

In The
Commonwealth Court of Pennsylvania

587 M.D. 2014

WILLIAM PENN SCHOOL DISTRICT, et al.

Petitioners

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION, et al.,

Respondents

*On Remanded to the Commonwealth Court of Pennsylvania by Decision, dated September 28, 2017
From the Supreme Court of Pennsylvania, No. 46 MAP 2015*

BRIEF OF AMICUS CURIAE
Commonwealth Foundation for Public Policy Alternatives

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STATEMENT OF INTEREST OF AMICUS CURIAE

Commonwealth Foundation for Public Policy Alternatives (“Commonwealth Foundation” or “Amici Curiae”) respectfully submits this *amici curiae* brief¹ in support of Respondents, Pennsylvania Department of Education; Sen. Jake Corman in his official capacity as President Pro-Tempore of the Pennsylvania Senate; Rep. Bryan Cutler in his official capacity as the Speaker of the Pennsylvania House of Representatives; Gov. Tom W. Wolf, in his official capacity as the Governor of the Commonwealth of Pennsylvania; Pennsylvania State Board of Education; and Pedro Rivera in his official capacity as Acting Secretary of Education (collectively “Respondents”).

The Commonwealth Foundation transforms free-market ideas into public policies so all Pennsylvanians can flourish. The Commonwealth Foundation’s vision is that Pennsylvania once again writes a new chapter in America's story by ensuring all people have equal opportunity to pursue their dreams and earn success. Since the Commonwealth Foundation began fighting for freedom in Pennsylvania in 1988, it has saved taxpayers billions of dollars, brought greater knowledge of free-market principles and happenings in Harrisburg to millions of fellow citizens, and helped enable hundreds of thousands of families to choose a school for themselves

¹ The *Amicus Curiae* submit this Brief and the Application for Leave to File pursuant to Pa.R.A.P. 531(b)(1).

² URL: <https://www.education.pa.gov/Teachers%20->

The Commonwealth Foundation has studied the issues presented in this litigation, has tracked and compiled state educational spending and revenue data over several decades, has regularly analyzed Pennsylvania education spending and performance, and believes that the Court will benefit from its perspective.

The Commonwealth Foundation is deeply invested in the how this Court resolves the pending questions. As a nonpartisan public policy research and advocacy nonprofit organization, Commonwealth Foundation has provided expertise on issues related to education funding to legislators, practitioners, reporters, and the public at large. Its ongoing research includes annual analysis of state and federal data regarding school spending in Pennsylvania; our most recent white paper titled “The Truth About Education Spending in Pennsylvania” was released in April 2021 and is available on our website. Numerous media outlets have cited Commonwealth Foundation’s research on this important subject area. These outlets include: Fox News, Forbes, WTAE, ABC 27, CBS 21, the Philadelphia Inquirer, Pittsburgh Post-Gazette, Pittsburgh Business Journal, and others, just within the past year.

Furthermore, Commonwealth Foundation policy experts have frequently testified on issues related to public education funding, including before the Pennsylvania Senate Education Committee regarding the 2007 “costing-out” study, before Pennsylvania Auditor General special hearings on charter school funding and reform, before the Basic Education Funding Reform Commission (which led to the development of the current “fair funding” formula), before the Senate Democratic

Policy Committee on the role of charter schools in education, and before the Pennsylvania Senate Education Committee on the subject of teacher strikes.

No other person or entity other than the amicus curiae, its members, or counsel have (i) paid in whole or in part for the preparation of this amici curiae brief or (ii) authored in whole or in part this amici curiae brief. *See* Pa. R.A.P. 531(b)(2).

INTRODUCTION

The Petition for Review (“Petition”) contains two separate counts, challenging how Pennsylvania funds its public education system. Under Count I, Petitioners assert that Respondents violated the Education Clause in the Pennsylvania Constitution, which specifies “[t]he 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 (emphasis added). According to Petitioners, Respondents “fail[ed] to provide [school districts] with resources sufficient to enable the districts to ensure that all students . . . have an opportunity to obtain *an adequate education* that prepares them to meet state academic standards and prepares them for civic, economic, and social success.” Petition at ¶ 304 (emphasis added). Petitioners cite “[t]he current levels and allocation of public-school funding” as the culprit for this alleged violation. *Id.* at ¶ 305. They brand current funding levels as “irrational, arbitrary, and not reasonably calculated to ensure” that all students have access to the prerequisites for an adequate public education. *Id.*

Under Count II, Petitioners claim that Respondents infringed upon their rights under the Commonwealth’s equal protection guarantees. *See* PA. CONST. art. III, § 3. They challenge the alleged inequities present in the *method* Pennsylvania uses to fund public education. Petition at ¶ 310. Specifically, the Petition asserts, “[Respondents] adopt[ed] a school-financing arrangement that discriminates against

an identifiable class of students who reside in school districts with low incomes and property values[.]” *Id.* Count II posits that Pennsylvania’s Constitution “imposes a duty on the Commonwealth to ensure that all students have the same basic level of educational opportunity[.]” *Id.* at ¶ 308. Petitioners define this threshold requirement as “the same fundamental opportunity to meet academic standards and to obtain an adequate education that prepares the student for civil, economic, and social success.” *Id.* The current school-financing arrangement, Petitioners contend, “den[ies] those students [residing in economically disadvantaged districts] an equal opportunity to obtain an adequate education” that achieves these stated benchmarks. *Id.* at ¶ 310.

