IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT, *et al*.,	:	
	:	
Petitioners,	:	
	:	
v.	:	Docket No. 587 M.D. 2014
	:	
PENNSYLVANIA DEPARTMENT OF EDUCATION, *et al*.,	:	
	:	
	:	
Respondents.	:	

SENATOR JAKE CORMAN'S POST-TRIAL BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pennsylvania's Education Clause is different from every other state's education clause because it provides that our system of public education should "serve the needs of the Commonwealth." This language imbues in the General Assembly broad discretion in determining how to support and maintain a system of public education, because determining the "needs of the Commonwealth" involves inherently legislative decisions. In our republican form of government, deciding the needs of the Commonwealth (on education and other subjects) is the role of the General Assembly. Senators and members of our House of Representatives are elected to represent the people, serving them and giving voice to their interests and needs. The Petitioners, Governor, Department of Education, State Board of Education, this Court, and even the President *pro tempore* of the Pennsylvania Senate and Speaker of the House cannot substitute their own judgment for the judgment of the General Assembly in determining what best serves the needs of the Commonwealth.

The General Assembly's role in formulating policy is even more pronounced in this context than others because this case involves an issue that is full of debate – a debate that has continued and frequently shifted over Pennsylvania's history. Many individuals have deeply-rooted, but often differing, beliefs regarding the societal roles and responsibilities of schools, families, communities, and the

individual in educating our youth. This case is replete with these social issues. This Court should not enter into the political fray by choosing one set of policy viewpoints over another. Yet, Petitioners ask the Court to take precisely that approach, seeking to position our judicial branch as a super-school board that will oversee and guide Pennsylvania's system of public education.

Nothing reinforces this point more than the actions that the Executive Respondents and Attorney General Shapiro have taken. At trial, Governor Wolf, Acting Secretary Ortega, and the Department of Education, called a single witness who testified for a few minutes on direct examination. Former Secretary of Education Pedro Rivera recused himself from this case "on the ground that he has previously served as Superintendent of The School District of Lancaster, one of the petitioner school districts in this matter." *See* Exec. Resps. Answer & New Matter at 1, n. 1. Instead, the Department designated former Deputy Secretary Matthew Stem, who was the *Assistant* Superintendent of the School District of Lancaster under Mr. Rivera, and worked for that district for nineteen years, as their designee regarding primary and secondary education issues in this case. During closing statements, their counsel announced what everyone already understood: they support Petitioners in the case.

Likewise, Attorney General Shapiro, in a blatant political move that violated state law, filed an *amicus* brief in support of Petitioners. His brief, which contradicted a filing that his office previously made in this case, was filed the day before he ran unopposed in the primary election to be the Democratic Party's candidate for governor. The Attorney General's *amicus* brief was a part of his political campaign. *See* Dale Mezzacappa, *Gubernatorial candidate Shapiro backs case for more, fairer school funding*, Chalkbeat Philadelphia, available at https://philadelphia.chalkbeat.org/2022/5/17/23105173/governor-candidate-shapiro-supports-school-funding-overhaul-system-unconstitutional (May 17, 2022).

Petitioners ask the Court to step into the Commonwealth's political fray and take their side, and the side of the Executive Respondents and Attorney General Shapiro, in this ongoing debate. The Court should decline to do so, recognizing that the decision as to what serves the needs of the Commonwealth in setting state funding levels for education is for the General Assembly.

After a four-month trial, many of the arguments in the parties' briefs will be familiar to the Court. Petitioners focus largely on standardized test scores and the academic standards; Legislative Respondents focus on what is actually happening in schools. Petitioners repeat the mantra that was spoken daily at trial: "All children can learn," as if it were a legal argument or anyone disagreed. And they continue to take statements from counsel out of context in an effort to establish a caricature of

an uncaring, heartless General Assembly that refuses to consider differing perspectives.

But beneath this veneer built for the media are numerous legal faults. For instance, there are significant problems with Petitioners' theory on causation, which rests on the belief that simply providing more money to schools will lead to greater academic success. Petitioners' view ignores the reality that student *results* are not the same as student *opportunities*. Educating a child is not like baking a cake – a school cannot simply combine ingredients together and guarantee success.

Likewise, while Petitioners assert a facial challenge to Pennsylvania's system of public education, their trial presentation focused on only a small fraction of that system. They ignore that the system of education is *intentionally decentralized*. The General Assembly has largely placed the responsibility to make direct decisions about public schools with locally-elected school board representatives, giving the residents in the 500 school districts across the Commonwealth a greater voice in their communities' schools. The vast system of public education also includes charter schools, intermediate units, career and technical schools, public libraries, and other entities. Testimony from nine school districts is not representative of all 500 school districts across the Commonwealth.

A review of data from across the Commonwealth shows that Petitioners' claims about a failing public education system are simply wrong. Teachers in

Pennsylvania are highly trained, having some of the most rigorous credential requirements in the nation. Student-to-teacher ratios are decreasing; teacher experience, education levels, and salaries are increasing; and teacher evaluations show that our educators get widely positive marks. Pennsylvania is a leader in STEM education and provides students with ample opportunities for career and technical education and education in charter schools. While Senator Corman does not believe that student outcome measures can be used as evidence to support an Education Clause claim, even those measures cut against Petitioners. Graduation rates are at an all-time high, post-secondary credentials are increasing, and Pennsylvania is well above average on every national assessment of student achievement.

Even if the Petitioner Districts were representative of all other school districts, the record is clear that each of them is providing its students with an opportunity for a basic standard education, which is what our Education Clause requires. Students in Petitioner Districts receive instruction in core subject matters, by appropriately trained teachers, in safe facilities, and with adequate instrumentalities of learning. In fact, every Petitioner District goes well beyond the constitutional minimum, providing a variety of non-core courses and electives, opportunities for academic advancement, student supports, career and technical education, extracurricular opportunities, and athletic programs.

Nor does the evidence show that Petitioners are "broke," as they claimed at trial. Rather, it shows that, in recent years, the Petitioner Districts have increased academic opportunities for students and positions for staff. When it comes to the Petitioner Districts, the Court heard testimony about adding over 35 courses in a single year, renovating or rebuilding every building in a district, purchasing iPads and Apple TVs, replacing stadium lights, building Olympic-sized swimming pools, and increasing fund balances. These things do not occur in school districts that are out of funds.

As predicted, the views that Petitioners' witnesses espoused at trial are not found in public communications from the school districts that are involved in this case. Petitioners' witnesses spent much of the trial attempting to explain away their earlier comments, create nuance where none exists, shift the blame for statements to former employees, or claim that their position on a subject had suddenly and recently changed. Petitioner Districts even attempted to characterize videos of their schools that *they* posted online as inaccurate portrayals that were "cherry-picked." This case remains the only forum in which the Petitioner Districts have asserted that they provide a deficient education to their students and that standardized test scores are the proper way to measure the education they are providing.

At trial, the Petitioner Districts avoided comprehensive reviews of their schools, instead focusing on high-level commentary, unverifiable stories designed

to elicit sympathy, and selected photographic close-ups that portrayed small areas in need of repair. Petitioners highlighted conditions that had been corrected and buildings that had been closed (or even sold). Petitioners made exaggerated claims, such as a claim that 75 kindergartners shared a single toilet, when cross-examination revealed that a lavatory with multiple stalls was located just around the corner. Petitioners decried a temporary "weight room" that was in a non-functioning locker-room shower, but did not show the Court the other, permanent weight room that was available to the same students. Petitioners showed a photo of a classroom that accommodated a teacher and at least six well-spaced student desks and called it a "closet," leaving unanswered the question of when a closet is spacious enough to be a "room," or a less spacious room becomes a "closet." But, of course, Petitioners do not have any incentive to provide an accurate depiction of their schools – they are motivated by the prospect that the judicial branch will usurp the General Assembly's authority and pronounce that Petitioners should have more funds.

Pennsylvania's system of public education involves a complex assortment of laws, regulations, and school board policies. The system is not stagnant – it changes and improves every year, with the General Assembly working to make it better. The question in this case is not whether Pennsylvania's system of public education could be better. Imperfect is not unconstitutional. Yet, regardless of which changes are made to the system, Petitioners update their case to claim that the changes are

insufficient and the system remains unconstitutional. The fact that Pennsylvania is among the top-ten highest spending states on a per-student basis? To Petitioners, this fact is irrelevant. The passage of Act 35 of 2016, which provides additional funding to school districts based on their level of poverty? Petitioners claim that, without billions more dollars in state funding, the Fair Funding Formula is ineffective. Petitioners have even claimed that Pennsylvania's recent historic increases in public education spending are essentially meaningless.

In the end, Petitioners believe that they have a better way to fund public schools in Pennsylvania – both a massive increase in school funding and a redistribution of funds. They believe that *they* know how to best serve the needs of the Commonwealth. But, the responsibility to support and maintain a system of public education was placed in the hands of Pennsylvania's General Assembly for a reason. The General Assembly represents the will of the people of the Commonwealth. If Petitioners believe that they have identified a policy prescription that will bring a positive change to our society, they need to follow the political process like everyone else. Instead, they have turned to the Judiciary in an attempt to transform the courts into a super school board.

COUNTERSTATEMENT OF FACTS

Senator Corman incorporates Legislative Respondents' Proposed Findings of Facts.

ARGUMENT

I. Burden of Proof

Petitioners have a heavy burden of proof. Our Supreme Court has routinely explained that "'[l]egislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of a finding of constitutionality.'" *Consumer Party v. Commonwealth*, 507 A.2d 323, 331–32 (Pa. 1986) (emphasis added) (quoting *Pa. Liquor Control Bd. v. Spa Athletic Club*, 485 A.2d 732, 735 (Pa. 1984)). As this Court has explained, "[i]t is axiomatic that legislation properly enacted by the General Assembly enjoys a strong presumption of constitutionality." *Redevelopment Auth. v. Bratic*, 45 A.3d 1168, 1179 (Pa. Cmwlth. 2012). As a result, in challenging Pennsylvania's school financing regime on constitutional grounds, the Petitioners have what our Supreme Court has described as a "very heavy burden of persuasion[.]" *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005).

Petitioners assert that, from an evidentiary perspective, they simply need to substantiate their claims by a preponderance of the evidence. In support of this contention, they cite to decisions that courts issued under the laws of South Carolina, Delaware, and Washington. *See* Petitioners' Proposed Conclusions of Law ("Pets. COL") ¶¶ 75-77. This approach is misguided. Under Pennsylvania law, those extra-

territorial decisions are not binding authority. *See Verdini v. First Nat'l Bank of Pa.*, 135 A.3d 616, 619 n.5 (Pa. Super. 2016); *Barris v. Stroud Twp.*, 257 A.3d 209, 219 n.13 (Pa. Cmwlth. 2021). Further, in applying Pennsylvania law, a court should not treat out-of-state decisions as persuasive authority if they are "incompatible with Pennsylvania law." *Newell v. Mont. West, Inc.*, 154 A.3d 819, 823 n.6 (Pa. Super. 2017) (citation omitted).

Petitioners, in this regard, claim that Pennsylvania case law is "less than clear" as to whether a constitutional challenge to a statutory regime creates a "burden of proof." *See* Pets. COL ¶ 75. But Pennsylvania case law undoubtedly establishes otherwise. In fact, our Supreme Court has explained that "the heavy burden resting upon the person asserting unconstitutionality of legislation is one of the most firmly established principles of our law." *Rufo v. Bd. of License & Inspection Rev.*, 192 A.3d 1113, 1120 (Pa. 2018) (internal citations omitted). To the extent that, under the laws of other states, courts have used a "preponderance of the evidence" standard in this context, those decisions are "incompatible with Pennsylvania law[,]" *see Newell*, 154 A.3d at 823 n.6, and the Court should disregard them.

II. The Education Clause

The Education Clause states: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. Art. III, § 14.

In construing a constitutional provision like the Education Clause, "as when construing a statute, this Court begins with the plain language." *Jubelirer v. Rendell*, 953 A.2d 514, 525 n. 12 (Pa. 2008). In considering the plain language, "the fundamental rule of construction . . . is that the Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 925 (Pa. 2004). "A constitution is not to receive a technical or strained construction, but rather the words should be interpreted in their popular, natural and ordinary meaning. We should also consider the circumstances attending its formation and the construction probably placed upon it by the people." *Commonwealth v. Harmon*, 366 A.2d 895, 897 (Pa. 1976).

Because the United States Constitution does not contain a counterpart to the Education Clause, the Court, in construing the clause, should not engage in the analysis that our Supreme Court set out in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). *See Jubelirer*, 953 A.2d at 524 (declining to engage in the four-factor *Edmunds* analysis). That said, the Court may consider the *Edmunds* factors to the degree that doing so is helpful in understanding the provision. This approach can include a review of relevant decisional law, policy considerations, and cases from other states regarding similar constitutional provisions. *Id.* at 525 n.12.

Our Supreme Court has noted, moreover, that courts that have taken "the most sensible approach" to interpreting their states' education clauses have done so "by reference to the history of their own constitutions." *William Penn School Dist. v. Pennsylvania Dept. of Educ.*, 170 A.3d 414, 450 (Pa. 2017) (hereinafter "*William Penn II*"). "Because their histories are not ours," the court explained, the "results of such an inquiry in Pennsylvania may vary." *Id*.

What follows in this section of this brief is an assessment of how these canons of constitutional construction apply to Pennsylvania's Education Clause, an assessment that, in turn, helps to inform which standard of review the Court should adopt to evaluate a claim that the clause has been violated, as explained below in Section III.

a. Current version of Education Clause

On May 16, 1967, Pennsylvania voters adopted the Education Clause, in its current form, through a referendum. In doing so, they voted to make material changes to the prior version of the clause. These changes are best understood by comparing the prior version of the clause to the current version. The prior version stated: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose." Constitution of 1874, Article X, section 1.

Through the 1967 amendments, this clause moved from Article X to Article III, 30 words were removed from it, 8 words were added, and 18 words were kept the same. A red-line comparison of the two versions of the clause depicts the changes from the 1874 version to the 1967 version:

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

As the red-line comparison shows, the amendments changed the reference to a system of "public schools" to a system of "public education." They also removed the references to the children of the Commonwealth and their education, deleting the phrase "wherein all the children of this Commonwealth above the age of six years may be educated." The amendments, moreover, added a statement of purpose, specifying that the system of public education should "serve the needs of the Commonwealth." Finally, the amendments removed the portion of the former Education Clause that specified the minimum amount (1 million dollars) that the General Assembly was required to annually appropriate to support and maintain the system of public schools.

During the trial, Petitioners' expert on the history of the Education Clause took the position that these changes to the language of the clause did not change its

meaning. This stance is baffling. Well-established precedent confirms that when the language of a constitutional provision changes, its meaning changes as well. *Panik v. Didra*, 88 A.2d 730, 732 (Pa. 1952) ("Where words of a later statute differ from those of a previous one on the same subject they presumably are intended to have a different construction. . . .") (internal citations omitted); *see also Costa v. Cortes*, 142 A.3d 1004, 1010 (Pa. Cmwlth. 2016) ("[T]he various principles of statutory construction apply with equal force in interpreting the Pennsylvania Constitution."). Reaching a contrary conclusion would require the Court to ignore fundamental canons of constitutional construction.

Indeed, it is well-settled that if language is removed from a constitutional provision (here, for example, the phrase "wherein all the children of this Commonwealth above the age of six years may be educated"), the removal signals that, although something was once enshrined in the provision, it has been taken out. *See Deremer v. Workmen's Comp. Appeal Bd.*, 433 A.2d 926, 928 (Pa. Cmwlth. 1981) ("The deletion of statutory language by the legislature renders the language inoperative and indicates that the legislature has admitted a different intent."). Likewise, it is equally well-established that if language is added to a constitutional provision (here, for example, the phrase "to serve the needs of the Commonwealth"), the language should be given independent meaning, force, and effect and cannot be treated as mere surplusage. *See, e.g.*, *Fisher v. Commonwealth*, 501 A.2d 617, 619

(Pa. 1985) ("The supreme principle of statutory interpretation must be that each word used by the Legislature has meaning and was used for a reason, not as mere surplusage."). As applied here, these canons of construction focus on the text of the Education Clause, and how that text evolved over time. Therefore, they are of paramount, and primary, importance in discerning the meaning and functionality of the clause, because a constitutional provision's text is always the best source for determining its meaning. *See, e.g., Jubelirer*, 953 A.2d at 525 n.12.

The removal of the phrase "wherein all the children of this Commonwealth above the age of six years may be educated" signals that, under the Education Clause, Pennsylvania's system of public education is not only for children. The *statutory* scheme that the General Assembly enacted provides each child with the right to receive a free basic public education. However, as discussed below in the equal protection section of this brief, if there ever was a right to an education under Pennsylvania's Constitution, that right was removed with the removal of this language from the Education Clause. *See supra* Section VIII(c). Likewise, as further explained below, the addition of the statement that the system of public education must be designed "to serve the needs of the Commonwealth" exhibits that the General Assembly should be given significant deference in designing the system of education. This deference is warranted because the General Assembly is the branch of Pennsylvania's government that determines the needs of the

Commonwealth. *See Sch. Dist. of Phila. v. Twer*, 447 A.2d 222, 225 (Pa. 1982) ("The constitution has placed the educational system in the hands of the legislature, free from any interference from the judiciary save as required by constitutional limitations.") (internal citations omitted). The General Assembly is uniquely positioned to determine the needs of the Commonwealth – and whether the system of public education is serving those needs – because it is the only branch of Pennsylvania's government that is made up entirely of the people's elected representatives. *See* Pa. Const. Art. II; *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1047 (Pa. 2019) ("[O]ur jurisprudence requires that the basic policy choices involved in legislative power actually be made by the legislature as constitutionally mandated. . . . This . . . ensures that the duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate.") (internal citations omitted).

