UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JESSICA MARTINEZ, et al., *Plaintiffs*, v. DANNEL PATRICK MALLOY, in his official capacity as Governor of Connecticut, et al., *Defendants*.	Civil Action No. 3:16-cv-01439-AWT

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs Jessica Martinez, on behalf of herself and her son Jose Martinez; Dahlia Bryan, on behalf of herself and her children Jorr Moorley, Curtis Moorley, Alec Patterson, and Jaidyn Bryan; Leslie Rodriguez, on behalf of herself and her granddaughter Nina Martinez; and Frankie Frances, on behalf of himself and his son, Dylon Frances (collectively, "Plaintiffs") respectfully submit this opposition to the motion to dismiss filed by Defendants (the "State" or "Connecticut").

I. INTRODUCTION

Every year, the State of Connecticut prevents thousands of children from accessing a meaningful public education—an "indispensable ingredient for achieving the kind of nation, and the kind of citizenry," the United States needs. *Board of Ed. v. Allen*, 392 U.S. 236, 247 (1968). In cities like Bridgeport, Hartford, and New Haven, the State forces children to attend traditional public schools that the State *knows* are (and for decades, have been) failing on virtually every possible measure. And while vastly superior public-school alternatives exist within the State's own borders—a veritable life raft for students lucky enough to attend them—Connecticut has knowingly, and without any rational justification, erected barriers that deprive inner-city children of the chance to access them. Specifically, the State has (1) imposed a sweeping moratorium on public magnet schools, (2) effectively capped the number of public charter schools operating within the State, and (3) created powerful disincentives that discourage high-performing traditional schools from participating in the State's Open Choice program. Without those laws and policies, Plaintiffs and thousands of other children would have meaningful educational opportunities and a chance to succeed in life. With those pernicious laws and policies in place, they have little or no hope of escaping the cycle of poverty, illiteracy, and despair that entraps their communities.

Every year, thousands of students apply for admission to Connecticut's high-performing public-school alternatives with the hope of avoiding the failing traditional schools they otherwise

would be forced to attend. But, as a result of the laws and policies at issue in this case—laws that artificially cap the opportunities available to Connecticut's students—thousands of students are routinely denied admission and placed on miles-long wait lists. This "state-imposed" discrimination "disrespect[s] and subordinate[s]" the liberty and dignity of children living in Connecticut's most neglected communities, punishing them for factors well beyond their control, relegating them to second-class citizenship, and stamping them with a badge of inferiority that will harm them "for the rest of time." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–95, 2604 (2015). As the Supreme Court set forth in *Brown v. Board of Education*, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. 483, 494 (1954).

In their motion to dismiss, Defendants make three main arguments, none of which justifies dismissal. First, Defendants mischaracterize Plaintiffs' claims in an attempt to persuade this Court that Connecticut's state-created barriers to education have not harmed Plaintiffs. But Plaintiffs' allegations, which describe in detail how the laws at issue deprive Plaintiffs of vital educational opportunities available to their more fortunate peers throughout the State, are more than sufficient to confer standing. Second, Defendants ask this Court to create a *sui generis* exception to the time-honored legal principle espoused in *Ex parte Young*, 209 U.S. 123 (1908), and hold that the Eleventh Amendment prohibits consideration of Plaintiffs' claims. The Supreme Court, the Second Circuit, and this Court, however, *all* have declined Defendants' misguided invitation where, as here, a plaintiff seeks declaratory and injunctive relief against the enforcement of invalid state laws. Third, Defendants contend that Plaintiffs' claims fail because the Supreme Court has not yet recognized a fundamental right to education under the U.S. Constitution. That contention

alone, however, is not a sufficient basis on which to grant Defendants' motion. There is no binding precedent from the Supreme Court or the Second Circuit preventing this Court from deciding for itself whether Plaintiffs have stated a claim under the federal Constitution. To the contrary, the Supreme Court has expressly acknowledged the undetermined nature of the educational rights asserted in this case and, through its modern equal protection and due process jurisprudence, confirmed that Plaintiffs have indeed stated a viable constitutional claim.

For these and the following reasons, this Court should deny Defendants' motion to dismiss.

II. SUMMARY OF FACTUAL ALLEGATIONS

Plaintiffs are seven schoolchildren from Bridgeport and Hartford, ranging in age from five to thirteen who—together with their parents and guardians—are deeply concerned about the quality of education that they and thousands of other Connecticut students are receiving. Compl. ¶¶ 11, 13–16, 18, 20. Plaintiffs' concerns are well founded: According to Connecticut's own metrics, nearly *40,000* students statewide are trapped in chronically failing schools. *Id.* ¶ 34. Worse still, nearly 90% of the children attending these schools are children of color and children living in poverty. *Id.* These students are being left behind, year after year, contributing to one of the widest achievement gaps in the Nation between minority and white students, low-income and non-low-income students, and English Language Learners ("ELLs") and non-ELLs. *See id.* ¶¶ 30–37, 44–46, 153. Indeed, the State's minority and low-income students are, on average, three grade levels behind their white and non-low-income peers on *all* measures, and the State's ELLs are more than five grade levels behind their non-ELL peers across *all* measures. *Id.* ¶ 46. These education gaps carry grave and long-lasting consequences that impair students' prospects of graduating high school, attending college, and preparing for a career after school. *Id.* ¶¶ 47–49.

For a lucky few, however, three public-school opportunities offer a means of escaping these chronically failing schools and the communities they plague. *See* Compl. ¶¶ 50–81, 85, 97–98.

- Inter-district magnet schools: Connecticut's inter-district magnet schools are publicly-funded schools designated to promote racial, ethnic, and economic diversity, offering a special or high-quality curriculum. Compl. ¶¶ 51, 54; Conn. Gen. Stat. § 10-264*l*(a).

- Charter schools: Connecticut's charter schools are public, nonsectarian schools that are established under a charter, organized as a nonprofit entity, and operated independently of any local or regional board of education. *See* Compl. ¶ 62; Conn. Gen. Stat. § 10-66aa.

- The Open-Choice Program: The Open-Choice Program is designed to allow students in Hartford, New Haven, Bridgeport, and New London—low-income and minority districts—to attend district schools in nearby towns. Compl. ¶ 76; Conn. Gen. Stat. § 10-266aa.

Although these public school alternatives differ in many ways, they share a common thread—according to the State's own findings, all three have a proven track record of student success, *significantly* outpacing the academic performance of the traditional district schools in low-income communities, helping to bridge the achievement gap between the "haves" and the "have-nots," and offering greater promise of a meaningful and productive future for students allowed to attend them. Compl. ¶¶ 54–60, 64–75, 77–81. For that very reason, *thousands* of students apply for admission to these schools. *Id.* ¶¶ 85, 97–98, 108–09. But, based on nothing more than a cruel game of chance, most are denied admission via lottery, placed on miles-long waiting lists, and relegated to the same traditional district schools that have failed their communities for decades. *Id.*

Connecticut *knows* that these traditional district schools have been failing their students for decades, yet compels students to attend those schools anyway. Compl. ¶ 42 ("[T]ens of thousands of students across Connecticut are attending chronically failing schools that do not provide meaningful educational opportunities to the students in their charge."); *see also id.* ¶¶ 30–41, 43–

49. And it *knows* that the State's magnet, charter, and Open Choice schools are offering life-changing educational opportunities to students. *Id*. ¶¶ 30, 53–60, 63–74, 77–83, 87, 99, 109. But instead of expanding access to these viable public alternatives, the State has instead taken the exact opposite approach, intentionally erecting the following series of legal constraints (the "Anti-Opportunity Laws") that impede the availability of these superior public schools. *Id*. ¶¶ 82–109.

- Magnet School Moratorium: Since 2009, the State has instituted and enforced a moratorium on the construction of new inter-district magnet schools. *See* Compl. ¶¶ 4, 83–85.

- Charter School Cap: Unlike traditional district schools, which automatically receive funding for each enrolled student, Connecticut forces charter public schools to rely on the shifting whims of the General Assembly for funding every year, which may—or may not—choose to fund them, and at an amount that may—or may not—permit them to keep their doors open for students. *See* Compl. ¶¶ 88, 91, 92–93. These barriers and the inevitable uncertainty arising from them effectively cap the number of charter public schools that exist in Connecticut, leaving Connecticut with one of the lowest charter-school penetration rates in the country. *Id.* ¶¶ 94–96.

- Open Choice Penalties: Schools participating in Open Choice—the very program ostensibly designed to help urban students attend high-performing district schools—receive just half the funding for each Open Choice student they accept. This built-in disincentive causes far too few school districts to open up far too few seats for students in need. Compl. ¶¶ 101–08.

Individually and collectively, these laws produce inadequate and inequitable educational opportunities for Plaintiffs and thousands of other Connecticut students. Without these laws in place, there would be substantially more magnet, charter, and/or Open Choice slots available to Plaintiffs and the other Connecticut children trapped in failing schools. Compl. ¶¶ 82–84, 87, 94–98, 101, 116–18.

