

STATEMENT OF THE ISSUES

- I. Whether public school students who claim to be receiving an inadequate education have standing to challenge Indiana's school-funding formula when a favorable decision could in no way, as an exercise of judicial power, ensure that the students receive a better public-school education.
- II. Whether Article 8, Section 1 of the Indiana Constitution provides judicially enforceable standards for evaluating the constitutionality of Indiana's school-funding formula.

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PETITION TO TRANSFER

Defendants-Appellees Mitch Daniels, Suellen K. Reed, and the Indiana State Board of Education respectfully petition the Court to transfer jurisdiction over this case from the Court of Appeals and affirm the trial court's dismissal of Plaintiffs' Complaint.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

This is a case of massive importance to every resident of Indiana, in terms not only of funding for primary and secondary education, but also in terms of the ways and amounts residents are taxed, the abilities of legislators to balance competing demands for scarce resources, and the proper functioning of government generally. In a 2-1 decision, the Court of Appeals reached the extraordinary conclusion that the Indiana judiciary may use Article VIII, § 1 of the Indiana Constitution to review the adequacy of the General Assembly's public school appropriations and funding formula. It then remanded the case without specifying any useful legal standard for the trial court to apply. And it did all of this fully aware that the plaintiff public school students themselves have no concrete expectation of benefiting from a favorable final judgment.

This case warrants review now, before the parties and the trial court waste enormous resources constructing and implementing a vague legal standard of uncertain validity in a case offering no reasonable prospect of actual judicial redress.

1. Discharging its duties under Article VIII of the Constitution, the General Assembly has enacted a highly complex series of statutes establishing and

funding a public-education system. *See generally* Ind. Code tit. 20. Appropriations for primary and secondary public education constitute the largest spending component of the State Budget, with maximum state tuition support totaling \$3,812,500,000 for 2007 and \$3,960,900,000 for 2008. *See* Ind. Code § 20-43-2-2; *see also* *List of Appropriations Made by the 2007 Indiana General Assembly for the Biennium July 1, 2007 to June 30, 2009* at 1 (2007), *available at* http://www.in.gov/sba/files/ap_2007_all.pdf. In addition to the state share, there has also been a local contribution determined by calculating the sum of the school corporation's adjusted tuition support levy and its previous year's excise tax revenue. *See* Ind. Code § 20-43-6-4.

Calculating each school corporation's allotment from the overall budget begins with the amount the General Assembly deems necessary to educate each student—\$4,563 in 2007, \$4,790 in 2008, and \$4,825 in 2009—multiplied by the “Adjusted Average Daily Membership” of each corporation—which is itself the result of a complex calculation. *See* Ind. Code §§ 20-43-4-7 (version b); 20-43-5-4. That product is then subject to another multiplier known as the Complexity Index, which accounts for the needs of school corporations who educate particularly disadvantaged populations of students, including the poor and disabled. *See* Ind. Code § 20-43-5-3.

The method for financing each school's tuition support requirement is undergoing radical changes associated with the legislature's decision to shift tax burdens away from owners of real property. Prior to the enactment of House Enrolled Act 1001 in 2008, school corporations were responsible for substantial

portions of their tuition support requirements based on the dollars they expected to receive from local property taxes, vehicle excise taxes, and financial institution taxes. *See* Indiana Department of Education, *Digest of Public School Finance in Indiana, 2007-2009 Biennium* at 1 (2007). Roughly speaking, the state would make up the difference between a corporation's yield from those taxes and its total required tuition support. *See id.* at 14. Now, after HEA 1001, the state will, beginning January 1, 2009, assume responsibility for 100% of each corporation's tuition support. *See* Pub. L. No. 146-2008 §§ 328, 806. Accordingly, HEA 1001 increased state tuition support for 2009 from the maximum distribution of \$4,119,600,000 originally set by the General Assembly in 2007, to \$6,509,000,000. *Compare* Ind. Code § 20-43-2-2 *with* Pub. L. No. 146-2008 § 482. This change not only eliminates school property-tax levies for tuition support, but also alleviates cash-flow risks associated with delayed property tax collections and distributions, such as have arisen in recent years as local officials have implemented new assessment laws. *See, e.g., Late Taxes Force Schools to Borrow Money*, Seymour Tribune, Apr. 11, 2008, *available at* 2008 WLNR 6835274; Kelly Soderlund, *Late Tax Bills Strap Area Schools*, Ft. Wayne Journal-Gazette, Sept. 11, 2007, at 2C, *available at* 2007 WLNR 18830976.

