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In the Supreme Court of Pennsylvania

WANDA BROOKS

v.

EWING COLE, INC., CITY OF PHILADELPHIA, AND FAMILY COURT OF THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT COURT

***APPEAL OF*:**
FAMILY COURT OF THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT

On appeal from the July 9, 2020 Order of the Commonwealth Court, at No. 912 CD 2018, quashing the appeal of the July 3, 2018 order of the Philadelphia Court of Common Pleas, at No. 680, Dec. Term 2016

BRIEF OF *AMICUS CURIAE*, GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The General Assembly of the Commonwealth Pennsylvania is the Legislative Branch of Pennsylvania's government. Article II, Section 1 of the Pennsylvania Constitution vests the General Assembly with "all affirmative legislative powers." *Jubelirer v. Rendell*, 953 A.2d 514, 531 (Pa. 2008). In the exercise of those powers—and for every other action taken in the sphere of legitimate legislative activity—the Legislature and its Members enjoy absolute protection against lawsuits: they "shall not be questioned in any other place" "for any speech or debate in either House." PA. CONST. art. II, §15. Speech or Debate or Legislative Immunity protects the independence of the legislative institution and the freedom of its Members in all of their legislative affairs.

To fulfill this promise of our governing charter, Legislators of course must be able to ask trial courts to free them from lawsuits forbidden by the Speech or Debate Clause. But Members also must be able to seek prompt appellate review when a trial court denies that protection. Pennsylvania Legislators thus have taken immediate appeals under the collateral order doctrine when trial courts reject this absolute immunity defense.[1] That is what happened in *Sylvan Heights Realty*

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[1] *See, e.g.*, *Youngblood v. DeWeese*, 352 F.3d 836, 838 (3d Cir. 2003) (appeal

(footnote continued on next page)

Partners, LLC v. LaGrotta, 940 A.2d 585 (Pa. Commw. 2008), which the Commonwealth Court relied on here. There, a Pennsylvania House Member invoking Speech or Debate Immunity sought immediate, collateral order review of a trial court's rejection of that defense.

The General Assembly thus has a unique viewpoint on—and significant interest in the outcome of—this case. Like the Judicial and Executive Branches, the Legislature's ability to carry out its constitutional charge hinges on its independence and protection from external interference. The General Assembly urges the Court to use this case to endorse collateral order appeals when trial courts deny assertions of absolute governmental immunity from suit—whether Sovereign Immunity, Speech or Debate Immunity, Judicial Immunity, or a similar protection.

The General Assembly supports the position of appellant, the Family Court of the First Judicial District. The Commonwealth Court should have allowed the Family Court to take an immediate appeal of the trial court's denial of its absolute

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under collateral order doctrine by two Pennsylvania Representatives following district court denial of their motion to dismiss asserting Legislative Immunity); *Larsen v. Senate of Commonwealth of Pa.*, 152 F.3d 240, 245 (3d Cir. 1998) (appeal under collateral order doctrine by Pennsylvania Senators following district court's partial denial of their motion to dismiss asserting Legislative Immunity).

immunity defense. The General Assembly submits this brief to provide the benefit of the Legislature's institutional perspective on the issues confronting the Court.[2]

[2] No person or entity other than the General Assembly paid for or authored this brief, either in whole or in part. *See* Pa.R.A.P. 531(b)(2). The General Assembly adopts by reference the sections of the Family Court's brief not included here.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's standard of review is *de novo* and scope of review is plenary. Thus, the Court owes no deference to the decision below. *See Shearer v. Hafer*, 177 A.3d 850, 855 (Pa. 2018) ("Whether an order is appealable under the collateral order doctrine under Pa.R.A.P. 313 is a question of law, subject to a *de novo* standard of review, and the scope of review is plenary."); *Pa. Mfrs.' Ass'n Ins. Co. v. Johnson Matthey, Inc.*, 188 A.3d 396, 398 (Pa. 2018) ("The question whether a court has jurisdiction is *de novo*, and the scope of review is plenary." (citation omitted)).

STATEMENT OF THE ISSUE PRESENTED

Are denials of absolute immunity immediately appealable under the collateral order doctrine, or must the Judicial, Legislative, and Executive Branches defend each lawsuit until its conclusion before asking the appellate courts to find they were immune from suit in the first place?

