No. 18-1855/18-1871

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY B.; JESSIE K., a minor, by Yvette K., guardian ad litem; CRISTOPHER R., a minor, by Escarle R., guardian ad litem; ISAIAS R., a minor, by Escarle R., guardian ad litem; ESMERALDA V., a minor, by Laura V., guardian ad litem; PAUL M.; JAIME R., a minor, by Karen R., guardian ad litem,

Plaintiffs-Appellants,

v.

RICHARD D. SNYDER, Governor; JOHN C. AUSTIN, member of Mich. Bd. of Educ.; MICHELLE FECTEAU, member of Mich. Bd. of Educ.; LUPE RAMOS-MONTIGNY, member of Mich. Bd. of Educ.; PAMELA PUGH, member of Mich. Bd. of Educ.; KATHLEEN N. STRAUS, member of Mich. Bd. of Educ.; CASANDRA E. ULBRICH, member of Mich. Bd. of Educ.; EILEEN WEISER, member of Mich. Bd. of Educ.; RICHARD ZEILE, member of Mich. Bd. of Educ.; BRIAN J. WHISTON, Superintendent of Public Instruction for State of Mich.; DAVID B. BEHEN, Dir. of Mich. Dep't of Technology; NATASHA BAKER, State School Reform/Redesign Officer, in their official capacities,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan, Case No. 2:16-CV-13292

AMICUS CURIAE BRIEF OF MARTHA MINOW, 300TH ANNIVERSARY UNIVERSITY PROFESSOR AT HARVARD UNIVERSITY, IN SUPPORT OF PLAINTIFFS-APPELLANTS SUPPORTING REVERSAL

Lena Konanova
David S. Flugman
Jessica Underwood
Bria Delaney
Nicholas J. Klenow
SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, New York 10104
(212) 390-9000

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, *Amicus Curiae* Martha Minow makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identify of such corporation and the nature of the financial interest:

   No.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST AND AUTHORITY OF *AMICUS CURIAE*[1]

Martha Minow is the 300th Anniversary University Professor at Harvard University. Since 1981, she has taught at Harvard Law School, where she was previously the Carter Professor of General Jurisprudence and served as Dean from 2009 to 2017. Professor Minow is a leading constitutional scholar, including on the intersection of constitutional rights and education, and an expert in human rights and advocacy for racial and religious minorities, women, children, and persons with disabilities. She has authored and contributed to numerous writings on law and education, with a specific focus on *Brown v. Board of Education*. Some of her books and articles include *In* Brown*'s Wake: Legacies of America's Educational Landmark*; *Just Schools: Pursuing Equality in Societies of Difference*; "Essay on *Brown v. Board of Education*" in Harvard Ed. Magazine; "*Brown v. Board* in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge" in the San Diego Law Review; "After *Brown*: What Would Martin Luther King Say?," in the Lewis & Clark Law Review; and "Surprising Legacies of *Brown v. Board*," an introductory essay in *Legacies of* Brown*: Multiracial Equity in American*

---

[1] Pursuant to FRAP 29(a)(4)(E), counsel for *Amicus Curiae* certifies that no party or any counsel for a party in this appeal authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. *Amicus* further certifies that no person or entity other than *Amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Education. *See also* Prof. Minow's Motion for Leave to File Amicus Curiae Brief at 1-3 (filed herewith).

As an eminent scholar on *Brown*, education reform, racial disparities in access to education, and the right to education and access to literacy, Professor Minow is uniquely well-suited to offer an expert analysis of *Brown*'s impact on the important constitutional questions presented in this case.

PRELIMINARY STATEMENT

This case implicates the right to equal access to education, a fundamental principle embodied in *Brown v. Board of Education*, 347 U.S. 483 (1954). In Detroit's overwhelmingly minority and low-income public schools, Michigan state officials have failed to supply students with access to a minimally adequate education equal to that enjoyed by other public-school students in Michigan. By depriving Detroit students of any meaningful access to education, Defendants have violated these students' constitutional equal protection and due process rights as guaranteed by *Brown* and its progeny.

