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IN THE SUPREME COURT OF PENNSYLVANIA

No. ____

ARTHUR ALAN WOLK, PHILLIP BROWNDIES
and CATHERINE MARCHAND

Respondents.
v.

SCHOOL DISTRICT OF LOWER MERION

Petitioner,

PETITION FOR ALLOWANCE OF APPEAL OF SCHOOL DISTRICT OF LOWER MERION

Petition for Allowance of Appeal from the March 2, 2020 Order of the Commonwealth Court at 1465 CD 2016 on Remand from this Court's December 11, 2018 Order Reversing the Commonwealth Court and Affirming Trial Court's Grant of Preliminary Injunction at No. 2016-01839

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TABLE OF CONTENTS

APPENDICES

EXHIBITS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES & REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This is the second time that the School District of Lower Merion has sought allowance of appeal from a Commonwealth Court order letting stand an August 2016 Court of Common Pleas injunction that required the District to revoke those portions of its 2016-2017 tax increase that arose from the Pennsylvania Department of Education's authorization of Act 1 exceptions for pension and special education obligations. The District took an appeal pursuant to Pa.R.A.P. 311(a)(4) immediately upon the injunction's entry, but on April 20, 2017, the Commonwealth Court refused to consider the appeal on its merits, asserting that the District instead should have filed post-trial motions pursuant to Pa.R.C.P. No. 227.1.

On December 11, 2018, this Court unanimously reversed the Commonwealth Court and remanded "for consideration of the merits of the District's interlocutory appeal filed as of right." Supreme Court Op., App. B, at 19. In its latest opinion, the Commonwealth Court has not done as this Court instructed, and has done even what it has done in a way that conflicts with the holdings of this Court how a court should view a mandatory preliminary injunction (or, for that matter any preliminary injunction).

The law forbids a school district from changing a tax rate once set, but that was the very relief that Judge Smyth ordered. Each year's tax rate becomes the

next year's base rate. Accordingly, now, almost ***four years*** after the preliminary injunction was entered, the School District still does not know whether its lawfully set tax rate for 2016-2017 will stand, or if it should have been "revoked" in part, in which case, the tax rate will change (retroactively) for 2017-2018, 2018-2019, 2019-2020—and for 2020-2021. The General Assembly enacted taxing statutes to provide school districts and their residents with certainty, and that has been taken from the District, first by the Court of Common Pleas and now by the decision of the Commonwealth Court. The District asks that this Court grant allowance of appeal once again to restore the order the General Assembly so carefully created.

REFERENCES TO THE OPINIONS IN THE MATTER

The current panel opinion in the Commonwealth Court does not yet have an Atlantic Reporter citation. The Commonwealth Court docket number is 1465 CD 2016. Its Westlaw citation is 2020 WL 982023 (Hon. Leavitt, P.J.). It is attached as Appendix A. This Court's prior opinion is reported at 197 A.3d 730 (Pa. 2018), and is attached here at Appendix B; the unpublished Commonwealth Court opinion that this Court reversed can be found at 2017 WL 1418445 (Hon. Hearthway, J.), and is appended here at Appendix C. The opinion of the Montgomery County Court of Common Pleas (Hon. Smyth, J.), is unreported, but is available at 2016 WL 10859462. It is attached at Appendix D.

ORDER IN QUESTION

The Commonwealth Court's Order reads in full:

AND NOW, this 2nd day of March, 2020, the order of Montgomery County Court of Common Pleas, dated August 29, 2016, is hereby AFFIRMED. This matter is REMANDED to the Court for further proceedings on the underlying complaint.

Consistent with the foregoing opinion, Appellees' motion to strike Appellant's amended brief and the amended *amici* briefs is DENIED in part and GRANTED in part. Appellees' motions for judicial notice are DISMISSED.

Jurisdiction relinquished.

_____

MARY HANNAH LEAVITT, President Judge

QUESTIONS PRESENTED

1. Does a Court of Common Pleas have the authority to invalidate the tax increases under Act 1's exceptions for pension and special education obligations, which increases have been duly submitted to and approved by the Department of Education?[1]
2. Did the Commonwealth Court disregard this Court's mandate when it failed to address the merits and (A) held that a violation of the perceived "intendment" of a statute obviates the need for the six prerequisites in obtaining a preliminary injunction; and (B) wrongly applied a "highly deferential" standard in reviewing a mandatory injunction?

[1] This question is identical to the fourth question that the District raised in its initial petition for allowance of appeal, a question the Court did not need to answer given the waiver ruling. The Commonwealth Court's most recent ruling squarely presents the issue to this Court.

CONCISE STATEMENT OF THE CASE

Act 1 establishes a highly-ordered process to govern the form, timing, and content of a school district's budget cycle and associated requests for referendum exceptions. *See* 53 P.S. §§ 6926.311, 6926.312, 6926.333. All school boards seeking to increase taxes beyond the automatically-allowed and inflation-correcting increases (the so-called "index" amount) are obliged to adopt four different versions of their budget in the course of a given budget cycle—the proposed preliminary budget, the (actual) preliminary budget (assuming the district intends to seek exceptions), the proposed final budget, and the (actual) final budget, 53 P.S. §§ 6926.311, 6926.312—and provide for public inspection and time for review (and objections) prior to adoption, 53 P.S. §§ 6926.311(c), 6926.312(c).

As initially enacted, Act 1 itemized several categories of referendum exceptions and allocated the approval mechanism for each—sometimes to the courts of common pleas and sometimes to the Department. *See* Section 333 of the Act of June 27, 2006, P.L. 1873, *as amended*, 53 P.S. § 6926.333. In 2011, however, the General Assembly repealed all but four of the exceptions—including ***all*** of the exceptions that had designated the courts of common pleas as the approving authority. *See* Section 1 of the Act of June 30, 2011, P.L. 148, 53 P.S. §§ 6926.333(f)(2), (i), (j) (striking sections 333(f)(2)(i), (ii), and (iv)). Under the

revised statute, applications for the remaining exceptions are reviewed and resolved by the Department of Education alone, and, indeed, the exceptions to meet special education and Pennsylvania Public School Employees' Retirement System ("PSERS") obligations were always reserved to the Department of Education, because the expenses in these categories are not controlled by the school districts themselves. The courts of common pleas likewise do not have appellate jurisdiction over the decisions of the Department of Education. *See* 42 Pa.C.S. § 933.

