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No. 4 EAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

FAMILY COURT OF THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL DISTRICT,
Appellant

v.

WANDA BROOKS and EWING COLE, INC. D/B/A EWING COLE and CITY OF PHILADELPHIA,
Appellees

Appeal from the July 9, 2020, Order of the Commonwealth Court at No. 912 CD 2018, which quashed Appellant's appeal from the July 3, 2018, Order of the Court of Common Pleas of Philadelphia at December Term 2016, No. 00680, denying Appellant's Motion for Summary Judgment

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BRIEF OF THE COUNTY COMMISSIONERS ASSOCIATION OF PENNSYLVANIA, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, AND THE PENNSYLVANIA MUNICIPAL LEAGUE IN SUPPORT OF APPELLANT FAMILY COURT OF THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL DISTRICT

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae, the **County Commissioners Association of Pennsylvania ("CCAP")**, is an organization which came into being in 1886 as a largely volunteer group. Beginning in the late 1880's, CCAP and its predecessor, the Pennsylvania State Association of County Commissioners, received recognition from the Pennsylvania General Assembly in various statutes permitting the Association to be designated as a "State Association," permitting the Association to hold annual meetings and permitting the Association to cooperate with other similar state associations. In 1955, under the Pennsylvania County Code, CCAP was officially recognized as a state association empowered to discuss and resolve questions arising in the discharge of the duties and functions of the respective officers of Pennsylvania's Counties, and to provide uniform, efficient, and economical means of administering the affairs of Pennsylvania's Counties. 16 P.S. § 441.

CCAP's mission and vision encompasses providing "a strong, unified voice for the Commonwealth's 67 counties," and advocating and providing "leadership on those issues that will enhance and strengthen the ability of county commissioners to better serve their citizens and govern more effectively and efficiently." CCAP Corporate Mission Statement, available at

https://www.pacounties.org/AboutUs/Documents/CCAPCorporateMission2013Update.pdf (last accessed March 4, 2021).

CCAP acts through its staff members, Board of Directors, and Committees, the latter two being comprised of representatives of CCAP member Counties, who serve to direct the advocacy and efforts on behalf of those members.

Amicus curiae, the **Pennsylvania Municipal League (the "League")**, is a nonprofit, nonpartisan organization established in 1900 as an advocate for Pennsylvania's 3rd class cities. Today, the League represents participating Pennsylvania cities, boroughs, townships, home rule communities, and towns that all share the League's municipal policy interests. Its Board of Directors oversees the administration of a wide array of municipal services including legislative advocacy (on both the state and federal levels), publications designed to educate and inform, education and training certification programs, membership research and inquiries, consulting-based programs, and group insurance trusts.

Amicus curiae, the **Pennsylvania State Association of Township Supervisors ("PSATS")**, is a non-profit association that has been providing training, educational, and other member services to officials from over 1,400 townships of the second class in the Commonwealth of Pennsylvania for 100 years. PSATS also advocates for its members before the legislative, executive, and

judicial branches at the state and federal levels on matters of importance to the administration of townships and the performance of township officials' duties.

Amici Curiae's members are political subdivisions and executive officials who are entitled to certain governmental immunity subject to the exceptions outlined in the Political Subdivision Tort Claims Act, 42 Pa. C.S. §§ 8541 *et seq.* (the "Tort Claims Act"). In that regard, this Court's decision may affect their members' ability to make policy decisions and provide services to their respective constituents free from fear of litigation. Further, this Court's decision may impact members' financial resources and their capacity to recruit and maintain the best candidates for public service.

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), *Amici Curiae* certify that no person other than *Amici Curiae*, their counsel, and their members contributed money intended to fund this brief's preparation or submission.