Finally, the 1967 Amendment removed the minimum appropriation of $1 million from the 1874 version of the Education Clause. Although that minimum amount was antiquated by the 1960s, the 1967 Amendments did not, instead, replace the one million dollar minimum with a larger amount that was more consistent with the then-current school system (*e.g.*, $1 billion). When the $1 million floor was placed into the former Education Clause, several delegates to the 1873 Convention argued that a minimum appropriation improperly took away the General Assembly's

discretion to allocate any amount for public schools. *See, e.g.*, Boyd, Vol. 2, at 436; Beebe, Vol. 7, at 679; Buckalew, Vol. 7 at 689. Consistent with the other 1967 amendments to the Education Clause, the removal of this language signals that voters were returning discretion to the General Assembly.

i. Terms used in the Education Clause

In order to better understand the Constitution's language "in its popular sense, as understood by the people when they voted on its adoption[,]" *see Ieropoli*, 842 A.2d at 925, courts frequently consult dictionary definitions from the time when the voters adopted the language. *Adams Outdoor Adver., L.P. v. Zoning Hearing Bd.*, 909 A.2d 469, 483 (Pa. Cmwlth. 2006) ("Where a court needs to define an undefined term, it may consult definitions in . . . the dictionary for guidance."). Set forth below are dictionary definitions of key terms that appear in the Education Clause. These definitions are taken from a commonly-used dictionary that was in circulation when the current Education Clause was adopted in 1967:

> **Education**: **1a**: the action or process of educating or at being educated; also: a stage of such a process[;] **b**: the knowledge and development resulting from an educational process[;] **2**: the field of study that deals mainly with methods of teaching and learning in schools.
>
> **Educate** **1**: to provide schooling for[;] **2a**: to develop mentally or morally, esp. by instruction; b: TRAIN, INSTRUCT syn **see** TEACH.
>
> **Thorough**: **1**: carried through to completion[.]

> **<u>Efficient</u>**: **1**: immediately effecting. **2**: productive of desired effects; esp: productive without waste. syn SEE EFFECTIVE.

Webster's Seventh New Collegiate Dictionary (1965).

ii. History of 1967 amendments

The history of the 1967 amendments to the Education Clause can be bifurcated into two phases. The first phase relates to the drafters of the provisions. The second phase involves a review of materials that bear upon how, in May 1967, voters understood the version of the Education Clause that was presented to them for ratification.

When it comes to interpreting the Education Clause, "secondary sources[,]" such as the ones that are described immediately below, carry less weight under the canons of constitutional construction, which primarily focus on the text of the clause itself. *See Ieropoli*, 842 A.2d at 925. Nonetheless, it is helpful to review them to understand the context in which the clause was adopted.

1. Comments from drafters and pre-referenda commentary

In the late 1950s, there was a public movement to amend Pennsylvania's Constitution or prepare a new one, in order to modernize it and address issues that were associated with the 1874 version. The General Assembly formed the Commission on Constitutional Revision to identify ways to modernize the Constitution. *See* Woodside, *et al*., Report of the Commission on Constitutional

Revision (1959).[1] The Commission produced a report, which is typically referred to as the Woodside Report, named for its chairman, Robert Woodside. *Id.* In the Woodside Report, the Commission recommended an amendment to the former Education Clause, which was located in Article X. *Id.* at 152. It would have amended the former language to state: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of the Commonwealth may be educated." *Id.* This development became the starting point for what would later become our current Education Clause.

A few years later, in 1963, the Pennsylvania Bar Association's ("PBA") Project Constitution prepared a report titled "A Revised Constitution for Pennsylvania." PBA, Pennsylvania Bar Association Quarterly, *A Revised Constitution for Pennsylvania* ("Project Constitution") (Jan. 1963). The PBA's report addressed several proposed amendments to our Constitution. One of those proposals, Resolution No. 3, contained proposed changes to the Education Clause, along with proposed changes to other provisions in the Constitution. The PBA

[1] Appendix A contains copies of relevant portions of historical materials that are referenced in this section of the brief. Under Pennsylvania Rule of Evidence 201, the Court can take judicial notice of the materials in this section. *See, e.g.*, *Sch. Dist. of Phila. v. Bd. of Revision of Taxes*, 217 A.3d 472, 483 (Pa. Cmwlth. 2019) (Pennsylvania Rule of Evidence 201(b) permits a trial court to "judicially notice a fact that is not subject to reasonable dispute.").

proposed for the Education Clause to be converted into its current form: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." *Id.* at 173.

The PBA's report contains a short narrative from its Education Committee. In that narrative, the Education Committee explained that it had reviewed the Woodside Report. *Id.* at 304. With regard to the Education Clause, the Committee stated that it changed the recommended language from what was contained in the Woodside Report to its new proposal (the current constitutional language) because, "In the opinion of the Committee the system of public education should not necessarily be limited to serve the needs of children as the Constitution now provides." *Id.* at 305. The Committee said that, instead, the Education Clause should focus more widely on serving the needs of the Commonwealth. *Id.* at 304. The PBA then presented a set of twelve resolutions to the General Assembly. *See* PBA, Report of the Special Committee on Project Constitution, Jan. 1966, at 3 (describing history).

All twelve resolutions were brought before the General Assembly, but only two of them passed. *Id.* The next year, eleven of the twelve resolutions were re-introduced in the General Assembly. *Id.* In addition, the Governor created another commission, which was charged with reviewing the various constitutional

amendments that the Woodside Commission and PBA had proposed. This commission prepared a report to the Governor. In that report, the commission suggested only limited changes to the constitutional amendment proposals. It did not propose any changes to the PBA's recommended amendments to the Education Clause. *See* Report of the Governor's Commission on Constitutional Revision, Jan. 24, 1964, at 13-14.

In 1965, Resolution 3, which included the proposed amendments to the Education Clause, was re-introduced in the Senate as Senate Bill 532. *See* Legislative Journal-Senate at 286 (Mar. 23, 1965) (describing bill). On June 28, 1965, the Senate passed that bill. Legislative Journal-Senate at 727 (June 28, 1965). On December 21, 1965, the House of Representatives passed it. Legislative Journal – House at 2977 (Dec. 21, 1965). Before the Resolution could be put to the voters for ratification, however, a second General Assembly needed to pass it. *See* Pa. Const. Art. XVIII (1874 Constitution) (setting forth the same amendment procedure found in Article XI of current Constitution).

During this time period, a non-profit corporation, the Modern Constitution for Pennsylvania, Inc., was formed to act as a proponent of the modernization of Pennsylvania's Constitution. For instance, it released pamphlets regarding the proposed constitutional amendments. And it understood that the proposed changes to the Education Clause would increase the General Assembly's authority and

discretion. Its records, for instance, contain a letter from its Executive Director, Robert Sidman, to its President, Gustave G. Amsterdam, in which Mr. Sidman "tried to digest all the best condensations that have been made by various sources." *See* Letter from Robert Sidman to Gustave Amsterdam, Dec. 8, 1965 at 5.[2] In addressing the proposed amendments to the Education Clause, Mr. Sidman explained that they would "give[] [the] Legislature broader powers to deal with education[.]" *Id.* at 2.

In 1966, after the General Assembly's first passage of the resolution for amending the Education Clause, the PBA's Special Committee on Project Constitution released a report in which it described the proposed changes to the clause:

> An important change under the heading "Education" would require the General Assembly to provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth. Today the Legislature's duty is to provide a system of public schools in which all *children* of the Commonwealth above the age of six years may be educated, and—believe it or not—the Legislature is commanded to appropriate at least $1 million each year for that purpose! This requirement has long since become meaningless.

PBA, Report of Special Committee on Project Constitution pg. 7 (Jan. 1966).

[2] Modern Constitution for Pennsylvania, Inc. archives available at Charles Library, Temple University.

In 1966, after a new General Assembly had been constituted, the Senate, on January 16, 1967, passed the resolution for amending the Education Clause for the second time (this time as SB 4) and, on January 30, 1967, the House passed it for the second time. Legislative Journal – Senate at 35 (Jan. 16, 1967); Legislative Journal – House at 81 (Jan. 30, 1967). The proposed amendments were therefore added to the ballot for the May primary election.

2. The May 1967 referendum

On May 16, 1967, Pennsylvania citizens voted on nine referenda that pertained to the Constitution. Eight of these referenda concerned proposed amendments to the Constitution, while one of them asked voters to decide whether the Commonwealth should have a limited constitutional convention that would address four separate issues. Referenda 3-A included all of the proposed changes to Article III of our Constitution, including the proposed changes to the Education Clause (which was to be relocated to Article III from Article X).

As required by the Constitution, newspapers across the Commonwealth reported the language of the proposed amendments. *See* Pa. Const. Art. XVIII (1874 Constitution). In addition, a number of newspapers across Pennsylvania published

articles that were designed to help inform voters about the issues that the proposed constitutional amendments addressed.[3]

Several newspaper articles explained that the proposed amendments to the Education Clause would change the clause's language to require the General Assembly to "'provide a system of education to serve the needs of the Commonwealth,' rather than maintain a system wherein 'children over 6 may be educated.'" Kathy Begley, *Amendments Would Change State's Constitution*, Delaware County Daily Times, May 3, 1967, at § 2, p. 1. Similar comparisons ran in other newspapers across the state. *See* Editorial, *Better Legislative Procedures*, Wilkes-Barre Record, May 1, 1967, at 14 ("Article X of the Constitution . . . requires the Legislature to provide public schools 'wherein all the children of the Commonwealth above the age of six years may be educated,' . . . . Resolution 3 would simply have the Legislature 'provide a system of public education to serve the needs of the Commonwealth.'"); Dick Cowen, Question 3-A 'Streamlines the Legislative Process,' The Morning Call, May 6, 1967, at 34 ("The new wording [of the Education Clause] would be 'The General Assembly shall provide for the

[3] Appendix B contains all newspaper articles referred to in this section of the brief. Under Pennsylvania Rule of Evidence 201, the Court can take judicial notice of these articles. *See, e.g.*, *Commonwealth v. Tilghman*, 366 A.2d 966, 967 (Pa. Cmwlth. 1976); *In re Pub. Info. Concerning the Death of Jack Fuellhart*, 38 Pa.D.&C.4th 69, 82–83 (Clarion Co. C.C.P. 1997).

maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.'").

Other newspaper articles asserted that the proposed amendments to the Education Clause would broaden the Education Clause. As one newspaper noted, "An important change would be made in the section headed 'Education' to broaden the power of the Legislature to provide adequate support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Wilfred Norris, *All Voters Must Consider Constitutional Revision*, The Daily News, May 11, 1967, at 6. The Pittsburgh Post-Gazette explained that the changes to the Education Clause would provide the General Assembly with "a broader mandate to provide a system of public education 'to serve the needs of the commonwealth[.]'" *State Legislative Power*, Pittsburgh Post-Gazette, May 5, 1967, at 10. *See also Seven Constitutional Changes Listed on Ballot for Tuesday*, Gazette and Daily, May 11, 1967 at 1, 7 (explaining that proposed amendments to Education Clause would "[b]roaden the legislature's responsibility in the field of education by changing 'requirement to educate children over six in a system of public schools' to public education without limitation by age.").

Shortly before the May 16, 1967 election, several other newspapers carried an identical article that described the proposed changes to the Education Clause, explaining that the changes "would eliminate out-dated language requiring the state

to provide a public education system for all children over the age of six and directing the legislature to appropriate a minimum of $1 million for education purposes." *See* Vincent Carocci, *Constitution Issues Are Explained*, The Evening Standard, May 8, 1967, at 5. The article ran under different headlines in the Hazelton Standard-Speaker, the Public Opinion, Sunbury Daily Item, The Evening Times, Centre Daily Times, The Evening Sun, and the McKean Daily Democrat. *See* Appendix B.

On May 16, 1967, Pennsylvania's citizens voted to ratify referendum Question 3-A. Legislative Respondents Findings of Fact and Conclusions of Law ("LR FOF") ¶¶ 33-34. Contrary to what Petitioners' expert witness Professor Black stated during the trial, the Education Clause was *not* adopted as an outgrowth of the 1968 Constitutional Convention. LR FOF ¶ 43. Professor Black's confusion about when the clause was adopted helps to illustrate that he was unprepared to testify about its history or meaning. Notably, Professor Black admitted that he had never researched what voters in 1967 understood the current Education Clause to mean when they voted to adopt it. LR FOF ¶ 44. Because the meaning that those voters ascribed to the Clause should be the Court's primary focus in construing it, Professor Black's testimony is largely irrelevant to the constitutional questions at issue in this case.

iii. Analysis of history of 1967 amendments

The text and history of the 1967 amendments to the Education Clause show that those amendments effectuated a material and meaningful change to the clause that modernized its meaning, broadened its scope, and increased the General Assembly's discretion and authority. Contrary to what Petitioners' expert stated during the trial, the changes to the Education Clause were not hidden. Not only were they readily apparent from the text of the amendments themselves, but the voters also knew about them and discussed them.

Taking these changes into account, the 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. Because determining the "needs of the Commonwealth" is necessarily an exercise in making policy decisions, the General Assembly alone is in the best position to determine whether Pennsylvania's system of public education is through and efficient to serve the "needs of the Commonwealth." The result is that, while it is always the case that legislation enjoys a strong presumption of constitutionality, in the Education Clause context, the General Assembly is entitled to even more deference than usual.

b. 1874 version of the Education Clause

Petitioners assert that the meaning of the Education Clause should be determined with reference to the 1874 version of the clause. This perspective is wrong. The Education Clause that was adopted in 1874 (then Article X, Section 1)

was amended in 1967, 93 years after its adoption. The Education Clause from 1874 is no longer operative or controlling as law.

But even assuming, *arguendo*, that Petitioners' stance is correct, the historical perspective that they have advanced is still misguided for several reasons. For one, as a general matter, Petitioners focus on limited statements from certain individual delegates to the 1873 Convention, who were expressing personal opinions.[4] The opinions of these individual delegates ***are not*** the opinions of the convention itself and "must be understood to be merely the personal opinion of individual members

[4] Petitioners also completely ignore the context of the statements that the delegates to the 1873 Convention made during their debates. A review of the seventeen quotes from the 1873 Convention that appear in Petitioners' brief shows that, in every instance in which Petitioners quote the debates, they have mischaracterized the statements to mean something that they do not mean or failed to acknowledge the statements in their proper context. As one example, when Petitioners, in their brief, quote the debates on pages 15 (quoting Vol. 2: 426), 16 (quoting Vol. 2:472), 19 (quoting Vol. 6:56), 67-68 (quoting Vol. 7:691-92), and 68 (quoting Vol. 6:45 & 64 and Vol. 2:421 & 472), they are quoting arguments that delegates *unsuccessfully* asserted in support of proposed sections in the Education Article that were *ultimately rejected*. Similarly, Petitioners include a block quote from Delegate Landis, Pet. Brief 18, but *omit* the following paragraph from Delegate Landis's statement, which runs contrary to their argument. *See* Landis, Vol. 2, at 423. In support of their claim that education was the most important issue before the Convention, they cite to a delegate's unsuccessful argument that the convention should delay discussing the Education Clause because Delegate Funk was absent that day. *See* Pet. Brief 74; Wherry, Vol. 2 at 421. Similarly, when Petitioners assert that the delegates believed that education was a "great fundamental right," Pets. Brief 67, they *omit* the fact that the statement came in the context of a debate on taxation and that the speaker himself acknowledged that he was not agreeing "[w]hether that principle be right or wrong . . . ." Bartholomew, Vol. 3, at 345.

of the Convention." *Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 48 (Pa. 1937).

Even if the Court considers the 1873 Convention debates as evidence of intent that bears upon the meaning of the 1967 Education Clause (which it should not do), Petitioners have left out a sizeable portion of the relevant information, including: the Education Article sections that the delegates rejected; the delegates' repeated rejection of attempts to require or promote uniformity within the system of public education; a variety of delegate statements to the effect that the General Assembly had broad authority regarding education; and, that the system of education that was in place in 1873, while geographically incomplete, was a high quality system.[5] In order to provide the Court with a more fulsome understanding of the debates, these items are discussed below.

i. Education Article sections that 1873 Convention delegates adopted

At the 1873 Convention, the delegates adopted four education-related provisions, described below.

1. The Education Clause

[5] Petitioners' expert Professor Black opined that the subject of public education was the paramount concern of the 1873 Convention. This viewpoint is plainly wrong. The principal impetus for the 1873 Convention was the desire of the voters to address political corruption and abuses. *See* LR FOF ¶¶ 51-52.

As initially proposed, the Education Clause that would later become Article X, Section 1 of the 1874 Constitution was divided into two sections. The first section called for the maintenance and support of a system of public schools, and the second section addressed the minimum $1 million appropriation.

Article X, Section 1, as initially proposed by the Education Committee, stated: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated." 1873 Debates, Vol. 2, at 419. When the Convention's Committee of the Whole first considered this section, Mr. Darlington, the chair of the Education Committee, offered some opening remarks. He noted that Pennsylvania had "out-grown" the prior education language in the Constitution, which provided that the poor would be taught *gratis*. In fact, Mr. Darlington noted that the General Assembly had far exceeded that requirement. Darlington, Vol. 2, at 419.[6] Turning to the proposed Education Clause, Mr. Darlington stated that it was likely unnecessary to include the clause in our Constitution at all – but the Education Committee believed that Pennsylvania might "be said to be on the backward road if [the Convention] said nothing on the subject." *Id.* According to Mr. Darlington, the Education Committee determined that the

[6] In this brief, when the comments of a specific delegate are cited, they are referred to by the name of the delegate, volume, and page.

Convention should "recognize the existence of that admirable system of public schools which now prevails all over the Commonwealth[.]" *Id.* Therefore, according to Mr. Darlington, instead of requiring the General Assembly to establish a system of public schools, the Education Clause was purposefully phrased to provide for the system's maintenance and support. *Id.* at 419-420.

Other than Mr. Darlington's opening comments, the debate on Article X, Section 1 did not directly address the meaning or interpretation of the provision that was ultimately adopted. *See* 1873 Debates, Vol. 2 at 419-434 (Article X, Section 1 adopted without amendment); Vol. 6 at 38 (Article X, Section 1 adopted without debate). Instead, the debate centered on proposed amendments to the clause that would have added the word "uniform" or required the General Assembly to prescribe the books to be used in public schools. *Id.* These issues are described below, *supra* Section II(b)(iii).

Article X, Section 2, as initially proposed by the Education Committee, stated: "The Legislature shall appropriate at least one millions dollars for each year, to be annually distributed among the several school districts, according to the law, and applied to public school purposes only." 1873 Debates, Vol. 2, at 435. The delegates debated this section, with some of them arguing that it would improperly encroach on the General Assembly's discretion. Boyd, Vol. 2, at 436; Beebe, Vol. 7, at 679. Other delegates argued that a minimum appropriation requirement was necessary to

ensure that schools in some areas of the Commonwealth would exist at all, or be operated for more than a few months at a time. *See, e.g.*, Lear, Vol. 2, at 435. The amount of the required appropriation, $1 million, was an increase in funding in relation the prior year[7] that some delegates believed would jump-start the educational system in some rural areas of Pennsylvania. *See, e.g.*, Carter, Vol. 7, at 680. Other delegates stated that the $1 million figure was not very significant, but that it would be helpful to include this requirement in the Education Clause because it would increase popular support for the Constitution as a whole. *See, e.g.*, Lilly Vol. 6, at 39; White, Vol. 2, 437-39. In any event, in 1967, the $1 million appropriation requirement was removed from the Education Clause. Pa. Const. Art. III, § 14. At that time, state funding for education was approaching $1 billion annually. *See, e.g.,* Carocci, *Constitution Issues Are Explained*, at 5 (noting that the Governor's 1967-68 budget proposed $923 million for education).

