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.

GRETCHEN WHITMER, Governor; **TOM MCMILLIN,** 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; **JUDITH PRITCHETT,** member of the MI Bd of Education; **CASANDRA E. ULBRICH,** member of the MI Bd of Education; **NIKKI SNYDER,** member of the MI Bd of Education; **TIFFANY TILLEY,** member of the MI Bd of Education; **SHEILA ALLES,** Interim Superintendent of Public Instruction for the State of MI; **TRICIA L. FOSTER,** Director of the MI Dept of Technology; **WILLIAM PEARSON,** 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

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INTRODUCTION

In 2016, Plaintiffs filed this lawsuit against twelve State Defendants, including Michigan's Governor, its Superintendent of Public Instruction, and members of the Michigan Board of Education. The Complaint alleged appalling conditions in Plaintiffs' schools: insufficient teachers, insufficient and outdated textbooks, and decaying building conditions that made learning impossible. As a consequence, Plaintiffs were deprived of the opportunity to attain literacy. Test scores confirmed that the State's failure to provide Plaintiffs access to literacy left them and their schoolmates with zero or near-zero percent proficiency in core subjects. This violates the Fourteenth Amendment.

Three years later, these conditions persist, and in some instances have worsened. All but two of the Defendants have dropped any argument that the Constitution allows them to impose these conditions on Plaintiffs. Indeed, two of the Defendants, Pamela Pugh and Tiffany Tilley, have declined to join *any* argument, procedural or substantive, in support of the district court's judgment. (*See* Mtn. for Leave to File Corrected Appellees' Br., Dkt. 152 ¶¶ 2–3.) And Michigan's Attorney General, as *amicus curiae*, agrees that the State violated Plaintiffs' constitutional right to a basic education.

Yet—despite their apparent recognition of the persistent constitutional violations in Plaintiffs' schools—all Defendants other than Pugh and Tilley assert

that they have no responsibility to provide any remedy. Defendants do not challenge the district court's ruling that their control and supervision of Plaintiffs' schools caused the schools' current state. Defendants' new theory is that changes in Michigan law have shifted educational responsibilities in the State—effectively letting Defendants off the hook. Because they have no responsibility for Detroit schools going forward, Defendants say, any remedy ordered against them would be retroactive relief barred by the Eleventh Amendment.

This new argument, which Defendants could have raised below but did not, fares no better than the one the district court already rejected. State officials may not shirk their constitutional obligations to remedy harm the State caused by tweaking the State's "org chart." Under State and federal law, these State officials remain firmly on the hook.

Moreover, there is no merit to Defendants' contention that the remedies Plaintiffs seek are inconsistent with the Eleventh Amendment. The Supreme Court made this clear in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). The *Milliken II* Court ordered Michigan state defendants to provide remedial educational programs similar to what Plaintiffs seek here—holding that this remedy was necessary to "wipe out [the] continuing conditions of inequality produced by" the defendants' unlawful conduct. *Id.* at 290. So too here.

Just two of the twelve Defendants—Tom McMillin and Nikki Snyder—attempt to defend the district court's decision on the merits. First, they assert that the Supreme Court held in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that there is no fundamental right to access to literacy. But, as the district court explained, *Rodriguez* deliberately and expressly left this question open. McMillin/Snyder next ask this Court to ignore our nation's well-established history of a right to access to literacy, contending that the many state constitutions guaranteeing an education at the time of the Fourteenth Amendment's ratification merely sought to organize education centrally. This is historically incorrect. McMillin/Snyder thus have no answer to Plaintiffs' showing that access to literacy is a fundamental right.

McMillin/Snyder next argue that there is no due process violation in the State's compelling Plaintiffs to attend school for 180 days each year while providing them no meaningful education. According to McMillin/Snyder, Plaintiffs' liberty interests would be implicated only if the children were in complete custody round-the-clock. But the Due Process Clause prohibits even a limited deprivation of liberty without justification, and the justification McMillin/Snyder offer—that schools without meaningful instruction nonetheless offer an opportunity for "expos[ure]…to group interactions" (Dfts.' Br. 58)—could be said equally of prison. Nor would their position admit of any limiting principle:

compelling children to sit idly for hours on end in a building titled "school" would, under the McMillin/Snyder view, not violate the Due Process Clause so long as the children could go home at the end of the day. Of course, such extreme circumstances are, practically speaking, the tragic reality for Plaintiffs.

