

# EDUCATION EQUITY AFTER THE PANDEMIC: THE CASE FOR A PRIVATE RIGHT OF ACTION UNDER TITLE VI

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## ABSTRACT

*The coronavirus (COVID-19) pandemic has wreaked havoc on the U.S. education system. Indeed, since March 2020, every state in the nation has imposed recommended or mandatory school closures in an effort to mitigate the spread of this devastating virus. More concerning still, as the pandemic continues to rage, school finance scholars have projected substantial cuts to public education in the coming months—cuts that are estimated to far outstrip those adopted in the wake of the Great Recession. In fact, “[i]f these projections are correct, the resulting hit to education spending would be two and a half times worse than the lowest point of the last recession.” Moreover, as 55 million public schoolchildren nationwide transitioned to remote learning over the past two years, the prevailing disparities within and between the nation’s most vulnerable schools have not only been laid bare, but also exacerbated. Despite the treatment that the school recovery effort has received in judicial opinions and legal scholarship to date, neither has undertaken an exhaustive analysis of the school recovery process from an equity lens. This Article aims to fill that gap. To do so, it makes two broad claims.*

*First, this Article offers a timely analysis of the federal response to the pandemic within and between our nation’s public schools. It then argues that the Congressional response to the pandemic has failed to advance educational equity in any meaningful sense. Second, this Article provides a critique of the American Rescue Plan Act, one of the most recent Congressional measures enacted to support elementary and secondary school recovery. It then proposes a novel alternative: to meaningfully advance equity in the pandemic’s wake, future education litigants should look to the doctrine of stare decisis and examine the viability of a legal challenge to Alexander v. Sandoval under its analysis. In so doing, the communities most impacted by the educational harms of the pandemic will no longer be left to rely on a political process that has failed to meaningfully advance education equity; to the contrary, overturning Sandoval will not only restore a private right of action under Title VI, but will also add an arrow of empowerment to parents’ collective quiver to challenge inequitable education policies after the pandemic.*

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## I.

### INTRODUCTION

The COVID-19 pandemic has upended the U.S. system of public education. On March 11, 2020, the fast-spreading COVID-19 virus was formally declared a global pandemic by the World Health Organization (WHO).<sup>1</sup> Five days later, 27 states across the U.S. either recommended or required that all in-person learning end.<sup>2</sup> By March 25, virtually every state public school building in the nation had closed its doors indefinitely.<sup>3</sup> Over the next several months, approximately 55 million schoolchildren were forced to attend school remotely.<sup>4</sup> Although these school

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1. *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [https://perma.cc/UEQ3-Q9GD].

2. *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUC. WK. (July 1, 2020), <https://www.edweek.org/leadership/the-coronavirus-spring-the-historic-closing-of-u-s-schools-a-timeline/2020/07> [https://perma.cc/86Q2-Q7ME].

3. *See id.*

4. *See Holly Peele & Maya Riser-Kositsky, Map: Coronavirus and School Closures*, EDUC. WK. (Oct. 13, 2021), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> [https://perma.cc/YSR2-98BU].

closures proved necessary to mitigate exposure to this deadly virus, they also laid bare—and often exacerbated—many of the structural inequities that have long endured within and between our nation’s most vulnerable public schools.<sup>5</sup>

Nearly three years later, the Congressional response to the pandemic’s impact on schools has undermined what researchers have inferred to be its own<sup>6</sup> *raison d’être*: advancing education equity within and between our most vulnerable public schools. For students of color experiencing poverty, moreover, Congress’s failure to meaningfully advance equity during the pandemic has led to substantial harms. One such harm has been disparate levels of access to quality instruction once schools transitioned to distance learning.<sup>7</sup> Indeed, students attending schools within high-poverty, majority-minority school districts were more likely to start

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5. See EQUITY & EXCELLENCE COMM’N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 14 (2013), <https://oese.ed.gov/files/2020/10/equity-excellence-commission-report.pdf> [<https://perma.cc/KE6T-CYFZ>] (“Our education system, legally desegregated more than a half century ago, is ever more segregated by wealth and income, and often again by race. Ten million students in America’s poorest communities—and millions more African American, Latino, Asian American, Pacific Islander, American Indian and Alaska Native students who are not poor—are having their lives unjustly and irredeemably blighted by a system that consigns them to the lowest-performing teachers, the most run-down facilities, and academic expectations and opportunities considerably lower than what we expect of other students.”); see generally Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 1, 3 (Prudence L. Carter & Kevin G. Welner eds. 2013); see generally Michael Griffith, *The Impact of the COVID-19 Recession on Teaching Positions*, LEARNING POL’Y INST. (Apr. 30, 2020), <https://learningpolicyinstitute.org/blog/impact-covid-19-recession-teaching-positions> [<https://perma.cc/9Z56-9CZZ>].

6. EMMA GARCIA & ELAINE WEISS, ECON. POL’Y INST., COVID-19 AND STUDENT PERFORMANCE, EQUITY, AND U.S. EDUCATION POLICY 4 (2020), <https://files.epi.org/pdf/205622.pdf> [<https://perma.cc/3JE9-MT25>].

7. See Betheny Gross & Alice Opalka, *Too Many Schools Leave Learning to Chance During the Pandemic*, CTR. ON REINVENTING PUB. EDUC. (June 2020), <https://www.crpe.org/publications/too-many-schools-leave-learning-chance-during-pandemic> [<https://perma.cc/YED7-PJ8N>] (finding in a nationally representative survey of 477 school systems that high-poverty districts were less likely to expect synchronous teaching in spring 2020); NAT MALKUS, CODY CHRISTENSEN, & JESSICA SCHURZ, AM. ENTERPRISE INST., SCHOOL DISTRICT RESPONSES TO THE COVID-19 PANDEMIC: ROUND 6, ENDING THE YEAR OF SCHOOL CLOSURES 6 (2020), <https://www.aei.org/research-products/report/school-district-responses-to-the-covid-19-pandemic-round-6-ending-the-year-of-school-closures/> [<https://perma.cc/RXY9-Y78U>] (finding in a survey of a nationally representative sample of 250 public school districts that low-poverty districts were more likely to offer rigorous remote instruction than high-poverty districts); Anya Kamenetz, *Survey Shows Big Remote Learning Gaps for Low-Income and Special Needs Children*, NPR (May 27, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/862705225/survey-shows-big-remote-learning-gaps-for-low-income-and-special-needs-children> [<https://perma.cc/53QS-E5H2>] (finding that low-income parents were much more likely to say their schools did not offer distance learning materials and that remote learning was going poorly because they feared their children were falling behind academically).

the year fully remote in fall 2020.<sup>8</sup> Recent research has also found that low-poverty districts, in particular, were more likely to offer rigorous remote instruction than high-poverty districts.<sup>9</sup> Another recent study discovered that teachers employed within low-poverty districts were interacting with students more frequently than those within high-poverty districts.<sup>10</sup> Worse still, low-income parents were approximately ten times more likely than families making over six figures to report that remote instruction undermined student learning and academic development.<sup>11</sup> In fact, nearly one-third of low-income parents reported being very concerned that remote instruction would lead to their children falling behind in school.<sup>12</sup>

As the pandemic continued to rage well into the 2021–2022 academic year,<sup>13</sup> the foregoing disparities within and between these school districts largely worsened. First, despite the enactment of three critical recovery aid packages since March 2020,<sup>14</sup> Congress has failed to meaningfully advance equity by affording states and localities virtually unfettered discretion as to how such aid will be spent

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8. See EMMA DORN, BRYAN HANCOCK, JIMMY SARAKATSANNIS, & ELLEN VIRULEG, MCKINSEY & CO., COVID-19 AND LEARNING LOSS—DISPARITIES GROW AND STUDENTS NEED HELP 4, 12 (2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help> [<https://perma.cc/3HBC-DWPG>]; see also BETHENY GROSS, ALICE OPALKA & PADMA GUNDAPANENI, CENTER ON REINVENTING PUBLIC EDUCATION, GETTING BACK TO SCHOOL: AN UPDATE ON PLANS FROM ACROSS THE COUNTRY (2020), [https://www.crpe.org/sites/default/files/getting\\_back\\_to\\_school\\_brief.pdf](https://www.crpe.org/sites/default/files/getting_back_to_school_brief.pdf) [<https://perma.cc/8JV8-TMJ5>].

9. See MALKUS, CHRISTENSEN, & SCHURZ, *supra* note 7.

10. See Holly Kurtz, *National Survey Tracks Impact of Coronavirus on Schools: 10 Key Findings*, EDUC. WK. (Apr. 10, 2020), <https://www.edweek.org/ew/articles/2020/04/10/national-survey-tracks-impact-of-coronavirus-on.html> [<https://perma.cc/SS7T-ETJ7>] (“More than half of teachers (56 percent) in lower poverty districts (with poverty rates under 25 percent) are interacting with their students at least once a day, compared with about 1 in 3 in districts in which three quarters or more students come from low-income families.”).

11. See Kamenetz, *supra* note 7; see also Megan Brenan, *Over 8 in 10 Parents Now Say Child Is Learning Remotely*, GALLUP: NEWS (Apr. 8, 2020), <https://news.gallup.com/poll/307754/parents-say-child-learning-remotely.aspx> [<https://perma.cc/D6GS-8CHK>] (“Parents with an annual household income of at least \$90,000 are more likely than those with a household income of less than \$90,000 to say their child is receiving online distance learning from their school.”).

12. See Kamenetz, *supra* note 7.

13. See Dia Bryant, *Bring Back Remote Learning: With COVID’s Delta Raging, NYC Parents Need the Option*, N.Y. DAILY NEWS (Aug. 22, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-bring-back-remote-learning-20210822-c64mcgn4f5cgxjokroq4bwj6l4-story.html> [<https://perma.cc/Q889-A3ZX>].

14. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, 134 Stat. 1182, 1909–49 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

in response to the pandemic.<sup>15</sup> Although deference to state and local education officials should be maintained as a practical matter, federal officials should not offer such broad discretion at the expense of equity.

Second, Congress has failed to meaningfully advance equity due to its use of inadequate funding mechanisms. Indeed, despite the historic sum of federal funding provided to states and localities in the wake of the pandemic, all three recovery bills distribute the lion's share of their education aid through the federal Title I program.<sup>16</sup> Yet the Title I program is no longer constructed to meaningfully advance educational equity for indigent students. As Professor Derek W. Black observed, "Gradual changes during the last three decades have come to undermine Title I's core mission[, which] was to assist poor children, remedy inequity, and incentivize integration."<sup>17</sup> In fact, the Title I program has strayed so far from its original purpose that it now serves to effectively punish low-income students by ignoring, among other things, the particular needs of students experiencing concentrated poverty.<sup>18</sup> Consequently, by relying on the Title I program as the vehicle to distribute federal recovery aid, Congress's ongoing school recovery project will not only fail to meaningfully advance educational equity,<sup>19</sup> but also will fail to counter the disparate impacts that have been exacerbated by the pandemic.

In light of the foregoing limitations, this Article will demonstrate that the Congressional response to the pandemic will fail to meaningfully advance educational equity in both the near- and long-term. Within the near-term, today's heightened Congressional partisanship<sup>20</sup> counsels against pursuing legislative action as the primary avenue of education reform. In the long-term, moreover, "legislation alone cannot guarantee long term assurance of educational funding, equity, and quality. Rather, legislation would leave education subject to the same political

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15. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1313 (2017) [hereinafter *Abandoning the Federal Role*] ("[T]he ESSA grants states nearly unfettered discretion to create school performance systems and set goals. States are largely free to weight test results and soft variables however they see fit. With this discretion, as many as fifty disparate state systems could follow."). Since the education funding provisions codified in all three pieces of pandemic recovery legislation largely mirror the funding provisions set forth in the Every Student Succeeds Act (ESSA), Congress has effectively adopted this broad discretionary approach.

