The Color of (Juvenile) Justice: Disparate Impact and the Congressional Response to the Pandemic

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ABSTRACT

In the wake of the COVID-19 pandemic, approximately 55 million schoolchildren have been compelled to attend school remotely. However, despite this nationwide shift to virtual schooling, the school-based disparities that long pre-dated the pandemic have been laid bare and exacerbated. This is painfully evident in the context of the school-to-prison pipeline (STPP). Indeed, despite Congress' historic investment in the school recovery effort through the passage of the CARES Act, recent research confirms that the majority of the states and localities have devoted scant, if any, federal recovery dollars to dismantling the STPP. Without a meaningful commitment by states and localities, our nation's most vulnerable students will continue to be pushed out of the schoolhouse and into the criminal legal system. Therefore, a more feasible legal alternative to dismantle the STPP is needed.

Despite the treatment that the school recovery effort has received in judicial opinions and legal scholarship in response to the pandemic, neither has undertaken an exhaustive analysis of the school recovery process and its impact on the STPP. This Article aims to fill that gap. To do so, it makes two broad claims. First, the Essay provides a timely review of how states and localities have addressed the STPP with federal recovery aid. Next, it argues that the response to the pandemic fails to advance meaningful reforms that could begin dismantling the STPP. Lastly, the Essay contends that, to begin this process, prospective litigants should leverage the doctrine of stare decisis to overturn Alexander v. Sandoval *under its "unworkability" analysis. By overturning* Sandoval, *future litigants will again be empowered to remedy disparate impact discrimination under Title VI of the 1964 Civil Rights Act. In so doing, parents and students will stand a fighting chance of remedying the disparate educational harms caused by the STPP in both the near- and long-term.*

INTRODUCTION

In the wake of the COVID-19 pandemic, approximately 55 million schoolchildren have been compelled to attend school remotely.[1] Consequently, the school-based disparities that long pre-dated[2] the pandemic have been laid bare and exacerbated.[3] This is painfully evident in the context of the school-to-prison pipeline, which "refers to the trend of directly referring students to law enforcement for committing certain offenses at school or creating conditions under which students are more likely to become involved in the criminal justice system, such as excluding them from school."[4] Indeed, prior to the onset of the pandemic, a wide body of research found that Black and brown public school students were several times more likely to face suspension or expulsion for the same infraction committed by their white peers.[5] Although Black children comprise approximately 18 percent of the total population of public school students nationwide, these students accounted for nearly half of all school suspensions.[6] The Council of State Government (CSG) Justice Center recently reported that truancy filings "totaled more than 60,000 in 2018—even before the pandemic—despite overwhelming evidence that 'arrest, court involvement, and/or system supervision for youth who are truant or commit other low-level offenses actually decreases their likelihood of attending school and completing high school.'"[7]

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1. *See* Holly Peele & Maya Riser-Kositsky, *Map: Coronavirus and School Closures in 2019-2020*, EDUCATION WEEK (Updated Oct. 13, 2021), https://www.edweek.org/leadership/map-coronavirus-and-school-closures-in-2019-2020/2020/03.

2. *See* EQUITY & EXCELLENCE COMM'N, A REPORT TO THE U.S. SECRETARY OF EDUCATION, FOR EACH AND EVERY CHILD—: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 14 (2013) ("Our education system, legally desegregated more than a half century ago, is ever more segregated by wealth and income, and often again by race. Ten million students in America's poorest communities—and millions more African American, Latino, Asian American, Pacific Islander, American Indian and Alaska Native students who are not poor—are having their lives unjustly and irredeemably blighted by a system that consigns them to the lowest-performing teachers, the most run-down facilities, and academic expectations and opportunities considerably lower than what we expect of other students.").

3. Michael Griffith, The Impact of the COVID-19 Recession on Teaching Positions, Learning Policy Institute (Apr. 30, 2020), https://learningpolicyinstitute.org/blog/impact-covid-19-recession-teaching-positions. .

4. Jason Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L. J. 313, 313 (2016).

5. *State Action to Narrow the School-to-Prison Pipeline (Part One): A Review of State Plans for Allocating the Elementary and Secondary School Emergency Relief (ESSER) Fund*, THE SENTENCING PROJECT 3 (2022).

