# IN THE SUPREME COURT OF PENNSYLVANIA

## NO. 46 MAP 2015

WILLIAM PENN SCHOOL DISTRICT; PANTHER VALLEY SCHOOL DISTRICT; THE SCHOOL DISTRICT OF LANCASTER; GREATER JOHNSTOWN SCHOOL DISTRICT; WILKES-BARRE AREA SCHOOL DISTRICT; SHENANDOAH VALLEY SCHOOL DISTRICT; JAMELLA AND BRYANT MILLER, parents of K.M., a minor; SHEILA ARMSTRONG, parent of S.A., a minor; TYESHA STRICKLAND, parent of E.T., a minor; ANGEL MARTINEZ, parent of A.M., a minor; BARBARA NEMETH, parent of C.M., a minor; TRACEY HUGHES, parent of P.M.H., a minor; PENNSYLVANIA ASSOCIATION OF RURAL AND SMALL SCHOOLS; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE—PENNSYLVANIA STATE CONFERENCE,

Appellants,

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION; JOSEPH B. SCARNATI III, in his official capacity as President Pro-Tempore of the Pennsylvania Senate; MICHAEL C. TURZAI, in his official capacity as the Speaker of the Pennsylvania House of Representatives; TOM WOLF, in his official capacity as the Governor of the Commonwealth of Pennsylvania; PENNSYLVANIA STATE BOARD OF EDUCATION; and PEDRO A. RIVERA, in his official capacity as the Acting Secretary of Education,

Appellees.

# REPLY BRIEF OF APPELLANTS

Appeal from the Order of the Commonwealth Court of Pennsylvania
Entered on April 21, 2015, at No. 587 M.D. 2014

Jennifer R. Clarke (Bar No. 49836)
Michael Churchill (Bar No. 04661)
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
Telephone: (215) 627-7100

Aparna Joshi (admitted *pro hac vice*)
Matthew J. Sheehan (Bar No. 208600)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

Maura McInerney (Bar No. 71468)
David Lapp (Bar No. 209614)
Cheryl Kleiman (Bar No. 318043)
EDUCATION LAW CENTER
1315 Walnut St., Suite 400
Philadelphia, PA 19107
Telephone: (215) 238-6970

Brad M. Elias (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000

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## ARGUMENT

Respondents contend that Petitioners' equal protection and Education Clause claims are barred by the political-question doctrine, and that the Petition fails to state a claim and seeks relief barred by sovereign immunity. As explained below, Respondents' arguments are baseless. This Court has never endorsed the extreme position urged by Respondents—that any challenge to the constitutionality of Pennsylvania's education-funding scheme is permanently barred as a political question—and it should not do so now, when the funding scheme is the most inequitable in the nation and the inadequacies are manifest.

### I. Respondents Distort the Purpose of the Political-Question Doctrine.

The political-question doctrine safeguards the separation of powers and ensures the integrity of our tripartite system of government. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013). Yet Respondents use that doctrine as a shield, contending that all education-funding decisions—no matter how extreme, irrational, or arbitrary—should be immune from judicial review. They paint fearful scenarios of lengthy and complex litigation, as if Pennsylvania courts should punt when faced with a difficult issue. And they contend that equitable and adequate education funding would not improve student outcomes. (Exec. Br. 29-31; Legis. Br. 25-27.)[1] Respondents are both legally and factually wrong.

[1] As used herein, "Exec. Br." refers to the Brief for Executive Branch Appellees (Nov. 5, 2015); "Legis. Br." refers to the Brief of Appellees Michael C. Turzai, Speaker of the House, and

### A. The Political-Question Doctrine Is Not a Mechanism for Avoiding Difficult Cases.

While Respondents point to the "pitfalls" of deciding "difficult issues of educational policy" and caution against a "Stygian swamp" of litigation (Exec. Br. 17, 31; Legis. Br. 19, 25), those warnings are neither compelling nor relevant to whether this matter is justiciable. The political-question doctrine is not a mechanism for avoiding difficult cases (*see* Pet. Br. 24)—courts have time and again decided politically sensitive and challenging education issues.

The U.S. Supreme Court, for example, refused to abdicate its responsibility to interpret the U.S. Constitution with respect to education policy when it decided *Brown v. Board of Education*, 347 U.S. 483 (1954), even though it resulted in decades of litigation. Pennsylvania's courts were likewise willing to intervene when faced with the same issue. In *Pennsylvania Human Relations Commission v. Chester School District*, 233 A.2d 290 (Pa. 1967), for example, this Court held that schools must be desegregated, even if it "did not order the authorities to adopt any particular program" because "the school district bears primary responsibility for the choice and implementation of an effective desegregation program." *Id*. at 302. In other words, the Court found the system unconstitutional, and left the decision about the precise remedy in the hands of the school districts.

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Joseph B. Scarnati, III, Senate President Pro Tempore (Nov. 2, 2015); and "Pet. Br." refers to the Brief of Appellants (Sept. 18, 2015).

In this case, the Court has a similar responsibility to interpret the Pennsylvania Constitution and determine whether Respondents have complied with their obligations under the Education Clause and equal protection provisions. For more than two hundred years, courts have recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). That duty does not disappear merely because the issues are complex or politically charged.

### B. Court-Mandated Education Reforms Directly Improve Student Performance.

Respondents try to dissuade the Court from reviewing the constitutionality of education-funding litigation by mischaracterizing court-mandated funding reforms as inherently ineffective (Exec. Br. 30; Legis. Br. 33), but the effectiveness of such reforms in improving educational outcomes is well documented by academic scholars and recognized by judicial authorities, including those described in the *Amici Curiae* brief of Public Citizens for Children and Youth, *et al*. (Sept. 18, 2005) at pages 18-25.

