IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | |
|---|---|
| WILLIAM PENN SCHOOL DISTRICT, *et al*.,<br><br>*Petitioners*,<br><br>v.<br><br>PENNSYLVANIA DEPARTMENT OF EDUCATION, *et al*.,<br><br>*Respondents*. | No. 587 MD 2014 |

# PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS

Jennifer R. Clarke (Bar No. 49836)
Michael Churchill (Bar No. 04661)
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
Telephone: (215) 627-7100

Maura McInerney (Bar No. 71468)
David Lapp (Bar No. 209614)
Cheryl Kleiman (Bar No. 318043)
EDUCATION LAW CENTER
1315 Walnut St., Suite 400
Philadelphia, PA 19107
Telephone: (215) 238-6970

Aparna Joshi (*admitted pro hac vice*)
Matthew J. Sheehan (Bar No. 208600)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

Brad M. Elias (*admitted pro hac vice*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000

## TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

## TABLE OF CONTENTS
(continued)

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**

## TABLE OF AUTHORITIES
(continued)

**Page**

## TABLE OF AUTHORITIES
(continued)

**Page**

## TABLE OF AUTHORITIES
(continued)

**Page**

## TABLE OF AUTHORITIES
(continued)

**Page**

## TABLE OF AUTHORITIES
(continued)

**Page**

## TABLE OF AUTHORITIES
(continued)

**Page**



**Statutes**

## TABLE OF AUTHORITIES
(continued)

**Page**



**Constitutional Provisions**

## PRELIMINARY STATEMENT

Pennsylvania's public education system has defaulted on its obligations to our children. Hundreds of thousands of students in low-wealth communities across the state are being denied even a basic or adequate education, as measured by the state's own academic standards, because their school districts cannot afford to provide essential services or repair crumbling facilities. Worse, these school districts are powerless to remedy this shameful situation. Many of the communities they serve are already saddled with property tax rates far higher than those of wealthier areas yet raise only a fraction of the revenue. And even if they had the means to increase their tax burden to compensate for inadequate state appropriations, Pennsylvania law restricts these districts from raising more than a *de minimis* amount of additional revenue. As a result, the availability of an adequate education in Pennsylvania is now a function of community wealth rather than a constitutional guarantee.

Unmoved by this dire and deteriorating situation, Respondents contend that the growing chasm in education funding between low-wealth and high-wealth districts is inevitable—"an inherent component of a free market society"—and thus some communities will simply "have more money to spend on the necessities."[1]

---

[1] Legislative Respondents' Preliminary Objections to Petition, Dec. 10, 2014 ("Legis. Objs."), at 22. Unless otherwise noted, this Brief omits all internal quotation marks and citations and adds any emphasis reflected in quoted passages.

But that is precisely what the framers sought to prevent by enshrining the right to a "thorough and efficient system of public education" in the Pennsylvania Constitution. Through this clause they declared that public education is not a product that can be left to the whims of the free market, nor are Pennsylvania's children mere consumers who can be deprived of basic educational necessities based solely on the happenstance of their zip code. Public education is the cornerstone of our society, and it must be treated as such. Yet, as detailed in the Petition, Respondents have forsaken their obligation to "provide for the maintenance and support" of the public education system by adopting an irrational and inequitable funding scheme that drastically underfunds school districts across the state and precludes hundreds of thousands of students from meeting state standards. In doing so, they have violated two pillars of the Pennsylvania Constitution: Article III, Section 14 (the "Education Clause"), and Article III, Section 32 (the "Equal Protection Clause").

Respondents ask this Court to turn a blind eye to these constitutional violations and immediately dismiss the Petition as non-justiciable under the political-question doctrine. But Respondents' argument—based on the assumption that the Court lacks any means to evaluate Petitioners' claims and would therefore substitute its own judgment for the legislature's—is meritless. First, the Court is not being asked to make public-policy judgments or intrude on an area of law

committed exclusively to legislative self-monitoring. To the contrary, the Petition describes in detail how the legislature has already made the necessary policy judgments and defined exactly what constitutes a "thorough and efficient system of public education." While those policy judgments may change over time, that does not prevent the Court from determining whether the legislature has complied with its constitutional obligation to "provide for the maintenance and support" of the public education system that exists today. To do otherwise would subvert the Court's important role in protecting constitutional rights and permit Respondents to abandon their constitutional mandate without consequence.

Second, in contrast to the situation when earlier funding cases were decided—including *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999)—there are now judicially manageable standards for assessing Petitioners' claims. Over the past 15 years, the legislature has (i) adopted statewide academic standards defining an adequate education, (ii) implemented statewide assessments to measure and hold students and school districts accountable for meeting those standards, and (iii) commissioned a costing-out study to determine the actual costs of meeting those standards on a district-by-district basis. Thus, the Court now can rely on an objective set of benchmarks for assessing whether Respondents are providing sufficient funding to maintain and support a "thorough and efficient system of public education," as they have defined it.

The factual allegations here also distinguish this case from earlier funding challenges. This case is not based on an alleged failure to provide a single school district with sufficient funding—it is based on Respondents' failure to support the statewide ***system*** of public education that they have adopted and deemed necessary to prepare our children for success in today's world. The Petition also includes specific allegations—missing in earlier cases—showing (i) the vast disparities in education funding, (ii) the inability of low-wealth districts to provide basic educational resources, and (iii) the failure of the system as a whole to provide hundreds of thousands of students across the state with an adequate education. Under these circumstances, the Court is not only permitted to hear Petitioners' claims, but obligated to do so.

As a fallback argument, Respondents contend that Petitioners' equal protection claim should be dismissed because any disparities in education funding are justified by the state's interest in maintaining local control over education. But there is no state interest that can justify a funding scheme that denies a generation of students in low-wealth districts the opportunity to obtain even a basic or adequate education. And even if there were, the current funding scheme is not rationally related to advancing any such interest because rather than encourage local control, it denies low-wealth districts ***any control*** over the amount they spend on education. This is because many low-wealth districts cannot raise sufficient

funds locally to fill the gap between the state education funds they receive and the amount it costs to provide their students with basic educational resources and an opportunity to meet state standards. In other words, low-wealth districts spend everything they can, but still come up short. For these districts, the mantra of local control is a cruel illusion—not a rational basis for providing them with a fraction of the resources available to wealthier districts and turning the availability of an adequate education into an accident of geography.

## LEGAL STANDARD

Preliminary objections must be overruled unless "it is ***clear and free from doubt*** that the facts pled are legally insufficient to establish a right to relief." *Dotterer v. Sch. Dist. of Allentown*, 92 A.3d 875, 880 (Pa. Commw. Ct. 2014). "[W]here any doubt exists as to whether the preliminary objections should be sustained, that doubt should be resolved by a refusal to sustain them." *Pa. State Troopers Ass'n v. Commonwealth*, 606 A.2d 586, 587 (Pa. Commw. Ct. 1992). The "Court must consider as true all the well-pleaded material facts set forth in [the] petition for review and all reasonable inferences that may be drawn from those facts," *Werner v. Zazyczny*, 681 A.2d 1331, 1335 (Pa. 1996), and "no testimony or other evidence outside of the [petition] may be considered to dispose of the legal issues presented." *Cardella v. Public Sch. Emps. Ret. Bd.*, 827 A.2d 1277, 1282 (Pa. Commw. Ct. 2003). The merits of a claim are also not

considered—the inquiry is limited to whether any valid claim has been alleged. *Ins. Adjustment Bureau v. Ins. Comm'r for Pa.*, 485 A.2d 858, 860 (Pa. Commw. Ct. 1984). And if "any theory of law would support a claim, preliminary objections are not to be sustained." *Goodheart v. Thornburgh*, 522 A.2d 125, 128 (Pa. Commw. Ct. 1987), *on remand*, 545 A.2d 399 (Pa. Commw. Ct. 1988) (permitting equal protection claim to survive preliminary objections).

## ARGUMENT

### I. RESPONDENTS' OBJECTIONS TO PETITIONERS' FIRST CAUSE OF ACTION SHOULD BE OVERRULED.

Respondents raise two objections to Petitioners' first cause of action for violation of the Education Clause: (i) the claim is non-justiciable under the political-question doctrine; and (ii) the allegations in the Petition are insufficient to state a claim. Both of these objections are meritless and should be overruled.

#### A. This Court Has the Power to Decide Whether Respondents Have Satisfied Their Constitutional Obligations Under the Education Clause, Regardless of the Political-Question Doctrine.

##### 1. Petitioners' Claims Are Justiciable Under *Baker v. Carr*.

The Pennsylvania Constitution "should be construed, when possible, to permit . . . review of legislative action alleged to be unconstitutional." *Sweeney v. Tucker*, 375 A.2d 698, 711 (Pa. 1977). Respondents' assertion that the political-question doctrine nevertheless precludes this Court from exercising its authority to review the constitutionality of education-funding legislation must be rejected.

The political-question doctrine is a narrow exception to the governing rule and permits a court to abstain from reviewing the actions of another branch of government only where that branch has been granted the power to "self-monitor" the constitutionally of its actions. *See id*. at 706. The doctrine is "disfavored," however, when a "claim is made that individual liberties have been infringed." *Id*. at 709; *see also Robinson Twp. v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013) (finding need to enforce constitutional requirements "particularly acute where the interests or entitlements of individual citizens are at stake").

In deciding whether to abstain under the political-question doctrine, Pennsylvania courts consider the factors enunciated by the U.S. Supreme Court in *Baker v. Carr,* 369 U.S. 186 (1962):

> A textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving it; the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; and the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 217; *see also Robinson*, 83 A.3d at 928 (adopting federal political-question framework); *Sweeney*, 375 A.2d at 706 (Pa. 1977) (same). Here, none of the *Baker* factors supports judicial abstention.