6. Marilyn Elias, The School-to-Prison Pipeline, Teaching Tolerance Magazine (2013), https://www.tolerance.org/magazine/spring-2013/the-school-to-prison-pipeline.

7. The Sentencing Project, *supra* note 5 (citations omitted).

The foregoing disparities have only worsened in the era of COVID-19 and distance learning. Consider the case of Ka'Mauri Harrison, a Black public school student at Woodmere Elementary in Louisiana.[8] In September 2020, as the COVID-19 pandemic continued to rage, Ka'Mauri logged onto Zoom from his home to attend his fourth-grade social studies class.[9] During this class, Ka'Mauri's brother entered his room and inadvertently knocked over a BB gun.[10] Ka'Mauri subsequently leaned over and retrieved the BB gun, placing it securely beside his seat. Ka'Mauri neither brandished, nor displayed the faux firearm in any menacing way that would prove disruptive. Yet, since the BB gun was in view of his teachers and classmates during their Zoom session, Ka'Mauri's teachers ultimately suspended him for six days and he faced the possibility of expulsion.[11] Although Ka'Mauri was spared the more serious penalty of expulsion, a hearing officer upheld his suspension for "displaying a facsimile weapon while receiving virtual instruction," violating the school district policy.[12]

Ka'Mauri's case has not been an isolated incident in the wake of the COVID-19 pandemic. Reports during the pandemic suggest that Black and Latinx students were more likely to suffer harsh consequences for missing online lessons than students of other races. In Massachusetts, school officials have reported dozens of families to state social workers on charges of neglect after their students repeatedly failed to participate in remote learning.[13] In another example, a 15-year-old Michigan student with a documented disability was incarcerated for violating her probation by not completing her online coursework.[14]

As a result of these troubling disparities, at least in part, the long-heralded federal recovery effort in the nation's public schools will likely fail to address the school-to-prison pipeline (STPP) in any meaningful sense. Indeed, despite

8. Tim Elfrink, *A Teacher Saw a BB Gun in a 9-Year-Old's Room During Online Class. He Faced Expulsion*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/nation/2020/09/25/louisiana-student-bbgun-expulsion/.

9. *Id.*

10. Minyvonne Burke, *Boy, 9, Suspended After Teacher Sees BB Gun in His Room During Virtual Class; Family Sues*, NBC NEWS (October 6, 2020), https://www.nbcnews.com/news/us-news/boy-9-suspended-after-teacher-sees-bb-gun-his-room-n1242275.

11. Faimon A. Roberts III, *Family of Student Suspended for BB Gun in Bedroom Sues Jefferson Parish School System*, TIMES PICAYUNE-NEW ORLEANS ADVOCATE (October 2, 2020), https://www.nola.com/news/education/article_ea17ca7e-04eb-11eb-b64d-a7ec002ee7c6.html.

12. Gisela Crespo, *Parents Sue Louisiana School District After 4th Grader Suspended for BB Gun During Virtual Class at Home*, CNN (October 4, 2020), https://www.cnn.com/2020/10/04/us/student-suspended-gun-virtual-lawsuit-trnd/index.html.

13. Bianca Vazquez Toness, *Your Child's A No-Show at Virtual School? You May Get a Call from the State's Foster Care Agency*, BOSTON GLOBE (August 15, 2020), https://www.bostonglobe.com/2020/08/15/metro/your-childs-no-show-virtual-school-you-may-get-call-states-foster-care-agency/.

14. Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention.*, PROPUBLICA ILLINOIS (July 14, 2020), https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention.

Congress' historic investment in the school recovery effort through the passage of the CARES Act, recent research confirms that most of the states and localities have devoted scant, if any, federal recovery dollars to dismantling the STPP. In fact, "only five states and the District of Columbia included concrete action steps or clear strategies in their ESSER plans to better address the educational needs of justice-involved youth."[15] Without a meaningful commitment by states and localities to address the needs of justice-involved youth, our nation's most at-risk students—particularly students of color and children with disabilities—will continue to be pushed out of the schoolhouse and into the criminal legal system.

