IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| WILLIAM PENN SCHOOL DISTRICT, *et al.*,<br><br>*Petitioners,*<br><br>v.<br><br>PENNSYLVANIA DEPARTMENT OF EDUCATION, *et al.*,<br><br>*Respondents.* | No. 587 MD 2014 |

# BRIEF AMICI CURIAE of Law School Professors

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## STATEMENT OF INTEREST

We are law professors at schools of law in Pennsylvania and New Jersey.[1] We are specialists in federal and state constitutional law. In our professional capacities, we have researched, studied, and written about public law issues of the kind this court now faces-- involving the judiciary and its relationship to the legislative and executive branches of government. We hope that the body of knowledge we have helped to develop may be of value to the court in resolving the questions now at bar. We do not rehearse the parties' arguments on the merits of this lawsuit, but rather confine ourselves to the justiciability of the petitioners' claims. As friends of the court, we offer our experience, our expertise, and our academic perspectives.

[1]The views expressed are those of the individual amici and are not those of the schools we serve.

## ARGUMENT

### I. Article III, Section 14 Limits The General Assembly's Discretion Over Support For Public Education, And Judicial Enforcement Of It Does Not Present A Political Question In The Circumstances Before This Court

Amici write to emphasize that both recent Pennsylvania Supreme Court precedent and Pennsylvania's constitutional history counsel a reluctance to extend the "political question" doctrine to the circumstances before this Court .

A. Recent Precedent

In *Marrero v. Commonwealth*, 739 A. 2d 110 (Pa. 1999), the Pennsylvania Supreme Court concluded that the "thorough and efficient" claims pressed by the plaintiffs were not justiciable. For reasons fully discussed by the plaintiffs, the current case presents a quite different factual matrix. Amici emphasize that developments since *Marrero* provide reason not to extend that case beyond its limits. Pennsylvania's political question doctrine has been clarified in important ways; this Court must be cognizant of those clarifications.

The Pennsylvania Supreme Court's 2009 decision in *Council 13, AFSCME ex rel. Fillman v. Rendell*, 986 A.2d 63 (Pa. 2009) presents the first benchmark. Pennsylvania's constitution, like those in most states, provides that no money may be expended by state government unless appropriated by law. Article III, § 24.

For a number of years prior to 2009, when the governor and legislature could not agree on a budget or appropriations bill by the end of the fiscal year, Governor Edward Rendell took the position that he would have to furlough state employees who he deemed nonessential to the health and safety of the state. The union, by contrast, did not want its members to miss paydays ("payless paydays") as bargaining chips in larger political controversies. The union sought a declaratory judgment that the state constitution's appropriations provision was preempted by the Federal Fair Labor Standards Act, therefore depriving the governor of the argument that he had to furlough state employees. In an opinion by Chief Justice Castille the Court agreed with the union, and declared that the FLSA did in fact preempt the Pennsylvania Constitution's appropriations clause.

The state defendants had argued all along that it was a nonjusticiable "political question." *Id.* at 73-74. Under this doctrine, state courts should not intrude upon authority *granted* to a co-equal branch of government by the constitution. *Id.*, at 74. Chief Justice Castille's opinion concerning the political question doctrine is a landmark in Pennsylvania. His analysis included the following important statement:

> The happenstance that the preemption issue the Union Parties posed to the court arises in political circumstances, when a budget impasse was looming and the Governor was announcing furlough options and decisions, does not change the nature of the jurisprudential issue from

> one of law that the courts are to decide, to one of executive policy that the courts are not to consider. . . . the political question doctrine is a shield, not a sword. The doctrine exists to protect the Executive branch from intrusion by the courts into areas of political policy and executive prerogative; it does not exist to remove a question of law from the Judiciary's consideration merely because the Executive branch has forwarded its own opinion of the legal issue in a political context.

*Id.*, at 76.