Finally, McMillin/Snyder contend that the State's functional exclusion of a discrete group of schoolchildren from its statewide system of education satisfies the Equal Protection Clause because the exclusion is not encoded in a statute. But, as the Supreme Court explained in *Plyler v. Doe*, 457 U.S. 202 (1982), the Equal Protection Clause is not so woodenly applied. Rather, when State action "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status," the Equal Protection Clause is violated. *Id.* at 223.

ARGUMENT

I. Defendants Caused—and Remain Liable for—the Unconstitutional Conditions in Plaintiffs' Schools.

A. Defendants Control Plaintiffs' Schools.

On appeal, Defendants do not challenge the district court's ruling (Opinion, RE.117, PageID#2792) that they directly controlled Plaintiffs' schools for decades preceding the Plaintiffs' complaint. (*See also* Br. of Amicus Curiae DPSCD at 9–20.) Instead, Defendants advance a new argument, asking this Court to immunize them for their past misconduct due to "changed circumstances" that supposedly

relieve them of all ongoing responsibility for Plaintiffs' schools. (Dfts.' Br. 30–31.) Defendants cannot escape liability so easily.

First, much of what Defendants identify is not new. Michigan Public Act 192 of 2016, which created a new school district to operate Detroit schools and dissolved the Educational Achievement Authority, became effective June 21, 2016—months before Plaintiffs filed suit—and was referenced in both the Complaint (RE.1, PageID#51, 55) and the district court's opinion (RE.117, PageID#2792). The local school board that Defendants now argue is solely responsible for addressing Plaintiffs' constitutional harms took office on January 1, 2017—over 18 months before the district court's ruling—and the court was informed of the board's election in both the Complaint (RE.1, PageID#51) and Defendants' motion to dismiss (RE.60, PageID#508). Defendants did not argue below that these changes eliminated their responsibility, and though aware of them, the district court nonetheless recognized "that state actors effectively control" Plaintiffs' schools. (Opinion, RE.117, PageID#2796.)

Although State officials may designate local officials to fulfill a State's obligation to administer elements of the statewide system of education, that delegation cannot shield State officials from liability where, as here, ultimate responsibility for schools remains with the State. This Court has said so: "[I]t is well established under the Constitution and laws of Michigan that the public school

system is a State function and that local school districts are instrumentalities of the State created for administrative convenience." *Bradley v. Milliken*, 484 F.2d 215, 246 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974) ("*Milliken I*").[1] From the State's founding and through each of the four State constitutions, "Michigan always has regarded education as the fundamental business of the State as a whole. Local school districts are creatures of the State and act as instrumentalities of the State under State control." *Id.* at 246–47 (collecting authorities).

The constitution and laws of Michigan continue to expressly confer authority for Plaintiffs' schools on Defendants. (*See* Opinion, RE.117, PageID#2788.) The Michigan constitution provides that "[l]eadership and general supervision over all public education…is vested in a state board of education" of which Defendants McMillin, Fecteau, Ramos-Montigny, Pugh, Pritchett, Ulbrich, Snyder, and Tilley are members. Mich. Const. Art. VIII § 3. The Michigan

[1] Though it reversed this Court's decision to require inter-district busing as a remedy, the *Milliken I* Court did not question the conclusion that the State was responsible for ensuring that the statewide system of education complies with federal constitutional requirements. *See* 418 U.S. at 748–49. Defendants also claim that *L.M. v. State*, 862 N.W.2d 246 (Mich. Ct. App. 2014), places the "responsibility to 'provide for the education'" of students on local school districts. (Dfts.' Br. 15.) But *L.M.* does not insulate Defendants from constitutional obligations applicable to the system of education they control. *L.M.* merely holds that there is no "direct cause of action" against the members of the Michigan school board "arising under the Michigan Constitution." 862 N.W.2d at 253.

Supreme Court has reaffirmed "the responsibility of the state board of education to supervise the system of free public schools set up by the legislature and, as a part of that responsibility…to determine the curricula and, in general, to exercise leadership and supervision over the public school system." *Welling v. Livonia Bd. of Ed.*, 171 N.W.2d 545, 546 (Mich. 1969); *see also* Mich. Comp. Laws § 388.1009. As Interim Superintendent of Public Instruction for the State of Michigan, Defendant Alles is the principal executive officer of the Michigan Department of Education and a non-voting member of the Board of Education. Mich. Const. Art. VIII § 3 ("[The Superintendent of Public Instruction] shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education."). By statute, she is responsible for administering and enforcing state laws related to public education. Mich. Comp. Laws § 388.1014. Defendant Whitmer, as Governor, has ultimate responsibility for and control over administration of all state laws and regulations concerning education. (Complaint, RE.1, PageID#23–24.)

