CASE NO. 20-2082

United States Court of Appeals

for the

First Circuit

A.C., a minor, by her parent and guardian ad litem, Torrence S. Waithe; A.C.C., a minor, by her parent and guardian ad litem, Nicolas Cahuec; A.F., minor, by his parent and guardian ad litem, Aletha Forcier; R.F., a minor, by her parent and guardian ad litem, Aletha Forcier; I.M., a minor, by his parents and guardians ad litem Jessica Thigpen and Anthony Thigpen; L.M., a minor, by her parents and guardians ad litem Jessica Thigpen and Anthony Thigpen; K.N.M.R., a minor, by her parent and guardian ad litem, Marisol Rivera Pitre; J.R.H., a minor, by her parents and guardians ad litem, Moira Hinderer and Hillary Reser; M.S., a minor, by his parent and guardian ad litem, Mark Santow; M.M.S., a minor, by his parent and guardian ad litem, Amie Tay; M.S., a minor, by her parents and guardians ad litem, Maruth Sok and Lap Meas; A.W., a minor, by her parent and guardian ad litem, Chanda Womack; J.W., a minor, by her parent and guardian ad litem, Chanda Womack; N.X., a minor, by her parents and guardians ad litem, Youa Yang and Kao Xiong,

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, CASE NO. 1:18-CV-00645

AMICUS CURIAE BRIEF OF MARTHA MINOW, 300TH ANNIVERSARY UNIVERSITY PROFESSOR AT HARVARD UNIVERSITY, IN SUPPORT OF PLAINTIFFS-APPELLANTS SUPPORTING REVERSAL

YELENA KONANOVA
JORDAN W. GARMAN
SELENDY & GAY PLLC
Attorneys for Amicus Curiae
1290 Avenue of the Americas
New York, New York 10104
(212) 390-9000

v.

GINA M. RAIMONDO, in her official capacity as Governor of the State of Rhode Island; NICHOLAS A. MATTIELLO, in his official capacity as Speaker of the Rhode Island House of Representatives; DOMINICK J. RUGGERIO, in his official capacity as President of the Rhode Island Senate; RHODE ISLAND STATE BOARD OF EDUCATION; COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION; ANGELICA INFANTE-GREEN, in her official capacity as Commissioner of Education of the State of Rhode Island,

Defendants-Appellees.

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INTEREST OF *AMICUS CURIAE*[1]

Martha Minow is the 300th Anniversary University Professor at Harvard University. Since 1981, she has taught at Harvard Law School, where she was previously Dean from 2009 to 2017. Professor Minow is a leading constitutional scholar, including on the intersection of constitutional rights and education, and an expert in human rights and advocacy for racial and religious minorities, women, children, and persons with disabilities. Professor Minow has authored and contributed to numerous writings on law and education, with a specific focus on *Brown v. Board of Education* and access to educational opportunity, including *In Brown's Wake: Legacies of America's Educational Landmark*; *Just Schools: Pursuing Equality in Societies of Difference*; "Essay on *Brown v. Board of Education*" in Harvard Ed. Magazine; "*Brown v. Board* in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge" in the San Diego Law Review; "After *Brown*: What Would

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[1] Pursuant to FRAP 29(a)(4)(E), counsel for *Amicus Curiae* certifies no party or any counsel for a party in this appeal authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission, and that no person or entity other than *Amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Martin Luther King Say?," in the Lewis & Clark Law Review; and "Surprising Legacies of *Brown v. Board*," an introductory essay in *Legacies of* Brown*: Multiracial Equity in American Education*.

As an eminent scholar on *Brown v. Board*, education reform, racial disparities in access to education, and the right to education, Professor Minow is uniquely well-suited to offer an expert analysis of *Brown v. Board*'s impact on the constitutional questions presented here. All parties have consented to Professor Minow filing this brief with the Court.

PRELIMINARY STATEMENT

This case implicates the right to equal access to education—including education for and about civics—a fundamental principle embodied in *Brown v. Board of Education*, 347 U.S. 483 (1954). The importance of a civics education cannot be overstated; the Court need look no further than recent events at the U.S. Capitol to appreciate the perils of a populace ignorant of basic constitutional mandates and democratic norms. An urgent need exists for the federally guaranteed minimally adequate civics education Plaintiffs seek—one enabling citizens to participate in the political process in a reasoned, legal, and ethical manner. Yet, Defendants deprive many Rhode Island public-school students—predominantly

minority and low-income ones—of access to such an education, infringing a federal fundamental right in violation of Plaintiffs' substantive due process and equal protection rights. Their actions cannot survive the corresponding exacting level of scrutiny. Even if access to a minimally adequate civics education were not a fundamental right, Defendants' disparate treatment runs afoul of the spirit of *Brown* and survives neither intermediate nor rational basis scrutiny.

