IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

PETITIONERS' COMBINED OPPOSITION TO RESPONDENTS' SUPPLEMENTAL BRIEFS IN SUPPORT OF PRELIMINARY OBJECTIONS

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INTRODUCTION

Petitioners—parents, school districts, and two statewide organizations—filed this lawsuit over three years ago alleging that the General Assembly had violated its fundamental obligation to maintain and support a thorough and efficient system of public education. In the intervening years, tens of thousands of children in underfunded schools, including the individual Petitioners' children, have been deprived of the basic resources they need and the quality education they are guaranteed under the Pennsylvania Constitution. Their futures depend on this lawsuit finally getting underway.

Although Respondents continue to put up roadblocks and seek further delay, this Court has a clear and unambiguous mandate to move this case forward in accordance with the Pennsylvania Supreme Court's September 28, 2017 decision. In its comprehensive 86-page opinion, the Supreme Court held that the judiciary has an affirmative duty to monitor and ensure the General Assembly's compliance with its constitutional obligations under the Education Clause. The Court also held that Petitioners have pleaded a colorable equal protection claim, which is not foreclosed by principles of local control, and that Petitioners must be afforded the opportunity to "substantiate and elucidate" the standard of review applicable to this claim. *See William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 464 (Pa. 2017).

In light of this ruling, Governor Wolf and the Pennsylvania Department of Education have withdrawn their preliminary objections and urged this Court to move swiftly towards resolution. (*See generally* Exec. Supp. Br.[1]) Other Respondents, however, seek to mire this case in meritless preliminary objections that ignore the Supreme Court's thorough legal analysis, contravene applicable rules of civil procedure, and urge dismissal of claims that must be subject to evidentiary consideration.

Speaker Turzai, for example, abandons his preliminary objections to Petitioners' Education Clause claim, but nonetheless rehashes an argument expressly rejected by the Supreme Court: that the General Assembly's desire to preserve local control over education defeats Petitioners' equal protection claim. In making that argument, the Speaker relies on precisely the type of conclusory presentation the Supreme Court warned against and disregards the limitations on local control caused by the paucity of financial resources in low-wealth districts.

[1] The "Legislative Respondents," which include Speaker of the House Michael C. Turzai and President *pro tempore* of the Pennsylvania Senate Joseph B. Scarnati, originally filed joint preliminary objections ("Legis. Prelim. Objs."). The "Executive Respondents," which include Governor Thomas W. Wolf, the Pennsylvania Department of Education, the Pennsylvania State Board of Education, and Secretary of Education Pedro A. Rivera, did the same ("Exec. Prelim. Objs."). For purposes of supplemental briefing, however, Speaker Turzai and Senator Scarnati filed separate briefs (cited herein as "Turzai Supp. Br." and "Scarnati Supp. Br." respectively). The Executive Respondents filed a joint supplemental brief ("Exec. Supp. Br."), except for the Board of Education, which broke from the other Executive Respondents and filed its own brief ("Bd. of Educ. Supp. Br.").

For his part, Senator Scarnati argues that the Petition fails to state a claim because it lacks allegations of causation. But that objection is barred by Pennsylvania Rule of Civil Procedure 1028(b), which precludes the Senator from raising a new objection on remand that was not previously asserted. Furthermore, the objection is entirely baseless because, as the Supreme Court recognized, the Petition contains specific allegations of causation and harm. Senator Scarnati further contends that Petitioners' claims are moot because Act 35 supplants the education-funding scheme described in the Petition, but this argument, too, was soundly rejected by the Supreme Court. *See William Penn Sch. Dist.*, 170 A.3d at 435. It is also factually wrong. Act 35 expressly and unambiguously *locks in*, rather than retreats from, the funding arrangement challenged in the Petition, and Act 35's new allocation formula applies to *only 2%* of overall education funding.

While Governor Wolf and the Department of Education withdrew their sovereign immunity and separation of powers objections, the State Board of Education (the "Board") has chosen to pursue these objections. But the sovereign immunity and separations of powers doctrines do not bar Petitioners' claims. As the Supreme Court made explicit in holding Petitioners' claims to be justiciable, this Court has the authority to declare an education-funding scheme unconstitutional and to enjoin state officials from enforcing it. In doing so, the Court would not impose on a legislative function, as the Board contends; rather,

the Court would be performing its core judicial function: to ensure that the legislature lives up to its constitutional mandate.

The deprivations and harm alleged by Petitioners and suffered by children in Pennsylvania's underfunded schools cannot be undone. A child is in kindergarten only once and the denial of basic resources can and will change that child's life. Time is of the essence for every child who will be impacted by this lawsuit. Accordingly, Petitioners request that these meritless objections be overruled swiftly so that Pennsylvania's schoolchildren can finally have their day in court.

PROCEDURAL HISTORY

In November 2014, six families and six school districts (William Penn, Panther Valley, Lancaster, Greater Johnstown, Wilkes-Barre Area, and Shenandoah Valley), as well as the Pennsylvania Association of Rural and Small Schools ("PARSS") and the National Association for the Advancement of Colored People ("NAACP") of Pennsylvania (collectively "Petitioners"), filed the Petition against Legislative and Executive Respondents. The Petition alleged that the State's school funding scheme violated Article III, § 14 of the Pennsylvania Constitution (the "Education Clause") and Article III, § 32 of the Pennsylvania Constitution (the "Equal Protection Provision").

In December 2014, Legislative and Executive Respondents filed two sets of Preliminary Objections. Executive Respondents asserted that the Petition (i) raised

non-justiciable questions; (ii) failed to state a claim because the statutory scheme establishing and providing for public education is rationally related to legitimate governmental objectives; and (iii) sought relief barred by the doctrines of sovereign immunity and separation of powers. (*See* Exec. Prelim. Objs. ¶¶ 4–7.) Legislative Respondents—who, at the time, were jointly represented—likewise objected on justiciability grounds, arguing that there were no judicially manageable standards for granting relief. (*See* Legis. Prelim. Objs. ¶¶ 47–63.) They also asserted that the Petition failed to state a claim under either the Education Clause or the Equal Protection Provision because (i) the funding system served the rational purpose of preserving local control over education, and (ii) the Supreme Court in *Danson v. Casey*, 399 A.2d 360 (Pa. 1979), and *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110 (Pa. 1999), had held the current funding scheme constitutional as a matter of law. (*Id*. ¶¶ 64–75.).

On April 21, 2015, this Court held that Petitioners' claims were non-justiciable under the binding precedent of *Danson* and *Marrero*. *See William Penn Sch. Dist. v. Pa. Dep't of Ed.*, 114 A.3d 456, 464 (Pa. Commw. Ct. 2015). Petitioners appealed, and on September 28, 2017, the Supreme Court issued a comprehensive and thoroughly reasoned decision that overruled that precedent and held that Petitioners' claims are justiciable. *See William Penn Sch. Dist.*, 170 A.3d at 457, 463 (describing at length the "irreconcilable deficiencies in the [analytical]

rigor, clarity, and consistency" of *Danson* and *Marrero* and concluding "[t]o the extent our prior cases suggest a contrary result, they must yield").

