

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

**PETITIONERS' ANSWER AND MEMORANDUM IN OPPOSITION TO
RESPONDENT SPEAKER CUTLER'S APPLICATION IN THE FORM OF
A MOTION *IN LIMINE* TO PRECLUDE PETITIONERS FROM
OFFERING EVIDENCE OR ARGUMENT RELATING TO
RACIAL DISCRIMINATION OR DISPARATE IMPACT**

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I. INTRODUCTION

In a case brought by the Pennsylvania State Conference of the NAACP, the nation's most storied civil rights organization, Speaker Cutler seeks to preclude Petitioners from presenting any "race-based evidence." Speaker Cutler's definition of "race-based evidence" is vast, including – but not limited to – any "fact or expert testimony directed at showing racial discrimination, segregation or inequities in Pennsylvania, currently or in the past; disparate funding on account of race or ethnicity; or disparate impact on student achievement or outcomes." (Cutler App. at 10-11.)

Speaker Cutler's Application would require this Court to exclude broad categories of evidence about the educational needs and outcomes of the Commonwealth's students of color and severely undermine the NAACP's ability to prosecute its claims. The Speaker attempts to justify this stunning request by arguing that because Petitioners have not asserted a race discrimination claim, any evidence about how students of color are faring under the current funding system, and what these students require in order to access the educational opportunities to which they are constitutionally entitled, is "irrelevant" and merely "intended to inflame." (Cutler App. at 11, 3.)

Speaker Cutler misunderstands the critical significance of this evidence. Petitioners have asserted claims under the Pennsylvania Constitution's Education

Clause and equal protection guarantees. Both provisions require Respondents to ensure that *all* students in the Commonwealth have access to a high-quality education. The evidence Speaker Cutler now seeks to eliminate – including evidence that students of color are more likely to reside in the lowest-funded districts, more likely to lack the educational resources they need to learn, and consequently less likely to become proficient on state assessments, graduate high school, or enter college – is central to the question of whether Respondents are fulfilling their constitutional mandates.

Indeed, state and federal agencies commonly consider this type of evidence to evaluate the efficacy of educational systems. Policymakers, educators, and even Speaker Cutler’s own expert acknowledge the importance of looking at information disaggregated by race to determine whether students are getting the resources they need. And courts in other funding challenges have relied on race-based data to assess whether constitutional education mandates are being met. The use of racial data here is no different: Petitioners are introducing it to help demonstrate that the system is not working for all students. Reliance on this evidence does not require Petitioners to have asserted a race discrimination claim any more than introducing evidence about English Learners and students with disabilities requires the filing of a national origin or disability discrimination claim.

Nor is this evidence news to Speaker Cutler. It has been repeatedly featured in fact discovery, deposition testimony, and multiple expert reports.

At base, Speaker Cutler's Application asks the Court to reject the realities of a significant portion of the Commonwealth's student population and to deprive Petitioners of their right to present evidence that is squarely relevant to their constitutional claims. The Application should be denied.

II. EVIDENTIARY BACKGROUND

In the 2018-2019 school year, there were 255,023 African American students and 208,386 Hispanic students attending the Commonwealth's public schools.¹ Together, these students represent over 25% of Pennsylvania's public school student body² and disproportionately reside in the Commonwealth's most under-resourced districts.³ It is estimated that 40% of all Hispanic students and 50% of African American students in Pennsylvania attend school in the poorest quintile of districts, while only 11% of Hispanic students and 14% of African American students attend school in the wealthiest quintile of districts.⁴

¹*Enrollment Data and Statistics*, PA. DEP'T. OF EDUC., <https://public.tableau.com/app/profile/padeptofed/viz/EnrollmentDataandStatistics/Enrollment> (last updated July 20, 2020).

² *Id.*

³ *See, e.g.*, Dep. of Adam Schott, Special Assistant to the Sec'y, Pa. Dep't. of Educ., 77: 4-7.

⁴ Kelly Expert Report, 27.