Respondents filed Preliminary Objections and challenged both counts as non-justiciable, which this Court granted and dismissed the case. On appeal, the Pennsylvania Supreme Court reversed and remanded. It ruled that these causes of action “cannot be dismissed as non-justiciable[.]” and are therefore subject to judicial review – guided by a standard that has not yet been fully defined. *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 457 (Pa. 2017). The Supreme Court was mindful of the possible dangers “in wading deeply into questions of social and economic policy,” an endeavor the Court has “long [] recognized as fitting poorly with the judiciary’s institutional competencies.” *Id.* at 463 (citing *Martin v. Unemployment Comp. Bd. of Review*, 466 A.2d 107, 111–13 (Pa. 1983)). The Court concluded, “[h]owever, the judiciary has a correlative and equally important obligation to fulfill its interpretive function.” *Id.*

It is a mistake to conflate legislative policy-making pursuant to a constitutional mandate with constitutional interpretation of that mandate and the minimum that it requires. In this domain, as in so many others, courts have the capacity to differentiate a constitutional threshold, which ultimately is ours to determine, from the particular policy needs of a given moment, which lie within the General Assembly's purview.

Id. at 463-464.

The Supreme Court's decision only addressed *whether* Petitioners' claims are justiciable, that is "whether *any* conceivable judicially enforceable standard might be formulated and applied after the development of an adequate record[.]" *Id.* at 450 (emphasis in original). It did not articulate "*what* standard a court might employ in assessing the General Assembly's satisfaction of its mandate[.]" *Id.* (emphasis in original). Rather, on remand, this Court now must undertake the twin responsibilities of deciding (i) what the Pennsylvania Constitution requires, and (ii) whether Respondents have satisfied that standard. *See id.* (explaining that, on remand, the Commonwealth Court is free to establish the standard it determines appropriate, "as is its prerogative by virtue of Petitioners' request for 'such other and further relief as the [c]ourt may deem just and proper'")(quoting Petition at ¶ 324).

Petitioners challenge the constitutionality of Pennsylvania's current school-financing arrangement in two distinct regards. They contend that the funding levels are both deficient and unequal. Neither claim is valid. Although the funding levels available to each school district in Pennsylvania vary, each district has the necessary funds to provide the quality of education constitutionally mandated. Public education

in Pennsylvania is not underfunded. The metrics support this conclusion. Pennsylvania allocates much of the state education funding to school districts with the most need. This ensures that each district receives the requisite minimum threshold, while also countering much of the disparity that exists between wealthy and impoverished school districts. The current school-financing arrangement – while admittedly imperfect – does not violate the Pennsylvania Constitution in any respect.

ARGUMENT

I. THE LEVEL OF PUBLIC SCHOOL FUNDING IN PENNSYLVANIA EXCEEDS THE THRESHOLD CONSTITUTIONALLY REQUIRED BY THE EDUCATION CLAUSE

A. Defining the Constitutional Threshold Requirement – a *Thorough and Efficient Education*

The Supreme Court’s decision indicates that the Education Clause guarantees students in Pennsylvania a certain minimum threshold level of public education. *William Penn Sch. Dist.*, 170 A.3d at 449-450, 457. The Court seemed to adopt Petitioners’ nomenclature in referring to this constitutional threshold as an *adequate education* – a “condition precedent” needed to maintain “a thorough and efficient system of public education to serve the needs of the Commonwealth.” *See id.* at 449-450; PA. CONST. art. III, § 14. In other words, Pennsylvania’s public education system is *adequate* when (i) it is “thorough and efficient” and (ii) “serve[s] the needs of the

Commonwealth.” *Id.* Defining this threshold, however, is a more elusive task than identifying its existence.

According to Petitioners, “the General Assembly effectively has defined an ‘adequate’ education either through, or at least by inference from, the various performance standards it has imposed upon school districts[.]” *William Penn Sch. Dist.*, 170 A.3d at 448. In recognizing “that Petitioners lean heavily upon the strict academic standards embodied in the General Assembly’s measures of educational success[.]” the Supreme Court refused to accept this standard as the appropriate constitutional benchmark. *Id.* at 449 (citing Petition at ¶¶ 313–14, 320–21). “Surely, it cannot be correct,” the Supreme Court opined, “that we simply constitutionalize whatever standards the General Assembly relies upon at a moment in time, and then fix those as the constitutional minimum moving forward[.]” *Id.* at 451. “It is reasonable to maintain that these measures necessarily are mutable, and are ill–suited, as such, to serve as a constitutional minimum now or in the future.” *Id.* at 449. The constitutional threshold “might lie somewhere below [the strict academic standards embodied in the General Assembly’s measures of educational success] or be differently described.” *Id.* (citations omitted).

Regardless, “universal satisfaction of performance thresholds is not the goal” under Count I. *Id.* at 448. For practical purposes, the issue before this Court is exclusively about funding – or, rather, the alleged inadequacy of funding. The question is whether the General Assembly and the other Respondents have satisfied

their obligation “[to] provid[e] sufficient support to all school districts to ensure that their students have the opportunity to [receive an *adequate* public education.]” *See id.* at 448. Petitioners seek to create a strong link between the Education Clause’s minimum threshold and success regarding the Commonwealth’s stated academic benchmarks and litany of standardized testing. The Supreme Court’s guidance as to this open question, however, is more comfortable discussing the substance of a constitutionally *adequate education* in broader and more generalized terms. *See id.* at 449 (recognizing that Petitioners claim asks whether Respondents “provide[d] the ‘support necessary to ensure that all students have the opportunity to obtain an adequate education that will enable them to . . . participate meaningfully in the economic, civic, and social activities of our society.’”) (quoting Petition at ¶ 314).