The Supreme Court also held that Petitioners had adequately stated claims under both the Education Clause and Equal Protection provisions, whether viewed as intertwined or distinct. *Id.* at 464. The Court observed that the General Assembly cannot hide behind preservation of "local control" to abdicate its affirmative duty under the Education Clause, *id*. at 442 n.40 ("recitations of the need for local control cannot relieve the General Assembly of its exclusive obligation under the Education Clause"), and that such arguments do not preclude consideration of Petitioners' equal protection claim, which the Court found "colorable," *id*. at 464. With regard to both claims, the Court concluded that Petitioner's allegations "suggest a 'gross disparity' that, if true, might sow doubt in the mind of a fact-finder regarding the thoroughness and efficiency of the education that the districts on the short end of the funding stick can hope to provide." *Id*. at 443. Similarly, such gross funding disparities might irrationally discriminate against a class of children. *Id*. at 459. The Supreme Court reversed this Court's decision and remanded for further proceedings consistent with its opinion. *Id.* at 464.

Upon remand, Speaker Turzai waited more than two months to request leave from this Court to file supplemental briefing on Respondents' "unresolved"

preliminary objections and requested a stay of Respondents' time to answer to the Petition. (Speaker Turzai's Appl. to Permit Supp. Briefing & Arg. of Unresolved Prelim. Objs., Stay Time for Answering Pet. & Shorten to Seven Days the Time to Respond to Appl. ("Turzai App.") at 1, filed on December 5, 2017.) Senator Scarnati separately asked this Court on December 27, 2017, to dismiss the Petition on mootness grounds. (Appl. in the Nature of a Mot. to Dismiss for Mootness ("Scarnati App.") at 1.) On January 5, 2018, this Court issued an order permitting Respondents to submit supplemental briefs and staying the time for Respondents to answer the Petition. (Jan. 5, 2018 Order at 1.) The order permitted Petitioners to respond to Senator Scarnati's mootness application in their response to Respondents' supplemental briefs. (*Id.*)

STANDARD OF REVIEW

Preliminary objections in the nature of a demurrer test the legal sufficiency of a complaint and must be overruled unless "it is *clear and free from doubt* that the facts pled are legally insufficient to establish a right to relief." *Dotterer v. Sch. Dist. of City of Allentown*, 92 A.3d 875, 880 (Pa. Commw. Ct. 2014) (emphasis added). "[W]here any doubt exists as to whether the preliminary objections should be sustained, that doubt should be resolved by a refusal to sustain them." *Pa. State Troopers Ass'n v. Commonwealth*, 606 A.2d 586, 587 (Pa. Commw. Ct. 1992). When considering preliminary objections, all material facts set forth in the

pleadings must be accepted as true, as well as all inferences reasonably deducible therefrom. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). The Court's inquiry is limited to whether any valid claim has been alleged, and if "any theory of law will support a claim, preliminary objections are not to be sustained." *Goodheart v. Thornburgh*, 522 A.2d 125, 128 (Pa. Commw. Ct. 1987).

Moreover, Petitioners need only plead facts constituting the cause of action and are not required to specify the entire legal theory underlying the complaint. *See Milton S. Hershey Med. Ctr. v. Commonwealth of Pa. Med. Prof'l Liab. Catastrophe Loss Fund*, 763 A.2d 945, 952 (Pa. Commw. Ct. 2000); *Heinly v. Commonwealth*, 621 A.2d 1212, 1215 n.5 (Pa. Commw. Ct. 1993).

ARGUMENT

I. SPEAKER TURZAI'S PRELIMINARY OBJECTIONS SHOULD BE OVERRULED.

A. The Supreme Court Has Already Determined that Petitioners Have Stated an Equal Protection Claim.

In light of the Supreme Court's opinion, Speaker Turzai has abandoned his argument that Petitioners have failed to state an Education Clause claim. He continues to argue, however, that Petitioners have failed to state an equal protection claim. But that argument, too, is foreclosed by the Supreme Court's opinion, which states in unambiguous terms:

> [W]e find colorable Petitioners' allegation that the General Assembly imposes a classification whereunder

> distribution of state funds results in widespread deprivations in economically disadvantaged districts of the resources necessary to attain a constitutionally adequate education.

William Penn Sch. Dist., 170 A.3d at 464.

In reaching this conclusion, the Supreme Court specifically rejected Speaker Turzai's contention that the alleged injuries to children in low-wealth school districts from being denied a constitutionally adequate education are not actionable under either the Education Clause or the Equal Protection Provision because the funding scheme "serves the rational basis of preserving local control over public education." (*See* Legis. Prelim. Objs. at 20, 24 (capitalization omitted).) The Supreme Court observed:

> The relationship of school funding and local control is often cited by defenders of hybrid school funding schemes that result in significant district-by-district disparities. Numerous courts and commentators have observed that *this relationship is typically conclusory in its presentation, and disregards the limitations on local prerogatives caused by a paucity of financial resources*. *The school funding disparities defended by resort to local control in practice disserve that end as to many districts.*
>
> . . .
>
> Furthermore, recitations of the need for local control cannot relieve the General Assembly of its exclusive obligation under the Education Clause. Regardless of how it balances the minimal education that the Constitution requires to be provided to all students with the limitations inherent in local control and funding (and, again, to suggest that those two are inextricable is tendentious), *the General Assembly alone must be held*

> *accountable, regardless of whether one perceives the cause of the actionable deficiency to exist at the local or state level*.

William Penn Sch. Dist., 170 A.3d at 442 n.40 (emphasis added).

The Supreme Court also quoted with approval the following passage from *Dupree v. Alma*, 651 S.W.2d 90, 93 (Ark. 1983):

> Those jurisdictions finding no equal protection violation in a system based on district wealth generally uphold the system of funding by finding a legitimate state purpose in maintaining local control. We find however, two fallacies in this reasoning. First, to alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced. Second, as pointed out in *Serrano v. Priest*, [18 Cal. 3d 728, 135 Cal. Rptr. 345] 557 P.2d 929, 948 (Cal. 1976), "The notion of local control was a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself. . . . Far from being necessary to promote local fiscal choice, the present system actually deprives the less wealthy districts of the option."

Id. at 442 n.40.

Against this backdrop, Speaker Turzai's argument that the current funding scheme is justified by a desire to maintain local control over education must be rejected *under any standard of review*. As the Supreme Court anticipated, Speaker Turzai's argument is "conclusory in its presentation, and disregards the limitations on local prerogatives caused by a paucity of financial resources." *Id.* Indeed, nowhere in his brief does Speaker Turzai grapple with the questions of *how*

Pennsylvania's current funding scheme effectuates the goal of maintaining local fiscal choice anywhere but in the wealthiest districts or *how* low-wealth districts can exercise any *meaningful* fiscal choice given the "paucity" of financial resources detailed in the Petition. (*See* Turzai Supp. Br. at 33–38.) Nor does Speaker Turzai explain how his argument can survive the Supreme Court's statement that "the General Assembly alone must be held accountable, *regardless of whether one perceives the cause of the actionable deficiency to exist at the local or state level*." *William Penn Sch. Dist.*, 170 A.3d at 442 n.40. That statement is consistent with the Supreme Court's longstanding recognition that school districts are instrumentalities for carrying out the State's constitutional obligations. *See Wilson v. Sch. Dist.*, 195 A. 90, 94 (Pa. 1937) ("[S]chool districts . . . are but agencies of the state legislature to administer [its] constitutional duty."). Consequently, the State is responsible for any systemic funding disparities, whether created by State statute or local funding decisions.

While Speaker Turzai points to the fact that local districts exercise control over certain "spending decisions" (Turzai Supp. Br. at 37), he ignores the critical distinction between local *fiscal* control (*i.e.*, control over the *amount* of funding available) and local *administrative* control (*i.e.*, control over *how* that money is spent). As the Supreme Court recognized, "to suggest that those two are inextricable is tendentious" because distributing education funds in a more

equitable manner "'does not in any way dictate that local [administrative] control must be reduced.'" *William Penn Sch. Dist.*, 170 A.3d. at 442 n.40 (quoting *Dupree* 651 S.W.2d at 93).