Of particular note is the recent groundbreaking study by Kirabo Jackson, who evaluated the effects of funding increases that resulted from court-mandated reforms. *See* C. Kirabo Jackson, et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, & Adult Outcomes*, NAT'L BUREAU OF ECON. RESEARCH, January 2015, available at

http://www.nber.org/papers/w20118, Working Paper No. 20118. The study considered the impact of court-mandated reforms in 28 states between 1971 and 2010 and found a direct causal connection between those reforms and improved student outcomes. *Id*. at 1, 5, 35.

Respondents' assertion that court-mandated reforms lead to "dubious result[s]" is therefore baseless.[2] (Exec. Br. 30.) As researchers who recently examined education funding in Pennsylvania explained, "[t]he question is no longer whether money makes a difference for students[,] but rather the extent to which educational resources are adequate for schools to educate their students." *See* Matthew P. Steinberg & Rand Quinn, *A Tale of Two Decades: New Evidence on Adequacy and Equity in Pennsylvania*, 40 J. OF ED. FIN. 273, 277 (2015) (observing that "Pennsylvania has bucked the national trend toward equity and adequacy in school financing"). The Court should thus proceed with knowledge that judicial intervention would yield important gains for Pennsylvania students.

## II. Petitioners' Equal Protection Claim Is Not Barred by the Political-Question Doctrine.

Pennsylvania, by a wide margin, has the most inequitable education-funding scheme in the nation. (*See* Pet. Br. 12-13.) Respondents do not even acknowledge that troubling fact, much less explain why the Court should ignore the pervasive discrimination against students in low-income school districts. Instead,

[2] The study's findings are consistent with numerous other state-specific studies. *See Amici Brief of PCCY et. al* at 20-25.

Respondents strain to construct legal support for the lower court's perfunctory dismissal of Petitioners' equal protection claim—where none exists. Neither the U.S. Supreme Court nor any state court has applied the political-question doctrine to bar an equal protection claim in the education-funding context. To the contrary, courts have routinely analyzed such claims, most famously in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), under the standard equal protection analysis. There is no basis to depart from those cases here.

### A. Respondents Misconstrue *Danson*.

Respondents' assertion that *Danson v. Casey*, 399 A.2d 360 (Pa. 1979), held that equal protection challenges to education funding raise non-justiciable political questions is demonstrably wrong. (*See* Legis. Br. 12-15.) The *Danson* Court did not find that the petition there "failed to state a ***justiciable*** cause of action" because it raised a political question, as Respondents contend. (Exec. Br. 33; Legis. Br. 29 (quoting *Danson*, 399 A.2d at 363).) Rather, the *Danson* Court found the petitioners' cause of action non-justiciable because they had failed to allege a ***legal injury***—a prerequisite to stating a justiciable cause of action under Pennsylvania law. *See Danson*, 399 A.2d at 365 ("[A]ppellant School District of Philadelphia has failed to allege that it has suffered any legal harm . . . . Nowhere do appellants allege that any Philadelphia public school student is, has, or will, suffer any legal injury . . . ."); *Raezer v. Raezer*, 236 A.2d 513, 514 (Pa. 1968) ("[T]here is no justiciable controversy to which this court can address itself" where "[n]o . . . legal

injury to the plaintiff is alleged"); *see also Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (justiciability requires petitioner to allege "a substantial, direct and immediate interest in the outcome of the litigation").[3] In fact, the *Danson* opinion does not even mention the political-question doctrine, although the Court was certainly aware of it having decided *Sweeney v. Tucker*, 375 A.2d 698, 708-12 (Pa. 1977), only two years earlier.

Respondents' assertion that Petitioners' equal protection claim is "in all material respects identical" to the claim rejected in *Danson* is also wrong. (Exec. Br. 22.) *Danson* was not a case about inequity in education funding. Rather, *Danson* involved an equal protection claim based on differences in the ***quality*** of education being provided to Philadelphia schoolchildren, who were allegedly being denied an undefined "'normal program of educational services' available to all other public school students in Pennsylvania." *Danson*, 399 A.2d at 366. The *Danson* petitioners had no basis for challenging the equity of education funding because Philadelphia at the time ranked fifth among 505 Pennsylvania school districts in total funding. *Id.* at 365 n.10. Here, by contrast, Petitioners' case is all about the ***equity*** of education funding—now that vast disparities in funding have opened a chasm between Pennsylvania's low-wealth school districts and their

[3] Respondents are also wrong that *Danson* "affirmed the same result reached by the Commonwealth Court here" and was not a decision on the merits. (Exec. Br. 28.) "Dismissal of an action for failure to state a claim is a final judgment on the merits." *Brown v. Cooney*, 442 A.2d 324, 326 (Pa. Super. Ct. 1982). The Commonwealth Court here, by contrast, chose to abstain under the political-question doctrine from reaching the merits of Petitioners' claims.

high-wealth counterparts. The *Danson* Court recognized that this type of allegation can support an equal protection claim, but found no allegation there that the "state's financing system resulted in some school districts having significantly less money than other districts, causing gross disparities in total and per child expenditures throughout the state." *Id.* Respondents either ignore that language (Exec. Br. 31-34) or try to avoid it as "dicta." (Legis. Br. 48.) But the Court's distinction between quality and equity highlights the key factual difference with this case and confirms that *Danson* does not bar Petitioners' claim.

### B. Respondents Ignore the *Baker* Analysis.

Despite 99 pages of combined briefing, Respondents do not apply the *Baker* analysis to Petitioners' equal protection claim or identify a single *Baker* factor that supports nonjusticiability. But that does not stop Respondents from suggesting that Petitioners "provide no cogent explanation as to why a justiciability analysis under the Equal Protection Clause would yield a different result than a similar analysis under the Education Clause." (Legis. Br. 30.) To the contrary, Petitioners have explained in detail why a justiciability analysis of an equal protection claim yields a different result than in *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999), (*see* Pet. Br. 23-26 (applying *Baker* factors))—an explanation to which Respondents have offered no response.

