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## Surfing the Waves: An Examination of School Funding Litigation from *Serrano v. Priest* to *Cook v. Raimondo* and the Possible Transition of the Fourth Wave

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SURFING THE WAVES: AN EXAMINATION OF  
SCHOOL FUNDING LITIGATION FROM *SERRANO V.*  
*PRIEST TO COOK V. RAIMONDO* AND THE  
POSSIBLE TRANSITION TO THE FOURTH WAVE

Christine Rienstra Kiracofe\*  
Spencer Weiler\*\*

INTRODUCTION

As every student of education law learns, there is no mention of schools, students, teachers, education, or any related language in the federal Constitution.<sup>1</sup> Were scholars, unfamiliar with the American system of public education, to read through the federal Constitution in an attempt to understand how children are educated, they would be left with the plausible misunderstanding that the United States does not have a formal system of schools to educate its children. The absence of any language related to education in the federal Constitution, coupled with language of the

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<sup>1</sup> KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 88 (9<sup>th</sup> ed. 2019).

Tenth Amendment indicating that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”<sup>2</sup> mean that education is first and foremost a state, and not federal, issue.

The geographic and political diversity of the 50 states has resulted in a veritable patchwork quilt of school systems throughout the country operating under myriad curricula and radically different educational standards and guidelines. With states free to fund education as they please, and to the desired level as guided by state constitutional language, there are significant differences in how schools are funded from state to state. Given this, it is unsurprising that the lion’s share of school funding litigation has been adjudicated in state courts. A search of the literature yields hundreds of scholarly articles on state school funding litigation; fewer in number are articles focusing on federal school funding claims. To mark the important anniversary of the landmark school finance case *Serrano v. Priest*, we examine the small(er) but important role that federal claims have played in school funding litigation. Part I of this article provides an overview of the federal origins of school finance litigation. Part II of the paper examines the recent return of litigants to federal courts through an overview of five recent cases touching upon school funding and related issues. Part III provides analysis of these new federal cases and what may be the next (federal) “wave” of school funding litigation. Part IV concludes with implications for potential future litigants.

## PART I: FEDERAL ORIGINS OF SCHOOL FINANCE LITIGATION

Those familiar with school funding litigation today would rightly characterize it as being uniquely situated

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<sup>2</sup> U.S. CONST. amend. X.

within the purview of state courts. Of the hundreds of school funding cases filed over the past decades since the *Serrano* ruling, the vast majority have been filed in state, not federal, courts. However, when petitioners first filed litigation challenging the funding mechanisms employed by states to provide money to schools, they filed these early challenges in federal courts.

### *McInnis v. Shapiro*<sup>3</sup>

In 1968, the U.S. District Court for the Northern District of Illinois issued a ruling in a school funding litigation case addressing four school districts in Cook County, Illinois, in *McInnis v. Shapiro*.<sup>4</sup> In this class action case, petitioners argued that the state's funding mechanism permitted "wide variations in the expenditures per student from district to district, thereby providing some students with a good education and depriving others, who have equal or greater educational need" and these disparities violated the Fourteenth Amendment.<sup>5</sup> Illinois' overreliance on local property taxes to fund public schools<sup>6</sup> led to significant disparities in per pupil funding.<sup>7</sup>

The *McInnis* court characterized the "underlying rationale of the complaint" to be "that only a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth

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<sup>3</sup> *McInnis v. Shapiro*, 293 F.Supp. 327 (N.D. Ill. 1968).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 329. Petitioners in this case also alleged that a number of state statutes were violated, however given the topic addressed in this paper, we focus exclusively on the federal constitutional violations alleged.

<sup>6</sup> The phenomenon of relying heavily on local property tax to fund public education continues today in Illinois and many other states.

<sup>7</sup> *Id.* at 330. Per pupil expenditures varied "between \$480 and \$1,000" at the time of litigation, meaning that some students received more than double the funding spent on the education of other students in the state.

Amendment.”<sup>8</sup> Philosophically, the trial court appeared to agree with petitioners’ argument, noting “without doubt, the educational potential of each child should be cultivated to the utmost.”<sup>9</sup> However, the court drew a clear line between school funding philosophy and the law, clarifying that “the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court.”<sup>10</sup> Finding that the state funding system was “neither arbitrary nor . . . constitute[s] an invidious discrimination” the court held that the Fourteenth Amendment had not been violated.<sup>11</sup> Petitioners were essentially instructed to take their concerns to the legislature and the case was dismissed.<sup>12</sup>

***Burruss v. Wilkerson***<sup>13</sup>

One year following the court’s decision in *McInnis v. Shapiro*, the U.S. District Court for the Western District of Virginia weighed in on a second, similar school funding lawsuit in *Burruss v. Wilkerson*.<sup>14</sup> Petitioners’ arguments in *Burruss* were nearly identical to those in *McInnis*, arguing that Virginia’s system of funding public schools “[c]reates and perpetuates substantial disparities in the educational opportunities available in the different counties and cities of the state,” denying petitioners “educational opportunities substantially equal to those enjoyed by children attending

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<sup>8</sup> *Id.* at 331.

<sup>9</sup> *Id.* at 332.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Petitioners challenging the Illinois funding mechanism for public schools have repeatedly been told by both state and federal courts that school funding issues are non-justiciable political questions. See Kelly Summers, Jon Crawford & Christine Kiracofe, *A Legal and Statistical Analysis of Illinois School Funding in Light of Pending Litigation in Chicago Urban League v. Illinois*, 309 Ed. Law Rep. 595 (2014).

<sup>13</sup> *Burruss v. Wilkerson*, 310 F.Supp. 572 (W.D. Va. 1969).

<sup>14</sup> *Id.*

public schools in many other districts of the State” in violation of the Fourteenth Amendment.<sup>15</sup> The *Burruss* court, like its counterpart in *McInnis*, sympathized with petitioners’ plight, stating “plaintiffs seek to obtain allocations of State funds among the cities and counties so that the pupils in each of them will enjoy the same educational opportunities. This is certainly a worthy aim, commendable beyond measure.”<sup>16</sup> Despite this conciliatory language, the court dismissed petitioners’ suit, finding that no violation of the Fourteenth Amendment occurred:

[C]ourts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here.<sup>17</sup>

### ***Serrano v. Priest*<sup>18</sup> (*Serrano I*)**

The case that ushered in what has been widely coined as the “first wave” of school funding litigation was *Serrano v. Priest*, decided by the California Supreme Court in 1971. While *Serrano I* is rightly classified as a state, and not federal case, the text of the case reads almost exclusively as a federal one. As Derek Black notes, the only reference to a state constitutional right is in a single footnote in the case stating “our analysis of plaintiffs’ federal equal protection

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<sup>15</sup> *Id.* at 573.

<sup>16</sup> *Id.* at 574.

<sup>17</sup> *Id.*

<sup>18</sup> *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*).

contention is also applicable to their claim under these state constitutional provisions.”<sup>19</sup>

*Serrano I* was a class action lawsuit filed by students and parents in school districts located in metro Los Angeles County, California. Litigants outlined three causes of action: first, petitioners argued that the California funding formula’s heavy reliance on local property tax revenues to fund public schools resulted in significant disparities in per-pupil funding.<sup>20</sup> Second, petitioners asserted that the funding disparities led to a significant difference in “the quality and extent of availability of educational opportunities” available to schoolchildren.<sup>21</sup> They further argued that educational opportunities available to petitioners were “substantially inferior to the educational opportunities made available to children attending public schools in many other districts of the State” in violation of the equal protection clause of the Fourteenth Amendment and the state constitution.<sup>22</sup> Petitioners’ third cause of action asserted that “an actual controversy has arisen and now exists between the parties as to the validity and constitutionality of the financing scheme under the Fourteenth Amendment of the United States Constitution and under the California Constitution.”<sup>23</sup> The state argued that “the applicability of the equal protection clause to school financing has already been resolved adversely to plaintiffs’ claims by the Supreme Court[.]”<sup>24</sup> However, the California Supreme Court rejected this assertion, clarifying that while the U.S. Supreme Court had issued per curiam affirmances in *McInnis*<sup>25</sup> and

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<sup>19</sup> DEREK BLACK, SCHOOL HOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 202 (2020) (citing *Serrano*, 487 P.2d at 1250).

