IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM PENN SCHOOL DISTRICT, et al., Petitioners v. PENNSYLVANIA DEPARTMENT OF EDUCATION, et al., Respondents	NO. 587 MD 2014

LEGISLATIVE RESPONDENTS' REPLY BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

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Pursuant to Pa. R.A.P. 2185(a), Legislative Respondents, by and through their undersigned counsel, respectfully submit the following Reply Brief in Support of their Preliminary Objections.[1]

I. INTRODUCTION

Try as they might, Petitioners cannot meaningfully distinguish the instant case from prior decisions in which the Pennsylvania Supreme Court has emphatically rejected constitutional challenges to the Commonwealth's system for funding public education, including but not limited to *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110 (Pa. 1999). In *Marrero*, the Court sustained preliminary objections based upon nonjusticiability, holding that it was "unable to judicially determine what constitutes an 'adequate' education or what funds are 'adequate' to support such a program." 739 A.2d at 113-14. The Court found that such matters "are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government." *Id.* at 114. While Petitioners urge that "*Marrero* be overturned," such relief is not available from this Court.

Contrary to Petitioners' arguments, the Commonwealth's recent implementation of academic standards and benchmarks does not create judicially

[1] Capitalized terms shall have the same meaning as used in Legislative Respondents' Brief in Support of their Preliminary Objections to the Petition for Review in the nature of an action for declaratory and injunctive relief ("Opening Brief").

manageable standards. Nor can the judiciary bind future legislatures to current educational policy under the guise of constitutional interpretation. Yet, whether or not they choose to admit it, this is exactly what the Petitioners are urging this Court to do.

The funding system established by the General Assembly satisfies the Commonwealth's constitutional obligations under both the Education Clause and the Equal Protection Clause. Petitioners complain that the funding system is irrational because it provides them with "a fraction of the resources available to wealthier districts." However, that precise argument has already been squarely rejected by the Pennsylvania Supreme Court, which has expressly held that "[t]he Legislature has enacted a financing scheme reasonably related to [the] maintenance and support of a system of public education in the Commonwealth of Pennsylvania." *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979). Indeed, Petitioners admit that through the Commonwealth's education subsidy, the Respondents have "made some efforts to close the gap" caused by differences in local tax revenue. [Petition, ¶¶ 11].

Although Petitioners insist that they are not asking the Court to "inquire into the reason, wisdom or expediency" of the legislature's policy choices, such contention simply does not withstand scrutiny. Petitioners plainly believe that education funding should be increased and/or that local property tax dollars should

be redistributed throughout the state, so that the taxpayers in the wealthier districts will subsidize poorer districts. While that may be a profoundly held belief, it clearly is a ***policy*** argument, which must be advanced to Pennsylvania's elected representatives, rather than imposed by the judiciary. The mere fact that Petitioners disagree with the General Assembly's policy choices does not render those choices irrational.[2]

II. ARGUMENT

A. *Marrero and Danson* are Controlling and Cannot Be Distinguished.

Because the Pennsylvania Supreme Court's decisions in *Marrero* and *Danson* clearly establish that constitutional challenges to the Commonwealth's system for funding public education are not justiciable, Petitioners attempt great feats of legal acrobatics in an effort to distinguish those obviously dispositive cases. Yet, there plainly are no legitimate grounds for doing so. Put simply, *Marrero* and *Danson* are controlling and cannot be distinguished.

1. The Supreme Court's Previous Decisions Are Directly On Point.

In *Danson*, the Supreme Court held that the judiciary "may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded, not

[2] Because the *amici curiae* briefs filed in support of the Petition primarily assert the same arguments as Petitioners and/or advance policy arguments regarding perceived flaws in the Commonwealth's system for financing public education, those briefs will not be specifically addressed except where noted.

only in Philadelphia, but throughout the Commonwealth." 399 A.2d at 367. Petitioners attempt to distinguish *Danson* by making the remarkable contention that the Supreme Court "did not abstain from hearing an education-funding challenge on political-question grounds," but instead "reached the merits" of that case. [Petitioners' Brief at 22]. Such contention turns a blind eye towards the actual result in *Danson*, which dismissed a challenge to the Commonwealth's system for funding public education ***on preliminary objections***, specifically stating at the very outset of the opinion that "it is clear that appellants have failed to state a justiciable cause of action." *Danson*, 399 A.2d at 363.

