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No. 20-2082

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

A.C., a minor, by her parent and guardian ad litem, Torrence S. Waithe; 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,*

v.

GINA 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; ANGELA INFANTR-GREEN, in her official capacity as Commissioner of Education of the State of Rhode Island,

*Defendants-Appellees.*

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On Appeal from the United States District Court, District of Rhode Island

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**BRIEF OF *AMICI CURIAE* LATINOJUSTICE PRLDEF, HISPANIC ASSOCIATION OF COLLEGES AND UNIVERSITIES, U.S. HISPANIC LEADERSHIP INSTITUTE, LATINO POLICY INSTITUTE, PROGRESO LATINO, RHODE ISLAND LATINO POLITICAL ACTION COMMITTEE, PARENTS LEADING FOR EDUCATIONAL EQUITY, IMMIGRATION LAW CLINIC AT ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW, HISPANIC FEDERATION, & LAWYERS FOR CIVIL RIGHTS**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1(a), counsel for amici respectfully submits this Corporate Disclosure Statement and certifies that:

1. Amici does not have any parent corporations.
2. No publicly held corporation owns 10% or more of the stock or ownership interest in amici.

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## INTERESTS OF AMICI<sup>1</sup>

Amici organizations are committed to the full and equal participation of all public school students in the promise of educational equity secured under the United States Constitution. The claims of constitutionally inadequate education raised in this dispute are of grave importance to the Amici organizations.

**LatinoJustice PRLDEF (“LatinoJustice”)** works to create a more just society by using and challenging the rule of law to secure transformative, equitable and accessible justice, by fostering leadership through advocacy and education, and by empowering the Pan-Latinx community in the areas of education, voting rights, immigrant rights, economic justice, and criminal justice reform. For nearly five decades, LatinoJustice has litigated groundbreaking cases, including *ASPIRA of NY v. Board of Education of City of N.Y.* (1973), challenging exclusionary policies denying English Language Learners access to equal educational opportunity.

**Hispanic Association of Colleges & Universities (“HACU”)** champions the higher education success of the nation’s youngest and largest ethnic population. HACU also advocates on behalf of Hispanic Serving School Districts and the Hispanic K-12 students they educate. HACU promotes the development of member

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4), counsel for amici certify that amici and their counsel authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution to this brief’s preparation or submission. All parties consented to the filing of this brief.

colleges and universities; improves access to and the quality of postsecondary educational opportunities for Hispanic students; and works to meet the needs of business, industry, and government through the development and sharing of resources, information, and expertise.

**U.S. Hispanic Leadership Institute (“USHLI”)** has over 30 years of experience working with Latino students in middle schools and high schools in twenty-nine states, including Rhode Island, promoting education and motivating them to stay in school, improving their academic performance, focusing on completing their public school education, and planning to pursue some level of post-secondary education or training. USHLI annually sponsors the largest Latino student recruitment fair in the nation, attended by recruiters representing Ivy League schools, major universities, small colleges, community colleges, as well as vocational and technical schools. USHLI has served over one million students representing approximately 1,000 public schools and colleges, and has awarded \$1.3 million in scholarships and internships to under-served and low-income students. USHLI was honored at the White House by a former President for its “service for the nation” in promoting education and civic participation.

**The Latino Policy Institute at Roger Williams University (LPI)** works to stimulate public policy discourse by objectively examining and communicating the evolving Latino experience in Rhode Island. LPI works to provide information and

analysis about the Latino community in order to influence decision and policymaking to achieve greater social, educational, and economic equity.

**Progreso Latino** is Rhode Island’s largest Latino and immigrant community organization, and it works to achieve greater self-sufficiency and socio-economic progress by providing transformational programs that support personal growth and social change. Progreso Latino serves thousands of people each year through over a dozen core programs and services, including adult education, early childhood education, senior services, health and wellness, workforce development, youth development, domestic violence intervention and prevention programs, Volunteer Income Tax Assistance, immigration and social services, and emergency food relief.

