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Education Inequality During COVID-19: How Remote Learning Is Widening the Achievement Gap and Spurring the Need for Judicial Intervention

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EDUCATION INEQUALITY DURING COVID-19: HOW REMOTE LEARNING IS WIDENING THE ACHIEVEMENT GAP AND SPURRING THE NEED FOR JUDICIAL INTERVENTION

Abstract: Remote learning during the COVID-19 pandemic (COVID-19) disrupted nearly every student's life and will cause immense learning losses. Low-income students and students of color are the most likely to be in online classes, yet the least likely to have necessary resources to succeed in a remote school environment. Studies show that the COVID-19 pandemic has and will continue to worsen the racial and socio-economic achievement gap in education. As a result, two groups of parents in California filed class action lawsuits alleging that the State of California and the Los Angeles Unified School District respectively failed to provide a basic education to students of color in impoverished neighborhoods since the school closures in spring 2020. Following the United States Supreme Court's seminal ruling in *Brown v. Board of Education* in 1954, education litigation has slowly progressed under State constitutions towards recognizing an affirmative duty for States to provide a free and equal education. The Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* in 1963 solidified that the federal Constitution does not guarantee an equal public education for all citizens. As such, since the federal Constitution does not guarantee the right to public education, but all state constitutions do, the citizens of California and other states must use their state constitution to enforce the constitutional guarantee of a free and equal education. During the Pandemic, California's remote learning plan has disproportionately affected low-income students of color, while privileging students in wealthier districts. This Note contends that both class action complaints sufficiently allege an equal protection violation, spurring the need for judicial intervention, and providing a model for future litigants in other states. The courts, therefore, should advise the legislature to adopt a plan that accounts for the lost learning time and ensures the most disadvantaged students receive a meaningful education during and post COVID-19.

INTRODUCTION

In the fall of 2020, in Oakland, California, eight-year-old twins Cayla and Kai's average day in third grade consisted of a forty-five-minute remote class in the morning, a thirty-minute small group video conference in the afternoon, and a four-hour period to learn on their own with an agenda provided by their

teacher.¹ In the spring of 2020, the twins fared even worse, with only two classes being conducted from March to the end of the term.² Unsurprisingly, these students are now struggling with basic math concepts like subtraction, which the students were expected to master in the second grade.³ Their mother, Angela, in addition to working three jobs, has tried unsuccessfully to communicate with the school and the teachers for guidance and supplementary materials to make up for the lost learning time.⁴ Her family, like many low-income families and families of color, feel completely abandoned by the public education system during the pandemic.⁵

The United States will be reckoning with the disruption of the COVID-19 pandemic for years to come, but there is one situation that requires immediate attention—that remote learning is exacerbating the racial and socio-economic achievement gap.⁶ The achievement gap is an educational phenomenon where students of color and students from disadvantaged backgrounds consistently perform worse than white students academically due to disparate opportunities both in and outside of the classroom.⁷ Due to America’s long history of racial

¹ Complaint for Injunctive and Declaratory Relief at 7, *Cayla J. v. State*, No. RG20084386 (Cal. Super. Ct. filed Nov. 30, 2020) [hereinafter *Cayla J. Complaint*]. Student plaintiffs filed the class action complaint in the Superior Court in Alameda County in November 2020 to challenge the State of California’s learning plan and response during COVID-19. *See id.* at 1, 3, 63. Student plaintiffs, including Cayla and Kai, seek increased resources, support, live-learning time, and a plan to make up for the learning losses that have already accumulated from the pandemic. *Id.* at 61–62.

² *Id.* at 6. Another twelve-year-old plaintiff, Matthew, resides with his brother and single mother, who was forced to take an extended period off from work to care for her sons, causing significant financial troubles. *Id.*

³ *Id.* at 7.

⁴ *Id.* at 6–7. Additionally, she has received no support in learning how to navigate the online learning software that her daughters switched to in the fall. *Id.* at 7. In the spring of 2020, Angela’s youngest daughter, Ellori, had two very involved kindergarten teachers who facilitated an easy transition to remote learning by instructing Angela to use the platform on video chat and communicating with parents through text messaging and email. *Id.* at 8. Ellori’s first grade teacher in the 2020–2021 school year has not been as responsive or involved, as she has thirty-three students in her class. *Id.* Angela taught herself how to navigate the platform used in the twin’s classroom in the spring of 2020, but when the school implemented a new and more complicated platform in the fall, she received no support. *Id.* at 7.

⁵ *Id.* at 6. *See generally* WORTH MORE LA, <https://worthmorela.org/> [<https://perma.cc/W8TK-RLJE>] (explaining how parents and members of the Los Angeles community banded together to challenge the district’s remote learning plan after seeing their children struggle and receiving no support from the schools).

⁶ *See* Ember Smith & Richard V. Reeves, *How We Rise: Students of Color Most Likely to Be Learning Online: Districts Must Work Even Harder on Race Equity*, BROOKINGS (Sept. 23, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/09/23/students-of-color-most-likely-to-be-learning-online-districts-must-work-even-harder-on-race-equity/> [<https://perma.cc/LX9Z-Z37R>] (describing that although school looks different for most students, data predict that students of color will be adversely affected by remote learning at an increased rate, likely expanding the achievement gap).

⁷ *See* Andy Porter, *Rethinking the Achievement Gap*, PENN GSE NEWS, <https://www.gse.upenn.edu/news/rethinking-achievement-gap> [<https://perma.cc/4LRB-2WDR>] (describing how the gap in academic performance between white students and students of color appears before kindergarten, has

oppression, Black and Hispanic families are more likely to live in urban areas burdened by higher COVID-19 infection rates, leading those districts to hold courses remotely.⁸ Consequently, students of color disproportionately reside in school districts that conduct remote-only classes.⁹ Yet, because these students are often from low-income families, their parents cannot stay home from work, pay for childcare, or provide reliable Internet or computer access.¹⁰ There is, furthermore, evidence that remote learning will have the harshest effects on the districts with the lowest historical test scores and fewest resources.¹¹

Around the one-year anniversary of mass school closures, two coalitions filed class action lawsuits in California to force lawmakers and public school officials to address that the state's most disadvantaged students were being deprived of an education during COVID-19.¹² A group of parents filed the first

persisted since the 1960s, and how meaningful reform in the classroom includes targeted interventions for Black students that outpace the trend of white students' general improvement).

⁸ See Maria Godoy & Daniel Wood, *Coronavirus by the Numbers: What Do Coronavirus Racial Disparities Look Like by State?*, NPR (May 30, 2020), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state> [<https://perma.cc/6MKN-6YWG>] (explaining how “[c]ommunities of color” have experienced the harshest effects of COVID-19). One study in Chicago illustrated how the rate of COVID-19 deaths was much higher in the parts of the city with a mostly Black population due to “increased levels of social vulnerability and other risk factors.” Sage J. Kim & Wendy Bostwick, *Social Vulnerability and Racial Inequality in COVID-19 Deaths in Chicago*, 47 HEALTH EDUC. & BEHAV. 509, 509 (2020). The authors explored how certain catastrophic events, such as a pandemic, affect communities differently based on their social, political, and economic situation. See *id.* (“The disproportionate effects of COVID-19 in African American communities are a reflection of racial inequality and social exclusion that existed before the COVID-19 crisis.”).

⁹ See Smith & Reeves, *supra* note 6 (using data from nine hundred school districts and population density statistics to accurately predict that in the fall of 2020 two thirds of students of color lived in a district conducting remote-only learning as opposed to an in-person or hybrid model).

¹⁰ See *id.* (describing the disproportionate burden faced by families of color during the pandemic and how those unique needs should be addressed in conjunction with remote learning plans).

¹¹ *Id.*; see Zachary Parolin & Emma K. Lee, *Large Socio-economic, Geographic, and Demographic Disparities Exist in Exposure to School Closings and Distance Learning*, 5 NATURE HUM. BEHAV. 522, 522–28 (2021) (examining how “large disparities in exposure to distance learning that threaten to exacerbate regional, racial, and class-based divides in educational performance”); Jason DeParle, *Disadvantaged Students More Likely to Be Learning Remotely, Study Finds*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/12/24/us/remote-learning-student-income.html?searchResultPosition=3> [<https://perma.cc/ZA3D-J2LT>] (citing Columbia University and the Brookings Institution studies, and discussing the struggles that families of color faced during COVID-19).

¹² See N’dea Yancey-Bragg, *Families Sue California, Claiming State Failed to Educate Poor and Minority Students Amid Pandemic*, USA TODAY, <https://www.usatoday.com/story/news/education/2020/12/01/california-families-sue-remote-learning-inequities-coronavirus/3780771001/> [<https://perma.cc/542G-VBRK>] (Dec. 1, 2020, 5:40 PM) (explaining that several families of color from Oakland and Los Angeles are suing the State of California, its Board of Education, and the Los Angeles Unified School District’s Superintendent); Amy Taxin, *Parents Sue Over Distance Learning in Los Angeles*, NBC L.A. (Sept. 24, 2020), <https://www.nbcalosangeles.com/education/parents-sue-over-distance-learning-in-los-angeles/2433700/> (writing that parents and two non-profit organizations brought claims against the Los Angeles Unified School District (LAUSD) for “failing to engage their children online at the same rate as other large California school districts”).

class action complaint in September 2020 in the Los Angeles Superior Court, alleging that the Los Angeles Unified School District (LAUSD)'s remote learning plan denied their children a basic education and exacerbated pre-existing educational inequities.¹³ A different group of students filed the second class action complaint in the Superior Court in the County of Alameda in November 2020, challenging the State of California and its Board of Education's failure to provide any form of education that meets minimal standards for vulnerable students.¹⁴

This Note analyzes why both complaints in California, and future litigants in other states, can successfully assert that remote learning has disproportionately impacted students of color and thus those in charge of public education have discriminated against low-income students in violation of the state's constitution.¹⁵ To remedy this potential constitutional violation, the courts should direct the legislature to enact a remote learning plan that accounts for the needs of the state's most disadvantaged students.¹⁶ This plan should include a summer or after-school program to make up for lost learning time, involve community organizations and parents who can best advocate for students' needs, mandate a certain amount of live instruction and student engagement, and provide basic resources—including WIFI.¹⁷

¹³ See First Amended Class Action Complaint for Injunctive and Declaratory Relief at 1, Shaw v. L.A. Unified Sch. Dist., No. 20STCV36489 (Cal. Super. Ct. filed Sept. 24, 2020) (discussing how Black and Latino students in the LAUSD were severely underperforming compared to their white peers before the pandemic began) [hereinafter Shaw Complaint]. Plaintiff Vicenta Martinez's daughter had zero remote instruction time during the spring of 2020, which her school never addressed, and in the fall of 2020, she received only 25% of normal instruction time. *Id.* at 2.

¹⁴ See Cayla J. Complaint, *supra* note 1, at 1, 61 (alleging that the LAUSD's remote learning plan disproportionately harmed Black and Hispanic students).

¹⁵ See *Butt v. State*, 842 P.2d 1240, 1249 (Cal. 1992) (explaining how California's constitution protects the right to an education although the federal Constitution does not). The California judiciary will intervene when there are disparities in public education whether the State intended to discriminate or not. See *id.* (finding *de facto* segregation, or unintentional segregation, violates the state constitution). The California court previously found that students' equal protection rights would be violated if one district implemented its proposal to end the school term six weeks early and the State had not intervened. *Id.* at 1256.

¹⁶ See Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1527 (2007) (discussing that education litigation in state courts has led to significant reform). In *Butt*, the Supreme Court of California upheld the lower court's order for the State to issue a loan to the school district to keep the school open for the full term and to suspend the school board, so that the State could oversee the successful operation of the district. 842 P.2d at 1240.

¹⁷ See Cayla J. Complaint, *supra* note 1, at 62 (asking for Internet access, a mandated amount of live instruction, the inclusion of parents and community organizations, and "[c]ompensatory education to remediate the learning losses"); *A P-12 Education Agenda in Response to COVID-19*, EDUC. TRUST (Apr. 15, 2020), <https://edtrust.org/resource/a-p-12-education-agenda-in-response-to-covid-19/> [<https://perma.cc/U9BG-TRLM>] (describing the Education Trust's suggested goals and criteria, including creating an online multi-lingual platform to communicate with parents and the community,

Part I of this Note examines the educational inequality that existed before the pandemic, COVID-19's impact on communities of color, and the likelihood that the pandemic's disparate impact widens the achievement gap.¹⁸ Part I also previews the history of educational equity litigation at the federal and state level.¹⁹ Part II discusses the relevant case law in California and introduces the two class action complaints filed in the state as a case study for future COVID-19 education litigation.²⁰ Part II also analyzes the merits of the two complaints' equal protection claims and finds that claims of this nature brought under a state constitution have a chance of surviving the pleadings stage.²¹ Part III advocates for robust judicial intervention to remedy this constitutional violation and urges the legislature and individual school districts to enact a plan that provides additional resources and support to low income students and students of color who have been disproportionately impacted by COVID-19 and the remote learning crisis.²²

I. EDUCATIONAL INEQUALITY: WHERE WE STAND AND HOW WE GOT HERE

Although universal access to public education is heralded as “the great equalizer” of the nation, the United States has increasingly become the most unequal developed nation in the world.²³ A person's future success is largely dependent on their zip code, and where that person lives is likely dependent on their race, ethnicity, and wealth.²⁴ In fact, data from the 2019 Survey of Con-

aimed at influencing federal and state attribution of resources and support for students during COVID-19).

¹⁸ See *infra* notes 23–62 and accompanying text.

¹⁹ See *infra* notes 63–111 and accompanying text.

²⁰ See *infra* notes 112–167 and accompanying text.

²¹ See *infra* notes 168–200 and accompanying text.

²² See *infra* notes 201–253 and accompanying text.

²³ See David Rhode, Kristina Cooke & Himanshu-Ojha, *The Decline of the ‘Great Equalizer,’* THE ATLANTIC (Dec. 19, 2012), <https://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455/> [<https://perma.cc/9QLY-88YU>] (discussing how Massachusetts is one of the most educated states, but also has one of the highest growing rates of wealth inequality); see also Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/#:~:text=Across%20income%20groups%2C%20U.S.%20adults,right%20amount%20of%20economic%20inequality> [<https://perma.cc/BMB7-BB7W>] (describing how, of the G7 nations, the rate of income inequality is the highest in the United States).

²⁴ See Greg Kaufmann, *Why Achieving the American Dream Depends on Your Zip Code*, TALK POVERTY (Dec. 17, 2015), <https://talkpoverty.org/2015/12/17/american-dream-zip-codes-affordable-housing/> [<https://perma.cc/GS2P-YNPK>] (discussing a report from the Center for American Progress that illustrates that race and ethnicity often predetermines one's housing situation); DAVID SANCHEZ, TRACEY ROSS, JULIA GORDON, SARAH EDELMAN, MICHELA ZONTA & ANDREW SCHWARTZ, CTR. FOR AM. PROGRESS, AN OPPORTUNITY AGENDA FOR RENTERS 4 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/12/16050037/LowIncomeRenters-report1.pdf?_ga=2.204598864.1945268578.1610310029-152599998.1610310029 [<https://perma.cc/2RRR-RYXC>] (describing

sumer Finances suggests that, on average, a white family holds eight times more financial resources than a Black family and five times more financial resources than a Hispanic family.²⁵

This staggering disparity in wealth corresponds with educational achievement statistics for students of color and white students.²⁶ The compounding factors of race and wealth, particularly in urban areas, are predictors of success and educational achievement.²⁷ For instance, in New York City in 2014, 40% of white male graduates were prepared for college level work, compared to 11% of Hispanic male graduates, and only 8% of Black male graduates.²⁸ Income and educational inequality reinforce each other by ensuring that children who grow up low-income households are less likely to attain higher educational degrees, which, in turn, makes them more likely to remain in poverty.²⁹ Because students of color are more likely to live in impoverished urban neighborhoods as a result of racist housing policies and the United States' history of segregation,³⁰ Black and Hispanic students are more likely to be enrolled in

the rate of families who reside in "high-poverty neighborhoods" and how those rates are substantially higher for Black families).