When Article X, Section 1 was brought up for its third reading, Sections 1 and 2, as previously debated, had been combined. The combined version of Sections 1 and 2 stated: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this

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[7] According to Delegate White, during the prior year, the General Assembly allocated $700,000 to public schools and $450,000 to the education of orphans of soldiers. While the Convention was meeting, the House Committee of Ways and Means resolved to include an $800,000 appropriation to public schools for the next year. *See* White, Vol. 2, at 438-39.

Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose." The Convention adopted this section following a debate that again centered on the propriety of including a specific appropriation requirement in the Education Clause. 1873 Debates, Vol. 7, at 677-681.

In sum, during the 1873 Convention, the 1874 version of the Education Clause was debated on three occasions, but there was *no* significant discussion regarding the language in the clause that remains in the current version – *i.e.*, "provide for the maintenance and support of a thorough and efficient system. . . ." Other than Mr. Darlington's commentary noted above, this language was raised only in debates related to other proposals for the Education Article.

2. Other Education Article sections

In addition to the Education Clause, the Education Article of the 1874 Constitution had two other provisions. Section two prohibited the General Assembly from appropriating money for sectarian schools. Pa. Const. Art. X, § 2 (1874). The delegates adopted this section without significant debate. 1873 Debates, Vol. 2, at 439. It is now found at Article III, Section 15 of our Constitution.

Section three stated: "Women twenty-one years of age and upwards, shall be eligible to any office of control or management under the school laws of this State." In 1967, this provision was removed from the Constitution.

The Education Article initially included a provision that would have established the position of Superintendent of Public Schools. This provision was instead addressed in the section of the Constitution on the Executive Department. *See* Pa. Const. of 1874, art. VI, §§ 1, 8, 20.

ii. Delegates rejected several Education Article sections

The delegates to the 1873 Convention also considered, and rejected, at least three additional proposed sections of the Education Clause. Their rejection of these proposed sections, discussed below, reinforced that the General Assembly had broad discretion and authority to address education.

Article X, Section 6. This proposed section would have read: "The arts and sciences may be encouraged and promoted in colleges and other institutions of learning, under the exclusive control of the State." 1873 Debates, Vol. 2, at 463. Delegates argued that this proposal was unnecessary because the General Assembly already possessed the authority to encourage and promote the arts and sciences as it saw fit. *See* Dodd, Vol. 2, at 463-64; Mann, Vol. 2, at 464; Wherry, Vol. 2, at 467; Dodd, Vol. 6, at 41.

Article X, Section 7: This proposed section would have read: "The Legislature may establish industrial schools, and require the attendance of vagrant, neglected and abandoned children." 1873 Debates, Vol. 2, at 470. As one delegate explained, this provision would have focused on educating children who were hindered from

attending the common schools of Pennsylvania because they had been neglected or abandoned. Wherry, Vol. 2, at 470. Again, among the delegates, one of the central arguments against this proposal was that it was unnecessary because the General Assembly could already take these steps if it saw fit. *See, e.g.*, Hanna, Vol. 6, at 59 ("[T]his proposition should not be agreed to, because it belongs to the Legislature of the State to make such rules and regulations."); Bullitt, Vol. 6, at 68; Corbett, Vol. 6, at 76; Broomall, Vol. 7, at 681. Other delegates questioned the cost of the proposal, and whether it would benefit all parts of Pennsylvania. Campbell, Vol. 6, at 57; MacConnell, Vol. 6, at 64; Black, Vol. 7, at 691.

Article X, Section 8: This proposed section would have authorized the General Assembly to pass a compulsory attendance statute. 1873 Debates, Vol. 2, at 472. As with the two other rejected proposals, delegates argued that this section was unnecessary because the General Assembly already had this authority. *See, e.g.*, Patterson, Vol. 7, at 684 ("Let this Convention leave this question to the Legislature – to the people where it should be left."); Reed, Vol. 7, at 688.

iii. Delegates rejected multiple attempts to require or promote uniformity within Pennsylvania's system of public schools

At the 1873 convention, delegates introduced several proposed amendments that would have created more uniformity among Pennsylvania's public schools. In every instance, the delegates rejected these proposals. In speaking against the

proposals, delegates repeatedly emphasized regional differences that existed between schools and the importance of local control.

In particular, a delegate proposed to add the term "uniform" to the Education Clause so that it would have read, in part, "thorough, uniform, and efficient. . . ." This amendment was proposed in an effort to prevent the General Assembly from creating a system of education that had differing features in different areas of the Commonwealth. Minor, Vol. 2, at 422. Similarly, several delegates proposed amendments that would have required public schools across Pennsylvania to use the same textbooks and not change those textbooks too frequently. Delegates proposed these amendments in an effort to stop school districts from requiring parents to purchase new textbooks for their children on a frequent basis. Howard, Vol. 2, at 426; Woodward, Vol. 2, at 427.

Because these proposed amendments failed to account for the differences between school districts and the need for local control, multiple delegates spoke against them. Delegate Hazzard noted that he opposed the addition of "uniform" to the Education Clause because he wanted to give school districts "the right" to provide advanced courses of study. Hazzard, Vol. 2, at 425-426. As he explained:

> Let those of us who prefer the plan of giving our children the benefits of the higher studies in their own district, and near to their own homes, be allowed to do so. As to the school tax, we can, in any event, only get our share of that; and if we choose to pay something more for the privilege

> I speak of, over and above the tax, let us have the right to do it.

Id. at 426.

As Delegate Palmer stated: "It would be perfectly apparent to the gentlemen, if he had served as a school director during the last forty or fifty years, that the wants of one school are quite different from the wants of another, and that nobody can understand them so well as the directors themselves." Palmer, Vol. 2, at 429. Several other delegates made similar points. Landis, Vol. 2, at 428 ("[T]he wants of every locality differ. The directors are the only ones who should determine what are the wants of the scholars or the schools in their district."); Lilly, Vol. 2, at 422 (comparing school districts "in the woods," where a school year lasted only three or four months, with school offerings in Philadelphia, and noting that uniformity would be "very impractical"); Stanton, Vol. 2, at 425 (opposing amendment because it would "degrade materially the public schools from that high standards which they have attained" in Philadelphia and other cities in Pennsylvania); Hazzard, Vol. 2, at 423.

In sum, the framers rejected all attempts to add "uniformity" to the Education Clause, or require the use of uniform textbooks across Pennsylvania. *See generally* Art. X, §§ 1-3 (1874 Constitution).

iv. Delegates believed that the General Assembly should have broad discretion related to education

During the 1873 Convention, multiple delegates made it clear that, in their view, the Education Clause and the Education Article in general would give the General Assembly significant discretion in crafting a system of public education. As explained above, the delegates rejected repeated calls to authorize the General Assembly to address the arts and science, schools for neglected children, and compulsory education because it already had the authority to address those items and the delegates believed these policy questions should be left to the General Assembly.

Similarly, with regard to the use of uniform textbooks, delegates rejected multiple calls to impose this requirement and noted that this issue should be left in the hands of Legislature, as the "representatives of the people." Simpson, Vol. 2, at 459.

And, more generally, several Delegates recognized that matters of education should largely be left up to the General Assembly as representatives of the people. *See, e.g.*, Darlington, Vol. 7, at 681 ("[T]he Legislature has entire control over the subject of education."). For instance, when, on the third reading of the Education Article, the convention initially added multiple amendments to the Article that would have limited the General Assembly's discretion, other delegates asserted that the proposed Article improperly intruded on the authority and discretion of the General Assembly. Smith, Vol. 7, at 693 ("Let us upon this question vote down this article,

encumbered as it is, and let us leave the people of this state through their representatives chosen in the future, two hundred in the House and more than we have ever had heretofore in the Senate, and therefore more nearly related to the people, to advance in the future just as they have advanced in the past."); Black, Vol. 7, at 691 (stating that the ability to appropriate funds to schools "belongs to the representatives of the people."); Buckalew, Vol. 7, at 689. Thereafter, the delegates removed the late-added amendments to the proposed Education Article, and passed the Education Article that would become part of the Constitution of 1874. 1873 Debates, Vol. 7, 694-696.

v. Delegates considered the then-current system of public education to be a high quality system, although it was geographically incomplete

At the 1873 Convention, several delegates expressed the belief that Pennsylvania's system of public education was of a high quality, although they also recognized that it did not yet reach all parts of the Commonwealth. Among the delegates, the view was that the system, where it existed, was meeting the constitutional standard, as it was understood at that time.

For instance, Delegate Darlington recognized the "admirable system of public schools" that was in place at the time of the Convention. Darlington, Vol. 2, pg. 419. Other delegates made similar laudatory comments. Wherry, Vol. 2, at 424 ("Surely if there be any matter of pride and glory in our State, it is to be found in our

system of common schools[.]"); Hazzard, Vol. 2, at 426 ("Our common schools, sir, are the pride and boast of Pennsylvania. Do not let us restrict or limit their operations too much."); Smith, Vol. 7, at 692 ("If there has ever been one thing of which Pennsylvanians have boasted in the past more than of any other thing, it has been of their common school system."); Patterson, Vol. 7, at 683 (stating that the school system has been "so successful" and has progressed to "meet public sentiment"); Curtin, Vol. 7, at 686 ("There is no part of our government in Pennsylvania which has progressed with more certainty and have developed more beneficial results to the people of the State than our system of common school education."). There is nothing to suggest that, in the delegates' view, the system was not thorough and efficient. Quite to the contrary.

Yet, at the time of the convention, the system of public education had the following attributes, among others:

- The total amount of funding for public schools was approximately $8 million, of which $700,000 was from the Commonwealth. Bowman, Vol. 6, at 64. Even accounting for the increase that the 1874 Constitution mandated in the following year, about 88% of the cost of the system of public schools was covered by local funds.

- Approximately a 47-to-1 student-to-teacher ratio. *See* Cuyler, Vol. 2, at 459 (noting that the system of public education had approximately 900,000 students and 19,000 teachers).

- Many schools operated for only a few months during the year, Lilly, Vol. 2, at 422, and 75,000 children attended no school at all. Curtin, Vol. 7, at 687.

- There were no academic standards. LR FOF ¶ 1694.
- Parents were required to purchase books for their children. *See, e.g.*, Woodward, Vol. 2, at 442.

It is not difficult to see that, in Pennsylvania, the system of public education has improved immeasurably since the 1870s.

vi. Summary of 1873 Convention

In sum, the 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. The delegates sought to protect local control and the ability of school districts to differentiate the education that they provided to their students, rejecting every attempt to add uniformity to the Constitution's command. The delegates repeatedly affirmed that the General Assembly had wide discretion to formulate the system of education as it saw fit. In particular, they rejected multiple attempts to set priorities for the General Assembly, or call out areas of its authority with regard education, and adopted only the general statement contained in the Education Clause and the $1 million minimum appropriation requirement. In direct contravention to the arguments now made by Petitioners, under the 1874 version of the Education Clause, education spending was not to be handled completely by school districts and "it is just as clear that it was not intended that the school districts should shift the

burden on the state by largely reducing local taxation." *In re Walker*, 36 A. 148, 150 (Pa. 1897).

III. Standard of Review Under The Education Clause

In remanding this case, our Supreme Court did not announce which standard this Court should use to determine whether the General Assembly has fulfilled its duty under the Education Clause. *William Penn II*, 170 A.3d at 457. The Supreme Court determined that this Court should craft such a standard after hearing the evidence and considering the historical record.

The Court should conclude that the Education Clause requires the General Assembly to create a system of public education that provides students with a basic standard public school education. In assessing whether a student is being provided with such an education, the Court should consider the following factors, to the degree that they are applicable:[8]

- **Courses and curricula**: whether students are being offered a standard curriculum in core subject matters with opportunities for advancement;
- **Teachers**: whether students are served by sufficient, well-trained, and experienced teachers;

[8] Some of these factors may not apply to a given public education entity. For instance, a cyber charter school may not maintain physical facilities for students.

- **Facilities**: whether facilities are generally safe and appropriate for students; and,
- **Instrumentalities of learning**: whether students have access to the basic educational instrumentalities of learning.

This proposed standard is supported by a review of Pennsylvania's Education Clause and long-standing system of locally managed education, a review of caselaw from other states, and the appropriate role of the Commonwealth's courts in evaluating the public education system. These items are discussed below.

a. Pennsylvania's Education Clause and locally-controlled system of education

The standard that Legislative Respondents propose comports with the language of the Education Clause and Pennsylvania's long-standing system of locally managed public education. The language in the Education Clause that obligates the General Assembly to support and maintain a "thorough and efficient system of public education to serve the needs of the Commonwealth" is intentionally vague, hortatory, and adaptable to changing circumstances. Even using Petitioners' definitions of the terms, "thorough" means complete and "efficient" means effective. Pets. Brief 8-9. Neither term is an absolute. Both terms are meaningful only with reference to an objective. The objective here is "to serve the needs of the Commonwealth." The language of the Education Clause lacks detail because the

field of education involves a variety of policy choices and changes based on time and location. As our Supreme Court explained,

> The very essence of [the Education Clause] is to enable successive Legislatures to adopt a changing program to keep abreast of educational advances. The people have directed that the cause of public education cannot be fettered, but must evolute or retrograde with succeeding generations as the times prescribe.

Reichley by Wall v. N. Penn Sch. Dist., 626 A.2d 123, 127 (Pa. 1993) (quoting *Malone v. Hayden*, 197 A. 344, at 352 (Pa. 1938)). As our Supreme Court has said, the Education Clause "placed the educational system in the hands of the legislature, free from any interference from the judiciary save as required by constitutional limitations." *Sch. Dist. of Phila.*, 447 A.2d at 225 (citation omitted). Even before the Education Clause was amended in 1967, the Supreme Court recognized that, under the prior version of that clause, the General Assembly was "empowered to determine what is 'efficient' in school management." *Ehret v. Sch. Dist. of Borough of Kulpmont*, 5 A.2d 188, 192 (Pa. 1939).

Moreover, Pennsylvania's system of public education is, and always has been, locally based and managed. To that end, the framers of Pennsylvania's 1874 Education Clause resisted multiple attempts to include requirements for the system to be uniform. *See infra*, Section II(b)(iii).

Since supporting and maintaining a thorough and efficient system of public education that serves the needs of the Commonwealth involves making policy

choices regarding (i) what are the needs of the Commonwealth and (ii) what best serves those needs, the Court should assess the system by determining whether Petitioners have proven that it does not provide students with a basic standard education. After making that determination, the analysis under the Education Clause stops. *See, e.g.*, *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 176 A.3d 28, 34 (Conn. 2018) (noting that beyond making a determination of "minimum adequacy," courts are not in a position to determine how best to use additional resources).

Indeed, consistent with the meaning and history of the Education Clause, which are detailed above, this standard 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 and something that is not reasonably up for debate. Again, the framers of the 1874 clause repeatedly rebuffed attempts to intrude on legislative control of the education system. *See infra* Section II(b)(iv). And, in 1967, the voters ratified amendments to the Education Clause that broadened the General Assembly's discretion in this area. *See infra* Section II(a). Adopting this standard will avoid wrapping the Court up in policy disputes, which are exclusively in the General Assembly's domain.

Nor is the standard perfunctory. Rather, providing a basic standard education requires meaningful effort. Teachers must be trained and hired; buildings built and

maintained; curricula developed or purchased; and, materials provided to students. It is not "simple" or inexpensive to offer a free and comprehensive standard public school education to over a million students across the Commonwealth every year.

b. Decisional law from Pennsylvania and other states

In the only other case in which, for purposes of Pennsylvania's Education Clause, a court sought to define the meaning of a "thorough and efficient system of public education to serve the needs of the Commonwealth," this Court identified a standard that is similar to the one that Legislative Respondents are advocating here. In particular, in *PARSS v. Ridge*, Judge Pellegrini determined that, in order to meet its burden under the Education Clause, "PARSS had to show that the present system of funding education produced the result that a substantial number of districts did not have funds to provide a basic or minimal education for their students." *PARSS v. Ridge*, at pg. 129. Likewise, Judge Pellegrini commented that an educational system with "a funding scheme not providing school districts with sufficient revenues to hire teachers, turn on the lights or heat their buildings" would be unconstitutional. *Id.* at 114. Although Judge Pelligrini's decision is not binding, it is persuasive and this Court can look to it for guidance.

Courts in other states, in interpreting their own states' education clauses in lawsuits that were similar to this one, have developed and utilized tests that are similar to the one that Legislative Respondents propose. For instance, the Maryland

Supreme Court determined that its state's education clause[9] requires a statewide system that provides "a basic or adequate education to the State's children." *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 776-77 (Md. 1983). The Maryland Supreme Court commented:

> The development of the statewide system under § 1 is a matter for legislative determination; at most, the legislature is commanded by § 1 to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education. To the extent that § 1 encompasses any equality component, it is so limited. Compliance by the legislature with this duty is compliance with § 1 of Article VIII of the 1867 Constitution.

Id.

Similarly, the Minnesota Supreme Court determined that its state's system of education[10] was constitutional because the system met "the basic educational needs of all districts." *Skeen v. Minnesota*, 505 N.W.2d 299, 312 (Minn. 1993). That court stated: "Any inequities which exist do not rise to the level of a constitutional violation of the state constitutional provisions[.]" *Id.* The court held that the

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[9] Maryland's education clause directs its General Assembly to: "establish . . . a thorough and efficient System of Free Public Schools[.]" Md. Const. Art. VIII, § 1.

[10] Minnesota's education clause provides that it is the Legislature's duty to: "establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state." Minn. Const. Art. XIII, § 1.

plaintiffs in the case were "unable to establish that the *basic system* is inadequate[.]" *Id.* (emphasis added).

The Texas Supreme Court held that, under the education clause in the Texas Constitution,[11] "[t]he school system is constitutionally adequate if it achieves a general diffusion of knowledge." *Morath v. The Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 849 (Tex. 2016). As that court explained, Texas's Constitution "demands not the best education, but only an educational system that is adequate to provide a general diffusion of knowledge." *Id.* at 855.

The Connecticut Supreme Court[12] held that:

> [T]he state must provide (1) "minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn," (2) "minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks," (3) "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies," and (4) "sufficient personnel adequately trained to teach those subject areas'. . . . [T]he trial court should determine whether the specific educational facilities, instrumentalities, curricula and personnel that the state is required to provide . . . reasonably address the minimal educational needs of this state's children, that is, whether the state's offerings are

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[11] Texas's education clause states that it is the legislature's duty to: "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. Art. VII, § 1.