**Rhode Island Latino Political Action Committee (“RILPAC”)** is a nonpartisan organization that educates elected officials, political leaders, and candidates about the concerns and priorities shared by Rhode Island Latinos; takes a stand on issues that affect the state’s underrepresented communities; and supports candidates committed to improving the quality of life for Rhode Island Latinos. RILPAC supports an education system that provides all Rhode Island children with the targeted support that they need to succeed, and it advocates for equitable structures that provide much-needed services in vulnerable communities.

**Parents Leading for Educational Equity (“PLEE”)** is a parent-of-color-founded and led grassroots organization in Rhode Island that works to elevate the

voices of parents of color in advocating for improved educational outcomes, education equity, and anti-racist schools. PLEE works collaboratively with state and local leaders to create systems that support the future of Rhode Island children, especially children of color.

**The Immigration Law Clinic at Roger Williams School of Law** represents indigent immigrants who seek lawful permanent residence in the United States and/or seek to defend against removal proceedings. In addition to case representation, students enrolled in the Immigration Law Clinic conduct “Know Your Rights” presentations for the immigrant communities in Rhode Island and for noncitizens who are detained by the Immigration and Customs Enforcement (ICE) at the Wyatt Detention Facility in Central Falls, RI.

**Hispanic Federation (“HF”)** is the nation’s premier Latino nonprofit membership organization. Founded in 1990, HF seeks to empower and advance the Hispanic community; support Hispanic families; and strengthen Latino institutions through work in the areas of education, health, immigration, civic engagement, economic empowerment, and the environment. For two decades, HF has worked to advance educational equity, promote racial diversity, and diminish racial isolation for students of color, particularly Latinx students. HF promotes its education objectives through several initiatives, including Pathways to Academic

Excellence with its Pathways to College Prep and Pathways for Early Childhood Literacy components.

**Lawyers for Civil Rights (“LCR”)** fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. Founded in 1968, LCR has successfully filed dozens of cases to advance the educational rights of students of color, immigrant students, and low-income students, including *McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545 (1993) (transforming Massachusetts’ system of school financing for the benefit of low-income districts). LCR also made the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954), a reality in the North as well as the South through a series of landmark school desegregation cases, including *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (desegregating Boston’s public schools). Through litigation and policy advocacy, LCR continues to ensure that all schoolchildren have equal access to a high-quality education.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Nearly forty years after *Plyler v. Doe*, 457 U.S. 202 (1982) guaranteed undocumented Mexican school-age children a right to a free public education and sixty-seven years after *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) outlawed “separate but equal” schooling, Latinx students

continue to receive constitutionally inadequate education in intensely segregated school districts in Rhode Island and across the United States.<sup>2</sup>

The Latinx population is the second largest ethnic-racial group in the United States. *See* U. S. CENSUS BUREAU, QUICKFACTS: UNITED STATES, <https://www.census.gov/quickfacts/fact/table/US/PST040219> (last visited Jan. 27, 2021). In U.S. public schools, however, Latinx students are the most segregated community of color. *See* Erica Frankenberg, *et al.*, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, at 4, 32–33 (Jan. 2003). The segregation of Latinx students, which took hold in the 1980s and grew in the 1990s, has steadily intensified; Latinx students are more segregated now than at any time since the 1960s. *See* Gary Orfield and Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, at 42 (Jan. 2005); Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, A REPORT OF THE CIVIL RIGHTS PROJECT, UCLA, at 4–5 (Aug. 2007). Indeed, when ethnicity, poverty and linguistic isolation—denoted triple segregation—are measured in tandem, Latinx students are by far the most segregated group. *See* Orfield & Lee, *Historic Reversals*, *supra*, at 31.

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<sup>2</sup> The term “Latinx” refers to persons of Hispanic heritage. Amici use the terms Latinx and Latino interchangeably.

