

CASE NOS. 18-1855/18-1871

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**In the United States Court of Appeals  
for the Sixth Circuit**

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GARY B.; JESSIE K., a minor, by Yvette K., guardian ad litem; CRISTOPHER R. and ISAIAS R., minors, by Escarle R., guardian ad litem; ESMERALDA V., a minor, by Laura V., guardian ad litem; PAUL M.; and JAIME R., a minor, by Karen R., guardian ad litem, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants,*

v.

RICHARD D. SNYDER, in his official capacity as Governor of the State of Michigan; JOHN C. AUSTIN, MICHELLE FECTEAU, LUPE RAMOS-MONTIGNY, PAMELA PUGH; KATHLEEN N. STRAUS, CASANDRA E. ULBRICH, EILEEN WEISER, and RICHARD ZEILE, in their official capacities as members of the Michigan Board of Education; BRIAN J. WHISTON, in his official capacity as Superintendent of Public Instruction for the State of Michigan; DAVID B. BEHEN, in his official capacity as Director of the Michigan Department of Technology, Management, and Budget; and NATASHA BAKER, in her official capacity as the State School Reform/Redesign Officer,

*Defendants-Appellees.*

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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MICHIGAN

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**BRIEF OF *AMICUS CURIAE* PEN AMERICA IN SUPPORT  
OF PLAINTIFFS-APPELLANTS**

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**STATEMENT OF CORPORATE  
AFFILIATIONS AND FINANCIAL INTEREST**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 6th Circuit Rule 26.1, *amicus curiae* PEN America makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

**No.**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

**No.**

/s/ Michael J. Dell

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## **STATEMENT OF INTEREST**

PEN America is a non-profit association of approximately 7,000 writers, including novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals.<sup>1</sup> It is affiliated with PEN International, the global writers' organization with more than 100 centers in Africa, the Americas, Asia, Australia, and Europe. PEN America's members include authors who have received the Pulitzer Prize or other significant awards or recognition of substantial literary merit, including its president, Jennifer Egan, and Ayad Akhtar, Kwame Anthony Appiah, Margaret Atwood, Paul Auster, Robert A. Caro, Michael Chabon, Teju Cole, Rita Dove, Nathan Englander, Jonathan Franzen, Neil Gaiman, Roxane Gay, Masha Gessen, Amitav Ghosh, AM Homes, Siri Hustvedt, Marlon James, Saeed Jones, Jonathan Lethem, Dinaw Mengestu, Paul Muldoon, Joyce Carol Oates, Susan Orlean, Ayelet Waldman and Hanya Yanagihara. Its prior members include James Baldwin, Robert Frost, Allen Ginsberg, Langston Hughes, Norman Mailer, Arthur Miller (former President), Toni Morrison, Salman Rushdie (former President), Susan Sontag (former President) and John Steinbeck.

PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. PEN America's

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<sup>1</sup> No party or its counsel authored this brief in whole or in part or contributed money to fund its preparation or submission. No one other than *amicus curiae* or its counsel contributed money to its preparation or submission.



mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible. PEN America champions the freedom of people everywhere to write, create literature, convey information and ideas, and express their views, recognizing the power of the word to transform the world.

PEN America has a particular interest and expertise in the benefits of access to literacy and literature. Its mission and mandate include fighting for access, particularly for under-represented groups. For example, PEN America's Children/Young Adult Book Authors Committee advocates on public policy issues to serve the literacy needs of children. Its Writers in the Schools Committee serves New York City school students from under-resourced communities. Its original and comprehensive research includes reports on the importance of literacy in our society and children's access to diverse literature. It supports the right of individuals in American prisons to access literature.

PEN America submits this brief in support of Plaintiffs-Appellants because the District Court's failure to recognize the constitutional right of access to literacy is flawed and has far-reaching and unacceptable consequences for all of us.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiffs present a particularly compelling and heart-breaking claim for the right to literacy that should not be necessary in our affluent society. They are students in Detroit public schools who have been denied the most basic education

that is a prerequisite to life, liberty and the pursuit of happiness, which the Declaration of Independence and the Fourteenth Amendment recognize as fundamental and inalienable rights. The right to education, and therefore to literacy, is also recognized in the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

The proficiency rates in most subjects in Plaintiffs' schools are near zero, however. Many students cannot read, write, or comprehend at anything close to their grade level. Their schools lack appropriate textbooks, instructional materials and classroom resources. They suffer from overcrowding. They have unsanitary and dangerous conditions, including extreme temperatures and vermin. And there, but for the grace of God, could have been any of us, or any of our children.