²⁵ See Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/4Q3Z-HLE6>] (consolidating data from the 2019 Survey of Consumer Finances and reporting average household wealth broken down by race).

²⁶ See Sean F. Reardon, *School Segregation and Racial Achievement Gaps*, RUSSELL SAGE FOUND. J. SOC. SCIS., Sept. 2016, at 34, 50–51 (describing the prevalence of poverty among Black and Hispanic students and explaining how the ensuing racial concentration in high-poverty schools is linked to academic performance).

²⁷ See *id.* at 51 (finding that students of color, when concentrated in schools with a high poverty rate, perform the worst on standardized tests out of any other socio-economic group).

²⁸ Corydon Ireland, *The Costs of Inequality: Education's the One Key That Rules Them All*, HARV. GAZETTE (Feb. 15, 2016), <https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-educations-the-one-key-that-rules-them-all/> [<https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-educations-the-one-key-that-rules-them-all/>].

²⁹ See Rhode et al., *supra* note 23 (describing how high-paying jobs are increasingly requiring higher degrees that are becoming more unaffordable). In Massachusetts, for example, in the area around the affluent town of Weston, around 67% of adult residents obtained at a minimum a bachelor's degree compared to the area around Gardner, where only 23% of adult residents had a college degree. *Id.* In 2009, adults in Weston made twelve times more than the average adult in Gardner. *Id.* Furthermore, the high school in Weston sent 96% of graduates to a four-year university, while only half of Gardner high school graduates went on to a four-year university. *Id.* ("An American with a bachelor's degree earns on average about \$1 million more over a lifetime than one with just some college, according to recent studies.").

³⁰ See Sonya Ramsey, *The Troubled History of American Education After the Brown Decision*, ORG. OF AM. HISTORIANS (Feb. 2017), <https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/> [<https://perma.cc/SZTK-5GYK>] (describing the lasting impacts of Jim Crow segregation and how the rise in suburbs after WWII, coupled with racist housing policy, contributed to segregated schools and neighborhoods).

schools with the highest rates of low-income students, contributing to their lag in academic achievement.³¹

Section A of this Part discusses the devastating impact that COVID-19 has had on communities of color, providing context for the two class action complaints in California and the state of education in all states.³² Section B gives an overview of education jurisprudence at the federal level to illustrate where the concept of equality in education comes from and how federal courts eventually limited their role in enforcing it.³³ Section C concludes by discussing education litigation at the state level, which is the judicial forum used by most student and parent plaintiffs today.³⁴

A. The Harsh Impacts of COVID-19 in Communities of Color

COVID-19 has disproportionately harmed people of color in the United States; the death rate is the highest among the Black population, followed by the Indigenous population, and then the Hispanic population.³⁵ White Americans, therefore, are the least likely to die from COVID-19.³⁶ There are a multitude of explanations for this disparity, including that people of color make up the majority of essential workers in several industries,³⁷ more often reside in urban neighborhoods and in multigenerational or multi-family housing, more regularly use public transportation, and experience comorbidities at a higher rate due to systemic racism in medicine and public health efforts.³⁸

³¹ See Sean F. Reardon, Ericka S. Weathers, Erin M. Fahle, Heewon Jan & Demetra Kalogrides, *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps*, (Ctr. for Educ. Pol’y Analysis, Working Paper No. 19-06, 2019), <https://cepa.stanford.edu/sites/default/files/wp19-06-v092019.pdf> [<https://perma.cc/F7HD-77FR>] (describing how minority students are more likely to attend a “high-poverty school[,],” so rates of racial segregation correlate with the quality of the school).

³² See *infra* notes 35–62 and accompanying text.

³³ See *infra* notes 63–90 and accompanying text.

³⁴ See *infra* notes 91–111 and accompanying text.

³⁵ See Júlia Ledur, *The COVID Racial Data Tracker*, COVID TRACKING PROJECT, <https://covidtracking.com/race> [<https://perma.cc/7LZ6-C3DS>] (Mar. 7, 2021) (citing 178 deaths per one hundred thousand Black people, 172 deaths per one hundred thousand American Indian or Alaskan Native people, 154 deaths per one hundred thousand Hispanic people, and 124 deaths per one hundred thousand white people in the United States as of March 7, 2021). From the data gathered that recorded race, 15% of all people who died from COVID-19 were Black. *Id.*

³⁶ See *id.* (comparing 178 deaths per one hundred thousand Black people with 124 deaths per one hundred thousand for white people).

³⁷ See Celine McNicholas & Margaret Poydock, *Who Are Essential Workers?: A Comprehensive Look at Their Wages, Demographics, and Unionization Rates*, ECON. POL’Y INST. (May 19, 2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/> [<https://perma.cc/4TK4-A43M>] (explaining how 50% of the essential workers in the food and agriculture industry are people of color, as well as over 50% of the essential workers in industrial and commercial services).

³⁸ See Wei Li, *Racial Disparities in COVID-19*, SCI. IN THE NEWS (Oct. 24, 2020), <http://sitn.hms.harvard.edu/flash/2020/racial-disparities-in-covid-19/> [<https://perma.cc/UGK5-EFGW>] (explor-

The unprecedented nature of the pandemic and corresponding mass school closures brought a host of challenges and competing interests for educators, parents, and students alike.³⁹ But the lasting impact of this pandemic and the disruption in education will likely harm poor minority students the most.⁴⁰ Since the lockdown in March 2020, numerous studies demonstrate that socio-economically disadvantaged students are more likely to experience the negative impacts of remote learning due to a lack of resources at home and a lack of support from their schools.⁴¹ This phenomenon will likely exacerbate the pre-existing achievement gap.⁴²

Although nearly every state mandated or recommended that schools close in the spring of 2020, the 2020–2021 school year brought varying plans and procedures across states and districts for in-person learning.⁴³ In fact, in Octo-

ing the root causes of the disproportionate effects of COVID-19 on people of color). A comorbidity is a “health condition[] that increase[s] the risks following [an] infection.” Richard V. Reeves & Faith Smith, *Black and Hispanic Americans at Higher Risk of Hypertension, Diabetes, Obesity: Time to Fix Our Broken Food System*, BROOKINGS (Aug. 7, 2020), <https://www.brookings.edu/blog/up-front/2020/08/07/black-and-hispanic-americans-at-higher-risk-of-hypertension-diabetes-obesity-time-to-fix-our-broken-food-system/> [<https://perma.cc/L7J6-5MTU>]. For example, diabetes, which worsens the outcomes of COVID-19, affects 14% of Hispanic men and 12% of Hispanic women, and 11% of Black men and 12% of Black women, compared to 9% of white men and 7% of white women. *Id.* Diabetes is also linked to obesity. *Id.* Studies have shown that people who experience food insecurity or live in food deserts are at an increased risk of obesity and Black and Hispanic families are more likely to experience food insecurity. Ingrid Wright, *Those with Inadequate Access to Food Likely to Suffer from Obesity*, SCIENCEDAILY (Jan. 23, 2019), <https://www.sciencedaily.com/releases/2019/01/190123144522.htm> [<https://perma.cc/H75Y-P3MV>]. A food desert is place in which access to healthy, fresh produce and foods is restricted due to confounding factors of poverty, population density, and transportation. Jessica Caporusio, *What Are Food Deserts and How Do They Impact Health?*, MED. NEWS TODAY (June 22, 2020), <https://www.medicalnewstoday.com/articles/what-are-food-deserts> [<https://perma.cc/9Z54-FPZJ>].

³⁹ See Dana Goldstein & Eliza Shapiro, *Teachers Are Wary of Returning to Class, and Online Instruction Too*, N.Y. TIMES, <https://www.nytimes.com/2020/07/29/us/teacher-union-school-reopening-coronavirus.html> [<https://perma.cc/2MQ6-L7H2>] (Aug. 13, 2020) (describing how teachers’ unions fought for virtual school and fewer required hours of live interaction, while parents split on whether they wanted their children to return to in-person school).

⁴⁰ See Smith & Reeves, *supra* note 6 (gathering data that show white students are far less likely than students of color to live in a remote-only district, and arguing that, without immediate action, this could worsen the current racial achievement gap).

⁴¹ See *id.* (citing studies showing that students of color are most likely to be remote learning, and citing a study showing that 4% of white students do not have Internet access, compared to 10% of Black students and 9% of Hispanic students); DeParle, *supra* note 11 (discussing the evidence gathered by Columbia University that demonstrates the likelihood of an expanding achievement gap due to remote learning).

⁴² See DeParle, *supra* note 11 (arguing that the most disadvantaged students who performed at the lowest levels pre-pandemic will likely experience increased learning loss due to the difficulties of navigating remote learning and a higher likelihood of a remote-only plan, which will lead to even bigger inequalities after the pandemic).

⁴³ See Hristina Byrnes, *Reopening Schools Amid COVID-19: A Mix of In-Person Attendance, Remote Learning and Hybrid Plans*, USA TODAY, <https://www.usatoday.com/story/money/2020/08/03/every-states-plan-to-reopen-schools-in-the-fall/112599652/> [<https://perma.cc/EBQ6-9Q3L>] (Aug.

ber 2020, distance learning was more prevalent in schools with lower levels of academic achievement and a higher density of poverty and students of color.⁴⁴ As of December 2020, white students likely lost one to three months of learning in Mathematics due to school closures, while students of color likely experienced three to five months of lost learning time.⁴⁵ Remote learning, therefore, results in significant learning losses for all students, but harms students of color the most.⁴⁶

Additionally, children learning English and children experiencing homelessness face unique challenges to participating in school during the pandemic.⁴⁷ An estimated 60% of English language learning students reside in households far below the poverty line.⁴⁸ Specifically, English language learners suf-

3, 2020) (discussing each state's plan for education). In most states, the plan to reopen schools depended on the state's rate of infection. *Id.*

⁴⁴ Parolin & Lee, *supra* note 11, at 522–23 (explaining how with the schools most likely to be remote were the “schools with lower third-grade math scores, a higher share of students experiencing homelessness, more students eligible for free/reduced-price lunches and from racial/ethnic minorities”).

⁴⁵ Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Learning Loss—Disparities Grow and Students Need Help*, MCKINSEY & CO. (Dec. 8, 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/8ABK-NN2H>]. Not only are students of color more likely to be in remote-only schools, but also studies show that their parents are more likely to prefer that their children stay home. See Eliza Shapiro, *12,000 More White Children Return to N.Y.C. Schools Than Black Children*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/nyregion/ny-schools-reopening-inequality.html#:~:text=That%20gulf%20is%20illustrated%20in,children%20in%20the%20system%20overall> [<https://perma.cc/6C3T-EE9Q>] (discussing that, although there are more Black students in the New York City school system, twelve thousand more white children opted for in-person learning.) This is likely because of the severe effects of the pandemic on minority communities. See *id.* (quoting the New York mayor's press secretary's acknowledgement that communities of color distrust of the government stems from the disproportionate impact of COVID-19).

⁴⁶ See Katie Reilly, *The Learning Gap Is Getting Worse as Schools Rely on Remote Classes, Especially for Students of Color*, TIME (Dec. 8, 2020), <https://time.com/5918769/coronavirus-schools-learning-loss/> [<https://perma.cc/54D6-A4AE>] (explaining that students of color have suffered nearly double the amount of lost learning time in math and reading compared to white students).

⁴⁷ See Juliana Kim, *With Remote Learning, a 12-Year-Old Knows Her English Is Slipping Away*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/nyregion/coronavirus-english-language-students.html?searchResultPosition=2> [<https://perma.cc/V2RY-7FQU>] (discussing the struggles faced by 142,000 New York City students, who are learning English through an online school platform); Barbara Goldberg, *New York Sued Over Homeless Shelters' Internet Gap for Remote School*, REUTERS, <https://www.reuters.com/article/health-coronavirus-new-york-education/new-york-sued-over-homeless-shelters-internet-gap-for-remote-school-idUSKBN2842LY> [<https://perma.cc/Y5VC-B3M3>] (Nov. 24, 2020) (describing how a lawsuit in New York City highlighted the city's failure to provide Internet access to homeless shelters during the pandemic, causing thousands of children to miss substantial periods of instruction because they could not attend online classes).

⁴⁸ GRANTMAKERS FOR EDUC., EDUCATING ENGLISH LANGUAGE LEARNERS: GRANTMAKING STRATEGIES FOR CLOSING AMERICA'S OTHER ACHIEVEMENT GAP 7 (2013), https://edfunders.org/sites/default/files/Educating%20English%20Language%20Learners_April%202013.pdf [<https://perma.cc/L9U7-67FN>].

fer because they cannot participate in the everyday social interactions that in-person education provides.⁴⁹ Oftentimes for these students, English is not the main language used in their homes or neighborhoods, meaning that it will take longer for them to learn the language than if they were in a classroom of English speakers.⁵⁰ Remote learning, moreover, inhibits teachers from detecting and responding when English language learning students are lost or disengaged.⁵¹ Further, an estimated 1.5 million children live in homeless shelters or hotels, meaning that nearly 1.5 million children have experienced a devastating disruption in their education while navigating the realities of homelessness.⁵² Despite only accounting for 13% of the US population, over 50% of families with children experiencing homelessness are Black.⁵³

Access to a computer and reliable Internet is a primary challenge faced by these students.⁵⁴ In New York City, a class action lawsuit challenged Mayor Bill de Blasio's plan to implement WIFI by the end of the 2021 school year in 27 homeless shelters that house up to 114,000 students.⁵⁵ The plaintiffs claimed that since the start of the pandemic the city knew of the lack of Internet access in homeless shelters and impermissibly waited to respond, effectively depriving homeless students of an education.⁵⁶ In late December 2020, a

⁴⁹ Kim, *supra* note 47 (explaining how students who primarily learn English in the classroom learn from the physical gestures and social responses they observe in addition to the words they hear spoken).

⁵⁰ *See id.* (describing how twelve-year-old Taniya emigrated from Bangladesh one year prior and quickly picked up English in school and became a translator for her family, but she failed to comprehend or remember those English skills once her school went remote).

⁵¹ *See id.* (depicting a middle school teacher's struggle with reading students' body language over video, which in a normal classroom setting cued her as to whether the students were lost and needed assistance).

⁵² *See* Cory Turner, *Homeless Families Struggle with Impossible Choices as School Closures Continue*, NPR (Oct. 7, 2020), <https://www.npr.org/2020/10/07/920320592/an-impossible-choice-for-homeless-parents-a-job-or-their-childs-education> [<https://perma.cc/TT5F-NE4M>] (explaining how children experiencing homelessness not only face problems accessing online school, but also experience the loss of emotional support that school previously provided them).

⁵³ *Homelessness and Racial Disparities*, NAT'L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/> [<https://perma.cc/H4TA-PWKB>] (Oct. 2020).