### i. Nothing in the Text of the Pennsylvania Constitution Commits Education Funding to Legislative Self-Monitoring.

The first *Baker* factor supports abstention only in the rare circumstance where the text of the Pennsylvania Constitution entrusts the legislature with the power to self-monitor the constitutionality of its own actions. *See Robinson*, 83 A.3d at 928 (quoting *Sweeney*, 375 A.2d at 706) (finding that abstention under first *Baker* factor is appropriate only where the constitutional determination "has been entrusted ***exclusively*** and ***finally*** to the political branches of government for self-monitoring"); *Zemprelli v. Thornburgh*, 407 A.2d 102, 106 (Pa. Commw. Ct. 1979) (holding that constitutional provision requiring Governor to fill state vacancies did not support judicial abstention because it "contains no explicit suggestion of commitment in any exclusive sense for self-monitoring").[2]

That standard is not satisfied here because Respondents have identified ***no language*** in the Pennsylvania Constitution granting them such power. *See Robinson*, 83 A.3d at 929 (refusing to apply political-question doctrine in part because "Commonwealth [could] not identify any provision of the Constitution which grants it authority to adopt non-reviewable statutes"). While the Education

---

[2] By contrast, Pennsylvania courts will not intrude into the General Assembly's rulemaking process or internal procedures because Article II, Section 11, of the Pennsylvania Constitution provides that "each House ***shall have power*** to determine the rules of its proceedings." PA. CONST. art. II § 11; *Dintzis v. Hayden,* 606 A.2d 660, 662 (Pa. Commw. Ct. 1992) ("Article II Section 11 indicates a 'textually demonstrable constitutional commitment . . . to a coordinate political department.'").

Clause obligates the legislature to "provide for the maintenance and support of a thorough and efficient system of public education," it says nothing about whether the legislature has the power to self-monitor its compliance with that obligation. Absent such an express grant in the constitutional text, it is for the judiciary to interpret the Education Clause and decide whether the legislature is satisfying its constitutional obligations. *See id.*; *Zemprelli*, 407 A.2d at 106; *Thornburgh v. Lewis*, 470 A.2d 952, 955 (Pa. 1983) ("It is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts. That our role may not extend to the ultimate carrying out of those acts does not reflect upon our capacity to determine the requirements of the law.").

Pennsylvania courts have repeatedly recognized their right to intervene if the legislature fails to fulfill those obligations. *See Wilkinsburg Educ. Ass'n v. Sch. Dist. of Wilkinsburg*, 667 A.2d 5, 13 (Pa. 1995) ("[T]his court has consistently examined problems related to schools in the context of [the] fundamental right [to education]."); *Sch. Dist. of Phila. v. Twer*, 447 A.2d 222, 225 (Pa. 1982) ("[A]ny interpretation of legislative pronouncements relating to the public educational system must be reviewed in context with the General Assembly's responsibility to provide for a 'thorough and efficient system' for the benefit of our youth."); *Ehret v. Sch. Dist. of Borough of Kulpmont*, 5 A.2d 188, 190 (Pa. 1939) (judiciary can

interfere with legislature's control of school system as long as "constitutional limitations" so require); *Teachers' Tenure Act Cases*, 197 A. 344, 352 (Pa. 1938) (judiciary can determine whether legislation "has a reasonable relation to the purpose" of the Education Clause). Thus, there is no basis in the text of the Pennsylvania Constitution or the relevant precedent to conclude that the judiciary is barred from reviewing legislative action taken under the Education Clause.

### ii. Judicially Discoverable and Manageable Standards Exist for Resolving Education-Funding Challenges.

The second *Baker* factor supports abstention only where there is a lack of judicially discoverable and manageable standards for resolving the petitioners' claims. *See* 369 U.S. at 217. The need for such standards derives from the principle that judicial action must be governed by standards and rules that produce case law that is consistent, principled, reasoned, and rational. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (Scalia, J.) (plurality opinion). Respondents' position here that there are no judicially manageable standards for resolving Petitioners' Education Clause claim is demonstrably false. (*See* Legis. Br. 24–30; Exec. Br. 10–11, 14–15.[3]) As the Petition describes in detail, legislation and regulations enacted over the past 15 years have defined both the "inputs" and

[3] Legislative Respondents' Brief in Support of Preliminary Objections, Jan. 16, 2015 ("Legis. Br."); Brief in Support of Executive Branch Respondents' Preliminary Objections to the Petition for Review, Jan. 16, 2015 ("Exec. Br.").

"outputs" of a "thorough and efficient system of public education" and provided an objective and manageable basis to evaluate the adequacy of education funding.

First, the Pennsylvania School Code defines specific inputs of a thorough and efficient system of public education by mandating that school districts provide certain basic services and resources to students. (*See* Pet. ¶¶ 116–18.[4]) The School Code requires, for example, that each school district have sufficient numbers of qualified professional employees, substitutes, and temporary professional employees to enforce the curriculum requirements set forth in Chapter Four of the Pennsylvania Code. *See* 24 P.S. § 11-1106 (2015); (Pet. ¶ 117). Each school district must also provide: (i) active learning experiences for every grade level in the arts and physical education, (ii) programs for English-language learners, (iii) developmental services, (iv) handicap and other disability services and accommodations, and (v) special education. *See, e.g.*, 22 PA. CODE §§ 4.21–4.23, 4.25–4.28, 12.41, 15.1, 16.2 (2015); (Pet. ¶ 118). High school students must also be provided instruction in world languages, technology, and vocational training. 22 PA. CODE § 4.23(d); (Pet. ¶ 118). The Court can therefore ***look to whether schools have sufficient funds to hire qualified employees and provide statutorily required programs and services*** to determine if Respondents are satisfying their

[4] Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief, Nov. 10, 2014 ("Pet.").

constitutional obligation to support a "thorough and efficient system of public education." (*See* Pet. ¶¶ 171–229, 247–48.) As described in the Petition, school districts across the Commonwealth are unable to provide those basic programs and services under the current funding scheme, and students are being denied an adequate education as a result. (Pet. ¶¶ 169–299.)

Second, the statewide academic standards adopted since 1999 provide the Court with objective benchmarks regarding the outputs of a thorough and efficient system of public education—*i.e.*, what students should be learning at each grade level to prepare them to succeed in today's society.[5] (*See* Pet. ¶¶ 98–106.) The accompanying statewide assessments, including the Keystone Exams, are designed to determine whether students and school districts are meeting those standards and whether the public education system is functioning properly. (*See* Pet. ¶¶ 98, 107–119.) The Court can therefore ***look to student test scores*** to determine whether school districts are providing students an opportunity to meet state standards and receive an adequate education. (*See* Pet. ¶¶ 153–68); *see Abbeville v. South Carolina*, 767 S.E.2d 157, 168 (S.C. 2014) (considering test scores a "substantive measure of student performance in assessing whether the inputs afford students their mandated opportunity"). As described in the Petition, those test scores show

[5] These standards are not vague or unstructured; they span hundreds of pages and detail exactly what students are expected to know and accomplish by the end of select grade levels. *See* 22 PA. CODE app. § 4 A-2–E (2015); (Pet. ¶ 106.)

that the public education system is failing hundreds of thousands of students who are unable to meet state standards and, therefore, unlikely to graduate high school. (Pet. ¶¶ 154–168.)

While Respondents argue that the Pennsylvania Constitution does not require them to provide all students with an education that satisfies "current" academic standards (Legis. Br. 26), they miss the point articulated by the Commonwealth Court in *Danson v. Casey*, 382 A.2d 1238 (Pa. Commw. Ct. 1978): The School Code and other legislative enactments "establish a thorough and efficient system of public education, and every child has a right thereto." *Id.* at 1245. In other words, by adopting a standards-based education system and mandating that students receive certain educational resources, Respondents themselves have defined what currently constitutes a "through and efficient system of public education." It does not matter that these requirements are of "recent vintage" (Legis. Br. 26)—they are what legislators have decided are necessary to meet the Commonwealth's needs. *See Teachers' Tenure Act Cases*, 197 A. at 352 ("[T]he cause of public education . . . must evolute or retrograde with succeeding generations as the times prescribe."). The Pennsylvania Constitution obligates Respondents to provide sufficient financial resources to maintain and support the system of education they have currently adopted to prepare students for success in

***today's*** world—regardless of whether existing standards and regulations may change in the future.

Third, the General Assembly commissioned the 2007 costing-out study to objectively determine, based on reliable and accepted scientific methods, "the basic cost per pupil to provide an education that will permit a student to meet the State's academic standards and assessments." 24 P.S. § 25-2599.3(a) (2014); (Pet. ¶¶ 120–25.) Calculating the necessary funding by district, the study concluded that the vast majority of districts had significant spending shortfalls. (*See* Pet. ¶¶ 126–28.) It also concluded that the revenue needed to close the funding gaps must come from the state—to reduce the inequities caused by the current heavy reliance on local sources. (*Id*.) That the study was conducted eight years ago does not make it obsolete; the cost of educating students has only risen since 2007, further widening the gap between the funds available to school districts and the funds they need. (*See* Pet. ¶¶ 135–42, 151–52.) Thus, the Court can ***look to the costing-out study*** as a benchmark for determining whether the current education-funding scheme is denying students an opportunity to obtain an adequate education, as defined by current state standards. (*See* Pet. ¶¶ 120–29, 152); *see also Montoy v. Kansas*, 102 P.3d 1160, 1164 (Kan. 2005) (finding Kansas's costing-out study, prepared by same consultants as Pennsylvania's, to be "substantial competent

evidence . . . establishing that 'suitable' education, as that term is defined by the legislature, is not being provided").

Petitioners are not asking the Court to order the legislature to fund education at the precise levels identified in the costing-out study or to dictate how the legislature fulfills its constitutional obligation. (*See* Pet. ¶¶ 312–24.) Nor are Petitioners seeking uniform funding across school districts. (*See* Legis. Br. 22.) Petitioners ***are*** asking the Court to declare the existing funding scheme unconstitutional because, as evidenced by Respondents' own study, it fails to reasonably support the public education system that Respondents adopted.

