IN THE
SUPREME COURT OF INDIANA

Court of Appeals Cause No. 49A02-0702-CV-00188

PHILIP-ANTHONY BONNER, a minor, by his parents and next friends, Joseph and LaTanya Bonner, et al., Plaintiffs/Appellants, v. MITCH DANIELS, Governor of the State of Indiana and Co-Chair of the Education Roundtable; SUELLEN K. REED, Indiana State Superintendent of Public Instruction and Chair of the State Board of Education and Co-Chair of the Education Roundtable; and the INDIANA STATE BOARD OF EDUCATION, Defendants/Appellees.	)	Appeal from the Marion Superior Court Cause No. 49D01-0604-PL-016414 The Honorable Cale J. Bradford, Judge

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BRIEF OF *AMICUS CURIAE* TAX FOUNDATION

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STATEMENT OF THE ISSUES

I. Whether the court below erred in concluding that the Indiana Constitution creates a judicially enforceable right to a "quality" education.

II. Whether a judicial mandate requiring changes to the current system of school finance policy is likely to improve the quality of education.

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INTEREST OF *AMICUS CURIAE*

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The Tax Foundation furthers its mission by educating the legal community and the general public about economics and taxpayer protections, and by advocating that judicial and policy decisions on tax law promote principled tax policy. Recent federal and state tax-related cases in which the Tax Foundation has participated as *amicus curiae* include *Department of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801 (2008); *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 128 S. Ct. 467 (2007); *Heatherly v. State*, 658 S.E.2d 11 (N.C. 2008), and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2005).

This case involves important issues of tax policy nationally. The decision of this Court may cited as authority by other states confronting similar questions, and would affect states with constitutional provisions similar to Article VIII, Section 1 of the Indiana Constitution. Furthermore, the Tax Foundation has conducted extensive research into education finance litigation and its impacts, which may prove helpful to the Court. Accordingly, the Tax Foundation has an institutional interest in this case.

SUMMARY OF ARGUMENT

An examination of the text and historical meaning of the Education Clause of Indiana's Constitution reveals no support for the conclusion that a quality education is an enforceable

right. At best the state has a duty to encourage learning with a system of free schools, not an enforceable right to receive a quality outcome. Similarly, an approach that focuses on finance as the key to improving education quality is both unsupported by the text of the Indiana Constitution and questionable as a policy matter.

The Court of Appeals did not discuss contrary opinions, other than listing them in a footnote. Resolution of the issues in this case requires a balanced and comprehensive discussion, informed of the issues, to assess the proper role of the judiciary and determine how best to utilize the State's resources to achieve lasting and satisfactory improvements in the quality of education.

For the Plaintiffs' claim to be judicially cognizable, a trial court must be able to reach a just ruling on this complex policy matter, even without the help of resources available only through the legislative process. However, courts have had trouble limiting their involvement in education policy matters. The issues presented in this case require not only the nuanced examination of current educational quality, but also thorough consideration of spending policies and their attendant effects on taxation. To promote fair and comprehensive examination of the current state of education policy, and to conserve judicial resources, resolution of Plaintiffs' claims should be addressed to the General Assembly, not the judiciary.

Courts that have become involved in judicial education mandates quickly find that they lack the tools necessary to measure "quality education" beyond dollar amounts. Instead of bringing about increases in student performance, courts find themselves engaged in continuous jurisdiction over lawsuits seeking increases in spending. In some states, overall education spending even *decreases* after judicial mandate, perhaps due to the belief that legislative involvement is no longer needed because "the court is handling it." This Court should consider these serious issues, and reverse the decision of the court below.

ARGUMENT

I. THE INDIANA CONSTITUTION DOES NOT CREATE A JUDICIALLY ENFORCEABLE RIGHT TO A "QUALITY" EDUCATION.

A. The interpretation adopted by the court below goes beyond the text of the Education Clause.

The text of Article VIII, Section 1 of the Indiana Constitution (the "Education Clause") does not support the Court of Appeals' conclusion that a "quality" education is an enforceable right. The Education Clause requires only that the General Assembly (1) "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement"; (2) "provide, by law, for a general and uniform system of Common Schools"; (3) that tuition in the state's public school system "shall be without charge"; and (4) that the state's public school system be "equally open to all." Nothing in these requirements explicitly or impliedly creates a right to a "quality" education--an infinitely malleable concept.

