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' OMNIBUS REPLY BRIEF

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Other Authorities

Rules

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

I. INTRODUCTION

Across 54,000 words of briefing, Legislative Respondents offer little more than a claim of unreviewable supremacy. They propose a constitutional standard that is not based in text or history. They invent new evidentiary burdens and bypass basic principles of government. They offer circular defenses of a failing, discriminatory system that effectively place it outside the reach of judicial review. And they repeatedly minimize or altogether ignore a Supreme Court decision that forecloses the logic they rest upon.

All of this is in service of a false choice between respecting the General Assembly's discretion over educational policy and evaluating whether that body has fulfilled its constitutional obligations. But pursuant to the most basic principles of republican government, this Court has the duty to ensure that "constitutional promises . . . [are] kept." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 418 (Pa. 2017). And the record developed at trial demonstrates that the General Assembly has failed to deliver what the Constitution guarantees – a high-quality, contemporary education for every child in the Commonwealth, and an equal opportunity to access that education. For all the reasons set forth in their Findings of Fact and Conclusions of Law, their Post-Trial Brief, and below, Petitioners are entitled to relief.

II. ARGUMENT

A. LEGISLATIVE RESPONDENTS' ATTEMPTS TO REINTERPRET THE LANGUAGE AND HISTORY OF THE EDUCATION CLAUSE FAIL.

Legislative Respondents begin by arguing that the Court should ignore the origins of the Education Clause's constitutional mandate to provide a thorough and efficient system of education, which was first enshrined in the Constitution in 1874 in "a provision that has remained in our Constitution in materially the same form" ever since. *William Penn Sch. Dist.*, 170 A.3d at 418. Instead, Legislative Respondents advocate for an interpretation of the Clause that begins and ends in 1967, when other portions of the Clause were revised. July 1, 2022 Senator Jake Corman's Post-Trial Brief ("Corman Br.") 10-29; July 1, 2022 Speaker Cutler's Post-Trial Brief ("Cutler Br.") 11-12.

Having failed to introduce any evidence on this issue at trial, Legislative Respondents instead contort basic principles of constitutional construction to reinterpret the Education Clause. Their conclusions should be rejected for this reason alone. But even applying their own strained methods of interpretation, Legislative Respondents fail to identify anything in the Clause's text or history supporting their claim that the only right conferred by the Clause is a grant of extraordinary legislative discretion, and that this discretion is broad enough to

justify a system that does not meet the needs of all the children it purports to educate.

1. Legislative Respondents' attempts to ignore the origins of the Education Clause should be rejected.

Legislative Respondents' central argument appears to be that the origins of the Education Clause ratified in 1874 are irrelevant because portions of that Clause were subsequently amended in 1967. Corman Br. 27-28; Cutler Br. 11-12. But this position cannot be squared with the Supreme Court's conclusion that "the language upon which the instant case primarily hinges" – the Education Clause's mandate to "maintain and support a thorough and efficient system" of education – "first appeared in our Constitution in 1874." *William Penn Sch. Dist.*, 170 A.3d at 425 (quotation omitted). And these words were retained when the Clause was amended in 1967.[1] May 2, 2022 Petitioners' Proposed Findings of Facts and Conclusions of Law ("FOF") ¶ 110; *compare* Pa. Const. art. X, § 1 (1874) *with* Pa. Const. art. III, § 14. Accordingly, this Court should consider how the words first enshrined in the Constitution in 1874 were used and understood at that time. *See* 1 Pa.C.S. § 1953 ("Whenever a section or part of a statute is amended, . . . the portions of the statute

[1] The 1874 Clause mandated the maintenance and support of a "system of public *schools*," Pa. Const. art. X, § 1 (1874), while the current Clause refers to a "system of public *education*." Pa. Const. art. III, § 14 (emphasis added). However, even Legislative Respondents do not contend that the obligation to provide a "system of public schools" in 1874 was understood as anything other than an obligation to provide a system of public education. To the extent Respondents argue this change in language broadened their discretion, Corman Br. 100, that argument is addressed *infra* at Section D.

which were not altered by the amendment shall be construed as effective from the time of their original enactment . . .") ;[2] *see also*, *e.g.*, *Patrick Media Grp., Inc. v. Commw., Dep't of Transp*., 620 A.2d 1125, 1127 (Pa. 1993) (holding that the terms of a statutory provision enacted in 1971 and retained in a 1975 amendment should be assigned the definitions in effect in 1971). As Petitioners established through the expert testimony of constitutional history scholar Derek Black, their Findings of Fact, and their Post-Trial Brief, the 1873 Convention delegates chose to mandate a high-quality education by using the phrase "thorough and efficient," because voters at the time would have understood the terms to mean "complete" and "effective," and because other state constitutions had used the phrase the same way. June 1, 2022 Petitioners' Post-Trial Brief ("Pet'rs Br.") 7-21.

When construing today's Education Clause, it is also appropriate to consider the "circumstances attending its formation[.]" *Scarnati v. Wolf*, 173 A.3d 1110, 1118 (Pa. 2017) (quotation omitted). Because the Clause's central features became a part of the Constitution in 1874, the 1873 Convention debates are critical to its construction. For this reason, both the Supreme Court and the Commonwealth Court have heavily relied on this time period in the Clause's history to understand

[2] The Pennsylvania Supreme Court has affirmed that "in undertaking explication of a provision of the Pennsylvania Constitution . . . we follow the rules of interpretation similar to those generally applicable when construing statutes." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (citing cases).

its meaning. *William Penn Sch. Dist.*, 170 A.3d at 423-25; *PARSS v. Ridge*, 1998 Pa. Commw. Unpub. LEXIS 1, *91-*119 (Pa. Cmmw. Ct. July 9, 1998). They have done so because they recognize that the historical record undergirding the development of the Constitution's Education Article in 1874 provides a comprehensive, in-depth window into the framers' motivations and intent in creating the Clause's thorough and efficient mandate. *William Penn Sch. Dist.*, 170 A.3d at 425; *see also PARSS*, 1998 Pa. Commw. Unpub. LEXIS at *91-92 ("To provide background to that mandate that the Pennsylvania Constitutional Convention adopted in 1873, it is necessary to briefly examine the history of education in Pennsylvania, the intellectual foment at the time of the Constiuttional Convention in 1873 and the debates of the delegates when they proposed the Education Clause.").

And these courts' analyses have focused not only on the debates about the Clause's "thorough and efficient" requirement itself, but also on the broader discussions in which that obligation was conceived, including how the relevant language was used and understood, why other language was rejected, and the political context in which the drafting process took place. *Id.* This approach is squarely in line with the precept that constitutional interpretation may be informed by "the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained;

and the contemporaneous legislative history." *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 929-30 (Pa. 2017) (quotation omitted).[3]

Disregarding the Supreme Court, the canons of constitutional interpretation, and the relevant constitutional history, Legislative Respondents claim that the definitions and discussions surrounding the origins of the Education Clause are irrelevant, and that the 1873 Convention debates are merely a collection of "personal opinions" by "individual delegates" that should have no bearing on the Court's analysis. Corman Br. 28-29; Cutler Br. 12. Their alternative analysis should be rejected.

2. Legislative Respondents' interpretation of the 1967 amendments to the Education Clause is not supported by the historical record.

In any event, even the historical record surrounding the 1967 amendments – including the sources that Legislative Respondents themselves cite – demonstrates

[3] Legislative Respondents appear to acknowledge these principles when they support their own reading of the Clause. For example, although they criticize Petitioners for citing to portions of the debates beyond the discussion of the provision that was ultimately adopted, *see* Corman Br. 28 n.4, 31, Respondents themselves extensively discuss other versions of the provision in support of their argument that the framers of the Clause intended to give the General Assembly broad discretion over education. Corman Br. 30-41; Cutler Br. 42-43. Similarly, although Respondents argue that the Education Clause should be interpreted as if it was established in 1967, their proposed definition of an adequate education and their attempts to justify the system's reliance on local funding appear to rely on a distinctly 1874 conception of education. *See, e.g.*, Corman Br. 40-41; Cutler Br. 88. To the extent Respondents claim that Petitioners took excerpts of the debates out of context, the record of those debates, which Petitioners provided to the Court in full for its own independent examination and analysis, speak for themselves. *See* FOF App'x B.

that the 1967 voters believed they were affirming the central tenets of the 1874 Education Clause, not radically changing them.

i. There is no basis for Legislative Respondents' claim that the 1967 constitutional amendments eliminated the right to an education.

In 1967, the phrasing of the Education Clause was changed from requiring a "thorough and efficient system of public schools, wherein all children of this Commonwealth above the age of six years may be educated" to a "thorough and efficient system of public education to serve the needs of the Commonwealth." FOF ¶ 103 (quotation omitted). Legislative Respondents claim that "[b]y removing the reference to children, the 1967 amendments confirmed that the Education Clause is not intended to create a right to a public education." Corman Br. 98; Cutler Br. 11 (incorporating argument by reference). Their only basis for this conclusion is that by deleting "the prior references to 'children' and people who were aged over 'six years'" those words were deemed "inoperative," and thus had the effect of eliminating children as "the focus of the Education Clause." Corman Br. 98-99. Respondents' reasoning should be rejected.

As set forth in Petitioners' Post-Trial Brief, and as discussed further below, the 1874 Education Clause clearly and expressly established a constitutional right to education. Pet'rs Br. 15-21; *see also infra* Section D. And there is nothing in the record of the 1967 amendments to suggest that the removal of the words "wherein

all children of this Commonwealth may be educated" was intended or understood to extinguish that right. To the contrary, as Petitioners' expert Professor Black explained in unrebutted testimony, the language change was a reflection of the fact that although educating "all children" had been "quite a radical concept in 1868 . . . by the time you get into the 1960s, there's no serious conversation that somehow or another that when we say that we're going to have a system of common schools, that not all children are going to get to go." FOF ¶ 104 (quotation omitted). Professor Black's conclusion is buttressed by the legislative history, which described the amendment as "replacing the *obsolete* requirement that all children of the Commonwealth above the age of six be educated . . ." *Id.* (quoting H.R. Journal, 151st Gen. Assemb., Sess. of 1967, Vol. 1, No. 6 at 80 (Jan. 30, 1967)) (emphasis added).

The deletion of "all children" was similar to another effort to modernize the Constitution, which eliminated a section in the Education Article stating that "[w]omen twenty-one years of age and upwards, shall be eligible to any office of control or management under the school laws of this State." Pa. Const. art. X, § 3 (1874). This section's deletion did not, of course, have the effect of prohibiting women from holding leadership positions in education. To the contrary, it was eliminated because it was no longer necessary to specify what was by then presumed. *See* Trial Transcript ("Tr.") 936:3-24 (Black). In much the same way,

Project Constitution's explanation for the replacement of the phrase "all children" with "the needs of the Commonwealth" was that the system "should not necessarily be *limited* to serve the needs of the children," because they took for granted that the system would continue to serve children. FOF ¶¶ 105-106 (quotation omitted); *see also* 1 Pa.C.S. § 1978 ("Whenever a statute which created a personal . . . right in derogation of the common law is repealed as obsolete or by a code which does not contain an express provision with respect to such personal . . . right, the repeal shall not be construed to revive the prior inconsistent common law rule, but such repeal shall be construed as a recognition by the General Assembly that such personal or property right has been received into and has become a part of the common law of this Commonwealth."). The concept was simply so obvious that it no longer needed to be specified.

The newspaper articles cited by Legislative Respondents reflect the same understanding. A 1967 article printed in several newspapers explained that the amendments to the Education Clause "would eliminate *out-dated* language requiring the state to provide a public education system for all children over the age of six . . ." *See* Vincent Carocci, *Constitution Issues Are Explained*, The Evening Standard, May 8, 1967, at 5 (emphasis added) (Corman Br. App'x B, Tab 7). Another newspaper described the revision as simply "changing requirement to educate children over six . . . to public education without limitation by age." *Seven*

Constitutional Changes Listed on Ballot for Tuesday, Gazette and Daily, May 11, 1967, at 36 (Corman Br. App'x B, Tab 6).

