IN THE SUPREME COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT, *et al.*	:	
	:	
Appellants,	:	
	:	
v.	:	NO. 46 MAP 2015
	:	
PENNSYLVANIA DEPARTMENT OF EDUCATION, *et al.*	:	
	:	
Appellees.	:	

BRIEF OF AMICI CURIAE PHILADELPHIA FEDERATION OF TEACHERS, LOCAL 3, OF THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND THE AMERICAN FEDERATION OF TEACHERS PENNSYLVANIA, AFT, AFL-CIO, IN SUPPORT OF APPELLANTS' APPEAL

Appeal from the Order of the Commonwealth Court Dated April 21, 2015 at Docket Number 587 M.D. 2014 Sustaining Appellees' Preliminary Objections

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Curiae, the Philadelphia Federation of Teachers, Local 3 of the American Federation of Teachers, AFL-CIO ("PFT"), is the recognized and sole collective bargaining representative of ten bargaining units at the Philadelphia School District ("PSD" or "District"). Its President and Trustee ad Litem is Jerry Jordan. Within the ten bargaining units are those employees who have direct responsibility for the education and support of the District's students, including teachers, specialized teachers, remedial teachers, assistant teachers, substitute teachers, librarians, school nurses, counselors and instructional aides. The PFT represents over 10,000 employees at the PSD.

As the exclusive bargaining representative for thousands of employees of the PSD, the PFT has an interest in this action in which Appellants allege insufficient funding has resulted in the inability of school districts, including the PSD, to provide an adequate education for students of the District. The lack of funding has had a direct and adverse impact on the goals and objectives of the PFT. Due to the lack of financial resources, teachers represented by the PFT struggle to provide an adequate education to their pupils in accordance with the Commonwealth of

Pennsylvania ("Commonwealth")'s recently-imposed academic standards. Based on its experience and the professional judgment of its members, the PFT asserts that the lack of adequate funding results in the low proficiency testing of students in the PSD.

Amicus Curiae, the American Federation of Teachers Pennsylvania, AFT, AFL-CIO ("AFT PA"), is an intermediary body which supports the activities of AFT locals in Pennsylvania representing educational employees in the Commonwealth, such as the PFT. The President and Trustee ad Litem of the AFT PA is Ted Kirsch. AFT PA includes approximately 61 local affiliates and represents over 24,000 employees throughout the Commonwealth of Pennsylvania. Of those 61 local affiliates, approximately 30 represent teachers or support staff in Pennsylvania public schools or intermediate units with a combined membership of over 15,000 members.

Due to its support for these local affiliates in Pennsylvania, AFT PA shares the interest, goals, and objectives of the PFT. Additionally, under its governing constitution, the purpose of AFT PA includes (1) "promot[ing] the welfare of the children and youth of the Commonwealth

and . . . provid[ing] better educational opportunities for them"; and (2) rais[ing] the standards of teaching by securing conditions essential to the best professional services." AFT PA has been actively involved in various legislative efforts to improve the quality of public education in the Commonwealth, including efforts to increase education funding for the PSD and to provide for a more equitable and adequate system of educational funding throughout the Commonwealth.

For all these reasons, Amici Curiae are interested in ensuring that Article III, Section 14 of the Pennsylvania Constitution ("Education Clause") is enforced so that all Commonwealth children receive a "thorough and efficient system of public education" as promised by the framers of this provision. Amici Curiae believe this Court will benefit from this brief because it outlines the current state of Pennsylvania law in the area of justiciability and provides a historical overview and legal analysis of the Education Clause. For these reasons, Amici Curiae assert that this Court should reverse the decision of the Commonwealth Court of Pennsylvania ("Commonwealth Court" or "Lower Court") sustaining Appellees'

Preliminary Objections on the erroneous grounds of non-justiciablity[1] and remand the matter back to the Lower Court to allow discovery to proceed.

[1] A true and correct copy of the Commonwealth Court's decision below is attached to this Brief as Appendix A.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 42 P.S. § 723(a).

III. ORDER IN QUESTION

AND NOW, this 21st day of April, 2015, the preliminary objections of the Respondents are sustained and Petitioners' petition for review is dismissed.

DAN PELLEGRINI, President Judge

IV. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

When an inquiry presents a pure question of law such as this, this Court's standard of review is de novo and the scope of review is plenary. *See Liberty Mut. Ins. Co. v. Domtar Paper Co.*, 113 A.3d 1230, 1234 (2015). In cases of preliminary objections in the nature of a demurrer, the court must accept all pleaded facts and all reasonable inferences as true. *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa. 454, 461, 866 A.2d 270, 274 (2005). In *Bilt-Rite*, this Court explained: "[T]he question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it." *Id.* (citing *MacElree v. Philadelphia Newspapers, Inc.*, 544 Pa. 117, 674 A.2d 1950, 1056 (1996)); *see also Jones v. Nationwide Prop. & Cas. Ins. Co.*, 613 Pa. 219, 228, 32 A.3d 1261, 1267 (2011) (same).

V. STATEMENT OF QUESTION(S) INVOLVED

Should this Court reverse the decision of the Commonealth Court sustaining Appellees' Preliminary Objections when recent Pennsylvania appellate court decisions on the political question doctrine as well as the Education Clause of the Pennsylvania Constitution, including its history, the case law considering it, and contemporary studies on the relationship between funding and educational performance, all demonstrate that, under the facts alleged by Appellants, this matter is justiciable?

Suggested Answer: Yes.

VI. STATEMENT OF THE CASE

On November 11, 2014, Appellants—six school districts ("Appellant School Districts") and seven parents of six children attending Appellee School Districts—filed a Petition for Review, challenging on state constitutional grounds the failure to ensure an adequate education due to insufficient state funding of public schools. Appellants' cause of action was asserted against the Pennsylvania Department of Education; Carolyn Dumeresq, the former Acting Secretary of Education; and Thomas W. Corbett, the former Governor of the Commonwealth of Pennsylvania (collectively referred to herein as "Executive Appellees") as well as Joseph B. Scarnati, President Pro-Tempore of the Pennsylvania Senate, and Samuel H. Smith ("Mr. Smith"), the former Speaker of the Pennsylvania House of Representatives (collectively referred to herein as "Legislative Appellees"). Later, Legislative Appelles sought and were granted a motion to substitute Mr. Smith with the new Speaker of the Pennsylvania House, Michael C. Turzai.

Appellants allege that the current level of state spending for public education as well as statutory restrictions on increasing local revenue have resulted in Appellee School Districts' inability to provide a

"thorough and efficient system of public education" as required by Article III, Section 14 ("Education Clause") and Article III, Section 32 ("Equal Protection Clause") of the Pennsylvania Constitution. While Appellants explain in detail the current state of inequitable funding existing between Appellee School Districts and other, wealthier school districts, the gist of their complaint is that the current state appropriations for public education are grossly insufficient, resulting in a direct and demonstrable diminution of educational achievement for the children in their school districts who will be unable to meet the newly-imposed, Commonwealth-mandated educational standards.

On December 10, 2014, the Executive and Legislative Appellees filed Preliminary Objections along with supporting briefs, seeking to dismiss the Petition for Review in its entirety. Relying upon earlier education funding cases decided by our appellate courts, Appellees argued that the Lower Court should sustain their Preliminary Objections on the grounds that the issue is a non-justiciable political question. On December 19, 2014, Appellants filed an answer to the Executive and Legislative Appellees' Preliminary Objections. The parties, as well as Amici Curiae, including the PFT and AFT PA, filed briefs supporting their respective

positions. On April 21, 2015, the Commonwealth Court issued a decision sustaining the Preliminary Objections, erroneously concluding that the matter is non-justicable as it is a matter within the exclusive discretionary purview of the General Assembly despite clear constitutional language mandating that it provide for a "thorough and efficient system of public education."

For reasons explained in Appellants' Brief in Support of Their Appeal, this Amici Curiae Brief in Support of the Appellants' Appeal, as well as the Amici Curiae Brief of the Law Professors in Support of Appellants' Appeal, this Court should reverse the decision of the Commonwealth Court and remand the matter back to that court to allow Appellants to proceed to discovery on their claims.

VII. SUMMARY OF THE ARGUMENT

The Commonwealth Court erroneously determined that Appellees' Preliminary Objections be sustained and the Petition for Review dismissed on the grounds that the matter is non-justiciable. Essentially, the Commonwealth Court concluded that any constitutional challenge to the General Assembly's gross underfunding of Pennsylvania public education, as alleged in Appellants' Petition for Review, is not legally cognizable because the Education Clause gives the General Assembly sole discretion to determine if, and by what measure, it will provide and support a "thorough and efficient system of public education." The Commonwealth Court's conclusion is clearly erroneous and fatally flawed because it is inconsistent with recent jurisprudence on non-justiciability as well as the text and history of the Education Clause. Effectively, the Commonwealth Court abdicated its constitutional responsibility to enforce a mandatory obligation that the General Assembly provide for a "thorough and efficient system of public education," by hiding behind its flawed interpretation of non-justiciability.

Recent decisions from this Court demonstrate that constitutional challenges to underfunding in public schools should not be

dismissed on justiciability grounds. This Court recently modified, refined, and limited the breadth of the political question doctrine, cautioning our state's judiciary against refusing consideration of constitutional claims based on the political question doctrine. These decisions demonstrate that any review of a defense of justiciability must be a fact-based determination, considering the constitutional provision in question, the statute allegedly in violation of that provision, and the facts of the case. Appellants meet this test as demonstrated through the factual allegations and legal claims asserted in their Petition for Review.