Even weaker is the Petitioners' effort to distinguish *Danson* on the basis that the *Danson* Court found there is no constitutionally required *"**normal**"* program of educational services whereas, according to Petitioners, this case alleges a failure to provide an *"adequate"* level of educational services. [Petitioners' Brief at 23]. It is difficult to imagine a more paradigmatic example of a "distinction without a difference." Neither "normal" nor "adequate" is a term specifically used in the Education Clause, and the controlling question of whether the case is justiciable certainly cannot turn on what synonym a petitioner chooses to place in its Petition. Indeed, as the Court expressly stated in *Marrero,* "[i]n short, as the Supreme Court was unable to judicially define what constitutes a 'normal program of educational services' in *Danson*, this court is likewise unable to judicially define what

constitutes an 'adequate' education or what funds are 'adequate' to support such a program." 739 A.2d at 113-14.

Contrary to Petitioners' rhetoric, plaintiffs in *Danson* most certainly ***did*** allege "a systemic failure to provide students with an adequate education …." As stated by the Supreme Court:

> Appellants' constitutional challenge to the state financing system is broad and general. They do not purport to challenge any particular portion of either the state subsidy or local taxation aspects of the scheme. Instead, appellants' basic constitutional claim is that, viewed as a whole, the Pennsylvania system of school financing fails to provide Philadelphia's public school children with a thorough and efficient education and denies them equal educational opportunity solely because of their residence in the School District of Philadelphia.

399 A.2d at 363.

Any contention that *Danson* (or *Marrero*) is distinguishable because of its focus on the Philadelphia School District simply fails to apprehend the broad nature of the constitutional challenges to the statewide system of funding public education at issue in both cases. Moreover, such "distinction" is immediately defeated by this Court's decision in *PARSS* – subsequently affirmed by the Supreme Court – in which a group of rural and small school districts argued that the Education Clause "is being violated because there exists a disparity between the amount spent on education among Pennsylvania's 501 school districts, resulting in a corresponding disparity in the education students are receiving."

Pennsylvania Ass'n of Rural and Small Schools v. Ridge, No. 11 M.D. 1991, Slip. Op. at 3 (Pa. Commw. Ct. July 9, 1998), *aff'd* 737 A.2d 246 (Pa. 1999). Judge Pellegrini, writing for the Court, determined that "[b]ecause PARSS is making the same challenge as the plaintiffs did in *Marrero*, its claim is also a political question and, correspondingly, makes it non-justiciable." *Id.* at 109.

The *Marrero* case is even more impossible for Petitioners to distinguish. Petitioners' primary contention is that *Marrero* is inapposite because "Petitioners here are not asking the Court to define as a matter of public policy what constitutes an 'adequate' education." [Petitioners' Brief at 26]. Petitioners contend that the legislature has "already done this" by enacting statewide educational standards. However, Petitioners' characterization is simply not accurate. Notwithstanding their repeated protestation to the contrary, Petitioners most certainly ***are*** asking this Court to determine what constitutes an "adequate" education as a matter of constitutional law – a task that is simply not appropriate for the judiciary.

As explained in Legislative Respondents' Opening Brief, and elaborated upon in the next Section of this Reply, the Commonwealth's current academic standards do ***not*** constitute a determination as to a *constitutionally* required program of "adequate" education, nor do such requirements and benchmarks create any judicially manageable standards by which the Courts of this Commonwealth

could draw the line between a "constitutional" and an "unconstitutional" system for funding public education.

2. Petitioners Fail To Show That The Commonwealth's Current Education Standards Are Judicially Manageable.

Petitioners repeat the mantra that in the years since *Marrero*, the Commonwealth has implemented statewide standards, requirements and benchmarks that can be used to ascertain whether Respondents are fulfilling their constitutional duties under the Education Clause. However, this argument misses the mark for several reasons. Most fundamentally, Petitioners utterly fail to explain how these requirements and benchmarks create a standard that is ***judicially*** manageable.

An overriding and fatal flaw in Petitioners' argument is that Petitioners continue to conflate what the Commonwealth's current elected representatives and education officials deem to be sound education policy with what is *required* by the Pennsylvania Constitution. Petitioners' analysis is built upon the assumption that the current state standards are intended to set a constitutional floor for determining the adequacy of public education. Yet, Petitioners cite no authority whatsoever in support of this non-evident proposition. Indeed, Petitioners argument is counterintuitive. Finding that a failure to meet state education standards might place elected officials in violation of the Pennsylvania Constitution would create a

perverse incentive that would discourage the Commonwealth from adopting ambitious educational goals.

Furthermore, the Petitioners fail to offer any explanation as to how the "inputs" and "outputs" described on pages 26-28 of their Brief translate into ***judicially manageable*** standards. It is well-established that "[t]he courts are in no position to exercise control over schools and determine the policy of school administration; the judges ordinarily are not equipped for this immense task." *Wilson v. School Dist. of Philadelphia*, 195 A. 90, 97 (Pa. 1937). *See also Zebra v. School Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972) ("Courts are further restrained, when dealing with matters of school policy, by the long-established and salutary rule that the courts should not function as super school boards."). Yet, this is exactly the role that Petitioners are asking the courts to play.