<sup>20</sup> *Serrano I*, 487 P.2d at 1244.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1263.

<sup>25</sup> *McInnis v. Ogilvie*, 394 U.S. 322 (1969).

*Burruss*,<sup>26</sup> the content of the Court's opinion had been limited to a single statement: "the motion to affirm is granted and the judgment is affirmed."<sup>27</sup> Thus, the California high court proceeded in its analysis of petitioners' claims in accordance with the Fourteenth Amendment.

The court acknowledged significant disparities in per-pupil spending and assessed valuation between districts. For example, the court highlighted expenditures and assessed valuation for three different Los Angeles County school districts for the years of 1968-69. Baldwin Park school district spent \$577 per-pupil, Pasadena Unified school district spent \$840 per-pupil, and Beverly Hills – the highest spending district – spent \$1,232 per-pupil.<sup>28</sup> Per-pupil spending was closely linked with assessed valuation, with Baldwin Park at just \$3,706 per child, \$13,706 per child in Pasadena, and \$50,885 per child in Beverly Hills, "a ratio of 1 to 4 to 13."<sup>29</sup> Deliberating on these data, the court considered whether wealth should be considered a suspect classification – something that would trigger the application of strict scrutiny. The court found "irrefutable" the proposition that "the school financing system classifies on the basis of wealth."<sup>30</sup> The court observed that property wealthy districts like Beverly Hills, for example, could raise significantly more money per-pupil with *lower* tax rates than property-poor districts like Pasadena, and especially Baldwin Park, noting that "affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poorer districts, by contrast, have no cake at all."<sup>31</sup>

The court also addressed petitioners' argument that education is a fundamental interest, something that would

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<sup>26</sup> *Burruss v. Wilkerson*, 397 U.S. 44 (1970).

<sup>27</sup> *Id.* at 44.

<sup>28</sup> *Serrano I*, 487 P.2d at 1248.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1250.

<sup>31</sup> *Id.* at 1251–52.

likewise trigger the application of strict scrutiny. The majority decision cited the U.S. Supreme Court's decision in *Brown v. Board of Education* to underscore the importance of education:

Today, education is perhaps the most important function of state and local governments ... it is the foundation of good citizenship ... 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.<sup>32</sup>

The court concluded that “the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest’”<sup>33</sup> and applied strict scrutiny to its analysis of petitioners’ complaints. Accordingly, the court found for the petitioners, holding that the current funding mechanism in the state violated the Equal Protection clause of the Fourteenth Amendment.

### **The Great Hope for School Funding Petitioners: *San Antonio v. Rodriguez***<sup>34</sup>

Petitioners’ landmark victory in *Serrano I* drew the attention of similarly-situated litigants across the country. Individuals in states other than California hoping for a

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<sup>32</sup> *Serrano I*, 487 P.2d at 1256 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>33</sup> *Serrano I*, 487 P.2d at 1258.

<sup>34</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

similar outcome for students in their jurisdiction were presented with two different paths: 1.) petitioners could file litigation similar to *Serrano I* in their state, hoping to secure a similar outcome, or 2.) petitioners could file litigation in federal court. By following the latter path, litigants hoped that the U.S. Supreme Court would share the California High Court's interpretation of education as a fundamental right and likewise address the constitutionality of significant differential per-pupil spending and assessed valuation in public school districts within a state.

Like *Serrano I*, *Rodriguez* was a class action lawsuit, filed by children and parents living within the boundaries of Edgewood Independent School District (EISD), a property-poor district in San Antonio, Texas. EISD was compared to the much wealthier neighboring Alamo Heights Independent School District (AHISD) to highlight the role the district's tax base plays in determining per-pupil funding.<sup>35</sup> For example, in 1967-68, EISD had an average assessed property value of \$5,960 per-pupil – a figure more than 8 times less than the per-pupil assessed property value of \$49,000 for AHISD students.<sup>36</sup> The two districts also had significantly different tax and per-pupil spending rates. EISD taxed residents at a rate of \$1.05 “per \$100 of assessed property” and was able to spend just \$356 per pupil.<sup>37</sup> In comparison, AHISD had a significantly lower tax rate of \$0.85 and spent \$594 per pupil.<sup>38</sup> Thus, even though residents of EISD taxed themselves at a significantly higher rate, the relatively low tax base of their community meant that they could not come close to meeting the per-pupil funding achieved by neighboring AHISD at a far lower tax rate.

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<sup>35</sup> It is also important to note the significant demographic differences between the two districts. The Court's decision notes that EISD students were more than 90% Hispanic and 6% Black. In comparison, AHISD students were “predominantly Anglo” with a minority student population of less than 20%. *Id.* at 13–14.

<sup>36</sup> *Id.* at 12.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 13.

The trial court, the U.S. District Court for the Western District of Texas, held that discrepancies such as those highlighted were violative of the Fourteenth Amendment. The court noted that:

Having determined that the current system of financing public education in Texas discriminates on the basis of wealth by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes, this Court concludes, as a matter of law, that the plaintiffs have been denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution.<sup>39</sup>

On appeal to the U.S. Supreme Court, appellants argued that if Texas' financing mechanism was subjected to strict scrutiny, as the lower court had opined, that neither Texas' nor "its counterpart in virtually every other State will not pass muster."<sup>40</sup> Thus, the first major point of order for the Supreme Court was to determine whether or not strict scrutiny should be applied.

As outlined above, petitioners argued for the application of strict scrutiny for two reasons: 1.) that education was a fundamental right, and 2.) that wealth was a suspect classification. Thus, the Supreme Court considered both of these arguments and ultimately held that it found "neither the suspect-classification no[r] the fundamental-interest analysis persuasive."<sup>41</sup>

The High Court was critical of the District court's analysis of wealth discrimination, the former noting that

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<sup>39</sup> *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F.Supp. 280, 285 (W.D. Tex. 1973).

<sup>40</sup> *Rodriguez*, 411 U.S. at 17.

<sup>41</sup> *Id.* at 18.

“there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts,” citing a Connecticut study in support of this assertion.<sup>42</sup> While the Court acknowledged that “whether a similar pattern would be discovered in Texas is not known,” that it ultimately did not matter as there was “no basis on the record in this case for assuming that the poorest people...are concentrated in the poorest districts.”<sup>43</sup> The Court further clarified that appellants’ claim that an *unequal* education was received was constitutionally quite different from a total deprivation of education altogether. The Court clarified “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”<sup>44</sup> Thus, the Court did not agree with petitioners’ assertion that wealth was a suspect class.

Like the court in *Serrano I*, the U.S. Supreme Court also referenced *Brown v. Board of Education*, underscoring the value of education to society and individuals. However, in contrast, the *Rodriguez* Court held that though important, education fell short of classification as a fundamental right. The Court wrote:

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that ‘the grave significance of education both to the individual and to our society’ cannot be doubted. 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.<sup>45</sup>

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<sup>42</sup> *Id.* at 23.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 24.

<sup>45</sup> *Id.* at 30.

The Court clarified that “social importance is not the critical determinant for subjecting state legislation to strict scrutiny.”<sup>46</sup> Thus, with both petitioners’ arguments for the application of strict scrutiny having failed, the Court found for the state.