In *Brown*, a landmark ruling celebrated as one of the finest decisions in American constitutional law, the Supreme Court struck down the "separate but equal" public-education system that segregated students on the basis of race as violating the Equal Protection Clause of the Fourteenth Amendment. In doing so, the Supreme Court emphasized that "education is perhaps the most important function of state

and local governments," pointing to "[c]ompulsory school attendance laws and the great expenditures for education" as evidence of our collective "recognition of the importance of education to our democratic society." *Id.* at 493. The Court found it "doubtful that any child may reasonably be expected to succeed in life if … denied the opportunity of an education." *Id.* Having recognized the foundational importance of education to a democratic society, the Court held that a state must provide education to all its students "on equal terms." *Id.*

For centuries before *Brown*, governmental actors at all levels recognized the importance of education as a core function of government. The federal government highlighted the importance of education as early as 1787, when Congress determined that "knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787 art. III, *available at* http://avalon.law.yale.edu/18th_century/nworder.asp. Crucially, at the time the Fourteenth Amendment was passed, the majority of states recognized education as a fundamental right. *See* Steven G. Calabresi and Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 MICH. ST. L. REV. 429, 450-60 (2015). Michigan was among these states and continues to guarantee the right today. *Id.* at 450-53; MICH. COMP. LAWS ANN., CONST. art. 8 § 2 ("The legislature shall maintain and support a system of free public elementary and

secondary schools as defined by law … without discrimination as to religion, creed, race, color or national origin.").

Yet Michigan, which is responsible for the education of its citizens, *see Bd. of Educ. of City of Grand Rapids v. Bacon*, 162 N.W. 416, 416 (Mich. 1917), fundamentally and systematically fails in its obligation to provide *all* its citizens equal access to an adequate education, as required by *Brown*, saddling many of its residents, including Plaintiffs, with "an enduring disability"—illiteracy—that will "handicap [them] … each and every day of [their] li[ves]." *Plyler v. Doe*, 457 U.S. 202, 222 (1982). That, together with Plaintiffs' other allegations of horrific conditions in Detroit schools, which deprive these students of *any* access to education, must be taken as true at this initial Federal Rule of Civil Procedure 12(b)(6) stage. *See Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016) (court must "accept the complaint's well-pleaded factual allegations as true, construe the complaint in the light most favorable to the plaintiff[s], and draw all reasonable inferences in the plaintiff[s'] favor").

The district court below acknowledged that "literacy—and the opportunity to obtain it—is of incalculable importance." Corrected Opinion and Order ("Opinion"), RE.117, PageID#2816. Nonetheless, it misunderstood *Brown*, finding no constitutional violation when Michigan provides no educational opportunities to some of its children while providing real opportunities to others, and reading the case to

imply that "education is not a fundamental right." *Id.* at PageID#2819. That was error. *Brown* in fact laid the groundwork for recognition of education as a fundamental right and established that a state violates the Constitution when it undertakes to provide education but deprives a segment of its students of the right to access that education. The district court's misinterpretation of *Brown* and its progeny requires reversal.

ARGUMENT

I. MICHIGAN DEPRIVES STUDENTS IN DETROIT PUBLIC SCHOOLS OF EQUAL ACCESS TO EDUCATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

Under the Equal Protection Clause, "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Michigan's public-school system violates the equal protection rights of its predominantly minority, lower-income Detroit students by depriving them of the same access to education that more affluent students in predominantly white districts outside of Detroit routinely enjoy. The district court erred in concluding otherwise.

A. Michigan Fails To Provide A Minimally Adequate Education To Detroit Public-School Students

Plaintiffs describe an education system in Detroit that utterly fails to provide students with any meaningful education: "Plaintiffs may physically enter their school buildings, but they sit in facilities that are functionally incapable of delivering literacy access." Complaint, RE.1, PageID#80. Their schools lack adequate

instructional materials: many classes do not have textbooks, and those that do have books that are outdated, defaced, and without sufficient numbers for children to bring them home to do homework (or even for each child to have their own book during class). *Id.* at PageID#81-86.

Plaintiffs lack access to qualified teachers—classes are frequently covered by non-certificated paraprofessionals, substitutes, and teachers who lack any expertise in their assigned course. *Id.* at PageID#15-16. In one class, an eighth-grade student was tasked with teaching seventh- and eighth-grade math classes because the school lacked an appropriate math teacher. *Id.* In June of 2016, the Michigan legislature passed legislation permitting "noncertificated, nonendorsed teachers" to teach in the Detroit Public Schools District. *Id.* at PageID#59-60. Detroit's public-school system is the *only* system in the state to allow noncertificated teachers to teach.

