IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT *et al.*,
Petitioners

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION *et al.*,
Respondents

NO. 587 M.D. 2014

BRIEF OF AMICI CURIAE LAW PROFESSORS DAVID S. COHEN, GARY S. GILDIN, SETH F. KREIMER, JULES LOBEL, ROBERT J. REINSTEIN

PETITION FOR REVIEW

Seth F. Kreimer, ID no. 26102
3501 Sansom Street
Philadelphia, PA 19104

Richard Feder, J.D.
BY: Richard Feder, ID no. 55343
623 Westview Street
Philadelphia, PA 19119
richiefeder@gmail.com
(267) 563-6842

Of Counsel:
Faegre Drinker Biddle & Reath, LLP
BY: Brian R. Kisielewski, ID 307395
Daniel Dorson *
Hannah Jane McCausland *
One Logan Square, Suite 2000
Philadelphia, PA 19103
(215) 988-2903
* Not admitted in Pa.

Counsel for Amici Law Professors

Dated: May 13, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

I. Interest of Amici Curiae

We are constitutional law professors at various Pennsylvania law schools.[1] We have a strong interest in the proper development of Pennsylvania constitutional law. Since the determination of the appropriate level of scrutiny to apply to Petitioners' equal protection claim may be critical to the outcome of this profoundly important case, we share our analysis to assist the Court in reaching a proper result.

---

[1] Our titles and affiliations, for identification purposes only, are as follows:

David S. Cohen, Professor of Law, Drexel University Thomas R. Kline School of Law.

Gary S. Gildin, Dean *Emeritus*, Professor of Law, and Honorable G. Thomas and Anne G. Miller Chair in Advocacy, The Dickinson School of Law of the Pennsylvania State University.

Seth F. Kreimer, Kenneth W. Gemmill Professor of Law, University of Pennsylvania Carey Law School.

Jules Lobel, Professor of Law, Bessie McKee Walthour Endowed Chair, University of Pittsburgh School of Law.

Robert J. Reinstein, Clifford Scott Green Professor of Law *Emeritus*, Temple University Beasley School of Law.

No person or entity, other than the *amici curiae* or counsel, paid in whole or in part for the preparation of this brief or authored in whole or in part this brief.

II. Summary of Argument

The right to an opportunity for a meaningful education is a fundamental right under the Pennsylvania Constitution, warranting strict scrutiny of the school funding scheme at issue in Petitioners' equal protection claim.

Although the constitutional history and text varies in each of the 50 states, there is sufficient commonality to draw important guidance from other state high courts. Among the cases that our Supreme Court indicated might provide guidance, the clear weight of authority points in favor of a fundamental right; and those cases to the contrary involve constitutional provisions, legal principles, or factual circumstances that simply are not applicable in Pennsylvania. Moreover, the evidence in this case demonstrates the current, historical, and critical importance of education for success in a democratic society, an important factor relied upon by many courts in holding education to constitute a fundamental right.

III. Argument: The Right to a Meaningful Education is a Fundamental Right, Warranting Strict Scrutiny of the Challenged School Funding Scheme.

A. A right that derives from the constitution is a fundamental right.

Our Supreme Court has not spoken definitively on how to define a fundamental right for equal protection purposes. We know from its most recent majority pronouncement on the question that a right that derives from the constitution is, *at a minimum*, an "important right"; that classifications implicating such a right must be reviewed with, at a minimum, "heightened scrutiny"; and that *strict* scrutiny is inapplicable when the constitution itself severely limits the nature of the right. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1118-20 (Pa. 2014).

Absent a constitutional limitation on the right, however, the Court has strongly suggested that a right that derives from the constitution is, indeed, fundamental. "Fundamental rights generally are those which have their source in the Constitution." *Id.* at 1118. *See also Yanakos v. UPMC*, 218 A.3d 1214, 1221-22 (Pa. 2019) (three-Justice plurality) (constitutional "remedies clause" does not create a fundamental right because the constitution limits the contours of the right); *id.* at 1230-31 (Donohue, J., concurring) ("remedies clause" *does* create a fundamental right because the constitution does *not* allow for any limitation on its contours).

The right to a constitutionally adequate education, or at least a real opportunity for an adequate education, is not subject to limitation; the Legislature is subject to an absolute "constitutional mandate to furnish education of a specified

quality." *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 457 (Pa. 2017).