The deletion of the language "all children" was so inconsequential that it was not the subject of much discussion in the press, and some newspaper articles reporting on the amendments did not explain its removal at all. *See, e.g.*, Dick Cowen, *Question 3-A 'Streamlines the Legislative Process,'* The Morning Call, May 6, 1967, at 34 (Corman Br. App'x B, Tab 3); Wilfred Norris, *All Voters Must Consider Constitutional Revision*, The Daily News, May 11, 1967, at 6 (Corman Br. App'x B, Tab 4). One such article concluded this way:

> [T]here is nothing controversial about Resolution 3. It was approved unanimously in the Senate when first proposed in the 1965-1966 session, and again earlier this year, and with but one dissenting vote in the House. Changes proposed by Resolution 3 are intended to bring matters concerned with lawmaking under a single article, to get rid of outmoded terms and procedures, and to make the legislative process less complicated . . . . Consequently, an affirmative vote on Resolution 3 is strongly urged.

Editorial, *Better Legislative Procedures*, Wilkes-Barre Record, May 1, 1967 (Corman Br. App'x B, Tab 2).[4]

In the face of this evidence, the claim that deleting "all children" from the Constitution in 1967 had the major impact of removing children as "the population

[4] And in fact, the ballot question that was ultimately presented to voters on Resolution 3 made no mention of the Education Clause revisions at all. *See* Pennsylvania State Chamber of Commerce, "Primary Ballot Questions," Modern Constitution for Pennsylvania Records (1965-1968), Acc. 182, Special Collections Research Center, Temple University Libraries, attached as Exhibit A.

for which the General Assembly was to provide a system of public schools," Corman Br. 99, is specious. By 1967, children had been entitled to a thorough and efficient system of public education for almost a century. Pet'rs Br. 15-21; *see also infra* Section D. As Professor Black explained, introducing such a significant change to the Constitution without explanation or notice to voters would have been "illegitimate." FOF ¶ 109. And although Respondents insist that the 1967 changes "were not hidden" and "not only . . . readily apparent from the text of the amendments themselves, but the voters also knew about them and discussed them," Corman Br. 27, there is no evidence that voters "knew" and "discussed" the fact that these revisions would deny children a constitutional right to an education.[5] To the contrary, the record demonstrates that by 1967, the understanding that the Education Clause inured to the benefit of "all children of this Commonwealth" was so foundational that it required no elaboration.

[5] Certain evidence suggests that if anything, voters believed they were doing quite the opposite – as suggested by an advertisement directed at voters ahead of the May 1967 referendum, urging them to vote "yes" to the amendments because the "[b]iggest job of state government is to provide for education. Give your kids a break . . . give them a modern state through a modern constitution." *See* "Vote Yes 9 Times" advertisement, Modern Constitution for Pennsylvania Records (1965-1968), Acc. 182, Special Collections Research Center, Temple University Libraries, attached as Exhibit B.

ii. There is no basis for Legislative Respondents' claim that the 1967 amendments converted the Education Clause's absolute mandate into a grant of extraordinary legislative discretion.

Legislative Respondents also argue that a "major impact of the 1967 amendments was that the General Assembly was given even more discretion and authority than it possessed under the prior version of the clause." Corman Br. 27. Two revisions to the Education Clause form the basis for Respondents' claim: the elimination of the phrase mandating a minimum annual appropriation of $1 million, and the addition of the phrase "to serve the needs of the Commonwealth." Corman Br. 15-17. Once again, Respondents claim to root their theory in the historical record; once again, their own sources defeat their proposed interpretation.

Legislative Respondents first assert that as an initial matter, the intent of the 1873 Convention delegates was to give the General Assembly "broad discretion and authority to address education." Corman Br. 34. But while there is no doubt that the 1874 Education Clause was designed "to enable successive Legislatures to adopt a changing program to keep abreast of educational advances," *William Penn Sch. Dist.*, 170 A.3d at 440 (quotation omitted), the 1873 Convention debates are replete with evidence that the delegates intended to foreclose any legislative discretion over whether to provide a high-quality, contemporary education to every child in the first instance. FOF ¶¶ 74-100; Pet'rs Br. 18-21.

There is nothing in the text of the 1968 Constitution that relaxed this constitutional threshold, or the General Assembly's absolute duty to meet it. Pet'rs Br. 28-30. The 1967 amendments left intact the language requiring the General Assembly to provide a "thorough and efficient" system of education, as well as the requirement to include education in the general appropriations bill and the provision naming the Secretary of Education as a constitutional officer. Pa. Const. art. III, § 12; *id.* art. IV, § 1. And although the amendments did eliminate the minimum $1 million appropriation, there is no basis for Legislative Respondents' bald claim that "the removal of this language signals that voters were returning discretion to the General Assembly." Corman Br. 17. The undisputed record, including the legislative history and Respondents' own sources, makes it clear that the minimum dollar figure "was omitted as anachronistic." *William Penn Sch. Dist.*, 170 A.3d at 425; *see* FOF ¶¶ 103-104; *see also* Corman Br. 22 (quoting a 1966 Project Constitution report explaining that the $1 million requirement "has long since become meaningless"); *State Legislative Power*, Pittsburgh Post-Gazette, May 5, 1967, at 10 (Corman Br. App'xB, Tab 5) (calling it a "ridiculously outdated stipulation"); Wilfred Norris, *All Voters Must Consider Constitutional Revision*, The Daily News, May 11, 1967, at 6 (calling it "obsolete and meaningless"); Dick Cowen, *Question 3-A 'Streamlines the Legislative Process,'* The Morning Call (Allentown), May 6, 1967 (explaining that the provision was

being eliminated because $1 million "may have been an impressive figure in 1874. But it's a bit silly now . . .").

Respondents also insist that the addition of "to serve the needs of the Commonwealth" gave the General Assembly "significant deference" because the General Assembly is "uniquely positioned to determine the needs of the Commonwealth – and whether the system of public education is serving those needs. . . ." Corman Br. 15-16. But this puts the rabbit in the hat. As the Supreme Court has already observed, the addition of that phrase "does not textually repose in the General Assembly the authority to self-monitor and self-validate its compliance with that provision." *William Penn Sch. Dist.*, 170 A.3d at 460.

And Respondents have failed to produce a single historical source endorsing their alternative interpretation of the phrase. Respondents point to newspaper articles "assert[ing] that the proposed amendments to the Education Clause would broaden the Education Clause." Corman Br. 25. But none of those articles claim that the 1967 amendments broadened the General Assembly's *discretion*. The Pittsburgh Post-Gazette confirms that the mandate to provide a thorough and efficient system of education was "broaden[ed]," rebutting Respondents' suggestion that the new language freed the Legislature of some aspect of the mandate initially enshrined in the Constitution in 1874. *State Legislative Power*, Pittsburgh Post-Gazette, May 5, 1967, at 10. The Gazette and Daily described the

amendments as "[b]roadening the legislature's responsibility," *Seven Constitutional Changes Listed on Ballot for Tuesday*, Gazette & Daily, May 11, 1967 at 7. Respondents cite an article in The Daily News for the proposition that the amendments would "broaden the power of the Legislature," but the author is referring to the "power of the Legislature to provide *adequate support*" to education, a point that is underscored by the sentence that follows, explaining that "the obsolete and meaningless provision that at least $1 million be appropriated annually, *therefore*, will be repealed." Wilfred Norris, *All Voters Must Consider Constitutional Revision*, The Daily News, May 11, 1967, at 6 (emphasis added).[6]

At most, the sources cited by Legislative Respondents support the uncontroversial principle that the General Assembly bears a significant obligation to provide the thorough and efficient system of education required by the Education Clause. But Respondents' interpretation of these sources incorrectly conflates the authority and mandate to execute a constitutional duty with the unilateral discretion to determine its scope.

[6] Respondents also rely on a private letter sent by one advocate to another, in which the letter writer offers his one-sentence impression that the amendments would "[g]ive[] [the] Legislature broader powers to deal with education[.]" *See* Letter from R. Sidman to G. Amsterdam, Dec. 8, 1965, Modern Constitution for Pennsylvania Records (1965-1968), Acc. 182, Special Collections Research Center, Temple University Libraries, attached as Exhibit C. It is unclear why Respondents rely on an unpublished private opinion after taking the position that "the meaning that . . . *voters* ascribed to the Clause should be the Court's primary focus in construing it." Corman Br. 26 (emphasis added). But in any event, Mr. Sidman's cursory remark that the amendments gave the General Assembly "broader powers to deal with education" hardly proves that he believed it conferred unlimited legislative discretion.

* * *

In sum, Legislative Respondents' account of the constitutional history is divorced from fact, and its interpretation of the 1967 amendments violates the maxim that courts should avoid "strained" interpretations in favor of a "natural reading" that "conforms to the intent of the framers and which reflects the views of the ratifying voter." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (quotation omitted). Legislative Respondents' attempts to misconstrue the Education Clause must be rejected.

B. LEGISLATIVE RESPONDENTS' PROPOSED CONSTITUTIONAL STANDARD IS FATALLY FLAWED.

In their briefs, Legislative Respondents encourage the Court to reject the constitutional standard that flows from the Education Clause's text and history, claiming that Petitioners' proposed construction of the Clause is both "divorced from reality" and "impossible to apply." Corman Br. 53. But the standard Petitioners identify recognizes that the Education Clause requires a high-quality, contemporary education that prepares children for self-sufficiency and civic participation. And that standard is reasonable, manageable, grounded in history, and in line with sister courts around the country. *See* Pet'rs Br. 33-37. By contrast, Legislative Respondents' proposed standard claims that the Constitution requires only a "standard basic" or "minimum basic" education, whose parameters are

determined exclusively by the General Assembly. This standard would be an end-run around Supreme Court precedent and the Education Clause itself.

1. Petitioners' proposed standard is reasonable, manageable, grounded in history, and in line with courts across the country.

First, Legislative Respondents claim that Petitioners have "invent[ed] their own construction" of the Education Clause "that is not supported by the constitutional history they cite." Cutler Br. 27. But as set forth at length in Petitioners' filings, the concept of a "high-quality" education flows directly from the language of the Education Clause's "thorough and efficient" mandate, and the repeated express intent of the 1873 delegates to guarantee an education capable of achieving ambitious end-goals. FOF § III(A)(3); Pet'rs Br. VI(A)(1)-(2). In fact, Senator Corman *admits* that the delegates saw the Education Clause as an avenue to enshrine a high-quality system of public education across the Commonwealth. *See* Corman Br. 41 ("[T]he Education Clause that was ratified as part of the 1874 Constitution was designed to continue and build upon Pennsylvania's system of public education that was in place at the time, which the Convention delegates believed to be a high quality system.").

It is also clear that the Education Clause required this "high-quality" system to reflect contemporary standards. FOF ¶¶ 98-99; Pet'rs Br. 16. The unrebutted history of the Clause demonstrates that "the provision and maintenance of a 'thorough and efficient' public education system must also evolve to ensure the

Commonwealth's citizens are fully capable of competing socially, economically, scientifically, technologically and politically in today's society." *William Penn Sch. Dist.*, 170 A.3d at 466 (Dougherty, J., concurring); *see also id.* at 440. Case after case in other states have held the same.[7] Education is not a static concept, and it is beyond dispute that the Education Clause requires a system that can meet the demands of the times. Such a system today does not countenance a "47-to-1 student-teacher ratio," Corman Br. 40, where one teacher instructs three classes as if in a one-room schoolhouse, with no non-instructional supports or services, Corman Br. 59-60. Legislative Respondents seem to ultimately concede this as well. *See* Corman Br. 43-44 (quoting *Reichley by Wall v. N. Penn Sch. Dist.*, 626 A.2d 123, 127 (Pa. 1993) for the proposition that the system must "keep abreast of educational advances").

[7] *See Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 380–81 (N.C. 2004) (defining "a sound basic education as one that provides students with . . . sufficient academic and vocational skills to enable the student to compete on an equal basis with others in formal education or gainful employment in contemporary society."); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330 (N.Y. 2003) ("[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."); *State v. Campbell Cnty. Sch. Dist.*, 19 P.3d 518, 539 (Wyo. 2001) ("[T]he fundamental question of what is an education 'appropriate for the times' is a constitutional one that we must answer."); *Montgomery Cnty. v. Bradford*, 691 A.2d 1281, 1284 (Md. 1997) (when "standards failed to make provision for an adequate education, or the State's school financing system did not provide all school districts with the means essential to provide the basic education contemplated by [the constitution], when measured by contemporary educational standards, a constitutional violation may be evident.") (quotation omitted); *McDuffy v. Sec'y of Exec. Off. of Educ*., 615 N.E.2d 516, 555 (Mass. 1993) ("The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society.")

