

**No. 18-1855/18-1871
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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

Plaintiffs - Appellants,

v.

RICHARD D. SNYDER, Governor; **JOHN C. AUSTIN**, member of MI Bd of Education; **MICHELLE FECTEAU**, member of the MI Bd of Education; **LUPE RAMOS-MONTIGNY**, member of the MI Bd of Education; **PAMELA PUGH**, member of the MI Bd of Education; **KATHLEEN N. STRAUS**, member of the MI Bd of Education; **CASANDRA E. ULBRICH**, member of the MI Bd of Education; **EILEEN WEISER**, member of the MI Bd of Education; **RICHARD ZEILE**, member of the MI Bd of Education; **BRIAN J. WHISTON**, Superintendent of Public Instruction for the State of MI; **DAVID B. BEHEN**, Director of the MI Dept of Technology; **NATASHA BAKER**, State School Reform/Redesign Officer, in their official capacities,

Defendants - Appellees.

On Appeal from the United States District Court for the
Eastern District of Michigan, the Honorable Stephen J. Murphy, III, Presiding
Case No. 2:16-cv-13292

***AMICI CURIAE* EDUCATION LAW AND POLICY
AND CIVIL RIGHTS PROFESSORS
IN SUPPORT OF PETITIONERS-APPELLANTS**

Dr. Michael F. Addonizio, Dr. David Arsen, Professor Kristine Bowman, Dr. Rebecca Jacobsen, Dr. Peter Hammer, Dr. Sarah Winchell Lenhoff, Dr. Sarah Reckhow, and Dr. Regina Umpstead as *amici curiae*, respectfully submit this Brief in support of Plaintiffs-Appellants.

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Don’t Stall Education Reform, Detroit News, 15A (Apr. 23, 2010) 12, 16
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INTEREST OF AMICI CURIAE

Amici are professors Education Law and Policy and Civil Rights whose expertise includes the role of the State of Michigan in public education including the emergency management of public-school districts. Collectively, *amici* share an interest in assisting the court as it engages with complex legal and policy issues in this case of general public interest. Because of their expertise, *amici* are uniquely well situated to explain the context of the issues presented in this case.

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ARGUMENT

To understand the lack of meaningful educational opportunities in the city of Detroit today, one must situate present conditions within a complex history of regulation of public education by the State of Michigan. For the past twenty-four years, Michigan school funding has been highly centralized in a way that creates substantial challenges for school districts like Detroit that have both a declining enrollment but largely fixed costs, and a student population that is more expensive to educate. As a result, the State's funding structure throws districts like Detroit into crisis. The State responded to the crisis in Detroit's public schools by assuming significant control over the district via an approach relatively unique in the national context: an emergency manager. Because of the Detroit Public Schools' escalating financial problems and other consequences of State law, emergency managers retained control over the district for many years. For these reasons, amici support the District Court's conclusion that the State has exercised sufficient control over Detroit's public schools to be held liable for a violation of students' right to literacy. Indeed, there is no one else who could be. Furthermore, amici support, though do not brief, the argument that the limited federal right of access to literacy articulated by Plaintiffs-Appellants is a fundamental constitutional right.¹

¹ Some of the research for this brief was conducted by Kristi Bowman while writing *The Failure of Education Federalism*, which is available online here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876889. Any text herein that is identical to that draft is excerpted with the permission of the author.

I. The State of Michigan’s Unusually Centralized School Finance System Has Budgetary and Governance Consequences For Local School Districts, Including Detroit.

Since the passage of legislation commonly known as “Proposal A” in 1994, Michigan has maintained one of the nation’s most centralized funding systems for K-12 schools. In 2010, the nonpartisan Citizens Research Council of Michigan wrote that the “the state has been reasserting its authority over education governance [ever since Proposal A]. . . . The state now controls almost all funds supporting K-12 education, including local property tax revenues.” Citizens Research Council, *Public Education Governance in Michigan*, vi, 15 (2010). This centralization creates particular financial difficulties for districts with declining enrollments, a failing of Michigan’s school finance system that has been, as we discuss extensively in the following section, especially harmful for Detroit. The centralization also has governance implications for school districts, again including Detroit.