The U.S. Supreme Court decision would have a profound and lasting impact on school funding litigation in the United States. Most significantly, *San Antonio v. Rodriguez* shut the proverbial door on petitioners’ hope for addressing school funding inequities at the federal level. Instead, what resulted over the next decades – and continues today – are scores of cases filed in state courts. The short-term impact of *Rodriguez*, however, was immediate and swift, as the California Supreme Court decided *Serrano v. Priest (Serrano II)*<sup>47</sup> in 1976.

***Serrano v. Priest (Serrano II)***<sup>48</sup>

After the California Supreme Court’s decision in *Serrano I*, the state legislature went to work, passing two pieces of legislation addressing school funding and significantly increasing the per-pupil foundation, or base, funding level. For example, the per-pupil base went from \$355 per elementary student and \$488 per high school student to \$765 and \$950, respectively, in the 1973-1974 school year.<sup>49</sup> While the increase in per-pupil funding was certainly a welcome turn of events for California schoolchildren, it did not address the equal protection concerns raised in *Serrano I*. The court noted that “it is clear that substantial disparities in expenditures per pupil resulting

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<sup>46</sup> *Id.* at 32.

<sup>47</sup> *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (*Serrano II*).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 935.

from differences in local taxable wealth will continue to exist” under the new legislation.<sup>50</sup>

Addressing the impact of *Rodriguez* on its previous decision in *Serrano I*, the court explained:

We—along with the trial court and the parties—think it is clear that *Rodriguez* undercuts our decision in *Serrano I* to the extent that we held the California public school financing system (if proved to be as alleged) to be invalid as in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. However, as we made clear in footnote 11, our decision in *Serrano I* was based not only on the provisions of the federal Constitution but on the provisions of our own state Constitution as well.<sup>51</sup>

With this statement, the California Supreme Court invoked the one mention of a California constitutional violation in *Serrano II*, and—in keeping with the impact of *Rodriguez*—effectively acknowledged the return of school litigation in California to the purview of the state.

## PART II: RECENT FEDERAL SCHOOL FINANCE LITIGATION

In the decades after *Serrano II*, school funding litigation was almost exclusively conceptualized as a state issue. However, in the recent half-decade, federal school finance litigation has experienced somewhat of a resurgence. Since 2017, there have been five school finance lawsuits

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<sup>50</sup> *Id.* at 938.

<sup>51</sup> *Id.* at 949.

filed in the federal court system. This recent shift from state courts to federal could signal the long-anticipated fourth wave in school finance litigation.<sup>52</sup> Each of the five cases are summarized below. In our discussion of the five cases, we review the plaintiffs' claims, the justification for filing the lawsuit in the federal court system, and the holding or settlement agreement.

### ***Ella T. v. State of California (2017)***<sup>53</sup>

The *Ella T.* complaint focused on the importance of literacy and the fact that California's system for funding public education failed to provide specific groups of students access to adequate literacy instruction.

### **The Claim**

The plaintiffs in the *Ella T.* case were students attending schools in Los Angeles Unified School District, Stockton Unified School District, and a charter school in Inglewood Unified School District.<sup>54</sup> Each of the plaintiffs attended schools where academic performance is significantly below the state average.<sup>55</sup> The defendants are the state of California, the state board of education, the state

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<sup>52</sup> Christie Geter, *Let's Try This Again, Separate Educational Facilities are Inherently Unequal: Why Minnesota Should Issue a Desegregation Order and Define Adequacy in Cruz-Guzman v. State*, 38 LAW & INEQ. 165, 174–175 (2020). See also Lauren Nicole Gillespie, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989 (2010).

<sup>53</sup> Complaint, *Ella T. v. State of California*, No. BC685730 (Super. Ct. Cal. Dec. 5, 2017). A copy of the complaint can be found at <https://media2.mofo.com/documents/171205-ella-t-v-california-complaint.pdf>.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *Id.* at 3. Proficiency rates in the plaintiff schools are all under 11% of students attaining the pre-determined benchmark in reading and math and “are frequently under 5%.”

department of education, and specific individuals in their official state capacities.<sup>56</sup>

The complaint focuses on the lack of literacy instruction provided to the plaintiffs and asks for “a judicial declaration that the Defendants have violated the state constitution and ‘statutory provisions.’”<sup>57</sup> The plaintiffs contend:

[T]he State’s system of education is failing them. *An education that does not provide access to literacy cannot be called an education at all.* Nor can it prepare students to be citizens, participate meaningfully in politics, exercise free and robust speech, and voice the views of their communities. In California’s education system, the children of the “haves” receive access to a basic education while the children of the “have nots” are barred access, rendering the state system of public education the great unequalizer.<sup>58</sup>

Specifically, the plaintiffs’ complaint contends the defendants’ actions, or inactions, related to literacy instruction violated California’s Equal Protection Clause in the state constitution<sup>59</sup> and constituted an “illegal expenditure of taxpayer funds.”<sup>60</sup>

### **The Justification for Filing Federally**

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<sup>56</sup> *Id.* at 3–4.

<sup>57</sup> *Id.* at 56.

<sup>58</sup> *Id.* at 3 (emphasis added).

<sup>59</sup> *Id.* at 55. California’s Equal Protection Clause is found in CAL. CONST. art. I, § 7(a); *id.* art. IV, § 16(a).

<sup>60</sup> Complaint at 56, *Ella T.*, No. BC685730 (Super. Ct. Cal. Dec. 5, 2017).

Despite the fact that it had been 44 years since the adjudication of the *Rodriguez* case when this case was filed,<sup>61</sup> there was very little justification provided in the *Ella T.* complaint for filing in the federal courts. The first justification is specific to the state board of education, which is “required to supervise local school districts to ensure that they comply with State and federal law requirements concerning educational services.”<sup>62</sup> The second justification argues that the state department of education has the duty to cooperate “with federal and state agencies in prescribing rules and regulations.”<sup>63</sup> In the third effort to justify filing the complaint federally, the plaintiffs point out that California schools receive federal funds as part of a school improvement effort to raise academic performance.<sup>64</sup> Finally, the plaintiffs’ claim includes the following statement, “Defendants’ expenditure of federal, state, county, and/or municipal funds to administer and implement a system of public education that engages in unconstitutional discrimination, as challenged herein, is unlawful.”<sup>65</sup>

### The Ruling

The defendants filed motions to have the case dismissed since the plaintiffs failed to identify a specific class of students that is being negatively impacted by the alleged discrimination. In addition, the defendants moved to have the case dismissed due to the lack of connection between the state’s actions or inactions and the plaintiffs’

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<sup>61</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>62</sup> Complaint at 4, *Ella T.*, No. BC685730 (Super. Ct. Cal. Dec. 5, 2017).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 44.

<sup>65</sup> *Id.* at 56.

literacy issues. These motions were rejected in 2018, and the judge allowed the case to proceed to trial.<sup>66</sup>

Following the 2018 decision, the two sides agreed to a settlement. The specifics of the settlement included the agreement to “propose legislation during the 2020-2021 legislative session” aimed at addressing the literacy issue for students in property-poor schools and school districts.<sup>67</sup> The new state statute makes \$50 million available annually to the 75 lowest performing elementary schools throughout the state, in the form of block grants, to address literacy issues. In addition, \$3 million is available to school districts to contract with literacy experts who can help with the implementation of the literacy improvement plans.<sup>68</sup>

### ***Martinez v. Malloy (2018)***<sup>69</sup>

The *Martinez* case focuses on school funding issues involving Connecticut students residing in inner city school districts.

### **The Claim**

The plaintiffs in the *Martinez* case are five “students enrolled in low-performing traditional public schools in Bridgeport and Hartford” Connecticut, as well as their parents.<sup>70</sup> The plaintiff parents and students had repeatedly attempted to transfer to high performing magnet schools or charter schools in the area, but, due to state-imposed limits

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<sup>66</sup>SCHOOLFUNDING, <https://www.schoolfunding.info/litigation-map/california/#1484003321789-d475191d-188c> (click “Recent Events) (last visited Nov. 22, 2021).