Furthermore, there is no doubt, based on the text and history of the Education Clause of the Pennsylvania Constitution, that the framers who drafted it and the people who adopted it meant to impose a "constitutional injunction" against the General Assembly to provide and support public education for all children in the Commonwealth. The debates at the Constitutional Convention that first considered the "thorough and efficient" language show that the intent was to require the General Assembly to perform this function. Our appellate courts support such a constitutional interpretation, as they have recognized that public education is an "indispensable government function" which the General Assembly

may not abridge and is, in fact, a "fundamental right." Contrary to the Commonwealth Court's conclusion, the intent was not to afford the General Assembly unfettered discretion to decide if, and by what measure, it would meet this constitutional mandate.

Finally, when applying the facts as alleged by Appellants in their Petition for Review to the clear constitutional mandate established by the Education Clause, it is undeniable that this matter is, in fact, justiciable. As alleged by Appellants, the General Assembly and the State Board of Education not only established what constitutes a "thorough and efficient system of public education" through newly-imposed academic standards, but also commissioned a study detailing the amount of additional funding necessary to meet those goals. Due to Appellees' refusal to abide by those funding criteria, Appellants allege, significant numbers of students in some school districts have not and will not meet the state's new academic criteria. These factual allegations make this matter distinguishable from previous underfunding cases, and establish justiciability.

For all these reasons, this Court should reverse the erroneous decision of the Commonwealth Court and remand this matter back to the Lower Court to allow Appellants to proceed with discovery on their claims.

VIII. ARGUMENT

This Court Should Reverse the Commonwealth Court's Decision Sustaining Appellees' Preliminary Objections Because the Claims Raised in Appellants' Petition for Review Are Justiciable.

A. Recent Case Law from This Court on Justiciability Demonstrates that Appellants' Claims Are, In Fact, Justiciable.

In support of its legal conclusion that this matter is non-justiciable, the Commonweatlh Court relies upon earlier education funding cases in which our appellate courts found the matter not justiciable. Specifically, the Lower Court relies heavily on *Marrero v. Commonwealth*, 559 Pa. 14, 739 A.2d 110 (1999) and discusses in support *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979). However, since those cases were decided, this Court has significantly limited the breadth of the political question doctrine, beginning with its decisions in *Council 13, AFSCME ex rel. Fillman v. Rendell*, 604 Pa. 352, 986 A.2d 63 (2009) (hereinafter "*Council 13*"), and *Jefferson County Court Appointed Employees Ass'n v. PLRB*, 603 Pa. 482, 985 A.2d 697 (2009) (hereinafter "*Jefferson County*").

In *Council 13*, AFSCME Council 13 ("Council 13" or "AFSCME") and other labor unions filed a petition for review against the Commonwealth, seeking a declaration that Governor Rendell's decision to

furlough certain employees if no budget was passed violated the Fair Labor Standards Act ("FLSA").[2] 604 Pa. at 362-63, 986 A.2d at 69-70. The Governor argued that Article III, Section 24 of the Pennsylvania Constitution prohibited payment to those employees without a budget. 604 Pa. at 360-61, 986 A.2d at 68. AFSCME countered that the FLSA preempted Article III, Section 24, so the Governor had no grounds to engage in furloughs. 604 Pa. at 362-63, 986 A.2d at 69-70.

In its defense, the Commonwealth argued, in part, that the matter was non-justiciable under the political question doctrine. 604 Pa. at 368, 986 A.2d at 73. In considering that argument, this Court, in a decision written by former Chief Justice Castille, explained the political question doctrine under Pennsylvania jurisprudence:

> As this Court noted in *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (Pa. 1977), a basic precept of our form of government is that the Executive, the Legislature, and the Judiciary are independent, co-equal branches of government. *Id. at 705.* As we further noted, while the dividing lines among the three branches "are sometimes indistinct and are probably incapable of any precise definition[,]" under the principle of separation of the powers of government, no branch should exercise the functions exclusively committed to another branch. *Id.* The political question doctrine is generally considered to derive from the principle of separation of powers. Under

[2] Act of June 25, 1938, c. 676, § 1, 52 Stat. 1060, *as amended*, 29 U.S.C. § 201 *et seq.*

> the doctrine, the courts will not review the actions of another branch of government where the constitution entrusts those actions to that other branch. *Id.*

604 Pa. at 370, 986 A.2d at 74.

This Court made clear, however, that the mere fact that the judiciary may rule upon the statutory or constitutional obligations of another coordinate branch of government does not implicate the political question doctrine. Relying upon and quoting *Thornburgh v. Lewis*, 504 Pa. 206, 470 A.2d 952 (1983)—a case involving the question of whether the Governor is required to give the Chairman of the Senate Appropriations Committee certain requested budget information—that Court declared:

> ***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.*** The [Chairman] asks the Court to direct the Governor to supply him with certain budgetary data. A decision that the Governor is required, or is not required, to do so would in no way involve the Judiciary in the role assigned to the General Assembly of enacting a budget, or in the role assigned to the Governor of preparing and approving a budget. It would merely determine the meaning of Constitutional and statutory provisions, precisely the role of the Judiciary in our tri-partite system of government.

Council 13, 604 Pa. at 372, 986 A.2d at 75 (quoting *Thornburgh*, 470 A.2d at 955 (emphasis added).

Applying these principals to the facts of the *Council 13* case, this Court found the matter was clearly justiciable despite the fact that it involved the judiciary in a political dispute over the budget:

> [We] hold that the issue raised in the Union Parties' Petition does not implicate the political question doctrine and, thus, is justiciable. The Union Parties do not ask the Commonwealth Court to make the Governor's furlough decisions or other policy determinations for him. Rather, they ask the court to interpret and declare the law, a function our Constitution assigns to the Pennsylvania Courts. That is, as individuals or representatives of individuals who had been affected in their employment status by the Governor's reliance on Section 24 for his furlough decisions, the Union Parties filed a declaratory judgment action, asking the Commonwealth Court to construe Section 6 of the FLSA, consider its interaction with *Section 24 of the Pennsylvania Constitution* under preemption principles, and declare that *Section 24* did not, as the Governor had asserted, prohibit their continued employment and the payment of their wages.

604 Pa. at 372-73, 986 A.2d at 76.

Ultimately, this Court held that AFSCME's request for a declaratory judgment and its subsequent appeal did not constitute a non-justiciable political question:

> The happenstance that the preemption issue the Union Parties posed to the court arises in political circumstances, when a budget impasse was looming and the Governor was announcing furlough options and decisions, does not change the nature of the jurisprudential issue from one of law that the courts are to decide, to one of executive policy that the courts are not to consider. As we instructed in *Thornburgh*, ***the political question doctrine is a shield, not a sword. The doctrine exists to protect the Executive branch from intrusion by the courts into areas of political policy and executive prerogative; it does not exist to remove a question of law from the Judiciary's consideration merely because the Executive branch has forwarded its own opinion of the legal issue in a political context.*** Accordingly, we conclude that the Commonwealth Court correctly refused to dismiss the Petition as non-justiciable.

Id. (emphasis added).

On the same day that this Court decided *Council 13*, it also decided *Jefferson County,* which again addressed the issue of justiciability regarding whether a Court of Common Pleas may compel a county to expend additonal funds for the judiciary beyond those amounts outlined in the county's budget. *Id.* In that case, the county made cuts to the judiary budget and mandated the common pleas court to fire five employees. 603 Pa. at 488-89, 985 A.2d at 700-01. Those employees filed grievances through their unions which resulted in the President Judge settling those grievances in favor of the employees. 603 Pa. at 489-90, 985 A.2d at 701.

The county refused to comply with those settlements, so the unions filed an unfair labor practice charge for failure to enforce the settlement agreements. 603 Pa. at 490-91, 985 A.2d at 702. The county defended the charge on the grounds that the settlement agreements violated its exclusive constitutional right to set the county budget. 603 Pa. at 491, 985 A.2d at 703. While the Pennsylvania Labor Relations Board ("PLRB")'s hearing examiner's proposed decision found the county had violated the labor statute, the PLRB reversed after the county filed exceptions. 603 Pa. at 492-93, 985 A.2d at 703-04. On appeal, the Commonwealth Court affirmed the decision of the PLRB, and this Court granted review. 603 Pa. at 493, 495, 985 A.2d at 704, 705.