Respondents also point to a U.S. Supreme Court decision that applied the political-question doctrine to an equal protection claim in the ***gerrymandering***

context, which directly concerned the political process.[4] (Exec. Br. 34 (citing *Vieth v. Jubelirer*, 541 U.S. 267 (2004)).) But when presented with an equal protection challenge to ***education funding*** in *Rodriguez*, 411 U.S. 1, the U.S. Supreme Court applied the standard equal protection analysis, without invoking *Baker* or the political-question doctrine. Respondents offer no explanation for why this Court should apply a different analysis here.[5] *See Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (equal protection analysis under Pennsylvania Constitution is same as under U.S. Constitution).

### C. Respondents Improperly Conflate Petitioners' Equal Protection and Education Clause Claims.

Respondents attempt to shoehorn Petitioners' equal protection claim into the *Marrero* framework by arguing that the claim "cannot be disentangled" from Petitioners' Education Clause claim and "amounts to little more than swapping out one label for another." (Exec. Br. 31, 34; *see also* Legis. Br. 30.) But Respondents ignore the distinct constitutional bases for those claims, the analytical and factual differences between them, and myriad cases in which courts have analyzed them under different standards.

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[4] Respondents also try to rebut Petitioners' assertion that "they have not encountered[] a single decision in which another state court has found such a claim non-justiciable under *Baker*" (Pet. Br. 25) by citing an Oklahoma decision that does not mention or apply *Baker*. (Legis. Br. 24 n.9 (citing *Okla. Educ. Ass'n v. State*, 158 P.3d 1058 (Okla. 2007)).)

[5] As described below, the level of scrutiny required under Pennsylvania law differs from federal law because education is a right "explicitly or implicitly" guaranteed by the Pennsylvania Constitution, whereas education "is not among the rights afforded explicit protection under our Federal Constitution." *Rodriguez*, 411 U.S. at 35.

Petitioners' equal protection and Education Clause claims not only rest on different constitutional provisions, they challenge different aspects of Pennsylvania's education-funding scheme. Petitioners' equal protection claim challenges the inequitable ***distribution*** of education funds (*see* Pet. Br. 26), while Petitioners' Education Clause claim challenges the ***adequacy*** of education funding. (*See* Pet. Br. 18.) These claims are also analyzed under different legal standards. *See Reichley ex rel. Wall v. N. Penn Sch. Dist.*, 626 A.2d 123, 127 (Pa. 1993) (refusing to apply "the 'strict scrutiny'/'rational basis' framework" to Education Clause analysis because "[t]his is not an equal protection case"). An equal protection analysis examines whether disparities in education funding are justified, while an Education Clause claim examines whether a legislature has complied with its constitutional obligation to adequately fund a public education system. *Compare, e.g.*, *Brigham v. State*, 692 A.2d 384, 396-98 (Vt. 1997) (applying equal protection analysis); *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 92-95 (Ark. 1983) (same); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152-56 (Tenn. 1993) (same); *with, e.g.*, *Gannon v. State*, 319 P.3d 1196, 1233-38 (Kan. 2014) (applying education clause analysis); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211-14 (Ky. 1989) (same); *Robinson v. Cahill*, 303 A.2d 273, 283-97 (N.J. 1973) (same).

Respondents cannot overcome these differences by asserting that Petitioners have "frame[d] their equal protection claim in terms of an equal opportunity 'to

obtain an adequate education.'" (Exec. Br. 31.) Petitioners' equal protection claim is based on the vast disparity in funding between high-wealth and low-wealth school districts, which is not explained by tax effort and "is not justified by any legitimate desire for local control over education." (Pet. ¶¶ 282, 294.)[6] While Petitioners also allege that students in low-wealth districts are "denied the opportunity to receive even an adequate education, while their peers in property- and income-rich districts enjoy a high-quality education" (*id.* ¶ 8), that is merely one of the spending divide's many consequences and not a necessary element of Petitioners' equal protection claim.[7]

## III. Petitioners' Education Clause Claim Is Not Barred By the Political-Question Doctrine.

Respondents take the position that Petitioners' Education Clause claim is non-justiciable because (i) the Court already "approved" the current funding

[6] *See also* Pet. ¶ 7 ("[T]he very low levels of state funding and unusually high dependence on local taxes under the current financing arrangement have created gross funding disparities among school districts—an asymmetry that disproportionately harms children residing in districts with low property values and incomes."); *id.* ¶ 262 ("Pennsylvania's school funding arrangement irrationally discriminates against students living in school districts with low property values and incomes . . . by denying them educational opportunities because their schools have only a fraction of the resources available to students in districts with high property values and incomes.").

[7] Petitioners' allegation that they are being denied an adequate education might be relevant to pleading an injury sufficient to establish standing, but Respondents' Preliminary Objections do not challenge Petitioners' standing to assert an equal protection claim. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 918 (Pa. 2013) ("We have consistently held that we will not raise standing claims *sua sponte*."). And even if they had, the allegations in the Petition are sufficient to establish that Petitioners have a "'a substantial, direct and immediate interest in the outcome of the litigation,'" *id.*, without any need to define an "adequate education."

scheme in *Marrero*, (ii) current academic standards do not create constitutional norms that bind the legislature, and (iii) factual developments since *Marrero* have not created judicially manageable standards for determining whether funding levels are reasonable. None of these arguments has merit.

