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SUPREME COURT OF PENNSYLVANIA

37 – 70 MAP 2023
(CONSOLIDATED)

In re: APPEAL OF PROSPECT CROZER LLC FROM THE DECISION OF THE BOARD OF ASSESSMENT APPEALS OF DELAWARE COUNTY, PA

Appeal of: Chester Upland School District

Appeal From the Order of the Commonwealth Court at No. 1596 CD 2019 entered on September 28, 2022 Vacating and Remanding the Order of the Delaware County Court of Common Pleas, Civil Division, at No. 2016-010839 Dated October 11, 2019 and entered on October 15, 2019

APPELLEE'S BRIEF

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INTRODUCTION

This Court should affirm. Under well-established precedent of this Court and the common law generally, the order on appeal was invalid because former Judge Braxton was powerless to issue it, former Judge Braxton having previously vacated his judicial office by accepting and serving in a Constitutionally incompatible position. Despite the clarity of the Constitutional text, the School District argues that former Judge Braxton was exempt from it as a senior judge. But no authority exempts senior or "part-time" judges from the Constitution. The School District also misplaces its reliance on precedent involving judicial discipline. But this is not, and never has been, a disciplinary proceeding, nor does the potential for such proceedings immunize an invalid judgment from the normal avenues of appellate review for a Constitutional violation.

The facts are as clear is the law. In particular, there is no dispute about when former Judge Braxton began serving in an incompatible position, and—despite the School District's repeated insistence to the contrary—conclusive evidence established that neither this Court nor AOPC ever authorized such dual service. This factual record is fatal to the School District's position. Perhaps for that reason, the School District

resorts to repeatedly characterizing the Commonwealth Court as biased—an allegation that is as inaccurate as it is improper.

COUNTER-STATEMENT OF THE CASE

I. Procedural History

This Court appointed former Judge Braxton to preside over property tax cases involving Prospect in Delaware County in July 2017. (R. 30a). Former Judge Braxton conducted bench trials and issued final orders in four sets of consolidated cases. The consolidated cases concern the valuation of property owned by Prospect in Delaware County (Nos. 37-70 MAP 2023 and 503-504 MAL 2022); whether certain of Prospect's property is exempt from property taxation (Nos. 505-506 MAL 2022); and whether Prospect is entitled to refunds of excess tax previously paid (Nos. 499-502 MAL 2022).[1] The order at issue in these appeals (37-70 MAP 2023) was dated October 11, 2019 and docketed on October 15, 2019. (R. 31a, 35a).

However, former Judge Braxton had not only accepted an appointment but had begun service on the Philadelphia Board

[1] The School District and other taxing authorities have filed Petitions for Allowance of Appeal in each of these sets of cases. This Court granted the School District's petition in cases 37-70 MAP 2023 and has reserved judgment on the remaining petitions pending the outcome of this appeal.

of Revision of Taxes ("BRT") in June 2019, before issuing the order on appeal. *See below* at Counter Statement of the Case § II.A. Judge Braxton did not disclose to the parties that he had begun serving on the BRT. Instead, he stated on the record on June 24, 2019, that he had been appointed to the BRT but that he planned to begin serving on it in the future. *Id.* § II.C. In other words, he actively misled the parties by suggesting that his incompatible service had not yet commenced, but would begin at some point in the future. For that reason, Prospect was unaware that former Judge Braxton actually began serving on the BRT until after he had issued the order on appeal. *See id*.

In late January 2020, after all of the orders on appeal had been issued, Prospect's counsel learned for the first time that former Judge Braxton may have begun serving on the BRT before he issued the orders on appeal. *See id*. (Prospect did not receive actual confirmation of former Judge Braxton's simultaneous service until it received the City of Philadelphia's response to its Right to Know request in June 2020. (R. 390-91a)). Prospect promptly and properly investigated the structural error created by former Judge Braxton's acceptance of an incompatible position which, under common law, rendered him powerless to issue the order on appeal. *See id*. On March 6, 2020, Prospect filed an Application to Vacate the order

on appeal in Commonwealth Court. (*See* Application to Vacate, filed in Commonwealth Court No. 1596 CD 2019). Between late January 2020 and March 6, 2020, there were no active proceedings in either the trial court or the Commonwealth Court. The Commonwealth Court deferred ruling on the Applications to Vacate. (*See* May 27, 2020 Order, filed in Commonwealth Court No. 1596 CD 2019). The parties briefed the merits of the appeals, and the Commonwealth Court heard argument on March 10, 2022. Throughout the Commonwealth Court appeal, the School District repeatedly and vociferously represented that this Court had authorized former Judge Braxton's constitutionally incompatible service on the BRT. *See below* at pp. 8-10.

Following argument, on March 17, 2022, the Commonwealth Court issued an order retaining jurisdiction but remanding to the Delaware County Court of Common Pleas to "issue a report with findings of fact" within 60 days on three limited, discrete issues:

> (1) The date on which Senior Judge Braxton assumed his position on the Philadelphia Board of Revision of Taxes and began receiving compensation therefor;

> (2) Whether Senior Judge Braxton's continued work on the above-captioned assessment appeals of Prospect Crozer, LLC while simultaneously serving on the Philadelphia Board of Revision of Taxes was approved in writing or in some other way by the Pennsylvania Supreme Court; and
>
> (3) The date on which Prospect Crozer, LLC learned that when Senior Judge Braxton issued the orders in the above-captioned appeals, he had already assumed his position with the Philadelphia Board of Revision of Taxes.

(R. 79a (amended order at R. 82a)). On March 31, 2022, the Delaware County Court of Common Pleas scheduled a hearing for April 20, 2022 to address the Commonwealth Court's questions. (R. 87a).

Following that hearing, on May 4, 2022,[2] the trial court issued findings of fact (R. 496a), and the parties submitted additional briefing to the Commonwealth Court, which filed its opinion on September 28, 2022. *In re: Appeal of Prospect Crozer LLC*, 283 A.3d 428 (Pa. Cmwlth. 2022). The Commonwealth Court held the order on appeal was invalid because former

[2] The trial court's findings were dated May 4, 2022 but docketed May 11, 2022.

Judge Braxton vacated his judicial office as a matter of law. The Commonwealth Court alternatively ruled that Judge Braxton's decision must be vacated on the merits. *Id.* at 447-50.

Meanwhile, on April 13, 2022, the School District filed a King's Bench petition in this Court, requesting that it assume jurisdiction over this case on the basis that this Court and not the Commonwealth Court should decide whether Judge Braxton forfeited his judicial office. (R. 88-187a). This Court denied the King's Bench petition on August 10, 2022. (R. 893-94a).

II. Factual Background Regarding the Invalidity of the Order on Appeal

A. Judge Braxton assumed an incompatible position on the BRT and began receiving payment for that service before issuing the orders on appeal.

It is undisputed that Judge Braxton "assumed his position on the Philadelphia Board of Revision of taxes and began receiving compensation therefor" before he entered the orders on appeal. (*See* R. 80a (identifying questions asked by Commonwealth Court on remand)). "Both the testimony of Senior Judge Braxton and the Declaration of the Director of Human Resources for the City of Philadelphia established the date of Senior Judge Braxton's appointment to the [BRT] as May 19, 2019." *In re: Appeal of Prospect Crozer*, 283 A.3d at 439.