The second, third, and fourth requirements do not compel the State to ensure the attainment of a quality education. These requirements are structural in nature, and require only that the General Assembly establish free public schools. Nor does the first requirement create an enforceable right to a quality education. This portion of the text imposes a duty only to "encourage" knowledge and learning; it does not require the General Assembly to "ensure" that knowledge and learning are actually attained. Additionally, the General Assembly need encourage "moral, intellectual, scientific, and agricultural improvement" only in a generalized sense. That is, the State is required only to maintain a generally supportive stance towards knowledge and learning, not that it achieve any specific, defined level.

Although "suitable" appears in the text, its meaning differs from that given to the word "quality" (or any other synonym) by the court below. Whereas the court below uses "quality" to

refer to a level of knowledge that prepares students to "flourish in Indiana's economy," *Bonner ex. rel. Bonner v. Daniels*, 885 N.E.2d 673, 695 (Ind. Ct. App. 2008), the context in which "suitable" appears indicates that it refers to the manner in which the General Assembly should discharge its duty to encourage the generalized acquisition of knowledge. "Suitable" does not require some minimum level of knowledge.

B. The interpretation adopted by the court goes beyond the historical meaning of the Education Clause.

Even if the Education Clause requires some minimum level of education, such level does not rise to that suggested by the court below. The court below concludes that public school students have a right to an education that prepares them to become productive members of the global economy. *See Bonner*, 885 N.E.2d at 695. To construe the sparse language of the Education Clause as consistent with this conclusion, the court below looks to the Constitutional Convention Debates for support. *Id*. at 690-91, 695 ("It was recognized that education provides the key to individual opportunities for social and economic advancement and . . . our place in the global economy."). This conclusion, however, goes beyond the substance of the quoted debates.

It is true that the quoted debates illustrate the value placed upon the creation of state-administered equally-accessible tuition-free public schools. Delegate Read is quoted: "The education of every child in the State has become a political necessity. . . . [W]e *must* have a better devised and more efficient system of general education." *Id*. at 690. Delegate Allen is also quoted:

> We should cherish [education] as one of the strongest safeguards of human freedom; we should encourage it by every legitimate means in our possession; and we should not stay our efforts until we shall have placed within the reach of every child the means of a common school education.

Id. at 691. The court below thus reasonably observes the delegates' high regard for free public schools.

However, it overstretches this language to conclude that the delegates intended the State to provide an education enabling students to secure their "place in the global economy." The quoted debates do not suggest that the delegates expressed concern with the economic success or social advancement of public school graduates. Rather, the recurring theme of their comments is the preservation of freedom through democracy. This theme is consistent with the prefatory statement of the Education Clause, which provides that "Knowledge and learning . . . [is] essential to the preservation of a free government." Even if there is a right to some level of state-provided education, the text and its original meaning limit that right to enable citizens to preserve freedom by participating in the democratic process.

Although the delegates expressed the importance of employing superior means to promote democratic participation, such "means" language does not suggest that a "quality" education is a protected right. Delegate Read's quoted statement, for example, advocates relative improvement in the quality of schools, but stops short of supporting any particular desired level. *See id.* at 690. Similarly, Delegate Allen's quoted statement promotes democracy through establishment of free public schools, but does not outline a specific level of knowledge necessary to achieve that goal. *Id.* at 691.

It may be the case that basic reading, writing, and arithmetic are insufficient in the modern world to enable students to achieve economic success or social advancement. It may also be valid to believe that the people of Indiana have an interest in seeing that students acquire the skills necessary to foster a competitive local business climate. But such valid concerns cannot overcome the lack of textual or historical support necessary to sustain the proposition that a

"quality" education is a constitutional right. The Framers in drafting the Constitution, and the people with the power of amendment, have had the opportunity to require expressly that the education provided by the state guarantee economic success. They have not. The Education Clause guarantees a free public education, not the right to a "quality" education.