SUMMARY OF THE ARGUMENT

This Court should hold that trial court denials of claims of absolute immunity from suit are immediately appealable under the collateral order doctrine.

The Commonwealth's government, and each of its Branches, depend on several forms of absolute immunity from suit to carry out essential governmental powers conferred by the Pennsylvania Constitution. These immunities ensure the freedom of government officials to conduct the People's business independently, without fear of burdensome litigation. Thus, when officials are sued, they ask trial courts to excuse them from having to defend based on their immunity from suit.

If a trial court denies that protection, an immediate collateral order appeal must follow. Without that right, governmental parties will have to endure the full scope of the litigation process—including written discovery, document productions, summary judgment motions, and trial. They will suffer precisely the burdens absolute immunities are designed to prevent. Those protections will be lost, and cannot be recovered in a later appeal.

The federal courts have long recognized the need for immediate appeals in this setting, even under their narrower conception of the collateral order doctrine. If the stricter federal view freely permits collateral order appeals here, then this Court's more receptive iteration should, too. Immunity denials naturally fit within

each element of the collateral order test: (1) an immunity defense is separate from the plaintiff's cause of action; (2) denial of a litigation shield guaranteed by the Constitution is a decision too important to deny review; and (3) absolute immunity from participation in a lawsuit is forever lost without immediate review.

The Commonwealth Court, however, continues to maintain that denials of absolute immunity defenses are not susceptible to immediate review. The court's logic echoes its collateral order approach of decades ago—epitomized by its *Sylvan Heights* decision—that this Court has long since discarded. This Court should reject the Commonwealth Court's attempt to resurrect that outdated analysis.

For these reasons, detailed below, the General Assembly asks this Court to reverse the decision below and broadly hold that denials of absolute immunity defenses are always immediately appealable under the collateral order doctrine.

ARGUMENT

A. Immunity from suit is essential for the government to function.

1. Each Branch of government enjoys absolute immunity protections.

The People of Pennsylvania, in their Constitution, have divided their government's powers into three separate, co-equal Branches of government. *See* PA. CONST. art I, §2 ("[a]ll power is inherent in the people, and all free governments are founded on their authority"), art. II, §1 (legislative power vested in the General Assembly), art. IV, §2 (executive power vested in the Governor), & art. V, §1 (judicial power vested in the Unified Judicial System). Each Branch must be free of external encroachments to ensure the unfettered exercise of the powers entrusted to it. To that end, our charter includes various immunities. They are essential to the government's ability to function.

Each Branch has its own protections. The Judiciary enjoys Judicial Immunity. *See Guarrasi v. Scott*, 25 A.3d 394, 405 n.11 (Pa. Commw. 2011) (citing *Mireles v. Waco*, 502 U.S. 9 (1991)). The Legislature has Speech or Debate Immunity, also known as Legislative Immunity. *See* PA. CONST. art. II, §15. And the Executive may assert the Deliberative Process Privilege. *See LaValle v. Office of Gen. Counsel*, 769 A.2d 449, 457 (Pa. 2001).

The protection here—Sovereign Immunity—covers all three Branches. *See* PA. CONST. art. I, §11; 1 Pa.C.S. §2310; 42 Pa.C.S. §102 (defining Commonwealth government to include its three Branches); *Precision Mktg., Inc. v. Republican Caucus of Senate of Pa.*, 78 A.3d 667, 685 (Pa. Commw. 2013) (holding Pennsylvania Senate Republican Caucus, one of two parts that comprise the Senate, entitled to Sovereign Immunity). By statute, Sovereign Immunity specifies that the Commonwealth and its officials are "immune from suit" unless the Legislature has waived that protection. 1 Pa.C.S. §2310. The purpose of this immunity is to ensure that taxpayer dollars "are not subject to unnecessary depletion." *Mullin v. Dep't of Transp.*, 870 A.2d 773, 779 (Pa. 2005).

2. Speech or Debate Immunity protects the General Assembly.

While this case involves Sovereign Immunity, the Court's decision will impact the appealability of denials of Speech or Debate Immunity. In its decision below, the Commonwealth Court followed *Sylvan Heights Realty Partners, LLC v. LaGrotta*, 940 A.2d 585 (Pa. Commw. 2008), which it decided in the Speech or Debate setting. Thus, this case invites a discussion of all types of absolute immunity, including Speech or Debate Immunity.