We acknowledge the argument that the Education Clause imposes a duty on the Legislature, but no correlative "right" in the people. *See id.* at 489 (Saylor, J., dissenting). As we will show, *infra*, the overwhelming on-point jurisprudence, to which the Supreme Court itself has directed our attention, is to the contrary; the duty is for the benefit of the people, and implies a corresponding right in the people. Indeed, just last year, a unanimous Supreme Court quoted approvingly the following statement from *Hazleton Area School District v. Zoning Hearing Board,* 778 A.2d 1205, 1213 (Pa. 2001): "The purpose of the School Code is to establish a thorough and efficient system of public education, *to which every child has a right*." *In re Formation of Indep. Sch. Dist.*, 260 A.3d 925, 938–39 (Pa. 2021) (emphasis added). The contours of that right may be subject to dispute, and we defer to the parties here to flesh that out. The *existence* of the right, however, is recognized by caselaw across the country.

B. Pennsylvania schoolchildren have a fundamental right to a meaningful education.

Every attribute that we would expect to render a right as fundamental is present with respect to the right to education under the Pennsylvania Constitution: (1) explicit constitutional text prescribing the governmental duty, Pa. Const., Art.

III, § 14[2]; (2) Supreme Court recognition that the duty is enforceable, *William Penn*, 170 A.3d at 445-57; (3) a historical constitutional commitment, mandating that the government educate its citizens, *id.* at 423-25; (4) a similar longstanding recognition that education is a prerequisite to the exercise of other rights guaranteed by the Constitution and is essential to the proper functioning of a democracy, *id.* at 424; and (5) recognition of education as a fundamental right by the highest courts of other states when interpreting analogous constitutional language. We focus this brief on that last point.[3]

In holding Petitioners' equal protection claim justiciable, our Supreme Court expressly did not decide whether the challenged school funding system implicated a "fundamental right" or the related question of the level of scrutiny applicable to that claim. *William Penn*, 170 A.3d at 462. The Court did, however, point to high Court decisions from other states that have confronted these questions. *Id.* nn. 69,

---

[2] Nothing in the caselaw or in this brief suggests that constitutional text is a *necessary* condition to find a fundamental right. Rather, this brief argues, supported by a mountain of caselaw, that, at least where the right is as important as the right to a meaningful education, the constitutional text is *sufficient*.

[3] These are the essential attributes that our Courts look to in determining whether to depart from the federal constitution when construing an analogous provision of the Pennsylvania Constitution. *See Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). Consistent with the approach in *Yanakos*, however, and as explained in *Zauflik*, 104 A.3d at 1117 n.10, there is no need to conduct a formal "*Edmunds*" analysis to determine whether a right is "fundamental" under the Pennsylvania Constitution, as the equal protection analysis is the same under the Pennsylvania and federal Constitutions; the only question is the level of scrutiny applicable under the accepted equal protection inquiry.

70. Of course, the Court had no need to review or analyze these rulings, instead leaving it to this Court, at least initially, to determine what guidance this caselaw provides. The Supreme Court suggested these decisions have produced a "conflicting array of rulings," *id.*, but a careful review of that caselaw reveals that the array actually gives quite clear guidance.

The overwhelming thrust of that caselaw is that a school funding scheme that relies heavily on the wealth of the local school district to determine the funding available to educate schoolchildren implicates fundamental rights; that a grossly inadequate level of funding available to many school districts to provide the level of education that every child deserves and that the constitution demands is constitutionally suspect; and that equal protection challenges to such schemes need to be examined through a strict scrutiny lens. Cases to the contrary are inapposite, as they rely on constitutional provisions, legal principles, or factual circumstances that simply are not applicable here.

1. <u>Persuasive precedent from other jurisdictions firmly supports the conclusion that education is a fundamental right, the unequal provision of which should be subjected to strict scrutiny</u>.

In footnotes 69 and 70, the Supreme Court listed high court decisions from 11 states that held education, or an equal opportunity for an education, constitutes a fundamental right, all in the context of challenges to the inequity of school funding schemes which produce disturbing disparities in funding and educational opportunity based entirely on the vagaries of the strength of the local tax base. These decisions are instructive, fully applicable here, and highly persuasive.

We note that the Court did not include *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in the list of cases that could provide guidance. And with good reason. The decision in *Rodriguez* "was a consequence of the United States Constitution's conspicuous and complete silence on the very topic of education. This renders the High Court's determination on the question of an individual right immaterial to the Pennsylvania Constitution, which, obviously, is not at all silent on the topic." *William Penn*, 170 A.3d at 460.