⁵⁴ *See* Nikita Stewart, *She's 10, Homeless, and Eager to Learn. But She Has No Internet.*, N.Y. TIMES, <https://www.nytimes.com/2020/03/26/nyregion/new-york-homeless-students-coronavirus.html> [<https://perma.cc/SH97-LQWU>] (Apr. 13, 2020) (writing about how in April 2020, one director of a shelter in the Bronx with 177 school-aged children polled the seventy-nine families to see if they had a device for students to attend class virtually, and only fifteen of those families did on top of the shelter having no WIFI).

⁵⁵ *See* Class Action Complaint at 8–9, 20, *E.G. v. City of New York*, No. 1:20-cv-09879 (S.D.N.Y. filed Nov. 24, 2020) (alleging that New York City was knowingly depriving students of an education by failing to equip homeless shelters with WIFI). Parents living in homeless shelters in New York City filed suit because their children did not have access to reliable WIFI after eight months of online learning, and consequently, the public schools deprived those students of an education. *Id.* at 2–3.

⁵⁶ *Id.*

judge in the federal District Court for the Southern District of New York, ordered the lawsuit to move to trial with expedited discovery, writing that New York City has a duty to remedy the situation, given that students residing in homeless shelters have no ability to attend school until the city steps in.⁵⁷ In May of 2021, the parties reached a settlement providing a plan with corrective measures including for all shelters to be equipped with WIFI by August 2021 and a “DOE helpdesk and technological support,” to ensure homeless students have access to an education.⁵⁸

Additionally, the families suffering the least have the most options for supporting their children’s education during this unprecedented time.⁵⁹ Many families with resources pulled their children out of public school, opting for private school, home schooling, or “learning pods.”⁶⁰ The ability to attend private school, or to create a “pod” with several other families where a teacher is hired, very much depends on the wealth and privilege of the family.⁶¹ Ulti-

⁵⁷ See Order Granting Expedited Discovery at 9, *E.G. v. City of New York*, No. 1:20-cv-09879 (S.D.N.Y. 2020) (explaining now the 114,000 children living in homeless shelters need access to WIFI immediately to participate in school during the pandemic).

⁵⁸ See Proposed Stipulation and Order of Settlement at 7, *E.G. v. City of New York*, No. 20-cv-9879 (S.D.N.Y. Apr. 5, 2021) (articulating the measures the city would take ensure homeless students have access to an education during the pandemic).

⁵⁹ See Melinda Wenner Moyer, *Pods, Microschools, and Tutors: Can Parents Solve the Education Crisis on Their Own?*, N.Y. TIMES, <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html> [<https://perma.cc/KQ8Y-KV2B>] (Aug. 18, 2020) (explaining that homeschooling options, or “pandemic pods,” replicate the social and interactive school experience, but require money and time). The ability for wealthy students to opt out of remote-learning for pandemic pods is a luxury that low-income students don’t have. See *id.* The alternative education form dubbed the “pod” usually consists of a group of under ten students who are taught in person by either a parent or hired tutor or teacher. *Id.* During COVID-19, social media groups, online tutor placement services, and various private schools assisted groups in finding and managing educators. *Id.* Some organizations funded similar experiences for low-income students, called “[e]quity” pods. See Beth Hawkins, *When the Point of the Pod Is Equity: How Small Grants Are Empowering Parents of Underserved Students to Form Pandemic Microschools*, 74MILLION (Sept. 21, 2020), <https://www.the74million.org/article/when-the-point-of-the-pod-is-equity-how-small-grants-are-empowering-parents-of-underserved-students-to-form-pandemic-microschools/> [<https://perma.cc/SST9-4KMN>] (explaining how the National Parents Union provided thirty-seven groups a grant of up to \$25,000 to support the formation of learning pods and to address racial and economic inequities). The groups who received the funding included groups, for example, attempting to integrate the children of refugees, children living in foster care, bilingual children, into out-of-school curricular programs that augmented or replaced remote learning. *Id.*

⁶⁰ See Naomi Martin, *Families with Means Leave Public School for Private Schools or ‘Learning Pods,’ Raising Concerns About Worsening Educational Inequality*, BOS. GLOBE, <https://www.boston-globe.com/2020/08/08/metro/families-with-means-leave-public-schools-private-schools-or-learning-pods-raising-concerns-about-worsening-educational-inequality/> [<https://perma.cc/34JN-URYG>] (Aug. 8, 2020) (discussing the negative impacts that public school students could endure due to the rate of wealthy families opting for other forms of education).

⁶¹ See Moyer, *supra* note 59 (stating that because creating learning pods is expensive and time consuming, wealthy families are the most likely to partake in them). One estimate for employing a full-time teacher for a year, puts the cost at \$100,000; even if this salary is split five ways, each family is still paying \$20,000 to create a “pod.” See Emily Oster, *Private ‘School Pods’ Are Coming. They’ll*

mately, low-income parents across the nation are likely to require a legal remedy to offset these mounting disparities.⁶²

B. The Federal Courts' Role in Remedying Educational Inequity

For a period of time, the Supreme Court took an active role in regulating public education.⁶³ Later, the Court slowly stepped out of the arena due to fears about federalism, particularly that the Court would usurp legislative power.⁶⁴ The Supreme Court's most significant intervention occurred in 1954, when the Court in *Brown v. Board of Education (Brown I)* held that *de jure* segregation in public schools was unconstitutional under the Equal Protection Clause of the 14th Amendment.⁶⁵ By barring racial segregation in schools, the Court introduced the notion of "equal educational opportunity," shifting the American understanding of the fundamental character of public education and civil rights.⁶⁶ The Court rejected the rationale that equal facilities created equal opportunity by explaining how the stigma of racial isolation bred intractable inequality.⁶⁷

Worsen Inequality., WASH. POST (July 23, 2020), <https://www.washingtonpost.com/outlook/2020/07/23/pods-school-private-online-education-inequality/> [<https://perma.cc/9V7P-88VF>] (describing how one San Francisco-based Facebook group, "Pandemic Pods," has over one thousand participants

⁶² See Larry J. Obhof, *School Finance Litigation and the Separation of Powers*, 45 MITCHELL HAMLINE L. REV. 536, 539, 541 (2019) (explaining that every state constitution calls for the maintenance of a system of public education and how this language furnishes the groundwork for litigation).

⁶³ See Rebell, *supra* note 16, at 1496–97 (discussing how the Supreme Court oversaw the desegregation of schools for nearly twenty years following *Brown v. Board of Education* before deferring to state legislatures in matters relating to public education).

⁶⁴ See *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (explaining how the Court defers to local legislatures on matters of public education because "local control" is a central American principle and encourages democratic participation).

⁶⁵ See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) (finding intentional racial segregation in public schools to be unconstitutional, thereby outlawing the concept of "separate but equal"). "De jure" segregation refers to "Jim Crow" and other racialized laws that explicitly segregated Black and white people that were in place between the 1880s and 1964. *What Are De Jure and De Facto Segregation?*, EDUPEDIA (June 13, 2018), <https://www.theedadvocate.org/edupedia/content/what-are-de-jure-and-de-facto-segregation/> [<https://perma.cc/RJ28-JUMP>]. "De facto" segregation results from often neutral, informal patterns of residents in particular neighborhoods, such as the "White flight," which saw white people increasingly relocate to the suburbs after *de jure* segregation was outlawed. *Id.*

⁶⁶ See *Brown I*, 347 U.S. at 493 (stating that education "must be made available to all on equal terms" due to how necessary and fundamental it is in American democracy); Rebell, *supra* note 16, at 1489–90 (discussing the legacy of *Brown* on civil rights, education, and constitutional law more broadly).

⁶⁷ *Brown I*, 347 U.S. at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). The plaintiffs in *Brown* produced a myriad of evidence of internalized racism that the Court cited in its decision; in one study, psychologists asked Black and white children between three and seven which doll they preferred between a Black and white doll that were otherwise identical. *A Revealing Experiment: Brown v. Board and*

A year after this seminal ruling, the Court explained how reform should be executed and what the judiciary's role should be in that process.⁶⁸ In 1955, in *Brown v. Board of Education (Brown II)*, the Supreme Court directed state courts to implement the new constitutional standard for integrating schools because state courts had knowledge of and familiarity with the local school systems.⁶⁹ The Court, furthermore, instructed lower federal courts to hold school officials accountable for a speedy, effective, and "good faith" effort to follow the Supreme Court's holding in *Brown I*.⁷⁰

In the line with the Court's vision of equal educational opportunity, Congress directed federal funding to struggling school districts and enacted Title VI of the 1964 Civil Rights Act, which allowed the federal government to withhold funding from "any school that discriminated on the basis of race, color, or national origin."⁷¹ Title VI had immediate effects beyond segregation, including the prohibition of discrimination or harassment of students based on their English language speaking skills or national origin in all school programs and activities.⁷² For example, the first major challenge involved non-English-speaking students who alleged that San Francisco public schools failed to provide them any additional English language instruction or support in violation of Title VI.⁷³ In this 1974 case, *Lau v. Nichols*, the Supreme Court held that it is impossible for non-English-speaking students to fully benefit from their ed-

"The Doll Test," NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/significance-doll-test/> [<https://perma.cc/YF34-B9GK>]. Most children of both races chose the white doll and associated the white doll with positive feelings. *Id.* (explaining how the psychologists "concluded that 'prejudice, discrimination, and segregation' created a feeling of inferiority among African-American children and damaged their self-esteem").

⁶⁸ See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955) (explaining that it is the duty of local school officials to desegregate the schools and that the courts will review their efforts to determine if they were made in "good faith" to comply with *Brown*).

⁶⁹ See *id.* (remanding cases to the lower courts due to their closeness to and knowledge of the local schools).

⁷⁰ See *id.* at 300 (instructing courts to ensure that defendants provide a "prompt and reasonable start toward full compliance"). For example, in *Griffin v. County School Board*, the Supreme Court in 1964 struck down a Virginia law that closed the public schools in Prince Edward County and funded all-white private schools because the law was clearly premised on the desire to racially segregate. 377 U.S. 218, 230–31 (1964).

⁷¹ See *Rebell*, *supra* note 16, at 1494–95 (describing how Congress passed the Elementary and Secondary Education Act and Title VI of the 1964 Civil Rights Act, in conjunction with the Court's effort to desegregate schools).

⁷² See *Race and National Origin Discrimination: Frequently Asked Questions*, U.S. DEP'T OF EDUC.: OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html> [<https://perma.cc/PSY9-WJRT>] (Jan. 10, 2020) (discussing Title VI's broad reach over all schools that receive any federal funding and the type of discrimination and harassment the legislation protects against).

⁷³ See *Lau v. Nichols*, 414 U.S. 563, 564–65, 566 (1974), *abrogated by* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (describing how non-English-speaking Chinese students alleged that San Francisco school officials provided them with inferior and inadequate educational opportunities). Of the 2,856 Chinese American students who did not speak fluent English, around 1,800 were provided no extra support to learn the English language. *Id.* at 564.

ucation until the state provides them basic language skills.⁷⁴ Thus, the San Francisco public schools violated Title VI of the Civil Rights Act and Congress could deny federal funding until the district remedied the situation.⁷⁵

That being said, the Court eventually began limiting its intervention in matters of public education.⁷⁶ In 1963, in *San Antonio v. Rodriguez*, the Supreme Court severely hindered the concept of equal educational opportunities under the Constitution.⁷⁷ In *Rodriguez*, Mexican-American parents challenged the school funding scheme in Texas by arguing that the state was denying families living in school districts with low property values equal protection rights because the funding scheme resulted in large socio-economic and racial inequality between districts.⁷⁸ The United States District Court in the Western District of Texas ultimately found that there was no reasonable basis to make the quality of public education on how wealthy the district is, which occurs when you fund a district based on the tax evaluation of the homes within that district.⁷⁹ Thus, it ordered Texas to redraw the plan so that district funding depended on “the wealth of the state as a whole,” not on the tax base of the individual districts.⁸⁰ The Supreme Court, however, overturned the ruling, and found that lower court should not have applied strict scrutiny because the fund-

⁷⁴ *Id.*

⁷⁵ *See id.* at 566, 568–69 (“Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”). The Court did not consider if the San Francisco public schools’ failure to provide English language instruction was a violation of those students’ Equal Protection rights under the Fourteenth Amendment. *Id.* at 566. Instead, the Court only considered if there was a violation of § 601 of the Civil Rights Act of 1964. *Id.*

⁷⁶ *See* Rebell, *supra* note 16, at 1496 (discussing how even though *Brown v. Board of Education* was enforced by Congress and the Supreme Court for a period of time, as the cases began challenging schools in “northern and western locales,” the Court began stepping out of the education litigation arena).

⁷⁷ Charles J. Ogletree, Jr., *The Legacy and Implications of San Antonio Independent School District v. Rodriguez*, 17 RICH. J.L. & PUB. INT. 515, 534 (2014) (describing how, in *Brown*, the Warren Court made far-reaching promises of equity in education, but in *San Antonio Independent School District v. Rodriguez*, the Burger court took a step back to hold that the Court would only interfere when a system was so unequal that it was “invidiously discriminatory” (citing 411 U.S. 1, 54–55 (1973)); *see Rodriguez*, 411 U.S. at 35 (holding that a right to education is not protected by the Constitution)).

⁷⁸ *Rodriguez*, 411 U.S. at 5–6, 12–13. The total per student spending in the poorest district in San Antonio was \$356, while in the wealthiest district it was \$594 per student. *Id.* at 12–13. The large discrepancy in funding was the result of the differences in home values, or in other words, the property tax base available in each district. *See id.* In the poorest district the “assessed property value per pupil” was \$5,960 and in the wealthiest it was over \$49,000. *Id.*

⁷⁹ *Rodriguez v. San Anton. Indep. Sch. Dist.*, 337 F. Supp. 280, 285 (W.D. Tex. 1971), *rev’d*, 411 U.S. 1 (1973) (finding that that public education should not be a “function of wealth”).

⁸⁰ *See Rodriguez*, 411 U.S. at 64 (White, J., dissenting) (discussing how the district court found that Texas’s school funding plan was a form of wealth discrimination, and “local control” of schools was not a valid reason to uphold that plan); *Rodriguez*, 337 F. Supp. at 285 (instructing the state legislature “to determine what new form of financing should be utilized to support public education”).

ing scheme did not rely on a suspect-classification, and because the Constitution does not provide the right an education.⁸¹ Applying rational basis review, the Court deferred to the state legislature and reasoned that matters of state finances and the system of public education should be left to the states' discretion.⁸²

Following its holding in *Rodriguez*, the Court undermined its emphasis on the urgent need for desegregation in two decisions born out of Denver and Detroit school districts.⁸³ In 1972, in *Keyes v. School District*, the Supreme Court addressed whether the zoning plan of the Denver public school system was unconstitutional and ruled that the *intent* of the state to segregate or racially discriminate is the critical factor in the equal protection analysis.⁸⁴ Consequently, unless the zoning plan intentionally discriminated, the fact that the schools were highly segregated did not warrant judicial intervention.⁸⁵ Subse-

⁸¹ *Rodriguez*, 411 U.S. at 59. The court held that it will only apply strict scrutiny to a state's legislation when the law involves a "suspect classification" or a fundamental right. *See id.* at 37–38. Strict scrutiny, the harshest form of judicial review, requires the judiciary to: (1) analyze the legislative purpose behind a potentially discriminatory law to infer whether that purpose is legitimate (i.e. a "compelling state interest"); and (2) if there is a compelling interest, determine if the law is written in the least burdensome or discriminatory way (i.e., if the law is "narrowly tailored"). STEPHEN MICHAEL SHEPPARD, *Strict Scrutiny*, in *BOUVIER LAW DICTIONARY* (Wolters Kluwer Bouvier Law Dictionary Desk ed. 2012), Lexis. Under this standard of review, the state has the highest burden, and must show a compelling state interest. *Rodriguez*, 411 U.S. at 16–17. Strict scrutiny only applies to suspect classifications including race, religion, and national origin. *Suspect Classification*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/suspect_classification [<https://perma.cc/R3UN-3BCC>]. The Court in *Rodriguez* ultimately held that the Constitution neither explicitly protects education as an individual right nor implies that right in its provisions. 411 U.S. at 35.

