

*In The*  
**United States Court of Appeals**  
*For The Sixth Circuit*

**GARY B.; JESSIE K., a minor, by Yvette K., guardian ad litem;  
CHRISTOPHER 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 the  
MI Bd of Education; MICHELLE FECTEAU, member of the MI Bd of  
Ed; LUPE RAMOS-MONTIGNY, member of the MI Bd of Ed; PAMELA  
PUGH, member of the MI Bd of Ed; JUDITH PRITCHETT, member of  
the MI Bd of Ed; CASANDRA E. ULBRICH, member of the MI Bd of Ed;  
NIKKI SNYDER, member of the MI Bd of Ed; TIFFANY TILLEY,  
member of the MI Bd of Ed; 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 – Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN AT DETROIT**

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**BRIEF OF *AMICUS CURIAE* HOME SCHOOL LEGAL DEFENSE  
ASSOCIATION IN SUPPRORT OF PETITION FOR REHEARING *EN BANC***

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## **Corporate Disclosure Statement**

Amicus curiae Home School Legal Defense Association is a nonprofit corporation. It has no parent corporation, nor does any publicly held company own 10 percent or more of the amicus' stock.

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## **Interest of Amicus Curiae**

Home School Legal Defense Association (HSLDA) is a nonprofit advocacy organization whose mission is to protect and advance the right of parents to homeschool their children. With 83,000 member families in the United States, HSLDA is the world's largest homeschool advocacy organization. Within the states of the Sixth Circuit, HSLDA has 2,775 member families in Michigan; 3,880 in Ohio; 3,100 in Tennessee, and 2,185 in Kentucky.

Since its founding in 1983, HSLDA has been in the vanguard of removing legal barriers to homeschooling, state by state. Pursuing both litigation and legislation, HSLDA and a vibrant network of state and local homeschool organizations, together with an engaged grass roots, have moved homeschooling from being treated as illegal in many states to unquestionably legal in all 50 states and the District of Columbia. Homeschoolers in Michigan, for example, were prosecuted in those early days for the simple act of homeschooling without a state-issued teaching certificate. In 1993, in a case we handled, the Supreme Court of Michigan held that the teaching-certificate requirement violated the First and Fourteenth Amendments.<sup>1</sup> The Michigan Legislature amended state education

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<sup>1</sup> *People v. DeJonge*, 442 Mich. 266 (1993). This litigation depended on traditional negative rights as described in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

statutes to accommodate homeschooling shortly thereafter. Today, there are approximately two million children being privately homeschooled, accounting for around four percent of the school-age children in America.<sup>2</sup>

One consequence of the majority opinion, perhaps unintended, is the threat it poses to homeschool freedom in the four states within the Sixth Circuit. By virtue of its heretofore rejected positive-rights theory, the panel decision endorses a legal project that ideological opponents of homeschool freedom have advanced to outlaw or severely restrict homeschooling through federal civil-rights litigation. The panel opinion is a precedent-setting error of grave and exceptional public importance to homeschool freedom in the entire country.<sup>3</sup>

Accordingly, HSLDA joins the Michigan Legislature in urging this Court to grant the petition for rehearing en banc.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this

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<sup>2</sup> The 2016 National Center on Education Statistics found that 3.3 percent of all school-age children, or 1.69 million children, are homeschooled. *See* MEGAN MCQUIGGAN ET. AL., PARENT AND FAMILY INVOLVEMENT IN EDUCATION: RESULTS FROM THE NATIONAL HOUSEHOLD EDUCATION SURVEYS PROGRAM OF 2016: FIRST LOOK, 18 Tbl. 7 (2017). Extrapolating continued growth over the last four years leads to the round numbers cited above.

<sup>3</sup> Sixth Cir. I.O.P. 35(a); Fed. R. App. P. 35(b)(1)(B).

brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

## **Argument**

### **I. The decision threatens homeschool freedom.**

As the petition for rehearing and the dissenting opinion point out, the majority opinion’s creation of a new positive right is “a breathtaking attack on federalism that ‘will immerse the federal courts in a host of education disputes far outside [their] constitutionally assigned role to interpret legal texts.’”<sup>4</sup>

One of the education disputes that will undoubtedly arise in the federal district courts, if this opinion stands, is in challenging state homeschooling laws. How can we be so sure? Because ideological opponents of homeschool freedom have forthrightly said so.

In her newly minted law-review article, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, an influential Harvard Law Professor, Elizabeth Bartholet, calls for a dramatic change to state homeschooling laws.<sup>5</sup> “The new legal regime should impose a presumptive ban on homeschooling,

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<sup>4</sup> Michigan Senate and Michigan House of Representatives’ Petition for Rehearing En Banc at 1, *Gary B. et. al. v. Whitmer*, No. 18-1855 / 18-1871 (6th Cir. May 7, 2020).