This Court and others agree that once a state takes on a role such as provider of education, it cannot immunize itself from obligations imposed by federal law by delegating its responsibilities to local authorities. *See Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008) (Ohio official could not be "insulated from any

enforcement burdens" under the National Voter Registration Act by "delegating NVRA responsibilities to local authorities."); *Robertson v. Jackson*, 972 F.2d 529, 534 (4th Cir. 1992) ("A state that chooses to operate its program through local…agencies cannot thereby diminish the obligation to which the state, as a state, has committed itself, namely, compliance with federal requirements."); *accord United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008); *Woods v. United States*, 724 F.2d 1444, 1447–48 (9th Cir. 1984). Surely such delegation does not render this case moot, for the State retains not only overall authority over public education but specific power to reassert direct control over Plaintiffs' schools. *See* Mich. Comp. Laws §§ 141.1549, 141.1554. Moreover, Defendants have not remedied their unlawful practice by enacting a new statute or regulations (as defendants did in *Mosley v. Hairston*, 920 F.2d 408 (6th Cir. 1990)). Instead, Defendants' recent and direct mismanagement led to the current unconstitutional conditions in Plaintiffs' schools—and despite their delegation, Defendants retain sufficient authority over the statewide education system to remedy the harm they caused to Plaintiffs.

B. The Eleventh Amendment Does Not Bar the Relief Plaintiffs Seek.

As the Supreme Court has made clear since *Ex Parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not bar relief designed to compel a State official's prospective compliance with federal law, even when the cost of

compliance will be paid using State funds. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978); *Papasan v. Allain*, 478 U.S. 265, 276 (1986). To get around this longstanding principle, Defendants assert that any relief against them would necessarily be compensatory because, as a result of the organizational changes in Michigan's education system, "there is no continuing conduct of a state official to enjoin under *Young*." (Dfts.' Br. 34.) Defendants are doubly incorrect. As detailed above, Defendants *do* have an ongoing and essential role in controlling Plaintiffs' schools within the Michigan system of education. Moreover, the Supreme Court and this Court have made clear that where Defendants contribute to ongoing deficiencies like those suffered by Plaintiffs, the Eleventh Amendment does not prevent a remedy like the one Plaintiffs seek.

In *Milliken II*, the Court held that "consistent with the Eleventh Amendment, a federal court can require state officials found responsible for constitutional violations to bear the costs of [remedial educational] programs" to combat enduring effects of unconstitutional racial discrimination in Detroit Public Schools. 433 U.S. at 269. State officials in *Milliken II* shared responsibility for the unconstitutional school conditions with a local school board. *Id.* at 269, 277–79. And, like Defendants here, the State officials objected to the order to pay for remedial educational programs because such payments were "in practical effect, indistinguishable from an award of money damages against the state based upon

the asserted prior misconduct of state officials." *Id.* at 288–89 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

But the Supreme Court held that "[t]he decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception [to the Eleventh Amendment]." *Id.* at 289. Exactly as here, unconstitutional conduct by State officials "caused significant deficiencies in communications skills[,] reading[,] and speaking the victims…will continue to experience." *Id.* at 290. Remedial educational programs were necessary to "eliminate from the public schools all vestiges" of defendants' unlawful conduct. *Id.* These programs were "plainly designed to wipe out [the] *continuing conditions of inequality* produced by" the defendants' unlawful actions. *Id.* (emphasis added); *see also id.* ("Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers."). The Supreme Court concluded that the remedial programs—though "also 'compensatory' in nature"—were not barred by the Eleventh Amendment because "they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system." *Id.*

As in *Milliken II*, Plaintiffs seek relief aimed squarely at compelling Defendants' future compliance with their constitutional obligation to provide Plaintiffs access to literacy. Implementing "evidence-based programs for literacy

instruction," "universal screening for literacy problems," "timely and appropriate intervention with individual students," and a "system of statewide accountability" (Complaint, RE.1, PageID#128), will "operate[ ] prospectively to bring about" compliance with Defendants' obligations under the Constitution, *Milliken II*, 433 U.S. at 290.