These students are overwhelmingly affected by the way the Commonwealth distributes education funding. While students of all races experience underfunding, the quintile of districts with the most concentrated numbers of African American and Hispanic students are \$1.4 billion dollars more underfunded than the shortfall in the districts with the fewest students of color.⁵ Similarly, 80% of African American and Hispanic students attend a district that receives less Basic Education Funding than they would if the state actually used its Fair Funding Formula to distribute the vast majority of Basic Education Funding.⁶

As a result, a significant number of children of color in Pennsylvania attend schools that do not have the resources necessary to effectively educate them. For example, students of color are more likely to be served by inexperienced teachers⁷ and less likely to have access to advanced coursework like AP classes.⁸ Moreover, these disparities have persisted despite a broad consensus that historically

⁵ *Id.* at 57.

⁶ *Id.* at 4.

⁷ PA. DEP'T OF EDUC., *ESSA Consolidated State Plan*, 79 (2019) <https://www.education.pa.gov/Documents/K-12/ESSA/PennsylvaniaConsolidatedStatePlan.pdf>.

⁸ *See* Dep. of Adam Schott, 63: 18-25, 64: 1-2; Dep. of Matthew Stem, Deputy Sec'y for the Off. of Elementary and Secondary Educ., Pa. Dep't. of Educ., 482: 12-16.

underserved children need more educational resources, not fewer, to address entrenched inequities.⁹

As the Pennsylvania Department of Education readily admits, the Commonwealth's funding scheme has resulted in some of the largest achievement gaps in the country.¹⁰ In 2015 state assessment measures, students of color lagged as much as 30 points behind their White peers, who are more likely to live in well-resourced districts.¹¹ For example, only 17.1% of African American students and 22.7% of Hispanic students in the Commonwealth scored proficient or advanced in Mathematics, and only 35.9% of African American students and 40.0% of Hispanic students scored proficient or advanced in English Language Arts.¹² Students of color are more likely to attend high schools that graduate the fewest students,¹³ and they complete college at significantly lower rates than the Commonwealth average.¹⁴ These inequities have serious consequences, not only for the students who are subjected to them, but for the Commonwealth. According

⁹ See, e.g., ESSA Plan *supra* note 7, at 8, 44; see also Dep. of Matthew Stem, 286: 3-6; Dep of Kenneth Huston, President of the NAACP Pa. State Conf., 130: 17-20; Willis Expert Report, 8.

¹⁰ Dep. of Matthew Stem, 271: 5-6.

¹¹ ESSA Plan, *supra* note 7, at 9.

¹² ESSA Plan, *supra* note 7, at 9.

¹³ *Id.* at 7.

¹⁴ Pa. Dep't of Educ. Presentation at Point Park University, "African American Males: The Dwindling Teacher Pipeline," Wil Del Pilar, Deputy Sec'y, Postsecondary and Higher Educ. (Apr. 21, 2017), PDE0015728-41, slides 5-6.

to an analysis cited by the State Board of Education, if there were no racial equity gap in college attainment rates, Pennsylvania's gross domestic product would have been \$40.4 billion higher than it was in 2012.¹⁵

These wide gaps in student outcomes do not exist in a vacuum; they are directly related to wide gaps in resources and educational opportunities. Senior officials from the Pennsylvania Department of Education concede that these glaring disparities are caused in part by lack of funding, and that more funding is necessary to address them.¹⁶

III. ARGUMENT

1. The Evidence Speaker Cutler Seeks to Exclude is Central to Petitioners' Case.

Under the Pennsylvania Rules of Evidence, evidence is relevant to a cause of action if it has “any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Pa.R.E. 401. Evidence does not need to be conclusive to be relevant: it is sufficient that it “logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption

¹⁵ Pennsylvania Statewide Attainment Goal, STATE BD. OF EDUC. (citing analysis from PolicyLink's National Equity Atlas); *see also* Off. of Postsecondary and Higher Educ. Presentation to State Bd. of Educ., Del Pilar (Nov. 14, 2016), slide 14 (same).

¹⁶ *See, e.g.*, Dep. of Noe Ortega, Acting Sec'y, Pa. Dep't of Educ., 130: 5-19; Dep. of Matthew Stem, 286: 3-6.

regarding the existence of a material fact.” *Commonwealth v. Hawk*, 709 A.2d 373, 376 (Pa. 1998) (citation omitted); *accord Brady v. Urbas*, 111 A.3d 1155, 1162 (Pa. 2015) (“the threshold for relevance is low due to the liberal ‘any tendency’ prerequisite”) (citation omitted) (emphasis in original).