⁸² *See Rodriguez*, 411 U.S. at 42 (discussing how the Court is ill-equipped to answer the complicated questions surrounding education policy, and due to the complexity of those problems, should defer to the decisions of the state and local legislatures). Rational basis review, the lowest standard of review a court applies when analyzing legislative action, only requires the state to prove that the state's system "bear[s] some rational relationship to a legitimate state purposes." *Id.* at 40. The Court will apply a form of rational basis review to state action not involving a suspect class or a fundamental right. *Id.*

⁸³ *See Milliken v. Bradley*, 418 U.S. 717, 723, 744–45 (1974) (ruling that Detroit's suburban school districts could not be forced to partake in a court implemented de-segregation plan when only the city of Detroit was shown to intentionally discriminate); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 193 (1973) (holding that *de facto* segregation cannot warrant judicial intervention); *Rebell*, *supra* note 16, at 1496–97 (discussing how the Court's decisions in *Keyes* and *Milliken* revealed its waning commitment to desegregation in favor of localized control of schools and concerns over the separation of powers).

⁸⁴ *See Keyes*, 413 U.S. at 198 ("[P]laintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.").

⁸⁵ *See id.* at 192, 193 (finding that *de facto* segregation is not unconstitutional); *see also id.* at 215 (Douglas, J., concurring) (arguing that there should be no distinction between *de facto* and *de jure* segregation because whether a state purposefully segregates or creates school district lines that effectively segregate, the outcome of segregation is the same). Justice Lewis F. Powell, Jr. also concurred and advocated for the abandonment of the *de jure/de facto* binary. *Id.* at 224 (Powell, J., concurring). Justice Powell suggested that forcing plaintiffs to locate "segregative intent" was unnecessary and proposed that states and school boards have an affirmative duty to desegregate. *Id.* Therefore, under Justice Powell's construction, when a district or school is segregated, a *prima facie* case exists. *Id.*

quently, in *Milliken v. Bradley*, the Court in 1974 struck down an extensive desegregation and redistricting plan that involved the city of Detroit and its neighboring suburban districts.⁸⁶ The Court found only Detroit's school district intentionally segregated its schools so the neighboring districts could not be ordered to partake in the remedy.⁸⁷ The Supreme Court found that district lines could only be redrawn in two scenarios: (1) if the intentional segregative acts of one district produced substantial segregation in another district; or (2) if the district boundaries were a product of intentional segregation themselves.⁸⁸ By limiting the federal judiciary's ability to oversee the desegregation of public education, the Court ultimately facilitated a stagnate system of racial inequity in public education that could no longer be challenged at the federal level.⁸⁹ Thus, parents and students who now wish to challenge inequity in public education are forced to seek that remedy using their respective state constitutions.⁹⁰

C. State Court Intervention and the Separation of Powers Issue

Following the Court's ruling in *Rodriguez*, most education reformers turned their attention to the state level,⁹¹ which ushered in large waves of school funding litigation in most states.⁹² As disparities persist between poor urban schools and rich suburban schools, state courts have considered additional factors, such as *de facto* segregation or racial isolation as an impediment to equal educational opportunities.⁹³ For example, in 1996, in *Sheff v. O'Neill*, the Supreme Court of Connecticut found that the school districting in Hartford

⁸⁶ See *Milliken*, 418 U.S. at 749 (holding that the legislative plan to redistrict across fifty-two districts to desegregate two districts was unconstitutional).

⁸⁷ See *id.* (holding that a court may not order any relief that achieves a racial balance in one segregated school via reconfiguring the neighboring school districts).

⁸⁸ See *id.* at 745 (holding there was "no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect").

⁸⁹ See *Rebell*, *supra* note 16, at 1500 (explaining how the impact of *Brown* lived on in Congress and in the state courts). In Justice Douglas's dissent in *Milliken*, he again critiqued the falsity of the *de jure/de facto* distinction and predicted the fate of future federal constitutional education litigation. *Milliken*, 418 U.S. at 761 (Douglas, J., dissenting) ("Today's decision, given *Rodriguez*, means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate but 'inferior.'").

⁹⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that there is no federal guaranty of an education).

⁹¹ See *Obhof*, *supra* note 62, at 547–48 (explaining that after *Rodriguez*, education reform plaintiffs focused on state constitutions and their respective equal protection language).

⁹² See *id.* at 547, 550 (explaining how a wave of litigation in the 1970s that focused on equal funding led just over twenty states to modify their school spending plans and led another wave of litigation in the 1990s that focused on the "adequacy" of the education provided by the states).

⁹³ See *Sheff v. O'Neill*, 678 A.2d 1267, 1270, 1274 (Conn. 1996) (finding that the state failed in its duty to provide an equal education to students in the Hartford School District by allowing for severe racial and socio-economic isolation). The court discussed how the state's equalized funding scheme provided for higher per student spending in Hartford compared to the neighboring suburban areas. *Id.* at 1273.

deprived its students of the state constitution's guarantee of an equal education by isolating its minority students in certain districts.⁹⁴

Educational reform litigation has been more successful at the state level because every state's constitution contains language establishing the right to an education.⁹⁵ Plaintiffs at the state level, thus, have used their state constitutions' equal protection clause to argue that certain students or school districts are not given adequate resources or opportunity to receive an education on par with more privileged districts.⁹⁶ Around 1990, plaintiffs also began wielding the language in their state constitution guaranteeing public education to contend that many states or districts were failing students in their duty to provide an "adequate" education, or in other words plaintiffs introduced the notion that a state's constitutional right to an education implies some floor or minimum standard of adequacy.⁹⁷ Courts instead of the legislature, therefore, interpret this notion of adequacy and determine what constitutes a baseline education.⁹⁸ If a certain district is not meeting the requirements of basic education, courts can instruct legislatures to intervene and remedy the situation.⁹⁹

That being said, the traditional roadblock between judicial intervention and legislative reform posited by the Supreme Court in *Rodriguez* remains a limiting factor in the success of these suits seeking substantive policy changes.¹⁰⁰ Whether courts should play a role in shaping education policy, a matter

⁹⁴ See *id.* at 1273, 1285 (explaining how the Hartford School District largely underperformed on standardized testing compared to surrounding districts and how most students in the Hartford schools lived in economically disadvantaged households). Although the state played no active role in the segregation of the public schools, the court explained that the districting statute that drew town boundaries was the "single most important factor" leading to *de facto* segregation. *Id.* at 1274. Although the segregation was unintentional, the state was still responsible for addressing the situation. *Id.* at 1280.

⁹⁵ See *Rodriguez*, 411 U.S. at 35 (explaining that education is not protected by the Constitution itself, nor will the Court impose such a safeguard). *But see* Obhof, *supra* note 62, at 541 (discussing how every state constitution contains some language providing for a public education, and that language furnishes the basis for legal challenges when the state fails that duty).

⁹⁶ See Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 970–71 (2014) (explaining how plaintiffs at the state level framed their challenges to school financing schemes in the same way that the *Rodriguez* plaintiffs did, but used the state, rather than federal, constitutions and equal protection clauses as authority).

⁹⁷ See Obhof, *supra* note 62, at 551 (explaining how plaintiffs used their state's education clauses to improve the most disadvantaged school districts, arguing that they had to meet some minimum standard). This moment in time marked a shift in litigation strategy: as courts began rejecting arguments that each district had to be equal, plaintiffs began fighting for an adequate or basic education. *Id.* at 550.

⁹⁸ See Note, *The Misguided Appeal of a Minimally Adequate Education*, 130 HARV. L. REV. 1458, 1461 (2017) (discussing how the recent trend in education litigation to establish a minimum educational standard tasks courts with determining that policy baseline).

⁹⁹ See Bauries, *supra* note 96, at 974–75 (explaining how plaintiffs mostly seek declaratory or injunctive relief, thereby asking the courts to declare a system unconstitutional before issuing general instructions on how to fix it).

¹⁰⁰ See Note, *supra* note 98, at 1472 (arguing that courts are an improper venue for reforming education, as judges lack the expertise and their lack of authority to legislate or decide policy matters).

traditionally left to the legislature, remains highly contested.¹⁰¹ Scholars have noted that the specific text in a given state constitution, and how broad or narrow the language is in granting the right to an education, does not provide insight into how deferential to the legislature a court will be.¹⁰² Furthermore, studies have not found a correlation between how explicit a state constitution's separation of powers language is and how deferential a court will be to that state's legislature.¹⁰³ Thus, some scholars suggest that a judge's personal beliefs and political motivations are the determining factors in the success of an education reform suit.¹⁰⁴ Therefore, some believe that judges should remain impartial and should stay out of these political questions involved with defining an "adequate" education.¹⁰⁵

On the flip side, many education activists argue that judicial intervention is a necessary and effective tool for solving this constitutional crisis.¹⁰⁶ In support of this view, several courts have interpreted an "adequate" education for students living in poverty to require funding and support to go beyond what wealthier districts receive.¹⁰⁷ For example, the New Jersey Supreme Court in 1990, in *Abbott v. Burke*, identified the needs of students living in low-income,

Some courts have broken from the traditional judicial function of declaring something unconstitutional, and instead instructed the legislature to overhaul the system and coordinated the efforts of activists, organizations, and legislatures. See William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 24–25 (2007) (explaining how courts are coordinating and collaborating with different sources to implement reform); see also *Rodriguez*, 411 U.S. at 42 (“[T]his case also involves the most persistent and difficult questions of educational policy, another area in which this Court’s lack of specialized knowledge and experience counsels against premature interference with the informed judgements made at the state and local levels.”).

¹⁰¹ See Note, *supra* note 98, at 1473 (claiming that recent education litigation surrounding adequacy involves policy questions that should be left to democratically elected officials); see also *Rebell*, *supra* note 16, at 1526 (advocating for the necessary and important role of courts in equalizing education, beginning with *Brown v. Board of Education*).

¹⁰² See *Obhof*, *supra* note 62, at 562 (using the outcomes of several important cases and the language from the state’s constitution to illustrate a disconnect between how strong the constitutional language guaranteeing education is and how permissive that state’s judiciary has been when considering the legislative erosion of that right).

¹⁰³ See *id.* at 561 (claiming that a state constitution’s separation of powers language has little bearing on how deferential a court will be).

¹⁰⁴ See *id.* at 562 (discussing William Koski’s observations that school finance litigation outcomes are a product of how “liberal” or “activist” a judiciary is).

¹⁰⁵ See Note, *supra* note 98, at 1472 (“[I]t is well settled that courts should tread lightly when asked to exercise ‘nonjudicial discretion’ or otherwise ‘express[] lack of the respect due coordinate branches of government.’” (footnote omitted) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

¹⁰⁶ See *Rebell*, *supra* note 16, at 1530–32 (explaining that fear of judicial activism came from judicial desegregation orders and claims that courts were well-suited to tackle complex policy issues).

¹⁰⁷ See *id.* at 1503 (describing how some courts recently recognized that students living below the poverty line require extra support to have a “meaningful educational opportunity” under their state constitutions).

urban neighborhoods to include “food, clothing, [and] shelter.”¹⁰⁸ The New Jersey Supreme Court ultimately directed the legislature to create a new funding plan for the low-income urban districts, that was “approximately equal” to the wealthy suburban school districts and that provided for additional funding programs addressing the urban districts’ “special needs.”¹⁰⁹ This included the availability of early education programs for low-income children as necessary to achieve educational equality, which other state courts have also found necessary to achieve an adequate education.¹¹⁰ Thus, although the Supreme Court stepped away from the legacy of *Brown*, activism in the state legislatures and courts continue to be a source of hope for change, educational equality, and the erasure of racial disparity.¹¹¹

II. PARENTS TURN TO COURTS TO FIGHT EDUCATION INEQUALITY DURING COVID-19

In the wake of the COVID-19 pandemic and the resulting educational and racial disparities, two groups of plaintiffs turned to California state courts to enforce their or their children’s state constitutional right to a free and equal education.¹¹² A group of parents is suing the Los Angeles Unified School District, and another group of students are suing the State of California and the Board of Education.¹¹³ Both class action suits allege that remote learning during the pandemic failed to meet the minimum standard of educational quality required by the California Constitution and that such learning disproportionately harmed Black and Hispanic low-income students.¹¹⁴

Section A of this Part explores relevant California case law to show how education litigation has progressed at the state level.¹¹⁵ Sections B and C introduce the two lawsuits alleging state equal protection and disparate impact

¹⁰⁸ 575 A.2d 359, 369 (N.J. 1990). The New Jersey Supreme Court stated in *Abbott v. Burke* that an equalized funding scheme should include both state and federal funds that would provide additional funds for the neediest students to receive an education. *Id.* at 381.

¹⁰⁹ *Id.* at 409. The “special needs” of those students include housing and food insecurity. *Id.*

¹¹⁰ See Rebell, *supra* note 16, at 1504 (discussing rulings in North and South Carolina that called for the legislature to implement early childhood education programs).

¹¹¹ See *id.* at 1506 (“Although *Brown*’s vision has been imperfectly implemented at best, this momentous decision has led to the most serious and sustained commitment to equal educational opportunity in America’s political and legal history.” (footnote omitted) (citing Charles Vert Willie & Sarah Susannah Willie, *Black, White and Brown: The Transformation of Public Education in America*, 107 TCHRS. COLL. REC. 475, 490–91 (2005)).

¹¹² See Shaw Complaint, *supra* note 13, at 1, 38, (alleging that children in Los Angeles are being denied equal protection during COVID-19 remote learning plans); Cayla J. Complaint, *supra* note 1, at 1–3 (alleging that California has provided an inadequate education during the pandemic).

¹¹³ See Yancey-Bragg, *supra* note 12 (reporting on the filing of the Cayla J. Complaint); Taxin, *supra* note 12 (describing the allegations set forth in the Shaw Complaint); see also *supra* notes 12–15 and accompanying text (discussing the context behind the two complaints).

¹¹⁴ Shaw Complaint, *supra* note 13, at 1–2; Cayla J. Complaint, *supra* note 1, at 1.