A. Under Michigan’s School Finance System, School Districts’ Funding is Subject to Multiple Interactive Constraints.

Proposal A established a system in which the State legislature and governor annually set the per-pupil foundation grants for all local districts and charter schools. Local districts have very little discretion to raise additional tax revenues for school operations beyond what the State provides. Local districts’ operating revenues are directly tied to their enrollment, and funding is “portable” in the sense that virtually all operating revenues follow students when they transfer to other districts or charter schools. State funding is poorly adjusted for changes over time in the cost of educating students to meet State standards or to compensate for the additional costs of educating high-cost students.² Michael Addonizio & Philip Kearney,

² For example, the State reimburses only 28.6 percent of approved special education spending by local education agencies. The State, however, counts the general education per-pupil foundation grant for students with disabilities towards its special education funding obligation. Citizens Research Council, *Financing Special Education: Analyses and Challenges* (2012).

Education Reform and the Limits of Policy, Upjohn Institute for Employment Research, Michigan State Board of Education, *Recommendations for Change to Michigan School Organization and Finance* (Dec. 2014). Indeed, according to the State's own consultants, the State has been underfunding education dramatically.

In 2014, the legislature authorized and funded Michigan's first ever study to determine the cost of providing an education designed to meet the Michigan Merit Standards, which an experienced and nationally-prominent consulting firm determined was \$8667 per student. MCL 380.1281a. Roughly eighteen months later, the same consultants collaborated with another firm and concluded that the base cost to provide each Michigan student with an adequate education in a large school district like Detroit is \$9590, if the student does not live in poverty, speaks English, and does not have disabilities. Augenbich et al., *Costing Out the Resources Needed to Meet Michigan's Standards and Requirements*, viii (2018). By comparison, in FY 2016, Michigan's basic foundation grant was \$7391; in FY2017 it was \$7511.

Both costing-out studies examined the additional costs, beyond the base cost, to educate students with additional needs. Underfunding these students is particularly important for districts like Detroit because it reduces the already-inadequate funding available for general education students. The 2016 study noted that at-risk and ELL spending by Michigan districts was "far below [that] recommended by costing-out research and far below [the levels] currently available for districts in many other states." *Id.* It concluded that an additional \$2600 beyond the base cost is needed for at-risk students and an additional \$3467 per student for English Language Learner students. Augenblick et al., *Michigan Education Finance Study*, xi (2016). The 2018 study determined that ELL students in a large district like Detroit cost an additional 18-46% above the base cost, or an additional \$1726-4411 per student, depending on a student's literacy in English. *Id.* at viii. Thus, the concentration and

need of students in poverty in a large district like Detroit increases the costs of adequate services by an additional \$2781-\$5736 per student. *Id.* at viii.

The 2018 study also estimated the additional cost of providing adequate services for students with disabilities. These costs vary by disability severity, but on average students with disabilities cost 148% of the base figure, or an additional \$14,193 per student. *Id.* Similarly, the 2017 Special Education Funding Subcommittee Report submitted to Michigan Lieutenant Governor Brian Calley concluded that the State's special education services were underfunded by about \$700 million in 2015-16, or \$11,498 per special education student. *Special Education Funding Subcommittee Report*, 4 (Nov. 2017). In 2018, the US Department of Education concluded that Michigan is the only state to be serving special education students so poorly that it needs federal intervention to ensure it is meeting the requirements of federal disability law. U.S. Department of Education, *2018 Determination Letters on State Implementation of IDEA* (July 24, 2018).

Studies like these are particularly important when considering the State's financial support of public education in Detroit, where at the very least, 16.6% of the district's roughly 50,000 students are currently identified as being students with disabilities, compared to 13.1% of all students state-wide. MI School Data, *2017-18 Special Education Data Portraits: Disability Snapshot*, <https://www.mischooldata.org/SpecialEducationEarlyOn2/DataPortraits/DataPortraitsDisability.aspx#> (2018); Jennifer Chambers, *Detroit Schools Target Special Ed Failures*, *The Detroit News* (July 10, 2018). Thus, the Subcommittee Report almost certainly underestimates the impact of the already-severe underfunding on Detroit's schools.