Nor do the "changed circumstances" claimed by Defendants alter the character of the relief sought. Although State officials have delegated certain responsibilities to a local school board, they remain responsible for remedying the unconstitutional conditions suffered by Plaintiffs as a result of Defendants' acts and omissions. *Id.* at 295 (Powell, J., concurring) ("[T]he State has been adjudged a participant in the constitutional violation[], and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate."). Indeed, under Defendants' theory, if State officials burned down Plaintiffs' school buildings and then handed off responsibility for Plaintiffs' education to local officials, the Eleventh Amendment would bar any order requiring State officials to participate in rebuilding the schools because it would be strictly "compensatory." As *Milliken II* makes clear, that is not the law. *See also Hutto*, 437 U.S. at 690

("The line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief.").[2]

Indeed, this Court recently rejected similar attempts by State officials to dodge responsibility for remedying their unconstitutional acts. In *Boler v. Earley*, State officials involved in the Flint water crisis argued that the Eleventh Amendment barred any relief against them because there were no "ongoing violations of [plaintiffs'] constitutional rights" after Flint reconnected to its prior, safer water supply. 865 F.3d 391, 412 (6th Cir. 2017). This Court held that the State officials' argument "takes too narrow a view of the ongoing constitutional violations that Plaintiffs allege." *Id.* at 413. Defendants' actions and inaction had done damage to the water pipes, which had "ongoing effects" on plaintiffs. *Id.* Further, defendants' "ineffective relief efforts…prolonged the effects of the crisis." *Id.* (internal quotation marks omitted). This alone was "sufficient to show an ongoing violation of the Plaintiffs' constitutional rights." *Id.* Plaintiffs' proposed remediation plan, which established medical monitoring services and healthcare to affected class members, fell clearly within the exception articulated in *Ex Parte*

[2] Moreover, Defendants' choice to raise their mootness argument for the first time in this Court risks severe prejudice to Plaintiffs. If Defendants had previously raised the argument that only "[t]he DPSCD and its superintendent" can provide prospective relief (Dfts.' Br. 33), then Defendants (or even Plaintiffs or the district court) could have joined DPSCD and its superintendent. *See* Fed. R. Civ. P. 19(a)(1).

Young. *Id.* ("The injunctive order did not award money retroactively, but directed the state's conduct in the future.").

As in *Boler*, Plaintiffs' proposed relief "[does] not award money retroactively," but seeks "to direct the [State officials'] conduct in providing services to Plaintiffs affected by" Defendants ongoing unconstitutional conduct. *Id.*

II. Defendants' Denial of Access to Literacy Violates Plaintiffs' Due Process Rights.

Plaintiffs and their *amici*, including Michigan's Attorney General, have established that the federal Constitution compels States to provide children access to literacy. (*See, e.g.*, Pls.' Br. 24–36; Br. of Amicus Curiae Michigan Attorney General Dana Nessel ("AG Br.") at 5–35; Br. of Amicus Curiae the City of Detroit at 9–21.) Most Defendants do not dispute this point. (*See* Dfts.' Br. 2.) Defendants McMillin and Snyder, however, persist in arguing that the State is free under the federal Constitution to compel Michigan children to attend school every day even if those schools do not provide them with access to literacy.[3] The law is to the contrary.

[3] McMillin/Snyder also persist in mischaracterizing Plaintiffs' claim as "ask[ing] that the United States Constitution be used to guarantee the outcome of an educational method." (Dfts.' Br. 37.) Defendants attempted a similar obfuscation before the district court, which flatly rejected it: "Defendants are incorrect: from the beginning of the case, Plaintiffs couched the claim in terms of the right to 'access to literacy.'…Literacy is of course an outcome of education, whereas

A. The Due Process Clause Establishes a Fundamental Right to Access to Literacy.

Defendants cannot dispute that literacy is necessary for virtually any form of civic, economic, or social activity in American society. (*See, e.g.*, AG Br. 14–21.) It is for this reason that State-provided access to literacy is "deeply rooted in this Nation's history and tradition," as a supermajority of State constitutions guaranteed public education at the time of the Fourteenth Amendment's ratification. (*See* Pls.' Br. 21.) Access to literacy is also "implicit in the concept of ordered liberty," because the foundation of American liberty—our written Constitution, our written laws, the exercise of voting on a written ballot—cannot exist without literacy. (*Id.* at 28–29; *see also* AG Br. 5.) Access to literacy is therefore a fundamental right protected under the Fourteenth Amendment.