Consider, for example, the statewide assessment standards that are repeatedly cited by the Petitioners. While a court may be able to determine what percentage of students meet or do not meet those standards, at what point does insufficient academic performance require a finding that the General Assembly's public education funding system is unconstitutional. Is it when a single school fails to achieve those academic standards? A single school district? Is there a certain "tipping point" in the number of schools or school districts that can fall below expectations before the system is declared unconstitutional? Does it matter

how *far* below the state assessment standards a school district falls? Similar questions can be posed with respect to the "input" factors.[3] As these questions illustrate, such matters simply are not susceptible to judicially manageable standards. It is, therefore, easily understood why the Supreme Court has stated that judicially manageable standards cannot be determined without the type of "rigid rule" that is not appropriate in this context. *Danson*, 399 A.2d at 366.

Petitioners continue to ignore the Supreme Court's admonition that "expenditures are not the exclusive yardstick of educational quality, or even educational quantity." *Danson*, 399 A.2d at 366. Petitioners contend that the Court can "look to student test scores to determine whether school districts are providing students an opportunity to meet state standards and receive an adequate education" and that "the Court can readily determine whether school districts are receiving sufficient funds" by looking at the various "inputs" and "outputs" identified in the Petition. [Petitioners' Brief at 12, 27]. However, a closely similar argument was rejected by the Supreme Court in *Danson*, where if stated:

> It must indeed be obvious that the same total educational and administrative expenditures by two school districts do not

[3] For instance, Paragraph 118 of the Petition purports to summarize items that school districts must provide to comply with Commonwealth education regulations, including planned instruction at every grade level in "[t]he arts, including active learning experiences in art, music, dance and theatre." Is the Commonwealth's system of funding public education rendered unconstitutional if a single school district fails to offer every grade an "active learning experience" in dance? Such example is not intended to be flippant, but rather to demonstrate that there are simply no judicially manageable standards for determining what educational "inputs" or "outputs" are required as a matter of Constitutional law.

> necessarily produce identical educational and administrative services. The educational product is dependent upon many factors, including the wisdom of the expenditures as well as the efficiency and economy with which available resources are utilized.

Danson, 399 A.2d at 366.

Finally, the Supreme Court found in *Danson* and *Marrero* that the Court cannot bind future legislatures to current educational standards. Petitioners attempt to evade this clear and unambiguous language by disingenuously claiming that this is not what they are attempting to do. Such argument is meritless. It is clear that a declaration that the public education funding system is unconstitutional because certain schools or school districts fail to meet current academic standards would restrict the Commonwealth's ability to change those standards as it sees fit. If not, the absurd result would be that the Commonwealth could cure any constitutional violation found to exist merely by eliminating its educational standards and benchmarks.

Tellingly, Petitioners' self-serving rhetoric that they are not attempting to bind future legislatures is contradicted elsewhere in their Brief, where they repeatedly rely on the General Assembly's 2007 costing-out study as evidence from which this Court can "readily determine whether school districts are receiving sufficient funds." [Petitioners' Brief at 27]. Yet, Petitioners specifically complain that Respondents "abandoned the funding formula" resulting from that costing-out

study in 2011. [Petition, ¶ 3]. Thus, the intended consequence of Petitioners' argument would be that once the Commonwealth adopts an educational policy choice that accords with Petitioners' beliefs as to what constitutes an "adequate" education, future Commonwealth officials would be powerless to change course without judicial approval. Such a result plainly cannot be reconciled with the Supreme Court's clear and unambiguous statement that the Constitution "makes it impossible for a legislature to set up an educational policy which future legislatures cannot change." *Danson*, 399 A.2d at 360.

3. This Court May Not Overrule The Supreme Court's Decision In *Marrero.*

After struggling in vain to find a basis for escaping the result compelled by prior Supreme Court precedent, Petitioners eventually admit that they simply disagree with the result reached by the Court and "ask that *Marrero* be overturned…." [Petitioners' Brief at 26, n.8]. However, it could not be any clearer that this Court lacks the power to grant such relief. As this Court stated in another case in which a similar request was made:

> Even if it were true that the opinions in *Lyles* and *Smith* were wrongly decided, we, as an intermediate appellate court are bound by the decisions of the Pennsylvania Supreme Court and are powerless to rule that decisions of the Court are wrongly decided and should be overturned…. Any argument that *Lyles* and *Smith* were wrongly decided is an issue for a forum other than this Court.

Griffin v. Southeastern Pennsylvania Transp. Auth., 757 A.2d 448, 451 (Pa. Commw. 2000) (citations omitted).