Plaintiffs also attend classes in unsafe and unsanitary physical conditions. Their facilities are rife with overcrowding, irregular and dangerous temperatures, hazardous or missing equipment, vermin, and other conditions that make learning difficult, if not impossible. *Id.* at PageID#87-92.

Plaintiffs' damning allegations, which must be accepted as true, describe conditions that are not—and would never be—permitted in more affluent areas in Michigan. The demographic and achievement data comparing Detroit schools to those in

more affluent, whiter areas demonstrates the disparate results achieved.[2] Students in Plaintiffs' schools consistently score lower on standardized tests than students in Michigan's more affluent districts (and score well below even statewide averages). *See id.* at PageID#65-69 and Figs. 3-7. They also perform lower on college admissions tests, like the ACT, *see id.* at PageID#71-72 and Fig. 9. Plaintiffs are deprived of access to any education *at all* by virtue of their race, socioeconomic status, and residence within the Detroit Public Schools District, while other Michigan students are provided with genuine educational opportunities.

B. *Brown v. Board* Repudiated The "Separate But Equal" Education System And Should Guide Treatment Of The Detroit Schools

Since the early 1900s, minority groups have sought access to education as an integral part of their fight for racial equality. In 1900, the Niagara Movement, led by W.E.B. Du Bois highlighted the importance of education:

> The school system in the country districts of the South is a disgrace. … We want the national government to step in and wipe out illiteracy in the South. Either the United States will destroy ignorance or ignorance will destroy the United States.

---

[2] The district court erred in determining that "Michigan schools as a whole are not the proper comparator" to Plaintiffs' schools. Opinion, RE.117, PageID#2821. The Court in *Brown* compared plaintiffs' individual school districts in Kansas, Delaware, South Carolina, and Virginia to white schools in districts across those states, 347 U.S. at 486, 494-95. So too here, the question of access to literacy applies to all schools under Michigan's control, and the appropriate comparators are other students throughout Michigan's statewide education system. *See* Appellants' Br. at 48-51.

Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 612 (2008) (citing W.E.B. Du Bois, *Address at the Second Annual Meeting of the Niagara Movement* ¶ 11 (Aug. 16, 1900), *available at* http://www.wfu.edu/~zulick/341/niagara.html)). The Niagara Movement's goal was for all children to receive access to an education, recognizing that education was critical to the advancement of children in society. The Niagara Movement later gave rise to the NAACP, which continued the fight for racial equality and educational access, in part by litigating cases under the Equal Protection Clause.

This decades-long movement culminated in 1954, when *Brown* came before the Supreme Court. *Brown* squarely presented the question whether "separate-but-equal" schools for white and black children satisfied the Equal Protection Clause.[3] 347 U.S. at 487-88. The Supreme Court overturned the "separate-but-equal" doctrine announced in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and held the Constitution requires that once a state undertakes to provide an education to its students, it must provide that education on an equal basis, without depriving individuals segregated by race of the opportunities to succeed in learning and in the world. *Brown*, 347 U.S. at 495.

[3] The *Brown* Court explicitly withheld judgment on whether segregation also violated the Due Process Clause of the Fourteenth Amendment. 347 U.S. at 495.

The Supreme Court's unanimous opinion discussed at length the importance of education in our democracy. Chief Justice Warren wrote:

> Today, education is perhaps *the most important function* of state and local governments. In these days, 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*.

Id. at 493 (emphasis added).

Brown conclusively repudiated "separate but equal," and established equality as a central commitment of the American educational system.[4] *Brown* made great strides in achieving desegregation, but it was also a means to a greater end—establishing the constitutional right to an equal educational opportunity. *See* Minow, *After Brown*, *supra*, at 608. *Brown* "launched more than a half century of debate over whether students from different racial, religious, gender, and ethnic backgrounds, and other lines of difference must be taught in the same classrooms." MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATION LANDMARK 6-7

---

[4] *Brown*'s legacy and impact reaches outside the education context. The Supreme Court has cited *Brown* with approval at least 179 times, not only in affirmative action and school desegregation cases, *see, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (affirmative action); *Freeman v. Pitts*, 503 U.S. 467 (1992) (school desegregation), but also in cases addressing abortion and the right to privacy, *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), desegregation in prisons, *Johnson v. California*, 543 U.S. 499 (2005), redistricting, *Shaw v. Reno*, 509 U.S. 630 (1993), and free exercise of religion, *Locke v. Davey*, 540 U.S. 712 (2004).