As scores of social science research indicate, the short- and long-term educational harms wrought by such exclusionary discipline regimes are legion.[16] Yet, students and parents are often left with few formal avenues to challenge them in court. In fact, to challenge policies that produce such adverse and disparate impacts within schools, parents must rely almost exclusively on Title VI of the 1964 Civil Rights Act to achieve some modicum of relief. Yet, Title VI has largely failed[17] to protect students' civil rights after *Alexander v. Sandoval*,[18] a key Supreme Court case that held that no private cause of action existed to enforce disparate impact claims under Section 602, a key implementing regulation under Title VI.[19] As observed by Professor Kimberly Jenkins Robinson, "disparate impact claims provide a potential remedy for a wide range of educational practices, including school funding disciplinary measures, tracking, and the overrepresentation of minorities in special education."[20]

What is needed, then, is a more feasible legal alternative to challenge the STPP. This Essay argues for the overturning of *Alexander v. Sandoval* as that alternative. Indeed, by overturning *Sandoval*, future reformers—especially low-

15. The Sentencing Project 3, State Action to Narrow the School-to-Prison Pipeline (Part One): A Review of State Plans for Allocating the Elementary and Secondary School Emergency Relief (ESSER) Fund, The Sentencing Project 3 (2022)

16. AM. PSYCH. ASS'N, THE PATHWAY FROM EXCLUSIONARY DISCIPLINE TO THE SCHOOL TO PRISON PIPELINE 2, https://www.apa.org/advocacy/health-disparities/discipline-facts.pdf (last visited Nov. 1, 2022); *see also* Sara Luster, How Exclusionary Discipline Creates Disconnected Students, NAT'L EDU. ASS'N (Jul. 19, 2018), https://www.nea.org/advocating-for-change/new-fromnea/how-exclusionary-discipline-creates-disconnected-students; *see also* Aaron Kupchik & Thomas J. Catlaw, *Discipline and Participation: The Long-Term Effects of Suspension and School Security on the Political and Civil Engagement of Youth*, 47 YOUTH & SOC'Y 95, 109 (2014).

17. *See* Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 INDIANA L.J. 51, 69 (2020) ("Given the great difficulty of proving intentional discrimination and the decrease in overt discrimination, a claim for disparate impact discrimination provides the only potential avenue for those injured by discrimination to find relief from an array of harmful educational practices.").

18. 532 U.S. 275, 285–86 (2001).

19. 42 U.S.C. § 2000d. Section 601 prohibits discrimination on the basis of race, color, or national origin among federally-funded programs. Section 602 permits federal agencies "to effectuate the provisions of (section 601). . .by issuing rules, regulations, or orders of general applicability."

20. *Supra* note 17.

income litigants of color—will be empowered to remedy instances of disparate impact discrimination under Title VI of the Civil Rights Act of 1964. Parents and students will stand a fighting chance of remedying the disparate educational harms caused by the STPP in both the near- and long-term.

This Essay proceeds in two Parts. Part I provides a brief overview of the CARES Act's education provisions as applied in the context of dismantling the STPP. This Part then critiques these funding provisions as offering states and localities overbroad spending discretion. It thus contends that the Congressional response to the harms wrought by the pandemic has not meaningfully challenged the STPP. Part II, in response to Congress's failure to meaningfully respond to the foregoing harms, this Article proposes a novel alternative: to challenge the STPP, advocates must seek to overturn *Alexander v. Sandoval*. Future plaintiffs should leverage the doctrine of stare decisis and bring a formal legal challenge in federal court claiming that the *Sandoval* decision has proven "unworkable"[21] in practice and should be overturned.

I. BACKGROUND

As a response to the COVID-19 pandemic, Congress funneled historic sums of federal aid into the nation's elementary and secondary schools. In March 2020, Congress passed and enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the first of three congressional enactments designed to stave off the worst effects of the pandemic within and between schools and districts.[22] The CARES Act allocated approximately $32 billion in recovery aid to states and localities through the newly-created Education Stabilization Fund (ESF). The ESF provided COVID-19 relief aid to the nation's public school via two discrete trenches.[23] The CARES Act served as a critical lifeline for many school districts, but education law scholars and advocates grew increasingly concerned that lawmakers' failure to include any meaningful equity mandates within this legislation's key provisions would continue to harm vulnerable populations.[24] As discussed in more detail below, these concerns had merit.

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21. Mary Ziegler, *Taming Unworkability Doctrine*: *Rethinking Stare Decisis*, 50 ARIZ. ST. L. J. 1215, 1217 (2020) (defining stare decisis' "unworkability" standard and reviewing cases in which the Supreme Court employs this standard to overturn its own precedents).