We discuss the 11 state cases largely in the order presented by our Supreme Court, but the reasoning of these decisions can be summarized in one sentence: Standing alone (and consistent with Pennsylvania precedent, *supra*, pp. 3-4), the importance placed upon education by the text and history of the state constitution points toward its status as a "fundamental right"; but, *in combination with* the critical importance of education in the life of a citizen in a democratic society, the right to a meaningful education is surely "fundamental" for purposes of equal protection analysis.

In *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (*Serrano II*), the California Court re-affirmed the reasoning of its earlier, path-breaking decision in *Serrano v. Priest*, 487 P.2d 1241, 1255–59 (Cal. 1971) (*Serrano I*), finding a "fundamental interest" in education implicated by the State's unequal school funding scheme. *Serrano II*, 557 P.2d at 951-52. The *Serrano* decisions rely both on the importance placed by the California constitution itself on education, *see Serrano I*, 487 P.2d at 1258; *Serrano II*, 557 P.2d at 952 n.48, and the critical importance of education for success and meaningful participation in a democratic society.

The California Court emphasized the dual propositions that "education is a major determinant of an individual's chances for economic and social success in our competitive society" *and* that "education is a unique influence on a child's development as a citizen and his participation in political and community life." *Serrano I*, 487 P.2d at 1255-56. Focusing particularly on the inequality of educational opportunity at the heart of plaintiffs' equal protection claim, the Court reasoned that, "[u]nequal education . . . leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society."

The Court placed particular reliance on the manifest relationship of education to the right to vote, which itself "has been regarded as a fundamental right because it is 'preservative of other basic civil and political rights.'" *Id.* at 1258 (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)). So too, the Court held, is education. "At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities." *Id.* Our Supreme Court has noted this same, critical connection. *See William Penn,* 170 A.3d at 424 (framers of Education Clause "appear to have linked the importance of public education to the success of democracy").

Finally, the California Court noted the importance that the State itself has placed on education, in particular, by making school attendance compulsory. *Id.* at 1259.

All of that can be said regarding few, if any, other rights. *Id.* at 1255-59.

The Connecticut Court relied on similar considerations in *Horton v. Meskill*, 376 A.2d 359, 372–75 (Conn. 1977), noting that Connecticut, for centuries, has made school attendance compulsory, *id.* at 374, and has demonstrated the importance of education by imposing on the Legislature a mandatory constitutional duty to provide for education. *Id.*

In Kentucky, the Court relied heavily on the history of its state constitution's education clause, noting that the framers deemed education "the most vital question that can come before [the convention]." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205 (Ky. 1989). The framers considered education so vital because, *inter alia*, it is necessary "for training the[State's children] to be good citizens"; "to assure that students develop patriotism and understand our government"; and to ensure "the prosperity of a free people"; and because, without a sufficient education, the children "cannot hope to succeed." *Id.*

Critical to a challenge to the State's inequitable funding scheme, the Court noted that the framers were particularly concerned to develop a "system of practical equality in which the children of the rich and poor meet upon a perfect level and the only superiority is that of the mind." *Id.* The framers' ultimate goal was to see to it that "[t]he boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, *but all stand upon one level.*" *Id.* at 206 (emphasis supplied by the Court).

Our Supreme Court has extensively documented the comparable Pennsylvania constitutional history as it relates to the equalizing role of education.

William Penn, 170 A.3d at 418-25. Suffice it to say here that the two histories are remarkably similar.[4]

In New Hampshire, the Court was explicit that the fundamental nature of the right to "a State funded constitutionally adequate elementary and secondary education" derives dually from its placement in the constitution and its critical importance to democratic participation. *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1358–59 (N.H. 1997).

As for the constitution, the Court saw particular significance in the fact that "education is deemed so essential to the viability of the State that [the education clause] is one of only two places in the constitution where a duty is affirmatively placed on the legislature." *Id.* The same, of course, can be said of the Pennsylvania constitution.[5]

As for its critical importance to democratic participation, the Court echoed the California view:

> [E]ven a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights. The latter being recognized as

[4] We skip over the Massachusetts case next cited by the Supreme Court, *McDuffy v. Sec'y of Exec. Off. of Educ.*, 615 N.E.2d 516 (Mass. 1993), as it relies on the *education clauses* to invalidate a funding scheme and does not address the equal protection or "fundamental right" question.

[5] Contrast this with Chief Justice Saylor's view, *in dissent*, that the placement of an affirmative duty on the Legislature to provide for a thorough and efficient system of education cuts *against* the fundamental nature of the right, given its non-placement in the Declaration of Rights. *William Penn*, 170 A.3d at 488.