Providence—the largest school district superintended by Defendants-Appellees—exemplifies this triple segregation. *See, e.g.,* Abeyta Emilio, *School Desegregation in Providence, Rhode Island*, U.S. COMM’N ON CIVIL RIGHTS (1977) (documenting patterns of residential segregation, discriminatory policies resulting in racially identifiable schools and early resistance to desegregation). For the 2020-21 school year in the Providence district, 84% of the student population is low-income and 33% of students are English Language Learners. *See* R.I. DEP’T OF EDUC., 2020-21 ENROLLMENT REPORT, <http://www.eride.ri.gov/reports/reports.asp> (last visited January 30, 2021). Latinx students constitute 67% of that student population, compared to Black and white students who make up 15% and 8% of the student population, respectively. *See id.* By contrast, Latinx, Black, and white students constitute 28%, 9% and 54%, of the statewide student population, respectively. *See id.*

Troublingly, this triple segregation correlates with Latinx students’ academic achievement. *See* Gary Orfield, *Why Segregation is Inherently Unequal: The Abandonment of Brown and Continuing Failure of Plessy*, 49 N.Y.L. SCH. L. REV. 1041, 1049 (2005) (noting an “extremely powerful relationship between segregation by race, segregation by poverty and educational inequity”). On the state’s 2018-19 standardized testing regime, for example, only 13% of Latinx 8th graders in the Providence school district met or exceeded expectations in English Language

Arts/Literacy, compared to 35% of white students. *See* R.I. DEP'T OF EDUC., ASSESSMENT DATA PORTAL, <https://www3.ride.ri.gov/ADP#> (last visited Jan. 30, 2021). The result for 8th grade English Language Learners was virtually identical to the Latinx cohort. *Id.* Unsurprisingly, nationally, Latinx 8th graders also lagged behind their white peers in reading by a 24-point achievement gap. *See* Cadelle Hemphill, et al., *Achievement Gaps: How Hispanic and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Education Progress*, at 53 (2011), NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf> (last visited Jan. 30, 2021).

Below, Amici further underscore inequitable achievement gaps that beset Latinx students and impede their ability to obtain a constitutionally adequate education. Latinx students deserve better. For far too long, Latinx students, like Black students, have been marginalized and, in effect, alienated from their white peers in American public schools. They need an education adequate to prepare them to fully function in a participatory democracy—one that will be vastly more racially and ethnically diverse than ever in our past. *See* Orfield & Lee, *Historic Reversals*, *supra*, at 4 & n.5 (extolling the virtues of affording marginalized students an education adequate to prepare them to live and work in an increasingly racially diverse nation). They seek, as Plaintiffs contend, a fundamental right to an education



adequate to prepare them for capable citizenship, grounded in substantive due process. Accordingly, Amici urge reversal of the decision below.

## ARGUMENT

### **I. Public Schools in Rhode Island Fail to Provide Latinx Students with an Education Adequate to Prepare Them for Capable Citizenship**

#### *A. Plyler v. Doe and Its Precursors Promised Public School Students an Education Adequate to Prepare Them for Capable Citizenship in Our Democratic Society*

A constitutionally adequate education is a fundamental right insofar as a minimally adequate education is necessary to an individual's ability to exercise their constitutional rights to free speech, vote, and run for office. Indeed, a foundational level of literacy and civics education unquestionably is necessary for participation in our country's democracy. This is particularly true in modern America where so many citizens decide how to participate in their democracy based on information from the Internet. Without the ability to read and understand basic civics, let alone the ability to discern fact from fiction, citizens cannot purposively fulfill their civic duties or exercise their constitutional rights to improve every aspect of their life. *See e.g. Laura McNabb, Civic Outreach Programs: Common Models, Shared Challenges & Strategic Recommendations*, 90 DENV. U. L. REV. 871, 876–77 (2013) (discussing the prevalence of civic illiteracy among young students).

