, many state courts have closely examined the relationship of education to effective citizenship and have often ruled on the specific skills that students need for capable citizenship under contemporary conditions. For example, in *Rose v. Council for Basic Education,* 790 S.W. 2d 186, 212 (KY,. 1989), a decision cited and relied upon by courts in at least seven other states, the Kentucky Supreme Court held that the state's school system needed to have as its goal providing students "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization," as well as "sufficient knowledge of economic, social and political systems to enable the student to make informed choices," and "sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation." *See also, Serrano v. Priest,* 5 Cal.3d 584, 608 (Cal. 1971) (en banc) (education "is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities").

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are being properly prepared for civic participation, while the individual plaintiffs and the class they represent are not. (See Compl. ¶ 113- 115, and *infra* at 38. The plaintiffs' appeal of Judge Murphy's decision is now pending before the U.S. Court of Appeals for the Sixth Circuit.

The Supreme Court has alluded to the importance of many of the specific kinds of knowledge, skills, experiences, and values that that plaintiffs have alleged in their complaint. For example, the Court has emphasized the importance of exposing students to a market place of ideas, controversies, and opposing viewpoints, *see Tinker v. Des Moines Indep. Comm. Sch. Dist*, 393 U.S. 503, 512 (1969) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"); *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) ("[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."); and of the importance of basic knowledge of how our governmental institutions function, *id.* at 876 (Blackmun, J., concurring) ("the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs").

The Court has also underscored the importance of democratic deliberation, *Weiman v. Updegraff*, 344 U.S. 186, 191 (1952); *See also id.* at 196 (Frankfurter, J., & Douglas, J, concurring) ("Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens"), and of the need for schools to inculcate basic civic values, specifically including the values of tolerance and democratic deliberation. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (schools must inculcate the "fundamental values necessary to the maintenance of a democratic political system . . . [which] must, of course, include tolerance of divergent political and religious views").

Education is also critical for preparing students to function productively as civic participants in a many other areas of civic involvement, such as jury service— which, as the Supreme Court has stated, is, "with the exception of voting, for most citizens . . . their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 407 (1991). Inadequate education not only impedes the ability of individuals to exercise this important civic right, but incompetent jurors also pose a threat to the functioning of our democratic system:

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

Steven L. Friedland, *Competency and Responsibility of Jurors in Deciding Cases,* 85 NW.W U.L. REV. 190, 194-195) (1990).

The competence of jurors to deal with complex issues that often arise in criminal and civil trials has been a concern raised by many judges (*see, e.g., Campaign for Fiscal Equity v. State of New York,* 719 N.Y.S.2d 475, 485 (N.Y. Sup. Ct. 2001), aff'd, 801 N.E. 2d 326 (N.Y. 2003) ("[J]urors today may be called on to decide complex matters that require the verbal, reasoning, math, science, and socialization skills that should be imparted in public schools. Jurors today must determine questions of fact concerning DNA evidence, statistical analyses, and convoluted financial fraud, to name only three topics."); *Cf In re U.S. Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979) (rejecting idea of a "complexity exception" to the Seventh Amendment).

Although this Court is not called upon to determine the specific "quantum of education" that is necessary for students to be prepared to effectively exercise their constitutional rights at this stage in the proceedings before evidence has been produced, the Court does need to determine

whether allegations concerning the denial of the right to such an education, whatever its exact parameters, is a fundamental interest, entitled to strict scrutiny analysis.

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

Although the Supreme Court held in *Rodriguez* that as a general matter, education is not a fundamental right for the purposes of triggering strict scrutiny review, it has nevertheless continued to recognize and act upon the point it emphasized in *Brown* concerning the unique status that education holds in our society. In *Plyler v. Doe*, 457 U.S. 202, 221 (1982), the Court stated that:

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

Id. at 221. The *Plyler* court then carved out an exception to *Rodriguez'* general holding by applying a heightened level of scrutiny to the claims of exclusion from public education raised by children of undocumented immigrants who had been denied access to Texas' public schools.

The Court stated that "education has a fundamental role in maintaining the fabric of our society, . . . [w]e cannot ignore the significant social costs borne by our Nation when *select groups are denied the means to absorb the values and skills upon which our social order rests.*" *Id.* (emphasis added). It then defined the level of scrutiny it would apply in the case as requiring more than a mere "rational relationship" between a challenged state policy and a legitimate state purpose, but, instead, the challenged policy must "further[] some substantial goal of the State." *Id.* at 224. The Court rejected the state's rationales for its exclusionary policy (preserving educational resources for its lawful residents, impact on other students, and the possibility that

these students might move out of state after receiving a state-funded education) as being "wholly insubstantial in light of the costs involved to these children, the State, and the Nation." *Id.* at 230.

The defendants in the present case are now denying the plaintiffs the opportunity to obtain the basic knowledge, skills, experiences, and values they need to function productively as civic participants. In doing so, the state is also precluding these students from participating in our "civic institutions" and is impeding their ability to "contribute . . . to the progress of our nation." *Id.* at 223. Whatever the rationales that the state defendants may put forward for the inadequate civic preparation they are providing to many Rhode Island students, these goals are also likely to be deemed "wholly insubstantial" in light of the significant danger to the maintenance of our democratic system that inadequate civic preparation poses for the state and for the nation.

Defendants note that *Plyler* presented "unique circumstances" and that the Supreme Court has not yet applied this heightened standard in other education cases (Edu. Def. Br. at 28-29). The case does, however, stand for the proposition that the unique importance of education in our society justifies applying a more stringent level of equal protection analysis to certain claims that credibly bring to the fore the question of whether the core purposes of education are being met. Justice Blackmun, in his concurring opinion in *Plyler*, stated that "I joined Justice POWELL's opinion for the Court in *Rodriguez*, and I continue to believe that it provides the appropriate model for resolving most equal protection disputes." *Plyler*, 457 U.S. at 232 (Blackmun, J. concurring). Nevertheless, he asserted that there can be and should be exceptions to *Rodriguez'*s general holding that education is not a fundamental constitutional interest:"

> With all this said, however, I believe the Court's experience has demonstrated that the *Rodriguez* formulation does not settle every issue of "fundamental rights" arising under the Equal Protection Clause. Only a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition. To the contrary, *Rodriguez* implicitly acknowledged that

> certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis.

Id. at 232-233.

The claims in this case, like the claims of the *Plyler* plaintiffs, involve vital educational interests that should be "accorded a special place in equal protection analysis," that warrants applying to them, at the least, the level of heightened scrutiny that the Supreme Court employed in *Plyler*.

C. Even under a Rational Basis Analysis, Defendants' Argument Would Fail

Even if the Court were to apply the less demanding rational relationship standard to the facts of this case, plaintiffs should still prevail. Under rational relationship, a state's policy or action will be upheld if a court determines that it bears some rational relationship to a legitimate state purpose. *Rodriguez*, 411 U.S. at 40.[13] The only stated purpose that the defendants have put forward in this case for failing to adopt and enforce effective policies to promote civic participation is an outmoded concept of "local control of education," Gov. Def. Br. at 20-24; Ed. Def. Br at 20, 38.

The education defendants support this position by citing the Supreme Court's discussions of the value of local control in *Rodriguez* and in *Milliken v. Bradley*, 418 U.S. 717 (1974). In *Rodriguez*, the Court extolled the virtues of local control that provides "the opportunity . . . for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs." 411 U.S at 49-50. However, the Court also repeatedly emphasized that a large part of its concern for local control had to do

[13] In his *Rodriguez* dissent, Justice White (joined by Justices Brennan and Douglas) stated his opinion that the Texas school financing program failed to meet the "rational relationship" standard. *Rodriguez, supra*, 411 U.S. at 63.

with the fact that in taxation, "even more than in other fields, legislatures possess the greatest freedom in classification." *Id.* at 41; in its view, invalidating the system of local taxation for education would undermine the systems for "providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds." *Id.* at 54. By way of contrast, in this case, the Court is not being asked to interfere with complex state and local taxing and funding decisions and prerogatives.