For the same reason, Petitioners extensive reliance on decisions by courts in other states is misplaced.[4] It is beyond peradventure that decisions from courts in other jurisdictions are persuasive authority but not binding precedent. More importantly, decisions from foreign jurisdictions are only persuasive and relevant to this Court when it is "writing on a clean slate[.]" *In re O'Reilly*, 100 A.3d 689, 694 (Pa. Commw. Ct. 2014) (per curiam).

"[T]he Pennsylvania Supreme Court is the final authority with respect to the Pennsylvania Constitution." *Meggett v. Pennsylvania Dep't of Corr.*, 892 A.2d 872, 878 (Pa. Commw. Ct. 2006), *as amended* (Apr. 24, 2006). Any argument based on decisions from other jurisdictions "must fail in light of the clear directive of our Supreme Court." *In re O'Reilly*, 100 A.3d at 694. "Where there is controlling authority in Pennsylvania law," lower courts "need not consult the

[4] While not relevant to the Preliminary Objections in this case, it bears mention that the Petitioners' efforts to portray the Pennsylvania Supreme Court as an island among its sister states is misguided. Education funding challenges have been brought in several states, with a wide range of results. Certainly, other state supreme courts have reached the same result as *Marrero*. *See*, *e.g.*, *Nebraska Coalition for Educational Equity and Adequacy*, 273 Neb. 531, 731 N.W.2d 164 (2007) (dismissing declaratory judgment action challenging constitutionality of Nebraska's education funding system for failing to provide sufficient funds for an "adequate" and "quality" education as raising nonjusticiable political questions); *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 672 N.E.2d 1178 (1996) (holding that constitutional challenge to Illinois's public education funding system was nonjusticiable).

decisions of sister jurisdictions to reach a disposition." *Branham v. Rohm & Haas Co.*, 19 A.3d 1094, 1107 (Pa. Super. Ct. 2011).

Petitioners have not presented this Court with a ***case*** of first impression. As such, there is no need to look to out-of-state decisions to decide Petitioners' constitutional challenges. Indeed, Petitioners' citation to out-of-state cases is not even an ***argument*** of first impression. When the Pennsylvania Supreme Court handed down *Marrero* in 1999, most of the out-of-state cases cited by Petitioners, including those from the bordering states of New Jersey, Maryland, and Ohio, had already been decided under those states' respective constitutions. Given that the Pennsylvania Supreme Court decided *Marrero* ***after*** most of the out-of-state cases cited by Petitioners, those cases have little persuasive value.

Quite simply, in *Marrero* and *Danson*, the Pennsylvania Supreme Court squarely held that constitutional challenges to the Commonwealth's system for funding public education are not justiciable, and those decisions remain binding precedent on every lower court in Pennsylvania. Therefore, Petitioners' reliance on decisions from other jurisdictions cannot save their constitutional challenges.

B. Petitioners' Detailed Justiciability Analysis Misconstrues Pennsylvania Case Law and Ignores *Marrero*.

Unable to distinguish *Marrero*, Petitioners choose to ignore its ultimate holding and implore this Court to re-analyze the non-justiciability of their challenge under the multi-factor test established by the United States Supreme

Court in *Baker v. Carr*, 369 U.S. 186 (1962) and adopted by the Pennsylvania Supreme Court in *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). Petitioners' insistence on applying the *Baker/Sweeney* test demonstrates their unwillingness to accept the holdings of *Marrero* and *Danson*.

In *Marrero*, the Pennsylvania Supreme Court quoted the familiar *Baker/Sweeney* factors used to determine whether a matter presents a non-justiciable political question, and applied those factors to the argument "that the General Assembly violated the Pennsylvania Constitution by failing to provide adequate funding for the Philadelphia School District[.]" 739 A.2d at 111. The Pennsylvania Supreme Court expressly held that, according to the *Baker/Sweeney* factors, judicial review of a constitutional challenge to education funding is inappropriate. Despite that specific holding, a significant portion of Petitioners' Brief deals with addressing each of the *Baker/Sweeney* factors. Given *Marrero's* global application of *Baker* and *Sweeney*, Petitioners' arguments as to each individual factor is irrelevant.[5]

Moreover, none of the arguments or cases raised by the Petitioners as to the individual *Baker/Sweeney* factors require judicial management of education funding. First, Petitioners have misconstrued the binding precedent cited in the

[5] Additionally, as this Court noted in *PARSS*: "The Pennsylvania Supreme Court has held that the presence of any one of these elements will prompt a court to refrain from considering the claim asserted." Slip Op. at 110, n. 65 (citing *Zemprelli v. Daniels*, 436 A.2d 1165 (Pa. 1981)).