The Pennsylvania Constitution's Speech or Debate Clause declares that Senators and Representatives "shall not be questioned in any other Place" "for any

Speech or Debate in either House." *See* PA. CONST. art. II, §15. Its history lies in the English Parliament's struggle for independence from the Crown in the mid-1600s. The legislature's conflicts with King Charles I led to inclusion of legislative privilege in the English Bill of Rights of 1689. *See generally* Wittke, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 1-27 (1921). In America, that protection was replicated in the Articles of Confederation, United States Constitution, and state constitutions. *See* ART. OF CONFED. art. V, cl. 5; U.S. CONST. art. I, §6, cl. 1. The Constitution's Framers recognized the need to inoculate legislators against claims arising from governmental business.[3]

From the start, and to the present, courts have recognized the purpose of Speech or Debate immunity is "to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808); *see Kilbourn v. Thompson*, 103 U.S. 168, 203-04 (1881) (following *Coffin*). The

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[3] *See* 2 WORKS OF JAMES WILSON 38 (Andrews ed. 1896) ("In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."); 8 WORKS OF THOMAS JEFFERSON 322 (Ford ed. 1904) ("representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any").

Clause was not "written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 502 (1975).[4] It guarantees "that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 330 (Pa. 1986) (citation omitted). The Clause ensures legislative discretion is not "inhibited by judicial interference or distorted by the fear of personal liability." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998).

Legislators thus are entitled to absolute immunity for their legislative activities. *Id.* at 49; *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). But the Clause does not just protect against liability. It also bars even the filing of a lawsuit against a legislator for acts in the legislative arena. *See Consumers Educ.*, 368 A.2d at 680-81 (holding lawsuit against Senator should have been dismissed on Speech or Debate grounds). As this Court has explained, to realize the promise of the Speech or Debate Clause, "we must not only insulate the legislator against the results of litigation brought against him for acts in the discharge of the

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[4] This Court relies on United States Supreme Court decisions to interpret the Speech or Debate Clause of the Pennsylvania Constitution. *See Consumers Educ. & Prot. Ass'n v. Nolan*, 368 A.2d 675, 681 (Pa. 1977).

responsibilities of his office, but also relieve him of the responsibility of defending against such claims." *Consumer Party*, 507 A.2d at 331; *see also McNaughton v. McNaughton*, 72 Pa. D. & C. 4th 363, 369 (Dauphin 2005) (holding Speech or Debate Clause protects against discovery).

The Speech or Debate Clause is applied "broadly to effectuate its purposes." *Eastland,* 421 U.S. at 501. It "attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376); *see Consumers Educ.*, 368 A.2d at 681 (stating same). Legislative Immunity thus covers a "host of kindred activities" beyond literal speech or debate.[5] *National Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 630 (1st Cir. 1995). And because an investigation can take a legislator anywhere, courts readily apply immunity far beyond the walls of the legislative chamber.[6] *See Firetree, Ltd. v. Fairchild*, 920 A.2d 913, 919-20 (Pa. Commw. 2007) ("legitimate legislative activity extends beyond Floor debate on proposed legislation, and it is not confined

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[5] *See Youngblood v. DeWeese*, 352 F.3d 836, 840 (3d Cir. 2003) (explaining that protected activities include voting on a resolution, subpoenaing records, preparing an investigative report, addressing a legislative committee, and speaking to the chamber during a legislative session).

[6] Speech or Debate protection also extends to legislators' "alter egos," including legislative staff members and others who lend aid. *See Gravel v. United States*, 408 U.S. 606, 616-18 (1972) (holding Speech or Debate protection applied to communications between a legislator and an outside expert).

to conduct that actually occurs in the State Capitol building"); *United States v. McDade*, 827 F. Supp. 1153, 1163 (E.D. Pa. 1993) (same).