> fundamental, it is illogical to place the means to exercise those rights on less substantial constitutional footing than the rights themselves.

Id.

In North Carolina, the Court concluded that the "right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime" is a "fundamental right." *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997). The case, though, is distinguishable because North Carolina is one of the few states to place the right to education in its Declaration of Rights. *See id.* (The Wyoming case cited by our Court at n.70 is to like effect. *See Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1257 (Wyo. 1995).)

The North Dakota Court held that the state constitution recognized a fundamental right to education, which has "at least equal standing with the guarantees of freedom of religion and freedom of speech and press." *See Bismarck Pub. Sch. Dist. No. 1 v. State By & Through N. Dakota Legislative Assembly*, 511 N.W.2d 247, 256, 259 (N.D. 1994) (citation omitted). The North Dakota education provisions (Article VIII), like Pennsylvania's and those of most states, are located in an article separate from the constitution's declaration of rights.

In Wisconsin, the Court required little analysis to hold that the right to equal opportunity for education is a fundamental right. "The involvement of the legislature from the framing of the constitution to the present and the many cases which have come before this court, emphasize that the equal opportunity for education as defined by art. X, sec. 3, is a fundamental right." *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) (citation and emphasis omitted).

Although the Court went on to reject the equal protection challenge to the school funding scheme, the reason for that rejection is *sui generis* to Wisconsin; the Court found that the "right" at issue was defined by the state constitution's very particular education clause, which actually *mandated* the funding scheme that plaintiffs there were challenging. *Id.* The Court's decision was also infused with notions of non-justiciability, *id.* at 582, plainly inconsistent with our Supreme Court's approach to the issue. And the Court emphasized that all children were receiving a "basic" education; had that not been the case, the Court's deference to the Legislature would "abruptly cease." *Id.* We understand that Petitioners, here, have presented substantial evidence to the contrary.

In footnote 70, our Supreme Court identified two additional cases.

In Minnesota, the Court succinctly concluded that education is a fundamental right, both "because of its overall importance to the state" *and* "because of the explicit language used to describe this constitutional mandate. While a fundamental right cannot be found '[a]bsent constitutional mandate,' *Rodriguez,* 411 U.S. at 33, . . . the Education Clause *is* a mandate, not simply a grant of power." *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (emphasis in original).

As in Wisconsin, the Minnesota Court nonetheless found the school funding system satisfied equal protection, in part because of unique wording of the Minnesota constitution, but primarily because plaintiffs there *conceded* they were receiving "an adequate education." *Id.* at 315-16. More recently, however, the same Minnesota Court allowed an equal protection challenge to the State's

education financing system to go forward, as plaintiffs there alleged they were not receiving the adequate education that had been conceded 25 years earlier. *See Cruz-Guzman v. State*, 916 N.W.2d 1, 11 (Minn. 2018) ("The fundamental right recognized in *Skeen* was not merely a right to anything that might be labeled as "education," but rather, a right to a general and uniform system of education that is thorough and efficient, that is supported by sufficient and uniform funding, and that provides an adequate education to all students in Minnesota.").

In West Virginia, the Court, after reviewing cases from jurisdictions with similar constitutional language, concluded that "the mandatory requirement of . . . Article XII, Section 1 of our Constitution [("The Legislature shall provide, by general law, for a thorough and efficient system of free schools.")], demonstrates that education is a fundamental constitutional right in this State." *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

In sum, we submit that the foregoing extensive line of cases demonstrates persuasively that, under the Pennsylvania constitution, as with the constitutions of so many other states, education is a fundamental right.

2. Five other cases cited by the Court do not directly address the question, but most of them still provide strong support.

Our Supreme Court also cited five cases in footnote 69 preceded by a "*cf.*" signal. The first three cases provide strong support for the "fundamental right" conclusion and the application of strict scrutiny; the other two are of no moment either way.

In Tennessee, Arkansas, and Arizona, the Courts did not need to reach the fundamental right or strict scrutiny question, relying instead on other grounds to

invalidate funding schemes that produced gross disparities in funding or education quality. In Tennessee and Arkansas, the Courts found the funding schemes *failed even the rational basis test*. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151, 154 (Tenn. 1993) (relying on both the critical importance of education for societal success and on an Education Clause not dissimilar to ours to conclude that the "opportunity for education [is a] right which must be made available to all on equal terms"); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (to same effect). In Arizona, the Court applied equal protection-like principles under the Education Clause itself. *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) (plurality opinion). Concurring justices in two of the cases would have gone farther and reached the strict scrutiny question. *See Dupree*, 651 S.W.2d at 97 (Purtle, J., concurring) ("the right to a free public education is fundamental [as the Constitution] clearly mandates the state to provide a free school system to safeguard liberty and provide a bulwark for free and good government"); *Roosevelt*, 877 P.2d at 816-17 (Feldman, C.J., concurring) (to same effect).