<sup>67</sup>ELLA T. SETTLEMENT AGREEMENT 1 (2020), <https://media2.mofo.com/documents/200220-literacy-ca-ella-t-settlement-agreement.pdf>.

<sup>68</sup> SCHOOLFUNDING, *supra* note 66.

<sup>69</sup> *Martinez v. Malloy*, 350 F.Supp.3d 74 (2d Cir. 2018).

<sup>70</sup> *Id.* at 82.

to these educational alternatives, these efforts were denied.<sup>71</sup> The defendants in this case are five individuals in their political capacities.<sup>72</sup>

The plaintiffs' case alleges that the defendants are perpetuating a funding formula for public education that disproportionately favors affluent, White student populations while denying historically marginalized students, especially those living in inner cities, "a minimally adequate education."<sup>73</sup> In addition, petitioners argue the state inexcusably promotes "educational inequity and inadequacy" by placing a hold on inter-district magnet schools and disincentivizing charter schools from entering Connecticut.<sup>74</sup>

The plaintiffs' case focused on seven specific complaints. First, "the defendants ... violated the plaintiffs' fundamental right to substantial equality of education opportunities under the Fourteenth Amendment's Equal

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<sup>71</sup> The state of Connecticut imposed a moratorium on the construction of new inter-district magnet schools in 2009 so that a state-wide magnet school plan could be developed. At the time of the *Martinez* ruling, the moratorium was still in place and a statewide plan had not been developed. Related to charter schools, the plaintiffs presented data showing that Connecticut inner-city charter schools were outperforming the traditional public schools in the same area. However, the way the state funds charter schools serves to disincentivize "charter school operators from trying to open new charter schools in the state." *Id.* at 80–81.

<sup>72</sup> *Id.* at 74. The specific individuals named in the lawsuit were: Dannel P. Malloy as Governor of Connecticut; Dianna Wentzell as the state commissioner of education; Kevin Lembo as the state comptroller; Denise Nappier as state treasurer; and Denise W. Merrill as state secretary of state.

<sup>73</sup> *Id.* at 79–80.

<sup>74</sup> "The plaintiffs allege that the State knows that 'inter-district magnet schools are a superior alternative to its traditional district schools that are failing to provide thousands of children with a minimally adequate education... The plaintiffs allege that Connecticut's approach to funding charter schools disincentivizes charter school operators from trying to open new charter schools in the state.'" *Id.* at 80–81.

Protection Clause.”<sup>75</sup> Second, defendants’ actions also violated the Fourteenth Amendment’s Equal Protection Clause by purposefully denying plaintiffs from accessing a minimally adequate education. Third, the defendants violated the Equal Protection Clause by requiring plaintiffs to attend failing public schools and, at the same time, restricting alternative education opportunities (inter-district magnet schools and charter schools). Fourth, petitioners argue the defendants’ actions that deny plaintiffs from accessing a minimally adequate education also violate the Fourteenth Amendment’s Due Process Clause. Fifth, petitioners assert “the defendants have violated the Fourteenth Amendment’s Due Process Clause on its face and as applied to the plaintiffs, because they knowingly infringed on the plaintiffs’ fundamental liberty and punish the student-plaintiffs for something beyond their control.”<sup>76</sup> Sixth, the plaintiffs claim the defendants’ failure to fulfill its constitutionally required duty regarding public education violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Finally, the plaintiffs contend that the defendants’ failures to properly fund public education in the inner cities of Connecticut violates 42 U.S.C. § 1983 “by depriving the plaintiffs of numerous rights secured by the Fourteenth Amendment.”<sup>77</sup>

### **The Justification for Filing Federally**

The seven claims in the plaintiffs’ case are built around the U. S. Constitution’s Fourteenth Amendment and 42 U.S.C. § 1983. In addition, the plaintiffs cite previous cases decided by the U. S. Supreme Court, including *Rodriguez* and *Plyler v. Doe*.<sup>78</sup> Related to the *Plyler* holding,

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<sup>75</sup> *Id.* at 83.

<sup>76</sup> *Id.* at 84.

<sup>77</sup> *Id.*

<sup>78</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). *Plyler v. Doe*, 457 U.S. 202 (1982).

the plaintiffs argue this ruling establishes a higher scrutiny standard that applies to the Connecticut case because the defendants have enacted statutes that create burdensome obstacles to the plaintiffs receiving a minimally adequate education.

### The Ruling

The defendants filed motions to dismiss the plaintiffs' seven claims, arguing that the plaintiffs "lack standing, that the plaintiffs' suit is barred by the Eleventh Amendment, and that the statutes at issue should be subject to rational basis scrutiny."<sup>79</sup> In addition, the defendants argued that the plaintiffs' complaint failed to state a claim. The Court granted the defendants' motions on all the claims except for the sixth. The only reason the Court did not deny the motion on the sixth claim was because the "defendants d[id] not provide any argument in their memorandum of law."<sup>80</sup>

To determine the standing question, the Court considered three factors: injury-in-fact,<sup>81</sup> causation,<sup>82</sup> and redressability.<sup>83</sup> To establish injury-in-fact, plaintiffs are required to document actual harm that negatively impacted them. The Court ruled that the plaintiffs' case clearly documented injury and that the plaintiffs had standing in this

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<sup>79</sup> *Martinez v. Malloy*, 350 F.Supp.3d 74, 79 (2d Cir. 2018).

<sup>80</sup> *Id.* at 84.

<sup>81</sup> *Id.* at 85. "To show an injury-in-fact, the plaintiffs must have suffered 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjecture or hypothetical.'"

<sup>82</sup> *Id.* at 87 (citing *Chevron Corp. v. Donziner*, 833 F.3d 74, 121 (2d Cir. 2016)). "The traceability requirement for Article III standing means that 'the plaintiffs must demonstrate a causal nexus between the defendant's conduct and the injury.'"

<sup>83</sup> *Id.* "To satisfy the redressability prong of Article III standing, the plaintiffs must demonstrate that they 'personally would benefit in a tangible way from the court's intervention.'"

regard.<sup>84</sup> Related to causation, the Court concluded that “[b]eing in those failing schools is the direct cause of their injury, and the laws at issue deprive them of the opportunity to attend a school that is not failing.”<sup>85</sup> Finally, related to redressability, the plaintiffs asked the Court to hold the state’s anti-opportunity laws against magnet and charter schools unconstitutional. The Court determined a ruling that invalidated these anti-opportunity laws would increase the likelihood of the plaintiffs receiving “an adequate and equal education.”<sup>86</sup> In short, the Court ruled that the plaintiffs did have standing.

The Court then analyzed the defendants’ motion to dismiss because the lawsuit is barred by the Eleventh Amendment. According to the ruling, “The Eleventh Amendment precludes suit against the State and its officers unless: (1) the State unequivocally consents to suit in federal court; (2) Congress unequivocally abrogates the State’s immunity; or (3) the case calls within the *Ex parte Young* exception.”<sup>87</sup> Despite the claim from the defendants that *Ex parte Young* does not apply “because relief in this case will interfere with a recent state court judgment,”<sup>88</sup> the Court held that there is a precedent for allowing challenges to the way states fund public education to proceed in federal courts if the plaintiffs satisfy the *Ex parte Young* standard and the plaintiffs did satisfy this standard in the *Martinez* ruling.

Finally, the defendants argued the plaintiffs failed to state a claim. This is where the Court’s ruling unequivocally sides with the defendants. In each of the seven claims, excluding the sixth (which the defendants “make no argument with respect to Claim Six in their memorandum in

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<sup>84</sup> *Id.* at 85.

<sup>85</sup> *Id.* at 87.

<sup>86</sup> *Id.* at 88.