C. The decision below leaves unanswered the concerns raised in contrary persuasive authority.

Although the court below refers to right-to-adequate-education cases from other states, it did not fully address contrary cases and the concerns they raise. This asymmetrical analysis is problematic given the gravity of consequences in constitutional education issues in general and this case in particular.

The court below cites a New Hampshire case holding that minimum constitutional standards of educational quality are a judicially enforceable right. *See Bonner*, 885 N.E.2d at 693 (discussing *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1358 (N.H. 1997)). The court also quotes factors that some courts have used to justify judicial involvement in education finance and policy decisions. *See id.* at 693 n.9 (quoting *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989) (listing as benchmarks for "efficient" education "sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage," and "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counter parts in surrounding states, in academics or in the job market.")). By contrast, little attention is given to cases reaching opposing conclusions, aside from a footnote citation. *See id.* at 692-93 n.6.

Many authorities have expressed the view that protracted judicial involvement in education finance and policy has propelled courts beyond their proper role. For example, in declining to enforce an asserted right to an adequate education, the Rhode Island Supreme Court

stated that its involvement "could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that has attempted to define what constitutes the 'thorough and efficient' education specified in that state's constitution." *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995). The Nebraska Supreme Court recently expressed similar concern. *See Neb. Coal. for Educ. Equity and Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007) ("The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp."). *See also Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1066 (Okla. 2007) (concluding that initial judicial involvement would lead to continuous monitoring and oversight of the legislature); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400, 406 (Fla. 1996) (same); *cf. Ex parte James*, 836 So.2d 813 (Ala. 2002) (conceding that further litigation and involvement "after issuing four decisions in this case over the past nine years" would be "judicially imprudent").

These cases signal caution to courts that have yet to decide issues of education standards and policy. Rather than racing to join an increasing number of states in overturning school funding systems, a reasoned analysis should be conducted to address and refute concerns that judicial involvement will result in extensive litigation, strain judicial resources, and micromanage policy and financial decisions best left to the political branches.

D. The interpretation adopted by the court below will produce no judicially manageable standards.

Even if the people of Indiana have a right to a quality education, it would be impossible to enforce that right with judicially manageable standards. Although the court below attempts to define the standards the state must meet, *see Bonner*, 885 N.E.2d at 695 ("Mere 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."), the guidance to policymakers will necessarily remain vague and elusive. Courts will have to provide more specificity about what knowledge is required beyond "[m]ere competence in the basics," and what it means for students to be "fully integrated into the world around them."

Applying hard-to-define and continually evolving standards such as these to real cases can harm the credibility of the judiciary. Enforcing a right to a quality education means developing a non-arbitrary meaning for that term. Ascertaining if the standard is being met would require more than simply overseeing Board of Education metrics. Courts would need to hear testimony from economic participants, gather and analyze reports, consider the short-term and long-term results of the current education system, evaluate transition costs and trade-offs, and employ appropriately specific standards against which to judge the State's alleged failures. *See, e.g., Carroll-Hall v. Rell*, No. X09CV054019406, 2007 WL 2938295, at *12 (Conn. Super. Ct. Sept. 17, 2007) (suggesting a non-exhaustive list of policy questions courts would need to address).

Courts are generally not well-equipped to perform such a micromanaging role, particularly in the field of education finance and policy, as many courts have concluded. *See Neb. Coal.*, 731 N.W.2d at 181 (concluding that "[t]his court is simply not the proper forum for resolving broad and complicated [education] policy decisions"); *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 803 (Ill. 1999) (quoting *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996)("It would be a transparent conceit to suggest that whatever standards of [education] quality courts might develop would actually be derived from the constitution in any meaningful

sense.")); *Sundlun*, 662 A.2d at 58 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973) ("What constitutes an appropriate education or even an 'equal, adequate, and meaningful' one, 'is not likely to be divined for all time even by the scholars who now so earnestly debate the issues.'")).