### iii. Resolving Petitioners' Claims Will Not Require Public-Policy Judgments.

The third *Baker* factor supports abstention only where it is "impossib[le]" to decide the petitioners' claims without making an initial public-policy determination of the kind reserved for the legislature. 369 U.S. at 217. Respondents' assertion here that adjudicating Petitioners' Education Clause claim would require this Court to make public-policy judgments is completely unfounded. (*See* Legis. Br. 19–21, 23–24; *see also* Exec. Br. 10.) Petitioners seek only to hold Respondents accountable to financially supporting the system that ***they independently created and mandated***. Deciding Petitioners' claims will not, for example, require the Court to make a policy decision on what qualifies as an adequate education—the legislature has already established statewide academic

standards and imposed consequences on students and school districts that fall short. (*See* Pet. ¶¶ 98–115.) Nor will it require the Court to articulate maximum class sizes, textbook requirements, or appropriate course offerings. *See Conn. Coal. for Justice in Educ. v. Rell*, 990 A.2d 206, 224 (Conn. 2010) (finding funding-scheme challenge justiciable in part because court was not required to articulate policies such as "maximum class sizes or minimal technical specifications for classroom computers"). While Respondents contend that they are already providing sufficient funding to meet their constitutional mandate (s*ee* Legis. Br. 44–45; Exec. Br. 7, 15–16), their opinion is irrelevant: The "political question doctrine does not exist to remove a question of law from the Judiciary's purview merely because another branch has stated its own opinion of the salient legal issue." *Hosp. & Healthsys. Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 598 (Pa. 2013).

The Supreme Court's decision in *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa. 1971), is instructive. There, the Supreme Court addressed the power of the judiciary to inquire into whether the executive and legislative branches were adequately funding the courts. *See id.* at 195. In rejecting the argument that court funding is a public-policy issue falling within the exclusive purview of the legislature, the Supreme Court reasoned that "the Judiciary must possess the inherent power to determine and compel payment of those sums of money which

are ***reasonable and necessary*** to carry out its ***mandated responsibilities***, and its powers and duties to administer justice, if it is to be in reality a co-equal, independent Branch of our Government." *Id*. at 196. The Supreme Court recognized, of course, that it "does not have unlimited power to obtain from the City whatever sums it would like or believes it needs for its proper functioning or adequate administration. Its wants and needs must be proved by it to be '***reasonably necessary***' for its proper functioning and administration, and this is ***always subject to Court review***." *Id*. at 199. Such review is necessary because the "[l]egislature has the power of life and death over all the Courts and over the entire Judicial system," and "[u]nless the [l]egislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated."[6] *Id*.

The logic of *Tate* applies equally here. Just as the legislature must provide the financial support "reasonably necessary" for the proper functioning of the court system that it established under Article V, Section I, of the Pennsylvania Constitution, the legislature must provide the financial support "reasonably necessary" for the proper functioning of the "thorough and efficient system of

---

[6] Subsequent decisions have repeatedly affirmed that challenges to judicial funding are justiciable. *See Cnty. of Allegheny v. Commonwealth*, 534 A.2d 760 (Pa. 1987) (holding that statutory scheme for county funding of common pleas courts violated constitutional provision requiring single unified judicial system); *Kremer v. Barbieri*, 411 A.2d 558 (Pa. Commw. Ct. 1980) (en banc) (per curiam).

public education" that it established under the Education Clause. *See Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979) (quoting *Teachers' Tenure Act Cases*, 197 A. at 352) ("As long as the legislative scheme for financing public education 'has a reasonable relation' to '[providing] for the maintenance and support of a thorough and efficient system of public schools,' the General Assembly has fulfilled its constitutional duty to the public school students."). Judicial review of the education-funding scheme is also required because the legislature has the same "power of life and death" over the schools that it has over the courts. *Tate*, 274 A.2d at 199. Indeed, this lawsuit arises from legislative decisions denying many school districts the resources necessary to perform their most basic (and mandated) functions. (*See* Pet. ¶¶ 120–29, 135–289.) If this Court does not have the power to intervene under even these circumstances, then the Education Clause will be rendered meaningless.

#### iv. Respondents Concede That None of the Other *Baker* Factors Is Relevant.

Respondents have not raised any of the remaining *Baker* factors as a basis to preclude judicial review of Pennsylvania's education-funding scheme. *See Thornburgh*, 470 A.2d at 955–57 (considering only those *Baker* factors briefed by respondents). Nor have previous courts found those factors relevant in education-funding cases. *See, e.g.*, *Marrero*, 739 A.2d at 113. Pennsylvania courts generally do not give those factors much weight. *See Robinson*, 83 A.3d at 928–29

(spending little to no time on the remaining factors); *see also Hosp. & Healthsys.*, 77 A.3d at 598 & n.12 (same); *Marrero*, 739 A.2d at 113 (same).

In any event, none of the remaining factors is present in this matter. The Court can resolve Petitioners' claims without "disrespecting" the legislative branch or creating "potential embarrassment from multifarious announcements on one question." If that were the case, the judiciary could never rule on the constitutionality of legislative or executive action. *See Hosp. & Healthsys.*, 77 A.3d at 598 n.12 ("[A] judicial finding that Congress has passed an unconstitutional law . . . cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge . . . would be impermissible."). Nor do Petitioners' claims present an unusual need for the Court's unquestioning adherence to a political decision already made. To the contrary, there is an urgent need for this Court to enforce Respondents' constitutional mandate.

### v. Judicial Abstention Is Not Warranted Because Education Is a Fundamental Right.

Even if the *Baker* factors indicate that an issue might warrant judicial abstention, the inquiry does not end. Because "the legitimacy of the abstention is dependent upon the situation presented," the Court must consider the Petition's allegations and determine whether deference to a coequal branch of government is warranted given the specific rights at issue. *Jubelirer v. Singel*, 638 A.2d 352, 358

(Pa. Commw. Ct. 1994). Here, abstention is not warranted because public education is a fundamental right guaranteed by the Pennsylvania Constitution. *See Wilkinsburg*, 667 A.2d at 12–13 ("[P]ublic education in Pennsylvania is a fundamental right . . . [and] this court has consistently examined problems related to schools in the context of that fundamental right."). As the Supreme Court observed in *Gondelman v. Commonwealth*, 554 A.2d 896, 899 (Pa. 1989), "[a]ny concern for a functional separation of powers is, of course, overshadowed if the [statute] impinges upon the exercise of a fundamental right." This Court reached a similar conclusion in *Jubelirer v. Singel*, finding that though the first *Baker* factor was satisfied, "we will not abdicate our responsibility to insure that government functions within the bounds of constitutional prescription . . . under the guise of deference to a co-equal branch of government." 638 A.2d at 358; *see also Pa. AFL-CIO ex rel. George v. Commonwealth*, 691 A.2d 1023, 1033 (Pa. Commw. Ct. 1997).

While it is well established that the courts should not intrude in the affairs of another branch of government, assessing whether Respondents have complied with their constitutional mandate is not a usurpation of power or an intrusion into legislative affairs. If it is for the legislature to determine what constitutes a "thorough and efficient system of public education" in today's world, it is for the courts to determine whether the legislature has satisfied its constitutional

obligation to implement a funding scheme that is reasonably related to supporting that system. *See Danson*, 399 A.2d at 367. Absent such oversight by the courts, education would cease to be a right, much less a fundamental one, and the legislature's duty could be avoided without consequence, no matter how extreme the dereliction.

That is what is happening right now. The Petition documents how Pennsylvania's public education system is failing not only the Individual Petitioners but children all across the state. (*See* Pet. ¶¶ 23–74, 153–299.) It also documents how the perilously underfunded system has left many school districts unable to provide even basic educational resources mandated by the School Code, much less the resources necessary for students to meet state academic standards. (See Pet. ¶¶ 16–22, 152–299.) As a result, hundreds of thousands of children are currently unable to pass the Keystone Exams and thus at risk of not graduating high school. By failing to provide the funding necessary to fix this dysfunctional system—even after their own costing-out study confirmed the extent of the problem—Respondents have violated their constitutional obligations under the Education Clause and infringed on the fundamental right of Pennsylvania's children to "a thorough and efficient system of public education," as defined by Respondents themselves. This Court should not ignore this clear constitutional violation or abandon its duty to "insure that government functions within the

bounds of constitutional prescription." *Jubelirer*, 638 A.2d at 358; *accord Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002) ("We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.").

### 2. Previous Education-Funding Cases Do Not Support Judicial Abstention Under These Circumstances.

Respondents largely avoid the *Baker* analysis and instead rely on education funding cases that were decided decades ago. But those cases are legally and factually distinguishable, and none supports abstention under the circumstances presented here.

#### i. The Supreme Court Reached the Merits of an Education-Funding Challenge in *Danson*.

Although Respondents repeatedly cite *Danson*, that decision does not support their non-justiciability argument. (*See, e.g.*, Legis. Br. 10–14; Exec. Br. 10–11.) In *Danson*, the Supreme Court ***did not abstain*** from hearing an education-funding challenge on political-question grounds. *See* 399 A.2d at 363. To the contrary, without mentioning the political-question doctrine or the *Baker* factors, the Supreme Court dismissed the petition for lack of standing and failure to state a claim.[7] *See id*. The Supreme Court found that the petitioners failed to allege "any

[7] The respondents-appellees in *Danson* challenged only the School District of Philadelphia's standing. *See* 399 A.2d at 363 ("Appellees filed preliminary objections . . . on the grounds that appellants had failed to state a cause of action and that the School District of Philadelphia was

legal injury as a result of the operation of the state financing scheme" because they did not allege that any Philadelphia student was "being denied an 'adequate,' 'minimum,' or 'basic' education." *Id*. at 365. Instead, the petitioners alleged only that the lack of uniformity in Pennsylvania's education funding forced the School District of Philadelphia to offer a "truncated and uniquely limited program of educational services" that was less than a "normal" program. *Id*. The Supreme Court rejected that argument, finding that there is no "constitutionally required 'normal' program of educational services" in Pennsylvania and that the legislature must be free "to adopt a changing program to keep abreast of educational advances." *Id*. at 366. It also rejected the petitioners' call for uniformity in funding, finding that the framers "took notice of the right of local communities to utilize local tax revenues to expand educational programs subsidized by the state." *Id*. at 367.