III. SUBSEQUENT FACTUAL DEVELOPMENTS: *CCJEF v. RELL*

Subsequent to the filing of Plaintiffs' Complaint, the Superior Court for the Judicial District of Hartford issued a long-awaited opinion in *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, No. X07HHDCV145037565S, a case in which an education advocacy group, parents, and students challenged several aspects of the Connecticut education system as violative of the State Constitution. 2016 WL 4922730 (Conn. Super. Ct. Sept. 7, 2016).

Defendants discuss this opinion in their motion to dismiss, claiming that it held that "the State provides more than minimally adequate educational opportunities" to Connecticut's students and "does not provide those opportunities on a constitutionally unequal basis …." Mot. at 7. This remarkable description distorts the core holding of *CCJEF*, which unambiguously held that Connecticut routinely and unconstitutionally deprives *thousands* of students—including those within Plaintiffs' own school districts—of any semblance of an adequate or meaningful education.

As the *CCJEF* court explained in language echoing Plaintiffs' Complaint in this case, "[i]nstead of … honoring its promise of adequate schools, [Connecticut] has left rich school districts to flourish and poor school districts to flounder." 2016 WL 4922730, at *1. This chasmic gap appears in virtually every measure of student achievement. "While less than 1 in 10 students in many of the state's richest communities are below the most basic reading levels …, nearly 1 in 3 students in many of the state's poorest communities can't even read at basic levels." *Id.* at *14. Similarly, "while around 90% of the students in the state's richest places made their … math goals, most students in the poorest places did not." *Id.*; *see also* Compl. ¶¶ 29–49.

These educational inequities—a direct result of State policies like those at issue here—have long-lasting consequences that affect students for the rest of their lives. "SAT scores," for instance, "showed 90% of Bridgeport students were not college and career ready." *CCJEF*, 2016 WL 4922730, at *19. And, although "high schools in impoverished cities are graduating high

percentages of their students," students are leaving school without "the basic literacy and numeracy skills the schools promise." *Id.*; *see also id.* ("[T]he school superintendent of Bridgeport painfully but readily confessed that a functionally illiterate person could get a Bridgeport high school degree."); *id.* at *20 ("Among the poorest, most of the students are being let down by patronizing and illusory degrees."). "[H]igher education realities remove any doubt that the state is failing poor students," as "more than 70% of impoverished students across the state's public higher education system … don't have basic literacy and numeracy skills and have to get special instruction." *Id.* at *20.

Try as they may, Defendants cannot in good conscience argue that these findings are good news for Connecticut or its neediest students. *CCJEF*, 2016 WL 4922730, at *14 ("There is no place to hide this bad news."). These are not "isolated stories" either: "[F]or thousands of Connecticut students there is no elementary education, and without an elementary education there is no secondary education." *Id.* at *22. As these and many other findings make clear, *CCJEF* certainly did *not* find that the State provides all Connecticut students with adequate educational opportunities, as Defendants pretend; on the contrary, it held that, "[w]ithout any reasonable doubt, [Connecticut] breaks [its] constitutional promise of a free [] education by making it for the neediest students meaningless." *Id.* at *20. Against this background, and for the reasons alleged in the Complaint, Connecticut has no possible justification for enforcing the Anti-Opportunity Laws.

IV. LEGAL STANDARD

"When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff." *Quinn v. Fishkin*, 117 F. Supp. 3d 134, 138 (D. Conn. 2015) (citation omitted). To survive such a motion, the "plaintiff must plead 'only enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 139 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." *Id*. Similarly, courts evaluating motions to dismiss for lack of standing "borrow from the familiar Rule 12(b)(6) standard, construing the complaint in plaintiff's favor and accepting as true all material factual allegations …." *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012) (citations omitted).

V. ARGUMENT

A. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CLAIMS.

To establish Article III standing, a plaintiff need only meet three requirements, by alleging: "(1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Macedonia Church v. Lancaster Hotel Ltd. P'ship*, 498 F. Supp. 2d 494, 497 (D. Conn. 2007) (quotation omitted). Plaintiffs have satisfied these elements.

1. Plaintiffs Have Suffered Cognizable Harm.

Plaintiffs' seventy-page Complaint meticulously describes their devastating and long-lasting injuries. Connecticut has compelled them and thousands more students to attend schools it knows are chronically failing, year after year, while impeding the availability of viable, superior public-school alternatives. Compl. ¶¶ 29–81, 83, 87, 101, 110–18. The State's conduct undeniably has deprived Plaintiffs and countless others of the opportunities available to their peers—ample basis for this Court to conclude that Plaintiffs have suffered injury in fact.

Indeed, as the Supreme Court has explained, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Northeastern*

Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993). Rather, "[t]he 'injury in fact' … is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*; *see also Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (plaintiff "clearly" had standing to challenge race-conscious admissions policy); *Gratz v. Bollinger*, 539 U.S. 244, 260–63 (2003) (injury was denial of "opportunity to compete for admission on an equal basis"); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam).

In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), for example, a group of parents sued the Seattle School District, asserting that its school assignment policies violated the Constitution. Seattle argued that plaintiffs would "only be affected if their children [sought] to enroll in a Seattle public high school and choose an oversubscribed school that [was] integration positive—too speculative a harm to maintain standing." *Id.* at 718. The Court, however, found this argument "unavailing," holding instead that plaintiffs had satisfied the injury in fact requirement because they had "children in the district's elementary, middle, and high schools" and "the complaint sought declaratory and injunctive relief on behalf of … members whose elementary and middle school children may be denied admission to the high schools of their choice when they apply for those schools in the future." *Id.* (quotation omitted). Notably, the "fact that it [was] possible that children of group members [might] not be denied admission to a school . . . [did] not eliminate the injury." *Id.* at 718–19 (quotation omitted).

Courts within the Second Circuit and elsewhere have reached the same conclusion in analogous circumstances, finding that a lost opportunity is sufficient to establish standing. *See, e.g.*, *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004) (parents had standing to challenge policy of scheduling girls' soccer in Spring that deprived daughters of opportunity to play in championships held in Fall); *Petrella v. Brownback*, 697 F.3d

1285, 1289, 1295 (10th Cir. 2012) (joined by Gorsuch, J.) (plaintiffs had standing to challenge Kansas's public-school financing system because they alleged that "unequal treatment (manifested in, among other things, lower per-pupil funding) … prevented them from even attempting to level the playing field"); *Wiesmueller v. Kosobucki*, 571 F.3d 699, 702–03 (7th Cir. 2009) ("[L]oss of an opportunity to compete for a position … is injury enough.").

Applying this law to the Complaint here, Plaintiffs have plainly alleged sufficient and particularized injury. Plaintiffs allege, for instance, either that they attend chronically failing district schools (and have been excluded from higher-performing public charter, magnet, and Open Choice schools) or that they are at imminent risk of being forced to attend chronically failing district schools in the near future. Compl. ¶¶ 9, 14, 82. To take just one example, Plaintiff Dylon Frances attends a low-performing traditional district school—Cesar A. Batalla School—in the Bridgeport School District. *Id.* ¶ 20. His father has repeatedly applied for his admission to higher-performing schools, but each year he has been waitlisted as a result of the Anti-Opportunity Laws, forcing Dylon to remain at Cesar A. Batalla. *Id.* ¶¶ 20, 114. Unless his future applications are successful, Dylon will soon be forced to attend Bassick High School, one of the lowest-performing schools in the entire State. *Id.* ¶¶ 41, 114; *see also id.* ¶¶ 11, 38–39, 111 (describing the similar situation of Plaintiff Jose Martinez).

Defendants ignore these allegations, instead making a merits argument that Plaintiffs lack standing because there supposedly is "no federal right to a minimally adequate education." Mot. at 2. Specifically, they point to *dicta* in a footnote of an off-point Second Circuit case, *Montesa v. Schwartz*, 836 F.3d 176 (2d Cir. 2016), for the proposition that "there is no free-standing federal constitutional right to a public education that entitles the Student-Plaintiffs to a minimum level of educational services such that the deprivation of those services creates cognizable injury." *Id.* at

200 n.15. That case, however, concerned only whether students "had standing to bring an Establishment Clause claim" against a school board for "funding Hasidic schools," a "unique context" that had nothing to do with depriving students of educational opportunities. *Id.* at 194–96. Therefore, *Montesa*'s inapposite *dicta* (*infra* § V(C)(2)), which does not "express [the] Circuit's authoritative position," *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005), is nowhere close to "dispositive" here, as Defendants claim, Mot. at 9. Moreover, Defendants ignore Plaintiffs' due process and equal protection claims that are grounded in the well-founded rights of liberty and equality, which do not depend on a fundamental right to education.

Defendants also mischaracterize the Complaint, suggesting Plaintiffs' alleged injury is entirely dependent on "test scores and graduation rates." Mot. at 10. Not so. Plaintiffs allege more broadly, for example, that "thousands of students across the State are confined to severely underperforming schools" that "do not provide students with the necessary tools to succeed academically or to become productive and successful members of society." Compl. ¶ 30; *see also id.* ¶¶ 3, 5. In any event, standardized tests—though by no means the only way in which to measure student achievement—are indisputably a reasonable proxy for assessing whether the State's schools provide adequate and equal educational opportunities. Indeed, the State itself has explained that they "define learning expectations for what students should know and be able to do at each grade level." Conn. SDE, "Smarter Balanced Reporting Information," http://www.sde.ct.gov/sde/cwp/view.asp?a=2748&q=335724. If vast majorities of students at certain schools are not meeting the State's own learning expectations at each grade level, it is safe to say that those schools are failing their missions.