B. Enrollment Volatility Is Enhanced By State Law and Has A Significant Financial Impact on School Districts.

In this unusually centralized system, nearly all operating funding moves with students when they transfer to other districts or charter schools, and thus enrollment declines reduce school districts' operating revenues in significant and often unanticipated ways. With declining enrollment, district revenues (primarily the per-pupil foundation grants from the State) decline faster than costs, because some costs are fixed in the short- and medium-run. Consequently, declining-enrollment districts must cut spending on services for remaining students or draw down their fund balances, or both.

District enrollment volatility is greatly increased, especially in urban districts, by State laws that enable students to easily move out of their home district into a charter school or into other districts via schools of choice.³ MCL 380.501 (charter schools, known in Michigan as public school academies); MCL 388.1705-1705c (open enrollment, known in Michigan as schools of choice). The National Alliance for Public Charter Schools ranks Detroit second only to New Orleans among U.S. cities in terms of its share of students attending charter schools. National Alliance for Public Charter Schools, *A Growing Movement: American's Largest Charter School Communities* (2013). By 2016, more Detroit resident students attended charter schools than Detroit Public Schools. The growth of the charter system has contributed directly to large and sustained enrollment and revenue declines in Detroit's public schools.

³ In a state-by-state review of state policies favorable to charter school growth, the National Alliance for Public Charter Schools (2014) ranked Michigan third among states--after Washington, DC and Louisiana. In recent years, Michigan's charter school policy implementation has been sharply criticized for poorly regulating the supply, business operations, and quality of schools. Education Trust Midwest, *Accountability for All: 2016*, 10 (Feb. 2016); Detroit Free Press. *State of Charter Schools Special Report: How Michigan spends \$1 billion, but fails to hold charter schools accountable* (June 22-29, 2014).

C. State Law Creates Governance Consequences For School Districts in Fiscal Crisis, and Also Contributes to Such Crises.

In addition to financial consequences for districts, the State's school finance system and related statutes have governance consequences for local districts. For many reasons, it is appropriate for states to oversee and support local district operations and to intervene when serious problems arise. All states have enacted statutes that permit state involvement in local school districts' finances upon the occurrence of certain conditions or events, and Michigan leads the country in both the number of statutes (40) and interventions (137) that authorize state involvement. For context, roughly 70% of states have 9 or fewer relevant statutory provisions. Dirk Zuschlag and Kristi Bowman, *States' Intervention in School Districts' Finances* (working paper, draft on file with amici).

The most significant form of state involvement—and one not available in most states—is emergency management. Since 2009, five Michigan school districts including Detroit have been taken over by state-appointed emergency managers who displaced both the superintendent and elected school board. Mich. Dept. of Treasury, *Emergency Manager Information* (2016).⁴ The grounds for emergency management intervention under State law are strictly financial, and nearly all are consequences of a deficit fund balance.

State emergency management laws presume that local district fiscal distress is caused by local officials' lack of expertise or, at times, malfeasance, and therefore they seek to shift administrative authority to other parties. Yet, in a study of finance of all Michigan districts with at least 100 students over a 20-year span, Michigan State University Professor David Arsen and colleagues found that “state policies were in large part responsible for the underlying financial problems.” By failing to account for the budgetary consequence of rapid enrollment

⁴ Between 2016 and June 2018, all emergency managers concluded their work although four school districts—including Detroit—continue to “remain under partial state oversight.” Paul Egan, *Michigan Without State-Appointed Emergency Managers for First Time in 18 Years*, Detroit Free Press (June 27, 2018).

loss and higher concentrations of students with disabilities, State policies “triggered financial emergencies in a small but vital subset of Michigan districts and established grounds for state intervention.” David Arsen et al., *Which Districts Get Into Financial Trouble and Why: Michigan’s Story*, 42 *Journal of Education Finance* 100 (2016).

Indeed, rather than rectify the mismatch between State revenues and local costs in declining-enrollment districts, over time, State policy changes made them worse. In 1994, district pupil counts for State funding were a 50-50 weighted average of district enrollment in the previous spring and fall of the current academic year. Thereafter, to the funding detriment of declining-enrollment districts, the State progressively decreased the weight of past enrollment, so that by 2015 previous-year enrollment was weighted only 10%. Consequently, since the (90%-weight) fall enrollment count did not take place until October of each year, districts were forced to establish their annual budgets based on enrollment estimates and did not know their actual funding until more than a month after the start of the academic year.⁵

II. For Nearly Twenty Years, The State of Michigan Has Actively Intervened in the Governance, Finances, and Operations of Detroit’s Public Schools.