[12] Connecticut's education clause states: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Conn. Const. Art. VIII, § 1.

> sufficient to enable a student who takes advantage of them to become a functional member of society.

Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 55–56 (Conn. 2018) (quoting *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995)).

New York[13] adopted a similar standard – in fact, the Connecticut Supreme Court borrowed its standard from a decision that the New York Court of Appeals had issued. *See Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330–32 (N.Y. 2003) (setting forth prior holding that, under New York's education clause, school system should provide students with minimally adequate facilities, instrumentalities of learning, and access to the teaching of reasonably up-to-date basic curricula, by sufficient and adequately-trained personnel).

The Georgia[14] Supreme Court took a similar approach. *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981) ("In the absence of evidence to show that existing state funding for public education deprives students in any particular school district

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[13] New York's education clause states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. Art. XI, § 1.

[14] Georgia's Education Clause states: "The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation, and the General Assembly may by general law provide for the establishment of education policies for such public education." Ga. Const. Art VIII, § 1.

of *basic educational opportunities*, cross-appellants' contention that low wealth districts fail to provide an 'adequate education' must be rejected.")

Michigan and Oklahoma also adopted somewhat similar standards. *See E. Jackson Pub. Sch. v. State*, 348 N.W.2d 303, 305 (Mich. 1984); *Fair School Finance Council of Oklahoma, Inc. v. State*, 746 P.2d 1135, 1149 (Okla. 1987).

It is true that some state courts have adopted strenuous and complex standards under their states' education clauses, seemingly out of thin air. For instance, without any textual or historical basis for doing so, the West Virginia Supreme Court developed a standard with approximately ten sub-factors, which, if read on their face, are virtually impossible to understand or apply with any certainty. *See Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.V. 1979). In contrast, the Education Clause standard that Legislative Respondents propose lines up with the applicable constitutional text and history, as explained above.

c. The role of courts in education policy decisions

The Judiciary should not make itself into a "super-school board." The provision of primary and secondary education involves a myriad of policy choices, and a child's education can vary widely based on many different influences that exist outside of the schoolhouse doors. *See, e.g.*, *Danson v. Casey*, 399 A.2d 360, 366 (Pa. 1979) ("The educational product is dependent upon many factors[.]"); Woodward, Vol. 5, at 601 ("We have a great many educational influences in this

land; we have the pulpit; we have the school; we have the social circle."). Courts are not positioned to make these policy choices. The standard that Legislative Respondents propose is consistent with this point.

In our system of public education, the General Assembly has delegated significant discretion to local school districts. *See* Public School Code, Article II – School Districts, 24 P.S. § 2-201, *et seq.* Pennsylvania courts have repeatedly recognized the "long-established and salutary rule" that they "should not function as super school boards" and therefore should not second-guess the decisions of school districts. *Zebra v. Sch. Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972); *Telly v. Pennridge Sch. Dist. Bd. of Sch. Directors*, 53 A.3d 705, 717 (Pa. 2012) ("[I]n light of the broad discretion provided to school boards by the Legislature, courts have been reluctant to intercede in school board decision-making[.]"). Pennsylvania courts recognize that the day-to-day operations of schools and matters of school finance "must be left to persons of experience who have made a life study of it, and certainly is not to be subjected to the consideration of jurists who have little or no training to appraise school systems or their necessities." *Wilson v. School Dist.*, 195 A. 90, 97 (Pa. 1937) (holding that issues involved in day-to-day oversight of schools, such as the number of instructors hired, class sizes, and how students are separated by grades in accordance with mental aptitudes, are all questions that the school board alone should decide); *see also Latsnic v. Canon-McMillan School Dist.*,

69 Pa. D. & C.2d 499, 500 (Wash. C.C.P. 1975). Whether a court would have "reached a different decision [than a school district] based on the same facts is of no consequence." *Warrington v. Lakeland School Dist. Directors*, 3 Pa. D. & C.3d 349, 354 (Lacka. C.C.P. 1974).

This reasoning applies with equal force to a challenge to the public education system as a whole. Just as courts will not second-guess the decisions of school boards in administering the affairs of school districts, the Court should not enter into the fray of policy choices that pertain to the system as a whole. As the Texas Supreme Court stated,

> our judicial responsibility is not to second-guess or micromanage Texas education policy or to issue edicts from on high increasing financial inputs in hopes of increasing educational outputs. There doubtless exist innovative reform measures to make Texas schools more accountable and efficient, both quantitatively and qualitatively. Judicial review, however, does not license second-guessing the political branches' policy choices, or substituting the wisdom of nine judges for that of 181 lawmakers.

Morath, 490 S.W.3d at 833 (Tex. 2016).

If the Court were to adopt a standard that goes beyond the one that Legislative Respondents propose, it would quickly become mired in policy questions, which are outside of its purview. *See* Section III(d) below, evaluating Petitioners' proposed standard. Furthermore, as explained above, the text and history of the Education

Clause support leaving issues of education policy to the General Assembly. *See infra* Section II.

d. Petitioners' proposed standard is divorced from reality and impossible to apply

Petitioners assert that the Education Clause requires the General Assembly to provide for a "high-quality" and "contemporary" education. Pets. Brief at 3. Attempting to apply this standard illustrates that it is fraught with problems and policy choices. What is a "high-quality" education? Is it a state-of-the art education that involves every conceivable instructional support for which Petitioners advocate? Is it one that involves every conceivable instructional *and* non-instructional support? Is it something else? If so, where should the line be drawn? What is the discernible, objective standard that should be used to draw the line? Should the line be redrawn every five or ten years to account for new studies from scholars in the field of education? More frequently? Less frequently? Why? Which scholars will be consulted for this project?

Likewise, the assertion that an education must be "contemporary" is essentially meaningless. By definition, all education that is being provided today is "contemporary." Perhaps Petitioners are trying to say that the education should be "modern," which creates the same interpretation problems. What is a "modern" education? What is the discernible, objective standard that should be used to determine if an education is "modern?" How often does an education need to be

evaluated to ensure that it is "modern?" Every year? Petitioners do not answer any of these questions because they cannot answer them. Their proposed standard does nothing except replace the Education Clause's non-descript words with words that are even more nebulous, hoping to substitute the Judiciary for the General Assembly in the realm of educational policy-making.

Similarly, Petitioners argue that a constitutional system of public education is one in which the General Assembly provides children with the "resources necessary to graduate as capable, engaged citizens, ready to succeed in college and in family-sustaining careers." Pet. Brief at 3. This standard is also impossible to apply in real life. For instance, what is a "capable citizen?" Is it someone who volunteers, shows patriotism, and seeks to protect the environment? Why is that citizen "capable" while another one is not?

What is an "engaged citizen?" Should the Court track public discourse and voting records to determine the engagement of students and graduates? Which discernible, objective standard should be used to determine if a citizen is sufficiently "engaged?"

Similarly, how should the Court determine whether students graduate "ready to succeed in college and in family-sustaining careers?" Should the General Assembly require students to attend college and then track their grades? If a student drops out of college, should the Commonwealth conduct exit interviews to determine

the reason why the student left the school? For instance, Petitioner Michael Horvath had solid grades in college but he stated that he dropped out for a variety of reasons, including some personal losses, his inability to continue playing football, the cost, and the coursework. LR FOF ¶¶ 1632, 1641. Was it the case that Mr. Horvath was not ready to succeed in college?

Furthermore, under Petitioners' proposed standard, what is a "family-sustaining career?" Under their standard, is it ever acceptable for a person to work in an entry-level position, or do all citizens need to occupy a managerial position? Is a family-sustaining career defined by its salary, its salary and benefits, or something else? Perhaps the Court would need to evaluate work-life balance and employee happiness as well.

All of these rhetorical questions illustrate the fundamental problem with Petitioners' proposed standard – it is replete with meaningless platitudes that call for the courts to make subjective, policy-laden decisions.

In their brief, Petitioners themselves struggle to explain how their test could be applied in the real world – at one point even appearing to suggest that the Court should account for student vaccination status in determining whether Pennsylvania's system of public education is satisfactory under the Constitution. *See, e.g.*, Pets. Brief at 60. As their brief illustrates, Petitioners do not actually expect a Court to use their standard. Rather, their hope is that the Judiciary will substitute itself for

the General Assembly in the realm of educational policy-making. Or else, perhaps, they want the Court to rule based simply on state standardized test scores, which, of course, is an approach that the Supreme Court has already rejected. *See William Penn II*, 170 A.3d at 450.

IV. Evaluation of Petitioners' Education Clause Claim

a. Application of Legislative Respondents' proposed standard

As a threshold matter, during the trial, Petitioners did not introduce direct evidence regarding whether the vast majority of Pennsylvania's public schools are providing their students with an opportunity to obtain a basic standard public school education. In fact, they introduced no direct evidence about most school districts. They focused, instead, on the alleged problems at eight school districts out of five hundred – the Petitioner Districts and two others. As a consequence, they failed to substantiate their claim that Pennsylvania's school financing arrangement is facially unconstitutional. Because they are *not* asserting as-applied challenges to the school financing arrangement, they cannot rely solely on evidence about the Petitioner Districts to prove their claims. This glaring problem in Petitioners' trial presentation is discussed below, *supra* Section VII.

But, even with regard to the Petitioner Districts specifically, Petitioners failed to demonstrate an Education Clause violation. In fact, as shown by the summary exhibits that Legislative Respondents prepared and the fact-intensive cross-

examination of witnesses at trial, every Petitioner District provides its students with an opportunity to obtain a basic standard public school education. Every Petitioner District provides instruction in core subject matters,[15] by highly credentialed and experienced teachers,[16] in safe and appropriate facilities,[17] and with necessary instrumentalities for learning.[18] Moreover, the instruction is differentiated for ELL and special education students.[19]

In fact, the evidence that was presented at trial showed that each Petitioner District *exceeds* the constitutional standard. Every Petitioner District provides its students with instruction in non-core subject matters, including a range of electives,[20] dual enrollment and AP courses,[21] and extracurricular clubs and sports.[22] They also provide their students with opportunities to obtain career and technical

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15 LR FOF ¶¶ 498-502, 631-639, 805-808, 812-813, 824, 832-837, 960-967, 969-979, 1060-1063, 1065-1066, 1068, 1070-1071, 1074, 1182, 1184, 1186, 1189-1190, 1193.

16 LR FOF §§ VI(A)(iii), B(iii), C(iii), D(iii), E(iii), F(iii).

17 LR FOF §§ VI(A)(iv), B(iv), C(iv), D(iv), E(iv), F(iv).

18 LR FOF §§ VI(A)(v), B(v), C(v), D(v), E(v), F(v).

19 LR FOF ¶¶ 525, 749-751, 767, 803, 995, 1002, 1025.

20 LR FOF ¶¶ 503-505, 519-520, 628, 630, 633-636, 641, 811, 814, 816-823, 826, 835, 968, 987, 1064, 1067, 1072-1073, 1075, 1173, 1185, 1187-1188, 1191-1192, 1194, 1196-1198.

21 LR FOF ¶¶ 506, 509-518, 628, 630, 641, 646-652, 808-810, 815, 826-829, 832, 981-983, 986, 1050-1051, 1069, 1078-1082, 1084, 1173, 1176-1181, 1184, 1186, 1189-1190, 1269-1270.

22 LR FOF §§ VI(A)(vii), B(vii), C(vii), D(vii), E(vii), F(vii).

education services.[23] Likewise, every Petitioner District provides students and families with the services of a range of administrators and student support professionals.[24] Every Petitioner District provides its students with access to non-educational facilities, such as sporting venues. Moreover, the Petitioner Districts provide students with non-core instrumentalities of learning, such as 3D printers and service animals.[25] The evidence also shows that, although they are not Petitioners, SDP and Otto-Eldred provide their students with the same kinds of opportunities and amenities.[26]

At trial, Petitioners repeatedly asserted that, with more funding, they could do more for their students. This assertion is simply a truism: indeed, with more money, *every* government entity (or private entity or family or individual) could do more of the things that it wants to do. Petitioners asserted that, if they received a transformational amount of funding, they would be able to provide additional supports that, in their view, would assist students. But that assertion misses the point. The question before the Court is whether Petitioners have met their heavy burden to prove that, because of current funding levels, many school districts across

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23 LR FOF ¶¶ 507-508, 642, 653, 830-831, 984-986, 1083.

24 LR FOF ¶¶ 497, 580-589, 752-763, 768-773, 904-912, 916-919, 1002, 1026, 1144-1147, 1170, 1256, 1266-1268, 1274-1278.

25 LR FOF ¶¶ 597-602, 712, 717, 825, 839, 860, 867, 1098-1100.

26 LR FOF §§ VII(A)-(B).

the Commonwealth are unable to provide their students with a basic standard educational opportunity. The evidence shows that Petitioners have not met this burden.

b. Other educational inputs that Petitioners have identified

Petitioners have focused much of their attention on specific educational offerings that are not required under the Education Clause. For instance, they have pointed to alleged deficiencies in student support programs, large class sizes, and a lack of state-wide, publicly-funded "high quality" pre-K programming. By taking this approach, Petitioners, once again, are seeking to prompt the Court to wade into the field of educational policy.

i. Non-instructional supports

Petitioners believe that school districts should provide students with access to a certain, undefined level of non-instructional supports, such as guidance counselors, social workers, psychologists, instructional coaches, and behavioral interventionists. If the Petitioner Districts do not provide enough of these supports, they claim, it shows that they are not providing their students with a constitutionally-sufficient education. But non-instructional supports are not "education" for purposes of the Education Clause. And, in any event, there is no way to determine that a particular level of non-instructional supports is needed in order to have a material and measurable impact on student learning.

No one doubts that non-instructional supports may be helpful and meaningful for some students. These supports, however, are typically aimed at addressing factors that exist *outside* of school. Providing these supports goes beyond the scope of providing a standard basic education. In 1967, when the Education Clause was amended to refer to a system of "public education" instead of "public schools," the word "education" was not defined with any reference to non-instructional supports. Definitions of "education" and "educate," from Webster's Dictionary, are set forth in Section II(a)(i). Again, "the fundamental rule of construction which guides us is that the Constitution's language controls and *must be interpreted in its popular sense, as understood by the people when they voted on its adoption*." *Ieropoli*, 842 A.2d at 925 (emphasis added).

Based on its 1967 standard meaning and usage, "education" means the formal provision of instruction to students. Petitioners have presented no evidence to the contrary. Non-instructional supports are therefore irrelevant to an assessment of an Education Clause claim.

Notably, many of the out-of-school factors that non-instructional supports address can also be addressed (and more effectively so) by the institutions in society that exist for the *very purpose* of dealing with these issues. Petitioners' own expert, Dr. Noguera, agreed that school districts are not better positioned to address these factors than the other institutions. In fact, when schools try to deal with these factors

within the school setting, it can dilute from their delivery of educational content. LR FOF ¶ 2200-2203.

And, in any event, in any given school district or other school setting, there is no method for determining how many non-instructional supports must be in place in order to have a material impact on student learning. Petitioners did not even attempt to present evidence about how many additional social workers, instructional coaches, therapists, behavioral specialists, family liaisons, resource officers, truancy officers, or any other non-instructional supports they believe are needed in the Petitioner Districts, let alone any other Pennsylvania school district or LEA. Rather, they simply claimed that they need "more." It follows that, for the Court to find that Petitioner Districts do not have in place sufficient numbers of student supports, it would need to decide first which supports are required, and then decide how many of those supports a given district needs. With no objective standard to apply, the Court could not make these decisions without making subjective policy judgments, a task that is outside of the role of the judicial branch.

Contrary to their claims, moreover, each Petitioner District *is*, in fact, providing various student and school supports that go beyond the scope of a traditional education. For instance, Greater Johnstown employs nine behavioral interventionists and two full-time psychologists. Lancaster employs 34 counselors, 11 psychologists, and 20 student and family resource specialists. Wilkes-Barre

employs four psychologists and three truancy officers. The list goes on. *See, e.g.*, LR FOF ¶¶ 2177-2185.

ii. Class size

During the trial and in their post-trial submissions, Petitioners have pointed to allegedly large classes sizes in an effort to show that the Petitioner Districts are providing an ineffective education to their students. The Education Clause does not set a class size limit and there is no valid basis for creating one.

If Petitioners were hoping to prove that there are over-crowded classes in schools across the Commonwealth, they fell far short.

The class sizes in the Petitioner Districts are facially reasonable. Class size data shows that 76% of classrooms in Lancaster have 25 students or less. LR FOF ¶ 747. In Shenandoah Valley, the majority of classes in grades K to three have nineteen or fewer students per class. LR FOF ¶ 1020. Wilkes-Barre has notably low class sizes in its high schools – approximately 15 students per class. LR FOF ¶¶ 1142-1143. In William Penn's elementary schools, average class sizes are between 22.5 and 26.4 students per class. LR FOF ¶¶ 1264-1265.

Springfield Township School District ("Springfield Township"), which Petitioners have highlighted as a "high-spending" school district, has class sizes that are similar to the ones in the Petitioner Districts. Its class sizes averaged 20 to 22 students in grades K to two, 24 to 25 students in grades three to five, and 25 to 26

students in grades six to twelve. LR ¶ 1463. Accordingly, the evidence does not show that, in the Petitioner Districts, there is a widespread problem of large class sizes. And there is *no evidence* of large class sizes in other school districts across the Commonwealth.

iii. Pre-K

The 1874 version of the Education Clause referred to a system of public schools "wherein all the children of this Commonwealth above the age of six years may be educated[.]" Pa. Const. Art. X, § 1 (1874). In 1967, this language was amended. The references to children and the age of six were removed. They were replaced by a goal – the system of education must be designed "to serve the needs of the Commonwealth." There is nothing in the language or history of the Education Clause to indicate that the 1967 amendments were intended to make pre-K a constitutional requirement. Instead, whether public pre-K education should be implemented or expanded is a policy question for the General Assembly – and, in fact, Pennsylvania has recently made tremendous investments in pre-K programs. *See* LR FOF ¶¶ 1855-1864.

c. Outcomes should not be part of the Education Clause standard

The Court should not consider or use outcome data as part of the standard that it applies under the Education Clause because the Clause does not require the

General Assembly to ensure a certain level of student outcomes, and the use of outcomes would otherwise be unmanageable and inappropriate.

i. The Education Clause does not require the General Assembly to ensure a certain level of student outcomes

Under the Education Clause, the General Assembly is not required to ensure a certain level of student outcomes. As discussed throughout the trial and in Legislative Respondents' Proposed Findings of Fact, a variety of factors that exist outside of school heavily influence those outcomes. LR FOF ¶¶ 1671-1681; 1714-1723. By definition, therefore, Pennsylvania's public education system, in and of itself, cannot ensure that certain outcome levels will be met. To read the Constitution to say otherwise would be to create an illogical result, which is improper. *See Commonwealth v. Novak*, 150 A.2d 102, 109-10 (Pa. 1959) ("Constitutional provisions, like all laws, must receive a sensible and reasonable construction.")