Depriving these children — our children — of access to literacy is an unacceptable and immoral tragedy for them. It is also a tragedy for all of us that is and should be unconstitutional. It undermines the essential fabric of our society and democracy, which are grounded on the promise that everyone should have an opportunity to achieve her or his potential, and require educated, engaged and informed citizens. This was recognized by the Framers and, if anything, is even more important today. As explained in PEN America's report, *Missing from the Shelf: Book Challenges and the Lack of Diversity in Children's Literature*, literacy

is essential to enable each of us to formulate and challenge ideas and concepts and participate in and provide leadership to our communities. As shown in the PEN America report, *Faking News: Fraudulent News and the Fight for Truth*, literacy enables citizens to vet and reject fraudulent news stories and be knowledgeable participants in our political process.

Low literacy rates also impose enormous costs on our economy. Individuals who lack literacy are far more likely to be low wage workers or unemployed and to rely on public financial aid. Their inability to get by will be exacerbated as the economy continues to move away from low-skilled jobs. Low literacy also affects health and health care literacy, creating inefficiencies in our health care system and increased dependence on Medicaid. And low literacy is highly correlated with incarceration and recidivism, including among juveniles. Recognizing that access to literacy is a fundamental constitutional right would help address each of these concerns.

The Supreme Court has repeatedly emphasized the importance of education. It recognized in *Brown v. Board of Education* and *Plyler v. Doe* that states cannot deprive certain groups of an education. And although the Court determined in *San Antonio Independent School District v. Rodriguez* that there is no general, constitutional right to education, the principles and analysis of *Obergefell v. Hodges* compel the conclusion that access to literacy — the most basic component

of education — is a fundamental right because, like marriage, it is inherent in the concept of individual autonomy, draws meaning from related constitutional rights, and is a keystone of the Nation’s social order. The District Court erred by failing to apply this framework.

Finally, even if access to literacy was not a fundamental constitutional right, the District Court erred in failing to apply the heightened scrutiny that the Supreme Court undertook in *Plyler* to state actions that wholly deprive children of an education. As in *Plyler*, Plaintiffs are children who have been deprived of access to the most basic education through no fault of their own.

### **BACKGROUND**

U.S. literacy rates have made little progress in the last few decades. The literacy rate between 2012 and 2014 was not significantly higher than it was from 1994 to 1998. See Nat’l Ctr. For Educ. Statistics, Program for the International Assessment of Adult Competencies (PIACC), *U.S. PIACC Prison Study Results: 2014* (2014).<sup>2</sup> The already enormous individual, social and economic costs of inadequate literacy have increased, however.

Yet Defendants deny Plaintiffs even the most basic access to literacy education. The District Court found that: “The conditions and outcomes of Plaintiff’s schools, as alleged, are nothing short of devastating. When a child who

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<sup>2</sup> <https://nces.ed.gov/surveys/piaac/results/summary.aspx>.

could be taught to read goes untaught, the child suffers a lasting injury — and so does society.” (Opinion, R. 117, Page ID #2819). Children require the tools of basic literacy, including the alphabetic principle, phonics instruction, fluency and reading comprehension. (Complaint, R. 1, Page ID ##114-15). However, Plaintiffs’ schools rank in the zero to sixth percentile in literacy scores according to Michigan’s accountability system, and have a track record of not assisting failing students, (*id.* at Page ID ##112-13), even though schools “can systematically implement effective evidence-based literacy programs and practices to ensure that every student learns to read in the first instance and to intervene and remediate when students fall behind.” (*Id.* at Page ID ##113-14; *see also id.* at Page ID #120).

**A. Literacy Is Essential to Meaningful Social and Political Participation**

The connection between literacy and meaningful social and political participation is undeniable. James Madison wrote that “Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”<sup>3</sup> The Supreme Court has recognized that education plays “a pivotal role in maintaining the fabric of our

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<sup>3</sup> Library of Congress, *James Madison to W.T. Barry*, Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York; G.P. Putnam’s Sons, 1900-1910, <https://www.loc.gov/item/mjm018999/>.

society and in sustaining our political and cultural heritage.” *Plyler v. Doe*, 457 U.S. 202, 203 (1982). As Robert D. Putnam explained:

“Education is one of the most important predictors – usually, in fact, the most important predictor — of many forms of social participation — from voting to associational membership, to chairing a local committee to hosting a dinner party to giving blood. . . . Education, in short, is an extremely powerful predictor of civic engagement.”

Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 186 (2000); see also Barry C. Burden, *The Dynamic Effects of Education on Voter Turnout*, *Electoral Studies* 28, 540-49 (2009).<sup>4</sup>

Literacy programs promote participation in community, union and other associations and activities. Rodrigo Martinez & Andres Fernandez, *The Social and Economic Impact of Illiteracy*, UNESCO 46 (2010).<sup>5</sup> Literacy provides access to information and increases confidence and a willingness to work with others. By denying Plaintiffs access to literacy, Defendants have effectively removed Plaintiffs from the field of social and political endeavors.

### **1. Literacy is a fundamental tool for learning**

The importance of the access to knowledge that literacy brings to a child cannot be overstated. Literacy educates children, broadens their horizons, and inspires their imaginations and creativity by giving them access to ideas. And, as

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<sup>4</sup> <https://faculty.polisci.wisc.edu/bcburden/es2009.pdf>.

<sup>5</sup> <http://unesdoc.unesco.org/images/0019/001905/190571E.pdf>.

the Supreme Court has emphasized, “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom . . . such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26. v. Pico*, 457 U.S. 853, 867-68 (1982). “The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment. That student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom. The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies.” *Right to Read Defense Committee of Chelsea, v. Sch. Committee of the City of Chelsea*, 454 F. Supp. 703, 715 (D. Mass. 1978).

PEN America’s August 2016 report, *Missing from the Shelf: Book Challenges and the Lack of Diversity in Children’s Literature* (the “August 2016 Report”), addresses the serious issues that arise when students’ access to books is limited.<sup>6</sup> Literature — even “controversial” literature — helps students formulate and challenge new ideas and concepts. “The role of literature is to tell us the difficult truths . . . to arm us for the world in all of its ugliness.” *Id.* at 11.

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<sup>6</sup> <https://pen.org/research-resources/missing-from-the-shelf-book-challenges-and-lack-of-diversity-in-childrens-literature/>.

The August 2016 Report details how books and literature expose students to diverse thought. That prepares them for a more diverse world, enables them to place their own lives in perspective, and allows them to relate to diverse characters who they might never have imagined before. *Id.* at 13-17. As the Report explains:

Access to diverse books is not just important for children of color, of course. For all children, a crucial part of education is learning about differences, learning to value other cultures, histories, and experiences, and understanding the breadth of experiences that comprise both our own society in the U.S. and the wider world. Education can also help children to see truths about society. A book collection that misrepresents the world children see around them presents a skewed view of the world and does children a disservice. For children being raised in a majority minority nation and in an increasingly globalized world, navigating diversity will be an essential life skill.

*Id.* at 14.

For Plaintiffs, the majority of whom are students of color, “[e]xposure to diverse books not only does . . . the service of preparing them to navigate a more diverse world, but helps enable them to put their own life experiences in perspective by recognizing from an early age that their cultures, behaviors and norms are not universal.” *Id.* Access to literacy means giving students access to a diversity of ideas that will allow them to grow intellectually.



## 2. Literacy enables students to critically analyze information

One clear effect of the lack of access to literacy education is the inability to critically analyze “Fake News.” PEN America’s October 2017 report, *Faking News: Fraudulent News and the Fight for Truth*, details the alarming inability of many Americans to understand the difference between accurate reporting and fraudulent news or advertising, and the threat it poses to American democracy, which requires an informed and engaged electorate.<sup>7</sup> False information presented as factual, with the intention to deceive, undermines our democracy and our way of life by obscuring the truth, increasing political polarization, sowing distrust, stymying public debate, hindering the development of evidence- and fact-driven public policy, increasing vulnerability to private and foreign interests, escalating panic and irrational behavior during emergency situations, creating a culture of cynicism and permitting elected officials to avoid accountability.

Children, in particular, “need help to filter out misinformation and to understand whether, when, and how news is biased.” *Id.* at 70. They “fall prey to false news sites and lack the skills to evaluate the steady flow of information aimed at them via social media.” *Id.*

Literacy education in critical reading and thinking skills would combat this growing problem by enabling children to identify and defend themselves from fake

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<sup>7</sup> <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf>.

news. *Id.* at 17. “News literacy programs are among the most promising approaches to addressing the long-term harms posed by fraudulent news, because they hold the potential to reshape Americans’ attitude toward, and evaluation of, the news media.” *Id.* at 75. They “prepare generations of students to look critically at information and its sources and know how to get their questions answered.” *Id.* at 19.