The main issue in *Milliken* was whether a remedy for the *de jure* school segregation the Court had found in Detroit could also encompass 54 surrounding suburban school districts that had not been held liable for the unconstitutional segregation in the city. Chief among the remedial concerns that the Supreme Court expressed was that a metro-area-wide remedy would require extensive judicial involvement in the running of local schools and a perception that "the District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area." 418 U.S. at 743-744. In the present case, though, a ruling in favor of plaintiffs would not involve any similar possibility of the Court needing to take operational control of local school districts. *Infra* at pp. 67-70.

The greatest fallacy of defendants' position, however, is that they presume that "local control" has a set, perennial meaning that remains unchanged over time and uninfluenced by geographical setting. Over the 46 years since *Rodriguez* was decided, major new federal educational policies and mandates like the No Child Left Behind Act ("NCLB")",[14] the Every Student Succeeds Act ("ESSA"),[15] and the Individuals with Disabilities Education Act

[14] Pub.L. 107–110, 115 Stat. 1425 (2002).

[15] PL 114-95, December 10, 2015, 129 Stat 1802 (2015).

("IDEA")[16] have been enacted. These Acts required the states to develop challenging academic content and student academic achievement standards, to undertake annual assessments to ensure that all public school students are making progress toward meeting these goals and standards, and to adopt an extensive set of procedures and substantive rights regarding the education of students with disabilities. States also need to submit plans to the U. S. Department of Education spelling out in detail how they will work with localities and schools to implement these goals and standards. [17]

As is set forth in more detail in the first section of this brief, the governmental authorities in Rhode Island have also adopted numerous statutes, regulations and standards in recent decades that have substantially curtailed the authority of the local school officials. By shifting decisions regarding many curricular matters, instructional methods, accountability measures and graduation requirements from the discretion of local school districts to compliance with broad federal and state mandates, "The reform movements of the last 40 years have created an elaborate intergovernmental system in which the federal and state levels of government share responsibilities and have gained power and influence over local school districts." Gail Sunderman, Ben Levin and Roger Slee. *Evidence of the Impact of School Reform on Systems Governance and Educational Bureaucracies in the United States*," 34 REV. OF RESEARCH .IN EDUC. 226 (2010); *see also* Barry Friedman and Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 121-148 (2013) (discussing in detail the substantially

[16] 20 USCA §§ 1400 *et seq.*

[17] Indeed, the Supreme Court itself pointed out that even at the time it rendered its decision in *Rodriguez,* "[T]he question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination" 411 U.S. at 43.

increasing control of educational policy by state and federal laws and regulations in recent decades).

Traditionally, state defendants have prevailed in rational relationship cases because they have been able to put forth credible justifications for challenged state policy decisions. Where, however, the justifications for a state's policy are arbitrary or unfounded, the Supreme Court has applied the rational relationship standard with "bite," and plaintiffs have prevailed. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating Alaska's policy of providing a monetary "dividend," stemming from windfall oil revenues to its residents in accordance with the number of years that each individual had lived in the state); *Att'y Gen. of N.Y. v. Soto- Lopez*, 476 U.S. 898 (1986) (holding that the denial of civil service benefits to veterans who were not state residents at the time they entered the armed services was a violation of constitutional right to travel), *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432 (1998) (zoning ordinance excluding group homes for individuals with developmental delays but not similarly situated groups like boarding homes and hospitals was not rationally related to any legitimate state purpose).

The state defendants here have invoked the "mantra" of local control[18] from a previous era, without undertaking any analysis of the realities of local control of education at the present time in Rhode Island. They have failed to explain in any way why in recent decades the state has developed and enforced statewide policies regarding curriculum standards, assessments, and graduation standards in English, math and other areas, but has neglected to develop and enforce

[18] "[L]ocal control has been more of a mantra than an analytical concept. Once local control is defined with greater rigor, the costs associated with it may become more apparent; even if one concludes that some of the values latent in local control generally are desirable." Richard Briffault, *The Role of Local Control in School Finance Reform,* 24 CONN. L.REV. 773, 774 (1992).

similar policies in regard to civic preparation—historically the prime purpose of public education—and has constrained the ability of many LEAs to establish effective local policies in this area.

In reality, there is no rational relationship between the need to educate all students for effective civic participation and an education system that systematically denies students in most schools an education adequate for effective citizenship. Certainly, the state defendants cannot be said to have rational justifications for their decisions in recent decades to eliminate requirements for civics courses (Compl. ¶¶ 54-55), to allow the amount of time devoted to social studies and civics in K-12 schools to decline (Compl. ¶¶ 64, 66), to fail to monitor the implementation of their own social studies frameworks (Compl. ¶ 59), to fail to include any requirements for civic preparation in their teacher preparation requirements (Compl. ¶¶ 61, 80), and to neglect totally monitoring and accountability regarding civics, history, social studies, and economics (Compl. ¶ 62). Defendants cite as an example of the advantages of "local control" the fact that some schools teach limited computer skills (Gov. Def. Br. at 23), but they ignore the reality that in many of the schools attended by the plaintiffs, there are insufficient computers and other technological devices (Compl. ¶ 83) and that none of the plaintiffs are being properly taught the kind of media skills they need to distinguish accurate from false information on the internet and to harness the positive potential of social media and shun destructive uses of this technology. (Compl. ¶¶ 81-82, 84-85).

In sum, although plaintiffs respectfully submit that strict scrutiny is the appropriate equal protection standard to apply to the facts of this case, even under the lesser rational relationship approach, defendants' actions and inactions in regard to civic preparation fail to pass muster, particularly at the motion to dismiss stage.

D. Plaintiffs Have Properly Alleged Disparate Treatment

Instead of addressing the core issues of the "quantum of education" students need to meaningfully exercise their constitutional rights, and whether the state has established any compelling, substantial or even rational justifications for their actions and inactions in regard to civic preparation, the thrust of the education defendants' discussion of the equal protection issues in this case is that "Plaintiffs' Complaint contains no allegation concerning the appropriate class or that Plaintiffs were treated disparately as compared to similarly situated persons." Gov. Br at 20; *see also*, Edu. Def. Br at 25. Defendants' position on this point is baffling since plaintiffs clearly have alleged that they are being treated differently than other similarly situated students.

Paragraphs 112-115 of the Complaint explicitly state that students attending schools in North Kingstown and other affluent Rhode Island school districts are being provided an education that is preparing them well for civic participation, in stark contrast to the inadequate civic preparation that the individual plaintiffs and class they represent are receiving. For example, North Kingstown has a mandatory "Democracy" course that all students must take, and the course includes substantial opportunities to engage in democratic community activities; North Kingstown High School also offers a rich range of electives on civics-oriented themes (Compl. ¶ 114). Unlike the meager opportunities available in the plaintiffs' schools,

> North Kingstown also has a school wide digital learning program that emphasizes digital citizenship, the ability to critically assess information obtained through the media and the use of ethical behavior when accessing technology. The high school emphasizes student engagement in community activities and actively promotes the development of specific civic values and a positive school culture. The school offers a wide range of extracurricular programs, including an active student government, yearbook, mock trial, band, orchestra, drama, community service, leadership society (that develops specific civic leadership skills), a wide range of clubs and the largest athletic program in Rhode Island. As a graduation requirement, all students must complete a senior project, which may consist of a major service experience, an option which is specifically encouraged by the school.

Compl. ¶ 115.

