

Nos. 18-1855, 18-1871

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

GARY B., *et al.*,
Plaintiffs-Appellants,

v.

RICHARD D. SNYDER, in his official capacity as Governor of the
State of Michigan, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
THE HONORABLE STEVEN J. MURPHY III, DISTRICT JUDGE
CASE No. 16-CV-13292

**BRIEF OF AMICUS CURIAE THE CITY OF DETROIT
IN SUPPORT OF APPELLANTS AND REVERSAL**

LAWRENCE GARCIA
ELI SAVIT
2 Woodward Avenue
Detroit, MI 48226
(313) 237-1737

JOHN B. SPRANGERS
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower, 7 Times Sq.
New York, NY 10036
(212) 326-2000

BRADLEY N. GARCIA
SAMANTHA M. GOLDSTEIN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
ARGUMENT	3
I. DETROIT’S CHALLENGES UNDERSCORE THE CRITICAL IMPORTANCE OF ACCESS TO LITERACY.....	4
II. ACCESS TO LITERACY IS A FUNDAMENTAL RIGHT.....	9
A. The Supreme Court repeatedly has recognized the paramount importance of a basic education, including access to literacy.	10
B. The right of access to literacy is deeply rooted in our nation’s history and tradition.	16
C. Modern developments confirm that access to literacy is fundamental.	19
III. THE EQUAL PROTECTION CLAUSE PROHIBITS DEFENDANTS FROM DENYING PLAINTIFFS ACCESS TO LITERACY.....	21
A. A statewide education system that selectively denies children access to literacy is subject to heightened equal protection scrutiny.	22
B. The proper “comparator” for equal protection purposes is students across the State of Michigan.	23
CONCLUSION.....	28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abington Sch. Dist. v. Schempp</i> , 374 U.S. 203 (1963).....	10
<i>Bd. of Educ. v. Allen</i> , 392 U.S. 236 (1968).....	11
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954).....	<i>passim</i>
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	26
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	13
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	11
<i>Harper v. Va. Bd. of Elections</i> , 383 U.S. 663 (1966).....	13
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102 (1996).....	22, 23
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	18
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	11, 16
<i>Nat’l Endowment for the Arts v. Finley</i> , 524 U.S. 569 (1998).....	14
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	<i>passim</i>
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986).....	15

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	<i>passim</i>
<i>Rinaldi v. Yeager</i> , 384 U.S. 305 (1966).....	26
<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> , 411 U.S. 1 (1973).....	13, 14, 15
<i>Skinner v. State of Okla. ex rel. Williamson</i> , 316 U.S. 535 (1942).....	11, 22
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	9, 16
<i>Williams v. Vermont</i> , 472 U.S. 14 (1985).....	25
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	10, 11
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978).....	22
 Other Authorities	
Ann Zaniewski, <i>Free Tuition for Detroiters to Add 4-year Universities</i> , Detroit Free Press (Nov. 28, 2016), https://goo.gl/FnN2Lb	2
Barry C. Burden, <i>The Dynamic Effects of Education on Voter Turnout</i> , 28 Electoral Studies 540 (2009).....	13
Barry Friedman & Sara Solow, <i>The Federal Right to An Adequate Education</i> , 81 Geo. Wash. L. Rev. 92 (2013)	20
<i>Big Cities Battle Dismal Graduation Rates</i> , CBS News (Apr. 1, 2008), https://goo.gl/vmXjPz	6
Bryony Hoskins, <i>et al.</i> , <i>Does Formal Education Have an Impact on Active Citizenship Behaviour?</i> , 7 Euro. Ed. Res. J. 386 (2008).....	14

TABLE OF AUTHORITIES
(continued)

	Page(s)
Candice Williams & James Dickson, <i>Crime Stats: Detroit marks 302 homicides in 2016</i> , Detroit News (Jan. 4, 2017), https://goo.gl/2v7MSM	7
City of Detroit, <i>Detroit Demolition Program</i> , https://goo.gl/QFt17V	2
Declaration of Rights, Detroit City Charter (2012).....	2
Derek Black, <i>Unlocking the Power of State Constitutions With Equal Protection: The First Step Toward Education as a Federally Protected Right</i> , 51 Wm. & Mary L. Rev. 1343 (2010).....	20
Detroit News, <i>Bond agency: Detroit’s local control ‘credit positive’</i> (May 5, 2018), https://goo.gl/it9s4o	7
Detroit Regional Workforce Fund, <i>Addressing Detroit’s Basic Skills Crisis</i> (May 2011), https://goo.gl/x9qeny	4
<i>Diary and Autobiography of John Adams, 1755-1770</i> (L.H. Butterfield ed. 1961), https://goo.gl/X5EXJv	17, 18
Donald P. Green & Rachel Sondheimer, <i>Using Experiments to Estimate the Effects of Education on Voter Turnout</i> , 54 Am. J. Pol. Sci. 174 (2010).....	13
Goodwin Liu, <i>Education, Equality, and National Citizenship</i> , 116 Yale L.J. 330 (2006)	19
Grover J. Whitehurst & Christopher J. Lonigan, <i>Child Development and Emergent Literacy</i> , 69 Child Development 848 (1998)	8
J.P. Morgan Chase, <i>Detroit’s Untapped Talent: Jobs and On-Ramps Needed</i> (Jan. 2016), https://goo.gl/ySZGQR	6
John Gallagher, <i>Amazon to Detroit: You didn’t have enough talent to get HQ2</i> , Detroit Free Press (Jan. 18, 2018), https://goo.gl/MfBb4Z	7
Kavitha Cardoza, <i>Adding Up the Cost of Low Literacy Among Adults</i> , NPR (Nov. 4, 2013), https://goo.gl/6Efo4V	20