First, the district court correctly recognized the central, historical role of education—and, specifically, civics education—but erred in holding the right to a minimally adequate civics education is not fundamental under the U.S. Constitution, misapplying Supreme Court jurisprudence. For centuries, governmental actors at all levels recognized the importance of education as a core function of government. At the time the Fourteenth Amendment was passed, the majority of states recognized education as a fundamental right and, today, all fifty states require some duration of education for all children.

In this context, the Supreme Court emphasized in *Brown* that "education is perhaps the most important function of state and local governments." 347 U.S. at 493. Since *Brown*, the Court has left open the

possibility that a fundamental federal constitutional right exists to a minimum quantum of education as necessary to exercise other constitutional rights. That quantum must include a minimally adequate civics education, meaning sufficient literacy and training enabling students to understand and engage in the rights and duties of citizens. Without a civics education, contrary to the district court's reasoning, citizens are largely incapable of effectively exercising their right to free speech, to vote, to participate on a jury, among others. Because Defendants deprive Plaintiffs of this fundamental right without articulating any "compelling governmental interest" for doing so, they violate Plaintiffs' substantive due process and equal protection rights. The district court's misinterpretation of history—and of *Brown* and its progeny—requires reversal.

Second, even if a minimally adequate civics education were not a fundamental right, Defendants depriving Plaintiffs of an education equal to that enjoyed by other public-school students in Rhode Island violates Plaintiffs' equal protection rights guaranteed by *Brown* and its progeny. These students, unlike other similarly situated students, learn neither the attributes of our constitutional form of government nor how to discern fact from fiction through critical thought. The district court wrongly read

Brown narrowly as only abolishing governmentally-mandated segregation and similar intentional discrimination in schools.

In *Brown*, the Supreme Court struck down the "separate but equal" public-education system that segregated students on the basis of race as violating the Equal Protection Clause of the Fourteenth Amendment. In doing so, the Supreme Court recognized the unique importance of education, finding it "doubtful that any child may reasonably be expected to succeed in life if … denied the opportunity of an education." *Id.* Also recognizing the foundational importance of education to a democratic society, the Court held that a state must provide education to all its students "on equal terms." *Id.* *Brown* has served as the cornerstone for subsequent Supreme Court education jurisprudence and remains lauded in and beyond the United States.

Yet, Rhode Island, responsible for the education of its citizens, *see* *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 781 (R.I. 2014), systematically fails in its obligation to provide *all* its citizens equal access to an adequate civics education. Because Defendants' differential treatment of Plaintiffs implicates education, which "must be accorded a special place in equal protection analysis," *Plyler v. Doe*, 457 U.S. 202, 233 (1982)

(Blackmun, J., concurring), that lesser treatment must "further[] some substantial goal of the State," *id.* at 224 (majority opinion). Defendants articulate no such "substantial goal," nor—contrary to the district court's holding—is that treatment rationally related to any legitimate state interest. Because Defendants violate Plaintiffs' equal protection rights, the district court must be reversed.

ARGUMENT

I. RHODE ISLAND UNDERMINES THE FEDERAL FUNDAMENTAL RIGHT TO A MINIMALLY ADEQUATE CIVICS EDUCATION

Plaintiffs—predominantly minority and low-income students—plead that Rhode Island deprives them of a minimally adequate civics education necessary to exercise their right to speech and to fully participate in the political process. *See infra* Section II.A. Accepting Plaintiffs' allegations as true, the state violates those students' federal fundamental right to such an education.

The Supreme Court has defined "fundamental rights" as those "which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks

omitted). Thus, "[o]ur Nation's history, legal traditions, and practices … provide the crucial guideposts for responsible decisionmaking" on which rights should be considered "fundamental." *Id.* at 721 (internal quotation marks omitted). Applying this test, the Court has found—besides those rights enumerated in the Bill of Rights—that the following rights are fundamental: the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), to direct the education of one's children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and to use contraception, *id.*, among others.

As made clear by this nation's history and practices, as well as the Supreme Court's treatment of governmental attempts to limit access to education, receipt of a minimally adequate education—specifically, one that prepares students to capably participate in a democratic society—is a constitutionally protected fundamental right. Defendants' actions infringing on a fundamental right are subject to, and fail, strict scrutiny under the equal protection and the due process rubrics. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

A. The U.S. Constitution Provides A Federal Fundamental Right To A Minimally Adequate Education

Access to a minimally adequate education is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington*, 521 U.S. at 720–21 (internal quotation marks and citation omitted). As the founders, states, and courts have all recognized, citizens must obtain education to participate in the basic privileges and fundamental responsibilities of our democracy. Even though the Supreme Court was not previously compelled to articulate this fundamental right explicitly, the Court's own jurisprudence has paved the way for recognition of access to a minimally adequate education as a fundamental right.

1. Education Is Deeply Rooted In The Nation's History

In its constitution, Rhode Island recognizes the importance of education, noting that education is "essential to the preservation of … rights and liberties" of the people. R.I. Const. art. 12 § 1. Correspondingly, education is compulsory in Rhode Island for children ages 6 through 18. 16 R.I. Gen. Laws § 16-19-1.