Speaker Turzai also contends that the current funding scheme must be constitutional because it is the same system that "has been in place for as long as there has been public funding of education in Pennsylvania." (Turzai Supp. Br. at 33–34.) But that is a red herring. Petitioners do not challenge the *general structure* of Pennsylvania's education-funding scheme—*i.e.*, its reliance on a combination of local and state tax revenues—which Speaker Turzai correctly observes has been embraced since the founding. (*See id*. at 34.) Rather, Petitioners challenge Pennsylvania's *current implementation* of that structure—*i.e.*, its *unusually* high dependence on local taxes. *See William Penn Sch. Dist.*, 170 A.3d at 459 (citing Petition's allegation that "the very low levels of state funding and unusually high dependence on local taxes under the current financing arrangement have created gross funding disparities among school districts—an asymmetry that disproportionately harms children residing in districts with low property values and incomes"). The Supreme Court recognized this distinction and acknowledged that while "the framers understood that local communities had the right to use local tax revenues to *expand* educational programs subsidized by the Commonwealth," they "also understood that the Commonwealth had a duty to

make a 'good' or 'proper' education available to all children throughout Pennsylvania." *Id.* at 443 n.41 (quoting Noreen O'Grady, *Comment, Toward a Thorough and Efficient Education: Resurrecting the Pennsylvania Education Clause*, 67 Temp. L. Rev. 613, 634 (1994) (emphasis added)). Thus, the mere fact that the framers embraced a system of local and state property tax revenues does not speak to the question of whether the *current method of implementing* that system—which results in funding disparities the framers could not have imagined—is constitutional.

Indeed, there is nothing inherently unconstitutional about a funding system that relies on both state and local revenue sources. There are at least 25 other states that employ a structure similar to Pennsylvania but nonetheless ensure that low-wealth districts receive a *higher* share of education funds given their greater needs.[2] In other words, Pennsylvania's highly regressive system—*which is now the most inequitable in the country by a wide margin*[3]— is not the natural or

[2] *See* Nat'l Ctr. for Educ. Statistics, Education Finance Statistics Center Table A-1, http://nces.ed.gov/edfin/Fy11_12_tables.asp (last visited Feb. 15, 2018) (analyzing the most recently available data from the 2011–12 school year).

[3] *See id.* A U.S. Department of Education study comparing public education spending nationwide found that Pennsylvania ranked dead last among all states, with the widest per pupil spending gap—33.5%— between poor school districts and affluent districts. In other words, Pennsylvania school districts with high-poverty rates (*i.e.*, the districts with the greatest financial need) have *33.5% less* funding on average than low-poverty school districts (*i.e.*, the districts with the least need). That is *more than double* the national average of 15.6%. (Vermont has the next greatest differential at 18.1%.).

inevitable result of relying on both state and local revenue sources; it is a result of the General Assembly's *specific decisions* to raise and distribute education funds in a manner that discriminates against low-wealth districts and denies them necessary resources. *See id.* at 459 ("Petitioners' equal protection claims focus upon the *method* by which education funds are raised and distributed—not the *overall* amount of funding." (quotation marks omitted)).[4]

For this reason, Speaker Turzai's reliance on decisions from other jurisdictions is misplaced. Pennsylvania has a *uniquely* inequitable system, and Petitioners' equal protection claim must be assessed based on the *specific facts* alleged in the Petition. *See William Penn Sch. Dist.*, 170 A.3d at 458 ("Petitioners' pleading establishes the independence of their equal protection claim from their Education Clause claim."). Moreover, the Supreme Court has criticized and rejected the rationale of Speaker Turzai's cited authorities, (Turzai Supp. Br. at 35–36 (citing *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (conflating local fiscal control and local administrative control); *Bd. of Educ. of City Sch. Dist. of Cincinnati v. Walter*, 390 N.E.2d 813 (Ohio 1979) (same))), and

[4] Those decisions encompass not only the manner in which the State distributes its own share of education funding, but also the limits that the State places on the ability of low-wealth districts to raise additional funds and the manner in which it draws district lines. (*See* Pet. ¶¶ 143–44 (citing Act 1).)

there are plenty of cases that came out the other way.[5] What matters is that our Supreme Court has expressed *its own view* that "the need for local control" is not a rational justification for an education-funding scheme that discriminates against low-wealth districts and denies them the resources necessary to provide their students with an adequate education.[6] That courts in other jurisdictions may disagree is irrelevant.

B. Determining the Proper Standard of Review for Petitioners' Equal Protection Claim Is Premature.

After finding that Petitioners have stated a "colorable" equal protection claim and rejecting "local control" as a justification for the current education-funding scheme, the Supreme Court declined to decide "what standard of review applies to Petitioners' equal protection claim." *William Penn Sch. Dist.*, 170 A.3d at 461. In doing so, the Court observed that "whether education is a fundamental right under Pennsylvania law *is not a settled question*" and that "reading any of [its

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[5] *See, e.g.*, *Opinion of Justices*, 624 So.2d 107 (Ala. 1993); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977), *Brigham v. Vermont*, 692 A.2d 384 (Vt. 1997); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

[6] While Speaker Turzai may disagree with the Supreme Court, he cannot negate the clear import of its opinion by pointing to footnote 29, which merely states that the Supreme Court did not intend to rule on any preliminary objection beyond justiciability. *See William Penn*, 170 A.3d at 433 n.29. That footnote does not supersede or diminish the express findings and conclusions in the Supreme Court's opinion, including its finding that Petitioners' equal protection claim is "colorable" as pleaded, and its observation that a desire for "local control" is insufficient to justify an education-funding scheme that denies students in low-wealth school districts an adequate education. *Id.* at 414, 442 n.40, 464.

prior cases] to the contrary is to confer upon them more precedential value on that question than they warrant." *Id.* at 461–62 (emphasis added).

Nevertheless, Speaker Turzai now devotes 16 pages of his Supplemental Brief to asking this Court to declare that education is *not* a "fundamental right" in Pennsylvania based on the *same* "non-conclusive" cases discussed by the Supreme Court and several out-of-state decisions addressing *other* state constitutions, (Turzai Supp. Br. at 16–32)—and he asks the Court to do so *without the benefit of any evidence* regarding the framers' *actual intent* when drafting the Pennsylvania Constitution or the historical importance of education *in Pennsylvania*. The Court should decline that invitation for at least two reasons.

First, Speaker Turzai's perfunctory conclusion that rational basis review applies ignores the fact that in Pennsylvania there is no question that education is an "important" right and, thus, any classification that burdens that right is subject, at a minimum, to an "intermediate or heightened standard of review." *See James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984); *William Penn Sch. Dist.*, 170 A.3d at 458 (describing three tiers of review and finding that Petitioners "are entitled to elevated scrutiny only if they establish that they have an *important or* fundamental

right to education" (emphasis added)[7]). "Those rights which have been considered important enough to warrant this heightened scrutiny have been described as those affecting liberty interests, or a denial of a benefit ***vital*** to the individual." *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114, 122 (Pa. 1985) (internal quotation marks and citation omitted) (emphasis added).

Here, Speaker Turzai does not deny that education is an "important" right, and in fact concedes that education is of "***vital*** social importance to the Commonwealth." (Turzai Supp. Br. at 17 (emphasis added).) Nor does he offer *any* explanation as to how the current funding scheme, which burdens the ability of low-wealth districts to provide their students an adequate education, could survive intermediate scrutiny. Indeed, even if Speaker Turzai could establish (contrary to the Supreme Court's opinion) that "local control" provides a rational basis for the current funding scheme, that would not justify the Commonwealth's endemic discrimination against low-wealth districts under the heightened scrutiny of intermediate review. Thus, even on the current record, the Court could assess the education-funding scheme's constitutionality without even reaching the issue of whether education is a fundamental right.