To avoid this conclusion, McMillin/Snyder first repeat their claim that the Supreme Court in *Rodriguez* "determined that there was no express or even implied fundamental right to education." (Dfts.' Br. 51.) But as the district court explained, the *Rodriguez* Court *did not address* the question presented in this case. (*See* Opinion, RE.117, PageID#2811; *see also* Pls.' Br. 25; AG Br. 6–7.) *Rodriguez* held that relative differences in education funding would not be

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'access to literacy' speaks to an opportunity; and an opportunity is precisely what the Plaintiffs describe." (Opinion, RE.117, PageID#2796–97 (citations omitted).)

subjected to strict scrutiny in an equal protection analysis. 411 U.S. at 38–39. The Court made clear the boundaries of its holding—that the case did not present the question whether "some identifiable quantum of education" is "constitutionally protected," 411 U.S. at 36–37, and the Court later reiterated—in direct contradiction to McMillin/Snyder's claim—that, "[a]s *Rodriguez* and *Plyer* indicate, this Court has not yet definitively settled the question[] whether a minimally adequate education is a fundamental right." *Papasan*, 478 U.S. at 285. McMillin/Snyder fail to address the plain statement in *Rodriguez* that the question is left open, and fail even to cite *Papasan.*[4]

McMillin/Snyder next dispute the role of education and access to literacy in American history. Unable to challenge the fact that States overwhelmingly recognized an affirmative right to public education before 1868—when the Fourteenth Amendment was ratified—they recast this guarantee as "[s]imply" a decision by the States to "centralize the organization of their educational systems,"

[4] McMillin/Snyder assert that *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988), "once again reaffirmed *Rodriguez* by noting that education is not a fundamental right." (Dfts.' Br. 51.) In fact, *Kadrmas* cites *Papasan* for the point that the question presented in this case remains open. 487 U.S. at 458; *see also id.* at 466 n.1 (Marshall, J. dissenting) ("[T]his Court explicitly has left open the question whether such a deprivation of access [to a minimally adequate education] would violate a fundamental constitutional right.").

not to "guarantee" that any meaningful education would be provided. (Dfts.' Br. 45; *see also id.* at 47–48.)

Their argument is historically unsupportable. As explained by Professor Friedman and Solow, the educational reforms during this period were intended not just to consolidate schooling, but to improve education and extend its benefits to students throughout the state. Barry Friedman & Sarah Solow, *The Federal Right to an Adequate Education*, 81 Geo. Wash. L. Rev. 92, 121–26 (2013). The state constitutional provisions "ensured that education was a right with concomitant duties for government," including the requirement that state legislatures "establish or maintain schools" for the purpose of furthering their citizens' educations. *Id.* at 125. As one 1868 constitutional amendment provided, "[I]t shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools." *Id*. Moreover, these educational clauses also standardized the curriculum across localities, seeking to ensure that everyone received an education sufficient to fulfill their obligations as citizens.

As Professor Friedman and Solow further detail, this nationwide expansion of public education occurred against the backdrop of widespread reforms intended to improve educational quality. Among other improvements, reformers sought to "professionalize teaching and to enhance the quality of education. They sought a

longer school year, more regular attendance, and teacher training." *Id.* at 123–24. Other legal historians are in full accord with the understanding of Professor Friedman and Solow. *See* Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 Mich. State L. Rev. 429, 552 ("The obvious explanation for state constitutional clauses creating a duty to set up public schools is a recognition that in a democracy the education of children is vital to the proper functioning of a state as well as being important for the child.").[5]

McMillin/Snyder's attempt to recast the role of education in the American constitutional system also fails to account for the fact that every State in the union *compels* children to attend school. (*See* Pls.' Br. 21, 35.) If State guarantees of public education were merely an organizational preference, then why would States *require* children to attend schools? State mandates of school attendance are "perhaps the surest indication that the roots of education run deep" in American tradition. (AG Br. 13.)

McMillin/Snyder also suggest that the existence of non-public school options, including private schools and home schooling, somehow "belies the

[5] McMillin/Snyder repeat the district court's mistake by looking to whether access to literacy was guaranteed as of 1789 rather than 1868. (*See* Dfts.' Br. 51–52.) With the benefit of 80 years' experience in a democracy founded on a written Constitution, by 1868, a supermajority of States recognized the crucial role of State-provided access to literacy, and it was by that time—the relevant time—enshrined as a fundamental right protected by the Fourteenth Amendment.

argument that *State-provided* access to literacy is now, or ever has been, viewed as fundamental to ensuring liberty or justice." (Dfts.' Br. 52 (emphasis in original).) This is a non-sequitur. Ordered liberty in America requires an electorate that has access to literacy—which is why every State not only provides education, but compels all children to obtain an education. *See Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

Finally, McMillin/Snyder attack a strawman by arguing that "[s]imply because the states decided to centralize the organization of their educational systems does not mean that they intended to guarantee a specific type of education delivered by state-government officials." (Dfts.' Br. 45.) Plaintiffs do not argue that the State must provide any "specific type of education." Nor do Plaintiffs argue they must receive an education equal to that provided in all other school districts. Rather, Plaintiffs—like all children in Michigan—must have the "opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *Rodriguez*, 411 U.S. at 37. That is what nearly every State guaranteed by 1868, and what the Fourteenth Amendment requires. Under any measure, Defendants are violating this right.