Next, Defendants complain that many of Plaintiffs' allegations pertain to "schools that these Plaintiffs do not attend or relate to a statewide achievement gap that bears no particularized

relation to these individual Plaintiffs." Mot. at 10–11; *see also id.* at 2–3. The Complaint, however, alleges that *Plaintiffs'* schools are low-performing and—by virtue of the Anti-Opportunity Laws—*Plaintiffs* personally are being denied an equal and adequate education by having to remain in their failing schools. *See* Compl. ¶¶ 11, 13–16, 18, 20, 39, 40–41, 111.

Finally, Defendants contend that Plaintiffs' allegations "demonstrate that many students in [Plaintiffs'] schools ***have*** received adequate test scores and ***have*** been able to graduate," and there "simply is no basis to conclude that those students who test well and who are on track to graduate have been harmed." Mot. at 11. These assertions, however, are belied by the factual findings in *CCJEF*, which found that graduation degrees are meaningless in many struggling school districts and, in fact, give children in these schools a false sense of security.[1] *See supra* § III. Moreover, even if *some* students at Plaintiffs' schools find a way to succeed despite the abysmal educational environment, that is beside the point for standing purposes because Plaintiffs' allegations are based on the substantial and undisputed risk that these failing schools will result in harm to Plaintiffs.

2. Plaintiffs' Injuries Are Fairly Traceable To The Anti-Opportunity Laws.

Defendants next contend that Plaintiffs' injuries are not fairly traceable to the challenged statutes "for at least two reasons." Mot. at 12. Neither is availing.

First, Defendants contend that Plaintiffs have not shown causation because they fail "to even identify what the educational opportunities in their own schools actually are, much less to demonstrate whether and how those opportunities are inadequate for Plaintiffs' own educational needs." Mot. at 12. For the reasons demonstrated above, *supra* § V(A)(1), this argument rests on a faulty premise—that Plaintiffs' injury arises from micro-level inputs in their classrooms, rather than being forced to attend schools that, according to the State's metrics for student achievement,

1 Defendants do not dispute these findings (*see* Br. of Defendants-Appellants/Cross-Appellees (Conn. No. S.C. 19768) at 6), and, in fact, rely on *CCJEF* here. Mot. at 7.

fail to provide them with a minimally adequate education or educational opportunities remotely rivaling their wealthier suburban peers. *See* Compl. ¶¶ 9, 14, 82, 87–99, 101.

Second, Defendants argue that the Anti-Opportunity Laws do not "cause [] Plaintiffs' alleged injury" because they "do not control or have any bearing on the quantity or quality of educational opportunities *in Plaintiffs' own schools*." Mot. at 13 (emphasis added). But that misses the point. Plaintiffs are injured because the laws at issue *deprive them of the opportunity to attend a school that is not failing*.

- ***Magnet School Moratorium.*** The moratorium on new inter-district magnet-schools "prevent[s] the opening or expansion of schools with a proven track record of success," resulting in Plaintiffs and thousands of others being denied admission and forced to remain in failing schools. Compl. ¶¶ 81–85.
- ***Charter School Laws.*** The charter school authorization and funding regime deters charter school networks from entering the State and "effectively caps the ability of charter school operators … to maintain or expand existing schools in the State," resulting in Plaintiffs and thousands of others being denied admission and forced to remain in failing schools. Compl. ¶¶ 88–99.
- ***Open-Choice System***. The "Open Choice program has a built-in financial disincentive that causes far too few school districts to open up far too few seats for students in need," resulting in thousands being denied admission and forced to remain in failing schools. Compl. ¶¶ 104, 106, 108–09.

By definition, a lost opportunity is fairly traceable to policies denying or limiting that opportunity. In *Watt v. Energy Action Ed. Found.*, 454 U.S. 151 (1981), for example, California sued the Secretary of the Interior, asserting that he had violated a statutory command to experiment with different royalty systems for offshore drilling leases. The Secretary argued that the State lacked standing because, even if he had to experiment, he retained discretion to use traditional royalty systems. But the Court held that California's injury—a lost opportunity to obtain a benefit—was "fairly traceable" to the Secretary's conduct. *Id.* at 160–62; *see Petrella*, 697 F.3d at 1293 (plaintiffs challenging law capping local education spending showed causation because "[a]s pled, the [] cap is the source of [plaintiffs'] alleged injury" and "[b]ut for the [] cap, … the

school district could submit a proposed property tax increase to the voters").

Here, Plaintiffs injuries likewise are fairly traceable to the Anti-Opportunity Laws. Plaintiffs allege that the State "forc[es] Plaintiffs and thousands of other students to attend public schools that it *knows* are failing, while impeding the availability of viable public educational alternatives through the Anti-Opportunity Laws." Compl. ¶ 9. For example, Plaintiff Jose Martinez's mother "has repeatedly applied on Jose's behalf for admission to higher-performing magnet schools, but—as a direct result of the Anti-Opportunity Laws—Jose has been denied admission each and every time." *Id.* ¶ 11. And "the Anti-Opportunity Laws are likely to prevent Jose from gaining admission to any such schools" in the future as well. *Id.* As a result, Jose will be forced to attend "one of the lowest-performing high schools in the State." *Id.*; *see also id.* ¶¶ 20 (Dylon Frances), 113 (Curtis Moorley). The State's decision to artificially restrict enrollment in magnet, charter, and Open-Choice schools injures Plaintiffs by depriving them of an opportunity to compete and thereby diminishing their chance of escaping failing schools.

3. Plaintiffs' Injuries Are Redressable.

Finally, Defendants argue that declaring the Anti-Opportunity Laws invalid and enjoining their enforcement will not redress Plaintiffs' injuries because, even after judgment, there may not be enough new magnet or charter public schools to "meet the alleged demand" for those schools, or the General Assembly may take a number of hypothetical actions in the future, like defunding charter schools altogether, refusing to make the Open Choice program mandatory, or providing a different Open Choice funding formula. Mot. at 15–16. None of these arguments holds water.

As an initial matter, Defendants again mischaracterize Plaintiffs' injury. *See Petrella*, 697 F.3d at 1294 (The "district court's conclusion that Appellants' alleged injury was not redressable was based on an inaccurate characterization of that injury."). Removing barriers that stand in a plaintiff's way indisputably *can* redress a plaintiff's injury in a lost-opportunity case, irrespective

of whether the plaintiff is ultimately able to achieve his or her desired goal. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) ("The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing.") (quotations omitted); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272, 280 n.14 (1978) ("[E]ven if Bakke had been unable to prove that he would have been admitted [to medical school] in the absence of the [challenged] special program, it would not follow that he lacked standing.").

In *Bryant v. New York State Education Department*, 692 F.3d 202 (2d Cir. 2012), for example, the Second Circuit considered whether parents of New York children attending a school for individuals with behavioral disorders had standing to enjoin a New York regulation prohibiting "aversive" techniques. *Id.* at 210–12. Defendants argued that plaintiffs' injuries were not redressable because they would not *all* be able to receive aversives at the lone New York facility that used them. *Id.* at 211. But the Second Circuit rejected this argument because "[i]f New York's prohibition was declared invalid, it is 'likely' that other facilities in New York would provide aversives." *Id.*; *see also id.* at 212 ("authority to obtain aversive interventions" redressed injury).

Similarly, in *Wiesmueller*, out-of-state law school graduates challenged a rule admitting graduates of Wisconsin schools to the bar without taking the bar exam. Even though the court did "not know what exactly Wisconsin would do to comply with a ruling invalidating the [rule]," it concluded that plaintiffs' injuries were redressable because the state "might require all applicants … to take a continuing legal education course in Wisconsin law in lieu of a bar exam" and "[t]hat would give the plaintiffs most of the relief they seek." 571 F.3d at 702–03; *see also Petrella*, 697 F.3d at 1294–95 (injuries flowing from a cap on local educational expenditures were redressable "under a variety of scenarios," including a ruling "strik[ing] down the [local funding] cap and the [finance system], but stay[ing] [the court's] order to give the Kansas Legislature time to respond").

Here, a declaration invalidating and enjoining the Anti-Opportunity Laws will benefit Plaintiffs by removing State-sanctioned barriers to meaningful and high-quality education. Removal of the magnet school moratorium, for example, will directly and immediately allow more magnet schools—which the State knows are superior to Plaintiffs' failing schools—to open, expand, and offer their seats to students like Plaintiffs. *See* Compl. ¶¶ 82–85, 110–18; *Bryant*, 692 F.3d at 211. Indeed, even Defendants admit that "Plaintiffs' chances of winning [a magnet school] lottery may increase with more magnet schools." Mot. at 16. That is sufficient for purposes of redressability, irrespective of whether Plaintiffs ever obtain admission to those schools.