Defendants apparently base their groundless disparate treatment argument on the finding of a lack of "comparator districts" that was the basis for Judge Murphy's decision to dismiss the equal protection claims in *Gary B., supra,* 329 F. Supp. 3d at 367. According to Judge Murphy, the relevant state action in *Gary B.* was the state's oversight of the Detroit public schools, including the appointment of a series of emergency managers to run the city's schools. He held, therefore, that the proper "comparator schools," for the plaintiffs, who were students in certain Detroit schools, should not have been schools in the affluent suburbs or other parts of the state, but rather other Detroit schools that also had been subject to the emergency manager and other state oversight actions, but whose students might have been receiving better educational services and were achieving better outcomes than the schools the plaintiffs attended. *Id.*

However, Judge Murphy's "comparator schools" analysis has no relevance to the present case. Plaintiffs here represent a state-wide class, and they have sued the state defendants for actions and inactions they have taken on a statewide basis that, among other things allow civics and social studies to be neglected by those school districts that are unable or unwilling to prioritize civic preparation. Thus, it is appropriate for them to allege as the "comparator districts" for the purposes of this case, North Kingstown and other affluent districts[19] where students are receiving an opportunity for an education adequate for civic preparation, while the plaintiffs and other members of the class they represent continue to receive an education that is inadequate for these purposes.

[19] The specific identity of the scope of the class and number of districts will be established after discovery.

The education defendants also cite an intermediate level California state court opinion, *Vergara v. State of California*, 246 Cal. App. 4th 619 (Ct. App. Second Dist., Div. 2, April 14, 2016), *as modified on* May 3, 2016, *review denied* Aug. 22, 2016, for their argument that plaintiffs here have failed to allege proper disparate treatment. Edu. Def. Br at 24-26. Plaintiffs in *Vergara* had described two classes of plaintiff students, one of which ("Group 1") were the "unlucky students who would be taught by "ineffective teachers."[20] The Court held that these "unlucky students" were not an identifiable class because:

> Under plaintiffs' Group 1 theory, an unlucky subset of students will inevitably be assigned to grossly ineffective teachers. The chance that this will happen to any individual student, however, is random, as the challenged statutes do not make any one student more likely to be assigned to a grossly ineffective teacher than any other student. Thus, the unlucky subset is nothing more than a random assortment of students. Moreover, because (according to the trial court's findings) approximately 1 to 3 percent of California teachers are grossly ineffective, a student in the unlucky subset one year will likely not be the next year, meaning that the group is subject to constant flux.

Id. at 648.

The indeterminate characteristics of the "unlucky student" class in *Vergara* has no relevance to the description of the plaintiff class in this case. Unlike those "unlucky" students in California who could be identified only on the basis of future random events, the students in the plaintiff class here can easily be identified by a factual description of the services and resources regarding civic participation that are not currently available at their schools. The individual plaintiffs and others similarly situated who attend schools in Providence, Woonsocket, Central Falls, Pawtucket, and Cranston (and other districts that may be identified during discovery) who

[20] "Group 2" consisted of poor and minority students who allegedly were receiving a deficient education. Although the lack of proper civic preparation in Rhode Island does have a greater detrimental impact on many poor and minority students (Compl. ¶¶ 76, 90, 93,105-11), plaintiffs in this case have not defined the plaintiff class in terms of race, income or ELL status. Accordingly, the references to "Group 2" in *Vergara* have no bearing on this case.

are not receiving adequate civic preparation opportunities are members of the class; the students in North Kingstown (and other districts that may be identified during discovery) who are receiving ample civic preparation opportunities are not members of the class.

Clearly, students attending schools in a district that provides fewer educational opportunities than are available to students in another school district have alleged the appropriate degree of "disparate treatment" to justify a proper equal protection claim. Moreover, if there were any doubt on this point, it would be foreclosed by the fact that in *Rodriguez* the Supreme Court raised no "disparate impact" objection and ruled on the merits of the equal protection claims put forward by a class of students who it described as a "large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts." 411 U.S.at 28. The present plaintiffs might be described similarly as a "large, diverse and amorphous class unified only by the common factor of residence in districts that happen to [provide substantially less adequate civic preparation] than other districts." They also are entitled to have their claims considered on their merits.

IV. INADEQUATE CIVIC PREPARATION CONSTITUTES A DENIAL OF SUBSTANTIVE DUE PROCESS BECAUSE OF THE DEEP HISTORICAL ROOTS OF EDUCATION FOR CAPABLE CITIZENSHIP AND ITS PROFOUND SIGNIFICANCE IN CONTEMPORARY LIFE

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

Plaintiffs and defendants agree on the standard that should be applied to determine whether plaintiffs have a substantive due process right to an education that prepares them

adequately for civic participation. That standard is the one the Supreme Court articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997) and a number of earlier and later cases:[21]

> [T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," *id.*, at 503, 97 S.Ct., at 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

Id. at 720-21; Gov. Def. Br. at 7-8; Edu. Def. Br. at 34-35.

Defendants assert, however, that the right plaintiffs claim to an education adequate to prepare them for capable citizenship is not "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty" because no broad-based public school system was established "at the time the Constitution was ratified" or "as late as 1830." Gov. Def. Br. at 8. *See also*, Edu. Def. Br. at 17.

Although a system of public schools in which all children in the United States may be educated was not fully established until the middle of the nineteenth century, it is clear that both the founders of the Constitution and the early leaders of the nineteenth century common school movement believed that for the new republic to survive, the role of the schools would be critical. As John Adams put it: "The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many." David McCullough, JOHN ADAMS, 364 (1995). Similarly, Thomas

[21] *See, e.g., Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (state statute may not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."); *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment) ("Our cases reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society....'"), *Michael H v. Gerald D*, 491 U.S. 110, 122 (1989) ("Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.").

Jefferson said that each citizen would need "to know his rights, to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates and to notice their conduct with diligence, with candor and with judgment." Thomas Jefferson, The University of Virginia, in THE COMPLETE JEFFERSON 1097 (1818) (Padover, ed. 1943).[22]

Most of the original thirteen states did establish various forms of public schooling and many of them included calls for schooling in their state constitutions, *see, e.g.* Mass. Const. Pt. 2, Ch. 5, § 2 (1780). The founders' commitment to broad-based education was also reflected in Congress' stipulation in the Northwest Ordinance of 1785 that each new town set aside "the lot No. 16 . . . for the maintenance of public schools within the said township." *Papasan v. Allain*, 478 U.S. 265, 268 (1986). Public schooling became systemic and universal in most states starting in the 1830s when the combination of rapid industrialization, population growth, mobility, and immigration fueled a broad-based "common school" movement to implement a free public school system dedicated to moral education and good citizenship. Carl Kaestle, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860 (1983).

The common school was an attempt to educate in one setting all the children living in a particular geographic area, whatever their class, religious, or ethnic background. Such a school would be open to all and supported by tax funds. Horace Mann, the initiator of the common school movement, reiterated the founders' understanding that mass schooling was necessary for

[22] Of course, in Jefferson's day, the category of citizens who had the right to vote was largely limited to white men who owned land. The vast expansion of the franchise over time has now entitled individuals of both genders and all races and income levels to vote and to participate fully in civic and political life. The rise of technology, the internet and social media have all increased the level of cognitive skills and knowledge of political and social systems that individuals need to exercise free speech, to vote and to undertake other forms of civic participation. Civic engagement today requires not only the ability to understand and act on one's political, economic and social interests, but also the capacity to sort and analyze the continuing stream of information that confronts all of us daily, to make sense of an ever-changing world.

the survival of American democracy. He stated that, "Under a republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civic and social duties he will be called to discharge" (quoted in R. Freeman Butts, THE CIVIC MISSION IN EDUCATION REFORM 104–05 (1989)).

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

However, even if one accepts *arguendo* the defendants' assumption that to be "deeply rooted in the Nation's history and tradition" a practice has to be fully pervasive in societal institutions at a specific point in time, the defendants provide no basis for presuming that 1789 or 1830 is the point at which the historical timeline should commence in this case. The constitutional right that plaintiffs are claiming is not a right to an education for all purposes, but a right to an education that prepares students specifically to exercise important constitutional rights, and especially "First Amendment freedoms and [the] intelligent utilization of the right to vote." *Rodriguez, supra,* 411 U.S. at 35.