Further, "[t]he parties stipulated that Senior Judge Braxton received his first paycheck from the [BRT] on June 16, 2019." *Id.*

Although former Judge Braxton testified that he could not remember the exact date that he began hearing cases on the BRT, he acknowledged that it would have been in fall 2019. (*See* R. 370a at 96:9-20). Further, the fact that former Judge Braxton was being compensated for his work on the BRT in June 2019 means that he was an active member of the BRT – otherwise there would be no reason for him to be compensated for his service on that board.

B. This Court did not approve Judge Braxton's simultaneous service.

The Commonwealth Court also directed findings regarding "[w]hether Senior Judge Braxton's continued work on the above-captioned assessment appeals of Prospect Crozer, LLC while simultaneously serving on the Philadelphia Board of Revision of Taxes was approved in writing or in some other way *by the Pennsylvania Supreme Court*." (R. 80a (emphasis added)). That question was likely prompted by the School District's repeated and incorrect insistence throughout the Commonwealth Court appeals that this Court had done so, as detailed below:

Filing	School District Statement	R.R. Page
Sch. Dist. Ans. to Prospect App. to Vacate	"Judge Braxton Obtains the Supreme Court's Authorization to Complete These Cases"	51a
Id.	"Judge Braxton transparently advised counsel that their decisions regarding briefing deadlines had to be shared 'with the Supreme Court to let them know what is going on.' [Cite]. *Thus, the Supreme Court was aware of Judge Braxton's impending retirement from the judiciary, his appointment to the BRT, and the status of these trials*." (emphasis added)	52-53a
Id.	"Judge Braxton advised the parties that he is now willing to 'carry things further' out in the calendar to accommodate counsel because 'the Supreme Court has authorized' him to extend the parties' briefing deadlines. [Cite] *Clearly, Judge Braxton had spoken with AOPC and obtained the Supreme Court's authorization to allow additional time for the parties' briefing and to allow Judge Braxton to continue to preside over these matters to conclusion*." (emphasis added)	54a

Filing	School District Statement	R.R. Page
Sch. Dist. Response to Prospect Supp. to App. to Vacate	"Judge Braxton represented to all counsel that he had the approval of the Pennsylvania Supreme Court, communicated through [AOPC], to complete these matters even though he accepted an appointment to [BRT]. Because Judge Braxton's statements and representations both on and off the record are presumptively truthful and accurate, it is Prospect's burden to prove that Judge Braxton made a false representation regarding the authority granted to him by the Supreme Court as communicated to him by the AOPC."	57-58a
Id.	"Prospect's 'public record evidence' fails to prove that Judge Braxton's completion of these matters as a visiting senior judge-*which was authorized by the Supreme Court*-was improper." (emphasis added)	58a

Filing	School District Statement	R.R. Page
Id.	"[T]he Supreme Court's approval, communicated through the AOPC, for Judge Braxton to complete this finite assignment . . . after his appointment to the BRT is a presumptively proper interpretation of the Code [of Judicial Conduct]."	59a
Sch. Dist. Commonwealth Ct. Merits Brief	"Judge Braxton transparently advised counsel that the parties' briefing deadlines had to be shared 'with the Supreme Court to let them know what is going on.' [Cite] *Thus, the Supreme Court was aware of Judge Braxton's impending retirement from the judiciary, his appointment to the BRT, and the status of these trials*." (emphasis added).	76a
Id.	"Judge Braxton stated he could confirm the tentative briefing schedule because 'the Supreme Court has authorized' him to extend the parties' briefing deadlines. [Cite] *The context of Judge Braxton's statement indicates that the Supreme Court authorized him to preside over these matters to their conclusion*." (emphasis added)	77a

See also In re Prospect Crozer, LLC, 283 A.3d at 437 ("The School District responded . . . that the Pennsylvania Supreme Court approved Senior Judge Braxton's completion of this judicial assignment after his appointment to the [BRT].")

However, on remand, the only relevant evidence conclusively established that this Court gave no such approval. In particular, a certification from Pennsylvania Court Administrator Geoff Moulton, ("Moulton Certification") states:

> After an examination by the Administrative Office of Pennsylvania Courts ("AOPC") of its records pertaining to the time period from 2017 through 2020, as well as an examination of the records of the Prothonotary of the Supreme Court of Pennsylvania, I hereby certify **there is no record or entry of any order, decision, or other determination of the Supreme Court of Pennsylvania, the Chief Justice or any other Justice, or AOPC approving simultaneous service, by the Honorable John L. Braxton, on the Philadelphia Board of Revision of Taxes and as a senior judge within Pennsylvania's Unified Judicial System**. Any such record or entry would be in my custody as Court Administrator of Pennsylvania.

(R. 393a (emphasis added)). Judge Moulton's certification was admissible and probative pursuant to 42 Pa.C.S. §§ 6103 and

6104. *See also* Pa. R. Evid. 803(10)(A) (admissibility of certification that a record does not exist). Notably, the School District does not acknowledge the existence of the Moulton Certification in its Petition for Allowance of Appeal or its Opening Brief.

The School District offered no evidence supporting its contention that this Court had approved simultaneous service by former Judge Braxton on the BRT and as a Senior Judge. Instead, the School District elicited hearsay testimony from former Judge Braxton regarding communications he allegedly had with individual employees of AOPC, including Joseph Mittleman. (*See* R. 338-46a, 372-73a). Judge Braxton did not testify that this Court itself, or any Justice, had approved of his simultaneous service. Moreover, former Judge Braxton admitted that nobody from AOPC specifically advised him that he was "permitted to serve as a senior judge with AOPC receiving compensation while at the same time serving in the role of a BRT member also being compensated by the City of Philadelphia." (R. 365-66a at 91:25-92:5). He also admitted that he had not advised AOPC that he "had started employment with the BRT," but rather only that he had been elected to that position. (R. 366a at 92:10-14; *see also* R. 371a at 97:15-24).

Prospect objected to the School District's attempt to elicit hearsay testimony regarding the alleged statements by Mr. Mittleman, and the trial court properly sustained Prospect's objection. (*See* R. 341a at 67:6-13, R. 382-83a at 108:19-109:22). However, the trial court's findings of fact included a number of findings based on the hearsay that the trial court had excluded, including that former Judge Braxton credibly testified that "Mr. Mittleman . . . told Judge Braxton to finish up these cases," (R. 500a ¶ 7.f); that "the AOPC authorized him to complete his conflict cases, the present matters and the criminal matter in Carbon County," (*id.* ¶ 7.i); that his "authority to complete his assignments" was "confirmed," (*id.* ¶ 7.j), and that he "received authority to complete his outstanding judicial assignments," (R. 502a ¶ 10).

After the trial court hearing and in direct response to Judge Braxton's testimony, Mr. Mittleman provided an affidavit[3] that directly contradicted former Judge Braxton's

[3] The trial court expressly permitted evidence in the form of affidavits during the remand proceedings. (*See* R. 292a at 18:12-15) ("You can provide exhibits. You can provide affidavits. You can provide argument, if necessary. You can provide stipulations, and you can call witnesses.")

hearsay testimony. Mr. Mittleman's affidavit stated, among other things, that:

> To the extent that SJ Braxton may have begun his work with the BRT before he completed his work on the tax appeals in CCP Delaware, I had no contemporaneous knowledge of this; **I did not and could not approve any such simultaneous service, as I had no authority to do so; and I know of no official approval of any sort for such simultaneous service by SJ Braxton**.