Applications for any of the four remaining categories of referendum exceptions—including the two relevant to this appeal—must be delivered to the Department on a Department-mandated form no less than 75 days prior to the primary election, 53 P.S. § 6926.333(e). The statute itself identifies the pertinent data and calculations. 53 P.S. §§ 6926.333(f)(v), (n).

The Department has those data, because the Public School Code provides that each district must track its yearly expenditures relating to special education students (with certain exceptions) and report them to the Department. 24 P.S. § 13-1372(8). When a district then applies for a special education exception, the Department itself pre-populates the form using that district's actual special education expenditures for the prior two budget years, drawn from the Department's own records. Hearing Testimony, Ex. 1, at 195:8-197:18, R.1151a-

1153a. It does the same for the PSERS contribution exception, but draws on different data. *See id.* at 197:19-198:2, R.1153a-1154a.

In addition, the law requires school districts to provide extensive financial information to the Department each year, including documents containing the information that the Court of Common Pleas (and the Commonwealth Court) mistakenly believed was not disclosed. *Compare* H.T., Ex. 1, at 206, R.1162a; 24 P.S. § 2-218 (annual financial report and certification that the information contained therein was materially consistent with the audited financial statements must be submitted on or around October 31 of each year); 24 P.S. § 6-687 (submission of budgets)) *with* Court of Common Pleas Opinion ("CCP Op."), App. D, at 6-7. Providing the data a second time would be both redundant and superfluous to the statutorily-directed calculations.

The District must provide public notice of its intent to seek an exception at least a week in advance, and the Department is authorized to hold a hearing on the application, with the District to provide immediate notice to the public including the date, time, and place of the hearing. 53 P.S. § 6926.333(j)(2). Act 1 then instructs the Department, and only the Department, to rule on the application within 20 days, 53 P.S. § 6926.333(j)(5)(i), and to approve the request if it determines that "the school district qualifies for one or more exceptions" and that

"the revenue raised by the allowable increase under the index is insufficient to balance the proposed budget." 53 P.S. §§ 6926.333(f)(1), (j)(3).

The record reflects that the budgeting and exception procedure described above progressed as statutorily required in this case. By the Fall of 2015, the District had set the calendar for the coming year, including the dates on which the preliminary and final proposed budgets would be presented for public comment, H.T., Ex. 1, at 192-194, R.1148a-1150a, and in December 2015, the District publicly presented its preliminary proposed budget, setting forth the anticipated tax increase for the 2016-2017 year. *Id*. at 192-93, R.1148a-1149a; DEX2, R.1522a-1537a. In addition to revenues and expenditures, these publicly available budgets, which are submitted on a form specified, and in part pre-populated by the Department from the annual financial reports, must include the district's proposed tax rates. 53 P.S. § 6926.312.

In January 2016, the District published notice of its intent to seek approval of the identified Act 1 exceptions from the Department. Lower Merion School District Notice for Publication in the Main Line Times, dated Jan. 31, 2016, *available at* https://www.lmsd.org/uploaded/documents/Departments/Budget Documents/1617/160129_ADMLT_Exceptions.pdf. And, the only two witnesses at the preliminary injunction hearing both testified that the District was legally permitted to raise taxes for the 2016-2017 school year by the full 4.44 percent it

had enacted. *See* District Findings of Fact at ¶¶ 29-32, R.1570a-1572a; H.T., Ex. 1, at 105-106, 199-200, R.1061a-1062a, 1155a-1156a.

In assigning to the Department the exclusive power and duty to approve referendum requests, *see* 53 P.S. §§ 6926.333(j)(5)(ii), the General Assembly instituted an important safeguard against fiscal abuse or irresponsibility while ensuring that all school districts satisfied these critical, but largely unfunded obligations. And the fact is that the Department does not rubber stamp the applications submitted to it. Thus, taking an example from the year in question, Altoona Area School District had applied for $1,013,673 in special education exceptions but was approved for only $772,287. Pa. Dept. of Educ., *Taxpayer Relief Act Special Session Act 1 of 2006: Report on Referendum Exceptions for School Year 2017-2018*, Apr. 2017, tbl. 5, *available at* http://www.education.pa.gov/Documents/Teachers-Administrators/Property%20Tax%20Relief/ReferendumExceptions/2017-18%20Report%20on%20Referendum%20Exceptions.pdf. Likewise, the Frazier School District had applied for $108,704 in pension obligation exceptions but was approved for only $40,568. *Id*. In any event, with regard to the 2016-2017 year, the Department had approved both of the Lower Merion School District's requests in their entirety on March 2, 2016. R.1541a. Here, Plaintiffs never mounted any challenge or made any complaint to the Department. Instead, they waited until May to file a request for a

preliminary injunction in the Court of Common Pleas as part of a lawsuit seeking $55 million in damages and asking the Court to appoint a Trustee (presumably one to the satisfaction of the Plaintiffs) to run the School District instead of the elected School Board.

Mr. Wolk had filed his Complaint in February 2016, in the middle of the District's statutorily-mandated 2016-2017 budgeting process. After the District filed preliminary objections, he then amended his complaint to add Plaintiffs and to add eight additional counts. In both pleadings, he took issue with a number of decisions the School Board was making with regard to the spending (or conserving) of money. In particular, he did not agree with the Board's consistent and well-publicized belief that it should meet current needs out of current taxes while preparing for anticipated (and unanticipated) future needs from fortuitous or other savings.

The School District filed preliminary objections to the Amended Complaint as the budgeting process proceeded methodically, as required by law. Plaintiffs recognized as much when they filed their petition for injunctive relief, observing that the 2016-2017 budget had been adopted and asserting that a tax increase "which now will automatically become law unless this Court acts" was part and parcel of that budget and would be part of the July 1 tax bills. Plaintiffs'

conclusion was that the District did not "need" the tax increase, and thus should not be allowed to take it. Injunction Petition, Ex. 2, R.412a.