### A. The Court Has Never "Approved" the Current Education-Funding Scheme.

Respondents take inconsistent positions on *Marrero*. On one hand, they acknowledge that *Marrero* found an Education Clause claim non-justiciable under the political-question doctrine. (Exec. Br. 19-20.) On the other, they contend that *Marrero* nonetheless "approved" any education-funding scheme "based on a combination of local property tax revenue, state subsidies, and federal funds." (Legis. Br. 32-33.) The Court should reject this latter interpretation as inconsistent with the plain language of *Marrero*, which did not reach the merits of the petitioners' claim and therefore did not "approve" any aspect of the funding scheme. *See Marrero*, 739 A.2d at 113-14.

Moreover, even if the *Marrero* Court had "approved" the concept of raising education funds through a combination of local property taxes, state subsidies, and federal funding, that would not resolve Petitioners' Education Clause claim here, which is based not on the ***sources*** of education funds but on the ***amount***, which Petitioners allege to be irrational, arbitrary, and not reasonably calculated to maintain and support the public education system that Respondents have created

and mandated. (*See* Pet. ¶¶ 304-06.) Under *Marrero*, those allegations are sufficient to support an Education Clause claim if there are judicially manageable standards in place to resolve the claim "without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion." 739 A.2d at 113.

### B. Respondents Misconstrue the Role of State Academic Standards in Evaluating the Reasonableness of Education Funding.

Respondents argue at length that current academic standards and assessments cannot "bind subsequent legislatures" or "transmute . . . into permanent constitutional mandates." (Legis. Br. 34-36; Exec. Br. 25-29.) To do so, Respondents say, would "freeze in place, for all time, the policy judgments made at a particular time by particular legislators and bureaucrats." (Exec. Br. 28.) That argument is a red herring.

Petitioners do not contend that current academic standards and assessments must remain unchanged forever or permanently define constitutional requirements. To the contrary, Petitioners have repeatedly acknowledged that the legislature is free to modify those standards and assessments at any time. (*See* Pet. Br. 33-34.) Petitioners' actual position is that those standards and assessments constitute the legislature's current pronouncement of what a "thorough and efficient system of public education" should teach students to "serve the needs of the Commonwealth" and prepare them for success in today's world. (*See id.* 33.) Respondents

therefore have an obligation to provide funding that bears a "reasonable relation" to giving students an opportunity to meet those standards. (*Id.* 32.) And to the extent the standards change over time, Respondents' funding obligations may change with them.[8] This is not a novel position. The highest courts of numerous states have relied on state academic standards to inform the interpretation and enforcement of their own education clauses.[9] (*See id.* 34-35.)

Once Petitioners' position is properly framed, most of Respondents' arguments fall by the wayside. Respondents contend, for example, that Petitioners are asking the Court to exercise "oversight over future changes in educational policy." (Exec. Br. 28-29). Petitioners seek no such thing. They are asking the Court to determine whether current funding levels are reasonably related to supporting the system of public education in place today. Respondents also contend that Petitioners "are not so much asking the Court to define the contours of a constitutional right, as to outsource that task to the Legislature and the Board of Education." (*Id*. 26-29.) But the Court has recognized for more than 80 years that

[8] Respondents are wrong to suggest, however, that "an alleged constitutional violation could be remediated merely by eliminating the standards altogether." (Legis. Br. 36.) In theory, the legislature could eliminate all statewide standards and assessments, thus removing an important benchmark for determining whether education-funding levels are reasonable. But that would not necessarily remedy an existing constitutional violation. Nor can Respondents seriously suggest that the legislature would sacrifice the future of the Commonwealth to avoid its constitutional obligations.

[9] Even the Oklahoma Supreme Court, which Respondents rely on to support their justiciability argument (Legis. Br. 23), has recognized that "the right [to public education] guaranteed in Article 13 § 1 [of the Oklahoma Constitution] is a basic, adequate education according to the standards that may be established by the State Board of Education." *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1149 (Okla. 1987).

it is the legislature's job to decide as a policy matter what constitutes a "thorough and efficient system of public education." *See Teachers' Tenure Act Cases*, 197 A. 344, 352 (Pa. 1938). The issue here is whether the Court, fully respecting the role of the legislature to make those policy choices, retains any role in ensuring that the legislature complies with its constitutional obligation to "provide for the maintenance and support" of that system—which, contrary to Respondents' assertions, is distinct from merely establishing a system. (*See* Exec. Br. 14-15 ("School Code and related legislation establish and support a "system" of publication education; and that should be the end of the matter").) The Court has repeatedly recognized that it does retain such a role, *see Teachers' Tenure Act Cases*, 197 A. at 352; *Danson*, 399 A.2d at 367, which is necessary to give the Education Clause meaning and prevent Respondents from shirking their constitutional duty without consequence.

### C. Since *Marrero*, the Legislature Has Created Judicially Manageable Standards for Evaluating the Reasonableness of Education Funding.

Respondents' reliance on *Marrero* is misplaced because Pennsylvania's public education system has undergone substantial changes since that case was decided in 1999. *See Freed v. Geisinger Med. Ctr.*, 971 A.2d 1202, 1211 (Pa. 2009) (*stare decisis* applies only when facts are substantially the same). Those changes, implemented by the legislature itself, permit the Court to evaluate in a way that was not possible 16 years ago whether "the legislative scheme for

financing public education 'has a reasonable relation' to providing for the maintenance and support of a thorough and efficient system of public schools." (Legis. Br. 32 (quoting *Marrero*, 739 A.2d at 113).)[10]

### 1. Respondents Overlook the Utility of Statewide Exams and the Costing-Out Study in Evaluating the Reasonableness of Education Funding.

