No. 18-1855

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY B. ET. AL,

Appellants,

vs.

RICHARD SNYDER, GOVERNOR OF THE STATE OF MICHIGAN, ET. AL.,

***Appellees*.**

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

BRIEF OF AMICI CURIAE PROFESSOR BARRY FRIEDMAN AND SARA SOLOW IN SUPPORT OF APPELLANTS' ARGUMENT FOR REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party.

The Honorable Stephen J. Murphy, III, United States District Judge for the Eastern District of Michigan.

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STATEMENT OF THE ISSUE

Did the District Court err holding Plaintiffs could not assert a federal due process right to a minimally adequate education?

IDENTITY AND INTEREST OF THE AMICI CURIAE

Professor Barry Friedman is the Jacob D. Fuchsberg Professor of Law and the Director of the Policing Project at New York University School of Law. He has written and researched extensively on issues of constitutional interpretation and the federal courts. Sara Solow is a senior associate at a law firm in Philadelphia. Her practice focuses on appellate and Supreme Court litigation. She previously clerked for Justice Stephen Breyer on the Supreme Court. (Friedman and Solow are parties to this brief purely in their personal capacities; their law school and law firm affiliations are provided for identification purposes only.)

Friedman and Solow have an interest in this case because the District Court's opinion erroneously cites their scholarship. They are co-authors of two articles on constitutional interpretation and education rights. They believe a proper reading of their scholarship makes clear the existence of a federal due process right to a minimally adequate education. The District Court cited their scholarship for the opposite of what it says.

By correcting the record, Friedman and Solow believe their participation in this appeal will provide a vital perspective on the issue presented for review. No party authored any portion of this brief or contributed any money toward its preparation.

SUMMARY OF THE ARGUMENT

This appeal turns on whether Plaintiffs have a federal due process right to a minimally adequate education. The District Court cited Friedman and Solow's law review scholarship to support its view that there is no such right under the United States Constitution.

But the article cited by the District Court states the exact opposite. Even a cursory reading would have revealed Friedman and Solow's view that constitutional history and this country's educational traditions support such a right: "When one interprets the Constitution as judges and lawyers interpret, it turns out there is a federal right to an adequate education—at least to a minimally adequate one." Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 96 (2013). (A copy of the law review article is attached for the Court's convenience.) *See also* Barry Friedman & Sara Solow, *How to Talk About the Constitution*, 25 YALE. J. L. & HUMAN. 69, 78–93 (2013). The District Court miscites Friedman and Solow and then uses its misunderstanding of their central point to hold that there is no federal constitutional right to a minimally adequate education. Applying their scholarship and conducting proper constitutional interpretation requires reversal of the District Court.

ARGUMENT

The District Court erroneously relied on Friedman and Solow's scholarship to support its holding that there is no federal constitutional right to an education. To the contrary, the article concludes that, as a matter of educational history and constitutional analysis, "there is a positive, federal constitutional right to a minimally adequate education. That right is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments." *See* Friedman & Solow, *supra*, at 110.

Under the Supreme Court's jurisprudence, the authors explain, one looks at "the history and traditions of the American people" to determine whether the "Due Process Clauses have come to incorporate the substantive guarantee at issue." *Id.* at 107. Traditional constitutional interpretation, as relied upon in many of the Supreme Court's most important precedents, establishes this as the proper approach to interpret the Due Process Clauses of the Fifth and Fourteenth Amendments. *See id.* at 105–09 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to bear arms based on "history and text"); *Boumediene v. Bush*, 553 U.S. 723 (2008) (using history and traditions analysis to conclude the writ of habeas corpus applies to foreign nationals at Guantanamo); *Lawrence v. Texas*, 539 U.S. 558 (2003) (history and traditions analysis used to find Fourteenth Amendment due process right to consensual, homosexual sodomy); and *Washington v. Glucksburg*, 521 U.S. 702 (1997) (examining the

"Nation's history, legal traditions, and practices" to determine that there is no substantive due process right to physician-assisted suicide)).

Indeed, since Friedman and Solow published their piece in 2013, the Supreme Court has reaffirmed the propriety of the "history and traditions of the American people" analysis and has applied it in several cases to shape the scope of substantive due process rights. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (explaining, in determining whether the Due Process Clause guarantees a right to same-sex marriage, that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution" and that "[h]istory and tradition guide and discipline this inquiry."); *Kerry v. Din*, 135 S. Ct. 2128, 2135 (2015) ("[T]he relevant question is . . . whether the asserted interest . . . is supported by 'this Nation's history and practice.'") (internal citation omitted); *United States v. Windsor*, 570 U.S. 744, 768–74 (2013) (similar).