In *Neeley v. West Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746 (Tex. 2005), no equal protection or fundamental right claim was presented. Our Supreme Court's suggestion at n.69 that the Texas Court "reject[ed] fundamental right formulation *and* rational basis" was misplaced; the issue simply was not addressed. The Texas Court, did, however, invalidate the school funding system, holding that the system's heavy reliance on local property taxes compels local districts to increase those taxes to such an extent that the

system violated a unique Texas constitutional provision relating to property taxes. *Id.* at 794-98.

Finally, *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978), holds that the mandatory duty imposed by Washington's education clause necessarily creates an enforceable "right" in schoolchildren "to have the State make ample provision for their education." *Id.* at 91. The case, however, arguably is distinguishable, as the Washington constitution makes the Legislature's education responsibilities a "*paramount* duty." *Id.* (emphasis added).

3. Those cases that reject the "fundamental right" claim are entirely inapposite.

As previously noted, our Supreme Court suggested that there is a "conflicting array" of cases on the question of whether education should be treated as a fundamental right for purposes of equal protection analysis, but the Court had no cause to review that caselaw in any detail. In fact, the cases cited in the Supreme Court's "*but see*" string cite, 170 A.3d at 463 n.69, are all inapposite.

The Georgia Court's rejection of a fundamental right argument is thoroughly distinguishable. *See McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981). Most critically, the Georgia constitution's education article, in stark contrast to Pennsylvania's, contains 19 separate provisions, some quite detailed, spelling out how education is to be financed. Unsurprisingly, the Court was unwilling to find a system that was largely *dictated* by the constitution to be in *violation* of that same constitution. *Id.* at 166.

The Court further explained its unwillingness to apply strict scrutiny to Georgia's school funding scheme by noting the judiciary's "lack [of] expertise" in matters of taxation, particularly when they implicate "difficult questions of educational policy. * * * Education, perhaps even more than welfare assistance, presents a myriad of intractable economic, social, and even philosophical problems." *Id.* at 167 (quoting *Rodriguez*, 411 U.S. at 42).[6] But these justiciability concerns were expressly rejected by our Supreme Court, *see William Penn*, 170 A.3d at 460.

Further, the Georgia Court construed the equal protection challenge as demanding "inflexible statewide uniformity in expenditure." *McDaniel*, 285 S.E.2d at 166. But this is not what Petitioners here are demanding, and our Supreme Court has recognized the argument for what it is: "the straw man of funding equality." *William Penn*, 170 A.3d at 449.[7]

Finally, the Georgia Court was addressing an equal protection challenge in the context of a system where the Court found no evidence that "existing state funding for public education deprives students in any particular school district of basic educational opportunities." *McDaniel*, 285 S.E.2d at 165. As noted

---

[6] *See also McDaniel*, 285 S.E.2d at 165 (noting "the inherent difficulty in establishing a judicially manageable standard for determining whether or not pupils are being provided an adequate education") (internal quotation marks omitted).

[7] *Cf. Danson v. Casey*, 399 A.2d 360, 366 (Pa. 1979) ("the only judicially manageable standard this Court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures"); *William Penn*, 170 A.3d at 449 (expressly rejecting this aspect of *Danson*).

previously, we understand that Petitioners here have presented very different evidence.

The decision in *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975), is entirely distinguishable because Idaho law, at the time, did not even recognize the *availability* of strict scrutiny, let alone a heightened scrutiny based on a fundamental right. Under the Idaho equal protection clause, the only available mode of review was the "rational basis" test, and the Court expressly declined to adopt the federal "two-tiered" mode of analysis, *id.* at 643-45, "encumbered as it is with serious problems," *id.* at 645. So any discussion of whether education is a fundamental right was, by the Court's own admission, entirely *dicta*. *See id.* ("for the sake of argument").[8]

The Idaho Court was also plainly influenced by justiciability concerns, *see, e.g.*, *Thompson*, 537 P.2d at 640, 642, and a grave skepticism "concerning the relationship of funds expended per pupil and the equality of educational opportunity," *id.* at 651. Our Supreme Court, however, has soundly rejected the justiciability concerns; and we understand that Petitioners here have presented ample evidence to demonstrate the causal connection of funding to educational quality. *See also In re Formation of Indep. Sch. Dist.*, 260 A.3d at 939 n.13 (Pa. 2021) ("[t]he centrality of school financing to effectuate the constitutional mandate