<sup>87</sup> *Id.* The *Ex parte Young* ruling, 209 U.S. 123 (1908), allows a lawsuit to proceed in federal courts, despite a state’s sovereign immunity, when there is evidence that the state or its agents acted contrary to the U. S. Constitution or federal statute.

<sup>88</sup> *Martinez v. Malloy*, 350 F.Supp.3d 74, 90 (2d Cir. 2018).

support of their motion to dismiss”<sup>89</sup>), the Court held that the plaintiffs failed to make a solid legal claim. This failure to state a claim is the reason the plaintiffs lost this case.

### ***Williams v. Reeves (2020)***<sup>90</sup>

*Williams v. Reeves* raises concerns over the funding for public education in Mississippi.

### **The Claim**

In *Williams v. Reeves*, the plaintiffs are low-socioeconomic status mothers of children attending public schools in Mississippi.<sup>91</sup> The plaintiffs allege that the current funding for public education in Mississippi is inadequate. The defendants are the ones held responsible for the current condition of funding in the state. The named defendants in the lawsuit are thirteen individuals in their current political positions.<sup>92</sup>

The plaintiffs in *Williams v. Reeves* invoke a historical fact as the foundation of their claim. Specifically, following the Civil War, Mississippi was only readmitted into the Union once it met specific readmission conditions,

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<sup>89</sup> *Id.* at 94.

<sup>90</sup> *Williams v. Reeves*, 954 F.3d 729 (5th Cir. 2020).

<sup>91</sup> *Id.* at 732.

<sup>92</sup> The named defendants are: Tate Reeves (state governor); Philip Gunn (speaker of the state house of representatives); Tate Reeves (state lieutenant governor); Delbert Hosemann (secretary of state); Carey M. Wright (state superintendent of education); Rosemary Aultman (chair of the state board of education); Jason Dean (member of the state board of education); Buddy Bailey (member of the state board of education); Kami Bumgarner (member of the state board of education); Karen Elam (member of the state board of education); Johnny Franklin (member of the state board of education); William Harold Jones (member of the state board of education); John Kelly (member of the state board of education); and Charles McClelland (member of the state board of education).

which included a prohibition on amending the state constitution if the modifications deprived “any citizen or class of citizens of the United States of the *school rights and privileges* secured by the constitution of said State [emphasis added].”<sup>93</sup> The plaintiffs allege that Mississippi’s current education clause violates the conditions for readmission. The current education clause reads, “[t]he Legislature shall, by general law provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.”<sup>94</sup> In contrast, the education clause adopted in 1868 read:

As the stability of the republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the Legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade.<sup>95</sup>

Since 1868, when the education clause was enacted as a condition for Mississippi being readmitted to the Union, the state has amended this portion of the state constitution four times.<sup>96</sup> The plaintiffs allege that the current state education clause clearly violates the conditions for readmission to the Union because “school rights and privileges” have not been protected since 1868.<sup>97</sup> Specifically, the plaintiffs point to

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<sup>93</sup> *Id.* (emphasis added). The quote is from the original statutory language when Mississippi was readmitted to the Union.

<sup>94</sup> MISS. CONST., art. VIII § 201 (1987).

<sup>95</sup> MISS. CONST., art. VIII § 1 (1868).

<sup>96</sup> *Williams v. Reeves*, 954 F.3d 729, 733 (5th Cir. 2020).

<sup>97</sup> *Id.*

the fact that a key quality standard found in the education clause was dropped. The key standard was “a uniform system of free public schools,” which has been identified by school finance scholars as an important quality standard.<sup>98</sup> In contrast, the current iteration of the state’s education clause makes no reference to the need for any degree of uniformity.<sup>99</sup> And, this omission of uniform not only violates the conditions for readmission, it also has resulted in “significant disparities in the educational resources, opportunities, and outcomes afforded to children in Mississippi based on their race and the race of their classmates.”<sup>100</sup>

The plaintiffs cite data demonstrating that the plaintiffs’ schools are struggling to perform academically. In addition, they allege that the school facilities are dilapidated, their children are regularly taught by underqualified and inexperienced teachers, and that the state’s funding formula restricts the plaintiff school districts from offering an appropriate array of extracurricular options.<sup>101</sup>

### **The Justification for Filing Federally**

The justification for filing the case in the federal courts hinged almost exclusively on the conditions for readmitting Mississippi to the Union following the Civil War. According to noted scholar Derek Black, enslaved African Americans saw education as the most important path to true freedom.<sup>102</sup> For this reason, preserving the

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<sup>98</sup> Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. EDUC. FIN. 143 (1994). See also William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525 (1998).

<sup>99</sup> *Williams*, 954 F.3d at 733.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* The plaintiffs allege that “extracurricular activities are limited or non-existent.”

<sup>102</sup> BLACK, *supra* note 19, at 79.

educational rights of all children in Mississippi, as well as the other southern states, was essential before they were readmitted to the Union. And, according to the plaintiffs, it was the federal government's role to determine which states were to be readmitted and, ultimately, to ensure that the southern states continued to meet conditions for readmission.<sup>103</sup>

### The Ruling

The Court of Appeals received this case on appeal from the District Court's ruling to dismiss the case due to the Eleventh Amendment, which barred such lawsuits against states.<sup>104</sup> The appellate court held that "[t]hough we agree that a portion of the relief plaintiffs seek is prohibited by the Eleventh Amendment, we hold that the lawsuit also partially seeks relief that satisfies the *Ex parte Young* exception to sovereign immunity."<sup>105</sup> Specifically, the Court of Appeals held that the plaintiffs' claim satisfies the *Ex parte Young* exception when it seeks to sue state officials in their "official capacity if the suit seeks prospective relief to redress an ongoing violation of federal law."<sup>106</sup> Specifically, the Court of Appeals held that the plaintiffs' claim that the state's current education clause fails to meet the conditions of the Readmission Act of 1868 "may be pursued under *Ex parte Young*."<sup>107</sup>

### **Gary B. v. Whitmer (2020)**<sup>108</sup>

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<sup>103</sup> *Williams*, 954 F.3d at 732.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 736. "There are three basic elements of an *Ex parte Young* lawsuit. The suit must: (1) be brought against state officers who are acting in their official capacities; (2) seek prospective relief to redress ongoing conduct; and (3) allege a violation of federal, not state, law."

<sup>107</sup> *Id.* at 739.

<sup>108</sup> Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020).

After years of neglect and poor academic performance, the plaintiffs in *Gary B.* filed a lawsuit claiming that the state of Michigan's neglect denied students in the Detroit Public Schools Community District a minimum educational experience.

### The Claim

The plaintiffs in *Gary B.* are seven students attending the lowest academically performing schools in the Detroit Public Schools Community District (Detroit Public Schools). The defendants are the state of Michigan, Gretchen Whitmer, in her capacity as governor, and other state officials who the plaintiffs allege are responsible for the "abysmal conditions" of the plaintiffs' schools.<sup>109</sup> The complaint was originally filed in 2016 and the district court held that the defendants were the correct responsible parties, but the lawsuit was dismissed due to failures related to the equal protection claim, the under developed compulsory attendance argument, and the fact that education is not a federal fundamental right.<sup>110</sup>

The plaintiffs based their complaint on 42 U.S.C. § 1983 as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment and contend that the state, which assumed control of Detroit Public Schools multiple times, was responsible for the deplorable academic environment in the plaintiffs' schools.<sup>111</sup> Specifically, the plaintiffs allege their educational experience has been defined by "the absence of qualified teachers, crumbling facilities, and insufficient materials."<sup>112</sup> The lack of qualified teachers negatively impacted the plaintiffs' ability to

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<sup>109</sup> *Id.* at 620–621. The plaintiffs' schools are described as serving "almost exclusively low-income children of color."

