Nos. 18-1855, 18-1871

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY B., et al.,
Plaintiffs-Appellants

v.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

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BRIEF OF THE STATES OF TENNESSEE, ARKANSAS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF STATE DEFENDANTS' PETITION FOR REHEARING EN BANC

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INTERESTS OF *AMICI CURIAE*

Amici States and their local subdivisions have long had primary responsibility for public education. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Among other benefits, state and local control "over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* at 742 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)). *Amici* States thus have a strong interest in ensuring that control over public education remains with the States and that the Constitution is interpreted in a manner that respects the federal-state balance in this important area. *Amici* file this brief under Federal Rule of Appellate Procedure 29(b)(2) to explain how the panel decision undermines these interests and threatens sweeping practical ramifications for States.

ARGUMENT

I. En Banc Review Is Needed to Protect Principles of Federalism and Separation of Powers.

The Supreme Court has cautioned that courts must "exercise the utmost care" in identifying implied fundamental rights, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992)), "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of judges, *id.* That principle has special force when recognition of an asserted liberty interest would "trench on the prerogatives of state and local" governments. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). To guard against judicial overreach, federal courts must give "wise appreciation [to] the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment); *cf. Rodriguez*, 411 U.S. at 44 ("[T]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action[.]" (internal quotation marks omitted)). But the panel majority instead gave those foundational doctrines short shrift. Its recognition of a new "fundamental right to a basic minimum education," slip op. 33, significantly alters the federal-state balance and usurps the policymaking authority of state and local officials.

A. The panel decision upsets the federal-state balance.

It is "difficult to imagine a case having a greater potential impact on our federal system" than one asking a federal court to interfere with States' authority over public education and discretionary spending. *Rodriguez*, 411 U.S. at 44. The federal Constitution reserves to the States and their political subdivisions authority over public education. *See* U.S. Const. amend. X; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The Supreme Court has affirmed time and again that state and local control over education is a "vital national tradition." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977); *see also, e.g.*, *Milliken*, 418 U.S. at 741-42 ("No single tradition in public education is more deeply rooted than local control over the operation of schools[.]"). Indeed, public education "is perhaps the most important function of state and local governments." *Rodriguez*, 411 U.S. at 29 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Many state constitutions expressly charge the legislature to provide for a system of public schools, *see, e.g.*, Ky. Const. § 183 (requiring legislature to "provide for an efficient system of common schools"); Jeffrey S. Sutton, *51 Imperfect Solutions* 27 (2018), and some of those provisions have been interpreted to provide a fundamental right to education, *see, e.g.*, *D.F. v. Codell*, 127 S.W.3d 571, 576 (Ky. 2003). State budgets also reflect education's importance. In 2019, over 35 percent of state general-fund spending went to elementary and secondary education. *See* Nat'l Ass'n of State

Budget Officers, *2019 State Expenditure Report* 12, http://tinyurl.com/nasbo2019report.

The panel's recognition of a federal constitutional right to a "basic minimum education," slip op. 33, deeply intrudes on States' sovereign authority over public education and upsets the constitutionally prescribed federal-state balance. Decisions of the most local nature that the Constitution assigns to the States—those concerning "the conditions of a school's facilities, the age of its textbooks, or the number of teachers in its classrooms," slip op. 58—will be wrested away from state and local officials and put in the hands of federal judges. As Justice Thomas has explained, when federal "courts seize complete control" over schools in this manner, "they strip state and local governments of one of their most important governmental responsibilities, and thus deny their existence as independent governmental entities." *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring).

The new right created by the panel majority will "disrupt state fiscal policies too." Slip op. 72 (Murphy, J., dissenting). States ordinarily have "wide discretion" to "make delicate tradeoffs about how much money to devote to education as compared to other priorities like healthcare, welfare, or police protection." *Id.* The panel decision will substantially interfere with those discretionary decisions, which lie at the core of state sovereignty. *See Horne v. Flores*, 557 U.S. 433, 448 (2009)

(noting that "[f]ederalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities").