In considering the matter, this Court recognized that the case raised important separation of powers issues. First, "Article V of the Pennsylvania Constitution vests the judiciary with the power to administer justice," including its right "to hire, fire, and supervise its employees." 603 Pa. at 498, 985 A.2d at 707. This Court noted that "the judiciary's authority over court personnel 'is essential to the maintenance of an independent judiciary.'" *Id.* Therefore, this Court found that another branch of

government "may not encroach upon this judicial power, although it is not unlimited." *Id.*

In considering the constitutional role of the legislative branch vis-à-vis the judicial branch of government, this Court explicitly acknowledged the latter's exclusive constitutional authority to require a legislative body to appropriate sufficient funds for the judiciary to prevent encroachment on the courts' constitutional function:

> [C]ontrol of state finances, specifically, the power to appropriate funds and levy taxes, lies with the legislative branch. *McCulloch v. Maryland, 17 U.S. 316, 431, 4 L. Ed. 579 (1819)*; *Beckert [v. Warren*, 497 Pa. 137, 144], 439 A.2d [638,] 642-43 [(1981)]; *Leahey v. Farrell, 362 Pa. 52, 66 A.2d 577, 579 (Pa. 1949)*. The legislative power, however, is also not unlimited because it is constrained by other constitutional considerations. *Marbury v. Madison, 5 U.S. 137, 176-77, 2 L. Ed. 60 (1803)*; *Leahey, 66 A.2d at 579*. ***A legislative action that impairs the independence of the judiciary in its administration of justice violates the separation of powers; the corollary is that a judicial action that infringes on the legislative function also violates the separation of powers.*** **Beckert*, 439 A.2d at 643. In the case of such a violation, there is no question that the judiciary has the power to exercise its check on the legislature and invalidate such a constitutionally repugnant act by compelling expenditures that are necessary to prevent the impairment of the administration of justice through an action in mandamus. Id. at 643-44;* Jiuliante [v. County of Erie, *540 Pa. 376, 657 A.2d 1245, 1247 (1995)]. Without such power, the Pennsylvania General Assembly***

> ***could destroy the state judiciary, the existence of which the Pennsylvania Constitution, Article V, mandates.*** *Beckert, 439 A.2d at 643*; *Jiuliante, 657 A.2d at 1247.*

603 Pa. at 498-99, 985 A.2d at 707 (emphasis added).[3]

The political question doctrine has since been further explained and refined in two more recent cases in 2012 and 2013—*Hospital and Healthsystem Ass'n of Pennsylvania v. Commonwealth*, 621 Pa. 260, 77 A.3d 587 (2013) (hereinafter "*HHAP*") and *Robinson Township v.*

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[3] Although not cited in the *Jefferson County* decision, its holding is consistent with this Court's holding in *County of Allegheny v. Commonwealth*, 517 Pa. 65, 534 A.2d 760 (1987). In that case, Allegheny County sought a declaration from the Commonwealth Court that it was not obligated by statute to fund the Common Pleas Court and that the responsibility fell to the Commonwealth. Through preliminary objections, the Commonwealth raised as a defense that the Commonwealth Court lacked authority to direct it to fund the Common Pleas Court. The Commonwealth Court agreed, sustaining the preliminary objections on the grounds that Allegheny County's claims were non-justiciable. On appeal, this Court reversed, declaring in part:

> In *Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595 (1978)*, this Court recognized the authority of the General Assembly to control the state's finances, but the Court also recognized that the General Assembly's control of fiscal matters might, in particular circumstances not present in that case, be limited by the constitution. **Shapp v. Sloan, *therefore, is no authority for the proposition that control of the state's finances has been incontrovertibly and in all instances assigned to the authority of the General Assembly. Moreover, in* Beckert v. Warren, *497 Pa. 137, 145, 439 A.2d 638 (1981), we reaffirmed the holding of* Leahey v. Farrell, *362 Pa. 52, 57, 66 A.2d 577, 579 (1949), that although control of state finances rests with the legislature, that control is subject to constitutional limitations.***

Allegheny County, 517 Pa. at 65, 534 Pa.2d 760 (emphasis added).

Commonwealth, 623 Pa. 564, 83 A.3d 901 (2013) (hereinafter "*Robinson Township*").

HHAP involved a constitutional challenge to the Act of October 9, 2009, P.L. 537, No. 50 ("Act 50") which mandated a one-time transfer of $100 million from the Medical Care Availability and Reduction of Error Fund ("MCARE Fund") to the General Fund due to an existing revenue shortfall. *HHAP*, 621 Pa. at 267, 77 A.3d at 591. The MCARE Fund was the creation of the Medical Care Availability and Reduction of Error Act ("MCARE Act"),[4] under which, "Pennsylvania physicians, hospitals, and certain other health care providers, as a condition of practicing in Pennsylvania, are required to purchase medical professional liability insurance (or provide self-insurance) in the amount of $500,000 per occurrence or claim, and to participate in the MCARE Fund." 621 Pa. at 268, 77 A.3d at 592.

Hospital associations challenged the constitutionality of Act 50, initially seeking a declaration in the Commonwealth Court that it violated due process guarantees in Article I, Section 1 of the Pennsylvania

[4] Act of Mar. 20, 2002, P.L. 154, No. 13, *as amended*, 40 P.S. §§ 1303.101-1303.1115.

Constitution and tax uniformity requirements of Article VIII, Section 1. Shortly thereafter, they also requested preliminary injunctive relief. 621 Pa. at 269-70, 77 A.3d at 593. Although the Commonwealth Court denied the request for a preliminary injunction, it granted the hospital associations a declaratory judgment in their favor. The Commonwealth appealed to this Court, asserting, in part, that the matter was a non-justiciable political question. 621 Pa. at 270, 77 A.3d at 593-94.

In considering the Commonwealth's justiciability argument, this Court, in a majority decision written by now-Chief Justice Saylor, reviewed the holdings in *Sweeney* and its projeny, and exstablished an important limitation on the political question doctrine:

> [T]he need for courts to fulfill their role of enforcing constitutional limitations is particularly acute ***where the interests or entitlements of individual citizens are at stake.*** See *Sweeney, 473 Pa. at 517, 375 A.2d at 709* ("[T]he political question doctrine is disfavored when a claim is made that individual liberties have been infringed.")

621 Pa. at 276, 77 A.3d at 597 (emphasis added). In explaining this limitation, the Court relied upon and quoted from the decision in *Jubelirer v. Singel*, 162 Pa. Cmwlth. 55, 638 A.2d 352 (1994):

> A determination that an issue is a nonjusticiable political question is essentially a matter of judicial abstention or

> restraint. As our Supreme Court has said: "To preserve the delicate balance critical to a proper functioning of a tripartite system of government, this Court has exercised restraint to avoid an intrusion upon the prerogatives of a sister branch of government . . . ."
>
> ***Here, Petitioners allege various constitutional violations. In such cases, 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 . . . [I]t would be a serious dereliction on our part to deliberately ignore a clear constitutional violation."***[5]

HHAP, 621 Pa. at 277, 77 A.3d at 597-98 (quoting *Jubelirer*, 162 Pa. Cmwlth. at 66-67, 638 A.2d at 358) (citations omitted) (emphasis added). This Court concluded that the matter was justiciable and rendered a decision on the merits. 621 Pa. at 278, 77 A.3d at 598.

Three months later in *Robinson Township*, former Chief Justice Castille, writing for a pluraity of this Court, again addressed the issue of justiciability. *Robinson Township* involved a petition for review, challenging the constitutionality of a statute amending the Pennsylvania Oil and Gas

[5] The language in quotes in the last paragraph comes from this Court's decision in *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (1986), *overruled on other grounds by Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 316-17, 877 A.2d 383, 408 (2005).

Act ("Act 13")[6] under Article 1, Section 27 ("the Environmental Rights Amendment") to allow more drilling of oil and natural gas in Marcellus Shale. *Robinson Township*, 623 Pa. at 584, 83 A.3d at 913. The Commonwealth filed preliminary objections to the petition for review, which the petitioners answered, and both parties filed applications for summary relief. 623 Pa. at 589, 83 A.3d at 916. The Commonwealth Court rendered a decision favorable, in part, to the petitioners, and each party appealed to this Court. *Id.*

In again addressing justiciability, this Court made clear that the political question doctrine under Pennsylvania law is substantively different than under federal law:

> In contrast to the federal approach, notions of case or controversy and justiciability in Pennsylvania have no constitutional predicate, do not involve a court's jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations. *See Fumo v. City of Philadelphia*, 601 Pa. 322, 972 A.2d 487, 500 n.5 (Pa. 2009); *Rendell* [*v. Pennsylvania State Ethics Comm'n*], [603 Pa. 292, 307 & n.9,] 983 A.2d [708,] 717 & n.9.

623 Pa. at 591, 83 A.3d at 917.

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[6] Act No. 13 of Feb. 14, 2012, P.L. 87, eff. immediately (in part) and Apr. 16, 2012 (in part), 58 Pa.C.S. §§ 2301-3504.

This Court provided a comprehensive summary of the "well-settled [and] applicable standards" for determining when to exercise judicial restraint based on the political question doctrine:

> Courts will refrain from resolving a dispute and reviewing the actions of another branch only where "the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for 'self-monitoring.'" *Sweeney, 375 A.2d at 706*; *Council 13, 986 A.2d at 76* (quoting *Thornburgh*). . . . Cases implicating the political question doctrine include those in which: there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department; there is a lack of judicially discoverable and manageable standards for resolving the disputed issue; the issue cannot be decided without an initial policy determination of a kind clearly for non-judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; and there is potential for embarrassment from multifarious pronouncements by various departments on one question.

623 Pa. at 608-09, 83 A.3d at 928 (citing *Council 13*, 986 A.2d at 75 and *HHAP*, 77 A.3d at 596-98 & n.11).

This Court went on to declare that the political question doctrine is one that should be used sparingly as it is the judiciary's province to say what the law is:

> In application, the Court has recognized that "[i]t 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." *Council 13, 986 A.2d at 75* (quoting *Thornburgh v. Lewis, 504 Pa. 206, 470 A.2d 952, 955 (Pa. 1983))*. This is not a radical proposition in American law. *See, e.g., Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 166, 2 L. Ed. 60 (1803)* ("where a specific duty is assigned by law [to another branch of government], and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy"). Indeed, "[o]rdinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers," and ***abstention under the political-question doctrine is implicated in limited settings***. *See Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 596 (Pa. 2013)* ("HHAP") (quoting *Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698, 705 (Pa. 1977))*.