Similarly, a judgment striking down the State's effective cap on charter public schools will remove legal constraints that produce such severe uncertainty that "charter schools are left not knowing whether their schools will even exist the following year." Compl. ¶ 93. That uncertainty, as Plaintiffs have alleged, prevents high-performing charter public school networks from opening and expanding in the State, *id*. ¶¶ 94–96, capping the educational opportunities for students trapped in failing schools, *id.* ¶¶ 97–99. *See Bryant*, 692 F.3d at 211; Compl. ¶¶ 110–18. Furthermore, Plaintiffs have alleged that, "[i]f the Anti-Opportunity Laws did not exist, charter school operators such as KIPP and Uncommon Schools undoubtedly would open a network of charter schools in Connecticut, thereby giving *thousands* of Connecticut's inner-city students an opportunity to escape the failing schools that the State compels them to attend." Compl. ¶ 96 (emphasis added).

Of course, it is theoretically *possible* that the General Assembly could withdraw funding for charter schools together, as Defendants warn. Mot. at 15. But this Court should not presume that the legislature would take such severe action. *See E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1055 (2d Cir. 1983) (the State's "exercise of discretion … cannot infringe constitutional rights and must be guided by legal principles"). Furthermore, even though

Defendants do "not know what exactly [the State] would do to comply with a ruling invalidating [these laws]," Defendants "cannot say that the probability of [] a mode of compliance is so slight that the plaintiffs cannot show that they have anything to gain from winning their suit and so cannot be permitted to maintain it." *Wiesmueller*, 571 F.3d at 702–03.

Finally, it is not speculative at all to infer that a judgment declaring unconstitutional the Open Choice program's built-in disincentives—disincentives that "cause[] far too few school districts to open up far too few seats for students in need"—will increase the number of spots available to students like Plaintiffs. Compl. ¶ 104. Again, it is *possible* that the General Assembly could scrap the Open Choice program altogether, but that outcome is far from likely and may not be presumed. *See Powers*, 723 F.2d at 1055.

4. Plaintiffs Who Recently Escaped Failing Schools Still Have Standing.

Defendants also argue that Plaintiff Curtis Moorley, in particular, lacks standing because "he already has been accepted to one of the charter schools that Plaintiffs want to attend." Mot. at 17. In light of recent events, Defendants would likely assert the same argument regarding Plaintiffs Nina Martinez, Jorr Moorley, Alec Patterson, and Jaidyn Bryan.[2] That argument is without merit, as it is squarely foreclosed by the Supreme Court's decision in *Parents Involved*, 551 U.S. 701.

In *Parents Involved*, the Court considered whether a plaintiff had standing to seek relief against future injury, even though he had "been granted a transfer to … the school to which transfer was [previously] denied under the racial guidelines" under review. 551 U.S. at 719. The Court concluded that the plaintiff in question *did* have standing because "[u]pon [his] enrollment in … school, he may again be subject to assignment based on his race." *Id.* at 719–20. Here, Plaintiffs

2 These Plaintiffs have recently gained admittance—after years of unsuccessful applications (*see* Compl. ¶¶ 110–14)—to public charter schools in Bridgeport and Hartford. But all five may be forced to return to the low-performing district schools for which they are zoned if the Anti-Opportunity Laws force their charter public schools to reduce spaces or even stop operating.

Nina Martinez, Curtis Moorley, Jorr Moorley, Alec Patterson, and Jaidyn Bryan now attend charter schools whose very existence depends on the annual whims of the General Assembly, which has refused to fund such schools in the past, and very well may do so in the future. *See* Compl. ¶¶ 88–93. Like the student in *Parents Involved* who had received a transfer and temporary reprieve, these Plaintiffs "may again be subject to" the very harms that they recently escaped. *See Parents Involved*, 551 U.S. at 719–20; *see also Wiesmueller*, 571 F.3d at 703 ("[T]he fact that a loss or other harm … is probabilistic rather than certain does not defeat standing.") (quotation omitted).[3]

* * *

In sum, Plaintiffs have suffered ongoing cognizable injury because they must attend—or in the near future may be forced to attend—schools that fail to provide adequate or equal educational opportunities. These injuries are fairly traceable to and can be redressed by declaring invalid and enjoining the Anti-Opportunity Laws.

B. THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS.

Next, Defendants argue that "the Eleventh Amendment … bars [Plaintiffs'] claims" because Plaintiffs purportedly request a "specific and rigid" form of relief—a "mandate that the State must provide and pay for essentially unlimited charter schools, magnet schools, and Open Choice opportunities"—that poses a "great[] threat to our federal system" of governance. Mot. at 20, 22–24, 26. Contrary to these alarmist arguments, however, Plaintiffs do not seek anything so rigid or extraordinary. To the contrary, Plaintiffs' federal claims fit comfortably within the long-standing exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908).

3 The injuries of Plaintiffs Nina Martinez, Jorr Moorley, Alec Patterson, and Jaidyn Bryan are also redressable even though they now attend charter public schools because they all attended low-performing district schools and were on charter school waitlists when this suit was filed. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (a plaintiff has standing if her "injury was at that moment capable of being redressed through injunctive relief").

1. Plaintiffs' Claims Satisfy The Requirements Of *Ex parte Young*.

Ex parte Young "established an important limit on the sovereign-immunity principle." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011). Under *Ex parte Young*, the Eleventh Amendment does not bar suit "where prospective relief is sought against individual state officers in a federal forum based on a federal right …." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276–77 (1997) (Kennedy, J.). This exception is vital "to promote the vindication of federal rights," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (citations omitted), and "gives life to the Supremacy Clause," *Green v. Mansour*, 474 U.S. 64, 68 (1985). Indeed, it is "a landmark of American constitutional jurisprudence that operates to end ongoing violations of federal law and vindicate the overriding 'federal interest in assuring the supremacy of that law.'" *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (citations omitted).

"In determining whether the doctrine of *Ex parte Young*" applies, "a court need only conduct a 'straightforward inquiry into whether [the] complaint [1] alleges an ongoing violation of federal law and [2] seeks relief properly characterized as prospective.'" *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citations omitted). If so, the Eleventh Amendment does *not* bar the suit in question. *See id.* Here, Plaintiffs have plainly satisfied the first prong of this test, alleging that Defendants are violating the federal Constitution by knowingly and unjustifiably forcing "Plaintiffs and thousands of other students to attend public schools that [they] *know[]* are failing, while impeding the availability of viable public educational alternatives …." Compl. ¶ 9. Plaintiffs have satisfied the second *Ex parte Young* prong as well because, as Defendants concede, *see* Mot. at 19, Plaintiffs are requesting only declaratory and injunctive relief to prevent future constitutional violations, Compl. ¶¶ 159, 170, 177, 187, 192, 199, 204; Prayer for Relief. Because Plaintiffs have satisfied this "straightforward" inquiry, *Stewart*, 563 U.S. at 255–56, Plaintiffs' claims may proceed under *Ex parte Young*.

2. This Court Should Deny Defendants' Unsupported Request To Create A *Sui Generis* Exception To *Ex parte Young* For Education-Related Claims.

Defendants, however, argue that *Ex parte Young* does *not* apply because the State has a "special sovereignty interest in determining the policies and structure of public education." Mot. at 19–20. This Court should decline Defendants' invitation to create a *sui generis* exception shielding any and all education laws from constitutional scrutiny because *Coeur d'Alene* (the sole case on which they rely) does not remotely establish the broadly applicable exception that Defendants suggest. There, an Indian Tribe sued Idaho and state agencies and officers, alleging that defendants had unlawfully deprived the Tribe of certain lands. 521 U.S. at 264–65 (maj. opn.). Although the Tribe ostensibly sought prospective relief—a declaration establishing its right to occupy the lands and an injunction prohibiting interference with those lands—the Court held that the Tribe could not invoke *Ex parte Young* under the "particular and special circumstances" of the case. *Id.* at 265, 287–88. According to the Court, the relief "would … extinguish[] the State's control over a vast reach of lands and waters," an outcome "fully as intrusive as almost any conceivable retroactive" remedy. *Id.* at 282, 287–88. As Justice O'Connor explained, the Eleventh Amendment barred suit because the Tribe sought "to eliminate altogether the State's regulatory power over the submerged lands at issue—to establish not only that the State [had] no right to possess the property, but also that the property [was] not within Idaho's sovereign jurisdiction *at all*." *Id*. at 289 (O'Connor, J., conc. in part and conc. in judgment) (emphasis added).