Legislative Respondents' Opening Brief regarding the text of Education Clause. Under *Danson* and *Marrero*, the Education Clause mandated the General Assembly to establish a thorough and efficient ***system*** of public education, not an individual right to a particular level or quality of education. *Marrero*, 739 A.2d 110. Relying on *Baker* and *Sweeney*, the Pennsylvania Supreme Court in *Marrero* held that those petitioners' constitutional challenge to education funding levels necessarily runs afoul of "a textually demonstrable constitutional commitment of the issue to a coordinate political department, *i.e.*, the General Assembly." *Id.* at 113 (internal quotations omitted). Petitioners' cannot overcome the Pennsylvania Supreme Court's textual interpretation by citing to pre-*Marrero* education cases, such as *Wilkinsburg*, *Twer*, and *Teachers' Tenure Act Cases*, or to cases dealing with other Constitutional provisions, such as *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). Indeed, Petitioners cite to *Robinson* for the proposition that abstention requires that a constitutional determination be entrusted "exclusively" to political branches, but *Marrero* holds that education funding matters "are exclusively within the purview of the General Assembly's powers[.]" *Marrero*, 739 A.2d at 114.

Second, Petitioners misconstrue this Court's and the Pennsylvania Supreme Court's willingness to make public policy determinations regarding funding. The Petitioners have relied on out-of-state cases and a pre-*Marrero* decision regarding

the General Assembly's funding of the judicial branch to support their argument that the *Baker/Sweeney* factors weigh in favor of justiciability. *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa. 1971).

However, this analysis deliberately chooses to overlook that this Court handed down an opinion less than sixty days ago that engaged in a lengthy analysis of the justiciability of constitutional challenges to the General Assembly's funding determinations, and drew sharp contrast between challenges to judicial funding and non-judicial funding. *See Pennsylvania Envtl. Def. Found. v. Com.*, No. 228 M.D. 2012, --- A.3d ----, 2015 WL 79773, at *20 (Pa. Commw. Ct. Jan. 7, 2015), *reargument denied* (Feb. 3, 2015). "[T]he Pennsylvania Supreme Court has been willing to involve itself in the General Assembly's fiscal decisions when they impact the **judiciary**, relying heavily on the need to preserve its independence[.]" *Id.* (reviewing the history of disputes over judicial funding, including *Commonwealth ex rel. Carroll v. Tate* (emphasis added)). Pennsylvania courts have "been cautious in intervening in funding disputes when it comes to matters outside the sphere of the judicial branch." *Id.* Indeed, in *Pennsylvania Envtl. Def. Found.*, this Court relied heavily on *Marrero* as an example of an instance where Pennsylvania courts declined to intrude on the General Assembly's non-judiciary funding determinations. *Id.* at **20-21. *See also Mental Health Ass'n in Pennsylvania v. Corbett*, 54 A.3d 100, 104 (Pa. Commw. Ct. 2012) (finding non-

justiciable a challenge to the inadequacy of funding for mental health and intellectual disability services).[6]

C. The Court Must Reject Petitioners' Appeal To Public Policy.

At the heart of this case lies a policy dispute over how public education should be financed. Some citizens, including the individual Petitioners, believe that public schools should be funded in a manner that reduces reliance on local property taxes and better achieves equality in total per-student education funding throughout the Commonwealth. Others believe equally strongly in the importance of local control, including that local school tax revenue should remain in the community, rather than being redistributed to fund schools in other parts of the Commonwealth. The issue of how to fund our public schools is a topic of intense public debate; indeed, it was one of the central issues in the recent gubernatorial election.

The funding system established by the Commonwealth represents the General Assembly's policy determination as to the appropriate method for funding public schools. While Petitioners repeatedly and disingenuously claim that resolving their claims "will not require public-policy judgments," such argument is an obvious façade. Indeed, pages upon pages of Petitioners' Brief (as well as the

[6] Moreover, as set forth herein, the remaining *Baker/Sweeney* factors weigh against judicial intervention. Education is not a fundamental individual right under the Pennsylvania Constitution and Petitioners have raised a constitutional challenge that requires public policy determinations that can only be managed by the legislature, not the judiciary.

Briefs submitted by their *amici*) are filled with appeals to public policy. Among other things, Petitioners contend that "Pennsylvania's public education system has defaulted on its obligations to our children" (Petitioners' Brief at 1); that Respondents are "[u]nmoved by this dire and deteriorating situation" (*id.*); that the current funding scheme "drastically underfunds school districts across the state" (*id.* at 2); that Pennsylvania's public education system is "perilously underfunded"; (*id.* at 21); and that preserving local control over education "is not a rational basis for the current funding scheme." (*id.* at 50).

Unable to maintain their charade for their entire Brief, Petitioners eventually let the proverbial "cat out of the bag" and concede that the problem of education funding "is 'multi-faceted' and relates to matters of public policy." [Petitioners' Brief at 32]. These policy issues must be addressed through the political process and not in civil litigation.