In regard to these essential rights, the critical point in time for commencing an historical analysis would be 1868 when the Fourteenth Amendment was enacted, 1870 when the Fifteenth

Amendment establishing the right to vote was added to the U.S. Constitution and 1925 when the Supreme Court first held that the First Amendment was applicable to the states by being implicitly incorporated into the due process clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 630 (1925) (holding that free speech guarantees of the First Amendment apply to the states); *comp*are *Barron v. Baltimore*, 32 U.S. 243 (1833) (holding that due process rights of the Fifth Amendment do not apply to the states).

In other words, for analyzing the centrality of education for meaningful exercise of constitutional rights to free exercise of speech, to political participation and to vote, the critical fact is that "[t]he constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system," *McDonald v. City of Chicago, Ill*., 561 U.S. 747, 754 (2010). And it is clear that by 1868, education was deeply rooted in the Nation's history and traditions. At that time, constitutions in more than three-quarters of the states recognized an affirmative right to education. Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 449–63.[23] Prior to Reconstruction virtually none of the Southern states required universal public education, but Congress conditioned readmission to the Union on inclusion in the state constitution of a provision guaranteeing public education. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1090-1095 (2019). Significantly, by 1875, every state in the union but one had a clause in

[23] The Supreme Court has relied upon analogous analyses of patterns of rights written into state constitutions in other cases. *See e.g.,Timbs v. Indiana,*139 S. Ct. 682, 688 (2019) (stating that *"*in 1868 upon ratification of the Fourteenth Amendment . . . the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines [for criminal offenses]," *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1838 (2014) (Thomas, J., concurring) (assessing understandings of the First Amendment establishment clause at the time of the adoption of the Fourteenth Amendment by reviewing language in state constitutions as of 1868), *McDonald v. City of Chicago*, 561 U.S. 742, 777–78 (2010) (plurality opinion) (noting that "[t]he right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified.")

its constitution calling for universal public education, *id.* at 1094;[24] in the century following the enactment of the Fourteenth Amendment, 13 new states sought admission to the Union, and every single one included an education mandate in their constitutions. *Id.* at 1093. Since 1918, education has become compulsory for all children in all states. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 586 (1992).

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

In addition to being deeply rooted in the Nation's history and traditions, education for capable citizenship is also "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720–21. The founding fathers recognized that education was essential if liberty and justice were to survive in the new form of republican government they were establishing. Schools would be "needed to produce well-informed protectors of republican government. 'If the common people are ignorant and vicious,' [Benjamin] Rush concluded, 'a republican nation can never be long free.'" Alan Taylor, *The Virtue of an Educated Voter*, AM. SCHOLAR, 18-27 (Autumn, 2016). Indeed, the Supreme Court specifically recognized in *Plyler*, "the importance of education in maintaining our basic institutions," and it stated that "education has a ***fundamental role*** in maintaining the fabric of our society" 457 U.S. at 221 (emphasis added). This point has also been understood by policymakers in all 50 states who have established universal systems of education and enacted compulsory

[24] Connecticut was the lone hold-out, although it did have a constitutional clause calling for the funding of education, and it finally enacted a constitutional amendment requiring public education in 1965. Black, *supra* at 1094. The education clause in Rhode Island's Constitution, Art. XII, which dates back to 1842, was interpreted narrowly by the Rhode Island Supreme Court in *Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

education laws because of their recognition of the criticality of education for maintaining "ordered liberty" in the Nation's democratic institutions.

The liberty protected by the Due Process Clause also has an important personal autonomy component. As the Supreme Court stated in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Although voting and jury service are considered civic duties, they are also civic rights essential to a citizen's liberty and autonomy. To act as an autonomous voter or juror requires a citizen to form his or her own beliefs consciously and intelligently, and one can only do so with an adequate education. Similarly, for a citizen to hold the government accountable, he or she must have the capacity to critically evaluate the claims of public officials and to vote and to speak out on these issues based on those evaluations. *See*, James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995) (arguing that "deliberative autonomy" is rooted, along with "deliberative democracy," in the language and design of our Constitution).

C. In Modern Times, Preparing Students for Capable Citizenship is an Urgent Priority

The Supreme Court has also made clear that "rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Certainly, in modern times, the centrality of education in general, and, specifically, its relevance to preparing students for capable citizenship in our increasingly complex and technological society, has grown substantially.

Since 1973, there have been litigations regarding the equity and adequacy of education in at least 45 of the 50 states, MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS AND

CIVIC PARTICIPATION 51 (2018), and 32 of those states' highest courts have held that preparation for capable citizenship is the prime purpose or one of the prime purposes of education (no state courts deny this proposition; the other 18 courts have not opined on the issue), *id.* at 57, and many of these courts have discussed in detail the specific knowledge, skills, experiences and values that students need for civic participation. *Id.* at 57-61.

The defendants also discuss the large number of state court litigations that have focused on the importance of all students receiving the opportunity for an adequate education. They cite this pattern to illustrate their position that education is a state-based, rather than a federal right. Edu Def. Br at 36, 39-42.[25] However, broad-based recognition of the importance of a right by the states is not inconsistent with the assertion of a federal right in the area, but actually supports such federal recognition. As Yale law professor Jack M. Balkin has explained, "When lots of different states from different parts of the country agree that these rights deserve protection, they are more likely to be rights with special constitutional value that all governments are supposed to protect." Jack M. Balkin, LIVING ORIGINALISM 210 (2011). *See also Obergerfell*, *supra*, 135 S. Ct. at 2597 (referring to the significance of the fact that "there has been extensive litigation in state and federal courts," regarding single sex marriage and specifically listing in an appendix the dozens of cases that had discussed the issue); *Washington v. Glucksberg*, *supra*, 521 U.S. at 716-

[25] Plaintiffs have prevailed in 60% of these cases , not 50%, as defendants assert, *see* Rebell, FLUNKING DEMOCRACY, *supra*, at 54, n.14, and www.schoolfunding.info for current information about the status of the state court litigations. Moreover, many state courts have recognized that their state constitutional education provisions contain substantive guarantees to an adequate education, even if in the particular case they held that the plaintiffs had not provided sufficient evidence to establish that the right had been violated. *See* Barry Friedman and Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 129 (2013). Rhode Island, however, is one of the states in which the state supreme court has held that there is no right to education under the state constitution. *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Woonsocket Sch. Comm v. Chafee*, 89 A.3d 778 (R.I. 2004)

718 (reviewing recent state statutes and positions regarding the legality of assisted suicide for terminally ill patients).

Over the past 46 years, the federal government has also increasingly recognized the importance of providing adequate educational opportunities to all children for the nation's national security, economic competitiveness and democratic functioning. [26] It has taken substantial actions to improve the quality of education nationwide by convening a major national Presidential summit in 1989 involving the governors and education commissioners of all 50 states to deal with these challenges,[27] and then enacting a series of major statutory initiatives to try to improve the quality of the nation's schools. *See, e.g.*, the Goals 2000 Education Achievement Act,[28] the Improving America's Schools Act[29] in 1994, the No Child Left Behind Act, *supra*, in 2001, and the Every Student Succeeds Act, *supra*, in 2015.

Indeed, education is of such central importance to the nation's economic competitiveness, to personal well-being and to maintaining our democratic institutions that the Supreme Court's casual *dicta* in *Brown v. Board of Education* that a state might choose to deny all of its children access to public education[30] has become an anachronism. It is inconceivable today that any state would entirely dismantle its compulsory education system and create and perpetuate not merely the "*subclass* of illiterates within [its] boundaries," that the Court decried in *Plyler,* 457 U.S. at

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[26] *See* A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) (report of a Presidential commission); The Equity and Excellence Commission, FOR EACH AND EVERY CHILD-A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE (2013) (report of a congressionally-authorized commission).

[27] *See* Patrick J. McGuinn, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005 51, 60 (2006).

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

[29] Pub. L. No. 103–382, 108 Stat. 3518 (1994).

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

230, (emphasis added), but an entire younger generation of illiterates and civic incompetents that would result from such an abolition of education.