To sum up, Speech or Debate Immunity prohibits legislators from being "questioned" in any lawsuit—voluntarily or involuntarily, and whether party to a suit or not—about matters in the legislative sphere. The General Assembly relies on this protection as an institution, and legislators rely on it as individuals. *See In re Grand Jury Investigation*, 587 F.2d 589, 593 (3d Cir. 1978) (the Clause is of "great institutional importance to the House as a whole, [and] it is also personal to each member"). Speech or Debate Immunity guarantees the General Assembly protection from interference with its constitutional role. And in case after case, the Legislature has successfully invoked that shield against attempts to burden the institution and its individual Members with lawsuits over legislative acts.[7]

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[7] *See, e.g.*, *Smolsky v. Pennsylvania General Assembly*, 34 A.3d 316, 322 (Pa. Commw. 2011) (Speech or Debate Immunity held applicable; lawsuit against General Assembly over constitutionality of legislative enactment), *aff'd*, 50 A.3d 1255 (Pa. 2012); *Finn v. Rendell*, 990 A.2d 100, 106 (Pa. Commw. 2010) (same; lawsuit against General Assembly seeking to compel appropriation of funds); *Lincoln Party v. General Assembly*, 682 A.2d 1326, 1333 (Pa. Commw. 1996) (same; lawsuit against General Assembly seeking to delay vote on proposed constitutional amendment); *Jubelirer v. Singel*, 638 A.2d 352, 354 (Pa. Commw. 1994) (same; lawsuit against legislators over voting on seating of Senators); *Kennedy v. Commonwealth*, 546 A.2d 733, 735-36 (Pa. Commw. 1988) (same; lawsuit against General Assembly over constitutionality of legislative enactment);

(footnote continued on next page)

B. The collateral order doctrine applies to the denial of absolute immunity from suit.

A key purpose of an absolute immunity defense—such as Sovereign Immunity or Speech or Debate Immunity—is to protect officials from lawsuits over government business. So it should come as no surprise that courts across the country almost always find denials of those protections immediately appealable.

1. This Court takes a permissive approach to the collateral order doctrine.

The collateral order doctrine was first adopted by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). It permits immediate appeals from orders that "determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. Starting in the 1970s, this Court adopted the *Cohen* approach to collateral orders. *See Bell v. Beneficial Consumer Disc. Co.*, 348 A.2d 734, 735 (Pa. 1975); *Pugar v. Greco*,

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Cianfrani v. State Employees Ret. Bd., 426 A.2d 1260, 1261 (Pa. Commw. 1981) (same; claim that retired legislator's vote should be construed as assent to application of legislation to him), *aff'd*, 460 A.2d 753 (Pa. 1983); *see also Melvin v. Doe*, 48 Pa. D. & C. 4th 566 (Allegheny 2000) (Wettick, J.) (holding deposition of Senator barred on Speech or Debate grounds, where deposition would have inquired into the Senator's discussions about nominations for judicial vacancies).

394 A.2d 542, 545-46 (Pa. 1978); *Fried v. Fried*, 501 A.2d 211, 214 (Pa. 1985). The Court also adopted *Cohen*'s iteration of the collateral order test, which provides that an order is immediately appealable if:

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

Pugar, 394 A.2d at 545-46 (citing *Cohen*, 337 U.S. at 546). Later, this Court incorporated the collateral order doctrine into its procedural rules. *See* Pa.R.A.P. 313 (Official Note) (stating rule "is a codification of existing case law with respect to collateral orders" and citing *Pugar*). The collateral order doctrine thus is firmly entrenched in Pennsylvania law.

To be sure, Pennsylvania collateral order decisions have not always mirrored—and currently do not mirror—those of federal courts. At first, our courts construed the doctrine more narrowly. In the mid-1980s, the Commonwealth Court began strictly construing the first requirement—separability—as requiring an order must "not relate in any way to the merits of the action itself." *Doe v. Commonwealth*, 524 A.2d 1063, 1065 (Pa. Commw. 1987). This Court later rejected that cramped approach, and instead looked to federal

decisions in holding that separability relates to a case's legal merits, not its factual predicate. *See Ben v. Schwartz*, 729 A.2d 547, 551-52 (Pa. 1999); *accord Melvin v. Doe*, 836 A.2d 42, 46 (Pa. 2003) (rejecting attempted "return" to *Doe*-based approach); *see also Geniviva v. Frisk*, 725 A.2d 1209, 1213-14 (Pa. 1999) (applying federal collateral order decisions).