By contrast, the Petition here does not seek to enforce a constitutional right to a "normal" program of education services or uniformity in education funding. Rather, it alleges a ***systemic failure*** to provide students with an ***adequate*** education, as defined by Respondents. (*See* Pet. ¶¶ 23–74, 135–299.) It further

---

without standing."). Respondents here, by contrast, have not challenged the standing of any Petitioner. In any event, such an objection would be futile given that the Petitioner School Districts allege that they are being held to state standards and face state-imposed consequences for failing to meet them, even as they are being denied the financial support necessary to do so. (*See* Pet. ¶¶ 179–261.)

alleges that the current education-funding scheme bears no relation, much less a "reasonable relation," to supporting the system of public education that Respondents have implemented by statute and deemed necessary to educate today's youth. (Pet. ¶¶ 290–99); *see Danson,* 399 A.2d at 367 (requiring funding scheme to have "reasonable relation" to supporting public education system). These distinctions are not merely "creative drafting"—as Respondents argue—but are fundamentally different allegations from those in *Danson*, and more than sufficient to state a claim for relief. (*See* Legis. Br. 2.)

Moreover, unlike the draconian remedy sought in *Danson*—which would have restrained the legislature from making payments to any other school district until the Philadelphia schools received sufficient funds to provide a "normal" program of services—Petitioners here seek a declaration that the current funding scheme is unconstitutional. Respondents would then have to develop a funding scheme that falls within constitutional bounds. The Court need not "inquire into the reason, wisdom, or expediency" of the legislature's policy choices for what constitutes an adequate education. *Teachers' Tenure Act Cases*, 197 A. at 352; (*see* Legis. Br. 11). Nor is the Court being asked to make those policy choices permanent, impose uniformity across school districts, or eliminate local control of education. (Legis. Br. 13, 22, 27–29, 33–40; Exec. Br. 10–11, 14–15.) Consistent

with *Danson*, the Court is being asked only to perform a fundamental duty: to keep the legislature functioning within constitutional bounds.

### ii. The Supreme Court Decided *Marrero* Before the General Assembly Adopted a Standards-Based Education System.

Respondents' reliance on *Marrero* is similarly misplaced. (Legis. Br. 10, 14–16; Exec. Br. 11–12.) While the Supreme Court abstained from hearing an education-funding challenge in *Marrero* on political-question grounds, it did so under different legal and factual circumstances and did not foreclose the possibility that future funding challenges could be successful if the legislature failed to satisfy its constitutional mandate.

The petitioners in *Marrero* alleged that the respondents did "not provide the School District [of Philadelphia] with adequate funding . . . and its students [were] thereby deprived of an adequate education." *Marrero v. Commonwealth*, 709 A.2d 956, 958 (Pa. Commw. Ct. 1998), *aff'd*, 739 A.2d 110 (Pa. 1999). The Commonwealth Court sustained the respondents' preliminary objection under the political-question doctrine, holding that it could not judicially define what constitutes an adequate education and that "it would be impossible to resolve the claims without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion." *Id.* at 966. The Supreme Court affirmed, finding that it, too, was "unable to judicially define what constitutes an 'adequate'

education or what funds are 'adequate' to support such a program." *Marrero,* 739 A.2d. at 113–14. In doing so, however, the Supreme Court did not suggest that every education-funding challenge would be non-justiciable. Instead, it quoted with approval the standard set forth in *Danson* that "the legislative scheme for financing public education" must have a "reasonable relation" to "[providing] for the maintenance and support of a thorough and efficient system of public schools." *Id*. at 113 (modification in original).[8]

Petitioners' claims here meet that standard and are readily distinguishable from those found non-justiciable in *Marrero*. First, unlike in *Marrero*, Petitioners here are not asking the Court to define as a matter of public policy what constitutes an "adequate" education. Respondents have already done this. (*See* Pet. ¶¶ 95–119.) In the 15 years since *Marrero*, the legislature has made important public-policy decisions on the inputs and outputs of a "thorough and efficient system of public education." The School Code mandates that public schools provide students with a variety of educational resources, as described above. (Pet. ¶¶ 118.) The legislature has also adopted detailed academic standards defining the subject matter that students should be learning at each grade level. (*Id*. ¶¶ 98–106.) And it has adopted statewide assessments to hold students accountable for achieving those

[8] For the reasons set forth herein, Petitioners believe that a decision to hear this case is consistent with *Marrero*. To the extent the Court disagrees, Petitioners ask that *Marrero* be overturned and expressly preserve that argument for appeal.

standards and school districts accountable for providing an adequate education. (*Id*. ¶¶ 107–15.) While all of these public-policy decisions are subject to revision by future legislatures, they nonetheless constitute the legislature's current pronouncement of what a "thorough and efficient system of public education" entails—a pronouncement that did not exist when *Marrero* was decided in 1999.

Second, the legislative enactments since *Marrero* have created judicially manageable standards for determining whether the legislature is satisfying its constitutional obligation to provide sufficient funding to support the public education system. As described in Section I.A.1.ii above, the Court can readily determine whether school districts are receiving sufficient funds by looking to (i) their ability to afford basic educational resources mandated by the School Code, (ii) the ability of their students to meet state academic standards, and (iii) the costing-out study. (*See* Pet ¶¶ 95–261.) As the Petition makes clear, there is overwhelming evidence that current funding levels are insufficient. (*See* Pet. ¶¶ 169–261.) Petitioner Shenandoah Valley School District, for example, has been forced to cut art, physical education, music, and after-school tutoring, all while student performance on the Keystone Exams predicts a high-school graduate rate of just ***36%*** in 2017—and that poor prognosis is the ***highest*** among all Petitioner School Districts. (Pet. ¶¶ 156, 196, 224.) Given these and other reliable data

points for assessing the adequacy of education funding, *Marrero* is consistent with hearing Petitioners' claims.[9]

Third, Petitioners are not asking this Court to recognize or enforce an individual constitutional right to a "particular level or quality of education." *Marrero,* 739 A.2d. at 112. Petitioners are seeking to enforce the Education Clause's unambiguous mandate that the legislature "provide for the ***maintenance*** and ***support*** of a thorough and efficient ***system*** of public education." PA. CONST. art. III, § 14. Both *Danson* and *Marrero* authorize such an action when the legislative funding scheme lacks a "reasonable relation" to maintaining and supporting the public education system. *See Marrero,* 739 A.2d. at 113; *Danson*, 399 A.2d at 367. The allegations in the Petition easily satisfy that standard, as they show that Pennsylvania's current funding scheme is irrational and not reasonably calculated to provide even basic educational resources to students in many parts of the Commonwealth or give them an opportunity to meet state standards. (*See* Pet. ¶¶ 290–99.)

---

[9] While Respondents also cite *Pa. Ass'n of Rural & Small Schs. v. Ridge*, No. 11. M.D. 1991, slip op. (Pa. Commw. Ct. July 9, 1998) (attached as Exhibit A to Legis. Br.), *aff'd*, 737 A.2d 246 (Pa. 1999), the Court there merely applied *Marrero* to an Education Clause claim brought by a different association of schools. Judge Pellegrini held that he was "constrained to follow *Marrero*" and dismiss the petitioners' claims as non-justiciable, even though he "believe[d] a challenge to the constitutionality of the current educational funding scheme is not a political question and is justiciable." *Id.* at 13, 109.

### iii. The Supreme Court Reached the Merits of a Constitutional Challenge in the *Teachers' Tenure Act Cases*.

The *Teachers' Tenure Act Cases*, 197 A. 344 (Pa. 1938), also show that Petitioners' claims are justiciable. There, the Supreme Court did not mention the political-question doctrine and decided the underlying constitutional issues ***without abstaining***. *Id*. at 355 ("The Act does not violate the sections of the Constitution referred to."). While the Court observed that "everything directly related to the maintenance of a 'thorough and efficient system of public schools,' must at all times be subject to future legislative control" such that "[o]ne legislature cannot bind the hands of a subsequent one," it did not suggest that school-funding legislation is immune from constitutional challenge. *Id*. at 352. Indeed, the language partially quoted by Respondents shows that the Supreme Court contemplated a role for itself and believed there is a constitutional line over which the legislature may not step:

> In considering laws relating to the public school system, courts will not inquire into the reason, wisdom or expediency of the legislative policy with regard to education, but whether the legislation has a ***reasonable relation*** to the purpose expressed in Article X, Section 1, and whether ***the fruits or effects*** of such legislation impinge the Article by circumscribing it, or ***abridging its exercise*** by future legislatures within the field of "a thorough and efficient system of public schools."

*Id*.