In sum, although the deep link between education and the viability of democracy widely recognized by the founders was not fully put into effect immediately, the establishment of the common schools beginning in the 1830s, the incorporation of provisions requiring universal public education in virtually all of the states by the end of the 19th century, the adoption of compulsory education by all of the states by the beginning of the 20th century and the increased emphasis on education by both the states and the federal government throughout the twentieth and twenty-first centuries make clear that "the 'traditions and conscience' of the country, reflected in our laws and practices over the 150 years from the 1830s through the 1980s, [established] that the constitutional right to an adequate education is evident." Barry Friedman and Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 121 (2013).[31] *See also* Bitensky, *supra*, 86 NW. U. L. REV. at 586-590. [32]

[31] In their discussion of the history of education in the United States, the education defendants repeatedly cite and misinterpret the Friedman and Solow article, *see, e.g.*, Ed. Def. Br at 17-18, leading a reader to assume that these authors support their position, when, as the very title to their article indicates, they clearly conclude that education should be considered a substantive due process right. Similarly, the defendants mis-cite several articles by Prof. Derek Black, *see,* Edu Def. Br at 18, 34, 36, whose historical analyses led him also to conclude that "although the federal constitution does not specifically mention education, education as a right of state citizenship is implicit in the Fourteenth Amendment's guarantee of citizenship." Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 744 (2018).

[32] The defendants also cite Judge Murphy's holding in the Detroit literacy case that the Due Process Clause does not guarantee every student "a minimum level of education by which the child can attain literacy." *Gary B. v. Snyder, supra*, 329 F. Supp. 3d at 366, *see*, Gov. Def. Br at 9-10. Judge Murphy's analysis, like that of the defendants here, relied substantially on the fact that "[t]here was no federal or state-run school system anywhere in the United States as late as 1830," *id*, which, for the reasons above, is not the appropriate reference point for an analysis of whether a right to an education for capable citizenship is rooted in this country's history and traditions.

D. Constitutional Rights Often Rely on Affirmative Governmental Action

The defendants argue that plaintiffs are seeking an affirmative right to education, even though "the United States Constitution has traditionally been considered a collection of negative rights protecting against governmental intrusion, rather than a statement of affirmative rights to be enforced." Edu. Def Br. at 21-22; see also, Gov. Def. Br. at 11-13. Although the federal Constitution does emphasize "negative" rights, the text of the Constitution and many rights upheld by the Supreme Court, also contain affirmative "positive" rights. As Harvard Law professor Laurence Tribe has noted:

> Even within our largely individualistic and negative constitutional scheme, however, there are exceptional rights that the constitutional text itself expresses in affirmative form. For example, the sixth amendment guarantees to 'the accused' the right to 'enjoy . . . a speedy and public trial, by an impartial jury.' . . . These commands obviously entail recognition of positive and not merely negative rights.

Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 332 (1985).[33] Tribe also cites Supreme Court rulings that require affirmative government actions to enable citizens to exercise their right to vote and that require assistance of counsel for those who cannot pay for a lawyer themselves in criminal cases or divorce proceedings. *Id.* at 334. He states that "access to basic education may well be of the same character." *Id.*

[33] Other scholars have also pointed out that positive rights to governmental assistance are implied in many traditional constitutional protections such as equal protection, and that whether a right is perceived as involving action or inaction really depends on baseline assumptions about "the natural or desirable functions of government." Cass R. Sunstein, *Lochner's Legacy*, 87 COLO. L. REV. 873, 889 (1987). *See also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 CHI. L. REV. 864, 887 (1986) ("[f]rom the beginning there have been cases in which the Supreme Court, sometimes very persuasively, has found in negatively phrased provisions constitutional duties that can in some sense be described as positive"); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2279 (1990) ("[t]he definitional difficulties in distinguishing action from inaction are manifold").

In the present case, where the key issue for decision involves the subset of education needed for civic preparation and not education *per se*, the supposed distinction between "negative" and "positive" rights is particularly paltry. Alexander Meiklejohn has explained that the "negative," constitutional right to free speech contains a core "positive" educational component:

> Far deeper and more significant than the demand for the freedom of speech is the demand for education, for freeing of minds. These are not different demands. The one is a negative and external form of the other. We shall not understand the First Amendment unless we see that underlying it is the purpose that the citizens of our self- governing society shall be 'equally' educated.

ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 103 (1948). Similarly, education is also obviously of critical importance to the "positive" right to vote because

> [N]onvoting results from a lack of knowledge about what government is doing and where parties and candidates stand, not from a knowledgeable rejection of government or parties. Further, it is not the poor performance of political institutions as much as ignorance of the institutions that is the source of many current discontents.

Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 122 (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

An additional distinctive feature of education for capable citizenship that further justifies its recognition as a positive right is that education is compulsory in all 50 states. The very fact that education, in contrast to every other government service, is compulsory indicates that education is a compelling state interest that should be considered a fundamental right. *See New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 944 (1st Cir. 1989) ("[T]he state's interest in making certain that its children receive an adequate secular education is

compelling.") For substantive due process purposes, the compulsory nature of education also means that in mandating that all students attend school, the government is imposing a substantial restriction on their personal liberty.

Although the government is not generally responsible for providing individuals "particular protective services", *DeShaney v. Winnebago County Dept. of Social Svc*., 489 U.S. 189 (1989), "when the State by the affirmative exercise of its power so restrains an individual's liberty….it transgresses the substantive limits on state action set by the …..the Due Process Clause," *Id.* at 200, and it has an affirmative obligation to provide a reasonable level of adequate services. *See, e.g*., *Youngberg v. Romeo,* 457 U.S. 307, 317-19 (1982) (holding that "[w]hen a person is institutionalized--and wholly dependent on the State... a duty to provide certain services and care does exist" under the Fourteenth Amendment, and this duty includes "provid[ing] minimally adequate or reasonable training [to involuntarily committed, developmentally disabled individuals] to ensure safety and freedom from undue restraint"); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding that under the Eighth Amendment, the state has an "obligation to provide medical care for those whom it is punishing by incarceration"); *City of Revere v. Mass. Gen. Hosp*., 463 U.S. 239, 244 (1983) (holding that the Due Process Clause requires a state to provide medical care to persons in police custody).

The Supreme Court has stated that the "compelling" justification for compulsory education is that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence," *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1971). Accordingly, it follows that students obligated to attend school five days a week for nine months a year, must, at the least,

receive an education that is reasonably geared to providing them that stated goal, *i.e*. an education adequate to prepare them to be capable citizens.

Judicial recognition of fundamental rights protected by the Fourteenth Amendment is rare—and appropriately so. But the depth of the link between education and democracy throughout American history is unique and its deep roots in the Nation's history and tradition, as well as its central importance to the maintenance of ordered liberty in our democratic society, compels the recognition of state-provided access to education for capable citizenship as one of those affirmative rights that is enshrined in the Constitution.

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

An alternative basis for upholding plaintiffs' claims in this case is provided by the Privileges and Immunities Clause of the Fourteenth Amendment. The clause provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In 1868, "privileges" and "immunities" were both synonyms for rights. "Generally speaking, a privilege was a right to do something; an immunity was protection against invasions of a legally protected interest." JACK M. BALKIN, LIVING ORIGINALISM 210 (2011). Rhode Island, like virtually every other state, recognizes the preeminent importance of education and grants all children the "privilege" of attending public schools—and, in fact, *mandates* that all children attend school. On its face, the state's abridgement of that privilege by providing grossly inadequate education for civic preparation violates this federal constitutional requirement.

One of the major oddities of American legal history is that the Privileges and Immunities Clause, which, according to most scholars, was meant to provide important national rights for the newly-freed slaves and all other citizens, has been rarely invoked in modern times. Goodwin Liu,

now an associate justice of the California Supreme Court, writing an extensive study of the intent of the drafters of the Fourteenth Amendment when he was a professor at the University of California, Berkeley Law School, concluded that they understood that they were creating new substantive national rights when they wrote the Privileges and Immunities Clause. Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L.J. 330, 349 (2006).