Further, Friedman and Solow demonstrate by reference to a body of case law that the proper way to determine whether a right is within the "history and traditions" of the American people is to look at the *full sweep* of American history. This is a key point the District Court missed. The Supreme Court's due process (and other) cases do not look to one point in time to determine whether a right is embedded in American tradition. They look to the evolution of American law, traditions, and common understandings over decades and even centuries. Applied

here, the Court's jurisprudence teaches that it is the *evolution* of public education over 150 years—from the one-room rural school house of yesteryear to the state and federally regulated education system of today—that matters. And as Friedman and Solow document in meticulous detail, that evolution demonstrates the crystallization over time of a federal constitutional right to a minimally adequate education.

The District Court did not apply this mode of analysis. Rather, it cherry-picked a single historical reference in Friedman and Solow's piece from the early days of public education to rationalize its ultimate finding. The court wrote:

> Moreover, the Supreme Court's understanding of a "fundamental right," requires finding that neither liberty nor justice would exist absent state-provided literacy access. *See Glucksberg*, 521 U.S. at 720-21. That finding is difficult to square with the fact that "[t]here was no federal or state-run school system anywhere in the United States as late as 1830." Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 Geo. Wash. L. Rev. 92, 117 (2013) (citing Frederick M. Binder, *The Age of the Common School, 1830-1865*, at 20 (1974)). School districts at the time of the Constitution's ratification were formed "when a group of farms came together and decided to construct a public building for schooling, where their children could gather and be taught reading, writing, and moral codes of instruction." *Id.* at 112. The history envinces a deep American commitment to education, but runs counter to the notion that ordered society demands that a state provide one.

See Op. & Order Granting Defs.' Mot. to Dismiss, R.E. 117, PageID#2818. The District Court further mischaracterized Friedman and Solow's scholarship by citing their article for the proposition that state courts that have found a constitutional

right to a minimally adequate education did so under the precise language of their state constitutions, thus precluding finding a fundamental right under the federal constitution:

> State courts that have found a right to a minimum level of education have not done so based upon the intrinsic necessities of a free society, but rather, on the precise wording of the relevant state constitutions. *See* Friedman & Solow, supra, at 129–30. And Michigan has not even found that. *See LM v. State*, 307 Mich. App. 685, 697 (2014).

Id. at PageID#2819.

These citations distort the analytic points Friedman and Solow made in their 2013 article. Friedman and Solow's key assertion was that, as a result of evolving American practice, public education *did* come to be commonly understood as a constitutionally guaranteed right (at least at the state level) by the time the Fourteenth Amendment was ratified. Starting in the 19th century, Friedman and Solow explain, the common schools movement created a system of free public schools overseen by state bureaucracies and financed through a combination of local and state taxes. *Id.* at 121–122. By 1868, all but one of the States' constitutions mandated the provision of free public education to all students. *Id.* at 124. *See also* 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, 108–11 (2008). This point is absolutely critical; it indicates that, at the time the

Fourteenth Amendment was ratified, free education was an established constitutional norm throughout the United States—at least as a matter of state constitutional law. *See* Friedman & Solow, *supra*, at 124–25; Calabresi & Agudo, *supra*, at 111.

Friedman and Solow trace practices in public education through the 20th century, during which the constitutional status of the right to education became more deeply entrenched and, eventually, became federal in character. First, the authors show, the States made great efforts to professionalize and improve the quality of education during the early decades of the 20th century, increasingly treating education as an essential public good. The States established state-appointed commissions to recommend everything from school curricula to professional teaching standards. *See* Friedman & Solow, *supra,* at 126. States took over the licensing of teachers. *Id.* State legislatures passed a blizzard of bills on everything from curriculum, to attendance, to teacher training. *Id.* By 1918, education was compulsory in every State, underscoring its existence as positive, constitutionally protected right. *Id.* at 127.