[8] The Idaho Court's reliance in this regard on *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973), is nonetheless odd, given *Robinson*'s holding that the State's duty to "maintain[] and support[] 'a thorough and efficient system of free public schools' . . . can have no other import" other than to mandate "equal educational opportunity." *Id.* at 294; *see Thompson*, 537 P.2d at 646.

of a thorough and efficient system of public education was recently highlighted in *William Penn*").

The Indiana Court's rejection of a fundamental right is not relevant here, as the Indiana Constitution apparently does not even require a bare minimum level of education adequacy:

> [T]he Education Clause . . . speaks only of a general duty to provide for a system of common schools and does not require the attainment of any standard of resulting educational quality. [It does] not require or prescribe any standard of educational achievement that must be attained by the system of common schools. The Clause says nothing whatsoever about educational quality.

Bonner ex rel. Bonner v. Daniels, 907 N.E.2d 516, 521 (Ind. 2009).

Without the existence of any meaningful duty imposed on the Legislature, it is no surprise that the Indiana Court found no correlative fundamental right in the schoolchildren. Indeed, in discussing the equal protection challenge to the school funding system, the Court described the Education Clause as merely providing for "aspirational goals and objectives assigned to the General Assembly." *Id.*

In Kansas, the Court's rejection of a fundamental right must be read against the backdrop of the Court's reading of the state constitution to require deference to the Legislature's determination of educational adequacy, *see, e.g., Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) ("the court will not substitute its judgment of what is 'suitable', but will utilize as a base the standards enunciated by the legislature and the state department of education"), and, critically, the finding that "all schools in Kansas" were able to meet the State's standards, *id*. Thus, in refusing to apply strict scrutiny, the Court emphasized that

the constitution left matters of education policy and taxation to legislative discretion. *Id.* at 1189. The Court was particularly concerned that declaring education to be a fundamental right would leave the Court no choice but to require mathematic exactitude in funding and would leave no room for *any* disparities between districts. *Id.* As already noted, our Supreme Court has rejected this line of reasoning.

Moreover, and far more recently, the Kansas Court invalidated the State school funding scheme as inequitable, without needing to revisit the "fundamental right" question:

> [Recent legislation] exacerbate[s] wealth-based disparities, resulting in unacceptable levels. Under these provisions, school districts will not have reasonably equal access to substantially similar educational opportunity through similar tax effort. Stated more precisely, the State has failed to meet its burden of establishing that [the school funding scheme] complies with the equity standard of [the Kansas education clause].

Gannon v. State, 402 P.3d 513, 545 (Kan. 2017).

Illinois' rejection of a fundamental right is even more closely tied to its unique constitutional text, history, and interpretation. *Committee for Educ'l Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996). The framers of the Illinois Education Clause -- which was not adopted in its current form until 1970 -- were well aware of the growing controversy surrounding the disparities in education finance, *and expressly rejected proposals to "provide for substantial parity of educational opportunity throughout the state." Id.* at 1186-87 (emphasis added). Indeed, any suggestion in the constitution that the State had a primary obligation to provide for school funding in order "to cure inequality in education" was "not a legally

obligatory command"; rather, it was an unenforceable, "purely hortatory statement of principle." *Id.* at 1187.

Moreover, the Illinois Court expressly declined to read into the Education Clause an enforceable mandate with regard to education *quality*, holding that determination to be reserved exclusively for the Legislature. *Id.* at 1189-93. Without an enforceable mandate upon the Legislature, the Court naturally would not find any correlative right, let alone a *fundamental* right, to any particular quality of education. Rather, the Court held, a quality education is at most a "fundamental '*goal*'." *Id.* at 1195 (quoting the Education Clause; emphasis supplied by the Court).

Thus, the Court's apparent concern that recognition of education as a fundamental right will open the door to an "affirmative obligation" on the part of government to provide enhanced educational services, *id.* at 1194-95, is of no moment here, because the concern was premised on a state constitution that did not actually impose *any* meaningful affirmative obligation on the government with respect to education. In Pennsylvania, however, the affirmative obligation to provide meaningful educational opportunities derives exclusively from the Education Clause itself; Petitioners' equal protection claim merely demands that those profoundly important opportunities must be offered in a non-discriminatory manner. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (benefits provided by state-created institution of marriage must be offered in a non-discriminatory manner).