Chief Justice Castille's political question analysis caught the attention of a leading state constitutional scholar, writing about the doctrine. Dean Daniel B. Rodriguez of Northwestern University School of Law cited the case, admiring the "self-confidence [that] has been a conspicuous part of the doctrine in the decided cases" under state constitutions in recent years ,and the distinctions between the appropriate roles of state and federal courts Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 584, 586 (2013). See also, Hans A. Linde, *The State and Federal Courts in Governance: Vive La Différence!,* 46 WILLIAM AND MARY L. REV. 1273 (2005), Christine Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power,* 76 N.Y.U. L. REV. 1601, 1609 (2001) (quoting Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1560-61 (1997)).

The Pennsylvania Supreme Court's newly emphasized independence in its view of the political question doctrine was further elaborated, again by Chief Justice Castille, writing for the Court in *Robinson Twp., Washington County v. Commonwealth*, 83 A.3d 901, 925-30 (Pa. 2013). He stated:

> We have made clear, however, that "[W]e will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty." *Council 13*, 986 A.2d at 76 (quoting *Thornburgh*). "[T]he need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake." *HHAP*, 77 A.3d at 597 (citing *Sweeney*, 375 A.2d at 709 ("[T]he political question doctrine is disfavored when a claim is made that individual liberties have been infringed.")); *accord Gondelman v. Commonwealth*, 520 Pa. 451, 554 A.2d 896, 899 (1989) ("Any concern for a functional separation of powers is, of course, overshadowed if the [statute] impinges upon the exercise of a fundamental right. . . .").

*Id.*, at 928.

B. History

These recent, post-*Morrero*, refinements of the political question doctrine echo the Commonwealth of Pennsylvania's early independent views of judicial review.

The doctrine of judicial review in federal constitutional law dates from Chief Justice Marshall's famous opinion in *Marbury v. Madison*, 5 U.S. 137 (1803). But the recognition of the obligation and authority of Pennsylvania's judiciary to enforce our constitution against a recalcitrant legislature antedates *Marbury*.[2] The Pennsylvania Supreme Court recognized unequivocally its duty to invalidate legislation that violates constitutional mandates in *Respublica v. Duquet*, 7 Yeates 493, 501 (Pa. 1799) , and reaffirmed that recognition in *Eakin v. Raub*, 12 S.&R. 330, 339 (Pa. 1825). Justice Gibson of the Pennsylvania Supreme Court argued against the exercise of judicial review under Pennsylvania's constitution in a dissent in *Eakin*. *Id.* at 343-58. Yet twenty years later, after becoming Chief Justice, Gibson interrupted counsel who had cited *Eakin v. Raub* and said:

> I have changed that opinion for two reasons. The late Convention [the 1838 Pennsylvania Constitutional Convention], by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case.

*Norris v. Clymer*, 2 Pa. St. Rep. 277, 281 (1845).

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[2] A number of state courts had exercised this power well before 1803. *See, e.g.* Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 521 (1925).

More importantly, the Education Clause, Article III, Section 14, must be read against the crucial historical differences between the federal constitution, and the Constitution of Pennsylvania. The United States Constitution "*grants*" or "*delegates*" powers to the national government. Most provisions of the Pennsylvania constitution by contrast, operate primarily to *limit* the otherwise plenary powers of state government, particularly the legislature.

Article III, Section 14 did not confer some new power on the General Assembly in 1873. The General Assembly already had plenary authority over public education in the Commonwealth of Pennsylvania. The act of the People of Pennsylvania in adopting the requirement of a thorough and efficient system of education was not a delegation to the legislature of powers already present, and cannot properly be read as unenforceable in court. It is well known, and clearly acknowledged by the Pennsylvania Supreme Court, that the 1873 Constitutional Convention was convened to propose *limitations* on the unpopular and corrupt state legislature. *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 394 (Pa. 2005). There would have been no reason for that constitutional convention, or the voters, to seek to "authorize" or "empower" the General Assembly to provide for a thorough and efficient education when it already had the undisputed power to do so

The Pennsylvania Supreme Court has declared that the Commonwealth's constitution must be interpreted as "understood by the people who adopted it." *Firing v. Kephart*, 353 A.2d 833, 835 (Pa. 1976). It is not plausible that the voters in 1874, based on the recommendation of the Constitutional Convention, went to the polls to ratify this provision in the Constitution with the understanding that it would simply leave everything about public education to the discretion of the General Assembly. The People spoke in 1874 with the understanding that their changes in the state constitution would make a difference in how the General Assembly operated: limiting its discretion to provide for less than a "thorough and efficient" education.