Thus, *Coeur d'Alene* stands, at most, for the notion that *Ex parte Young* does not apply if a suit seeks to fully "extinguish" a State's regulatory power. *Coeur d'Alene*, 521 U.S. at 282. "To interpret *Coeur d'Alene* differently," as Defendants suggest, "would be to open a Pandora's Box as to the relative importance of various state powers or areas of state regulatory authority"—an unworkable approach that finds no basis in the governing case law. *Agua Caliente Band of*

Cahuilla Indians v. Hardin, 223 F.3d 1041, 1048 (9th Cir. 2000); *see also Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008) ("[W]e cannot extend *Coeur d'Alene* beyond its 'particular and special circumstances,' … which involved the protection of a State's land."); *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (*Coeur d'Alene* does not "requir[e] 'federal courts [to] examine whether the relief sought against a state official 'implicates special sovereignty interests'"); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 206 (4th Cir. 2001) (*Coeur d'Alene* was inapplicable where plaintiff did "not seek[] to strip Maryland of its authority to regulate liquor").

Defendants have not provided *any* authority in support of their argument that challenges to education laws implicate the "special sovereignty interest[s]" at issue in *Coeur d'Alene*. Nor could they. In fact, courts have applied *Ex parte Young* time and again in cases challenging unlawful or unconstitutional educational laws and policies. In *Milliken v. Bradley*, 433 U.S. 267 (1977), for example, the Supreme Court considered the propriety of a remedial order entered after a court found *de jure* segregation in the Detroit public school system. In addition to pupil reassignment, the order called for "compensatory educational components," including new programs in communications skills and reading, teacher in-service training, student testing, and counseling and career guidance, with costs to be borne equally by the Detroit School Board and the State. *Id.* at 273–76. The Supreme Court affirmed this remedial order and held that it "fit squarely within" *Ex parte Young* because it "require[d] state officials, held responsible for unconstitutional conduct … to eliminate a de jure segregated school system" prospectively. *Id.* at 288–91.

Defendants argue that *Milliken* did not involve "principles of federalism" allegedly implicated here because the defendant school board in *Milliken* "proposed the desegregation plan" that the court approved. Mot. at 25. As an initial matter, that description of *Milliken* is far from complete. While the *school board* in *Milliken* proposed portions of the remedial order that the

district court adopted, the *State of Michigan and its officers* opposed the requested relief, yet the State was nonetheless required to bear half the cost of the remedial order. 433 U.S. at 272–74, 288–91 & n.6. More importantly, neither the school board's non-opposition to the requested relief, nor the State's opposition to that relief, had any bearing on the Supreme Court's decision: the remedial order satisfied *Ex parte Young* because it was "designed to wipe out continuing conditions of inequality produced by [an] inherently unequal" school system. *Id.* at 290.

Similarly, in *Papasan v. Allain*, 478 U.S. 265 (1986), the Supreme Court held that the Eleventh Amendment did not bar a challenge to Mississippi's unequal distribution of school funds. Plaintiffs alleged that Mississippi's decision to establish lucrative trusts that benefitted schools in certain parts of the State, while selling lands and improperly managing the proceeds in other parts, produced unconstitutional school funding disparities. *Id.* at 268–74. Plaintiffs requested a declaration that the legislation implementing the land sales was void; the establishment of a trust to be held in favor of plaintiffs; or an injunction making lands available to plaintiffs. *Id.* at 274. As the Court held, the "alleged ongoing constitutional violation—the unequal distribution by the State of the benefits of the State's school lands—[was] precisely the type of continuing violation for which a remedy may permissibly be fashioned under [*Ex parte*] *Young*." *Id.* at 282.

The Second Circuit and this Court have also permitted, over Eleventh Amendment objections, lawsuits challenging education-related laws, policies, and conduct. *See, e.g.*, *Burr by Burr v. Sobol*, 888 F.2d 258, 259 (2d Cir. 1989) (order awarding compensatory education due to denial of free, appropriate education was "permissible despite the Eleventh Amendment"); *Taylor v. Norwalk Cmty. Coll.*, 2015 WL 5684033, at *16–17 (D. Conn. Sept. 28, 2015) (student's equal protection claim); *Fetto v. Sergi*, 181 F. Supp. 2d 53, 79 (D. Conn. 2001) (student's due process claims based on alleged failure to provide procedure to apply for education support services). As

Milliken, *Papasan*, and these many other education-related cases make clear, challenges to education laws and practices are plainly permissible if they satisfy *Ex parte Young*.

3. Plaintiffs Seek A Traditional Remedy For Constitutional Violations.

Attempting to make this case sound extraordinary, Defendants mischaracterize the relief Plaintiffs seek as a "specific and rigid … mandate that the State must provide and pay for essentially unlimited charter schools, magnet schools and Open Choice opportunities to any student that wants them." Mot. at 23. Defendants also claim there are "any number of potential solutions that State and local officials conceivably could adopt to address any alleged inadequacies in Plaintiffs' schools, including, most notably, taking appropriate steps to improve *those schools*." *Id*. at 22–23. These arguments also fail.

First, far from requesting "extraordinary relief," Mot. at 17, Plaintiffs in fact seek traditional remedies: a declaration that the laws violate the Constitution, an injunction against further enforcement, and an injunction requiring the State to "take any and all steps necessary" to remedy constitutional violations. Compl. ¶¶ 9, 159, 170, 177, 187, 192, 199; *see, e.g.*, *Rothstein v. Wyman*, 467 F.2d 226, 241 (2d Cir. 1972). Defendants concede as much, stating that "[t]he only relief [Plaintiffs] seek is a declaration that the [laws] are unconstitutional and an order enjoining the State from enforcing those specific statutes on a prospective basis." Mot. at 14.

Second, Plaintiffs *agree* that increasing the quality of educational opportunities in all underperforming traditional public schools could remedy the constitutional violations here. *See* Mot. at 17. In fact, that is precisely why Plaintiffs requested that this Court enjoin the Anti-Opportunity Laws, "*to the extent they force Connecticut students, including Plaintiffs, to attend failing public schools*." Compl. ¶¶ 159, 170, 177, 187, 192, 199 (emphasis added). If no failing public schools existed, the injunction Plaintiffs seek would be satisfied.

Third, even if Plaintiffs had requested "specific and rigid" relief, *Milliken* and *Papasan*

would *still* authorize such relief. *Milliken* did not merely affirm an order declaring that the Detroit school system had engaged in segregation; rather, it instituted "compensatory educational components" to address this inequity. *Milliken*, 433 U.S. at 273–76. Likewise, *Papasan* held that the Eleventh Amendment did not bar Plaintiffs' request for a very particular form of injunctive relief—the establishment of a trust or the transfer of lands to plaintiffs. *Papasan*, 478 U.S. at 282.

4. Plaintiffs' Complaint Will Not Interfere With Any State Court Proceedings.

Finally, Defendants suggest that *Ex parte Young* should not apply because any relief would "interfere with" and "contradict" the recent *CCJEF* judgment. But the existence of allegedly overlapping litigation is irrelevant: Defendants have not cited a single example where a court has relied on parallel litigation to evade *Ex parte Young*. That is because, as discussed above, the only relevant factors under *Ex parte Young* are "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645.

This Court should also reject Defendants' argument because there is no substantial overlap—let alone complete overlap—between this case and *CCJEF*. Here, Plaintiffs allege violations of the *federal* Constitution based on a variety of different legal theories, including, *inter alia*, the existence of a constitutional right to *equal* educational opportunities. Compl. ¶¶ 149–204. By contrast, the sole issue reached in *CCJEF* was whether Connecticut is depriving its students of a minimally *adequate* education under the *Connecticut* Constitution. 2016 WL 4922730. Nor is there any likelihood that any remedy ordered here will overlap with *CCJEF*. Unlike this case, which challenges three sets of laws that limit the availability of viable public school alternatives, the remedial order entered in *CCJEF* commands the State to correct deficiencies in its funding allocation formula, graduation standards, teacher evaluation and compensation policies, and special education programs—different topics of litigation. Because the claims in these cases rest on different legal theories, different constitutional authorities, and

different laws, there is no likely conflict between them. *See Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 156 (2008) ("[A]lthough we may follow the analytical approach taken by courts construing the federal constitution, our use of that approach for purposes of the state constitution will not necessarily lead to the same result.").

Finally, a judgment from this Court validating Plaintiffs' allegations would not "conflict with" *CCJEF*. Mot. at 23. To the contrary, it would *corroborate* the factual findings reached in *CCJEF*, where the court found that the State's laws contribute to "egregious gaps between rich and poor school districts" and held that, "[b]eyond a reasonable doubt, Connecticut is defaulting on its constitutional duty to provide adequate public school opportunities." *CCJEF*, 2016 WL 4922730, at *14, *17; *see supra* § III. As these and other findings make clear, *CCJEF*—to the extent it is relevant at all—verifies, not undercuts, Plaintiffs' allegations here.