The Maryland Court, too, relied on its Education Clause's unique history. The 1864 Maryland Constitution had imposed a series of mandates on the State Legislature to fund schools equitably, but, after much debate on the very question, *all of that language was intentionally removed in 1867*. *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 771-74 (Md. 1983). The Maryland Court held that this history demonstrated an affirmative *rejection* of any constitutional mandate of equality. *Id.* at 776.

The Maryland Court acknowledged that recognizing education as a fundamental right would almost surely "foreordain[] the invalidation" of the funding scheme. *Id.* at 786. The Court explained its substantial reluctance to interfere with legislative discretion, given the Court's "lack of expertise and familiarity" with the underlying issues. Therefore, *working backwards*, and not wishing to engage in strict scrutiny, the Court was determined not to find a fundamental right. *Id.* at 786-87. Though admirable for its candor, the Court's reluctance to review legislative action is in substantial contrast to our Supreme Court's extensive justiciability reasoning.

Finally, as with many of the other distinguishable cases, the Maryland Court was uncomfortable with what it understood to be demanded by the challengers' claim -- mathematical exactitude in per-pupil spending, *id.* at 770, 777 (citing favorably *Danson v. Casey*[9]), 785-86 -- noting further that it was *not* faced with a

[9] As previously noted, our Supreme Court expressly rejected this aspect of *Danson*. *See supra*, note 7.

case where "the right to an adequate education prescribed under Article VIII of the Maryland Constitution is . . . being denied to any child in this State," *id.* at 787.

The Michigan case is of little precedential significance. It is an unsigned, intermediate appellate court decision, which simply cites to a concurring opinion in an unsigned Supreme Court order in a previous case. *E. Jackson Pub. Sch. v. State*, 348 N.W.2d 303, 305-06 (Mich.App. 1984). That concurring opinion argued that education is not a fundamental right because the Michigan Constitution expressly contemplates the inequalities in education funding that were being challenged, *Milliken v. Green*, 212 N.W.2d 711, 717 (Mich. 1973), and because, in any event -- and in direct opposition to the instant case -- "[t]he obligation of . . . the Legislature . . . to students who live in a school district unable or unwilling to provide an adequate level of educational services or opportunity is . . . not presently before us," *id.* at 718, and "no evidence has been presented that specific, significant educational inequities exist as a result of the current school financing system," *id.* at 718-19.[10]

Missouri's rejection of a fundamental right to education was tied to two unique aspects of the Missouri Constitution. First, reminiscent of Maryland, "language regarding equitable educational funding . . . was removed in the 1875 Constitution and never has been restored." *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 490 (Mo. 2009). Indeed, the Court notes that the constitution actually "builds in" provisions for substantial funding variability. *Id.* Second, Missouri's

[10] The Michigan Constitution provides that education "shall forever be encouraged," and imposes no modifier describing the school system that must be maintained. Mich. Const. Art. 8, §§ 1, 2.

constitution does not mandate adequacy. *Id.* Indeed, any quality goals set forth in the constitution merely constitute "a community aspiration." *Id.* at 489.

The Rhode Island Court concluded that education is not a fundamental right for the simple reason that the state constitution imposed no constraint on the Legislature's determinations of either quality or inequality when it came to education or education funding. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 60 (R.I. 1995). "The constitutional convention retained language that expressly and unequivocally assigned to the General Assembly the sole discretion 'to adopt all means which *it* may deem necessary and proper' in the promotion of public schools." *Id.* at 50 (quoting R.I. Const., Art. 12, § 1) (emphasis supplied by Court); *see also id.* at 49 (constitutional convention rejected numerous proposals to require equalization in funding). Moreover, the Court was explicit that "the absence of justiciable standards could engage the court in a morass," *id.* at 59, precisely the concern *rejected* by our Supreme Court.

Finally, Justice Saylor, in dissent, identified cases from two additional states as declining to find a fundamental right. 170 A.3d at 490 n.25. Those cases are similarly inapposite.

Lujan v. Colorado State Board of Education, 649 P.2d 1005 (Colo. 1982), relied on a by-now familiar litany of distinguishable factors to reject the fundamental right argument. The Court found that "each school district" in the State was already providing "thorough" educational opportunities. *Id.* at 1025. Plaintiffs there apparently claimed an entitlement to "equal expenditures per student." *Id.* at 1017. And the Court held that "courts are ill-suited to determine

what equal educational opportunity is," thus refusing "to venture into the realm of social policy." In contrast, Petitioners here do not seek mathematical exactitude; they allege a substantial deficit in educational opportunities; and only the *dissent* in our Supreme Court believes the courts are "ill-suited" to the task at hand.