16. CARES Act § 18003; Consolidated Appropriations Act, 2021, div. M, § 313(b)–(c); American Rescue Plan Act of 2021, § 2001(c)–(d).

17. Derek W. Black, *Leveraging Federal Funding for Equity and Integration*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 227, 229 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015) [hereinafter *Leveraging Federal Funding*].

18. *See id.*

19. *See* Emily Boudreau, *The Cost of the Pandemic*, HARV. GRADUATE SCH. OF EDUC. (Oct. 7, 2020), [https://www.gse.harvard.edu/news/uk/20/10/cost-pandemic?utm\\_source=facebook&utm\\_medium=social&utm\\_campaign=hgse\\_organic](https://www.gse.harvard.edu/news/uk/20/10/cost-pandemic?utm_source=facebook&utm_medium=social&utm_campaign=hgse_organic) [<https://perma.cc/Y76C-M4T9>].

20. Luke Broadwater, *Congress's Ideological Divide Has Stymied Aid for Pandemic-Stricken Schools*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/us/politics/congress-schools-coronavirus.html> [<https://perma.cc/KJH4-UVX8>].

pressures that plague it now.”<sup>21</sup> Accordingly, “passing new legislation . . . would require far more political will and public outrage than what seems to currently exist.”<sup>22</sup>

To meaningfully advance educational equity, education reformers should return to the federal judiciary to seek relief. Given the current composition of the Supreme Court,<sup>23</sup> however, returning to the Court merely to tweak the structure of previous education rights claims will likely fail to advance educational equity in any meaningful sense. In fact, attempts focused on modifying such rights risk undermining the broader, more enduring project of ensuring equal educational opportunity for every child.<sup>24</sup> Consequently, to improve the odds of succeeding before today’s Supreme Court, this Article argues for the overturning of *Alexander v. Sandoval*.<sup>25</sup> By overturning *Sandoval*, future reformers—and particularly low-income litigants of color—will once again be empowered to remedy instances of disparate impact discrimination under Title VI of the Civil Rights Act of 1964.<sup>26</sup> And given the well-documented limitations of enforcing disparate impact protections to date,<sup>27</sup> a reversal of *Sandoval* could create “the specter of litigation . . . [which can] prompt[] reluctant—and even recalcitrant—school districts to voluntarily comply with the law.”<sup>28</sup>

This Article proceeds in four Parts. Part I catalogs the equity-based harms wrought by the pandemic. Part II provides an overview of the Congressional response to these harms. Part III offers a critique of one of the most recent pieces of recovery legislation—the American Rescue Plan Act (ARP). It then argues that ARP’s school funding provisions have largely failed to meaningfully advance educational equity for low-income students of color. Part IV then looks to the doctrine of stare decisis and examines the viability of a legal challenge to *Sandoval*

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21. Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1348 (2010) [hereinafter *Unlocking the Power*].

22. *Id.* at 1348–49.

23. See David Leonhardt, *A Supreme Court, Transformed*, N.Y. TIMES (July 6, 2021), <https://www.nytimes.com/2021/07/06/briefing/supreme-court-donald-trump.html> [https://perma.cc/C3WN-ZLP3].

24. See Bruce Meredith & Mark Paige, *Reversing Rodriguez: A Siren Call to a Dangerous Shoal*, 58 HOUS. L. REV. 355, 360 (2020) (describing the risk in filing right-to-education suits before the current Supreme Court “because they invite an increasingly conservative federal bench to define a constitutional right to education through market-based solutions that often erroneously conflate ‘choice’ with equality and will work to undermine our nation’s system of public education”).

25. 532 U.S. 275, 293 (2001) (holding that there is no private right of action to enforce disparate impact regulations under Title VI of the Civil Rights Act of 1964).

26. See Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 69 (2020) (“Disparate impact claims provide a potential remedy for a wide range of educational practices, including school funding, disciplinary measures, tracking, and the overrepresentation of minorities in special education.”).

27. *Id.* (“Given the great difficulty of proving intentional discrimination and the decrease in overt discrimination, a claim for disparate impact discrimination provides the only potential avenue for those injured by discrimination to find relief from an array of harmful educational practices.”).

28. *Leveraging Federal Funding*, *supra* note 17, at 244.

under its analysis. Drawing on existing social science literature and key jurisprudential developments two decades after *Sandoval*, this Part contends that one central premise relied upon by the *Sandoval* majority has changed so dramatically as to supply the “special justification”<sup>29</sup> necessary to overturn *Sandoval* as a matter of stare decisis’s “changing circumstances” factor.<sup>30</sup>

## II.

### TRACING THE EDUCATIONAL HARMS OF THE PANDEMIC

The full extent of the educational harms wrought by the pandemic will likely remain indeterminate for years to come. Yet where these data and research do exist, identifying a cross-section of pandemic-imposed harms should serve as a critical step toward determining equity-based solutions that can address them. Accordingly, this Part documents two central educational harms wrought by the COVID-19 pandemic. First, it examines how the pandemic has worsened the prevailing teacher shortage crisis, particularly within schools and districts that are largely low-income and racially isolated. Second, it assesses the effects that school closures have had on student achievement through the lens of learning loss.

#### *A. Teacher Shortages*

A qualified teacher workforce functions as one of the most important factors influencing student learning and achievement.<sup>31</sup> Indeed, “studies at the state, district, school, and individual level have found that teachers’ academic background, preparation for teaching, and certification status, as well as their experience, significantly affect their students’ achievement.”<sup>32</sup> Yet, in response to teacher shortages, “states are likely to hire individuals without preparation to teach, and these individuals are most likely to be hired in the low-wealth, high-poverty schools serving the highest-need students.”<sup>33</sup>

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29. See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.”).

30. See CONG. RSCH. SERV., R45319, THE SUPREME COURT’S OVERTURNING OF CONSTITUTIONAL PRECEDENT (2018), [https://www.everycrsreport.com/files/20180924\\_R45319\\_3cafb6dc6b134c9a1c83eff9bfb780a3b904bd3a.pdf](https://www.everycrsreport.com/files/20180924_R45319_3cafb6dc6b134c9a1c83eff9bfb780a3b904bd3a.pdf) [<https://perma.cc/EU6C-ZQXC>]. Although the Congressional Research Services labels the fourth stare decisis prong as “factual developments,” the term “changing circumstances” will instead be adopted and used throughout this Article.

31. See, e.g., LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 240–51 (2010); Dan Goldhaber, *Teachers Clearly Matter, but Finding Effective Teacher Policies Has Proven Challenging*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY* 157 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015); Steven G. Rivkin, Erik A. Hanushek, & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417 (2005).

32. See Linda Darling-Hammond, *Assuring Essential Educational Resources*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 235, 242–43 (Kimberly Jenkins Robinson ed., 2019).

33. *Id.*

The Economic Policy Institute has reported teacher shortages within key subject areas nationwide.<sup>34</sup> Moreover, “[t]here are about 570,000 fewer local education jobs this year compared to the start of the previous school year.”<sup>35</sup> The nation’s current teacher shortage long precedes the onset of the pandemic, to be sure. Take the Great Recession, and the many divergent responses to it, as an example. Following the Great Recession, public school districts nationwide lost nearly \$600 billion in funding as a result of various state-level austerity measures.<sup>36</sup> The subsequent loss of tens of thousands of teachers and school support staff only worsened the teacher shortage.<sup>37</sup> One notable response to the foregoing measures included the advent of a new labor movement.

Widely known as the “Red for Ed” movement, these budget cuts and their attendant teacher shortages galvanized nearly 130,000 public school teachers and staff nationwide to lead one of the largest labor struggles in U.S. history.<sup>38</sup> Teachers and staff organized mass demonstrations and work-stoppages to protest, among other things, such vast resource disparities and poor working conditions that were often exacerbated by these budget measures.<sup>39</sup> Still, while many demonstrations proved successful in select states, many failed to achieve the budgetary and legislative changes that had animated the movement’s broader project of “fundamentally reshaping the struggle for public education.”<sup>40</sup> Thus, the foregoing

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34. EMMA GARCIA & ELAINE WEISS, ECON. POL’Y INST., A POLICY AGENDA TO ADDRESS THE TEACHER SHORTAGE IN U.S. PUBLIC SCHOOLS 7 (2020), <https://files.epi.org/pdf/186493.pdf> [<https://perma.cc/6965-CJAS>].

35. Cory Turner, *America’s School Funding Crisis: Budget Cuts, Rising Costs and No Help in Sight*, NPR (Oct. 23, 2020, 7:00 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/23/926815076/americas-school-funding-crisis-budget-cuts-rising-costs-and-no-help-in-sight> [<https://perma.cc/9URH-GBYU>].

36. DANIELLE FARRIE & DAVID G. SCIARRA, EDUC. L. CTR., \$600 BILLION LOST: STATE DISINVESTMENT IN EDUCATION FOLLOWING THE GREAT RECESSION 2 (2020), [https://edlawcenter.org/assets/\\$600%20Billion/\\$600%20Billion%20Lost.pdf](https://edlawcenter.org/assets/$600%20Billion/$600%20Billion%20Lost.pdf) [<https://perma.cc/G6GT-FT5R>].

37. EMMA GARCIA & ELAINE WEISS, ECON. POL’Y INST., THE TEACHER SHORTAGE IS REAL, LARGE AND GROWING, AND WORSE THAN WE THOUGHT 7 (2019), <https://files.epi.org/pdf/163651.pdf> [<https://perma.cc/T238-R5LW>].

38. ERIC BLANC, RED STATE REVOLT: THE TEACHERS’ STRIKE WAVE AND WORKING-CLASS POLITICS 47 (2019) (“Public education’s location at the heart of social reproduction means that these work stoppages involved far more people than the roughly 130,000 teachers and support staff that struck in Arizona, Oklahoma, and West Virginia.”).

39. Stan Karp & Adam Sanchez, *The 2018 Wave of Teacher Strikes*, RETHINKING SCHS., Summer 2018, at 4, <https://www.rethinkingschools.org/articles/the-2018-wave-of-teacher-strikes> [<https://perma.cc/SJ8R-FTEW>].

40. *Id.* (“As of late May, walkouts in Colorado and North Carolina have followed statewide actions in West Virginia, Oklahoma, Arizona, and Kentucky. Some of these protests won significant, even if modest, gains in teachers’ salaries and funding for schools. Others won political promises that have yet to be redeemed. But all have contributed to the groundswell of teacher walkouts, and it’s unclear how it will carry on into next year.”).



funding cuts continued apace in several states, ultimately wreaking havoc within districts that served a high concentration of low-income students of color.<sup>41</sup>

Even prior to the onset of both the Great Recession and the COVID-19 pandemic, research confirms that the shortage of quality teachers has not been evenly experienced in schoolhouses across the United States. Indeed, “[s]chools serving large percentages of low-income and minority students [were] wildly unequal in their ability to attract, compensate, and retain quality teachers.”<sup>42</sup> In fact, “students attending predominantly poor and minority schools are assigned to novice, unqualified, and “out-of-field” teachers at twice the rate of students in low-poverty schools and predominantly white schools.”<sup>43</sup>

Despite the enduring nature of our national teacher shortage, the COVID-19 pandemic has led to funding reductions for schools, which will merely exacerbate this labor crisis.<sup>44</sup> Indeed, among the states that have already cut their education budgets, several have instituted specific cost-cutting measures that closely track the state-level reductions made in the wake of the Great Recession.<sup>45</sup> As a consequence, elementary and secondary schools nationwide have experienced a nearly seven percent decline in the number of employed school professionals between September 2019 and September 2020.<sup>46</sup> More concerning still, school employment figures from the 2020–2021 academic year dropped to their lowest point since the 2000–2001 academic year.<sup>47</sup> Accordingly, by overturning *Sandoval*, parents will not only regain a private right of action under Title VI, but also add an arrow of empowerment to their collective quiver, enabling them to challenge prevailing teacher shortages and the disparate harms such shortages cause.