B. Defendants Also Violate the Due Process Clause by Compelling Children to Attend Schools That Do Not Provide Access to Literacy.

Whether the Constitution guarantees a right of access to literacy, Defendants' conduct independently violates Plaintiffs' due process rights by confining them to "school" buildings nearly every day while failing to provide even a basic education during the confinement. *See Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (Due Process Clause requires provision of "minimally adequate training" to individual in state custody). Although the unique importance of education in American history and society typically justifies compulsory school attendance, no such justification exists when the "school" is not much more than a warehouse, as alleged here. The Due Process Clause does not permit such an arbitrary restriction on Plaintiffs' liberty.

McMillin/Snyder try to skirt the issue, asserting that Plaintiffs failed to preserve this argument below. (Dfts.' Br. 54–55.) That is incorrect. The district court expressly acknowledged that "the allegations [of the Complaint] state the violation of a negative right." (Opinion, RE.117, PageID#2815–17.) In addition, both the Complaint and Plaintiffs' opposition to dismissal asserted that the State's compulsory attendance laws violated the Due Process Clause. (*See* Pls.' Br. 42.) The issue was squarely presented below. *See Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016).

On the merits, McMillin/Snyder argue that mandating school attendance "a few hours a day for 180 days per year does not rise to the level of an affirmative restraint on individual liberty comparable to incarceration or institutionalization," and cite a series of cases that they describe as "distinguishing school attendance from *Youngberg* custody." (Dfts.' Br. 57–58, 60.) But these cases do not apply here. These cases stand for the proposition that school officials do not have the same "duty of care under the Fourteenth Amendment" for students attending school as prison officials do with respect to prisoners in their custody. *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011) (cited at Dfts.' Br. 58).[6] That is, school officials will not be held liable for, *e.g.*, failing to provide medical care for students or failing to protect students from injury, because "[e]ven when school attendance is mandatory, the parents—not the state—remain the student's primary caretakers." *Id.*

These cases do not address the question presented here: whether Due Process Clause scrutiny is triggered when State officials restrict the liberty of children and their families in a manner involving less than full "custody." The answer to that question is yes. Even limited detentions far less restrictive than

[6] *See also* Dfts.' Br. 57–58 (citing *Morrow v. Balaski*, 719 F.3d 160, 174–75 (3d Cir. 2013); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d, 729, 732 (8th Cir. 1993); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1371 (3d Cir. 1992)).

imprisonment give rise to due process protections. *See, e.g.*, *Eidson v. State of Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 635 (6th Cir. 2007) ("[P]arents have a fundamental liberty interest in the custody of their children," and "[e]ven a temporary deprivation of physical custody requires a hearing"); *Goss v. Lopez*, 419 U.S. 565, 575–76 (1975) (even "temporar[y]" exclusions from education trigger the Due Process Clause); *cf. Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) (momentary seizures trigger Fourth Amendment protections). That Plaintiffs may enjoy freedom of movement on weekends and during school vacations does not excuse Defendants from the obligation to justify the deprivation of liberty that exists during the more than six hours per day, 180 days per year that Plaintiffs must attend school.

Nor is it any answer that Plaintiffs and their parents "have several options" of schooling to choose from, "including homeschooling, private schools, charter schools, cyber schools and schools of choice." (Dfts.' Br. 57.) That some families enjoy the substantial wherewithal required to remove their children from arbitrary state confinement does not excuse the State's failure to provide the bare minimum of access to literacy for students whose families lack the means to find some alternative.

In sum, compulsory school attendance is consistent with the Due Process Clause—and not an arbitrary deprivation of liberty—only if it meets the

fundamental requirement that "each child" be provided "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." *Rodriguez*, 411 U.S. at 37. Indeed, as McMillin/Snyder must acknowledge, the "purposes" of compulsory education laws are the promotion of "educational value" and "learning." (Dfts.' Br. 58 (citing *Slocum v. Holton Bd. of Ed.*, 429 N.W.2d 607, 609–10 (Mich. App. 1988)).) Because Plaintiffs are compelled by State law to attend schools where these purposes are not fulfilled—schools where access to literacy is not provided—Defendants have violated Plaintiffs' due process rights.