Despite this apparent agreement, Legislative Respondents protest that Petitioners' standard "is fraught with problems and policy choices," which they attempt to illustrate with 28 rhetorical questions. Corman Br. 53; *see also* Cutler Br. 38 (claiming that Petitioners' standard "[i]nterpret[s] the Constitution to impose . . . an impossible requirement"). But at bottom, Respondents' criticism is just another way to insist, as Legislative Respondents did before the Supreme Court, "that this Court cannot define thoroughness and efficiency while still respecting the legislature's primacy in fashioning educational policy and preserving its ongoing flexibility to refine that policy to reflect pedagogical advances and to adapt to changing times and evolving needs." *William Penn Sch. Dist.*, 170 A.3d at 455.

The trouble for Legislative Respondents is that, as the Supreme Court explained:

> [C]enturies of litigation leading to judicially enforceable definitions of such vague terms as "probable cause," "due process," "equal protection," and "cruel and unusual punishment" undermine the argument. Courts give meaning routinely to all manner of amorphous constitutional concepts, including those that lie at the intersection of legislative prerogative and judicial review. And they do so while still leaving room for future development by whatever government body or mechanism the law fairly prescribes. Nor is this a phenomenon reserved for fundamental rights. The United States Supreme Court has given judicial meaning to such nebulous terms as "interstate commerce."

Id. (quotation omitted). Difficulty, in other words, does not justify abstention, either explicitly or implicitly. *Id.* at 463 (noting that "the clear majority of state courts . . . have held it their judicial duty to construe interpretation-begging state education clauses like ours to ensure legislative compliance with their constitutional mandates, no matter the difficulties invited or, in many cases, confronted.").

Legislative Respondents do not acknowledge the Supreme Court's conclusion, because it forecloses their arguments. Instead, they claim that the Supreme Court has deemed it "inappropriate to constitutionalize the current standards." Corman Br. 66. But this overstatement misses the point of the Court's reasoning, which is that a court need not constitutionalize any specific academic standard, intervention, resource, or outcome to create a thoughtful and effective rubric for measuring constitutional compliance. *William Penn Sch. Dist.*, 170 A.3d at 453 (citing to the Pennsylvania's Administrative Code's provision on the purposes of education and noting that "a court could fashion a constitutionalized account not unlike this one, and measure the state of public education against that rubric, just as other states have done").

As the Supreme Court pointed out, state after state with education clauses that, like Pennsylvania's, "employ qualitative language," *id.* at 453, have adopted and applied the standards Legislative Respondents deem unworkable. *See, e.g.*,

Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 330 (N.Y. 2003) ("[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."); *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997) ("An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995) ("[W]e can conclude the framers intended the education article as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.").

And in fact, there is broad consensus to guide this Court – in statute, regulation, policy, reports, and admissions – to answer the questions before it: what the purpose of a high-quality education is, how it should be measured in the 21st century, and what it requires to meet its objectives. *See* FOF §§ III.B-C, IV-V; Pet'rs Br. 21-32; July 1, 2022 Post-Trial Brief of Respondent State Board of Education ("State Board Br.") 25-27.

Respondents' strawman arguments to the contrary notwithstanding, the Court need not guarantee success, or draw bright lines around any single outcome, to develop a judicially manageable standard.

2. Legislative Respondents' conclusory pronouncement that the Education Clause only requires a "standard basic" or "minimum basic" education is made from whole cloth.

The Supreme Court made plain that "the language upon which the instant case primarily hinges first appeared in our Constitution in 1874." *William Penn Sch. Dist.*, 170 A.3d at 425. As one would expect, Legislative Respondents therefore claim that their "Education Clause standard . . . lines up with the applicable constitutional text and history." Corman Br. 50.

Yet noticeably absent from their conclusion that the Constitution requires only a "standard basic" education or a "minimum basic" education is any textual source for that standard at all. Under an obligation to "develop the historic record concerning what, precisely, thoroughness and efficiency were intended to entail," *William Penn Sch. Dist.*, 170 A.3d at 457, Legislative Respondents do not even seek to use the definitions of "thorough and efficient," but instead would have the Court ignore them altogether.

As discussed above, Legislative Respondents' attempts to ignore the 1874 definitions of language written into the Constitution in 1874 are meritless. And in any event, Legislative Respondents ignore even their own proffered definitions of

"thorough" and "efficient" from 1967, and instead fashion a standard that makes no attempt to connect the meaning of those words – terms synonymous with "complete," "exhaustive," and "effective," *see* Corman Br. App'x A, Tab 1 (Webster's Seventh New Collegiate Dictionary (1965)) – to their "basic standard" or "minimum basic" conception of public education.

The Supreme Court ruled that Petitioners' claims merited "an appropriately rigorous discussion of how courts might ensure that the Education Clause *is more than merely hortatory* without unduly infringing legislative prerogatives." *William Penn Sch. Dist.*, 170 A.3d at 450 (emphasis added). Rather than engage in that discussion, Legislative Respondents dismiss the Education Clause's plain language as "non-descript," "intentionally vague," "nebulous," and "hortatory," and then baldly assert that it should be ignored. *See* Corman Br. 43, 54. Constitutional interpretation requires more.

3. *Danson*, *Marrero*, and *PARSS* cannot provide support for Legislative Respondents' standard.

The only purported basis in Pennsylvania law for Respondents' "basic standard" and "minimum basic" interpretation of what the Education Clause requires appears to be Judge Pellegrini's unreported decision in *PARSS*. Cutler Br. 33-34. Yet in the wake of the Supreme Court's decision in this case, *PARSS* does not counsel the adoption of Respondents' proposed standard.

As already noted, *PARSS* extensively reviewed the history of the terms "thorough and efficient," tracing the phrase from a lecture by Horace Mann in 1840 through its introduction to the Constitution during the 1873 constitutional convention. 1998 Pa. Commw. Unpub. LEXIS at *91-119. But the court in *PARSS* did not subsequently connect that history – or the text of the Constitution – to the standard it then recited. Rather, it concluded its survey by remarking that while the historical evidence was "helpful in adding new insights," its interpretive value was limited by the fact that "[b]oth this court and our Supreme Court *have examined the constitutional history and have already determined the constitutional obligation imposed on the General Assembly by the Education Clause*." *PARSS*, 1998 Pa. Commw. Unpub. LEXIS 1, *119 (emphasis added). In other words, *PARSS* was constrained by the Supreme Court's decision in *Danson* and the Commonwealth Court's prior decision in *Marrero*, *see id.* at *130-37, and so long as that was the case, it could do no more. *Id.* at *136-37 (holding that "*unless another standard is now applicable*, the present educational funding scheme would have survived PARSS' challenge") (emphasis added).[8]

[8] *PARSS* was also decided on very different sets of facts, with far less data on how the system was performing, 1998 Pa. Commw. Unpub. LEXIS at *84-89, and Petitioners who conceded they were providing students an adequate education, *id.* at *149 ("Not one of PARSS' witnesses testified that any of the children in their districts were receiving an inadequate education.").

The Supreme Court in *William Penn* repeatedly referenced *PARSS*'s history of the Education Clause. *William Penn Sch. Dist.*, 170 A.3d at 419, 421-24. But rather than affirming the standard from *Danson* and *Marrero* that *PARSS* adopted, the Supreme Court reversed those cases as part of an "unstable three-legged stool." *Id.* at 445. It described *Danson* as "a case that defies confident interpretation," with "little developed reasoning," an "absence of reasoned analysis," various "internal tensions," "manifestly debatable premises," an overall "imprecise approach," and with "irreconcilable deficiencies in the rigor, clarity, and consistency" of its reasoning. *William Penn Sch. Dist.*, 170 A.3d at 441, 443, 444, 445, 447. The Court similarly described *Marrero I* and *Marrero II* as guided by "dubious" logic, and "suffer[ing] from the same faults" as *Danson*, which the decisions had "adopted . . . wholesale, warts and all," and thus suffering from the same "irreconcilable deficiencies." *William Penn Sch. Dist.*, 170 A.3d at 444, 445, 458.

In doing so, the Supreme Court repeatedly confirmed that it was up to *this* Court, in *this* case, to finally "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." *Id.* at 457. *PARSS*'s history is extensive. And freed from the now-overruled decisions that controlled it, that history must be used to give meaning to a standard in a manner that *PARSS* could not.

4. Legislative Respondents' proposed constitutional standard conflicts with precedent and seeks to "deploy a rubber stamp in a hollow mockery of judicial review."

Legislative Respondents' efforts to advance a "basic standard" or "minimum basic" conception of education are simply another attempt to demand that this Court surrender to the power of the General Assembly. Respondents' reasoning is circular – they claim that because only the General Assembly represents the people, only the General Assembly can determine the needs of the Commonwealth, and therefore "thorough and efficient" is whatever the General Assembly says it is – and they say it is "basic." Corman Br. 45 (endorsing the adoption of a "basic standard education" on the basis that it is "appropriately deferential to the General Assembly, while at the same time recognizing that providing students with an opportunity for a basic standard education is a constitutional minimum"). Implicit in this tautology is Respondents' view that their legislative power in the field of education is so plenary that it overrides the authority of every other elected official, supersedes Supreme Court precedent, and can even redefine the words of the Constitution itself.

Legislative Respondents claim this supremacy without even attempting to articulate what they believe to be the "needs of the Commonwealth." They deny that the state's academic standards, or even the General Assembly's own legislative enactments of programs and assessment systems, reflect the

Commonwealth's needs.[9] *See* FOF §§ IV-V; VI.I; Pet'rs Br. 29 n.5; *see also* State Board Br. 13-17 (describing Pennsylvania's standards, which included legislator input, as "robust and relevant to the real world" and reflecting "the knowledge and skills our young people need to succeed in life"). And Legislative Respondents fail to explain why "the needs of the Commonwealth" require some number of Pennsylvania children to follow a "McDonald's career track," or why it is Respondents who are best situated to decide which children are placed on that track.[10]

Legislative Respondents then argue that the Court should consider only four factors to determine whether the system is providing a "basic standard" education: whether students are being provided a "standard curriculum," "sufficient, well-trained, and experienced teachers," "generally safe and appropriate" facilities, and "basic instrumentalities of learning." Corman Br. 42-43. This bare-bones, input-only list is ultimately an attempt to secure a rubber stamp. That is not because the educational resources Respondents list are unimportant – personnel and books and

[9] Indeed, the origin of the State Board's assessment system is state law requiring them to "measure objectively the adequacy and efficiency of the educational programs offered by the public schools of the Commonwealth." 24 P.S. § 2-290.1.

[10] In order to continue defend the two-track system he advocates, Senator Corman baldly offers that Petitioners' standard would require the Court to "account for student vaccination status" in determining constitutional compliance. Corman Br. 55. In reality, what Petitioner and PDE witnesses made clear is academic fundamentals have real world benefits to all Pennsylvania citizens, from service workers to elected officials. FOF § IV(C).

facilities are part of any contemporary notion of education – but because Legislative Respondents seek to orphan those resources from any end goals that might give them qualitative meaning, turning compliance with the Education Clause into a simplistic exercise in box-checking. According to Legislative Respondents, the Court may review whether there is a qualified professional in front of a class, and it can ensure that books exist and lights are on. But "[a]fter making that determination, the analysis under the Education Clause stops." Corman Br. 45.

Decisions in other school funding cases, which incorporate components like teachers, facilities, and curricula into their standards, demonstrate how unmoored Legislative Respondent's standard is from the Constitution's requirements. *See, e.g.*, *Maisto v. State*, 196 A.D.3d 104, 111-13 (N.Y. App. Div. 2021); *Martinez v. State*, No. D-101-CV-2014-00793, 2018 WL 9489378, at *12 (N.M. Dist. July 20, 2018); *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1263.