TABLE OF AUTHORITIES
(continued)

	Page(s)
Kevin Milligan, <i>et al.</i> , <i>Does Education Improve Citizenship? Evidence from the U.S. and the U.K.</i> , 88 J. Pub. Econ. 1667 (2004).....	13
Mich. Comm'n on L. Enforcement Stds., <i>Information on Law Enforcement Reading and Writing Test</i> , https://goo.gl/4u2k7s (last visited Jan. 19, 2017)	7
Michael Winerip, <i>Are Schools Passing or Failing? Now There's a Third Choice . . . Both</i> , N.Y. Times (Nov. 2, 2005), https://goo.gl/QioBXi	5
Nat'l Ctr. for Educ. Statistics, <i>2017 Mathematics TUDA Assessment Report Card: Summary Data Tables with Additional Detail for Average Scores, Achievement Levels, and Percentiles for Districts and Jurisdictions</i> (2018), https://goo.gl/rMJZpo	5
Nat'l Ctr. for Educ. Statistics, <i>2017 Reading TUDA Assessment Report Card: Summary Data Tables with Additional Detail for Average Scores, Achievement Levels, and Percentiles for Districts and Jurisdictions</i> (2018), https://goo.gl/QPJdMk	5
Nat'l Ctr. for Educ. Statistics, <i>Literacy in the Labor Force: Results from the National Adult Literacy Survey</i> (1999)	19
Nat'l Inst. for Literacy, <i>The State of Literacy in America: Estimates at the Local, State, and National Levels</i> (1998), https://goo.gl/BlhLE4	4
Paul W. Kingston, <i>et al.</i> , <i>Why Education Matters</i> , 76 <i>Sociology of Ed.</i> 53 (2003).....	14
Raymond Wolfinger & Steven Rosenstone, <i>Who Votes?</i> (Yale Univ. Press 1980).....	13
Roz Edward, <i>City Launches New Initiative to Ensure More Detroiters Have Access to Skilled Trades Apprenticeships and Careers</i> , Mich. Chronicle (Dec. 19, 2016), https://michronicleonline.com/2016/12/19/city-launches-new-initiative-for-skilled-trades-apprenticeships-and-careers/	2

TABLE OF AUTHORITIES
(continued)

	Page(s)
Ryan Beene, <i>Detroit's Public Schools Post Worst Scores on Record in National Assessment</i> , Crain's (Dec. 8, 2009), https://goo.gl/Zcrx1a	5
Shawn Lewis, <i>Detroit Worst in Math, Reading Scores Among Big Cities</i> , Detroit News (Oct. 28, 2015), https://goo.gl/Zpncso	5
Sidney Verba, <i>et al.</i> , <i>Race, Ethnicity and Political Resources: Participation in the United States</i> , 23 Brit. J. Pol. Sci. 453 (1993)	13
Skillman Foundation, <i>State of the Detroit Child: 2012 Report</i> (2012), http://www.skillman.org/wp-content/uploads/2017/12/2012_Detroit_Child_report-min.pdf	8
Steven Calabresi & Michael Perl, <i>Originalism and Brown v. Board of Education</i> , 2014 Mich. St. L. Rev. 429	16, 17, 18
Steven Calabresi & Sarah Agudo, <i>Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?</i> , 87 Tex. L. Rev. 7 (2008)	17, 19
Susan H. Bitensky, <i>Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis</i> , 86 Nw. U.L. Rev. 550 (1992).....	18
Thomas S. Dee, <i>Are There Civic Returns to Education?</i> , 88 J. of Pub. Econ. 1697 (2004).....	14
U.S. Census Bureau, <i>QuickFacts: Detroit City, Michigan</i> , https://goo.gl/4s1L2T (last visited Nov. 23, 2018).....	8
William C. Wood, <i>Literacy and the Entry-Level Workforce: The Role of Literacy and Policy in Labor Market Success</i> (June 2010), https://goo.gl/bVLrG1	7

INTEREST OF AMICUS CURIAE¹

When a child is denied a fair opportunity to learn how to read and write, the adverse effects radiate throughout the community. “Illiteracy,” after all, “is an *enduring* disability”: a child “deprived of a basic education” will be “handicap[ped]” by the “inability to read and write . . . each and every day of his life.” *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (emphasis added). Denying children access to literacy today inevitably impedes tomorrow’s jobseekers and taxpayers, fathers and mothers, citizens and voters. That is why the Supreme Court has stressed the “significant social costs borne by our Nation” when children suffer the “stigma of illiteracy,” and are thereby denied “the basic tools by which [to] lead economically productive lives to the benefit of us all.” *Id.* at 221-23.

The City of Detroit (though it does not control Detroit’s schools) is all too familiar with the far-reaching effects of illiteracy. Widespread illiteracy has hampered the City’s efforts to connect Detroiters with good-paying jobs, to fill vacancies on its police force, and to grow its tax base. Illiteracy, moreover, has greatly exacerbated the effects of intergenerational poverty in Detroit.

¹ *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The City is charged with “insur[ing] equality of opportunity for all persons,” and with providing “for the public peace, health, and safety of persons and property within its jurisdictional limits.” Declaration of Rights, Detroit City Charter (2012). The City takes those mandates seriously. And over the past several years, it has made significant strides in fulfilling them. Businesses are returning to Detroit’s downtown. The City’s long darkened streets have been relit by over 65,000 new LED lights. More than 16,000 blighted structures have been demolished since 2014.² Every Detroit student meeting minimum academic standards is now entitled to a scholarship to a four-year college or university.³ The City, moreover, has recently launched major efforts to connect Detroiters with the skills training needed for successful careers.⁴

Ultimately, however, Detroit’s renaissance will lag if its children are not afforded a fair opportunity to learn how to read and write. Perhaps more than any other municipal entity, the City of Detroit understands how fundamental literacy is to a stable, vibrant community. The City thus files this brief in support of the

² City of Detroit, *Detroit Demolition Program*, <https://goo.gl/QFt17V>.