Here, Petitioners do not seek to "bind the hands" of future legislatures or institute the legislature's current articulation of a "thorough and efficient system of public education" as a fixed constitutional requirement. Petitioners seek only to enforce the legislature's constitutional obligation to provide sufficient funding for the "maintenance and support" of the public education system that the legislature has prescribed through the School Code and other enactments, all of which may evolve over time.[10]

### 3. Recent Commonwealth Court Decisions Support a Finding of Justiciability.

Despite contending that Petitioners' arguments in this case are "cut from the same cloth as those rejected" in recent Commonwealth Court decisions (*see* Legis. Br. 19–21), Respondents cite only inapposite cases. In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 2015 WL 79773 (Pa. Commw. Ct. Jan. 7, 2015), the court held that it "need not . . . reach the question of whether the adequacy of funding . . . is justiciable" because there was "no evidence that the current funding . . . is inadequate." *Id.* at *22. Here, in contrast, the evidence is overwhelming. The Petition explains in detail how school districts

---

[10] Respondents also rely on *Commonwealth v. Hartman*, 17 Pa. 118 (Pa. 1851) (Legis. Br. 4, 19, 22)—a case decided 22 years before the current Education Clause was added to the Constitution and 125 years before the modern political-question analysis was adopted. The provision at issue in *Hartman* also contained entirely different language from the current Education Clause, requiring only the establishment of free schools, and therefore has no applicability here. *Id.* at 119.

across the Commonwealth are being denied sufficient funding and hundreds of thousands of children are being deprived of an opportunity to obtain an adequate education. (*See* Pet. ¶¶ 120–29, 135–289.)

*Mental Health Association in Pennsylvania v. Corbett*, 54 A.3d 100 (Pa. Commw. Ct. 2012), is similarly irrelevant. There, the question was whether the Governor had acted within his constitutional powers when he submitted a budget to the General Assembly proposing a 20% reduction in funding for mental health services and a change in how mental health funds were distributed.[11] *Id.* at 103–05. In concluding that he had, the Court observed that it could not "direct the Governor how to speak to the legislature" and that "the General Assembly . . . ultimately determines how statutory budget obligations will be satisfied." *Id.* at 105. The Court therefore refused under the political-question doctrine to "insert itself" into the budgeting process. *Id.* at 105–06. Here, by contrast, Petitioners are not asking the Court to interfere with the budgeting process or give the Governor direction—they are asking the Court to determine whether the General Assembly has met its constitutional obligations. Nothing in *Mental Health Association* suggests that the Court should abstain from performing this core judicial function.

---

[11] The plaintiffs in *Mental Health Association* did not sue the General Assembly or any of its members for failing to provide a state agency with sufficient funding to satisfy its constitutional obligation.

### 4. The Vast Majority of States Have Recognized That Education Funding Challenges Are Justiciable.

Respondents underestimate the ability of the Pennsylvania courts to address the problem of education funding. (Legis. Br. 32.) Just because the problem is "multi-faceted" and relates to matters of public policy, (*id.*), does not mean the judiciary has no role to play. Where other state courts have addressed this issue, the vast majority have found that constitutional challenges to education-funding legislation ***are justiciable***. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Lobato v. Colorado*, 218 P.3d 358 (Colo. 2009); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993); *Gannon v. Kansas*, 319 P.3d 1196 (Kan. 2014); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Skeen v. Minnesota*, 505 N.W.2d 299 (Minn. 1993); *Helena Elementary Sch. Dist. No. 1 v. Montana*, 769 P.2d 684 (Mont. 1989); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Leandro v. North Carolina*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. Ohio*, 677 N.E.2d 733 (Ohio 1997); *Abbeville Cnty. Sch. Dist. v. South Carolina*, 767 S.E.2d 157 (S.C. 2014); *Davis v. South Dakota*, 804 N.W.2d 618 (S.D. 2011); *Neeley v. W. Orange-Cove Consol.*

*Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *McCleary v. Washington*, 269 P.3d 227 (Wash. 2012); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Campbell Cnty. Sch. Dist. v. Wyoming*, 907 P.2d 1238 (Wyo. 1995).[12]

The Pennsylvania courts—among the oldest in the nation—are equally "equipped" as the courts in those cases to address whether a legislature has fulfilled its constitutional obligation under a state's education clause. To suggest otherwise runs contrary to the judiciary's role as the ultimate interpreter of state and federal constitutions and its long history of oversight on complex constitutional issues that implicate public policy.

#### 5. The Pennsylvania Supreme Court Has Grown Reluctant to Apply the Political-Question Doctrine to Deflect Judicial Review of Legislative Action.

Recently, the Pennsylvania Supreme Court has twice refused to abstain from reviewing high-profile cases on political-question grounds. Both cases demonstrate the Supreme Court's willingness to address constitutional issues, particularly where legislative appropriations implicate the General Assembly's constitutional obligations.

---

[12] The courts of Ohio, Minnesota, Maryland, West Virginia, and New Jersey were adjudicating constitutional provisions that are essentially the same as Pennsylvania's.

In September 2013, the Pennsylvania Supreme Court decided *Hospital & Healthsystem Association of Pennsylvania v. Commonwealth*, 77 A.3d 587 (Pa. 2013), which concerned the General Assembly's attempt to balance the state budget by transferring $100 million from an insurance fund for medical providers to the General Fund under its constitutional appropriations powers. *Id.* at 593. While the petitioners sought a declaration that the transfer constituted an illegal taking under the Pennsylvania and U.S. Constitutions, *id.*, the Commonwealth argued that the petition presented a non-justiciable political question and would require the Court to make a policy determination on budgetary priorities. *See id.* at 598 n.12 (summarizing Commonwealth's argument that courts lack judicially manageable standards to decide where "the money [should] come from and what other programs should be defunded"). The Supreme Court, rejecting the Commonwealth's argument, refused to abdicate all matters of budget appropriations to the legislature—particularly when appropriations and budget allotments affect the interests or entitlements of individual citizens: "[R]egardless of the extent to which the political branches are responsible for budgetary matters, they are not permitted to enact budget-related legislation that violates the constitutional rights of Pennsylvania citizens." *Id.* at 598. Applying the *Baker* factors, the Supreme Court found that determining whether the transfer of funds was constitutional "is not a matter that has been textually committed to a

coordinate branch of government, nor is there an unusual need for unquestioning adherence to the legislative decision already made." *Id*.

Three months later, the Pennsylvania Supreme Court issued its decision in *Robinson Township v. Commonwealth*, which concerned legislation amending the Pennsylvania Oil and Gas Act. 83 A.3d at 913. The petitioners alleged that the legislation violated Article I, Section 27, of the Pennsylvania Constitution (the "Environmental Clause"), which provides that "the Commonwealth shall conserve and maintain [natural resources] for the benefit of all the people." PA. CONST. art. I, § 27.

Although there was only a plurality decision on the merits in *Robinson*, a ***majority*** of the Supreme Court agreed that the issue was justiciable. Applying *Baker*, the Court found that the political-question doctrine was not triggered because (i) "the Commonwealth [did] not identify any provision of the Constitution which grant[ed] it authority to adopt non-reviewable statutes" governing the environment; (ii) the "[o]rganic constitutional provisions on which the citizens rely offer[ed] . . . the type of judicially discoverable and manageable standards by which courts are able to measure and resolve the parties' dispute without overstepping the Judiciary's own constitutional bounds"; (iii) there was "no prospect that the Court would be required to make an initial policy

determination"; and (iv) there was no "unusual need for unquestioning adherence to the legislative decision already made." *Robinson*, 83 A.3d at 929.

The Supreme Court's analysis in both *Hospital & Healthsystem* and *Robinson* demonstrates that legislative appropriations are not immune from constitutional challenge, particularly where they impact the rights of Pennsylvania's citizens. That analysis applies equally here, where hundreds of thousands of Pennsylvania children are being denied access to a "thorough and efficient system of public education" because of Respondents' refusal to comply with their constitutional funding obligations. As the Supreme Court concluded in *Hospital & Healthsystem*, the Court must fulfill its core duty to ensure that the General Assembly does not "enact budget-related legislation that violates the constitutional rights of Pennsylvania citizens." 77 A.3d. at 598.

### B. Petitioners Have Alleged Facts Sufficient to State a Claim for Violation of the Education Clause.

In their Preliminary Objections, Respondents assert that the Petition fails to state a claim under the Education Clause. (Legis. Objs. 20–23; Exec. Objs. 2.[13]) Specifically, Respondents assert that the legislative scheme for financing public education "has a reasonable relation" to providing for the maintenance and support of a thorough and efficient system of public education because it "is based on a

[13] Executive Branch Respondents' Preliminary Objections to the Petition for Review, Dec. 10, 2014 ("Exec. Objs.").

combination of state appropriations and local property taxes" and "provides more than an equal share of state education subsidy funds to the Petitioners." (Legis. Objs. 20–21.) Although the Legislative Respondents do not address this objection in their supporting brief and the Executive Respondents touch on it only briefly (Exec. Br. 15–16), Petitioners will address it here and demonstrate why it is meritless.

First, the mere fact that the education-funding scheme is based on some combination of state and local funds says nothing about whether the scheme as a whole is reasonably related to supporting the public education system adopted by Respondents through the School Code and other legislative enactments. As the Petition describes in detail, the current education-funding scheme provides low-wealth districts with insufficient funds to deliver basic educational resources, many of which are mandated by the School Code, to their students. (Pet. ¶¶ 145–150, 169–261.) As a result, students in those districts are denied an opportunity to obtain an adequate education, as defined by state standards and demonstrated by their performance on state assessments. (*Id.* ¶¶ 95–115, 153–68.) A fact finder could plainly conclude that a funding scheme with those characteristics is unreasonable and bears no relation to supporting a "thorough and efficient system of public education."

Second, the Legislative Respondents' narrow focus on state education "subsidy funds" is irrelevant. (Legis. Objs. 21.) Under the structure devised by the General Assembly, education funds in Pennsylvania come from a combination of state, local, and federal appropriations. (*See* Pet. ¶ 262–99; Legis. Br. 2; Exec. Br. 5.) Thus, to determine whether the overall funding scheme is reasonably related to supporting the public education system, a fact finder must consider the net effect of those funding sources. *See Opinion of the Justices*, 624 So. 2d 107, 120 (Ala. 1993) ("[T]he appropriate funds to consider in evaluating state funds for education are funds raised for schools from *both* state and local sources.") (emphasis in original). That the Petitioner School Districts and other low-wealth districts get a larger share of state subsidy funds does not make up for their overall shortfall: The ***total funds*** available to those districts—even with tax rates often twice as high as wealthy districts—are still insufficient to provide their students with the educational resources mandated by the School Code or an opportunity to obtain an adequate education, as defined by state standards. (Pet. ¶¶ 95–115, 262–99.)