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41. MICHAEL LEACHMAN, KATHLEEN MASTERTSON, & ERIC FIGUEROA, CTR. ON BUDGET & POL’Y PRIORITIES, *A PUNISHING DECADE FOR SCHOOL FUNDING I* (Nov. 29, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/11-29-17sfp.pdf> [<https://perma.cc/378N-ZTWY>].

42. *Abandoning the Federal Role*, *supra* note 15, at 1351.

43. Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 442 (2016).

44. See Sarah Reber & Nora Gordon, *How Congress Can Equitably Allocate COVID-19 Education Aid to States*, BROOKINGS INST. (June 15, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/06/15/how-congress-can-equitably-allocate-covid-19-education-aid-to-states/> [<https://perma.cc/Y4QB-5D4W>].

45. See Moriah Balingit, *Schools Get a \$54 Billion Lifeline in Stimulus Package—but the Money Won’t Last Long*, WASH. POST (Dec. 28, 2020, 7:31 PM), [https://www.washingtonpost.com/education/schools-get-a-54billion-lifeline-in-stimulus-package—but-the-money-wont-last-for-long/2020/12/28/fdf22f62-4956-11eb-839a-cf4ba7b7c48c\\_story.html](https://www.washingtonpost.com/education/schools-get-a-54billion-lifeline-in-stimulus-package—but-the-money-wont-last-for-long/2020/12/28/fdf22f62-4956-11eb-839a-cf4ba7b7c48c_story.html) [<https://perma.cc/DF3R-AG34>].

46. See Barb Rosewicz & Mike Maciag, *Nearly All States Suffer Declines in Education Jobs*, PEW CHARITABLE TRS. (Nov. 10, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/11/10/nearly-all-states-suffer-declines-in-education-jobs> [<https://perma.cc/PJ4E-NM8N>].

47. See Valerie Bauerlein & Yoree Koh, *Teacher Shortage Compounds Covid-19 Crisis in Schools*, WALL ST. J. (Dec. 15, 2020, 11:36 AM), <https://www.wsj.com/articles/teacher-shortage-compounds-covid-crisis-in-schools-11608050176> [<https://perma.cc/7KQF-RMEN>].

### B. Unfinished Student Learning

The nationwide turn to remote instruction has led to disparate learning opportunities. For low-income students of color, however, these disparate learning opportunities have led to disproportionate harms. This is particularly true in the context of learning loss.<sup>48</sup> Indeed, researchers have discovered that, during the first few months of the pandemic, school closures resulted in a greater incidence of unfinished learning among low-income students of color.<sup>49</sup> What is more, commentators have projected that existing achievement gaps between low-income students of color and their white, more affluent peers would grow by 15 to 20 percent in the years ahead: “[t]he average loss in our middle epidemiological scenario is seven months. But [B]lack students may fall behind by 10.3 months, Hispanic students by 9.2 months, and low-income students by more than a year. We estimate that this would exacerbate existing achievement gaps by 15 to 20 percent.”<sup>50</sup>

The unfinished learning wrought by pandemic-induced school closures has had a notable effect on student learning in the areas of math and reading. Indeed, the Center for Research on Education Outcomes (CREO) estimates that, during the spring of 2020, students across 19 states lost between 57 to 183 days of learning in reading and 136 to 232 days of learning in math.<sup>51</sup> Despite our advances in vaccine distribution and uptake, moreover, the 2020–2021 academic year proved to be “perhaps one of the most challenging for educators and students in our nation’s history.”<sup>52</sup> Indeed, by the end of the 2020–2021 school year, “the impact of the pandemic on K–12 student learning was significant, leaving students on average five months behind in mathematics and four months behind in reading.”<sup>53</sup> For low-income students of color, “the [learning] losses [were] not only greater but also piled on top of historical inequities in opportunity and achievement.”<sup>54</sup>

Beyond its near-term effect on student academic achievement, a growing body of research suggests that such learning loss threatens students’ future economic health. Consider the following research from October 2020. As a result of

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48. Learning loss is also known as ‘unfinished learning’ within the literature. The author will use each term interchangeably hereinafter.

49. Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis, & Ellen Viruleg, *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. (June 1, 2020), <https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime#> [<https://perma.cc/P8VZ-TE8C>].

50. *Id.*

51. CREDO at Stanford University Presents *Estimates of Learning Loss in the 2019–2020 School Year*, CTR. FOR RSCH. ON EDUC. OUTCOMES (Oct. 1, 2020), <https://mailchi.mp/9d437ebe9f0f/estimates-of-learning-loss-released-by-credo-at-stanford-university-4732038> [<https://perma.cc/9E3G-R72R>] (“The learning loss estimates were translated into lost days of learning, based on a typical 180-day school year. Across the 19 states, the average estimates of how much students lost in the Spring of 2020 ranged from 57 to 183 days of learning in Reading and from 136 to 232 days of learning in Math.”).

52. Dorn, Hancock, Sarakatsannis, & Viruleg, *supra* note 49.

53. *Id.*

54. *Id.*

students' unfinished learning, researchers projected that while "white students would earn \$1,348 a year less (a 1.6 percent reduction) over a 40-year working life, the figure is \$2,186 a year (a 3.3 percent reduction) for [B]lack students and \$1,809 (3.0 percent) for Hispanic [students]."55 Taken in the aggregate, the impact that such learning loss could have on the broader economy is estimated to reach between "\$128 billion to \$188 billion every year as this cohort enters the workforce."56 Worse still, researchers project that if such unfinished learning amounts to one-third of an academic year, the U.S. stands to lose approximately \$14.2 trillion over the next 80 years.57

### III.

#### PUBLIC EDUCATION AND THE CONGRESSIONAL RESPONSE TO THE PANDEMIC

Since March 2020, three major pieces of recovery legislation have been passed by Congress that provide support for public K-12 education in the wake of the COVID-19 pandemic: The Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Consolidated Appropriations Act of 2021 (CAA), and the American Rescue Plan Act (ARP). The first of the three COVID-19 recovery laws, the CARES Act allocated approximately \$32 billion in recovery aid to states and localities through the newly-created Education Stabilization Fund (ESF).58 By December 2020, Congress passed and enacted the CAA, adding \$54.3 billion to the ESF and adopting many of the terms set forth in the CARES Act.59 By March 2021, ARP was passed and enacted as the third installment of federal recovery aid. In terms of education-specific investments, ARP funneled an additional \$122 billion into the ESF.60 Taken together, all three bills have been critical to staving off the pandemic's worst effects within and between schools and districts. The following Subpart grounds its analysis on the terms of each piece of legislation and their attendant provisions for elementary and secondary education.

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55. *Id.*

56. *Id.*

57. ERIC A. HANUSHEK & LUDGER WOESSMANN, ORG. FOR ECON. COOP. & DEV., THE ECONOMIC IMPACTS OF LEARNING LOSSES 12 (2020), [http://hanushek.stanford.edu/sites/default/files/publications/The%20Economic%20Impacts%20of%20Learning%20Losses\\_final\\_v1.pdf](http://hanushek.stanford.edu/sites/default/files/publications/The%20Economic%20Impacts%20of%20Learning%20Losses_final_v1.pdf) [https://perma.cc/RB57-RYGL] ("A learning loss equivalent to one-third of a year of schooling for the current student cohort is estimated according to historical growth relationships to mean 1.5% lower GDP on average for the remainder of the century.").

58. CARES Act, Pub. L. No. 116-136 §§ 18001–18006, 134 Stat. 281, 564–69 (2020).

59. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, 134 Stat. 1182, 1909–49 (2020).

60. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001, 135 Stat. 4, 19–23.

### A. *The CARES Act*

On March 27, 2020, the 116th Congress signed the CARES Act into law.<sup>61</sup> As the largest federal stimulus package in U.S. history at the time of its enactment,<sup>62</sup> the CARES Act established an Education Stabilization Fund<sup>63</sup> (ESF) that distributed public K-12 recovery aid through two discrete tranches.<sup>64</sup> The first tranche—the Elementary and Secondary School Emergency Relief Fund (ESSER)<sup>65</sup>—allotted \$13.2 billion to states and localities to support elementary and secondary school recovery. The second tranche—the Governor’s Emergency Education Relief Fund (GEER)<sup>66</sup>—allocated an additional \$3 billion to the states’ governors, who were authorized to use GEER funding to support both public K-12 education and higher education.<sup>67</sup> The following Subpart outlines the statutory allowances and limitations set forth in both ESSER and GEER. It then concludes by cataloging how states and localities have used ESSER and GEER funding to support the broader recovery project for K-12 education.

#### 1. *ESSER*

As outlined in Section 18003(a) of this Act, the Elementary and Secondary School Emergency Relief Fund<sup>68</sup> allows the Secretary of Education to “make elementary and secondary school emergency relief grants to each state educational agency with an approved application.”<sup>69</sup> In total, \$13.2 billion was funneled into the ESF by the CARES Act to support the ESSER Fund.<sup>70</sup> When a state received an ESSER grant, moreover, the exact dollar amount varied depending on the amount of the Title I dollars a state received in the most recent fiscal year.<sup>71</sup> Furthermore, any state that receives an ESSER grant is permitted to distribute subgrants to Local Education Agencies (LEAs).<sup>72</sup> However, if a state does elect to distribute such subgrants, then the state must follow one predicate condition: it must ensure that no subgrant amounts to less than

90 percent of the grant funds awarded to the State under this section as subgrants to local educational agencies (including charter schools that are local educational agencies) . . . in

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61. Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html> [<https://perma.cc/2DBS-7DQY>].

62. *Id.*

63. CARES Act §§ 18001–18006.

64. §§ 18002, 18003, 134 Stat. at 564–67.

65. § 18002, 134 Stat. at 564.

66. § 18002(c)(1), 134 Stat. at 565.

67. *Id.*

68. § 18003(a), 134 Stat. at 565.

69. *Id.*

70. § 18001(b)(1)–(2), 134 Stat. at 564.

71. § 18003(b), 134 Stat. at 565.

72. *Id.*

proportion to the amount of funds . . . received under part A of title I of the ESEA of 1965 in the most recent fiscal year.<sup>73</sup>

Put differently, each state must use at least 90% of its ESSER allocation for subgrants to LEAs.

As previously discussed, the amount of a given subgrant is determined by each LEA's share of federal dollars received under Title I, Part A in the prior fiscal year (in this instance, the 2019–2020 fiscal year).<sup>74</sup> Take California as an example. The State Education Agency (SEA) in California was allocated \$1,647,306,127 in ESSER aid.<sup>75</sup> Given the provision outlined in Section 18003(c)—which requires no less than 90% of a state's ESSER allocation be made as subgrants to LEAs—California's minimum LEA subgrant distribution amounted to \$1,482,575,514 during the 2020–2021 academic year.<sup>76</sup> Although this provision provides a list of 12 specific areas where the \$13.2 billion may be used, the plain language of the foregoing provision affords grantees wide discretion as to how ESSER dollars are

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73. § 18003(c), 134 Stat. at 565.