³ Ann Zaniewski, *Free Tuition for Detroiters to Add 4-year Universities*, Detroit Free Press (Nov. 28, 2016), <https://goo.gl/FnN2Lb>.

⁴ *E.g.*, Roz Edward, *City Launches New Initiative to Ensure More Detroiters Have Access to Skilled Trades Apprenticeships and Careers*, Mich. Chronicle (Dec. 19, 2016), <https://michronicleonline.com/2016/12/19/city-launches-new-initiative-for-skilled-trades-apprenticeships-and-careers/>.

Detroiters who are Plaintiffs-Appellants in this suit, and specifically to augment their arguments that literacy is a fundamental right the United States Constitution protects and that the district court's equal protection analysis was fundamentally flawed and must be reversed.

ARGUMENT

The ability to read and write is the foundation for meaningful participation in America's democracy, and in the American economy. The Supreme Court has repeatedly recognized as much—emphasizing, in multiple cases, that selectively denying children access to literacy is presumptively unconstitutional. The import of those cases is plain: Access to literacy is a fundamental right. Longstanding constitutional tradition and modern realities confirm that the right is fundamental. And the City of Detroit's experience underscores that literacy is fundamental not just to an *individual*, but also to the community to which he or she belongs. The district court's conclusion that the right of access to literacy is not fundamental should therefore be reversed.

The district court also erred in dismissing Plaintiffs' equal protection claim for two additional reasons. First, the district court failed to acknowledge a longstanding line of equal protection cases holding that a state cannot selectively burden a fundamental right. Second, the district court erroneously concluded that the appropriate "comparator" class for Plaintiffs was other students who attend

low-performing schools. Under the district court’s reasoning, no equal protection violation occurs so long as all of the people subject to the discriminatory government action are treated the same. This Court should repudiate that view, because it would gut the Equal Protection Clause and has been rejected by the Supreme Court on several occasions.

I. DETROIT’S CHALLENGES UNDERSCORE THE CRITICAL IMPORTANCE OF ACCESS TO LITERACY

The adverse effects of illiteracy have long reverberated through the Motor City. Though exact figures vary, Detroit is consistently rated as having the lowest literacy rates of any urban area in the United States. One significant national study found 47% of Detroiters lack basic reading and writing skills.⁵ Strikingly, nearly half of that population—approximately 200,000 people—have a high school diploma or a GED.⁶

School-aged Detroiters over the past several years have fared even worse. The National Assessment of Education Progress (NAEP)—the “gold standard” of

⁵ See, e.g., Nat’l Inst. for Literacy, *The State of Literacy in America: Estimates at the Local, State, and National Levels* 141-42 (1998) (commissioned by U.S. Dep’t of Educ.), <https://goo.gl/BlhLE4>; see also Detroit Regional Workforce Fund, *Addressing Detroit’s Basic Skills Crisis* 2 (May 2011), <https://goo.gl/x9qeny>.

⁶ See Detroit Regional Workforce Fund, *Addressing Detroit’s Basic Skills Crisis*, *supra* n.5, at 2.

national education assessments⁷—determined that in 2017, 95% of Detroit fourth-graders were not proficient in reading, and 96% were not proficient in math.⁸

Indeed, Detroit’s academic performance lags far behind other large, demographically similar U.S. cities. In 2009, 2011, 2013, 2015, and 2017—the last five times the NAEP was administered—Detroit fourth-graders and eighth-graders had the lowest math and reading scores when compared with students in *any* other U.S. city.⁹ As one urban-education expert put it: “There is no jurisdiction of any kind, at any level, at any time in the 30-year history of NAEP that has ever registered such low numbers.”¹⁰ And when students don’t learn, they

⁷ See, e.g., Michael Winerip, *Are Schools Passing or Failing? Now There’s a Third Choice . . . Both*, N.Y. Times (Nov. 2, 2005), <https://goo.gl/QioBXi>.

⁸ See Nat’l Ctr. for Educ. Statistics, *2017 Reading TUDA Assessment Report Card: Summary Data Tables with Additional Detail for Average Scores, Achievement Levels, and Percentiles for Districts and Jurisdictions* (2018), <https://goo.gl/QPJdMk>; Nat’l Ctr. for Educ. Statistics, *2017 Mathematics TUDA Assessment Report Card: Summary Data Tables with Additional Detail for Average Scores, Achievement Levels, and Percentiles for Districts and Jurisdictions* (2018), <https://goo.gl/rMJZpo>.

⁹ *Id.*; Shawn Lewis, *Detroit Worst in Math, Reading Scores Among Big Cities*, Detroit News (Oct. 28, 2015), <https://goo.gl/Zpncso>.

¹⁰ Ryan Beene, *Detroit’s Public Schools Post Worst Scores on Record in National Assessment*, Crain’s (Dec. 8, 2009), <https://goo.gl/Zcrx1a>.

often don't graduate. Recently, Detroit has maintained one of the lowest high-school graduation rates in America, often landing at the bottom of the rankings.¹¹

In *Plyler v. Doe*, the Supreme Court afforded heightened constitutional scrutiny to the selective denial of the right to access literacy—noting that illiteracy imposes “significant social” and “economic” costs on the wider community. 457 U.S. at 221-22. Sadly, Detroit epitomizes that dynamic. Unemployment remains high in Detroit, as many Detroiters lack the skills employers demand.¹² To combat joblessness, the City is committing significant resources to job-training programs in Detroit. Yet illiteracy remains a roadblock. A large percentage of Detroiters read at or below a sixth grade level, meaning “it can take from 12 to 36 months to bring these adults to a level of proficiency necessary” to “*enter[]* many job training programs.”¹³ Illiteracy thus stubbornly obstructs the City's efforts to connect Detroiters with good jobs, to attract employers to the City, and to grow Detroit's tax base. For example, Amazon recently cited Detroit's K-12 academic performance as a reason that Detroit was not selected as a finalist for Amazon's

¹¹ See, e.g., *Big Cities Battle Dismal Graduation Rates*, CBS News (Apr. 1, 2008), <https://goo.gl/vmXjPz>.