In addition to providing 100% tuition support, the General Assembly also offers other grants to schools, subject to caps. The legislature has, for example, appropriated \$2,000,000 for each fiscal year this biennium for schools that have incurred ADM growth of at least 150 students over the prior year. *See* Pub. L. No. 234-2007 § 9(B). Schools may also receive grants if they offer certified alternative

education programs, early intervention and reading diagnostic assessment, full-day kindergarten (\$8.5 million in 2006; \$33.5 million in 2007-08; \$58.5 million in 2008-09), gifted and talented education, non-English-speaking instruction (\$700,000 per year last biennium; \$6.9 million per year this biennium), and summer school, among other programs. *See* Pub. L. No. 246-2005 § 9(B); Pub. L. No. 234-2007 § 9(B). In addition, all schools receive grants to assist with ISTEP+ testing and remediation (\$31.4 million per year last biennium; \$41 million per year this biennium) and to assist with the cost of textbook rental for low-income students (\$19.9 million per year last biennium; \$39 million per year this biennium). *See id.*

2. On April 20, 2006, Plaintiffs, nine Indiana public-school students attending various elementary, middle, and high schools in the State (and their parents), filed the Complaint in this action. Appellants' App. 18-21; Complaint ¶¶ 1-2. They have asked for a declaration that Indiana's school-funding formula violates the state Constitution because the Indiana General Assembly does not provide adequate funding for the State's overall educational needs and because the formula creates inequalities in levels of funding and quality of education among school districts throughout the State. Appellants' App. 57-60.

Plaintiffs purport to represent a class consisting of children who "attend or will attend public school in the same school corporations, or because, on account of their poverty, their race or ethnicity, their physical or mental disabilities, or their limited English proficiency, they are not receiving an education that equips them with the knowledge and skills they need to compete for productive employment, to

pursue higher education and to become responsible and informed citizens.”
Complaint ¶ 6. No class has been certified.

3. On July 13, 2006, the Defendants moved to dismiss, arguing that the case is not justiciable for plaintiffs’ lack of standing, the defendants’ inability to provide any meaningful relief, and the lack of any judicially enforceable constitutional standards. Appellants’ App. 83-107, 141-67. The trial court granted the State’s motion, concluding that plaintiffs’ claims were not redressable by a declaration that the school-finding formula was unconstitutional. Appellants’ App. 12-16.

On May 2, 2008, the Court of Appeals reversed, holding that the plaintiff public school students have standing to seek a declaration of their rights under “the Education Clause, encapsulated in Article VIII, § 1 of the Indiana Constitution” and that Article VIII, § 1 “provides Indiana’s children with the right to a public education, as envisioned by the framers of our Constitution.” *Bonner ex rel. Bonner v. Daniels*, 885 N.E.2d 673, 696 (Ind. Ct. App. 2008). Judge Friedlander dissented, concluding that Bonner “asks us to sit in judgment of decisions made by the Indiana Legislature that are firmly within the discretion accorded to that body by the Education Clause I would hold that such action is beyond our purview.” *Id.* at 697 (Friedlander, J., dissenting).