74. See *Elementary and Secondary School Emergency Relief Fund Tracker*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 25, 2022) [hereinafter NCSL Tracker], <https://www.ncsl.org/ncsl-in-dc/standing-committees/education/cares-act-elementary-and-secondary-school-emergency-relief-fund-tracker.aspx> [<https://perma.cc/A38K-WMNX>].

75. U.S. DEPT. OF EDUC., OFF. OF ELEMENTARY & SECONDARY EDUC., ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND: STATE ALLOCATION TABLE (2020), <https://oese.ed.gov/files/2020/04/ESSER-Fund-State-Allocations-Table.pdf> [<https://perma.cc/7U7Q-5K9P>].

76. See *id.*

to be spent.<sup>77</sup> From technological<sup>78</sup> and connectivity advances<sup>79</sup> to teacher retention measures<sup>80</sup> and nutrition support for students,<sup>81</sup> the states varied greatly in terms of how they spent down their ESSER grants.

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77. CARES Act § 18003(d). The authorized uses for ESSER funds are summarized as:

- (1) Any activity supported by the Every Student Succeeds Act;
- (2) Coronavirus response coordination between states, districts, public health agencies and other related agencies;
- (3) Allocating the resources that principals need to respond to the needs within their schools;
- (4) “Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population[;]”
- (5) Strengthening the preparedness and actions of school districts in response to the coronavirus;
- (6) Educating staff about how to adopt sanitation practices and reduce virus spread;
- (7) Obtaining cleaning supplies for school districts;
- (8) Addressing the needs of school districts during lengthy school closures, including distributing technology for remote learning and meals, ensuring other required educational services, and services for students with disabilities consistent with the individuals with disabilities in education act;
- (9) Acquiring technology to support remote instruction, including equipment to support disabled students and those from low-income households;
- (10) Supports and services for mental health;
- (11) Supplemental and support programs, including remote or classroom instruction to students with unique needs; and,
- (12) Any other actions that the district must take to continue to educate students. *Id.*

78. See Press Release, State of Illinois, Gov. Pritzker Announces \$108.5 Million COVID Funding for PreK-12, Higher Education with Equity Focus (July 14, 2020), <https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=21812> [<https://perma.cc/T3XC-3DFL>] (“Gov. Pritzker has announced he will invest \$40 million to help close the digital divide, so K-12 students can engage in robust and meaningful learning opportunities, whether in-person or at home. School districts will receive \$32.5 million to purchase devices, such as laptops and tablets, and \$7.5 million to purchase WiFi hotspots and increase internet connectivity for students and families.”).

79. HAW. STATE DEP’T OF EDUC., CARES ACT ELEMENTARY & SECONDARY SCHOOL EMERGENCY RELIEF FUND (2020), <http://www.hawaiipublicschools.org/DOE%20Forms/budget/HIDOE-CARES-Act-ESSER-Funds.pdf> [<https://perma.cc/6QH5-5WWE>] (“Priority Area: DEVICES & CONNECTIVITY \$15.01 million: MiFi and mobile hubs: \$2.89 million; mobile hubs: \$100,430; purchase 10,000 devices for summer learning: \$5.46 million; purchase 12,000 devices for school reopening: \$6.57 million.”) (footnotes omitted).

80. *What Are School Districts Using Federal Coronavirus Aid For?*, ALLEGHENY INST. FOR PUB. POL’Y (Nov. 11, 2020), <https://www.allegHENYinstitute.org/what-are-school-districts-using-federal-coronavirus-aid-for/> [<https://perma.cc/7ZJ4-8KJR>] (“There are 16 districts indicating that they have spent or will spend some portion of their allocation on salaries and/or benefits. In some cases, this is to pay for personnel for after-school and summer school activities, to retain staff that was to be furloughed and to hire additional staff to reduce class size to comply with social-distancing requirements. In most cases the salaries and benefits are for instructional personnel.”).

81. ESSER I Fund Frequently Asked Questions, CAL. DEP’T. OF EDUC., <https://www.cde.ca.gov/fg/cr/esserfaqs.asp> [<https://perma.cc/9N23-ULCA>] (last visited Apr. 7, 2022) (noting how the state of California “directed most of funding from the ESSER I state reserve to LEAs through \$112.2 million to support nutrition services.”).

## 2. GEER

In total, GEER received \$3 billion from the ESF. Much like the terms set forth for ESSER, GEER afforded governors wide discretion when responding to the needs of “significantly impacted”<sup>82</sup> school districts. Any funds that were not used by a governor within a calendar year of receiving these funds must be returned so that the Secretary of Education can reallocate the remaining aid in accordance with the terms set forth in the ESF’s Reservations Clause.<sup>83</sup> After a state receives GEER aid, an initial report must be provided no more than 45 days after receipt of such aid, allowing the federal Department of Education to track each state’s GEER spending.<sup>84</sup> According to the Center for American Progress,

17 states and Washington, D.C., spent little to no money on higher education, opting instead to spend all of it on school districts and services for K-12 students. Among the remaining 33 states, GEER funding dedicated to higher education was most commonly distributed to institutions, either through a direct allocation or competitive grants.<sup>85</sup>

Moreover, several states allocated CARES Act funding to support school expansion efforts and to cover general operational expenses. For example, California invested \$45 million in a competitive grant program meant to grow the state’s community schools initiative.<sup>86</sup> Other states have put CARES Act funding towards supporting students’ social-emotional wellbeing and mental health.<sup>87</sup> In still other states, GEER funding has been allocated to support special education. Texas Governor Greg Abbott, for example, established the Supplementary Special Education Services (SSES) program, which was designed to “connect eligible

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82. CARES Act § 18002(c)(1) (providing no definition for districts that were “significantly impacted” by the COVID-19 pandemic, which allows federal recovery recipients to decide).

83. § 18001(b)(1), 134 Stat. at 564.

84. See *GEER Awards*, U.S. DEPT. OF EDUC., OFF. OF ELEMENTARY & SECONDARY EDUC. (Apr. 20, 2022), <https://oese.ed.gov/governors-emergency-education-relief-fund/geer-certifications-agreements/> [<https://perma.cc/C8LW-XLYJ>].

85. Bradley D. Custer, *5 Interesting Ways Governors Are Spending CARES Act GEER Funds on Higher Education*, CTR. FOR AM. PROGRESS (Oct. 26, 2020), <https://www.americanprogress.org/issues/education-postsecondary/news/2020/10/26/492238/5-interesting-ways-governors-spending-cares-act-geer-funds-higher-education/> [<https://perma.cc/DH8U-2VBM>].

86. See CAL. DEP’T OF EDUC., *supra* note 81.

87. See Phyllis W. Jordan & Javaid Siddiqi, *How Governors Are Using Their CARES Act Education Dollars*, FUTUREED (Sept. 9, 2020), <https://live-fe-future-ed.pantheonsite.io/how-governors-are-using-their-cares-act-education-dollars/> [<https://perma.cc/CV5C-D6JX>] (“Eleven governors are spending their discretionary dollars on students’ health and social-emotional wellbeing. North Carolina will spend \$40 million to hire school nurses, counselors, social workers, and psychologists. Connecticut will devote spending to developing a statewide social-emotional learning framework. Illinois’s State Board of Education will create a Student Care Department”).

students with severe cognitive disabilities with additional support for the critical services they require.”<sup>88</sup>

Despite these efforts to adequately and equitably respond to the educational harms of the COVID-19 pandemic, CARES Act funding has largely failed to offer enough aid to ensure that all students could access remote coursework through strengthened technology services.<sup>89</sup> In fact, given the prevailing school funding disparities between low- and high-wealth states, several states used CARES Act funding to stabilize their education budget following substantial state budget cuts.<sup>90</sup> Consider the following example. In Michigan, the state legislature cut “\$175 per pupil in every district, totaling \$256 million. The state then added \$512 [million] from the federal Coronavirus Relief Fund (CRF), providing \$350 per pupil to every district, along with \$351 million through the Elementary and Secondary School Emergency Relief Fund under the CARES Act.”<sup>91</sup> State officials in Texas and New York, to name a few, have regrettably followed these budgetary practices adopted by the Michigan legislature, leaving in place their “flat” education funding model rather than allocating these funds to schools and districts with the greatest need.<sup>92</sup>

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88. Press Release, Off. of the Texas Governor, Governor Abbott, TEA Establish Targeted Education Funds for Families of Students with Cognitive Disabilities (Oct. 21, 2020), <https://gov.texas.gov/news/post/governor-abbott-tea-establish-targeted-education-funds-for-families-of-students-with-cognitive-disabilities> [<https://perma.cc/5EHZ-4KX7>].

89. See Kalyn Belsha, *As CARES Act Helps Some Schools, Many Says it's Just a Down Payment on What Districts Need to Avoid Financial Disaster*, CHALKBEAT (July 10, 2020, 1:50 PM), <https://www.chalkbeat.org/2020/7/10/21320206/cares-act-down-payment-on-what-schools-really-need-avoid-financial-disaster> [<https://perma.cc/8D2U-HKDM>].

90. See Michael Griffith & William Berry, *COVID-19 and State Education Budgets: The Story Behind the Numbers*, LEARNING POL’Y INST. (Sept. 24, 2020), <https://learningpolicyinstitute.org/blog/covid-state-education-budgets-story-behind-numbers> [<https://perma.cc/B44F-AS5U>] (“Why are state education budgets looking better than some have predicted? Simply put, federal and state moves to infuse new funds and implement stopgap measures have been effective at stabilizing public education budgets—for now, at least. But without additional federal funds, we should prepare ourselves for large cuts to state education budgets.”).

91. Mary McKillip, *Tracking State School Aid Cuts in the Pandemic*, EDUC. L. CTR. (Aug. 25, 2020), <https://edlawcenter.org/news/archives/school-funding-national/tracking-state-school-aid-cuts-in-the-pandemic.html> [<https://perma.cc/6L4C-86KK>] (“Michigan’s combination of aid cuts and allocation of federal funding treated all districts the same, without regard to need, thus continuing the state’s longstanding pattern of ‘flat’ school funding.”).

92. *Id.* (“Texas and New York followed a playbook from the 2009 Great Recession by cutting over \$1 billion in state aid, an amount equal to the one-time federal funds provided for emergency relief for public schools under the CARES Act. In both states, the cuts are disproportionately higher in districts segregated by poverty and those most in need from COVID-19.”).



To be sure, increased school funding provides substantial educational benefits, especially for the most vulnerable student populations.<sup>93</sup> However, these state funding regimes have had the effect of providing low-income, predominately Black and brown communities with less overall state funding than more affluent, predominately white communities.<sup>94</sup> In fact, the highest-spending districts nationwide spend nearly ten times more than the lowest-spending school districts nationwide.<sup>95</sup> Such disparities paint a more sobering picture at the per pupil level. Among the nation's highest poverty districts—which serve the largest share of students from low-income households—state officials spend approximately seven percent less per pupil than students educated in our nation's highest-wealth districts.<sup>96</sup> For a district serving 5,000 pupils, then, this seemingly minor gap amounts to approximately five million dollars less in overall funding each year when compared to spending levels within the nation's highest wealth districts.<sup>97</sup>

### *B. The Consolidated Appropriations Act of 2021*

Congress passed the Consolidated Appropriations Act (CAA) of 2021—a \$900 billion-dollar economic measure—on December 21, 2020, with President Donald Trump signing the bill into law on December 27th.<sup>98</sup> The CAA funneled nearly \$82 billion through the Education Stabilization Fund,<sup>99</sup> providing support to public K-12 education in three key ways. First, \$54.3 billion was provided through the Elementary and Secondary School Emergency Relief (ESSER) Fund of the CAA.<sup>100</sup> This additional aid, as was the case with CARES Act allocations,

93. Jeff Raikes & Linda Darling-Hammond, *Why Our Education Funding Systems Are Derailing the American Dream*, LEARNING POL'Y INST., (Feb. 18, 2019), <https://learningpolicyinstitute.org/blog/why-our-education-funding-systems-are-derailing-american-dream> [https://perma.cc/LA8S-ARSA] (“School finance reforms across the country for 15,000 students over 40 years found that, for low-income students, a 10% increase in per-pupil spending for all 12 years of public school resulted in an increase of 10 percentage points in graduation rates and a reduction of 6 percentage points in adult poverty rates. This study estimated that a 22% increase in per-pupil spending throughout the school years for low-income children would be large enough to eliminate the educational attainment gap between children from low-income and nonpoor families.”).