### **B. Low Literacy Hurts Our Economy**

Low literacy imposes substantial and avoidable costs on the U.S. economy. As former Education Secretary Arne Duncan has written, “the American education system is failing too many of its children and . . . this failure threatens the nation’s ability to compete and retain leadership in the global economy.” U.S. Department of Education, *For Each and Every Child—A Strategy for Education Equity and Excellence* 19, Washington, D.C. (2013).<sup>8</sup> Low literacy causes billions of dollars of unnecessary expenditures each year. The inability to read, understand information, and fully participate in our democratic society undermines the national economy, from low wages and high unemployment, to poor healthcare results, to higher rates of incarceration and recidivism.

Studies indicate that low literacy rates lead to increased social dependence. Individuals with low literacy scores are more likely to rely on financial support

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<sup>8</sup> <https://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf>.

from the government. According to the Employment Policies Institute, “those with the lowest literacy scores are 16.5 times more likely to have received public financial aid in the past year, relative to those in the highest literacy group.” William C. Wood, *Literacy and the Entry-Level Workforce: The Role of Literacy and Policy in Labor Market Success* 3 (June 2010).<sup>9</sup>

One explanation for this increased social dependence is that “[w]orkers with limited functional literacy account for a disproportionate share of low-wage . . . workers.” Robert I. Lerman & Stefanie R. Schmidt, *Functional Literacy and Labor Market Outcomes* (June 1999).<sup>10</sup> Not surprisingly, those with the lowest literacy rates also make up the majority of the nation’s unemployed. “About 60 percent of the nation’s unemployed in 1991 fell into the lowest two literacy categories.” *Id.* This cycle perpetuates itself because “[i]lliterate people earn 30%-42% less than their literate counterparts and do not have the literacy skills [or financial means] required to undertake further vocational education or training to improve their earning capacity.” See World Literacy Foundation, *The*

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<sup>9</sup> [https://www.epionline.org/wp-content/studies/Wood\\_10-10.pdf](https://www.epionline.org/wp-content/studies/Wood_10-10.pdf).

<sup>10</sup> <https://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/nalsfina/nalsfina.htm>.

*Economic & Social Cost of Illiteracy: A Snapshot of Illiteracy in a Global Context*  
5 (Aug. 24, 2015).<sup>11</sup>

The economic cost of unemployment is substantial. Between 2007 and 2012, state and federal unemployment insurance programs spent roughly \$520 billion. See Tami Luhby, *Unemployment Benefits Cost: \$520 Billion*, CNN Money (Nov. 29, 2012).<sup>12</sup> As the global economy moves away from low-skill and low-wage jobs, unemployment expenditures will increase. But recognizing access to literacy as a fundamental right would have the tripartite effect of lifting wages, enabling low-wage and low-skill workers to use foundational literacy to obtain further job training, and decreasing government spending on unemployment programs.

Low literacy also contributes to increased healthcare costs. Medicaid, which covers health care costs for individuals with limited financial resources, totaled \$565.5 billion, or 17% of national health expenditures in 2016. See Centers for Medicare & Medicaid Services, *NHE Fact Sheet* (2016).<sup>13</sup> Low literacy is responsible for a significant portion of these costs.

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<sup>11</sup> <https://worldliteracyfoundation.org/wp-content/uploads/2015/02/WLF-FINAL-ECONOMIC-REPORT.pdf>.

<sup>12</sup> <https://money.cnn.com/2012/11/29/news/economy/unemployment-benefits-cost/index.html>.

<sup>13</sup> <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html>.

Low health literacy, defined as “the degree to which individuals have the capacity to obtain, process, and understand basic health information and services needed to make appropriate health decisions,” also creates economic inefficiencies in the U.S. health care system. *See* Alexandra King, *Poor Health Literacy: A ‘Hidden’ Risk Factor*, 7 *Nat. Rev. Cardiology*, 473-74 (2010). “Low health literacy has been associated with non-adherence to treatment plans and medical regimens, poor patient self-care, . . . and increased risks of hospitalization and mortality.” *Id.* Each of these outcomes creates significant additional costs. A 2006 report estimated the cost of low health literacy in the U.S. is between \$106 billion and \$238 billion annually, or roughly the equivalent of insuring the 47 million people who lacked coverage that year. *See* John A. Vernon et al., *Low Health Literacy: Implications for National Health Policy*, Dep’t of Health Policy, School of Pub. Health & Health Servs., The George Washington Univ. 1 (2007).<sup>14</sup> Protecting access to literacy as a fundamental right would reduce the prevalence of low health literacy, improve health outcomes, eliminate economic inefficiencies, and save billions of dollars.