<sup>110</sup> *Gary B. v. Snyder*, 313 F.Supp.3d 852, 876 (E.D. Mich. 2018).

<sup>111</sup> *Gary B.*, 957 F.3d at 621.

<sup>112</sup> *Id.* at 624.

become functionally literate and the high teacher turnover rate magnified the teacher issues.<sup>113</sup> Ultimately, the plaintiffs' complaint is that they are forced to "sit in classrooms where not even the pretense of education takes place, in schools that are functionally incapable of delivering access to literacy."<sup>114</sup>

Related to facilities, the plaintiffs entered as evidence a statement from the City of Detroit, which "admitted that during the 2015-16 academic year, none of the school district's buildings were in compliance with city health and safety codes."<sup>115</sup> Facility conditions that made learning difficult, at best, included extreme temperatures, rodent feces, the persistent "smell of dead vermin and black mold," contaminated water from drinking fountains, and the lack of basic hygiene products in bathrooms.<sup>116</sup> Finally, the plaintiffs demonstrated that the schools they attended lacked sufficient educational materials and that existing materials were often outdated.

All of these deplorable factors resulted in dismal academic performance indicators. "Achievement data reveal that in Plaintiffs' schools, illiteracy is the norm. The proficiency rates in Plaintiffs' schools hover near zero in nearly all subject areas."<sup>117</sup> The ruling stresses that in Michigan education is viewed as a state duty, not a local one. However, the state's contributory responsibility in the *Gary B.* claim also stems from the fact that "the State has directly controlled [the Detroit school system] for most of the past fifteen years through variations of an emergency manager system."<sup>118</sup> In addition, in 2016, the state enacted a statute

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<sup>113</sup> *Id.* at 624–25.

<sup>114</sup> *Id.* at 652.

<sup>115</sup> *Id.* at 625–26.

<sup>116</sup> *Id.* at 626.

<sup>117</sup> *Id.* at 627.

<sup>118</sup> *Id.* at 622. The state assumed control of Detroit Public Schools due to consistent poor academic performance and financial mismanagement.

that authorized Detroit Public Schools to employ teachers who did not meet minimum licensure requirements; this law ensured that the only students in Michigan who could be taught by teachers who did not meet state requirements for certification were those attending Detroit Public Schools.<sup>119</sup>

### **The Justification for Filing Federally**

The *Gary B.* complaint was structured around the Fourteenth Amendment and § 1983 to show that the plaintiffs were being denied access to the “fundamental right to a basic minimum education.”<sup>120</sup> Related to the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs’ case essentially argued that the defendants created a system of education that discriminated against them when it came to access to literacy.<sup>121</sup> According to the plaintiffs, the Due Process Clause of the Fourteenth Amendment applies to this case because literacy is “so substantial that no process is enough to allow the government to restrict” access to this skill.<sup>122</sup>

### **The Ruling**

In short, the appellate court held that most of the plaintiffs’ arguments failed, but ultimately concluded that these students have been “denied a basic minimum education, and thus have been deprived of access to literacy.”<sup>123</sup> This holding is based on the court’s interpretation of U.S. Supreme Court cases focused on education, including *Brown*, *Rodriguez*, and *Plyler*. The court also determined that literacy is a basic “fundamental

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<sup>119</sup> *Id.* at 624.

<sup>120</sup> *Id.* at 643.

<sup>121</sup> *Id.* at 633.

<sup>122</sup> *Id.* at 643.

<sup>123</sup> *Id.* at 621.

right.”<sup>124</sup> Within a month of this ruling, the full Sixth Circuit vacated the *Gary B.* holding while also granting an *en banc* rehearing of the case.<sup>125</sup> Following this decision, the two parties in the case settled, which included direct payments to the plaintiffs and additional revenue to Detroit Public Schools.<sup>126</sup>

### ***Cook v. Raimondo* (2020)**<sup>127</sup>

The focus of the *Cook v. Raimondo* complaint was that Rhode Island’s funding for public education denied some students access to the civics education necessary to create productive citizens who are capable of voting, serving on juries, or engaging in other civic activities.

### **The Claim**

The plaintiffs are 13 students attending various public schools throughout the state of Rhode Island and their parents.<sup>128</sup> The defendants are four individuals in their official capacities as public servants as well as the Rhode Island State Board of Education and the Council on

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<sup>124</sup> *Id.* at 649.

<sup>125</sup> *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

<sup>126</sup> *Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case*, OFFICE OF GOVERNOR GRETCHEN WHITMER (May 14, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90640-529231--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-529231--,00.html).

<sup>127</sup> Complaint, *A.C. v. Raimondo*, 494 F.Supp.3d (D.R.I. 2018).

<sup>128</sup> *Id.* at 6–8.

Elementary and Secondary Education.<sup>129</sup> The complaint was filed in 2018 and decided in 2020.<sup>130</sup>

The plaintiffs allege that the actions of the defendants violate “their rights because the State of Rhode Island ... is not providing them with an adequate civics education.”<sup>131</sup> The plaintiffs argue that this lack of civics education violates specific Constitutional provisions, including: the Equal Protection, Privileges and Immunities, and Due Process Clauses of the Fourteenth Amendment; the Sixth Amendment; the Seventh Amendment; and the Republican Guarantee Clause of Article IV.<sup>132</sup>

According to the plaintiffs’ complaint, the state of Rhode Island deemphasized civics instruction over the emphasis of basic reading and math instruction, which included overlooking valuable professional development opportunities for civics teachers.<sup>133</sup> Other factors that also serve to restrict Rhode Island students from fully appreciating civic participation are the loss of media specialists, the inability of some schools to provide students with civic-focused field trips, and the elimination of foundational civic opportunities for students such as student government, debate teams, and school newspapers.<sup>134</sup> The plaintiffs ask the district court to declare:

[T]hat all students in the United States  
have a right under the Fourteenth

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<sup>129</sup> *Id.* at 8–10. The individuals mentioned in the lawsuit are: Gina Raimondo (Governor of the state); Nicholas A. Mattiello (Speaker of the Rhode Island House of Representatives); Dominick J. Ruggiero (President of the Rhode Island Senate); and Ken Wagner (Commissioner of education for the state).

<sup>130</sup> *A.C. v. Raimondo*, 494 F.Supp.3d 170 (D.R.I. 2020).

<sup>131</sup> *Id.* at 174.

<sup>132</sup> *Id.*

<sup>133</sup> Complaint at 11, *A.C. v. Raimondo*, 494 F.Supp.3d (D.R.I. 2018).

<sup>134</sup> *Id.* at 27–29.

Amendment, the Sixth and Seventh Amendments, and Article 4, Section 4 of the United States Constitution, and under 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.<sup>135</sup>

The district court's ruling stated "[t]his is an ambitious lawsuit. It asks this Court to declare rights that have not been recognized by the Supreme Court of the United States, or, with a single exception, any other federal court in recent history."<sup>136</sup>

### **The Justification for Filing Federally**

*Cook v. Raimondo*<sup>137</sup> is the first federal case reviewed to include in the complaint a section dedicated to addressing jurisdiction questions. The plaintiffs argue that federal jurisdiction "is invoked under 28 U.S.C. §§ 1331 and 1341."<sup>138</sup> In addition, the plaintiffs state their request for relief is authorized by 42 U.S.C. § 1983, "which provides redress for the deprivation under color of state law of rights, and privileges and immunities secured to all citizens and person within the jurisdiction of the United States."<sup>139</sup>

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<sup>135</sup> *Id.* at 45.

<sup>136</sup> *A.C. v. Raimondo*, 494 F.Supp.3d at 3.

<sup>137</sup> Complaint at 6, *A.C. v. Raimondo*, 494 F.Supp.3d (D.R.I. 2018).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

Finally, the plaintiffs built their entire case around specific Constitutional Articles, Amendments, and federal statutes.