Speaker Cutler incorrectly contends that neither Petitioners’ Education Clause claim nor their equal protection claim – claims that, at their core, challenge the state’s failure to support and maintain a thorough and efficient system of education for *all* children – “can be advanced in any way by asserting or proving that the harm alleged may disproportionately impact certain racial or ethnic groups.” (Cutler App. at 12.) To the contrary, as set forth below, evidence of underfunding’s outsized impact on students of color is directly relevant to proving, first, that Respondents’ system for funding public education is inadequate because it is failing a significant proportion of the Commonwealth’s children; second, that the system distributes resources to students in an irrational and inequitable way; and third, that Respondents’ actions have inflicted serious injury on Petitioners.

i. The Impact of Underfunding on Students of Color Demonstrates that Pennsylvania’s System for Funding Public Education is Constitutionally Inadequate.

The Education Clause requires the General Assembly to provide for the maintenance and support of a thorough and efficient system of public education.

PA. CONST. art. III, § 14. A “thorough” or comprehensive system requires the

Commonwealth to provide children with access to a high-quality education that prepares them for college or a career. Accordingly, Petitioners’ prayer for relief asks the Court to enter equitable remedies that will ensure that *all* students benefit from this constitutional guarantee. *See, e.g.*, Pet. ¶¶ 312 (“public education is a fundamental right guaranteed by the Pennsylvania Constitution to *all* school-age children . . .”); 313 (Respondents have an obligation “to adopt a school-financing arrangement that is reasonably calculated to ensure that *all* students in Pennsylvania have an opportunity to obtain an adequate education . . .”); 314 (Respondents have an obligation “to provide school districts with the support necessary to ensure that *all* students in Pennsylvania have the opportunity to obtain an adequate education . . .”); 320 (asking the Court to compel Respondents “to establish, fund, and maintain a thorough and efficient system of public education that provides *all* students in Pennsylvania with an equal opportunity to obtain an adequate education . . .”) (emphasis added). The Commonwealth cannot meet its constitutional obligations if it is failing to serve identifiable subsets of its student body.

To evaluate whether students are receiving the knowledge and skills they need to succeed, the Commonwealth has adopted statewide assessments to measure learning and maintains a wide array of other data to track student achievement, such as standardized test scores and graduation rates. This information is not

collected or analyzed as an undifferentiated whole, because educators know that averages can hide important problems. Instead, they require the data to be broken down by student subgroup so that the state can specifically monitor the progress of economically disadvantaged students, English learners, students with disabilities, and students of color.¹⁷ This practice recognizes that a functioning educational system must be able to serve the full spectrum of its students, and that statistical averages rarely tell the whole story. The use of racially disaggregated data, in particular, to assess the adequacy of an educational system is well accepted by policymakers, educators, and national experts.¹⁸

¹⁷ See, e.g., ESSA Plan, *supra* note 7, at 9 (disaggregating assessment data); 11-12 (disaggregating graduation rate data); 104 (disaggregated reading scores), 154-157 (disaggregated measures of interim progress in ELA, mathematics, and graduation rate); Educator Equity Letter (Dec. 13, 2019), 2, PDE0018184-5 (evaluating educator effectiveness by non-white quartile); Off. of Postsecondary and Higher Educ. Presentation to State Bd. of Educ., Ortega (Sept. 12, 2018) (analyzing college benchmarks by subgroups); Sec’y of Educ. Testimony before Senate Appropriations Comm. (March 7, 2017), PDE0027271-2 (discussing racial achievement gap in high school graduation); Pa. Dep’t of Educ. Presentation at Point Park University, “African American Males: The Dwindling Teacher Pipeline,” Del Pilar (Apr. 21, 2017), PDE0015728-41 (disaggregating proficiency, graduation, and postsecondary data); PA. DEP’T. OF EDUC., *Pennsylvania’s State Plan for Ensuring Equitable Access to Excellent Educators for All Students* (June 1, 2015), <https://www.education.pa.gov/Documents/K-12/Equitable%20Access%20to%20Excellent%20Educators/Pennsylvania%20Educator%20Equity%20State%20Plan.pdf> (measuring teacher quality, salary, turnover, and expenditures disaggregated by race).