In application, the precise definition of an adequate education – that is “a *thorough and efficient system of public education*” that “serve[s] the needs of the Commonwealth” – is far less significant than this Court’s determination of the funding levels necessary to provide a system of public education that satisfies the constitutional standard. Although the Petition for Review discusses tangible resource deficiencies as well, the substance of Count I focuses squarely on funding – particularly the need for increased funding in order to comply with the constitutional mandate. The mandate is, therefore, defined by the funding level required.

- B. The Data Indicates that Pennsylvania’s School Funding Levels Are Sufficient to Provide a Constitutionally Thorough Education that Serves the Needs of the Commonwealth

Pennsylvania spends significantly more than the national average on education per student, ranking the Commonwealth within the top ten regarding education expenditures annually. *See Revenues and Expenditures for Public Elementary and Secondary Education: FY 19*, Nat. Ctr. for Ed. Statistics (NCES) 2021-302 (U.S. Dep’t of Ed., June 2021). “Total revenues per pupil averaged \$15,122 on a national basis in FY 19[.]” *Id.* at 2 (citing Table 2). For FY 2018-2019, Pennsylvania spent \$19,363 per student, which is a difference of more than \$4,000 in per student expenditures. *Id.* at 9 (Table 2 indicating Pennsylvania’s per pupil expenditure was \$19,363). In fact, according to the June 2021 Report by the National Center for Education Statistics (NCES), Pennsylvania is one of only fifteen (15) states and the District of Columbia that expends \$15,000 or more per pupil. *Id.* at 3 (Figure 2).

Respondents have cited similar statistics in their attempts to rebut Petitioners’ allegations. The claims in this case, however, are not concerned with the broad strokes of Pennsylvania’s school-financing arrangement or where the Commonwealth ranks nationally in terms of expenditures for public education. Petitioners’ case focuses on the nuances lodged interstitially between the gaps in these statistical figures. They argue that Pennsylvania’s school-financing arrangement has failed to provide the constitutionally required funding levels for *some* school districts. *See* Petition at ¶¶ 304-305, 308-310. Petitioners cite “[the] wide gaps in resources between school districts — the product of a long-ingrained funding system that relies

more heavily on local taxes than all but six other states[.]” *See* Hanna, Maddie, et al., *A landmark case that could change school funding across Pa. is going to trial*, PHILADELPHIA INQUIRER, at 2 (November 12, 2021).

Lower Merion, for instance, has more than \$31,000 to spend per student because it can reap more in property taxes — even at lower rates — compared with poorer districts like William Penn, which has \$18,000 per student.

Id. Likewise, Upper Darby Superintendent Dan McGarry faces a similar situation to the William Penn School District, “ha[ving] \$16,000 to spend per student — in the bottom 10% statewide — despite taxing residents at one of the highest rates in the state.” *Id.* at 3.

According to Mimi McKenzie, legal director of the Public Interest Law Center, “It’s a story where children who need the most often get the least[.]” *Id.* at 3. But, for purposes of Count I and considering whether Pennsylvania’s system of public school funding violates the Education Clause, the question concerns the adequacy of funding to deliver a thorough and efficient education system that serves the needs of students in the Commonwealth — not equality of funding for every school district. The disparity between Lower Merion’s per pupil expenditures and the per pupil expenditures of countless other school districts across the Commonwealth may very well be problematic. Allowing such a disparity to exist could demonstrate that elected officials implemented poor policy decisions. But these types of disparities do not violate the Education Clause *unless* the poorer school districts — those districts which

do not enjoy the same resources as Lower Merion – lack the funds necessary to provide their students with a thorough and efficient education.

The Supreme Court has made clear that “financial equalization” is not the appropriate standard by which to evaluate whether Pennsylvania’s school-financing arrangement violates the Education Clause. *William Penn Sch. Dist.*, 170 A.3d at 449.

To impose such a standard would confound the constitutional design in numerous particulars. First, it would contradict the framers’ specific consideration and rejection of a uniformity requirement. Second, it would undermine the enduring emphasis on local prerogatives that long has animated education policy in the Commonwealth and elsewhere.

Id. (footnote omitted). The Education Clause is not egalitarian. Therefore, for Count I, the most pertinent data is not the relative disparity in financial resources across the school districts in Pennsylvania. Disparities exist, but the metrics illustrate that the funding levels in all school districts throughout the Commonwealth – even in the poorest school districts – are sufficient to provide all students with a constitutionally adequate education.

a. Pennsylvania Allocates the Most State Funding to Districts with the Highest Poverty Levels

In FY 2019, Pennsylvania generated \$18,521,251 from local revenue sources for education funding, which represents about 63% of the total education expenditures for the year. *See Revenues and Expenditures for FY 19*, at 8 (Table 1, identifying total education expenditures in Pennsylvania of \$29,235,226). Only four states derived more funding from local revenue sources than Pennsylvania: (i) Texas;

(ii) New York; (iii) Illinois; and (iv) California. *Id.* Revenues from property taxes are, by far, the primary source of local funding for school districts in Pennsylvania. *See* Hanna, *supra* at 3. This structure inevitably leads to a disparity between wealthier school districts with greater resources and higher property values and those school districts with lower incomes, lower property values and minimal resources. *See William Penn Sch. Dist.*, 170 A.3d at 449 n.52 (explaining that “equalization of expenditures could be achieved only by capping what wealthier districts could spend on their schools”).

Contrary to Petitioners’ claims, however, Pennsylvania recognizes the disparity created by reliance on revenues from local property taxes. Addressing the incongruence, Pennsylvania diverts significant state-level funding to struggling school districts. In fact, Pennsylvania’s state-level funding exceeds that of most states on a per-student basis. The Commonwealth allocates a substantial bulk of its spending to school districts with high poverty levels and low property values. *See* Table, 2017-18 Poverty Rate and 2019-20 District Revenues. Pennsylvania’s school-financing arrangement takes active steps to solve deficiencies, and to direct state taxpayer resources toward higher poverty districts to address disparities in local wealth and revenue.