94. See Rachel Kaufman, *New School Funding Report Shows the Effects of Segregation Persist*, NEXT CITY (Feb. 27, 2019), <https://nextcity.org/daily/entry/new-school-funding-report-shows-the-effects-of-segregation-persist> [https://perma.cc/4FUK-FNXH].

95. See Raikes & Darling-Hammond, *supra* note 93.

96. See Ivy Morgan & Ary Amerikaner, *Funding Gaps 2018: An Analysis of School Funding Equity Across the U.S. and Within Each State*, THE EDUC. TR. (Feb. 27, 2018), <https://edtrust.org/resource/funding-gaps-2018/> [https://perma.cc/Z2G9-MSWF].

97. *Id.*

98. See, e.g., Benjamin Swasey & Barbara Sprunt, *Trump Signs COVID-19 Relief Deal After His Criticism Threatened to Derail*, NPR (Dec. 27, 2020, 8:14 PM), <https://www.npr.org/2020/12/27/950133658/trump-signs-covid-19-relief-package-after-threatening-to-derail-it> [https://perma.cc/QT8G-GQH7].

99. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

100. *COVID-19 Economic Relief Bill*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2021), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/covid-19-economic-relief-bill-stimulus.aspx> [https://perma.cc/HB36-3AKM].

was funneled to elementary and secondary schools through the Title I program.<sup>101</sup> In total, the CAA's additional ESSER aid nearly quadrupled the ESSER aid allocated to schools within the first CARES package.<sup>102</sup>

Second, \$22.7 billion in additional aid was provided to states to better support higher education.<sup>103</sup> Of this amount, \$1.7 billion will be allocated to minority-serving institutions, and one billion dollars will be allocated to for-profit colleges.<sup>104</sup> Third, the CAA set aside over four billion dollars in discretionary aid for governors.<sup>105</sup> Of this amount, \$2.7 billion was directed to private schools, though governors were barred from spending CAA aid to underwrite private school tuition or private school vouchers (notwithstanding governors who began spending their initial CARES Act aid for these purposes).<sup>106</sup> Not unlike initial aid provided through the CARES Act, the new CAA aid afforded school districts wide discretion in determining how best to use these funds. Much like the CARES Act, the only caveat was that the state was required to reserve no more than 10% of CAA dollars to support administrative needs.<sup>107</sup>

### C. *The American Rescue Plan Act*

The structure of the education provisions within the American Rescue Plan Act<sup>108</sup> (ARP) can be broken into requirements for (1) localities and (2) the states. In terms of ARP's key education provisions for localities, it should be noted that ARP's education funding nearly doubles the total amount of federal education aid provided within both the CARES Act and the CAA combined.<sup>109</sup> The lion's share of ARP education aid—some 90%, which amounts to approximately \$110 billion in federal aid—will be distributed to local education agencies, like charter schools that function as LEAs.<sup>110</sup> Of this amount, LEAs are required to “reserve not less than 20 percent [\$22 billion] of such funds to address learning loss through the implementation of evidence-based interventions.”<sup>111</sup>

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101. Consolidated Appropriations Act, 2021 div. M, § 313(b)–(c).

102. § 313, 134 Stat. at 1929–32 (the CARES Act authorized approximately \$13.2 billion for ESSER while the Consolidated Appropriations Act authorized \$54.3 billion for K-12 education).

103. § 314, 134 Stat. at 1932–36.

104. *Id.*

105. § 312, 134 Stat. at 1925–29.

106. *Id.*

107. See Phyllis W. Jordan, *What Congressional Covid Funding Means for K-12 Schools*, FUTUREED (Sept. 29, 2022), <https://www.future-ed.org/how-governors-are-using-their-cares-act-education-dollars/> [<https://perma.cc/EF9G-QYLQ>] (reiterating that “[t]he CARES Act requires that at least 90 percent of the Elementary and Secondary School Emergency Relief Fund flow to local education agencies, with no more than 10 percent reserved for the state agency, and a fraction of that for administrative costs.”).

108. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(b)(1), 135 Stat. 4, 19.

109. See Rebecca Klein, *Joe Biden's Stimulus Plan Emphasizes School Reopenings*, HUFFPOST (Jan. 18, 2021), [https://www.huffpost.com/entry/joe-biden-reopen-schools-stimulus\\_n\\_600307e6c5b62c0057bd5c7b](https://www.huffpost.com/entry/joe-biden-reopen-schools-stimulus_n_600307e6c5b62c0057bd5c7b) [<https://perma.cc/VAJ9-3PDD>].

110. American Rescue Plan Act of 2021 § 2001(d)(1).

111. § 2001(e)(1), 135 Stat. at 20.

The foregoing local-level interventions include, among other things, addressing students' academic, social, and emotional needs in the wake of the COVID-19 pandemic.<sup>112</sup> Other interventions include addressing the disproportionate impact that the pandemic has wrought on particular student subgroups,<sup>113</sup> which is defined by the Elementary and Secondary Education Act of 1965.<sup>114</sup> Still others broadly require "activities" that allow LEAs to "address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth."<sup>115</sup> Most of the remaining ARP aid, which amounts to roughly \$89 billion in federal funding, is indeed quite flexible, allowing LEAs to choose how to spend down this allocation to best meet local priorities.<sup>116</sup>

In terms of ARP's key education provisions for the states, five percent of ARP funding must be used by state education agencies (SEAs) to implement "evidence-based interventions," while districts are required to use one-fifth of such funding for this purpose.<sup>117</sup> States must use this allotment to "address learning loss by supporting the implementation of evidence-based interventions, such as summer learning, extended day, comprehensive afterschool programs, or extended school year programs."<sup>118</sup> Much like with LEAs, ARP's statutory language offers the states broad flexibility to ensure that such interventions "respond to students' academic, social, and emotional needs and address the disproportionate impact of the coronavirus."<sup>119</sup> SEAs must reserve a minimum of one percent of their ARP allotment to establish additional after-school programs<sup>120</sup> and summer enrichment programs that address student need.<sup>121</sup> Furthermore, SEAs are prohibited from reserving "more than one-half of 1 percent of the total amount of grant funds awarded to the State" for administrative costs and state-defined exigencies.<sup>122</sup> As the next Section describes, states are also required to distribute the remaining 90% of ARP education aid to LEAs based on their proportional share of ESEA Title I-A funds.<sup>123</sup>

In sum, all three recovery bills share common features, as well as common proscriptions, for K-12 education recovery amidst the pandemic. Given these similarities, the following Section thus isolates its critique of the Congressional

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112. *Id.*

113. *Id.*

114. 20 U.S.C. 6311(b)(2)(B)(xi).

115. American Rescue Plan Act of 2021 § 2001(e)(2)(F).

116. § 2001(f), 135 Stat. at 22.

117. § 2001(e)-(f), 135 Stat. at 20-22.

118. § 2001(f)(1), 135 Stat. at 22.

119. *Id.*

120. § 2001(f)(2), 135 Stat. at 22.

121. *See id.*

122. § 2001(f)(3), 135 Stat. at 22.

123. NCSL Tracker, *supra* note 74.

response to the pandemic to the most recent COVID-19 recovery legislation: the American Rescue Plan Act.

#### IV.

##### CRITIQUE: THE AMERICAN RESCUE PLAN ACT

The American Rescue Plan Act accomplishes two important feats that prior education legislation failed to achieve. First, given its historic monetary sum, ARP dramatically expands the federal role in public education.<sup>124</sup> Second, ARP provides broad discretion to states and localities, allowing these jurisdictions to better address the growing educational needs brought on by the pandemic.<sup>125</sup>

Yet ARP's education provisions commit at least two key errors that undermine equity. The first such error is that, despite ARP's historic monetary investment, the legislation imposes few requirements in terms of how participating states and localities are to spend their recovery aid. Instead, ARP adopts the CARES Act's<sup>126</sup> virtually unfettered discretionary approach to state and local education spending. To be sure, although spending flexibility is a critical component of the recovery process, ARP's virtually unfettered discretion ignores a deep and well-documented history of state and local abandonment of equity in the face of competing demands.<sup>127</sup>

The second major flaw is that ARP funnels its largest share of funding—which relies on the CARES Act's Elementary and Secondary School Emergency Relief Fund (ESSER)<sup>128</sup>—through the Title I program.<sup>129</sup> This exacerbates inequity, as Title I's funding provisions prioritize factors other than concentrated student poverty when distributing federal aid.<sup>130</sup> The next Subpart describes and critiques each of the foregoing failures in turn.

##### *A. Assessing Our National History of State and Local Disinvestment*

The American Rescue Plan Act undermines educational equity by providing states and localities with broad discretion as to how ARP recovery aid is spent.<sup>131</sup>

124. Given the widening fiscal inequalities between and within our nation's most underserved schools and districts, this development is a significant one that has been championed by leading education and school law scholars for decades. See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 948.

125. American Rescue Plan Act of 2021 § 2001(c)(2)(F).

126. CARES Act, Pub. L. No. 116-136, § 18003(d), 134 Stat. 281, 565–66 (2020).

127. See Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 1002–05 (2015).

128. See Reber & Gordon, *supra* note 44; see American Rescue Plan Act of 2021 § 2001(b).

129. § 2001(c), 135 Stat. at 19.

130. *Leveraging Federal Funding*, *supra* note 17, at 233–38.

131. See Mark Muro, Eli Byerly-Duke, & Joseph Parilla, *The American Rescue Plan's Secret Ingredient? Flexible State and Local Aid*, BROOKINGS INST. (Apr. 2, 2021), <https://www.brookings.edu/blog/the-avenue/2021/04/02/the-american-rescue-plans-secret-ingredient-flexible-state-and-local-aid/> [https://perma.cc/3VUH-MWNP] (“[I]n short, ARP is much more flexible than March 2020's CARES Act.”).

Although calls for “maximum flexibility”<sup>132</sup> have persisted since the start of the COVID-19 pandemic, funneling historic sums of federal recovery aid to states and localities without meaningful equity requirements or enforcement mechanisms ignores a deep history of educational disinvestment at the state and local levels.<sup>133</sup> Indeed, even during normal times, state and local officials have proven unwilling to prioritize funding equity in the distribution of school aid.<sup>134</sup> In fact, “[s]tates have consistently failed to offer equal educational opportunities. State successes are almost entirely attributable to federal intervention, and states have resisted that intervention at nearly every turn. Thus, as a matter of history, state educational power poses a threat to equality and, by extension, to adequacy.”<sup>135</sup>

These patterns of state and local disinvestment are not confined to the annals of history. To the contrary, as of this writing, at least eight state-level courts have refrained from adjudicating school finance disputes due to separation of powers concerns.<sup>136</sup> Worse still, although education litigants have brought approximately 200 state constitutional challenges to nearly every school finance system since the mid-1970s,<sup>137</sup> reformers in several states have never won a school finance challenge in state court.<sup>138</sup> Consequently, schoolchildren in these states—though disproportionately low-income children of color—are left to rely on the same obstinate legislatures that failed to prioritize educational equity in the first instance.