Rhode Island's recognition of the importance of education is deeply rooted in the nation's history. John Adams emphasized the significance of education when he wrote in 1785:

> [T]he whole people must take upon themselves the education of the whole people, and must be willing to bear the expenses of it. There should not be a district of one-mile square, without a school in it, not founded by a charitable individual, but maintained at the public expense of the people themselves.[2]

Thomas Jefferson opined "[n]o other sure foundation can be devised for the preservation of freedom, and happiness."[3] And George Washington believed that "the assimilation of the principles, opinions, and manners of our country-men by the common education of a portion of our youth from every quarter well deserves attention."[4] The founders thus

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[2] Letter from John Adams to John Jebb (Sept. 10, 1785) *in* 9 The Works of John Adams, Second President of the United States 538, 540 (Charles Francis Adams ed., 1856), *available at* https://oll.libertyfund.org/title/adams-the-works-of-john-adams-vol-9-letters-and-state-papers-1799-1811.

[3] Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786) *in* 10 The Papers of Thomas Jefferson 243, 243–45 (Julian P. Boyd ed., 1954), *available at* https://founders.archives.gov/documents/Jefferson/01-10-02-0162.

[4] George Washington, Eighth Annual Message (Dec. 7, 1796), *available at* https://avalon.law.yale.edu/18th_century/washs08.asp.

recognized that maintaining a constitutional democracy requires the engagement and vigilance of an educated public.

These ideals sparked the common-schools movement in 1830—the precursor to our modern public-school system. In advocating for common schools for boys, girls, and immigrants, Horace Mann cited the need to "promote political stability, equalize conditions, … and enable people to follow the law …." Minow, *In Brown's Wake*, *supra*, 115. By 1868, the year the Fourteenth Amendment was adopted, a large majority of states "had a fundamental right to a public school education." Steven G. Calabresi and Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 Mich. St. L. Rev. 429, 490 (2015).

Since then, the right to education has become only more firmly engrained. *See Brown*, 347 U.S. at 492–93 ("[W]e cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted …. We must consider public education in light of its full development and present place in American life throughout the Nation."). By 1918, every state had not only adopted systems of publicly financed and operated education, but also had made school attendance compulsory. *See* Timothy Garrison, *From Parent to Protector: The History of Corporal Punishment in*

American Public Schools, 16 J. Contemp. Legal Issues 115, 117 (2001). By 1954, forty-four of the then-forty-eight states had explicit language in their state constitutions requiring legislatures to establish a free public-education system, incorporating into their constitutions the right to a free public-school education. *See* Calabresi & Perl *supra*, at 471–81; *cf. Atkins v. Virginia*, 536 U.S. 304, 314–15, 321 (2002) (requiring only 34 of 50 states precluding execution of mentally disabled individuals to conclude the nation's "evolving standards of decency" found such punishment excessive). And today, every state has compulsory education laws requiring school attendance for between nine years and thirteen years.[5]

2. The Supreme Court Has Supplied The Basis For Recognizing A Fundamental Federal Right To A Minimally Adequate Education

It was in this context that Chief Justice Warren wrote in *Brown* that "education is perhaps *the most important function* of state and local governments," as evidenced by "[c]ompulsory school attendance laws and the great expenditures for education." *Brown*, 347 U.S. at 493 (emphasis

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[5] *See* Louisa Diffey and Sarah Steffes, *50-State Review: Age Requirements for Free and Compulsory Education*, Educ. Comm'n of the States (Nov. 2017), *available at* https://www.ecs.org/wp-content/uploads/Age_Requirements_for_Free_and_Compulsory_Education-1.pdf.

added). This bold language is unlike that used to describe any other right not already recognized as fundamental, holding open the door for later recognition of a fundamental right to education. In *Plyler*, the Court further described education as not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." 457 U.S. at 221. Rather, "education has a *fundamental role* in maintaining the fabric of our society." *Id.* (emphasis added).

Even in *San Antonio Independent School District v. Rodriguez*—relied on by the district court (at Add.29–31) to hold there is no fundamental right to civics education—the Court acknowledged its precedent had long "express[ed] an abiding respect for the vital role of education in a free society." 411 U.S. 1, 30 (1973) (collecting cases). More importantly, *Rodriguez* implied the Constitution could be violated where schools "fail[] 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 37 (emphasis added).[6] According

[6] Dissenting Justices in *Rodriguez* expressed in even stronger terms that education is necessary to instill "political consciousness" and to provide "the interest and … tools necessary for political discourse and debate," *id.* at 113 (Marshall, J., dissenting); and is intimately intertwined with

to the district court, *Rodriquez* "was careful to leave the door open, if only a crack, to a future challenge to an education program that was totally inadequate," and the Court has since taken "pains to reemphasize that its holding in *Rodriguez* did not close the door to every possible claim of a constitutional protection for education." Add.36–37 (citing, *e.g.*, *Papasan v. Allain*, 478 U.S. 265, 285 (1986)).