A month later, on June 14, Judge Smyth, a senior judge of the Montgomery County Court of Common Pleas, held a half-day hearing, and on August 29 he issued his ruling, granting part of the requested injunction and commanding the District to roll back the tax rate on the already-issued tax bills to reflect a 2.4 percent increase rather than a 4.44 percent increase. That, despite the provision of the Pennsylvania School Code limiting a school district to one and only one levy of school taxes for any given year. 24 P.S. § 6-603 ("There shall be but one levy of school taxes made in each school district in each year..."). Judge Smyth conceded that the statutory exception process did not require the District to disclose to the Department of Education whether past budgeting experience had resulted in deficits or surpluses, but went on to hold that the District's budgeting practice violated the "intendment" of the law, and he crafted what he perceived as "the only appropriate remedy." CCP Op., App. D, at 14-15. The result was a court of common pleas order requiring the District to revoke the portion of the tax that the Department of Education had approved.

Notably, Judge Smyth acknowledged that there were still preliminary objections pending—including (as this Court noted in its opinion reversing the Commonwealth Court) objections that the Plaintiffs had raised "non-justiciable,

political questions; they lacked standing; their claims were barred by the Political Subdivisions Tort Claims Act; they had failed to join indispensable parties; the amended complaint failed to state claims upon which relief could be granted; the requested relief was unconstitutional, and there was a failure to exhaust statutory and administrative remedies." Supreme Ct. Op., App. B, at 2. When Judge Smyth held the hearing, those objections were all pending before Judge Haaz.[2] Even though Judge Smyth recognized that tax bills had already gone out and many had been paid, he "left for another day" the question whether he would (or could) order the District to return those monies (and to whom). The District filed a notice of appeal August 31, 2016. After briefing and argument, the Commonwealth Court issued an opinion dismissing the appeal on the ground that no post-trial motions had been filed in the Court of Common Pleas.

This Court unanimously reversed the decision of the Commonwealth Court, decrying the "procedural disorder" that had attended the case. Supreme Court Op., App. B, at 13. The Court rejected the Commonwealth Court's—and Plaintiffs'—suggestion that the petition for an injunction was separable from the case that gave rise to it, *id*. at 14, and held that (1) the petition was, indeed a petition for a

[2] Although the objections themselves were pending before Judge Haaz, Judge Smyth was well aware of them and the issues they raised because the District had attached a copy of its preliminary objections to the Answer to the Preliminary Injunction and had argued that they showed why Plaintiffs could not succeed on the merits. Answer to P.I. Petition, Ex. 3, at ¶ 52, R.798a.

preliminary injunction; (2) Pa.R.A.P. 311(a)(4) provided an appeal as of right, and (3) the District did not need to file post-trial motions before taking an appeal. *Id*. at 14-16. Moreover, this Court was clear that there had been no final order, given that the preliminary objections were (and still are) pending, and given the express language of Pa.R.C.P. No. 1038, which protects against serial post-trial motion practice. *See id*. at 13, 16. Indeed, the Court found it "difficult to apprehend that a judicial officer would undertake to issue a final and permanent injunction while a challenge to the standing of the proponent to seek judicial review remained pending." *Id*. This Court also rejected the Commonwealth Court's willingness to rely on a "bare procedural history from a prior decision as supportive authority for a controlling legal principle." *Id*. at 8 n.5. The Court accordingly reversed and remanded for "consideration of the merits of the District's interlocutory appeal filed as of right."

On remand, both parties filed substituted briefs, and the arguments were reframed into two. The first question asked: "Can a Court of Common Pleas invalidate the Department of Education's approval of tax increases under Act 1's referendum exceptions for pension and special education obligations?" Supp. Br. at 3, and the argument in support of the answer to that question focused on whether the injunction should have issued in the face of the lack of standing, failure to

exhaust, and political questions raised.[3] The second question focused on whether Plaintiffs had met all of the requirements for mandatory preliminary injunctive relief. The Court of Common Pleas had not answered either question in granting the mandatory injunction.

The Commonwealth Court, in an opinion authored by President Judge Leavitt, the only judge remaining from the panel that had decided the case three years ago, again affirmed the Court of Common Pleas. President Judge Leavitt first decided that she would disregard citation to anything outside the injunction record and all arguments that she considered to be based on such facts. Commonwealth Court Remand Opinion ("Remand Op."), App. A, at 12-13.[4] She addressed the District's first question in part, focusing only on exhaustion of remedies, and discussed multiple points in that regard. She determined that there was no administrative challenge available to the Department's approval of the Act 1 exceptions because the General Assembly had substituted a referendum for an appeal if a school district were unhappy with a Department denial of exceptions. She likewise found that the School Code, Administrative Agency Law, the Local

[3] Particularly in light of the Commonwealth Court's answer to the first question, the District is mystified as to why the Commonwealth Court thought a third question was needed but not raised. See Remand Op., App. A, at 20.

[4] The District had included background information on its history and practices because it thought that information would be helpful to the appellate courts. Notably, neither the Commonwealth Court nor this Court had any objection to the inclusion of these background facts when the case was originally in that court or here. *See also infra* n.5.

Agency Law, and General Rules of Administrative Practice and Procedure provide no avenue of relief. From those determinations, she concluded that a taxpayer is free to ask a court of common pleas to determine what the Department knew and did not know and should and should not have done. *Id.* at 16-20.

Tellingly, the Commonwealth Court predicated its answer to the District's second question—whether the well-established six prerequisites were satisfied—on a mischaracterization of the record. According to the opinion:

> The trial court found that the School District overstated expenses and understated revenue in order to obtain the exception and avoid a voter referendum. The trial court also found that the School District did not disclose its actual prior year surpluses to the Department in seeking the exception.