Courts can only develop doctrine in a case-by-case fashion. The General Assembly, by contrast, can obtain evidence from interested stakeholders and consider political and economic factors when developing education requirements. This greater comprehensiveness and accountability is why, as other courts recognize, legislative action is the best vehicle for addressing perceived inadequacies in educational quality. *See, e.g., Neb. Coal.*, 731 N.W.2d at 181 (quoting *Edgar*, 672 N.E.2d at 1191 ("Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.")); *Sundlun*, 662 A.2d at 57-58 (concluding that if "the right to an education is a constitutional right in this state," that "the proper forum for this deliberation is the General Assembly, not the courtroom"). It is amiss to expect that trial courts will be able to adjudicate these complex policy issues in a fair manner, without the aid of resources available only through the legislative process.

This Court should be wary of overlooking the difficulty other courts have had in limiting their involvement in education policy matters. *See, e.g., Neb. Coal.*, 731 N.W.2d at 182-83 (noting the significant number of years and resources the Alabama, Kansas, New Jersey, and Texas Supreme Courts have expended since first addressing education policy issues); *Sundlun*, 662 A.2d at 59 (discussing the New Jersey courts' twenty-one year involvement in education policy cases). Most likely, Indiana courts would similarly have their resources drained by ongoing oversight roles.

Changes to current education policy routinely spill over into spending and taxation, affecting the public at large. Stakeholders interested in these policy matters, who express their views through the political process, are shut out when these issues are turned over to judicial discretion. *See Edgar*, 672 N.E.2d at 1191 ("To hold that the question of education quality is subject to judicial determination would largely deprive members of the general public of a voice in a matter which is close to the hearts of all individuals. . . .").

Because the relief sought by Plaintiffs cannot be brought about with judicially manageable standards, and because a comprehensive review of state education policy without legislative resources is folly, this Court should instruct Plaintiffs to direct his claims to the General Assembly, not to the courts.

II. A JUDICIAL MANDATE REQUIRING CHANGES TO THE CURRENT SYSTEM OF SCHOOL FINANCE POLICY IS NOT LIKELY TO IMPROVE THE QUALITY OF EDUCATION.

This case is the latest instance of a national campaign to involve the courts in determining appropriate levels of state spending on education. The unstated assumption used to justify these efforts is that increased education spending leads to increases in education quality. This argument is not applicable in this case because the Education Clause does not focus on finance issues. The argument is also problematic because more money does not necessarily mean better performance. A focus on dollar amounts ignores potential efficiency increases, the diminishing returns of added spending, and alternative uses for each dollar.

Legislatures are better equipped to navigate these competing concerns than courts, which have quickly found that they lack the tools to measure "quality education" beyond dollar amounts. Instead of achieving increases in student performance, courts find themselves entertaining endless lawsuits seeking dollar-amount increases in spending. In some states, overall

education spending even *decreases* after judicial mandate, perhaps due to the belief that legislative involvement is no longer needed because "the court is handling it." Because these serious issues remain unaddressed, the decision of the court below should be reconsidered.

A. The Framers did not envision that finance policies would be the focus of improving the quality of state education.

A review of the text of the Education Clause yields no reference to "funding," "finance," "appropriation," "spending," or synonymous terms. *See* Ind. Const. art. VIII, § 1. This does not mean that the General Assembly has no duty to provide "some" level of funding; indeed, this must be so in order to maintain a state-administered system of equally-accessible tuition-free public schools. Nevertheless, construing the Education Clause's broad outlines as requiring a financial focus is misguided.

As discussed *supra*, there is no constitutional right to a quality education sufficient to "instill in Indiana's children the knowledge and learning essential for today's workplace." *See Bonner*, 885 N.E.2d at 695. Also as discussed *supra*, the "suitable means" language of the Education Clause is inextricably tied to the General Assembly's duty only to encourage knowledge and learning in a broad and generalized sense. There being no textually mandated quality of education, it logically follows that any funding scheme other than that necessary to support tuition-free and equally-accessible schools lacks a constitutional basis of enforcement.