History confirms what logic dictates. The current mandate that the General Assembly establish a "thorough and efficient system of public education" originates in the Pennsylvania Constitution of 1874. Although prior constitutions had provided that " the legislature shall, as soon as conveniently may be, provide by law for the establishment of schools" ," Article VII Section 1 (1790), Article VII Section 1 (1838), the effect of these provisions had been less than satisfactory to the constitutional framers of 1874. As the Court observed in *In re Walker*, 179 Pa. 24, 28, 36 A. 148, 149 (1897):

> The school system had been in operation for forty years, yet statistics demonstrated that a large percentage of even Pennsylvania born children grown to manhood or womanhood under the public school system were illiterate. The school laws as administered had

not accomplished nearly to the full extent the purpose of its founders. Hence the mandate of the new constitution.

The framers of the 1874 Constitution viewed the mandate to educate the children of Pennsylvania as a crucial obligation of government. In introducing the provisions of the new education article to the Constitutional Convention of 1874, Mr. Darlington observed that "If we are all agreed upon any one thing, it is that the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education." Debates of the Constitutional Convention Vol. II at 421 (1874). Unlike the prior constitutional provisions which exhorted the legislature to establish a system of school to education the poor "as soon as conveniently may be," the 1874 Constitution *required* that the General Assembly "shall provide for the maintenance and support of a thorough and efficient system of public schools," and mandated that the legislature appropriate an amount of money adequate to the purpose.

The change in the text of the state constitutional provision concerning education, from the discretionary 1790 and 1838 versions, to the substantive standard of "thorough and efficient" adopted in the 1874 constitution is a direct textual commitment to qualitative and quantitative standards in the constitution itself. As one commentator observed, the constitutional convention, and the people of the Commonwealth "broadened" the educational mandate. Rosalind L. Branning, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 107 (1960). There is

every indication that the broadening was intended to be a meaningful constraint on the legislature.[3]

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[3] The proceedings of the 1873 convention make clear the delegates aware that the provisions of the Education Article were binding and not merely hortatory. The delegates rejected a proposal that the Article require a "uniform" system of education out of concern that it would preclude flexibility to meet local needs. See Debates of the Constitutional Convention, Vol. II at 422-26. Delegates voiced the beliefs that the mandate of a "thorough and efficient system of education" would "accomplish all that was necessary to accomplish" *Id.* at 423(remarks of Mr.Landis) and that the amended article was adequate to mandate "an opportunity to every child in the Commonwealth to get an equal chance for a good and proper education" *Id.* at 424 (remarks of Mr. Simpson).

So, too, where the delegates believed a matter like the choice of school books was "a question for the legislature," *Id.* at 432 (remarks of Mr. Broomall), they declined to include a provision in the Constitution

On the other hand, the delegates explicitly retained the requirement the Legislature appropriate at least $1,000,000 to the purpose, a sum adequate in 1874 to provide the assistance necessary to ensure education in "localities where children prevail to a greater extent than wealth." *Id.* at 436 (remarks of Mr. Lear); *See Id.* at 435-39.

This last provision was removed by the 1967 Amendments to the Pennsylvania Constitution on the grounds that a $1,000,000 minimum was obsolete. The amendment was presented to the voters as a provision that "Articles Three, Ten and Eleven of the Constitution relating to legislation be consolidated and amended to modernize provisions relating to the powers duties and legislative procedures" (Notice of Special Election Tuesday May 16, 1967). *See* Pa. Legislative Journal, House, January 30,1967, p.80 (remarks of Mr. Beren)(revised education provision Article III Section 14 "updates the constitution by replacing the obsolete requirement that... at least $1 million be spent for that purpose."); Pennsylvania Bar Association, *Pennsylvania Constitutional Revision 1966 Handbook* 28 ( 1966) ("The Legislature's duty as to education would be broadened...Also, the ridiculous provision that the Commonwealth shall appropriate at least one million dollars a year for maintaining the public schools would be eliminated"); Pennsylvania Economy League, *Comparison of Proposed New Constitutional Provisions with Pennsylvania's Present Constitution*, 26 (April 1965) ("Proposed amendment would eliminate the mandate for appropriations of at least one million dollars a year (meaningless today)").