¹⁸ See, e.g., OFF. OF CIVIL RIGHTS, U.S. Department of Education Civil Rights Data Collection survey, 2015-16, <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16-all-schools-form.pdf>; The Nation’s Report Card, 2019 Reading State

Racial data is also consistently considered relevant in school funding cases, even when the court is not considering a race-based claim. *See, e.g., Gannon v. State*, 390 P.3d 461, 466, 469, 496-501 (Kan. 2017) (finding legislation failed to meet the state constitutional adequacy test and considering racial achievement gap in student proficiency data, NAEP performance, ACT benchmark performance, and graduation rates as important output data); *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1148-51 (Mass. 2005) (considering racially disaggregated performance on state tests, SAT tests, and dropout data in discussion of student performance); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 328, 333, 337 (N.Y. 2003) (affirming dismissal of race-based claim but considering racially disaggregated data to evaluate education clause claim). In fact, according to Speaker Cutler’s pretrial memo, which was filed while this Application was pending, it appears that the Speaker considers this evidence relevant to the case before this Court, as well.¹⁹

Snapshot Report, <https://nces.ed.gov/nationsreportcard/subject/publications/stt2019/pdf/2020014PA4.pdf> (reporting racial achievement gap in NAEP scores); The Nation’s Report Card, 2019 Mathematics State Snapshot Report, <https://www.education.pa.gov/Documents/K-12/Assessment%20and%20Accountability/NAEP/Results/NAEP%202019%20Grade%204%20Math.pdf> (same).

¹⁹ In his pretrial memo, Speaker Cutler cites racially disaggregated data to argue that Petitioner Districts are performing adequately. Specifically, when examining the William Penn School District, Speaker Cutler acknowledges that the District’s

The Pennsylvania Department of Education readily admits that the Commonwealth's racially disaggregated student data indicates the system is not working for a staggering number of its students of color, and that the state "needs to make significant progress in addressing achievement and equity gaps" before these students can be "educated to the same high standards of achievement" as their peers.²⁰ The Pennsylvania Department of Education also acknowledges that these disproportionalities are caused in part by lack of funding, and would require an increase in funding to fix.²¹ Speaker Cutler's own expert recognizes this connection, analyzing the concentration and performance of "underrepresented

"graduation rate lags behind those of many other school districts." Speaker Cutler's Pretrial Statement, 34. But, he attempts to argue, there is a more appropriate way to examine William Penn's performance: "its graduation rate for African-American students (the demographic group that comprises the overwhelming majority of WPSD students) was 74.52 percent, which exceeded the 72.9 percent African-American graduation rate set in the Department of Education's ESSA plan as a measure of interim progress for that year." *Id.* In other words, according to Speaker Cutler, the fact that African-American students at William Penn exceeded the lower attainment goal set for African-American students is probative of whether the District's performance is constitutionally adequate.

²⁰ See ESSA Plan, *supra* note 7, at 7-8; see also Dep. of Matthew Stem, 400: 3-6; Exec. Resp'ts' Pretrial Mem., 7 ("The Plan reflects the value of an educational plan and the effort necessary to prepare students for college and a career, no matter the student's race, economic circumstances, or where the student lives.")

²¹ See, e.g., Dep. of Noe Ortega, 130: 5-19; Dep. of Matthew Stem, 286: 2-6.

minority students.”²² He does so because “underrepresented minority students can present additional needs regardless of income, EL, or disability status.”²³

In this context, evidence of underfunding’s disproportionate impact on 463,000 students of color goes directly to establishing Petitioners’ argument that the Commonwealth’s system is constitutionally inadequate. This information must be incorporated into the evaluation of the state’s approach to funding public education.

ii. The Current Distribution Scheme’s Impact on Students of Color is Relevant to Establishing that Pennsylvania’s School Funding System is Irrational.