By way of example, in *Campbell County*, the Wyoming Supreme Court held that the state's thorough and efficient clause required "an equal opportunity for a quality education," 907 P.2d at 1263, "of a quality appropriate for the times," and a "proper education," defined as "the best that we can do," *id.* at 1279 (quotation omitted). Some of the components Wyoming included in its standard are familiar: from adequate, sufficient numbers of teachers, to suitable facilities, and integrated

curricula. *Id.* at 1275, 1279. But Wyoming's test is not a punch list. Rather, the court reviewed whether the identified resources were aligned to serve the end goals of the system: providing children a "uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually," and "ample, appropriate provision for at-risk students, special problem students, [and] talented students," such that they are equipped for post-secondary pursuits. *Id.* at 1259, 1279. By contrast, Legislative Respondents have responded to a three-dimensional world by proposing a simplistic, two-dimensional standard.

5. Legislative Respondents rely heavily for support on a case that does not provide it.

Legislative Respondents rely heavily on the Maryland Court of Appeals' decision in *Hornbeck v. Somerset County Board of Education*, 458 A.2d 758, 776-77 (Md. 1983), for the proposition that a thorough and efficient system should not require more than an "adequate" or "basic" education. To be sure, *Hornbeck* viewed the constitutional rights of Maryland children more narrowly than Petitioners believe Pennsylvania history and jurisprudence warrants for Pennsylvania's education system.

Yet *Hornbeck*'s education clause holding was quite limited. The court held only that the plaintiffs had not demonstrated, or even alleged, that the state's "comprehensive statewide qualitative standards governing all facets of the

educational process in the State's public elementary and secondary schools . . . were not being met in any school district, or that the standards failed to make provision for an adequate education," and that it was not enough to "[s]imply . . . show that the educational resources available in the poorer school districts are inferior to those in the rich districts . . ." *Id.* Put another way, *Hornbeck* merely held that pure uniformity in spending was not required under the Maryland Constitution. 458 A.2d at 780.

But Maryland's story did not end with *Hornbeck*. Years later, students from Baltimore, and eventually Baltimore City itself, brought another challenge to the school funding system, alleging that "at-risk" Baltimore students had "inadequate educational resources far short of the standard for an adequate education," resulting in "poor performance of these students on State outcome tests," along with "low student attendance," "high dropout rates," and the failure to qualify for admission in the University of Maryland system. *Montgomery Cnty. v. Bradford*, 691 A.2d 1281, 1282-83 (Md. 1997) (describing history while affirming denial of motion to intervene of Montgomery County).

Partial summary judgment was granted for the students, with the trial court finding that "the public schoolchildren in Baltimore City were not being provided with an education that is adequate when measured by contemporary educational standards." *Id.* at 1287; *see also* Memorandum Opinion at 5, *Bradford v. Md. State*

Bd. Of Educ., No. 94340058 (Md. Cir. Ct. Aug. 20, 2004), attached as Exhibit D (noting in consent decree proceeding that the court found a violation based on "undisputed evidence" of, among other things, "woefully low scores on the State's Maryland School Performance Program standards, Baltimore City's high drop-out rate, and other objective gauges of academic performance"). The trial court reserved the issue of causation to trial, and the parties thereafter entered into a consent decree to increase funding to the school district. *Montgomery Cnty.*, 691 A.2d at 1288.

The Maryland Court of Appeals, in affirming the trial court's ruling on intervention, made plain what *Hornbeck* stands for:

> While *Hornbeck* teaches that the Maryland constitutional provision does not mandate uniformity in per pupil funding or require that the system operate uniformly in every school district, it does require that the General Assembly establish a Statewide system to provide an adequate public school education to the children in every school district. As *Hornbeck* recognizes, 295 Md. at 639, 458 A.2d 758, Maryland has established "comprehensive Statewide qualitative standards governing all facets of the educational process in the State's public elementary and secondary schools." Where, however, these standards "failed to make provision for an adequate education," or the State's school financing system "did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards, a constitutional violation may be evident.

Id. at 1284. In their briefs, Legislative Respondents do not cite *Bradford*, let alone explain it, but the point is plain: if Maryland children are denied the education

which permits them to perform to contemporary standards, a violation of that state's constitution will lie.

6. Legislative Respondents' standard does not even accord with a "sound basic education."

Even court decisions applying a "sound basic education" standard demonstrate how hollow Legislative Respondents' "minimum basic" standard is in practice. For example, both the New York and North Carolina constitutions require the state to provide all students with a "sound basic education." *See Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 330; *Leandro*, 488 S.E.2d at 254. Unlike Legislative Respondents, however, those states' courts identify broad end-goals for such a system. *See Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 330 ("[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."); *Leandro*, 488 S.E.2d at 254 ("An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."). They also identify the skills that indicate that standard has been met. *See Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 331; *Leandro*, 488 S.E.2d at 255. And these courts reject the proposition that the state "is responsible only to provide the opportunity for a sound basic education and cannot be blamed if some students . . . do not avail themselves of the opportunity it provides." *Campaign for Fiscal Equity, Inc.*, 801

N.E.2d at 337; *see also Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d at 390 (affirming order that schools must be "more effective in addressing the trial court's primary concern – namely, to ensure that 'at-risk' children in Hoke County are afforded a chance to take advantage of their constitutionally-guaranteed opportunity to obtain a sound basic education").

Accordingly, be it through "supplemental programming, as well as support from adequate numbers of guidance counselors, social workers or other similar professionals," *Maisto*, 196 A.D.3d at 152, or "tutoring, extra class sessions, counseling, and other programs that target 'at-risk' students in an effort to enable them to compete among their non 'at-risk' counterparts," *Hoke Cnty. Bd. of Educ.*, 599 S.E.2d at 390, opportunity must "be placed within reach of all students," including "those who came from impoverished backgrounds, had disabilities, or whose primary language was one other than English," *Maisto*, 196 A.D.3d at 152; *see also Hoke*, 599 S.E.2d at 390 (additional resources allow at-risk students to "avail themselves of their right to the opportunity to obtain a sound basic education.").

As demonstrated in these court decisions, once the "basics" are identified, and "opportunity" is defined as more than simply unlocking the door and turning

on the lights, even a "basic" education system demands far more than the standards proposed by Legislative Respondents.[11]

C. LEGISLATIVE RESPONDENTS' DEFENSE OF THE FUNDING SYSTEM UNDER THE EDUCATION CLAUSE IS WRONG ON THE LAW AND THE FACTS.

1. Courts evaluating education clause challenges assess whether legislatures are living up to their constitutional mandates.

As set forth in Petitioners' Post-Trial Brief, in order to determine whether the General Assembly has fulfilled the constitutional requirements of the Education Clause, the Court should evaluate whether Legislative Respondents have erected a funding system that is achieving or is likely to achieve its mandate to provide a high-quality, contemporary system of education to every child in the Commonwealth. *See* Pet'rs Br. 36-37.

Legislative Respondents protest, and suggest that one case Petitioners cite in support of their proposed evaluation standard, *McCleary v. State,* 269 P.3d 227 (Wash. 2012), "stands on a virtual island." Cutler Br. 24. They are mistaken. Far from an "island," *McCleary* is one of multiple state courts that have recognized that education clauses impose affirmative duties on legislatures, and therefore education clause challenges like Petitioners' require an evaluation as to whether

[11] *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 176 A.3d 28, 37 (Conn. 2018), is inapposite. Connecticut's constitution requires only that "There shall always be free public elementary and secondary schools in the state." Conn. Const. art. VIII, § 1. It does not require thorough, efficient, uniform, or any other descriptor of schools.

the legislature "has done enough" to fulfill those constitutional duties. *McCleary*, 269 P.3d at 248; *see, e.g.*, *Martinez*, 2018 WL 9489378 at *8; *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1264 ("When the legislature's transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required by the constitution."); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) ("A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right.").

In practice, this means that courts begin with the most fundamental inquiry: whether legislatures are living up to their constitutional mandate to children. *See*, *e.g.*, *Gannon v. State*, 390 P.3d 461, 488 (Kan. 2017) (examining "whether the evidence in the record demonstrates that the funding levels and other resources produce an education system reasonably calculated to achieving" constitutional goals); *Abbeville Cnty. Sch. Dist. v. State*, 767 S.E.2d 157, 161-62 (S.C. 2014) ("[T]he Plaintiff Districts do not argue that the statutes comprising South Carolina's education regime in and of themselves are repugnant to the Constitution, or that the Defendants overstepped their authority in creating the regime. Instead, Plaintiff Districts argue, and we agree, that the proper question is whether the education funding apparatus as a whole gives rise to a constitutional violation."); *McCleary*, 269 P.3d at 258 ("Substantial evidence confirms that the State's funding system neither achieved nor was reasonably likely to achieve the

constitutionally prescribed ends under article IX, section 1."); *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1155 (Mass. 2005) (relinquishing jurisdiction because the record no longer supports that "the Commonwealth is presently neglecting or is likely to neglect its constitutional duties, thus requiring judicial intervention").[12]

2. Respondents' "facial" vs. "as-applied" arguments are irrelevant to the evaluation of Petitioners' claims.

Legislative Respondents argue that (i) Petitioners' claims constitute "a facial challenge to the entire school finance system"; and (ii) that Petitioners have not met their burden to "show that the school funding system results in a substantial number of students being denied their right to receive an education." Cutler Br. 96;[13] Corman Br. 83.[14] However, it makes no sense to view Petitioners' claims as

---

[12] To make this determination, courts have examined the funding available to districts, the educational resources districts are able to provide, and the outcomes that result from those resources. Pet'rs Br. 36-37 (citing cases). As part of this inquiry, courts routinely look at outcome measures, including a central examination of whether a state's students are learning the state's own academic standards. *See* Pet'rs Br. 36, 46-49. While any single resource or outcome, standing alone, is unlikely to be a per se measure of compliance, Pet'rs Br. 47 n.13, courts also routinely acknowledge that the assessment of a system's adequacy must include evidence about how the system *is actually performing* for its students. *See, e.g.*, *Martinez*, 2018 WL 9489378, at *16-17; *Gannon*, 390 P.3d at 496; *Abbeville Cnty. Sch. Dist.*, 767 S.E.2d at 167; *Hoke Cnty. Bd. of Educ.*, 599 S.E.2d at 383-84; *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 336-40; *Rose*, 790 S.W.2d at 197. Moreover, to the extent national tests are a part of that determination – for whatever weight the Court ascribes to them – the performance of Petitioners, students of color, and other subgroups on those tests is more probative than a single state average. *See* Pet. Br. 48-49; FOF ¶¶ 886-888, 916-918.

[13] Speaker Cutler asserts that both the Education Clause claim and the equal protection claim are facial challenges. Cutler Br. 96. As set forth below, that framework is not applicable under either provision.

[14] *See also* Corman Br. 83 ("Petitioners are asserting 'facial' challenges to Pennsylvania's school financing arrangement. They are not asserting "as-applied" challenges").

either a "facial" constitutional challenge or an "as applied" constitutional challenge. They are neither.

First, a facial/as-applied framework is inapplicable where, as here, the constitutionality of a specific statute or regulation has not been called into question. As this Court has found, in a "facial constitutional challenge," all a court needs to "examine[] [a]re the 'express provisions'" of the challenged statute, and a court "need not go beyond the 'express provisions' . . . or engage in any additional fact finding in order to resolve [the] claim." *E. Coast Vapor, LLC v. Pa. Dep't of Revenue*, 189 A.3d 504, 511 (Pa. Commw. Ct. 2018) (Cohn Jubelirer, J.) (quoting *Parsowith v. Com., Dep't of Revenue*, 723 A.2d 659, 662 (Pa. 1999)). In case after case, courts only employ a facial/as-applied framework where there is a challenge to the constitutionality of specific legislative enactments. *See, e.g.*, *Germantown Cab Co. v. Phila. Parking Auth*., 206 A.3d 1030, 1041 (Pa. 2019) (challenging the constitutionality of a statute concerning the assessments of taxi cabs); *Kamp v. Green Acres Contracting Co.*, 270 A.3d 602, 607 (Pa. Commw. Ct. 2022) (same, regarding a provision of the Workers' Compensation Act); *Haveman v. Bureau of Pro. & Occupational Affs.*, 238 A.3d 567, 572 (Pa. Commw. Ct. 2020) (same, regarding the Beauty Culture Law); *Pa. Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 390 (Pa. 2005) (same, regarding the Pennsylvania Race Horse Development and Gaming Act) (cited at Corman Br. 9). Indeed, the

only case cited by Legislative Respondents for the proposition that Petitioners' case poses a facial challenge – *Nigro v. City of Phila.*, Corman Br. 83 – *also* considered a challenge to the constitutionality of a statute, and is therefore inapposite. 174 A.3d 693, 698 (Pa. Commw. Ct. 2017) (challenging the constitutionality of a Philadelphia Salary Ordinance).