The post-1999 move from vague academic guidelines to objective, content-based standards is a critical change from the *Marrero* era. (*See* Pet. Br. 7-9; Pet. ¶¶ 95-115.) While Respondents contend that the PSSA exams "did not suddenly drop from the sky" and have "existed for many decades" (Exec. Br. 23), they ignore Petitioners' allegations that the PSSA exams changed dramatically with the adoption of content-based standards (Pet. ¶¶ 95-115)—allegations that must be taken as true for purposes of deciding this appeal. Whereas the pre-1999 standards were vague and amorphous—which is why neither the *Marrero* Court nor the Commonwealth Court in *Pennsylvania Association of Rural & Small Schools* ("*PARSS*"), No. 11 MD 1991, Slip op. (Pa. Commw. Ct. 1998), ever mentioned them—the post-1999 standards defined precisely ***for the first time*** what a "thorough and efficient system of public education" should teach children. (*See* Pet. Br. 7-9.) As a result, the PSSA exams and later the Keystone Exams became

[10] Alternatively, if *Marrero* is an absolute bar to any education-funding challenge, the Court should overrule that decision. *See Tincher v. Omega Flex*, 104 A.3d 328, 352 (Pa. 2014) ("[F]aithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle or which are unsuited to modern experience and which no longer adequately serve the interests of justice.").

objective indicators of system-wide academic performance and reliable benchmarks for evaluating the reasonableness of education funding. (*Id.* 32-37.)

The 2007 legislatively commissioned costing-out study (and the availability of costing-out studies in general) is also a critical development since *Marrero*. (*See id.* 9-11; *see* Pet. ¶¶ 120-29.) Respondents contend that the costing-out study is of little use because it estimates the cost of achieving 100% proficiency on the PSSA exams and therefore reflects a policy judgment. (Exec. Br. 24.) According to Respondents, that is "not the only policy option open to the Legislature," which "could instead change the assessment standards . . . [or] opt for structural changes to the school system." (*Id.* 25.) But that argument fails for two reasons. First, any policy judgments that went into the costing-out study were made by the ***legislature***, which only lends further weight to using the study as a benchmark for evaluating the adequacy of school funding. Second, while the legislature could have made structural changes to the education system that might have rendered the costing-out study obsolete, the legislature did not do so. Students continue to take the PSSA exams, and the adoption of the Pennsylvania Common Core has only further raised standards. The costing-out study therefore remains a reliable benchmark of student performance and demonstrates that current funding levels are plainly unreasonable. (*See* Pet. Br. 37-38.)

Respondents' criticism of costing-out studies also ignores the experiences of other states, at least three of which have ordered costing-out studies conducted as

part of their remedial orders. *See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee,* 91 S.W.3d 472, 486 (Ark. 2002); *Campaign for Fiscal Equity, Inc. v. State,* 801 N.E.2d 326, 348 (N.Y. 2003); *Campbell Cty. Sch. Dist. v. State,* 907 P.2d 1238, 1279 (Wyo. 1995); *see also Montoy v. State,* 120 P.3d 306, 309 (Kan. 2005) ("[T]here is substantial competent evidence, including the Augenblick & Myers study, establishing that a suitable education . . . is not being provided."); *DeRolph v. State,* 728 N.E.2d 993, 1006-07 (Ohio 2000) (discussing Augenblick study commissioned by legislature).

### 2. Judicially Manageable Standards Do Not Require a Bright-Line Test.

Respondents fare no better in arguing that content-based standards and the costing-out study do not permit the Court to draw a bright line between a constitutional and an unconstitutional funding system. (Legis. Br. 38-41; Exec. Br. 29.) There is no requirement that judicially manageable standards equate to a bright-line test. To the contrary, courts often eschew bright-line tests in the constitutional context, recognizing that they can be impractical and arbitrary. *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 785 (2009) (rejecting bright-line test under Sixth Amendment as "[un]desirable," "arbitrary," and "hollow formalism").[11] The U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), for

[11] *See also Miller v. California*, 413 U.S. 15, 24 (1973) (analyzing concept of obscenity under First Amendment without developing a bright-line judicial standard); *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (analyzing what constitutes search

example, found an equal protection challenge to legislative reapportionment justiciable without adopting a bright-line test, and courts today routinely hear complex reapportionment cases that require them to exercise considerable judgment. *See, e.g.*, *Holt v. 2011 Legislative Reapportionment Comm'n*, 620 Pa. 373, 418 (Pa. 2013) ("[T]he question is not one of mere mathematics or computer schematics: multiple constitutional and practical (geography, demographic distribution) values must be balanced in this exercise in line-drawing.").

A bright-line test is no more appropriate here, where education-funding decisions are similarly complex. That is why this Court has repeatedly recognized that the proper test is whether funding levels bear a "reasonable relation" to supporting the public education system. *Danson*, 399 A.2d at 367 (quoting *Teachers' Tenure Act Cases*, 197 A. at 352) ("[a]s long as the legislative scheme for financing public education 'has a reasonable relation' to '[providing] for the maintenance and support of a thorough and efficient system of public schools,' the General Assembly has fulfilled its constitutional duty").

Reasonableness is a fact-specific inquiry that must be evaluated based on the totality of the circumstances. *See, e.g.*, *Commonwealth v. Revere*, 888 A.2d 694, 706-707 (Pa. 2005) (eschewing bright-line test under PA. CONST. art. I, § 8 in favor of reasonableness standard determined by totality of circumstances). Thus, the

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under Fourth Amendment without developing a bright-line rule); *Commonwealth v. Duncan*, 817 A.2d 455, 463 (Pa. 2003) (adopting federal *Katz* standard for searches under Article I § 8 of the Pennsylvania Constitution, which is not a bright-line test).

task is not, as Respondents suggest, to identify a precise threshold at which low exam scores render the funding scheme unconstitutional (*see* Exec. Br. 24, 29), but rather to determine whether low exam scores and other evidence, ***taken as a whole***, establish that the current funding scheme is clearly unreasonable and therefore unconstitutional.[12] As described in Section V, *infra*, Petitioners' allegations in this case, including the alarmingly high failure rates (Pet. ¶¶ 153-63) and the deprivation of basic, state-mandated educational services and resources (*Id.* ¶¶ 152, 169-248), are more than sufficient to satisfy that standard without drawing a fine line between a 10% and a 20% failure rate. (*See* Legis. Br. 40.)