A basic civics education is necessary for citizens to participate, meaningfully, in our country's democracy. In *Plyler*, for example, the Supreme Court recognized

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.” 457 U.S. at 221.

[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence .... In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.

*Id.* (citations and quotation marks omitted).

Crucially, the Supreme Court recognized in *Plyler* that it “cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” *Id.* Accordingly, when the government provides certain citizens, on the basis of race, a constitutionally inadequate education, the government necessarily deprives the full franchise of citizenship to that group. Indeed, the deprivation of a basic civics education is an “affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.” *Id.* at 221–22.

The Constitution protects a basic level of minimum education that enables one to participate in democratic society. Virtually every interaction between a citizen and the government depends on a constitutionally adequate education. The Constitution prescribes rights and duties concerning voting, taxes, the legal system,

and jury duty, yet none of those rights and duties has meaning without a constitutionally adequate education. Indeed, without literacy and basic civics education, a citizen cannot understand and complete a voter registration form, file a tax return, comply with a summons, or serve as a competent juror. Access to a constitutionally adequate education therefore “is required in the performance of our most basic public responsibilities.” *Brown*, 347 U.S. at 493. Indeed, our government has placed a constitutionally adequate education “at the center of so many facets of the legal and social order.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

Not only is a constitutionally adequate education essential to participation in our political system, but a constitutionally adequate education is *the* path to achieve constitutionally guaranteed equality. Providing education, as a means of achieving equality in our society, is a belief “that has persisted in this country since the days of Thomas Jefferson.” *Hunnicut v. Burge*, 356 F. Supp. 1227, 1237 (M.D. Ga. 1973). The Supreme Court’s “decision in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) acknowledges the right of students ‘to inquire, to study and to evaluate, to gain new maturity and understanding . . .’” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). Although “[t]he opportunity for formal education may not necessarily be the essential determinant of an individual’s ability to enjoy throughout his life the rights of free speech and association guaranteed to him by the First Amendment,” such an opportunity

unquestionably enhances “the individual’s enjoyment of those rights, not only during but also following school attendance.” *Id.* Thus, in the final analysis, “the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.” *Id.*

The relationship between education and the political process cannot be overstated. For this reason, “Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 112–13 (1973) (Marshall, J., dissenting). “Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation.” *Id.* “Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Accordingly, as Plaintiffs contend, the Fourteenth Amendment affords a constitutional right to an education adequate for capable citizenship.

*B. Poor Academic Performance by Latinx and English Language Learners in RI Public Schools Demonstrates Unpreparedness for Capable Citizenship*

As previously noted, Latinx students are triply segregated—by ethnicity, poverty and language—in Rhode Island’s public school system. Indeed, from 2013 to 2014, Rhode Island was one of the most segregated states for Latinx students. *See* Gary Orfield, et al., *Brown at 62: School Segregation by Race, Poverty, and State*, CIVIL RIGHTS PROJECT, UCLA (2016) (explaining that from 2013-14 Latinx students’ exposure to white students was 27.8%, that 49.5% of Latinx students attended schools where 90-100% of the students were of color, and that the state percentage of Latinx enrollment was 22.7); *see also* Orfield & Lee, *Historic Reversals*, *supra* at 32 Table 13 (explaining that from 2005 to 2006, 78% of Latinx students in Rhode Island were enrolled in 50% minority schools, that 31% of Latinx students were enrolled in 90% minority schools, and that Latinx students’ exposure to white students was 28%). These numbers have only worsened since 2000 to 2001, when only 20% of Latinx students were enrolled in majority white schools, while 25.4% of Latinx students were enrolled in schools where 90-100% of the students were of color, and 30.5% of white students were enrolled in a school that was typically Latinx. *See* Frankenberg, *A Multiracial Society with Segregated Schools*, *supra* at 52. These numbers place Rhode Island in the top ten states for segregation of Latinx students and should be shocking and concerning, particularly given that in

1986 Latinx enrollment in majority white schools was 41.8%. *See* Frankenberg, *A Multiracial Society with Segregated Schools*, *supra* at 51.