While, as noted above, the State of Michigan has assumed greater control over the operations of all Michigan school districts, State interventions in and control over operations of Detroit’s public schools have been more sustained and varied than in any other district. Beginning in 1999, the State of Michigan replaced Detroit’s elected school board with an appointed board; appointed a series of emergency managers to assume the role of the superintendent and the school board; and moved all of the students and assets from the old Detroit district (which will be dissolved when the old district’s debt is retired) into a newly-

⁵ The State restored the 50-50 past spring-current fall pupil weighting in 2017.

created, debt-free district. These steps were taken via statutes enacted by the legislature, signed into law by the governor, enforced by the executive branch, and upheld by the judiciary.

A. The State of Michigan Replaced Detroit’s Elected School Board With An Appointed “Reform Board” from 1999-2005, Prior to Emergency Management.

As the District Court observed, the State of Michigan’s active intervention in Detroit public schools’ governance and finances began a decade before an emergency manager was appointed. *Gary B. v. Snyder*, 2:16-cv-13292, at 5 (June 29, 2018) [hereinafter “Opinion”]. In 1999, in an effort to reform the district both academically and administratively, the State legislature passed and Governor Engler signed into law a statute that removed Detroit’s elected school board from office and replaced it for a period of time with an appointed “‘school reform board’ charged with appointing a chief executive officer.” *Id.* at 5; MCL 380.371-75. Six of the board members were appointed by the mayor of Detroit and one was appointed by the State superintendent of education for the first five years. *Opinion* at 5. The law was challenged in court and upheld. Curt Guyette, *After Six Years and Four State-appointed Managers, Detroit Public Schools’ Debt Has Grown Even Deeper*, *Metro Times* (Feb. 25, 2015). State intervention, however, did not resolve the district’s financial problems. In 2005, when voters elected school board members for the first time in six years, the district had a \$200 million deficit.

B. Detroit Was the First Michigan School District to Come Under Emergency Management in 2009 Under a 1990 Statute.

Michigan enacted its first emergency fiscal management law in 1988, and in 1990 the law, which came to be known as PA [Public Act] 72, was amended so that it also applied to school districts as well as general-purpose municipalities such as cities. MCL 141.1201-1244 (repealed). In 2009, Governor Granholm appointed the first emergency financial manager of Detroit Public Schools, Robert Bobb, who was also the first emergency financial manager of a

school district appointed under this statute. (As the District Court noted, the Governor selected the emergency financial manager from a list generated by the State's chief education officer with input from the State's board of education. Opinion at 6).

PA 72 granted emergency financial managers responsibility only for school district finances, while the local board retained authority for all other district operations, including academics. From the start, however, Mr. Bobb exercised authority over academics as well as all other district functions, arguing that the district's financial crisis was inextricably linked to its poor academic performance. In August of 2009, the DPS board filed a lawsuit charging Mr. Bobb with overstepping his authority.

While the lawsuit was pending, Mr. Bobb implemented changes in Detroit schools on a scale rarely observed in any U.S. school district. During his two-year term, Mr. Bobb closed 69 schools, secured cuts in district employment and employee compensation, contracted out many services, and issued a series of new academic plans impacting curriculum, assessment, and staffing. Yet, during this whirlwind of activity, DPS's deficit increased by about 50%, from \$219 million in fiscal 2009 to \$327 million in fiscal 2010. Scholars concluded that "[t]he fundamental reason [for this increase] is that the district's longstanding enrollment decline accelerated during Mr. Bobb's tenure, which is hardly surprising given the program cuts he imposed. So even though he cut spending, revenues declined even faster, and the deficit grew." David Arsen & Mary Mason *Seeking Accountability Through State-Appointed Emergency District Management*, 27 *Educational Policy* 248 (2013).