### **The Ruling**

The decision, authored by Judge Smith, walks a fine line between validating the importance of civics education to ensure a healthy democracy and adhering to legal precedent, while also acknowledging the *Gary B.* decision. Ultimately, the court ruled that legal precedent is clear on the question of education from a federal perspective, which requires it to declare that the “[p]laintiffs’ claims must be dismissed.”<sup>140</sup> However, it should be noted that the judge came to this decision begrudgingly, as evidenced by the following statement in his ruling:

This case does not represent a wild-eyed effort to expand the reach of substantive due process, but rather a cry for help from a generation of young people who are destined to inherit a country which we – the generation currently in charge – are not stewarding well. What these young people seem to recognize is that American democracy is in peril. Its survival, and their ability to reap the benefits of living in a country with robust freedoms and rights, a strong economy, and a moral center protected by the rule of law is something that citizens must cherish, protect, and constantly work for. We would do well to pay attention to their plea.<sup>141</sup>

The defendants filed motions for dismissal stating that the plaintiffs failed to “join necessary parties ... to demonstrate

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<sup>140</sup> A.C. v. Raimondo, 494 F.Supp.3d at 5.

<sup>141</sup> *Id.*

standing, and the presence of a nonjusticiable political question.”<sup>142</sup> However, all of these motions were dismissed. Where the plaintiffs’ case fails, according to Judge Smith, is in its failure to plead a present injury related to inadequate civic education. Instead, the plaintiffs’ case is built around “hypothetical harms.”<sup>143</sup> The ruling ends with this powerful statement:

Plaintiffs should be commended for bringing this case. It highlights a deep flaw in our national education priorities and policies. The Court cannot provide the remedy Plaintiffs seek, but in denying relief, the Court adds its voice to Plaintiffs’ in calling attention to their plea. *Hopefully, other who have the power to address this need will respond appropriately.*<sup>144</sup>

In essence, the ruling acknowledged the validity of plaintiffs’ claims and calls on the U.S. Supreme Court to revisit the *Rodriguez* decision.

### PART III: THE NEXT (FEDERAL) WAVE OF SCHOOL FUNDING LITIGATION?

In comparing early school funding litigation to the recent five cases, perhaps the most striking difference between these two groups of caselaw is how much (in the former cases) or how little (in the latter) funding is emphasized. We posit that this trend may signal the

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<sup>142</sup> *Id.* at 19.

<sup>143</sup> *Id.* at 24.

<sup>144</sup> *Id.* at 55 (emphasis added).

beginning of a new federal “wave” of school funding litigation.

There exists in the literature a consensus that there have been three distinct waves of school funding litigation. First wave cases emphasize equity in school funding in federal courts, best characterized by *San Antonio v. Rodriguez*. Petitioners in this case highlighted disparities in per-pupil funding rates and/or property tax rates, linking their arguments to the Equal Protection Clause of the Fourteenth Amendment. While the U.S. Supreme Court appeared to be sympathetic to petitioners’ concerns about educational funding equity in dicta, the High Court stopped short of holding education to be a fundamental right and disagreed with petitioners’ assertions that personal or property wealth-based distinctions should trigger application of strict scrutiny.

After petitioners’ loss in *Rodriguez*, school funding litigants turned their attention to state courts, ushering in school funding litigation’s second proverbial wave. Equity arguments in cases during the second wave were similar to those raised in *Rodriguez*, however the locus of arguments was not on the Fourteenth Amendment but instead focused on state constitutions. Litigation outcomes during the second wave were mixed from a win-loss perspective, however what became increasingly apparent was that the focus on equity was insufficient to address petitioners’ claims.

The prototypical second wave case might look like this: parents and children from a property-poor school district realize that per-pupil spending in their schools is far lower than that in districts with greater property wealth. Compounding the issue is the fact that these lower per-pupil rates exist despite the fact that their school district may actually be taxing itself at significantly higher rates than their property wealthier neighbors. In some instances, it might even be statistically or statutorily impossible for petitioners’ school district to tax themselves at a high enough rate to even come close to raising the same amount of per-

pupil spending as the neighboring comparison district. Concerned about the inequity in per-pupil funding caused by the way schools are funded in their state, petitioners go to court. In some instances, petitioners “won” their case, and the court forced the state legislature’s hand to attempt to equalize funding between districts. However, what often resulted – years down the line – was the realization that equalization of inadequate funding did not result in the change in educational quality that petitioners had hoped.

Metaphorically speaking, if \$10,000 per-pupil provides a ‘Cadillac-level’ education for a wealthy suburban student with significant family and community resources, that same \$10,000 spent on a student from a low-income family living in a historically under-resourced community might only be enough to purchase a bus pass. The reasons for these discrepancies are complex and long standing; intertwined are issues of poverty and systemic racism that cannot be easily “outspent.” Thus, petitioners soon realized that “winning,” when it came to equity, was not always enough to effectuate real change if the socioeconomic deck had already been stacked against the petitioners’ community. Thus, the third wave of school funding litigation – acknowledged by most scholars to begin with *Rose v. Council for Better Education*<sup>145</sup> – began; this time with a focus on adequacy instead of equity. Third wave cases did not emphasize the amount of money spent on a child’s education, but instead focused on the outcomes of what could be purchased. Like cases in the second wave, third wave cases were filed in state courts and, for the previous three plus decades, have been filed in 44 different states – with several states experiencing serial, or ongoing, litigation.<sup>146</sup>

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<sup>145</sup> *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989).

<sup>146</sup> Spencer C. Weiler, Jason Kopanke & Christine Kiracofe, *Applying Odds Ratio to the Study of School Finance Litigation*, 392 Ed.

Some scholars have argued that the fourth wave of school funding litigation has already begun, and that it involves “pursuing a federal right to an adequate education”<sup>147</sup> or that the fourth wave may involve “race-conscious” litigation.<sup>148</sup> We agree with these, and other, scholars that recent school funding litigation appears to be taking a new turn. To be sure, third wave-type cases continue to be litigated.<sup>149</sup> However, at the same time, in recent years a new federal wave of litigation has also been emerging as well. While the parameters of this new wave of litigation are not as well defined as earlier waves, they have several distinct characteristics in common.

#### Federal Courts Appear Ready to Address School Funding Litigation

Recent decisions in the cases reviewed suggest that federal courts may be increasingly receptive to entertain federal school funding arguments. For example, petitioners have successfully overcome the long-standing argument that federal claims related to funding litigation were barred by the 11th Amendment. For example, both the Martinez and Williams courts found an exception to Eleventh Amendment immunity as held in *Ex parte Young*.<sup>150</sup>

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Law Rep. 1 (2021). The 44 states exclude the five states to never have an adjudicated school funding lawsuit (Delaware, Hawaii, Iowa, Nevada, and Utah) as well as Georgia, which has not had a funding case adjudicated after 1989.

<sup>147</sup> Gillespie, *supra* note 52, at 989.

<sup>148</sup> David G. Hinojosa, “Race-Conscious” School Finance Litigation: *Is a Fourth Wave Emerging?*, 50 U. RICH. L. REV. 869 (2016).

<sup>149</sup> According to Spencer C. Weiler and Scott Bauries, *Special Education’s Lessons for Educational Reform Litigation*, 6 ED. L. & POL. REV. 127, 149 (2021), “the ‘waves’ metaphor is not meant to place clear dividing lines between the three classifications of litigation over time and that the use of ‘waves’ has been criticized for being unnecessarily reductive.”

<sup>150</sup> *Ex parte Young*, 209 U.S. 123 (1908).