22. Since March 2020, three major pieces of recovery legislation have been passed by Congress that provide support for public K12 education in the wake of the COVID-19 pandemic: The Coronavirus Aid, Relief, and Economic Security Aid, the Consolidated Appropriations Act of 2021, and the American Rescue Plan Act.

23. Coronavirus Aid, Relief, and Economic Security Act, PL 116-136 § 18001-18006 (2020). The first tranche was named the Elementary and Secondary School Emergency Relief (ESSER) fund, which distributed $13.2 billion to states and localities to support elementary and secondary school recovery. The second tranche, the Governor's Emergency Education Relief (GEER) fund, distributed an extra $3 billion to the states' governors, who were authorized to use GEER funding to support both public K12 education and higher education.

24. *Supra* note 17, at 59 ("The federal response has taken some important steps toward educational equity but has not consistently prioritized it. States, districts, and schools have lacked the clear and consistent guidance, support, and leadership that they needed to tackle the

By December 2020, Congress passed and enacted the Consolidated Appropriations Act of 2021 (CRRSA), funneling $54.3 billion into the ESF and adopting much of the terms set forth in the CARES Act.[25] Approximately 90 days later, the American Rescue Plan Act (ARP) was enacted as the third installment of federal recovery aid to the school recovery effort. In terms of its education-specific investments, ARP funneled an additional $122 billion into ESF.[26] Despite the rapid succession of federal legislation enacted in response to the COVID-19 pandemic and the harms that it engendered, this Essay's central focus will be the CARES Act's education provisions given its foundational role in the recovery effort.

Accordingly, the following Part provides a broad overview of these provisions, their scope, as well as key limitations as it relates to juvenile justice. It concludes by demonstrating that, given the virtually unfettered discretion that the CARES Act affords states and localities as to *how* such federal recovery aid is to be spent, legislative reform is not enough to dismantle the school-to-prison pipeline.

A. The CARES Act

On March 27, 2020, the 116th Congress signed the CARES Act into law.[27] As the largest federal stimulus package in U.S. history at the time of its enactment,[28] the CARES Act established an Education Stabilization Fund[29] (ESF) that distributed public K-12 recovery aid through two discrete tranches.[30] The first tranche— the Elementary and Secondary School Emergency Relief Fund (ESSER)[31]—allotted $13.2 billion to states and localities to support elementary and secondary school recovery. The second tranche—the Governor's

pandemic.151 These federal missteps hinder disadvantaged communities the most because they are more dependent on federal law and policy to ensure that their schoolchildren's needs are met."); *see generally* The Education Trust-New York, *Educational Equity & Coronavirus* (April 2020), https://edtrustmain.s3.us-east-2.amazonaws.com/wp-content/uploads/sites/5/2020/04/08092654/Parent-Poll-Graphics.pdf (noting research indicating that many English-Language Learners (ELs) were not receiving adequate instruction during school closures. Furthermore, the Education Trust-New York reported, based on their statewide survey of public school parents, that 40% of parents said they did not have a computer or a tablet or enough devices at home and 38% of parents said they did not have reliable high-speed internet access at home.).

25. Consolidated Appropriations Act, 2021, PL 116-260, 134 Stat 1182 (2020).

26. American Rescue Plan Act of 2021, PL 117-2, § 2001 (2021).

27. Coronavirus Aid Relief and Economic Security Act, PL 116-136 § 18001, 134 Stat. 281, 564 (2020).

28. Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES (Mar. 26, 2020), https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html.

29. Coronavirus Aid, Relief, and Economic Security Act, PL 116-136 § 18001-18006 (2020).

30. Coronavirus Aid, Relief, and Economic Security Act, PL 116-136 § 18002, 18003 (2020).

31. Coronavirus Aid, Relief, and Economic Security Act, PL 116-136 § 18002 (2020).

Emergency Education Relief Fund (GEER)[32]—allocated an additional $3 billion to the states' governors, who were authorized to use GEER funding to support both public K-12 education and higher education.[33] The following subpart outlines the statutory allowances and limitations set forth in both ESSER and GEER.