623 Pa. at 607-08, 83 A.3d at 927-28 (emphasis added).

Signficantly, in applying its understanding of the political question doctrine, this Court emphasized the judiciary's obligation to interpret the law:

> We have made clear, however, that "[w]e will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty." *Council 13, 986 A.2d at 76* (quoting *Thornburgh*). "[T]he

> need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake." *HHAP, 77 A.3d at 597* (citing *Sweeney, 375 A.2d at 709* ("[T]he political question doctrine is disfavored when a claim is made that individual liberties have been infringed."); accord *Gondelman v. Commonwealth, 520 Pa. 451, 554 A.2d 896, 899 (Pa. 1989)* ("Any concern for a functional separation of powers is, of course, overshadowed if the [statute] impinges upon the exercise of a fundamental right. . . .").

623 Pa. at 609, 83 A.3d at 928.

In light of this judicial obligation, this Court concluded that in rendering a decision on the merits, it was carrying out its constitutional duty to interpret and apply the law:

> There is no doubt that the General Assembly has made a policy decision respecting encouragement and accommodation of rapid exploitation of the Marcellus Shale Formation, and such a political determination is squarely within its bailiwick. But, the instant litigation does not challenge that power; it challenges whether, in the exercise of the power, the legislation produced by the policy runs afoul of constitutional command. Responsive litigation rhetoric raising the specter of judicial interference with legislative policy does not remove a legitimate legal claim from the Court's consideration; the political question doctrine is a shield and not a sword to deflect judicial review. *Council 13, 986 A.2d at 75-76.* Furthermore, a statute is not exempt from a challenge brought for judicial consideration simply because it is said to be the General Assembly's expression of policy rendered in a polarized political context. See *id. at 76*; *HHAP, 77 A.3d at 598* ("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"). Whatever the context may have been, it produced legislation; and it is the legislation that is being challenged.

623 Pa. at 609-10, 83 A.3d at 928-29. Ultimately, this Court held that the matter was justiciable, in part, because the Commonwealth did "not identify any provision of the Constitution which grants it authority ***to adopt non-reviewable statutes*** addressing either oil and gas or policies affecting the environment." 623 Pa. at 611, 83 A.3d at 929 (emphasis added).

In contrast to the easy application of the political question doctrine advanced in *Marrero* and *Danson*, *Council 13*, *Jefferson County*, *HHAP*, and *Robinson Township* command our state judiciary to exercise considerable restraint when deciding whether to refuse to hear the merits of a plaintiff's constitutional challenge to a statute. The recent justiciability cases from this Court effectively reject an absolute position that bars any consideration of a constitutional challenge to a current or future law implicating a particular constitutional provision unless the clear language and history of that provision contemplates that no such challenge is allowed.

The Supreme Court's recent justiciability jurisprudence suggests that a more nuanced, fact-based examination is required by our courts when a party advances a defense that a constitutional claim is non-justiciable. Similarly, a recent Texas Supreme Court case reached a similar conclusion when considering an education funding challenge. That court recognized that any consideration of justiciability is a fact-based analysis partially dependent on the nature of the statute challenged as unconstitutional. *See Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005).

B. This Court Should Reverse the Commonwealth Court's Decision Sustaining Appellees' Preliminary Objections Because the Education Clause Constitutes an Enforceable Constitutional Obligation on the General Assembly To Fund Public Education in Order To Ensure a "Thorough and Efficient System of Public Education" and, Therefore, Appellants' Claims Are Justiciable.

1. From the beginning of our Commonwealth's constitutional history, Pennsylvanians have obligated the General Assembly to provide a public education for children.

The Commonwealth has a long-established and proud constitutional tradition of recognizing the premier importance of public

education in a democratic republic and the necessity of providing sufficient funds to ensure its residents are adequately educated. This tradition's roots can be traced as far back as Benjamin Franklin ("Mr. Franklin"), a framer of both the first constitution of Pennsylvania and the United States Constitution, who declared prior to the Revolutionary Era:

> The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Common-wealths. Almost all Governments have therefore made it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country.

Benjamin Franklin, *Proposals Relating to the Education of Youth in Pennsylvania* (1749).[7] Given Mr. Franklin's involvement in the drafting of our first state constitution, it is hardly surprising that the promotion of public education found itself enshrined in that original document and in subsequent versions.

The Pennsylvania Constitution of 1776, the first for our Commonwealth, reflects Mr. Franklin's views on public education as it

[7] Benjamin Franklin, *Proposal Relating to the Education of Youth in Pennsylvania* (1749), *available at* http://www.archives.upenn.edu/primdocs/1749proposals.html. Mr. Franklin devoted considerable effort in his lifetime to advancing the cause of public education in Philadelphia and across Pennsylvania. Upon his death, he bequeathed considerable funds to the education of children.

requires the General Assembly to educate children through county schools to accomplish this goal at reduced cost. Chapter II of that document reads:

> A school or schools ***shall be established in each county*** by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities.

Pa. Const. of 1776, ch. II, § 44 (emphasis added).

Following the Constitutional Convention of 1790, the Pennsylvania Constitution of 1790 modified the public education provision, and declared:

> The legislature ***shall, as soon as conveniently may be, provide, by law***, for the establishment of schools throughout the state, in such manner that the poor may be taught gratis.

Pa. Const. of 1790, art. VII, § 1 (emphasis added). Unlike the prior provision, this language obligated the General Assembly to educate poor children free of charge, although giving some leeway in the amount of time to accomplish this duty. This provision remained in our Constitution until adoption of the Pennsylvania Constitution of 1874.[8]

[8] Although there was a Constitutional Convention in 1837, the adopted document, the Pennsylvania Constitution of 1838, retained the same words as Article VII, Section 1 in

With the adoption of the Pennsylvania Constitution of 1874, the provision on public education was expanded. It required that the General Assembly educate all children over the age of six and established a minimum appropriation of $1 million to accomplish this mandate. Article X, Section 1 stated:

> The General Assembly ***shall provide for the maintenance and support of a thorough and efficient system of public schools***, wherein all the children of this Commonwealth above the age of six years may be educated, and ***shall appropriate at least one million dollars each year for that purpose.***

Pa. Const. of 1874, art. X, § 1 (emphasis added).

This version of the Education Clause remained in our Constitution until May 16, 1967, when the voters approved several amendments proposed by the General Assembly through passage of Joint Resolution No. 3, 1967, P.L. 1037. One of those amendments refined the public education provision to read as follows: "The General Assembly ***shall provide for the maintenance and support of a thorough and efficient system of public education*** to serve the needs of the Commonwealth." Pa. Const., art. III, § 14 (emphasis added). The provision, which remains in our Constitution to this day, continues the

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the previous version. The only difference was the deletion of commas before and after "by law." *Compare* Pa. Const. of 1790, art. VII, § 1, *with* Pa. Const. of 1838, art. VII, § 1.

centuries-long, constitutional obligation of the General Assembly to ensure the education of the children of the Commonwealth and provide sufficient "maintenance and support" for the effort.

Any consideration of whether Appellants' claims are justiciable must begin with the understanding that the text of our Constitution creates a constitutional obligation, commanding the General Assembly to ensure that it provide for public education as well as the necessary support, including adequate funding.

2. The debates at the Constitutional Convention of 1873 demonstrate that the framers understood the necessity of requiring the General Assembly to provide for and fund public education.

At the debates at the Constitutional Convention of 1873—at which it was first decided to add a requirement that the Legislature provide a "thorough and efficient system" of public education for all children—there was universal agreement that this effort was necessary for the common good. The delegates to the convention felt so strongly concerning the need for public education that they sought to impose a "constitutional injunction" against the General Assembly to provide for it, even though efforts had

already been underway legislatively. William Darlington, a Senator from Chester and Delaware Counties ("Mr. Darlington"), explained:

> The Legislature, with the sanction of the people of this Commonwealth, has gone far in advance of the constitutional injunction placed [in Article VII, Section 1 of the Pennsylvania Constitution of 1790]. Perhaps the subject might be safely left to the Legislature still. Indeed there cannot be any absolute necessity for the expression of an opinion by this Convention; ***but inasmuch as we might be said to be on the backward road if we said nothing on the subject, we felt that it was better for this Convention that it ought so to recognize the existence of that admirable system of public schools which now prevails over the Commonwealth as the existing state of things require. It will be therefore perceived that, instead of depending upon the Legislature to establish a system of education, the phraseology of the first section, now before us, we think shall provide for the maintenance and support***, merely recognizing the fact as it exists, and merely changing the phraseology from common schools to a system of public schools. This is the general purport of the first section.

II *Debates of Constitutional Convention of 1873* at 419 (emphasis added). Through these remarks, Mr. Darlington demonstrated that the framers of the new education provision did not desire to leave the continued existence and support of public education at the sole discretion of the General Assembly.

The need for a constitutional requirement to be placed upon the General Assembly to provide for public education arises from the framers' strong conviction that it was a necessity for a democratic republic to have an educated populous. Mr. Darlington explained his understanding on the subject: "If we are all agreed upon one thing it is, that the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education." *Id.* at 421.

Other delegates expressed a similar enthusiasm for the importance of the public education system. Harry White, a State Senator from Indiana County ("Mr. White"), declared that "[t]he section on education is second in importance to no other section to be submitted to this Convention." *Id.* In response to delegates who engaged in a failed attempt to amend the proposed provision by inserting the word "uniform" before "thorough and efficient," Augustus S. Landis ("Mr. Landis"), a State Senator, rejected the idea, arguing that "enough would be attained by the use of the word 'system,' and when you have affixed to that the adjectives 'thorough and efficient,' it seems to me you have accomplished all that is necessary to accomplish." *Id.* at 423. Even in arguing in favor of the

insertion of the word "uniform," Samuel M. Wherry ("Mr. Wherry"), a State Senator from Cumberland and Franklin Counties, proclaimed:

> Surely if there be any matter of pride and glory in our State, it is to be found in our system of common schools; and if there be one thing in it of more value than another, it is this uniformity—this rigid, equal and impartial system. Our common schools are the great, broad leveler by which all the children of the Commonwealth are placed in one common arena.