2017-18 Poverty Rate and 2019-20 District Revenues

Poverty Quintile	Average Poverty Level	Total Funding per Student	Local Funding per Student	State Funding per Student	Federal Funding per Student
Highest poverty quintile	26%	\$19,003	\$6,687	\$10,854	\$763
2nd highest quintile	17%	\$18,937	\$8,249	\$9,471	\$513
3rd highest quintile	14%	\$19,338	\$9,218	\$8,557	\$403
4th highest quintile	10%	\$18,751	\$10,866	\$6,703	\$284
Lowest poverty quintile	5%	\$20,518	\$14,509	\$5,033	\$192

Sources: 2017-18 Poverty - Kids Count Data Center, <https://datacenter.kidscount.org/data/tables/2778-poverty--estimated-percent-of-relevant-population-age-5-17-under-100-poverty-by-school-district-using-saige?loc=40&loct=10#detailed/10/5475-5975.8788/false/871,870,573,869,36,868,867,133,38,35/any/10226>; 2019-20 Revenues - Pa. Department of Education, Annual Financial Report, Revenue data, <https://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/AFR-Data-Summary-Level.aspx>.

The table above demonstrates two critical points. First, in school districts with the highest poverty percentage, Pennsylvania provides the most state funding – \$10,854 per pupil, compared with only \$5,033 per student of state funding in school districts with 5% or less poverty. For example, Lower Merion does not require the same amount of state funding as less affluent school districts. Lower Merion can generate most of its education funding through local property taxes. Second, the total funding amounts per student – from all sources – in districts with the highest and the lowest poverty levels are quite similar. Pennsylvania protects school districts that lack the resources of Lower Merion by allocating state funding to those districts, thus ensuring all students in Pennsylvania have access to the constitutional minimum threshold.

This is the structure for which Petitioners advocate – a system that redistributes scarce resources and funding to less affluent school districts, which are unable to rely primarily upon revenues from local property taxes. The system Petitioners seek

already exists. The question is whether the Education Clause demands more. Petitioners maintain that Pennsylvania must redistribute greater amounts of state funding to certain school districts – districts that are struggling financially – because current-funding levels in those districts remain insufficient. *See e.g.*, Petition at ¶¶ 304, 305, 308, and 310. The available data, however, simply does not support this conclusion.

b. Funding Levels in High Poverty Districts Exceed the National Average for Per Pupil Expenditures and the Average Private School Tuition in Pennsylvania

Some proponents of increased spending argue that the statistics discussed above constitute a form of “[c]herry picking numbers to suit [an] argument[.]” *See* Churchill, Michael. *Pennsylvania’s School Funding Problem Is Real*, The Public Interest Law Ctr. (Last visited Nov. 16, 2021) (URL: <https://www.pubintlaw.org/cases-and-projects/pennsylvanias-school-funding-problem-is-real/>). According to this criticism, it is misleading to cite \$19,363 as the average per pupil expenditure across all school districts in Pennsylvania. *Id.* Because of wealthy districts like Lower Merion – these critics argue – the average per pupil expenditure in Pennsylvania masks the gaping disparities that afflict schools in high poverty areas. *Id.* In other words, the average per pupil expenditure in Pennsylvania is artificially high because a small minority of school districts spends unusually high amounts.

The few districts with high local levels of wealth are well funded and spend lots of money, [. . .] But because Pennsylvania appropriates so little in state funds, the vast majority of districts without a mall in their tax base or wealthy taxpayers do not have the resources to have small

class sizes, up to date text books, up to date technology or even adequate buildings, much less sufficient tutors, nurses, counselors, music and art.

Id. While this criticism appears somewhat persuasive, it loses much of its fervor when the expenditures for each district are examined more closely.

For the overwhelming majority of school districts in Pennsylvania, the per pupil expenditures meet or exceed the national average of about \$15,000 per student. *See Revenues and Expenditures for FY 19*, at 2 & 9 (Table 2, identifying national average of spending \$15,122 per pupil); *AFR Expenditure Data for: School Districts, Career and Technology Centers, and Charter Schools*, Spreadsheet 2019-2020, Pennsylvania Dep't of Ed. (last visited Nov. 16, 2021).² The *median* per pupil expenditure across all 500 school districts in Pennsylvania, during the 2019-2020 school year, is \$18,388.45. *See AFR Expenditure Data for 2019-2020* (arranging spreadsheet data for per pupil expenditures of all school districts in ascending order and ascertaining median value). Where a data set is arranged according to individual values, the median value is defined as “[the] specific type of value or quantity at the ascending or descending order’s halfway point.” *Black’s Law Dictionary*, (8th ed. 2004). Therefore, at minimum, half of all school districts in Pennsylvania spent \$18,388.45 *or more* per student during the 2019-2020 school year. Of the two hundred and fifty (250) school districts in Pennsylvania that spent \$18,388.45 *or less*, no single district spent below approximately

² URL: <https://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/AFR-Data-Summary-Level.aspx>

\$13,000 per pupil. *See AFR Expenditure Data for 2019-2020* (identifying Norwin School District as the district with lowest per pupil expenditure, spending \$12,902.11 per pupil).