1. Cataloging GEER & ESSER Investments

In terms of GEER, "[m]ost governors split their GEER funding among K-12 schools and higher education, with several investing in early childhood learning. New Jersey Governor Phil Murphy (D) stands alone in devoting his entire $68.8 million allocation to higher education. New York Governor Andrew Cuomo (D), by contrast, is sending all his $164 million directly to K-12 districts and allowing them to decide how to spend it."[34] Other states have put GEER funding towards supporting students' social-emotional wellbeing and mental health.[35] In still other states, GEER funding has been allocated to support special education; Texas Governor Greg Abbott, for example, established the Supplementary Special Education Services (SSES) program, which was designed to "connects eligible students with severe cognitive disabilities to additional support for the services they need."[36]

Similar to the GEER funding provision, the ESSER funding provision provides a list of twelve specific areas where its $13.2 billion dollar allocation may be used. At the same time, however, the plain language of the CARES Act affords grantees wide discretion as to how ESSER dollars are to be spent. This is a problem. While some modicum of flexibility should be afforded to states as to how such recovery aid must be invested, the CARES Act, as presently constructed, offers states virtually unfettered discretion on this score. Such broad spending discretion has led to a patchwork pandemic response from the states. Indeed, from technological and connectivity advances,[37] to teacher retention

32. Coronavirus Aid Relief and Economic Security Act, PL 116-136 § 18002(c)(1), 134 Stat. 281, 565 (2020).

33. *See id.*

34. *See* Phyllis W. Jordan, *How Governors Are Using Their CARES Act Education Dollars*, FUTUREED (Sept. 9, 2020), https://www.future-ed.org/how-governors-are-using-their-cares-act-education-dollars/.

35. *See id.*

("Eleven governors are spending their discretionary dollars on students' health and social-emotional well-being. North Carolina will spend $40 million to hire school nurses, counselors, social workers, and psychologists. Connecticut will devote spending to developing a statewide social-emotional learning framework. Illinois's State Board of Education will create a Student Care Department.").

36. Press Release, Governor Abbott, Governor Abbott Announces Additional $123.3 Million In Education Funding (Dec. 20, 2021),https://gov.texas.gov/news/post/governor-abbott-announces-additional-123.3-million-in-education-funding.

37. Haw. State Dep't of Educ., CARES Act Elementary and Secondary School Emergency Relief Fund, (2020) http://www.hawaiipublicschools.org/DOE%20Forms/budget/HIDOE-CARES-Act-ESSER-Funds.pdf (internal citations omitted) ("[p]riority Area: Devices & Connectivity $15.01 Million;

measures[38] and nutrition support for students,[39] the states varied greatly in terms of how they ultimately spent down their ESSER grants. By affording states such broad discretion, the harms engendered by exclusionary discipline policies during the pandemic have received little, if any, federal recovery dollars from state officials. Although spending flexibility is critical, especially during times of crisis, this virtually unfettered discretion ignores a well-established history of state and local abandonment of equity in the face of competing demands.[40] Moreover, "since many states neglect the provision of equitable educational opportunities that focus on the needs of disadvantaged communities, equity must also remain a top-tier goal for federal law and policy makers during and beyond the pandemic."[41] The next subpart considers this disinvestment in terms of how the states have invested ESSER funding.

2. ESSER and the School-to-Prison Pipeline

The CARES Act's ESSER fund is overbroad in terms of the equity mandate it installs, or perhaps fails to install, for states receiving federal recovery aid. This broad discretion has resulted in states devoting little attention to reforms that could dismantle the school-to-prison pipeline and the exclusionary discipline practices that create it. Indeed, as first reported by The Sentencing Project, "states are paying virtually no attention to the counterproductive over-policing of schools in their plans to use ESSER funding. . .while some plans indicate a commitment to addressing the continuing overreliance on exclusionary discipline practices, like suspensions and expulsions in response to student misbehavior, most do not."[42]More concerning still, "not a single state has proposed to use the ESSER funds to end or curtail the criminalization of routine adolescent behavior at school despite the fact that tens of thousands of students are arrested at school every year, often for low-level misbehavior."[43] This abuse of discretion by the states has not only been at odds with the spirit of federal

wifi and mobile hubs: $2.89 million; mobile hubs: $100,430; purchase 10,000 devices for summer learning: $5.46 million; purchase 12,000 devices for school reopening: $6.57 million.") .