C. PLAINTIFFS HAVE PLEADED VALID CONSTITUTIONAL CLAIMS.

Finally, Defendants contend that the Court should dismiss this action for failure to state a claim because the Anti-Opportunity Laws: (1) "treat" all students the same (Claims One through Three); and (2) are "subject to" and "easily survive" "rational basis scrutiny" (All Claims). Mot. at 27.[4] Not so. The Anti-Opportunity Laws treat students who attend failing traditional schools differently from other students. Moreover, Plaintiffs have properly alleged *rights*-based due process and equal protection claims. Thus, the Anti-Opportunity Laws trigger strict (not rational basis) scrutiny, and in any event, Plaintiffs' claims may not be dismissed on the pleadings

[4] Defendants also contend that Plaintiffs have failed to state a claim under 42 U.S.C. Section 1983 (Claim Seven) because that statute only permits a claim to be asserted against "persons." In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Supreme Court held that "a State is not a person within the meaning of § 1983" and "a suit against a state official in his or her official capacity is … no different from a suit against the State itself." *Id.* at 64, 71. However, as *Will* further explained, "a state official in his or her official capacity, when sued for *injunctive* relief, [*is*] a person under § 1983." *Id.* at 71 n.10 (citations omitted) (emphasis added); *see also Barstow v. Shea*, 196 F. Supp. 2d 141, 146 (D. Conn. 2002) (same). Because the Complaint here seeks declaratory and injunctive relief, Defendants are "persons" under Section 1983.

irrespective of which standard applies.

1. The Anti-Opportunity Laws Are The Proper Subject Of An Equal Protection Challenge (Claims One Through Three).

Defendants argue that the Anti-Opportunity Laws cannot be challenged under the Equal Protection Clause *at all* because the Anti-Opportunity Laws allegedly "do not treat similarly situated persons differently." Mot. at 39. But the Anti-Opportunity Laws treat students in failing traditional public schools—schools that are identifiable based on Connecticut's own data, *see* Compl. ¶¶ 43–49—far worse than students who are fortunate enough to attend satisfactory or superior traditional public schools. *Id*. ¶ 5. Only students in failing traditional public schools require educational alternatives like charter and magnet schools; thus, only those students are harmed by the Anti-Opportunity Laws that restrict those public alternatives.

In any event, Defendants misapprehend the very nature of *rights*-based equal protection claims, which—unlike *class*-based claims—are "determined by the right, not the class, affected." *Ramos v. Town of Vernon*, 353 F.3d 171, 178 (2d Cir. 2003). Often, an equal protection claim is premised on a "suspect" or "quasi-suspect" classification and alleges discrimination against one or more *groups*. *See, e.g.*, *Brown*, 347 U.S. 483 (race); *United States v. Virginia*, 518 U.S. 515 (1996) (gender). But if a law infringes on individuals' fundamental rights, that too gives rise to an equal protection claim. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632–33 (1969); *Harper v. Va. Bd. of Elections* 383 U.S. 663, 670 (1966); *see Obergefell*, 135 S. Ct. at 2604 ("[T]he Equal Protection Clause … prohibits [the] unjustified infringement of [] fundamental right[s].").

In *Bullock v. Carter*, for instance, the Supreme Court held that a law requiring *all* political candidates to pay election filing fees was unconstitutional because it impinged upon voters' right to vote. 405 U.S. 134, 144 (1972). The Court reached this conclusion even though the statutes did not expressly distinguish between candidates or the voters whose voting rights the law affected.

Id. at 141, 144. As the Supreme Court explained, *rights*-based equal protection claims can be established even though the harmed group cannot "be described by reference to discrete and precisely defined segments of the community …." *Id.* at 144; *see also Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.").

Circuit courts have followed suit. In *Ramos*, 353 F.3d 171, for example, the Second Circuit held that the rationale underpinning "rights-based equal protection doctrine" is that "some rights are so important that they should be afforded to individuals *in a manner blind to all group classifications* …." *Id.* at 179 (emphasis added); *see also Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1246–47 (8th Cir. 2012) (law requiring students to disclose their nationality violated equal protection despite "appl[ying] equally to each child" because of "special impact" on some). Because Plaintiffs allege *rights*-based equal protection claims, they need not demonstrate that the laws at issue have classified between any identifiable *groups* of individuals.

2. Plaintiffs' Claims Cannot Be Resolved On A Motion To Dismiss Because The Court Must Analyze The Fit Between The Means And Ends Of The Statutes.

Defendants also argue that Plaintiffs' claims should be evaluated under a deferential standard that asks whether "any reasonably conceivable state of facts [] could provide a rational basis for the" Anti-Opportunity Laws—a standard that Defendants say Plaintiffs' allegations fail to meet. Mot. at 33 (citation omitted). Even if rational basis review were to apply, however, this Court still would be required to analyze the purpose behind the Anti-Opportunity Laws and the means by which the statutes try to accomplish that purpose—an inappropriate analysis on a motion to dismiss. *See Pappas v. Town of Enfield*, 2010 WL 466009, at *7 (D. Conn. Feb. 3, 2010) (determining "whether there [is] a rational basis … is impermissible upon a motion to dismiss"); *Taylor v. N.Y. State Dep't of Corr. Servs.*, 2009 WL 3522781, at *2 (N.D.N.Y. Oct. 29, 2009)

("Rational basis analysis cannot be conducted on [a] motion addressed to the pleadings."); *see also Accord Mary Hitchcock Mem'l Hosp. v. Cohen*, 2016 WL 1735818, at *8 (D.N.H. May 2, 2016). On this basis alone, this Court should deny Defendants' motion to dismiss.

Regardless, the Anti-Opportunity Laws trigger strict scrutiny because they "heav[il]y burden," *Bullock*, 405 U.S. at 144, and "substantial[ly] … dilute[]," *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), students' rights. The State must therefore show that they "'are narrowly tailored'" and "'further compelling state interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005).

a. Strict Scrutiny Applies To Claim One Because The Anti-Opportunity Laws Deprive Students Of Equal Educational Opportunities.

In *San Antonio School Independent School District v. Rodriguez*, 411 U.S. 1 (1973), a divided Supreme Court upheld the constitutionality of Texas's public-school financing system, which relied heavily on property taxation and, due to unequal inter-district property values, produced funding disparities between districts. Applying the then-existing test for identifying unenumerated constitutional rights, the Court held that the equal protection clause did not guarantee a fundamental right to education. In the Court's view, equal educational opportunity was not "explicitly or implicitly guaranteed by the Constitution" and thus was not deserving of heightened scrutiny. *Id*. at 33–35. Defendants contend that *Rodriguez* precludes the application of strict scrutiny here. Mot. at 27–28. For at least three reasons, Defendants are mistaken.

First, whatever *Rodriguez* may have said about the fundamental right to education in 1973, the Supreme Court has dramatically altered its fundamental-rights jurisprudence over the past forty years. Under modern jurisprudence, rights are deserving of heightened scrutiny so long as they are (1) "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed"; and (2) susceptible

to "careful description." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).[5] The right to education unquestionably satisfies this test.

As to the first prong, the "federal government's involvement in public education dates back to the time of the founding." Compl. ¶¶ 119–22; *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education … as [a] matter[] of supreme importance."); *see also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). Indeed, the national commitment to education, long and storied as it is, has only increased in recent years—as exemplified by the government's issuance of funding grants to school districts, the elevation of the Department of Education to Cabinet-level status, the establishment of national content and performance standards, and, most recently, the implementation of the "Race to the Top" program. Compl. ¶¶ 129–37. These measures manifest an unwavering commitment to education that is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721.

The Supreme Court's precedents likewise make clear that education is "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721. "[E]ducation—the 'very foundation of good citizenship'—is 'required in the performance of our most basic public responsibilities ….'" Compl. ¶ 1 (citing *Brown*, 347 U.S. at 493). It is "'a principal instrument in awakening' children 'to cultural values,' in 'preparing [them] for later professional training,' and in 'helping [them] to adjust normally to [their] environment[s].'" *Id.* In short, "education has a fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

Finally, the means by which to identify violations of the right to education are now far more capable of definition and identification than they once were. In *Rodriguez*, the Court

5 *Glucksberg* was a substantive due process case, not an equal protection case, but that is irrelevant for this motion because "a substantive due process analysis proceeds along the same lines as an equal protection analysis." *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004).

emphasized that it had reached its decision, at least in part, due to the Court's belief that it could not practicably determine whether there had been a deprivation of plaintiffs' rights. 411 U.S. at 36–37. Now, however, Connecticut and other States implement a number of widely-accepted measures of educational outcomes, described at length in the Complaint. Compl. ¶ 147. So, too, does the federal government. *Id.* (citing 74 Fed. Reg. 59,688 (Nov. 18, 2009)). Indeed, virtually every State has recognized a fundamental right to education in their state charters since *Rodriguez*—further proof that the right is readily capable of definition. *Id.* ¶¶ 127–28 (collecting cases).

Moreover, even *Glucksberg*—which post-dates *Rodriguez* by more than two decades—is not the Court's latest pronouncement on unenumerated rights. In *Obergefell*, where the Supreme Court held that persons in same-sex relationships have the constitutional right to marry, the Court held that the "identification and protection of fundamental rights" can no longer be "'reduced to any formula,'" and instead "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." 135 S. Ct. at 2598 (citation omitted). "History and tradition guide [the] inquiry but do not set its outer boundaries," so that the "past alone" does not "rule the present." *Id.*; *see also id.* at 2602.