Martel v. Allegheny County, No. GD17-010704, 2018 WL 10602105 (Pa. Ct. Com. Pl. Mar. 29, 2018) (Colville, J.), although not binding on this Court, is instructive. In that case, the court explicitly recognized that Legislative Respondents' suggested framework is not applicable in a challenge like Petitioners'. There, the court declined to apply a facial/as-applied framework, explaining that

> [f]acial constitutional challenges arise where the language *of the challenged law* is, on its face, purportedly unconstitutional. 'As applied' constitutional challenges arise where the government's application *of the challenged law* is purportedly unconstitutional. Here, there is no real "challenged law" . . . *but rather [the laws] are not being applied at all.*

Id. at *2 (emphasis added).

Similarly, Petitioners are not seeking to invalidate a statute or rule as unconstitutional. Legislative Respondents concede this. In his brief, Speaker Cutler asserts that "the Petition is not directed at any particular statute. Rather, Petitioners argue that the entire school financing arrangement (which comprises a vast network of statutes, regulations and school board policies) is unconstitutional."

Cutler Br. 101. Likewise, Senator Corman has noted more than once that "Petitioners do not challenge any specific statute . . ." Corman Br. 105; *see also* Tr. 14895 (remarking that Petitioners "do not challenge any particular law or regulation.").[15]

But insisting that this is a facial challenge because Petitioners' claims concern "Pennsylvania's school financing arrangement," Corman Br. 83, or "the entire school finance system," Cutler Br. 96, demonstrates precisely why these claims are not facial challenges: There are no "express provisions" for the Court to analyze here. *E. Coast Vapor*, 189 A.3d at 511. Rather, from day one, Petitioners have asked this Court to declare that Respondents have violated their constitutional duties under the Education Clause and, in doing so, have also violated the constitutional guarantees of equal protection. *See* Nov. 10, 2014 Petition for Review ¶¶ 304, 310. It is axiomatic that "Plaintiffs are masters of their

[15] Despite Respondents' apparent recognition that Petitioners are not challenging a legislative enactment, they repeatedly claim that "[i]n reviewing Petitioners' claims, as with any constitutional challenge to legislation, the challenger bears the heavy burden of demonstrating that the statute clearly, plainly, and palpably violates the Constitution." Cutler Br. 21 (internal citation and quotation marks omitted). Because Petitioners do not assert that any statute violates the Constitution, their claims should be examined under a preponderance of the evidence standard. *See* May 2, 2022 Petitioners Conclusions of Law ¶¶ 75-77. However, the outcome is no different if the Court determines that Petitioners must demonstrate that Respondents' failure to adequately fund the system "clearly, plainly, palpably" violates the Constitution – Petitioners have more than met this burden of proof as well. *Cf. League of Women Voters*, 178 A.3d at 801-802 (partisan gerrymander "clearly, plainly, and palpably violates the Free and Equal Elections Clause of our Constitution"); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *26 (Pa. Commw. Ct. Jan. 17, 2014) (voter ID law permanently enjoined as unconstitutional).

complaints." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989). Legislative Respondents may not distort the nature of Petitioners' causes of action, and then claim that Petitioners have failed to meet their burden under a wholly inapplicable analysis.

Legislative Respondents also appear to suggest that Petitioners' challenge must be facial because Petitioners seek relief that would have positive effects across the Commonwealth. *See, e.g.*, Corman Br. 83. But courts regularly review claims like Petitioners' – i.e., where (i) a governmental entity has acted (or failed to act) in a way that violates the Constitution, and (ii) wide-ranging relief is sought – *without* applying a facial/as-applied framework. *See generally Kuren v. Luzerne Cnty.*, 146 A.3d 715 (Pa. 2016) (facial/as-applied framework not applied in case alleging inadequate funding by county of office of public defender deprived indigent defendants of right to counsel); *Jubelirer v. Rendell*, 953 A.2d 514 (Pa. 2008) (same, in case alleging that the Governor may not disapprove of language – as opposed to amounts appropriated – in a bill involving statewide appropriations).[16] In other words, Petitioners may seek to cure "systematic,

[16] Moreover, when remedying a constitutional challenge, even in an as-applied challenge, a "[c]ourt possesses broad authority to craft meaningful remedies when required." *Pa. Democratic Party v. Boockvar,* 238 A.3d 345, 371 (Pa. 2020) (granting statewide equitable relief in a case involving as an as-applied challenge to the Election Codes deadline for receiving mail in ballots and permitting statewide non-compliance with the ballot deadline) (quotation omitted); *Applewhite*, 2014 WL 184988 at *24 n.31 (stating that "in the event our Supreme Court deems the challenge more akin to an 'as applied' challenge as to the hundreds of thousands of electors who lack compliant photo ID, this Court holds the photo ID provisions of the statute are

widespread" violations of the Pennsylvania Constitution outside of a facial constitutional challenge. *Kuren*, 146 A.3d at 718.

3. The record demonstrates that the funding system is failing to live up to its mandate.

Under any framework, however, Petitioners have most certainly "show[n] that the school funding system results in a substantial number of students being denied their right to receive an education." Cutler Br. 96. Although Respondents suggest that Petitioners have failed to demonstrate a system-wide problem or causation, they are wrong on both counts.

The evidence Petitioners submitted at trial was extensive. *See* Pet'rs Br. 37-47. It included Dr. Kelly's comprehensive statewide analysis of how the school funding system works and how it fails, because those school districts who need the most have the least, despite trying the hardest. Pet'rs Br. 45-46; FOF § VI. And it included testimony from Pennsylvania Department of Education Deputy Secretary Stem and multiple other witnesses admitting the system was underfunded, and identifying various ways in which the system was failing across the Commonwealth, with yawning spending disparities, and achievement gaps so large and so persistent that different races and classes of children have been given different end goals long into the future. *See, e.g.*, FOF § VI(A), (H).

---

unconstitutional as to all qualified electors who lack compliant photo ID, and enjoins their application.").

The evidentiary record before the Court also contains a slew of admissions from the state – from the ESSA Plan, PX-1830, which catalogues the Pennsylvania school system's various deficiencies, to admissions from Speaker Cutler regarding the plight of low-wealth school districts that "don't have meaningful control over the total amount of funding they can raise because they have so little wealth to tax and their property taxes are already high," FOF ¶ 606 (quotation omitted). And the record also demonstrates wide-scale consensus, even from Legislative Respondents' witnesses, about the role that funding and resources play in improving the educational prospects – or limiting the achievement – of children. *See, e.g.*, FOF § III(B). And contrary to Legislative Respondents' suggestion that Petitioners' evidence addressed only a handful of districts, the record includes the demographics of every district, PX-4806, the wealth of every district, PX-4898, the funding available to every district, *id.*, the expenditures of every district, *id.*, the adequacy shortfalls of each district, PD-3-107–128, the need of every district, PX-4898, and the outcomes of every district, *see, e.g.*, PX-846.

Petitioners also submitted reams of evidence regarding the funding system's disparate impact on low-wealth districts generally, and demonstrated how Petitioner Districts, the School District of Philadelphia, and Otto-Eldred School District fit within the Commonwealth as a whole, both quantitatively and qualitatively. *See, e.g.*, FOF § VII. The Court heard weeks of testimony from low-

wealth district superintendents, whose experiences repeated common themes again and again. *Id.* Legislative Respondents cannot seriously dispute that these districts' challenges are not representative of the system's problems: they have themselves designated every one of them as one of 100 "Level Up" districts, which Speaker Cutler admitted were the "highest need districts." FOF ¶¶ 450-51.

The evidence Petitioners presented at trial demonstrates that Pennsylvania school districts cannot provide wide swaths of students with the education they need to fulfill their potential and become college and career ready without additional funding. For example, Deputy Secretary Stem testified about interventions everyone agrees children need to learn to read. FOF ¶¶ 669-70. Superintendent Arcurio followed him on the stand and demonstrated – through testimony and data – that she was unable to provide those same interventions because Greater Johnstown could not afford them, and instead, she was left to triage the futures of her children. FOF ¶ 672.

By way of another example, Speaker Cutler admitted that local control is largely an illusion for many low-wealth districts: "When considering their lack of wealth and their current tax rates, many low-wealth school districts do not have the capacity to raise substantially more money locally even if those school districts believe additional funding was necessary to improve the education they provide their students." PX-3215, Resp. No. 7 (Speaker's Resp. to RFAs). And then

witness after witness explained in practical terms that they are the very districts that Speaker Cutler identified, forced to make the sorts of decisions explained by Dr. Costello:

> We don't have the ability to analyze the situation and say that this is something that we – we need. We need a Title I reading teacher to help provide interventions for our students without taking away from something else. We just don't have that ability.
>
> So every time we try to implement a program, provide additional support service, we have to take away from another program that has always – that had already existed.

Tr. 10669:9-18 (Costello); *see also* FOF ¶¶ 608-618. All of this went on and on.

Instead of addressing the comprehensive, system-wide evidence, Legislative Respondents rely on misstatements of the record and hypothetical evidence introduced in other cases, all to make points they failed to prove at trial. For instance, Speaker Cutler asserts that "William Penn has recently put new roofs on several of its buildings and acknowledged that its biggest facilities issue, relating to heating and cooling, is being addressed with ESSER funding." Cutler Br. 52. In reality, William Penn leaders testified that their facilities were "in terrible shape" and "deplorable," FOF ¶ 810, and showed extensive examples of those conditions. FOF § IX(B)(8)(vi). And while the District intends to use much of its $16 million in ESSER III funds on building repairs, it would cost $62 million just to repair the HVAC systems alone, and another $90 million to address other critical facilities issues. FOF ¶ 824. This is more than every dollar in William Penn's general fund

budget for an entire year. FOF ¶ 823. In other words, last year, this year, and well into the future, many William Penn students will attend schools in conditions that do not befit their potential or their rights.

In another misstatement of the record, Legislative Respondents ask this Court to find that for the 2021-22 school year, Greater Johnstown "did not turn away from its pre-K program any child who met the age and income requirements for participating in the program." May 2, 2022 Legislative Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 605. In reality, the testimony they cite says the opposite:

> Q. For the current school year, did Johnstown turn away from the pre-K program any child who met the age and income requirements for participation?
>
> A. We currently have a waiting list for students.
>
> Q. And so, the students on the waiting list, if I'm understanding your testimony correctly, are ones who were not able to get into the program even though they met the age and income requirements; is that right?
>
> A. That's correct.

Tr. 2987:15-2988:2 (Arcurio).

Senator Corman's citation to *Davis v. State*, 804 N.W.2d 618 (S.D. 2011), merely underscores the paucity of substantive evidence Legislative Respondents offered at trial in defense of their system. Corman Br. 87-88. In *Davis*, the state offered testimony from the former Secretary of Education, who provided observations from his personal visits to sixty percent of school districts in support

of the state's claim that the conditions described by plaintiff districts were not representative. *Davis*, 804 N.W.2d at 649.

By contrast, Legislative Respondents offered exceedingly little at trial: they presented a legislative staffer who admitted he knew little about the conditions of schools, FOF ¶¶ 457-62, an expert who made various peer comparisons filled with errors, FOF § XII(B)(2), a private school CEO who agreed with most of Petitioners' claims, FOF ¶¶ 115, 118, 168, 667, 682, 721, and two cyber charter school officials whose testimony Senator Corman's counsel insisted had nothing "to do with whether any other school can or cannot provide an adequate education," Tr. 14047:19-14048:2; *see also* FOF ¶ 949 n.48.

The Court has now presided over a fourteen-week trial; fourteen more weeks are not needed to reaffirm the point that the General Assembly is denying Petitioners sufficient resources for the education the Constitution demands, and that the cause is a statewide failure to provide low-wealth school districts adequate funding.