ARGUMENT

I. The Decision Below Conferring Standing Warrants Transfer Because It Conflicts with a Prior Court of Appeals Decision, Contravenes this Court's Standing Precedents, and Ignores the Text of the Declaratory Judgment Act

The Court of Appeals has permitted schoolchildren and their parents to challenge the Indiana school funding formula on constitutional grounds even though there is no reasonable expectation that the exercise of judicial power in their favor could actually confer any benefit on them. The court held that Bonner and his co-plaintiffs had a “substantial interest in the relief sought” sufficient to confer standing because they “[c]ontend[] that the state’s financing is insufficient to provide [Bonner], and the members of his Class, with a quality public education that will prepare him to function in a complex society, and to compete successfully with his peers for productive employment and opportunities for higher education.” *Bonner*, 885 N.E.2d at 685. The court did not, however, require even so much as a theory as to how Bonner or the other plaintiffs would actually benefit from a favorable decision. Transfer is warranted to address these issues.

1. The holding below squarely conflicts with the Court of Appeals’ own decision in *Fort Wayne Education Association v. Indiana Department of Education*, 692 N.E.2d 902, 904 (Ind. Ct. App. 1998), *trans. denied*, 706 N.E.2d 179 (Ind. 1998), which rejected the standing of parents of public-school students to challenge a school board’s agreement to pay the high school for students enrolled in an alternative education program. Observing that standing “serves as a check on the exercise of judicial power by Indiana courts and thereby maintains our state constitutional scheme of separation of powers,” the Court of Appeals in *Fort Wayne*

ruled that parents could not sue just because the agreement would result in less money for other programs. *Id.* The court held that this claim “merely calls upon the court to engage in . . . ‘abstract speculation.’” *Id.* (quoting *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995)). Thus, *Ft. Wayne* holds that, unless public-school parents (and, implicitly, children) would benefit from a favorable ruling more directly than by merely disrupting objectionable school spending, the plaintiff does not have legal standing to challenge that spending.

The decision below contravenes that rule because it permits standing to students and parents whose only realistic goal for a *judicial* remedy is to disrupt educational spending (though they disclaim even that, *see* Appellants’ Br. 26). The plaintiffs’ theory that this case might lead to better educational opportunities for themselves is based on at least four speculative premises: (1) that a declaration that the current school funding system is invalid will prompt the General Assembly to revise that system; (2) that the Plaintiffs’ schools will receive more money as a result; (3) that their schools will use this extra money to provide better classes and programs in which the Plaintiffs participate; and (4) that as a result, they will receive a “quality education.” *Ft. Wayne* squarely rejected standing based only on such conceivable consequences of a judicial declaration.

The decision below ignored *Ft. Wayne* and invoked instead *Nagy v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d 481, 482-83 (Ind. 2006), despite obvious distinctions. In *Nagy*, parents challenged a locally assessed \$20.00 school activities fee under the Free Tuition Clause. An injunction against collecting that fee had an objectively verifiable direct and remedial impact on the plaintiffs—it

meant they did not have to pay the fee. *Id.* at 493. This is exactly the sort of concrete, judicially redressable injury that was missing in both *Ft. Wayne* and this case.

The Court of Appeals even recognized that, unlike in *Nagy*, the Plaintiffs here “do[] not request executory relief,” but merely “envision[] the court to explain [their] rights under the Constitutional Education Clause, in hopes it will spur the General Assembly into action.” *Bonner*, 885 N.E.2d at 685. Hoping to “spur” another branch of government into action using the moral authority of a favorable judicial decree is not grounds for standing in Indiana courts. To have standing, a plaintiff must be able to articulate an injury fairly traceable to the defendants that is reasonably redressable *by a court*. *Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 989 (Ind. Ct. App. 2003).

2. Nor does the Declaratory Judgment Act supply standing where none otherwise exists. The Act itself states that a declaratory judgment is not proper where “the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.” Ind. Code § 34-14-1-6. The Court of Appeals, nonetheless, inexplicably ruled that “We find the purported speculative nature of any possible remedy to be of no effect when dealing with the Declaratory Judgment Act.” *Bonner*, 885 N.E.2d at 685. This holding cannot be squared with Ind. Code § 34-14-1-6, not to mention *Ft. Wayne* and precedents from this Court holding that speculation is an insufficient basis for finding redressability. *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) (“The standing requirement mandates that courts . . . eschew action when called upon to engage only in abstract

speculation.”).