¹² J.P. Morgan Chase, *Detroit's Untapped Talent: Jobs and On-Ramps Needed 2*, 6 (Jan. 2016), <https://goo.gl/ySZGQR>.

¹³ *Id.* at 8 (emphasis added).

second headquarters despite Detroit's otherwise competitive bid.¹⁴ And national credit ratings agencies have continuously warned that the scourge of illiteracy “affects the city's ability to grow its tax base.”¹⁵

Widespread illiteracy has also hampered the City's efforts to make Detroit safer. Committed to combatting violent crime, the City has expended tremendous efforts to fill vacancies on its police force.¹⁶ But progress filling those vacancies has been slowed by a significant number of prospective recruits' inability to pass the state-mandated reading and writing test.¹⁷

Perhaps worst of all, illiteracy exacerbates intergenerational poverty in Detroit. Poverty and illiteracy travel hand-in-hand. In modern society, those who lack the ability to read and write are disproportionately likely to live in poverty.¹⁸

¹⁴ See John Gallagher, *Amazon to Detroit: You didn't have enough talent to get HQ2*, Detroit Free Press (Jan. 18, 2018), <https://goo.gl/MfBb4Z>.

¹⁵ See Detroit News, *Bond agency: Detroit's local control 'credit positive'* (May 5, 2018), <https://goo.gl/it9s4o>.

¹⁶ Though crime is down, violent crime remains a major issue in Detroit. See Candice Williams & James Dickson, *Crime Stats: Detroit marks 302 homicides in 2016*, Detroit News (Jan. 4, 2017), <https://goo.gl/2v7MSM>.

¹⁷ See Mich. Comm'n on L. Enforcement Stds., *Information on Law Enforcement Reading and Writing Test*, <https://goo.gl/4u2k7s> (last visited Jan. 19, 2017).

¹⁸ To take but one data point, adults with the lowest literacy scores are 16.5 times more likely to have received public financial aid in the past year than those with the highest scores. See William C. Wood, *Literacy and the Entry-Level Workforce: The Role of Literacy and Policy in Labor Market Success* 3, 10 (June 2010), <https://goo.gl/bVLrG1>.

Yet the flip side is also true: children born into poverty face greater obstacles than their wealthier peers when learning to read and write.¹⁹ This vicious feedback loop between poverty and illiteracy is of major concern in Detroit, where both ills remain too common.²⁰ And until the poverty-illiteracy cycle is disrupted, new generations of Detroiters will remain at risk of failing to obtain the “basic tools by which [they] might lead economically productive lives.” *Plyler*, 457 U.S. at 221.²¹

The City of Detroit does not want this for its citizens, and parents do not want it for their children. That much is clear from Detroit’s population trends. From 2000 to 2010, the City’s population fell 25%, but the population under the age of 18 fell by nearly 36%, with parents citing education as a primary motivator for leaving.²² To be sure, Detroit has made significant strides since 2010, and the

¹⁹ See, e.g., Grover J. Whitehurst & Christopher J. Lonigan, *Child Development and Emergent Literacy*, 69 *Child Development* 848, 858 (1998).

²⁰ According to the most recent U.S. Census data, 39.4% of Detroiters live in poverty. U.S. Census Bureau, *QuickFacts: Detroit City, Michigan*, <https://goo.gl/4s1L2T> (last visited Nov. 23, 2018).

²¹ It should be self-evident that the fact that children born into poverty face literacy-related obstacles does not diminish their constitutional right to a real *opportunity* to learn to read and write. That much is clear from *Plyler*, in which the plaintiffs were children of undocumented immigrants, many of whom presumably came from non-English speaking families—and many of whom thus presumably had specialized learning needs. Yet nothing in *Plyler* suggested that fact could be used as an excuse to deny them a basic education.

²² Skillman Foundation, *State of the Detroit Child: 2012 Report 3*, 13 (2012), http://www.skillman.org/wp-content/uploads/2017/12/2012_Detroit_Child_report-min.pdf.

City is confident that Detroit will continue its forward progress. But Detroit’s revitalization is unlikely to be complete—and the enduring effects of educational inequity are unlikely to be eradicated—until Detroit’s children are given a fair opportunity to learn how to read and write.

II. ACCESS TO LITERACY IS A FUNDAMENTAL RIGHT

The challenges facing Detroit speak volumes about the question at the heart of this appeal: whether access to literacy is a fundamental right, such that its selective denial is presumptively unconstitutional. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (courts must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect”). Contrary to the district court’s conclusion, the right of access to literacy is indeed fundamental, for at least three reasons. *First* is precedent: the Supreme Court has expressly recognized that the opportunity to obtain a minimally adequate education—including the ability to read and write—has heightened constitutional significance. *See, e.g., Plyler*, 457 U.S. at 221. *Second*, access to literacy is a right that is “objectively, ‘deeply rooted in this Nation’s history and tradition,’” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation omitted), and therefore must be accorded heightened protection under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, *see also Obergefell*, 135 S. Ct. at 2603 (these “Clauses may converge in the identification and definition of

the right”). *Third*, courts presented with a claim sounding in fundamental rights must not blind themselves to “new insights and societal understandings.” *Id.* Although literacy has long been recognized as a vital competency, the importance of reading and writing has only grown in the modern era. Under any constitutional analysis, therefore, access to literacy is a fundamental right.