Finally, low literacy is also strongly correlated with incarceration and repeat offenders. The U.S. Department of Justice recognized this in 1993 when it studied juvenile delinquency and recidivism. The Justice Department observed that there

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<sup>14</sup> [https://publichealth.gwu.edu/departments/healthpolicy/CHPR/downloads/LowHealthLiteracyReport10\\_4\\_07.pdf](https://publichealth.gwu.edu/departments/healthpolicy/CHPR/downloads/LowHealthLiteracyReport10_4_07.pdf).

was “ample evidence of the link between academic failure and delinquency[,]” which is “welded to reading failure.” Michael S. Brunner, *Reduced Recidivism and Increased Opportunity Through Research-Based Reading Instruction*, Office of Juvenile Justice and Delinquency Prevention Abstract 6 (1993).<sup>15</sup>

Two decades later, it was estimated that approximately 30% of the U.S. prison population falls in the lowest two literacy levels. See Nat’l Ctr. For Educ. Statistics, Program for the International Assessment of Adult Competencies (PIACC), *U.S. PIACC Prison Study Results: 2014* (2014).<sup>16</sup> Researchers continue to recognize that “[t]hose who are still illiterate upon release have a high probability of re-offending[,]” which poses “a high cost to the economy in terms of maintaining prisons, administrating the courts and running the justice system.” See World Literacy Foundation, *supra* note 11, at 7. As the Justice Department emphasized in 1993, “[i]f delinquency and recidivism are to be substantially reduced, . . . reading instruction [must] be greatly improved.” See Bruner, *supra* note 15, at 51. This Court has the opportunity to act on this plea.

In short, the economic costs of low literacy are a significant drag on our gross domestic product (“GDP”). According to the World Literacy Foundation, the cost of inadequate literacy is approximately 2% of GDP in developed countries.

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<sup>15</sup> <https://www.ncjrs.gov/pdffiles1/Digitization/141324NCJRS.pdf>.

<sup>16</sup> <https://nces.ed.gov/surveys/piaac/results/summary.aspx>.

That is hundreds of billions of dollars annually in the U.S. *See* World Literacy Foundation, *supra* note 11, at 10. President George W. Bush recognized fifteen years ago in his 2004 State of the Union address that, “[a]ll skills begin with the basics of reading and math, . . . [y]et for too long, for too many children, those skills were never mastered.” George W. Bush, State of the Union Address (Jan. 20, 2004).<sup>17</sup> This Court should recognize that access to literacy education is a fundamental constitutional right.

## ARGUMENT

### I. THE CONSTITUTION GUARANTEES THE FUNDAMENTAL RIGHT OF ACCESS TO LITERACY

#### A. **An “Identifiable Quantum” of Education Is a Prerequisite to the Meaningful Exercise of First Amendment Rights and Guaranteed by the Equal Protection Clause**

The Supreme Court’s education precedents emphasize the importance of education, and strongly imply that access to the most basic, minimal skills necessary for the enjoyment of the rights of free speech and full participation in the political process — which unquestionably include literacy — is a fundamental right. In *Brown v. Board of Education*, the Court recognized that education “is perhaps the most important function of state and local governments.” 347 U.S. 483, 493 (1954). Education “is required in the performance of our most basic

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<sup>17</sup> <https://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120-7.html>

public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.” *Id.* Although the Court in *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973), held that a broadly defined concept of “education” is not a fundamental right, that case does not bar Plaintiffs’ claims. The District Court correctly held that here “the right alleged is ‘access to literacy’—a distinct concept from the bare right to education or the right to an equally funded education.” (Opinion, R. 117, Page ID #2810). The District Court erred, however, in finding that access to literacy is not a constitutionally protected right.

In *Rodriguez*, the Court expressly reserved the question whether “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [First Amendment rights and the right to vote].” *Rodriguez*, 411 U.S. at 36-37; *see Papasan v. Allain*, 478 U.S. 265, 284 (1986) (*Rodriguez* “did not ... foreclose thi[s] possibility.”). One of the reasons that *Rodriguez* upheld the school financing system at issue there was it did not “result[] in the absolute deprivation of education.” *Rodriguez*, 411 U.S. at 23-25. “The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth.” *Id.* The Court emphasized that “no charge fairly



could be made that the [state's financing] 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. But that is not true in Detroit. Defendants have failed to provide Plaintiffs with access to basic reading and writing skills that are necessary for them to be able to participate in society and exercise their constitutional rights.