4. The reasonable relationship test is inappropriate to use in a school funding challenge.

Legislative Respondents also suggest Petitioners' Education Clause claims should be evaluated under the reasonable relationship test. But their source for this proposition is the now overturned *Danson v. Casey*. *See* supra § II(B)(3). Despite this, Speaker Cutler argues that the Supreme Court actually reaffirmed *Danson*'s

use of the reasonable relation test for school funding challenges. *See* Cutler Br. 16 (citing *William Penn Sch. Dist.*, 170 A.3d at 445.). His citation has no such endorsement, and he is incorrect. If the Court's withering treatment of *Danson* and its progeny was not clear enough, *supra* Section B, the Court made plain that there was "precisely . . . one unequivocal proposition that may reasonably be inferred from the *Teachers' Tenure Act Case, Danson*, and *Marrero II*:" that the Education Clause provides "legislative freedom to experiment with education policy in response to changing needs and innovations." *William Penn Sch. Dist.*, 170 A.3d at 448.

All of this, however, is largely irrelevant in practice. Whether the Court applies a test that asks whether Pennsylvania's school funding system is achieving or likely to achieve a high-quality, contemporary system of public education to all children, or instead asks whether Pennsylvania's school funding system is reasonably related to providing a high-quality, contemporary system of public education to all children, the answer is that it unequivocally is not.

5. The "reasonable legislator" test that Speaker Cutler devises is meritless.

Speaker Cutler does not stop with *Danson*'s reasonable relationship test. Instead he proposes a so-called "reasonable legislator" test. *See* Cutler Br. 63-73. He cites no source for such a standard, which again ignores Supreme Court precedent, and again should be rejected.

i. Speaker Cutler cannot use a "reasonable legislator" standard to evade the unrebutted evidentiary record.

This Court is well aware that an issue often raised in school funding litigation is funding's impact on student outcomes. To that end, the parties offered various witnesses, including experts, "to assist the factfinder in understanding issues which are complex or go beyond common knowledge." *Commonwealth v. Rounds*, 542 A.2d 997, 999 (Pa. 1988).

Their testimony demonstrated substantial consensus that increased school funding has a positive causal impact on student outcomes. FOF § III(B)(3). That is, as Speaker Cutler's expert witness made plain, when it comes to improving educational outcomes, "on average, money absolutely matters." FOF ¶ 167.[17] Faced with this evidence, the Court takes on its central role: determining if the evidence in front of it helps establish a material fact. *See, e.g.*, *Carpenter v. Pleasant*, 759 A.2d 411, 414 (Pa. Commw. Ct. 2000) ("Evidence is considered relevant if it logically tends to establish a material fact in the case, tends to make the fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact.") (citing Pa. R.E. 401).

[17] In an attempt to rebut this consensus, Legislative Respondents merely continue to distort Dr. Rucker Johnson's findings, misinterpreting the methodology of his first study, FOF ¶ 179, and ignoring that even this misinterpretation would not apply to his second study. *See* Tr. 9519:16-9526:23 (Johnson) (discussing that his California impact analysis relied on actual district spending changes).

Speaker Cutler, however, proposes that rather than weigh that evidence, the Court should do something else: determine whether a "reasonable legislator" could disagree with it. Cutler Br. 68-70. This is a test of his own making.

Speaker Cutler's "reasonable legislator" standard even suggests the Court should ignore admissions contained in legislation passed by "reasonable legislators." For instance, another issue of material fact for the Court is *why money matters*: the importance of educational strategies and interventions for children. From state reports, to state fact and expert witnesses, to state legislation, the answer was unequivocal: key strategies, supports, and interventions improve students' academic outcomes. *See* FOF § IX; *see also, e.g.*, 25 P.S. § 25-2599.2 (describing strategies that allow schools to "attain or maintain academic performance targets").

Yet according to Speaker Cutler, the Court should not use this evidence to establish a material fact, but rather recognize that "policymakers may reasonably consider that large-scale expenditures on even the most widely accepted educational programs and initiatives will not necessarily produce the anticipated results and that those Commonwealth tax dollars may be needed for other important priorities." Cutler Br. 73.

The Court should not view evidence through the lens of a "reasonable legislator." This standard has support in no law, and it ignores the actual

foundational question before the Court: whether the General Assembly's system of school funding is in fact providing the financial resources necessary to satisfy its constitutional mandate.

ii. Speaker Cutler cannot use a "reasonable legislator" standard to re-write the Constitution or ignore the Supreme Court.

Speaker Cutler also offers his "reasonable legislator" standard to revisit an excuse that the Supreme Court forcefully rejected: That rather than judging whether the General Assembly is providing children the education to which they are entitled, this Court should instead examine the many competing and incompatible demands legislators face in order to determine whether their actions are reasonable.

Speaker Cutler disputes what he claims is *Petitioners'* position that "the demands of the Education Clause may not jostle with non-constitutional considerations." Cutler Br. 65 (quoting Pet'rs Br. 51-52).[18] But these are the Supreme Court's words, not Petitioners'. And Speaker Cutler is wrong that this assertion "merely supports the Court's general conclusion that the judiciary cannot

[18] Speaker Cutler suggests an "absurd result that the Commonwealth may not spend a dime on any activity not mentioned in the constitution, including many vital health and human services provided or funded by the Commonwealth, until the judicial branch has ruled that Pennsylvania has satisfied its obligations under the Education Clause." Cutler Br. 66. In reality, however, the Constitution also ensures that appropriations for education stand apart from every other program in the Commonwealth, absent government itself, and the public debt. Pa. Const. art. III, § 11; FOF ¶ 92.

shirk from its duty to determine whether the General Assembly's actions meet its minimum constitutional duties." *Id*. As explained by the Supreme Court, in the same paragraph Speaker Cutler quotes, the very reason for court responsibility is to ensure a "reasonable legislator" *does not* use non-constitutional considerations as an excuse for constitutional deprivations:

> It is fair neither to the people of the Commonwealth nor to the General Assembly itself to expect that body to police its own fulfillment of its constitutional mandate. *This is especially so in light of the many competing and not infrequently incompatible demands our legislators face to satisfy non-constitutional needs*, appease dissatisfied constituents, and balance a limited budget in a way that will placate a majority of members in both chambers despite innumerable differences regarding policy and priority. . . . 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 (emphasis added).

The primacy of education is not a "policy question" for a "reasonable legislator," nor an excuse for constitutional deprivations, but rather a mandate from the people to guard against those deprivations in the first instance.

6. The "all plausible cost-saving measures" presumption Senator Corman devises is meritless.

For his argument on causation, Senator Corman cites two cases regarding standing. *See* Corman Br. 75 (citing *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469 (Pa. 1994) and *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975)). It is unclear what these cases bring to bear for the purpose of this analysis, but even if the standard for standing were transmuted into a standard for causation, Petitioners have plainly proven a "sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as immediate rather than 'remote'." *William Penn Parking Garage*, 346 A.2d at 286.[19]

Senator Corman also adds an evidentiary burden of his own making: That Petitioners "must establish that the school districts that are allegedly providing constitutionally-deficient educational experiences have undertaken all plausible

[19] Legislative Respondents conflate the burden of proof with the legal standards for causation. *See, e.g.* Cutler Br. 23 ("[T]he only Pennsylvania cases relied on by Petitioners in support of their proposed preponderance of evidence standard are personal injury actions that do not involve the constitutionality of legislative acts.") (citing *Jones v. Montefiore Hosp.*, 431 A.2d 920 (Pa. 1981) and *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016) (cases discussing principles of causation)). These are not the same thing. To the extent Legislative Respondents believe that in a case brought under the Constitution, as opposed to the common law, a petitioner must per se eliminate any other contributing causal factor, they are wrong. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 122, 178 A.3d 737, 817 (2018) ("When . . . it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, *in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage*, a congressional redistricting plan violates Article I, Section 5 of the Pennsylvania Constitution.") (emphasis added).

cost-saving measures." Corman Br. 78-79. In other words, in the absence of any actual evidence, he attempts to manufacture an evidentiary presumption that a district's financial woes are the result of district mismanagement unless proven otherwise.

Senator Corman provides no citation for his assertion, which should end the matter. *See* Pa. R.A.P. 2119 (requiring all pertinent citation of authorities). In any case, the claim is meritless. The question for causation is whether Pennsylvania's school funding system is providing Petitioners with sufficient funding such that they can provide their students with a constitutionally adequate education. The answer – to the great detriment of students and this Commonwealth – is that it is not.

D. LEGISLATIVE RESPONDENTS HAVE FAILED TO JUSTIFY THE SYSTEM'S DISCRIMINATORY IMPACT ON STUDENTS IN LOW-WEALTH DISTRICTS.

As set forth in their Post-Trial Brief, Petitioners have also demonstrated that Legislative Respondents' school funding scheme discriminates against students educated in low-wealth districts in violation of the Constitution's equal protection guarantee. Pet'rs Br. 75-86. Moreover, Petitioners have established that because this discrimination burdens a fundamental right, the Court must examine the system's disparate impact on students in low-wealth districts using strict scrutiny. Pet'rs Br. 63-75.

Legislative Respondents have responded with a series of arguments already dismissed by the Supreme Court. They encourage this Court to collapse Petitioners' equal protection claim into the Education Clause claim, Corman Br. 90-91, Cutler Br. 87, despite the Supreme Court's clear direction not to "uncritically link[]" the two causes of action. *William Penn Sch. Dist.*, 170 A.3d at 458-460. They argue that "[r]ather than conferring a right to an education, the Constitution imposes a duty on the General Assembly to support and maintain a system of education," Corman Br. 94, Cutler Br. 83-84, ignoring the Supreme Court's 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. And they once again attempt to justify their discriminatory system by invoking local control, Cutler Br. 88-92, 97-101, a rationale that the Supreme Court has dismissed as "tendentious." *William Penn Sch. Dist.*, 170 A.3d at 442, n.40.

These arguments have already been addressed at length in Petitioners' principal brief, and Petitioners do not seek to reiterate them here. Instead, Petitioners focus below on three foundational errors that infect Respondents' defense.

1. Respondents' attempts to deny that the Education Clause confers a constitutional right to education are baseless.

Legislative Respondents argue that "[u]nder Pennsylvania law, there is not a fundamental right to an education because the Constitution does not confer *any* right to an education." Corman Br. 93; Cutler Br. 83-84. Respondents make no effort to square this claim with a century of case law recognizing that the education system mandated by the Education Clause bestows a corresponding right. *See* Pet'rs Br. 67 n.21 (citing cases); *see also William Penn*, 170 A.3d at 461 & n.68. And their claim once again bypasses the express intent of the delegates that established the Clause to ensure "that every child in the Commonwealth should be properly educated and trained for the high and responsible duties of citizenship." Pennsylvania Debates of 1873, Vol. 2:472; *see also* FOF § III.A.

Legislative Respondents' position is meritless for two other reasons as well. First, they assert that the Education Clause does not confer a right because it "is directed at our legislature" and does not "make an express reference to the people who hold the right and then identify the nature of the right." Corman Br. 95-96; *see also* Cutler Br. 83-84. But Legislative Respondents provide no case authority suggesting that a right cannot be inferred in such circumstances. And indeed, numerous states have recognized a right to education in constitutional clauses that do not follow Respondents' formulation. *See, e.g.*, *Serrano v. Priest*, 557 P.2d 929, 950 n.42 (Cal. 1976); *Rose*, 790 S.W.2d at 207; *Claremont Sch. Dist. v. Governor*,

703 A.2d 1353, 1358 (N.H. 1997). In fact, Pennsylvania's own Constitution defeats Legislative Respondents' theory. Article III, Section 32, which has long been "considered to guarantee the citizens of this Commonwealth equal protection under the law," *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114, 120 (Pa. 1985), does not "reference the people who hold the right" or the "nature of the right," and is instead "directed at our legislature." Corman Br. 95-96. Respondents fail to provide any explanation for this notable exception to their rule.

Second, Respondents argue that the Education Clause does not confer a right because it is not in Article I of the Constitution, which is titled "Declaration of Rights." Corman Br. 97-98; Cutler Br. 83-84. This claim is also baseless. The fact that many individual rights reside in the Declaration of Rights does not make it the exclusive fount of those rights within the Constitution, and none of Respondents' authorities hold otherwise. In fact, once again, the Court need look no further than the Pennsylvania's Constitution's right to equal protection, which, like the Education Clause, resides in Article III. Other state courts have rejected the argument that only a provision in the declaration of rights can confer a constitutional right. *See Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (rejecting the state's argument that there are "any such limits on finding a fundamental right"); *McDuffy*, 615 N.E.2d at 527 (holding that the Massachusetts

Constitution confers a right to education despite the fact that the provisions concerning education are not in the declaration of rights).