### The Quest for the “Fundamental” Right Continues, but Differently

In 1973, the U.S. Supreme Court’s ruling in *San Antonio v. Rodriguez* dashed petitioners’ hopes of the High Court adding education to its list of fundamental rights in the United States. However, this decision has not dampened school funding advocates’ hopes that one day education will be recognized as a fundamental right. In a recent article, Martha McCarthy notes that given the flurry of new federal litigation “the Supreme Court conceivably will take a stand that education is an implied fundamental right under the U.S. Constitution, thus overturning the *Rodriguez* precedent” adding that “perhaps . . . the time IS right for a Supreme Court declaration of a right to the resources needed for all our citizens to become literate.”<sup>151</sup>

McCarthy’s comments underscore the likely nature of the new wave of litigation aimed at securing a fundamental right; it may not be education that is a fundamental right, but instead literacy or civic knowledge or some other element of education raised in this new wave of cases. Litigants in this new wave of cases have demonstrated that there may be a path to success in specifically highlighting what deprivation of an adequate education entails: loss of jurors able to participate in the democratic process, or loss of fully literate citizens able to fully engage in society. By linking the fundamental right argument to outcomes instead of inputs, litigants may ultimately be more successful at the federal level.

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<sup>151</sup> Martha McCarthy, *Is there a Federal Right to a Minimum Education?*, 2020 BYU EDUC. & L. J. 1, 28 (2020).

#### PART IV: THE COMPOSITION OF THE SUPREME COURT AND POTENTIAL IMPLICATIONS FOR FUTURE SCHOOL FUNDING LITIGATION

The adage “timing is everything” appropriately applies to the speculation on how the Supreme Court might handle future school funding litigation filed within the federal court system. When – and by whom – a case is heard can be as important to a decision’s outcome as is the content of the case itself. There is no question that Supreme Court Justices’ opinions are impacted, at least in part, by their ideological leanings. Researchers Andrew Martin and Kevin Quinn developed a metric (resulting in “Martin-Quinn” scores) that measures the judicial ideology of a given Justice on a continuum where “0” is neutral and increasing positive scores indicate increasing levels of conservative ideology, and increasingly negative scores indicate increasing levels of liberal ideology.<sup>152</sup> For example, a Justice who had a Martin-Quinn score of 4 would be much more conservative than one with a score of -3.

In 1973, when *Rodriguez* was decided, the Justices in the majority, issuing the holding that education was not a fundamental right, all had positive Martin-Quinn scores, suggesting a conservative ideological bent. As seen in the table below, their Martin-Quinn scores ranged from a high of 4.266 (Justice Rehnquist, the Supreme Court Jurist with the highest Martin-Quinn score for 1973) to a low of 0.489 (Justice Stewart). In comparison, all of the Justices in the minority (with the exception of one) had negative Martin-Quinn scores, ranging from 0.563 (Justice White, the only Justice in the minority with a positive Martin-Quinn score for 1973) to ---7.821 (Justice Douglas, the Supreme Court jurist with the lowest Martin-Quinn score for 1973). Analyzing the ideological bent of Justices that took part in

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<sup>152</sup> Andrew Martin & Kevin Quinn, *Martin-Quinn Scores*, CENTER FOR EMPIRICAL RESEARCH IN THE LAW, <https://mqscores.lsa.umich.edu/index.php> (last visited Nov. 22, 2021).

*Rodriguez* suggests that this case was decided by a conservative-leaning Court.

**Table 1: Martin-Quinn Score for Supreme Court Justices in *Rodriguez***

<b>Justice</b>	<b>Martin-Quinn Score (1973)</b>
Justice Burger (majority)	2.212
Justice Stewart (majority)	0.489
Justice Blackmun (majority)	1.301
Justice Powell (majority)	1.160
Justice Rehnquist (majority)	4.266
Justice Douglas (minority)	-7.821
Justice Brennan (minority)	-1.733
Justice White (minority)	0.563
Justice Marshall (minority)	-1.475

Now, nearly 50 years after the decision in *Rodriguez*, the makeup of the Supreme Court has changed dramatically. There has been a significant turn-over in the Court's membership in recent years, with former President Trump nominating three Justices to the Supreme Court. Current Martin-Quinn scores are available through 2019, the most recent year for which data are published, and the Martin-Quinn scores for the current Justices are reported in Table

2.<sup>153</sup> However, this means that data are not included for the most recent Justice to join the Court, Justice Amy Coney Barrett. However, it is safe to assume, based on recent decisions, that Justice Coney Barrett is likely to have a positive Martin-Quinn score.

**Table 2: Martin-Quinn Scores for Current Supreme Court Justices**

<b>Justice</b>	<b>Martin-Quinn Score (2019)</b>
Justice Roberts	0.216
Justice Thomas	3.691
Justice Breyer	-1.867
Justice Alito	2.051
Justice Sotomayor	-3.483
Justice Kagan	-1.693
Justice Gorsuch	0.836
Justice Kavanaugh	0.513
Justice Coney Barrett	No data available

Based solely on the Martin-Quinn ideological scale, it appears that the current Court is at least as conservative ideologically – if not more so – than its counterpart in 1973. Thus, assuming that decision-making related to education as

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<sup>153</sup> *Id.*

a fundamental right is swayed by political ideology, perhaps the wave of recent federal cases has come – at least from petitioners’ point of view – at an inopportune time given the current membership of the Court. Or perhaps not. Ultimately, we do not know, and, at the same time, we must acknowledge that the Court’s composition could change by the time the case is actually argued before the Justices.

#### CONCLUSION

As we reviewed at the beginning of this work, initial school funding lawsuits were filed in federal courts. However, due to the outcomes of these two cases,<sup>154</sup> the *Serrano* rulings, and the U.S. Supreme Court’s holding in *Rodriguez*, school finance litigation has shifted almost exclusively to the state court arena since the 1970s. In addition, the focus of all school funding claims has been on the inequitable and inadequate levels of funding within a state’s funding formula for public education. The focus of this work has been to highlight recent and emerging trends in school funding lawsuits.

The five cases highlighted in this work illustrate a potential shift in school funding claims, which could constitute the long-anticipated fourth wave of school finance litigation. Specifically, we observe the following shifts. First, these cases are being filed in federal courts. Second, the plaintiffs’ claims focus on specific aspects of education that are being denied to them under the state’s current funding formula. Finally, the plaintiffs are grounding their claims in specific aspects of the U.S. Constitution to support their claims.

There is reason for optimism when analyzing this shift in school funding claims. Of the five cases reviewed, the plaintiffs only prevailed in two rulings and one of the two was quickly vacated.<sup>155</sup> Although a small sample size, these data align with the typical percentage of plaintiff victories in

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<sup>154</sup> The plaintiffs lost in both the *McInnis* and *Burress* cases.

<sup>155</sup> The plaintiffs prevailed in *Williams v. Reeves* and *Gary B.* The *Gary B.* ruling was vacated.

the second and third waves. However, another reason for optimism is perhaps found in the decisions that sided with the defendants. In all three holdings, there is evidence that the courts found the plaintiffs' claims compelling and justiciable. Unfortunately, the plaintiffs' cases failed on specific legal elements that the judges could not overlook.<sup>156</sup> We believe we are on the precipice of a new wave in school funding claims. What may follow in the future will be more cases filed in federal courts contending a state's funding formula is denying a specific group of students access to an adequate and equitable education.<sup>157</sup> Ultimately, if this trend is followed to its logical conclusion, at some point the U.S. Supreme Court will be invited, or forced, to revisit its *Rodriguez* ruling. It stands to reason that this fourth wave of school funding claims holds the potential to ensure that all students, regardless of zip code, ethnicity, gender, or any other arbitrary or capricious distinguishing factor, is provided access to an equitable and adequate education.

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<sup>156</sup> The only case where the judges may have actually overlooked precedent and case law was the Gary B. ruling.

<sup>157</sup> The focus of future school funding lawsuits could be individual claims. See Scott R. Bauries, *A Common-law Constitutionalism for The Right to Education*, 48 GA. L. REV. 949 (2014).