## IV. The Petition States an Equal Protection Claim.

### A. Petitioners Allege a Government Classification.

Respondents' argument that the Petition fails to "identify any 'classification' present in the current public education funding system" (Leg. Br. 45) borders on frivolous. No court appears to have accepted that argument, and Respondents do not cite a single authority to support it. (*See id.* 45-46.) Petitioners have clearly alleged a government classification based on wealth in the legislatively established school districts, which results in vast disparities in education funding. (Pet. ¶¶ 262-89.) In fact, the U.S. Supreme Court and other state courts have had no difficulty finding a government classification under ***identical*** circumstances. *See*

[12] The absence of a bright-line test has not deterred at least 27 other states from finding a judicially manageable standard. (*See* Pet. Br. 41 n.17.)

*Rodriguez*, 411 U.S. at 28 (observing that school district property wealth was one method of defining the relevant classification); *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 499 (holding that "a classification between poor and rich school districts does exist and that the State, with its school-funding formula, has fostered this discrimination based on wealth"); *Serrano v. Priest*, 487 P.2d 1241, 1254 (Cal. 1971) ("Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain."); *Washakie Cty. Sch. Dist. v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980) (finding government classification where education-funding scheme "falls far short of raising the level of poor counties to that of rich counties").

### B. The Court Should Apply Intermediate Scrutiny Because Public Education Is, At a Minimum, an Important Interest.

This Court has stated unambiguously that "public education in Pennsylvania is a fundamental right," and it has "consistently examined problems related to schools in the context of that fundamental right." *Wilkinsburg Educ. Ass'n v. Sch. Dist. of Wilkinsburg*, 667 A.2d 5, 9 (Pa. 1995). While Respondents try to dismiss the Court's declaration as mere dicta and argue that it does not justify applying strict scrutiny to Petitioners' equal protection claim (*see* Legis. Br. 53-54), the Court need not reach that issue because the current education-funding scheme does not satisfy the lesser standard of intermediate scrutiny.

Intermediate scrutiny applies to any government classification that burdens an "important interest." *See Smith v. Philadelphia*, 516 A.2d 306, 311 (Pa. 1986) (concluding that a government classification limiting an important right required heightened scrutiny); *see also Commonwealth v. Albert*, 758 A.2d 1149, 1152 (Pa. 2000) (noting that classifications implicating an important right are subject to heightened scrutiny). Important interests include "liberty interests or 'a denial of a benefit vital to the individual.'" *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302, 1306 (Pa. 1984). There can be no doubt that public education is a "benefit vital" to Pennsylvania's youth. The Constitution includes a provision dedicated to education, the Commonwealth has made education mandatory for all children, and the legislature and courts alike have expressly recognized the critical role of education in maintaining a civil society. *See, e.g.*, PA. CONST. art. III, § 14; 22 Pa. Code § 11.13 (discussing compulsory school age); *Wilson v. Phila. Sch. Dist.*, 195 A. 90, 94 (Pa. 1937) ("[T]he Constitutions of 1776, 1790, and 1838, and the laws recognized [the common school system's] vitally important part in our existence."); House Legislative Journal, 192nd General Assembly, 2008 Session, No. 545 at 1909 (July 4, 2008) (statement from Rep. Dwight Evans) ("We all recognize, if we are to continue to move in the 21st century, that nothing, nothing is more important than the investment in education"). Given the unqualified constitutional, legislative, and judicial endorsements of public education,

classifications burdening the right to public education should be subject, at a minimum, to an intermediate level of scrutiny.

Respondents' argument that *Danson* mandates rational basis review is baseless. (*See* Legis. Br. 47.) While Respondents cite a portion of the *Danson* opinion addressing the standard of review under the Education Clause (*id.*), the *Danson* Court did not apply that "reasonable relation" standard to the petitioners' equal protection claim. *See Danson*, 399 A.2d at 367; *see also Reichley*, 626 A.2d at 127 ("Although similarly phrased, this [reasonable-relation test] is not the 'rational relationship test' of equal protection analysis."). Because the *Danson* Court found no constitutional right to a "normal program of educational services"—the right the petitioners alleged was burdened in that case—the Court did not determine whether the funding scheme was justified under any level of scrutiny. *Danson*, 399 A.2d at 366-67. Thus, *Danson* is no barrier to this Court applying intermediate scrutiny.

### C. The Current Education-Funding Scheme Is Not Closely Related to an Important Government Objective.

Under intermediate scrutiny, an education-funding scheme that results in vast discrepancies in per-student funding will be allowed to stand only if Respondents can show that it is closely related to an "important" government objective. *See Smith*, 516 A.2d at 311 (requiring the statutory classification to be closely related to an important governmental interest in order to satisfy

intermediate scrutiny); *Fischer v. Dep't of Pub. Welfare,* 502 A.2d 114, 122 (Pa. 1985) (same); *James*, 477 A.2d at 1307 (same); *Whitewood v. Wolf,* 992 F. Supp. 2d 410, 425 (M.D. Pa. 2014) ("To survive intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."). While the Court need not reach this issue at this preliminary stage, Respondents' vague references to "local control" cannot defeat Petitioners' claim. (*See* Legis. Br. 46-52; Exec. Br. 39.) Indeed, Respondents neither define "local control" nor explain how the current funding scheme is "closely related" to achieving that goal.