III. The Equal Protection Clause Prohibits the State from Denying Plaintiffs Access to Literacy.

Plaintiffs' equal protection argument is straightforward. The Equal Protection Clause does not permit Defendants to compel Plaintiffs—a discrete group of Detroit schoolchildren, nearly all of whom are low-income children of color—to attend school and then provide these children, unlike other Michigan students, with no opportunity to attain literacy while there. The Equal Protection Clause does not permit Defendants to functionally exclude Detroit's schoolchildren from the State's system of education.

A. *Plyler* Controls This Case.

McMillin/Snyder first ask this Court to adopt a strict, formulaic approach to its equal protection analysis. (Dfts.' Br. 60.) But their rigid analysis runs contrary to *Plyler*. There, the Court explained:

> More is involved in these cases than the abstract question [of] whether [the government action at issue] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.…In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [this statute] can hardly be considered rational unless it furthers some *substantial goal* of the State.

457 U.S. at 223–24 (emphasis added). Recognizing the "fundamental role" education plays "in maintaining the fabric of our society," *id.* at 221, the Court concluded that a rigid approach—like the one McMillin/Snyder espouse here—is inappropriate. Rather, where the State "den[ies] a discrete group of innocent children the free public education that it offers other children residing within its borders," *id.* at 230, a heightened level of scrutiny is warranted.

McMillin/Snyder concede that *Plyler* imposes a heightened level of scrutiny when a State excludes a discrete group of children from its system of education. (Dfts.' Br. 66.) But they contend that *Plyler* does not apply to the facts alleged here. None of their arguments withstands scrutiny.

First, McMillin/Snyder take the untenable position that they "have not excluded [Plaintiffs] or anyone else…from Michigan's system of public schools." (Dfts.' Br. 61.) This argument ignores altogether the Complaint, which specifies in concrete factual detail the many ways in which Defendants have effectively excluded Plaintiffs from the access to literacy that other students in the State are provided. (Complaint, RE.1, PageID#10, 55–57, 76–80 (offering no curriculum); PageID#13–16, 78–80, 101–02 (no teachers); PageID#8–11, 56–57, 81–86 (no books or instructional materials); PageID#12–14, 80–81, 87, 90–92 (buildings without working HVAC); PageID#12–13, 57, 80–81, 88–89, 93 (buildings with vermin); PageID#12–13, 57, 87, 92–97 (buildings with dangerous conditions).) As the Complaint makes clear, Defendants may permit Plaintiffs to walk through the schoolhouse doors, but the conditions of those schools functionally excludes Plaintiffs from access to literacy. (Br. of Amicus Curiae Scholars, Entities and University Administrators at 9–16.)

McMillin/Snyder also argue that *Plyler* does not govern because that case supposedly involved "an absolute—that is, complete—denial of an education," whereas Plaintiffs allege "a 'functional' exclusion." (Dfts.' Br. 61.) But the law at issue in *Plyler* did not completely close the schoolhouse doors either; it provided that immigrant children failing to establish legal presence had to pay tuition, while other children did not. 457 U.S. at 206–08. Thus, that discrete class of children

did not face a "complete" denial of an education, but rather a functional burden on the opportunity to obtain its benefits.

So too here. Plaintiffs allege that they have been classified into Michigan schools that place a severe burden on their opportunity to attain literacy, an opportunity afforded to other children throughout the State. The conditions of Plaintiffs' schools leave no doubt that this case raises the same grave concerns present in *Plyler*: "the creation and perpetuation of a subclass of illiterates" that is deprived of "the means by which that group might raise the level of esteem in which it is held by the majority." *Id.* at 222, 230. If McMillin/Snyder believe otherwise, they will have their day at trial.

McMillin/Snyder assert that Plaintiffs' "educational choices"—such as homeschooling, charter schools, and cyber schools—"further remove[] this from the ambit of *Plyler*." (Dfts.' Br. 67 n.19.) The *Plyler* plaintiffs likewise could have "chosen" to be home-schooled or to pay tuition to attend public or private schools. Nonetheless, the burdening of the *Plyler* plaintiffs' opportunity to obtain a state-provided education—when other students could attend their local public schools free of charge—violated the Equal Protection Clause, just as Defendants' conduct does here.