Remand Op., App. A, at 17 (no citation in original)). What the Court of Common Pleas actually found (and what the question asked at the hearing was), was that "neither the District's proposed budgets nor the actual surpluses it experienced in prior years ***accompany the requests to the Commonwealth*** for exemptions from the index, which are made at the beginning of the budgeting process." CCP Op., App. D, at 7 (emphasis added).[5] But it does not follow that the Department did not

[5] The answer to the Preliminary Injunction had explained the statutes setting forth the data the Department needed and itself generated; and at the injunction hearing, the District Business Manager confirmed that the forms were prepopulated. *See* Answer to P.I. Petition, Ex. 3, at ¶¶ 14-20, R.791a-793a; H.T., Ex. 1, at 195-97, R.1153a-1157a; SD-3, R.1538a; Defendants' Proposed Findings at ¶¶ 23-28, R.1570a. The Court of Common Pleas, however, incorrectly inferred that the submission of the form was a "represent[ation] to the Pennsylvania Department of Education that costs for pensions and special education could not be covered without a tax increase," CCP Op., App. D, at 8. This was in direct contradiction to the form itself and the

have that very information; it did. The statutes governing school districts require a whole host of information to be provided to the Department; *see, e.g.*, 24 P.S. § 2-218 (annual financial report and certification); 24 P.S. § 6-687 (submission of budgets)). The District had told the Court of Common Pleas as much, *e.g.*, H.T., Ex. 1, at 206, R.1162a, but Judge Smyth was focused on the exception form itself, which led him to conclude mistakenly that the Department did not have information that it did in fact have.

The Commonwealth Court read the Court of Common Pleas opinion as enjoining a statutory violation, in spirit if not in letter,[6] and concluded that such an "illegality" (1) was irreparable harm *per se*; (2) defined the "status quo that existed prior to the alleged wrongful conduct" for the purpose of the injunction; and (3) constituted a "clear right to relief" on the ground that a court can circumvent a school board's discretion if the school board "acts in violation of the law." Remand Op., App. A, at 21-25. At most, then, it collapsed the six-prerequisite analysis to three, each of which it found satisfied by its inferred statutory violation. Indeed, it expressly stated that the Court of Common Pleas was "relieved [] of

testimony at the hearing. H.T., Ex. 1, at 197-99, R.1153a-1155a; SD-3, R.1538a; Defendants' Proposed Findings at ¶¶ 26-28, R.1570a.

[6] In fact, as discussed above, the only two witnesses at the hearing both agreed that the applications were in accordance with the requirements of the Taxpayer Relief Act and the Department, and neither court could say otherwise. The supposed "illegality," then, was a perceived failure to comply with the supposed "intendment" of the law, not a failure to comply with the statute as enacted by the General Assembly.

undertaking the balance of the harm inquiry," *id.* at 24, and it simply ignored the others—including whether the injunction would adversely impact the public interest.

The Commonwealth Court acknowledged that the injunction was mandatory, and thus required stricter scrutiny, but nonetheless applied a "highly deferential" standard of review that deferred to the Plaintiffs as the "winner at the trial court level." *Id*. at 22, 25. Not surprisingly, given the above, it affirmed the injunction.

CONCISE STATEMENT OF THE REASONS RELIED ON FOR ALLOWANCE OF APPEAL

As set forth above, the General Assembly has provided very detailed instruction about how school financing is to be addressed—and by whom. School boards and the Department of Education have been given express decision-making authority. The courts of common pleas have not. The decision that a common pleas judge can enjoin the portion of school taxes that the Department authorizes thus raises questions "of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court." Pa.R.A.P. 1114(b)(4). It is also unprecedented. Pa.R.A.P. 1114(b)(3). [7]

[7] The State Education Association, Pennsylvania Association of School Administrators, Pennsylvania Association of School Business Officials, and the Pennsylvania School Boards Association and their members are severely and adversely impacted by the first issue presented here and the affidavits from each are attached at Exhibits 4-7.

In the process of reaching the result it reached, the Commonwealth Court on more than one occasion cited this Court's case law out of context, and its holdings were accordingly contrary to the holdings of this Court on the same question, as well as to the holdings of intermediate courts of appeals. Pa.R.A.P. 1114(b)(1) and (b)(2). In particular, this Court has repeatedly held that (1) dissatisfaction with an administrative agency does not give a litigant free access to the courts of common pleas; (2) a preliminary injunction may not issue without a finding of all six essential prerequisites; (3) an assertion of "illegality" goes only to irreparable harm and requires statutory construction by the court; and (4) where a court of common pleas has issued a mandatory injunction against a school board, a reviewing court applies ***heightened*** scrutiny that accords great respect to the decisions of elected school boards.

For these reasons, the School District respectfully asks this Court to grant allowance of appeal a second time.

1. The Commonwealth Court's Resolution of the Question Whether the Court of Common Pleas Had the Authority to Enter the Injunction Raises an Issue of Widespread Public Importance, Which Requires "Prompt and Definitive Resolution" by this Court.

When this case was first here, this Court observed that it is "difficult to apprehend that a judicial officer would undertake to issue a final and permanent injunction while a challenge to the standing of the proponent to seek judicial review remained pending." Supreme Ct. Op., App. B, at 13; *see also id*. at 2

(recognizing that the injunction was issued while objections were pending on threshold grounds such as Plaintiffs were raising "non-justiciable, political questions; they lacked standing; their claims were barred by the Political Subdivisions Tort Claims Act; they had failed to join indispensable parties; the amended complaint failed to state claims upon which relief could be granted; the requested relief was unconstitutional, and there was a failure to exhaust statutory and administrative remedies.").

It is well settled that when the General Assembly delegates authority to a Commonwealth agency, a court of common pleas must have authority before it can second-guess the Department's decision made pursuant to that authority. The first time the case came to the Commonwealth Court, the panel concluded the entire appeal was waived, because the District needed to file post-trial motions first. This time, the panel has said (1) it would not consider certain facts or arguments based on those facts, because they had been "waived;" and (2) because no "third" question had been separately presented, the effect of the pending preliminary objections was waived. In many ways, that is the only, or at least the primary, question presented; and the District did not "waive" the question any more than it "waived" the appeal by not filing post-trial motions. *See supra* n.3.

As an alternative to its waiver holdings, the Commonwealth Court has found that pending preliminary objections do not "bar" a preliminary injunction, because

a preliminary injunction is just temporary. *Id*. at 21. That "answer" is no answer at all, because any court can enter only orders that are within its authority to enter and can accord relief only to parties that satisfy threshold requirements such as standing and exhaustion.