Moreover, only thirty (30) of Pennsylvania’s 500 school districts spent less than \$15,000 per pupil – with all but seven (7) school districts spending at least \$14,000 per pupil. *Id.* The current school-financing arrangement creates some disparity in spending and resources amongst the various school districts throughout the Commonwealth. Yet about four hundred and seventy (470) school districts in Pennsylvania recorded per student expenditures at or above the national average of approximately \$15,000 per student. Even the funding levels of school districts that spent less than the national average were within \$2,000 or less of the \$15,000 benchmark. Each of the six school districts that have petitioned this Court reported per pupil spending figures exceeding the national average for the 2019-2020 school year:

School District	Per Pupil Expenditure for 2019-2020 School Year
Wilkes-Barre Area SD	\$15,463.87
Greater Johnstown SD	\$16,345.68
William Penn SD	\$17,921.00
Panther Valley SD	\$18,645.44
Lancaster SD	\$22,322.70
Shenandoah Valley SD	\$26,018.43

See AFR Expenditure Data for 2019-2020 (delineating per pupil expenditures by school district). These six school districts spent between \$341.87 and \$10,896.43 above the \$15,122 national average. *Id.* Despite this reality, these school districts claim to suffer from underfunding caused by Pennsylvania's school-financing arrangement. The data simply does not support the contention that a constitutional deficiency in funding afflicts Pennsylvania's public schools.

The per pupil expenditures for the school districts that filed this action mirror the per pupil expenditures for many of the wealthier school districts with high property values identified and contrasted in the Petition for Review. For example, Tredyffrin-Eastown School District spends \$20,224.47 per pupil, similar to the expenditures of Panther Valley and Lancaster School Districts and far less than Shenandoah Valley School District. *See AFR Expenditure Data for 2019-2020.* According to U.S. News and World Report, of the 711 public high schools in Pennsylvania, Conestoga High School (located in Tredyffrin-Eastown) ranks fifth with math and reading proficiency at 93%. *See Best Pennsylvania High Schools 2021 Ranking*, U.S. News & World Report (last visited Nov. 17, 2021) (URL: <https://www.usnews.com/education/best-high-schools/pennsylvania/rankings>).

The Downingtown STEM Academy ranks second in the entire state (and thirty-fourth nationally) with 100% proficiency in both math and reading. *Id.* In fact, Downingtown's two other high schools also rank within the top 10% of Pennsylvania's 711 public high schools, with reading and math proficiency at or near

90%. *Id.* Yet Downingtown Area School District reported spending only \$16,647.58 per pupil for the 2019-2020 school year, which is *less spending per student than the William Penn School District at \$17,921.00*. See *AFR Expenditure Data for 2019-2020*. Perhaps the most stark illustration is the Norwin School District, which spends only \$12,902.11 per pupil – the *least* of any school district in Pennsylvania. *Id.* Norwin Senior High School, however, ranks in the top 20% of Pennsylvania’s 711 public high schools, with 75% proficiency in math and 86% proficiency in reading. See *Best Pennsylvania High Schools 2021 Ranking* (ranking Norwin Senior High School #143 of 711). Five hundred and sixty-eight (568) public high schools rank below Norwin in terms of academic success. *Id.* By contrast, Penn Wood High School in the William Penn School District ranks 392 with math and reading proficiency below 50% despite per student funding of \$5,000 more than Norwin. *Id.*

The data reveals that the deficiency confronting Petitioners is not a deficiency in available funding, but rather a deficiency in performance outcomes. The six school districts, which filed this action, spend the same amount – or, in some instances, more – on per pupil expenditures as better-performing school districts like Downingtown, Tredyffrin-Eastown and Norwin. Many school districts across the Commonwealth have achieved and documented academic success with similar funding levels to those reported by Petitioners. This Court should, therefore, infer that factors *aside from funding* are substantially responsible for the disparity in achievement. It defies logic to conclude that Pennsylvania has somehow violated the state constitution for failing to

provide necessary funding to certain school districts, when other school districts in the Commonwealth have succeeded academically with the same funding levels.

Yet this is precisely the relief that Petitioners seek from this Court. They ask this Court to order a spending increase designed to erase the performance gap – that is, an increase in spending sufficient to enable these failing districts to achieve the academic benchmarks delineated by the General Assembly. First, this request seeks improperly to constitutionalize the mere policy decisions of the legislature, and thus ignore the Supreme Court’s guidance to the contrary. “It is reasonable to maintain that these measures [of academic success] necessarily are mutable,” the Supreme Court opined, “and are ill–suited, as such, to serve as a constitutional minimum now or in the future.” *William Penn Sch. Dist.*, 170 A.3d at 449.

Second, the relief disregards the nature of Count I. Count I of the Petition for Review solely concerns whether Pennsylvania’s system of public school financing denies students in less affluent school districts the constitutional minimum threshold guaranteed under the Education Clause. *See William Penn Sch. Dist.*, 170 A.3d at 449–450, 457. The metrics clearly establish that the current funding levels are sufficient to provide an *adequate education* – an education that is “thorough and efficient” and that “serve[s] the needs of the Commonwealth.” With similar per pupil expenditures, many school districts in Pennsylvania – like, *inter alia*, Downingtown, Tredyffrin-Eastown and Norwin – have achieved and exceeded the academic benchmarks delineated by the General Assembly. The Education Clause guarantees that school

districts be afforded the resources necessary to provide students with the opportunity for an *adequate education* that serves the needs of Pennsylvania’s students. Petitioners suggest the Education Clause requires Pennsylvania to allocate the funding needed – according to expert opinion – to achieve specific performance outcomes. But doing so would misapprehend the notion of a constitutional minimum threshold, and transform a public policy determination into a judicial interpretation of a constitutional provision.

c. All School Districts in Pennsylvania Maintain Massive Reserve Funds, which Remain Unspent and Total in the Millions of Dollars