A. The Supreme Court repeatedly has recognized the paramount importance of a basic education, including access to literacy.

Over and over and over again, the Supreme Court has emphasized the critical importance of education. Education, the Court has stressed, is “a most vital civic institution for the preservation of a democratic system of government.” *Plyler*, 457 U.S. at 221 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)). It is “a bulwark of a free people against tyranny.” *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972). And a *minimally adequate* education is a prerequisite to effective participation in American life. “[S]ome degree of education,” the Court has cautioned, “is necessary . . . to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” *Plyler*, 457 U.S. at 221 (quotation omitted).

As the Court explained in *Brown v. Board of Education*:

[E]ducation is perhaps the most important function of state and local governments It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later

professional training, and in helping him to adjust normally to his environment. 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.²³

Given the paramount importance of education, the Supreme Court has held that access to a basic education must be afforded heightened constitutional protection. In *Plyler v. Doe*, the Court struck down a law allowing local districts to bar undocumented immigrant children from attending public school. Along the way, the Court expressly rejected the argument that education is “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” 457 U.S. at 221. Instead, the Court held, state action denying some children the opportunity to acquire a “basic education”—like state action denying people other fundamental rights—is presumptively invalid. *Id.* at 222.²⁴

Crucially for purposes of this case, *Plyler* also makes clear that the constitutionally protected opportunity to obtain a “basic education” necessarily includes the opportunity to learn how to read and write. To be sure, the *Plyler* Court had no occasion to flesh out the precise contours of what qualifies as a “basic education.” After all, the children in *Plyler* were barred from school

²³ 347 U.S. 483, 493 (1954); see also *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); *Bd. of Educ. v. Allen*, 392 U.S. 236, 247 (1968); *Yoder*, 406 U.S. at 221; *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

²⁴ E.g., *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (law selectively denying “fundamental” right to procreate presumed unconstitutional).

entirely, so it was beyond question they were denied access to a “basic education.” But *Plyler* reasoned that access to a “basic education” is fundamental largely *because* it affords children the opportunity to learn how to read and write. In striking down the Texas statute, the Court warned that children who are denied a “basic education” will be marked “for the rest of their lives” by the “stigma of *illiteracy*.” 457 U.S. at 222-23 (emphasis added). “The inability to read and write,” the Court stressed, “will handicap the individual deprived of a basic education each and every day of his life.” *Id.* at 222. It was principally because “[i]lliteracy is an enduring disability” that the *Plyler* Court concluded the “denial of basic education” is “most difficult to reconcile . . . with the framework of equality embodied in the Equal Protection Clause.” *Id.*

The *Plyler* Court saw literacy as crucial, in part, because reading and writing are the gateway to civic participation. Those who are deprived of access to literacy, the Court explained, are denied “the ability to live within the structure of our civic institutions,” and foreclosed from “any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” *Id.* at 223. Access to literacy, therefore, is more than just an end to itself. Rather, like other fundamental rights, the Constitution protects it because it is “preservative of other

basic civil and political rights.” *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966).²⁵

Literacy, for example, helps to safeguard the right to vote. As the Court has recognized, “a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973). Consistent with that observation, studies consistently show that higher levels of education result in higher voter turnout.²⁶

Literacy is also a virtual prerequisite to effective participation in other civic endeavors. *See, e.g., Plyler*, 457 U.S. at 221 (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system.” (quotation omitted)). After all, an individual who cannot read or write will be unable to make sense of a newspaper article concerning issues of the

²⁵ *Cf. Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (“The right of freedom of speech and press includes . . . the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach Without those peripheral rights the specific rights would be less secure.” (citations omitted)).

²⁶ *See, e.g.,* Raymond Wolfinger & Steven Rosenstone, *Who Votes?* (Yale Univ. Press 1980); Donald P. Green & Rachel Sondheimer, *Using Experiments to Estimate the Effects of Education on Voter Turnout*, 54 *Am. J. Pol. Sci.* 174, 174 (2010); Barry C. Burden, *The Dynamic Effects of Education on Voter Turnout*, 28 *Electoral Studies* 540, 540-49 (2009); Kevin Milligan, *et al.*, *Does Education Improve Citizenship? Evidence from the U.S. and the U.K.*, 88 *J. Pub. Econ.* 1667, 1667-95 (2004); Sidney Verba, *et al.*, *Race, Ethnicity and Political Resources: Participation in the United States*, 23 *Brit. J. Pol. Sci.* 453, 453-97 (1993).

day. She will be unable to effectively research a political candidate's positions on topics of local or national importance. She will be unable to express or develop her views in online fora. All of these handicaps will severely hamper her ability to effectively engage in political speech, "the primary concern of the First Amendment." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998).²⁷

The opportunity to learn how to read and write, in short, plays "a fundamental role in maintaining the fabric of our society." *Plyler*, 457 U.S. at 221. It is a "keystone" of America's social and political order, and thus must be protected as a fundamental right. *Obergefell*, 135 S. Ct. at 2601.