In *Plyler*, 457 U.S. at 221, the Supreme Court reaffirmed that “some degree of education is necessary ... to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” (Quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)). *Plyler* struck down a law denying a public education to children who were not legally admitted to the United States. The Court expressly rejected the argument that education is “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” *Id.* To the contrary, the Court held that state action denying some children the right to obtain a “basic education” is presumptively barred by the Constitution. *Id.* at 222. It is most “difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.” *Id.* The Court found the constitutionally-protected opportunity to obtain a basic education necessarily includes the opportunity to learn how to read and write, and the inability to do so

“will handicap the individual deprived of a basic education each and every day of his life.” *Id.*

It was principally because “[i]lliteracy is an enduring disability” that the Court concluded that the “denial of basic education” is “most difficult to reconcile ... with the framework of equality embodied in the Equal Protection Clause.” *Id.* The denial of a basic education imposes a “lifetime hardship;” “[t]he stigma of illiteracy will mark [individuals] for the rest of their lives[,] ... deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” *Id.* at 223.

Several years later, the Supreme Court reiterated that it had “not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.” *Papasan*, 478 U.S. at 285. *Papasan* did not decide the issue because the Court found the petitioners did not allege sufficient facts to support their claims that they were denied a minimally adequate education. For example, the Court held that “petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics.” *Id.* at 286.

**B. Obergefell Supports A Fundamental Right of Access To Literacy Under The Fourteenth Amendment.**

The Supreme Court’s reasoning in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the fundamental right to marry is guaranteed to same-sex couples under the Fourteenth Amendment, also supports the existence of a fundamental right of access to literacy. *Obergefell* explained that “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.” *Id.* at 2598. “History and tradition guide and discipline this inquiry but do not set its outer boundaries” because the rights guaranteed by the Constitution extend beyond the Bill of Rights to “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Id.* at 2597-98.

*Obergefell* identified four “principles and traditions” that show that same-sex couples have a fundamental right to marriage. Three of those principles apply to the right of access to literacy: (i) the right “is inherent in the concept of individual autonomy,” (ii) it “draws meaning from related rights,” and (iii) the “Court’s cases and the Nation’s traditions make clear that [the right] is a keystone of the Nation’s social order.” *Id.* at 2589-90.

First, access to literacy is inherent and essential to “the concept of individual autonomy.” *Obergefell*, 135 S. Ct. at 2589. Without that access, Detroit students are deprived of the opportunity to be informed about and engage in the full range

of life choices that individual autonomy entails. “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” *Brown*, 347 U.S. at 493; *see also* Wood, *supra* note 9, at 3 (“[T]hose with the lowest literacy scores are 16.5 times more likely to have received public financial aid in the past year, relative to those in the highest literacy group.”). These lost opportunities include political choices such as the exercise of the right to vote,<sup>18</sup> social choices such as who to associate with,<sup>19</sup> economic choices such as whether to contract, career choices about what profession to enter,<sup>20</sup> spiritual choices about what, if any, religious beliefs to subscribe to, and choices about one’s own body and healthcare.<sup>21</sup> The choices literacy enables are, no less than marriage, those that “shape an individual’s destiny.” *Obergefell*, 135 S. Ct. at 2599.

Second, the right of access to literacy “draws meaning from related rights.” *Id.* at 2590. In *Obergefell*, the Court identified rights related to marriage including,

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<sup>18</sup> *See Rodriguez*, 411 U.S. at 36 (“[A] voter cannot cast his ballot intelligently unless his reading skills . . . have been adequately developed.”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 341 (2010) (“[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”).

<sup>19</sup> *See Martinez & Fernandez*, *supra* note 5, at 46.

<sup>20</sup> *See Goodwin Liu, Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 396-97 (2006).