Unsurprisingly, these statistics stem from the hyper-segregation of roughly 55% of Latinx students in Rhode Island's three most urban cities: Central Falls, Providence, and Pawtucket. *See* R.I. DEP'T OF EDUC., 2020-21 ENROLLMENT REPORT, <http://www.eride.ri.gov/reports/reports.asp> (last visited Jan. 30, 2021); Huguley, *Latino Students in Rhode Island: A Review of Local and National Performances*, *supra* at 9.<sup>3</sup> As a result, Central Falls, Providence, and Pawtucket schools are 45%, 67%, and 28% Latinx, respectively. *See* R.I. DEP'T OF EDUC., 2020-21 ENROLLMENT REPORT, <http://www.eride.ri.gov/reports/reports.asp> (last visited Jan. 30, 2021). Consistent with the high correlation between intensely segregated schools (i.e. 90% or more are students of color) and poor academic performance, these districts average only a 17.3% proficiency rate for 4th grade English language arts/literacy, 15.8% for 4th grade math, 11.86% for 8th grade English language

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<sup>3</sup> For a history of governmental policies that entrenched segregation in Providence—the largest school district in Rhode Island—*see, e.g.* Matthew Jerzyk, *Gentrification's Third Way: An Analysis of Housing Policy & Gentrification in Providence*, 3 HARV. L. POL'Y REV. 413 (2009) (noting how redlining, discriminatory lending practices and transportation infrastructure entrenched segregated neighborhoods in Providence); *see also*, Kelton Ellis, *Small State, Big Gaps: Segregation in Rhode Island's Public Schools*, THE COLLEGE HILL INDEPENDENT (2016), <https://www.theindy.org/976> (last visited Jan. 26, 2021) (explaining how Providence transformed from a 90% white population in 1970 to 49% in four decades).

arts/literacy, and 5.4%<sup>4</sup> for 8th grade math. *See* R.I. DEP’T OF EDUC., ASSESSMENT DATA PORTAL, <https://www3.ride.ri.gov/ADP/> (last visited Jan. 28, 2021). These scores put these districts “almost universally below” the state averages for Latinx performance. *See* Huguley, *Latino Students in Rhode Island: A Review of Local and National Performances*, *supra* at 9. Moreover, and perhaps obviously, Rhode Island’s urban districts, like these, are less effective than suburban districts in terms of Latinx education. *Id.* at 10.

Latinx students in Rhode Island also score lower than white students and Latinx students nationally. *See id.*, at 6 Figure 1. In fact, as recently as 2011, in 4th grade math and reading, and 8th grade reading, Latinx students in Rhode Island ranked 30th, 43rd, and 41st, respectively, among their same race peers in the United States. *Id.* The gap in performance between Latino Rhode Island students and their national same-race peers is one that is not reflected by the performance of white and Black Rhode Island students. *Id.*

These heightened and concentrated levels of segregation undoubtedly lead to Latinx students in Rhode Island having lower levels of achievement than their Latinx peers do on a national level. Indeed, in intensely segregated Latinx schools in Rhode Island, “Latino students do far worse than their national peers.” *Id.* at 11. While

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<sup>4</sup> This does not include the data for Central Falls, as that data has been suppressed to ensure confidentiality, because greater than 95% of students did not meet expectations.