Petitioners claim, *inter alia*, that “Pennsylvania’s public school children **are being shortchanged by \$4.6 billion[.]**” with “the poorest 20% of school districts hav[ing] \$7,866 less per student than the wealthiest 20%[.]” *See* Fernandez, Cynthia, et al., *Pa. Schools Need an Additional \$4.6 Billion to Close Education Gaps, New Analysis Finds*, SPOTLIGHT PA, at *3-4 (October 27, 2020) (Last visited Dec. 6, 2021) (URL: <https://www.spotlightpa.org/news/2020/10/pa-public-school-funding-analysis-philadelphia-reading-lancaster/>) (emphasis added). They rely upon a report prepared by Matthew Gardner Kelly, an assistant professor of education at Pennsylvania State University. *Id.* at *4. Kelly’s analysis claims to delineate how much additional spending each school district in the Commonwealth should receive. *Id.* He based his findings upon (i) current data and (ii) a 2008 formula adopted by the General

Assembly “that assessed the cost of providing an education *that would allow all Pennsylvania students to meet state academic standards.*” *Id.* at *5 (emphasis added).

Petitioners do not, however, advocate using the sizable reserve funds – funds that nearly every school district in Pennsylvania maintains – to finance these *necessary* spending increases. “Despite constant complaints of inadequate resources, unfair funding, and unmet needs, districts in every region are holding/hoarding barrels of money in interest-bearing accounts.” *See* Baer, John. *Billions of your tax dollars feed growing school reserve funds*, PHILADELPHIA INQUIRER, at *2 (May 30, 2018).

Latest statewide reserves (for 2016-17), including funds for charter and vocational schools, approach \$5 billion; **for school districts alone it’s \$4.53 billion.** To put these numbers in context, the total state appropriation for basic education is \$5.9 billion.

Id. at *2-3 (emphasis added). For the General Fund data during the 2016-2017 school year, ninety-seven percent (97%) of Pennsylvania’s 500 school district maintained reserves. *Id.* at *3. “Annual data from the state Department of Education show reserve amounts increase every year.” *Id.* at *2.

Many school districts that appear to struggle financially often store millions of dollars in reserve funds. For example, the Philadelphia school district has \$29,583,254.00 in reserve as of the 2019-2020 school year. *See* Pa. Dept. of Ed., *Annual Financial Report (AFR) Detailed – Miscellaneous/General Fund Balance*. Finances AFR 9 Gen. Fund Balance for 2010-11 to 2019-20 (“AFR Detailed Gen.

Fund Balance Table”).³ This amount increased from about \$14 million held in reserves for the 2016-2017 school year. *Id.* Three years ago, the Scranton school district had the largest negative balance of \$30 million. *See* Baer, *supra* at *4. Now, as of the 2019-2020 school year, Scranton maintains \$4,441,150.00 in reserve funds. *See* AFR Detailed Gen. Fund Balance Table.

According to Petitioners’ analysis the Reading school district “spends about \$8,600 less per student than it should, the state’s largest gap.” *See* Fernandez, *supra* at *6. Yet, as of the 2019-2020 school year, the Reading School District maintained **\$36,441,426.00** in reserve funds. This dichotomy seems incomprehensible to Pennsylvania taxpayers, whom Petitioners are asking to bridge the spending disparities in public education. On the one hand, Petitioners suggest that school districts – like Reading – are spending thousands less per student than they “should” be contributing. But the same districts with purportedly substantial deficiencies in available resources *also* maintain millions of dollars in reserve funds, which are *never* used. The two facts cannot be reconciled. With reserve funds of nearly \$37 million, *why* does Reading school district allegedly have the “state’s largest gap” between (a) its actual per student expenditure and (b) the idealized per student expenditure?

Each of the school districts that filed this lawsuit stores reserve funds exceeding \$1 million. *See* AFR Detailed Gen. Fund Balance Table.

³ (Last visited Nov. 16, 2021) (<https://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/AFR-Data-Detailed-.aspx>)

School District	General Fund Balances as of 2019-2020 School Year
Wilkes-Barre Area SD	\$7,438,012.00
Greater Johnstown SD	\$7,618,472.00
William Penn SD	\$2,478,940.00
Panther Valley SD	\$1,219,855.00
Lancaster SD	\$30,588,459.00
Shenandoah Valley SD	\$5,218,054.00

Certainly, many school districts across the Commonwealth stockpile far greater amounts in reserve than the districts listed above. Lower Merion stored reserves of \$42,912,440.00 during the 2019-2020 school year. *Id.* Pittsburgh school district has amassed \$144,636,996.00 in reserve funds. *Id.*

One point remains. Pennsylvania’s **\$4.84 billion** in school district reserve funds as of 2019-20 statewide is noticeably absent from the conversation that Petitioners wish to have about funding deficiencies and inequities.⁴ *See* Pa. Dept. of Ed., Detailed Annual Financial Reports (Last visited Jan. 12, 2022) (URL: <https://www.education.pa.gov>).⁵ The total amount held in reserve by Pennsylvania’s 500 school districts is nearly the amount needed in increased spending, according to Petitioners’ argument. Former state Auditor General Eugene DePasquale explained, “When the amount of reserves gets over 20 percent of a district’s total spending, I get a little anxious.” Baer, *supra* at *5 (quoting DePasquale). DePasquale opined that, at

⁴ The \$4.84 billion in reserve funds for 2019-20 *only* includes school districts, the amount of reserve funds grows to \$5.54 billion when charter schools are included.