The circumstances of the Pennsylvania voters' intent in 1874 have recently been thoroughly canvassed by Dr. Emily Zackin in LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS ch. 5 (2013), which contains a chapter on educational rights, including Pennsylvania's. She provides a detailed review of the grassroots activists' campaign to convince the Constitutional Convention to include the enhanced educational provision, both to *require* the legislature to provide adequate funding, and to *limit* the legislature from enacting measures detrimental to public education. *See also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

It would misread history to imagine that the 1873 Constitutional Convention, or the people of the Commonwealth, intended to commit the question of what constituted a "thorough and efficient" education solely to the legislature.

The Supreme Court of Pennsylvania acknowledeged as much in *Wilkinsburg Education Association v. School District of Wilkinsburg*, 542 Pa. 335, 667 A.2d 5 (1995), where the Pennsylvania Supreme Court had before it allegations of a school system in shambles, in "dire financial circumstances," entirely unable to educate large segments of its students. Justice Flaherty's opinion for the Court observed—without dissent on this point-- that "public education in Pennsylvania is

a fundamental right." The Court held that while the challenged limits on public schools might "pass constitutional muster under most conditions, there may be other conditions, which the school district here insists there are, which would render this application of the Public School Code unconstitutional" under Article III Section 14. 542 Pa. at 343, 667 A.2d at 9. The Court remanded the case for a determination of whether such conditions were present. So too, this Court should address plaintffs' claims on the merits. .

## II. The Structure And History Of The Equality Provisions Contained In The Pennsylvania Constitution Confirm That, Unlike The Federal Courts, This Court Should Adjudicate Challenges To Radically Unequal And Unwarranted Provision Of The Fundamental Right To Education

The Pennsylvania State Constitution does not contain an "equal protection" clause. Rather it contains a variety of provisions protecting Pennsylvania citizens from unequal treatment. Despite this fact, however, the Pennsylvania Supreme Court has, on occasion stated (not "held") that the Pennsylvania Constitution's equality provisions are to be interpreted in lockstep with the federal Equal Protection clause. But in actual holdings, the Pennsylvania Courts have actually and appropriately emphasized that inequality with regard to "important" rights is to be judged by a standard that imposes limits on legislative discretion.

Article I, Section 1 of the 1776 Pennsylvania Declaration of Rights provided: "All men are born *equally* free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

Pennsylvania's Article I, Section 1 was not an equal *protection* clause. Not only did it originate almost one hundred years before the Fourteenth Amendment, but it was also a statement of revolutionary, republican, egalitarian ideology.

A century later, legislative abuses led to specific limitations on legislative procedure being inserted into the Pennsylvania Constitution of 1874. The call for a Constitutional Convention carried by almost a five to one popular vote in 1872. *See* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 56 (1960). As Branning stated:

> The Pennsylvania constitution of 1874 . . . was drafted in an atmosphere of extreme distrust of the legislative body . . . . It was the product of a convention whose prevailing mood was one of reform . . . and, overshadowing all else, reform of legislation to eliminate the evil practices that had crept into the legislative process. Legislative reform was truly the dominant motif of the convention and that purpose is woven into the very fabric of the constitution.

*Id.* at 37; *see* ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 578 (1985). As a part of this major rethinking of the legislative process, the constitution was amended to prohibit *special* laws—a provision aimed at equal, or *general*, legal treatment. The 1874 Pennsylvania Constitution not only added the special laws ban but also added the requirement of a thorough and efficient system of public education and a mandatory minimum appropriation.