Detroit's emergency management experience clearly demonstrated the difficulty of stabilizing a district's budget through program cuts and school closures when revenues are based solely on student enrollment, and in settings where large shares of students in closing schools do not remain in district schools but rather move to charter schools or schools in other

districts. This was the same fundamental problem experienced when DPS budgeting was under the local school board's control, and emergency management did not diminish it.

During 2009 and 2010, Mr. Bobb approached the legislature several times asking for amendments to PA 72 to grant him clearer authority over academics. Chris Christoff, *Bobb to Mich. Lawmakers: Let Me Take Over DPS Academics*, Detroit News 1A (Dec. 10, 2009). Governor Granholm supported this direction, saying "Robert Bobb is pursuing dramatic reforms to repair the district's finances and academics, for the two are inextricably bound." Jennifer Granholm, *Don't Stall Education Reform*, Detroit News, 15A (Apr. 23, 2010). Over several months starting in January 2010, the House Education Committee discussed amending PA 72 to provide emergency managers with academic control, but revising PA 72 proved too politically divisive for the committee to take action.

Obligated by PA 72 to submit a deficit elimination plan to the State, in October 2010 Mr. Bobb announced two alternative plans. Plan B which he termed draconian and undesirable but the only way to cut the district's way out of the deficit, called for high school class sizes of 62 students, sharing high school principals across four schools, closing almost half of the remaining 142 schools, and other extreme measures. His preferred Plan A was never specified but would require substantial additional State revenue. When the legislature balked, Mr. Bobb was forced to submit his Plan B. In February of 2011 the State superintendent ordered Mr. Bobb to implement the plan immediately and cautioned him to not declare bankruptcy. Chastity Pratt Dawsey, *Deadlines Given in Plan for DPS Cuts*, Detroit Free Press, 4A (Feb. 22, 2011).

In December 2010, the Wayne County Circuit Court ruled in favor of the DPS board in a decision that put authority for academic decisions squarely with the elected board. *Detroit Board of Education v. Robert Bobb*. Case No. 09-020160 AW (Wayne County Circuit Court, 2010). The ruling came just as the then-minority party was preparing to take control of the governor's office and both chambers of the Legislature after the November 2011 election.

Local resistance to the State takeover was so significant that, over time, it led to at least five lawsuits in which Detroit public school board members or other local entities sued various State-appointed emergency managers of the Detroit public schools. During this same time, at least three other lawsuits statewide challenged PA 72 in other ways. Kristi L. Bowman, *State Takeovers of School Districts and Related Litigation: Michigan as a Case Study*, 45 *The Urban Lawyer* 1, 8-11 (2011).

C. In Response to Circumstances in Detroit’s Public Schools, the State Enacted a More Aggressive Emergency Manager Law in 2011, Which Voters Nullified in 2012 and the State Effectively Reenacted Six Weeks Later.

By the start of 2011, owners of DPS’s outstanding bonds grew concerned about emergency management’s failure to stabilize the district’s finances and blocked DPS’s access to new short-term borrowing. Caitlin Devitt, *New Detroit School Czar Has More Powers*. *Bond Buyer* 1, 4 (May 11, 2011). On February 9, 2011 before a joint hearing of the Michigan Senate and House Education Committees, Mr. Bobb pleaded for the State to insure repayment of DPS’s past borrowing, just to meet near-term payroll obligations. Robert Bobb, *Testimony to the joint House and Senate Education Committee* (Feb. 9, 2011), available at: http://www.senate.michigan.gov/committees/files/2011-SCT-ED__-02-09-1-02.PDF). On the same day, Republicans introduced the legislation that became the new emergency management law, known as PA 4. M.C.L. 141.1501 –141.1531 (repealed 2012). Despite opposition, the legislation quickly passed. In March 2011, Governor Snyder signed the new emergency management statute that expanded the scope of the manager’s authority from financial only to both academic and financial matters. MCL 141.1101 - 141.1118 (repealed); Bowman, *State Takeovers*; Opinion at 6. Emergency financial managers’ name changed to “emergency managers” to reflect their broader authority.

Given the strong opposition DPS’s emergency financial manager had faced from Detroit’s educators, board members, and citizens under the old emergency management law, it

was understandable that State policy makers might expect that the district's financial and academic prospects could be improved by completely disempowering these opponents and giving the emergency manager undisputed control over district operations. That is precisely what the new emergency management law did.