The panel majority completely disregarded the federalism implications of its decision. It claimed that "nothing in [its] recognition" of a right to a basic minimum education "could alter the broad powers of the states under our federalist system" because each State will remain "free to fashion its own school system in any number of ways," as long as it "give[s] all students at least a fair shot at access to literacy." Slip op. 58. But of course, States will most certainly not be free to fashion their own school systems if federal judges get to decide whether those systems satisfy the panel majority's nebulous standard.

That the panel majority's decision thwarts rather than "maint[ains] . . . the principles of federalism," *Rodriguez*, 411 U.S. at 44 (internal quotation marks omitted), is further proof that the decision is grievously wrong. And it is further reason for this Court to grant en banc review. *See Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992, 1001 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc).

B. The panel decision usurps the policymaking authority of state and local officials.

The panel's recognition of a "positive right to a minimum education" will also "jumble our separation of powers." Slip op. 63 (Murphy, J., dissenting). Whether a school system gives students a "fair shot at access to literacy," slip op. 58, and, if

not, what must be done to remedy the problem, are policy questions. Under our constitutional design, the political branches of government, not federal judges, get to decide those questions. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519, 538 (2012) (explaining that the Constitution vests federal judges "with the authority to interpret the law," not to "make policy judgments"). Article III simply "cannot be understood to authorize the Federal Judiciary to take control of core state institutions" like schools "and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make." *Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J., concurring).

The panel decision undermines separation-of-powers principles in an especially pernicious way. As this case well illustrates, "public officials sometimes consent to, or refrain from vigorously opposing" institutional reform litigation so they can achieve through the judicial branch what they could not achieve through ordinary policymaking process and then bind even future lawmakers to those policy preferences. *Horne*, 557 U.S. at 448-49; *see also* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265, 1294-95 (noting that "[n]ominal defendants are sometimes happy to be sued and happier still to lose"). Change through the political process is difficult *by design*. Choices to "impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable" were "consciously made by men who had lived under

a form of government that permitted arbitrary governmental acts to go unchecked." *INS v. Chadha*, 462 U.S. 919, 959 (1983). By placing difficult and complex policy choices "outside the arena of public debate and legislative action," *Glucksberg*, 521 U.S. at 720, the panel decision frustrates this constitutional design and thus warrants en banc review.

II. The Panel Decision Will Have Sweeping Practical Implications for States.

The panel established a fundamental right to education that it claimed was "narrow in scope." Slip op. 56. But that ostensibly "narrow" right will radically transform the public education system. It will transfer authority to decide basic policy questions away from the state and local officials best suited to address them to unelected federal judges who are ill-suited for such a role. And it will mire States in unremitting and costly litigation without improving educational outcomes.

A. The federal judiciary is ill-suited to formulate education policy.

In *Rodriguez*, the Supreme Court recognized that experts are divided on "even the most basic questions" involving public education. 411 U.S. at 42. These questions involve "a myriad of 'intractable economic, social, and even philosophical problems,'" *id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970))—problems that "are not likely to be divined for all time even by the scholars who now so earnestly debate" them, *id.* at 43. Accordingly, federal courts' "lack of specialized knowledge and experience" in the area of education policy "counsels against

premature interference with the informed judgements made at state and local levels." *Id.* at 42. Because "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education," allowing policymaking to occur at the state and local level provides the best opportunity "for experimentation, innovation, and a healthy competition for educational excellence." *Id.* at 50.

The panel decision flouts the restraint counseled in *Rodriguez*. It elevates the federal judiciary as the supreme arbiter of these intractable questions despite its lack of specialized knowledge and despite the clear advantages afforded by state and local control. Although the panel demurred that it was too "difficult to define the exact limits of what constitutes a basic minimum education" and that courts could not "prescribe a specific educational outcome," slip op. 57, its decision will require courts to do exactly that. Federal judges, with no specialized knowledge or relevant practical experience, will decide whether "the quality and quantity" of a school system's "facilities, teaching, and educational materials" are "sufficient for students to plausibly attain literacy." Slip op. 57.

This purported "question of fact," *id.*, requires courts to wade into difficult and complex policy choices that have stymied experts for years. There is no reason to think that federal judges will be better equipped to make those policy choices than the state and local officials to whom public education has long been entrusted. To

the contrary, because "judges lack the on-the ground expertise and experience of school administrators," they should "resist 'substitut[ing] their own notions of sound educational policy for those of school authorities which they review.'" *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 686 (2010) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)).