B. A Minimally Adequate Education Includes A Minimally Adequate Civics Education

Rodriguez thus left open the question of what constitutes a minimum quantum of education necessary for the enjoyment of the rights of speech and of full participation in the political process. The answer is a civics education. Even assuming the district court was correct in reading *Rodriguez* as requiring a "totally inadequate" education to trigger a fundamental right, Plaintiffs' allegations of unequal access to and deprivation of a civics education exemplify exactly that. Add.36 (citing *Rodriguez*, 411 U.S. at 37). In *Rodriguez*, plaintiffs' equal protection claim ostensibly failed because the record provided no evidence that schools were not providing students an opportunity to acquire minimal skills

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the rights to vote and to free speech, *see id.* at 63 (Brennan, J., dissenting).

necessary to exercise their rights to speech and full participation in the political process. 411 U.S. at 37. Plaintiffs here can provide such evidence showing Defendants totally deprive them of a minimally adequate education in the absence of an adequate civics education.

Beyond *Rodriguez*, Supreme Court jurisprudence makes clear that an education that does not prepare students to capably participate in a democratic society—*i.e.*, a civics education—is not an adequate education. In *Brown*, the Court emphasized that education "is the very foundation of good citizenship." 347 U.S. at 493. In *Tinker v. Des Moines Independent Community School District*, the Court recognized that public education is critical to the success of the Nation's democracy. *See* 393 U.S. 503, 512 (1969). And the majority in *Plyler* reiterated that schools instill "fundamental values necessary to the maintenance of a democratic political system," and education is necessary to "sustain[] our political and cultural heritage." 457 U.S. at 221.

Against this backdrop, the Sixth Circuit recently and correctly held (in a non-precedential opinion) that a fundamental right to a basic minimum education exists, and that such an education is one that imparts literacy. *Gary B. v. Whitmer*, 957 F.3d 616, 655 (6th Cir. 2020), *vacated*,

958 F.3d 1216 (6th Cir. 2020). As the district court noted, the *Gary B.* panel focused on the "key linkage" between education and "the ability of citizens to effectively participate in a democratic society," as emphasized in both *Brown* and *Plyler*. Add.39. Without literacy, citizen participation in a functioning democracy was "inaccessible." *Id.* (citing *Gary B.*, 957 F.3d at 652–53). Literacy, as the most fundamental tool in unlocking citizens' ability to learn and to act, is certainly necessary "for even the most limited participation in our country's democracy," and "is foundational to our political process and society." *Gary B.*, 957 F.3d at 652.[7]

Yet, literacy is not sufficient to meet the objectives conveyed in the Supreme Court jurisprudence—namely, that citizens understand the importance of their "contribut[ion] … to the progress of our Nation," *Plyler*, 457 U.S. at 223, and understand how to so contribute. "Unless citizens

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[7] Other subjects remain critical. "[I]n the age of data, quantitative literacy joins verbal literacy as the guarantor of liberty." Lynn Arthur Steen, *Numeracy: The New Literacy for a Data-Drenched Society*, 57 Educ. Leadership 8, 10 (1999), http://www.ascd.org/publications/educational_leadership/oct99/vol57/num02/Numeracy@_The_New_Literacy_for_a_Data-Drenched_Society.aspx. And history and social studies "provid[e] international and comparative perspectives essential for responsible citizenship." Peter N. Stearns, *Why Study History*, Am. Hist. Ass'n (1998), https://www.historians.org/about-aha-and-membership/aha-history-and-archives/historical-archives/why-study-history.

possess a basic level of civic knowledge—especially concerning political institutions and processes—it is difficult for them to understand political events or to integrate new information into an existing framework." William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 Ann. Rev. Pol. Sci. 217, 223 (2001). To avoid the "social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests," *Plyler*, 457 U.S. at 221,[8] literacy and other subjects must be amplified with some quantum of training (*infra* Section II.A.) on how to channel literacy, numeracy, and other studies toward becoming a capable citizen.

The need for such training is borne out in data. Though roughly 80% of adults in the U.S. are considered functionally literate,[9] only 39%

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[8] *See also* Campaign for the Civic Mission of Schools, *Guardian of Democracy: The Civic Mission of Schools* (Jonathan Gould ed., 2011), https://media.carnegie.org/filer_public/ab/dd/abdda62e-6e84-47a4-a043-348d2f2085ae/ccny_grantee_2011_guardian.pdf ("Americans who are not properly educated about their roles as citizens are less likely to be civically engaged …. They are less likely to vote, less likely to engage in political discourse, and less likely to participate in community improvement projects than their counterparts who receive civic education.").