<sup>5</sup> Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 *Ariz. L. Rev.* 1, 69 (2020). Professor Bartholet is the Morris Wasserstein Public Interest Professor of Law at Harvard



allowing an exception for parents who can satisfy a burden of justification. And it should impose significant restrictions on any homeschooling allowed under this exception.”<sup>6</sup>

She readily acknowledges that her preferred policy goals are not likely to succeed in state legislatures. “Given the current politics of homeschooling, legislatures are not likely to enact this new legal regime on their own initiative.”<sup>7</sup>

One of her proposed solutions to get around the people’s representatives in all 50 states is to pursue federal civil-rights litigation to advance a positive-rights theory, as was endorsed by the panel decision.

“Lawyers have recognized the potential in the Constitution for achieving educational reform,” she writes. “They are mounting challenges in different federal courts throughout the country with the goal of getting the Supreme Court to find that devastatingly inadequate public schools, and schools that fail to teach such core courses as government and civics, violate child rights to due process and equal protection.” Professor Bartholet concludes that cases like the one before this

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Law School, and Faculty Director of Harvard Law School's Child Advocacy Program.

<sup>6</sup> Bartholet, *supra* note 5, at 57.

<sup>7</sup> *Id.*

Court could be used to thwart the homeschooling laws of all 50 states. “A similar campaign could be mounted challenging the current homeschooling regime.”<sup>8</sup>

## II. Homeschool freedom has been a 50-state solution.

Each of the 50 states has its own approach to homeschooling law. In some states, homeschools are treated as small private schools.<sup>9</sup> Others have adopted specific homeschooling statutes.<sup>10</sup> Still others use administrative regulations.<sup>11</sup> This 50-state solution to education law generally, and homeschooling law specifically, has always been the norm in our federalist system of dual sovereignty.<sup>12</sup> Working within the democratic processes, homeschoolers have dramatically changed the face of education in America, one state at a time. Relying on the traditional understanding that negative rights limit the states in their coercive power to command public over private education, the 50 states have

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<sup>8</sup> *Id.* at 69.

<sup>9</sup> See MICH. COMP. LAWS § 380.1561 (2020); KY. REV. STAT. ANN. § 159.030 (2020).

<sup>10</sup> See TENN. CODE ANN. § 49-6-3050 (2020).

<sup>11</sup> See, e.g., OHIO ADMIN. CODE § 3301-34-01, *et seq* (2020). Ohio, like several other states, has more than one option. Parents possessing a bachelor’s degree in Ohio may choose to educate their children as a non-chartered, non-tax supported school. OHIO ADMIN. CODE § 3301-35-08 (2020).

<sup>12</sup> See *Alden v. Maine*, 27 U.S. 706, 714 (1999) (The Constitution reserves to the States “a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status”).

adopted laws that have made private homeschooling a viable option for more and more families.<sup>13</sup> And according to a recent survey taken after the onset of COVID-19, 10 percent of parents said they would choose homeschooling when asked, “If given the option, what type of school would you select in order to obtain the best education for your child?”<sup>14</sup>

As the dissent thoroughly details, the Supreme Court has consistently held that there is no positive federal right to public education that is enforceable against states in federal civil-rights litigation. The panel decision threatens to upset that framework, and with it, the 50-state solution to homeschooling laws. The point made by the petition for rehearing could apply to homeschooling laws under Professor Bartholet’s theory: “[I]nstead of a 50-state solution, the ruling here promotes a twelve-circuit solution, supported by lower-court judges who each decide for themselves what makes [a state homeschooling law] adequate in their particular federal district.”<sup>15</sup>

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<sup>13</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations”).

<sup>14</sup> EdChoice, Public opinion tracker, <https://edchoice.morningconsultintelligence.com>, (last visited May 11, 2020).

<sup>15</sup> Petition for Rehearing, *supra* note 4, at 15.

### III. The 50-state solution should not be upset by federal courts.

Professor Bartholet bases her goal of outlawing homeschooling on negative anecdotes that support her ideological presuppositions, rather than solid social science or educational research. Her law-review article was profiled last month in *Harvard Magazine*, which also promoted a now-postponed summit of likeminded intellectuals.<sup>16</sup> That magazine article “prompted a tsunami of critical responses.”<sup>17</sup> The magazine also drew more immediate scholarly scrutiny of the law-review article than it might have otherwise received. As one group of social scientists who study education and homeschooling wrote, “We expected it to be rigorous and fact-based but were sadly disappointed.”<sup>18</sup>

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<sup>16</sup> Erin O’Donnell, *The Risks of Homeschooling*, HARVARD MAGAZINE (May-June 2020), <https://harvardmagazine.com/2020/05/right-now-risks-homeschooling> (last visited May 11, 2020).