[7] Speaker Turzai misquotes the Supreme Court and omits the words "important or" from this quotation. (*See* Turzai Supp. Br. at 15.) That self-serving omission fundamentally alters the meaning of the Supreme Court's opinion.

Second, the Court should not decide the complex and hugely significant question of whether education is an "important" or "fundamental right" without the benefit of a fully developed historical record. As the Supreme Court observed in the context of Petitioner's Education Clause claim:

> The parties have had no opportunity to develop the historic record concerning what, precisely, thoroughness and efficiency were intended to entail, nor have they had an opportunity to develop a record enabling assessment of the adequacy of the current funding scheme relative to any particular account of the Constitution's meaning.

William Penn Sch. Dist., 170 A.3d at 457. The same is true with regard to Petitioners' equal protection claim, where the parties have had no opportunity to develop a historical record concerning the place of education among the rights enshrined in the Pennsylvania Constitution. This issue must be assessed carefully based on our own constitutional history and context. The rulings of other state courts addressing their own constitutions and history cannot be dispositive. As described below, the evidence here will demonstrate that education was considered an "important" and "fundamental right" during the drafting of the Pennsylvania Constitution and remains so today.

It would be precipitous for the Court to decide this critical issue without the benefit of historic evidence, when this Court will have ample opportunity to do so on summary judgment or at trial. The Court's two-part decision in *Meggett v. Pennsylvania Department of Corrections* provides an apt example of how this

matter should proceed. 856 A.2d 277 (Pa. 2004). There, the Court considered whether a prison's policy on hairstyles violated equal protection provisions of Pennsylvania's Constitution. *Id*. at 279. At the preliminary objection stage, the Court was unable to determine whether a violation had occurred, and overruled the objection. *Id.* at 279–80. Then, after the parties developed the record through discovery, the Court determined the standard of review at summary judgment, and resolved the issue. *Meggett v. Pa. Dep't of Corrections*, 892 A.2d 872, 884–88 (Pa. Commw. Ct. 2006); *see also Smith v. Philadelphia*, 516 A.2d 306, 310–11 (Pa. 1986) (determining equal protection standard after review of evidence); *Fischer*, 502 A.2d at 120–23 (same); *James*, 477 A.2d at 1306 (same). The same approach is appropriate here given the extensive and essential historical record at issue.

C. Trial Will Show that Education Is an Important or Fundamental Right Warranting Heightened Scrutiny

Petitioners intend to establish that they "have an important or fundamental right to education," *William Penn Sch.*, 170 A.3d at 458, by submitting substantial evidence—including the relevant history of the Education Clause, its contemporaneous construction, and debates and proceedings held in the course of constitutional conventions about the importance of public education—demonstrating that public education was of paramount importance to the framers and a vital factor in the formation of our civil society and institutions. *See*

Washington v. *Glucksberg*, 521 U.S. 702, 721 (1997) (defining fundamental right as one "deeply rooted in this Nation's history and tradition"); *Palko v. Connecticut*, 302 U.S. 319, 325, 328 (1937) (defining fundamental right as one that is part of "the very essence of a scheme of ordered liberty . . . which lie[s] at the base of all of our civil and political institutions"), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

Even a small portion of this evidence demonstrates why this issue is best left to the merits stage. One delegate to the 1874 convention, for example, testified that "[t]he section on education [was] second in importance to no other section to be submitted to [the] Convention."[8] That sentiment was repeated again and again by other delegates.[9] Indeed, delegates believed education to be fundamental to democracy and the vitality of the Republic itself, "averring 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."[10]

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[8] Debates of the Convention to Amend the Constitution of Pa., 2:421 (1872) (statement of Del. White).

[9] *See, e.g.*, *id.* at 7:678 (statement of Del. Mann) ("[I]f we are to legislate at all, I insist that we shall legislate upon this most important of all the interests of the State."); *id.* at 7:680 (statement of Del. Carter) ("[A] system of public school education is the most important interest of the State. . . . [A]n interest so vast, so important in its prospective results, so essential to the welfare of this great Commonwealth . . . ."); *id.* at 7:691–92 (statement of Del. Darlington) ("If there is any duty more incumbent upon the whole people of this Commonwealth than any other, it is to see that every child of the Commonwealth shall be educated and taken care of.").

[10] *William Penn Sch. Dist.*, 170 A.3d at 424 (internal quotation marks and citations omitted); *see also In re Albert Appeal*, 92 A.2d 663, 665 (Pa. 1952) ("[O]ur public school system is the most

The evidence will further demonstrate that delegates established a universal system of education *for the benefit of children*. *See Sch. Dist. v. Twer*, 447 A.2d 222, 225 (Pa. 1982) ("[A]ny interpretation of legislative pronouncements relating to the public educational system must be reviewed in context with the General Assembly's responsibility to provide for a 'thorough and efficient system' for the benefit of our youth."). One delegate stated, for example, that "[i]f there is any duty more incumbent upon the whole people of this Commonwealth than any other**,** it is to see that every child of the Commonwealth shall be educated and taken care of."[11] Another stated, "Let it be known that even the ragged boy out of the mine may go in there and get a good education."[12] In other words, the evidence will show that the Pennsylvania Constitution vests children with this vital right, "consistent with the intuition that to disregard the beneficiaries of a mandate is to render that mandate little more than a hortatory slogan." *William Penn Sch. Dist.*, 170 A.3d at 461 n.68.

It is for that reason the Supreme Court has long admonished that "[t]he polestar in any decision requiring the assignment of priorities of resources

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vital feature of our governmental and democratic system."); *Teachers' Tenure Act Cases*, 197 A. 344, 352 (Pa. 1938) ("The Constitution of Pennsylvania, by article 10, § 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.").

[11] Debates of the Convention to Amend the Constitution of Pa., 7:691–92 (1872) (statement of Del. Darlington).

[12] *Id.* at 2:426 (statement of Del. Hazzard).

available for education *must be the best interest of the student*." *Twer*, 447 A.2d at 224 (emphasis added); *accord Wilkinsburg Educ. v. Sch. Dist. of Wilkinsburg*, 667 A.2d 5, 9 (Pa. 1995); *see also Commonwealth ex rel. Hetrick v. Sch. Dist.*, 6 A.2d 279, 281 (Pa. 1939) ("The fundamental policy of our public school system is to obtain the best educational facilities *for the children of the Commonwealth.*") (emphasis added); *Walker's Appeal*, 2 A.2d 770, 772 (Pa. 1938) ("The fundamental public policy, expressed in the Constitution and underlying school laws, is to obtain a better education *for the children of the Commonwealth*.").

Speaker Turzai does not acknowledge any of this historical evidence or that surrounding the constitutional change in 1874 and the subsequent amendment in 1967. Nor does he explain why a right that he deems "of considerable importance" and "of vital social importance," (Turzai Supp. Br. at 2, 17), should not be, at a minimum, also acknowledged by this Court to be "important" or "vital to the individual," *see Fischer*, 502 A.2d at 122.