As noted in Legislative Respondents' Opening Brief, under Act 51, a bipartisan Basic Education Funding Commission has already begun its work of meeting and holding public hearings in an effort to develop and recommend a basic education funding formula and to identify factors that may be used to determine the distribution of basic education funding among Pennsylvania school districts. Moreover, Governor Wolf has proposed "The Pennsylvania Education Reinvestment Act," which would implement a 5% severance tax on gas extraction

and, according to the Governor, "would help increase the state's share of funding for schools" and help local districts "lower the tax burden on homeowners." *See* http://www.wolfforpa.com/sections/blog/help-pass-pa-education-reinvestment-act. The Governor has urged the public to contact members of the state legislature to express support for his proposal.

Regardless of one's views on any specific funding proposal, the above exercises in democracy reflect exactly how such issues should – and, in accordance with *Marrero*, ***must*** – be resolved. The policy issue of how to fund public schools must be made by the General Assembly, acting as the voice of the people, rather than dictated by judges under the guise of constitutional interpretation.

D. Legislative Respondents have Satisfied the Requirements of The Pennsylvania Constitution by Adopting a "System" of Public Education.

Petitioners argue that "[i]f this Court does not have the power to intervene under even these circumstances, then the Education Clause will be rendered meaningless." [Petitioners' Brief at 18]. Such sophistry is contrary to the clear precedent of the Supreme Court, which establishes that the Education Clause requires the legislature to establish a thorough and efficient ***system*** of public education. *Marrero*, 739 A.2d 110. The Education Clause has a function: It requires the General Assembly to maintain and support a system of public education.

By way of context, in *Walker v. Ross*, 36 A. 148, 149 (Pa. 1897), the Supreme Court noted that prior to the constitution of 1874, which added the clause that the General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education, public schools were supported almost entirely through local funds. As a result, "[t]he school system had then been in operation 40 years, yet statistics demonstrated that a large percentage of even Pennsylvania born children grown to manhood and womanhood under the public school system were illiterate."[7] *Id.* The Education Clause sought to remedy that problem by setting up a statewide system to maintain and support public education.

Once such a system has been established, however, the General Assembly has fulfilled its constitutional duties so long as the enacted funding scheme "has a reasonable relation" to providing for the maintenance and support of a thorough and efficient system of public schools.[8] *Marrero*, 739 A.2d at 113. The Supreme Court has already expressly held that "[t]he Legislature has enacted a financing

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[7] While the Petitioners allege numerous deficiencies and inadequacies that they believe to exist, they do not – and cannot – allege that the General Assembly has failed to establish a system for funding public education in the Commonwealth or that the majority of graduates from Pennsylvania public schools (or the Petitioner school districts) are illiterate. Instead, they ask this Court to engage in the decidedly non-judicial task of assessing whether the education being received in certain school districts is "adequate."

[8] The reasonable relation test is analogous to a rational basis standard. *Harrisburg School Dist. v. Zogby*, 828 A.2d 1079, 1088 (Pa. 2003) (rational basis standard is satisfied if the law "bear[s] a reasonable relationship to a legitimate state purpose.")

scheme reasonably related to [the] maintenance and support of a system of public education in the Commonwealth of Pennsylvania." *Danson*, 399 A.2d at 367. Accordingly, and as discussed further in Legislative Respondents' Opening Brief and in following section of this Reply, Petitioners' argument that the Commonwealth's system for funding public education is irrational is foreclosed by binding Supreme Court precedent.

E. Petitioners' Equal Protection Clause Challenge Also Fails To State A Justiciable Claim.

1. Challenges to the Commonwealth's system for funding public education are not justiciable, irrespective of the particular legal theory being pursued.

In *Marrero*, the Pennsylvania Supreme Court held that it was "unable to judicially determine what constitutes an 'adequate' education or what funds are 'adequate' to support such a program." 739 A.2d at 113-14. That such a challenge to the Commonwealth's education funding system raises an inherently political question does not and should not depend upon whether a particular claim is brought under the Education Clause, the Equal Protection Clause, or both.

Thus, while the petitioners in *Marrero* apparently relied entirely upon the Education Clause, the logic of the Supreme Court's holding applies with equal force to Petitioners' current claim under the Equal Protection Clause. As this Court held in *PARSS*, which ***did*** involve an Equal Protection count, "[b]ecause PARSS is making the same challenge as the plaintiffs did in *Marrero*, its claim is

also a political question and, correspondingly, makes it non-justiciable."[9] Slip. Op. at 109; *see also id.* at 13 ("*Marrero* holds that … what is 'thorough and efficient' education and whether it violates the Equal Protection provisions is non-justiciable.")