For support of its Declaratory Judgment Act theory, the Court of Appeals relied on *Smith v. Mercer*, 79 N.E.2d 772, 775 (Ind. Ct. App. 1948), and *Brindley v. Meara*, 198 N.E. 301, 303 (Ind. 1935), but no speculation as to the theoretical consequences of a declaration was necessary to justify those lawsuits. *Brindley* resolved a dispute between public officials as to which had power under a particular statute. 198 N.E. at 302. *Mercer* decided how property would be distributed between divorcing spouses under the terms of a prenuptial agreement—a classic sort of declaratory action. 79 N.E.2d at 577-78. In both cases a favorable judicial decree was the only thing necessary to provide redress for the plaintiffs’ claimed injuries.

Here, a declaration favorable to the plaintiffs could not, alone, provide the students with a better education. Hence, this case seeks nothing more than an advisory opinion that can be used as a political tool to lobby the legislature. The Court should reject such use of the judicial system.

II. The Decision Below Subjecting School Funding Decisions to Judicial Review Creates a Conflict with this Court’s Precedents Demanding Immediate Attention

Neither the General and Uniform Clause, nor any other clause of Article VIII, § 1 of the Indiana Constitution provides a principled basis for courts to measure the adequacy of the General Assembly’s public school appropriations or its formula for distributing those funds to public schools. Indeed, appropriations generally are “a central legislative function unusually unsuitable to judicial review as a matter of separation of powers.” *Bonney v. Ind. Fin. Auth.*, 849 N.E.2d 473, 482 (Ind. 2006).

By authorizing judicial review of the school-funding formula, the decision below has improperly opened the door to judicial governance of education through protracted litigation over inherently political controversies.¹

A. The State Constitution commits school-funding policy to the legislature, a proposition that the Court of Appeals ignored

1. Educational reforms were an important part of the Constitutional Convention of 1850, where the delegates were particularly concerned about the high rate of illiteracy. *See 2 Report of the Debates & Proceedings of the Convention for the Revision of the Constitution of the State of Indiana*, 1858-61; *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 488-89 (Ind. 2006). As the delegates perceived it, the problem was that there was no centralized system of schools to ensure the education of Indiana’s children. *See Nagy*, 844 N.E.2d at 489-90. Their constitutional remedy was to charge the General Assembly with responsibility to “encourage” learning “by all suitable means” and to provide “for a general and uniform system of Common Schools” that is “equally open to all” and where tuition would be “without charge.” Ind. Const. art. VIII, § 1.

Under this structural fix, however, this Court has squarely held that “determining the components of a public education is left within the authority of the legislative branch of government.” *Nagy*, 844 N.E.2d at 491. Accordingly, the “legislature has plenary power over the subject of the public schools,” including what kinds of schools to provide and how to fund them. *See State ex rel. Clark v.*

¹ Many other states’ courts have grappled with similar issues. *See Appellees’ Br.* at 37-48; *see also Lobato v. Colorado*, ___ P.3d. ___, 2008 WL 194019 (Colo.); *Pendleton Sch. Dist. 16R v. Oregon*, ___ P.3d ___, 2008 WL 2039263 (Or. App.); *Nebraska Coal. Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164 (Neb. 2007) (decisions rejecting similar challenges).

Haworth, 122 Ind. 462, 23 N.E. 946, 948 (1890); *see also Robinson v. Schenck*, 102 Ind. 317, 1 N.E. 698, 705 (1885) (holding that it is for the legislature “to select the means of building up and encouraging schools”). “[F]or mistakes or abuses” in exercising its plenary power over education, the legislature is “answerable to the people, but not to the courts.” *Haworth*, 23 N.E. at 948.