Since *Ben*, this Court has headed in the opposite direction, taking a broader view of the doctrine than the federal courts. For instance, in *Pridgen v. Parker Hannifin Corporation*, 905 A.2d 422 (Pa. 2006), the Court exhibited a subtle—yet perceptible—difference in approach. The Court held a trial court order refusing to apply a statute of repose was immediately appealable, even though the Third Circuit had just decided a similar order was not. *See id.* at 433-34 & n.14 (citing *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163 (3d Cir. 2006)).

The Court was less understated a few years later, in *Commonwealth v. Harris*, 32 A.3d 243 (Pa. 2011). There, it openly rejected the United States Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), which held that orders for disclosure of privileged material are not immediately appealable. As this Court later explained, *Mohawk* is "at odds with our own jurisprudence." *Shearer v. Hafer*, 177 A.3d 850, 857 (Pa. 2018); *see also Commonwealth v. Wright*, 78 A.3d 1070, 1079 (Pa. 2013) (applying doctrine to order denying defendant's request to represent himself, as the order injured his

"dignity and autonomy, and this harm cannot be repaired after a judgment on the merits"); *Commonwealth v. Williams*, 86 A.3d 771, 784 (Pa. 2014) (applying doctrine to order for prosecutor to disclose notes of witness interviews).

In sum, starting with *Ben*'s rejection of *Doe*, and continuing with *Harris*' rejection of *Mohawk*, this Court has followed a unique collateral order route. Even though the Court insists the doctrine remains narrow, admittedly it "has diverged from the federal approach in some regards." *Shearer*, 177 A.3d at 858. This Court is more receptive to finding orders immediately appealable than the federal courts.

The intermediate appellate courts' application of this Court's collateral order precedents has been uneven. The Superior Court seems to be faithfully applying this Court's directives. *See, e.g.*, *Commonwealth v. Schultz*, 133 A.3d 294, 301-05 (Pa. Super. 2016) (doctrine applied to order relating to right to counsel); *Richner v. McCance*, 13 A.3d 950, 955-58 (Pa. Super. 2011) (doctrine applied to *lis pendens* defense); *Castellani v. Scranton Times, LP*, 916 A.2d 648, 652 (Pa. Super. 2006) (acknowledging shift following *Ben*). The Commonwealth Court, however, has not followed suit—as discussed below.

2. The narrower federal view allows immediate appeals from denials of absolute immunity.

As noted, federal courts take a narrower view of the collateral order doctrine than this Court. But even under the federal approach, trial court denials of claims

of absolute immunity from suit are immediately appealable.

Perhaps the most significant Supreme Court case in this area is *Mitchell v. Forsyth*, 472 U.S. 511 (1985). There, the Court considered a lower court's denial of a former attorney general's claim that he enjoyed qualified immunity from having to defend against a plaintiff's lawsuit over illegal wiretapping. The Court explained that a collateral order's "major characteristic" is that "unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all." *Id.* at 525 (citation omitted). This led the Court to declare:

> the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.

Id. The Court thus decided the denial order was immediately appealable.[8] *Id.* at 526-30; *accord George v. Rehiel*, 738 F.3d 562, 571 (3d Cir. 2013).

Mitchell's roots trace to two earlier decisions. First, in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the trial court denied a claim of absolute presidential immunity from a government employee's civil lawsuit over his firing for testifying

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[8] *Mitchell*'s endurance is shown by the Court's later reliance on that decision in holding that orders denying claims of Eleventh Amendment immunity are immediately appealable. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44, 147 (1993).

before Congress. The Court held the denial of the immunity defense was an immediately appealable collateral order. *Id.* at 741-43. In reaching that decision, the Court pointed to the serious nature of the defense and threat of a "breach of essential Presidential prerogatives under the separation of powers" if an immediate appeal was not allowed. *Id.* at 743.

Second, and more importantly, the *Mitchell* court relied on *Helstoski v. Meanor*, 442 U.S. 500 (1979). There, the trial court denied a legislator's motion to dismiss an indictment on Speech or Debate grounds. The legislator responded by moving for a writ of mandamus. *Id.* at 504. The Supreme Court rejected the writ request, reasoning the legislator had a right to an immediate appeal from rejection of his Speech or Debate defense under the collateral order doctrine. *Id.* at 506-08.