Under the Pennsylvania Constitution’s equal protection provisions, the General Assembly is also prohibited from distributing public education funding in a way that irrationally discriminates against a class of children. PA. CONST. art. III, § 32; *see William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d. 414, 459 (Pa. 2017). Petitioners claim that Respondents’ funding system is irrational because it fails to allocate resources according to educational need, and that this violates not only the Education Clause, but also the equal protection rights of children living in low-wealth school districts. As a result, evidence about who lives in these districts, and what those students need, is highly relevant to Petitioners’ case.

²² Willis Expert Report, 33, 74, 77.

²³ *Id.* at 29.

As detailed above, low-wealth districts are home to a disproportionate number of students of color.²⁴ These same students often require additional resources to close long-standing achievement and opportunity gaps.²⁵ Their experiences therefore provide prime examples of how students are harmed by a method of funding schools that does not take district need into account.²⁶

This is the framework in which Petitioners' experts address racial disparities in their reports. They look at racial demographics and note disproportionate impacts, not, as Speaker Cutler claims, to "inject accusations of race discrimination into the case" (Cutler App. at 7), but because this data reflects realities that must be acknowledged to properly analyze whether the system is working. For example, Dr. Matthew Kelly's report provides a broad overview of the public education funding scheme, focusing primarily on the structure of school funding, how district and student characteristics impact costs, and the existing funding disparities across districts. Race is one of the myriad factors informing Dr. Kelly's discussion of the irrationalities of the current funding scheme, and the inequities it causes: the

²⁴ Kelly Expert Report, 4, 27; Dep. of Adam Schott, 77: 4-7.

²⁵ See, e.g., ESSA Plan, *supra* note 7, at 8, 44; see also Dep. of Matthew Stem, 286: 3-6; Dep. of Kenneth Huston, 130:17-20; Resp. Speaker of the House's Am. Resps. and Objs. to Pet'rs' Suppl. Set of Req. for Admis. (Dec. 15, 2020), Resp. to Req. No. 136 and Ex. E (article summarizing Speaker Cutler's position that "[f]unding Pennsylvania's schools isn't just about giving more. It's about giving more to schools who historically have gotten less to create a more equitable educational landscape[.]").

²⁶ Kelly Expert Report, 4.

“entire sections” on race that Speaker Cutler complains of in Dr. Kelly’s report actually comprise less than four pages out of a 64-page report. (Cutler App. at 8-9, citing Kelly Expert Report at 27, 55-57.)

Dr. Rucker Johnson’s report examines the role of poverty and inequality in school finance, detailing spending disparities in Pennsylvania by district wealth and laying out the importance of increased school funding. Dr. Johnson’s overall conclusion is that increased funding is essential for closing the unacceptable achievement and opportunity gaps that exist in Pennsylvania. The fact that Dr. Johnson’s findings are informed by research demonstrating that these disparities widen in majority-minority districts is not tantamount to alleging racial discrimination against Respondents. (Cutler App. at 8, citing Johnson Expert Report at 33.) This data simply underscores Dr. Johnson’s observation that Pennsylvania’s public education system does not currently provide equal opportunities, especially to poor students and students of color, and that increases in school funding “can improve educational and life outcomes for students.”²⁷

The thrust of Dr. Pedro Noguera’s report is that school districts can mitigate the effects of out-of-school factors like poverty and improve academic outcomes when they are given the resources necessary to invest in evidence-based interventions, including providing additional school resources to train educators,

²⁷ Johnson Expert Report, 2.

strengthening school support systems, enacting high quality pre-school, improving school climate, and lowering class size. Dr. Noguera's acknowledgement of the historic inequities that may impact students' conditions of learning, including poverty and racial segregation, is not a "diversion" from Petitioners' claims: it is simply an acknowledgement of the reality in which those claims arise. (Cutler App. at 9-10, citing Noguera Expert Report at 21-23.)