(2010). It "inspired social movements to pursue equal schooling beyond racial differences, … yield[ing] successful legal and policy changes addressing the treatment of students' language, gender, disability, immigration status, socioeconomic status, religion, and sexual orientation." *Id.*

Brown's emphasis on the importance of education in a democratic society—and the right of equal access to education—has been soundly reaffirmed. In *Plyler v. Doe*, the Supreme Court considered a Texas statute that denied funding for education to undocumented immigrant children solely because of their undocumented status. 457 U.S. at 205. To compensate for lost state funding, one school district charged a tuition fee to each undocumented student seeking to enroll. *Id.* Relying on *Brown*, the Court wrote that "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221-22. Just as in *Brown*, the exclusion of a class of children inherently created a subclass of citizens. The Court recognized that depriving students of access to literacy would "handicap the individual deprived of a basic education each and every day of his life," giving the child an "enduring disability." *Id.* at 222. Finding it "apparent that a State may not reduce expenditures for education by barring some arbitrarily chosen class of children from its schools," the Court rejected the notion that undocumented children could rationally be excluded.

Id. at 229 (citation omitted). This same reasoning later was relied on by courts to reject the notion that students with learning disabilities could be excluded from public education. *See Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 297 (E.D. Pa. 1972).

C. Unequal Access To Education Undermines Democracy And Betrays America's Constitutional Promise

Brown instructs that in determining whether Detroit children are deprived of equal protection in Michigan, this Court must "consider public education in the light of its full development and its present place in American life." 347 U.S. at 492-93. Because education is the means by which individuals gain the ability to participate in democracy, the consequence of Michigan's failure to provide any access to educational opportunities to Detroit students strangles their democratic participation.

In *Brown*, Chief Justice Warren wrote that education "is required in the performance of our most basic public responsibilities …. It is the very foundation of good citizenship." 347 U.S. at 493. Education is requisite for development of critical-thinking abilities, and thus necessary for children to understand the political process, to instill "political consciousness and participation," and to provide "the interest and … tools necessary for political discourse and debate." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 113 (1973) (Marshall, J., dissenting). In *Plyler*, the Supreme Court reiterated that "denying [undocumented] children a basic education … den[ies] them the ability to live within the structure of our civic institutions,

and foreclose[s] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." 457 U.S. at 223. Education is intimately intertwined with the right to participate in the country's election process and an individual's First Amendment right to free speech. *See Rodriguez*, 411 U.S. at 63 (Brennan, J., dissenting). Along these lines, this Court has recognized public education is critical to the success of the Nation's democracy. *See Williams v. Detroit Bd. of Educ.*, 306 F. App'x 943, 948 (6th Cir. 2009).

Social-science research supports these conclusions. In *Brown*, the Court relied in part on social-science research provided by the NAACP's Legal Defense Fund, which demonstrated the psychological harm to black schoolchildren caused by segregation and the resulting impact "on their educational opportunities." *Brown*, 347 U.S. at 494. Relying on this research, the Court held that separating children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494 & n.11.

It is apparent from *Plyler*, too, that education is a right, not a benefit, and a critical one at that, due to "the lasting impact of its deprivation" on a child's life and the functioning of our nation's basic democratic institutions. 457 U.S. at 221. Illiteracy makes it harder for people to contribute to society, exacerbates existing societal ailments, and increases government expenditures on crime, unemployment, and

welfare. *See id.* at 223; *see also* Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in THE PRICE WE PAY 74 (Clive R. Belfield & Henry M. Levin eds., 2007); Clive Belfield & Henry M. Levin, *The Cumulative Costs of the Opportunity Gap*, in CLOSING THE OPPORTUNITY GAP 196 n.24 (Prudence L. Carter & Kevin G. Welner eds., 2013). Disparities in educational opportunities cause disparities in political engagement. Research shows a positive correlation between education and participation in the electoral process. *See* Ronald La Due Lake & Robert Huckfeldt, *Social Capital, Social Networks, and Political Participation*, 19 POL. PSYCHOL. 567, 567 (1998); Michele S. Moses & John Rogers, *Enhancing a Nation's Democracy Through Equitable Schools*, in CLOSING THE OPPORTUNITY GAP 210-11. "[T]he privileged participate more than others and are increasingly well organized to press their demands on government." *American Democracy In An Age of Rising Inequality*, TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AM. POLITICAL SCI. ASS'N at 1 (2004), *available at* https://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/taskforcereport.pdf. "Citizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while the advantaged roar with a clarity and consistency that policy-makers readily hear and routinely follow." *Id.* When, through unequal access to education, some voices are amplified while others are relegated to a whisper, the rights of those whispering voices are hampered.