Id. at 424.

The delegates to the Constitutional Convention were equally supportive of the addition of the second sentence of the proposed provision requiring the General Assembly to appropriate at a minimum $1 million towards funding public education. While recognizing that this amount exceeded by nearly $300,000 the highest appropriation ever made for public education by the General Assembly, George Lear ("Mr. Lear"), a State Senator from Bucks and Northampton Counties, declared that mandating a minimum level of state appropriations for public education was "of the highest importance to the ***efficiency*** of the public school system of Pennsylvania, and we should have a minimum below which this appropriation shall not go . . . ." *Id.* at 435 (emphasis added). Thus, Mr. Lear acknowledged and supported the idea that adequate state funding for

public education, in fact greater funding, was a necessary step to ensure a "thorough and efficient system of public schools." In fact, he declared that "[t]his subject is probably of more importance than any other one that will receive the attention of this committee . . . ." *Id.* at 436. John S. Mann ("Mr. Mann"), a State Senator from Potter County, concurred, stating that the provision was "the most important one that has been proposed to this Convention." *Id.*

Delegates to the 1873 Constitutional Convention recognized that requiring adequate funding of public education would ensure that all the children of Pennsylvania, rich or poor, would receive the necessary instruction. In explaining his reasoning for the import of a constitutionally-mandated appropriation, Mr. Lear stated that it was a way to provide for the education of poorer children in the Commonwealth:

> [I]t enables the districts where they are not wealthy, because wealth does not always go with population, and where we have our farms of many hundred acres, and the population is sparse, the people are more wealthy, but when we get into our mining and manufacturing communities, where there are little huts filled with children—because poverty and population, at least the multiplicity of children seem to go hand in hand, there it is, that the appropriations from the State in accordance with the number of children in the schools, as the case may be, is an assistance and help to these localities where children prevail to a greater extent than wealth.

Id. Mr. White concurred, stating that "I do not think that we can over-estimate the value of this provision . . . If the original provision passes hundreds of people in the poorer parts of this Commonwealth will say, 'God bless the Convention.'" *Id.* at 437. He then urged:

> Let this Convention, representing as it does, the free sovereignty of this Commonwealth, indicate its wish, that in no event shall the Legislature, for all the great benefits and purposes of education, appropriate less than a million of dollars, and you will have accomplished a mighty thing.

Id. at 438. Thus, the delegates, through this provision, sought to prohibit any discretion on the part of the General Assembly about whether to provide public education or to fund it. In the end, the constitutional provision as originally presented to the delegates was agreed upon and later approved by the voters.

In 1967, the General Assembly sought to amend the Education Clause, along with several other provisions of the Pennsylvania Constitution, through passage of a resolution and presentation of the amendment to the voters. Nothing in the legislative history indicates that the framers were foregoing the long-held belief that the General Assembly was constitutionally-mandated to provide for and support public education,

including through necessary appropriations. Describing the amendment, House Representative Beren stated:

> Section 14 updates the constitution by replacing the obsolete requirement that all children of the Commonwealth above the age of six be educated, and, at least $1 million be spent for that purpose. Now the language provides that the General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.

House, *Pa. Legislative Journal* at 80 (Jan. 30, 1967).

Based on the above, the current Education Clause clearly imposes a mandatory obligation on the General Assembly to fund public education at levels adequate to ensure a "thorough and efficient system" of public education in the Commonwealth.

3. Our courts have recognized that public education is "indispensable" in a democracy as well as a "fundamental right."

Our courts have long recognized that the framers and the people demanded, through the Pennsylvania Constitution, that the General Assembly provide for a "thorough and efficient system" of public education. In the *Teachers' Tenure Act Cases*, 329 Pa. 213, 197 A. 344 (1938), this

Court made clear that the purpose of the "thorough and efficient" language in the Pennsylvania Constitution was to require the General Assembly to provide a public education for the benefit of the polity as a whole, including the poor, and not allow its future existence to be left to the Legislature's discretion alone. In considering a challenge to the constitutionality of the Teachers' Tenure Act under the then-existing Education Clause, the Court stated:

> ***The Constitution of Pennsylvania, by Article X, Section 1, not only recognizes that the cause of education is one of the distinct obligations of the State, but makes of it an indispensable governmental function. The power of the State over education thus falls into that class of powers which are made fundamental to our government.*** In the abstract it is not an absolute essential to government as taxation, law enforcement and preservation of the peace are essential, but by the express provision of the Constitution it ranks with them as an element necessary for the sustenance and preservation of our modern State. Education is to-day regarded as one of the bulwarks of democratic government. Democracy depends for its very existence upon the enlightened intelligence of its citizens and electors. ***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. The power over education is an attribute of government that cannot be legislatively extinguished. It cannot be bargained away or fettered. Its benefits to a free government cannot be placed on the auction block or impeded by laws which will ultimately weaken, if not destroy, the underlying constitutional***

> ***purpose. To permit such legislative incursion would relegate our State back to the days when education was scarce and was secured only through private sources, as a privilege of the rich.***

329 Pa. at 223-24, 197 A. at 352 (emphasis added).

While recognizing the framers' intent to create this "constitutional injunction," as Mr. Darlington commented, the Court still understood that it afforded the General Assembly the ability to make education policy choices "to adopt a changing program to keep abreast of education advances." 329 at 224, 197 A. at 352. However, the "people have directed that the cause of public education cannot be fettered, but must evolute or retrograde with succeeding generations as the times prescribe." *Id.* Thus, even in the Depression Era, this Court understood that the General Assembly has a constitutional mandate to provide a public education, while leaving in its hands the authority to make necessary adjustments to the nature of that education in order to abide by its obligation. The Legislature lacks, however, any authority to abolish or otherwise undermine public education such that it is not ensuring a "thorough and efficient system of public education" for the Commonwealth's children.

More recently, our appellate courts acknowledged the constitutional sanctity afforded public education by recognizing that it constitutes a "fundamental right." In *Wilkinson Education Ass'n v. School District of Wilkinson*, 542 Pa. 335, 667 A.2d 5 (1995) (hereinafter "*Wilkinson*"), this Court acknowledged:

> In reviewing the proceedings in this case, it is apparent that some salient principles have escaped notice. ***First, public education in Pennsylvania is a fundamental right***. It is required by *Article III, Section 14 of the Pennsylvania Constitution.* ***Second, this court has consistently examined problems related to schools in the context of that fundamental right***.

542 Pa. at 343, 667 A.2d at 9 (emphasis added). Similarly, a later single-judge opinion of the Commonwealth Court stated that "[u]nder the [Pennsylvania] Constitution, public education is a fundamental right, defined also as a civil right that may not be denied to any person on the basis of race within the Commonwealth." *Pennsylvania Human Relations Comm'n v. Sch. Dist. of Philadelphia*, 681 A.2d 1366, 1383 (Pa. Cmwlth. 1996) (hereinafter "*PHRC*").

Despite acknowledging that public education is a fundamental right, the *Wilkinson* court, quoting *School District of Philadelphia v. Twer*, 498 Pa. 429, 447 A.2d 222 (1982), found that the proper inquiry in

determining the constitutionality of a statute effecting public education is as follows:

> The polestar in any decision requiring the assignment of priorities of resources available for education must be the best interest of the student . . . Any 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.

542 Pa. at 343, 667 A.2d at 9 (quoting *Twer*, 498 Pa. at 435, 447 A.2d 222, 224-25). Hence, this Court did not impose a strict scrutiny standard otherwise required for cases asserting violations of fundamental liberties. Nevertheless, the appellate courts, through their declaration that public education is a fundamental right, demonstrated their understanding of the constitutional obligation imposed on the General Assembly to ensure such education is provided for and supported.[9]

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[9] The *Wilkinson* decision is consistent with the Supreme Court's earlier case in *Reichley v. North Penn School District*, 533 Pa. 519, 626 A.2d 123 (1993) (hereinafter "*Reichley*"). In *Reichley*, while refusing to state whether public education is a "fundamental right" and therefore requires application of strict scrutiny or rational basis analysis, the court found that the question of which standard of review to use only arises when the constitutional challenge is based on the Equal Protection Clause. 533 Pa. at 525, 626 A.2d 126. In neither *Wilkinson* nor *Reichley* was there an equal protection claim raised by the plaintiffs, unlike in the Petition for Review filed by Appellants in this matter.

Through their acknowledgement that public education is "an indispensable governmental function" and "a fundamental right," our appellate courts correctly understand the significance of the Education Clause. The provision created a constitutional obligation on the part of the General Assembly to ensure and support public education, rather than simply affording it unreviewable discretion to decide if, and to what extent, it would maintain and fund such a project.

C. Appellants Have Alleged Sufficient Facts to Establish a Justiciable Claim Against Appellees.

When applying the Supreme Court's more recent jurisprudence on the political question doctrine to the facts as alleged by Appellants and the law described above, it is clear that this matter is justiciable. As an initial matter, Appellees claim that the Education Clause grants the General Assembly unreviewable discretion to provide for public education as it sees fit, outside any judicial review. However, the text of Article III, Section 14 demonstrates that Pennsylvanians, through the adoption of this provision, obligated their General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education." See Pa. Const., art. III, § 14. Importantly, the framers of the 1874 version of the

education provision understood it as such, and nothing in the current iteration of the provision suggests a different understanding.