To be sure, the Supreme Court in *San Antonio v. Rodriguez* held that "education," broadly defined, is not a fundamental right, such that the Constitution does not require "absolute equality" of educational funding or educational outcomes. 411 U.S. at 24. But, as the district court rightly recognized, D. Ct. Op. 26-27, *Rodriguez* does not bar Plaintiffs' claims. Nearly a decade after *Rodriguez*, *Plyler* held that there is a distinction between (1) the question "whether education

²⁷ Again, studies have repeatedly confirmed that education is inextricably tied to forms of active citizenship, including membership in a political party and participation in protest movements. See, e.g., Bryony Hoskins, *et al.*, *Does Formal Education Have an Impact on Active Citizenship Behaviour?*, 7 Euro. Ed. Res. J. 386, 386-402 (2008); Thomas S. Dee, *Are There Civic Returns to Education?*, 88 J. of Pub. Econ. 1697, 1697-1720 (2004); Paul W. Kingston, *et al.*, *Why Education Matters*, 76 Sociology of Ed. 53, 53-70 (2003).

is a fundamental right” and (2) the constitutional significance of “a basic education”—and held that state action selectively denying the latter is presumptively invalid. *Plyler*, 457 U.S. at 223-24. The import of its holding in *Rodriguez*, the Court recognized, was simply that “a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.” *Id.* at 223 (emphasis added). But nothing in *Rodriguez* suggests that selectively denying some students a “basic education” is a permissible “variation in the manner in which education is provided,” or that the opportunity to obtain a “basic education” is anything less than a fundamental right.

Indeed, *Rodriguez* itself expressly reserved the question whether a state could constitutionally deny students the minimal “quantum of education” necessary to the “meaningful exercise” of their First Amendment freedoms and right to vote. 411 U.S. at 36-37. The *Rodriguez* Court went out of its way to note that “no charge fairly could be made” that the State *in that case* “fail[ed] 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. And the Court emphasized that the *Rodriguez* plaintiffs’ case would have been “far more compelling” if they were “absolutely precluded from receiving an education.” *Id.* at 25 n.60; see *Papasan v. Allain*, 478 U.S. 265, 284 (1986) (confirming *Rodriguez* left open the possibility of a claim based on the “radical

denial of educational opportunity”); *see also* Pls.’ Br. 25. That is precisely Plaintiffs’ claim here. *See* Compl. ¶ 8 (alleging a deprivation of the “opportunity to learn to read, write, and comprehend”). And their claim, lamentably, is amply supported by the allegations in Plaintiffs’ complaint. *See, e.g., id.* ¶¶ 10-17 (alleging, among other things, lack of textbooks and basic materials; overcrowded classrooms; failure to address students’ specific learning needs; lack of English Language Learner instruction; and unqualified staff).

In short, the Supreme Court’s numerous pronouncements on the constitutional significance of basic education, standing alone, demonstrate that access to literacy is fundamental.

B. The right of access to literacy is deeply rooted in our nation’s history and tradition.

Even setting aside Supreme Court precedent, access to literacy is a right that is “deeply rooted in this Nation’s history and tradition,” *Glucksberg*, 521 U.S. at 720-21 (quotation omitted), and must therefore be accorded heightened protection under the Fourteenth Amendment. “The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.” *Meyer*, 262 U.S. at 400. At the dawn of the Republic, at least five states recognized “a state’s obligation to provide a free and common public school education.” Steven Calabresi & Michael Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429, 558. Crucially,

that early emphasis on public education stemmed from the Founders’ belief that literacy is the lifeblood of liberty. According to John Adams—the principal architect of the Massachusetts Constitution and its guarantee of public schooling—literacy and democracy are inextricably intertwined:

The very Ground of our Liberties, is the freedom of Elections [And] how can any Man judge, unless his Mind has been opened and enlarged by Reading. A Man who can read . . . will enlarge his Range of Thought, and enable him the better to judge who has and who has not that Integrity of Heart, and that Compass of Knowledge and Understanding, which form the Statesman.²⁸

As the nation grew, more and more states embraced the right to a basic public education. *See* 2014 Mich. St. L. Rev. at 450-57. In fact, by the time the Fourteenth Amendment was ratified in 1868, *thirty-six of the thirty-seven state constitutions included a right to education*, with a staggering “[n]inety-two percent of all Americans in 1868 liv[ing] in states whose constitutions imposed this duty on state government.”²⁹ This historical evidence—which the district court ignored—thus demonstrates that, when the Fourteenth Amendment was ratified, “a public school education was a fundamental, or civil, right.” 2014 Mich. St. L. Rev.

²⁸ 1 *Diary and Autobiography of John Adams, 1755-1770*, at 220 (L.H. Butterfield ed. 1961) (Aug. 1, 1761 entry), <https://goo.gl/X5EXJv>.

²⁹ Steven Calabresi & Sarah 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, 108-09 (2008).

at 437. Indeed, so fundamental was the right to a public education that “[a]fter the Civil War, Congress . . . conditioned re-entry of the Confederate states into the Union upon their willingness to guarantee public education to all of the children within their respective borders.”³⁰

And even in 1868, the right to a public education encompassed more than the privilege of being shuffled into a building marked “schoolhouse.” 2014 Mich. St. L. Rev. at 552. “At a minimum,” the concept of a basic education in 1868 included an opportunity to access literacy, because “many of the Framers would have thought [it] fundamental” that children “be taught to read so they can read the laws for themselves.” *Id.*; see also *Adams, supra* n.28, at 220. The near-ubiquitous presence of education clauses in state constitutions in 1868—coupled with historical evidence that those clauses imposed a duty to teach children how to read and write—demonstrates that access to literacy is a right deeply rooted in our nation’s history and tradition. See *McDonald v. City of Chicago*, 561 U.S. 742, 777 (2010) (that twenty-two of thirty-seven state constitutions protected the right to keep and bear arms in 1868 was significant evidence that the right is “among the

³⁰ Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Nw. U.L. Rev. 550, 588 (1992) (citations omitted).

foundational rights necessary to our system of Government” that the Fourteenth Amendment protects (citing Calabresi & Agudo, *supra* n.29, at 50)).