II. PROCEDURAL HISTORY

On December 8, 2016, Plaintiff/Appellee Wanda Brooks ("Brooks") initiated an negligence action for monetary damages in the Philadelphia Court of Common Pleas (the "Trial Court") under matter captioned as *Wanda Brooks v. Ewing Cole, Inc. et al.*, No. 161200680. In her claim for negligence, Brooks alleged that she sustained injuries when on January 8, 2015 she walked into a glass wall on the premises located at 15th and Arch Streets, which is leased from the

City of Philadelphia (the “City”) by Appellant, the Family Court of the First Judicial District ("Family Court"). *Brooks v. Ewing Cole, Inc., et al*., No. 161200680, 2018 WL 6069892 (C.C.P. Phila. Nov. 6, 2018) (Rau, J.) (hereinafter, the “Trial Court Opinion”). In addition to the Family Court, Brooks named as defendants the City of Philadelphia and Ewing Cole, Inc. (“Ewing Cole”), the company that designed and constructed the building.

The Family Court filed a Motion for Summary Judgment, arguing that it was entitled to sovereign immunity with respect to Brooks’s negligence claim. *Brooks v. Ewing Cole, Inc*., Nos. 911 CD 2018 & 912 CD 2018, 2020 WL 3866647 (Pa. Commw. Ct. July 9, 2020) (hereinafter, the “Commonwealth Court Opinion”). It relied on the holding in *Russo v. Allegheny Co*., 125 A.3d 113, 118 (Pa. Commw. Ct. 2015), *aff'd*, 150 A.3d 16 (Pa. 2016), that the Courts of this Commonwealth are not “Commonwealth parties” subject to the exceptions to that immunity set forth at 42 Pa. C.S. § 8522. Entities entitled to sovereign immunity not subject to the exceptions in 42 Pa. C.S. § 8522 enjoy full immunity as set forth in 1 Pa. C.S. § 2310.

Without opinion on June 4, 2018, the Trial Court denied the Family Court’s motion for summary judgment. The Family Court both appealed that decision to the Commonwealth Court and also filed a motion for reconsideration and certification for interlocutory appeal. The Trial Court vacated its order for

summary judgment and granted reconsideration, only to reinstate its ruling on summary judgment and deny certification for interlocutory appeal on July 3, 2018 (again, without opinion). Immediately thereafter, the Family Court sought a stay of proceedings with the Commonwealth Court, which was granted on July 9, 2018. The July 9, 2018 Order from the Commonwealth Court directed the Trial Court to provide an opinion in support of its June 4, 2018 and July 3, 2018 Orders with the certified record.

In August 2018, the Family Court then appealed the denial of the motion for reconsideration. After the Family Court appealed both of the Trial Court's orders denying summary judgment, Brooks settled the lawsuit with designer/contractor Ewing Cole.

On November 6, 2018, Judge Lisa Rau issued an opinion which expounded on her denial of summary judgment. Judge Rau indicated that the "only dispute is a question of law as to whether the General Assembly's definition in the Sovereign Immunity Act of 'Commonwealth party' encompasses the courts." Trial Court Opinion, at *4. She also indicated that the Family Court's appeal then "involve[d] a controlling question of law as to which there is a substantial ground for difference of opinion" and that immediate appeal would "materially advance the ultimate termination of the matter," although failing to amend the July 3, 2018

order to certify it for review pursuant to Pennsylvania Rule of Civil Procedure 1312(a)(2).[1] Trial Court Opinion, at *1 n.2.

The Commonwealth Court quashed the Family Court's appeal on July 9, 2020. Rather than decide whether the Family Court was entitled to sovereign immunity, the Commonwealth Court declined to review the denial of summary judgment under Pennsylvania Rule of Appellate Procedure 313, which is a codification of the collateral order doctrine. *See* Commonwealth Court Opinion. The Commonwealth Court determined that the Family Court was not entitled to immediate review of its claim to sovereign immunity, as the issue did not meet the three-part test for a reviewable collateral order set forth by this Court in *Pridgen v. Parker Hannifin Corp*., 905 A.2d 422 (Pa. 2006):

> 1. the right asserted must be separable from and collateral to the main cause of action;
>
> 2. the right involved must be too important to be denied review; and
>
> 3. the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost.

Id. at 426 (internal citations omitted).

[1] Judge Rau also determined that since Brooks settled with Ewing Cole, and that the City was entitled to immunity as a landlord out of possession, the matter was now suited for interlocutory review. Trial Court Opinion, at *1 n.2.