38. *What are school districts using federal coronavirus aid for?*, ALLEGHENY INST. FOR PUB. POL'Y (Nov. 11, 2020), https://www.alleghenyinstitute.org/what-are-school-districts-using-federal-coronavirus-aid-for/ ("There are 16 districts indicating that they have spent or will spend some portion of their allocation on salaries and/or benefits. In some cases, this is to pay for personnel for after-school and summer school activities, to retain staff that was to be furloughed and to hire additional staff to reduce class size to comply with social-distancing requirements. In most cases the salaries and benefits are for instructional personnel.").

39. CAL. DEP'T OF EDUC., ESSER Fund Frequently Asked Questions, https://www.cde.ca.gov/fg/cr/esserfaqs.asp (noting how the state of California "directed most of funding from the ESSER state reserve to LEAs through $112.2 million to support nutrition services.").

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

41. *Supra* note 17.

42. *Id.*

43. *Id.*

recovery legislation,[44] but also exacerbates the overcriminalization of such routine adolescent behavior, disproportionately so for Black and brown students. What is needed is a more feasible legal alternative to protecting our most vulnerable student populations from being pushed out of school and into the justice system. Overturning *Sandoval* is that alternative. Indeed, by overturning *Sandoval*, future reformers—but particularly low-income litigants of color—will once again be empowered to remedy instances of disparate impact discrimination under Title VI of the Civil Rights Act of 1964. Perhaps more importantly, these litigants will be empowered to directly challenge and dismantle a STPP and the harms that it has wrought.

II. ANALYSIS: STARE DECISIS AND THE SCHOOL-TO-PRISON PIPELINE

A. Unpacking Unworkability

To overturn statutory or constitutional precedent, the Supreme Court must find special justification.[45] The institutional limits of this justification is informed by several "prudential and pragmatic" factors, like the quality of the reasoning in a given case or a changed understanding of relevant facts that may undermine the precedent's authoritativeness, among others.[46]Altogether, each factor permits the Court to overturn its own precedents in order to "foster the rule of law while balancing the costs and benefits of society by reaffirming or overturning a prior holding."[47] This Article's thesis focuses on the unworkability factor, which the Court has more often employed to overturn a prior decision when that decision was deemed "open-ended, incremental, controversial, or incoherent."[48] Although the Court has imagined "many competing definitions of unworkability"[49] in its stare decisis jurisprudence, it has more frequently overturned both constitutional and statutory precedents to avoid inconsistent application of the law among the

44. Emma Garcia & Elaine Weiss, *COVID-19 and Student Performance, Equity, and U.S. Education Policy*, ECON. POL'Y INST. 4 (Sept. 10, 2020), https://files.epi.org/pdf/205622.pdf ("[I]f our education system is to deliver on its excellence and equity goals during the next phases of this pandemic, it will be critical to identify which students are struggling most and how much learning and development they have lost out on, which factors are impeding their learning, what problems are preventing teachers from teaching these children, and, very critically, which investments must be made to address these challenges.").

45. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion) ("[A] decision to overturn should rest on some special reason over and above the belief that a prior case was wrongly decided."); *see generally* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L. J. 1535, 1551–67 (2000) (identifying *Casey* as creating the stare decisis factors).

46. *The Supreme Court's Overturning of Constitutional Precedent*, CONG. RSCH. SERV. (Sept. 24, 2018), https://www.everycrsreport.com/reports/R45319.html#_Toc525567243.

47. *Id*.

48. *Supra* note 21, at 1217.

49. *Id.* at 1230.

lower courts.[50] Indeed, "the more inconsistent rulings that a precedent generates, the more unworkable it seems."[51]

Consider the following example. In *South Dakota v. Wayfair*, Inc.[52] the Supreme Court reversed two of its prior decisions that barred states from collecting and remitting sales taxes from merchants who engaged in commerce within a given state if they lacked a physical presence in that state. Although the appellees in this case, *Wayfair* and *Overstock*, argued that the physical-presence rule had been both coherent and consistently applied (and thus workable),[53] the United States reasoned that, with the advent of global e-commerce and the market-based changes that it has engendered, the physical presence rule has now proved unworkable.[54]