Obergefell considered a variety of factors relevant to whether the equal protection and due process clauses preclude laws impinging upon the fundamental right to marry. Each is squarely applicable to education. Like marriage, "[c]hoices about [education] shape an individual's destiny," *Obergefell*, 135 S. Ct. at 2599, including his or her ability to graduate high school, complete college, and earn a livable wage. Compl. ¶¶ 47–49 ("High school dropouts in the State … make about $22,000 less" per year than graduates); *see also Brown*, 347 U.S. at 493. Education, like marriage, is a "keystone of our social order" because it is a "building block of our national

community." *Obergefell*, 135 S. Ct. at 2601; *see also Ambach v. Norwick*, 441 U.S. 68, 76–78 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens … long has been recognized by our decisions."). And *Obergefell* even analogized marriage to the "related right[] of … education," both of which "safeguard [] children" and "afford[] the permanency and stability important to children's best interests." *Obergefell*, 135 S. Ct. at 2600. Education thus satisfies the Supreme Court's modern unenumerated rights standard.

Defendants do not even attempt to address this modern jurisprudence, merely noting that "the Supreme Court has not overruled *Rodriguez*" and stating that "only the Supreme Court may overrule its own precedents." Mot. at 28. Plaintiffs, however, are not asking this Court to "overrule" *Rodriguez*; they are asking the Court to apply modern constitutional jurisprudence to the facts, in light of the sea change that has taken place over the past four decades.

That is precisely what the Second Circuit did in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012). There, the defenders of a statute limiting marriage rights to opposite-sex couples argued that a Supreme Court order from decades ago, *Baker v. Nelson*, 409 U.S. 810 (1972), required dismissal of plaintiffs' case. *Id.* at 178. As *Windsor* explained, however, *Baker* did *not* control because, "[i]n the forty years after *Baker*, there [were] manifold changes to the Supreme Court's equal protection jurisprudence," including the recognition of quasi-suspect classes. *Id.* at 178–79. Because of "[t]hese doctrinal changes …. *Baker* [did] not foreclose" plaintiffs' constitutional challenge. *Id.* at 179 (citations omitted); *see also Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698 (2d Cir. 2010) (rejecting argument that the court was bound by a previous Supreme Court finding because "the Supreme Court's jurisprudence … [had] evolved considerably since then"). This Court, too, can and should apply the Supreme Court's modern jurisprudence.

Second, the Supreme Court's jurisprudence regarding animus toward, and knowing

mistreatment of, disfavored groups has also evolved considerably since *Rodriguez*. In a variety of contexts, the Supreme Court has repeatedly emphasized that the State—armed with knowledge that poor, minority, or otherwise-disfavored groups are being targeted or treated unequally—may not actively cause or contribute to that discrimination. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell*, 135 S. Ct. 2584. Thus, where (as here) the State knows that certain of its schools are providing poor and minority communities with woefully inadequate educational opportunities, and where it knows the achievement gap has persisted for decades, the State cannot, consistent with the equal protection clause, perpetuate that achievement gap by intentionally inhibiting viable, superior public alternatives to those schools. *See Romer*, 517 U.S. at 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

Third, *Rodriguez* would not control even if it remained good law because it is factually distinguishable from this case. *Rodriguez* was "in significant aspects [a] sui generis" case, one that should only be read to apply where a litigant challenges the inequality of a school financing system—not the subject of Plaintiffs' challenge here. *Rodriguez*, 411 U.S. at 18; *id.* at 40 (describing the claim at issue as "a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues").

b. Strict Scrutiny Applies To Claims Two And Four Because The Anti-Opportunity Laws Deprive Students Of A Minimally Adequate Education.

Strict scrutiny also applies to Claims Two and Four because the Anti-Opportunity Laws violate the fundamental right of students to receive a minimally adequate education. For the reasons discussed above, *supra* § V(C)(2)(a), this right satisfies the modern tests for identifying

unenumerated rights. And when a state voluntarily assumes an obligation to provide its citizens with a right, it must ensure that *all* of its citizens can exercise that right in a meaningful and minimally adequate manner. *See Harper*, 383 U.S. at 665 ("[O]nce the franchise is granted …, lines may not be drawn"). Because Connecticut has assumed the obligation to provide public education to its citizens, *see* Compl. ¶¶ 29–30, and in fact provides meaningful and often excellent opportunities to *some* students (including through charter, magnet, and Open Choice schools), *id*. ¶¶ 45, 47, 50–81, Connecticut must not prevent *other* students from obtaining similar opportunities, *see Bush v. Gore*, 531 U.S. 98, 104 (2001) (per curiam) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

Defendants suggest that this Court cannot apply strict scrutiny to Claim Two because, according to Defendants, *Rodriguez* "categorically rejected ***any*** form of [a] fundamental right to education," including a minimally adequate education. Mot. at 28–29. Contrary to Defendants' argument, *Rodriguez* repeatedly explained that the right at issue in that case was the right to *equal* educational opportunity, not the right to a minimally *adequate* education. It made this fact clear when it described the legal theories underpinning the case and the judgment under review. *See Rodriguez*, 411 U.S. at 47 ("Because of *differences* in expenditure levels …, appellees claim that children in less affluent districts have been made the subject of invidious discrimination.") (emphasis added); *id.* at 16 (fiscal "*disparities*, … led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause") (emphasis added). And it framed the right at issue in this way in its central holding: "[T]o the extent that the Texas system of school financing results in *unequal* expenditures between children who happen to reside in different districts, we cannot say that such *disparities* are the product of a system that is so

irrational as to be invidiously discriminatory." *Id.* at 54–55 (emphasis added).

In fact, *Rodriguez* left open the possibility of a constitutional violation where "the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 411 U.S. at 36–37. After *Rodriguez*, too, the Court clarified that it had "not yet definitively settled … whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened … review." *Papasan*, 478 U.S. at 285; *see also Griffin High Sch. v. Ill. High Sch. Ass'n*, 822 F.2d 671, 675 n.2 (7th Cir. 1987).[6]

Alternatively, Defendants argue that this Court should not apply strict scrutiny because any right to a minimally adequate education would "set an exceedingly low bar" that could be satisfied "as long as [the State] provides at least ***some*** instruction on educational basics …." Mot. at 37. This cramped interpretation, however, is plainly inconsistent with the Supreme Court's fundamental-rights jurisprudence: a right to a *meaningful* educational opportunity—not merely a right to receive something more than "no education," *id.*—"shape[s] an individual's destiny," serves as a "building block of our national community," and "afford[s] the permanency and stability important to children's best interests." *Obergefell*, 135 S. Ct. at 2599–2601; *see also Allen*, 392 U.S. at 247 ("[*H*]*igh quality* education [is] an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, [Americans] have desired to create.") (emphasis added).[7]

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6 Defendants claim these statements are "*dicta*" and do not control. Mot. at 29. This Court should reject that argument, both because the statements accurately describe *Rodriguez*'s limits and because the Supreme Court's statements, even if *dicta*, "must be given considerable weight and cannot be ignored." *Warren v. Harvey*, 472 F. Supp. 1061, 1072 (D. Conn. 1979); *Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014).

7 Defendants' argument is likewise inconsistent with decisions reached by state courts interpreting education and equal protection clauses in their own state charters. *See, e.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 951 (2003) (students have a right to "a meaningful high school education, one which prepares them to function productively as civic participants"); *see also Abbeville Cty. Sch. Dist. v. State*, 335 S.C. 58, 68 (1999);

As Plaintiffs have alleged, Connecticut confines thousands of students "to severely underperforming public schools—schools that, as the State well knows, simply do not provide students with the necessary tools to succeed academically or to become productive and successful members of society." Compl. ¶ 30; *see also id.* ¶¶ 3, 36. These allegations echo the findings of *CCJEF*, which held that "the neediest [students] are leaving schools with diplomas but without the education [Connecticut] promise[s] them." 2016 WL 4922730, at *1. As a result, Connecticut has undeniably failed to provide a minimally adequate education to *thousands* of its students.

c. Heightened Scrutiny Applies To Claim Three Because The Anti-Opportunity Laws Deprive Students Of Their Equality Interests.

The Anti-Opportunity Laws also trigger heightened scrutiny because, irrespective of whether education is a fundamental right, they unreasonably restrict advancement on the basis of individual merit and deprive certain students of an equal opportunity to access the quality public education available to other students in the State.

As the Supreme Court held in *Plyler*, 452 U.S. 202, education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation," but rather, "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Id.* at 221–22. As such, any law impairing a child's ability to receive an equal or adequate educational opportunity imposes an "enduring disability" that "handicap[s] the [child] … each and every day of his life." *Id.* That deprivation is particularly devastating where the hardship falls on "children not accountable for their disabling status." *Id.* at 223. And that is why the Supreme Court held that the claims in *Plyler*—claims that challenged laws allowing school districts to deny education to undocumented children—must be analyzed under heightened

Claremont Sch. Dist. v. Governor, 142 N.H. 462, 470 (1997); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 150–51 (Tenn. 1993); Compl. ¶ 128 (collecting decisions).

scrutiny, requiring the State to prove they "further[ed] some substantial goal." *Id.* at 223–24.