According to the court below, the Family Court's appeal met the first two prongs of the *Pridgen* test, but not the third. Specifically, the Commonwealth Court opined that the immunity issue was capable of separate and distinct analysis, as it presented a pure question of law and did not require a factual inquiry into the Family court's liability. Commonwealth Court Opinion, at *6. The Commonwealth Court also found that the matter of sovereign immunity was "too important to be denied review," as it "implicate[d] public policy concerns that extend beyond the parties to the instant litigation." *Id.* at *7. Additionally, that court noted that it had in the past ruled that issues of sovereign immunity were of sufficient import to grant immediate review. *Id.*

As to the third prong, however, the Commonwealth Court held that the Family Court would not suffer irreparable loss of its right to sovereign immunity by denying immediate review on appeal and requiring it first to litigate the matter to a final judgment. The Commonwealth Court cited to prior decisions where it determined that neither a sovereign immunity defense nor an issue presenting a pure question of law would in itself justify interlocutory review. *Id.* at *7. The Commonwealth Court reasoned that the Family Court would still be able to assert sovereign immunity on appeal even after final judgment in the Trial Court, and thus there was no irreparable harm.

The Family Court timely filed a petition for review of the Commonwealth Court's decision to this Court. On January 11, 2021, this Court granted the Family Court's petition as to one issue:

> Should this Court review the Commonwealth Court's conclusion that an order denying a summary judgment motion based on sovereign immunity does not satisfy the collateral order doctrine of Pennsylvania Rules [sic] of Appellate Procedure 313, which conflicts with statutory law and case law that this immunity is "immunity from suit" and presents a matter of first impression for this Court on a substantial legal and policy issue involving absolute immunities?

Amici curiae now submit this brief in support of the Family Court's request that this Court reverse the decision to quash the Family Court's appeal based on the collateral order doctrine.

III. SUMMARY OF ARGUMENT

The Commonwealth Court erred when it determined that the Family Court was not entitled to immediate review of its claim to sovereign immunity under Pennsylvania Rule of Appellate Procedure 313 and the collateral order doctrine. Specifically, the Commonwealth Court failed to apply precedent established by this Court in *Pridgen v. Parker Hannifin Corp*., 905 A.2d 422 (Pa. 2006), holding that failing to review a determination of statutory immunity from suit results in irreparable loss to the party claiming the immunity.

Further, the Commonwealth Court decision contravenes the goals sought by giving government agencies immunity, the primary one being that governmental units and their employees can perform their functions most efficiently without the fear of litigation and liability. If the Commonwealth Court's opinion stands, governmental units will have to dedicate significant human and monetary resources to defending actions even where they are clearly entitled to immunity. The ruling also will cause uncertainty as to insurance coverage for those claims. The costs of defense could force agencies to settle claims which the General Assembly intended the agency to enjoy full immunity. Further, a verdict against an agency or employee could erode the public's confidence in government.

IV. ARGUMENT

The Commonwealth Court improperly denied the Family Court's appeal on the basis of the collateral order doctrine. Specifically, where a governmental unit asserts immunity that does not implicate any factual dispute, the matter should be subject to immediate review on appeal.

The Commonwealth Court admitted that, in the instant matter, the facts related to the immunity issue were not in dispute, presenting only a matter of law to be decided. Yet, it's decision would force the Family Court to proceed with a full trial on the merits of Brooks's negligence claim, despite the fact that, if the

Family Court is entitled to such immunity, the immunity would bar the negligence claim from inception.

A. The Commonwealth Court Erred in Denying the Family Court's Appeal, as Precluding Review of Governmental Immunity Until After Litigation to Final Judgment Causes Irreparable Loss.

Although citing the *Pridgen* decision for the three-prong standard for determining whether the immunity issue was an appealable one, the Commonwealth Court then ignored part of the holding in *Pridgen* directly applicable to its analysis. The Commonwealth Court agreed with the Family Court that the determination of governmental immunity satisfied the first two prongs of the *Pridgen* test. Commonwealth Court Opinion, at *6-7. The Commonwealth Court, however, then asserted that the fact that the Family Court would have to expend the costs to defend the matter at trial was not an irreparable loss of its right to immunity, although *Pridgen* says exactly the opposite.