<sup>17</sup> Patrick J. Wolf, Matthew H. Lee & Angela R. Watson, *Harvard Law Professor’s Attack on Homeschooling Is a Flawed Failure. And Terribly Timed, Too* (May 5, 2020), <https://www.educationnext.org/harvard-law-professors-attack-on-homeschooling-flawed-failure-terribly-timed> (last visited May 11, 2020).

<sup>18</sup> See Wolf, et. al., *supra* note 18 (“We are empirical social scientists who have studied and written about homeschooling along with other education policy topics. . . . We seek here to move the discussion beyond the 1,000-word *Harvard Magazine* article that sparked such opprobrium by carefully considering Bartholet’s 80-page Arizona Law Review article that inspired the story. We expected it to be rigorous and fact-based but were sadly disappointed. . . . Upon reviewing Professor Bartholet’s article, we conclude that it suffers from contradictions, factual errors, statements of stereotyping, and a failure seriously to consider that the alternative to homeschooling—public schooling—shares the problems that she attributes to home education”).

David Sikkink, Associate Professor of Sociology at the University of Notre Dame, took issue with Professor Bartholet's use of the available research.<sup>19</sup> After reviewing the results of two influential surveys, the 2016 National Household Education Survey (NHES)<sup>20</sup> and the Cardus Education Survey (CES) of 2018,<sup>21</sup> he concluded:

Bartholet seems to take the “home” in homeschooling too seriously, as if their windows have prison bars. In actual practice, homeschoolers are “organized for instruction” in complex networks with educational organizations, civic, religious, and cultural organizations, informal personal and virtual support groups, friendship circles, extended family, and so on. The weight of bonding and bridging social capital matters for children, and the actual practice of homeschooling has many strengths on this score.

Traditional public schools continue to face imposing obstacles to achieving public purposes, especially as conceived by Bartholet. The question of schooling oversight remains, of course, but it would be short-sighted not to keep homeschooling and other creative schooling options in the mix, including the hybrid models that cross sector boundaries. In a COVID world, homeschooling may have something to teach us.<sup>22</sup>

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<sup>19</sup> David Sikkink, *The Social Realities of Homeschooling* (May 7, 2020), <https://ifstudies.org/blog/the-social-realities-of-homeschooling> (last visited on May 11, 2020).

<sup>20</sup> National Center for Education Statistics, *Homeschooling in the United States: Results from the 2012 and 2016 Parent and Family Involvement Survey* (2019), <https://nces.ed.gov/pubs2020/2020001.pdf> (last visited May 11, 2020).

<sup>21</sup> Marissa Casgrande, Ray Pennings & David Sikkink, *Cardus Education Survey 2018: Rethinking Public Education* (October 7, 2019), <https://www.cardus.ca/research/education/reports/rethinking-public-education/> (last visited May 11, 2020).

<sup>22</sup> Sikkink, *supra* note 19.

When presented with the facts about the educational and social attainments of homeschooled children, both pro and con, state legislatures have consistently moved in the direction of homeschool freedom over the last 40 years. Ideological opponents of homeschooling, who wish it to be outlawed, would short-circuit the democratic processes in all 50 states. They would instead rely on a single federal judge to achieve at a stroke what they could not accomplish by persuasion in the 50 legislatures. That legal project relies on the positive-rights legal theory espoused by the panel decision. The long-term project of outlawing homeschooling only needs one boundary-breaking case, like the one before this Court, to turn the tables on one of the most dynamic educational and social movements in recent American history.

### **Conclusion**

We are not unsympathetic to the plight of the public-school students in this case. But placing federal district-court judges in charge of state and local education policy is not the solution. What is more, the remedy expressed by the panel decision opens Pandora's box, threatening state sovereignty and individual liberties alike. Left unchecked, the panel decision would threaten the 50-state solution regarding homeschooling laws.

The petition for rehearing should be granted.

Respectfully submitted this 14th day of May, 2020.

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## **Certificate of Compliance**

### **Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 10 pages and 2,067 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: May 14, 2020

/s/ James R. Mason III  
*Counsel for Amicus Curiae*



### **Certificate of Filing and Service**

I hereby certify that on this 14th day of May, 2020, I caused this Amicus Brief of Home School Legal Defense Association to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all of the registered CM/ECF users.

Dated: May 14, 2020

/s/ James R. Mason III  
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