(R. 505a ¶ 7 (emphasis added)).[4] That is consistent with the Moulton Certification, which, as described above, also confirmed that there was no record of this Court, any Justice of this Court, or the AOPC approving former Judge Braxton's simultaneous incompatible service. (R. 393a).

C. Prospect did not learn that former Judge Braxton had assumed a Constitutionally incompatible office until after the orders were entered.

Even before the Commonwealth Court remanded for additional factfinding, the record was clear that former Judge

[4] The trial court declined to admit the Mittleman Affidavit, which Prospect had submitted as Exhibit C-20, (R. 503-04a), but the Commonwealth Court directed that it be included in the certified record. (R. 891-92a).

Braxton had not disclosed that he had begun service on the BRT before entering the orders on appeal.

Transcripts of former Judge Braxton's comments in these cases and related proceedings evidenced that he never disclosed to the parties that he had begun serving on the BRT. The closest he came was a series of statements he made on the record on June 24, 2019, in which he indicated that he had been appointed to the BRT and planned to begin serving on it in the future. He explained:

> I'm retiring in the month of July. . . . [T]he reality is, I've got to get this matter finished. So I've got to do it as early as possible in the month of July. That's the problem.

(R. 419a at 216:3-9). His remarks concerned scheduling, not his intention to serve on the BRT while still serving as a judge. For instance, he explained that he could not allow the typical 30 days for submission of proposed findings of fact and conclusions of law at the close of trial and indicated that findings had to be submitted in time for him to render decisions by the end of July. (R. 420a at 217:1-6).

Eventually, former Judge Braxton disclosed what he portrayed as a future conflict that required him to expedite the proceedings:

> The good Judges of the City of Philadelphia have elected me to another post to which I'm **going to** leave — **as soon as I leave here, I'm going to do that other post.** And that's why I can't linger here. I have to get this matter done. And the AOPC, the Supreme Court wants me to just finish this and **then I will go on to my next assignment,** which will be something that probably Mr. Kessler is well familiar with. **I'm going to be sitting in Philadelphia as a member of the Board of Revision of Taxes over there**.

(R. 422a at 219:4-20) (emphasis added). This is consistent with Mr. Mittleman's testimony that former Judge Braxton "told me that he had been elected to the [BRT]" and that he "advised" Mr. Mittleman "that he intended to complete his work on the tax assessment appeals in CCP Delaware prior to beginning his work with the BRT." (R. 505a ¶ 6).

Former Judge Braxton's comments indicated that he had been "elected" to serve on the BRT but that he had not yet begun to work in that capacity. They also clearly established former Judge Braxton's understanding that he could not serve in both capacities simultaneously and had to complete his work in Prospect's cases "in the month of July" so that he could begin serving on the BRT. (R. 418a at 215:25-216:9). That was why—as

he explained it—he needed to finish his work on the Prospect matters.

Even though he already had received his first paycheck from the BRT *a week before* he made his comments to the parties, former Judge Braxton failed to disclose to the parties that he intended to serve in both offices simultaneously and that he had already commenced service on the BRT. (R. 396a). He also never claimed that this Court or the AOPC had authorized him to serve in both positions at the same time.

Nevertheless, the School District has insisted without any supportive facts that Judge Braxton had disclosed his simultaneous service to the parties. (*See, e.g.*, Opening Br. at 13). Accordingly, when the Commonwealth Court remanded for additional factfinding, it directed the trial court to make findings regarding "[t]he date on which Prospect Crozer, LLC learned that when Senior Judge Braxton issued the orders in the above-captioned appeals, he had already assumed his position with the Philadelphia Board of Revision of Taxes." (R. 81a).

Consistent with the existing record, the new evidence established that Prospect did not learn of former Judge Braxton's forfeiture of office until after he issued the order on appeal. At the trial court hearing, Prospect introduced affidavits of its counsel Luke P. McLoughlin (R. 396a) and Alan

C. Kessler (R. 398a) as well as Leslie M. Gerstein (R. 394a), an attorney who does not represent Prospect in these cases but who practices before the BRT.[5] *In re Prospect Crozer, LLC*, 283 A.3d at 438.

Ms. Gerstein, an attorney at Klehr Harrison Harvey Branzburg LLP who practices before the BRT, testified in her affidavit that she observed former Judge Braxton sitting as a member of the BRT and actively participating during proceedings in fall 2019, and that she advised Prospect's counsel of that fact in the latter part of January 2020. (R. 394a; *see also* R. 309a at 35:10-21).

Mr. McLoughlin testified in his affidavit that on or about December 18, 2019, he attended a proceeding at the BRT in another case and that he observed a nameplate for former Judge Braxton where a member of the BRT would normally sit.

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[5] The School District objected to the affidavits on the basis that the declarants were supposedly "not available for cross examination." (R. 305a at 31:5-7). However, Ms. Gerstein, Mr. McLoughlin, and Mr. Kessler were each present and available to testify at the April 20, 2022 hearing, although the School District declined to cross-examine any of them. (*See* R. 309a at 35:20-24, R. 313a at 39:25-40:1, R. 315a at 41:15-17, R. 374a at 100:9-12). The School District raises no issue in this Court about the trial court or the Commonwealth Court's consideration of those affidavits.

(R. 396a; *see also* R. 316-17a at 42:20-43:5). Mr. McLoughlin also testified that in late January 2020, he reached out to the Philadelphia Law Department for information on when former Judge Braxton commenced his role with the BRT, and that on February 10, 2020, the Philadelphia Law Department responded that it appeared former Judge Braxton was voted onto the BRT on or about May 16, 2019. (R. 396a; *see also* R. 317-18a at 43:7-44:1). Mr. McLoughlin then submitted a right to know request seeking information on the date of former Judge Braxton's first paycheck, and received that information on June 5, 2020. (R. 396a).

Mr. Kessler described in his affidavit unsuccessful efforts to research the date of former Judge Braxton's appointment to the BRT as well as his conversation with Ms. Gerstein in January 2020, in which she informed him that she observed Judge Braxton participating in a BRT hearing in fall 2019. (R. 398a).

In addition, Prospect introduced an email exchange between Mr. McLoughlin and Francois Dutchie, the Chief Deputy Solicitor of Philadelphia's commercial law unit, which further demonstrates Prospect's efforts in February 2020 to investigate former Judge Braxton's acceptance of an

incompatible position while serving as a senior judge. (R. 400-01a; *see also* R. 319-26a at 45:18-52:9).

At the trial court hearing, former Judge Braxton insisted that "[t]hroughout these proceedings, I attempted to keep counsel and the AOPC advised of the fact that I was trying to get my matters finished so that I could walk away from all my judicial responsibilities." (R. 339a at 65:4-8). Importantly, though, he never testified that he advised the parties that he had *actually commenced* service on the BRT, but only that he would allegedly commence such service in the future – that "as soon as I leave here, I'm *going* to do that other post." (R. 422a at 219:10-11) (emphasis added). As described above, the fact that he never made such a disclosure is obvious from his statements on the record.