The principle that the judiciary should not intrude on policy matters is longstanding. The Supreme Court has repeatedly reaffirmed in a variety of contexts that the judiciary's lack of expertise, training, information, and experience makes it ill-suited to handle sensitive policy questions. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (noting the political branches, not the courts, had the "responsibility and institutional capacity to weigh foreign-policy concerns"); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (emphasizing the need "to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve"); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (refusing to "engage the federal courts in an endless exercise of second-guessing" local policies and programs). The panel decision directly contravenes these precedents.

The "difficult problems of education policy presented by this case" should be left "where they have traditionally been—with the states and their people." Slip op. 63 (Murphy, J., dissenting). By presuming that the federal judiciary has "the

institutional ability to set effective educational, budgetary, or administrative policy," the panel decision "transform[s] the least dangerous branch into the most dangerous one." *Jenkins*, 515 U.S. at 132 (Thomas, J., concurring). This Court should grant en banc review to restore "the independence and dignity of the federal courts," *id.* at 133, and the federalism and separation-of-powers principles on which our constitutional structure rests.

B. Judicial oversight of state education systems will mire States in costly litigation without benefitting students.

If the panel decision is left intact, it will inevitably lead to protracted, expensive litigation that will do little, if anything, to help students in underperforming schools. The gravamen of plaintiffs' complaint is that the state legislature has not provided enough resources to the troubled Detroit school system. *See* slip op. 77 (Murphy, J, dissenting) ("All told, the plaintiffs seek to enforce the right to education that *Rodriguez* rejected simply by relabeling it."). Claims challenging the equity or adequacy of school funding have been litigated in state courts under state constitutions for decades. *See* Sutton, *supra*, at 30. But after years of costly litigation, many state courts have reached the conclusion that should have been obvious all along: Any solution to problems of educational policy must come from the political branches. *See, e.g.*, *Ohio v. Lewis*, 789 N.E.2d 195, 202 (Ohio 2003) (concluding, after more than a decade of litigation, that the "duty now lies with the General Assembly to remedy an educational system that [was] found by the

majority" in an earlier case to be unconstitutional); Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 Geo. Mason L. Rev. 301, 340-43 (2011) (discussing state-court decisions "grant[ing] strong deference—often absolute deference—to legislative decision-making power" because of separation-of-powers concerns). In cases where courts have attempted to fashion remedies, moreover, "the efficacy of successful lawsuits in bringing about desired social change remains contested." Michael Heise, *Litigated Learning and the Limits of the Law*, 57 Vand. L. Rev. 2417, 2449 (2004).

If state-court judges, who presumably are familiar with local policy and at least somewhat responsive to local needs and concerns, *see* Sutton, *supra*, at 36, have been unable to bring about the change desired by plaintiffs, it is highly unlikely that federal judges will fare better. To the contrary, attempts to impose a federal solution for quintessentially local problems will be even less successful and will "circumscribe or handicap the continued research and experimentation [that is] so vital to finding even partial solutions to educational problems." *Rodriguez*, 411 U.S. at 43.

The upshot of the panel decision, then, is that States will be subjected to years of costly litigation that impinges on federalism and separation-of-powers principles, with no appreciable benefit to students. State governments already face difficult questions about where to allocate funding among competing policy priorities, a

problem made more acute by the ongoing COVID-19 pandemic and resulting budget shortfalls. Forcing States to engage in expensive and interminable litigation over whether their education systems meet the panel's amorphous standard will only consume additional resources that undoubtedly would be better spent elsewhere.

CONCLUSION

This Court should grant rehearing en banc and hold that the Constitution does not guarantee a positive right to education.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the type-volume limitation of Fed. R. App. 26(b)(4) because it contains 2,594 words, excluding the parts enumerated by Fed. R. App. P. 32(f).

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/s/ Sarah K. Campbell
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May 13, 2020

CERTIFICATE OF SERVICE

I, Sarah K. Campbell, counsel for the State of Tennessee and a member of the Bar of this Court, certify that, on May 13, 2020, a copy of the Brief of the States of Tennessee, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, and Texas as *Amici Curiae* in Support of State Defendants' Petition for Rehearing En Banc was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

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