C. Modern developments confirm that access to literacy is fundamental.

In deciding whether Plaintiffs have a fundamental right of access to literacy, this Court also “must consider public education in the light of its full development and its present place in American life throughout the Nation.” *Brown*, 347 U.S. at 492-93. As the Supreme Court recently explained, “new insights and societal understandings” are crucial to discerning what the Fourteenth Amendment protects. *Obergefell*, 135 S. Ct. at 2603. Those insights and understandings confirm that the right of access to literacy is fundamental.

The importance of literacy is clearer now than ever before. Unlike the “agrarian and emerging industrial society” of the past, today’s “technological and information-based economy requires a much higher level of education.” Goodwin Liu, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 396-97 (2006). Today, people with low literacy levels are “four to seven times” more likely than those with high literacy levels to be unemployed—and illiteracy severely depresses the earnings of those who *can* land jobs.³¹ “People with low

³¹ Nat’l Ctr. for Educ. Statistics, *Literacy in the Labor Force: Results from the National Adult Literacy Survey*, at xiv, 263 (1999).

literacy,” studies have concluded, “are more likely to need unemployment checks, food stamps and subsidized housing. And they are more likely to end up behind bars.”³² The Supreme Court’s sixty-year-old admonition in *Brown* thus rings truer than ever: “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.” 347 U.S. at 493.

Recognizing these modern realities, all fifty states now have constitutional clauses that guarantee the right to education. 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). These clauses, by and large, have teeth. “[S]ome thirty-one state courts, most of them high courts, have held that the state constitutional provision has substantive content: it guarantees a right to a minimally adequate education.” Barry Friedman & Sara Solow, *The Federal Right to An Adequate Education*, 81 Geo. Wash. L. Rev. 92, 129 (2013). In other states, “extensive statutory schemes have further defined, specified, and regulated this right,” demanding that “states . . . deliver a certain qualitative level of education therein.” *Unlocking the Power*, 51 Wm. & Mary L. Rev. at 1398. “States,” in other words, “have contributed to the fundamental character of the [basic education] right by placing [it] at the center of

³² Kavitha Cardoza, *Adding Up the Cost of Low Literacy Among Adults*, NPR (Nov. 4, 2013), <https://goo.gl/6EfO4V>.

so many facets of the legal and social order.” *Obergefell*, 135 S. Ct. at 2601. And these modern developments only reinforce what has long been true: access to a “basic education” is fundamental, *Plyler*, 457 U.S. at 221, and a basic education ineluctably includes the opportunity to learn how to read and write.

Because access to literacy is a fundamental right that is protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the district court’s dismissal of Plaintiffs’ claims should be reversed.

III. THE EQUAL PROTECTION CLAUSE PROHIBITS DEFENDANTS FROM DENYING PLAINTIFFS ACCESS TO LITERACY

The district court’s analysis of Plaintiffs’ equal protection claim was flawed for two additional reasons. *First*, the district court wrongly concluded that because the Due Process Clause does not impose a “positive” obligation on states to provide all children with access to literacy, a state can maintain an education system in which only some children have an opportunity to learn how to read and write. *Second*, the district court erred in concluding that the proper “comparison,” for Equal Protection purposes, was between Plaintiffs and other children who have been subject to some of the very same educational mismanagement about which Plaintiffs complain.

A. A statewide education system that selectively denies children access to literacy is subject to heightened equal protection scrutiny.

The district court entirely failed to analyze Plaintiffs' contention that the State's selective denial of access to literacy burdens a fundamental right under the Equal Protection Clause. Instead, the district court brusquely reasoned that, because it had already concluded that the Due Process Clause does not provide children a "positive right" to a "minimally adequate education . . . [,] Plaintiffs fail[] to state an equal-protection claim on the basis of burdening a fundamental right." D. Ct. Op. 37.

That was error. The Supreme Court has repeatedly held that the Equal Protection Clause presumptively forbids a state from selectively burdening a right of "fundamental importance," even if the state has no obligation to affirmatively facilitate that right. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Skinner*, 316 U.S. at 541. For example, a state has no constitutional obligation to affirmatively provide its citizens opportunities to procreate. But because procreation is "fundamental," a law that significantly interferes with the procreative capacities of a subset of the population is presumptively invalid under the Equal Protection Clause. *Skinner*, 316 U.S. at 541. Similarly, the Court has made clear that "due process does not independently require that the State provide a right to appeal" in child-custody cases. *M.L.B.*, 519

U.S. at 120. But because parental rights are “fundamental,” the Equal Protection Clause bars states from conditioning such appeals on litigants’ ability to pay court costs. *See id.*

As a result, even if this Court concludes that the State is not affirmatively required to provide access to literacy under the Due Process Clause, that would not control the equal protection issue. In *Brown v. Board of Education*, the Supreme Court held 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 (emphasis added). The State of Michigan has “undertaken to provide” education. Yet Plaintiffs allege that their “schools”—unlike those in the rest of the state—are schools in name only. Given the fundamental nature of the right to access literacy, *see supra* Section II, a statewide education system in which only some children have an opportunity to learn how to read and write is subject to heightened scrutiny under the Equal Protection Clause. That is true regardless whether the Due Process Clause “independently require[s]” a state to provide children with access to literacy. *See M.L.B.*, 519 U.S. at 120.