It is appropriate to underscore the extraordinary degree of control over school district operations that PA 4 gave emergency managers. Under the new law all powers and duties of the district superintendent and school board transferred to the governor-appointed emergency manager, who must develop district financial and academic plans within 45 days of appointment. The law specified no conditions for the academic plan other than it can be provided with available revenues.

PA 4 also granted powers not available to local boards. For example, an emergency manager could unilaterally modify or terminate existing contracts, including union contracts. Collective bargaining rights could be suspended for five years. An emergency manager was empowered to modify employees' salaries and benefits, work rules, job responsibilities, due process rights, and seniority rights. An emergency manager also had the authority to fire any or all employees, hire replacements, or outsource provision of any district service to private contractors. He or she could also order tax millage elections and sell assets, including closing and selling school buildings.

Furthermore, the emergency manager could issue binding orders on local elected and appointed officials, employees, agents, and contractors necessary to implement his or her financial and operating plans. If any of these parties failed to implement an order, the emergency manager could deny that person access to facilities, electronic mail, and internal information systems. The emergency manager could issue subpoenas to obtain documents and records, and initiate court proceedings to enforce compliance with his or her orders. Finally, the emergency manager could "take any other action or exercise any power or authority of any

officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government” (Section 19(1)(ee)). M.C.L. 141.1519(1)(ee) (repealed 2012).

Under PA 4, a school district remained in receivership until the emergency manager declared the financial emergency to be remedied and the State Treasurer and State Superintendent of Public Instruction concurred. Before leaving, the emergency manager was obligated to draw up a two-year district budget, including all contractual and employment agreements, that would go into effect at the end of the receivership. The local district was prohibited from amending that budget without the approval of the State Treasurer, or from revising any order implemented by the emergency manager for a period of one year.

In May 2011, two months after PA 4’s passage, Governor Snyder replaced Robert Bobb with Roy Roberts as the DPS emergency manager. The new emergency manager (and others who followed) maintained the course set by Mr. Bobb—closing schools, cutting employment and compensation, contracting out service provision, and eliminating programs. Yet, district finances never returned to a sound footing because enrollment (and hence revenues) continued to fall, as the district’s long-term indebtedness increased.

The State played an essential role in enabling the district to continue borrowing to keep this precarious financial arrangement afloat. To reassure financial markets so that they would extend DPS additional credit, PA 4 included language that required the emergency manager to honor payments on a district’s outstanding bonds, notes, and securities. It also eliminated the emergency manager’s authority to declare bankruptcy without the governor’s approval. The State also passed laws giving creditors a statutory lien and trust superior to all other liens and interests on the required debt service payments of districts under emergency management. M.C.L. 380.1225 (amended 2016). Consequently, the State intercepted district state aid revenue necessary to repay borrowing obligations and made those payments on behalf of the

district. House Fiscal Agency, *Legislative Analysis, HB 5194 and 5195: Borrowing Against State Aid*. Lansing, MI (Dec. 7, 2011); Caitlin Devitt, *Detroit Public Schools Pin Hopes On Deficit Sale*. Bond Buyer, 1, 4 (Oct. 3, 2011).

In October 2011, the Michigan Finance Authority, which is part of the Michigan Department of Treasury, issued \$238 million in 10-year revenue bonds and loaned the proceeds to DPS. Devitt, *Detroit Public Schools*, at 1, 4. Mr. Roberts applied \$200 million of the proceeds to reducing Detroit Public Schools' legacy deficit by two-thirds. While this provided significant short-term relief, the new bond issue simultaneously increased the district's annual debt service expenditures by over 100%. The success of this debt refinancing strategy turned crucially on the district reversing its longstanding decline in enrollment and revenues. Unfortunately, DPS enrollment continued to fall. By 2016 DPS's enrollment was only 30% of its 2002 level. Consequently, in 2016, while DPS remained under emergency management, debt payments consumed a staggering \$1,100 per pupil of the district's \$7,300 in discretionary state aid (foundation grant) per pupil. Around that same time, pension contributions consumed a further \$1400 of each foundation grant. Citizens Research Council, *Funding for Public Education: The Recent Impact of Increased MPERS Contributions* (2013).