Comparing "the fundamental guarantees of the Speech or Debate Clause" to double jeopardy protection, the *Helstoski* Court explained that an immunity claim is "collateral to, and separable from, the principal issue" in dispute.[9] *Id.* at 507 (citation omitted). The Court also pointed out that an immediate appeal was necessary because "the Speech or Debate Clause was designed to protect

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[9] Later in its opinion, the Court cited existing Third Circuit collateral order precedent with approval—specifically, *United States v. DiSilvio*, 520 F.2d 247 (3d Cir. 1975). There, the court of appeals held denial of a double jeopardy assertion is an immediately appealable collateral order under *Cohen*. *Id.* at 248 n.2a.

Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.* at 508 (citation omitted). Put another way, if a legislator "is to avoid *exposure* to" questioning about legislative acts, "and thereby enjoy the full protection of the Clause," then the challenge "must be reviewable before ... exposure occurs." *Id.* at 508 (italics in original; cleaned up).

Together, the *Mitchell-Nixon-Helstoski* trinity broadly holds that trial court orders denying claims of absolute immunity from suit, including Speech or Debate Immunity, are always immediately appealable under the collateral order doctrine. And in the wake of those decisions, the Third Circuit has routinely held as such.[10] *See In re Montgomery County*, 215 F.3d 367, 373 (3d Cir. 2000) (collecting cases). This holding also applies to absolute immunity claims by state and local legislators. *See, e.g.*, *Youngblood v. DeWeese*, 352 F.3d 836, 838 (3d Cir. 2003) (Pennsylvania State Representatives); *Larsen v. Senate of Commonwealth of Pa.*, 152 F.3d 240, 245 (3d Cir. 1998) (Pennsylvania State Senators); *Acierno v.*

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[10] The same is true in the other circuits, too. *See, e.g.*, *Agromayor v. Colberg*, 738 F.2d 55, 57-58 (1st Cir. 1984); *United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980); *United States v. Jefferson*, 546 F.3d 300, 308-09 (4th Cir. 2008); *Williams v. Brooks*, 945 F.2d 1322, 1325 (5th Cir. 1991); *Maitland v. Univ. of Minn.*, 260 F.3d 959, 962 (8th Cir. 2001); *United States v. Renzi*, 651 F.3d 1012, 1018-19 (9th Cir. 2011); *Woods v. Gamel*, 132 F.3d 1417, 1419 (11th Cir. 1998); *United States v. Rostenkowski*, 59 F.3d 1291, 1296-97 (D.C. Cir. 1995).

Cloutier, 40 F.3d 597, 605-06 (3d Cir. 1994) (county council members).

The allowance of immediate appeals from absolute immunity denials is now so commonplace in federal court that it barely gets discussed. The issue is uncontested, and hardly warrants a mention in court decisions—even those rejecting immunity claims on the merits. *See, e.g.*, *Fowler-Nash v. Democratic Caucus of the Pa. House of Representatives*, 469 F.3d 328, 330 n.1 (3d Cir. 2006) (noting appellate jurisdiction under collateral order doctrine in one footnoted sentence). In short, even under the narrower federal conception of the collateral order doctrine, denials of absolute immunity claims comfortably fit within its boundaries.

C. This Court should hold that denials of absolute immunity defenses are immediately appealable collateral orders.

This Court should hold, consistent with the above federal cases, that trial court orders denying absolute immunity defenses are immediately appealable under the collateral order doctrine. As explained below, (1) those orders are separate from—and collateral to—the plaintiff's cause of action, (2) the right involved is too important to deny review, and (3) the right will be irreparably lost absent immediate review. *See Harris*, 32 A.3d at 248 (stating collateral order test).

1. Separability: Immunity questions are separate from and collateral to the plaintiff's claims.

First, a trial court order qualifies as separate and collateral where an appellate court's review does not entail a decision on the merits of the plaintiff's claims. *See Ben*, 729 A.2d at 549-50.

Absolute immunities—whether Sovereign Immunity, Speech or Debate Immunity, Judicial Immunity, or a similar protection—easily meet this criterion, as they always present legally separate questions from the lawsuits where they arise. This is true even if a court must give some consideration to the plaintiff's allegations to decide the immunity claim. *See Pridgen*, 905 A.2d at 433 (an immunity appeal "raises a question that is significantly different from the questions underlying plaintiff's claim on the merits" even if it is "practically intertwined with the merits" (citation omitted)); *Mitchell*, 472 U.S. at 528-29 ("a question of immunity is separate from the merits ... even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue").