In *Pridgen*, this Court evaluated the irreparable loss in denying review of a ruling on summary judgment to a corporation entitled to immunity from tort claims under the General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 *et seq.* ("GARA"). 905 A.2d at 433. The *Pridgen* appellants claimed that they were essentially immune from suit and an "explicit statutory right not to stand trial which would be irretrievably lost should [the defendants] be forced to defend [themselves] in a full trial." *Id.* at 429 (internal quotations and citations omitted).

The plaintiffs, on appeal, argued that the corporation's rights under GARA were not lost by denying appellate review, as GARA "merely creates a defense" to their claim for damages which could still be recognized after trial. *Id.* at 431.

This Court held in *Pridgen* that "the substantial cost that . . . will [be] incur[red] in defending [the] litigation at trial on the merits compromises a sufficient loss to support allowing interlocutory appellate review as of right." *Id.* at 433. Writing for the majority, Justice Saylor noted a "clear federal policy to contain such costs" in GARA which created an "interest in freedom from tort claims." *Id.*

Instantly, there is no doubt that if the Family Court is entitled to sovereign immunity in the action filed by Brooks, the General Assembly intended for the Family Court to be protected from litigation altogether. "[T]he purpose of absolute immunity is to foreclose the possibility of suit. [A]bsolute immunity is designed to protect [a party] from the suit itself, from the expense, publicity, and danger of defending the good faith of [its] public actions before a jury.". *See Montgomery v. City of Phila*., 140 A.2d 100, 104 (Pa. 1958) (discussing the basis for official immunity). The federal courts have also declared this principle that the harm to state governments and their agents is much greater than merely the cost of litigation:

> The Supreme Court's decisions in this area make it clear that an immune official's right to avoid trial is based not on the individual's

> desire to avoid the personal costs and aggravations of presenting a defense. Rather, the right not to stand trial is based on far broader concerns for avoiding the social costs of the underlying litigation, and for ensuring and preserving the effectiveness of government. The concern is that, absent immunity from suit as well as liability, the attention of public officials will be diverted from important public issues. Additionally, qualified individuals might avoid public service altogether, while the threat of litigation may undermine the willingness of those who do serve to act when action is necessary.

In re Montgomery County, 215 F.3d 367, 375 (3d Cir. 2000) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). Where there is a clear legislative intent to protect Commonwealth and local governments from suit, that a government agency will expend resources, both monetary and human, to defend a suit from which it is immune is a sufficient irreparable loss of right if immediate review is denied.

Rather than consider the language in *Pridgen*, the Commonwealth Court relied on cases that are factually and procedurally distinguishable from the instant matter, or were decided before *Pridgen*. Specifically, the Commonwealth Court cited to *Sylvan Heights Realty Partners, LLC v. LaGrotta*, 940 A.2d 585 (Pa. Commw. Ct. 2008), where it denied interlocutory review of legislative immunity after the trial court denied judgment on the pleadings. In *Sylvan Heights*, however, the Commonwealth Court determined that the plaintiff sufficiently pled facts which could render the legislative immunity inapplicable, thereby creating a factual dispute which required the parties to take discovery. *Id.* This Court acknowledged in *Pridgen* that, as in federal court, where a judge denies immunity

because material facts are at issue, the collateral order doctrine is not satisfied. 905 A.2d at 416. In the instant matter, however, the Trial Court and Commonwealth Court conceded that the Family Court's sovereign immunity presented a purely legal determination. Even more, the other cases relied on by the Commonwealth Court on this point, *Gwiszcz v. City of Philadelphia*, 550 A.2d 880 (Pa. Commw. Ct. 1988), and *Bollinger by Carraghan v. Obrecht,* 552 A.2d 359, 361 (Pa. Commw. Ct. 1989), both predate *Pridgen*.

This Court must correct the error made by the Commonwealth Court. Where there are no disputes of fact to be resolved before rendering a decision as to absolute immunity, denying immediate review causes much harm to not only the party seeking review, but to the public interest.