⁵ (URL: <https://www.education.pa.gov/Teachers%20-%20Administrators/School%20Finances/Finances/AFR%20Data%20Summary/Pages/AFR-Data-Detailed.aspx/>).

these reserve margins, some districts should provide taxpayers with a refund. *Id.* “45 percent of all districts, hold reserves amounting to 20 percent or more of spending[.]” with “13 districts in that category that also sought to raise taxes.” *Id.* at *6. Budget Secretary Randy Albright has acknowledged that reserve funds may be excessive, “sa[ying], ‘We could and should begin to talk about fund balances.’” *Id.* at *7 (quoting Albright).

C. Petitioners’ Equal Protection Challenge Is Legally Flawed and Internally Inconsistent.

The Pennsylvania Supreme Court determined that Petitioners’ Equal Protection claim at Count II was distinct from their first cause of action under the Education Clause. *William Penn Sch. Dist.*, 170 A.3d at 459. The Court explained that the alleged Equal Protection violation derives from “the Commonwealth’s failure ‘to finance the Commonwealth’s public education system *in a manner that does not irrationally discriminate against a class of children*[.]’” *Id.* (quoting Petition at ¶ 1 (emphasis added by Supreme Court)). “[I]t is clear that **it is the manner of distribution, not the quantum of financial resources distributed**, that drives this claim[.]” Justice Wecht wrote for a majority of the Court. *Id.* (emphasis added). In fact, Justice Wecht “[did] not impute to Petitioners the desire for funding equality[.]” recognizing the limitations in fashioning such relief. *Id.* at 449-450 & n.52. “Petitioners’ equal protection claims focus upon ‘the *method* by which education funds are raised and distributed—not the

overall amount of funding.” *Id.* at 459 (quoting Petitioners’ Brief (emphasis in original)).

The Equal Protection claim is vulnerable on two separate fronts. First, the targeted laws are facially neutral, and no evidence demonstrates that the Commonwealth purposefully distributed scarce educational resources based upon certain classifications. Second, even assuming a heightened level of scrutiny, the relief sought does not address the root cause of the alleged disparities identified in the Petition for Review. The Petitioners seem content to allow school districts to continue raising unrestricted amounts through local property taxes so long as the Commonwealth must increase state-level funding by billions of dollars.

a. Pennsylvania’s School Funding Arrangement Does Not – on Its Face – Distribute Funding or Resources based upon Separate Classifications

The concept of “‘equal protection of the law’ presupposes some other law that must be applied equally to similarly situated parties.” *Id.* at 460. Here, the Equal Protection claim focuses upon *how* Pennsylvania chooses to fund public education across the Commonwealth – targeting Pennsylvania’s heavy reliance upon local revenue sources and, in particular, local property taxes. This statutory scheme, according to Petitioners, violates the equal protection guarantees under Article III, Section 32 of the Pennsylvania Constitution. The claim focuses upon the alleged disparate impact of the law, assuming this disparity establishes that Pennsylvania’s school funding arrangement distributes money and resources based upon – unspoken,

yet clearly identifiable – classes of people. Equal protection jurisprudence requires evidence that the Commonwealth implemented the funding scheme “at least in part, because of, not merely in spite of, its adverse effects upon an identifiable group.” *Buck v. Com., Dep’t of Pub. Welfare*, 566 A.2d 1269, 1273 (Pa. Cmwlth. 1989) (citing *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 272–73 (1979)). The challenged law here is facially neutral, and whatever disparate impact data Petitioners rely upon appears inadequate to prove purposeful discrimination.

“The equal protection of the laws, it has been said, means that the rights of all persons must rest upon the same *rule* under similar circumstances.” *Barasch v. Pennsylvania Pub. Util. Comm’n*, 532 A.2d 325, 338 (Pa. 1987) (citations omitted). Here, Pennsylvania’s school funding arrangement applies, on its face, the same throughout the Commonwealth. The scheme emphasizes the importance of local control, and enables individual school districts to raise revenues through local property taxes – with minimal, if any, constraints. Equal protection challenges require that classifications be drawn, and that similarly situated individuals are treated differently. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1117–18 (Pa. 2014). “In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification.” *Feeney*, 442 U.S. at 272.

“[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.”

Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (citation omitted). Thus, even if this Court determines that the right to education is a fundamental right warranting strict scrutiny, Pennsylvania’s school-funding scheme must draw some distinction between identifiable classifications for equal protection to apply.

“A statute neutral on its face may still be invalid, however, if it reflects invidious discrimination.” *Klesh v. Com., Dep’t of Pub. Welfare*, 423 A.2d 1348, 1351 (Pa. Cmwlth. 1980) (citing *Feeney*, 442 U.S. at 272–73). “[W]here a statute creates a disproportionate impact on a particular group, that impact must be **traceable to purposeful discrimination** in order to be constitutionally invalid.” *Id.* (citing *Washington v. Davis*, 426 U.S. 229 (1976)) (emphasis added). Like the Fourteenth Amendment, the Pennsylvania Constitution “guarantees equal laws not equal results.” *See Appenbrite v. Com.*, 2014 WL 184988, at *24 (Pa. Cmwlth. 2014) (quoting *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 544 (3d Cir. 2011) (quoting *Feeney*, 442 U.S. at 272)). “Mere inequalities in the administration of [the challenged policy] do not give rise to a constitutional infringement absent an element of intentional or purposeful discrimination on the basis of an arbitrary classification.” *Buck*, 566 A.2d at 1273 (citation omitted).

“[D]iscriminatory purpose” requires a showing that “the decisionmaker adopted the challenged action at least partially because the action would benefit or burden an identifiable group.” *Lower Merion Sch. Dist.*, 665 F.3d at 552. “Even conscious awareness on the part of the [decisionmaker]” of the challenged law’s

disparate impact is not sufficient, “so long as that awareness played no causal role in the adoption of the policy.” *Id.* (internal quotations and citations omitted).