Speaker Turzai instead relies on this Court's unpublished opinion in *Pennsylvania Association of Rural & Small Schools v. Ridge*, to argue that the right to an education is merely a claim for ordinary "benefits and services authorized by the General Assembly," and thus only accorded rational basis review in order to provide deference to the Legislature's "function of allocating state resources." (Turzai Supp. Br. at 18 (quoting 1998 Pa. Commw. Unpub. LEXIS 1, at *143 n.76

(Commw. Ct. July 9, 1998)).) But the Supreme Court rejected this rationale, examining the longstanding priority of education in this Commonwealth and dismissing the idea that education was a mere ordinary benefit or service:

> Judicial oversight must be commensurate with the priority reflected in the fact that for centuries our charter has featured some form of educational mandate. Otherwise, it is all but inevitable that the obligation to support and maintain a "thorough and efficient system of public education" will jostle on equal terms with non-constitutional considerations that the people deemed unworthy of embodying in their Constitution. We cannot avoid our responsibility to monitor the General Assembly's efforts in service of its mandate and to measure those effects against the constitutional imperative, ensuring that non-constitutional considerations never prevail over that mandate.

William Penn Sch. Dist., 170 A.3d at 464.

Education, in other words, stands apart,[13] and Speaker Turzai's argument cannot be squared with the Supreme Court's admonition that education is not a normal good or service that "jostle[s]" with every other competing interest that the

[13] The Education Clause is not the only way the framers made clear that education warrants a greater level of consideration. Article IV, Section 8 makes the Secretary of Education a constitutional officer, while Article III, Section 11 provides only five things that may be included in the general appropriation bill: "appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools."

Legislature must consider. Speaker Turzai's preliminary objection is thus not only premature, but also meritless and should be overruled. [14]

II. SENATOR SCARNATI'S PRELIMINARY OBJECTIONS SHOULD BE OVERRULED AND HIS APPLICATION DENIED.

Senator Scarnati purports to submit a supplemental brief in support of the Preliminary Objections that he and Speaker Turzai jointly filed in December 2014, yet his brief does not address those objections at all. Instead, Senator Scarnati now asserts for the first time a preliminary objection on the ground that the Petition fails to state a claim because it does not adequately allege causation. Senator Scarnati separately argues that Petitioners' claims are moot. Neither objection has merit.

A. Senator Scarnati May Not Expand the Scope of His Original Objections to Include Causation.

Senator Scarnati's latest briefing clearly illustrates that his motivation is to delay the Court's consideration of this case. He outlines new, untimely preliminary objections and indicates that Petitioners should file an entirely new lawsuit in light of intervening developments. But Senator Scarnati does not have a right to another bite at the preliminary objection apple.

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[14] Much of the other case law Speaker Turzai cites is particularly unhelpful. He relies heavily, for example, on *Danson*, a decision that the Supreme Court termed "def[ying] confident interpretation," and containing "little of precedential value." *William Penn Sch. Dist.*, 170 A.3d at 441, 458 (Pa. 2017). In another section he cites *Commonwealth v. Hartman*, 17 Pa. 118, 119 (Pa. 1851), for a supposed textual description of the Education Clause, ignoring that the Court was not analyzing the current education clause, which would not be enacted for another twenty-three years.

Senator Scarnati's initial Preliminary Objections for failure to state a claim under the Education Clause and Equal Protection Provision were premised on the argument that (i) Petitioners' claims presented nonjusticiable political questions; and (ii) Petitioners failed to state a claim because "Pennsylvania's education funding system serves the rational basis of preserving local control over public education." (*See* Legis. Prelim. Objs. at ¶¶ 34–63, 64–82.) As explained above, both of those arguments were rejected by the Supreme Court. Evidently recognizing this, Senator Scarnati no longer raises those matters but instead argues, for the first time, that Petitioners have failed to state a claim because they "fail to allege facts that would satisfy an essential element of the claim—the causation element." (Scarnati Supp. Br. at 2.) Because he did not raise this objection before, Senator Scarnati is foreclosed from raising it now. [15]

It is black-letter law in Pennsylvania that "[a]ll preliminary objections shall be raised at one time," Pa. R.C.P. 1028(b), and any preliminary objection that could have been raised, but was not, is deemed waived, *see* Pa. R.C.P. 1032(a) ("A party waives all defenses and objections which are not presented either by

[15] To the extent Speaker Scarnati hints in a footnote that some Petitioners may lack standing to bring their claims, he never raised that meritless argument in his Preliminary Objections either and is prohibited from asserting it now. *See* Pa. R.C.P. 1028(a)(5); *see also Twp. of Bristol v. 1 Enters., LLC*, 2018 Pa. Commw. LEXIS 33, at *11 (Commw. Ct. Jan. 5, 2018) ("Objections to lack of standing, including claims of lack of capacity to sue, must be raised at the earliest opportunity and are waived if not promptly raised.").

preliminary objection, answer or reply . . . ."). *See also Lexington Ins. Co. v. Commonwealth*, 541 A.2d 834, 836 (Pa. Commw. Ct. 1988) ("The Rules imply a strong prohibition against a serial raising of objections.").

This includes objections for failure to state a claim under Pennsylvania Rule of Civil Procedure 1028(a)(4), which require a defendant to "provide the court *with specific grounds* as to why the complaint in fact fails to state a claim upon which relief may be granted." *Millan v. LaPorta*, 2005 WL 5280700, at *1 (Pa. Ct. Com. Pl. Dec. 30, 2005) (emphasis added). Here, Senator Scarnati's stated basis for his preliminary objection under Pennsylvania Rule of Civil Procedure 1028(a)(4) made no mention of causation. (*See generally* Legis. Prelim. Objs.) Accordingly, Speaker Scarnati has waived any objection to the sufficiency of Petitioners' pleading on that ground.

B. Petitioners Have Adequately Alleged Causation.

Even if Senator Scarnati had originally objected to the Petition on causation grounds, that objection would fail. Pennsylvania's fact-pleading standard requires only that a petitioner plead sufficient facts "to enable the adverse party to prepare his case." *See Landau v. W. Pa. Nat'l Bank*, 282 A.2d 335, 339 (Pa. 1971). Petitioners have done that and more by (i) alleging a direct causal relationship between the current funding scheme and the inability of low-wealth school districts to provide a constitutionally adequate education, and (ii) identifying *the specific*

resources and services that those districts cannot afford to provide. Petitioners allege, for example:

- Because of insufficient funding, Petitioner school districts are unable to provide students with the basic elements of an adequate education, such as appropriate class sizes, sufficient experienced and effective teachers, up-to-date books and technology, adequate course offerings, sufficient administrative staff, academic remediation, counseling and behavioral health services, and suitable facilities necessary to prepare students to meet state proficiency standards. (Pet. ¶ 5.)

- Because of the problems with Pennsylvania's current school financing arrangement, a substantial number of school districts, including the Petitioners School Districts, the Attended Districts, and many PARSS members, are unable to provide sufficient numbers of qualified teachers, principals, counselors, nurses, librarians, and instructional aides to meet the needs of their students. (*Id*. ¶ 173.)

- Petitioner School Districts, Attended Districts, and many PARSS members have been forced to cut or eliminate a range of courses and educational programs (and the teachers who taught them), including art, music, drama, physical education, health and drug education and electives, such that students—including children of the Individual Petitioners—are not receiving a well-rounded education, which will prepare them for civic, economic, and social success in accordance with state regulations and standards. (*Id.* ¶ 204.)

- Because of Pennsylvania's inadequate and inequitable system of school funding, Petitioner School Districts, Attended Districts, and many PARSS members are unable to provide some of the materials, equipment, and facilities needed by their students. Specifically, many students in Pennsylvania do not have adequate access to

> textbooks and other classroom resources; instructional equipment, including computers, software, and internet access; audio-visual equipment and resources; and instructional materials, such as workbooks and library books, all of which are an integral part of a thorough and efficient system of education. (*Id.* ¶ 230–31.)