Under the Education Clause, moreover, there is no textual basis for concluding that the General Assembly must ensure a certain level of outcomes. There is no mention of outcomes at all. In fact, the outcome measures that Petitioners highlight did not even exist when the Education Clause was adopted in 1967 (let alone in 1874, when the earlier version of the clause was adopted). In Pennsylvania, the first statewide standardized exam was not administered until two years after the voters adopted the 1967 amendments. LR FOF ¶ 1693. And, at that

point, standardized exams were not matched up with Pennsylvania state educational standards, which were not promulgated until the 1990s.

Petitioners and their *amici* do not identify any evidence to show that the voters in 1967 (or, for that matter, the voters or framers in 1874) believed that the Education Clause requires the General Assembly to ensure that students reach a certain level on any given outcome measure. Nor has Senator Corman found any such evidence. At most, in unsuccessfully arguing for an amendment to the Education Article that would have encouraged compulsory education, a delegate at the 1873 Convention suggested that an education should teach students to "read and write." *See, e.g.*, Hazzard, Vol. 7, at 684-685. Even if these remarks are reflective of the framers' intent (and there is no reason to believe that they are), there is nothing to suggest that, from their perspective, Pennsylvania's public education system would be unconstitutional if a certain number of students across the Commonwealth did not achieve a certain result on an outcome measure.

ii. Use of outcome data as part of the Education Clause standard would be unmanageable and inappropriate

There is no manageable way to use outcome data as part of the standard for assessing an Education Clause claim. Using outcome data would require the Court to decide which outcome measures should be used. Employing outcome data as part of the standard would require the Court to pick an outcome level (*e.g.*, a proficiency rate, growth score, or graduation rate) to determine whether or not Pennsylvania's

system of public education was meeting the standard. Both of these steps are fraught with problems and, if the Court undertook them, it would be acting as a super school board, setting educational policy for the Commonwealth.

As an initial matter, if the Court were to employ outcome data as part of the standard under the Education Clause, it would need to decide which outcome measure or measures to use. Making this choice would require the Court to make a policy judgment. For instance, the Court would need to determine whether standardized test scores, which are impacted by out-of-school factors, or student growth data, which more effectively isolate the impact of schools, should be used. The Court would be required to weigh and balance the importance and meaning of various outcome measures in order to determine which measure or measures to use.

Moreover, if the Court were to use outcome data as part of the test under the Education Clause, it would be required to either use an outcome goal that another entity had established (the General Assembly, PDE, State Board, or Petitioners) or create its own outcome goal – *e.g.*, that 95% of students must achieve a proficient or advanced score on standardized exams. There is not a viable basis for taking either of these approaches.

Our Supreme Court has already said that it would be inappropriate to constitutionalize the current standards. *William Penn II*, 170 A.3d at 450. As the Supreme Court explained, constitutionalizing the current standards would

essentially divest the courts of their function as interpreters of the law, and replace it with a metric that another branch of government had created. *Id.* And, of course, standards change. *Id.* Not to mention that using an existing outcome goal could create an incentive to make standards easier to satisfy, in order to ensure constitutional compliance.

Nor should the Court create its own outcome goal. Courts are not experts in the field of education and the Education Clause provides no guidance on appropriate levels of student outcomes. If the Court set its own outcome goal, it would be forced to make policy decisions.

d. If the Court considers outcomes, it should not give more weight to standardized achievement scores than other measures

To the degree that the Court uses outcome data to assess Petitioners' Education Clause claim, it should not give standardized achievement scores more weight than other measures. As with other outcome measures (other than growth), standardized achievement scores are impacted by a large number of out of school factors. LR FOF ¶¶ 1671-1681, 1714-1723. Moreover, placing too much weight on achievement scores would effectively constitutionalize the standards on which those scores are based, which our Supreme Court has already deemed improper. *William Penn II*, 170 A.3d at 450. Using achievement scores is also improper in light of the

design of the tests, *see* LR FOF ¶¶ 1724-1741, and the fact that they do not have a tangible impact on students. *See* LR FOF ¶¶ 1742-1749.[27]

For similar reasons, courts in other states have declined to adopt Petitioners' position that standardized achievement scores are a litmus test for constitutional compliance. For instance, Florida's Supreme Court, rejecting a position that was strikingly similar to Petitioners' position, stated as follows:

> Petitioners essentially ask this Court to constitutionalize the Legislature's own standards, which in part serve as goals. We reject that argument. In effect, Petitioners' argument is that a "high quality" system is whatever the Legislature says it is, so long as some acceptable—yet unknown—percentage of all subgroups of students achieve a satisfactory level of "3" on the assessment. Nothing in the language of article IX, section 1(a)[, Florida's Education Clause,] supports Petitioners' argument. Nor does this Court's case law. Moreover, as amicus Foundation for Excellence in Education logically points out, "adopting State standards as constitutional minima would have the perverse effect of encouraging the weakening of curriculum standards in order to achieve higher passage rates and to satisfy court-imposed requirements."

[27] The ability to use the outcome measures presented at trial to assess the constitutionality of the education system is also hindered by students who do not regularly attend school. The data presented at trial showed that approximately 17% and 28% of students attending the Petitioner Districts were habitually absent. Petitioners' own expert testified that students in lower wealth school districts have more students who are habitually absent. LR FOF ¶¶ 1847, 1849-50.

Citizens for Strong Schools, Inc. v. Florida State Bd. of Educ., 262 So.3d 127, 141-142 (Fla. 2019).

In sum, to the degree that the Court considers outcome data in assessing Petitioners' Education Clause claim, it should not place more weight on statewide standardized achievement scores than other outcome measures.

e. Various types of outcome data do not support Petitioners' case

Again, the Court should not use student outcome data as part of its standard under the Education Clause. To the degree that it does so, however, it should take a holistic view of student outcomes. For instance, it should consider student growth, graduation rates, NAEP scores, SAT and AP exam scores, CTE scores, student grades, and post-secondary activities. Each of these measures is addressed below.

***Growth*:** Under the Pennsylvania Public School Code, the General Assembly directed the Department of Education to make "[v]alue-added assessment system data" publicly available on its website. *See* 24 P.S. § 2-221. The value-added assessment system refers to "a statistical analysis of results on the [PSSA exams or other similar Pennsylvania exams] . . . that uses measures of student learning to enable the estimation of school or school district statistical distributions." *Id.* The Department has fulfilled this obligation by making Pennsylvania Value-Added Assessment System (or PVAAS) data publicly-available on its website.

PVAAS data constitutes an objective, accurate way to measure student academic growth and, relative to other forms of outcome data, is a better way to measure the influence that Pennsylvania's public school districts, schools, and teachers have on students' educational experiences. As the Department has explained, while standardized achievement scores are "often affected by factors outside the school," PVAAS scores are "dependent upon what happened as a result of schooling." LR FOF ¶ 1763. In particular, PVAAS scores "measure the impact of educational practices, classroom curricula, instructional methods, and professional learning on student achievement." *Id.* Value-added measures like PVAAS "remove the effects of factors not under the control of the school." LR FOF ¶ 1764. Accordingly, in assessing Pennsylvania's system of public education, it would be logical for the Court to emphasize the lone outcome measure that isolates the impact of schools and controls for out-of-school factors.

In fact, even though Petitioners' case is largely based on the use of achievement scores, several of their own witnesses agreed during the trial that value-added models are a better measurement of the relative quality of schools than standardized achievement scores. *See* LR FOF ¶¶ 1768-1773.

Based on PVAAS growth data, the Petitioner Districts are doing relatively well. Although their growth data is not universally favorable, this data, taken as a whole, helps to show that they are providing their students with a quality education.

See LR FOF ¶¶ 1775-1784. Petitioners, moreover, did not demonstrate that, based on PVAAS data, large numbers of Pennsylvania school districts are not performing well.

Graduation rates: In taking a holistic view of outcome data, the Court should also look at graduation rates. Petitioners' own expert, Dr. Belfield, equated graduating from high school with receiving an adequate education. LR FOF ¶ 1790. As set forth in Legislative Respondents' Proposed Findings of Fact, LR FOF ¶¶ 1785-1822, in public school districts across the Commonwealth, graduation rates are increasing and currently at their highest reported levels. Moreover, the graduation rates for various student sub-groups, including economically-disadvantaged students, English-language learner students, and special education students, have been on the rise. And, at both the overall level and the individual student group level, Pennsylvania has met – and exceeded – the rigorous graduation rate goals that PDE set forth in its ESSA Plan.

Student Grades*:* Likewise, the Court should look at student grade data. Grades are an important piece of information for students, parents, and post-secondary admissions officers. A review of student grade data that Legislative Respondents introduced shows that students who attend the Petitioner Districts are doing well academically. *See* LR FOF ¶¶ 1823-1832. Petitioners, for their part, did not introduce *any* data related to student grades and therefore failed to demonstrate

that, based on grade data, large numbers of Pennsylvania school districts are not performing well.

Other Exam Scores: Although Petitioners argue that, under the Education Clause, the Court should use standardized achievement scores to assess a claim, they argue that it should ignore other types of exam scores. Pets. Br. at 62, n. 19. This position is illogical.[28] In truth, Petitioners want the Court to ignore national test scores, like scores on the NAEP, SAT, AP, and NOCTI exams, because these scores show that Pennsylvania students are doing well as compared to students in other states. For instance, Pennsylvania's students have never scored below the national average on any reading or math NAEP exam. Their scores on the NAEP exams are almost always significantly higher than the national average. Moreover, Pennsylvania's NAEP exam scores have improved over time, relative to the other states. LR FOF ¶¶ 463-465, 469-470.

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[28] Nor is this position supported by the caselaw that Petitioners cite in their brief. For instance, Petitioners cite to the New Mexico State District Court's opinion in *Martinez v. New Mexico* thirteen times in their brief – most notably in support of their argument that this Court should review outcome data. Yet, when that court reviewed outcome data, it *did* make national comparisons. *See Martinez*, No. D-101-CV-2014-00793, 2018 WL 9489378 at *16 (N.M. Dist. Ct. July 20, 2018) ("New Mexico children rank at the very bottom in the country for educational achievement."); *id.* at *18 ("New Mexico continues to have one of the lowest high school graduation rates in the country.").

The story is similar for SAT and AP exam scores. As a whole, Pennsylvania test takers score above the national average on the SAT. Pennsylvania test takers whose first language is not English, or who are bilingual, also achieve SAT scores that are above the national average. Likewise, Pennsylvania test takers whose parents have lower levels of education have a higher average SAT score than the same group of students nationwide. With regard to AP exam scores, Pennsylvania has the sixth highest scores in the nation. LR FOF ¶¶ 471-479.

The results of the NOCTI assessments that have been administered to Pennsylvania's CTE students also show significant improvement. Between 2006 and 2017, the percentage of Pennsylvania's CTE students who scored competent or above on NOCTI and similar assessments increased by 29%. As of 2017, 84% of Pennsylvania CTE students scored competent or above on these assessments. LR FOF ¶ 485.

Other Future Ready Index Metrics: As part of its movement away from an over-reliance on standardized test scores, the Department of Education publishes several other school district metrics on its Future Ready PA Index. These metrics include, for instance, the "Career Standards Benchmark," the "Rigorous Courses of Study" indicator, and the "Postsecondary Transition to School, Military, or Work" indicator. A review of the "Career Standards Benchmark" data for the Petitioner

Districts shows that these districts are providing their students with significant career readiness experiences. *See* LR FOF ¶¶ 1833-1835.

Similarly, according to Petitioners' own expert, 57.5% of students in Pennsylvania have enrolled in "Rigorous Courses of Study." Even among what Petitioners' expert claimed to be the poorest students, over 54% of the students have enrolled in these types of courses. LR FOF ¶¶ 1836-1837.

While the "Postsecondary Transition to School, Military, or Work" indicator embodies some notable data limitations,[29] the results are still positive. Based on data that Petitioners' own expert witness presented during the trial, the statewide average for the "Postsecondary Transition to School, Military, or Work" indicator is 82.8%. Even among what Petitioners claim to be the two poorest groups of school districts, between 77.6% and 79.6% of students were making a postsecondary transition to school, military, or work. LR FOF ¶¶ 1838-1841. Similarly, Pennsylvania's post-secondary attainment rate has been increasing. LR FOF ¶¶ 1900-1908. Pennsylvania has already met its post-secondary attainment goal for residents holding a bachelors degree or higher. LR FOF ¶ 1908.

V. Causation

[29] For instance, the National Student Clearinghouse undercounts college enrollment, particularly among economically-disadvantaged students. Likewise, the workforce data include only individuals who work in Pennsylvania and do not work for a family business. Accordingly, this metric does not reflect the full number of students who make a postsecondary transition to school, military, or work.

Separately, Petitioners' Education Clause and Equal Protection claims fail because they failed to prove causation.

It is black letter law that, in order to substantiate a claim, a Petitioner must establish that a Respondent's behavior caused the injury that he alleges. *See, e.g.*, *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469 (Pa. 1994) (a plaintiff "must show causation of the harm to his interest by the matter of which he complains") (internal quotation omitted). "The requirement that an interest be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975).

Petitioners failed to establish that a lack of funding is what caused any of the alleged deficiencies that they identify. As a corollary, they failed to establish that the Petitioner Districts, or any other school districts in Pennsylvania, are spending money in a cost-effective manner. Petitioners had the burden of proving causation and failed to carry it.

a. Petitioners' claims fail because they have not established that a lack of funding caused any alleged deficiency

There is no clear and consistent relationship between student outcomes and school spending. Instead of relying on direct evidence about the vast majority of Pennsylvania school districts or other LEAs, Petitioners' claims are predicated on standardized achievement scores, and some other limited "outcome" data.

According to Petitioners, achievement scores are a proxy for whether or not a student is receiving an adequate educational opportunity. For the reasons discussed above, *infra* Section IV(c), this stance is misguided. Even if standardized achievement scores *could* be used to assess whether a school district is providing a constitutionally-sufficient education to its students, in order for Petitioners' claims to be meritorious, they would need to establish a causal relationship between school funding and student outcomes. They would need to prove, in other words, that the *reason* why some school districts have students with sub-par achievement scores is *because* they do not have enough funding, and that with increased funding, the achievement scores would improve.

However, the evidence does not support this proposition. In fact, as the expert testimony during the trial confirmed, this very issue has been studied hundreds of times and the studies have repeatedly failed to show a clear and consistent relationship between school spending and student achievement. Even Petitioners' own expert witnesses agree that the issue has been studied extensively and that the conclusion in the 1966 Coleman Report – that there is no clear relationship between school spending and student success – has been widely upheld. LR FOF ¶¶ 2208-2216.

While Petitioners' expert Dr. Johnson claimed that his study of hypothetical spending has undermined the Coleman Report, this study does not prove the

existence of a causal relationship between school spending and student success. Not only does Dr. Johnson's study reach a result that is different from the bulk of other studies on the subject, but it also has a variety of methodological flaws, which were highlighted during the trial. LR FOF ¶¶ 2220-2245. Perhaps most important, however, is that Dr. Johnson's study is not based in reality. It relied on "predicted" spending by school districts, rather than actual spending. And he confirmed that this approach generated "significantly different results" than what he would have obtained if he "used actual rather than predicted" spending increases by schools. LR FOF ¶ 2239. While Dr. Johnson's study determined that a 20% increase in school funding would close the outcome gap between poor and non-poor students, this result simply has not materialized in reality, even though school funding has increased by 150% over the past forty years. LR FOF ¶¶ 2224-2229. Unlike Dr. Johnson's study, Pennsylvania's school system does not exist in a computer simulation that pertains to hypothetical spending.[30] It operates in the real world.

In contrast, Dr. Koury's analysis used Pennsylvania's own data to address the relationship between school spending and student success in the Commonwealth. Dr. Koury's results were directly in line with the vast majority of similar studies on the same subject. In sum, through his analysis, Dr. Koury did not identify any

[30] In their brief, Petitioners use a similar tactic, only referring to "needs adjusted spending," rather than actual spending numbers. Pet. Brief 46, 77

relationship between school spending and student success as measured by district growth scores, even when controlling for demographics and adjusting for regional cost-of-living differences. *See* LR FOF ¶¶ 2246-2275.

At most, through their experts, Petitioners established that there is an active and ongoing debate about the impact of school funding on student success. They failed to meet their heavy burden of proof on this issue.

b. Petitioners failed to establish they are spending their funding in a cost-effective manner

Petitioners failed to show that a lack of funding, rather than ineffective management, is what caused any of the alleged problems at their school districts, or at any other school district or LEA across the Commonwealth. Petitioners acknowledge, as they must, that subpar educational opportunities may result from "local mismanagement," even where a district has sufficient resources. *William Penn II*, 170 A.3d at 447. Likewise, at trial, there was wide agreement that the manner in which funding is spent matters significantly. *See* LR FOF ¶¶ 2321-2325. Nobody on either side of the causation debate has argued, with any credibility, that additional funding will lead to improved student results *no matter how it is spent*.

In order for this Court to find that a lack of education funding has caused any alleged deficiencies in Pennsylvania's system of public education, it must first determine that the relevant funding is being spent in a cost-effective manner. Petitioners, who have the burden of proof, must establish that the school districts

that are allegedly providing constitutionally-deficient educational experiences have undertaken all plausible cost-saving measures.

Petitioners failed to make any such showing. Instead, they introduced direct evidence about only nine out of 500 school districts in Pennsylvania – one of which believes that it is providing an adequate education to its students. There is no evidence in the record regarding the spending decisions of any school districts other than the Petitioner Districts, SDP, Otto-Eldred, and Springfield Township. Furthermore, as explained below, *supra* Section VII, there is no evidence in the record showing that Petitioner Districts, SDP, and Otto-Eldred are representative of other Pennsylvania LEAs. *See* LR FOF ¶¶ 2332-2340. Likewise, PDE has never studied how school districts are spending their funding. *Id.* at ¶ 2327. The dearth of evidence on this critical issue is fatal to Petitioners' facial challenge to Pennsylvania's system of public education.