First, any order that is entered by a court without authority to enter it is void. This Court has addressed that truism in any number of circumstances. *See*, *e.g*., *Mayer v. Garman*, 912 A.2d 762, 766 (Pa. 2006) (issuing a writ of prohibition where an order of a court of common pleas was *ultra vires* in joining a third party without allowing for pleading of preliminary objections); *In re Stevenson*, 40 A.3d 1212, 1229 (Pa. 2012) (Baer, J., concurring) ("The Commonwealth Court is consequently without authority to direct the Secretary to contravene the preclusive effect of this final federal judgment."); *M & P Mgmt., L.P. v. Williams*, 937 A.2d 398, 398 (Pa. 2007) ("A void judgment arises when the court lacks subject matter jurisdiction, and a judgment from a court that lacks jurisdiction cannot be made valid through the passage of time."). A court of common pleas has an obligation to assure itself that it has the authority to enter any order. And it follows that the Commonwealth Court has an obligation to assure itself that an order entered by the Court of Common Pleas is not void before it affirms. *See, e.g., S & B Rest., Inc. v. Pa. Liquor Control Bd*., 114 A.3d 1106, 1112-1113 (Pa. Cmwlth. 2015) (court of

common pleas limited in scope of order it can issue by the parameters set by the Liquor Code).

In this case, the General Assembly gave the authority to determine Act 1 exceptions ***only*** to the Department of Education and it did so expressly. The Commonwealth Court's excuse that the Court of Common Pleas was only acting "temporarily" (as though going on four years is temporary) does not bring the order within the authority of the Court of Common Pleas.

For that matter, the Commonwealth Court's "temporary" authorization analysis came from the same practice of inferring legal principles from specific factual scenarios that this Court cautioned against last time this case was here. Supreme Court Op., App. B, at 8, n.5. This time, the Commonwealth Court has used a case on mootness to hold that preliminary objections can be considered "temporarily" and apparently in part. Remand Op., App. A, at 21 (*citing Aitkenhead v. Borough of West View*, 397 A.2d 878, 879 (Pa. Cmwlth. 1979) (*Aitkenhead I*)), a case that held that an appeal under then-12 P.S. § 672 was moot, because the injunction in question had been vacated). The limited factual setting of that case is irrelevant to whether a Taxpayer can undo a Department of Education decision by preliminarily enjoining a school tax in a court of common pleas.

Moreover, even in *Aitkenhead I* itself, the court observed that in *West Penn Power Company v. Goddard*, 333 A.2d 909 (Pa. 1975), this Court had "impose[d] an additional standard which must be met before a chancellor may issue a preliminary injunction. That is, when a plaintiff files a complaint in equity and also seeks preliminary injunctive relief, and the defendant interposes preliminary objections raising a question of jurisdiction, the chancellor must make a threshold inquiry into whether he believes the court has jurisdiction over the cause of action asserted." 397 A.2d at 880.[8] Here, of course, the Court of Common Pleas expressly ***did not*** answer the question whether it had the authority to enter the injunction. Supreme Ct. Op. at 13.

Second, for all the Commonwealth Court's rhetoric about not needing to reach the preliminary objections, the bulk of that court's opinion was spent excusing the action of the Court of Common Pleas by addressing ***one*** of the preliminary objections the District had asserted—whether the Plaintiffs needed to exhaust statutory remedies before the Department. Remand Op., App. A, at 13-20. The Commonwealth Court did not consider whether the ***other*** objections, such as lack of standing and the raising of a non-justiciable question set forth reasons these

[8] *West Penn Power* involved a question whether the since-repealed statute that provided for immediate appeals of certain questions of jurisdiction had been triggered by the entry of a preliminary injunction by a Chancellor in Equity. 333 A.2d at 912 ("The statute is, however, explicit in its requirement that where an issue has been framed questioning the jurisdiction of a court to act, this issue must be resolved before the court can proceed to dispose of the merits.").

plaintiffs could not seek recourse from the Court of Common Pleas. *See G.A. & F.C. Wagman, Inc. v. Pa. Tpk. Comm'n*, 565 A.2d 442 (Pa. 1989) (*Per curiam* Mem. summarily vacating a preliminary injunction because the parties awarded the injunction lacked standing); *County of Butler v. CenturyLink Comm'ns, LLC*, 207 A.3d 838, 851 (Pa. 2019) ("Plainly, the Legislature enjoys additional latitude in the prescription for remedies in instances in which it establishes a new duty or interest that is purely a creation of statute and concomitantly determines the extent of any available enforcement authority and/or remedial recourse. In this regard, there simply is no underlying vested entitlement to be protected, since the only interest or entitlement derives from the statute itself.").

In this case, the Court should grant allowance of appeal to review the Commonwealth Court's holding on exhaustion as part of the broader question whether the threshold questions posed by the District's preliminary objections precluded the injunction at issue here, because the Commonwealth Court allowed the injunction to stand on that basis, and because its *sua sponte* analysis has such far-ranging implications and is contrary to this Court's (and the Commonwealth Court's) jurisprudence. *See* Pa.R.A.P. 1114(b)(1), (2), (4).

By way of background, the Plaintiffs never pleaded that they were unable to challenge the Department's action before the Department (indeed, they pleaded that they had), but only that "[i]n the past, efforts to seek some independent

scrutiny of the conduct of the District by the State Department of Education has [sic] been repeatedly stonewalled, and any effort to investigate taxpayer complaints were [sic] dismissed, all with an aim to shield the District from taxpayer scrutiny." Am. Compl. at ¶ 44(d), R.15a; *see also id.* at ¶¶ 44(a)-(g) (setting forth Plaintiffs' excuses for non-exhaustion of statutory remedies). Such assertions do not excuse a failure to exhaust administrative remedies. This Court has recently reaffirmed that an agency's inaction despite a clear legislative allocation of responsibility does not give a plaintiff recourse to a court of common pleas. *Butler*, 207 A.3d at 852 (reversing Commonwealth Court because "Although we realize that the County may have been disadvantaged by PEMA's [Pennsylvania Emergency Management Agency's] apparent failure to act, this unfortunate circumstance does not control the judicial construction of a legislative enactment.").

Neither court relied on what Plaintiffs pleaded, the Court of Common Pleas because it never addressed the issue, and the Commonwealth Court because it instead made *sua sponte* observations about the nature of the exceptions and whether there could be any meaningful recourse to the Department. The Commonwealth Court concluded that the Department's approval of the 2016-2017 Act 1 exceptions was "legislative" and not "adjudicative," and that the General Assembly had not set forth a mechanism for review. If that were so, the

Commonwealth Court concluded, Plaintiffs could seek, and the Court of Common Pleas could issue, an injunction countermanding the Department's approval.