Furthermore, the recent justiciability decisions as discussed *infra* reject Appellees' argument on this issue as this Court warns that the political question doctrine should only be used in limited situations when it is clear from the constitutional text that the matter is reserved exclusively to a coordinate branch of government. Decades earlier, this Court made clear, in *Teachers' Tenure Act Cases*, that the Education Clause did not give unbridled discretion to the General Assembly to do as it wants with respect to public education. The Court made clear that the requirement for providing and supporting public education cannot be "legislatively extinguished," "bargained away or fettered" or "impeded by laws which will ultimately weaken, if not destroy, the underlying constitutional purpose." *Teachers' Tenure Act Cases*, 329 Pa. at 223-24, 197 A. at 352.

Appellees' position on justiciability is further belied by this Court and a single-judge opinion of the Commonwealth Court acknowledging that public education is a "fundamental right." *See Wilkinson*, 542 Pa. at 343, 667 A.2d at 9; *PHRC*, 681 A.2d at 1383. These judicial pronouncements

demonstrate an understanding that the framers of the Education Clause imposed a "constitutional injunction" against the General Assembly to provide for and support public education. Quite simply, nothing in the Education Clause or the history of its adoption suggests that it was anything but the people's command to the General Assembly to ensure the existence and growth of public education in our Commonwealth.

Additionally, the specific factual allegations in the Petition for Review demonstrate that this matter is distinguishable from previous educational funding cases and is justiciable. Unlike here, *Danson* and *Marrero* effectively were equity funding cases in which the petitioners alleged that the Education Clause was violated because funding in a particular school district or school districts did not meet levels found in others. The petitioners there did not allege that students were, in fact, harmed by receiving an inadequate education. *See Danson*, 484 Pa. at 420, 399 A.2d at 363 (alleging that the Philadelphia School District was receiving inadequate funds, but not alleging that any student "is, has, or will, suffer any legal injury as a result of the operation of the state financing scheme" or that they "are being denied an 'adequate,' 'minimum,' or 'basic' education"); *Marrero*, 559 Pa. at 15, 739 A.2d at 111 (alleging that the

Philadelphia School District was receiving inadequate funds, but not indicating that students were directly harmed by the inadequate funding).

In contrast, the thrust of Appellants' claims in this matter is that a significant number of students cannot and will not meet the very educational standards established by the Commonwealth. Specifically, they allege that, under the current funding scheme and legislative restrictions on their local taxing authority, Appellant School Districts will not meet the Commonwealth-mandated educational standards for a significant number of their students. Many of those students, Appellants allege, have not and will not meet those educational standards because their school districts lack sufficient funding to meet those standards, due in large measure, to the currently existing and grossly insufficient funding scheme. Under these facts, Appellants' claims are distinguishable from those asserted in the prior education funding cases relied upon by the Commonwealth Court.

Appellants also allege facts that refute the Commonwealth Court's claim that the judiciary "lacks judicially discoverable and manageable standards" for determining whether Appellees have violated

their constitutional duty to provide a "thorough and efficient system of public education." Through its detailed and specific factual allegations, Appellants' causes of action, in fact, have manageable standards by which they can be considered. Those standards derive from ones established by the General Assembly and the State Board of Education ("State Board") themselves, which have promulgated and mandated educational standards for public schools and the children who attend those schools. Appellant School Districts allege that a significant majority of Appellant School Districts cannot and will not meet those standards.

There also exist manageable standards to determine the level by which the current funding scheme fails to provide a "thorough and efficient system of public education." As is the case with the educational standards, funding standards derive from the General Assembly and the State Board itself, which, through a legislatively-required study of the Commonwealth's funding scheme determined the amounts of additional revenues required to achieve the educational standards set by the Commonwealth.

As alleged in the Petition for Review, in December 2007, Augenblick, Palaich & Assocs. Inc. ("APA") produced a comprehensive study entitled *Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals.*[10] The study concluded that the Commonwealth requires a massive infusion of additional revenues in order to meet the educational goals established by the General Assembly and the State Board. Based on APA's evaluation, the Commonwealth needed an additional $4.38 billion to reach student proficiency goals and other performance expectations. The study also demonstrated that poorer school districts were dramatically further behind these funding goals than richer school districts, and that the overreliance on local property taxes was the source of the disparity. APA recommended using tax revenues collected statewide to address the inequities. Appellants further allege that the General Assembly enacted a new state funding scheme to address the inequities outlined in the APA study, but they were abandoned in 2011, leading to massive public education cuts and a demonstrated inability of some school districts to meet the Commonwealth's newly-imposed education standards.

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[10] Augenblick, Palaich & Assocs. Inc., *Costing Out the Resources Needed to Meet Pennsylvania's Public Education Goals* 4 (Dec. 2007), *available at* http://www.pde.state.pa.us/portal/server.pt/community/research_reports_and_studies/19722/education_costing-out_study/529133.

Other studies cited in the Petition for Review support Appellants' contentions that the current funding scheme leads to poor academic outcomes that fall below the Commonwealth standards. Bruce D. Baker determined that the "empirical literature validates that state school finance reforms can have substantive, positive effects on student outcomes, including reductions in outcome disparities or increases in overall outcome levels."[11] A 2014 study by the Pennsylvania State Education Association ("PSEA") found that declines in reading and math scores in grades 3 through 6 worsened following the enactment of budget cuts in 2011-12.[12] Finally, the Pennsylvania Budget and Policy Center determined that districts with "more than 50% of students categorized as low income had per-student cuts of $883 on average in 2011-12, more than five times higher than districts with a quarter or fewer low-income students, whose cuts totaled $166 per student on average."[13] Ultimately, these additional reports support the APA study and Appellants' claims that there

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[11] Bruce D. Baker, *Evaluating the Recession's Impact on State School Finance Systems*, Education Policy Analysis Archives, Vol. 22, No. 91 (Sept. 15, 2015), *available at* http://epaa.asu.edu/ojs/article/view/1721/1357.

[12] Pa. State Educ. Assoc. Research Div., *Budget Cuts, Student Poverty, and Test Scores: Examining the Evidence* (Aug. 15, 2014), *available at* http://www.psea.org/uploadedFiles/LegislationAndPolitics/Key_Issues/Report-BudgetCutsStudentPovertyAndTestScores-August2014.pdf.

[13] Pa. Budget & Policy Ctr. Staff, *Pa. House Budget Looks in Most of the School Funding Cuts* (June 21, 2013) *available at* http://pennbpc.org/sites/pennbpc.org/files/Education-Funding-House-Budget-6-21-13.pdf.

exists a measurable lack of funding that is causing below-standard educational results in poorer school districts. Thus, contrary to the Commonwealth Court's decision, there exist clear and demonstrable standards for a court to evaluate Appellants' causes of action.

Furthermore, the mere difficulty in determining "judicially manageable standards" does not permit our courts to abdicate their duty to enforce our Constitution's provisions. *See Robinson Twp.*, 623 Pa. 564, 643, 83 A.3d 901, 953 ("Articulating judicial standards in the realm of constitutional rights may be a difficult task. The difficulty of the task, however, is not a ground upon which a court may or should abridge rights explicitly guaranteed in the Declaration of Rights."); *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment Appeals*, 615 Pa. 463, 470, 44 A.3d 3, 7 (2012) ("The General Assembly cannot displace our interpretation of the Constitution because 'the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court.'") (citation omitted); *Holt v. 2011 Legislative Reapportionment*, 614 Pa. 364, 401, 38 A.3d 711, 733 (2012) ("The proper construction of constitutional language (or statutory language for that matter) is a question peculiarly suited to the judicial funciton.").

Despite the fact that Appellants have, in fact, articulated "judicially manageable standards," it is important to remember that the parties are at the initial stages of the litigation. This Court simply needs to determine whether, under the facts of the case, Appellants have alleged a cognizable claim for violations of the Pennsylvania Constitution. For the reasons stated in detail above, they clearly have met that burden. To the extent that Appellants prove such violations following the discovery process, the Commonwealth Court, and this Court if necessary, can determine the appropriate remedy to address those violations. But this Court may not abdicate its obligations to enforce provisions of the Pennsylvania Constitution based on fears about the court's future possible involvement in determining such a remedy.

Thus, Appellants' claims are justiciable, and, therefore, the Commonwealth Court erred when it sustained the Preliminary Objections of Appellees.

IX. CONCLUSION

For the reasons enumerated above, this Court should reverse the Commonwealth Court's erroneous decision sustaining the Preliminary Objections of the Legislative and Executive Appellees and remand this matter to the Lower Court to allow the matter to proceed to discovery.

Respectfully submitted,

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APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Tyesha Strickland, parent of E.T., minor; Angel Martinez, parent of A.M., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference, Petitioners	:	
v.	:	No. 587 M.D. 2014
	:	Argued: March 11, 2015
Pennsylvania Department of Education; Joseph B. Scarnati III, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; Michael C. Turzai, in his official capacity as the Speaker of the Pennsylvania House of Representatives; Thomas W. Corbett, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Carolyn Dumaresq, in her official capacity as the Acting Secretary of Education, Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: April 21, 2015

Before this Court are the preliminary objections filed by the Respondents[1] to the petition for review filed by public school districts that allege that they are underfunded; individual parents of students attending public school; and organizations advocating for the school districts and the students (collectively, Petitioners)[2] seeking declaratory and injunctive relief because the current public school funding scheme purportedly violates the Education[3] and Equal Protection[4]

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[1] Specifically, the Department of Education (Department) and its Acting Secretary; the Governor; and the State Board of Education (State Board) (collectively, Executive Branch Respondents); and the President Pro-Tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives (collectively, Legislative Branch Respondents).

[2] Specifically, Petitioners are: 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, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Tyesha Strickland, parent of E.T., minor; Angel Martinez, parent of A.M., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference.