Although, during the trial, Petitioners presented some anecdotal evidence about cost-saving measures that their school districts took, that evidence is more than offset by contrary evidence in the record, which shows that the Petitioner Districts have not taken all plausible cost-saving measures (quite the opposite). *See* LR ¶¶ 2342-2347.[31] It is not for the Court to decide how the Petitioner Districts

[31] Petitioners attempt to head-off this issue by arguing that, if the Petitioner Districts failed to spend their funds in a cost-effective manner, it is *the General Assembly's fault* for not supervising them appropriately. Pets. Brief at 55. But it is

should spend their funding, or to evaluate the wisdom of those expenditures. But Petitioners cannot credibly claim that it was the General Assembly who caused them to experience deficiencies when their *own spending practices* prevented them from obtaining things that they claim to need.

VI. Pennsylvania's System of School Funding is Rational

a. It is not irrational for the General Assembly to refrain from following a costing-out study

Petitioners maintain that, in deciding how to fund Pennsylvania's system of public education, the General Assembly must first determine how much it costs to provide an "adequate education," or how much it costs to provide an education that would permit students to meet Pennsylvania state academic standards. Then, they say, the General Assembly should direct that amount of money into the system. In essence, Petitioners assert that the General Assembly should, but does not, follow a costing-out study, which makes the system irrational and unconstitutional (under

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Petitioners – not the General Assembly – who claim that the Petitioner Districts need additional funding in order to offer their students a constitutionally-sufficient education. It would be nonsensical to conclude that the General Assembly must ensure that Great Johnstown spends its funding on an additional social worker instead of new stadium lights. *Neither* one of those things is constitutionally required, and it is Greater Johnstown who claimed that it needs more student supports and, at the same time, decided to spend money on stadium lights. The General Assembly has given school districts wide latitude to set their spending priorities in accordance with the wishes and priorities of their local constituents.

equal protection principles and, presumably, under the Education Clause as well). This position is misguided.

As a primary matter, Petitioners' argument rests on the flawed premise that there is a causal relationship between school funding and student outcomes. As discussed above, *see* Section V, there is no clear or consistent causal relationship between these two things.

Even if it were otherwise, there is no evidence that a costing-out study can be used to determine and define the contours of this type of relationship. As the evidence shows, costing-out studies are based on faulty methodologies and have no basis in science. *See* LR FOF § IV(F). It is certainly not irrational for the General Assembly to refrain from conducting or following this type of study.

b. Hold harmless is rational

Petitioners, including PARSS, also claim that Pennsylvania's school financing arrangement is irrational and constitutionally-deficient because of what they call the system's "hold harmless provisions." Pets. Br. at 41. Indeed, without even a shade of circumspection, they label the system's "hold harmless provisions" as the system's "most obvious irrationality." *Id.* Yet, after filing this case, PARSS *made the opposite argument* before the Basic Education Funding Commission during the commission's public hearings that led to the creation of the Fair Funding Formula. PARSS and leaders from rural school districts testified in *favor* of hold

harmless because, as they explained, removing it from the school financing arrangement could have devastating impacts on certain school districts. LR FOF ¶¶ 292-294. It is common for states to use hold harmless systems, in order to prevent sudden changes in funding levels that would harm school districts. LR FOF ¶¶ 290-291. Sudden declines in funding levels, for example, can hinder districts from satisfying long-term payment obligations that they incurred with the reasonable expectation that those declines would not occur.

Moreover, Petitioners continue to ignore the fact that, as more time passes, a larger percentage of Basic Education Funding goes through the Fair Funding Formula, *i.e.*, the portion of the Act 35 formula that accounts for poverty levels, household income, and tax revenue, among other factors. 24 P.S. § 25-2502.53. Petitioners also ignore the "Level-Up" funding that the General Assembly appropriated during the 2021-2022 fiscal year. After the Level-Up funding provisions were enacted, the previous base allocations (*i.e.*, "hold harmless" amounts) were revised and an additional $100 million was allocated to the base allocations for 100 school districts, including all of the Petitioner Districts. LR FOF ¶ 253. Thus, not only does a larger percentage of funding go through the Fair Funding Formula over time, but the hold harmless amounts were upwardly revised, benefitting Petitioner Districts and similarly-situated school districts all across the Commonwealth.

VII. The Handful of School Districts that Petitioners Featured During the Trial are not Representative of Any Other Pennsylvania School Districts in the System of Public Education

Having failed to present direct evidence about the educational offerings and conditions that exist in the overwhelming majority of Pennsylvania's school districts, Petitioners failed to meet their "very heavy burden of persuasion" for their claims and this Court should therefore enter judgment in favor of Respondents.

Petitioners are asserting "facial" challenges to Pennsylvania's school financing arrangement. They are *not* asserting "as-applied" challenges, meaning that they are not arguing that the Commonwealth's statutes are unconstitutional as applied just to them, specifically, but instead that the statutes are unconstitutional in all of their applications, across the entirety of Pennsylvania. *See, e.g., Nigro v. City of Philadelphia*, 174 A.3d 693, 699-700 (Pa. Cmwlth. 2017) (noting that "an as-applied attack…does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right"). This point is evident in the fact that Petitioners are seeking relief that would alter the school financing regime as it applies across the entire Commonwealth. *See* Petition ¶¶ 93-94, 157. Our Supreme Court acknowledged this point when it remanded the matter to this Court. *See William Penn II*, 170 A.3d at 425 ("Petitioners aver that Pennsylvania's school funding system is flawed on its face . . . .").

Against this backdrop, this Court conducted a trial to enable the parties to illuminate the *effects*, factually, that Pennsylvania's statutory regime is having across the Commonwealth. In other words, the question is whether, from a factual perspective, the statutory regime is having the real-world effect of causing many public schools across the Commonwealth to provide their students with a constitutionally deficient education. Petitioners did not carry their "heavy burden of persuasion" because they failed to present direct evidence regarding the real-world conditions that exist in the vast majority of Pennsylvania's school districts. *See PAGE*, 877 A.2d at 393 (person who asserts constitutional challenge to statutory regime has a "very heavy burden of persuasion").

During the trial, Petitioners presented direct, first-hand evidence regarding facts and circumstances that exist in only nine Pennsylvania school districts: the Petitioner Districts, SDP, Otto-Eldred, and Springfield Township. They did not present any direct, first-hand evidence regarding the facts and circumstances that exist in the remaining 490 Pennsylvania school districts. Having failed to present this evidence for a full 98% of the Commonwealth's school districts, Petitioners failed to demonstrate a "*systemic* inability of *many* school districts" to provide their students with a constitutionally adequate educational experience, *see William Penn II*, 170 A.3d at 447 (first emphasis in original; second emphasis added), and therefore judgment should be entered against them.

Legislative Respondents have *never* agreed that the facts and circumstances that pertain to the Petitioner Districts, SDP, Otto-Eldred, or Springfield Township are representative of the facts and circumstances that pertain to any other school district in the Commonwealth. They are not. Each school district in Pennsylvania is locally-run by its own independent board of school directors. 24 P.S. § 3-301, *et seq*. Each school district has its own budget and spending priorities, personnel, curriculum, facilities, community, and resources.

As Judge Pellegrini explained in *PARSS v. Ridge*, 11 M.D. 1991 (Pa. Cmwlth. July 9, 1998), the conditions in one school district "cannot be applied" to another one as though the two districts are the same, because each district has different priorities:

> As to the conditions that exist in poor school districts, while the testimony was illustrative of specific conditions in specific school districts, no coherent picture emerged from the evidence that any of the problems experienced by any one district was universal as to the ten representative districts, let alone to the Commonwealth's 501 school districts.
>
> One reason for the lack of coherence is that ***conditions in one representative district cannot be applied to another because each school district has different priorities***: one district may place a greater emphasis on school facilities than on school books and computers; another may place emphasis on retaining the best possible staff causing them not to spend as much on facilities. Compounding that problem was that a comparison of choices that school districts made was not presented consistently from district to district. PARSS understandably placed the emphasis on

> what was "bad" in those districts, leaving gaps in the data, e.g., although there was testimony that school books were outdated in one district, no testimony was given about the status in the other poor districts or, for that matter, the wealthy districts.
>
> Simply put, there is no common data set that compares conditions in one representative school district to those in another representative school district, let alone that would provide a basis for conclusions about what conditions exist in the roughly 490 other school districts in Pennsylvania. Other than a study of curriculum offered by PARSS and a study for the Commonwealth concerning the correlation between spending and outcomes on standardized tests, no testimony was offered as to what conditions exist in education statewide. There is simply insufficient evidence to even address how funding affects education in all of the 501 school districts in the Commonwealth.

Id. at pp. 66-67 (emphasis added).

By focusing on a handful of school districts, Petitioners ignore the General Assembly's duty, which is to create a "system" of public education to "serve the needs of the Commonwealth." Pa. Const. Art. III, § 14. As our Supreme Court recognized, by enacting the "the Public School Code of 1949[,] the General Assembly provided a comprehensive system to meet the educational needs of the citizens of this Commonwealth." *Pennsylvania Labor Relations Bd. v. State College Area School Dist.*, 337 A.2d 262 (Pa. 1975); *see also Carroll v. Ringgold Educ. Ass'n*, 652 A.2d 417, 419 (Pa. Cmwlth. 1994) (Public School Code was enacted in furtherance of General Assembly's duty to create a system of public education).

When faced with similar facts, courts in other states have reached the same conclusion. In *Connecticut Coalition for Justice in Education Funding*, for example, the Connecticut Supreme Court concluded that the plaintiffs' evidence that pertained to select schools was insufficient to establish that the state's system of education funding was unconstitutional. 176 A.3d at 68. The plaintiffs presented evidence that a handful of schools could not fill teaching positions without using substitute teachers who, in many cases, were unfamiliar with the subjects that they were teaching, and that other schools did not have a budget allocation for textbooks. The court concluded that this evidence was insufficient, reasoning in part that "[a]lthough it may be cause for concern that a school district or a school has filled a small number of teaching positions with substitute teachers for a specified period, that fact does not compel the conclusion that the overall level of teaching in the district or school is inadequate." *Id.*.

In South Dakota, similarly, plaintiffs who were challenging the state's school funding system presented evidence of deficiencies in six "focus" districts, out of the state's 161 school districts. *Davis v. State*, 804 N.W.2d 618, 628, 633 n. 29 (S.D. 2011). The State, for its part, presented a witness who had toured more than 100 of South Dakota's districts and testified that the conditions in the six "focus" districts were not representative of the conditions in other districts across the state. *Id.* at 636. The South Dakota Supreme Court concluded that the plaintiffs did not meet

their burden of proof. Although the plaintiffs showed that "some groups of students are not achieving at desired levels and that some districts struggle to provide adequate facilities and qualified teachers[,]" this evidence did not support a conclusion that, as a whole, the education funding system was unconstitutional. *Id.* at 641.

This reasoning applies with equal force here. The facts and circumstances that pertain to the Petitioner Districts, SDP, Otto-Eldred, and Springfield Township "cannot be applied" to any other school district in the Commonwealth, because each district has different priorities and features. The result is that Petitioners failed to present any direct evidence about the educational conditions that exist in the vast majority (98%) of Pennsylvania's school districts, and "[t]here is simply insufficient evidence to even address how funding affects education in all of" those districts. *See PARSS*, at 67. Instead of presenting evidence about what is happening in the vast majority of school districts, Petitioners rely exclusively on limited outcome measures that they presented in a generalized manner – typically by unidentified "quintiles" of school districts in which SDP makes up about half of the quintile with the highest poverty level. However, these generalized outcome measures are insufficient to understand what is happening in any particular school district, or group of school districts, in Pennsylvania.

Lacking evidence to respond to this reasoning, Petitioners point to a single statement that Executive Respondents' counsel made during her closing argument at trial. Quoting from that closing argument, Petitioners assert that, "as PDE acknowledged, the 'conditions and experiences' of Petitioners and Philadelphia 'are representative of many of the under-resourced schools throughout the Commonwealth.'" Petitioners' Proposed Findings of Fact ("Pet. FOF") ¶ 476.[32] But this statement is not evidence; it is only argument. *See Commonwealth v. LaCava*, 666 A.2d 221, 231 (Pa. 1995) ("[I]t is well settled in the law that attorneys' statements or questions at trial are not evidence.").

And, in any event, the statement is entirely unsubstantiated by the evidence of record. No witness made a statement of this sort during the trial and no documentary evidence of record supports it. This point is reinforced, of course, by the fact that Petitioners are attempting to rely on an argument from Executive Respondents' counsel, rather than actual evidence. The Court should therefore simply disregard it.

Moreover, given that Petitioners are challenging the *system* of public education in Pennsylvania, it is also appropriate to look at some of the achievements

[32] Executive Respondents' counsel did not explain how she or her clients arrived at this conclusion, state how she or her clients define an "under-resourced school," or identify which "under-resourced schools" she or her clients believed were represented by the Petitioner Districts and SDP.

of that system. As set forth in Legislative Respondents' Proposed Findings of Fact, the system has numerous admirable qualities. *See* LR FOF §§ III, V. For the reasons stated above, Petitioners failed to substantiate their facial challenges to the Commonwealth's statutory school financing arrangement.

VIII. Equal Protection

a. Petitioners' Education Clause and Equal Protection claims are intertwined

Because Petitioners have failed to prove that, under the Education Clause, students across the Commonwealth have been deprived of a constitutionally-sufficient education, their equal protection claim also fails.

In pleading their equal protection claim, Petitioners allege that students in low-wealth school districts are denied an equal opportunity to obtain "an adequate education." Petition ¶¶ 308, 310. Their Brief makes the same claim. Pets. Brief at 42-46. Therefore, in order to prevail on their equal protection claim, Petitioners must first establish that someone in Pennsylvania has been deprived of an opportunity to obtain an adequate education – *i.e.*, that the Education Clause has been violated.[33]

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[33] In the *PARSS v. Ridge* case, Judge Pellegrini recognized this point as a logical outflow of pleading Education Clause and equal protection claims in the way that Petitioners have pled them. 1998 Pa. Commw. Unpub. LEXIS 1, at *148-49. In the instant matter, the Attorney General recognized the point as well, while he was serving as counsel to the Executive Respondents and State Board. *See* Brief of Executive Respondents and State Board in *William Penn School District, et al. v.*

For the reasons stated above, *infra* Section IV, Petitioners have failed to make such a showing. As a result, they have likewise failed to substantiate their equal protection claim.

In the event that the Court nevertheless uses a traditional equal protection framework to evaluate Petitioners' equal protection claim, the claim still fails, as explained below.

b. Standard for equal protection claims

Article III, Section 32 of the Pennsylvania Constitution provides, in pertinent part, that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law[.]" Pa. Const. art. III, § 32. This clause provides for "equal protection under the law[,]" meaning "that like persons in like circumstances will be treated similarly." *Curtis v. Kline*, 666 A.2d 265, 267 (Pa. 1995). "However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs." *Id*.

Pennsylvania Department of Education, et al., 46 MAP 2015, (Nov. 11, 2015), at 31-35 (filed in Pennsylvania Supreme Court by Pennsylvania Attorney General).

Equal protection principles come into play when the state takes an action that creates a classification of individuals who, as a group, are treated differently than other, similarly-situated individuals. *See James v. Southeastern Pa. Transp. Auth.*, 477 A.2d 1302, 1305-06 (Pa. 1984). As a general rule, if the classification involves a "suspect class" or burdens a "fundamental" right, the state action is valid if it satisfies the strict scrutiny test, meaning that its object is a compelling governmental interest and the classification is necessary to serve that interest. *See William Penn II*, 170 A.3d at 458. If the classification involves a "sensitive" class or burdens an "important" right, the state action is valid if it satisfies the intermediate scrutiny test, meaning that its object is an important governmental interest and the classification is "closely related" to serving that interest. *See James*, 477 A.2d at 1307; *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988). And, if the classification is of any other type, the state action is valid if it satisfies the rational basis test, meaning that its object is a legitimate governmental interest and the classification is reasonably related to serving that interest. *See Probst v. Commonwealth Dep't of Transp., Bureau of Driver Licensing*, 849 A.2d 1135, 1144 (Pa. 2004).

This case involves only an allegation of a classification that affects a group's constitutional right to an education—it does not involve an allegedly suspect or sensitive class of people. *William Penn II*, 170 A.3d at 458; LR COL ¶ 2445. Therefore, identifying the applicable level of scrutiny involves determining whether

Petitioners have a right to a particular level of education, and, if so, how that right should be categorized for purposes of the equal protection analysis.

After determining the level of scrutiny to be applied, the Court should examine the state action at issue (in this case, the General Assembly's enactment of the public education funding regime) and determine whether it passes constitutional muster under that standard.

c. Pennsylvania's Education Clause does not confer a right to an education

Under Pennsylvania law, there is not a fundamental right to an education because the Constitution does not confer *any* right to an education.

As a threshold point, simply because something is "important" does not mean that it is a fundamental right. As one example, although holding and using property is undoubtedly important, this Court has concluded that it is not a fundamental right. *McSwain v. Commonwealth*, 520 A.2d 527, 530 (Pa. Cmwlth. 1987). Instead, "[f]undamental rights generally are those which have their source in the Constitution." *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1118 (Pa. 2014); *see also James*, 477 A.2d at 1306 ("The question, therefore, as to whether the notice classification affects a fundamental right is to be determined by whether the right affected . . . is to be found in the Constitution.").

In construing the Constitution to determine whether it confers a given right, "the fundamental rule of construction which guides us is that the Constitution's

language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Ieropoli*, 842 A.2d at 925. "A constitution is not to receive a technical or strained construction, but rather the words should be interpreted in their popular, natural and ordinary meaning. We should also consider the circumstances attending its formation and the construction probably placed upon it by the people." *Commonwealth v. Harmon*, 366 A.2d 895, 897 (Pa. 1976).

Here, a review of the Pennsylvania Constitution's text and history, along with decisional law from other states, reveals that, contrary to what Petitioners assert, there is not a fundamental right to an adequate education. Rather than conferring a right to an education, the Constitution imposes a duty on the General Assembly to support and maintain a system of education.[34]

Taking account of these principles, the Court should review the text of the Constitution, the Constitution's history, and decisional law from other states to

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[34] Courts in other states have recognized that courts evaluating fundamental rights under state constitutions should apply a different analysis than courts evaluating such rights under the federal constitution because of the inherent differences between the state and federal constitutions. As one court explained, the federal constitution and state constitution "are drafted from discretely different constitutional perspectives. The Federal Constitution is one of delegated powers and specified authority; all powers not delegated to the United States or prohibited to the States are reserved to the States or to the people." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366 n.5 (N.Y. 1982); *see also McLinko v. Commonwealth*, 270 A.3d 1243, 1261 n.24 (Pa. Cmwlth. 2022) ("Congress is bound by the list of enumerated powers set forth in the United States Constitution; the General Assembly is not so bound.").

determine whether, as Petitioners assert, children in Pennsylvania have a fundamental right to an adequate education under Pennsylvania's Constitution. An analysis of these factors shows that the Constitution does not create a right to an education.

i. Language and structure of the Education Clause

The analysis regarding whether there is a fundamental right to an education starts with the Constitution's plain language. *See Ieropoli*, 842 A.2d at 925.