State-wide resistance to the 2011 emergency manager law was so significant that the statute was repealed via a referendum at the ballot box in November 2012. Paul Egan, *After Emergency Manager Law Repeal, Any New Legislation Will Be Balancing Act*, DETROIT FREE PRESS (Nov. 8, 2012); Opinion at 6. However, during the "lame duck" legislative session in late December 2012, the State legislature passed a slightly modified version of the prior emergency manager statute and Governor Snyder signed it into law; this statute, known as PA 436 remains in effect. MCL 141.1541-1575; Opinion at 6-7. Because the new emergency manager law contained an appropriations provision, it could not be repealed via a referendum. Throughout all iterations of this policy, the Governor retained the power to appoint emergency

managers, and also was required to, in the District Court’s words, “appoint a review board principally composed of state actors.” Opinion at 6.

D. The DPS Emergency Manager Transferred 15 DPS Schools to Another District, The Education Achievement Authority, Which Competed With DPS Schools for Students and Resources.

The DPS emergency manager played an essential role in implementing a dramatic experimental intervention in a subset of DPS schools. The Education Achievement Authority (EAA) was established in June 2011 under the guidance of the governor’s office and outside the legislative process through a little-known provision in Michigan law—the Urban Cooperation Act (1967)—that provides for inter-local agreements between government entities. Specifically, the EAA was created through an inter-local agreement between Detroit Public School’s emergency manager and Eastern Michigan University’s board of regents. MCL 380.1280c; MCL 124.505; MCL 388.1603; Opinion at 7-8. All individuals whose approval was necessary to ratify the inter-local agreement were appointed by the governor. In addition, as the District Court observed, the agreement required that the Governor appoint “seven of the eleven members of the EAA’s board of directors... [and] the executive committee from among the board members.” Opinion at 8.

The 2011 inter-local agreement established the EAA as a new type of school district with broad purposes and powers. Although public officials sometimes referred to the EAA as Michigan’s reform school district, the inter-local agreement made no reference to the turnaround of low-performing schools and set no limit on the number of schools that could be placed in or created by the EAA anywhere in Michigan. In October 2012, a *Detroit Free Press* front-page lead story announced that within five years the EAA could be the largest enrollment district in Michigan.

In practice, the EAA’s creation destabilized DPS operations. Some of the 15 schools transferred to the EAA by the DPS emergency manager were buildings newly constructed or

renovated with a \$500 million facility construction bond approved by Detroit voters in 2012 and paid for thereafter by Detroit taxpayers. Additionally, the EAA actively competed with DPS for students and revenues, and thus it contributed to Detroit's extraordinarily turbulent educational landscape.

The EAA was plagued by an extraordinary range of governance, administrative, funding, and instructional problems. Mary Mason & David Arsen, *Michigan's Education Achievement Authority and the Future of Public Education in Detroit: The Challenge of Aligning Policy Design and Policy Goals*, Michigan State University Education Policy Center (Dec. 2014); Lori Higgins, *EAA Could Be Mich. Largest School District in Next 5 Years*, Detroit Free Press, A1 (Oct. 8, 2012). After being the focus of nearly continuous controversy, and never expanding beyond its original 15 schools, the EAA was dissolved as of June 30, 2017, and its schools were absorbed into the new Detroit district which replaced DPS. Detroit Public Schools Community District, *EAA Transition Questions and Answers*, available at: <http://detroitk12.org/welcome/faq/>.

E. Under Emergency Management, Detroit Public Schools' Financial Deficit Increased to Unsustainable Levels, Forcing The State to Absorb a Portion of the Debt and to Create a New School District for Detroit's Students in 2016.

Seven years of State emergency management failed to improve the academic performance or financial status of Detroit's public school district. Detroit students' scores on the 2015 National Assessment of Educational Progress remained the lowest of any U.S. city. Lori Higgins, *Detroit's Schools Score Worst in the Nation Again, But Vitti Vows That Will Change*, Detroit Free Press, April 10, 2018. But the decisive impetus for change came with State policy makers' realization that under emergency management DPS's financial indebtedness worsened to the point that bankruptcy was clearly imminent. In that event, the State would be liable for roughly \$2 billion of the district's outstanding debt.