Consider another example. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[55] the Court considered whether the imposition of mandatory collective bargaining fees comported with the strictures of the First Amendment's Free Speech Clause. The petitioner, Mark Janus, argued that the imposition of such mandatory union shop fees failed to "adequately protect employees' First Amendment rights because it depend[ed] on unions to determine, under vague and subjective criteria, what fees they can constitutionally seize from nonmembers."[56] The Court ultimately agreed with Janus, reasoning that *Abood v. Detroit Board of Education*,[57] the prior decision that petitioners sought to overturn, was unworkable since "the line between chargeable and unchangeable union expenditures has proved to be impossible to draw with precision."[58]

The following sub-Part builds on the foregoing by arguing that education advocates should adopt the unworkability principle as a viable legal strategy to overturn *Alexander v. Sandoval*. In doing so, our most vulnerable student populations—including, but not limited to, students of color and students with disabilities—will no longer be pushed out of the schoolhouse and into the criminal legal system with impunity. These students will no longer be forced to rely on the mercurial political winds of Congress or their state legislature to remain in school and receive a substantively equal educational opportunity.[59]

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50. *Id.* at 1249 ("[T]he Court identifies precedents as unworkable because the lower courts interpret them in conflicting ways.").

51. *Id*. at 1248.

52. 138 S. Ct. 2080, 2099 (2018).

53. Respondents' Brief at 42-45, *Wayfair*, 13 8 S. Ct. 2080 (No. 17-494).

54. Brief for the United States as Amicus Curiae Supporting Petitioner at 9 , *Wayfair*, 138 S. Ct. 2080 (No. 17-494).

55. 138 S. Ct. 2448 (2018).

56. Reply Brief for Petitioner at 15, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

57. Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

58. *Janus*, 138 S. Ct. at 2481.

59. *See* Michael A. Rebell, Poverty *"Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1540 (2007) (stating that "precisely because state legislatures and executive agencies overseeing school districts have at times failed to ensure

Overturning *Sandoval* will not only restore a private right of action under Title VI—reviving the specter of litigation as an effective tool of enforcement—but also adds an arrow of empowerment to parents' collective quiver to challenge discrimination head-on.

B. The Case for Overturning Alexander v. Sandoval as Unworkable

In April of 2001, the Supreme Court, in a narrow 5-4 decision, held that Title VI of the 1964 Civil Rights Act did not establish a private right of action to enforce disparate impact discrimination claims.[60] The question at issue in *Sandoval* was whether an Alabama law unlawfully discriminated against non-English speakers by administering English-only drivers' license exams.[61] Reasoning that Title VI's implementing regulations[62] function as distinct provisions affording litigants discrete civil rights protections,[63] the *Sandoval* Court further held, as described in more detail below, that Section 601 established an enforceable right and cause of action that Section 602 did not.

The Court reasoned Section 601 provided an individual, enforceable right *if* a federal funding recipient unlawfully subjected racial and ethnic minorities to intentional discriminatory practices.[64] Section 602, by contrast, established no such right or cause of action.[65] Instead, the *Sandoval* Court reasoned that Congress intended Section 602 to confer authority solely upon federal agencies to promulgate regulations that advance the purpose of Section 601.[66] Accordingly, Section 601 only prohibited *intentional* discrimination among recipients of federal funding, not disparate impact discrimination.[67] Stated differently, the Court reasoned that Section 602 permitted only federal agencies to promulgate regulations that advance the purpose of Section 601.[68] As a consequence, *Sandoval* "closed the courthouse door to plaintiffs seeking to remedy disparate impact discrimination . . . the only remaining avenue to challenge education policies and practices that impose a disparate impact lies

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the effective use of education funds, and the targeting of resources to the students with greatest needs, courts need to become more, not less, active at the remedy stage of litigation[].").

60. Sandoval, 532 U.S. 275, 285–86, 293 (2001).

61. *Id.* at 279.

62. See id.42 U.S.C. § 2000d. (prohibiting discrimination on the basis of race, color, or national original among federally-funded programs.

63. Sandoval, 532 U.S. 275, 285–86, 293 (2001).

64. 42 U.S.C. § 2000d.

65. 42 U.S.C. § 2000d-1 ("[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section [601]. . .with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."); *see also* Sandoval, 532 U.S. at 289–292.

66. Sandoval, *supra* note 60.

67. *See id.* at 280.

68. *See id.*

with the [U.S. Department of Education's] Office for Civil Rights (OCR)."[69] This is a problem for at least two reasons.