¹¹⁵ See *infra* notes 118–136 and accompanying text.

claims against California and the school district respectively for not providing an adequate education during the pandemic.¹¹⁶ Section D concludes by assessing the potential success of both complaints at the pleadings level by applying California's equal protection framework as a case study for future litigants in state courts.¹¹⁷

A. Education Reform Litigation in California

The California Constitution explicitly instructs the legislature to organize a free, public school system.¹¹⁸ As early as 1924, courts in California posited the right to a public education from this language, and, in the wake of *Brown v. Board of Education*, California courts actively intervened in de-segregating schools.¹¹⁹ As schools remained largely unequal, despite being integrated, the state's judiciary began tackling other issues, such as the public school funding scheme.¹²⁰

In *Serrano v. Priest (Serrano I)*, the Supreme Court of California in 1971 considered if the state's public education funding plan violated both state and federal equal protection clauses.¹²¹ The state supreme court reversed the lower court's dismissal and remanded the case, holding that the plaintiff's alleged sufficient facts to show that the funding scheme infringed on plaintiffs' constitutional rights.¹²² The court held that: (1) the case involved a "suspect classification" because the financing scheme discriminated based on wealth; and (2) the right to an education is a "fundamental interest," so the state's financing scheme had to be examined under strict scrutiny.¹²³ As a result, the legislature enacted a

¹¹⁶ See *infra* notes 137–166 and accompanying text.

¹¹⁷ See *infra* notes 167–200 and accompanying text.

¹¹⁸ CAL. CONST. art. IX, § 5 (designating the role of the legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district").

¹¹⁹ See Christopher R. Lockard, Note, *In the Wake of Williams v. State: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 386–87 (2005) (discussing the history of education reform cases in California).

¹²⁰ See *id.* at 387 (explaining that, after schools were desegregated, they remained very unequal in quality, which led to the challenge of the school funding plan in *Serrano v. Priest*).

¹²¹ 487 P.2d 1241, 1244 (Cal. 1971). Parents and students in Los Angeles filed a class action suit against the authorities in charge of public school financing. *Id.* Plaintiffs argued that the property tax-based funding of public schools led to wealth discrimination. *Id.*

¹²² *Id.* at 1266.

¹²³ *Id.* at 1263, 1264 (finding that, assuming the facts in plaintiffs' complaint are true, the California public school funding plan violates the equal protection clause). The California Supreme Court described a fundamental right as one that is pivotal to one's autonomy and is obviously central to the state constitution's delineated rights, even if it not considered a fundamental right under the federal Constitution. See *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 818–19 (Cal. 1997) (discussing how California determines a fundamental interest and how the legislature's encroachment on those interests will be analyzed under strict scrutiny). For example, in *Lungren*, the California Supreme Court protected a minor's right to an abortion without parental consent by finding that the minor's

piece of legislation aimed at equalizing the funding scheme.¹²⁴ In light of the *Rodriguez* decision, in 1976 the Supreme Court of California reconsidered the case in 1976, in *Serrano v. Priest* (*Serrano II*), and ruled that the laws did not go far enough to remedy disparities in the school funding scheme because the state still tied educational opportunity to the wealth of each district.¹²⁵

Following the upheaval of *Serrano II*, the Supreme Court of California considered whether the State must intervene when a school district's financial difficulties keep its students from receiving an education on par with other districts.¹²⁶ In 1992, in *Butt v. State*, the California Supreme Court affirmed this duty after the Richmond Unified School District ended a term six weeks early due to budgetary shortfalls.¹²⁷ The court cited *Serrano I* when reiterating that education is a fundamental interest, and, therefore, that the state bore the burden of showing a compelling state interest that accounts for the disparity.¹²⁸ The court found that the "extensive educational disruption" caused by the District's early emergency closure amounted to a violation of those students' rights to an adequate education.¹²⁹ The court, furthermore, disagreed with the State's argument that it was only required to provide equal financing to each district and that local oversight of school budgets was a compelling state interest.¹³⁰

Over a decade later, however, in *Vergara v. State*, the Second District Court of California in 2016 found that the presence of "ineffective teachers" did not violate students' right to an education.¹³¹ Specifically, the student-

right to privacy is a fundamental interest, despite the contradictory federal standard. *See id.* (discussing *Planned Parenthood of Miss. v. Danforth*, 428 U.S. 52 (1976)).

¹²⁴ *See* Lockard, *supra* note 119, at 388 (describing how the legislature passed Senate Bill 90 in 1972 in reaction to *Serrano I*). Senate Bill 90 "increased state funding for districts with low property tax revenue." *Id.* (citing William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL'Y 607, 610 (1996)).

¹²⁵ *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 930, 958 (Cal. 1976); *see* Lockard, *supra* note 119, at 388 (explaining that the court was reconsidering whether the California school finance plan was constitutional after the legislature amended the plan). The court did not consider if the State violated the United States Constitution because *Rodriguez* affirmed that there is no federal constitutional provision protecting public education. *Serrano II*, 557 P.2d at 948–49.

¹²⁶ *See* Anne D. Gordon, *California Constitutional Law: The Right to an Adequate Education*, 67 HASTINGS L.J. 323, 340–41 (2016) (citing *Butt v. State*, 842 P.2d 1240 (Cal. 1992)) (discussing *Butt* and arguing that by using the word "basic" before the right to an education, the court imputed the right to a certain standard of education in the California constitution).

¹²⁷ *Butt*, 842 P.2d at 1241, 1249. Parents filed a class action suit after a district in California cut the 1990–1991 school year six weeks short. *Id.* at 1241.

¹²⁸ *Id.* at 1250. The court maintained that it would apply strict scrutiny if the impacted class is a suspect class or has a fundamental interest at stake. *Id.* at 1251–52.

¹²⁹ *Id.* at 1253.

¹³⁰ *See id.* at 1254 (explaining that the State may choose to give local districts discretion over their budgets, but the responsibility remains on the State to provide a basic education).

¹³¹ *See* *Vergara v. State*, 209 Cal. Rptr. 3d 532, 538 (Ct. App. 2016) (finding that the nine student plaintiffs failed to show how the Education Code's provisions covering teachers was a violation of equal protection). The complaint included two groups of affected students: one was a "general" group

plaintiffs failed to show how the California provisions regarding the hiring and firing process of teachers constituted an equal protection violation, because they did not demonstrate how the statutes or the presence of ineffective teachers impacted any one group of students in particular.¹³² In so deciding, the court suggested that the plaintiffs could have established an equal protection violation by illustrating how that the statutes themselves, rather than how the state enforced them, inevitably caused low income students and students of color to be deprived of an equal education.¹³³

Three years later, in *Collins v. Thurmond*, the Fifth District Court of Appeals of California in 2019 ruled that the appellants had sufficiently alleged that the state-level defendants violated the California Constitution's Equal Protection Clause when evidence established that educators were disciplining minority students at a significantly higher rate than their white peers for the same behaviors.¹³⁴ The court discussed how at the state-level a facially neutral policy that has a disparate impact on students of color interferes with their fundamental right to an education and violates the Equal Protection Clause.¹³⁵

Therefore, if a group of plaintiffs can show that school district practices are harming one group of students in comparison to another—for example, through a lack of resources and opportunity during a global pandemic—a court will intervene regardless of the state or school's intention.¹³⁶

consisting of students all over the state, and the second group consisted of students of color and students living in poverty. *Id.* at 540.

¹³² *See id.* at 557 (stating that school officials, not the laws themselves, place teachers at certain schools, which the plaintiffs did not consider).

¹³³ *See id.* at 555 (“A statute is facially unconstitutional when the constitutional violation flows ‘inevitably’ from the statute, not the actions of the people implementing it.” (citation omitted) (first citing *Pac. Legal Found. v. Brown*, 624 P.2d 1215 (Cal. 1981); and then citing *Arcadia Unified Sch. Dist. v. State Dep’t of Educ.*, 825 P.2d 438 (Cal. 1992))) (describing how the statute itself violates the constitution if, regardless of how it is implemented, the effect of the statute is discriminatory).

¹³⁴ *See Collins v. Thurmond*, 258 Cal. Rptr. 3d 830, 837–38 (Ct. App. 2019) (dismissing many of appellants’ claims brought against the state but holding that they sufficiently alleged a cause of action under the Equal Protection Clause). Appellants presented data showing “suspensions, transfers, and other disciplinary proceedings” from a school district demonstrating racial bias. *Id.* at 837.

¹³⁵ *See id.* at 843–44, 846 (holding that the data clearly demonstrated how students being disciplined for the same offenses were being treated differently based on their race). For the court to find to an equal protection violation, there must be “two or more *similarly situated* groups.” *Id.* at 843 (quoting *Cooley v. Superior Ct.*, 57 P.3d 654 (Cal. 2002)). In other words, there must be two identifiable groups for purposes of the claim. *Id.*

¹³⁶ *See id.* at 846 (explaining how intentional discrimination is not necessary to find a constitutional violation in California, rather the showing of a disparate impact and the State’s failure to remedy it is sufficient).

B. Parents Challenging Los Angeles's Remote Learning Plan: Shaw v. LAUSD

Parents from LAUSD filed the first suit in September in the County of Los Angeles, which cites statistics demonstrating the racial achievement gap in the LAUSD before the pandemic and alleges that the LAUSD's remote plan during the pandemic harmed its previously disadvantaged students.¹³⁷ Specifically, the plaintiffs alleged that the LAUSD cut back teachers' hours, lessened engagement and live instruction for students, halted teacher training initiatives, reduced assignments and oversight for students, failed to provide reliable WIFI and electronic devices, and did not address that over forty percent of students did not attend virtual class in the spring of 2020.¹³⁸

The complaint details how, after the LAUSD went fully remote in March 2020, it did nothing to address the tens of thousands of students absent from the online instruction.¹³⁹ The LAUSD also allegedly made an agreement with the teacher's union in April that reduced their required work time in half, did not require teachers to monitor students' work, and did not mandate any sort of live instruction or online interaction.¹⁴⁰ This agreement, called the "April Side Letter," made between the LAUSD and the United Teachers Los Angeles (UTLA) union, consists of 33,000 teachers and employees at the schools within the district.¹⁴¹ The April Side Letter largely undercut the previous agreement from 2019 between the LAUSD and the UTLA regarding what requirements teachers needed to provide a basic education.¹⁴² In describing the disparate racial

¹³⁷ Shaw Complaint, *supra* note 13, at 1–2. This class action complaint seeks injunctive and declaratory relief and a jury trial. *Id.* at 1. The nine plaintiffs are all parents of students in the Los Angeles Unified School District, and the listed defendants are the Los Angeles Unified School District and the Superintendent, Austin Beutner. *Id.*

¹³⁸ *Id.* at 1–2. The parents and advocates involved in this lawsuit created a non-profit whose mission statement asserts that Black and Latino students, English learners, and students with disabilities, are entitled to an education "even during a pandemic." WORTH MORE LA, *supra* note 5. Worth More LA was founded in 2020 by the parents fighting Los Angeles's remote learning plan. *Id.* Specifically, the parents seek more instruction time, increased efforts to engage struggling students, enhanced resources and support for parents navigating learning at home, and interventions to make sure all students are connected and attending online school. *Id.*

¹³⁹ See Shaw Complaint, *supra* note 13, at 12–13 (stating that information published by the LAUSD that about fifteen thousand high school students did not participate in any online instruction, while forty thousand high school students had failed to connect with their teachers daily).

¹⁴⁰ See *id.* at 13 (explaining how the school district's agreement with the teacher's union exacerbated the problems faced by students during COVID-19).

¹⁴¹ *Id.* at 13, 33. United Teachers Los Angeles (UTLA) had previously made an agreement, which mandated that teachers work eight hours per day with six of those hours at their respective school, with LAUSD in 2019 that was supposed to be in place until 2022. *Id.* at 10. This previous agreement also required that teachers be evaluated regularly and that teachers attend development meetings. *Id.* at 10–11.

¹⁴² See *id.* at 10–11, 13 (describing what the school district and teachers previously outlined as the minimum amount that teachers must do to provide a basic education, and what they agreed on during the pandemic).

impact of the April Side Letter, the plaintiffs claimed that many Black and Hispanic students only logged into class two times a week at most and that absenteeism only contributed to the pre-existing achievement gap.¹⁴³ In addition, the complaint details the LAUSD's failed promise to provide computers to low-income students, who were largely students of color.¹⁴⁴

The complaint further alleged that the LAUSD refused to respond to parents' concerns over the summer, but the State of California attempted to remedy the situation by passing S.B. 98, which set guidelines for remote learning in public school districts.¹⁴⁵ The plaintiffs argue that the LAUSD's fall remote learning plan, with the additional agreement referred to as the "August Side Letter," did not meet these requirements because it only required around two days of live instruction per week with students mostly left to "educate themselves."¹⁴⁶

Since the coalition of parents and students filed the complaint in September of 2020, the case and the state of the pandemic continue to evolve.¹⁴⁷ Notably, LAUSD entered into a new agreement with the UTLA to return to fully in-person learning for the 2021–2022 school year with an option for students and teachers to remain in an "online independent study program."¹⁴⁸ Addition-

¹⁴³ See *id.* at 14 (discussing how the school closures have impacted and will continue to impact students of color). Prior to COVID-19, the achievement gap in LAUSD was still stark: 32% of Black students and 38% of Latino students reached the benchmark for English Language Arts, compared to 68% of white students. *Id.* at 11. Additionally, only 20% of Black students and 27% of Latino students performed at the requisite level for Math, compared to 59% of white students. *Id.* at 11.

¹⁴⁴ *Id.* at 16, 39.

¹⁴⁵ See S. 98, 2021–22 Leg., Reg. Sess. (Cal. 2021); Shaw Complaint, *supra* note 13, at 20–22. This law required that school districts: (1) provide all students with meaningful opportunity to attend to online classes; (2) provide an education "substantially equivalent" to an in-person education; (3) provide academic and other support for struggling students, English learners, students experiencing homelessness, and students with disabilities; and (4) provide daily interactive instruction. *Id.*

¹⁴⁶ Shaw Complaint, *supra* note 13, at 23, 24. Although high schoolers in LAUSD receive four hours daily of instruction, students in neighboring districts receive between five and six hours comparatively. *Id.* at 35.

¹⁴⁷ See Jeanine Santucci & Christine Fernando, *Most States See Rising COVID Cases as Winter Surge Fears Grow; Some States Expand Booster Access. Latest COVID-19 Updates*, USA TODAY, <https://www.usatoday.com/story/news/health/2021/11/13/covid-19-updates-lawmakers-urge-strict-holiday-travel-protocol/8593301002/> [<https://perma.cc/U7FY-8QCP>] (Nov. 13, 2021, 12:40 PM) (describing how the Delta variant of COVID-19 continues to spread amidst failure to get the population fully vaccinated). As of November 23, 2021, children ages five and older are recommended to get the vaccine. *COVID-19 Vaccines for Children and Teens*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/children-teens.html> [<https://perma.cc/HYS5-LUBB>] (Jan. 11, 2022).