B. The Commonwealth Court's Decision Hinders the Goals of the General Assembly Advanced by Governmental Immunity.

Like Commonwealth agencies and the courts, local governmental units are entitled to absolute immunity under the Political Subdivision Tort Claims Act, 42 Pa. C.S. §§ 8541 *et seq.* (the "Tort Claims Act"). As such, as a precondition to maintaining an action against a local government unit, a plaintiff must plead an exception enumerated in the Tort Claims Act. *Mascaro v. Youth Study Center*, 523 A.2d 1118 (Pa. 1987). The protections in the Tort Claims Act also extend to employees acting within the scope of their employment, which is known as "official immunity." 42 Pa. C.S. §§ 8545, 8546. Complaints against local

governmental units are often dismissed on preliminary objection for failing to state a claim fitting within one of the exceptions to immunity. *See, e.g.*, *Alston v. Philadelphia Weekly*, 980 A.2d 215, 222 (Pa. Commw. Ct. 2009), *appeal denied*, 993 A.2d 901 (Pa. 2010) (affirming trial court's dismissal of case on preliminary objections because plaintiff failed to allege that solicitor acted with actual malice required to abrogate governmental immunity).

The Tort Claims Act was intended to protect local government agencies and their employees and officials not only from ultimately liability, but also from the hassles of engaging in litigation on certain matters. As this Court has stated, "it is within the province of the Legislature to determine that certain bars to suit are, in its judgment, needed for the operation of local government." *Carroll v. York County*, 437 A.2d 394, 397 (Pa. 1981). *See also Dorsey v. Redman*, 96 A.3d 332, 343 (Pa. 2014) (stating that the purpose of official immunity is to allow policymakers to act without fear of litigation and unlimited damages). Indeed, the potential impact to local governments goes well beyond simply the direct cost of litigation. The impacts on governmental units, and thus the public, are numerous. The most obvious of these impacts is that the cost of litigating an action that should ultimately be dismissed as matter of law based on the absolute governmental immunity wastes precious government resources, resources that ultimately belong

to the citizens and constituents of the Commonwealth. However, there are a host of impacts that are possibly more subtle than mere waste of public resources.

1. Denying review of determinations regarding immunity will require local agencies to unnecessarily divert human resources to litigation and away from public services at a time where the public is in critical need of government support.

Forcing municipalities and counties to engage in unnecessary litigation ties up available resources to serve the publics other needs. Like many entities, local governments have been strapped financially during the ongoing pandemic crisis. Even before the pandemic, many localities were faced with financial issues that required policymakers to engage in difficult decisions regarding cuts to manpower and services. If remaining employees are dedicating time to litigation—offering testimony, assisting counsel with investigating the facts and engaging in discovery, attending hearings and trial—that results in fewer resources available to provide necessary services to the public in a time where many citizens are critically reliant on those services. The General Assembly provided for governmental immunity in order to ensure that agency employees could serve the interests of the public without the distraction of litigation. *Dorsey*, 96 A.3d at 343 (Pa. 2014) ("The underlying purpose is to allow those in governmental policy making positions to have the ability to act without the fear or litigation and unlimited damages."). Not only would litigation assume the attention of those officials named as defendants in the action, to the extent that a county or locality employs a solicitor, that individual

will need to dedicate time and effort to responding to claims and litigating them, even by working with outside counsel.

2. Denying interlocutory appeal of governmental immunity puts the status of insurance coverage in question.

The Commonwealth Court's decision could cause uncertainty with respect to local agencies' insurance coverage and the cost of premiums. Under current precedent, the mere fact that an agency purchases excess coverage beyond the limitations on damages set forth in the Tort Claims Act is not a waiver of the immunity. *See Dunaj v. Selective Ins. Co. of Amer*., 647 A.2d 633 (Pa. Commw. Ct. 1994). Thus, the agency is still immune from all claims that do not fit within an exception to the Tort Claims Act, and insurers may not consider those claims when they assess the risks of insuring government agencies. Insurers base premium rates on the relative risk of insuring the agency.

Whether these claims are covered or not under existing policies, the public will bear the expenses of the litigation. Initially, insurers may bear the cost of defense and cost of settlement, even though the risk of those losses were not contemplated by the parties. In the future, insurers will increase premiums to account for those costs. In the alternative, if insurers exclude these claims, agencies will be unable to proactively guard public monies by obtaining insurance coverage, and taxpayers will be left with the bill.