Education was one of the substantive rights the framers of the Privileges and Immunities Clause had in mind. This was substantiated by the fact that a right to education was set forth in the constitutions of three-quarters of the 37 states, accounting for 92% of the U.S. population, in existence in 1868 when the Fourteenth Amendment was ratified, *see*, Stephen G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 TEX. L. REV. 7, 108 (2008).[34] *See also*, Derek Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN L. REV 735 (2018) (arguing that the original intent of the Fourteenth Amendment was to guarantee education as a right of state citizenship); William E. Forbath, *Class, Caste and Equal Citizenship*, 98 MICH. L. REV.1, 26 (1999). ("Citizenship demanded suffrage; and the independence of the freedmen's ballots required material foundations. That entailed not only equal rights to contract and own property, but also to public education and training").

Despite the framers' intent however, a century and a half ago, in *The Slaughter-House Cases*, 83 U.S. 36 (1873), the Supreme Court interpreted the clause in very narrow terms. The 5–4 majority decision held that citizenship of the United States included only the rights explicitly

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

set forth in the federal constitution plus such matters as a citizen's right to be able to "come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it," and "the right to use the navigable waters of the United States, however they may penetrate the territory of the several States." *Id*. at 79. Justice Field dissented. He stated that if the Congress that had adopted the Fourteenth Amendment intended that "privileges and immunities" be read so narrowly, then

> [I]t was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

Id. at 96.

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

Two members of the current Supreme Court have, however, specifically called for such a reconsideration. Two decades ago, Justice Clarence Thomas dissented in *Saenz v. Roe*, 526 U.S. 489 (1999), a case in which the Court majority, for the first time in a century, did invoke the Privileges and Immunities Clause, but limited its applicability to interstate travel, the sole national right the Court had articulated in the *Slaughter-House Cases*. Justice Thomas objected to the Court's failure to reconsider the ancient *Slaughter-House* precedent. He wrote that "the

Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases* . . . . Unlike the majority, I would look to history to ascertain the original meaning of the Clause." *Saenz,* 526 U.S. at 521-522.

A decade later, in a concurring opinion in *McDonald v. Chicago,* 561 U.S. 742 (2010), a case that applied the Second Amendment's right to bear arms to the states, Justice Thomas discussed at length the history of the enactment and ratification of the Privileges and Immunities Clause and held that this clause would have provided a stronger Constitutional basis for the right to bear arms:

> It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. 174, 2 L.Ed. 60 (1803)…… At the time of Reconstruction, the terms "privileges" and "immunities" had an established meaning as synonyms for "rights." The two words, standing alone or paired together, were used interchangeably with the words "rights," "liberties," and "freedoms," and had been since the time of Blackstone. See 1 W. Blackstone, Commentaries *129 (describing the "rights and liberties" of Englishmen as "private immunities" and "civil privileges").

McDonald, supra, 561 U.S. at 813-14 (Thomas, J. concurring).

Earlier this year, Justice Thomas re-iterated this position in his concurrence in *Timbs v. Indiana*, 139 S. Ct. 682 (2019), a case involving excessive civil fines:

> I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

Id. at 691) (Thomas, J., concurring).

On this occasion, Justice Gorsuch also wrote a concurrence in which he endorsed Justice Thomas' view: "[a]s an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this

Court has long assumed, the Due Process Clause (citing Justice Thomas' previous opinions on this point) *Id.* at 691 (Gorsuch, J, concurring).

Should Justices Thomas and Gorsuch, or the Supreme Court as a whole, apply the Privileges and Immunities Clause to the issues raised by this case, the right to an education adequate to exercise constitutional rights would surely stand out as one of the pre-eminent "privileges" of national citizenship. The vital role of education, and particularly education for capable citizenship, in American life historically and even more extensively in our own times, as discussed in the previous sections supports this conclusion.[35] Even assuming *arguendo* that the original intent of the framers of the Fourteenth Amendment did not include education among the privileges and immunities of citizenship, it is clear that the framers "chose generic language sufficiently elastic to permit reasonable future advances through legislation and judicial interpretation" Liu, *supra*, 116 YALE L.J. at 369. As John Hart Ely put it,

> The most plausible interpretations of the Privileges or Immunities Clause is, as it must be, the one suggested by its language— that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific ways gives directions for finding.

John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28 (1980).

The Privileges and Immunities Clause speaks to matters of substance in a way that "the language of due process and equal protection does not." Philip B. Kurland, *The Privilege and Immunities Clause: Its Hour Come Round at Last?* WASH. UNIV. L.Q. 405, 406 (1972). *See also*

[35] Justice Thomas, lauding the dissenting opinion of Justice John Marshall Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J. dissenting) that relied on the Privileges and Immunities Clause, also argued in a law review article that *Brown v. Board of Education* had provided "an opportunity to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment" and that Brown "would have had the strength of the American political tradition behind it if it had relied upon Justice Harlan's arguments instead of relying on dubious social science." Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L.& PUB. POL'Y 63, 68 (1989).

Balkin, *supra*, at 209 (Instead of asking whether an interest is a fundamental interest, "the more natural and sensible question is whether it is a privilege or immunity of national citizenship, part of a basic template of rights that all citizens enjoy"). Basing a right to an education adequate for capable citizenship on the Privileges and Immunities Clause also would avoid the "slippery slope" issue that concerned the Supreme Court in *Rodriguez*, 411 U.S. at 32-33, since neither housing, welfare or any other activity or benefit provided by governments have been so deeply rooted as a "privilege or immunity" in this nation's history and traditions, as has public education.

For all of these reasons, this Court should apply the Privileges and Immunities Clause to the claims raised in this case, as well as the Equal Protection and Due Process Clauses, and declare that the right to an education adequate to exercise constitutional rights is firmly grounded in the Fourteenth Amendment.

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

Article IV, section 4, of the U.S. Constitution requires the federal government to guarantee each of the states a "Republican Form of Government." On its face, this language would seem to prohibit "any tendencies in a state that might deprive its people of republican government," William M. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 1 (1972), including a substantial deprivation of the "quantum of education" needed to prepare students to exercise important constitutional rights.

However, this clause has been largely ignored for the past two centuries primarily because of the Supreme Court's hoary holding in *Luther v. Borden*, 48 U.S. 1 (1849). There, the Court was asked to validate the legitimacy of the sitting government in Rhode Island whose *bona*

fides were being challenged. The Court held that it was for Congress, and not the federal courts, to determine the legitimacy of a state government:

> Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.

Id. at 35.

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

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court undertook an extensive review of past cases that had held claims raised under the Republican Guarantee Clause to be non-justiciable and concluded that "it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' and no other feature, which could render them non justiciable." *Id.* at 228-229. This holding implies that a Republican Guarantee claim that does not raise "political questions" of the type the Court delineated in *Baker* would be justiciable. Indeed, the Supreme Court later specifically referred to the fact that it had considered the clause to be justiciable in some early cases and looking ahead stated that "perhaps not all claims under the Guarantee Clause present non justiciable political questions." *New York v. United States*, 505 U.S. 144, 185-186 (1992).[36]

[36] In *New York v. United States*, supra, the Court also cited a number of books and articles that advocated invoking the clause in various situations. *Id*. *See also* John Hart Ely, DEMOCRACY AND DISTRUST 118

Plaintiffs here claim that the state's failure to provide them an education adequate to prepare them for capable citizenship presents an issue that is appropriate for consideration under the Republican Guarantee Clause. Certainly, declaring that the maintenance of a Republican form of government requires an education system that prepares students for the meaningful exercise of constitutional rights does not raise any political questions. Plaintiffs do not allege that Rhode Island's state government or any state agencies are illegitimate or that any of the structures of state government need to be altered.[37] Rather, the claim is that these duly constituted state agencies need to carry out properly their responsibilities to ensure that the school system the state has established satisfies students' rights to an education that prepares them to function productively as civic participants.