U.S. Department of Education officials continue to encourage, rather than mandate, school districts to prioritize equity within their proposed spending plans.<sup>139</sup> However, even if federal officials were to go a step further and condition

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132. *Letter to U.S. Department of Education Regarding Education Stabilization Fund*, NAT’L GOVERNORS ASS’N (Apr. 4, 2020), <https://www.nga.org/advocacy-communications/letters-nga/education-workforce-committee/letter-to-u-s-department-of-education-regarding-education-stabilization-fund/> [<https://perma.cc/5H39-KLEU>] (“We also ask for maximum flexibility for states so that they may determine how to best address the needs of each community during the COVID-19 crisis.”).

133. See Cynthia G. Brown, *From ESEA to ESSA: Progress or Regress?*, in *THE EVERY STUDENT SUCCEEDS ACT: WHAT IT MEANS FOR SCHOOLS, SYSTEMS AND STATES* 153, 165 (Frederick M. Hess & Max Eden eds., 2017).

134. See *id.* (“Most state legislatures today are very conversative and uninterested in education equity.”).

135. *Abandoning the Federal Role*, *supra* note 15, at 1342.

136. See *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193–95 (Ill. 1996); *La. Ass’n of Educators v. Edwards*, 521 So. 2d 390, 394 (La. 1988); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007); *Okla. Educ. Ass’n v. State*, 158 P.3d 1058, 1065–66 (Okla. 2007); *Marrero v. Commonwealth*, 739 A.2d 110, 113–14 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55–56 (R.I. 1995).

137. See *The State Role in Education Finance*, NAT’L CONF. OF STATE LEGISLATORS, <https://www.ncsl.org/research/education/state-role-in-education-finance.aspx> [<https://perma.cc/36EB-E4SL>] (last visited Apr. 8, 2022).

138. See *Appendix: School Finance Litigation Cases*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY*, *supra* note 17, at 275, 277; see also R. CRAIG WOOD, *EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES* 69–70 (3d ed., 2007).

139. See *Jordan*, *supra* note 107.

receipt of ARP's education aid on state and local compliance with equity mandates, as some scholars have advocated,<sup>140</sup> state and local officials will still likely fail to advance educational equity in any meaningful sense. First, expanding the federal role in education by installing rigid federal mandates has proven largely unsuccessful in recent years. Take the No Child Left Behind Act of 2001 (NCLB) as an example.<sup>141</sup> Although NCLB increased federal aid to low-income students by a considerable margin, strict accountability and performance mandates set forth in this legislation ultimately undermined students' academic gains.<sup>142</sup> Second, ARP distributes its largest share of education funding through the federal Title I program. But as the following Subpart demonstrates, Title I's funding provisions are structured in such a way as to undermine educational equity.

*B. Distributing Federal Recovery Aid Through Title I Undermines Education Equity*

As described above, Title I funding formulae fail to advance educational equity in at least two ways. One major issue is that Title I program's funding provisions are currently structured to ignore the more demanding needs of concentrated poverty. For example, "all of Title I's funding formulas include a statutory minimum that provides a base level of funding to all states regardless of need, poverty level, or other factors, such as geographic cost."<sup>143</sup> By ensuring that all school districts receive a minimum grant regardless of need, Congressional recovery aid<sup>144</sup> is driven away from states serving higher concentrations of students experiencing poverty.

The other related issue is that Title I's provisions determine how federal aid will be allocated based on a state's per-pupil expenditures rather than student need.<sup>145</sup> The amount of Title I funding that a state receives is directly tied to the total funding that it distributed to each of its students during the previous academic

140. *Leveraging Federal Funding*, *supra* note 17, at 243 (discussing the need for federal officials to enforce strict equity standards within and between school districts).

141. No Child Left Behind Act of 2001, Pub. L. No. 107-100, 115 Stat. 1425 (2002).

142. See EDUC. COMM'N OF THE STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 18 (2004), <https://files.eric.ed.gov/fulltext/ED511682.pdf> [<https://perma.cc/H2WZ-LEG2>] (noting that by March 2003, only 55% of states' public schools were on pace to achieve federal mandates around performance and proficiency); see generally Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1754 (2012) (describing the unrealized federal mandates imposed by NCLB) [hereinafter *Civil Rights, Charter Schools*].

143. *Leveraging Federal Funding*, *supra* note 17, at 237.

144. See *id.* at 238 ("[T]he small state minimums provide funds to some states that bear no relation to the number of poor students they serve and, thus, drive funds to small states that more appropriately belong elsewhere."); see also Reber & Gordon, *supra* note 44.

145. 20 U.S.C. § 6576 ("Nothing in this subchapter shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school.").

year.<sup>146</sup> By structuring the distribution of federal funding in this way, the Title I program effectively punishes low-wealth states for their lack of wealth.<sup>147</sup> As Derek Black has observed, “many states fall into two different camps: one with a commitment to equity but no capacity for adequacy, and another with the capacity for adequacy but no commitment to equity.”<sup>148</sup>

Consider the following example. According to the Education Law Center, the state of Arkansas and the state of South Carolina possess two of the nation’s highest rates of poverty among its school-aged population.<sup>149</sup> This designation is at least in part due to each state’s relatively low GDP per capita.<sup>150</sup> Despite their status as low-wealth states, however, recent research has found that South Carolina and Arkansas made a high effort to fund their public schools progressively (that is, according to student need).<sup>151</sup> Yet, “even with [an] above average [funding] effort, [both states] only yield average or below average funding levels.”<sup>152</sup> Consequently, then, instead of rewarding a low-wealth state’s effort to distribute a greater share of its funding to students with the most financial need,<sup>153</sup> the current structure of Title I’s funding provisions rewards the inverse, effectively “penaliz[ing] poor states for being poor and aggravat[ing] inequality between states.”<sup>154</sup>

In light of the foregoing challenges, the Congressional response to the education-based harms of the pandemic achieves the same concerning result that the most recent reauthorization of the Elementary and Secondary Education Act—that is, the Every Student Succeeds Act—achieved: “[i]t removes the federal

146. The Title I program distributes federal education funding through the current reauthorization of the Every Student Succeeds Act (ESSA). All three COVID-19 recovery bills utilize ESSA to allocate funding to meet the educational needs of low-income children. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015); 20 U.S.C. §§ 6311–6339.

147. *Leveraging Federal Funding*, *supra* note 17, at 235 (“[S]tates with low per-pupil expenditures are often those with the least capacity to increase funding. As a group, states with low per-pupil expenditures already tend to tax themselves at higher levels than the states with high per-pupil expenditures. Thus, even if Title I grants were large enough to incentivize additional educational spending, rich states would be the only ones capable of taking advantage.”).

148. *Abandoning the Federal Role*, *supra* note 15, at 1363.

149. See DANIELLE FARRIE & DAVID SCIARRA, MAKING THE GRADE 2020: HOW FAIR IS SCHOOL FUNDING IN YOUR STATE 4 (2020), <https://edlawcenter.org/assets/MTG%202020/Making%20the%20Grade%202020.pdf> [<https://perma.cc/HVV5-49NV>].

150. See *id.* at 10.

151. See *id.*

152. The Education Law Center defines funding effort as “funding allocated to support PK-12 public education as a percentage of the state’s economic activity (GDP).” *Id.* at 2.

153. *Abandoning the Federal Role*, *supra* note 15, at 1362–63 (“Ironically, a few states fund education roughly equally across districts, but the actual funding level itself is relatively low. These states lag far behind the national average in terms of fiscal capacity. They devote a greater percentage of their states’ overall wealth to education, but because they are poor states, their extra effort still generates relatively low levels of education funding. As one study found, the greatest funding inequities are between poor and rich states, not within individual states.”).

154. *Leveraging Federal Funding*, *supra* note 17, at 235.

government from education at the cost of equal education for low-income students.”<sup>155</sup> Although ARP provides vital federal aid in response to the pandemic, removing any meaningful trace of federal oversight of the school recovery effort will undermine equity in both the near- and long-term. Moreover, prior challenges<sup>156</sup> with enforcing equity mandates counsel against the proposition of amending and installing new equity requirements within ARP’s statutory terms.

What is needed, then, is a more feasible legal alternative to protecting education equity after the pandemic. As the following Section demonstrates, overturning *Alexander v. Sandoval* is that alternative. Indeed, by overturning *Sandoval*, future reformers—and particularly low-income litigants of color—will once again be empowered to remedy instances of disparate impact discrimination under Title VI of the Civil Rights Act of 1964. The next Section makes this case.

## V.

### ANALYSIS: THE CASE FOR A PRIVATE RIGHT OF ACTION UNDER TITLE VI

#### *A. Alexander v. Sandoval*

On April 24, 2001, the Supreme Court decided *Alexander v. Sandoval*, a landmark case which held that disparate impact discrimination claims were not enforceable through a private right of action under Title VI of the 1964 Civil Rights Act.<sup>157</sup> In *Sandoval*, the Court considered whether an Alabama policy that provided English-only drivers’ license tests discriminated against non-English speakers on the basis of national origin, thereby violating the disparate impact regulations promulgated by Section 602 of the 1964 Civil Rights Act.<sup>158</sup> In its narrow 5-4 holding, the *Sandoval* Court reasoned that Title VI’s implementing regulations—two operative parts codified within Sections<sup>159</sup> 601 and 602—function as discrete provisions that afford litigants distinctive civil rights protections.<sup>160</sup> Indeed, according to the *Sandoval* Court, Section 601 established that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to [intentional] discrimination”<sup>161</sup> from recipients of federal funds, thereby creating an individual

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155. See *Abandoning the Federal Role*, *supra* note 15, at 1314.

156. See generally *Civil Rights, Charter Schools*, *supra* note 142 (describing the limitations, and subsequent failure, of NCLB’s rigid Congressional mandates); see also *Unlocking the Power*, *supra* note 21 (noting the challenges associated with legislative action as the predominate form of education reform).

157. *Alexander v. Sandoval*, 532 U.S. 275, 285–86, 293 (2001).

158. *Id.* at 279.

159. 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin among federally funded programs).

160. *Sandoval*, 532 U.S. at 285–86, 293.

161. 42 U.S.C. § 2000d.



right enforceable through a private right of action. Section 602, in contrast, created no such right or cause of action.<sup>162</sup>

The Court instead reasoned that Section 602 permitted only federal agencies to promulgate regulations that advance the purpose of Section 601.<sup>163</sup> In the Court's view, Section 601 only prohibited *intentional* discrimination—not disparate impact discrimination—among recipients of federal funding.<sup>164</sup> This is a problem for several reasons.

First, the overwhelming majority of discrimination takes the form of disparate impact discrimination, not intentional discrimination.<sup>165</sup> Among other things, such an overly formalist interpretation of Section 601 sets an impossibly high threshold for litigants seeking to prove the presence of intentional discrimination. Indeed, as Professor Kimberly Jenkins Robinson has observed, since public school officials rarely offer explicit evidence of such racial animus:

[T]he intentional discrimination requirement places a very heavy, sometimes impossible, burden on the plaintiff who has suffered harm. The Court has noted that intentional discrimination is not established when the defendant is merely aware of the negative racial consequences of her or his actions. Instead, a plaintiff must prove that the defendant “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>166</sup>

Second, the *Sandoval* majority leaves a key issue unresolved: how do regulations enacted under Section 602 prohibit activities that are proscribed under Section 601? Although the Court held that no private cause of action exists to enforce Section 602's disparate impact regulations, it did not challenge whether disparate impact regulations themselves were valid. By leaving this key issue unresolved, the Court has created an enduring confusion among commentators as to the distinctive rights afforded in Section 601 and Section 602. On the one hand, discrimination under Section 601, according to the *Sandoval* Court, amounts only to intentional discrimination. On the other, although the purpose of Section 602 is to vindicate “rights already created by [Section] 601,”<sup>167</sup> the Court's logic stands for

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162. § 2000d-1 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section [601] . . . with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.”); *see also Sandoval*, 532 U.S. at 289–92.