Indeed, courts consistently recognize that this kind of evidence is vital to understanding student need. *See, e.g., Hoke Cty. Bd. of Educ. v. State*, No. 95CVS1158, 2000 WL 1639686, at *99-112 (N.C. Super. Oct. 12, 2000), *aff'd in part as modified, rev'd in part*, 358 N.C. 605, 599 S.E.2d 365 (2004) (where plaintiffs alleged denial of constitutional right to equal education opportunities, the court noted race was an "at-risk factor" and engaged in detailed analysis of student performance disaggregated by race); *Abbott by Abbott v. Burke*, 693 A.2d 417, 433-34 (N.J. 1997) (court considered the racial isolation of plaintiff districts as a factor impacting special needs, which must be "confronted and overcome in order to achieve a constitutionally thorough and efficient education."). Yet for years, Respondents have disregarded these truths, perpetuating a system where low-wealth districts most in need of tools to help close racial achievement and equity gaps have access to the least funding.

Speaker Cutler encourages the Court to commit the same error here by excluding plainly probative evidence. Speaker Cutler's efforts should be rejected. The existence of these longstanding inequities, and Respondents' insistence on ignoring their effects, is relevant to establishing that Pennsylvania's school funding system is irrational and therefore unconstitutional.

iii. Petitioner NAACP is Entitled to Present Evidence of its Injuries.

Speaker Cutler's claim that "evidence of funding or achievement disparities on the basis of race" is "completely irrelevant to the legal causes of action asserted in the Petition" (Cutler App. at 12) is incorrect for another, very basic, reason: the NAACP Pennsylvania State Conference ("NAACP"), an organization dedicated to ensuring educational opportunities for students of color, is a Petitioner in this case.

The NAACP's interest in ensuring educational adequacy is incontestable. But were there any doubt, from the inception of this suit the NAACP has consistently averred that Pennsylvania's schools are "woefully inadequate" and that underfunding has had devastating consequences for its members, individuals of color who are concentrated in underfunded districts and bear the brunt of school budget cuts, high teacher turnover, inadequate educational materials, technology

deficits, and dangerous building conditions.²⁸ As an organization, the NAACP has also been forced to divert its resources to respond to the inequities that are perpetuated by the Commonwealth's inadequate funding system.²⁹ This evidence goes directly to establishing that the NAACP has suffered a cognizable harm under both the Pennsylvania Constitution's Education Clause and equal protection provisions. Speaker Cutler should not be permitted to deprive the NAACP of its ability to present evidence about the injuries it and its members have suffered at the hands of Respondents.

In sum, *who* is in a district matters, *how* specific student groups perform matters, and *why* students are falling behind matters. This is recognized by educators, by courts considering these very sorts of claims, and by the Speaker himself. This probative evidence should not be excluded.

2. The Evidence Speaker Cutler Seeks to Exclude is Not Prejudicial.

Pennsylvania Rule of Evidence 403 permits the Court to exclude relevant evidence if its probative value is outweighed by a danger of, *inter alia*, “unfair prejudice,” “confusing the issues,” or “undue delay.” Pa.R.E. 403. Speaker Cutler

²⁸ Dep. of Greg Zeff, Dir. of the Legal Redress Committee of the NAACP Pa. State Conf., 32: 12-20; 33: 8-20; 72: 21-25, 73: 1-6; Dep. of Rev. Kenneth Huston, 36: 11-14; 49: 11-18; 50: 8-18; 52: 1-7; 135: 9-25, 136: 1-9.

²⁹ *See, e.g.*, Pet'r. NAACP Resps. and Objs. to Senator Scarnati's Second Set of Disc. Reqs. (Jan. 18, 2019), Res. No. 5; Dep. of Rev. Kenneth Huston, 49: 11-18; 125: 4-13; 126: 5-14; 130: 17-20; Dep. of Greg Zeff, 32: 18-20; 33: 16-20.

argues that even if the race-based evidence he seeks to exclude were relevant, it should nevertheless be barred under Rule 403 because such “harmful” and “highly-charged” material will “distract” and confuse this Court, while also inappropriately eliciting its sympathy and prejudices. (Cutler App. at 17-20.)