Each step of the Commonwealth Court's reasoning is wrong. The Department's approval of a single year's tax exceptions for a single District is not legislation. An entire body of Commonwealth Court law supports the conclusion that the decision of the Department of Education here was an adjudication. An analogous award of tax credits has been held to be an adjudication. *Dijas Capital, LLC v. Dep't of Cmty. and Econ. Dev.*, 972 A.2d 120 (Pa. Cmwlth. 2009); *see also Waslow v. Pa. Dep't of Educ.*, 984 A.2d 575 (Pa. Cmwlth. 2009) (letter denying reimbursement of fees to a charter school is an adjudication). It makes no difference that the approval in this case was to a local governmental unit; indeed, there can be an adjudication as to a Commonwealth agency. *See, e.g.*, *Pa. Game Comm'n v. Pa. Pub. Util. Comm'n.*, 651 A.2d 596 (Pa. Cmwlth. 1994). If the Commonwealth Court were right, and there was no other forum in which to assert "rights, privileges, or immunities," the agency's action would still be an adjudication. *Shaulis v. Pa. Ethics Comm'n,* 739 A.2d 1091, 1099 (Pa. Cmwlth. 1999).

The General Assembly has not exempted the Taxpayer Relief Act from the applicability of the Administrative Agency Law, 2 Pa.C.S. §§ 101-754. If someone is aggrieved by a decision of the Department, that person can appeal to

the Commonwealth Court (subject to the standard of review applicable to agency actions). Indeed, 2 Pa.C.S. § 701(a) guarantees a right of appeal "regardless of the fact that a statute expressly provides that there shall be no appeal from an adjudication of an agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review"—unless one of the exceptions set forth in 2 Pa.C.S. § 501 applies. *See* 2 Pa.C.S. § 702(b). The Department's approval of Act 1 exceptions is not listed in Section 501, and the approval was not allocated to the Court of Common Pleas.

In addition, the Commonwealth Court appeared to read the Taxpayer Relief Act, 53 P.S. § 6926.333(j)(5)(iii), to provide that the sole "remedy" for a denial of a school district's request for Act 1 exceptions is a referendum. But the statute is not setting forth a remedy; by its terms it is specifying that a denial by the Department does not preclude a referendum. "If the department denies the request, the school district may submit a referendum question under subsection (c)(1). The question must be submitted to the election officials no later than 50 days prior to the date of the election immediately preceding the beginning of the school district's fiscal year." That permission says nothing about what a District does if it concludes that the decision by the Department was wrong and it was aggrieved thereby.

Although this case involves a handful of taxpayers and a decision by the Department of Education, the precedential decision has broad application for plaintiffs who would prefer to go to the Court of Common Pleas rather than the agencies designated by the General Assembly for decision-making. The Commonwealth Court went so far as to cite as a principle that an equitable remedy is available if "an administrative agency lacks the competency to rule on a question"—Remand Op., App. A, at 14—a position that clearly cannot characterize the statutory grant of authority to the Department of Education to approve Act 1 exceptions. The implications of this new path around such threshold issues as standing, non-justiciable questions, and exhaustion cannot be overstated, because the Commonwealth Court has shifted elected (School Board) and administrative (Department of Education) authority to individual disgruntled litigants and judges of the courts of common pleas.

In that regard, it is ironic that the Commonwealth Court cited *Aitkenhead I*, which concerned a question of mootness, but ignored the important and salient holding in *Aitkenhead II*, on which the *en banc* court relied in *In re Sunoco Pipeline LP*, 143 A.3d 1000, 1018 (Pa. Cmwlth. 2016) (*en banc*) in discussing the scope of the PUC's statutory authority to award a certificate of public convenience. It quoted *Aitkenhead v. Borough of West View*, 442 A.2d 364, 367 n.5 (Pa. Cmwlth. 1982)

> The administrative system of this Commonwealth would be thrown into chaos if we were to hold that agency decisions reviewable by law by the Commonwealth Court are also susceptible to collateral attack in equity in the numerous common pleas courts.

A three-judge panel of that very court has now created precisely that chaos, and this Court should grant allowance of appeal to stop the disorder the intermediate appellate court has created in a transparent but legally unsupportable effort to enable taxpayers to circumvent the provisions of Act 1 and go to the various courts of common pleas to seek relief from School District decisions with which they do not agree.

2. This Court Should Grant Allowance of Appeal Pursuant to Pa.R.A.P. 1114(b)(2) Because the Commonwealth Court Disregarded this Court's Mandate by (A) Holding that a Violation of the Perceived "Intendment" of a Statute is Enough in Itself to Warrant a Preliminary Injunction; and (B) Applying a "Highly Deferential" Standard of Review to a Mandatory Injunction.

The Commonwealth Court undertook all of the above reasoning before it addressed whether the Plaintiffs had established a right to a preliminary injunction in the record before the Court of Common Pleas. If the Court of Common Pleas had the authority to enter the injunction at all—which is Question 1, above—it nonetheless had to apply the right test, and the Commonwealth Court needed to apply the proper standard of review in measuring the test it applied. In this case, the Plaintiffs and the Court of Common Pleas disregarded this Court's precedent as

to the first; and the Commonwealth Court cited but did not apply this Court's precedent to either question.

A. This Court Has Been Explicit in Setting Forth the Standard for Granting and Upholding a Preliminary Injunction, and it Should Grant Allowance of Appeal to Make Clear that Just Because a Plaintiff Cries "Illegal," the Test Does Not Change.

Despite the record before it, the Commonwealth Court concluded that the District's use of the approved Act 1 exceptions was "a statutory violation." *Compare* Remand Op., App. A, at 23 ("For purposes of injunctive relief, statutory violations constitute irreparable harm *per se*.") *with id*. at 5, 24, citing CCP Op., App. D, at 14-15 ("The School District's accounting practices may not incur a specific sanction of the statutes regulating them, but they are skirting the purposes of the law….").