Plyler is on all fours with this case. Like the students in *Plyler*, thousands of children across the State are being denied an equal and adequate education and, as a result, "the means to absorb the values and skills upon which our social order rests." *Plyler*, 452 U.S. at 221; Compl. ¶¶ 3, 5–6, 8, 30, 34–44, 46–49, 82–118, 175. As in *Plyler*, this burden falls on the State's most vulnerable student populations, poor and minority students—punishing them for factors beyond their control, resulting in achievement gaps that register as "the worst in the country," and leaving "Connecticut's poor and minority students … several grade levels behind their more affluent and white peers …." *Plyler*, 452 U.S. at 221–22; Compl. ¶¶ 45–47. And, like *Plyler*, the State is actively "tak[ing] steps that prevent these poor and minority children from having viable public-school" choices by enforcing the Anti-Opportunity Laws at issue here and artificially capping the educational opportunities available to those students. Compl. ¶ 3; *see also id.* ¶¶ 19, 32, 82–109.

According to Defendants, *Plyler*'s scrutiny does not apply because "the State has not [] denied *all* educational opportunities to Plaintiffs, or to any other students …." Mot. at 30–31 (emphasis added). Courts within the Second Circuit and elsewhere, however, have not confined heightened scrutiny to such a limited set of circumstances. In *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001), for example, the Second Circuit affirmed, in relevant part, an order finding that New York could not deny automatic Medicaid eligibility to citizen children of illegal alien mothers, while affording automatic eligibility to citizen children of citizen mothers. *Id.* at 569. There was no permanent or absolute denial of any right to obtain Medicaid, given that citizen children of illegal alien mothers could still become eligible for Medicaid after birth. *Id.* at 591. But the "brief postponement of obtaining Medicaid coverage" warranted heightened scrutiny. *Id.*

Similarly, in *Hispanic Interest Coalition of Alabama*, 691 F.3d 1236, the Eighth Circuit

held that heightened scrutiny applied to an Alabama law that established a process by which schools could collect data about students' immigration status. Here, too, there was no absolute denial of education: the law was "only a means to collect data" and did "not by its terms purport to deny an education to any child." *Id.* at 1245. However, the Eighth Circuit applied heightened scrutiny because the law would "deter [students] from enrolling in and attending school" and "'significantly interfere[d] with the exercise of' the right to an elementary public education as guaranteed by *Plyler*." *Id.* at 1245, 1247 (citation omitted).

And in *National Law Center On Homelessness & Poverty v. New York*, homeless parents and their children brought an equal protection claim based on defendants' alleged failure to locate and assure school enrollment of homeless children, as well as defendants' failure to provide homeless families with educational services comparable to those that non-homeless children received. 224 F.R.D. 314, 316–17 (E.D.N.Y. 2014). Once again, the State did not categorically deny homeless children of an opportunity to obtain an education, yet "Plaintiffs' [complaint] warrant[ed] the 'heightened scrutiny' standard set forth in *Plyler*." *Id.* at 322.

As these cases make clear, Defendants' argument—that a complete and total deprivation of education is required in order to trigger heightened scrutiny—is incorrect.

d. Heightened Scrutiny Applies To Claim Five Because The Anti-Opportunity Laws Deprive Students Of Their Liberty Interests.

Plaintiffs' Fifth Claim for relief is also deserving of heightened scrutiny because the Anti-Opportunity Laws—by doling out educational opportunities in a manner that punishes children for something beyond their control—violate students' liberty interests under the due process clause. As the Supreme Court has explained, "[l]iberty" under the due process clause "presumes an autonomy of self that includes freedom of thought, belief, [and] expression," fundamental aspects of personhood that indisputably are fostered and nourished through education. *Lawrence*, 539

U.S. at 562. Thus, where a State law "demean[s] [one's] existence or control[s] [one's] destiny" by usurping this autonomy, it cannot withstand constitutional scrutiny. *Id.* at 578.

In the education context, specifically, the Fifth Circuit concluded in *St. Ann v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974), that laws that deprive children of educational opportunities as a result of factors beyond their control (e.g., the conduct of their parents) are subject to heightened scrutiny because they implicate the liberty interest to be punished only for "personal guilt." Plaintiffs' allegations here amply support an inference that Connecticut children are effectively being punished for factors beyond their control, namely their residential address and parental wealth. *See* Compl. ¶¶ 3, 5–7, 46, 48, 59, 87, 109, 115–17, 155–57, 159, 170, 175, 187.

Defendants suggest that heightened scrutiny would "fl[y] in the face of *Rodriguez*'s explicit holding that classifications based on [parental wealth] do not subject a law to heightened scrutiny." Mot. at 33. However, *Rodriguez*'s holding was rooted entirely in equal protection and based on allegations that the challenged laws created suspect classifications. *See Rodriguez*, 411 U.S. at 18–29. By contrast, the theory underpinning Claim Five is that students are being "punished without being personally guilty" in violation of the liberty protections of the due process clause, making *Rodriguez*'s suspect classification holdings inapplicable.[8] Compl. ¶¶ 188–92; *see Lawrence*, 539 U.S. at 562; *St. Ann.*, 495 F.2d at 427; *cf. Plyler*, 452 U.S. at 221–24.

3. Even Under Rational Basis Review, Plaintiffs Have Adequately Pleaded That The Anti-Opportunity Laws Are Unconstitutional.

Regardless of which standard applies, Defendants' motion must be denied because Plaintiffs have adequately pleaded that the Anti-Opportunity Laws are not rationally related to a

8 Defendants' alternative argument—that the State cannot violate due process because it allegedly provides "more funds and resources to students in low income districts compared to wealthier districts," Mot. at 33, is inapposite. Plaintiffs' lawsuit has nothing to do with whether Connecticut provides schools sufficient funding. Indeed, the amount of funding schools receive is irrelevant if they fail to *use* that money to provide a meaningful education.

legitimate state interest. "[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor*, 699 F.3d at 180 (citing *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)). Thus, "even under rational basis review the constitutional scrutiny is not 'minimalist,' rather the Court must consider the 'case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered.'" *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310 (D. Conn. 2012) (citation omitted).

Here, Plaintiffs allege that the Anti-Opportunity Laws do not bear "a rational relationship to a legitimate government objective." *Windsor*, 699 F.3d at 180 (citation omitted). To the contrary, Connecticut has no possible justification for intentionally subjecting poor and minority children to such unequal and unfair treatment. Compl. ¶ 7; *see also id*. ¶¶ 158–59, 169–70, 176–77, 186–87. Plaintiffs have also alleged that the Anti-Opportunity Laws are not rationally related to any conceivable state interest. *Id*. ¶¶ 8, 30. These allegations are sufficient, standing alone, to deny Defendants' motion. *See Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183–84 (10th Cir. 2009) (reversing order dismissing claim under rational basis review); *Dadian v. Vill. of Wilmette*, 1999 WL 299887, at *6 (N.D. Ill. May 4, 1999) (plaintiffs stated due process and equal protection claims "by pleading that Defendants' decision was 'arbitrary, capricious and unreasonable'").

The purported interests advanced by Defendants in their motion cannot change this outcome. Defendants suggest, for example, that the Anti-Opportunity Laws are rationally related to the state's interest in ensuring that children "attend traditional public schools in the communities in which they reside" because, according to Defendants, such schools may reasonably be thought of as "superior and preferable" to other schools. Mot. at 35. However, accepting Plaintiffs' allegations as true, there is no basis to conclude that the State's conduct is rationally related to this interest. *See* Compl. ¶ 9; *Dias*, 567 F.3d at 1183–84; *Pedersen*, 881 F. Supp. 2d at 334–43. Nor,

if Plaintiffs' allegations are true, could the State rationally believe that *failing* traditional schools are "superior and preferable" to other schools that are producing higher student achievement and closing the achievement gap. *See Immaculate Heart Cent. Sch. v. N.Y. High Sch. Athletic Ass'n*, 797 F. Supp. 2d 204, 215–16 (N.D.N.Y. 2011) (denying motion to dismiss under rational basis review because plaintiffs' allegations "negate[d]" defendants' justifications).

Defendants also argue that it is rational for the State to "focus on improving its traditional public schools." Mot. at 35–36. But the State would remain entirely free to "focus on improving its traditional public schools" even if it did not, through the Anti-Opportunity Laws, "stand[] in the way of feasible educational options that would significantly improve the quality of [children's] lives." Compl. ¶ 190. In fact, Defendants themselves argue that the Anti-Opportunity Laws "relate to different educational vehicles that are wholly separate and apart from the [State's] traditional public schools." Mot. at 13. And, as discussed above, *supra* § V(B)(3), Plaintiffs *agree* that one way to remedy these constitutional violations is for the State "to take steps to improve the educational opportunities provided ***in [traditional district] schools*** …." Mot. at 35. Thus, nothing about the Anti-Opportunity Laws bears any connection to the State's alleged interest in improving the quality of traditional district schools. *See Dias*, 567 F.3d at 1183–84.

VI. CONCLUSION

Plaintiffs raise well-founded allegations about devastating state laws that are depriving Plaintiffs and thousands of other Connecticut students of their fundamental rights under the federal Constitution. Accordingly, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Kevin M. Smith
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