Based on its plain language, the Education Clause imposes a duty on the General Assembly to provide for the maintenance and support of a system of public education. It states, in particular, that "[t]he *General Assembly shall*" take these steps. *See* Art. III, § 14 (emphasis added). And it provides that the system must be thorough, efficient, and serve the needs of the Commonwealth. *Id*. The Constitution leaves the specifics of how to accomplish this duty to the General Assembly.

Importantly, the Education Clause does *not* expressly grant any rights to anyone. It does not mention any particular person or group at all, including children, minors, or people living in poverty. Rather, the Education Clause is directed at our legislature, giving it the duty to provide for the maintenance and support of a system of public education.

In this way, the Education Clause's language is unlike the language of provisions in our Constitution that *do* confer rights. Those provisions, as a general

matter, make an express reference to the people who hold the right and then identify the nature of the right. *See, e.g.*, Pa. Const. Art. I, § 1 ("*All men* are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."); *id.* at § 2 ("All power is inherent in *the people*, and all free governments are founded on *their* authority . . ."); *id.* at § 4 ("*No person* . . . shall, on account of *his* religious sentiments, be disqualified to hold public office . . . ."); *id.* at § 7 (" . . . *every citizen* may freely speak, write and print on any subject. . . ."); *id.* at § 9 ("In all criminal prosecutions *the accused* hath a right to be heard . . . ."); *id.* at § 14 ("*All prisoners* shall be bailable by sufficient sureties . . . ."); *id.* at § 23 ("No soldier shall in time of peace be quartered in any house without the consent of *the owner*. . . .") (emphasis added).

In contrast, the Education Clause does not refer to any group of people who have rights in connection with the system of public education that the General Assembly is obligated to maintain and support. *Costa v. Cortes*, 142 A.3d 1004, 1010 (Pa. Cmwlth. 2016) (citing *Booth & Flinn v. Miller*, 85 A. 457, 459 (Pa. 1912)) ("[T]he various principles of statutory construction apply with equal force in interpreting the Pennsylvania Constitution."); *Shawnee Development, Inc. v. Commonwealth*, 799 A.2d 882, 888 (Pa. Cmwlth. 2002) (stating that "a change of

language in different sections of a statute is prima facie evidence of a change of intent"). *See also Harmelin v. Michigan*, 501 U.S. 957, 978 n. 9 (1991) (explaining that, when two constitutional provisions "use different language to address the same or similar subject matter, a difference in meaning is assumed"). It refers only to the General Assembly and its duty to establish the system of education. Likewise, the Education Clause does not identify the nature of any right that anyone holds.

The fact that the Education Clause is located in Article III of Pennsylvania's Constitution provides additional support for the conclusion that the clause does not confer any rights. Most provisions of the Constitution that confer individual rights are found in Article I, which is aptly titled the "Declaration of Rights." *See* Pa. Const. Art I. In contrast, Article III is titled "Legislation," and it sets forth the procedures for enacting legislation and otherwise addresses the manner in which the General Assembly operates. *See generally* Pa. Const. Art. III; *Compare Robinson Tp., Washington Cnty v. Com.*, 83 A.3d 901, 947 (Pa. 2013) ("Article I is the Commonwealth's Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such general, great and essential quality as to be ensconced as inviolate.") *with Stilp v. Com.*, 905 A.2d 918, 951 (Pa. 2006) ("Article III can be viewed as a constellation of constitutional requirements that govern various aspects of the legislative enactment procedure. . . . The Constitutional Convention of 1872-73 was convened to reform corrupt

legislative behavior, and to this end, the result was the constitutional strictures contained in Article III.") (quotation omitted).

Notably, in two of the extra-jurisdictional cases that Petitioners cite, *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) and *Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606, P.2d 310 (Wyo. 1980), the applicable state constitution *does* include an express right to education in its declaration of rights. N.C. Const. Art. I, § 15; Wyo. Const. Art. I, § 23.

In sum, based on its text and structure, the Pennsylvania Constitution does not confer any right to an education.

ii. History

Reviewing the history of the 1967 amendments to the Education Clause confirms that the clause does not give any particular person or group a right to an education. The 1967 amendments *removed* the prior references to "children" and people who were aged over "six years." *See supra* Section II(a). In this way, the 1967 amendments changed the focus of the Education Clause from establishing a system of education for Pennsylvania's children to meeting "the needs of the Commonwealth." By removing the reference to children, the 1967 amendments confirmed that the Education Clause is not intended to create a right to a public

education.[35] *Clearwater Construction, Inc. v. Northampton County General Purpose Auth.*, 166 A.3d 513, 521 (Pa. Cmwlth. 2017) ("We have held that the legislature's deletion of statutory language renders the language inoperative and indicates that the legislature has admitted a different intent.").

The former Education Clause defined the population for which the General Assembly was to provide a system of public schools. The current version does not. The former version had a minimum appropriation requirement. The current version does not. Under the former version, the purpose of the system of public schools was to educate children aged six and above. Under the current version, the purpose of the system is to serve the needs of the Commonwealth. The former version, in other words, was more akin to the rights-conferring constitutional provisions, referenced above, that make an express reference to the people who hold a right and identify the nature of the right. The current version does not contain the same type of language.

Tellingly, in their brief, Petitioners simply ignore these changes to the constitutional text. In fact, in the section of their brief purporting to analyze the Constitution's text, Petitioners *misstate* the text and claim that the Education Clause contains an "explicit mandate" to "provide *all children* with a 'thorough and

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[35] Of course, while there is no constitutional right to an education, which is the controlling point here, the General Assembly has created a *statutory* right to a public education for Pennsylvania residents aged 6 to 21. 24 P.S. § 13-1301.

efficient' system of education." *See* Pets. Brief at 66 (emphasis added). Petitioners' textual argument is facially inaccurate and appears to be based on the *former* text of the Education Clause. The Education Clause no longer contains the express mandate that Petitioners highlight in their Brief – and this important change has meaning and must be given force and effect. *Clearwater Construction, Inc.*, 166 A.3d at 521.

Likewise, the reference to "public schools" was also stricken and "public education" replaced it. The obligation to maintain public schools, as they were understood in the 19th Century, is not preserved by deletion. The General Assembly now has discretion to consider other ways and means of effectuating public education. And the public to be educated includes potentially all citizens, from childhood to old age. Petitioners' argument for a constitutional right of childhood education would apply equally to all adults seeking post-secondary education or career retraining.

iii. Pennsylvania caselaw

In applying Pennsylvania law, no court has held that there is a fundamental right to an education. In *William Penn II*, our Supreme Court considered whether there is a fundamental right to a public elementary and secondary education. After surveying the Pennsylvania caselaw, the court acknowledged that the issue "is not a settled question." *William Penn II*, 170 A.3d at 461 (discussing past caselaw on subject).

While our Supreme Court has not determined whether, under Pennsylvania law, there is a fundamental right to a public elementary or secondary education, it *has* concluded that there is no constitutional right to a higher education. *Curtis v, Kline*, 666 A.2d 265, 256 (Pa. 1995) ("Neither the United States Constitution nor the Pennsylvania Constitution provides an individual right to post-secondary education."). This is notable because the scope of the Education Clause is not limited to elementary and secondary education – it was broadened in 1967 so as *not* to differentiate between levels of education. In the Education Clause, in other words, there is no textual basis for concluding that there is *not* a right to an education at one level (higher education) but there *is* a right to an education at other levels (the elementary and secondary education levels).

Along these lines, in his *PARSS v. Ridge* decision, Judge Pellegrini determined that, under the Education Clause, there is *not* a fundamental right to an education and stated that he would have applied rational basis review to the equal protection claim. *PARSS* at 125 & 125 n.6.

iv. Caselaw from other states

In what many refer to as the "Second Wave" of education finance cases, many plaintiffs brought claims that were based on the equal protection clauses in their respective state constitutions. Although these plaintiffs had some limited early successes, after many of these challenges ultimately failed, they changed tactics and

the "Third Wave" – adequacy cases – was born. *See generally*, *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 480-81 (N.Y. Sup. Ct. 2001) (describing "waves" of education finance cases).

During the "Second Wave" of cases, many courts in other states declined to hold that citizens have a fundamental right to an education. As New York's highest court explained,

> The circumstance that public education is unquestionably high on the list of priorities of governmental concern and responsibility, involving the expenditures of enormous sums of State and local revenue, enlisting the most active attention of our citizenry and of our Legislature, and manifested by express articulation in our State Constitution, does not automatically entitle it to classification as a "fundamental constitutional right" triggering a higher standard of judicial review for purposes of equal protection analysis.

Board of Education, Levittown Union Free School Dist., 439 N.E.2d at 366. In concluding that there is not a fundamental right to an education, courts frequently observed that, like here, the applicable education clause imposed a duty on a legislature but did not expressly confer any rights on anyone. *See, e.g., Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758, 786 (Md. 1983) ("The directive contained in Article VIII of the Maryland Constitution for the establishment and maintenance of a thorough and efficient statewide system of free public schools is not alone sufficient to elevate education to fundamental status."); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982) ("On its face, Article IX,

Section 2 of the Colorado Constitution merely mandates action by the General Assembly-it does not establish education as a fundamental right[.]"); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 733 (Idaho 1993) ("[W]e further hold that education is not a fundamental right because it is not a right directly guaranteed by the state constitution. Rather, art. 9, § 1 imposes a duty upon the legislature to establish and maintain a general, uniform and thorough system of public, free common schools.") (brackets and quotation marks omitted); *see also William Penn II*, 170 A.3d at 463 n. 69 (collecting other decisions from Georgia, Indiana, Kansas, Illinois, Michigan Missouri, and Rhode Island, which determined that there is no fundamental right to education).

v. Summary

Under Pennsylvania law, there is no fundamental right to an education because the Pennsylvania Constitution does not confer any right to an education. The Education Clause does not confer any right at all – it imposes a duty on the General Assembly. Obviously, no one is claiming that education is trivial. But simply because something is *important* does not transform it into a "fundamental right." *See McSwain*, 520 A.2d at 530; *see also Hornbeck*, 458 A.2d at 786 ("The right to an adequate education in Maryland is no more fundamental than the right to personal security, to fire protection, to welfare subsidies, to health care or like vital

governmental services; accordingly, strict scrutiny is not the proper standard of review of the Maryland system of financing its public schools.").

d. Even if the Court finds that, under Pennsylvania law, there is a fundamental right to an education, rational basis review still applies to Petitioners' equal protection claim

Even assuming *arguendo* that, under the Education Clause, there is a right to an education, this Court should still apply rational basis review to Petitioners' equal protection claim, despite the general rule of strict scrutiny. *See Skeen*, 505 N.W.2d at 316 ("Many other state courts, when confronted with similar challenges to state education funding statutes, have followed a similar analysis and have held that although education is a fundamental right, some lesser level of scrutiny, such as the rational basis test, should apply in evaluating the constitutionality of the financing of the education system."). This point is detailed in Section V(C) of Speaker Cutler's brief, which is incorporated here by reference.

e. The rational basis test

The "rational basis test mandates a two-step analysis[.]" *Plowman v. Commonwealth*, 635 A.2d 124, 126-27 (Pa. 1993) (internal citations omitted). The first step is "to consider whether the challenged statute seeks to promote any legitimate state interest or public value." *Id.* The second step is to evaluate "whether the statute is reasonably related to accomplishing the articulated state interest or interests." *Id.*

In applying the rational basis test:

> [A] court is free to hypothesize the reasons the legislature might have had for its classification. The courts do not require record evidence to justify the classification nor do they require the legislative history to show that the legislature had considered the particular rationale that satisfies the court.

Martin v. Unemployment Comp. Bd. of Review, 466 A.2d 107, 111-12 (Pa. 1983) (internal citations omitted). "[I]f any state of facts can be envisioned to sustain the classification, equal protection is satisfied." *Commonwealth v. Albert*, 758 A.2d 1149, 1153 (Pa. 2000). The party who is challenging the statute bears a "heavy burden of establishing the lack of a rational relationship between the statute and a legitimate state interest." *Plowman*, 635 A.2d at 127.

Applying the rational basis test to Pennsylvania's statutory arrangement for funding K-12 education establishes that the arrangement plainly passes muster.

f. Application of the rational basis test

Although Petitioners do not challenge any specific statute, the Petition for Review makes it clear that their equal protection claim is directed to the fact that, in Pennsylvania, school districts are funded by both state and local funds. Petitioners contend that the Commonwealth's system of school funding relies too heavily on local funding, which disproportionately impacts school districts with lower property values. *See* Petition ¶¶ 262-289; Pets. Brief at § (VI)(E)(1). However, a system of

education funding that relies, in material part, on locally-based fund-raising is reasonably related to serving multiple legitimate state interests.

i. Promoting the involvement of communities and families in the schools

Pennsylvania's system of public education has long featured local control of schools, which is designed to promote and encourage the involvement of communities and families in the public education system. *Marrero by Tabales v. Com.*, 709 A.2d 956, 965 n. 19 (Pa. Cmwlth. 1998) (quoting *Martinez v. Bynum*, 461 U.S. 321, 329 (1983)) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."). Pennsylvania's system of school funding, which relies, in part, on local funding, is reasonably related to promoting this state interest.

Promoting the participation of families and communities in the public education system is indisputably a legitimate government interest. *See Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003) (General Assembly's power to classify flows from its power to promote health, safety, or welfare of the community). In fact, during the trial in this case, the witnesses widely agreed that parents or guardians, families, peers, and communities have an impact on students' educational opportunities and outcomes. *See* LR FOF ¶¶ 1671-1681.

The United States Supreme Court has acknowledged the importance of local control:

> [L]ocal control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973). Pennsylvania courts have likewise recognized the importance of local control. *See, e.g.*, *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979) ("[T]he framers endorsed the concept of local control to meet diverse local needs and took notice of the right of local communities to utilize local tax revenues to expand educational programs subsidized by the state.").

Pennsylvania's system of public education has a long and rich tradition of local control. Public K-12 schools are primarily maintained and run by locally-elected boards of school directors. The Public School Code provides that every school district must elect a school board that is comprised of local residents. *See* 24 P.S. § 3-301, *et seq.* School boards are required to have periodic public meetings, which allows for participation by students, parents, district residents, and other interested parties. 24 P.S. § 4-421.

The General Assembly has provided school boards with a number of powers and duties. *See, e.g.*, 24 P.S. § 2-211; 24 P.S. § 5-501, *et seq*. The most important

powers relate to funding and spending. With regard to funding, school boards are empowered to impose local taxes. In exercising this power, they may assess taxes on property and a variety of other items. 24 P.S. § 5-507. Along with the power to tax, school boards make spending decisions. This process involves creating and passing a budget. *See, e.g.*, 24 P.S. § 6-687. It is logical to give school boards both the power to tax and the power to spend. These two functions are essentially two sides of the same coin, and are logically handled by a single entity.

Because school boards are comprised of community members and have frequent public meetings, they are positioned to be responsive to the community. They are positioned to be responsive, in particular, to views and concerns about how they are collecting and spending money from local residents. Because of local control, local residents can more effectively monitor how their local taxes are being allocated and more effectively impact the spending decisions of school districts, through local meetings and elections. To the extent that Pennsylvania's school financing arrangement relies on locally-based taxing and spending, it unquestionably fosters these dynamics. In other words, it is reasonably related to serving a legitimate state interest.

ii. Promoting flexibility and competition

As the United States Supreme Court has explained, local control of school districts offers the "opportunity for experimentation, innovation, and a healthy

competition for educational excellence." *San Antonio Indep. Sch. Dist.*, 411 U.S. at 50. A system of public education funding that relies, in part, on locally-based fund-raising stands in service to these interests.

Providing school districts with the authority to impose local taxes allows them to be more creative in their fund-raising and spending decisions. School districts can choose to tax at different rates or though different means. Although some districts may conclude that increasing taxes is the best way to raise money, others may take a different position. School districts can seek to increase their local tax revenues through at least three different means: increase the tax rate, increase the tax base, or increase the percentage of taxes collected. For instance, a school district might try to increase local investment by keeping its taxes low and consistent, in order to encourage businesses to locate in the district and promote local job growth. Ultimately, if used successfully, this approach can increase the size of the tax base and the amount of local taxes that the district collects.

g. Pennsylvania's system of public education also passes intermediate or strict scrutiny

As explained above, under the Pennsylvania Constitution, there is no right to an education and rational basis review should apply to Petitioners' equal protection claim. However, to the degree that the Court decides to apply either intermediate or strict scrutiny, Pennsylvania's system of education satisfies those tests as well. This

point is further developed in Section V(E) of Speaker Cutler's brief, which is incorporated here by reference.

IX. Petitioners Sued the Wrong Parties

Petitioners are asking the Court to declare that "Respondents" are responsible for constitutional violations that a non-party, the General Assembly, allegedly committed. And they are asking the Court to issue relief against the General Assembly, which (again) is not a party. As a result, to the extent that Petitioners seek these forms of relief, the Court should enter a final judgment in favor of Respondents.

The Petition for Review contains two counts. Petition ¶¶ 300-311. In the first count, Petitioners assert that Pennsylvania's then-current school funding statutes violated Article III, Section 14 of the Pennsylvania Constitution (the "Education Clause"). *Id*. at ¶¶ 300-306; *id.* at ¶ 305 (noting that, under the Education Clause, Petitioners are challenging "[t]he current levels and allocation of public-school funding"). In the second count, Petitioners allege that the statutes in question violated the equal protection principles of Article III, Section 32 of the Pennsylvania Constitution. *Id*. at ¶¶ 307-311; *id.* at ¶ 310 (alleging that, by adopting then-current "school-financing arrangement," Respondents violated equal protection principles of Article III, Section 32).

Petitioners, in other words, are asserting constitutional challenges to certain Pennsylvania statutes. The General Assembly enacted those statutes. Petitioners, however, ask the Court to declare that other officials and entities are responsible for the General Assembly's actions. *See* Pets. COL ¶ 86. And, although the General Assembly is not a party to this matter, they ask the Court to issue relief against it. *Id.* Given these deficiencies, the Court should refuse to issue these forms of relief.

Instead of naming the General Assembly as a party, Petitioners named two (out of 253) members of that body: the President *pro tempore* of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives. The President *pro tempore* and Speaker are not the General Assembly and not agents of that body, and therefore not capable of binding it to take any given action. An official capacity lawsuit against them, like this one, is therefore not an official capacity lawsuit against the General Assembly.