The Republican Guarantee Clause can be, and should be "regarded as a protector of basic individual rights and should not be treated as being solely about the structure of government." Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable,* 65 COLO L. REV. 849, 851 (1994). And for Chemerinsky, the primary individual rights that the Clause was meant to protect were, in fact, the rights to vote, to exercise free speech and to engage in political participation. *Id*. at 868-869. *See also* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 559–60 (1962)

(1981) ("[I]t seems likely that this unfortunate doctrine-that all Republican Form cases are necessarily cases involving political questions-will wholly pass from the scene one of these days.").

[37] Defendants' citation of *Largess v. Supreme Judicial Court of Massachusetts*, 373 F.3d 219 (2004), Edu. Def. Br at 56; Gov. Br at 15, is inapposite. There, members of the Massachusetts legislature were asking the federal courts to invalidate the same sex marriage decision of the Massachusetts Supreme Judicial Court. Thus, the case presented a highly charged separation of powers and political question issue of the type that the U. S. Supreme Court had explicitly held to be inappropriate for federal judicial review in *Luther* and *Baker*. The First Circuit repeatedly denominated the issue in *Largess* as a "separation of powers" matter, *id*. at 226-8. Furthermore, it specifically rejected the defendants' position that "Guarantee Clause claims are *always* non-justiciable…" *Id.* at 225, and explicitly stated that "[w]e do not purport to spell out the entire scope or meaning of the Clause's guarantee of a republican form of government." *Id.* at 226.

(Republican Guarantee Clause should be interpreted today to require universal free public education); Wiecek, *supra*, at 302 (The Republican Guarantee Clause "can remove conditions in the structure of state governments, in their functioning or in the social institutions of the people that threaten republican government"); *Plessy v. Ferguson,* 163 U.S. 537, 563–564, (1896) (Harlan, J., dissenting) (racial segregation is "inconsistent with the guarantee given by the Constitution to each State of a republican form of government").

The relationship between the rights to vote, to exercise free speech and to engage in political participation and the "quantum of education" needed to exercise these rights under the Republican Guarantee Clause has never been considered by the U.S. Supreme Court, or by any other federal court. This is, therefore, an important issue of first impression that should be considered by this Court.

Applying the Republican Guarantee Clause to claims of inadequate education is consistent with the intent of the founding fathers. As discussed in Section IV above, they recognized the centrality of education to the preservation and proper functioning of our democratic society, and that schooling would need to play a central role in "the deliberate fashioning of a new republican character, rooted in the American soil . . . and committed to the promise of an American culture." Lawrence A. Cremin, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783-1876 (1980).

During the Reconstruction era, Congress made clear that an adequate education system was a *sine qua non* of republican government by requiring that none of the rebellious Southern states could be re-admitted to the union unless and until their state constitutions included a clause guaranteeing all children a free public education:

> [T]he legislative history of the Reconstruction Act reveals that as a condition of readmission to the Union, Congress expected states to provide for education in

> their constitutions. . . . both the Reconstruction Act and Article IV of the federal Constitution required states to adopt republican forms of government. . . . Members of Congress believed that education was inherent in a republican form of government. Without public education, the masses would lack the capacity to engage in democratic self-government and would instead be subject to domination by the elite class. Thus, any state constitution failing to provide for public education would have been subject to congressional disapproval.

Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 742-743 (2018) (footnotes omitted).[38]

The constitutions that most of the Northern and Western states adopted in the 19th century also directly linked education to the viability of a republican form of government. For example, the constitution of Minnesota, adopted in 1857 explicitly proclaims: "The *stability of a republican form of government depending mainly upon the intelligence of the people*, it shall be the duty of the legislature to establish a general and uniform system of public schools." Minn. Const. art. VIII, § 1 (emphasis added). *See also, e.g.,* S. Dak. Const. Art VIII, § 1 (1889) (emphasis added) ("*[t]he stability of a republican form of government depending on the morality and intelligence of the people*, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools"); Calif. Const. art. IX, § 1, (emphasis added) ([a] "*general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people*"); Ark. Const. art. XIV, § 1 (1874) (emphasis added) ("*[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government*, the State shall ever maintain a general, suitable and efficient system of free public schools").

[38] "[T]he idea that education was part of a republican form of government also took hold in the North and only accelerated following the ratification of the Fourteenth Amendment. On the eve of the Civil War, affirmative right-to-education clauses were already becoming a standard aspect of the constitutions of other newly admitted states. Four new states joined the Union in the 1860s: Kansas, West Virginia, Nevada, and Nebraska. All four entered with education clauses in their state constitutions." *Id.* at 791 (footnotes omitted).

The broad extension of the franchise beyond the limited domain of white male property owners that prevailed at the time the Constitution was enacted requires that today all citizens must be well prepared to vote intelligently, to understand and analyze critically the glut of information that they receive daily from the media and the Internet, and to participate actively in a range of civic affairs. Accordingly, the Court should reject defendants' motions to dismiss and should permit plaintiffs to proceed to trial to present evidence that can demonstrate the importance of the link between an adequate education and the maintenance of a republican form of government.

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

Defendants raise the specter that a ruling for plaintiffs in this case will require the Court to "intervene into the classroom curriculum on a national basis and at a granular level," Gov. Def. Br. at 13, and that plaintiffs are asking this Court "to function as a one-man board of education and unilaterally define education adequacy . . ." Edu Def. Br at 3. They further claim that the outcome of a favorable ruling for plaintiffs will be like the outcome of the state educational funding cases which, according to them, resulted in state courts "weigh[ing in] on controversial public policy choices concerning what is taught in the public school" and "did not achieve the expected results." Edu. Def. Br at 39. Both of these claims misconstrue the nature of the relief sought by the plaintiffs and have no factual basis.

Plaintiffs are not asking this Court to issue the type of detailed judicial decree that many federal courts did in school desegregation cases. Those decrees, often for compelling reasons, did call for extensive judicially-supervised plans that intervened in school operations "at a granular level." Prioritizing appropriate civic preparation in the schools, however, does not necessitate

extensive judicial intervention of this type, and plaintiffs here are not requesting any such remedy.

What the present plaintiffs are seeking is a declaratory judgment that would re-establish civic preparation as a priority responsibility for all schools in Rhode Island. The plaintiffs are not asking for any specific injunctive relief from the Court. Thus the entire substantive request for relief in the Complaint is for the Court to issue a judgment:

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

This formulation leaves entirely to state policymakers and educators the substantive decisions about how the goal of preparing students adequately to be capable citizens would be accomplished. In other words, the "granular specifics" of the statutes, regulations, educational policies, instructional methods, and accountability systems that would be needed to develop and implement sound civic preparation programs would be left entirely to the discretion of the state officials.

Civic preparation is a relatively non-controversial, non-partisan issue to which virtually all policymakers and educators pledge allegiance; the problem is that because of competing

priorities and the challenge of adapting traditional civic education practices to the needs of students in the 21st century, the Rhode Island defendants, like officials in many other states, have failed to implement effective civic preparation practices that meet contemporary needs. A declaratory judgment from this Honorable Court will galvanize them to do so.

The appropriate comparison here is not to school desegregation, disability rights, gender equity or other highly controversial issues where court decrees have often needed to spell out detailed compliance requirements that have sometimes prompted strong resistance. The declaratory decree that plaintiffs seek here is more akin to the judgments the Supreme Court and other federal courts have successfully implemented in cases like *Lau v. Nichols*, 414 U.S. 563 (1974) where the Court simply declared that non-English-speaking Chinese students were being denied "a meaningful opportunity to participate in the educational program" *Id.* at 568 and left it to the state and the school authorities to decide on how this discrimination should be remedied. The parties in *Lau* did, in fact, enter into a consent agreement that settled the case. Furthermore, Congress, the federal Office of Civil Rights and many states were also motivated by the Court's focus on the educational needs of non-English speaking students to adopt a number of important statutes, regulations and guidelines that led to the development of a range of instructional practices for dealing with this issue. *See, e.g.*, U.S. Department of Health, Education, and Welfare, Office for Civil Rights, "The Lau Remedies," (1975); Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* (1976).