[9] *Adult Literacy in the United States*, U.S. Dep't of Educ. Nat'l Ctr. for Educ. Stat. (July 2019), https://nces.ed.gov/datapoints/2019179.asp.

could correctly name the three branches of government in 2019;[10] only 10% have an age-appropriate understanding of the system of checks and balances between the branches of American government;[11] and there has been, on average, just over 50% voter turnout between 1980 and 2016[12]—lower than in comparable elections throughout Europe and Canada.[13] Moreover, civics courses are associated with increased student performance on the National Assessment of Educational Progress test, and increased student confidence to "perform such participatory functions as

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[10] *Americans' Civics Knowledge Increases But Still Has a Long Way to Go*, Annenberg Public Policy Center (Sept. 12, 2019), https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-increases-2019-survey.

[11] Jan Brennan, *ESSA: Mapping Opportunities for Civic Education,* at 5 (April 2017), https://www.ecs.org/wp-content/uploads/ESSA-Mapping-opportunities-for-civic-education.pdf.

[12] Voter Turnout in Presidential Elections, The Am. Presidency Project, UC Santa Barbara, https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections.

[13] Kathleen Hall Jamieson, *The Challenges Facing Civic Education in the 21st Century*, Daedalus J. of the Am. Acad. of Arts & Sci. 65, 72 (Spring 2013), https://www.amacad.org/sites/default/files/daedalus/downloads/Sp2013_American-Democracy-and-the-Common-Good.pdf.

writing a letter to Congress."[14] One study found that students who complete a year's worth of civics or American government coursework are 3 to 6 percentage points more likely to vote than those without such exposure.[15] For students who report not discussing politics at home, the increase jumps to 7 to 11 percentage points.[16]

As in *Gary B.*, "[e]ffectively every interaction between a citizen and her government depends" not only on "literacy," but also on understanding the basic concepts surrounding voting, jury duty, taxes, running for office, and the judicial system. 957 F.3d at 652. Thus, just like in *Gary B.*, access to a minimally adequate civics education is indeed "necessary for essentially *any* political participation." *Id.* (emphasis in original). Deprivation of a minimally adequate civics education *is* the "totally inadequate" education the district court viewed as necessary under *Rodriguez*. Add.36. Defendants' actions in depriving Plaintiffs of minimally

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[14] *Id.*

[15] Center for Educational Equity, Teachers College, Columbia University, *Civic Learning Impact and Measurement Convening*, CivXNow.org, at 2 (2018), https://www.civxnow.org/sites/default/files/basic_page/Research%20Summary-Political%20and%20Civic%20Behavior%2012-13-18.pdf.

[16] *Id.*

adequate educational opportunities effectively excludes them from political participation. The district court correctly recognized the importance of a civics education, but erred in concluding these building blocks of democracy are "not wholly inaccessible without civics education" and thus not fundamental. *Id.* at 45.[17]

C. Defendants' Actions In Depriving Plaintiffs Of A Minimally Adequate Civics Education Violate Plaintiffs' Due Process And Equal Protection Rights

The Due Process Clause—proclaiming that "[n]o state shall … deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1—provides heightened protection against government interference with certain fundamental rights. Substantive due process "forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the

[17] The district court also appears to conflate a minimally adequate civics education with a guarantee of the *most* effective speech or the *most* informed electoral choices, discussed in *Rodriguez*. Add.45. But unlike the *Rodriguez* plaintiffs, Plaintiffs do not seek education sufficient to make "the most effective speech or the most informed electoral choice." 411 U.S. at 36. Rather, they seek access to a *minimally adequate* civics education to allow them merely to *participate* in speech and electoral choice, among other key aspects of American democracy.

infringement is narrowly tailored to serve a compelling state interest." *Washington*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

Because Defendants' actions infringe on the fundamental right to a minimally adequate civics education, this exacting level of review is appropriate. Defendants have not articulated a compelling interest in depriving Plaintiffs of a minimally adequate civics education, nor can they. Defendants did not even argue below that they meet this standard. This concession is sufficient to find that Rhode Island's scheme, as alleged, violates Plaintiffs' substantive due process rights.

For the same reason—namely, that Defendants' actions are not narrowly tailored to a compelling interest—Defendants' disparate treatment of Plaintiffs, discussed *infra* Section II.A., in relation to a fundamental right is not sufficiently justified, and Plaintiffs sufficiently allege Defendants violate their equal protection rights.

II. RHODE ISLAND FAILS TO PROVIDE A MINIMALLY ADEQUATE CIVICS EDUCATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE, DISPROPORTIONATELY IMPACTING MINORITY AND LOW-INCOME STUDENTS

Rhode Island violates the equal protection rights of predominantly minority, low-income students by depriving them of the same access to

the minimally adequate civics education enjoyed by their more affluent counterparts in predominantly white districts. This disparate treatment is contrary to the spirit of *Brown* and, because it is devoid of sound justification, unconstitutional.

Under the Equal Protection Clause, "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted the Equal Protection Clause as requiring state legislation or official action to treat similarly situated persons alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Thus, "evidence of actual disparate treatment is a threshold requirement of a valid equal protection claim." *Ayala-Sepúlveda v. Municipality of San Germán*, 671 F.3d 24, 32 (1st Cir. 2012) (internal quotation marks omitted); *see also Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006). As the district court recognized, Plaintiffs have successfully pled disparate treatment, *infra* Section II.A, and such treatment runs afoul of *Brown*'s core meaning, *infra* Section II.B.