## II. RESPONDENTS' OBJECTIONS TO PETITIONERS' SECOND CAUSE OF ACTION SHOULD BE OVERRULED.

Respondents object to Petitioners' equal protection claim—which Respondents mischaracterize as seeking equal funding for all school districts—by asserting that (i) this claim also presents a political question, and (ii) the rationale

of "local control" justifies the unequal treatment alleged. Neither of Respondents' objections has merit.

### A. Equal Protection Challenges to Education-Funding Legislation Are Justiciable.

While the Executive Respondents argue that Petitioners' equal protection claim is non-justiciable (*see* Exec. Br. 7, 9), that argument is foreclosed by the *Baker* analysis—equal protection claims are routinely found justiciable by Pennsylvania courts—and by *Danson*, where the Supreme Court reached the ***merits*** of an equal protection challenge to the Commonwealth's education-funding scheme. *See* 399 A.2d at 367. The Legislative Respondents acknowledge that the *Danson* court did not abstain, and they argue that the Court should apply a similar equal protection analysis here (*see* Legis. Br. 34–35), though they misinterpret *Danson*'s holding, as described below.

*Pennsylvania Association of Rural & Small Schools* ("*PARSS*") does not change this result. (*See* Exec. Br. 12–13.) The *PARSS* court indicated that *Marrero* involved an equal protection claim and was therefore controlling on the justiciability question. *See PARSS*, Slip Op. at 13 ("*Marrero* holds that . . . what is 'thorough and efficient' education and whether it violates the Equal Protection provisions is non-justiciable."). *Marrero*, however, did not include an equal protection claim and was decided solely under the Education Clause. *See* 739 A.2d at 113 (dismissing petitioner's claims under the Education Clause). Still, the

*PARSS* court went on to reach the ***merits*** of the petitioners' equal protection claim after a month-long trial, ultimately holding that the petitioners failed "to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students." *PARSS*, Slip Op. at 129. While the Supreme Court affirmed the *PARSS* decision in a *per curiam* opinion, it remains unclear whether the Supreme Court agreed that the equal protection claim was non-justiciable under *Marrero* or that the petitioners had failed to meet their evidentiary burden at trial. *See Pa. Ass'n of Rural & Small Schs. v. Ridge*, 737 A.2d 246 (Pa. 1999). Given the Supreme Court's reliance on *Danson* in the *Marrero* opinion, however, it is unreasonable to infer that the Supreme Court intended to overrule *Danson* and foreclose an equal protection challenge where spending disparities deny students the opportunity to obtain even a basic or adequate education. *See also Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 93 (Ark. 1983) ("The constitutional mandate for a general, suitable and efficient education in no way precludes us from applying the equal protection clause to the present financing system.").

### B. Petitioners Have Alleged Facts Sufficient to State an Equal Protection Claim.

Article III, Section 32, of the Pennsylvania Constitution reflects the principle that "like persons in like circumstances will be treated similarly." *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003). The right to equal protection

"does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment." *Curtis v. Kline*, 666 A.2d 265, 267 (Pa. 1995). But where the Commonwealth resorts to legislative classifications, those classifications must be "reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation." *Id.* at 268.

When governmental classifications are challenged on equal protection grounds, the applicable standard of review depends on the type of classification at issue. *Love v. Stoudsburg*, 597 A.2d 1137, 1139 (Pa. 1991). A classification implicating neither suspect classes nor fundamental rights will be sustained if it meets a "rational basis" test. *Id.* Where a suspect classification has been made or a fundamental right has been burdened, the classification will be sustained if it satisfies "strict scrutiny." *Id.* And where a classification affects "important" though not fundamental rights, the classification will be sustained if it satisfies "intermediate" review. *Id.*

Here, Petitioners argue that Respondents have adopted an education-financing scheme that treats students differently based on the school district in which they reside. (Pet. ¶¶ 262–89.) This scheme discriminates against students residing in school districts with low incomes and property values by denying them an opportunity to receive a basic or adequate education, as defined by state standards. (*Id.* ¶¶ 262, 285–89.) School districts with high incomes and property

values, by contrast, have the financial resources to provide their students with a quality education that prepares them to become successful, productive citizens. This funding scheme—which turns the availability of a basic education into a function of community wealth—is not reasonably related to any state interest under any level of scrutiny.

Total education expenditures per student now range from as little as $9,800 per student in school districts with low property values and incomes to more than $28,400 per student in districts with high property values and incomes. (*Id.* ¶ 8.) Unfortunately, these gross disparities do not simply reflect decisions by wealthy districts to pay for educational luxuries. Rather, they reflect the inability of low-wealth districts to afford basic necessities even though they often have property tax rates far higher than wealthier districts. For example, Petitioner Panther Valley School District, a property-poor district, raised revenue of just $5,646 locally per student, while property-rich Lower Merion School District raised $23,709 locally per student—***four times*** more than Panther Valley. (*Id.* ¶¶ 8–10.) And yet Lower Merion was able to generate these funds with an equalized millage rate of just 14.7, almost ***half*** of Panther Valley's rate. (*Id.*) The insufficient revenues available to low-wealth districts has forced many to cut teacher and staff positions, eliminate course offerings, rely on outdated materials, and use dilapidated facilities. (*Id.* ¶¶ 173–246.) Petitioner School District of

Lancaster, for example, has been forced to eliminate over 100 teaching positions and more than 20 staff positions due to insufficient funding. (*Id.* ¶¶ 181–84.) Greater Johnstown has been forced to cut myriad programs, including science labs, special education, English-learner services, art, foreign languages, vocational training, after-school programs, and remediation and intervention services. (*Id.* ¶¶ 213–19.) William Penn lacks funding to purchase up-to-date textbooks that meet the requirements of the Pennsylvania Common Core or to replace the damaged roofs on its school buildings. (*Id.* ¶¶ 241–43.)

Lacking these and other basic resources, a substantial number of low-wealth districts are unable to provide their students with an opportunity to obtain an adequate education. This is demonstrated by their students' struggles to pass mandatory state assessments, including the Keystone Exams. In 2013, 36% of Pennsylvania students taking the Keystone Exams failed to score proficient in math, 25% failed to score proficient in literature, and more than 50% failed to score proficient in biology. (*Id.* ¶ 154.) These percentages are even worse in Petitioner School Districts. For example, 88% of William Penn students failed to score proficient in biology, and 71% of Lancaster students failed to score proficient in math. (*Id.* ¶ 156.) Thus, under the current funding scheme, students in low-wealth districts are being denied the inputs necessary to receive an adequate

education and are disproportionately failing to acquire the basic skills deemed necessary by the legislature.

### 1. The Current Education-Funding Scheme Is Unconstitutional Under Any Level of Scrutiny.

#### i. Public Education Is a Fundamental Right in Pennsylvania.

The education-funding scheme adopted by Respondents should be subject to strict scrutiny because it burdens a fundamental right: the right to public education. To determine whether a right is fundamental and entitled to strict scrutiny, courts "look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein." *James v. Southeastern Pa. Trans. Auth.*, 477 A.2d 1302, 1306 (Pa. 1984); *see also Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1118 (Pa. 2014) (explaining that fundamental rights "generally have their source in the Constitution"). Here, the right to public education is clearly identified in the constitutional provision that requires the General Assembly to provide a "thorough and efficient system of public education." PA. CONST. art. III, § 14. In fact, the Supreme Court recognized in *Wilkinsburg* that "***[p]ublic education in Pennsylvania is a fundamental right***."[14] 667 A.2d at 9 ("[T]his

---

[14] *Wilkinsburg* is consistent with decisions in other states that have found education to be a fundamental right based on language in their state constitutions. *See, e.g.*, *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W.Va. 1979) ("[T]he mandatory requirement of 'a thorough and efficient system of free schools,' found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State."); *Washakie County Sch. Dist. v.*

court has consistently examined problems related to schools in the context of that fundamental right."); *Teachers' Tenure Act Cases*, 197 A. 344, 352 (Pa. 1938) ("The power of the State over education thus falls into that class of powers which are made fundamental to our government.").

Public education should also be considered a fundamental right given its crucial place in the long history of the Commonwealth. *See Wilson v. Phila. Sch. Dist.*, 195 A. 90, 94 (Pa. 1937) ("[T]he Constitutions of 1776, 1790, and 1838, and the laws recognized [the common school system's] vitally important part in our existence."); *Marrero*, 709 A.2d at 960 ("By 1865 the concept of a free public school as a state institution had become firmly established."). Recognizing the importance of preparing children to participate in society and exercise their civic rights and duties, the Commonwealth early on made public education compulsory. *See* 22 PA. CODE § 11.13 (compulsory school age).[15]

To the extent the question of whether education is a fundamental right for equal protection purposes remains open, *see Harrisburg*, 828 A.2d at 1089 n. 14 (declining to resolve "whether education is a fundamental right for purposes of

---

*Herschler*, 606 P.2d 310, 333 (Wyo. 1980) ("In the light of the emphasis which the Wyoming Constitution places on education, there is no room for any conclusion but that education . . . is a matter of fundamental interest.").

[15] Other states have similarly found public education to be a fundamental right. *See Serrano v. Priest*, 487 P.2d 1241, 1258 (Cal. 1971); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 206 (Ky. 1989); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Opinion of the Justices*, 624 So. 2d at 156–57.

equal protection analysis"), this Court should resolve that question and hold that any law infringing on the right of Pennsylvania's children to obtain an adequate or basic public education must be subject to strict scrutiny.[16] Given public education's central place in the Constitution, values, and history of the Commonwealth, the Supreme Court's recognition in *Wilkinsburg* that education is a fundamental right should be extended to equal protection claims. To hold otherwise would lead to the incongruous result that education is a fundamental right for some purposes but not for purposes of determining whether the legislature is justified in denying certain students access to a basic education. Education is far too important a right to be denied without the most compelling of justifications.