2. The decision below directly contravenes this doctrine. The Court of Appeals reinstated this case so that a trial court could examine whether the General Assembly has created an “efficient” system that provides a “quality” education. *Bonner*, 885 N.E.2d at 690-691. Neither of these terms even appears in the text of Article VIII, § 1, of the Constitution, much less carries any legally significant (or objectively discernible) meaning. Using them to examine the adequacy of the General Assembly’s educational funding decisions cannot be squared with the Court’s prior rulings that the legislature’s educational policy and funding decisions are off limits to judicial second-guessing.

The Court of Appeals cited several cases purportedly showing that our courts have “reviewed and interpreted the Education Clause” in relevant ways. *Bonner*, 885 N.E.2d at 692. None, however, even remotely suggests courts may review the legislature’s enactments for “efficiency” or “quality” or compel the legislature to exercise its Article VIII power in a particular way. In *Greencastle Twp. v. Black*, 5 Ind. 557, 563 (1854), the Court addressed only the structural issue whether the General and Uniform Clause permits local governments to assess taxes to fund education, not whether that clause imposes judicially enforceable duties on the General Assembly or creates judicially enforceable rights for students.

Furthermore, *Greencastle* was essentially overruled by *Robinson v. Schenck*, 102 Ind. 317, 1 N.E. 698, 703 (1885). As the Court later observed in *Shepardson v. Gillett*, 133 Ind. 125, 129, 31 N.E. 788, 789 (1892), “[w]hatever doubts and uncertainties may have rested upon this question under the rulings of *Greencastle*” were put to rest by *Robinson*, “which holds that the enactment of laws granting the power to the various local subdivisions of the state to levy and collect taxes for the support of their public schools, which applies to all local subdivisions of that class, is a general and uniform system, within the meaning of the constitution.” The Court has otherwise consistently upheld the legislature’s authorization of local taxes to finance school expenditures, underscoring in the process the General Assembly’s plenary power over education policy. See *Haworth*, 23 N.E. at 948; *Adamson v. Auditor & Treasurer of Warren County*, 9 Ind. 174, 175 (1857); see also *Indiana State Bd. of Educ. v. Brownsburg Cmty. Sch. Corp.*, 865 N.E.2d 660 (Ind. Ct. App. 2007) (upholding local rule limiting part-time enrollment against “equally open to all” argument).

Furthermore, in the more recent *Nagy* decision, which the Court of Appeals also cited, this Court enforced the Free Tuition Clause against a local school board’s activities fee, not the General and Uniform Clause against an education policy decision of the General Assembly. That decision is both hardly surprising (given the obvious meaning of the phrase “without charge”) and consistent with *Haworth*, *Schenck*, *Adamson*, and *Shepardson*, particularly since the Court expressly relied on the *General Assembly’s* definition of “public education” in determining a local school’s free-tuition duties. *Nagy*, 844 N.E.2d at 491. *Nagy* only reinforces the

erroneousness of the decision below in subjecting the legislature's education policy and funding decisions to judicial supervision.

Finally, the decision below relied on *Town of St. John v. Boehm*, 675 N.E.2d 318 (Ind. 1996), where this Court ruled that Article X, § 1(a)'s provision for "a uniform and equal rate of property assessment and taxation" could be judicially applied. But even aside from the obvious distinction that *Town of St. John* addresses a different constitutional text with a different history and doctrine, the text of Article X, § 1(a) sets forth a well-understood and highly limited legal principle—equal treatment under the law—and applies it to very specific government actions—assessing and taxing real property. The Court did not use Article X to declare that the judiciary may review whether the entire state taxation system is "adequate," "uniform," "equal," "efficient" or "quality." Such a role for the courts is neither textually supported nor judicially manageable.

3. The Court of Appeals invoked the debates from the 1850 constitutional convention, but its holding is entirely unsupported by them. As noted, the chief education concerns of the delegates were the high rate of illiteracy and lack of a centrally organized school system. These problems inspired Delegate Read to say that "We *must*—yes, sir, I repeat it, we *must* have a better devised and more efficient system of general education." From this, the Court of Appeals concluded that "Providing an efficient education to all Indiana's children . . . became the objective of the framers of our current Constitution." *Bonner*, 885 N.E.2d at 691.