The Supreme Court clearly understood the causation allegations in the Petition and observed:

> Petitioners aver that Pennsylvania's school funding system is flawed on its face in its failure to ensure, in tandem with local funding, that each school district has the resources necessary to provide an adequate education. This includes broad averments as well as more particularized allegations, couched in quantitative comparisons of various districts' resources and respective capacities to provide an education of a quality that satisfies the Education Clause's mandate. Specifically, Petitioners plead numerous allegations concerning the circumstances faced by their own districts, *as well as the alleged injuries that a constitutionally inadequate school system has caused the individual petitioners, children attending such schools and their parents or guardians*.

William Penn Sch. Dist., 170 A.3d at 425 (emphasis added).

While Senator Scarnati may not agree that the current funding scheme denies children in low-wealth districts a constitutionally adequate education, he certainly cannot say that he lacks notice of Petitioners' claim. Indeed, contrary to his new assertions, there is nothing "conclusory" about the Petition's causation allegations. The Petition details how the funding system works; how low-wealth districts receive a fraction of the funds available to high-wealth districts even

though the low-wealth districts have higher tax rates; how low-wealth districts are unable to provide basic resources and services because of the funding shortfalls; *and* how, as a result, children in low-wealth districts (including the children of the Individual Petitioners) are harmed by being denied a constitutionally adequate education—as reflected, in part, by their poor test scores. (*See* Pet. ¶¶ 157–67.) The Supreme Court found such allegations "colorable" and observed that they "suggest a 'gross disparity' that, if true, might sow doubt in the mind of a fact-finder regarding the thoroughness and efficiency of the education that the districts on the short end of the funding stick can hope to provide." *William Penn Sch. Dist.*, 170 A.3d. at 443, 464.

At its core, Senator Scarnati's objection seems to be that Petitioners have not pleaded facts *excluding* other potential causes of their alleged injuries, such as local fiscal mismanagement or a lack of parental involvement. (Scarnati Supp. Br. at 10–12, 14–15.) But Petitioners have no obligation to plead facts showing that Respondent's constitutional violations are the *sole* or *exclusive* cause of their alleged injuries; Petitioners need only plead facts showing that those violations were a *substantial factor* in bringing about their injuries. As the Supreme Court has explained:

> Proximate cause is a term of art, and may be established by evidence that a defendant's . . . failure to act was a *substantial factor* in bringing about the harm inflicted upon a plaintiff. Pennsylvania law has long recognized

> that this *substantial* factor need not be, as the trial court incorrectly charged, the only factor, *i.e.*, *that cause* which produces the result. A plaintiff need not exclude every possible explanation, and the fact that some other cause concurs . . . in producing an injury does not relieve defendant from liability unless he can show that such other cause would have produced the injury independently . . . .

Jones v. Montefiore Hosp., 431 A.2d 920, 923 (Pa. 1981) (internal quotation marks and citations omitted); *see also Cochran v. Wyeth, Inc.*, 3 A.3d 673, 676 (Pa. Super. Ct. 2010) ("A proximate, or legal cause, is defined as a substantial contributing factor in bringing about the harm in question.") (citing *Whitner v. Von Hintz*, 263 A.2d 889, 893–94 (Pa. 1970)). While Respondents might point to other factors that they claim caused the injuries alleged, Petitioners have pleaded facts showing that the current education-funding scheme is not only a substantial factor, but also the primary culprit. (*See, e.g.*, *supra* pp. 26–27.)

Senator Scarnati's argument that Petitioners rely on test scores "in lieu of allegations" of actual harm is similarly flawed. (*See* Scarnati Supp. Br. at 16.) *First*, Senator Scarnati mischaracterizes the Supreme Court's holding with regard to test scores. While it is true that the Supreme Court rejected the notion that state academic standards are *automatically* transposed into constitutional minimums, *see William Penn Sch. Dist.*, 170 A.3d at 450, the Supreme Court left open the question of whether Pennsylvania's current academic standards provide a suitable standard for determining whether students are receiving a constitutionally adequate

education, *id.* ("That Petitioners focus upon the web of standards presently imposed upon districts by the General Assembly and the Department of Education as offering judicially enforceable standards for constitutional purposes does not mean that we should decide at this juncture whether those standards are suitable. Nor does it foreclose the prospect that the Commonwealth Court on remand may fashion an entirely different standard . . . ."). Put differently, the Supreme Court did not hold that test scores are irrelevant, as Senator Scarnati suggests; it left this Court to decide, based on a full evidentiary record, the extent to which test scores have probative value. The Supreme Court also recognized that "Petitioners' reliance upon today's statutory or regulatory standards, or any particular standardized testing measures, is by no means exclusive." *Id*. at 449. Indeed, as reflected in the Petition, test scores are but one metric highlighted by Petitioners in alleging an ongoing constitutional violation, in addition to the lack of basic educational resources and services, low graduation rates, etc.

Second, Speaker Scarnati ignores the *systemic* deficiencies in test scores in low-wealth districts. He is certainly correct that if *one* "student fails to score as proficient on a standardized test, it does not necessarily mean that he did not receive the constitutionally requisite opportunities to obtain an adequate education." (Scarnati Supp. Br. at 17.) But when upwards of *50% percent* of students in a given district fail to achieve proficiency in basic subject areas like

math or science, that is one indication that the district is not providing students with a legitimate opportunity to obtain a constitutionally adequate education. Here, the Petition details the plainly unacceptable test scores in the Petitioner school districts and the school districts attended by the individual Petitioners. For example, based upon 2012–13 Keystone Exam Results, in William Penn School District, 88% of students did not score proficient in Biology and 65% of students did not score proficient in Algebra I. (Pet. ¶ 156.) In Panther Valley School District, 78% of students did not score proficient in Biology and 59% of students did not score proficient in Algebra I. (*Id.*) And in the School District of Lancaster, 88% of students did not score proficient in Biology and 71% of students did not score proficient in Algebra I. (*Id.*) When combined with the Petition's detailed allegations concerning the vast resource deficiencies and lack of essential services and programs in those and other low-wealth districts (Pet. ¶¶ 170–202), a fact finder could easily conclude that students are being denied the opportunity for a constitutionally adequate education as a direct result of the education-funding scheme.

In any event, Petitioners are not required to prove their case at the pleading stage and are entitled to an opportunity to develop the evidentiary record to prove that the causal relationship that they have identified in fact exists. *See Landau*, 282 A.2d at 339 (describing fact pleading standard); *see also, e.g., Campaign for Fiscal*

Equity, Inc. v. New York, 861 N.E.2d 50, 53 (N.Y. 2006) ("[P]laintiffs had established the causation element of their claim by showing that increased funding can provide better teachers, facilities and instrumentalities of learning, and that such improved inputs in turn yielded better student performance." (internal citation omitted)).

C. Petitioners' Claims Are Not Moot.

Senator Scarnati argues that Petitioners claims are moot because Act 35 "supplanted" the education funding scheme described in the Petition. (*See* Scarnati Supp. Br. at 1.)[16] But the Supreme Court already considered and rejected that argument, holding that "[c]hanges in the formula do not render the questions presented moot . . . ." *See William Penn Sch. Dist.*, 170 A.3d at 435. Under the law-of-the-case doctrine, this Court should not revisit that decision. *See Neidert v. Charlie*, 143 A.3d 384, 390–91 (Pa. Super. Ct. 2016), *appeal denied*, 164 A.3d 457 (Pa. 2016) (law-of-the-case doctrine insures the uniformity of decisions, maintains consistency, and effectuates proper and streamlined administration of justice).