McMillin/Snyder also argue that *Plyler* is limited to just those cases where children are penalized for their parents' misconduct—facts not present here.

(Dfts.' Br. 68.) However, the *Plyler* Court focused not on the *parents'* illegal activity, but rather on the *children's* innocence: the challenged action was "directed against *children*, and impose[d] its discriminatory burden on the basis of a legal characteristic over which the *children* can have little control." 457 U.S. at 220, 223 (emphasis added). The same holds true here: the Defendants' actions are directed against innocent children who have no control over their situation. Plaintiffs did not choose to attend schools that provide no access to literacy; Defendants forced this situation upon Plaintiffs by mismanaging the schools that State law compels them to attend. (*See* Br. of Amicus Curiae DPSCD at 9–20.) It makes little sense for the children in *Plyler* to enjoy more probing review—and protection under the Equal Protection Clause—and the children in Detroit to be precluded from it.

Finally, McMillin/Snyder try to dodge their constitutional obligations by asserting that there is no discriminatory state action alleged here, because Defendants "do not control the factors, including residential housing patterns, causing the imbalance" at issue. (Dfts.' Br. 61–62.) But Plaintiffs' claim—unequal access to literacy—arises from Defendants' conduct in supervising and operating the statewide educational system in general and Plaintiffs' schools in particular.

B. The Appropriate Comparator Class Is Other Students Compelled to Participate in the Statewide System of Education.

McMillin/Snyder ask this Court to narrow the comparator class to "other Michigan schools that have come under the control of emergency managers, been designated a Priority School or were governed by the EAA." (Dfts.' Br. 63.) But the proper comparator is all children who, like Plaintiffs, are compelled to participate in Michigan's statewide system of education. It makes no difference that other districts have not experienced the same "state intervention" that Detroit has. (*Id.* at 64.) *All* school districts in Michigan are subject to Defendants' supervision and intervention by operation of State law. Defendants' actions in taking over Plaintiffs' schools caused those schools to deteriorate. Plaintiffs have alleged that Defendants did not take actions with similarly harmful effect elsewhere in the State—and other schools remain in far superior condition. That inequality of treatment violates the Equal Protection Clause.[7]

McMillin/Snyder quote *Phillips v. Snyder*, 836 F.3d 707 (6th Cir. 2016), for the proposition that "'[i]ndividuals in jurisdictions without emergency managers are not relevant to the protected right.'" (Dfts.' Br. 64.) But *Phillips* rejected on

[7] Under McMillin/Snyder's logic, if Defendants took over and burned down Plaintiffs' schools but left other schools in Michigan standing, there would be no equal protection claim—because there would be no other schools that had experienced such "state intervention." (Dfts.' Br. 64.)

the merits an atypical voting rights claim, holding that a State may structure its subdivisions such that some local leaders are elected and others are appointed, so long as voters can participate equally in those subdivisions holding elections. 836 F.3d at 719. *Phillips* said nothing about comparator classes in other contexts, as McMillian/Snyder intimate. And here, the rule is clear: "[W]here [a] state has undertaken to provide [education]," it "must…[make it] available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *Plyler*, 457 U.S. at 230 (using as a comparator "other children residing within [the state's] borders").

C. Defendants' Actions Fail to Satisfy Any Level of Scrutiny.

McMillin/Snyder offer a single sentence in their efforts to satisfy heightened scrutiny under *Plyler*: Defendants' "system of educational financing and financial and academic oversight furthers the substantial state interest of educating children and protecting the financial solvency of school districts." (Dfts.' Br. 66.) But the State cannot promote an interest in "educating children" by denying a discrete group of children a basic education. And although the State may have an abstract interest in saving money, withholding minimally sufficient conditions and education from some students is not a rational—much less narrowly tailored—means of serving that interest. *Plyler*, 387 U.S. at 230 ("[W]hatever savings might be achieved by denying these children an education, they are wholly insubstantial

in light of the costs involved to these children, the State, and the Nation."). Indeed, as stated, Defendants' so-called financial solvency interest would be furthered by providing students even worse buildings and fewer teachers. Defendants cannot offer any *rational*, let alone persuasive, explanation for why they should be permitted to preclude a discrete group of schoolchildren in Detroit from the opportunity to access literacy—an opportunity which all other students in the state enjoy. Because Defendants can articulate *no state interest* that would justify the deprivation of access to literacy from a class of Michigan school children, their actions fail any level of scrutiny.

CONCLUSION

For the foregoing reasons, the decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, according to the word-count feature of Microsoft Word, this brief contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF filing system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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