III. Commonwealth Court's Decision

The Commonwealth Court issued its decision vacating the orders on appeal on September 28, 2022. The Commonwealth Court determined not only that former Judge Braxton's order was void because he had forfeited his judicial office, but also that it was wrong on the merits because it did not include a sufficient rationale for its conclusion. *In re: Appeal of Prospect Crozer LLC*, 283 A.3d at 447, 449-50.

The Commonwealth Court concluded that former Judge Braxton's position on the BRT was incompatible with his service as a senior judge because the BRT "is a municipal corporation or political subdivision of the Commonwealth" and service on the board constitutes a "position of profit." *Id.* at 442-43. The Commonwealth Court further applied the generally accepted rule that "where a single person holds two incompatible offices, the acceptance of the second *ipso facto* vacates the first." *Id.* at 443 (quoting *Fauci v. Lee*, 38 Misc. 2d 564, 567, 237 N.Y.S.2d 469 (N.Y. Sup. Ct. 1963)). The Commonwealth Court held that former Judge Braxton's acceptance of an incompatible office was a non-waivable structural error, *id.*, and it rejected the School District's argument that the Constitutional prohibition on incompatible service was inapplicable to senior judges. *Id.* at 444. Finally, the Commonwealth Court rejected the School District's waiver argument based on the evidence establishing that Prospect was unaware until after the orders on appeal were entered that former Judge Braxton had actually commenced service on the BRT, as opposed to merely accepting an appointment to the BRT. *Id.* at 446-47.

The Commonwealth Court also vacated the order on appeal on the independent basis that it was inadequate on the

merits. The underlying tax assessment appeals involved competing expert opinions on the property's assessment. As the Commonwealth Court observed, former Judge Braxton "deemed both experts credible but relied entirely on [the School District's expert's] valuation without explanation." *Id.* at 447. The Commonwealth Court also noted that former Judge Braxton's summary of the evidence was inaccurate because he mischaracterized the valuation methodology employed by the School District's expert, and because it mis-stated the valuation proposed by Prospect's expert. *Id.* at 448. More importantly, former Judge Braxton "did not explain how [Prospect's expert's] testimony could be accepted but not used, or why it chose to use [a] $74 million [valuation] for all three tax years." *Id.* Further, former Judge Braxton "did not consider, and resolve, the differences in the cost approaches used by each expert, including the different methods used to depreciate the cost valuations." *Id*. Accordingly, his decision did not satisfy the Commonwealth Court's "precedent that, although a trial court may deem one expert more credible than the other, it must explain that decision." *Id*. at 449.

Accordingly, the Commonwealth Court vacated former Judge Braxton's order and remanded for proceedings before a different judge. *Id.* at 449-50. Contrary to the School District's

assertions throughout its brief, the Commonwealth Court did not suggest to the trial court what valuation it should adopt. And, contrary to the School District's framing of the issue on appeal, the Commonwealth Court did not declare the proceedings to be void "ab initio." Instead, it instructed that "the trial court, by a newly assigned judge, must provide an explanation for whatever valuation it sets for the 57.7-acre property that is the subject of this tax assessment appeal." *Id.* at 449. In other words, consistent with the court's precedent, the new opinion must "state 'the basis and reasons for [the court's] decision.'" *Id*. (quoting *Westinghouse Elec. Corp.*, 652 A.2d 1306, 1312 (Pa. 1995)). Finally, the Commonwealth Court directed that "[t]he trial court, on remand, may supplement the record if deemed appropriate but may not supplant the existing record." *Id.* at 450.

SUMMARY OF THE ARGUMENT

The Commonwealth Court was the proper forum to decide this appeal, and it was correct to conclude that the order on appeal was void because former Judge Braxton forfeited his judicial office before entering it.

The School District is wrong that this appeal is a disciplinary proceeding, which would be within the exclusive jurisdiction of this Court or the Court of Judicial Discipline. It is

not. The Commonwealth Court did not impose any sanction on former Judge Braxton or find that he violated the Rules of Judicial Conduct. To the contrary, it expressly reserved such issues to this Court. Instead, the Commonwealth Court's conclusion that the order on appeal was void followed from the incompatible nature of the positions former Judge Braxton served in, not whether his conduct violated the Rules of Judicial Conduct. This case was well within the jurisdiction of the Commonwealth Court as a direct appeal from the Court of Common Pleas. It is about the legitimacy of former Judge Braxton's *rulings*, not about whether his conduct is independently actionable.

The Commonwealth Court also did not err in finding that former Judge Braxton had vacated his judicial office by accepting an incompatible position and concluding that the order on appeal was void as a result. Former Judge Braxton's position on the Philadelphia Board of Revision of Taxes is constitutionally incompatible with his position as a senior judge, as a matter of law. And the undisputed facts established that he accepted and began serving in that incompatible position before issuing the orders on appeal. The only relevant evidence on the issue also conclusively demonstrated that, contrary to the School District's repeated and incorrect

insistence, neither this Court nor AOPC ever authorized former Judge Braxton's incompatible service. The Commonwealth Court also correctly recognized the invalidity of the order on appeal as a non-waivable structural error – and in any event, the evidence proved that Prospect was unaware that former Judge Braxton actually had commenced his Constitutionally incompatible service on the BRT, contrary to what he had told the parties, until *after* former Judge Braxton entered the order on appeal.

Finally, the Commonwealth Court also ruled that the order on appeal violated its precedent by providing no rationale for selecting the School District's valuation over Prospect's. This Court declined to grant review on that issue. As such, regardless whether the order on appeal was void, it is at least inadequate, and will have to be remanded to a different judge (because former Judge Braxton is retired) regardless how this Court rules on the question presented. Therefore, this Court may alternatively conclude that this appeal has been improvidently granted, because the Court's opinion will be merely advisory.

ARGUMENT

I. The Commonwealth Court's decision was procedurally proper and within its authority as an intermediate appellate court.

A. The Commonwealth Court appeal was not a disciplinary proceeding.

The School District incorrectly characterizes Prospect's appeal as a disciplinary proceeding to situate it outside the authority of the Commonwealth Court. But this appeal is not a disciplinary action, substantively or procedurally. Prospect does not and never has through this action sought to have disciplinary sanctions imposed on former Judge Braxton. Nor has Prospect initiated a complaint with the Judicial Conduct Board. The Commonwealth Court did not draw any conclusions about former Judge Braxton's compliance with the Code of Judicial Conduct, nor did it request the trial court to make findings on those issues. Whether the Judicial Conduct Board or the Court of Judicial Discipline would or even could take any action against former Judge Braxton at this point is an entirely separate issue.

The fact that former Judge Braxton's position on the BRT was incompatible with his judicial office, and the fact that his acceptance of that position forfeited his judicial office and rendered him powerless to issue the order on appeal, does not

require a finding in this case that former Judge Braxton breached the canons of judicial ethics. Instead, it follows from the incompatible nature of the positions themselves. In fact, the Commonwealth Court expressly declined to consider whether former Judge Braxton violated the Pennsylvania Code of Judicial Conduct, recognizing that "[s]hould a judge violate the standards of conduct, that is a matter for the Pennsylvania Supreme Court to address." *In re Prospect Crozer, LLC*, 283 A.3d at 445 n.21. Instead, the basis of the Commonwealth Court's decision was Judge Braxton's service in a position that was incompatible with his judicial office, not any finding that he violated the Code of Judicial Conduct. This appeal is about the validity of former Judge Braxton's order, not whether he is personally culpable for a violation of the Rules of Judicial Conduct.