[3] Article 3, Section 14 states that "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. art. III, §14.

[4] Article 3, Section 32 states that "[t]he General Assembly shall pass no local or special law in any case which has been and can be provided for by general law...." Pa. Const. art. III, §32. *See*

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Clauses of the Pennsylvania Constitution. We sustain the preliminary objections and dismiss the petition for review.

I.

Petitioners filed this petition for review in our original jurisdiction seeking declaratory and injunctive relief alleging that the Education Clause creates a fundamental right for every school-aged child to attend free public schools and an opportunity to obtain an adequate education as defined in the Department's regulations.[5]

In Count I, Petitioners assert that through the enactment of statewide academic standards[6] and assessments[7] such as the Pennsylvania System of School

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also Pa. Const. art. I, §1 ("All men are born equally free and independent, and have inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."); Pa. Const. art. I, §26 ("Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.").

[5] *See* 22 Pa. Code §4.11(b) ("Public education prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.").

[6] *See* 22 Pa. Code §4.3 ("*Academic standard*—What a student should know and be able to do at a specified grade level.").

[7] *See* 22 Pa. Code §4.3 ("*Assessment*—A valid and reliable measurement of student performance on a set of academic standards in a subject area that captures student understanding of the set as a whole and the central concepts, knowledge and skills of each content area.").

Assessment (PSSA)[8] and Keystone examinations,[9] Respondents have defined the content of the public education system and the level of proficiency that the individual students must attain in order to meet the requirements of the Education Clause. (Petition for Review at ¶302).[10] Petitioners also contend that the Commonwealth's academic Common Core standards[11] set forth a prescribed course of study for

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[8] *See* 22 Pa. Code §4.51a(b), (c) ("The Department will develop or cause to be developed PSSA assessments based on Pennsylvania Core Standards in Mathematics and English Language Arts ... and academic standards in Science and Technology and Environment and Ecology.... The PSSA assessments shall be administered annually and include assessments of the State academic standards in Mathematics and English Language Arts at grades 3 through 8, and in Science and Technology and Environment and Ecology at grades 4 and 8.").

[9] *See* Section 121 of the Public School Code (School Code), Act of March 10, 1949, P.L. 30, added by Act of June 30, 2012, P.L. 684, 24 P.S. §1-121 ("Subject to annual appropriation, not later than the 2020-2021 school year, the [Department] shall develop and implement Keystone Exams in the following subjects: algebra I, literature, biology, English composition, algebra II, geometry, United States history, chemistry, civics and government and world history."); 22 Pa. Code §4.51b(i), (j), (m) ("Beginning in the 2012-2013 school year, Keystone Exams in the following subjects will be developed by the Department and made available for use by school districts ... for the purpose of assessing high school graduation requirements ... : Algebra I[;] Literature[;] Biology[.] Subject to funding appropriated by the General Assembly for development of the exams and related project-based assessments and validation of related local assessments, Keystone Exams in the following subjects will be developed by the Department and made available for use by school districts ... for the purpose of assessing high school graduation requirements ... in accordance with the following schedule: School Year 2015-2016 English Composition[;] School Year 2016-2017 Civics and Government[.] ... The 11th grade PSSA exams in Reading, Writing, Math and Science shall be discontinued upon implementation of the Keystone Exams as the approved assessment system under section 1111(b)(2)(C) of the No Child Left Behind Act of 2001 (20 U.S.C.A. §6311(b)(2)(C)).").

[10] *See also* 22 Pa. Code §4.52(a)(1)-(2) ("Each school entity shall design an assessment system to ... [d]etermine the degree to which students are achieving academic standards ... [and] shall provide assistance to students not attaining academic standards at the proficient level or better ... [and u]se assessment results to improve curriculum and instructional practices and to guide instructional strategies.").

[11] As alleged, "[t]he academic and core standards are found in Appendices A-2, B, C, D, and E to Chapter Four of the Pennsylvania Code. These appendices describe what students should

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students and a progression from grade-to-grade that forms the core of the Commonwealth's public education system. (*Id.* at ¶303). Petitioners argue that Respondents have violated their constitutional duties by failing to provide sufficient resources to meet those standards because the current funding levels are irrational, arbitrary and not reasonably calculated to ensure that all students are provided with the required course of study or services or obtain the required proficiency in the subject areas. (*Id.* at ¶¶304, 305).[12]

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know and be able to do by the end of select grade levels for each of the academic and core standards." (Petition for Review at ¶106). As also alleged, the Board promulgated academic standards in 1999 for mathematics; reading; writing, speaking and listening. (*Id.* at ¶101). The Board added the following between 2002 and 2006: science and technology; environment and ecology; social studies (history, geography, civics and government, and economics); arts and humanities; career, education, and work; health, safety, and physical education; and family and consumer science. (*Id.*). *See also* 22 Pa. Code §§4.21(e)-(g); 4.22(c); 4.23(c). As alleged, school districts must provide: (1) planned instruction at every grade level in the arts, including active learning in art, music, dance and theater; (2) a comprehensive and integrated program of student services, including developmental services such as guidance counseling at every grade level; (3) planned instruction in vocational-technical education, business education, including business and information technology skills, world languages, and technology education to high school students; (4) programs for English-language learners to facilitate proficiency and meet the academic standards; (5) health, safety and physical education at every grade level; (6) aids, services and accommodations to meet the needs of handicapped students; (7) special education for students with disabilities that enables them to be involved in and progress in the general curriculum and for gifted students to participate in acceleration or enrichment, or both. (Petition for Review at ¶118); 22 Pa. Code §§4.21(e), (f); 4.22(c); 4.23(c), (d); 4.26; 4.27; 4.28(a), (b); 12.41(a)-(c); 16.2.

[12] Petitioners acknowledge that public education is paid for by a combination of local, state and federal funds. (Petition for Review at ¶¶263-265). They allege that pursuant to Section 2599.3 of the School Code, added by Act of July 11, 2006, P.L. 1092, 24 P.S. §25-2599.3, the Board commissioned a costing-out study which found that the average cost per student was $11,926.00 to meet state standards in 12 academic areas and to score "proficient" or above on the PSSA reading and math examinations by 2014, and that state funds should be allocated based on a formula sensitive to school district wealth to reduce the inequities caused by the heavy reliance on local revenues. (*Id.* at ¶¶120-129). Based on the study, the General Assembly enacted Section 2502.48 of the School Code, added by Act of July 9, 2008, P.L. 846, 24 P.S. §25-2502.48, providing a

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In Count II, Petitioners assert that an education is a fundamental right of every student and imposes a duty on Respondents to ensure that every student is treated equally and has the same fundamental opportunity to meet academic standards and obtain an adequate education and prohibits Legislative Branch Respondents from irrationally enacting laws that benefit a select few. (Petition for Review at ¶¶308-309). Petitioners contend that Respondents violated the Equal Protection Clause by

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funding formula for increasing the state basic education subsidy used through 2010, which determined a district's "adequacy" amount based on the study's weightings and subtracted actual spending to determine a district's shortfall and the "State funding" share of this shortfall based on the district's fiscal strength and tax effort and set the state appropriation at $1/6^{th}$ of the additional state share. (*Id.* at ¶¶130-134). Since 2011, the formula for calculating the basic education subsidy has changed on an annual basis and major cuts were made to educational funding that were borne by the poorer districts so that a number of grant programs were eliminated and the ones that were continued were limited and directed to specific districts thereby exacerbating the disparity in funding and its effects. *See* Section 2502.50 of the School Code, added by Act of June 30, 2011, P.L. 112, 24 P.S. §25-2502.50; Section 2502.51, added by Act of June 30, 2012, P.L. 684, 24 P.S. §25-2502.51; Section 2502.52, added by Act of July 9, 2013, P.L. 408, 24 P.S. §25-2502.52. (Petition for Review at ¶¶135-142, 145-148, 151, 293). As a result, the gap between the adequacy target and district shortfall in the districts have increased precipitously. (*Id.* at ¶152). Respondents have also substantially limited a district's ability to raise revenue by precluding a property tax increase beyond a cost of living percentage calculated by the Department under the Taxpayer Relief Act, Act of June 27, 2006, P.L. 1873, 53 P.S. §§6926.101-6926.5006. (*Id.* at ¶¶143-144, 296-298). Moreover, Respondents' funding arrangement irrationally discriminates against students living in poor districts because they are required to impose locally higher rates to obtain fewer funds resulting in greater tax burdens and disparity in funding as evidenced by the "Aid Ratio" and "Market Value/Income Aid Ratio" under Section 2501(14), (14.1) of the School Code, 24 P.S. §25-2501(14), (14.1), and such provisions are beyond local control. (*Id.* at ¶¶262-289, 294-295). Petitioners exhaustively outline the negative impacts flowing from the insufficient funding thereby demonstrating the lack of thoroughness and inefficiency of the system: students are unable to meet state proficiency standards on the Keystone and PSSA examinations and have eliminated courses, programs and services necessary to meet those standards (*id.* at ¶¶153-168, 203-229, 247-248); districts with significant funding gaps have insufficient and undertrained staff (*id.* at ¶¶173-200); districts have insufficient materials, equipment and facilities (*id.* at 230-246); and there is inadequate pre-kindergarten program funding requiring Petitioners to choose between less spending or using general operating funds to provide these programs. (*Id.* at ¶¶249-261).

adopting a school funding program that discriminates against the identifiable class of students living in low-income and low-property value districts and denying them an equal opportunity to obtain an adequate education. (*Id.* at ¶310). Petitioners allege that there are many available funding methodologies that retain local control without discriminating against students living in low-income and low-property value districts. (*Id.* at ¶311).