It states the obvious to observe that in order to violate a statute, the enjoined conduct—*i.e*., the taking of the special education and PSERS exceptions—needed to do something the Taxpayer Relief Act prohibited, or to fail to do something the Taxpayer Relief Act required. At the hearing, the only two witnesses testified that the District's request, and the Department's approval, of the exceptions ***complied with*** the statute. H.T., Ex. 1, at 105-106, 199-200, R.1061a-1062a, 1155a-1156a. This is undoubtedly why the Court of Common Pleas talked about "intendment" instead; but basic principles of statutory construction hold that the text of the statute is what determines what the statute requires or forbids. *See* 1 Pa.C.S §

1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). And looking only to descriptions of "purpose" and "intendment" and "legerdemain" is fundamentally inconsistent with the way this Court has said to evaluate "illegality" with regard to preliminary injunctions. *See SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 508 (Pa. 2014) (if the conduct sought to be restrained through the preliminary injunction "violates a statutory mandate," the irreparable harm prerequisite will be satisfied); *Commonwealth v. Coward*, 414 A.2d 91, 98-99 (Pa. 1980) (determination of statutory violation in preliminary injunction analysis a question of law for the court); *see also Port Auth. of Allegheny Cty. v. Amalgamated Transit Union*, 431 A.2d 1173, 1176-78 (Pa. Cmwlth. 1981) ("It is not clear from his opinion to what degree the chancellor was influenced in his decision by the union's threat of a work stoppage but we here state that the threat of an illegal strike in and of itself will not warrant the issuance of a status quo injunction; indeed, such a threat should not be even a consideration.").

Once President Judge Leavitt had concluded that the Court of Common Pleas had found the Department's approved tax increase to be "illegal," she excused or rubber-stamped the remainder of the prerequisites. *See* Remand Op., App. A, at 23-25 (illegality is irreparable harm *per se*, which "relieved the trial

court of undertaking the balance of harms inquiry; injunction is to restore the parties "to before the event that gave rise to the lawsuit"; there is a "clear right" to interfere with a school board's discretion if it acts "in violation of law."). That compounding of the effect of a finding of illegality is squarely at odds with this Court's holdings in *Brayman Const. Co. v. Dep't of Trans.*, 13 A.3d 925, 942, n.18 (Pa. 2011) and *Weeks* v. *Dep't of Human Servs.*, 222 A.3d 722, 731 (Pa. 2019). In both cases, the plaintiffs had alleged "illegality." In both cases, the Court was clear that those allegations of illegality go *only* to the irreparable harm prerequisite. In both cases, because the plaintiffs had not established all of the other prerequisites, there was no basis even to reach the question of illegality, and no injunction could issue. *Brayman*, 13 A.3d at 942, n.18; *Weeks*, 222 A.3d at 731. This Court should grant allowance of appeal to address the Commonwealth Court's collapse of the "six essential prerequisites" into one question: whether a plaintiff and a court of common pleas label conduct illegal—much less, as here, "intentionally violating the intendment" of a law.

In this case, the excuse was even more out of line with this Court's precedent because both the Plaintiffs and Judge Smyth had eschewed any need to provide evidence or arguments on the six prerequisites. *See Allegheny Cty. v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988) ("For a preliminary injunction to issue, every one of these prerequisites must be established; *if the petitioner fails* to

establish any one of them, there is no need to address the others." (emphasis added)).

Here, the only prerequisite that Plaintiffs identified was "irreparable harm"—but the "irreparable harm" they pleaded was that "[c]ollection of the proposed tax increase shall cause irreparable harm to the Petitioners because once the tax increase is enacted and taxes paid, the District will be under no obligation to return them as ill-begotten, and the monies will be allocated, albeit falsely, to projects that have yet to be approved, making it more difficult to identify." Injunction Petition, Ex. 2, at ¶ 13, R.416a-417a. Neither the Court of Common Pleas nor the Commonwealth Court credited ***that*** as irreparable harm.

In contrast, the District made a compelling showing at the injunction hearing—a showing that was neither countered nor counterbalanced—on, for example, the second prerequisite: because each year's tax rate results from an adjustment to a prior year's tax rate, and because the law specifies when and how taxing decisions must be made and tax notices disseminated, the court's *post hoc* order of revocation both required the District to take a step not permitted by law and created uncertainty and instability going forward; indeed, every year since 2016 has had an uncertain starting amount because of the injunction. *See* H.T., Ex.1, at 204-206, R.1160a-1162a.

B. The Commonwealth Court Allowed the Injunction to Stand by Applying a Deferential Standard of Review that is Inconsistent with This Court's Recognition of the Need for Care and Scrutiny When an Injunction is Mandatory or When it is Against a Public-Serving Entity.

On the one hand, the confusion that will result from an intermediate appellate court decision that professes to apply this Court's case law but does not is reason enough to grant allowance of appeal. But this Court should also grant allowance of appeal because the Commonwealth Court treated this injunction not just with the deference one might accord to a prohibitory injunction, but with the deference one would accord to a verdict winner. *See* Remand Op., App. A, at 22 ("facts in a light most favorable to the winner at the trial court level"); *id*. ("highly deferential" standard of review looking only to see "if no grounds exist"); *id*. at 25 ("substantial legal questions must be resolved to determine the rights of the parties" and "[g]iven our highly deferential review, we conclude that the injunction is reasonably suited to abate the alleged harm because the School District was allowed to implement the 2.4 percent tax increase for fiscal year 2016-2017" even though that had also been challenged as unlawful).

That extreme deference is inconsistent with the "extraordinary" nature of any preliminary injunction, but this was a mandatory injunction—as President Judge Leavitt recognized at the outset of her opinion (albeit in a footnote).

Remand Op., App. A, at 9, n.9 (*quoting Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981)).

This Court has repeatedly held that identification ***and*** application of the right standard of review is vital. *See, e.g., In re Doe*, 33 A.3d 615, 622 (Pa. 2011) ("Critical to disposition of all issues presented is a determination of the appropriate standard of appellate review."); *Commonwealth v. Sinott*, 30 A.3d 1105, 1110 (Pa. 2011) (faulting Superior Court for applying the wrong standard of review); *Commonwealth v. Valdivia*, 195 A.3d 855, 873 (Pa. 2018) (Todd, J., concurring and dissenting, recognizing that standard of review was critical to the suppression question). Obviously that is so, because the more deferential a reviewing court is, the less scrutiny it provides (and the more likely it is to affirm). What happened here is even more problematic than in the cases above, where there was confusion as to what the right standard was; here, the Commonwealth Court has acknowledged that this Court has identified the proper standard, but the Commonwealth Court nonetheless ***applied*** a very different standard.