163. *Sandoval*, 532 U.S. at 289–92.

164. *Id.* at 280.

165. Robinson, *supra* note 26, at 71 (“Given that modern-day discrimination is overwhelmingly disparate impact discrimination rather than intentional discrimination, it is essential that OCR serves as an effective arbiter for disparate impact claims.”).

166. *Id.* at 68 (footnotes omitted).

167. *Sandoval*, 532 U.S. at 289.

the proposition that discrimination under Section 602 *may* be permitted if it occurs unintentionally. Puzzlingly, the foregoing tension was acknowledged by the Court's majority in a brief footnote: "[H]ow strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601 . . . when § 601 permits the very behavior that the regulations forbid."<sup>168</sup>

Third, and relatedly, the *Sandoval* majority's reasoning undermined the deference principle established in *Chevron v. NRDC*, which affords federal agencies broad discretion in promulgating regulations based on its interpretation of a governing statute.<sup>169</sup> Indeed, in a scathing dissent, Justice Stevens criticized the majority's interpretative inconsistency as contrary to *Chevron*'s deference principle: "In most other contexts, when the agencies charged with administering a broadly worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling."<sup>170</sup> Taken together, then, the *Sandoval* majority not only placed its imprimatur on discrimination that results in disparate effects, but also leaves future funding recipients free to devise purportedly neutral education policies that lead to disparate impact.

Two decades after *Sandoval*, researchers have generated a substantial body of evidence undermining a predicate assumption behind one of the Court's holdings. This Section leverages such evidence to argue that *Sandoval* should be overturned as a matter of stare decisis. Accordingly, by overturning *Sandoval*, future litigants will not only regain the option to privately challenge education policies that produce disparate effects, but also reclaim the power to meaningfully advance educational equity for their children.

### *B. Overturning Sandoval with Stare Decisis*

To overturn statutory or constitutional precedent, the Supreme Court generally must find "special" justification beyond finding that the prior decision was

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168. *Id.* at 286 n.6.

169. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

170. *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting).

wrongly decided.<sup>171</sup> Several “prudential and pragmatic”<sup>172</sup> factors define the scope of this special justification under the Court’s stare decisis analysis. Moreover, each factor allows the Court to overturn its own precedents in order to “foster the rule of law while balancing the costs and benefits of society by reaffirming or overturning a prior holding.”<sup>173</sup> One such factor—which this Article has referred to as the “Changing Circumstances” factor<sup>174</sup>—considers whether the facts surrounding a prior decision have changed such that they “undermine the authoritativeness of [the Court’s] precedent.”<sup>175</sup>

The Court has overturned both constitutional and statutory precedents using stare decisis’s Changing Circumstances factor. Consider the following examples. In light of the economic devastation wrought by the Great Depression, the Court in *West Coast Hotel v. Parrish*<sup>176</sup> overturned its decision in *Adkins v. Children’s Hospital*,<sup>177</sup> which invalidated a state law establishing a minimum wage for women. By upholding a minimum wage for women, the vast societal and factual changes largely engendered by the Great Depression marked the beginning of the end of the *Adkins* era. Decades later, the Court in *Planned Parenthood v. Casey*<sup>178</sup> acknowledged the centrality of the foregoing changes between *Adkins* and *West Coast Hotel*: “[T]he interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimum levels of human welfare.”

More recently, in *South Dakota v. Wayfair*,<sup>179</sup> the Court overturned two prior cases that prevented states from collecting and remitting sales taxes from merchants who engaged in commerce within a given state if they lacked a physical presence within that state. By abrogating the physical presence rule and overturning established precedent, the Court viewed the advent of internet commerce—and the dramatic societal and commercial changes that it engendered—as central

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171. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion) (“[A] decision to overturn should rest on some special reason over and above the belief that a prior case was wrongly decided.”); see generally Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1551–67 (2000) (identifying *Casey* as creating the stare decisis factors). However, in the Court’s recent decision in *Dobbs*, the Court explicitly signaled a willingness to overturn precedent on the grounds that the prior decision was egregiously wrongly decided and rejected the dissent’s contention that changed circumstances were necessary for overturning precedent. See *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 69–70 (U.S. June 24, 2022). While arguably still a strong constraint on the Court’s ability to overturn precedent, after *Dobbs* the Changing Circumstances factor, discussed further in this Section, is not required for the Court to overrule its prior decisions.

172. CONG. RSCH. SERV., *supra* note 30.

173. *Id.*

174. *Id.*

175. *Id.* at 17.

176. 300 U.S. 379, 390 (1937).

177. 261 U.S. 525 (1923).

178. 505 U.S. at 861–62.

179. 138 S. Ct. 2080 (2018).

to its application of *stare decisis*.<sup>180</sup> Put another way, the changed circumstance of internet commerce pushed the Court to overrule precedent and align its jurisprudence with present-day realities.

Among the many predicates informing the Court's reasoning in *Sandoval*, one has evolved so dramatically as to provide the special justification necessary to overturn *Sandoval* as a matter of *stare decisis*. In its narrow 5-4 holding, the *Sandoval* majority declared that the presence of an express provision of a funding cut-off remedy within Title VI "suggests that Congress intended to preclude other [remedies]," like a private right of action.<sup>181</sup> At the time of this writing, however, a robust body of evidence undermines a key assumption animating this holding. That is, although the U.S. Department of Education possesses the statutory authority to terminate funding for Title VI violations, it has exercised this authority just once in the last two years.<sup>182</sup> As a practical matter, moreover, despite the *Sandoval* majority's faith in the availability of this administrative remedy, "the all or nothing nature of such a penalty makes it an unattractive option."<sup>183</sup> Indeed, "[i]f any agency terminated funds because of a single violation, it would at the same time be harming numerous other innocent students because less funds would then be available for their education."<sup>184</sup>

As a political matter, moreover, the foregoing remedy is further belied by the dramatic surge in Title VI complaints in the years following *Sandoval*. In fact, in 2001, the year *Sandoval* was decided, the U.S. Department of Education's Office for Civil Rights (OCR) received a total of 4,571 Title VI complaints nationwide.<sup>185</sup> By 2010, however, the number of discrimination complaints filed with OCR jumped to 6,936—a 51% increase merely nine years after *Sandoval* was decided.<sup>186</sup> By 2019, the number of discrimination complaints filed with OCR soared to nearly 10,000—a 44% increase since 2009, and an increase of more than 115% since 2001.<sup>187</sup>

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180. See *id.* at 2086 ("The Internet revolution has made *Quill*'s original error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace, where the Internet's prevalence and power have changed the dynamics of the national economy.").

181. *Id.*

182. CONG. RSCH. SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 19 n.154 (2019), <https://sgp.fas.org/crs/misc/R45665.pdf> [<https://perma.cc/6MXH-9MEJ>].

183. Derek W. Black, *Picking Up the Pieces After Alexander v. Sandoval: Resurrecting A Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 357 n.7 (2002) [hereinafter *Picking Up the Pieces*].

184. *Id.*

185. U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2004-9 (2003).

186. U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS 10 (2020), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2019.pdf> [<https://perma.cc/Z6YR-X5FL>].

187. *Id.*

Worse still, funding to OCR has not kept pace with this sharp increase in complaints, despite requests that Congress bolster agency funding so OCR can hire the staff needed to handle pending complaints.<sup>188</sup> As a result of such underfunding and understaffing, OCR officials have been inundated with an untenable backlog of pending Title VI complaints. For example, during the year *Sandoval* was decided, OCR reported a backlog of 206 pending Title VI complaints.<sup>189</sup> By 2016, OCR reported a backlog of 11,970 pending Title VI complaints.<sup>190</sup> Accordingly, due to insufficient federal resources and the lack of a litigation threat, decreased Title VI enforcement may drive increased violations “and push the problem toward a vicious cycle.”<sup>191</sup> Given the *Sandoval* Court’s removal of a private right of action, coupled with the administrative challenges involved in enforcing Title VI’s prohibitions, this Article contends that the overturning of *Sandoval* presents education reformers—but particularly low-income litigants of color—with the power to remedy instances of disparate impact discrimination after the pandemic.

### C. Addressing Counterarguments and Giving Effect to Statutory *Stare Decisis*

#### 1. Judicial Protection of Minority Rights

In light of Congress’s failure to meaningfully advance educational equity in the wake of the COVID-19 pandemic, the Supreme Court must overturn its decision in *Alexander v. Sandoval*. Although some have argued that the Court is less likely to overturn statutory precedent than constitutional precedent,<sup>192</sup> this

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188. Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 520 (2016).

189. U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., ANNUAL REPORT TO CONGRESS: FISCAL YEARS 2001 AND 2002 (2002), <https://www2.ed.gov/about/offices/list/ocr/AnnRpt2002/edlite-2002arc-2.html> [<https://perma.cc/89WD-P7Q5>].

190. U.S. DEP’T OF EDUC., *supra* note 186, at 9.

191. *Picking Up the Pieces*, *supra* note 183, at 357 n.7.

192. See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1875 (2008); see also Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 218 (2015) (“[T]he conventional wisdom is that prior interpretations of statutes by federal courts are entitled to ‘super-strong’ stare decisis effect, partly because Congress could amend a statute to override an erroneous or outdated judicial decision.”).

potential limitation is neither absolute<sup>193</sup> nor fatal when one considers the Court's role as counter-majoritarian. On this latter view, the central responsibility of the judiciary is to serve as the counter-majoritarian check on democratic overreach through both its interpretative and adjudicative functions.<sup>194</sup>

Consider the criminal procedure context as an example. Within much of its landmark Fourth and Fifth Amendment jurisprudence, “the Supreme Court has been credited for protecting minority rights from the vagaries of majority will.”<sup>195</sup> Indeed, legal scholars have long viewed the Court's—but particularly the Warren Court's—criminal procedure decisions as “plainly, even aggressively countermajoritarian.”<sup>196</sup> At the center of this “criminal procedure revolution”<sup>197</sup> are *Mapp v. Ohio* and *Miranda v. Arizona*. In both cases, “[t]he Warren Court would buck popular consensus by swinging the federalism pendulum in favor of federal constitutional protections to those suspected of criminal activity.”<sup>198</sup>

Take the protection of LGBTQ+ rights as another example. In *Lawrence v. Texas*, the Supreme Court recognized the right of same-sex couples “to engage in their [sexual] conduct without intervention of the government.”<sup>199</sup> As Lawrence Sager has explained, the Court in *Lawrence* did not “bend to the chore of aligning

193. See Daniel R. Suhr & Kevin LeRoy, *The Past and the Present: Stare Decisis in Wisconsin Law*, 102 MARQ. L. REV. 839, 856 (2019) (“[W]hether a court will adhere to stare decisis in a given case is unpredictable. The courts describe the doctrine explicitly as a ‘principle of policy’; it represents a judicial policy judgment that stability is more important than [sic] correctness in law. So, under the current approach, courts are overtly guided by ‘principle[s] of policy,’ not the ‘inexorable command[s]’ of the law. This inevitably—that is, by design—leads to courts making policy decisions, weighing arguments about reliance interests or workability, rather than assuming the age-old task of declaring what the law is. So since policy—not strict law—is at play, ‘[e]ach suggestion that [a] case[ ] must be overturned must be scrutinized *individually*,’ meaning the decision to overturn precedent in one case is unlikely to meaningfully assist in deciding whether to overturn precedent in a different case.”) (footnotes omitted) (first quoting *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, ¶ 97, 264 Wis. 2d 60, 665 N.W.2d 257; and then quoting *State v. Denny*, 2017 WI 17, ¶ 71, 373 Wis. 2d 390, 891 N.W.2d 144); see also C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 40 (1990) (“Stare decisis has never been an inexorable command in the American system; courts have always been willing to overrule under the proper circumstances.”); see generally Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197 (2014).