Respondents' contention that education is not a fundamental right in Pennsylvania fails to acknowledge *Wilkinsburg's* plain language to the contrary. (Legis. Br. 41–44.) Instead, Respondents argue that the Court should ***infer*** that education is not a fundamental right from the Supreme Court's purported application of a "rational basis review" in *Danson*. (*Id*. at 34.) But Respondents cite a portion of the *Danson* opinion addressing the standard of review under ***the Education Clause***. (Legis. Br. 34–35.) The *Danson* court ***did not apply*** that

---

[16] While the *PARSS* court applied rational basis review to an equal protection claim, petitioners there did not show that they were being denied a basic or adequate education. *PARSS*, Slip Op. at 3–4. Where students are being denied a basic or adequate education as the result of a government classification, the court should apply strict scrutiny to any purported justification given the fundamental nature of the right to obtain such an education.

"reasonable relation" standard to the petitioners' equal protection claim. *See Danson*, 399 A.2d at 367.

Instead, the Supreme Court found that there was no constitutional right to "uniformity" in education spending or services and thus did not scrutinize—under rational basis review or strict scrutiny—whether the funding scheme interfered with that right. *Id*. at 366–67. Had the petitioners alleged that they were being "denied an 'adequate,' 'minimum,' or 'basic' education"—which the Supreme Court specifically noted they did not, *id*. at 365—it is unclear what level of scrutiny the *Danson* court would have applied to the funding scheme.

Respondents' other cases are equally unavailing. In *D.C. v. School District of Philadelphia*, 879 A.2d 408 (Pa. Commw. Ct. 2005), the court did not address whether education is a fundamental right for equal protection purposes because the appellants' claims were based solely on their "fundamental right to reputation." *Id*. at 412–13. And while the court in *Lisa H. v. State Board of Education*, 447 A.2d 669, 673 (Pa. Commw. Ct. 1982), observed that "[t]his Court has previously recognized that the right to a public education in Pennsylvania is not a fundamental right," that statement was based on a misreading of *O'Leary v. Wisecup*, 364 A.2d 770 (Pa. Commw. Ct. 1976), the only case cited for that proposition. *O'Leary* involved a claim under the ***federal*** Equal Protection Clause, and thus when the court there stated that "public education . . . is not a fundamental right," it cited a

***federal*** district court decision. *Id*. at 773 (citing *Hammond v. Marx*, 406 F. Supp. 853, 855 (D. Maine 1975)). The same is true of *Brian B. ex rel. Lois B. v. Pa. Dep't of Educ*., 230 F.3d 582 (3d Cir. 2000), which is a ***federal*** district court decision based on the Fourteenth Amendment.

Finally, the court's statement in *Bensalem Twp. Sch. Dist. v. Commonwealth*, 524 A.2d 1027, 1029 (Pa. Commw. Ct. 1987), that "Pennsylvania courts . . . have refused to recognize in this mandate a fundamental right to education subject to strict judicial scrutiny" is based on the same misreading of *Danson* that Respondents offer here. (*See* Legis. Br. 34.) Again, the Supreme Court's reference in *Danson* to the "reasonable relation" standard was in the context of the Education Clause; the *Teachers' Tenure Act Cases* from which it took that language ***did not even involve an equal protection analysis***. *See* 197 A. at 352. Accordingly, *Danson* cannot be read as an endorsement of rational basis review where it is alleged that an education-funding scheme denies students access to an adequate or basic education.

### ii. There Is No Rational Basis, Much Less a Compelling Justification, for Denying Students in Low-Wealth Districts the Opportunity to Obtain an Adequate Education.

Under strict scrutiny, Respondents bear the burden of establishing that the funding scheme is narrowly tailored to further a "compelling" governmental purpose. *See Zauflik*, 104 A.3d at 1118 (citing *Whitewood v. Wolf*, 992 F. Supp. 2d

410, 424–25 (M.D. Pa. 2014)). While it is premature to make this factual determination on preliminary objections, Respondents come nowhere close to meeting that burden.

The only justification Respondents offer for the current funding scheme is a stated interest in maintaining "local control" over education. (*See* Legis. Br. 33–40.) But a preference for local control is not even a rational basis, much less a "compelling" justification, for denying students in low-wealth school districts the opportunity to obtain a basic or adequate education. *See PARSS*, Slip Op. at 129 (observing that a system in which school districts lack funds to provide basic education is not "rationally related to any state interest"); *see also Rose*, 790 S.W.2d at 211 ("Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education. . . . This obligation cannot be shifted to local counties and local school districts.") (emphasis in original).

Respondents assert a state interest in "local control" but gloss over the meaning of that term. This is an important omission because there are two types of local control over education: (i) local decision-making power over the administration of schools, and (ii) local fiscal control over the amount of money spent on education. The first is not a rational basis to support the state's current ***funding*** scheme because "[n]o matter how the state decides to finance its system of

public education, it can still leave [administrative] decision-making power in the hands of local districts." *Serrano*, 487 P.2d at 1260; *see also Dupree*, 651 S.W.2d at 93 ("[T]o alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced."); *Horton*, 376 A.2d at 369 ("[T]here is no reason why local control needs to be diminished in any degree merely because some financing system other than the present one is adopted."). Thus, the Legislative Respondents' observation that Petitioner School Districts exercise control over which educational resources they will cut in response to their large funding shortfalls says nothing about whether the method of providing that funding is rational. (Legis. Br. 33–40.) Moreover, the type of administrative control envisioned by the framers—*i.e.*, local districts tailoring their curriculum to the needs of their children and community—has already been significantly diminished by the Keystone Exam graduation requirements and myriad other legislative enactments imposing state control over critical aspects of education in Pennsylvania.

The second type of local control—fiscal control over the amount spent on education—is also not a rational basis for the current funding scheme. Implicit in that goal is the assumption that local fiscal control will give communities the option of raising additional funds to ***expand*** educational opportunities for their children beyond the basic education subsidized by the state. *See Danson*, 399 A.2d

at 367 ("[T]he framers endorsed the concept of local control to meet diverse local needs and took notice of the right of local communities to utilize local tax revenues to ***expand*** educational programs subsidized by the state."). Thus, any rational system for promoting local fiscal control must ensure that each school district has (i) sufficient funds to provide students with a basic or adequate education to begin with, and (ii) at least some control over the manner in which they raise additional funds to expand educational opportunities. The current funding scheme provides neither.

First, Petitioner School Districts and a substantial number of other low-wealth school districts lack sufficient resources under the current funding scheme to provide even a basic or adequate education to their students, as measured by state standards. (Pet. ¶¶ 285–89.) That alone renders the current funding scheme irrational: Promoting local fiscal control cannot come at the expense of providing basic educational opportunities to all students. *See Danson*, 399 A.2d at 365–66.

Second, local fiscal control is ***illusory*** under the current funding scheme for low-wealth districts, because they do not exercise any actual control over the amount of money they spend on education. Not only are low-wealth districts restricted by Act 1 from raising property taxes more than a *de minimis* amount, many already have ***higher taxes*** than their wealthy peers yet raise only a fraction

of the revenue.[17] Thus, as one state court put it, "fiscal freewill is a ***cruel illusion*** for the poor school districts" because a "poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide." *Serrano*, 487 P.2d at 1260. As another court explained: "***[P]oorer districts cannot realistically choose to spend more for educational excellence*** than their property wealth will allow, no matter how much sacrifice their voters are willing to make." *Brigham v. Vermont*, 692 A.2d 384, 396 (Vt. 1997); *see also Bismarck Pub. Sch. Dist. #1 v. State*, 511 N.W.2d 247, 261 (N.D. 1994) ("The present method of distributing funding for education ***fails to offer any realistic local control to many school districts***, because it fails to provide many local school boards with a means to generate the funding needed to provide educational opportunities similar to those in other districts, and it fails to give local school boards any realistic credit for the local taxation efforts their patrons bear."); *Opinion of the Justices*, 624 So. 2d at 141 ("[I]f local tax effort reflects the desire for a higher level of education, citizens in the poorest systems seem to want the most for their children—but ***their hands are tied by the very system that defendant argues is designed to enhance their ability***

[17] While Respondents contend that there were "strict ceilings" on local taxes when *Danson* was decided (*see* Legis. Br. 39–40), the Supreme Court disagreed: "The Philadelphia School District's ability to obtain local tax funds is limited only by the ability of its appointed school board to convince City Council and the Mayor that the levies it requests are necessary for current operation of the school district," *Danson*, 399 A.2d at 367. Petitioners here allege the opposite. Respondents have passed Act 1, which prohibits school districts from raising property taxes more than a trivial amount, thus limiting local revenues and hampering their ability to provide students with an opportunity to obtain an adequate education. (Pet. ¶¶ 143–44.)

***to realize their aspirations***."); *Tenn. Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 155 (Tenn. 1993) ("If a county has a relatively low assessed value of property and very little business activity, that county has, in effect, a stone wall beyond which it cannot go in attempting to fund its educational system regardless of its needs. In those cases, local control is truly a 'cruel illusion.'").