¹⁴⁸ See Sideletter Between LAUSD & UTLA for the Return to Traditional Instruction for the 2021–2022 School Year (June 9, 2021), https://www.utla.net/sites/default/files/tentative_agreement_utla_laUSD_sideletter_for_the_return_to_traditional_instruction_6_9_21_cmc_ab_signed_1.pdf [<https://perma.cc/BL5M-VZJC>] (explaining the testing and sanitation measures to ensure the safe reopening of schools in addition to requirements for the online program); *Welcome Back to School: Full In-Person Return to School: Frequently Asked Questions*, L.A. UNIFIED SCH. DIST., <https://achieve.lausd.net/returnfaq> [<https://perma.cc/WH6J-9WSW>] (answering FAQs from parents regarding the return to live instruction for the 2021–2022 school year).

ally, California responded to the educational crisis by increasing the education budget by 5% for the 2021–2022 academic year with a plan to offer a new “Expanded Learning Opportunities program” that provides low-income students with additional instruction outside of traditional school hours.¹⁴⁹ The LAUSD thus implemented an “Expanded Learning Opportunities Grant Plan” and an additional “Path to Recovery Budget Plan” with the increased funding available to address students’ post-pandemic needs.¹⁵⁰ The plan highlights the need for parent involvement and community engagement, and it outlines LAUSD’s goal to provide additional services to ensure success for the most at-risk students.¹⁵¹

In August of 2021, the Superior Court in the County of Alameda addressed these changed circumstances by ordering plaintiffs to amend their complaint to state a present, ongoing harm.¹⁵² In September of 2021, the court granted LAUSD’s *ex parte* motion to dismiss after the plaintiffs failed to timely file an amended complaint.¹⁵³ The plaintiffs quickly appealed in October of 2021.¹⁵⁴

C. Parents Challenging the State of California’s Remote Learning Plan: Cayla J. v. California

The second suit filed by a group of parents in November 2020 challenges the entire State of California, contending that the state failed to support its disadvantaged students during the pandemic, exacerbating the already large

¹⁴⁹ See *Budget Act for 2021–22: Information*, CAL. DEP’T OF EDUC., <https://www.cde.ca.gov/fg/fr/eb/yr21tr0811.asp> [<https://perma.cc/QB38-T63P>] (Oct. 5, 2021) (providing background information on the changes to the school spending plan).

¹⁵⁰ See *COVID-19 Relief and School Reopening Grants*, CAL. DEP’T OF EDUC., <https://www.cde.ca.gov/LS/HE/HN/COVIDRELIEFGRANTS.ASP> [<https://perma.cc/B4HC-GR6F>] (Dec. 30, 2021) (describing the Board’s \$400.8 million funding application for the state issued Expanded Learning Opportunities grant); L.A. UNIFIED SCH. DIST., *PATH TO RECOVERY BUDGET PLAN 4* (2021), <http://laschoolboard.org/sites/default/files/06-15-21SpclBdLCAPPPathRecoveryBudgetPlan.pdf> [<https://perma.cc/UGH6-E999>] (describing how increased governmental funding from COVID-19 allows the school district to implement new programs and initiatives to support students).

¹⁵¹ See L.A. UNIFIED SCH. DIST., *supra* note 150, at 6–7 (specifically outlining goals to bring parents and community organizations into the planning process and to close the achievement gap for students of color).

¹⁵² Order Sustaining Demurrer at 1, *Shaw v. L.A. Unified Sch. Dist.*, No. 20STCV36489 (Cal. Super. Ct. Aug. 16, 2021).

¹⁵³ Order Granting Ex Parte Motion to Dismiss and for Entry of Judgment at 2, *Shaw v. L.A. Unified Sch. Dist.*, No. 20STCV36489 (Cal. Super. Ct. Sept. 14, 2021).

¹⁵⁴ Notice of Appeal, *Shaw v. L.A. Unified Sch. Dist.*, No. 20STCV36489 (Cal. Super. Ct. Sept. 22, 2021). As of this Note’s publication, the appeal is still being processed. See *Shaw v. L.A. Unified Sch. Dist.*, TRELIS, <https://trellis.law/case/20STCV36489/KESHARA-SHAW-ET-AL-VS-LOS-ANGELES-UNIFIED-SCHOOL-DISTRICT-ET-AL> [<https://perma.cc/4583-5VLW>] (Dec. 31, 2021) (proving docket updates).

achievement gap.¹⁵⁵ The plaintiffs assert that the state ignored the needs of Black and Hispanic students living in poverty and essentially abandoned its constitutional duty to provide a “free and equal education.”¹⁵⁶ The complaint details how the state failed to provide proper WIFI and computers for those in need, failed to train teachers and parents on how to remedy technical issues, and neglected to meet adequate instruction time for students.¹⁵⁷ The plaintiffs further illustrated how the state could tailor remote learning to meet the needs of disadvantaged students by following the lead of community organizers and parents who have been left out of the plans and decisions thus far.¹⁵⁸

The complaint further asserts that California’s plan for reopening schools and for remote learning worsened the already-unequal school system.¹⁵⁹ The complaint provides statistics that illustrate the stark disparities in learning outcomes for students of color before and after the pandemic, showing staggering absentee rates among students of color and low-income students.¹⁶⁰ The plaintiffs, furthermore, allege that the state failed its constitutionally mandated duty to provide a free and equal education by tasking Local Education Agencies (LEAs) with developing remote learning plans, but providing no further guidance.¹⁶¹ Although the state passed legislation calling for robust and equal learning plans, it did nothing to ensure that the LEAs accomplished that goal.¹⁶² While the state tasked LEAs with creating plans tailored to their individual school districts and under the guidance of parents, the complaint asserts that the LEAs, and thus the state, completely shut low-income and minority parents out of the creation of any such plan.¹⁶³ They further note how Black and Hispanic parents’ participation and feedback is critical for any remote

¹⁵⁵ Cayla J. Complaint, *supra* note 1, at 1. The complaint called for declaratory and injunctive relief and a jury trial. *Id.* at 61. The plaintiffs consist of seven families from various school districts along with two organizations, Community Coalition and the Oakland REACH. *Id.* at 1.

¹⁵⁶ *Id.* at 2 (referencing the “Digital Divide,” through which low income students and students of color have less access to technology compared to white, affluent students, causing increasing harm to both disadvantaged students and their teachers by barring participation in remote learning).

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 61–62 (asking for the state to include community organizations and parents when remedying the remote learning situation). The complaint discusses how community organizers have successfully helped low-income students navigate remote learning through offering support, instruction, and resources to both the students and their families during the pandemic. *Id.* at 3.

¹⁵⁹ *See id.* at 27–28 (explaining how in one district before COVID-19, 18% of Black students and 23% of Hispanic students were reported to have met grade level reading standards, while 72% of the white children in that district were performing at grade level or better).

¹⁶⁰ *See id.* at 28–29 (reporting that 21% of homeless children are not attending class during the 2021 school year, compared to 12% last year).

¹⁶¹ *Id.* at 31. Local Education Agencies (LEAs) are the local administrative source of control, and, therefore, a school district is an LEA. *Local Education Agency (LEA)*, EDSOURCE, <https://edsources.org/glossary/local-education-agency-lea> [<https://perma.cc/R6KQ-7BNT>].

¹⁶² Cayla J. Complaint, *supra* note 1, at 31.

¹⁶³ *Id.*

learning model to be successful, yet historically school officials have barred parents of color from participating in decisions regarding their children’s education.¹⁶⁴

In June 2021, the court denied plaintiff’s motion for injunctive relief, finding that the type of relief sought—namely addressing the deep educational inequality highlighted by the pandemic—could not be adequately met through a preliminary injunction.¹⁶⁵ Although the court hinted at the likely success of the plaintiffs at trial, it also articulated how policy concerns persuade the court to not to solve complicated, prolonged issues through the hasty and perhaps shortsighted remedy of a preliminary injunction.¹⁶⁶

D. Applying California’s Equal Protection Framework

Based on existing precedent and the compelling manner in which the two classes have plead their complaints, both pending lawsuits challenging how the California educational system has handled the pandemic are strong examples of how to successfully assert an equal protection violation using the state Constitution.¹⁶⁷ In both the Shaw Complaint naming LAUSD as a defendant and the Cayla J. Complaint naming the State of California as a defendant, there are two similar causes of action: (1) discrimination based on wealth; and (2) racial discrimination in violation of the equal protection clause of the California Constitution.¹⁶⁸

When assessing these claims, the court will first look to how the state Constitution and past case law define the right to an education.¹⁶⁹ California courts use the equal protection provisions of the state constitution not to guarantee an equal, uniform education in every district or school, but to ensure some “basic” level of opportunity available to everyone.¹⁷⁰ Although the Cali-

¹⁶⁴ *Id.* at 31–32. The complaint also explains how the State Department and Board of Education failed to rectify the problems discussed in the plaintiffs’ letter from September 2020, which requested that the situation be remedied. *Id.* at 35.

¹⁶⁵ Motion for Preliminary Injunction Denied at 4, Cayla J. v. State, No. RG200884386 (Cal. Super. Ct. June 15, 2021).

¹⁶⁶ *See id.* (“Plaintiffs have demonstrated some likelihood of prevailing on the claims for disparate impact race discrimination and for access to a ‘basically equal’ education. Plaintiffs have demonstrated an immediate and potentially significant harm.”).

¹⁶⁷ *See infra* notes 168–205 (applying California caselaw to the equal protection violations outlined in both complaints).

¹⁶⁸ Cayla J. Complaint, *supra* note 1, at 51, 53; Shaw Complaint, *supra* note 13, at 38–39.

¹⁶⁹ *See Butt v. State*, 842 P.2d 1240, 1248 (Cal. 1992) (describing the judicial and legislative history behind the state constitution’s guaranty to an education before assessing the merits of the case).

¹⁷⁰ *See Gordon, supra* note 126, at 341 (explaining how the California Supreme Court in *Butt* created a requirement that all districts meet some minimum standard using the equal protection doctrine). Gordon argues that the “framers’ intent” when drafting the language in the California Constitution was to protect some minimally adequate education and to ensure some basic level of equity. *See*

ifornia Supreme Court has not specifically defined what that minimum educational requirement entails, it has held that every student is entitled to receive a substantially equal opportunity to their peers.¹⁷¹ Student- and parent-plaintiffs engage with this judicial understanding of California's right to an education through clearly articulating the defendants' failure to provide a *basic* education during the pandemic.¹⁷²

Furthermore, both complaints detail how the underserved students' disadvantaged position prior to the pandemic created a need for legislative action above and beyond the support provided other students to provide them a basic education.¹⁷³ In cases challenging the adequacy of an education that result in court-imposed remedial measures, the court can "infuse equity values into their calculations by targeting resources to underprivileged children."¹⁷⁴ Crucially, the court in *Butt* rejected the State's assertion that it had the responsibility to equally allocate educational financing among districts, and that the early closure of the district was a consequence of the district's misuse of those funds.¹⁷⁵ Ultimately, the court established an affirmative duty on the state legislature to intervene when a district "falls fundamentally below prevailing statewide standards."¹⁷⁶ Thus, the fact that the LAUSD or the State imposed the same state-wide remote learning plans for all students will not be dispositive as to whether the LAUSD or the State has met their duty to provide some level of

id. at 344 (illustrating how the equal protection clause works in tandem with the education clause in the California Constitution).

¹⁷¹ See *id.* at 341 (discussing the opinion in *Butt* and how the court used the equal protection doctrine to find a minimum standard necessary in public education, not just equality of education). Thus, Gordon argues "equality" was not truly the issue in *Butt*, since the case determined that uniformity was not the goal, and instead included the word "basic" to imply there is some requisite level of education the State must provide. See *Butt*, 842 P.2d at 1243 (deciding "[w]hether the State has a constitutional duty, aside from the equal allocation of educational funds, to prevent the budgetary problems of a particular school district from depriving its students of 'basic' educational equality"); see also Gordon, *supra* note 126, at 345 (discussing how *Butt* established the duty of basic education, but did not define what that looks like).

¹⁷² See Shaw Complaint, *supra* note 13, at 14 (describing a report published by LAUSD showing only 60% of students engaging with the online school, with most only logging on once or twice a week); Cayla J. Complaint, *supra* note 1, at 6 (detailing how second grade twins Cayla and Kai's teacher only held online class twice between March and June 2020 since many students could not connect).

¹⁷³ See Shaw Complaint, *supra* note 13, at 1 (describing the achievement gap between white and Asian and Black and Latino students prior to the pandemic); Cayla J. Complaint, *supra* note 1, at 2 (arguing that California's failure to account for the digital divide and other obstacles faced by low-income students and students of color will exacerbate inequities).

¹⁷⁴ See Koski, *supra* note 100, at 23 (explaining how education litigation has shifted towards theories of adequacy, but courts can still use equity principles in determining what an adequate education looks like by thinking about the distribution of resources practically).

¹⁷⁵ See *Butt*, 842 P.2d at 1253 (holding that *Serrano II* did not minimally establish the State's duty as being an equal allocation of educational funds, and that *Serrano II* actually imposes on the State a duty to intervene in inter-district affairs to ensure that students are not deprived of an education).

¹⁷⁶ *Id.* at 1252.

basic educational equality.¹⁷⁷ A court will also likely consider the fact that California’s underprivileged students are the most vulnerable to losing a quality education because they have the least amount of options available to them.¹⁷⁸

Under the state Equal Protection Clause, the courts in both cases will then look to whether, at a *prima facie* level, there are at least two identifiable “similarly situated groups,” wherein one group is clearly being treated differently.¹⁷⁹ Because the plaintiffs in both complaints alleged wealth and racial discrimination, there are identifiable groups—students of color and low-income students and their white, wealthy peers—that are similarly situated because the state subjected them all to the same COVID-19 protocols for California public schools.¹⁸⁰

Next, courts will apply strict scrutiny to the state and LAUSD’s action by asking if the affected group is a suspect class *or* if the State’s role deprives the effected group of a fundamental right because both scenarios trigger the harshest for of judicial review.¹⁸¹ Because education is recognized as a fundamental right under the California Constitution, it triggers the strict scrutiny standard for judicial review and requires the state to show that its conduct was narrowly tailored to serve a compelling state interest.¹⁸² Further, California courts also apply the same strict scrutiny analysis when a suspect class is targeted either

¹⁷⁷ See *id.* (explaining that “[a] finding of constitutional disparity depends on the individual facts”).

¹⁷⁸ See *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1259 (1971) (“Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent.”); Moyer, *supra* note 59 (discussing how homeschooling or “podding” is an expensive option that provides private, at home education, but it thus limited to privileged families).

¹⁷⁹ *Collins v. Thurmond*, 258 Cal. Rptr. 3d 830, 843 (Ct. App. 2019) (citing *Cooley v. Superior Ct.*, 57 P.3d 654 (Cal. 2002)).

¹⁸⁰ See *Collins*, 258 Cal. Rptr. 3d at 844 (holding that race was an identifiable group for the purpose of an equal protection analysis, and that students were considered “similarly situated” when they were placed in disciplinary hearings for the same reasons); Shaw Complaint, *supra* note 13, at 12 (discussing how after the state shut down schools in March, LAUSD’s remote learning plan harmed students of color); Cayla J. Complaint, *supra* note 1, at 2 (“Due to the State’s insufficient attention to the actual circumstances of remote learning, Black and Latinx students from low-income families are being deprived of their fundamental right to a free and equal education.”).

¹⁸¹ See *Butt*, 842 P.2d at 1251–52 (holding that strict scrutiny applies when “the disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest” (first citing *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982); and then citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled in part sub nom. Edelman v. Jordan*, 415 U.S. 651 (1974))).