Similarly, in many other cases involving education, declaratory judgements by the federal courts have clarified constitutional responsibilities and resulted in necessary changes, without involving the courts in any on-going monitoring and oversight regimes. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975) (declaratory judgment that students were entitled to basic due process

protections before being suspended from school); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (declaratory judgment upholding schools district's right to restrict "vulgar speech and lewd conduct" in school activities), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (declaring that religiously-oriented organizations were entitled to hold activities on school premises).

The education defendants set forth a long series of string citations to the state education funding cases at pp. 39-41 of their brief and then baldly conclude that these cases "did not achieve the expected results," *Id.* at 39, but nowhere do they tell us what results were expected or discuss the actual outcome of *even one of these cases* to justify their entirely negative assessment of the outcome of all of the cases.[39] Contrary to defendants' unsubstantiated conclusion, recent evidence has shown that overall the state education finance cases have been enormously successful.

A major study published by the National Bureau of Economic Research (NBER) that tracked the outcomes of *all* of the school funding cases decided between 1971 and 2010 found that school finance reforms stemming from court orders have tended both to increase spending in lower-income districts and to decrease expenditure gaps between low-and high-income districts. The authors also found that a 20% annual increase in annual per-pupil spending for K-12 low income students led to one more year of completed education, 25% higher lifetime earnings and a 20 point decrease in adult poverty. C. Kirabo Jackson, Rucker Johnson and Claudia Persico, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement*

[39] Defendants' sole authority for their sweeping rejection of the outcomes of the dozens of cases they cite is a single student note, *The Misguided Appeal of a Minimally Adequate Education*, 130 HARV. L.REV. 1458, (2017). That Note, however, discussed only one education funding case and focused on a handful of other recent cases that have sought to invalidate teacher tenure laws that have no relevance to the issues raised by this case.

and Adult Outcomes, National Bureau of Research Working Paper 20118 (2014). *See also, e.g.*, ANNE NEWMAN, REALIZING EDUCATIONAL RIGHTS: ADVANCING SCHOOL REFORM THROUGH COURTS AND COMMUNITIES 81-84 (2013) (discussing how the Kentucky litigation resulted in dramatic reductions in spending disparities among school districts, the redesign and reform of the state's education system, and a significant increase in student achievement scores), DAVID KIRP, IMPROBABLE SCHOLARS: THE REBIRTH OF A GREAT AMERICAN SCHOOL SYSTEM AND A STRATEGY FOR AMERICA'S SCHOOLS (2013) (documenting that as a result of that state's school funding litigation, Union City, New Jersey, a 92% Latino district that is the poorest in the state, has effectively closed the achievement gap between its students and non-urban students throughout the state).

This is not to say, of course, that the results of all of the dozens of declaratory judgments and decrees that state courts have issued in the educational funding cases have been uniformly successful. Many of these cases have had impressive results, but others have had more limited success. What is significant about the history of the state court education funding decisions is that, taken as a whole, they constitute the type of "laboratory of the states" that Justice Louis Brandeis long ago lauded as a prime virtue of the American federal system. *See New State Ice. Co. v. Liebmann*, 285 U.S. 262, 311 (1932). To the extent that this history is relevant to the present case, it would be at a remedial stage of this litigation, where after a full trial, the Court might choose to explore this rich repository of empirical outcomes of a range of remedial options to determine why some of these remedies proved successful and other did not.

Defendants also make further abstract pronouncements about separation of powers, federal abstention and political question principles that have no relevance to this case. The American concept of separation of powers has always been based on a "blending" of the roles of

the three branches to promote effective governance and has never called for a rigid model of absolute separation. *See, e.g.,* Malcolm P. Sharp, *The Classical American Doctrine of Separation of Powers,* 2 CHI. L. REV. 385, 427 (1935). In any event, the various separation of powers cases the education defendants cite on p. 42 of their brief have to do with the relative balance of powers among the three branches of the federal government and have no bearing on the issues of judicial review by a federal court of the actions of a state government that are at issue in this case.

The education defendants' invocation of the federal abstention doctrine is even more attenuated. There are no pending or potential state administrative procedures relevant to this case, and the defendants have never even alleged that there are any open issues of state law in Rhode Island regarding civic preparation. *Cf. Pustell v. Lynn Public Schools,* 18 F.3d 50, 54 (1st Cir. 1994) ("It has yet to be determined, therefore, whether the Lynn School Committee's interpretation of the evaluation component of its regulations, which conditions approval of home instruction on home visits, is authorized by state law.") The central legal issue that this Court needs to determine on this motion to dismiss is whether under the Fourteenth Amendment and Art IV, § 4 of the U.S. Constitution there is a right to an education adequate to exercise federal constitutional rights; these are purely federal questions and they involve no state law issues that would in any way call for federal abstention.

Defendants also raise the "political question" doctrine and specifically cite the six factors the Supreme Court delineated in *Baker v. Carr,* 369 U.S 186 (1962) for determining whether a non-justiciable political question has been raised. Edu. Def. Br. at 44. *Baker,* however, has generally been understood as a case that substantially narrowed the use of the political question doctrine by the federal courts. As one commentator has stated: "Although *Baker* set forth a new

test for political questions that seemed quite flexible, the case actually signaled the beginning of the end of the prudential political question doctrine." Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267 (2002).

Today, the political question doctrine is rarely invoked by federal courts, except in foreign affairs controversies. Even in sensitive foreign policy matters, the First Circuit has avoided invoking the political question doctrine. As it explained in declining to take jurisdiction of a case involving the legality of the war in Iraq:

> Our analysis is based on ripeness rather than the political question doctrine. The political question doctrine—that courts should not intervene in questions that are the province of the legislative and executive branches—is a famously murky one….It has also been used fairly infrequently to block judicial review. The modern definition of the doctrine was established in the landmark case of *Baker v. Carr*, 369 U.S. 186 (1962). In the forty years since that case, the Supreme Court has found a case nonjusticiable on the basis of the political question doctrine only twice. *See Nixon v. United States*, 506 U.S. 224, 236 (1993) (Senate procedures for impeachment of a federal judge); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (training, weaponry, and orders of Ohio National Guard). Our court has been similarly sparing in its reliance on the political question doctrine.

Doe v. Bush, 323 F.3d 133, 139-40 (1st Cir. 2003) (footnotes omitted).

In any event, the Supreme Court specifically held in *Baker* that in political question cases, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Id.* at 210.

In short, the defendants are attempting to immunize the State's glaring failures to prepare students to exercise their constitutional rights from federal judicial review by citing a mélange of inapposite legal doctrines. As the First Circuit has noted, federal courts need to "avoid the pitfalls inherent in blind deference to state autonomy." *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 635 (1996). Even though the policies regarding the basic operations of the

public schools generally are the province of the state authorities, the federal courts have repeatedly taken jurisdiction of school-based cases that raise important constitutional issues, and especially those that involve "the preparation of individuals for participation as citizens, and …the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

The critical link between education and the continued viability of our democratic society has only become stronger and more manifest today than it was in 1789 when the Constitution was adopted, in 1868 when the Fourteenth Amendment was enacted, and in 1954, when the Supreme Court's *Brown* decision used public education as the framework for overruling the "separate but equal" doctrine. Although this Court does not need to specify at this time the precise "quantum of education" that is necessary for all of Rhode Island's students to be accorded the opportunity for an education that prepares them adequately for the demands of citizenship in the 21st century, certainly, this key question that the Supreme Court left open for further consideration in *Rodriguez* should not be foreclosed on a motion to dismiss. Accordingly, the Court should deny the motions and declare that plaintiffs have a right to an education adequate for capable citizenship, the parameters of which will be determined based on an evidentiary record after trial.

CONCLUSION

For all of the aforesaid reasons, defendants' joint motions to dismiss should be denied in their entirety.

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Respectfully submitted,

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