To this end, this Court has explained that "[o]fficial capacity suits…generally represent only another way of pleading an action against an entity *of which an officer is an agent*." *Miller v. Bd. of Property Assessment, Appeals & Review of Allegheny Cnty*, 703 A.2d 733, 735 (Pa. Cmwlth. 1997) (emphasis added) (internal quotation omitted).

Here, there is no constitutional or statutory authority that empowers the President *pro tempore* to act as an "agent" of the Senate or General Assembly. The

President *pro tempore* cannot bind the Senate, and a judicial ruling against him cannot be enforced against that body, or the General Assembly. The Speaker is no different vis-à-vis the House. The General Assembly can take action only through the votes of a majority of its members. *See* Pa. Const. art. III, § 4; *see also Blackwell v. State Ethics Comm'n*, 567 A.2d 630, 637 (Pa. 1989) ("[t]here is no room…for the exercise of the legislative power by committee" even if "that committee is composed of certain select members of the General Assembly").

The Senate and House, in this way, do not function like administrative agencies. An agency is hierarchical. Its powers and duties are vested in the agency head. For example, Section 206 of the Administrative Code of 1929, titled "Department Heads," states that "[e]ach administrative department shall have as its head an officer who shall, either personally, by deputy, or by the duly authorized agent or employe of the department, and subject at all times to the provisions of this act, exercise the powers and perform the duties by law vested in and imposed upon the department." 71 P.S. § 66. Section 206 lists agency heads and specifically names "the Secretary of Education, of the Department of Education." *Id*.

Unlike the head of an administrative agency, who can direct the agency's actions and, in a litigation matter, can be considered a "stand-in" for the agency, the President *pro tempore* and Speaker cannot direct the actions of the Senate or House,

respectively, and are not stand-ins for those bodies. *See Howard v. Commonwealth*, 957 A.2d 332, 335 (Pa. Cmwlth. 2008) (agency officials "may be proper parties when their authority to implement or enforce a statute is in question or when their own actions are at issue"). In each chamber, each member of the General Assembly votes on bills and otherwise carries out his or her official duties in the manner that he or she chooses, regardless of the instructions or wishes of the President *pro tempore* or Speaker.

While the President *pro tempore* and Speaker are the leaders of the majority parties in the Senate and House, respectively, their powers and duties in those roles are relatively limited. The President *pro tempore*, for example, presides over the Senate in the absence of the Lieutenant Governor, who is the President of the Senate. *See* Pa. Const. art. II, § 9. As Petitioners observe, the President *pro tempore* is also "responsible for referring every bill and joint resolution which may be introduced in the Senate or received from the House of Representatives to the appropriate standing committee." Petition ¶ 86. The Speaker, for his part, is responsible for presiding over the House and signing all of the bills that the General Assembly passes. *See* Pa. Const. art. III, § 8; *see also* Petition ¶ 87.

Simply put, the President *pro tempore* and Speaker are not agents of the Senate or House, or the General Assembly, and cannot bind any of those entities to take any given action. They cannot enact legislation. They did not enact the

legislation that Petitioners are challenging in this matter. An official capacity lawsuit against them, like this one, is therefore not an official capacity lawsuit against the General Assembly.

This point finds support in *Teamsters Local 97 v. State*, 84 A.3d 989 (N.J. Super. Ct. 2014). There, various unions that represented public sector employees asserted constitutional challenges to three New Jersey statutes that pertained to employment benefits for those employees. Among others, the New Jersey Senate President and the New Jersey General Assembly Speaker were named as defendants. Like the President *pro tempore* and Speaker here, New Jersey's Senate President and Assembly Speaker were not agents of (or interchangeable with) any chamber of the applicable legislature or the legislature as a whole. In addressing the claims against the Senate President and the Assembly Speaker, the New Jersey Superior Court explained that "[t]hose claims should never have been filed. There was no basis, in law or in fact, for making them." *Id*. at 1010. The court explained that "in a case where the sole relief sought is a judicial declaration that a statute is unconstitutional, naming individual legislators is a meaningless exercise. They are unnecessary parties because the relief sought can be obtained without them, and nothing can be obtained from them." *Id.*

As explained above, it is readily apparent that Petitioners are requesting forms of declaratory and injunctive relief that the Court should not (and cannot) issue. Petitioners, for example, ask for the following forms of declaratory relief:

> A declaration that Respondents have violated their constitutional mandate . . . ;
>
> A declaration that Respondents have violated their mandate for equal protection of law . . . [.]

Pets. COL at ¶ 86(a) & (b). By definition, however, "Respondents" did not violate any constitutional mandate because, as explained above, the President *pro tempore* and Speaker are not the General Assembly or agents of that body, which is the lone entity that took the actions – namely, the enactment of school funding statutes – that Petitioners are challenging. And, in fact, if the President *pro tempore* and Speaker were held liable for participating in the enactment of the legislation at issue, it would run afoul of the Speech or Debate Clause in Article II, Section 15 of the Pennsylvania Constitution, which shields legislators from liability for, among other things, "the act of voting[.]" *Jubelirer v. Singel*, 638 A.2d 352, 357 n.6 (Pa. Cmwlth. 1994) (internal quotation omitted).

Petitioners also ask the Court to issue certain forms of relief against the General Assembly:

> A declaration that . . . the General Assembly shall provide . . . ;

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> An injunction directing that the General Assembly . . . shall allocate . . . ;
>
> An instruction that . . . the General Assembly shall take into account . . . [.]

Pets. COL ¶ 86(c), (e), & (f). But again, as explained above, the General Assembly is *not* a party to this matter. And the President *pro tempore* and Speaker are *not* agents of the Senate or House, or the General Assembly, and cannot bind any of those entities to take any given action. Any relief that the Court were to issue against the President *pro tempore* and Speaker would not be enforceable against the General Assembly, which is a body that can take action only through a majority of its 253 members (not just two of them). If the Court were to issue relief against the General Assembly, even though it is not a party, that relief would represent a due process violation and be unenforceable. *See Mayer v. Garman*, 912 A.2d 762, 767 (Pa. 2006) (vacating portion of trial court order that purported to *sua sponte* join non-party as defendant and issue relief against her); *In re Estate of Brown*, 30 A.3d 1200, 1205-06 (Pa. Super. Ct. 2011) ("In this case, we hold the trial court exceeded its authority when it assessed a surcharge against Husband, who was not named as a party to the suit, served with process, or given the opportunity to contest the surcharge.").

Because Petitioners are seeking relief from an entity that is not a party in this case, the Court should enter a judgment in favor Legislative Respondents.

X. Petitioners Have Failed to Name Indispensable Parties

In Paragraph 320 of their Petition, Petitioners request an injunction that would compel Respondents (not the General Assembly) to "establish, fund, and maintain" their ideal system of public education. Petition ¶ 320. In their Proposed Findings of Fact and Conclusions of Law, they propose that "[a]n injunction directing that the General Assembly…shall allocate sufficient funding" would be "an appropriate remedy" to support their preferred system. Pets. COL ¶ 86(e). In Paragraph 321 of the Petition, Petitioners seek an injunction "compelling the Respondents…to cease implementing a school funding arrangement that does not assure that adequate, necessary, and sufficient funds are available to school districts[.]" Petition ¶ 321.

Under the formula that Act 35 of 2016 put in place, school districts have a predictable share of the basic education subsidy. They also have a predictable share of the Commonwealth's large subsidy for school employee retirement.[36] But an injunction that reconfigured Pennsylvania's system of public education funding would affect numerous non-parties in these and other areas. The same is true of relief that cut off state funds to every Pennsylvania school district, including Petitioner Districts, as well as 494 non-party school districts and various other educational institutions, such as charter schools and intermediate units. Any relief

[36] Petitioners focus on the basic education subsidy, but there are many other state subsidies the allocation of which would have to be recalculated under Petitioners' theories.

would therefore have a material impact on the interests of those districts and institutions, which makes them indispensable parties in the context of this litigation. And yet, Petitioners have not joined them as parties. Given this failure to join indispensable parties, the Court should enter a final judgment in favor of Respondents.

Under Pennsylvania law, "[a] party is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience." *Van Buskirk v. Van Buskirk*, 590 A.2d 4, 7 (Pa. 1991) (internal quotation omitted); *see also Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) ("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."). Our Supreme Court has articulated a four-part test for determining whether a party is necessary or indispensable in an action: "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 of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?" *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981).

In *Mechanicsburg Area School District*, the Mechanicsburg Area School District ("MASD") asserted a claim that, under a statute, state officials had mis-

calculated its "personal income valuation" in a way that would cause it to receive less funding from the Commonwealth (referred to as "school subsidies") than otherwise. MASD asked this Court to enjoin the officials from "paying the final installment of school subsidies for the 1977-1978 school year" and compel the Secretary of Revenue to correct the calculation errors. The Supreme Court turned aside an argument that, under the test for determining indispensable party status, all of Pennsylvania's school districts were indispensable parties to MASD's claim. The Supreme Court's reasoning helps to illustrate why, in this matter, the various non-party school districts and other non-party educational institutions *are* indispensable parties.

The court explained in *Mechanicsburg Area School District* that the right of the non-party school districts was "identical in nature" to the right of MASD and, by its nature, was "a vested right to receive the benefit of the use of correct process by the state officials identified in the Code[,]" not "a vested right to receive a fixed or determined sum of money" or a right that was "contingent upon the actualization of the rights of each school district." 431 A.2d at 957. The court said that MASD's "right to a correct determination of the amount of subsidy to be granted is not interlocked with the similar right possessed by other school districts." *Id*. at 958. The court reasoned, in this regard, that "[i]f recalculation does cause additional payment to [MASD], such payment would not necessarily require [the state officials]

to recalculate the total subsidy [for all other school districts]." *Id*. at 958. Even if "other districts were affected as a result of the recalculation," the court explained, "such would not make them indispensable parties" because they "are not entitled to benefit from any error that may have been made in the calculation." *Id*.

Here, by contrast, the rights and interests of the non-party school districts and other non-party educational institutions (including charter schools) are not "identical in nature" to the rights and interests of Petitioners. Like the school districts in *Mechanicsburg Area School District*, the non-parties here have a "vested right to receive the benefit of the use of correct process" with regard to Pennsylvania's statutory regime that governs the manner in which funding is distributed to them. That regime is presumptively constitutional. *See, e.g., Redevelopment Auth. of York v. Bratic*, 45 A.3d 1168, 1179 (Pa. Cmwlth. 2012). Petitioners, by contrast, are asserting that the statutory regime is invalid and that the Court should force it to be changed. *See* Petition ¶¶ 320-321; Pets. FOF ¶ 86. The non-parties' rights and interests are therefore, in fact, "interlocked" with Petitioners' claims. If Petitioners prevail on their claims, it would alter the statutory regime and the manner in which school funding is distributed. This outcome would alter the non-parties' vested right and interest that goes along with it. Put differently, instead of asking this Court to ensure that the applicable school funding statute is correctly *administered*, which is the type of request that was at issue in *Mechanicsburg Area School District*,

Petitioners are asking the Court to orchestrate a full-scale *invalidation* and *alteration* of the statute, upending the non-parties' rights and interests in it. The non-parties are therefore indispensable parties to this litigation.

This conclusion finds support in *Oas v. Commonwealth*, 301 A.2d 93 (Pa. Cmwlth. 1973). There, as here, the plaintiffs filed a "complaint with the intention to challenge the constitutionality of the method of financing public school education through taxation by the local school district and the Commonwealth of Pennsylvania." *Id*. at 95. In Count IV of their complaint, the plaintiffs alleged that the School Districts of Philadelphia and Pittsburgh had received certain education funding through Pennsylvania statutes that were unconstitutional and asked this Court "to declare such special grants to be in violation of the Pennsylvania Constitution." *Id*. But the plaintiffs failed to name the School Districts of Philadelphia and Pittsburgh as parties. This Court concluded that, as a result, the plaintiffs had failed to name indispensable parties. It explained that, if the plaintiffs were to prevail on their claim in Count IV, "the school districts of Pittsburgh and Philadelphia in this case would be directly and immediately affected by a final order of this Court." *Id*. The Court determined that "these two school districts have such an interest in the subject matter of this suit, and in the relief sought, that their legal presence as parties to the proceeding is indispensable, without which this Court will not proceed." *Id*.

Here, similarly, Petitioners are asserting constitutional challenges to Pennsylvania's statutory regime that governs the manner in which funding is distributed to school districts and other educational institutions. They ask this Court to declare the regime to be unconstitutional and order it to be changed. Petition ¶¶ 320-321; Pets. FOF ¶ 86. If they were to prevail on their claims, all of Pennsylvania's school districts and various other educational institutions "would be directly and immediately affected by a final order of this Court." All of those entities are therefore indispensable parties to this matter. *See also Twp. of South Fayette v. Commonwealth*, 459 A.2d 41, 46 n.6 (Pa. Cmwlth. 1983) (noting that *Oas* is distinguishable from decisions like *Mechanicsburg Area School District* because it involved "a constitutional challenge to a statute, which establishes the basis for the revenue").

Because Petitioners have failed to join indispensable parties, the Court should enter a final judgment in favor of Respondents. *See Powell v. Shepard*, 113 A.2d 261, 264 (Pa. 1955) ("The absence of indispensable parties goes absolutely to the jurisdiction, and without their presence the court can grant no relief.") (internal quotation omitted); *see also Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975) (same).

XI. Separation of Powers

Petitioners are asking this Court to compel the General Assembly to enact certain legislation – including legislation that would make appropriations – and take specified information into account when doing so. Under separation of powers principles, the Court is precluded from issuing these forms of relief.

The separation of powers doctrine provides that each branch of the Commonwealth government is distinct and has powers upon which the others may not infringe. *See, e.g., Sweeney v. Tucker*, 375 A.2d 698, 705-06 (Pa. 1977). One of the powers that is vested exclusively in the General Assembly (and that, as a result, the other branches cannot impede) is the power to enact legislation. *See* Pa. Const. art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."); *see also Shapp v. Sloan*, 367 A.2d 791, 797 (Pa. Cmwlth. 1976) (noting that the "role of the General Assembly and its political accountability for legislative action was and is, in our opinion, the intent of our forefathers in vesting exclusive legislative power in the General Assembly subject only to gubernatorial veto and judicial scrutiny as to the constitutionality of enacted legislation").

It follows that, under separation of powers principles, this Court cannot order the General Assembly to enact legislation. As this Court explained, in rejecting a request to order certain members of the General Assembly "to pass appropriate legislation to provide compensation for plaintiff's claim and to establish a board to

hear moral claims against the Commonwealth," there would be a "complete negation" of separation of powers principles if it granted the request:

> [W]e are aware of no decisions in which the judicial branch has mandated a legislative body to act in its purely legislative domain. Here, plaintiff would have this Court direct but a few members of the General Assembly to do that which they themselves cannot do without the approval of the majority of their colleagues and to enact legislation on a given subject, a judicial act which would be a flagrant infringement upon a purely legislative matter and a complete negation of the principle of separation of powers. The judicial branch of the government is without any power or authority to so act.

Jones v. Packel, 342 A.2d 434, 438 (Pa. Cmwlth. 1975); *see also Erie Firefighters Local No. 293 of Int'l Ass'n of Firefighters v. Gardner*, 178 A.2d 691, 695-96 (Pa. 1962) (adopting lower court opinion) ("If we cannot compel the performance of an act which is discretionary and not ministerial, then we cannot compel defendants to enact the required legislation for, as pointed out above, the legislative function is purely discretionary."); *Finn v. Rendell*, 990 A.2d 100, 106 (Pa. Cmwlth. 2010) ("Granting the relief sought by the Commissioners and compelling appropriations of sufficient funds and reimbursement of the district attorney's salary would interfere with the functions exclusively committed to the legislative and executive

branches, *in contravention of the separation of powers and the speech or debate clause*.") (emphasis added).[37]

The "only exception to the rule barring mandatory injunctions against Commonwealth parties is that an action in mandamus will lie to compel a state officer or agency to perform a ministerial or mandatory statutory duty." *Finn*, 990 A.2d at 105; *see also Sears v. Corbett*, 49 A.3d 463, 471-72 (Pa. Cmwlth. 2012), *rev'd on other grounds*, *Sears v. Wolf*, 118 A.3d 1091 (Pa. 2015). Here, Petitioners do not assert any claim in mandamus against the President *pro tempore* of the Senate, Speaker of the House of Representatives, or any other Respondent (or the General Assembly). *See* Petition ¶¶ 300-324. Therefore, they are not attempting to invoke the "exception to the rule barring mandatory injunctions against Commonwealth parties[.]" *Finn*, 990 A.2d at 105. Instead, Petitioners ask this Court to issue the following forms of relief, which would compel the General Assembly to enact certain legislation, including legislation that would make appropriations, and take specified information into account when formulating the legislation. See Pets. FOF ¶¶ 86(c), (e), & (f).

Even if the General Assembly *were* a party to this matter (and its not), the Court could not issue the relief that Petitioners request because, under the separation

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[37] A single-judge opinion, cited for its persuasive value. *See* Commonwealth Court IOP § 414(b).

of powers doctrine, it cannot direct the General Assembly to perform actions in its legislative domain, *i.e.*, formulating legislation, considering certain variables, and enacting legislation. *Jones*, 342 A.2d at 438.[38] To the extent that Petitioners seek these forms of relief, the court should enter a final judgment against them.

[38] Despite being framed as a request for declaratory relief, Petitioners' request for a declaration that the General Assembly "shall" take certain legislative actions, *see* Pets. COL at ¶ 86(c), is a request for the Court to *order* the legislature to take those actions, and the separation of powers doctrine therefore bars it in the same way, and to the same extent, that it bars the improper requests for mandatory injunctive relief. *See, e.g., U.S. Steel Corp. Plan v. Musisko*, 885 F.2d 1170, 1175 (3d Cir. 1989) ("Where, as here, declaratory relief would produce the same effect as an injunction, a declaratory judgment is barred if [the law] would have prohibited an injunction.").

CONCLUSION

For the foregoing reasons and those set forth at trial and in Legislative Respondents' Joint Proposed Findings of Fact and Conclusions of Law, this Court should rule in favor of Legislative Respondents.

Respectfully submitted,

July 1, 2022

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATE OF WORD COUNT

I hereby certify that, based on the word count feature of Microsoft Word 2016, the foregoing Post-Trial Brief contains 29997 words.

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATE OF SERVICE

I hereby certify that, on July 1, 2022, I caused a copy of the foregoing Post-Trial Brief to be served via the Court's PACFile System upon all persons registered to receive service in this matter.

/s/Anthony R. Holtzman
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