Senator Scarnati's argument is also factually wrong. Act 35 did not increase funding (with the exception of a handful of targeted appropriations) and certainly did not resolve Petitioners' adequacy claim. To the contrary, Act 35 *locked in* the

[16] "Act 35" refers to the Act of June 1, 2016, P.L. 252, No. 35, §1, *codified at* 24 P.S. § 25-2502.53. Act 35 was passed during the pendency of Petitioners' appeal and was specifically discussed at oral argument before the Supreme Court on September 13, 2016.

funding distribution from 2013–14—the year in which Petitioners filed their Petition—and merely provides a formula for allocating any *new* Basic Education Funding among districts. *See* 24 P.S. § 25-2502.53(b)(1) ("For the 2015-2016 school year and each school year thereafter, the Commonwealth shall pay to each school district a basic education funding allocation which shall consist of . . . [a]n amount equal to the school district's basic education funding allocation for the 2013-2014 school year.").[17] That formula currently applies to approximately only *2% of overall education spending*[18] and approximately *only 7.5% of State spending*.[19] It is thus unsurprising that the new formula has done *nothing* to reduce

[17] In enacting Act 35, the legislature also made no attempt to assess the adequacy of education funding levels or determine the total amount of funding needed to bring the legislature into compliance with its constitutional obligations. (*See* Pet. ¶¶ 313-14); Basic Education Funding Commission, Report and Recommendations at 6 (June 2015) ("Act 51 placed . . . limitations on the work of the Commission. . . . The General Assembly, through the annual appropriate process, shall determine the level of state funding for basic education").)

[18] The latest appropriation act distributed only $452 million through the formula. *See* Pa. Dep't of Educ., *2017-18 Estimated BEF*, at "Narrative" tab, available at http://www.education.pa.gov/Documents/Teachers-Administrators/School%20Finances/Education%20Budget/2017-18%20Estimated%20BEF.XLSX. And the Department of Education reports that the combined State ($10.5 billion) and Local ($16.3 billion) Revenues available to districts in 2015-2016 was $26.8 Billion. *See* Pa. Dep't of Educ., *Finances AFR Expenditures 2015-2016*, at "2015-16 Revenue by Source" tab at H746, J746, available at http://www.education.pa.gov/_layouts/download.aspx?SourceUrl=http://www.education.pa.gov/Documents/Teachers-Administrators/School%20Finances/Finances/Summary%20of%20AFR%20Data/AFR%20Data%20Summary%20Level/Finances%20AFR%20Revenues%202015-2016.xlsx.

[19] Pa. Dep't of Educ., *2017-18 Estimated BEF*, at "BEF 2017-18 Estimated" tab at D503, F503.This is in line with the figures for 2016, in which the formula applied to approximately 6% of State spending. *See* Maddie Hanna, *In Pa. school-funding maze, formula for equity elusive*, The Inquirer, Sept. 25, 2017, available at http://www.philly.com/philly/education/in-pa-school-

the vast inadequacies and disparities described in the Petition. Indeed, as one newspaper reported this month, school districts across the Commonwealth are "pretty much just treading water."[20]

Moreover, even if Act 35 mooted Petitioners' claims (and it does not), the Court should deny Senator Scarnati's Application because, as the Supreme Court stated, the Petition raises "compelling" issues that are of "importance to the public interest" and "capable of repetition yet evading review." *William Penn Sch. Dist.*, 170 A.3d at 435 n.34. As a threshold matter, there is no question that the issue of public education funding is of great public interest. The Supreme Court observed that the importance of public education "cannot be disputed," *id.*, and Pennsylvania courts have previously described it as "one of the bulwarks of democratic government." *Teachers' Tenure Act Cases*, 197 A. 344, 352 (Pa. 1938); *see also Commonwealth. v. Bey*, 70 A.2d 693, 695 (Pa. Super. Ct. 1950) ("'It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members . . .'" (quoting *Ex Parte Crouse*, 4 Wharton 9, 11 (Pa. 1839))).

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funding-maze-formula-for-equity-elusive-20170925.html(describing that only 6% of the $5.9 billion education funding allocated in 2016 was applied through the formula, causing school districts to continue to struggle).

[20] Maddie Hanna, *Despite funding increases under Wolf, Pa. school districts still 'treading water',* The Inquirer, Feb. 8, 2018, available at http://www.philly.com/philly/news/despite-funding-increases-under-wolf-pa-school-districts-still-treading-water-20180209.html ("Even with the increases [Governor] Wolf proposed for next year, the formula would apply only to 9 percent of the $6.1 billion in basic education subsidies.").

Additionally, this case is quintessentially capable of repetition yet evading review, and thus the Court should hear it even if the issues raised may otherwise appear moot. *See S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). As the Pennsylvania Supreme Court recognized, with an action such as this one, "there inheres the risk that the General Assembly will move the goalposts by enacting new legislation." *William Penn Sch. Dist.*, 170 A.3d at 435 n.34. Senator Scarnati claims the General Assembly did just that, and is effectively asking the Court to declare Petitioners' claims moot with the passage of any appropriations bill that makes even the slightest change to the education-funding scheme, no matter how minimal the impact on funding levels.[21] But this case presents an exception to the mootness doctrine because Petitioners will continue to be inadequately and inequitably underfunded without the Court's intervention. There is simply no reason to delay and exacerbate the ongoing harm experienced by Pennsylvania schoolchildren—all of which is caused by Respondents' ongoing constitutional violations—by further delaying these proceedings every time there is a minor

[21] Notably, this is not a case like those Senator Scarnati cites, where an intervening fundamental change in the facts or law made it *impossible* for the court to act. *See In re Gross*, 382 A.2d 116, 121 (Pa. 1978) ("In short, there was nothing for the lower court to enjoin, nor can this Court now order the injunctive relief sought below."); *Commonwealth v. Packer Twp.*, 60 A.3d 189, 192 (Pa. Commw. Ct. 2012) ("[B]ecause the Ordinance is no longer in effect, there is no need to assess its validity.").

change in yearly appropriations that fails to remedy the unconstitutionally inadequate and inequitable funding scheme challenged in the Petition.

III. THE STATE BOARD OF EDUCATION'S PRELIMINARY OBJECTIONS SHOULD BE OVERRULED.

In its Supplemental Brief, the State Board of Education argues that the Court Petitioners' claims are barred by sovereign immunity and the separation of powers doctrine. But as Petitioners' explained in their original brief, sovereign immunity does not bar Petitioners' claims because courts have the authority and duty to declare an education-funding scheme unconstitutional *and* to enjoin state officials from enforcing such a scheme—*i.e.*, to provide the relief Petitioners are requesting. Nor does the separation of powers doctrine bar Petitioners' claims.[22] Far from imposing upon the functions of other branches, ruling on the merits of this case will ensure that the other branches—particularly the legislative branch, which bears the constitutional responsibility for providing a thorough and efficient system of education—will function as the Constitution mandates, consistent with separation of powers principals.

[22] Whether additional relief is appropriate and necessary will be for the Court to determine in light of the violations it finds and the requests of the parties at that time; any defenses concerning separation of powers or sovereign immunity as they relate to requested relief can be raised at that time in light of the trial evidence and not based on abstractions.