The Pennsylvania Supreme Court has itself ruled that "fundamental rights, are those which have their source, explicitly or implicitly, *in the Constitution,*" *Smith v. City of Phila.*, 516 A.2d 306, 311 (Pa. 1986) (emphasis added) – not specifically or exclusively the Declaration of Rights. And as Petitioners established in their Post-Trial Brief, an *Edmunds* analysis demonstrates that the Education Clause confers a fundamental right to obtain a high-quality, contemporary education. Pet'rs Br. 64-72.

Legislative Respondents' reliance on Judge Pellegrini's decision in *PARSS* is misplaced. Corman Br. 46. *PARSS*'s fundamental rights analysis relied on the now-abrogated *Danson*, and was influenced by the kinds of "slippery slope" concerns ultimately rejected by the Supreme Court when it held that "[j]udicial oversight must be commensurate with the priority reflected in the fact that for centuries our charter has featured some form of educational mandate." *William Penn Sch. Dist.*, 170 A.3d at 464; *see also* Pet'rs Br. 51-52. And *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995), does not stand for the proposition cited by Respondents. Corman Br. 101. In *Curtis*, a parent brought an equal protection challenge to a provision of the Domestic Relations Statute that required parents subject to child support obligations to pay for, *inter alia*, their adult children's post-secondary educational

costs. 666 A.2d at 267. The question before the Supreme Court was not whether the statutory provision infringed upon petitioner-parent's constitutional right to education. *Id.* at 269. Thus, the court's analysis of the Education Clause was limited to its determination that there was no "'entitlement' to participate in post-secondary education" that might justify compelling some parents to pay their children's college tuition. *Id.* at 268. The Court made no finding concerning children's right to elementary and secondary education, and in fact did not engage in a traditional fundamental rights analysis at all. *Id.*

Legislative Respondents argue that *Curtis* is nonetheless "notable" because the Education Clause "was broadened in 1967 so as *not* to differentiate between levels of education." Corman Br. 101. They posit that if there is no basis for finding an entitlement to post-secondary education, there must be no basis for finding an entitlement to an education at all. *Id.* This reasoning once again ignores the Clause's nondiscretionary mandate to provide a "thorough and efficient system of public education," and the consensus – among the framers, the voters, and the courts – about what that system *must* provide: a public education that gives all children the resources necessary to succeed in adult life as self-sufficient, engaged citizens. FOF §§ III; COL § I; Pet'rs Br. 7-32. To the extent the Clause was amended to ensure that there was "no restriction on the Legislature's right to make provision" for *other* kinds of educational opportunities, as explained by the

committee that proposed the revision, FOF ¶ 106, that does not obviate the legislature's constitutional obligation to provide a high-quality elementary and secondary education system, nor the right of children to receive it.

2. Rational basis review does not apply to Petitioners' equal protection claim.

Legislative Respondents also argue that even if education is a right, and even if the nature of that right is fundamental, a rational basis test should still apply to Petitioners' claim. Cutler Br. 84-86; Corman Br. 104. However, their position relies on a critical misinterpretation of case law.

Legislative Respondents rely heavily on *Skeen*, asserting that "the Minnesota Supreme Court concluded that education is a fundamental right under Minnesota's Constitution, yet still upheld Minnesota's statutory funding scheme under a rational basis test." Cutler Br. 85; *see also* Corman Br. 104. This misstates the actual holding in *Skeen*: the court declared that, as an initial matter, "there is a fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides an adequate education to all students in Minnesota [and in] *evaluating a challenge to such a fundamental right, this court must employ the strict scrutiny test*." *Skeen*, 505 N.W.2d at 315 (emphasis added); *see also 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.").

However, the plaintiffs in *Skeen* had *conceded* that Minnesota "provided uniform funding to each student in the state in an amount sufficient to generate an adequate level of education which meets all state standards." *Id.* (quotation omitted). Accordingly, the Court held "the state's . . . system of education withstands strict scrutiny analysis." *Skeen*, 505 N.W.2d at 315. Having determined that it was not being asked to evaluate an adequacy claim, but rather a challenge to "the particular means employed to finance state education," the Court then applied a rational basis test. *Id.*; *accord Campbell Cnty. Sch. Dist.*, 907 P.2d at 1267 (noting that the four-justice majority in *Skeen* recognized "a fundamental right to the state-provided basic level of funding needed to achieve a general and uniform education system" and "would apply a strict scrutiny test to a challenge of that right. It was only to a challenge of the local school district's funding of education *beyond* what is necessary to provide an adequate level of education that the majority would apply the rational basis test.") (citation omitted).

The other cases upon which Legislative Respondents rely are similarly inapposite. *Kukor*, like *Skeen*, applied rational basis review not because plaintiffs were asserting a challenge to the state's school financing system, but because the court found that the nature of the deficiencies alleged by plaintiffs did not rise to

the level of a denial of educational opportunity under Wisconsin's education clause, and thus "no fundamental right is implicated in the challenged spending disparity." *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wisc. 1989). The reasoning of the court in *Board of Education of the City School District of City of Cincinnati v. Walter* similarly flowed from the court's view that the challenge before it was "more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way in which Ohio educates its children." 390 N.E.2d 813, 819 (Ohio 1979). And in *King v. State* and *Salt River Pima-Maricopa Indian Community School v. State*, the courts declined to apply *any* level of scrutiny, because they found that the plaintiffs in those cases had failed to adduce sufficient facts to demonstrate that any infringement of educational rights had occurred in the first place. *King*, 818 N.W.2d 1, 27 (Iowa 2012) (affirming a motion to dismiss and explaining that "[w]e defer to another day the question whether education *can* amount to a fundamental right under the Iowa Constitution, thereby triggering heightened scrutiny. For present purposes, we conclude simply that the matters alleged in plaintiffs' petition, even if true, do not amount to a deprivation of such a right."); *Salt River*, 23 P.3d 103, 107 (Ariz. Ct. App. 2001) (affirming summary judgment in favor of defendants and holding that "[p]laintiffs alternatively argue that a strict scrutiny analysis must apply because education is a fundamental right under the Arizona Constitution. . . . We

find it unnecessary to resolve this issue because we conclude that, as a matter of law, the Deduct Statute does not infringe upon the access to education or rights of students . . .").

These cases are inapplicable to the equal protection claim before the Court, in which Petitioners have presented overwhelming evidence that Legislative Respondents' funding scheme *does* deprive students in low-wealth districts of an equal access to their education, leaving students in low-wealth districts with significantly fewer financial resources than students in higher-wealth districts, and resulting in the deprivation of basic educational resources and highly disproportionate rates of academic failure. FOF §§ VI-X; Pet'rs Br. 75-86. The assessment of a funding scheme in which a student's opportunity to obtain a constitutionally adequate education is foreclosed by his zip code must be evaluated under a strict scrutiny standard.

3. Legislative Respondents must justify the discriminatory impact of their funding system, not just the features of the system itself.

Petitioners have demonstrated "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. This shifts the burden to Respondents to prove that the deprivations created by Respondents' school funding system are constitutionally justifiable. *Id.* at 458.

Pursuant to "a familiar, time-honored rubric that courts have applied on innumerable occasions," *Id.* at 460, Respondents must demonstrate why the Court should countenance the disparities this system, with these features, creates and perpetuates. Those disparities are largely not in dispute. *See* Pet'rs Br. 76-80. Yet instead of explaining why the massive deprivations and gaps Petitioners proved at trial are "necessary to advance a compelling state interest," *William Penn Sch. Dist.*, 170 A.3d at 458, or are "substantially related" to a state interest, *Yanakos v. UPMC*, 218 A.3d 1214, 1225-26 (Pa. 2019), Respondents ignore both the evidence and their burden of proof. Instead, they choose to devote several pages of their brief to defending the system in a vacuum, arguing that because the system has always had local control, local control can always justify the disparities of the system. Cutler Br. 87-88; Corman Br. 105-109.

Respondents' conclusory rationales will not do. As Petitioners explained, by fact and by law, local control does not excuse the deprivations suffered by children in Pennsylvania's low-wealth districts. Pet'rs Br. 50-54, 82-83. And Respondents do not even offer a serious explanation for why local control, and the disparities it countenances, are necessary to advance their vague purported objectives of promoting the "involvement of communities" or "competition" in the first place.

Instead, they rest on the bare assertion that their position – which the Supreme Court held to be tendentious – "shows only that there are different points of view on the issue." Cutler Br. 91 n.27.[20]

The burden of proof was Respondents'. In the face of their own admissions, and a Supreme Court decision they ignore, they have failed to meet that burden.

E. LEGISLATIVE RESPONDENTS' EFFORTS TO AVOID LIABILITY ARE MERITLESS.

1. Senator Corman and Speaker Cutler are proper parties, and have admitted that they can represent the institutional interests of the General Assembly.

Close to eight years after this case was filed, Legislative Respondents assert that even should Petitioners prevail on the merits of the case, the Court should nevertheless enter a final judgement in Respondents' favor because Legislative Respondents do not adequately represent the interests of the General Assembly. Corman Br. 110.

Legislative Respondents' legal theory for this claim is unclear. Unlike their argument regarding school districts, *see infra*, they do not take the position that the General Assembly is an indispensable party. Instead, they reference principles

[20] Legislative Respondents also offer a digression about tax policy experimentation that is contradicted by the record, and is the epitome of supposition that will not pass muster as a justification. *See Yanakos*, 218 A.3d 1at 1225-26. The deprivations proven in this matter have no connection to a failure of school districts "to be more creative in their fund-raising and spending decisions." Corman Br. 109.

from the speech and debate privilege and due process clause. *See* Corman Br. 115-16. It is an argument with a variety of fatal errors. For example, they appear to argue on behalf of the General Assembly that the Court would be infringing on the due process of the General Assembly, while simultaneously failing to explain how they can raise such a defense on behalf of the General Assembly.

Moreover, the assertions Legislative Respondents make to this Court are contradicted by claims Legislative Respondents have made before others judges in Commonwealth Court and federal court alike – including during the pendency of this trial. For example, as Speaker Cutler and Senator Corman proclaimed to the Commonwealth Court in December 2021, in a suit regarding redistricting responsibilities directed to "each State by the Legislature thereof[:]" "the presiding officers of both Houses of the General Assembly" are well suited "to protect the official, individual, and/or institutional interests" of that body. *See* Mem. of Law in Support of App. for Leave to Intervene by Bryan Cutler, Speaker of the Pa. House of Representatives; Kerry Benninghoff, Majority Leader of the Pa. House of Representatives; Jake Corman, President Pro Tempore of the Pa. Senate; and Kim Ward, Majority Leader of the Pa. Senate ¶¶ 1, 7; Case Nos. 465 M.D. 2021, 464 M.D. 2021 (Dec. 27, 2021), attached as Exhibit E. In other words, Speaker Cutler and Senator Corman sought to intervene to represent the interests of the General Assembly, and they did so without the "the General Assembly."

Or as Speaker Turzai and Senator Scarnati said in federal court when seeking to intervene in an action (once again without the General Assembly): "[I]t is Pennsylvania's House of Representatives and Senate that are the legislative bodies bestowed with the constitutional obligation to prepare and enact redistricting plans. *See* Pa. Const. art. II, §§ 16-17. These state governmental bodies, led by Applicants, therefore would be directly affected by any Order of this Court that would require any modification or redrawing of the 2011 Plan." *See* Memorandum of Law in Support of Motion to Intervene By Michael C. Turzai, Speaker of the Pa. House of Representatives, and Joseph B. Scarnati III, Pa. Senate Pro Tempore, *Agre v. Wolf*, Case No. 17-04392, Doc. 45-3, at 6 (Oct. 24, 2017), attached as Exhibit F.

Legislative Respondents are correct that, to the extent the General Assembly needs to be represented at all, its presiding officers are well suited to defend its interests. *Cf. Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (naming Senator Pro Tempore and Speaker of House as Respondents, but not the General Assembly), *abrogated on other grounds by League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth v. Jubelirer*, 541 U.S. 267 (2004) (naming Senator Pro Tempore and Speaker of House as Respondents, but not the General Assembly). And as Legislative Respondents admit elsewhere, this is true

even where a remedy could require affirmative acts on the part of the General Assembly. *See* Exhibit F at 6 ("These state governmental bodies, led by Applicants, therefore would be directly affected by any Order of this Court that would require any modification or redrawing of the 2011 Plan.").