Latinx students in Rhode Island who attend schools where they make up 5% or less of the school score one grade level above their national peers, Latinx students in high-Latinx districts are a grade level behind their national peers. *Id.*

Further exacerbating poor performance for Latinx students in Rhode Island is the public school system's failure to address language barriers. From 2018-19, approximately 10% of Rhode Island students were English Language Learners, and roughly 80% of all English Language Learners in Rhode Island public schools were Spanish Speakers. *See* RHODE ISLAND KIDS COUNT, 2020 RHODE ISLAND KIDS COUNT FACTBOOK, at 140, <http://www.rikidscount.org/Portals/0/Uploads/Documents/Factbook%202020/Individual%20Indicators/multilingual-english-learners-2020fb.pdf?ver=2020-04-03-103701-187> (last visited Jan. 28, 2021); U.S. DEP'T OF EDUC., OUR NATION'S ENGLISH LEARNERS; WHAT ARE THEIR CHARACTERISTICS?, <https://www2.ed.gov/datastory/el-characteristics/index.html#one> (last visited Jan. 28, 2021); R.I. DEP'T OF EDUC., 2020-21 ENROLLMENT REPORT. At first blush, these numbers may seem ordinary, but they become much more alarming in light of the education crisis experienced by English Language Learner students in Rhode Island. These students "have some of the lowest scores in the country, and also face some of the nation's largest achievement gaps." *See* Huguley, *Latino Students in Rhode Island: A Review of Local and National Performances*, *supra* at 9.



Because educational outcomes are such strong predictors of later economic well-being, “the academic achievement of Latinos, particularly in Rhode Island, is an urgent challenge that warrants immediate and targeted action.” *Id.* at 1, 4. This notion, as the national statistics highlighted below make clear, holds true for societal well-being as well.

## **II. Latinx Students Remain Mired in Intensely Segregated Schools across the United States**

In *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 197, 214 (1973), the Supreme Court determined that segregation is a national, not regional, phenomenon, that “Hispanos [sic] constitute an identifiable class for purposes of the Fourteenth Amendment,” and that, like Black students, they are entitled to corrective desegregation policies. Yet, there has been little appetite for desegregation. *See Orfield & Lee, Historic Reversals, supra* at 14.

In the last five decades, America’s public school system—at 50.8 million students—witnessed dramatic shifts in its student body composition: its proportion of white students fell sharply from 79% in 1970 to 50% in 2013, while the Latinx student population soared from 5.1% to 25.4%.<sup>5</sup> *See Orfield, Brown at 62, supra* at 2. Between 1990 and 2013, the percentage of intensely segregated schools rose from

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<sup>5</sup> For data on the projected number of public school enrollment as of 2019, *see* Maya Riser-Kositsky, *Education Statistics: Facts About American Schools*, Education Week (2019), <https://www.edweek.org/leadership/education-statistics-facts-about-american-schools/2019/01>.

5% to 18%, and, at the same time, the average Latino student went from attending a school where the low-income population was 45% to 68%. *Id.* at 3, 7; *see also* Orfield & Lee, *Historic Reversals*, *supra* at 31. Many Latinx students attend schools where they constitute 55% of the student population. *See* Orfield & Lee, *Historic Reversals*, *supra* at 24–26. Further, one out of every nine Latinx student attends an intensely segregated school. *See* Frankenberg, *A Multiracial Society with Segregated Schools*, *supra* at 5; *see also* Orfield & Lee, *Why Segregation Matters*, *supra* at 13 (“[C]lose to a million Latino students attend schools that are all [students of color] compared to less than ten thousand white students.”).

These intensely segregated schools are also six times as likely to be predominantly high poverty schools. *See* Orfield & Lee, *Historic Reversals*, *supra* at 20 (“[e]conomic polarization is now evident for both white and nonwhite children, but concentrated poverty hits [mostly] nonwhite students”). Latinx and other students of color in intensely segregated schools are more than four times as likely to be in predominantly poor schools than their white peers. *Id.* at 21. Notably, high poverty schools suffer worse educational outcomes. *Id.* at 5 (“On average, segregated [nonwhite] schools are inferior in terms of the quality of their teachers, the character of the curriculum, the level of competition, average test scores, and graduation rates.”). By 8th grade, Latinx students in intensely segregated and high poverty schools score 2 to 2.5 grade levels behind their white peers. *See e.g.* James