Here, for example, the legal issue of whether the Judiciary has Sovereign Immunity differs from Ms. Brooks' claim for damages arising from her injuries after she walked into an unmarked glass wall. The immunity question entails an analysis of whether the Family Court qualifies as the "Commonwealth" and whether an immunity exception applies. *See, e.g.*, *Page v. City of Phila.*, 25 A.3d

471, 475-78 (Pa. Commw. 2011) (discussing Sovereign Immunity analysis). The same is true of Speech or Debate Immunity. That analysis involves consideration of whether a Legislator's activities are within the sphere of legitimate legislative activity—a question separate from the plaintiff's underlying claim for relief. In each instance, the courts can address the immunity question without reaching the merits of the plaintiff's claim.

2. Importance: Absolute immunity claims, rooted in the Constitution, are too important to deny review.

Second, an order is immediately appealable if the right involved is too important to deny review. *See Harris*, 32 A.3d at 248.

Claims of absolute immunity from suit, rooted in constitutional guarantees, easily qualify. They safeguard public officials from entanglement in lawsuits, protect taxpayer dollars, and—as for Speech or Debate Immunity—serve an essential role in the Separation of Powers. *See Mullin*, 870 A.2d at 779 (Sovereign Immunity ensures public funds "are not subject to unnecessary depletion"); *Nixon*, 457 U.S. at 743 (denial of immediate review of immunity claim could cause a "breach of essential Presidential prerogatives under the separation of powers"); *Bogan*, 523 U.S. at 52 (Speech or Debate Immunity protects against "judicial interference"). These protections benefit the People by ensuring the integrity of their government and the freedom of their chosen officials to act without worry

about possible litigation recriminations. *See Eastland,* 421 U.S. at 502 (Speech or Debate Immunity functions "to protect the integrity of the legislative process by insuring the independence of individual legislators"); *Coffin*, 4 Mass. at 27 (Speech or Debate immunity "support[s] the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal"). Put another way, if lesser protections like statutes of repose meet the importance element, *see Pridgen*, 905 A.2d at 433, then the Constitution's absolute immunities from suit certainly qualify, too.

3. Irreparability: Without immediate review, absolute immunities are lost forever.

Third, and finally, immediate appeal is allowed if the claimed right will be lost forever without immediate review. *See Harris*, 32 A.3d at 248.

Absolute defenses qualify here for a seemingly obvious reason: they are protections against suit—not just ultimate liability. For its part, the Sovereign Immunity law specifies that the Commonwealth and its officials are "immune from suit" absent a statutory waiver by the General Assembly. 1 Pa.C.S. §2310. Speech or Debate Immunity operates identically. As this Court explained over 40 years ago, "we must not only insulate the legislator against the results of litigation brought against him for acts in the discharge of the responsibilities of his office, but also relieve him of the responsibility of defending against such claims."

Consumer Party, 507 A.2d at 331 (emphasis added).

The Third Circuit similarly recognizes that Legislative Immunity "encompasses not only immunity from liability, but also immunity from suit." *Acierno*, 40 F.3d at 605-06. This has led the court to find that, "[i]f required to await final judgment on the merits of the underlying action before seeking appellate review," a party claiming immunity will "irretrievably lose the right not to stand trial in the first place." *Montgomery County*, 215 F.3d at 373. Immediate review "is necessary to preserve the protections such immunity affords." *Id.*

In sum, claims of absolute immunity relieve parties of the responsibility to defend against lawsuits. Denials of those defenses thus must lead to immediate appellate review, or those protections will be gone forever.

D. The Commonwealth Court incorrectly refuses to allow immediate appeals from absolute immunity denials.

Unlike the above cases, the Commonwealth Court's decisions hold that trial court denials of absolute immunity claims are not immediately appealable. Its cases diverge from this Court's collateral order decisions and clash with those of the federal courts.[11] This Court should take this opportunity to overturn the

[11] The Commonwealth Court also seems unaware of some key federal cases, as it has never even cited *Helstoski*, despite that decision's obvious import.