Moreover, beginning in the late 20th century, a wave of lawsuits caused some 31 state courts (29 of them state high courts) to recognize a right not only to public schooling, but also to receive a minimally *adequate* education, under their state constitutions. *Id.* at 129 (collecting cases). Those lawsuits, which began in the

1960s and 1970s but have continued through recent years, challenged the adequacy of education, particularly education funding, based on state constitutional provisions mandating a system of free and adequate public education. Such decisions caused several States to overhaul school funding, improve public schools, and remedy disparities between wealthy and poor school districts. *Id.* at 130–32. Accordingly, as it now stands, "in a majority of states, and in the vast majority of states where courts have considered the issue, a constitutional right to education exists and mandates minimal adequacy." *Id.* at 132. From the vantage point of federal constitutional analysis under the Due Process Clause, this historical fact is an important indication of the history and traditions of the American people. The crystallization of something as a virtually universal right at the state constitutional level sheds light on what the federal Constitution also protects.

Changes in federal educational practices over the last half-century provide an independent basis for a positive constitutional right to education under the Due Process Clause. For although "the Supreme Court frequently relies on evolving state practices to identify due process rights, it also relies on evolving federal practice to discern commitments so deeply engrained in American consciousness that they must be recognized as de facto constitutional." *Id.* at 133. After World War II, Friedman and Solow show, the federal government became more involved

in public education. The Supreme Court's decision in *Brown v. Board of Education* recognized the centrality of education and (because of state resistance to integration) required federal courts to become managers of school integration in counties across the United States. Another key factor was the passage of the landmark Education and Secondary Schools Act of 1965, a part of Lyndon Johnson's Great Society program, which provided a stream of federal funding for poor school districts throughout the United States. *Id.* at 138–39.

Federal involvement expanded at the Cabinet level during the Bush I and Clinton Administrations, prompted by *A Nation at Risk*, a 1983 report by the National Commission on Excellence in Education on the precarious state of America's public schools. In response, Presidents Bush and Clinton for the first time in history established federal standards for public schools backed by federal funding. *Id.* at 141–42. The Bush I Administration proposed education goals, and the Clinton Administration signed into law major federal legislation on student performance standards. *Id.* The Bush II and Obama Administrations deepened federal involvement in education with the passage of the No Child Left Behind Act and the establishment of the Race to the Top program, respectively. *Id.* at 142–46. By the 21st century, federal funding and oversight of public education in the United States had become ubiquitous.

Finally, Friedman and Solow make clear that nothing in the Supreme Court's prior education cases forecloses a federal right to a minimally adequate education. The two cases cited most often for the lack of a fundamental right to education, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Plyler v. Doe*, 457 U.S. 202 (1983), were equal protection challenges, "leaving ample space for the Court to find a federal right to a minimally adequate education within the Due Process Clause." Friedman & Solow, *supra*, at 117. The Supreme Court repeatedly has left the door open to recognizing a due process right to a minimal level of free public education. *Id.* at 117–19. In *Certain Named & Unnamed Non-Citizen Children v. Texas*, Justice Powell (the author of *Rodriguez*) affirmed a district court's holding that *Rodriguez* did not bar such a constitutional right, noting that the lower court opinion was well "reasoned." 448 U.S. 1327, 1327–32 (1980) (Powell, J., in chambers). In 1986, the full Supreme Court did the same. *See Papsan v. Allain*, 478 U.S. 265, 285 (1986) ("As *Rodriguez* and *Plyer* indicate, this Court has 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.").

Friedman and Solow show how the Supreme Court's due process precedents firmly supports a substantive federal right to education. Friedman & Solow, *supra*,

at 119–20. From *Meyer v. Nebraska*, 262 U.S. 390 (1923), through *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to Justice Souter's concurrence in *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court repeatedly has protected values implicated in education under the Due Process Clause. *See also* Calabresi & Agudo, *supra*, at 111 ("If the Supreme Court were to revisit *Rodriguez*, it is possible that the overwhelming presence of the right to education in state constitutions in 1868 would qualify as at least a partial basis for saying it is implicitly so protected.") (internal citation and quotation omitted).

The District Court's opinion failed to follow the proper "history and traditions" constitutional analysis and misconstrued the history recounted by Friedman and Solow. Their article thoroughly describes the history and analysis required to ground the right to a minimally adequate education in the United States Constitution. The District Court erred in relying upon their scholarship to reject this right.

CONCLUSION

Because constitutional history and traditional due process principles support a federal substantive due process right to a minimally adequate education, Friedman and Solow ask the Court to reverse the District Court's dismissal of this constitutional challenge to Detroit's schools.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) & 32(a)(7), I certify that this brief complies with the applicable type-volume limitation. According to the word count in Word, there are 2600 words in this brief.

s/ *Scott Burnett Smith*
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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

DATED: November 26, 2018 Respectfully submitted,

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