Under an equal protection analysis, differential treatment must be justified by a sufficiently strong governmental interest. As discussed

supra Section I.C., Defendants' actions infringe a fundamental right and are subject to strict scrutiny. But even if the Court disagrees, the Court must nonetheless apply heightened scrutiny under *Plyler v. Doe* because the violation pertains to education. And in any case, the state action at least must be rationally related to a legitimate state interest. *See City of Cleburne*, 473 U.S. at 440. As demonstrated *infra* Section II.C., Defendants' actions in inequitably depriving Plaintiffs of a minimally adequate civics education pass neither level of scrutiny, requiring reversal.

A. Rhode Island Deprives Plaintiffs Of A Minimally Adequate Civics Education, Unlike Many Similarly Situated Students

Plaintiffs describe five primary ways in which Rhode Island fails to provide many students—predominantly minority and low-income ones—the adequate civics education they need to effectively participate in American democracy. These failures are compounded by the state's treatment of similarly situated students in affluent districts. The district court thus correctly held that Plaintiffs adequately allege disparate treatment. *See* Add.49–50.

Specifically, Defendants deprive Plaintiffs of access to basic (i) civic knowledge; (ii) civic skills; (iii) civic experiences; (iv) civic values; and

(v) civic integration, obstructing Plaintiffs' ability to understand American democracy and their role in it. App.35–54, ¶¶ 54–111. By comparison, certain predominantly white, affluent Rhode Island school districts provide plentiful opportunities for students to develop into well-rounded civic citizens in accord with their fundamental constitutional rights. *Id.* at 54–56, ¶¶ 112–115. The effect of these deprivations on Rhode Island's minority and low-income students is evident in the achievement gap between those students and Rhode Island's non-minority students in more affluent districts. *Compare, e.g.*, *id.* at 42, 54 ¶¶ 76, 111, *with id.* at 55, ¶ 113. Plaintiffs are thus completely deprived of an adequate civics education by virtue of their race, socioeconomic status, and address, while other Rhode Island students are provided with genuine, civically oriented educational opportunities.

B. *Brown v. Board*—Which Repudiated The "Separate But Equal" Education System—Should Guide Treatment Of The Rhode Island Schools

The Supreme Court's landmark decision in *Brown* capped decades of minority group advocacy for access to education as an integral part of the fight for racial equality. In 1900, the Niagara Movement, led by W.E.B. Du Bois, highlighted the importance of education: "The school

system in the country districts of the South is a disgrace …. Either the United States will destroy ignorance or ignorance will destroy the United States." Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 Lewis & Clark L. Rev. 599, 612 (2008) (citing W.E.B. Du Bois, *Address at the Second Annual Meeting of the Niagara Movement* ¶ 11 (Aug. 16, 1900), *available at* http://www.wfu.edu/~zulick/341/niagara.html). The Niagara Movement's goal was for all children to receive access to an education, reflecting the critical role education plays in children's ability to advance in society. The Niagara Movement later gave rise to the NAACP, which continued the fight for racial equality and educational access, in part by litigating cases under the Equal Protection Clause.

This movement culminated in 1954, when *Brown* came before the Supreme Court. *Brown* squarely presented the question whether "separate but equal" schools satisfied the Equal Protection Clause.[18] 347 U.S. at 487–88. The Supreme Court overturned the "separate but equal" doctrine announced in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and held the

[18] The *Brown* Court explicitly withheld judgment on whether segregation also violated the Due Process Clause. 347 U.S. at 495.

Constitution requires that once a state undertakes to provide an education to its students, it must provide that education on an equal basis, without depriving individuals segregated by race of the opportunities to succeed in learning and in the world. *Brown*, 347 U.S. at 495.

Brown thus conclusively repudiated the "separate but equal" doctrine and established equality as a central commitment of the American educational system.[19] The *Brown* Court relied in part on social-science research provided by the NAACP's Legal Defense Fund, which demonstrated the psychological harm to black schoolchildren caused by segregation and the resulting impact "on their educational opportunities." 347 U.S. at 494 & n.11. Relying on this research, the Court held that separating children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

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[19] *Brown*'s legacy and impact reaches outside the education context. The Supreme Court has cited *Brown* with approval over 150 times, not only in education cases, *see, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (affirmative action); *Freeman v. Pitts*, 503 U.S. 467 (1992) (school desegregation), but also in cases addressing abortion and the right to privacy, *see Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), desegregation in prisons, *Johnson v. California*, 543 U.S. 499 (2005), and redistricting, *Shaw v. Reno*, 509 U.S. 630 (1993).