194. See Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 355 (1997) (“The courts possess a unique institutional ability and obligation to protect individual rights against majoritarian intrusion.”); see also Michael J. Klarman, *Bush v. Gore: Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1750 (2001) (identifying *Miranda* as a key Supreme Court decision that found support among less than half of Americans at the time).

195. Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365, 395 (2009).

196. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54 (1997).

197. Joseph L. Hoffman, *Substance and Procedure in Capital Cases: Why Federal Habeas Corpus Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1782 n.57 (2000).

198. Ronald J. Bacigal, *The Federalism Pendulum*, 98 W. VA. L. REV. 771, 782 (1996).

199. 539 U.S. 558, 578 (2003).

its judgment with the process of democratic choice.”<sup>200</sup> To the contrary, “[w]hen the claims of John Geddes Lawrence and Tyron Garner were presented to the [*Lawrence*] Court, what mattered was not the number of electoral votes that sponsored them.”<sup>201</sup> Accordingly, given the status of public K-12 education as a first-order, substantive right codified within all 50 state constitutions, the Court’s role as counter-majoritarian is paramount even when a statutory measure indirectly imperils this right.<sup>202</sup>

Similarly, although statutory precedents often enjoy a “super strong presumption of correctness” relative to their constitutional and common law counterparts,<sup>203</sup> this heightened presumption is normatively undesirable when children’s interests are implicated. Indeed, if the Court fails to overturn *Sandoval* as a matter of stare decisis, then the most vulnerable children and families within our public schools will be left with virtually no remedy to vindicate their civil and education rights. This would ultimately undermine the original purpose of Title VI, which is further discussed in the following Subpart.

In sum, the foregoing devolution of disparate impact enforcement renders students—though, to be sure, disproportionately low-income students of color—reliant on a political process that has failed to remedy facially neutral education policies that produce discriminatory effects. This failure has only worsened in the years following *Sandoval*, as “[a]ttorneys and investigators in the civil rights office have seen their workloads double since 2007, and the number of unresolved cases mushroom.”<sup>204</sup>

## 2. *Affirming Title VI’s Congressional Purpose*

By denying children and families of this remedy, the *Sandoval* decision also undermined Title VI’s original purpose. To keep *Sandoval* in place, then, would be to undermine Title VI’s core purpose by allowing “[f]ederally funded entities . . . to racially discriminate by distributing funds in a manner that simply *resulted in* discrimination on the basis of race, so long as the funds were not expressly distributed on the basis of race in the first instance.”<sup>205</sup> And given that the

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200. LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES* 223–24 (2004).

201. *Id.* at 224.

202. See Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1418 (2018) (noting that since elementary and secondary education is a constitutionally protected, first-order right in all 50 states, “states lack the authority to directly or indirectly resist” vindicating these rights).

203. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (noting that “[s]tatutory precedents . . . often enjoy a super-strong presumption of correctness”).

204. Lyndsey Layton, *Civil Rights Complaints to U.S. Department of Education Reach a Record High*, WASH. POST (Mar. 18, 2015, 6:08 PM), <https://www.washingtonpost.com/news/local/wp/2015/03/18/civil-rights-complaints-to-u-s-department-of-education-reach-a-record-high/> [https://perma.cc/Q2SJ-4Z2C].

205. Matthew D. O’Neill, *Searching for Enforcement: Title VI Regulations and Section 1983*, 61 U. KAN. L. REV. 787, 814 (2013).

predominate form of discrimination today is disparate impact—not intentional—discrimination, as described above,<sup>206</sup> it is imperative that *Sandoval* be overturned to once again align Title VI with its original purpose of rooting out state-subsidized discrimination within federally funded programs. Indeed, Senator John Pastore—a key drafter of the 1964 Civil Rights Act—explicated the animating spirit of Title VI in plain terms: “Title VI intends to insure once and for all that the financial resources of the Federal Government—the common wealth of Negro and white alike—will no longer subsidize racial discrimination.”<sup>207</sup>

The failure to overturn *Sandoval* would not only undermine Title VI’s original purpose, but also contradict the Court’s recent majority opinion in *Ramos v. Louisiana*.<sup>208</sup> Indeed, the Court in *Ramos* overturned *Apodaca v. Oregon*—a 1972 Supreme Court decision that permitted criminal convictions based on non-unanimous jury verdicts—with *stare decisis*’s Changing Circumstances factor.<sup>209</sup> The Court reasoned that its decision in *Apodaca* had failed to consider “the racist origins”<sup>210</sup> of non-unanimous jury laws that had been brought to bear in the intervening years. Yet it is Justice Kavanaugh’s concurring opinion in *Ramos* that demands careful attention. There, Justice Kavanaugh noted that, to overturn Court precedent, the prior case must be found to be “not just wrong,” but “egregiously wrong based on later legal or factual understandings.”<sup>211</sup>

Perhaps more importantly, at least for the purposes of this Article, Justice Kavanaugh identified a second, related inquiry that the Court may conduct before overturning its own precedents: to overturn a prior case, on Justice Kavanaugh’s view, the Court must determine whether “the prior decision caused significant negative jurisprudential or real-world consequences.”<sup>212</sup> Although this second inquiry attempts to refine the Court’s traditional understanding of the Changing Circumstances factor, Justice Kavanaugh’s normative honing supports the central

206. Robinson, *supra* note 26.

207. See Pastore Says Nation Must Halt ‘Subsidizing’ of Discrimination; Defends Rights Bill Section Barring Federal Funds to Segregated Programs, N.Y. TIMES (Apr. 8, 1964), <https://www.nytimes.com/1964/04/08/archives/pastore-says-nation-must-halt-subsidizing-of-discrimination-defends.html> [<https://perma.cc/45D4-LVR2>].

208. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (noting—when overturning *Apodaca v. Oregon* to hold that the Sixth Amendment’s right to a jury trial requires a unanimous verdict in order to convict a defendant of a serious crime—that “*stare decisis* has never been treated as an inexorable command”).

209. *Id.* at 1405–07.

210. *Id.* at 1417 (Kavanaugh, J., concurring); see generally Thomas Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1611–20 (2019) (noting the racist motivations for establishing non-unanimous juries).

211. *Ramos*, 140 S. Ct. at 1415.

212. *Id.* Although Justice Kavanaugh seemed to cabin both inquiries to controversies involving only constitutional precedents, Justice Roberts obscures this distinction between constitutional and statutory precedents in his concurring opinion’s treatment of statutory precedent in *South Dakota v. Wayfair*. Writing in dissent, he opined that the Court has “said that ‘the burden borne by the party advocating the abandonment of an established precedent’ is ‘greater’ than usual.” *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2101 (2018) (Roberts, J., dissenting) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).



thesis that this Article advances. In other words, Justice Kavanaugh’s attempt to confine its special justification inquiry to decisions that would engender “negative . . . real-world consequences” would still fail to exclude future education claimants. To the contrary, as demonstrated by a large body of research, the negative, real-world consequences of an uneducated or undereducated citizenry are legion.<sup>213</sup> As a result, failing to overturn *Sandoval* due to stare decisis would contradict the logic recently advanced by Justice Kavanaugh in *Ramos*.

Accordingly, this Article argues for the overturning of *Sandoval*.<sup>214</sup> In so doing, future litigants will likely achieve two interrelated goals. First, overturning *Sandoval* will revive the specter of litigation as a tool of enforcement.<sup>215</sup> Second, if the threat of litigation alone fails to prevent such disparate impact discrimination, low-income students of color would no longer be forced to rely on mercurial political winds to receive a substantively equal educational opportunity.<sup>216</sup> Instead, overturning *Sandoval* not only restores a private right of action under Title VI, but also adds an arrow of empowerment to parents’ collective quiver to challenge such discrimination directly.

## VI.

### CONCLUSION

As Professor Kimberly Jenkins Robinson has observed, once the *Sandoval* Court “closed the courthouse door to plaintiffs seeking to remedy disparate impact discrimination . . . the only remaining avenue to challenge education policies and practices that impose a disparate impact lies with the [U.S. Department of Education’s] Office for Civil Rights (OCR).”<sup>217</sup> Yet the Department has been historically unable to consistently remedy violations of Title VI through the termination

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213. See Sylvia Allegretto, Emma García, & Elaine Weiss, *Public Education Funding in the U.S. Needs an Overhaul*, ECON. POL’Y INST. (July 12, 2022), <https://files.epi.org/uploads/233143.pdf> [<https://perma.cc/9SQ8-SADV>] (“Substantial evidence points to the positive effects of higher spending on both short- and long-term student outcomes, as well as on schools overall and on adult outcomes.”); see generally *Leveraging Federal Funding*, *supra* note 17, at 233–38. Cf. BRUCE D. BAKER, ALBERT SHANKER INST., DOES MONEY MATTER IN EDUCATION? i (2019), <https://www.shankerinstitute.org/resource/does-money-matter-second-edition> [<https://perma.cc/LYJ8-4XVF>] (describing how recent research suggests that substantively equal school funding maintains a strong, positive relationship with important school conditions, including “smaller class sizes, additional supports, [and] early childhood programs”).

214. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1175 (2006) (noting that, while the doctrine of stare decisis “seeks to preserve stability,” it also “must leave room for innovation and correction of error”).

215. See *Leveraging Federal Funding*, *supra* note 17, at 244 (“The specter of litigation has always been instrumental in prompting reluctant—and even recalcitrant—school districts to voluntarily comply with the law.”).

216. See Michael A. Rebell, “Meaningful” Educational Opportunity, & the Necessary Role of the Courts, 85 N.C. L. REV. 1467, 1540 (2007) (stating that “precisely because state legislatures and executive agencies overseeing school districts have at times failed to ensure the effective use of education funds, and the targeting of resources to the students with greatest needs, courts need to become more—not less—active at the remedy stage of . . . litigation[.]”).

217. Robinson, *supra* note 26, at 71.

of a violator's federal funding. With the arrival of COVID-19, moreover, the need for alternative methods of meaningfully advancing educational equity—and, by extension, vindicating the education rights of future plaintiffs—could not be greater.<sup>218</sup> In sum, given the significant practical and political changes that have developed in the decades following *Sandoval*, this Article contends that overturning *Sandoval* as a matter of stare decisis serves as the most feasible alternative to advance educational equity in a meaningful way. If the Roberts Court's recent appetite for granting review in such cases is any indication, moreover, then future litigants are well-positioned to achieve the foregoing reforms.<sup>219</sup>

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218. Bradford Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 363 (2001) (describing complainant's limited rights under Title VI).

219. See Tejas N. Narechania, *Certiorari in Important Cases*, COLUM. L. REV. (forthcoming) (manuscript at 10) (available at <http://dx.doi.org/10.2139/ssrn.3931162>) (“The Roberts Court, for example, seems to favor granting review in cases that invite the Court to overturn precedent.”); see also Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 160 (2018) (noting that the current Court's textualists “regularly are willing to overturn statutory precedents”).