It was undoubtedly the intent of the Fourteenth Amendment's drafters to permit *all* citizens' voices to be heard equally. To deny access to education is to deny access to literacy, which is to deny participation in our democracy. Citizens should not—and the Equal Protection Clause mandates that they *cannot*—be so stigmatized, stifled, and made subservient based on the zip code in which they were born. The racial differences, and corresponding disparities in access to education, alive and well in Michigan's public-school system disquietingly echo the de facto "separate but equal" construct struck down in *Brown*.

D. Unlike In *Rodriguez*, Michigan Has Provided No Education At All To Some Of Its Students, While Offering Genuine Educational Opportunities For Others

Defendants' reliance on *Rodriguez* to argue against a fundamental right to education is unavailing. As even the district court recognized, *Rodriguez* left open how to treat a "functional deprivation of literacy" and did not reach the issue of total deprivation of minimal educational opportunities—which is precisely the question here. Opinion, RE.117, PageID#2811. In *Rodriguez*, plaintiffs alleged not an absolute denial of the opportunity for an education, but rather a violation of the Equal Protection Clause due to disparities in the *quality* of education resulting from Texas's dual financing system. 411 U.S. at 23 ("The argument here is not that the children in districts having relatively low assessable property values are receiving no public education[.]"). The Court held:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where … no charge fairly could be made that 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***.

Id. at 37 (emphasis added).

Unlike in *Rodriguez*, Defendants deprive Detroit's low-income, predominantly minority students of *any* opportunity to acquire those "basic minimal skills," while providing students from more affluent, predominantly white areas with genuine educational opportunities. Opinion, RE.117, PageID#2798-2801. Plaintiffs' complaint centers not on funding disparities or variable quality of education, but on Michigan's *complete failure to provide access to an education at all.* The relief Plaintiffs seek—"evidence-based programs for literacy instruction and intervention"—is geared precisely to address this inequality. Complaint, RE.1, PageID#131; *see also* Appellants' Br. 43 n.4.

II. THE FUNDAMENTAL RIGHT TO EDUCATION, IMPLIED IN PRIOR CASES, IS UNDERMINED BY MICHIGAN'S PUBLIC-EDUCATION SCHEME, WHICH COERCES THE ATTENDANCE OF DETROIT STUDENTS IN FAILING AND UNSAFE SCHOOLS

Michigan's system of education, which compels Detroit public-school students to attend schools that utterly fail to provide them access to literacy necessary for enjoyment of the rights of speech and full participation in the political process,

also deprives those students of their right to liberty under the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause provides heightened protection against government interference with certain fundamental rights, proclaiming that "[n]o state shall … deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has defined "fundamental rights" as those "which are, objectively, 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." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted). Thus, "[o]ur Nation's history, legal traditions, and practices … provide the crucial guideposts for responsible decisionmaking" regarding which rights should be deemed "fundamental" and merit due process protection. *Id.* at 721 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Applying this test, the Supreme Court has found—in addition to those rights enumerated in the Bill of Rights—that the following rights are "deeply rooted" and "implicit in the concept of ordered liberty": the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), to direct the education of one's children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and to use contraception, *id.*, among others. State actions that infringe upon a fundamental right are given the

most exacting scrutiny—to withstand strict scrutiny review, the challenged action must be narrowly tailored to serve a compelling governmental interest. *Does v. Muñoz*, 507 F.3d 961, 964 (6th Cir. 2007). Actions that are not subject to strict scrutiny must still survive a rational basis analysis, which requires that state action be "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

This nation's history and practices, as well as the Supreme Court's treatment of governmental attempts to limit access to education, make clear that the right to education is a fundamental right protected by the Due Process Clause and subject to strict scrutiny. The district court erred in concluding otherwise. But even under rational-basis review, Defendants' failure to provide Detroit students with access to education is constitutionally untenable.