The Citizens Research Council of Michigan reported at the end of FY 2015 that the Detroit public school district had “over \$3.5 billion outstanding in combined operating and capital liabilities. This includes nearly \$1.9 billion in employee legacy costs and cash flow borrowings and almost \$1.7 billion in multi-year bonds/notes and state loans.” Citizens Research Council, *Detroit Public Schools’ Legacy Costs and Indebtedness*, 1 (Jan. 2016). Roughly \$1.4 billion of this total consisted of due or overdue State pension contributions, including contributions to make up for the statewide pension plan’s unfunded liability. *Id.* at 2. The \$1.7 billion of bonded debt, notes, and State loans financed capital expenditures and also, beginning in 2005, allowed the district to convert short-term borrowing to long-term debt. *Id.* at 8-11.

In 2016, the staggering debt led the State legislature and Governor to enact a statute that radically reconfigured the district; the restructuring was inspired by private-sector bankruptcy. MCL 141.1633 et al., 141.932 et al., 12.252 et al., 380.3 et al., 423.202a, and 423.206. The legislative package brought many changes, including the creation of a new, debt-free district to which the Detroit public schools’ students and assets were transferred. The old district remained in name only and exists for the sole purpose of paying down the old district’s debt. David Eggert, *Michigan Governor Rick Snyder Signs \$617M Detroit Schools Bailout*, Detroit Free Press (June 21, 2016). It will be dissolved when the debt is retired.

The 2016 legislative package also provided for ending emergency management, returning the new district to local control, and terminating the EAA. A controversial piece of the package eliminated certification requirements for teachers in the new Detroit district. However, the most contentious element of the 2016 Detroit school package in legislative negotiations was an unsuccessful proposal to create a new nonpartisan entity, the Detroit Education Commission, to provide limited coordination across both charter and district schools. The legislation also prevented the district from issuing new debt, thus the district is

unable to raise funds for capital improvement. Although the 2016 legislation established a new framework for Detroit's public schools and restored a measure of local control, the terms of the framework drew limited support from Detroiters. No Detroit legislator voted to approve the bills and none were involved in the final negotiations.

III. It is Appropriate That The State's Control Over the Detroit District Properly Align With Responsibility For Its Actions.

A key question in this litigation is whether the State of Michigan can be held liable for the educational opportunities available in Detroit's public schools. It is appropriate to do so in this instance. Generally, courts hold individuals or entities responsible for situations when they exercised, or had the ability to exercise, significant control over those situations. That is the case here.

In its decision in *Gary B.*, the District Court correctly observed that “there is no question that the State has been heavily involved with Detroit schools for some time.” Opinion at 8. Furthermore, it continued, “[t]here likewise is no question that Michigan law imbues the emergency managers—under any of their various legal descriptions—with significant power and authority to conduct the affairs of Detroit schools.” *Id.* at 8. The District Court then analyzed two Sixth Circuit cases, one federal district court case, and two Michigan Court of Appeals cases, which all engaged questions about Michigan's emergency manager legislation. The District Court properly distinguished all of the cases, determining that none answer the question whether defendants “could be said to have controlled” or “should be held responsible for the conditions in Detroit schools.” Opinion at 10-11.

The District Court correctly noted that the Defendants—none of whom are emergency managers themselves—“were responsible for the selection and appointment of the emergency managers.” Opinion at 11. Specifically, the District Court continued, the “[e]mergency managers ‘serve[d] at the pleasure’ of the Governor and ultimately the Governor decided when

the financial emergency necessitating intervention was complete.” Opinion at 12. In other words, the State had significant authority—significant *control*—over Detroit’s public schools through its emergency managers. In its final word on the topic, the District Court noted that courts have upheld the actions of the State-appointed emergency managers in the various challenges to their authority, and it suggested that the State cannot claim and exercise authority but not take responsibility. In other words, the State cannot have it both ways.

CONCLUSION

Because of the State of Michigan’s control over Detroit’s public schools, State defendants are proper defendants in this lawsuit. *Amici Curiae* respectfully request the Sixth Circuit Court of Appeals uphold the District Court’s findings in this regard, and reverse the District Court’s findings to the extent they do not acknowledge the limited federal right to literacy articulated by the plaintiffs.

Respectfully submitted,

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