In 1967, the legislature proposed and the people of Pennsylvania adopted Article I, Section 26 as an addition to the Declaration of Rights. Section 26 provides: "Neither the Commonwealth nor any political subdivision thereof shall *deny* to any person the enjoyment of any civil right, *nor discriminate* against any person in the exercise of any civil right." The Article III, Section 14 right to a "thorough and efficient" education must be seen as a civil right under this clause. *See Wilkinsburg Education Association,* 542 Pa. at 343, 667 A.2d at 9 ("Public Education in Pennsylvania is a fundamental right."). The express ban on *discrimination* against persons in the exercise of their civil rights, in addition to prohibiting the *denial* of rights, provides a strong textual basis for extending such protection beyond the federal equal protection doctrine and specifically into the subject of public education.

The legislative history of the 1967 provision is sparse, but one conclusion clearly emerges: The protection of Section 26 was designed to reach beyond that

provided by the Fourteenth Amendment and beyond the existing equality provisions (Article I, Section 1 and Article III, Section 32) in the Pennsylvania Constitution. The predecessor of Article I, Section 26 originated as a 1963 proposal by the Committee on the Bill of Rights of the Pennsylvania Bar Association's "Project Constitution." *See* Constitutional Report, *A Revised Constitution for Pennsylvania ("Project Constitution")*, 34 PA. BAR ASS'N Q. 147, 247, 249 (1963). The Committee proposed Article I, Section 26 at the same time it recommended *additionally* redrafting Article I, Section 10 to include a separate "clause the wording of which is copied, *with the addition of an 'equal protection' clause, from the Federal Constitution.*" *Id.* at 247 (emphasis added)

The Supreme Court of Pennsylvania has on occasion suggested that Pennsylvania's state constitutional equality follow in lockstep with the Federal Equal Protection Clause. E.g., *Love v. Borough of Stroudsburg,* 597 A.2d 1137, 1139 (Pa. 1991) This view, ignores Pennsylvania state constitutional texts and history, as well as the lessons of federalism. And it is a view that is not in fact the law.

In actually applying the Pennsylvania Constitution's equality provisions, Pennsylvania courts have not woodenly mimicked federal outcomes. See, e.g. *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012) ("free and equal elections"), *Nixon v. Department of Public Welfare*, 576 Pa. 385, 839 A.2d 277 (2003);

*Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012). *Jones v. Penn Delco Sch. Dist.*, 2012 Pa. Commw. Unpub. LEXIS 955 (Pa. Commw. Ct. 2012), *Croll v. Harrisburg Sch. Dist.*, 2012 Pa. Commw. Unpub. LEXIS 957 (Pa. Commw. Ct. 2012). *Warren County Human Servs. v. State Civ. Serv. Comm'n (Roberts)*, 844 A.2d 70 (Pa. Commw. Ct. 2004); *Ass'n of Settlement Cos. v. Dep't of Banking*, 977 A.2d 1257 (Pa. Commw. Ct. 2009 ), *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Commw. Ct. 2000). In a number of cases the Pennsylvania Supreme Court has recognized a heightened scrutiny for "important, though not fundamental rights," or "sensitive" classifications. *Commonwealth v. Albert*, 758 A.2d 1149, 1152 (Pa. 2000), *citing Smith v. City of Philadelphia*, 516 A.2d 306, 311 (Pa. 1986) (where an important right or sensitive classification is involved "a heightened standard of scrutiny is applied to an 'important' governmental purpose…").

In *Smith*, and *James v. SEPTA*, 477 A.2d 1302 (Pa. 1984) the Pennsylvania Supreme Court applied heightened scrutiny to rights that, although not fundamental, were "important" because they were included in the state constitution itself. The same is true here—heightened equal protection scrutiny should be applied to the state constitutional right to a thorough and efficient education.

One final point: there are particular reasons in the area of educational equality for this Court to be leery of mimicking federal analysis. When the United States

Supreme Court's 5-4 decision in 1973 rejected a federal Equal Protection challenge to unequal and inadequate property-tax funding of the Texas schools, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) it noted:

> It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

Of course no obligation of deference to states should distract this Court. It is precisely the self governing authority of the People of Pennsylvania that is being invoked by the plaintiffs, and this Court should have no federalism-based hesitation in joining the majority of state courts that have enforced state

contitutional rights to equality in education against a heedless, deadlocked or indifferent legislature.

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Respectfully submitted,

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