A. Petitioners' Claims Are Not Barred By Sovereign Immunity.

1. *The Court Has Authority to Declare the Current Education-Funding Scheme Unconstitutional.*

The Board contends that sovereign immunity bars this Court from considering Petitioners' request for declaratory relief. (Br. in Supp. of Exec. Branch Respondents' Prelim. Objs. ("Exec. Br.") at 18–19.) But the Pennsylvania Supreme Court has held unambiguously that "sovereign immunity . . . is not applicable to declaratory judgment actions." *Legal Capital, LLC v. Med. Prof'l Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000), and "poses no bar" to a declaration that a statute is unconstitutional, *Wilkinsburg Police Officers Ass'n v. Commonwealth*, 636 A.2d 134, 137 (Pa. 1993); *see also Del. Valley Apartment House Owner's Ass'n v. Commonwealth*, 389 A.2d 234, 238 (Pa. Commw. Ct. 1978) (same). Thus, the Court would be well within its authority to grant Petitioners' requested relief and declare that "the existing school-financing arrangement violates . . . the Pennsylvania Constitution['s]" equal protection provisions (Pet. ¶¶ 316–19) and "fails to comply with the . . . Education Clause" (*id.* ¶¶ 313–15).[23]

[23] Relying on *Stackhouse v. Commonwealth*, 892 A.2d 54 (Pa Commw. Ct. 2006), the State Board of Education contends that declaratory relief is available only in conjunction with other types of relief, such as injunctive relief. (*See* Exec. Br. at 18–19.) This Court recently rejected that precise argument. *See Pa. Fed'n of Dog Clubs v. Commonwealth*, 105 A.3d 51, 59 (Pa Commw. Ct. 2014) ("[N]otwithstanding that Petitioners may be barred from injunctive relief

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

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

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because of sovereign immunity, they are permitted to seek declaratory relief and thus, their Amended Complaint cannot be dismissed on this basis.").

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

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

Respondents further mischaracterize this Court's holding in *Stackhouse v. Commonwealth*. There, the Court found that the plaintiff did not allege any

constitutional violations and concluded that the plaintiff's requested relief would have required the respondents to introduce certain guidelines, policies, limitations, and restrictions on their internal investigation processes. *Stackhouse*, 892 A.2d at 58, 61–62. Here, by contrast, Petitioners are not asking for an injunction requiring Respondents to introduce any specific policies or guidelines; Petitioners are asking the Court to enforce Respondents' affirmative duty to establish and support a system of public education within the bounds of the Education Clause. *See Teachers' Tenure Act Cases*, 197 A. at 352 ("When the people directed through the Constitution that the General Assembly should 'provide for the maintenance and support of a thorough and efficient system of public schools,' it was a positive mandate that no Legislature could ignore."). Sovereign immunity does not bar such relief because the affirmative action sought is mandated by the constitution.[24] *See Kane*, 312 A.2d at 617; *see also Brigham v. Vermont*, 692 A.2d 384, 385 (Vt. 1997) (requiring the legislature to enact a funding arrangement that complies with the state constitution). Accordingly, the Board's objection must be overruled.

[24] The remaining authorities cited in the Executive Respondents' original brief are inapposite. The distinguishing feature of those cases was that injunctive relief was sought as a means indirectly to obtain monetary relief, which is barred by sovereign immunity. *See Fawber*, 532 A.2d at 433 ("Suits which seek . . . *to obtain money damages . . . from the Commonwealth* are within the rule of immunity."). Here, in contrast, Petitioners are not seeking monetary relief. *Cf. Finn v. Rendell*, 990 A.2d 100, 106 (Pa. Commw. Ct. 2010) (request barred because it sought reimbursement of money); *Swift v. Dep't of Transp*., 937 A.2d 1162, 1169 (Pa. Commw. Ct. 2007) (request barred as "equivalent to action for damages"); *Chrio-Med Review Co. v. Bureau of Workers' Comp.*, 908 A.2d 980, 987 (Pa. Commw. Ct. 2006) (request barred when it was "meant to provide financial compensation").

B. Petitioners' Claims Are Not Barred By the Separation of Powers Doctrine.

The State Board of Education asserts that the separation of powers doctrine bars Petitioners from proceeding to trial, but offers no explanation as to how this argument is substantively different than the justiciability argument rejected by the Supreme Court. (*See generally* Bd. of Educ. Supp. Br.; *see also William Penn Sch. Dist.*, 170 A.3d at 457 ("[I]t is feasible for a court to give meaning and force to the language of a constitutional mandate to furnish education of a specified quality, in this case "thorough and efficient," without trammeling the legislature in derogation of the separation of powers.).)

Moreover, the Board's argument makes no sense: the separation of powers doctrine actually supports proceeding to the merits of this action, not dismissing it. The Board's argument that separation of powers requires the judiciary to refrain from interfering with any legislative function ignores the judiciary's important role as a check on the legislature. (Bd. of Educ. Supp. Br. at 9–13.) "The Framers . . . . created checks and balances to reinforce [the] separation" of the branches of government, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015), and it is this very concept that the Pennsylvania Supreme Court embraced in its opinion remanding this case for further proceedings:

> Since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed 60 (1803), it has been well-established that the separation of powers in our tripartite system of government typically depends upon judicial

> review to check acts or omissions by the other branches in derogation of constitutional requirements. That same separation sometimes demands that courts leave matters exclusively to the political branches. Nonetheless, '[t]he idea that any legislature . . . can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions.' *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed 819 (1898).

William Penn Sch. Dist., 170 A.3d at 418 (alterations in original).

Further, the Board's argument (incorporated from Executive Respondents' original brief) that the only time a court should check legislative power is when there is "threat to the independence or functioning of the judiciary" contradicts both the general separation of powers principal and the cases on which the Board attempts to rely. (*See* Bd. of Educ. Supp. Br. at 9; Exec. Br. at 20.) For example, in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, this Court did not dismiss the case on separation of powers grounds; rather, it relied on the principal as a basis for applying a restrictive standard when denying the petitioner's application for summary relief and granting respondents' application. 108 A.3d 140, 161–67 (Pa. Commw. Ct. 2015). In any event, the Pennsylvania Supreme Court *reversed* that ruling, holding that the legislative enactments at issue did "not reflect that the Commonwealth complied with its constitutional duties,"

and remanded the case for further proceedings on the merits. *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 939 (Pa. 2017).[25]

Contrary to the Board's assertions, Petitioners here are not asking the Court to order a specific funding distribution, only to ensure that the General Assembly meets its constitutional obligations. That is not an infringement on the legislative function, it is a check required to ensure that the General Assembly functions as mandated by the Constitution. And Petitioners do not ask the Court to direct policy decisions, but rather to retain jurisdiction to ensure that—whatever policies the legislature adopts—the legislature is fulfilling its constitutional obligation to provide a thorough and efficient system of education.

CONCLUSION

For the foregoing reasons, the Court should overrule the Legislative Respondents' and the State Board of Education's Preliminary Objections and permit this case to move swiftly toward trial.

[25] None of the other cases cited in the Executive Respondents' original brief support this separation of powers argument either. *See, e.g., Sears v. Corbett*, 49 A.3d 463 (2012) (addressing sovereign immunity but not separation of powers); *Finn v. Rendell*, 990 A.2d 100 (Pa. Comm. Ct. 2010) (dismissing mandamus action seeking judicial intervention into functions "exclusively committed to the legislative and executive branches" (i.e., a basis that is not applicable here)).

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Combined Response in Opposition to Respondents' Supplemental Briefs complies with the word count limitation of Pa. R.A.P. 2135 because it contains 11,071 words, exclusive of the exemption portions pursuant to section of this Rule. The 2016 Microsoft Word program that produced the brief provided this word count.

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