3. Denying interlocutory appeal could cause local governments to settle claims for which they are entitled to absolute immunity.

Litigation of tort claims can be very expensive. Depending on the nature of the injury alleged, defending such a claim could require the hiring of multiple experts, review of thousands of medical and other records, deposing multiple witnesses and responding to pleadings filed by multiple parties. Negligence claims often turn on factual disputes involving credibility determinations related to the most insignificant and immemorable of occurrences (*e.g.*, how fast an individual or object traveling at the moment of impact). All of these factors may make litigation cost prohibitive. Further, insurance policies may or may not establish limits on costs of defense (on individual claims or in the aggregate). Thus, the cost to defend an action undoubtedly becomes a consideration when parties assess risk of further litigation versus settlement.

If governmental units cannot rely on immediate interlocutory review of a purely legal determination of immunity, these entities will be forced to consider the cost of litigating a matter through the next stage (for the Family Court, through trial) and the risk of a jury decision that is not in its favor even when immunity is quite certain. Moreover, the implication of having a jury resolve legal issues that are more appropriate for a judge, such as a juror's sympathy for an injured party, could push an agency to settle a matter for which the General Assembly intended the agency to enjoy absolute immunity from suit.

The effect of settling claims for which an entity would otherwise be immune is to, in effect, limit the immunity more than the General Assembly intended. Essentially, future plaintiffs can expect, at minimum, that the government unit would be willing to settle to save on costs to defend the action, despite the fact that any potential claims would be barred by the governmental unit's immunity under the Tort Claims Act. By denying immediate review of such immunity, the Commonwealth Court has in practice established a minimum potential recovery for claims which should otherwise be barred. A plaintiff whose claim would typically be barred can use strategy to extract a settlement as long as its claims survives summary judgment. With a higher chance for some recovery, the Tort Claims Act loses some of its protective value—claimants may be more willing to pursue these claims. Officials lose the assurance that they can avoid litigation and claims when making decisions.

4. Denying interlocutory appeal will bring unnecessary scrutiny to government units and officials.

Further, if an agency is required to wait until after a final judgment is entered against it to appeal, with a judgment proceeded by a jury verdict in the plaintiff's favor, there is a serious possibility that public opinion will be influenced by the verdict, regardless of the outcome of the appeal. This could erode public trust in competent government.

Additionally, repeated litigation is likely to both impact employees' policy decisions and could deter a number of people from entering public service. *See In re Montgomery*, 215 F.3d at 375. Again, absolute immunity was purposed to give officials the ability to engage in policymaking decisions free from scrutiny and second guessing in litigation. *Dorsey,* 96 A.3d at 343. Being forced to undergo a deposition and having every decision scrutinized by a jury, whose conclusions are then entered into the record, could impact the individual employee's personal and professional reputation. That could very much deter thoughtful, principled individuals from seeking public office. The interest in protecting individuals in government positions from unwarranted scrutiny is great, especially when they cannot ultimately be liable for their actions.

In sum, the policies supporting immunity for government agencies are essentially defeated by requiring an agency to litigate the matter to a final judgment, especially where the issue can be determined on appeal purely as a matter of law. To preserve the full protections intended by the Constitution and General Assembly, the Court must reverse the Commonwealth Court's decision and find that the Family Court is entitled to review of the order denying summary judgment under the collateral order doctrine.

V. CONCLUSION

For the reasons set forth herein, *amici curiae* CCAP, PSATS, and the League request the Court reverse the decision of the Commonwealth Court and find that the denial of summary judgment based on the Family Court's assertion of governmental immunity is appealable under the collateral order doctrine.

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STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2)(i) and (ii), *Amici Curiae* certify that no person other than *Amici Curiae*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

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CERTIFICATE OF CONFIDENTIALITY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATION PURSUANT TO PA. R.A.P. 2135(d)

Undersigned counsel hereby certifies pursuant to Pa. R.A.P. 2135(d) that the foregoing document contains 4,420 words (exclusive of the caption, the table of contents, the table of authorities, signature block, and the certifications herein) according to the word count feature of undersigned counsel's computer.

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