¹⁸² See *Collins*, 258 Cal. Rptr. 3d at 845 (explaining the difference in how education is treated under federal equal protection law and state equal protection law); *Butt*, 842 P.2d at 1251 (refuting the state’s argument that the lenient standard of rational basis review should be applied); *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 952 (Cal. 1976) (“Under this standard the presumption of constitutionality normally attaching to state legislative classifications falls away, and the state must shoulder the burden of establishing that the classification in question is necessary to achieve a compelling state interest.” (citation omitted) (first citing *Serrano I*, 487 P.2d at 1246; and then citing *Weber v. City Council*, 513 P.2d 601, 606 (Cal. 1973))).

intentionally or unintentionally.¹⁸³ Under state precedent, wealth and race are suspect classes, and discrimination against these groups warrants strict scrutiny review.¹⁸⁴ When a racially discriminatory policy is challenged, a court will not consider whether the discrimination was intentional because segregation in schools, whether *de jure* or *de facto*, constitutes a violation of the students' right to an education.¹⁸⁵ The concentration of students of color in remote-only districts and the probability that it will widen the achievement gap is reminiscent of *Collins*, when the court discussed how evidence of racial disparities in student disciplinary actions created *de facto* segregation.¹⁸⁶

Under a strict scrutiny analysis, the courts will decide if the LAUSD and the State of California have a compelling state interest that offsets the discriminatory effect of their policies.¹⁸⁷ It is established that "local control" is not a compelling state interest when the State attempts to offset its responsibility.¹⁸⁸ Given the novelty of the COVID-19 situation, it is unclear if a court would find that any public health initiative of the State to be a compelling state interest.¹⁸⁹ Ultimately, because the plaintiffs are not challenging the need for school to be remote, but are instead challenging the insufficiency of the education that

¹⁸³ See *Butt*, 842 P.2d at 1249 (explaining how in *Serrano I*, the court concluded that it was not necessary to show that the State was intentionally discriminating in order for the educational policy to be struck down).

¹⁸⁴ *Id.* at 1247, 1249.

¹⁸⁵ See *Collins*, 258 Cal. Rptr. 3d at 846 ("[U]nder California's equal protection clause, a claim is stated when a policy adopted in California has a substantial disparate impact on the minority children of its schools, causing *de facto* segregation of the schools and an appreciable impact to a district's educational quality, and no action is taken to correct that policy when its impacts are identified."). Thus, a facially neutral policy does not excuse the discriminatory impact that it may have. *Id.* Under the federal Constitution, *de facto* segregation is not unconstitutional because there needs to be some showing of intent behind the segregation for it to violate the Fourteenth Amendment. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 215 (1973) (Douglas, J., concurring) (arguing that the Court's distinction between *de jure* and *de facto* segregation was wrong because segregation of any kind should be unconstitutional).

¹⁸⁶ See *Collins*, 258 Cal. Rptr. 3d at 847–48, 849 (discussing how the disparate treatment of minority students led to students of color being "placed in . . . lower quality school settings in substantially higher proportions"); see also DeParle, *supra* note 11 (stating that 58% of students of color live in districts with remote learning or mostly remote learning, contrasted with 36% of white students subject to the same situation).

¹⁸⁷ See *Butt*, 842 P.2d at 1251–52 (finding that strict scrutiny applies when the case involves a suspect class or fundamental right). Under the Equal Protection Clause of the California constitution, unlike in the federal Constitution, education is a fundamental interest. *Id.* at 1250.

¹⁸⁸ See *id.* at 1254 (finding that giving local districts control is not a "constitutional mandate, but a legislative choice," and is therefore, not a compelling state interest (citing CAL. CONST. art. IX, §§ 6.5, 14)).

¹⁸⁹ See *id.* (explaining that local control, although widely accepted, is not a policy that the court recognizes as a compelling state interest since the state bears the ultimate burden of ensuring equality for all students).

their children have received since then, a court would likely not support the state's inability to respond to or remedy the disparities.¹⁹⁰

Butt is also a helpful indicator of both classes of plaintiff's likely success, as its facts mirror the facts in both complaints, in that school closures in all three circumstances caused massive "disruption[s]" and learning losses for students.¹⁹¹ The opinion in *Butt* offers some guidance for when early or unexpected school closures constitute a deprivation of the students' right to an education.¹⁹² It explained that not all school closures are a *per se* constitutional violation, and that when a school plans to shorten the school year, it can offset the learning loss through "other means, such as extended daily hours, more intensive lesson plans, summer sessions, volunteer programs, and the like."¹⁹³ It appears from the facts in both the Shaw and the Cayla J. Complaints, however, that the State and LAUSD's plan failed to account for the disruption of the school closures in any of the ways enunciated in *Butt*, and therefore, the school in California denied its students the level of educational quality guaranteed to them by the state constitution.¹⁹⁴

Further support for the plaintiff's claims can be found in *Serrano v. Priest* (*Serrano II*), where the Supreme Court of California in 1976 found that any plan that made educational opportunities a "function" of wealth was unconstitutional because education is a constitutionally guaranteed right.¹⁹⁵ Given the fact that students living in districts with low tax bases were found to be deprived of their right to an education, a court will likely conclude that students without Internet or appropriate electronic devices were deprived of equal educational opportunities during the pandemic.¹⁹⁶ Therefore, because so many low-income students do not have reliable access to WIFI, which deprives them of a meaningful education during COVID-19, a court will likely agree that the plaintiff sufficiently alleged wealth discrimination by the State and school dis-

¹⁹⁰ See *id.* at 1254–55 (rejecting the fear that the State interfering with the district's budgetary problems will lead to other districts "overspend[ing]" as a compelling state interest).

¹⁹¹ See *id.* at 1243, 1253 (explaining how the plaintiffs made a preliminary showing of substantial learning losses resulting from the six week early unplanned term closure); Cayla J. Complaint, *supra* note 1, at 25 (describing how schools were shuttered in the spring of 2020 following the state government's directions in response to COVID-19); Shaw Complaint, *supra* note 13, at 3 (alleging that 40% of students received zero education in the spring of 2020 following school closures).

¹⁹² *Butt*, 843 P.2d at 1252.

¹⁹³ *Id.*

¹⁹⁴ See Shaw Complaint, *supra* note 13, at 12–13 (discussing how the LAUSD's plan cut down on instruction time and provided no additional support or resources); Cayla J. Complaint, *supra* note 1, at 3 (showing that the only successful programs helping students navigate the pandemic have come from community organizers, not the state).

¹⁹⁵ See *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 953 (Cal. 1976) (reaffirming its decision in *Serrano I* that as long as the funding plan distinguishes districts based on property values, it is unconstitutional).

¹⁹⁶ *Id.* (holding that wealth discrimination in public schools is unconstitutional).

tricts' failure to act.¹⁹⁷ This constitutional violation should trigger robust judicial intervention.¹⁹⁸

Ultimately, if a court holds that the Shaw or Cayla J. Complaints sufficiently allege *de facto* segregation, the State and LAUSD will have deprived their students of an equal education.¹⁹⁹ It will then be in the courts' discretion to determine what type of remedial measures should be taken to mitigate the disparities.²⁰⁰

III. REIMAGINING EDUCATION EQUITY POST-PANDEMIC ACROSS THE STATES

The relief sought by the plaintiffs in the Cayla J. Complaint against the State of California offers guidance for the type of action that legislatures should take, or courts should order, to ensure that the most vulnerable students receive a substantially equal education to their white, wealthy peers during and after the pandemic.²⁰¹ Both complaints provide strong examples for future parents and students to force their public education systems to take action to prevent a growing adequacy gap between low-income students of color and their white, wealthy counterparts during the Pandemic.²⁰² Given that groups nationwide likely have strong claims under the state Equal Protections Clause against their state and school districts, students suffering in other states should litigate their claims, and courts should ultimately direct their legislatures to enact remote learning plans that both address parents' immediate concerns and fund future programs that will offset the losses already experienced.²⁰³ It is im-

¹⁹⁷ See Shaw Complaint, *supra* note 13, at 16–17 (describing how the LAUSD failed in its promise to secure WIFI and devices for all students, with two plaintiffs detailing receiving broken devices or a device with no ability to connect to WIFI). Over 263,000 families live in urban areas in California with no WIFI, and 227,000 families live in rural areas of California with no WIFI. Sydney Johnson, *Up to 1 Million California Students May Still Lack Connectivity During Distance Learning*, ED-SOURCE (Oct. 15, 2020), <https://edsources.org/2020/california-still-lacks-connectivity-for-more-than-300000-students-during-distance-learning/641537> [<https://perma.cc/LK4G-XJ4V>].

¹⁹⁸ See Rebell, *supra* note 16, at 1540 (describing the primary function of courts as describing and upholding constitutional rights).

¹⁹⁹ See *supra* note 185 and accompanying text (discussing how *de facto* segregation is unconstitutional in California).

²⁰⁰ See Rebell, *supra* note 16, at 1503–04 (discussing how different courts have taken different approaches in mandating an “adequate” education). For example, in North Carolina, one case resulted in the state being ordered to create a pre-K option for “at-risk” four-year-old children. *Id.* at 1504 (citing Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 392 (N.C. 2004)).

²⁰¹ See Cayla J. Complaint, *supra* note 1, at 62 (asking the court to ensure reliable Internet access for all students, the inclusion of Black and Hispanic families in education decisions, supplementary learning programs, and partnerships with community organizations).

²⁰² See *infra* notes 168–205 (analyzing the likely success of the complaints using Californian caselaw).

²⁰³ See Shaw Complaint, *supra* note 13, at 44–45 (asking for injunctive and declaratory relief); Cayla J. Complaint, *supra* note 1, at 61–62 (same); see also Rebell, *supra* note 16, at 1506 (explaining

portant that these plans address learning losses, include some amount of expanded learning time, enforce some standard amount of in-person instruction, create accountability for teachers, and allocate resources to the most at-need students.²⁰⁴ Furthermore, all efforts to remedy the disparities in education should involve the parents and community organizations who are already invested in their children’s success.²⁰⁵

Section A discusses the type of relief courts across the country should order to ensure educational equality and why it is important that courts intervene in this constitutional crisis.²⁰⁶ Section B explores the policy objectives that legislatures and school administrators must implement to remedy the disparate impact experienced by low-income students and students of color during the pandemic.²⁰⁷

A. *The Need for Judicial Intervention*

Given the severity and urgency of the situation, courts should take an active role in remedying the disparities in education arising out of COVID-19.²⁰⁸ Historically, courts have played an integral role in reforming education and establishing equal opportunity for students.²⁰⁹ Although some will argue for judicial restraint and claim that the public education system should be under the exclusive control of the legislature, the judiciary’s role is to intervene

how equal opportunity in education has been a goal of state courts and legislatures since *Brown v. Board of Education*).

²⁰⁴ See Cayla J. Complaint, *supra* note 1, at 62 (urging the court to direct resources and support to vulnerable students and to include community organizers and parents in remedying the remote learning situation as part of the relief sought). See generally *A P-12 Education Agenda in Response to COVID-1*, *supra* note 17 (defining important policy goals for educators and legislators to consider such as directing resources and funds to at-need districts). The LAUSD’s response to the lawsuit via its plan to fund more after-school programs and to work with parents is an example of the action a school district may take when challenged in court. See *COVID-19 Relief and School Reopening Grants*, *supra* note 150 (discussing the increased funding for expanded learning time programs in response to COVID-19).

²⁰⁵ See Cayla J. Complaint, *supra* note 1, at 62 (requesting “[e]qual access to educational opportunities for all California students, implemented with meaningful participation from low-income, Black and Latinx families, and community organizations that serve [those] communities”).

²⁰⁶ See *infra* notes 208–220 and accompanying text.

²⁰⁷ See *infra* notes 221–253 and accompanying text.

²⁰⁸ See *Butt v. State*, 842 P.2d 1240, 1250 (Cal. 1992) (holding that “the unique importance of public education in California’s constitutional scheme requires careful scrutiny of state interference with basic educational rights”); see also DeParle, *supra* note 11 (analyzing studies from Columbia University and the Brookings Institution depicting the disparate racial and socioeconomic effects of the pandemic).

²⁰⁹ See *Rebell*, *supra* note 16, at 1527 (explaining the critical role courts play in equalizing education); see also *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) (outlawing segregation in public schools).

where a constitutional right is being deprived.²¹⁰ Like the state of California, many states nationwide are failing in their duty to provide a basic education to all students.²¹¹ Where a plaintiff successfully asserts a state constitutional claim of an unequal education under the equal protection clause or an inadequate education under the public educational mandate, state courts should order some form of declaratory relief and instruct the legislature to amend their remote learning plans.²¹²

State courts have taken the initiative to use declaratory relief to demand their state legislatures to modify their learning plans and have provided recommendations for those modifications.²¹³ For example, in 1976, in *Serrano v. Priest* (*Serrano II*), the California Supreme Court ordered the state legislature to rewrite the school financing scheme for a *second* time, after the legislature had failed in their first attempt to eliminate wealth discrimination from school financing.²¹⁴ This judicial intervention in education reform is indicative of the type of declaratory relief possible in the two class actions currently being considered in California, and for future state constitutional litigation in other states.²¹⁵

Furthermore, this has occurred at the federal level, as the United States Supreme Court in *Brown v. Board of Education* in 1954 made sweeping education reform when it outlawed segregation in public schools, illustrating that the judiciary has the power and duty to act when a government is violating the

²¹⁰ See *Rebell*, *supra* note 16, at 1530 (explaining how people use the separation of powers doctrine to argue against court intervention); *id.* at 1540 (discussing how the court's primary obligation is to ensure that constitutional rights are being protected, including children's right to an education).

²¹¹ See *Smith & Reeves*, *supra* note 6 (explaining a nationwide study showing how low income students and students of color are the most likely to be learning online and will thus be affected the worst by the pandemic).

²¹² See *Shaw Complaint*, *supra* note 13, at 2 (describing how one plaintiff's daughter did not attend any remote class in the spring of 2020 and her current remote learning situation only requires 25% of the instruction time she received before COVID-19); *Cayla J. Complaint*, *supra* note 1, at 2 (stating that California's lack of care and planning for poor students and students of color during the pandemic has effectively denied them an education); see also *Rebell*, *supra* note 16, at 1505 (describing how a court in South Carolina found "that poverty directly causes lower student achievement," and it ordered the state to create a pre-K through third grade program to mitigate the adverse consequences of living in a low-income household).

²¹³ See *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 930, 958 (Cal. 1976) (ordering California officials to reimagine the public school funding scheme since it was unconstitutional under the state constitution).

²¹⁴ See *id.* at 957 (invalidating the legislature's tax scheme to fund public schools).

²¹⁵ See *id.* at 953 (enforcing broad principles of equality in overturning education legislation); *Shaw Complaint*, *supra* note 13, at 5 (requesting: (1) "declaratory relief that Defendants violated their children's rights to an equal education"; and (2) "Defendants be enjoined from further violating Plaintiffs' children's statutory and constitutional rights"); *Cayla J. Complaint*, *supra* note 1, at 4 (stating that community organizations have shown that effective remote education for disadvantaged students is possible, so the state must be judicially compelled to provide these services for all students).

constitution it enforces.²¹⁶ In the same breath, the Court also invalidated all Jim Crow Era laws, essentially undoing an immense amount of legislation and demonstrating how from a policy perspective, the judiciary is a necessary way to achieve change when the legislature stagnantly allows rights to be violated by government agencies.²¹⁷ Had the Court been too timid to intervene in that case, who knows how long segregation would have persisted?²¹⁸

State courts provide meaningful forums for education reform because state constitutions protect children’s right to a free and equal education.²¹⁹ The judicial enforcement of equal education during COVID-19—when different districts are subject to different remote learning plans and disadvantaged students are suffering as a result—is a proper exercise of judicial power and a necessary policy matter.²²⁰

*B. For Educational Equity to Be Possible Post-Pandemic,
the Legislature Must Act Now*

Regardless of how the courts decide in California and in future litigation in other states, each state and their school districts, activist organizations, and families should work together to cure the learning losses already accumulated and plan for safe, effective remote learning options going forward given the unpredictability of the pandemic.²²¹ That being said, because the pandemic is ongoing and the national educational crisis is imminent, waiting for a trial in

²¹⁶ *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 494–95 (1954) (invalidating the model of public education that segregated white and Black students).