Accordingly, the School District is wrong that this case presents a question that is reserved to the jurisdiction of this Court or to the Court of Judicial Discipline. Significantly, the School District filed an application "for Extraordinary Relief Pursuant to the Court's King's Bench Jurisdiction" in this Court on April 13, 2022, requesting it to take jurisdiction of this case for that reason. (*See* Nos. 35-38 MM 2022). It declined to do so.

B. Nothing in the Constitution precludes an intermediate appellate court from correcting a structural error.

Merely because a judge's conduct is at issue does not prevent an order from being reviewed through normal appellate jurisdiction. For instance, appellate courts routinely consider arguments that judges improperly declined to recuse, despite the fact that a judge may in some cases have an ethical obligation to recuse. *See, e.g., Commonwealth v. Abu-Jamal*, 720 A.2d 79, 89 (Pa. 1998) (holding that a trial judge's refusal to recuse is reviewed for abuse of discretion); *Commonwealth v. Rhodes*, 990 A.2d 732, 751 (Pa. Super. 2009) (Superior Court holding that trial judge abused discretion by refusing to recuse).

The School District incorrectly claims that the Commonwealth Court "usurp[ed] the roles of the Judicial Conduct Board or the Court of Judicial Discipline." (Opening Br. at 23; *see also id.* at 25). However, neither of those bodies has appellate jurisdiction over an order of the Court of Common Pleas. Pa. Const. Art. 5 § 18(a)(7)-(9); *id.* § 18(b); 42 Pa.C.S. §§ 1604, 2105. As such, it is appropriate that the Commonwealth Court decide cases like this one. Indeed, adopting the School District's position would immunize a trial court decision from appellate review where the error implicated a violation of the

Code of Judicial Conduct or Constitutional provisions regarding judicial qualification and service. Moreover, even if issues regarding former Judge Braxton's forfeiture of office should have been decided by this Court in the first instance, the School District ignores that the Commonwealth Court also vacated the order on appeal on the merits, a determination clearly within its authority.

The School District mistakenly relies upon *Reilly by Reilly v. Southeastern Pennsylvania Transportation Authority*, 489 A.2d 1291 (Pa. 1985), which, according to the School District, "held that enforcement of judicial conduct is beyond the jurisdiction of intermediate appellate courts." (Opening Br. at 10). However, as explained above, the Commonwealth Court here did not purport to "enforce[] judicial conduct" and, in fact, expressly reserved any judgment regarding former Judge Braxton's conduct to this Court. Additionally, the Court in *Reilly* faced a different legal issue. There, the Superior Court erred by "establish[ing] a rule of judicial administration that in any recusal motion, a different judge would be required to rule on the motion" and by determining that a showing of prejudice was not required. *Reilly*, 489 A.2d at 1298. Unlike *Reilly,* the Commonwealth Court's decision in this case establishes no new "rule of judicial administration," nor does it modify any

standard set by this Court. Instead, it applies rules that are already established by Pennsylvania's Constitution and common law.

C. The Commonwealth Court's procedures in this case were appropriate.

The School District also complains about the particular procedures employed by the Commonwealth and the trial court. But the School District does not and cannot claim that it was prejudiced in any way by the procedures of either court. Moreover, the School District's procedural objections are premised entirely on its mischaracterization of this case as a disciplinary proceeding against former Judge Braxton.

First, the Commonwealth Court did not "create[] a new procedure for the investigation and adjudication of a claim of judicial misconduct by a disappointed litigant." (Opening Br. at 20). Likewise, the Commonwealth Court did not "investigate[]" Prospect's claims, nor did the trial court. (*Id*. at 24).[6] Instead, the Commonwealth Court simply and very properly directed the trial court to take evidence and make findings on three discrete questions. (R. 79-81a). Besides the fact that this is not a

[6] For this reason, the School District's characterization of the Commonwealth Court's opinion in its Statement of the Question Involved is also incorrect.

disciplinary proceeding focused on "judicial misconduct," it is neither inappropriate nor unusual for an appellate court to remand for further factfinding if the existing record is inadequate on a particular issue. *See, e.g., Commonwealth v. Dennis*, 950 A.2d 945, 964, 969, 979 (Pa. 2008) (remanding for submission of an adequate opinion and potential further evidentiary hearings and retaining jurisdiction); *Commonwealth v. D'Amato*, 856 A.2d 806, 826 (Pa. 2004) (remanding for evidentiary hearing and retaining jurisdiction); *Pa. Dep't of Conservation & Nat. Res. v. Vitali*, 2015 Pa. Commw. Unpub. LEXIS 479, at *25 (Pa. Cmwlth. July 7, 2015) (remanding for additional factfinding and retaining jurisdiction).

Further, the School District's complaint that the remand order "did not provide any direction to the Trial Court about fundamental due process" is unavailing, because the School District does not and cannot identify any way that it was harmed by that supposed lack of direction. (*See* Opening Br. at 25). For instance, the School District asks, rhetorically, whether the parties had "legal authority to issue subpoenas for witness testimony and subpoenas *duces tecum*." (*Id.* at 26). But the School District never asked to issue subpoenas nor does it now claim it was harmed by any lack of clarity in its right to do so.

The School District also complains that former Judge Braxton was "deprived . . . of the presumption of innocence and due process afforded accused jurists." (Opening Br. at 23). Again, however, that complaint confuses this appeal with a disciplinary proceeding. Unlike a disciplinary proceeding, former Judge Braxton is not subject to any form of discipline as a result of this appeal, nor would these proceedings have issue preclusive effect in any future disciplinary proceeding (which is entirely hypothetical). *See, e.g., Appeal of Coatesville Area Sch. Dist.*, 244 A.3d 373, 378-79 (Pa. 2021) (issue preclusion and claim preclusion require that the party against whom the doctrine is asserted be the same or in privity with the party in the previous action). Moreover, the School District has no standing to assert former Judge Braxton's due process rights, even if they were somehow implicated by these proceedings. *See In re T.J.*, 739 A.2d 478, 481 (Pa. 1999) ("[T]he core concept of the doctrine of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' and has no right to obtain a judicial resolution of his challenge.")

Additionally, the School District claims that the Commonwealth Court erred by failing to apply a "clear and convincing evidence" standard because that is the standard

required under Article V, Section 18(b)(5) of the Constitution for disciplinary proceedings. (Opening Br. at 24-25). However, this is not a disciplinary proceeding. Further, the relevant determinations here are either issues of law or are undisputed facts. In particular, it is an issue of law whether former Judge Braxton's service on the BRT was incompatible with his position as a senior judge and what effect his acceptance of that position had. The fact that he accepted and began service in that position before issuing the orders on appeal is undisputed. And, to the extent it is relevant, the Moulton Certification conclusively establishes that this Court did not approve his simultaneous, incompatible service.