Disparities in civics educational opportunities lead to similar disparities in political engagement, underscoring the importance of providing a minimally adequate civics education. Research shows a positive correlation between not only *education* and participation in the electoral process,[20] but also specifically *civics education* and the electoral process.[21]

"The privileged participate more than others and are increasingly well organized to press their demands on government."[22] "Citizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while the advantaged roar with a

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[20] *See* Ronald La Due Lake & Robert Huckfeldt, *Social Capital, Social Networks, and Political Participation*, 19 Pol. Psychol. 567, 567 (1998); Michele S. Moses & John Rogers, *Enhancing a Nation's Democracy Through Equitable Schools*, *in* Closing The Opportunity Gap 210–12 (Prudence L. Carter & Kevin G. Welner eds., 2013).

[21] Ashley Jeffrey and Scott Sargrad, *Strengthening Democracy with a Modern Civics Education*, Ctr. For Am. Progress (Dec. 14, 2019), https://www.americanprogress.org/issues/education-k-12/reports/2019/12/14/478750/strengthening-democracy-modern-civics-education/ ("It's important to address th[e] disproportionality [between white students and African American and Latinx students], as improved civics education can lead to greater civic engagement, including the increased likelihood of voting.").

[22] *American Democracy In An Age of Rising Inequality*, Task Force On Inequality & Am. Democracy, Am. Pol. Sci. Ass'n, at 1 (2004), *available at* https://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/taskforcereport.pdf.

clarity and consistency that policy-makers readily hear and routinely follow."[23] When unequal access to education amplifies some voices while relegating others to a whisper, the rights of those whispering voices are hampered.

It was undoubtedly the intent of the Fourteenth Amendment's drafters to permit *all* citizens' voices to be heard equally. To deny access to an adequate civics education is to deny participation in our democracy. Citizens should not—and the Equal Protection Clause mandates that they *cannot*—be so stigmatized, stifled, and made subservient based on the zip code in which they were born.

The racial differences and corresponding disparities in access to civics education, alive and well in Rhode Island's public-school system, disquietingly echo the *de facto* "separate but equal" construct struck down in *Brown*. The district court thus mischaracterized *Brown* in concluding that "at its heart, *Brown* was about racial segregation and discrimination in public education." Add.51 n.27. *Brown* made great strides toward desegregation, but it was also a means to establishing the right to an equal educational opportunity for students of different religions, genders,

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[23] *Id.*

sexual orientations, ethnic backgrounds, and disability, immigration, and socioeconomic statuses.

C. Defendants' Actions In Depriving Plaintiffs Of A Minimally Adequate Civics Education Are Devoid Of Sufficient Governmental Justification And Are Thus Unconstitutional

Because the right to a minimally adequate civics education is a federal fundamental right, *see supra* Section I.B., Defendants' disparate treatment of Plaintiffs is subject to and fails strict scrutiny review, *see supra* Section I.C. But even if an adequate civics education were not a federal fundamental right, Defendants' actions do not pass muster under either the heightened scrutiny established for state actions affecting education in *Plyler v. Doe* or under rational basis review. Defendants' disparate treatment of Plaintiffs, *supra* Section II.A., violates Plaintiffs' equal protection rights.

1. Defendants' Actions Fail Heightened Scrutiny Review Under *Plyler v. Doe*

Even assuming that Defendants' actions are not subject to strict scrutiny review, they nonetheless would fail the heightened scrutiny review set forth in *Plyler v. Doe*, otherwise applicable here. In *Plyler*, the Court applied heightened scrutiny to a state statute depriving the children of illegal aliens of free public education. Relying on both *Brown*'s

discussion of the consequences of denying children education and *Brown*'s promise that education would be provided on equal terms, the Court asked not whether the statute was rationally related to a legitimate government interest, but whether it "further[ed] some substantial goal of the State." *Plyler*, 457 U.S. at 222–24.

In finding the statute did not further a substantial state goal, the Court balanced, against the State's proffered justifications, the lifetime of continued hardship the children would endure absent access to education, the fundamental importance of education, and the accompanying "costs to the Nation" of creating a subclass of residents who could not contribute to the progress of the Nation. *Id.* at 223–24, 228–30. While illegal aliens were not a formal suspect class, innocent children of illegal aliens were blameless as to their illegal status and could "affect neither their parents' conduct nor their own status." *Id.* at 220 (citation omitted). And while education was not formally established as a fundamental right, it both "has a fundamental role in maintaining the fabric of our society," and is distinct from a mere governmental "benefit" given its "importance … in maintaining our basic institutions." *Id.* at 221; *see also id.* ("We have recognized the public schools as a most vital civic institution

for the preservation of a democratic system of government … and as the primary vehicle for transmitting the values on which our society rests." (internal quotation marks omitted)).

In the absence of fundamental right status, *Plyler* heightened scrutiny applies to and defeats Defendants' actions here. As in *Plyler*, Plaintiffs cannot control their low-income or minority status. And, like in *Plyler*, both Plaintiffs and the nation will suffer if Plaintiffs are not "prepare[d] … to participate effectively and intelligently in our open political system," crucial to "preserv[ing] freedom and independence." *Id.* at 221 (citation omitted); *see also Brown*, 347 U.S. at 493 ("[I]t is doubtful that any child may reasonably be expected to succeed in life if … denied the opportunity of an education.").