There are two types of local control over education, and the current funding scheme is not "closely related" to either. The first is local decision-making power over the administration of schools. The current funding scheme is not closely related to achieving that goal because "[n]o matter how the state decides to finance its system of public education, it can still leave [administrative] decision-making power in the hands of local districts." *Serrano,* 487 P.2d at 1260; *see also Dupree,* 651 S.W.2d at 93 ("[T]o alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced."); *Brigham*, 692 A.2d at 396 ("Regardless of how the state finances public education, it may still leave the basic decision-making power with the local districts."); *Horton*, 376 A.2d at 369 ("[T]here is no reason why local control needs

to be diminished in any degree merely because some financing system other than the present one is adopted.").

The second type of local control is fiscal control over the amount spent on education. The current funding scheme is not closely related to that goal because it denies low-wealth school districts any ***actual*** control over the amount they spend on education. Not only are low-wealth districts restricted by Act 1 from raising property taxes more than a *de minimis* amount, but many already have higher tax rates than their wealthier peers—and still raise only a fraction of the revenue.[13] Thus, as one state court put it, "fiscal freewill is a ***cruel illusion*** for the poor school districts" because a "poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide." *Serrano*, 487 P.2d at 1260 (emphasis added). As another court explained: "[P]oorer districts cannot realistically choose to spend more for educational excellence than their property wealth will allow, no matter how much sacrifice their voters are willing to make." *Brigham*, 692 A.2d at 396.[14]

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[13] While Respondents contend that there were "strict ceilings" on local taxes when *Danson* was decided (*see* Legis. Br. 50 n.16), the Supreme Court disagreed: "The Philadelphia School District's ability to obtain local tax funds is limited only by the ability of its appointed school board to convince City Council and the Mayor that the levies it requests are necessary for current operation of the school district." *Danson*, 399 A.2d at 367. Petitioners here allege the opposite. (Pet. ¶¶ 143-44.)

[14] *See also Bismarck Pub. Sch. Dist. #1 v. State*, 511 N.W.2d 247, 261 (N.D. 1994) ("The present method of distributing funding for education fails to offer any realistic local control to many school districts . . . ."); *Opinion of the Justices*, 624 So. 2d 107, 141 (Ala. 1993) ("[I]f local tax effort reflects the *desire* for a higher level of education, citizens in the poorest systems seem to want the *most* for their children—but their hands are tied by the very system that defendant

## V. The Petition States an Education Clause Claim.

Respondents contend that the Petition fails to state an Education Clause claim because "the School Code and attendant provisions bear a 'reasonable relation' to the purpose of establishing a 'system' of public education." (Exec. Br. 38.) But even if true, that is irrelevant to whether Petitioners have stated a claim. As Respondents acknowledge elsewhere in their briefs, the relevant inquiry under the Education Clause is whether "the legislative scheme for ***financing*** public education 'has a reasonable relation' to providing for the maintenance and support of a thorough and efficient system of public schools." (Legis. Br. 8 (emphasis added)); *see also Danson*, 399 A.2d at 367. The Petition thus states an Education Clause claim because it alleges that the current funding scheme bears no relation, much less a "reasonable relation," to supporting the public education system created and mandated by Respondents. (*See* Pet. ¶¶ 153-261, 290-306.) The Petition alleges, for example, that low-wealth school districts have been forced to cut a multitude of education programs and services necessary to provide an adequate education (*see id.* ¶¶ 169-261); that students in low-wealth districts are unable to meet state academic standards (*see id.* ¶¶ 153-168); and that the current funding scheme is divorced from the actual costs of providing an adequate

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argues is designed to enhance their ability to realize their aspirations."); *McWherter*, 851 S.W.2d at 155 ("If a county has a relatively low total assessed value of property and very little business activity, that county has, in effect, a stone wall beyond which it cannot go in attempting to fund its educational system regardless of its needs. In those cases, local control is truly a 'cruel illusion.'").

education. (*See id.* ¶¶ 290-99). Nothing more is required to state an Education Clause claim.

Respondents also contend that the Petition fails to state an Education Clause claim because the *Marrero* Court held that by adopting the School Code "the General Assembly has satisfied the constitutional mandate to provide 'a thorough and efficient system of public education.'" (Exec. Br. 38 (internal quotation marks omitted).) But the *Marrero* Court held no such thing. As Respondents themselves acknowledge, the *Marrero* Court actually found the Education Clause claim non-justiciable and thus did not reach the merits of whether the legislature satisfied its constitutional mandate to "provide for the maintenance and support" of the public education system. 739 A.2d at 112-14.

## VI. Petitioners' Claims Are Not Barred By Sovereign Immunity or the Separation of Powers.

Contrary to Respondents' assertion that sovereign immunity bars this Court from considering Petitioners' request for injunctive relief (Exec. Br. 39-42), sovereign immunity is inapplicable "where the plaintiff seeks to restrain [government officials] from performing an affirmative act," *Legal Capital, LLC v. Med. Prof'l Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000), or "from enforcing the provisions of a statute claimed to be unconstitutional." *Phila. Life Ins. Co. v. Commonwealth*, 190 A.2d 111, 114 (Pa. 1963); *see also Fawber v. Cohen*, 532 A.2d 429, 433-34 (Pa. 1987) ("[S]uits which simply seek *to restrain*

*state officials* . . . are not within the rule of immunity.").[15] Nor does sovereign immunity bar suits affirmatively requiring government officials to comply with the Pennsylvania Constitution. *See Twps. of Springdale & Wilkins v. Kane*, 312 A.2d 611, 617 (Pa. Commw. Ct. 1973) ("[P]laintiffs are not seeking some affirmative action on the part of State officials required by statute, but rather that the affirmative action sought is mandated by the constitutional provision."); *see also Legal Capital*, 750 A.2d at 302-03 (holding that sovereign immunity did not bar a suit seeking funds the appellee was obliged to pay). Thus, the Court has authority to grant Petitioners' limited request for an injunction.