> As a result, Petitioners ask this Court to declare:
>
> (1) public education is a fundamental right to all school-age children;
>
> (2) the Education Clause requires Respondents to provide support to ensure that all students obtain an adequate education to meet state academic standards and meaningful participation in the civic, economic, social, and other activities of our society;
>
> (3) the present funding system violates the Education Clause and the students' rights;
>
> (4) the Equal Protection Clause requires Respondents to provide funding that does not discriminate based on income or taxable property;
>
> (5) the present school funding system violates the Equal Protection Clause by providing students in school districts with high property values and incomes the opportunity to meet state standards and obtain an adequate education while denying students in districts with low property values and incomes those same opportunities;
>
> (6) the funding disparities between the school districts is not justified by any compelling governmental interest and is not rationally related to any legitimate government objective; and

(7) Respondents are violating Petitioners' constitutional rights by implementing the school financing arrangement.

(Petition for Review at ¶¶312-319).

Additionally, Petitioners ask this Court to permanently compel Respondents to establish, fund and maintain a system providing equal opportunity to all students to obtain an education meeting academic standards and societal participation; to develop a school-funding arrangement that complies with the Education and Equal Protection Clauses and maintain continuing jurisdiction to ensure that they are met; to award costs, including attorneys' fees and expert fees; and to grant other relief as this Court deems just. (Petition for Review at ¶¶320-324).

II.

Executive Branch Respondents filed the instant preliminary objections in the nature of a demurrer,[13] alleging: (1) Petitioners' claims present nonjusticiable political questions because the General Assembly has enacted statutes providing for the establishment, operation and funding of a system of public education as required by the Education Clause; (2) Petitioners fail to state a claim for which relief may be granted because the statutory scheme establishing and providing for the system of public education is rationally related to legitimate governmental objectives; (3)

[13] In ruling on preliminary objections, we must accept as true all well-pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom. *Marrero v. Commonwealth*, 709 A.2d 956, 959 (Pa. Cmwlth. 1998) (*Marrero I*), *aff'd*, 739 A.2d 110 (Pa. 1999) (*Marrero II*). In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain them. *Id.*

Petitioners' claims are barred by sovereign immunity to the extent that the petition for review seeks to impose a mandatory injunction; and (4) Petitioners' claims are barred by the separation of powers doctrine to the extent that the petition for review seeks to compel action by the General Assembly and subject it to ongoing supervision by this Court.

Likewise, Legislative Respondents filed preliminary objections in the nature of a demurrer, alleging: (1) Petitioners' claims present nonjusticiable political questions because there are no judicially manageable standards for granting relief; (2) Petitioners fail to state a claim upon which relief may be granted under the Education Clause because the existing funding system serves the rational basis of preserving local control over public education; and (3) Petitioners fail to state a claim upon which relief may be granted under the Equal Protection Clause because education is not a fundamental right subject to strict scrutiny and the existing funding system serves the rational basis of preserving local control over public education.

III.

With respect to Respondents' first preliminary objection, courts apply the *Baker v. Carr*, 369 U.S. 186 (1962), analysis to determine whether judicial abstention under the political question doctrine applies. *Robinson Township v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013); *Sweeney v. Tucker*, 375 A.2d 698, 711 (Pa. 1977). As the Pennsylvania Supreme Court has explained:

> Cases implicating the political question doctrine include those in which: there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department; there is a lack of judicially discoverable and manageable standards for resolving the

> disputed issue; the issue cannot be decided without an initial policy determination of a kind clearly for non judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; and there is potential for embarrassment from multifarious pronouncements by various departments on one question.

Robinson Township, 83 A.3d at 928 (citations omitted).

In *Marrero I and II*, the Philadelphia School District, students and parents in the district, the City of Philadelphia, and other organizations filed suit seeking declarations that the General Assembly had failed to fulfill its obligation under the Education Clause by failing to adequately fund the public school system in Philadelphia and that it must amend the School Code to ensure that the district provides adequately for the needs of its students because the local tax base did not provide sufficient revenues. This Court sustained the respondents' preliminary objections because the claims presented were nonjusticiable political questions in *Marrero I* and the Supreme Court affirmed in *Marrero II*.

Initially, the Supreme Court explained that "th[e] mandate of our state constitution ... does not confer an individual right upon each student to a particular level or quality of education, but, instead, imposes a constitutional duty upon the *legislature* to provide for the maintenance of a thorough and efficient *system* of public schools throughout the Commonwealth." *Marrero II*, 739 A.2d at 112 (quoting our opinion and citing *Danson v. Casey*, 399 A.2d 360 (Pa. 1979)).

The Court acknowledged that the Education Clause "'makes it impossible for a legislature to set up an educational policy which future legislatures cannot change' because 'the very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances,'" and that it would also be "contrary" to the "essence" of the Education Clause "for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required 'normal' program of education services...." *Id.* (citations omitted).

The Court continued:

> [T]he only judicially manageable standard this court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures.... [H]owever, ... expenditures are not the exclusive yardstick of educational quality, or even constitutional quantity.... The educational product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized.
>
> ....
>
> 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 of Philadelphia. The Legislature has enacted a financing scheme reasonably related to [the] maintenance and support of a system of public education in the Commonwealth[.] The framework is neutral with regard to the School District[] and provides it with its fair share of state subsidy funds. This statutory scheme does not "'*clearly*, *palpably*, and *plainly* violate the Constitution'"....
>
> ....

> Whatever the source of the School District['s] endemic ability to obtain the funds the School District deems are necessary for it to offer its students a "normal program of educational services," appellants by this litigation seek to shift the burden of supplying those revenues from local sources to the Commonwealth. This Court, however, may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded, not only in Philadelphia, but throughout the Commonwealth.

Id. at 112-13 (citations omitted and emphasis in original).

Contrary to Petitioners' assertions, the adoption of statewide academic standards and assessments and the costing-out study and subsequent appropriations since the Supreme Court's decision in *Marrero II* do not preclude its application in this case. While the foregoing may establish annual legislative or executive benchmarks regarding student achievement and educational spending that may be used in determining funding levels as a matter of policy, they do not confer funding discretion upon this Court nor provide us with judicially manageable standards for determining whether the General Assembly has discharged its duty under the Constitution.

As outlined above, the Court explained in *Marrero II* and *Danson* that the Constitution "does not confer an individual right upon each student to a particular level or quality of education," and "expenditures are not the exclusive yardstick of educational quality, or even constitutional quantity." *Marrero II*, 739 A.2d at 112-13 quoting *Danson*, 399 A.2d at 366. This Court can no more determine what level of annual funding would be sufficient for each student in each district in the statewide system to achieve the required proficiencies than the Supreme Court was able to

determine what constitutes an "adequate" education or what level of funding would be "adequate" for each student in such a system in *Marrero II* or *Danson*. This is a legislative policy determination[14] that has been solely committed to the General Assembly under Article 3, Section 14.

Accordingly because *Marrero II* and *Danson* preclude our review of Petitioners' claims in this matter as nonjusticiable political questions and require the grant of Respondents' first preliminary objections,[15] the preliminary objections of the Executive Branch Respondents and the Legislative Branch Respondents are sustained and Petitioners' petition for review is dismissed.

DAN PELLEGRINI, President Judge

Judge Cohn Jubelirer did not participate in the decision of this case.

[14] *See Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140, 154-55 (Pa. Cmwlth. 2015) ("[I]t is an equally unassailable truth enshrined in our governing document that the legislative and executive branches must annually reach agreement on a balanced plan to fund the Commonwealth's operations for the fiscal year, including funding for vital services to the most vulnerable among us in all corners of the Commonwealth. And, how they do this is as much a matter of policy as it is a matter of law, only the latter of which is reviewable by the judicial branch. Decisions to reduce a General Fund appropriation to an agency, even to an agency with constitutional duties, are matters of policy. Whether monies in a special fund may be used for a particular purpose, however, is a question of law fully reviewable by the Court. A decision to sell surplus vehicles or office equipment to help fund governmental operations is a matter of policy. But, a decision to lease Commonwealth property protected by the Constitution and held in trust for the benefit of all current and future Pennsylvanians is an appropriate subject of judicial scrutiny.").

[15] The foregoing applies to Petitioners' claims under both Article 3, Section 14 and Section 32. *Danson*, 399 A.2d at 365-67.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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, parents of K.M., a minor; Sheila Armstrong, parent of S.A., minor; Tyesha Strickland, parent of E.T., minor; Angel Martinez, parent of A.M., minor; Barbara Nemeth, parent of C.M., minor; Tracey Hughes, parent of P.M.H., minor; Pennsylvania Association of Rural and Small Schools; and The National Association for the Advancement of Colored People-Pennsylvania State Conference, Petitioners	:	
v.	:	No. 587 M.D. 2014
Pennsylvania Department of Education; Joseph B. Scarnati III, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; Michael C. Turzai, in his official capacity as the Speaker of the Pennsylvania House of Representatives; Thomas W. Corbett, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Carolyn Dumaresq, in her official capacity as the Acting Secretary of Education, Respondents	:	

ORDER

AND NOW, this 21st day of April, 2015, the preliminary objections of the Respondents are sustained and Petitioners' petition for review is dismissed.

DAN PELLEGRINI, President Judge

CERTIFICATE OF COMPLIANCE

I, Ralph J. Teti, do hereby certify pursuant to Pennsylvania Rule of Appellate Procedure 2135(d) that the foregoing Amici Curiae Brief complies with the required word count limits. Per the word processing system Microsoft Word, this brief contains 11,865 words.