Commonwealth Court's treatment and instead hold, consistent with federal decisions, that denials of absolute immunity claims—whether Sovereign Immunity, Speech or Debate Immunity, Judicial Immunity, or a similar protection—are immediately appealable under the collateral order doctrine.

1. The Commonwealth Court fails to recognize that absolute immunity includes immunity from suit.

The flaw in the Commonwealth Court's reasoning lies with its finding that absolute immunity defenses are not lost absent immediate review because review is available after final judgment. But that is no consolation at all. Absolute immunity defenses are defenses against suit—not just liability. *See* 1 Pa.C.S. §2310; *Consumer Party*, 507 A.2d at 331. By the time a case reaches post-judgment appellate review, the party claiming immunity from suit has been forced through the very litigation it had a right to avoid in the first place. Postponing review guarantees immunity from suit will be lost, and can never be reclaimed.

2. The Commonwealth Court departs from this Court's controlling collateral order precedents.

The Commonwealth Court's cases also conflict with this Court's collateral order decisions.[12] *See* Section B.1, *supra*; *Pridgen*, 905 A.2d at 433 (holding order

[12] They conflict with the Superior Court's cases, too. *See, e.g.*, *Yorty v. PJM*

(footnote continued on next page)

refusing to apply repose statute met irreparable loss element, given "the substantial cost" of a defense and "the clear federal policy to contain such costs in the public interest"); *Wright*, 78 A.3d at 1079 (holding order denying defendant's right to represent himself met irreparable loss element, as the order injured his "dignity and autonomy, and this harm cannot be repaired after a judgment on the merits"). That includes the decision in this case, where the Commonwealth Court followed its own decisions, rather than this Court's teachings.

Here, the Commonwealth Court relied chiefly on *Sylvan Heights Realty Partners, LLC v. LaGrotta*, 940 A.2d 585 (Pa. Commw. 2008), which held that an order denying a Legislator's claim of Speech or Debate Immunity was not immediately appealable. In reaching that conclusion, the court waved away this Court's decisions in *Ben* and *Pridgen* in favor of a *Doe*-style analysis, finding the appeal premature because the plaintiff had pleaded around the immunity defense, thus necessitating discovery.[13] *Id.* at 588-90; *see also Doe*, 524 A.2d at 1065. But this Court rejected *Doe* in *Ben*—and with good reason, as the *Doe* analysis

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Interconnection, LLC, 79 A.3d 655, 660-62 (Pa. Super. 2013) (holding collateral order doctrine applied to a trial court's denial of a federal immunity defense).

[13] *Sylvan Heights* has been the target of scholarly criticism for failing to follow *Pridgen*. *See* Merenstein, *Pennsylvania's Appellate Courts Strike Out On Their Own Collateral Order Path—Part Two*, 88 PA. B.Q. 1, 7-8 (Jan. 2017).

improperly collapses jurisdiction into the merits. *See Ben*, 729 A.2d at 551-54; *see also Fowler-Nash*, 469 F.3d at 330 n.1 & 340 (finding order immediately appealable but then rejecting the immunity claim's merits).

3. The Commonwealth Court's approach weakens absolute immunity defenses.

Lastly, the Commonwealth Court's decisions create disparate treatment of immunity defenses. In federal court, parties denied absolute immunity may immediately appeal. In Pennsylvania state court, they may not. *Compare Youngblood*, 352 F.3d at 838, *with Sylvan Heights*, 940 A.2d at 590. Without immediate review, parties claiming absolute immunity will suffer the very thing they are entitled to protection from. The Commonwealth Court's decisions thus make immunity a second-class right in state court. Our Constitution, however, specifies that legislators "shall not be questioned in any other place" for their legislative activities. PA. CONST. art. II, §15 (emphasis added). The forum does not dictate the scope of the protection. It applies the same, regardless of venue. *Cf. Consumers Educ.*, 368 A.2d at 681 (holding Pennsylvania's Speech or Debate Clause is to be interpreted consistent with its federal counterpart). This Court should reject the disparity created by the Commonwealth Court and elevate absolute immunity protections to the status they deserve.

CONCLUSION

For these reasons, *amicus curiae*, the General Assembly of the Commonwealth of Pennsylvania, requests that the Court reverse the decision of the Commonwealth Court.

Respectfully submitted,

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