<sup>21</sup> *See King*, *supra* at 473-74.

among others, rights related to procreation, childrearing and education, as a basis for protecting the right to marry. *See id.* at 2600 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (parents have a constitutional right to direct the education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the rights that the Fourteenth Amendment guarantees are “the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God ... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”). Depriving Plaintiffs of their right of access to literacy undermines their ability to exercise their related rights granted by the First Amendment to speech,<sup>22</sup> to receive information,<sup>23</sup> and to participate in the political process and vote.<sup>24</sup> It also hampers Plaintiffs’ ability to exercise other constitutional rights for which literacy is essential, such as the right

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<sup>22</sup> *Rodriguez*, 411 U.S. at 35 (“The ‘marketplace of ideas’ is an empty forum for those lacking basic communicative tools.”). The First Amendment freedom of speech also protects the right to speech in the preferred “form of access” of the speaker or recipient. *See Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

<sup>23</sup> *Kleindienst*, 408 U.S. at 762-63 (“It is now well established that the Constitution protects the right to receive information and ideas. This freedom of speech and press necessarily protects the right to receive.”); *Rodriguez*, 411 U.S. at 35 (“[T]he corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.”).

<sup>24</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) (“[T]he ability to read and write has some relation to standards designed to promote intelligent use of the ballot.”).

to interstate travel.<sup>25</sup> Without the right of access to literacy, “the[se] specific rights would be less secure.” *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

*Obergefell* observed that the children of those denied the right to marry “suffer the stigma of knowing their families are somehow lesser.” *Obergefell*, 135 S. Ct. at 2600. The Supreme Court in *Plyler* recognized that the deprivation of access to literacy causes a similar stigma. “The stigma of illiteracy will mark [the children] for the rest of their lives.” *Plyler*, 457 U.S. at 223. Without literacy, Plaintiffs will not only be shut out of participation in many facets of our society, but they will be exponentially more likely to become reliant on public aid.<sup>26</sup> As in *Obergefell*, Plaintiffs merely ask the Court to recognize their right to an opportunity to avoid this lifelong stigma and disability, and “for equal dignity in the eyes of the law.” *Obergefell*, 135 S. Ct. at 2608.

Third, the history of the Fourteenth Amendment and the United States make clear that access to literacy is a fundamental right and a “keystone of the Nation’s social order.” *Id.* at 2590. The Supreme Court has repeatedly described education

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<sup>25</sup> *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-55 (1974) (“The right of interstate [and intrastate] travel has repeatedly been recognized as a basic constitutional freedom.”). In order to obtain a driver’s license in Michigan, one must have at least a basic level of literacy: the Michigan State Driver’s Manual is written on a ninth grade Flesch-Kincaid level, and the Michigan Driver’s Test is based on the content of that manual. Michigan Secretary of State, *What Every Driver Must Know* (2017), <http://driving-tests.org/michigan/mi-dmv-drivers-handbook-manual/>.

<sup>26</sup> See Wood, *supra* note 9, at 3.

as the “very foundation of good citizenship.” *Brown*, 347 U.S. at 493. It is not just the importance of marriage that Alexis de Tocqueville found significant in our nation in its infancy. *Obergefell*, 135 S. Ct. at 2601. He also observed that “[i]t is by the attention it pays to Public Education that the original character of American civilization is at once placed in the clearest light ... clauses establish[] schools in every township ... [t]he municipal authorities were bound to enforce the sending of children to school by their parents.” 1 Alexis de Toqueville, *Democracy in America* ch. 2, part II (H. Reeve trans., rev. ed. 2013) (2006). These observations are not mere anecdote. Access to education at the most basic level — literacy — has been a part of our society and our country’s history since its inception, and states have provided that access nearly unanimously since the enactment of the Fourteenth Amendment. In 1868, the year the Fourteenth Amendment was ratified, *36 out of 37 states*, including Michigan, “imposed a duty in their constitutions on state government to provide a public-school education;” a “right to a public-school education is thus arguably deeply rooted in American history and tradition and is implicit in the concept of ordered liberty.”<sup>27</sup> Today, the

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<sup>27</sup> Steven G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 108 (2008). The District Court erred in dismissing this history by focusing on a study that found “there was no federal or state-run school system anywhere in the United States as late as 1830.” (Opinion, R. 117, Page ID #2818) (citing Barry Friedman

constitution of every state guarantees the right to education.<sup>28</sup>

The District Court declined to apply the *Obergefell* test for determining fundamental rights on the ground that it applies “only in reference to intimate relationships.” (Opinion, R. 117, Page ID #2814). That is incorrect. *Obergefell* is not and should not be so limited. The District Court misplaced reliance on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989), which found the Fourteenth Amendment did not obligate Wisconsin to protect a child from his abusive father when the State had knowledge of that abuse. The opinion has dicta that the “Due Process Clauses generally confer no affirmative right to governmental aid,” but it does not address the existence of a fundamental right — a phrase that does not appear in the majority opinion. The District Court also observed that the Supreme Court has typically recognized only “negative rights” as fundamental, and “the Complaint points exclusively to a positive-right argument.” (Opinion, R. 117, Page ID ##2815-16). That distinction has no basis in Supreme Court precedent regarding fundamental rights, and the District Court erred in using that analysis instead of the Court’s analysis in *Obergefell*.