B. The proper “comparator” for equal protection purposes is students across the State of Michigan.

The district court further erred when it concluded that Plaintiffs are entitled only to treatment equal to students in other “distressed” schools. Plaintiffs’ equal protection claim asserts that Defendants deny them “access to literacy equal to the

access provided to students in other schools in the State on the basis of their race.” Compl. ¶¶ 207-08. In establishing this claim, Plaintiffs point to disparities in treatment between students in Detroit schools and students in other schools across Michigan. *See, e.g., id.* ¶¶ 1, 85. Among other things, the State permits uncertified “teachers” to lead classes in Detroit, but not elsewhere. *Id.* ¶¶ 18, 85. The State fails to provide sufficient textbooks in Detroit schools, but not elsewhere. *Id.* ¶¶ 113-18. The State fails to ensure safe and sanitary learning environments in Detroit, but not elsewhere. *Id.* ¶¶ 119-27. And, unsurprisingly, schoolchildren in Detroit drastically underperform academically as compared to students elsewhere in the state. *Id.* ¶¶ 6-7, 72, 90-99.

The district court ignored those disparities, instead dismissing Plaintiffs’ equal protection claim based on a fundamentally flawed premise, *viz.*, that the relevant “comparator” to Plaintiffs’ schools for equal protection purposes was not “Michigan schools as a whole,” but rather only other “distressed” schools—i.e., “Michigan schools that have come under the control of emergency managers, been designated a Priority School, or were governed by the [Education Achievement Authority (EAA)].” D. Ct. Op. 37. And, the district court said, Plaintiffs failed to include in their complaint allegations establishing differences in treatment or racial composition between Plaintiffs’ schools and other such distressed schools. *Id.*

The district court overlooked the simple fact that Defendants are the State officials responsible for the education system for *all of Michigan*, not only those areas in which the State has directly intervened. *See* Pls.’ Br. 48-51; Compl. ¶¶ 63-67. For that reason, Plaintiffs’ claim in no way requires an allegation that Defendants have treated Plaintiffs’ schools differently from other “distressed” schools. Plaintiffs’ claim is that Defendants have failed to ensure Plaintiffs receive a basic opportunity to attain literacy, but *have* provided that opportunity to students throughout the rest of the State.

The district court’s rationale is particularly nonsensical given that the only reason Plaintiffs’ schools were designated “Priority Schools,” or placed in the EAA, was because the state-controlled education system overseen by Defendants was already profoundly failing Plaintiffs. Compl. ¶ 75. A school could be designated a “Priority School” or placed in the EAA only if it was one of “the State’s lowest-performing schools.” D. Ct. Op. 7; *see also* Compl. ¶ 75. By requiring Plaintiffs to allege disparate treatment *among*, for example, Priority Schools, the district court was requiring Plaintiffs to compare themselves to children who were also in the state’s lowest-performing schools. Effectively, the district court required Plaintiffs—who alleged that the state’s education system has failed them—to compare themselves to students that the State’s school system was also failing.

Endorsing the district court’s definition of those “similarly situated” as only those persons also impacted by the very government action alleged to be discriminatory would defeat nearly any conceivable equal protection claim. As the Supreme Court has explained, a “State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated.” *Williams v. Vermont*, 472 U.S. 14, 27 (1985); *see also Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (“The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes.”). As just one example, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985), the Supreme Court determined that a zoning ordinance requiring a group home for the mentally disabled to obtain a special use permit violated the Equal Protection Clause. In so doing, the Court did not ask whether the plaintiff group home operator had been treated similarly to others *subject to the special use permit requirement*; instead, it asked whether the city had justified the difference in treatment between those subject to the requirement and “permitted uses such as boarding houses and hospitals” that were *not* subject to the requirement. *Id.*

The same reasoning dictates that the proper comparison here is exactly the one set forth in Plaintiffs’ complaint. Plaintiffs have pleaded that Defendants are responsible under state law for overseeing Michigan’s system of education

statewide. And Plaintiffs have alleged that Defendants’ control of Plaintiffs’ schools, which have student bodies largely comprised of racial minorities, has “ushered in and hastened a period of dramatic decline” resulting in an abject lack of access to literacy. Compl. ¶ 72. The state of affairs in Plaintiffs’ schools stands in stark contrast to the conditions at other schools throughout Michigan, particularly schools that have far fewer minority students.

Again, as the Supreme Court made clear in *Brown*: “[T]he opportunity of an education . . . [,] where the state has undertaken to provide it, is a right that must be made available to *all* on equal terms.” 347 U.S. at 493 (emphasis added). At minimum, that means that Michigan’s statewide education system must provide *all* of its students—from Detroit to Ann Arbor to Bloomfield Hills to the Upper Peninsula—a fair opportunity to learn how to read and write. Under binding precedent and the terms of Plaintiffs’ complaint, the proper comparators for purposes of the equal protection analysis are thus students from schools across the State. The district court’s dismissal of Plaintiffs’ equal protection claim cannot stand.

CONCLUSION

For all of these reasons, the decision below should be reversed.

Dated: November 26, 2018

Respectfully submitted,

LAWRENCE GARCIA
ELI SAVIT
2 Woodward Avenue
Detroit, MI 48226
(313) 237-1737

/s/ Anton Metlitsky
ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower, 7 Times Sq.
New York, NY 10036
(212) 326-2000

JOHN B. SPRANGERS
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

BRADLEY N. GARCIA
SAMANTHA M. GOLDSTEIN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Form 6. Certificate of Compliance With Type-Volume Limit

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

1. This document complies with [the type-volume limit of Fed. R. App. P. [n/a]] [the word limit of Fed. R. App. P. [29(a)(5)]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [n/a]]:

this document contains 6,497 words, or

this brief uses a monospaced typeface and contains _____ lines of text.

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 a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font., or

this document has been prepared in a monospaced typeface using _____ with _____.

/s/ Anton Metlitsky

Attorney for The City of Detroit

Dated: 11/26/2018

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Anton Metlitsky
Anton Metlitsky

*Attorney for Amicus Curiae The City
of Detroit*