Finally, the School District complains at length about the Commonwealth Court's supposed consideration of the Mittleman Affidavit, likely because it undermines former Judge Braxton's testimony mischaracterizing his conversation with Mr. Mittleman.[7] However, and in any event, contrary to the

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[7] The School District did not disclose that it would call former Judge Braxton at the remand hearing, and Prospect was unaware that supposed statements by Mr. Mittleman to former Judge Braxton would be an issue until the School District called

Footnote continued on next page.

School District's characterization, the Commonwealth Court did not "heavily rel[y] upon" the Mittleman Affidavit. (Opening Br. at 24 n.5; *see also id.* at 40 (complaining that the Commonwealth Court "admitted" the Mittleman Affidavit into the certified record); *id.* at 42 (asserting that the Mittleman Affidavit should not have been considered because it was "after-discovered evidence"; *id.* at 43 (incorrectly asserting that the Commonwealth Court "substituted its own judg[]ment for that of the Trial Court" by considering the Mittleman Affidavit)). To the contrary, the Commonwealth Court made clear that it did *not* rely on the substance of Mr. Mittleman's affidavit. As it explained:

> First, the question was whether the Supreme Court, or one of its justices, had directed Senior Judge Braxton to serve as

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former Judge Braxton to testify and elicited textbook hearsay. Nonetheless, the School District complains that it lacked an opportunity to cross-examine Mr. Mittleman. (Opening Br. at 24 n.5). However, there was nothing preventing the School District from reaching out to Mr. Mittleman as Prospect did. Further, in response to the School District's request that the trial court strike the Mittleman Affidavit, Prospect requested leave to notice Mr. Mittleman's deposition or subpoena his live testimony to the extent the trial court was concerned about the School District's ability to cross-examine him. (R. 463a, 469a n.1; *see also* 511a).

> a senior judge notwithstanding the inception of his service on the [BRT]. Second, the School District did not establish that Mittleman, an employee of the AOPC, had authority to approve service on the [BRT] by a senior judge. ***Without that foundation, Mittleman's so-called verbal acts are irrelevant.*** In any case, the AOPC cannot waive the Pennsylvania Constitution.

In re Prospect Crozer, LLC, 283 A.3d at 445 (emphasis added).

In short, the School District's procedural complaints about the evidentiary record—including regarding the Mittleman Affidavit—are irrelevant. Even if this Court were to consider it beneficial to provide procedural guidance for future cases like this one, the School District identifies no procedural error that would justify reversal in this case.

II. The Commonwealth Court correctly applied the facts to well-established law.

For the reasons above, the Commonwealth Court had the authority to consider whether the orders on appeal are void and it employed proper procedures in making that decision. Further, the Commonwealth Court's decision was correct as a matter of law and fact.

A. Service on the BRT is incompatible with service as a senior judge.

The order on appeal is void because former Judge Braxton accepted and began serving in an incompatible position before entering it. Former Judge Braxton's service on the BRT was incompatible with his position as a senior judge as a matter of law. The Pennsylvania Constitution provides that:

> Justices and judges shall devote full time to their judicial duties, and shall not engage in the practice of law, hold office in a political party or political organization, ***or hold an office or position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof***, except in the armed service of the United States or the Commonwealth.

Pa. Const., Art. V § 17(a) (emphasis added). Under this standard, it is indisputable that former Judge Braxton's position on the BRT was incompatible with his judicial service. The BRT is a quasi-judicial body that performs actions such as hearing contested cases, ruling on evidence, and rendering decisions on the merits in property assessment appeals. Moreover, the BRT "assesses the value of real property in Philadelphia, examines tax returns, and hears appeals from assessments." *Board of*

Revision of Taxes, City of Philadelphia v. City of Philadelphia, 4 A.3d 610, 615 (Pa. 2010) (internal citation omitted). In other words, it decides precisely the same types of issues as these appeals. Former Judge Braxton's service on that board is compensated and it is therefore a position of profit.

This Court has repeatedly held that a judge may not serve in an incompatible office. For instance, in *Simmons v. Tucker*, this Court held that a judge of the Court of Common Pleas cannot simultaneously hold office as a federal judge. 281 A.2d 902, 904 (Pa. 1971). Likewise, because the office of "recorder for the Mayor's Court" was an "office of profit," this Court held that a judge was constitutionally prohibited from holding it. *Commonwealth v. Conyngham*, 65 Pa. 76, 83-84 (1870).

The School District's attempt to distinguish this Court's precedent in *Conyngham* and *Simmons* is unavailing. (*See* Opening Br. at 29-31). The School District appears to argue that such authority is inapposite because, unlike this case, those cases involved simultaneous service in two *judicial* offices. But that is a distinction without a difference. The School District does not and cannot claim that service on the BRT is not a "position of profit in the government of . . . the Commonwealth or any municipal corporation or political subdivision thereof." Pa. Const. Art. V § 17(a).

The School District also reasserts its argument, without any support and that was properly rejected by the Commonwealth Court, that the Constitution's prohibition on incompatible service by a judge does not apply to senior or "part time" judges. (Opening Br. at 31). However, the Constitutional prohibition on simultaneous incompatible service applies to "[j]ustices and judges" without qualification. There is no carve-out for senior judges or "part time" judges. Indeed, the School District does not identify any Constitutional or statutory definition of a "part time" judge, much less any authority or precedent that would relax otherwise applicable limitations for such judges. As the Commonwealth Court noted, "had the proscription against incompatible service not applied to senior judges, that exemption would have been provided in Section 17(b), as it was for magistrate judges." *In re Prospect Crozer LLC*, 283 A.3d at 444.

Finally, the School District suggests in passing that former Judge Braxton's service on the BRT is not incompatible with his service as a senior judge because orders from the Delaware County Court of Common Pleas are not appealable to the BRT and vice versa. (Opening Br. at 31 n.6). But that is irrelevant. The Constitutional prohibition on simultaneous service applies to "positions of profit" in the government,

which service on the BRT indisputably is. The Constitutional prohibition is not limited to positions in the chain of appellate review of a judge's existing office, or even judicial positions more generally.

B. Under Pennsylvania law, former Judge Braxton's acceptance of and service in an incompatible office rendered him powerless to issue the order on appeal and rendered the order void.

This Court's precedent, as well as case law from other jurisdictions, is also clear that a public official's acceptance of an incompatible office results in automatic forfeiture of the first position. Here, that left former Judge Braxton without the authority to enter the order on appeal, rendering it void.

"The applicable rule, which is generally held in all American jurisdictions, holds that where a single person holds two incompatible offices, the acceptance of the second *ipso facto* vacates the first." *Fauci v. Lee*, 38 Misc.2d 564, 567 (N.Y. Supreme Ct. 1963); *see also Com. ex rel Crow v. Smith*, 23 A.2d 440, 442 n.3 (Pa. 1942) (stating that an official holding incompatible offices is generally required to elect to abandon one of them); *De Turk v. Commonwealth*, 18 A. 757, 758 (Pa. 1889) (noting common law rule that where incompatible offices are derived from common source, acceptance of the second automatically vacates the first); *Opinion of the Justices*, 647 A.2d

1104, 1105 (Del. 1994); *Stubbs v. Lee*, 64 Me. 195, 198 (1874); *Scott v. Strobach*, 49 Ala. 477, 485 (1873); *Pombo v. Fleming*, 32 Haw. 818, 822 (1933); *Hollinger v. Kumalae*, 25 Haw. 669, 689 (1920); *State ex rel Johnson v. Nye*, 135 N.W. 126, 130 (Wis. 1912); *Commonwealth v. Hawkes*, 123 Mass. 525, 529-30 (1878).