If discriminatory impact cannot be “plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral.” [*Feeney*, 442 U.S.] at 275, 99 S.Ct. 2282. However, “[j]ust as there are cases in which impact alone can unmask an invidious classification, there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed.” *Id.*

Id.

b. Pennsylvania’s School-Funding Arrangement Does Not likely Discriminate against a Class of Students, despite the Existence of Certain Obvious Disparities

Petitioners cannot likely establish that the Commonwealth has purposefully discriminated against identifiable classes of students, thereby burdening their constitutional right to education. Under Pennsylvania’s current school-funding arrangement, wealthy school districts have the ability to raise unrestricted amounts by utilizing local property taxes. The current laws afford the same opportunity to less affluent school districts. The different compositions of Pennsylvania’s 500 school districts create the obvious disparities involved, not the law itself. Those officials who wrote, enacted and – now – enforce these laws are, undoubtedly, aware of the disparities in funding that inevitably ensue from the arrangement. Yet, it seems apparent “[this] awareness played no causal role in the adoption of the [school-funding] policy.” *See Lower Merion Sch. Dist.*, 665 F.3d at 552.

Pennsylvania allocates state-level funding to school districts largely based upon financial need, thus seeking to diminish the effect of disparities in resources among school districts. While such a policy demonstrates an awareness of the financial disparity affecting less affluent school districts, it also belies any suggestion that Pennsylvania policymakers intentionally or purposefully created that disparity.

Furthermore, Petitioners confuse the precise nature of the disparate impact cited in their Petition for Review. On the one hand, the claim identifies “[the] failure ‘to finance the Commonwealth’s public education system *in a manner that does not irrationally discriminate against a class of children[.]*’” *William Penn Sch. Dist.*, 170 A.3d at 459 (quoting Petitioner at ¶1) (emphasis in original). This language concerns the disparities stemming from “the *method* by which education funds are raised and distributed” – that is, *how* the Commonwealth disburses educational resources, whether financial or otherwise. *Id.* Because the Supreme Court seems to indicate this equal protection claim does not use “funding equality” as the applicable standard, the disparate impact identified in the Petition for Review must instead link available resources to academic performance outputs. *See id.* at 449-450. In other words, the Petition describes a disparate impact where the lack of available resources directly causes poor academic performance.

The available data, however, does not illustrate this precise causal relationship. Certainly, a correlation exists between academic performance and available resources, but not the type of causal relationship necessary to demonstrate disparate impact. In

short, it is unclear whether the disparate impact identified by Petitioners solely relates to the disparity in available resources, or whether it also – in some respect – concerns the disparity in academic performance. The two categories are not interchangeable.

c. The Relief Sought by Petitioners Does Not Remedy the Cause of the Alleged Disparity

Assuming this Court applies a heightened level of scrutiny to Petitioners' equal protection claim, the inquiry is twofold: (i) whether the Commonwealth has proffered either a "compelling" or "important" governmental purpose to justify Pennsylvania's school-funding arrangement; and (ii) whether the current arrangement is appropriately tailored to achieving the specified purpose. *Zauflik*, 104 A.3d at 1118.

The Supreme Court – and even Petitioners – seem to agree "the enduring emphasis on local prerogatives that long has animated education policy in the Commonwealth and elsewhere" is a compelling or important governmental interest. *See William Penn Sch. Dist.*, 170 A.3d at 449. "Petitioners never dispute that individual districts should be free to utilize local funding sources to elevate their standards above the constitutional floor[.]" the Supreme Court observed. *Id.* at 450. Apparently, the only open question is whether the current funding arrangement is appropriately tailored to furthering the identified end. Petitioners assert that the arrangement is unconstitutional, but they do so without asking this Court to abolish the institution that – ostensibly – creates the disparities cited in the Petition for Review. Specifically, "Petitioners do not dispute that a constitutional school funding scheme would still

enable wealthier districts to provide greater resources to their students than districts that cannot raise as much money through local taxes.” *Id.* at 431-432. If the Pennsylvania Constitution permits wealthier districts to continue raising greater revenues through local property taxes, the amount of such revenues must be capped at *some* ceiling-level or else the cited disparities will persist indefinitely. The alleged disparities in available resources cannot be remedied entirely through spending increases as Petitioners imply. The relatively low percentage of state-level funding—at a relatively high per-student--for public schools in Pennsylvania is the result of the remarkably high level of local revenue. The two are inversely proportional. Complaining of one without addressing the other is inconsistent and ignores, at least, half the problem.

CONCLUSION

For all the foregoing reasons set forth fully above, the *Amicus Curiae* requests that this Honorable Court determine that the current school-funding arrangement does not violate the Pennsylvania Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shawn M. Rodgers, Esquire, hereby certify that I caused a true and correct copy of the foregoing Amicus Curiae Brief for to be served on or before day of January 14, 2022, via e-filing, e-mail, hand delivery and/or first-class mail, to all counsel of record, which service satisfies the requirements of Pa.R.A.P. 121.

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CERTIFICATE OF WORD COUNT

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a)(1), I hereby certify that this brief complies with the type-volume limitation set forth in Rule 531(b)(3) and contains 7,094 words.

The Amicus Curiae moves for leave to appear and to submit this oversize brief, which contains 94 words more than half of the 14,000 words permitted for the merit briefs of parties under the Rules of Civil Procedure. *See* Pa. R. App. P. 531(b)(1)(iii).

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CERTIFICATE OF COMPLIANCE WITH RULE 127

I certify 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.

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