Speaker Cutler’s concerns are baseless. First, there is nothing inappropriate or inflammatory about introducing evidence about the educational needs and outcomes of the Commonwealth’s students of color in a case about the right to an adequate and equitable public education. However, if at trial Petitioners were to make an “inappropriate attempt to inject accusations of race discrimination into the case,” the Court would be perfectly qualified to disregard it. Concerns of unfair prejudice under Rule 403 have little application in a bench trial, where “[i]t is presumed that a trial court, sitting as factfinder, can and will disregard prejudicial evidence.” *Commonwealth v. Miller*, 987 A.2d 638, 670 (Pa. 2009); *see also, e.g., Commonwealth v. Fears*, 836 A.2d 52, 71 n.19 (Pa. 2003); *Commonwealth v. Dent*, 837 A.2d 571, 582 (Pa. Super. 2003). As this Court has already pointed out once before, because “a judge is sufficiently trained and knowledgeable in the law,” she is highly capable of ignoring “inflammatory or prejudicial evidence that should not have been admitted.” *See* Mem. Op. (July 24, 2020) at 19-20 (citing cases).

For the same reason, this Court will have no difficulty weighing evidence of disproportionate impact and resource needs, as that evidence relates to Petitioners’

Education Clause and discrimination claims. Speaker Cutler’s insistence that the introduction of racial evidence in this lawsuit might mislead the Court into deciding the case on an “improper basis” is specious. (Cutler App. at 20) (quotation marks omitted).³⁰

The Speaker’s complaints about prejudice to the parties are also unfounded. First, the evidence in question, which is ingrained in the performance and achievement data that Petitioners will be presenting, will not add any meaningful length to trial.³¹ Second, Petitioners’ reliance on this evidence does not come as a surprise to Speaker Cutler. The Application accuses Petitioners of attempting to

³⁰ Moreover, even if Speaker Cutler’s Application raised any valid potential concerns under Rule 403 – and it does not – they should be set aside until trial. The Pennsylvania Supreme Court has made clear that Rule 403 is a “trial-oriented rule,” with objections “better deferred until the situation is clear, not speculative,” after a “fact-intensive, context-specific inquiry.” *Commonwealth v. Hicks*, 91 A.3d 47, 53 (Pa. 2014). This is because “Rule 403 requires a trial court to weigh probative value and prejudice – the costs and benefits of relevant evidence – viewing it as part of a whole and not in isolation.” *Id.* In other words, the balancing required under Rule 403 cannot properly take place at this pretrial juncture.

³¹ And in any event, Rule 403 cannot be used to exclude relevant evidence merely because it would add length to trial. Rather, the Rule permits exclusion when evidence’s probative value is outweighed by the “needless presentation of cumulative evidence.” Pa.R.E. 403. Courts define “cumulative” evidence as “additional evidence of the same character as existing evidence and that supports a fact established by the existing evidence.” *Commonwealth v. Flamer*, 53 A.3d 82, 88 n.6 (Pa. Super. 2012) (citations omitted). That is not the case here, where the evidence at issue provides unique and important context for Petitioners’ claims. “Evidence that strengthens or bolsters existing evidence is corroborative evidence; we have previously explained that corroborative evidence is not cumulative evidence.” *Id.*

“belatedly insert . . . expert opinion testimony” regarding race into the case (Cutler App. at 16), as though the Speaker has not been on notice for years of the evidence on racial disparities that Petitioners developed during discovery. For example, in *June of 2019*, Adam Schott, Special Assistant to the Secretary of Education, testified that Pennsylvania’s gaps in achievement for students of color were “among the largest . . . in the nation” and that the districts educating those students could not sufficiently narrow those gaps without additional funding.³²

Were there any doubt that Speaker Cutler was on notice of this evidence, in March of 2020, counsel for Speaker Cutler conducted an examination of the Deputy Secretary of Education. Therein he asked several questions on the achievement gap specifically, including whether the Department of Education had evidence that African American or Hispanic students “who are in higher-wealth school districts score lower on standardized testing than white students in those same schools.”³³ Speaker Cutler cannot in good faith argue that he did not know he should “direct[] his defense” toward this evidence. (Cutler App. at 19.)

³² Dep. of Adam Schott, 90: 2-3, 24-25; 91: 1-12.

³³ Dep. of Matthew Stem, 531: 21-25; 532: 1-24.

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court deny Speaker Cutler's Application in the Form of a Motion *In Limine* to preclude evidence related to race.

Dated: June 14, 2021

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