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& Sara Solow, *The Federal Right to an Adequate Education*, 81 Geo. Wash. L. Rev. 92, 117 (2013)).

<sup>28</sup> Derek Black, *Unlocking the Power of State Constitutions With Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 Wm. & Mary L. Rev. 1343, 1398 (2010).



## II. DEFENDANTS' FAILURE TO PROVIDE EQUAL ACCESS TO LITERACY REQUIRES HEIGHTENED SCRUTINY

Even if access to literacy is not a fundamental right (and it is), the District Court erred in failing to apply a heightened level of scrutiny to Detroit's deprivation of Plaintiffs' access to literacy. (Opinion, R. 117, Page ID ##2821-822). *Plyler* is instructive. There, after finding that education was not a fundamental right, the Court nevertheless required a heightened justification — a “substantial interest of the State” — to sustain the debilitating effects of a lack of education on the group of children affected. *Plyler*, 457 U.S. at 217-18. The Court held that such a heightened level of scrutiny should be applied in “limited circumstances” where “legislative classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties.” *Id.* at 217; *see Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1244 (11th Cir. 2012) (“Together, the specific interplay between the types of individuals affected by the statute and the deprivation at issue may justify requiring a heightened level of scrutiny to uphold the statute’s categorization.”). The Court applied “intermediate” scrutiny to “evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles.” *Plyler*, 457 U.S. at 218 n.16.

*Plyler* grounded its decision to apply “heightened scrutiny” on the affected children’s lack of responsibility for or control over their status, and the risk of

significant and adverse consequences if they were denied access to a basic education. *Id.* at 223 (“Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives.”). Courts have applied *Plyler*’s rationale for heightened scrutiny to government actions that penalize children for the conduct of their parents and create the risk of significant and enduring adverse consequences to children.<sup>29</sup> Here too Plaintiffs, as minor children, are not to blame for their poverty and geographic location, and there are significant and enduring consequences if they are deprived of access to literacy. No substantial state interest is served by Defendants failure to provide Plaintiffs with curriculum, teachers, and books, and to eliminate the deplorable and unsafe conditions in their schools. Accordingly, a heightened level of scrutiny is required.

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<sup>29</sup> *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001) (the denial of welfare benefits for children solely because of their mothers’ alien status violates the Equal Protection Clause; the denial of a public education would present an even more compelling case for heightened scrutiny); *Nancy M. v. Scanlon*, 666 F. Supp. 723, 727 (E.D. Pa. 1987) (invalidating statutes that restricted foster children’s access to education under heightened scrutiny standard because “they comprise a discrete group of persons who, in the vast majority of cases, lack responsibility for and control over their status and the power to change it.”); *Nat’l Law Ctr. on Homelessness & Poverty, R.I. v. New York*, 224 F.R.D. 314, 322 (E.D.N.Y. 2004) (applying heightened scrutiny to government’s failure to provide homeless children equal access to the public education enjoyed by other children on account of the “the misfortunes or misdeeds of their parents.”); *Horton v. Marshall Pub. Sch.*, 769 F.2d 1323, 1330 (8th Cir. 1985) (applying intermediate security to statute limiting education to minor children who did not have a legal guardian living in the school district).

In *Brown*, the Court held that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education” and that the “opportunity [of an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” 347 U.S. at 493. Sixty-four years later, the state of Michigan has clearly undertaken to provide a statewide public education system to all of its students, but has failed to provide certain of Detroit’s children with access to its most basic element — literacy. The District Court erred in not assessing this under a heightened level of scrutiny.

### **CONCLUSION**

The Court should reverse the Order of the United States District Court for the Eastern District of Michigan dismissing the Complaint.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify the following:

(1) This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts identified and exempted pursuant to Fed. R. App. P. 32(f) and Circuit Rule 32(b)(1), this brief contains 6,497 words.

(2) This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Office Word and typed using Times New Roman 14-point font.

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Dated: November 26, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of November 2018, I presented *Amicus Curiae*'s Motion to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Michael J. Dell

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Dated: November 26, 2018