P. Huguley, *Latino Students in Rhode Island: A Review of Local and National Performances*, *supra* at 4.

With regard to linguistic isolation, consistent with Rhode Island public school data, Latinx students, according to U. S. Department of Education data, account for 75% of public schools' English Language Learners. DOE data also reveal that only 5% of English Language Learners 8th graders were proficient in reading on the 2017 National Assessment of Educational Progress examination. As argued in section III, *infra*, school districts have long employed discriminatory policies to deny Latinx English Language Learners a meaningful education. Suffice it to state that triply segregated schools do not provide equal educational opportunity. *See* Orfield & Lee, *Historic Reversals*, *supra* at 10. Tellingly, the provision of unequal education to Latinx students has a long and sordid past.

### **III. Unequal Education Meted Out to Latinx Students Is Deeply Rooted in Our Nation's History**

Latinx students have long endured unequal education on account of ethnicity and English language proficiency. In the mid-1800s, at the heels of the Treaty of Guadalupe Hidalgo, which brought an end to the Mexican-American War and subsequent annexation of territory in the Southwest, school boards established segregated schools for Mexican-origin children. *See* Richard R. Valencia, *The Mexican American Struggle for Equal Educational Opportunity in Mendez v. Westminster: Helping to Pave the Way for Brown v. Board of Education*, 107

TEACHERS. COLL. RECORD 390, 395–96 (2005) (discussing proliferation of separate schools for Mexican children in the Southwest); *see also* Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 308–09, 311–14 (1972) (recounting pervasive discrimination against Mexican Americans in spheres, including education, housing, public accommodation and employment); *see also*, Albert H. Kauffman, *Latino Education in Texas: A History of Systematic Recycling Discrimination*, 50 St. Mary’s L. J. 861, 870–73 (2019) (describing creation of “Mexican schools” and tactics deployed to segregate Mexican students). It was not until 1947 that a federal appellate court struck down the practice of separate and unequal educational facilities for Mexican children.

In *Westminster School District of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947), Defendants—school districts—appealed a lower court decision, which found that they, in contravention of the Fourteenth Amendment, for many years, had segregated students of Mexican ancestry and Latinx descent from their white peers. *Id.* at 776. Finding that state law did not authorize the challenged segregation, a unanimous Ninth Circuit agreed that the school districts had denied the students equal protection of the law. *Id.* at 781.

While *Westminster* was the first federal circuit decision to invalidate the segregation of Latinx students, it was not the first challenge brought by Latinx

students to dismantle separate and unequal schools. *See* Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N. C. L. Rev. 911, 921 (2010) (discussing *Alvarez v. Owen*, No. 66625 (Cal. Sup. Ct. San Diego County filed Apr. 17, 1931), a 1931 successful California state court challenge to the education of Mexican children in a barn-like structure); Valencia, *The Mexican American Struggle*, *supra* at 396 (discussing *Independent School Dist. v. Salvatierra*, (33 S.W.2d 790 Tex. App. 1930), *cert. denied* 284 U. S. 580 (1930), in which a Texas school district was initially enjoined from segregating Mexican American children).

Further, relying on *Westminster*, which, at the time, was ground-breaking, Latinx students challenged segregated schools with mixed results. *See e.g.*, *Delgado v. Bastrop Indep. Sch. Dist.*, (Civ. No. 388, W. D. Tex. 1948) (finding segregation of children of Mexican descent discriminatory, but permitting segregated classrooms for English Language Learners); *Gonzales v. Sheely*, 96 F. Supp. 1004, 1007 (D. Ariz. 1951) (finding segregative methods deployed by defendant school district “suggest[ed] inferiority [in the children] where none exist[ed]”).