2. Petitioners' Equal Protection Argument Is Subject To A "Rational Basis" Analysis.

Petitioners are mistaken in arguing that their challenge to Pennsylvania' public education funding system is subject to a strict scrutiny analysis because education is a fundamental right. First, as demonstrated in Legislative Respondents' Opening Brief, Education is ***not*** a fundamental right in Pennsylvania. Moreover, even if it were, Petitioners' argument misses the mark because they have failed to identify any "classification" made by Respondents that impacts upon that right.

In arguing that education is a fundamental right, Petitioners rely almost entirely upon the case of *Wilkinsburg Educ. Ass'n v. Sch. Dist. Of Wilkinsburg*, 667 A.2d 5 (Pa. 1995). However, as President Judge Pellegrini explained in *PARSS*: "While our Supreme Court in *Wilkinsburg* did state in *dicta* that education was a fundamental right, it cannot fairly be read into that decision that it meant to

[9] Petitioners' insinuation on page 40 of its Brief that this Court's decision in *PARSS* would effectively "overrule *Danson*" is an absurd misreading of both *Danson* and *PARSS* and demonstrates the inescapable bind in which the Petitioners find themselves as a result of their inability to meaningfully distinguish *Marrero* and the other binding precedent precluding constitutional challenges to the Commonwealth's system for financing public education.

reverse prior case law that education was not a fundamental right" or to hold that "a strict scrutiny standard should apply when reviewing the General Assembly's actions in funding education." Slip. Op. at 125-26.

In this regard, not only did the Supreme Court in *Danson* specifically apply a rational basis analysis to a similar funding challenge, this Court has repeatedly held in cases decided both before and after *Wilkinsburg* that education is ***not*** a fundamental right subject to strict scrutiny. Petitioners' only response to the multiple cases reaching that result is to simply argue that they believe this Court's analysis in each of those cases was wrong. Moreover, there is no allegation that Petitioners are not receiving an education, but rather that they are not receiving an "adequate education." Accordingly, for strict scrutiny analysis to apply, Petitioners must establish not only a fundamental right to an education, but a fundamental right to an "adequate education" as measured by the "inputs" and "outputs" cited by Petitioners.[10]

Furthermore, Petitioners' Equal Protection Clause argument is conceptually inappropriate, because Petitioners do not identify any "classification" present in the current public education funding system. The Equal Protection Clause does not apply to ***every*** deprivation of an individual's rights (fundamental or otherwise), but

[10] Contrary to Petitioners' argument, *Harrisburg School Dist.*, 828 A.2d at 1089 n. 14, does not hold that whether education is a fundamental right is an "open question," but merely stated that the Court did not need to address appellees' argument that it was, because the challenged legislation did not "infringe anyone's ability to receive an education."

only to deprivations caused by that individual's membership in a particular class. For instance, in *Gondelman v. Commonwealth*, 554 A.2d 896 (Pa. 1989), cited by Petitioners, the Court stated that "[a]ny concern for a functional separation of powers is, of course, overshadowed if ***the classification*** impinges upon the exercise of a fundamental right, or affects a suspect class." *Id.* at 899 (emphasis added).

In *Gondelman*, which involved a challenge to a mandatory retirement age for judges, the classification was individuals age seventy or older. *Id.* at 897. In this case, by contrast, the education funding system imposes no discernible classification. Instead, Petitioners are apparently arguing "disparate impact," which is no longer a viable theory in Pennsylvania. *Meggett*, 892 A.2d at 888 n.31; *Washington v. Davis*, 426 U.S. 229, 239 (1976). Moreover, even under a disparate impact analysis it is impossible to identify a classification of persons who have been treated differently, other than an amorphous one that has been cobbled together solely for litigation purposes, *e.g.*, "persons who live in school districts with low property tax bases."[11]

[11] Notably, the Equal Protection Clause argument *rejected* by the Supreme Court in *Danson* was plainly more cohesive than the one advanced by Petitioners in this case, because the *Danson* case alleged "a statutory classification between the Philadelphia School District and all other state school districts" by preventing the Philadelphia School District from levying taxes. *See Danson*, 399 A.2d at 369 (Manderino, J. dissenting).

Yet, many of the Petitioners arguments regarding the alleged inadequacy of Pennsylvania's education system do not relate solely to the disparate treatment of any class, but attempt to address alleged system-wide educational deficiencies. [*See*, *e.g.*, Petitioners' Brief at 43 (alleging that 50 percent of students taking the Keystone exams in biology, 36 percent of students taking the Keystone exams in math, and 25 percent of students taking the Keystone exams in literature fail to achieve a proficient score)]. Simply put, the Equal Protection Clause is not an appropriate vehicle for a policy challenge to Pennsylvania's education funding system.