Despite this, the decision below attempts to derive a historical basis for reading a funding focus into the Education Clause, stating that "[t]here was considerable debate during the [constitutional] convention . . . particularly regarding the funding of the common school system." *Id.* at 690. But nothing in the quoted dialogues refers to "funding," "finance," "appropriation," "spending," or synonymous terms. *See id.* at 690-91. Although Delegate Read is quoted as advocating a "better devised and more efficient system of general education," and Delegate

Allen as "encourag[ing adoption of such a system] by every legitimate means in our possession," the context of these remarks show that their focus was on the structure of the public school system, not on funding. *See id.* Delegate Read, for example, advocated a uniform and state-administered school system that would be "better devised and more efficient" relative to the varied and locally-administered systems then in existence. Delegate Allen supported that system by means such as free tuition and equal accessibility.

Against this structural background, the delegates' remarks reflect the plain text of the Education Clause. A focus on funding, by contrast, reflects neither the delegates' statements nor the Education Clause text, and therefore receives no constitutional support.

B. The experience of sister states in judicial mandates for education spending has been problematic.

The claim that education finance litigation brings about adequate and equitable school systems is tenuous. A recent study by the Tax Foundation shows that, after an initial lawsuit, courts typically require the legislature to "fix" the education system, strongly hinting that the only proper solution is to increase funding. *See generally* Chris Atkins, *Appropriation by Litigation: Estimating the Cost of Judicial Mandates for State and Local Education Spending*, Tax Foundation Background Paper No. 55, Jul. 2007, *available at* http://tinyurl.com/tfedfin.

Although judicial mandates often lead to funding increases, improvements in student performance are not guaranteed. Schools may fail to put funds to their best uses, leaving plaintiffs unsatisfied and prompting their return to court. The result is an endless cycle of resource-draining litigation. *See, e.g.*, Paul Galindo, *Indiana Judiciary Ponders an Education Spending Mandate*, Tax Foundation Tax Policy Blog, Jul. 14, 2008, http://www.taxfoundation.org/blog/show/23369.html (citing the New Jersey *Abbott* litigation of 17 education finance cases over 12 years).

Although spikes in capital funding may occur in the short-term, long-term trends indicate stagnation in recurring spending. *See Atkins, supra*, at 3. This suggests that court mandates tend to produce one-time high-profile expenditures, rather than long-term comprehensive solutions. Following the landmark *Rose* decision, for example, spending appears virtually unchanged even after the post-litigation Kentucky Education Reform Act pumped over $1,136 per pupil into education. *See id.* at 5. The explanation may lie in the fact that money is fungible, and an order mandating spending in one education-related area may simply shift resources from others. "In the long run . . . overall spending trends in [mandate] states suggest that recurring spending [on classroom size, teachers, etc.] is stagnant after court mandates. . . ." *Id.* at 14-15 (citing Frederick Hess, *Adequacy Judgments and School Reform, in* School Money Trials 159-94 (Martin West ed., Brookings Institution Press 2007)).

"The evidence shows that appropriation by litigation is not a particularly efficient long-term solution to perceived funding inequities or inadequacies in school finance, particularly for those who seek higher levels of recurring spending." *Id.* at 16 (citing Matthew G. Springer & James W. Guthrie, *The Politicization of the School Finance Legal Process, in* School Money Trials 102-30 (Martin West ed., Brookings Institution Press 2007)); Peter Schrag, *Final Test: The Battle for Adequacy in America's Schools* 233 (2003) ("[T]he courts are rarely great places to make educational policy."). Indiana's courts should not entertain judicially unmanageable questions of policy properly belonging before the Legislature. *See Robinson v. Schenck*, 102 Ind. 307, 308, 1 N.E. 698, 707 (1885) ("The duty rests on the legislature to adopt the best system that can be framed; but they, and not the courts, are to judge what is the best system.").

Courts that have issued mandates for "adequate" and "efficient" educational systems have quickly found themselves mired in endless lawsuits seeking to quantify the unquantifiable,

and doing so without the benefit of resources available only to legislative bodies. Indiana should learn from the mistakes of its sister states, and avoid judicial micromanagement of education finance and policy.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests the Court grant transfer, reverse the decision of the Court of Appeals, and reinstate the trial court's dismissal of this matter.

Respectfully submitted,

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