Board of Education v. Walter, 390 N.E.2d 813 (Ohio 1979), held that a challenge to the school funding scheme was "more directly concerned with tax[ation] than [with] the way in which Ohio educates its children," and that questions of taxation are particularly inappropriate for strict judicial scrutiny. *Id.* at 819 & n.4. Moreover, as in many of the cases that reject the "fundamental right" premise, the Court was addressing a situation where "each child receives an adequate education." *Id.* at 825.

In any event, *Walter* was effectively overruled in *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997), when the Court held that wide disparities in school funding violated the Education Clause:

> [I]n *Walter*, the General Assembly had relied on a determination of a legislative committee that the statutorily guaranteed amount actually was sufficient to provide a high quality education. * * * Here, however, the evidence clearly indicates that the funding level set by today's School Foundation Program has absolutely no connection with what is necessary to provide each district enough money to ensure an adequate educational program.

Id. at 745.

4. The abundant evidence in this case demonstrates the importance of a meaningful education.

Many courts have taken judicial notice of the importance of education to individual improvement and self-government. Here, the record is replete with evidence proving those connections. We highlight here just a fraction of that evidence.

Extensive research demonstrates that increased education funding results in higher levels of educational achievement. Tr. 9380:11-23, 9431:5-9432:10, 9499:16-9500:2. In turn, increased educational achievement translates to higher career earnings, Tr. 8994:5-8997:16, 8995:9-8996:8, 8997:8-16, 8999:17-24, 9435:1-9, 9470:1-13, 9478:2-17, 9486:20-9488:7, and improved health status over the course of a lifetime, Tr. 9009:6-9010:6, 9012:16-9014:17. Indeed, the evidence shows that students exposed to increased educational funding are less likely to engage in criminal activities during adulthood, thereby reducing incarceration. Tr. 9017:24-9018:13, 9435:1-17, 9478:2-17, 9486:20-9488:7.

Moreover, in the words of Professor Black, the delegates to the 1874 constitutional convention themselves recognized that, "if we're going to hand over political power to individuals to cast votes . . . , we need education so that we can have intelligent casting of votes. * * * [Moreover,] knowledge and ability to read allows the voters to hold government accountable." Tr. 941:6-18. Professor Black's review of voluminous convention records and contemporary newspapers thus reveals that public education was one of, if not the, most important issues to

the delegates at the convention. Tr. 919:19-920:15, 929:21-930:6, 939:11-23, 970:7-971:6, 983:6-984:12, 996:5-997:2.

C. The application of strict scrutiny is straightforward.

We know of no court that had any difficulty with the application of the strict scrutiny test to a system of school funding. In order to survive strict scrutiny, the Commonwealth must demonstrate that the disparities in educational opportunity, based on wealth of the local tax base, constitute a *necessary* and *narrowly tailored* means to serve a *compelling interest*. Other than the unique cases in Wisconsin and Minnesota, discussed *supra*, we know of no school funding schemes that rely heavily on local taxes to have survived this test. We doubt Pennsylvania's can, either.

IV. Conclusion

This Court should find that the right to meaningful educational opportunities is a fundamental right, and the gross disparities in the Legislature's fulfillment of its duty with respect to that right should be subjected to strict scrutiny.

Respectfully submitted,

/s/ Richard Feder

Seth F. Kreimer, ID no. 26102
3501 Sansom Street
Philadelphia, PA 19104

Richard Feder, JD
BY: Richard Feder, ID no. 55343
623 Westview Street
Philadelphia, PA 19119
(267) 563-6842

Counsel for Amici Law Professors

Of Counsel:
Faegre Drinker Biddle & Reath, LLP
BY: Brian R. Kisielewski, ID 307395
Daniel Dorson *
Hannah Jane McCausland *
One Logan Square, Suite 2000
Philadelphia, PA 19103
(215) 988-2903
* Not admitted in Pennsylvania

May 12, 2022

Certifications of Counsel

I certify that this brief is in compliance with the requirements of Sections 7.0 and 8.0 of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*.

I further certify that the word count of this brief is 6,536 words, exclusive of the cover, table of contents, table of citations, signature blocks, and this certification.

__/s/ Richard Feder_____
Richard Feder
Counsel for Amici Law Professors

Dated: May 13, 2022