3. Petitioners' argument that the system for funding public education lacks a rational basis is foreclosed by *Danson.*

Petitioners alternatively argue that a preference for local control "is not even a rational basis" for the public education system adopted by the General Assembly. However, such argument is foreclosed by the Supreme Court's contrary decision in *Danson*, in which the Supreme Court rejected an Equal Protection Clause challenge, specifically finding that Pennsylvania's use of a system that depended upon federal, state and local revenue is "reasonably related to [the] maintenance and support of a system of public education in the Commonwealth of Pennsylvania." 399 A.2d at 367; *see also Marrero*, 739 A.2d at 133. The *Danson* Court ***specifically noted*** the historic importance of preserving local control over education "to meet diverse local needs." 399 A.2d at 367.

Petitioners try to avoid the clear and unambiguous holding of *Danson* by contending that Legislative Respondents "gloss over" what is meant by "local control." However, Petitioners' argument is entirely circular, *i.e.*, that local control is illusory because it assumes that students are already receiving a "basic" or "adequate" education from the state. Of course, accepting such an argument would contravene the very principles underlying *Marrero* and *Danson* – that a court cannot judicially determine what constitutes a "basic" or "adequate" education.[12]

Once again, the argument advanced by Petitioners is merely a public policy disagreement. It cannot credibly be argued that no rational person could favor a funding system that keeps local tax revenues under the control of local school districts. Furthermore, Petitioners completely fail to address the argument set forth on pages 36-39 of Legislative Respondents' Opening Brief, *i.e.*, that the averments regarding the diverse budget-cutting strategies adopted by Petitioner school districts confirm, rather than disprove, the primary role of local educators in choosing how to best utilize available education funds and, therefore, reflect the very essence of "local control." In short, Petitioners' disagreement with the

[12] Notably, one of the Petitioners' arguments is that local control is illusory because low-wealth districts are "restricted by Act 1 from raising property taxes more than a *de minimis* amount…." [Petitioners' Brief at 51]. However, Act 1 does not contain an absolute prohibition against such tax increases. Instead, Act 1 provides that such increases may not take place without a voter referendum, in which a majority of the electors voting on the question approve the increase. 53 P.S. § 6926.333(c). Of course, this does not eliminate local control, but rather places authority directly within the hands of the local electorate.

funding system enacted by the General Assembly is not a sufficient reason for determining that such system lacks any rational basis.

F. Petitioners Mischaracterize The Relief They Are Seeking

Finally, in order to make their Petition appear more palatable and at least somewhat consistent with prior precedent, Petitioners repeatedly misconstrue the relief actually being sought in the Petition. For instance, Petitioners' Brief claims that "Petitioners are not asking the Court to interfere with the budgeting process…" [Petitioners' Brief at 31]. However, such statement is a blatant mischaracterization of the relief they are actually seeking. Read as a whole, it is clear that Petitioners seek declaratory and injunctive relief that would implode the funding system that has been adopted by Pennsylvania's elected representatives and require it to be replaced with a system that would achieve Petitioners' stated policy objective of increasing the overall level of education funding and/or redistributing local school tax revenue throughout the Commonwealth. It is harder to imagine a clearer example of attempting to "interfere with the budgeting process."

In fact, while Petitioners strive to create the impression that the relief they are seeking is limited to a mere declaration that the current funding system is unconstitutional – which would itself be a drastic remedy – some of the relief demanded could hardly be more extreme. Petitioners seek a declaration that the

Constitution "requires Respondents to provide school districts with the support necessary to ensure that ***all students in Pennsylvania*** have the opportunity to obtain an adequate education that will enable them to meet state academic standards and participate meaningfully in the economic, civic, and social activities of our society." [Petition, ¶ 314 (emphasis added)].

As a final point, by relying upon state assessments as the standard to judge constitutional compliance, Petitioners plainly are seeking not only equality of opportunity, but equality of outcome. However, the judiciary can no more "ensure" this result than it can ensure that every Pennsylvanian will "have the opportunity" to be safe on the streets, to have a supportive family, or to find and maintain a high paying job. While these are certainly goals to be strived for, it is up to Pennsylvania's elected officials and their designees to adopt the policies and standards that they believe are best suited to achieve these laudable aims. The judiciary cannot require compliance with a particular set of educational standards, or a particular philosophy for funding public schools, under the guise of constitutional interpretation.

III. CONCLUSION

For all of the reasons stated herein, as well as in Legislative Respondents' Opening Brief, and the Preliminary Objections by the Executive Branch Respondents, Legislative Respondents' Preliminary Objections should be sustained and the Petition should be dismissed with prejudice.

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CERTIFICATION OF COMPLIANCE WITH RULE 2135(D)

This Brief complies with the length-of-brief limitation of Pa.R.A.P. 2135, because this Brief contains, 6,664 words, excluding the parts exempted by section (b) of that Rule. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

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