This Court's opinion in *De Turk v. Commonwealth*, 18 A. 757 (Pa. 1889) is on point and controlling. There, Mr. DeTurk was elected to the office of county commissioner even though he was already the local postmaster, a federal office for which he received a salary. The Commonwealth filed a writ of quo warranto, following which "a judgment of ouster" from the county commission position "was entered against the defendant." *Id.* at 758. This Court reversed the judgment of ouster not because it was proper for Mr. De Turk to hold both positions simultaneously, but rather because his acceptance of the county commissioner position constituted a forfeiture of the postmaster position. *Id.*

In *De Turk*, this Court held that the constitutional prohibition on incompatible service was self-executing, i.e., it was enforceable even in the absence of enabling legislation. *Id.* Regarding forfeiture, this Court observed that the question would be even easier if it involved two state offices (as this case does), because where two offices are derived from a common

source, it is the common law rule "that an acceptance of the second office was an implied resignation and vacation of the first." *Id.* However, even though the office of postmaster was a federal office, this Court nevertheless held that "the acceptance of the second office was an implied resignation of the first, – an election to hold the former and to surrender the latter." *Id.* That was true even though the Constitutional provision did "not prescribe a penalty, or declare a forfeiture." *Id.*

This Court reaffirmed that principle in *Commonwealth ex rel. Crow v. Smith*, 23 A.2d 440 (Pa. 1942). There, this Court considered whether "a commissioned officer in the Officers' Reserve Corps of the United States, now called into active service as a major in the army, can continue to hold the office of mayor of the City of Uniontown." *Id.* at 440-41. This Court recognized the question as "purely a legal one" controlled by the constitutional prohibition on simultaneous incompatible service, which this Court again recognized as "self-executing." *Id.* at 441. As such, the only question was whether the mayor's subsequent position was "an office of trust or profit under the United States" and therefore an incompatible office under the then-existing Constitutional language. *Id.* The Court concluded without difficulty that it was. The Court recognized that "[n]early all the other states of the Union have similar

provisions in their constitutions, and practically all of them hold that the acceptance of a commission as an officer in the army amounts to an automatic vacation of a salaried office under the State."[8] *Id.*

The School District claims that in *Simmons*, this Court held that a Court of Common Pleas judge did not automatically vacate his office by operation of law when he was appointed to the federal bench. (Opening Br. at 30). However, the reason that Judge McCune in that case did not "vacate[] his state judicial office position by operation of law," *id.*, is because he did not take his federal oath of office until after he had resigned as a common pleas judge. *See Simmons*, 281 A.2d at 904 ("[O]ne does not hold office as a federal judge until the oath of office is administered.") In other words – unlike former Judge Braxton –

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[8] This Court noted in dicta that "[o]rdinarily, one holding two incompatible offices is allowed to elect which he desires to resign; if he declines or neglects to make a choice the court determines which office he should be compelled to relinquish." *Id.* at 442 n.3. To the extent that principle is applicable here, former Judge Braxton effectively made his choice by electing to continue service on the BRT and resigning his position as a senior judge. Contrary to the School District's assertions (Opening Br. at 28), the Commonwealth Court did not "remove" former Judge Braxton; former Judge Braxton's own decisions led to his effective resignation.

Judge McCune did not begin **serving** in the position to which he was newly appointed until **after** he resigned from his existing judicial office, avoiding any incompatibility. Indeed, *Simmons* demonstrates why former Judge Braxton's June 2019 disclosure that he had been *appointed* to the BRT was inadequate and misleading by not disclosing that, in fact, he had actually begun service. It was not merely his **appointment** to the BRT that divested former Judge Braxton of his ability to act as a judge. Instead, consistent with *Simmons*, it was former Judge Braxton's **commencement of service** on the BRT and payment by the City for that service that constituted a forfeiture of his judicial office.

The School District also insists that the only circumstance under which a judge may forfeit his or her office is upon conviction of misbehavior in office, disbarment, or removal under Section 18 of the Constitution, or to "file[] for nomination for or election to any public office other than a judicial office." (Opening Br. at 8-9 (quoting Pa. Const. Art. V, § 18(d)(4)). However, Section 18(d) specifically relates to circumstances under which a judge "shall be subject to disciplinary action." Just because a judge is subject to the disciplinary measure of forfeiting his or her office for standing for election to another

office does *not* negate the prohibition on holding incompatible offices that is clear from Article V, Section 17.

The bottom line is that a judicial judgment entered by a person not authorized to exercise judicial power at the time of entry is a nullity.

C. This Court did not authorize former Judge Braxton's Constitutionally incompatible service.

The undisputed fact that former Judge Braxton accepted and began serving in a Constitutionally incompatible office before he issued the orders on appeal is dispositive for the reasons discussed above. No further factfinding is necessary.

Nevertheless, the School District long insisted that this Court had authorized former Judge Braxton's simultaneous incompatible service. *See above* at pp. 8-10 (identifying numerous representations to that effect by the School District). After the Commonwealth Court remanded for additional factfinding, it became clear that was not true. In particular, the Moulton Certification conclusively proved that neither this Court, any Justice of this Court, nor AOPC authorized former Judge Braxton to serve on the BRT at the same time he was serving as a senior judge. (R. 393a). Unable to reconcile that evidence with its assertion that this Court approved former Judge Braxton's dual service, the School District now claims,

based on former Judge Braxton's hearsay testimony, that Judge Braxton was orally advised by two individuals at AOPC (including Mr. Mittleman) that he could continue serving as a senior judge after accepting his appointment at the BRT – advice nowhere confirmed in writing. (Opening Br. at 16). There are several problems with the School District's narrative.

The first is that the AOPC cannot authorize a judge's violation of the Constitutional prohibition on incompatible service. Indeed, the School District never explained the basis for its belief that this Court would authorize Judge Braxton's incompatible service, particularly without issuing any formal order to that effect. It is even less plausible that AOPC would presume to authorize such a violation of the Constitution and not do so in writing. And even if an individual AOPC employee purported to do so, it would be outside the AOPC's authority and therefore of no effect. *See* Pa.R.J.A. 504 (listing powers of the Court Administrator); Pa.R.J.A. 505 (listing functions of AOPC).

An additional problem is that the School District's claim is based on inadmissible evidence. In particular, former Judge Braxton's testimony regarding statements allegedly made by Mr. Mittleman are inadmissible hearsay. They are out of court statements that the School District is offering for the truth of the

matter asserted – i.e., that AOPC authorized former Judge Braxton's simultaneous service.[9]

The School District has argued that former Judge Braxton's testimony is not hearsay because it supposedly recounts Mr. Mittleman's "verbal act" of authorizing his incompatible service. (Opening Br. at 41-42). However, a "verbal act" is "a legally operative statement, like making a contract or a threat." *U.S. v. John-Baptiste*, 747 F.3d 186, 213 (3d Cir. 2014). Here, former Judge Braxton's testimony did not fall within a "verbal act" exception because no statement made by an employee of AOPC could be "legally operative" on its own.