First, the Court left open an important question: how do regulations codified under Section 602 permit activities that are prohibited under Section 601? Put differently, although the *Sandoval* majority held that a private right of action does not exist to enforce Section 602's disparate impact regulations, the Court failed to clarify whether disparate impact regulations were themselves a valid source of authority. On the one hand, discrimination under Section 601, according to the *Sandoval* Court, requires intentional discrimination. On the other hand, while the purpose of Section 602 is to vindicate "rights already created by [Section] 601,"[70] the Court's logic stands for the proposition that discrimination under Section 602 *may* be permitted if it occurs unintentionally.

The foregoing tension was acknowledged by the Court's majority in a brief footnote: "[H]ow strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601 . . . when § 601 permits the very behavior that the regulations forbid."[71] Leaving this issue unresolved will likely continue to engender confusion among both legal advocates and lower courts as to the scope of the rights afforded in Sections 601 and 602. Indeed, as observed by Professor Derek Black, "[a]lthough Sandoval does not completely undermine section 602 regulations, it does cloud their legal authority in the courts. Now that an implied private cause of action does not exist to enforce section 602 regulations, the meaning of these regulations is far from clear."[72]

Second, the *Sandoval* decision undermined the well-established deference principle established in *Chevron*, which conferred federal agencies with wide discretion to promulgate regulations due, at least in part, to an agency's interpretation of a controlling statute.[73] Unsurprisingly, the foregoing tension has led to confusion among the lower courts that have relied on the stability of *Chevron* as an enduring precedent.

> Because agencies such as the Department of Education are charged with enforcing Title VI, their interpretation of sections 601 and 602 should be given great deference so long as it is reasonable and does not conflict with congressional intent. The Ninth Circuit relied on this principle in *Monteiro v. Tempe Union High School District*, extending the rule from *Chevron*

69. Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 71 (2020) ("Given that modern-day discrimination is overwhelmingly disparate impact discrimination rather than intentional discrimination, it is essential that OCR serves as an effective arbiter for disparate impact claims.").

70. Sandoval, 532 U.S. at 289.

71. *Id.* at 286 n.6.

72. Derek W. Black, *Picking Up the Pieces After Alexander v. Sandoval*: *Resurrecting a Private Cause of Action for Disparate Impact*, N.C. L. REV. 363 (2002).

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

U.S.A. Inc. v. Natural Resources Defense Council that affords deference to agency interpretations.[74]

The dissent in *Sandoval* underscores this tension well. Indeed, Justice Stevens opined the majority's interpretative incongruity as contrary to *Chevron's* well-established deference principle: "[i]n most other contexts, when the agencies charged with administering a broadly worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling."[75] If the current Court fails to overturn *Sandoval* as unworkable, the Court will not only place its imprimatur on discrimination that results in disparate effects, but will also sanction future funding recipients to freely devise purportedly neutral education policies that lead to pernicious and lasting disparate harms. Given the disparate impact that the school-to-prison pipeline has wrought in the lives of Black and Brown children before and during the pandemic, it is critical that parents are once again empowered to challenge these exclusionary discipline practices head-on through a private right of action.

CONCLUSION

The foregoing devolution of disparate impact enforcement renders students—though, to be sure, disproportionately low-income students of color—reliant on a political process that has failed to remedy facially neutral education policies that produce discriminatory effects. This failure has only worsened in the years following *Sandoval*, as "attorneys and investigators in the civil rights office have seen their workloads double since 2007, and the number of unresolved cases mushroom."[76] To upset this vicious cycle, we must overturn *Sandoval*.[77] In so doing, low-income students of color will no longer be forced to rely on mercurial political winds to receive a substantively equal educational opportunity.[78] Overturning *Sandoval* will not only restore a private right of action under Title VI, but also adds an arrow of empowerment to parents' collective quiver to dismantle the school-to-prison pipeline once and for all. If the Roberts Court's recent appetite for granting review in such cases is any indication, then future litigants are well-positioned to achieve the foregoing reforms.[79]

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74. *Supra* note 66, at 361.

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

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

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

78. *Supra* note 54, at 1540.

79. *See* Tejas N. Narechania, *Certiorari in Important Cases*, COLUM. L. REV. 923, 934 (2022) ("The Roberts Court, for example, seems to favor granting review in cases that invite the Court to overturn precedent."); *see also* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 160 (2018) (noting the current Court's textualists "regularly are willing to overturn statutory precedents.").