The district court erred in holding that *Plyler* is inapposite because it "was based on the *total* deprivation of education to a discreet subset of children … not the deprivation of a subset of education to all, or most, children." Add.51. As explained *supra* Section I.B., deprivation of an adequate civics education *is* a total deprivation of education. And in any case, the district court's reasoning is contradicted by at least one federal appellate court and multiple commentators, which have interpreted

Plyler as establishing education itself as at least a quasi-fundamental right entitled to heightened scrutiny. *See United States v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992) ("In *Plyler* … the Court recognized that infringements on certain 'quasi-fundamental' rights, like access to public education, also mandate a heightened level of scrutiny."); Peter S. Smith, *Addressing the Plight of Inner-City Schools: The Federal Right to Education After* Kadrmas v. Dickinson Public Schools, 18 Whittier L. Rev. 825, 854 (1997) ("Barring recognition of education as a fundamental right under the Equal Protection Clause, *Plyler* is recent precedent indicating that heightened scrutiny should be applied to denials of adequate education by states challenged under the fundamental rights strand of equal protection."); Joan C. Slotnik, Plyler v. Doe, *Paving the Way for Heightened Judicial Scrutiny in Constitutional Adjudication of Denials of Education*, 9 J. Contemp. L. 235, 245 (1983) ("In essence, the [*Plyler*] Court may be announcing that middle tier scrutiny is the appropriate standard for judicial review of all denials of education, whether partial or total in extent.").

For these reasons, this Court should apply *Plyler*'s heightened scrutiny to the deprivation here. Defendants did not argue below that their

actions could survive such heightened scrutiny, arguing only (and wrongly) that such heightened scrutiny is inapplicable. Defendants' implicit admission that their actions do not further a substantial goal of the state is dispositive.

2. Even Under Rational Basis Review, Defendants' Actions Are Impermissible

Even were this Court to determine that rational basis review is the appropriate standard, Defendants' actions do not pass muster: Depriving Plaintiffs of a civics education is not rationally related to any legitimate governmental interest.

Defendants argued below that the state's interest in local control of schools sufficed as the legitimate interest defeating Plaintiffs' claim. In extolling the virtues of local control, Defendants quote the *Rodriguez* Court's concerns about the judiciary inserting itself in the "problems of financing and managing a statewide public school system." June 26, 2019 Gov. Def's Reply Mem. ISO Mot. to Dismiss ("Gov. Def's Reply") (Dkt. 35 at 13) (quoting 411 U.S. at 40). But unlike Plaintiffs here, *Rodriguez* plaintiffs asked the Court to unravel a complicated funding and taxation formula. Here, in contrast, Plaintiffs request only a holding that some minimum quantum of civics education is constitutionally required,

see App.62–63 (not, as Defendants argue, a reallocation of resources between affluent and other districts, *see* Gov. Def's Reply (Dkt. 35 at 14)). This requested relief in no way invites or requires the judiciary to "wade into the very minutiae of curricula." *Id.* at 15. Defendants have necessarily adapted educational requirements to federal directives in the past (*e.g.*, No Child Left Behind Act, Every Student Succeeds Act, and Individuals with Disabilities Education Act); there is no legitimate argument that they should not or cannot emphasize and monitor civics in the same way.

In short, Defendants' failure to provide a civics education serves no legitimate governmental interest, and their actions cannot survive rational basis review.

CONCLUSION

Brown and its progeny have repeatedly recognized that access to education is a right that cannot be denied to certain classes of citizens. If a state elects—as every state has—to provide public education, the state has a duty to provide a minimally adequate education to all its children. Rhode Island's failure to provide Plaintiffs with *equal* access to a basic civics education—a fundamental right—violates the Equal

Protection and Due Process Clauses of the Fourteenth Amendment. The district court's judgment should be reversed.

Date: February 1, 2021

Respectfully submitted,

SELENDY & GAY PLLC

/s/ Yelena Konanova
Yelena Konanova
Jordan W. Garman
1290 Avenue of the Americas
New York, NY 10104
Telephone: 212-390-9000
lkonanova@selendygay.com
jgarman@selendygay.com

Attorneys for Martha Minow, 300th Anniversary University Professor at Harvard University

CERTIFICATE OF COMPLIANCE

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Date: February 1, 2021

Respectfully submitted,

SELENDY & GAY PLLC

/s/ Yelena Konanova
Yelena Konanova

Attorneys for Amicus Curiae
Martha Minow, 300th Anniversary University Professor at Harvard University

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I electronically filed the foregoing document through the Court's Electronic Case Filing (ECF) system, which will send notifications to counsel of record for all parties.

DATED: February 1, 2021

/s/ Lena Konanova
Attorney for *Amicus Curiae*