²¹⁷ *See id.* (overruling the “separate but equal” precedent, established in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

²¹⁸ *See* Marcellus Antonio Mcrae, *Education Reform Through the Courts and Why It’s Necessary*, EDSOURCE (Nov. 15, 2013), <https://edsources.org/2013/education-reform-through-the-courts-and-why-its-necessary/49238> [<https://perma.cc/5D2F-QPBA>] (discussing how *Brown* is a perfect indicator of the necessity of judicial intervention).

²¹⁹ *See* EMILY PARKER, EDUC. COMM’N OF THE STATES, 50 STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/6X8L-ZAAK>] (stating that all fifty state constitutions contain some public education mandate); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is not a right ensured by the Constitution).

²²⁰ *See* *Butt v. State*, 842 P.2d 1240, 1256 (Cal. 1992) (“In sum, the California Constitution guarantees ‘basic’ equality in public education, regardless of district residence.”). The fact that students in certain districts are receiving hours more of school a day than students in other districts should trigger judicial intervention. *See* Shaw Complaint, *supra* note 13, at 35 (discussing how LAUSD requires four hours of class time for high school students compared to San Diego Unified School District requiring six hours).

²²¹ *See* Cayla J. Complaint, *supra* note 1, at 62 (asking for the state, parents, and community organizations to join forces to create a plan for schools reopening and to implement some supplementary learning program).

any state is not ideal.²²² The goals of the parents and the state should be aligned given that the parents and community organizations are not asking to open schools before it is safe to do so.²²³ In fact, families of color are the wariest of risking their children's safety with in-person instruction while COVID-19 remains a threat.²²⁴ The fact that California increased its public education budget for the 2021–2022 school year with the intent of aiding certain school districts with disadvantaged students, like the LAUSD, offers hope and opportunity for an effective legislative response.²²⁵

The legislature needs to devise a plan that tackles three discrete policy objectives aimed at equalizing educational opportunity during COVID-19: (1) a supplementary summer or after-school program should be made available to address the lost learning time between 2020–2021; (2) stricter regulations for online instruction time should be enforced by the State, and accountability measures such as attendance and achievement statistics should be monitored;²²⁶ and (3) additional resources and funding should be directed towards the most at need schools.²²⁷ These resources should include the provision of meaningful Internet access, training for parents on how to navigate the remote learning platforms, and an open line of communication that addresses any other significant learning barriers, such as translation for non-English-speaking families.²²⁸

The first goal—to design a supplementary program to address the significant learning loss experienced by low-income students and students of color—should attempt to curb the growing achievement gap by engaging those stu-

²²² See DeParle, *supra* note 11 (citing statistics from an online learning platform, that disadvantaged students have slipped 14% in their math scores since last winter, compared to wealthy students' scores increasing by 13%).

²²³ See WORTH MORE LA, *supra* note 5 (asking for resources, support, and a plan to get students back on track, but not requesting that schools reopen).

²²⁴ See Keeanga-Yamahtta Taylor, *What's at Stake in the Fight Over Reopening Schools*, NEW YORKER (Feb. 9, 2021), <https://www.newyorker.com/news/our-columnists/whats-at-stake-in-the-fight-over-reopening-schools> [<https://perma.cc/3XFC-35E7>] (discussing how families of color are the least likely to want their children to return to in-person learning due to the devastating effects COVID-19 has had on people of color).

²²⁵ See *infra* notes 151–153 (discussing California's expanded education budget to account for COVID-19 learning losses and the LAUSD's plan to use that budget for expanded learning time programs and more parent involvement).

²²⁶ See Shaw Complaint, *supra* note 13, at 20 (describing a letter sent by a cohort of community organizations to the superintendent asking for a minimum requirement of class time, and methods to improve and monitor teachers); Cayla J. Complaint, *supra* note 1, at 62 (requesting “[c]ompensatory education to remediate the learning losses”).

²²⁷ See Rebell, *supra* note 16, at 1515, 1543 (discussing three policy goals: (1) defining realistic criteria and objectives; (2) supporting students living in extreme poverty in a manner that accounts for those unique challenges; and (3) allocating “necessary resources” in a sustainable way).

²²⁸ See *A P-12 Education Agenda in Response to COVID-1*, *supra* note 17 (identifying important policy goals to protect vulnerable students).

dents who are risk of falling further behind.²²⁹ The Cayla J. Complaint details this type of community response taken on by organizations like Oakland REACH that have successfully helped students learn during the pandemic.²³⁰ One such program led by Oakland REACH, the “City Wide Virtual Hub,” provided an online summer school program for low-income children in kindergarten through eighth grade.²³¹ The co-founder of the “parent-led” advocacy group, Lakisha Young, said the program was a huge success with an attendance rate of 83%, compared to 35% attendance during the school’s spring term.²³²

Another community organization that provides a model for this type of program is Wide Angle Youth Media, based in Baltimore, that offers educational programs centered around media and the arts outside of traditional school hours.²³³ Wide Angle works directly with grades K-12 to offer programs that integrate the school’s curriculum and expand students’ skills in production, media, and design.²³⁴ For example, in the spring of 2021, Wide Angle offered a virtual course held two evenings a week for middle schoolers that explored various “storytelling mediums.”²³⁵

Organizations like Wide Angle and Oakland REACH demonstrate that “expanded learning time” is an incredibly important solution in remedying educational inequity during the COVID-19 pandemic.²³⁶ The Learning Policy

²²⁹ See Sarah Klevan, *Transforming Challenges into Opportunities: The Role of Expanded Learning Time in Advancing Educational Equity*, LEARNING POL’Y INST. (Jan. 14, 2021), <https://learningpolicyinstitute.org/blog/covid-expanded-learning-time-advancing-educational-equity> [<https://perma.cc/9BBK-G4TE>] (discussing how extra-curricular or supplementary programs that engage youths both inside and outside of the classroom can help reduce the educational opportunity gap).

²³⁰ Cayla J. Complaint, *supra* note 1, at 7–8 (describing how Oakland REACH has been a “lifeline” for plaintiffs during the pandemic by providing “a safe space for learning and community advocacy”).

²³¹ See Martha Ross, *SV Chat: Oakland Activist Pushes for Educational Equality During COVID-19*, MERCURY NEWS, <https://www.mercurynews.com/2021/01/03/sv-chat-oakland-activist-pushes-for-educational-equity-during-covid-19/> [<https://perma.cc/9KAP-95TS>] (Jan. 4, 2021) (interviewing Oakland REACH’s chief executive officer, Lakisha Young, about the organization’s efforts to reengage students during the COVID-19 pandemic).

²³² *Id.*

²³³ See Klevan, *supra* note 229 (discussing Wide Angle Media’s role in hosting a “virtual” prom and other expanded learning-time programs in Baltimore); *Our Mission*, WIDE ANGLE YOUTH MEDIA, <https://www.wideanglemedia.org/our-mission> [<https://perma.cc/VYW6-8NNV>] (stating that their goal is to “cultivate[] and amplif[y] the voices of Baltimore youth” through media arts education).

²³⁴ See Klevan, *supra* note 229 (discussing how expanded learning time is most beneficial for students when the program works in conjunction with the school and the curriculum).

²³⁵ See *2021–22 Course Catalog*, WIDE ANGLE YOUTH MEDIA, <https://www.wideanglemedia.org/spring-2021-course-catalog> [<https://perma.cc/5P4U-95D>] (detailing the various remote-based programs offered in the spring of 2021 for K-12 students in the community).

²³⁶ Klevan, *supra* note 229. Klevan describes expanded learning time initiatives, such as Wide Angle Media, as “more than an add-on program, field trip, or enrichment opportunity.” *Id.* She also discusses studies conducted before the pandemic that illustrate how students from more affluent families on average enjoy six thousand more hours on educational activities than their less affluent peers. *Id.*

Institute articulates how effective “expanded learning time initiatives” work with the schools to enhance the students’ learning experience and foster a supportive community where students feel at home.²³⁷ The Learning Policy Institute, furthermore, identified federal funds that could be used for expanded learning initiatives from the December 27th federal relief bill that directed \$54.3 billion to schools serving underprivileged students.²³⁸ The California legislature, along with other states, should direct the school districts receiving federal funds to institute supplementary courses and programs that either directly engage with community organizations or use those organizations as models for effective expanded learning time.²³⁹

The second policy goal—to increase transparency and regulation in the remote curriculum—is a necessary step to ensure that students receive an adequate education during COVID-19.²⁴⁰ As detailed by the Shaw and Cayla J. Complaints, the dismal attendance record and decreased instruction time for low-income students and students of color threatens future educational outcomes.²⁴¹ Although many state courts, including in California, have not imposed any strict standards for what a “basic” education looks like, forty-five minutes a day of live instruction time for third graders should certainly not meet this constitutional minimum.²⁴² In fact, the Education Trust suggests that states design a “user-friendly, multilingual hub” where families and students can find compiled information, assistance, and a place to communicate with teachers and school officials.²⁴³ Open communication with students and their parents will ultimately help facilitate effective learning at home and mitigate

²³⁷ See *id.* (“For maximum benefit, ELT should be taught by well-prepared educators who utilize student-centered pedagogy and curriculum.”).

²³⁸ See *id.* (describing how funds from the relief bill can be utilized to support any school or expanded learning time program that qualifies under the Elementary and Secondary Education Act).

²³⁹ See *id.* (explaining how Wide Angle Media is so successful and effective because it has strong ties to the community and it works with schools to support and supplement the curriculum).

²⁴⁰ See *Rebell*, *supra* note 16, at 1508–09 (explaining how the concept of equal educational opportunities is most effective when courts and legislators strictly outline it).

²⁴¹ See *Shaw Complaint*, *supra* note 13, at 15 (describing how over fifteen thousand high school students did not attend online instruction in the spring of 2020); *Cayla J. Complaint*, *supra* note 1, at 29 (citing statistics from various school districts demonstrating the lack of student attendance during remote learning).

²⁴² See *Gordon*, *supra* note 126, at 340–41 (discussing the rulings in *Serrano II* and *Butt*, and how the California supreme court did not “define” what a basic, quality education looked like); see also *Cayla J. Complaint*, *supra* note 1, at 7 (describing two plaintiffs’ “typical school day” as consisting of forty-five minutes of live instruction time).

²⁴³ *A P-12 Education Agenda in Response to COVID-1*, *supra* note 17. The Education Trust is an organization whose goal is to “close opportunity gaps that disproportionately affect students of color and students from low-income families.” *Who We Are*, EDUC. TR., <https://edtrust.org/who-we-are/> [<https://perma.cc/GTD9-WNCU>].

any challenges, such as parents not knowing how to navigate the learning portal, as they arise.²⁴⁴

The final solution—directing additional funding and resources to the most at-need school district—reflects the growing understanding that educational equality is not a one-size-fits-all model.²⁴⁵ When students’ basic needs, such as food and housing, are not met, they cannot be expected to meaningfully participate in their education.²⁴⁶ School districts should, thus, also establish “meal pick up” locations to serve students and families who typically receive and depend on school meals.²⁴⁷

The disparity in educational opportunity during COVID-19 is certainly not limited to California.²⁴⁸ At the close of the 2020–2021 school year, a study across the country exemplified how inequitable the learning losses were.²⁴⁹ In schools with mostly Black students, the students concluded the school year with an average six-month learning loss in math and reading, while students in predominantly white schools experienced an average loss of four months in math and three months in reading.²⁵⁰ This stark disparity necessitates both judicial and legislative intervention to not only mitigate the effects of the pandemic, but to reckon with the historic inequities in education that may be worsened if the states do not act.²⁵¹ The policy objectives outlined in this section are only a blueprint and can be adapted to each state’s needs.²⁵² While state courts remain a viable forum for parents and student plaintiffs who wish to enforce this kind of change, state legislatures have the ability and the re-

²⁴⁴ See Cayla J. Complaint, *supra* note 1, at 7 (explaining how the plaintiff had to teach herself how to navigate her daughter’s online platform without any instruction from the school).

²⁴⁵ See *Abbott v. Burke*, 575 A.2d 359, 401 (N.J. 1990) (explaining how the needs of low-income students are unique and require additional resources to provide for equity in education).

²⁴⁶ See Allison Weber, *Help Kids Facing Hunger This School Year*, FEEDING AMERICA (Aug. 8, 2019) <https://www.feedingamerica.org/hunger-blog/help-kids-facing-hunger-this> [<https://perma.cc/GHJ7-4KYJ>] (“Studies show that children from homes that lack consistent access to food are more likely to experience developmental impairments in areas like language, motor skills, and behavior.”).

²⁴⁷ See *A P-12 Education Agenda in Response to COVID-1*, *supra* note 17 (urging states to provide “critical supports” for low-income families through repurposing funds and distributing necessary resources).

²⁴⁸ See DeParle, *supra* note 11 (examining the racial and socio-economic learning gaps that are being exacerbated by the pandemic).

²⁴⁹ See Dorn et al., *supra* note 45 (looking at over one million students’ performance across forty states to discern the effects of the pandemic on education).

²⁵⁰ *Id.*

²⁵¹ See *id.* (discussing the influx of federal funds to public education in response to COVID-19 and the opportunity for these funds to offset loss from the pandemic and the historical inequities that persist in the United States).

²⁵² See *infra* notes 225–227 (explaining the broad policy goals that legislatures and school administrators should consider).

sponsibility to step in to ensure all students in their state receive the right to an education guaranteed in their state constitutions.²⁵³

CONCLUSION

COVID-19 has disrupted nearly every aspect of society. That type of cosmic shift leaves room for innovative and creative thinkers to solve problems that were previously viewed as intractable. The disparities in education relating to race and socio-economic status prior to the pandemic were shocking, but the fact that they have been exacerbated by remote learning is unacceptable. Education reform litigation has given activists an important tool to fight for change in state courts, and they can use that constitutionally defined right to levy a settlement or a court order.

Two coalitions filed class action complaints in California detailing how remote learning has created racial and wealth discrimination in violation of the equal protection provisions in the California Constitution. These suits will likely survive the pleadings stage because education is a fundamental right in California and these complaints involve suspect classes. These lawsuits provide a blueprint for parents and students in other states, as every state constitution includes a right to public education. Given the urgency of the situation, courts faced with successful claims under the state Equal Protection Clause or right to education should expediently direct legislatures to adopt an expanded learning plan. These plans should account for the damage already done by the disparate impact of remote learning and ensures effective and equal educational opportunities going forward.

Perhaps most important, there are community organizations already supporting low-income students and students of color through expanded learning time initiatives and parental engagement. The legislature and the school districts should model their programs after these organizations or directly partner with them to provide supplementary material to account for students' lost learning time since the spring of 2020.

Providing equal educational opportunities for all means extra attention and support for some—namely the students who are the most socio-economically disadvantaged. This vision of educational equality should guide the California courts, and state courts across the nation, in allocating resources and enforcing each state's constitutional standard for an adequate education during and after the pandemic.

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²⁵³ See *A P-12 Education Agenda in Response to COVID-19*, *supra* note 17 (creating a flexible agenda to guide states in their distribution of resources toward the public school system during COVID-19); Rebell, *supra* note 16, at 1540 (explaining how the most robust efforts to develop equal educational opportunity since *Brown* has happened in the state courts and state courts need to continue to be active in pursuing this goal).