There simply is no way to square the Commonwealth Court's recitation of cases such as *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981), with its highly deferential standard of review. This Court has been explicit that ***only*** when a "preliminary injunction appealed from" "is merely prohibitory" can a court refrain from reviewing "the merits of the controversy" and "only determine if there

were any apparently reasonable grounds to support that action and will reverse only if no such grounds exist." *Id*. at 988.[9]

Indeed, the Commonwealth Court did not even conduct its own statutory construction, *see supra* at 30, which is quintessentially the responsibility of a reviewing court. And while the Commonwealth Court thought the question before it was only whether the Plaintiffs showed that "substantial legal questions must be resolved to determine the rights of the parties," Remand Op., App. A, at 25, that question cannot be reconciled with this Court's requirement that a reviewing court assure itself that a mandatory injunction ***never*** be granted "except to prevent irreparable injury where the rights of the parties are entirely clear." *McMullan v. Wohlgemuth*, 281 A.2d 836, 841 (Pa. 1971) (*cited in Mazzie* and *citing Phila. Record Co. v. C-M News, Inc*., 157 A. 796, 798 (Pa. 1931)).

Here, the Commonwealth Court's "deference" led it to accept without verifying for itself what the record could and could not support. *See*, *e.g*., Remand Op., App. A, at 5 (stating that the School District presented no witnesses and only its preliminary and final budgets for fiscal year 2016-2017 and the letter approving

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[9] *See also Summit Town Centre, Inc. v. Shoe Show of Rocky Mount, Inc.,,* 828 A.2d 995, 1005, n.13 (Pa. 2003) (mandatory injunction is "an extraordinary remedy that should be utilized only in the rarest of cases."); *Ambrogi v. Reber*, 932 A.2d 969, 975 (Pa. Super. 2007) (recognizing the extraordinary nature of any preliminary injunction, and that greater scrutiny is required for a mandatory injunction, but reviewing a prohibitory injunction); *Commonwealth v. Snyder*, 977 A.2d 28, 44 (Pa. Cmwlth. 2009) ("Where, as here, the injunction is merely prohibitive rather than mandatory, we may reverse only if there are no reasonable grounds to support the decree or if the rule of law is palpably erroneous or misapplied.").

the exceptions). In fact, the Plaintiffs called the District's business manager as of cross, and the District introduced ***six*** exhibits. That uncritical acceptance of the recitation of the Court of Common Pleas may in itself explain why the Commonwealth Court disregarded the evidence that the Department had full documentation of the District's expenditures and savings over the years when it approved the Act 1 exceptions in March 2017, which alone demonstrated that there was no "legerdemain," *see supra* at 16-17; *see also* Remand Op., App. A, at 5 (citing to CCP Op., App. D, at 14-15), 25, let alone a statutory violation. If the Commonwealth Court had looked at all six prerequisites through the prism of a mandatory injunction standard of review, it would not have affirmed this injunction.

Moreover, although this Court has not expressly articulated which prerequisites are most affected by the heightened standard of review for a mandatory injunction, it has imposed a separately heightened review in an injunction case involving entities, including school districts, that serve the public interest. Thus, this Court in *Zebra v. Sch. Dist. of Pittsburgh*, 296 A.2d 748 (Pa. 1972), held that "[c]ourts are further restrained, when dealing with matters of school policy, by the long-established and salutary rule that the courts should not function as super school boards." *Id.* at 750. Accordingly, courts may "not interfere with the discretionary exercise of a school board's power unless the

action was based on 'a misconception of law, ignorance through lack of inquiry into facts necessary to form an intelligent judgment or the result of arbitrary will or caprice.'" *Id.* (quoting *Hibbs v. Arensberg*, 119 A. 727, 728 (Pa. 1923)).[10]

Education has been recognized as an essential public good by Pennsylvania's Constitution since the Constitution of 1776. *See* Pa. Const. Sec. 44 (1776); Pa. Const. Art. III, § 14. The General Assembly—presumed to act in the public interest, *see* 1 Pa.C.S. § 1922(5), particularly with regard to the School Code, *Watts v. Mannheim Twp. Sch. Dist.*, 121 A.3d 964, 976 (Pa. 2015)—has assigned the responsibility for furthering that good to school boards and the Department of Education. All of which dictates the standard of review this Court has set forth and not the "highly deferential" standard the Commonwealth Court applied in this case.

CONCLUSION

In this case, the Court of Common Pleas has failed to heed this Court's caution against becoming a "super school board" and has instead overturned by judicial *diktat* the budgeting and taxation decisions of an elected school board and the Department of Education. Worse, in issuing that mandatory injunction, the trial court ignored a litany of challenges to its authority to do so, including the lack

[10] The Court later articulated a similar principle in *New Castle Orthopaedic Assoc. v. Burns*, 392 A.2d 1383, 1385 (Pa. 1978) ("Additionally, the concern of the courts for the public welfare results in a close judicial scrutiny of restraints on physicians because of the value of their services to the community.").

of standing, the Plaintiffs' failure to go first to the Department of Education, and the fact that their suit raises nonjusticiable political questions. As for the Commonwealth Court, it has once again decided to look the other way and abrogated its responsibility to police such abuses when they occur—and has diluted the standard of review that appellate courts must apply when reviewing a mandatory injunction against a school district. The net effect of both courts' decisions is judicial overreach into subject matter that the General Assembly has assigned to other branches of government. The District therefore respectfully requests that this Court once again grant it allowance to appeal.

Dated: April 1, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 8,975 words, as determined by the word-count feature of Microsoft Word 2016, the word-processing program used to prepare this petition, and excluding the portions of the petition exempted by Pa.R.A.P. 1115(g).

Dated: April 1, 2020

/s/ Alfred W. Putnam, Jr.
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PROOF OF SERVICE

I, Alfred W. Putnam, Jr., hereby certify that, on this day, I caused true and correct copies of the foregoing Petition for Allowance of Appeal, together with the associated appendices and exhibits thereto, to be served upon the following via email and United States First Class Mail, postage prepaid, which service satisfies the requirements of Pa.R.A.P. 121:

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