There are two related but distinct problems with the Court of Appeals' decree that Article VIII provides a judicially enforceable "efficient" education standard.

First, the court erroneously recast Delegate Read's preference for a *comparatively* "more efficient" education as an *absolutely* "efficient" education. Whatever that term might mean, this was a subtle but important alteration, for it erroneously justified treating Article VIII not to provide structural improvements over the prior system so much as to create the means for constant judicial review of legislative outcomes.

Second, the context of Delegate Read's remarks demonstrates that, even if the term "efficient" carries constitutional significance, it can be reasonably understood only as a reference to centralizing the education system. That is, the old system was "inefficient" because localities were left to their own devices to educate children, tax money intended for education was left unspent, and high illiteracy was the result. Delegate Read and others argued for greater "efficiency" to justify proposed structural changes, such as the General and Uniform Clause and the creation of the office of state education superintendent. *See 2 Report of the Debates and Proceedings of the Convention of the Revision of the Constitution of the State of Indiana, 1858-61.*

According to the Court of Appeals, however, a preference for an "efficient" public education system meant that "those who drafted and ratified Article VIII refused to accept a stagnant form of education." *Bonner*, 885 N.E.2d at 694-95. This initial error of focus on outcomes rather than structure led the Court of Appeals to imbue Article VIII Section 1 with its own modern educational ideals, stating that, "[g]iven the complexities of our society today, the State's constitutional duty necessarily must extend beyond mere reading, writing, and arithmetic." *Id.*

Eradicating illiteracy may have been paramount to the delegates, but “a constitutionally-mandated public education is not a static concept removed from the demands of an evolving world.” *Id.* Rather, “[m]ere competence in the basics—reading, writing, and mathematics—is insufficient in the beginning days of the Twenty-First Century to insure that this State’s public school students are fully integrated into the world around them.” *Id.* Accordingly, “[a] broad exposure to the social, economic, scientific, technological, and political realities of today’s society is essential for our students to compete, contribute, and flourish in Indiana’s economy.” *Id.*

The convention debates in no way support the idea that the constitution permits constantly recalibrated judicial measurement of legislative outcomes in the field of education. The debates show only that the delegates chose as a constitutional solution a centralized system of public schools that is overseen by a superintendent and equally open to all students without charge. Everything beyond that, including deciding what constitutes “suitable means” to “encourage . . . moral, intellectual, scientific, and agricultural improvement,” Ind. Const. art VIII, § 1, is a matter of electorally accountable legislative discretion, not judicially imposed constitutional duty.

B. The Court of Appeals failed to identify any useful legal standard

Even if the General and Uniform Clause provides judicially enforceable rights, the decision below failed to articulate a useable legal standard. It variously referred to requiring an education that is not only “quality” and “efficient,” but that also includes “broad exposure” to various “realities,” that “insures” that students

are “fully integrated” into society, and that “equips” students to be “productive.” *Bonner*, 885 N.E.2d at 695. What these terms mean, or how a judge or juror would know whether they are being met, is not reasonably apparent.

Moreover, the decision below indicated that Article VIII’s meaning changes over time. *Id.* This understanding would not only frustrate the finality of whatever verdict might be achieved in this case, but it contradicts the well-established principle that the meaning of the Indiana Constitution does not “evolve” or “grow” to meet the exigencies of the moment. *See Bd. of Trs. of the Pub. Employees’ Ret. Fund v. Pearson*, 459 N.E.2d 715, 717 (Ind. 1984); *Finney v. Johnson*, 242 Ind. 465, 472-73, 179 N.E.2d 718, 721 (1962).

In all events, therefore, immediate review of this case is necessary to avoid a wasteful trial using constitutional standards of uncertain validity and meaning.

CONCLUSION

The Court should transfer jurisdiction from the Court of Appeals and affirm the judgment of the trial court.

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WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this Petition to Transfer contains no more than 4,200 words, not including the Statement of the Issues.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2008, a copy of the foregoing was served via First Class United States mail, postage pre-paid to the following:

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