With no support under Pennsylvania law, Legislative Respondents point to a New Jersey case, *Teamsters Local 97 v. State*, 84 A.3d 989 (N.J. Super. Ct. 2014), for the proposition that the General Assembly must be a named party for a legislative remedy to be available. But this misconstrues the holding of *Teamsters*, which noted that it was *unnecessary* to name the legislative leaders "because the relief sought [a judicial declaration that a statute is unconstitutional] can be obtained without them." *Id*. at 1010.

More telling, Legislative Respondents fail to mention relevant New Jersey education clause cases, including *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) and *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), where the New Jersey Supreme Court upheld legislative relief ordered by the lower courts even though the General Assembly was not a named party. The same is true for the only Pennsylvania school funding challenge to reach trial, and for school funding challenges across the country. *PARSS*, 1998 Pa. Commw. Unpub. LEXIS at *1 (naming only the Governor and the Secretary of Education as respondents); *see also Maisto*, 196 A.D.3d at 104 (naming only New York as defendant); *Gannon v. State*, 319 P.3d

1196, 1204 (Kan. 2017) (naming only Kansas as defendant); *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1244 n.1 (naming only Wyoming, the State Superintendent of Public Instruction, the Governor, and the Treasurer as defendants); *McDuffy*, 615 N.E.2d at 557 (naming only the Board of Education, the Commissioner of Education, and the Treasurer and Receiver General as defendants).

Meanwhile, other state courts considering school funding cases have held that naming representatives of a legislative body is sufficient for representation of the entire legislative body. In *Rose*, the court noted that "it is clear from the statement of parties contained within the complaint that [legislative leaders] were in fact named in a representative capacity." 790 S.W.2d at 204. And after surveying cases, the court in *Rose* observed: "We believe it is only common sense and practical to hold that service on both the President Pro Tempore of the Senate and the Speaker of the House of Representatives, named in their respective capacities is sufficient to acquire jurisdiction over the General Assembly in this action." *Id*. at 204-205 (citing *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71 (Wash. 1978); *Barkely v. O'Neill*, 624 F. Supp. 664 (S.D. Ind. 1981); *Jackson v. Congress of the United States*, 558 F. Supp. 1288 (S.D.N.Y. 1983)).

Finally, Legislative Respondents' speech and debate clause defense to liability is meritless. Here again the argument is unclear, as is its connection to the general argument that Legislative Respondents cannot represent the interests of the

General Assembly. Indeed, whomever else is in the litigation, the presiding officers of the General Assembly may plainly be held responsible in their official capacities for unconstitutional acts. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d at 741 (entering judgment against Speaker Turzai and Senator Scarnati in their official capacities).

Legislative Respondents have ably defended this litigation. They have not identified a single moment of the trial that would have differed had "the General Assembly" been named, or even speculated as to how that body would defend itself other than by relying on its presiding officers. This is because Legislative Respondents have the power to defend the institutional powers of the bodies they lead. That should end the matter.

2. Pennsylvania's 493 other school districts and 177 charter schools are not indispensable parties.

Legislative Respondents next argue that after over seven years of litigation and fourteen weeks of trial that they have discovered a jurisdictional defect that would require this Court to join 493 other school districts, 177 charter schools, and an undisclosed number of "various other educational institutions." Corman Br. 117, PX-2099 (showing 2020-21 enrollments for all publicly funded schools).

The defects in this argument are legion. Legislative Respondents miscast the relief Petitioners actually seek, fail even to identify all the parties they believe need to be joined or what the remedy would be were they correct, and rely on a series of

cases that provide no support for their position. At base, however, Legislative Respondents use the argument to advance a familiar strawman: that the only way to ensure a constitutionally sufficient education for some children is to hurt others. This threat of their own making should be rejected.

"A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988). As Legislative Respondents correctly observe, the Supreme Court in *Mechanicsburg Area School District v. Kline*, 431 A.2d 953 (Pa. 1981), articulated four factors a court should consider in evaluating whether a party is indispensable:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits or the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

Id. at 956.

In conducting the analysis, one must consider "the nature of the claim and the relief sought." *CRY, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 376 (Pa. 1994). At its core, "the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party." *Id.* at 375. All told, the consideration of these factors can be "rephrased as a balancing of the

interest of the plaintiff, the defendant, the absent party, and the efficient administration of justice." *Id.* at 377.

In *Mechanicsburg*, the Supreme Court faced a party who "urge[d], ipse dixit, the action of appellant automatically affects the subsidy payment of other school districts without providing those districts an opportunity to protect their rights as parties." 431 A.2d at 958. Like here, the court was faced with the argument that validating the rights of the appellant "would necessarily produce a ripple effect upon the subsidies calculated and paid to all school districts because of the limitations" of state law, and therefore the court should join other school districts. *Id.* (quotation omitted).

The court rejected the "ripple effect" claim, noting that, like here, nothing in the record supported it. *Id.* It recognized that school districts throughout the Commonwealth had a vested right to a correct and accurate determination of the amount of subsidy to be granted to them, but that "[a]ppellant's right to a correct determination of the amount of subsidy to be granted [was] not interlocked with the similar right possessed by other school districts . . . [as potential] additional payment to [appellants] . . . would not necessarily require appellees to recalculate the total subsidy." *Id.* at 484. Consequently, the Supreme Court noted that it was "clear that the rights of the other school districts are not 'essential' to the merits of [the case]" *Id*. at 482.

The present case falls squarely within the confines of *Mechanicsburg*. Legislative Respondents assert that should Petitioners prevail, the Court will necessarily order a "full-scale invalidation and alteration" of the educational system, thus "upending" non-parties' rights and interests. Yet Legislative Respondents point to *nothing* in Petitioners' prayer for relief that would remove funding from other school districts. Nor could they, for Petitioners are seeking validation of their right to a properly functioning system of education: a declaration that "the General Assembly shall provide all students throughout Pennsylvania with a contemporary, high-quality, and effective public education," with an injunction requiring sufficient funding to accomplish this. May 2, 2022 Petitioners' Conclusions of Law ¶ 86(c), (e).

Legislative Respondents misplaced reliance on *Oas v. Commonwealth*, 301 A.2d 93 (Pa. Commw. Ct. 1973), illustrates this point. In *Oas*, the court determined that the School Districts of Philadelphia and Pittsburgh were indispensable parties with respect to a claim by plaintiffs that the legislative vehicle by which those districts received grants was an unconstitutional special law. 301 A.2d at 95. But the plaintiff in *Oas* was challenging the constitutionality of special grants to Philadelphia and Pittsburgh *in order to invalidate those grants and remove their funding*. *Id*. at 94-95. In other words, a defined set of organizations were facing a defined legal threat. *Id.* Nothing of the sort exists here. In fact, Legislative

Respondents' claim is so speculative that they do not even bother to identify the entire universe of parties they believe are indispensable. *See* Corman Br. 117.[21]

It is entirely possible to do justice in this case with the present parties. Moreover, Legislative Respondents fail to identify the correct remedy if other parties actually were indispensable (which they are not). That remedy is not dismissal, but rather joinder of the 670 school districts and charter schools, along with the undescribed other parties that Legislative Respondents mention. Pa.R.Civ.P. No. 1032; 42 Pa.C.S. § 7540(a). And here they run aground again, for there are "limiting principles to the mandatory joinder provision," particularly where "joinder would render litigation unmanageable," and "[t]he addition of hundreds of new parties to an already robust roster will not enhance the thoughtful disposition" of the matter. *Stilip v. Commonwealth*, 910 A.2d 775, 785-86 (Pa. Commw. Ct. 2006), *aff'd* 974 A.2d 491 (Pa. 2009). Legislative Respondents point to no case that suggests anything different, because their claim is meritless.

[21] Legislative Respondents attempt to distinguish *OAS* from *Mechanicsburg* "because it involved 'a constitutional challenge to a statute, which establishes the basis for the revenue.'" Corman Br. 122 (quoting *Twp. of S. Fayette v. Commonwealth*, 459 A.2d 41, 46 n.6 (Pa. Commw. Ct. 1983)). This is baseless, as the rest of the footnote makes plain: "Furthermore*, Oas v. Commonwealth*, 8 Pa. Commonwealth Ct. 118, 301 A.2d 93 (1973), is distinguishable. There, we held that the two school districts were indispensable parties *where the complaint alleged that those districts were receiving funds, in addition to funds received by other districts, by virtue of illegal special legislation.* Here we are not facing a constitutional challenge to a statute, which establishes the basis for the revenue." *Twp. of S. Fayette*, 459 A.2d at 46 n.6 (emphasis added). The point is that Philadelphia and Pittsburgh were going to suffer immediate damage, not that the vehicle was a lawsuit which happened to be based in the Constitution.

F. LEGISLATIVE RESPONDENTS' SEPARATION OF POWERS ARGUMENT HAS ALREADY BEEN REJECTED BY BOTH THE SUPREME COURT AND THE COMMONWEALTH COURT IN THIS CASE.

Legislative Respondents end their argument by bringing this litigation back to where it started: with a claim that this matter is barred by the doctrine of separation of powers.

Legislative Respondents offer no explanation as to how this argument is substantively different than the justiciability argument rejected by the Supreme Court. *See 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."). And they fail to cite *this* Court, in *this* case, rejecting the same argument:

> The principle of separation of powers among the branches of government was intertwined with the discussion of justiciability in *William Penn II*. Our Supreme Court observed that generally, "'the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers . . . .'" *Id.* at 438 (quoting *Hosp. & Health System Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 596 (Pa. 2013); *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977)). As the Court explained, "'The need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake.'" *Id.* (quoting *Hosp. & Health System Ass'n*, 77 A.3d at 597; citing *Sweeney*, 375 A.2d at 709).

> We are persuaded by our Supreme Court's reasoning and conclude that the doctrine of separation of powers does not bar Petitioners' claims.

William Penn Sch. Dist. v. Pa. Dep't of Educ., No. 587 M.D. 2014, 2018 WL 2090329, at *5 (Pa. Commw. Ct. May 7, 2018).

Even were this issue to be revisited, which it cannot be, the argument is wrong: if there is a constitutional violation, the separation of powers doctrine actually supports entering a judgment for Petitioners. "[C]hecks and balances . . . reinforce [the] separation" of the branches of government. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015). 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, "the 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.

This action exists because the General Assembly has failed its duties. The separation of powers requires a judgment for that failure.

III. CONCLUSION

Petitioners have proven the Commonwealth's school funding system violates the Education Clause, and discriminates against Petitioners and children in other low-wealth districts in violation of their rights to equal protection under law. Judgment should be entered in their favor.

[*Signature page to follow*]

Dated: July 15, 2022

Respectfully submitted,

By: */s/ Katrina Robson*
Katrina Robson (*pro hac vice*)
Anne T. Marchitello (*pro hac vice*)
John F. Dermody (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

Daniel L. Cantor (*pro hac vice*)
Christopher P. Burke (*pro hac vice*)
Eli A. Grossman (*pro hac vice*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000

Christianna K. Mantas (*pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
Telephone: (213) 430-6000

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

By: */s/ Daniel Urevick-Ackelsberg*
Mary M. McKenzie (Bar No. 46434)
Michael Churchill (Bar No. 04661)
Daniel Urevick-Ackelsberg (Bar No. 307758)
Claudia De Palma (Bar No. 320136)
PUBLIC INTEREST LAW CENTER
2 Penn Center
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
Telephone: (215) 627-7100

Attorneys for All Petitioners

By: */s/ Maura McInerney*
Maura McInerney (Bar No. 71468)
Kristina A. Moon (Bar No. 306974)
Margaret Wakelin (Bar No. 325500)
EDUCATION LAW CENTER
1800 JFK Blvd., Suite 1900A
Philadelphia, PA 19103
Telephone: (215) 238-6970

Attorneys for Petitioners Jamella and Bryant Miller, Sheila Armstrong, Tracey Hughes, Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People – Pennsylvania State Conference.

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that this brief is 18,634 words, and therefore complies with the word count limit set forth in this Court's Order of June 29, 2022.

/s/ Daniel Urevick-Ackelsberg
Daniel Urevick-Ackelsberg