Finally, in *Cisneros v. Corpus Christi Independent School District*, 467 F. 2d 142, 145 (5th Cir. 1972), the Fifth Circuit acknowledged that Mexican-American children “have been historically separated in fact” from their white counterparts. Relevant to this historical segregation were established patterns of residential segregation and intentional choices made by the school board. *Id.* at 146–47.

Significantly, the Court declared *de facto* segregation unlawful discrimination violative of the Equal Protection Clause. *Id.* at 147. The Court also deemed Mexican-American students an “identifiable ethnic-minority class entitled to the equal protection guarantee.” *Id.* at 149.

*Hernandez v. Driscoll CISD*, 2 Race Rel. L. Rep. 329 (S.D. Tex. 1957), for example, exposed the subterfuge of deploying English language proficiency—widespread in the Southwest—as a proxy and “smoke screen for racial separation.” See Valencia, *The Mexican-American Struggle*, *supra* at 413. In *Hernandez*, English-language proficient students challenged their school district’s policy of indiscriminately assigning Spanish surnamed students to the “Mexican class” without regard to their English speaking fluency. *Id.* at 331; See also Steven H. Wilson, *Brown Over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145, 166 (2003) (providing historical background on the litigation of *Hernandez v. Driscoll*).

The record also revealed that, prior to 1949, the school district operated a school for Mexican children, but when that policy was determined unlawful under Texas law, the district’s practice morphed to segregating Spanish-surnamed students in separate classrooms. *Id.* at 330. Appallingly, the district’s policy was to segregate these students in the first two grades for four years thereby impeding their

educational attainment. *Id.* Striking down the policy, the Court found that the school district’s separation of Spanish-surnamed students without regard to their English fluency or individual ability was “unreasonable race discrimination against all Mexican children.” *Id.* at 332–33.

At the other end of the spectrum, in *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974), Spanish-language dominant students sued their school district for dumping them in English-only classes without bilingual and bi-cultural instructions, which, unsurprisingly, resulted in disparate achievement between them and their white peers. *Id.* at 1149. The Tenth Circuit held, consistent with the Supreme Court’s decision in *Lau v. Nichols*, 414 U.S. 563 (1974), that the school district failed to institute programs to rectify language deficiencies so that students can receive a meaningful education. *Id.* at 1153–54.

Plainly, these cases demonstrate that, for over a century, Latinx students were subjected to a dual educational system reminiscent of that imposed on Black students, which reinforced notions of social inferiority. *See Rangel & Alcalá, Project Report: De Jure Segregation of Chicanos in Texas Schools, supra* n. 13, at 321 (noting segregated schools provided Mexican-American students with substandard facilities and stamped them with a badge of inferiority). This historical exclusion not only belies any claim that contemporary educational inequities, discussed at sections I(B) and II, *supra*, that beset Latinx students are adventitious, but it also augments

Plaintiffs’ contention that education—its denial to some and provision to others—is deeply rooted in our nation’s history and traditions, and constitutionally protectable as a matter of substantive due process.<sup>6</sup>

### **CONCLUSION**

As the data makes clear, public schools in Rhode Island and across the U.S. are failing Latinx students by depriving them of a constitutionally adequate education. Amici respectfully request that this Court reverse the ruling below.

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<sup>6</sup> For an explication of the substantive due process argument, *see e.g.*, Derek W. Black, *The Fundamental Right to Education*, 94 Notre Dame L. Rev. 1059, 1095–96 (2019) (asserting that education is a fundamental right as a matter of substantive due process because of its deep historical roots and the consensus among states about its importance at the time of the ratification of the 14th Amendment); *see also*, Plaintiffs’ brief, ECF Doc. 00117696287, at p. 50-60.)



Dated: February 1, 2021

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies compliance of the foregoing amicus brief with the following requirements of the Federal Rules of Appellate Procedure and the Local Rules of this Court.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 5488 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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## CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and such service will be accomplished by the CM/ECF system.

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