A. Michigan And Other States Have Long Recognized A Fundamental Right To Education

Michigan recognizes education as a fundamental right and has established a public-school system to educate its children. *See* MICH. COMP. LAWS ANN., CONST. art. 8 § 2 ("The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."). Michigan requires all children ages 6 through 16 to attend public school. *See* MICH. COMP. LAWS ANN. § 380.1561. The State Board of Education has itself previously argued that it has a "compelling interest in assuring the adequate education of all children," *see* Amicus Curiae Brief

of State Board of Education at 4, *Michigan v. Dejonge*, 501 N.W.2d 127 (Mich. 1993), and the Michigan Supreme Court has agreed that the state is responsible for educating its citizens, *Bacon*, 162 N.W. at 416.

Michigan's recognition of the importance of education is rooted in our nation's rich history. John Adams wrote in 1785: "The whole people must take upon themselves the education of the whole people, and must be willing to bear the expenses of it. There should not be a district of one-mile square, without a school in it, not founded by a charitable individual, but maintained at the public expense of the people themselves." 9 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 540 (1854). Thomas Jefferson too opined on the necessity of literacy to a democracy: "[I]f a nation expects to be ignorant & free, in a state of civilization, it expects what never was & never will be… . [W]here the press is free and every man able to read, all is safe." Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), *in* 9 THE PAPERS OF THOMAS JEFFERSON, September 1815 to April 1816, at 331 (J. Jefferson Looney ed., Princeton University Press 2012). These writings recognize that maintaining a constitutional democracy requires the engagement and vigilance of an educated public.

The district court was misguided in noting that, as late as 1830, "there was no federal or state-run school system anywhere in the United States." Opinion, RE.117, PageID#2818. An overwhelming majority of the states have recognized the

fundamental importance of education and mandated public schooling for nearly 150 years. The ideals espoused by the nation's founding members were the very ideals that *sparked* the common-schools movement in 1830—the precursor to our modern public-school system. In advocating for common schools for boys and girls, as well as for immigrants, Horace Mann cited precisely the need to "promote political stability, equalize conditions, … and enable people to follow the law …." MINOW, IN BROWN'S WAKE, *supra*, 115.

The district court also considered whether a majority of states recognized a fundamental right to education at the time the Constitution was adopted in 1789. Opinion, RE.117, PageID#2818. That misses the mark. This case arises under the Fourteenth Amendment and, thus, the relevant question is whether, at the time of the Fourteenth Amendment's adoption in 1868, states recognized such a fundamental right. The answer is yes: by 1868, a majority of the states—thirty of the Nation's then-thirty-seven states—*constitutionally mandated* their respective legislatures provide for a system of free public schools. *See* Calabresi, *supra* at 450–51. Thus, "[i]t is … clear as day that there was an Article V consensus of three-quarters of the states in 1868 that recognized that children have a fundamental right to a free public school education." *Id.* at 460.

By 1918, every state not only had adopted systems of publicly financed and operated education, but also made school attendance *compulsory*. *See* Timothy

Garrison, *From Parent to Protector: The History of Corporal Punishment in American Public Schools*, 16 J. CONTEMP. LEGAL ISSUES 115, 117 (2001). And by 1954, forty-four of the then-forty-eight states had explicit, mandatory language in their state constitutions requiring their legislatures to establish a free public-education system, incorporating into their constitutions the notion that a child had a right to receive a free public-school education.[5] *See* Calabresi, *supra* at 471-81. Today, all fifty states and the District of Columbia have compulsory education laws requiring school attendance for at least nine years and up to thirteen years. *See* Louisa Diffey and Sarah Steffes, "50-State Review: Age Requirements for Free and Compulsory Education," Education Commission of the United States (Nov. 2017), *available at* https://www.ecs.org/wp-content/uploads/Age_Requirements_for_Free_and_Compulsory_Education-1.pdf.

B. The Supreme Court Has Supplied The Basis For Recognizing A Fundamental Federal Right To Education

It was in this context that Chief Justice Warren wrote in *Brown* that "education is perhaps the *most important* function of state and local governments[,]" as evidenced by "[c]ompulsory school attendance laws and the great expenditures for

[5] By way of comparison, in *Atkins v. Virginia*, the Supreme Court required only 34 of the 50 states precluding execution of mentally disabled individuals to conclude that the nation's "evolving standards of decency" found such punishment excessive. 536 U.S. 304, 314-15, 321 (2002).

education." *Brown*, 347 U.S. at 493. The language the Court used to describe the right to access education in *Brown* is unlike that used to describe any other area lacking fundamental right status, holding open the door to later recognition of a fundamental right to education. In *Plyler*, also decided on Equal Protection grounds, the Court addressed education and described it as not merely "some governmental 'benefit' indistinguishable from other forms of social welfare legislation." 457 U.S. at 221. Rather:

> The American people have always regarded education and the acquisition of knowledge as matters of supreme importance. We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests. As pointed out early in our history, some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence…. ***In sum, education has a fundamental role in maintaining the fabric of our society.***

Id. at 221-22 (emphasis added) (citations omitted). In *Plyler*, the Court recognized that education is necessary to "sustain[ ] our political and cultural heritage"; depriving a minority of the right to education "foreclose[s] the means by which that group might raise the level of esteem in which it is held by the majority." *Id.* at 221-22. Education is not merely some welfare program or perk of state citizenship—it is *critical* to the continued strength of our democracy. To deprive a student of the right to education is to deprive him or her of the ability to exercise other rights that are

fundamental to participation in our democracy. Even in *Rodriguez*, the Court acknowledged that its precedent had long "express[ed] an abiding respect for the vital role of education in a free society." 411 U.S. at 30 (collecting cases).

The ability to access literacy and a minimally adequate education is thus "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720-21. As the founders, states, and courts have all recognized, citizens must obtain these skills to participate in the basic privileges and fundamental responsibilities of our democracy. Even though the Supreme Court was not previously compelled to articulate this fundamental right explicitly, the Court's own jurisprudence, in recognizing "the fundamental role [of education] in maintaining the fabric of our society," *Plyler*, 457 U.S. at 221, has paved the way for recognition of access to a minimally adequate education as a fundamental right.[6]

---

[6] The district court also analyzed whether the fundamental right to education is a "positive right" or "negative right." Opinion, RE.117, PageID#2815. A number of legal scholars have drawn the conclusion that this distinction is overstated. *See* Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 867 (2008). Taking the example of *Brown*, the Court struck down the "separate but equal" principle in the context of public education as a violation of the Equal Protection Clause, enforcing the negative right to be free from governmental discrimination on the basis of race. But in fashioning a remedy, the Court mandated affirmative action on the part of the states to make a "prompt and reasonable start" toward desegregation of public schools. *Brown v. Bd. of Educ.* ("*Brown II*"), 349 U.S. 294, 300-01 (1955). Thus, protection of even so-called "negative rights" often requires Courts to mandate specific action.

The district court mistakenly cited *Brown* for the proposition that "education is not a fundamental right," suggesting that *Brown* recognizes "a state could choose not to undertake the provision of education at all," Opinion, RE.117, PageID#2819. That is wrong. In any meaningful respect, the overwhelming majority of the states could not choose to cease providing public education (and the notion that they would is difficult to fathom). To suggest that the states could simply stop providing education is tantamount to suggesting that the federal government could choose to eliminate freedom of the press, or freedom of religion. Just as the federal government would need to obtain a constitutional amendment to make such a tectonic shift, nearly every state would require similar constitutional amendments to stop providing public education. Both before and at the time of *Brown*, Americans and their state governments recognized the fundamental importance—and the necessity in a democracy—of access to education.

C. Michigan Violates Due Process By Forcing Plaintiffs To Attend Devastatingly Inadequate Schools

Michigan law requires children ages 6 through 16, including Plaintiffs, to attend public school, subject to certain exceptions (*e.g.*, private or home schooling). *See* MICH. COMP. LAWS ANN. § 380.1561. Yet, the state has utterly failed to provide Plaintiffs with an education. As detailed above, and at length in Plaintiffs' Complaint, the conditions in Plaintiffs' schools are atrocious. Complaint, RE.1, PageID#50-52. Paraprofessionals with no subject-matter expertise—or worse,

eighth-grade students—have been tasked with instruction. *Id.* at PageID#15-16, 102-03. Other students are taught by long-term substitutes or attend classes with no instructor at all. *Id.* at PageID#104. Plaintiffs' schools do not have *any* textbooks for students to bring home, and in many classes, there are not enough textbooks for use during class. *Id.* at PageID#82-83. The achievement data reveals that the dreadful conditions of Plaintiffs' school facilities prevents them from learning: students in Plaintiffs' schools cannot read, write, or comprehend at anything approaching appropriate grade level or at levels close to their counterparts in schools across Michigan. *Id.* at PageID#7-9.