While Respondents try to distort that request, suggesting that Petitioners seek "an injunction 'compelling Respondents to *establish, fund, and maintain*' a new system of public education" (Exec. Br. 41 (quoting Pet. ¶¶ 320-21)), Petitioners seek no such thing. The paragraphs quoted by Respondents actually ask for "permanent injunctions compelling Respondents to establish, fund and maintain a thorough and efficient system of public education"—as required by the Education Clause—and "after a reasonable period of time, to develop a school-funding arrangement that complies with the Education Clause and the Equal Protection Clause." (Pet. ¶¶ 320-21.) That language merely recites Respondents' duty to comply with the Constitution.

[15] Respondents do not contest that this Court has the authority to consider Petitioners' request for declaratory relief.

## CONCLUSION

Pennsylvania's Education Clause was adopted to remedy the legislature's failure to adequately fund public schools. It was intended to be a sword and never a shield. Immunizing the legislature from all judicial review at a time when school funding is both profoundly inequitable and grossly inadequate is directly at odds with that purpose, and would leave our schoolchildren to face the daily realities of crumbling buildings, inadequate teachers and staff, and overcrowded classrooms without any recourse under the very Constitution that promises to protect them. The Court should therefore reverse the lower court's Order.

Dated: November 30, 2015

Respectfully submitted,

By: /s/ Matthew J. Sheehan

Aparna Joshi (*pro hac vice*)
Matthew J. Sheehan (Bar No. 208600)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300

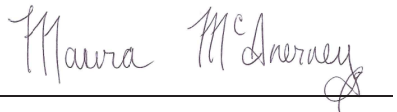
Brad M. Elias (*pro hac vice*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000

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

By: _____

Jennifer R. Clarke (Bar No. 49836)
Michael Churchill (Bar No. 04661)
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
Telephone: (215) 627-7100

*Attorneys for Appellants William Penn School District, Panther Valley School District, The School District of Lancaster, Greater Johnstown School District, Wilkes-Barre Area School District, Shenandoah Valley School District, Jamella and Bryant Miller, Sheila Armstrong, Tyesha Strickland, Angel Martinez, Barbara Nemeth, Tracey Hughes, Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People—Pennsylvania State Conference.*

By: 

Maura McInerney (Bar No. 71468)
David Lapp (Bar No. 209614)
Cheryl Kleiman (Bar No. 318043)
EDUCATION LAW CENTER
1315 Walnut St., Suite 400
Philadelphia, PA 19107
Telephone: (215) 238-6970

*Attorneys for Appellants Jamella and Bryant Miller, Sheila Armstrong, Tyesha Strickland, Angel Martinez, Barbara Nemeth, Tracey Hughes, Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People—Pennsylvania State Conference.*

## CERTIFICATION OF COMPLIANCE WITH RULE 2135(D)

The Reply Brief of Appellants complies with the word count limitation of Pa. R.A.P. 2135 because it contains 6,937 words, excluding the parts exempted by section (b) of this Rule. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

Date: November 30, 2015

By: /s/ Matthew J. Sheehan

## PROOF OF SERVICE

I hereby certify that, on this 30th day of November, 2015, I caused the foregoing to be served on the persons indicated below by depositing the requisite number of copies in the United States mail, first class, postage prepaid:

Patrick M. Northen
Lawrence G. McMichael
Dilworth Paxon, LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102

*Counsel for Legislative Branch Appellees*

John G. Knorr, III
Lucy E. Fritz
Deputy Attorney General
Civil Litigation Section
Strawberry Square, 15th Floor
Harrisburg, PA 17120

*Counsel for Executive Branch Appellees*

Deborah R. Willig
Ralph J. Teti
Bruce M. Ludwig
John R. Bielski
Willig, Williams, & Davidson
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103

*Counsel for Amici Curiae*

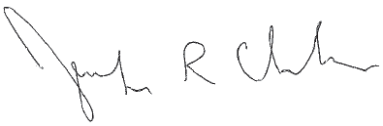
Fred T. Magaziner
Lynne Kolodinsky
Dechert LLP
2929 Arch Street
Cira Center
Philadelphia, PA 19104

*Counsel for Amici Curiae*

Robert M. Tomaine Jr., Esq.
Pennsylvania Department of Education
333 Market Street, 9th Floor
Harrisburg, PA 17123

By: /s/ Matthew J. Sheehan
(Signature of the Person Serving)

| | |
|---|---|
| Person Serving: | Matthew J. Sheehan |
| Attorney Registration No: | 208600 |
| Law Firm: | O'Melveny & Myers LLP |
| Address: | 1625 Eye Street, NW<br>Washington, D.C. 20006 |
| Representing: | Appellant William Penn School District<br>Appellant Panther Valley School District<br>Appellant The School District of Lancaster<br>Appellant Greater Johnstown School District<br>Appellant Wilkes-Barre Area School District<br>Appellant Shenandoah Valley School District<br>Appellant Pennsylvania Association of Rural and Small Schools |



By: _____
(Signature of the Person Serving)

| | |
|---|---|
| Person Serving: | Jennifer R. Clarke |
| Attorney Registration No: | 49836 |
| Law Firm: | Public Interest Law Center |
| Address: | 1709 Benjamin Franklin Parkway<br>Philadelphia, PA 19103 |
| Representing: | Appellant William Penn School District<br>Appellant Panther Valley School District<br>Appellant The School District of Lancaster<br>Appellant Greater Johnstown School District<br>Appellant Wilkes-Barre Area School District<br>Appellant Shenandoah Valley School District<br>Appellant Jamella and Bryant Miller<br>Appellant Sheila Armstrong<br>Appellant Tyesha Strickland<br>Appellant Angel Martinez<br>Appellant Barbara Nemeth<br>Appellant Tracey Hughes<br>Appellant Pennsylvania Association of Rural and Small Schools, and the National Association for the Advancement of Colored People—Pennsylvania State Conference. |