### 2. Similar Funding Schemes in Other States Have Been Found to Violate Equal Protection.

Courts in other states have repeatedly found education-funding schemes that produced disparities on a scale similar to Pennsylvania's to be unconstitutional, even under rational basis review.[18] The Supreme Court acknowledged such decisions in *Danson*, but declined to follow them because the petitioners there did not allege that the "state's financing system resulted in some school districts having significantly less money than other districts, causing gross disparities in total and per child expenditures throughout the state." 399 A.2d at 365 n.10. Petitioners here, by contrast, demonstrate that Pennsylvania's funding scheme has become extraordinarily inequitable in the 36 years since *Danson*. Thus, as other states have done, this Court should hold that invoking the term "local control" is not a rational justification for a funding scheme that results in vast disparities in

[18] *See, e.g.*, *Opinion of the Justices*, 624 So. 2d at 161; *McWherter*, 851 S.W. 2d at 156; *Dupree*, 651 S.W.2d at 95; *Horton*, 376 A.2d at 374; *Brigham*, 692 A.2d at 396.

educational opportunity and denies hundreds of thousands of students an adequate education.

## III. PETITIONERS' REQUESTED RELIEF IS NOT BARRED BY SOVEREIGN IMMUNITY.

### A. The Court Has Authority to Declare the Current Education-Funding Scheme Unconstitutional.

Executive Respondents contend that sovereign immunity bars this Court from considering Petitioners' request for declaratory relief. (Exec. Br. 18–19.) But the Pennsylvania Supreme Court has held unambiguously that "sovereign immunity . . . is not applicable to declaratory judgment actions," *Legal Capital, LLC v. Med. Prof. Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000), and "poses no bar" to a declaration that a statute is unconstitutional, *Wilkinsburg Police Officers Ass'n v. Commonwealth*, 636 A.2d 134, 137 (Pa. 1993); *see also Del. Valley Apartment House Owner's Ass'n v. Commonwealth*, 389 A.2d 234, 238 (Pa. Commw. Ct. 1978) (same). Thus, the Court would be well within its authority to grant Petitioners' requested relief and declare that "the existing school-financing arrangement violates . . . the Pennsylvania Constitution['s]" equal protection provisions (Pet. ¶¶ 316–19) and "fails to comply with the . . . Education Clause" (*id.* ¶¶ 313–15).[19]

---

[19] Relying on *Stackhouse v. Commonwealth*, 892 A.2d 54 (Pa. Commw. Ct. 2006), Executive Respondents contend that declaratory relief is available only in conjunction with other types of relief, such as injunctive relief. (*See* Exec. Br. 18–19). This Court recently rejected that precise

### B. The Court Has Authority to Enter an Injunction Barring State Officials From Enforcing an Unconstitutional Education-Funding Scheme.

Executive Respondents also contend that sovereign immunity bars this Court from considering Petitioners' request for injunctive relief. (Exec. Br. 16–18.) But sovereign immunity is inapplicable "where the plaintiff seeks to restrain [government officials] from performing an affirmative act," *Legal Capital*, 750 A.2d at 302, or "from enforcing the provisions of a statute claimed to be unconstitutional." *Phila. Life Ins. Co. v. Commonwealth*, 190 A.2d 111, 114 (Pa. 1963) ("[I]t is an equally generally recognized rule that an action against state officers, attacking the constitutionality of a statute of the state, to enjoin them from enforcing an unconstitutional law is not a suit against the state, and is not prohibited as such under the general principles of immunity . . . ."); *accord Fawber v. Cohen*, 532 A.2d 429, 433–34 (Pa. 1987) ("[S]uits which seek simply to restrain state officials . . . are not within the rule of immunity."). Nor does sovereign immunity bar suits affirmatively requiring government officials to comply with the Pennsylvania Constitution. *See Twps. of Springdale & Wilkins v. Kane*, 312 A.2d 611, 617 (Pa. Commw. Ct. 1973) ("[P]laintiffs are not seeking some affirmative

---

argument. *Pa. Fed'n of Dog Clubs v. Commonwealth*, 2014 WL 6663198, at *15 (Pa. Commw. Ct. Nov. 19, 2014) ("[N]otwithstanding that Petitioners may be barred from injunctive relief because of sovereign immunity, they are permitted to seek declaratory relief and thus, their Amended Complaint cannot be dismissed on this basis.").

action on the part of State officials required by statute, but rather that the affirmative action sought is mandated by the constitutional provision."); *see also Legal Capital*, 750 A.2d at 302–03 (holding that sovereign immunity did not bar a suit seeking funds the appellee was obliged to pay). Thus, the Court has authority to grant Petitioners' limited request for an injunction restraining Respondents from implementing an unconstitutional funding scheme and requiring Respondents to comply with the Pennsylvania Constitution.

While Executive Respondents try to distort Petitioners' request for injunctive relief—suggesting that Petitioners seek "an injunction 'compelling Respondents to establish, fund, and maintain' a new system of public education, and to 'develop' a new system of funding it" (Exec. Br. 18 (quoting Pet. ¶¶ 320–21))—Petitioners ask for no such thing. The paragraphs of the Petition quoted by Executive Respondents actually ask for "permanent injunctions compelling Respondents to establish, fund and maintain a thorough and efficient system of public education"—as required by the Education Clause—and "after a reasonable period of time, develop a school-funding arrangement that complies with the Education Clause and the Equal Protection Clause." (Pet. ¶¶ 320–21.) As that language makes clear, Petitioners are seeking an injunction simply requiring Respondents to comply with their constitutional obligations.

Respondents further mischaracterize this Court's holding in *Stackhouse v. Commonwealth*, 892 A.2d 54 (Pa. Commw. Ct. 2006). There, the Court found that the plaintiff did not allege any constitutional violations and concluded that the plaintiff's requested relief would have required the respondents to introduce certain guidelines, policies, limitations, and restrictions on their internal investigation processes. *Id.* at 58, 61. Here, in contrast, Petitioners are not asking for an injunction requiring Respondents to introduce any specific policies or guidelines: Petitioners are asking the Court to enforce Respondents' affirmative duty to establish and support a system of public education within the bounds of the Education Clause. *See Teachers' Tenure Act Cases*, 197 A. at 352 ("When the people directed through the Constitution that the General Assembly should 'provide for the maintenance and support of a thorough and efficient system of public schools,' it was a positive mandate that no legislature could ignore."). Thus, although the relief Petitioners seek is "affirmative," sovereign immunity does not bar such relief because the affirmative action sought is mandated by the constitution.[20] *See Kane*, 312 A.2d at 617; *see also Brigham*, 692 A.2d at 384

---

[20] The remaining authorities Executive Respondents cite are inapposite. The distinguishing feature of those cases was that injunctive relief was sought as a means to indirectly obtain monetary relief, which is barred by sovereign immunity. *See Fawber*, 532 A.2d 429, 434 (Pa. 1987) ("Suits which seek to . . . to obtain money damages . . . from the Commonwealth are within the rule of immunity."). Here, in contrast, Petitioners are not seeking monetary relief, directly or indirectly. *Cf. Finn v. Rendell*, 990 A.2d 100 (Pa. Commw. Ct. 2010) (request barred because it sought reimbursement of money); *Swift v. Dep't of Transp.*, 937 A.2d 1162 (Pa.

(requiring the legislature to enact a funding arrangement that complies with the state constitution).

## CONCLUSION

For the foregoing reasons, the Executive and Legislative Respondents' Preliminary Objections should be overruled.

Dated: February 17, 2015


By: /s/ Brad M. Elias

Brad M. Elias (*pro hac vice*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000

Aparna Joshi (*pro hac vice*)
Matthew J. Sheehan (Bar No. 208600)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

*Attorneys for Plaintiffs William Penn School District, Panther Valley School District, The School District of Lancaster, Greater Johnstown School District, Wilkes-Barre Area School District, Shenandoah Valley School District, and Pennsylvania Association of Rural and Small Schools.*

By: /s/ Jennifer R. Clarke

Jennifer R. Clarke (Bar No. 49836)
Michael Churchill (Bar No. 04661)
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
Telephone: 215-627-7100

*Attorneys for Plaintiffs William Penn School District, Panther Valley School District, The School District of Lancaster, Greater Johnstown School District, Wilkes-Barre Area School District, Shenandoah Valley School District, Jamella and Bryant Miller, Sheila Armstrong, Tyesha Strickland, Angel Martinez, Barbara Nemeth, Tracey Hughes, Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People—Pennsylvania State Conference.*


---

Commw. Ct. 2007) (request barred as "equivalent to an action for damages"); *Chiro-Med Review Co. v. Bur. of Workers' Comp.*, 908 A.2d 980 (Pa. Commw. Ct. 2006) (request barred where it was "meant to provide financial compensation").

By: /s/ Maura McInerney

Maura McInerney (Bar No. 71468)
David Lapp (Bar No. 209614)
Cheryl Kleiman (Bar No. 318043)
EDUCATION LAW CENTER
1315 Walnut St., Suite 400
Philadelphia, PA 19107
Telephone: (215) 238-6970

*Attorneys for Plaintiffs Jamella and Bryant Miller, Sheila Armstrong, Tyesha Strickland, Angel Martinez, Barbara Nemeth, Tracey Hughes, Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People—Pennsylvania State Conference.*

**CERTIFICATION OF COMPLIANCE WITH RULE 2135(d)**

Petitioners' Brief in Opposition to Respondents' Preliminary Objections complies with the word count limitation of Pa. R.A.P. 2135 because it contains 13,767 words, excluding the parts exempted by section (b) of this Rule. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

Date: February 17, 2015

By: /s/ Brad M. Elias

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

:
:
:

**PROOF OF SERVICE**

I hereby certify that I am this 17th day of February, 2015, serving the foregoing document by depositing the requisite number of copies in the United States mail, first class, postage prepaid upon the persons indicated below:

Patrick M. Northen
Lawrence G. McMichael
Dilworth Paxson, LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102

*Counsel for Legislative Respondents*

Lucy Fritz
Deputy Attorney General
Civil Litigation Section
Strawberry Square, 15th Floor
Harrisburg, PA 17120

*Counsel for Executive Respondents*

Robert M. Tomaine Jr. Esq.
Pennsylvania Department of Education
333 Market Street, 9th Floor
Harrisburg, PA 17126

By: /s/ Matthew J. Sheehan

Matthew J. Sheehan (Bar No. 208600)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300