Without question, these conditions deprive Detroit-area students of their fundamental right to education. *Cf. In re Gault*, 387 U.S. 1, 27-28 (1967) (even well-intentioned efforts require constitutional intervention where they result in a mockery of liberty—in *Gault*, a "kangaroo court"; here, detention amid vermin-infested rooms without educational instruction). In fact, Michigan's deprivation of the right to an education goes further still and deprives Plaintiffs of their access to *other* fundamental rights: their right to vote, to serve on a jury, and to participate in democracy. Here we have precisely the scenario contemplated by the Supreme Court in *Rodriguez*—"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 37. Because of the inadequate

education provided by Defendants, Detroit's students are being involuntarily shunted into the lower rungs of a caste system that the Supreme Court warned of in *Brown* and *Plyler*. *See* Complaint, RE.1, PageID#65-72. As in *Plyler*, Plaintiffs represent a "discrete class of children" who are "not accountable for their disabling status." 457 U.S. at 223. Michigan's failure to provide equal educational opportunities for this class of students "generates a feeling of inferiority … unlikely ever to be undone." *Brown*, 347 U.S. at 494. This malfeasance stigmatizes Plaintiffs, undermines our democracy, and creates significant social costs for our nation.

Because Defendants' actions infringe on Plaintiffs' fundamental rights, they must demonstrate that their actions are "narrowly tailored to a compelling governmental interest." *Muñoz*, 507 F.3d at 964. Not only have Defendants failed to make such a showing, but they have not even attempted to articulate what governmental interest could conceivably be promoted by withholding access to education from Detroit students. It is uncontested that Defendants' actions cannot withstand strict scrutiny analysis.

Moreover, the circumstances presented by this case fail to survive even rational basis review, which requires the State show its conduct is rationally related to a legitimate state interest. By mandating that Plaintiffs attend public schools from the ages of 6 to 16, Defendants require what amounts to a long-term detention of these students. As Judge Alvin B. Rubin recognized,

> Long-term detention of an individual is ordinarily a denial of due process except when he has been proved … to have committed a specific act defined as an offense against the state… . If an individual … is confined by the government for some reason other than his commission of a criminal offense, *the state must provide some benefit to the individual in return for the deprivation of his liberty.*

Gary W. v. Louisiana, 437 F. Supp. 1209, 1216 (E.D. La. 1976) (emphasis added). Typically, the benefit, or *quid pro quo*, of depriving a student's liberty and requiring attendance in school is the state's provision of an education.[7] But where, as here, Defendants have failed to provide students access to even a minimally adequate education, there is no justification for the deprivation of liberty that compulsory school attendance entails. Thus, there is no legitimate state interest served by requiring students to attend schools that abjectly fail to give them any benefit of education.

The State's failure to provide access to an education *at all* violates Plaintiffs' due process rights under strict scrutiny or rational basis, and the district court erred in holding otherwise.

---

[7] Courts have recognized that public-school students cannot be stripped of certain fundamental protections. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (students do not "shed their constitutional rights to freedom of speech or expression"); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (public-school students have procedural due process rights); *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) (students have "legitimate expectations of privacy" under the Fourth Amendment); *W. Va. State Bd. of Ed. v. Barnette,* 319 U.S. 624, 637 (1943) (holding boards of education must comply with the Fourteenth Amendment, and reasoning that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms").

CONCLUSION

Brown and its progeny repeatedly have recognized that access to education is a right that cannot be denied to certain classes of citizens. Where a state elects—as every state has—to compel school attendance and to provide public education, the state has a duty to provide a minimally adequate education to all its children. Michigan's abject failure to provide Plaintiffs with an *equal* right to access education—a fundamental right implicit in our concept of liberty—violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The district court's judgment should be reversed.

Dated: November 26, 2018
New York, New York

Respectfully submitted,

SELENDY & GAY PLLC

By: /s/ Lena Konanova

Lena Konanova
David S. Flugman
Jessica Underwood
Bria Delaney
Nicholas J. Klenow
SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 390-9000
E-mail: lkonanova@selendygay.com

Attorneys for Amicus Curiae Martha Minow, 300th Anniversary University Professor at Harvard University, in Support of Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements.

1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6480 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in Times New Roman 14-point font, a proportionally spaced typeface, using Microsoft Word.

DATED: November 26, 2018

/s/ Lena Konanova
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I electronically filed the foregoing document through the court's Electronic Case Filing (ECF) system, which will send notifications to counsel of record for all parties.

DATED: November 26, 2018

/s/ Lena Konanova
Attorney for *Amicus Curiae*