The School District also claims that former Judge Braxton's implausible testimony was not hearsay because "the truth of the facts asserted in the AOPC's out-of-court statement is irrelevant to Judge Braxton's reliance on that statement."

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[9] Prospect objected to former Judge Braxton's testimony on that basis, and the trial court properly sustained Prospect's objection. (R. 341a at 67:6-13, R. 382-83a at 108:19-109:22). However, despite its own prior ruling, the trial court's findings recount, accept, and rely upon former Judge Braxton's hearsay testimony. (*See* R. 498-502a ¶¶ 7.f, 7.i, 7.j, 10). Prospect also objected to former Judge Braxton's testimony on the basis of its irrelevance. (*See* R. 383-84a at 109:23-110:2).

(Opening Br. at 41-42). However, neither former Judge Braxton's subjective understanding of his responsibilities, nor any "reliance" by him on any statement of an AOPC employee, is at issue.[10] Again, this is not a disciplinary proceeding, and it is not former Judge Braxton's motives that are at issue. Instead, what matters is that he accepted and began serving in an incompatible office before issuing the orders on appeal.

Finally, former Judge Braxton's testimony is implausible. Former Judge Braxton admits that he received nothing in writing evidencing approval of his service on the BRT.[11] (*See* R. 368a at 94:18-23 (testifying that he had no writing that conflicted with the Moulton Certification); *see also* R. 351-53a at

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[10] In any event, former Judge Braxton could not have reasonably relied on any supposed authorization from Mr. Mittleman, because former Judge Braxton admitted that he did not advise AOPC that he had actually started employment with the BRT. (R. 366a at 92:10-14; *see also* R. 371a at 97:15-24).

[11] Former Judge Braxton claimed that his "own pay stubs or vouchers" demonstrated the permission he claimed to have obtained from an AOPC employee. (*See* R. 365a at 91:22-24). However, that former Judge Braxton continued to be paid as a senior judge obviously does not establish that he advised the Supreme Court (or AOPC) of his simultaneous service or that he received any approval for it. Instead, the more likely explanation is that former Judge Braxton failed to inform AOPC of all the facts.

77:25-78:3, 78:20-79:17 (testifying that assignments from AOPC are not made in writing)). Former Judge Braxton's implausible testimony was squarely contradicted both by the Moulton Certification and Mr. Mittleman's affidavit testimony, which provides that "records of the assignments are transmitted to the Supreme Court prothonotary and maintained on the Judicial Administration Docket." (R. 505a ¶ 3). This Court may take judicial notice of its entry of such orders. It is inconceivable that even if an AOPC employee improperly advised former Judge Braxton that he could serve on two incompatible positions, that there would not be written documentation of such a decision.

D. Prospect did not waive its objection to Judge Braxton's simultaneous, incompatible service.

Despite the School District's repeated accusations of waiver, whether Prospect preserved its objection to former Judge Braxton's incompatible service is outside the scope of this Court's allocatur grant. In any case, Prospect did not waive its objection. That is true as a matter of law, because it constituted a non-waivable structural error, and also as a matter of fact, because Prospect was unaware of the simultaneous incompatible service until after the order on appeal was entered.

1. Judge Braxton's simultaneous service is a non-waivable structural error.

The Commonwealth Court concluded that, as a matter of law, Prospect could not have waived its objection to former Judge Braxton issuing the orders on appeal after forfeiting his office because that is a non-waivable structural error. *In re Prospect Crozer LLC*, 283 A.3d at 443 ("It is not unlike the well-established principle that parties cannot agree to confer subject matter jurisdiction on a tribunal where it does not exist."). The Commonwealth Court was right. Former Judge Braxton's forfeiture of his judicial office constituted a structural error because Prospect was denied the right to have this case decided by a judge validly holding judicial office.

A structural error is an error "that affects 'the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017) (quoting *Commonwealth v. Baroni*, 827 A.2d 419, 420 (Pa. 2003) and citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). It is a structural error for a judge who does not validily hold office to preside over a case and enter judgment.

For instance, in *Intercollegiate Broadcasting Systems, Inc. v. Copyright Royalty Board*, the D.C. Circuit Court of Appeals recognized that "an Appointments Clause violation is a

structural error that warrants reversal regardless of whether prejudice can be shown." 796 F.3d 111, 123 (D.C. Cir. 2015) (Garland, J.) Although the court found no violation of the Appointments Clause in that case, it reaffirmed precedent consistently holding that an improper appointment constitutes structural error. *Id.* (citing *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) and *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012)).

The Tenth Circuit employed the same reasoning in *Bandimere v. SEC*, which invalidated a decision on the basis that it was entered by an Administrative Law Judge whose appointment violated the Appointments Clause. The Court noted that "[t]he error here is structural because the Supreme Court has recognized the separation of powers as a 'structural safeguard.'" 844 F.3d 1168, 1181 n.31 (10th Cir. 2016). The Tenth Circuit looked not only to the D.C. Circuit's decision in *Intercollegiate Broadcasting*, but also the United States Supreme Court's reasoning that "'constitutional errors concerning the qualification of the jury or judge' require automatic reversal." *Id.* (quoting *Rivera v. Illinois*, 556 U.S. 148, 161 (2009)). Subsequently, in *Lucia v. Sec. Exchange Comm'n*, 138 S. Ct. 2044 (2018), the United States Supreme Court confirmed that "the 'appropriate' remedy for an adjudication tainted with an

appointments violation is a new hearing before a properly appointed' official." *Id.* at 2055.

Judge Braxton's acceptance of an incompatible position – resulting in a forfeiture of his judicial office – implicates the same concerns as the line of cases holding that a Constitutionally invalid appointment results in a structural error. Like the Appointments Clause, Article 5, Section 17 of the Pennsylvania Constitution embodies concerns about the organization and qualification of government officials, and its violation constitutes structural error for the same reasons.

Judge Braxton's acceptance of an incompatible office also situates this case within precedent holding that the failure of a judge to recuse gives rise to a structural error. An example is the United States Supreme Court's holding in *Williams v. Pennsylvania*, 579 U.S. 1 (2016), which held that it constituted structural error for then-Chief Justice Castille not to recuse from this Court's consideration of a criminal defendant's PCRA petition, where Chief Justice Castille had been the district attorney who had approved the trial prosecutor's decision to seek the death penalty against the criminal defendant. The Supreme Court held that Chief Justice Castille's participation violated due process and that an unconstitutional failure to recuse constitutes structural error that is "not amenable" to

harmless-error review regardless whether his vote was dispositive. *Id.* at 14.

More recently, this Court held that a decision of the Zoning Board of Adjustment must be vacated because a member of the board had an interest in an application at issue yet failed to recuse. *Pascal v. City of Pittsburgh Zoning Bd. of Adjustment*, 259 A.3d 375, 393 (Pa. 2021). In a separate opinion, Justice Wecht reasoned that the member's participation constituted "a fatal structural error that undermine[d] [an] entire [zoning board of adjustment] proceeding." *Id.* at 393 (Wecht, J., concurring and dissenting). This is consistent with precedent holding that judicial bias can constitute a structural error. *See Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Greenway v. Schriro*, 653 F.3d 790, 805 (9th Cir. 2011) ("[W]hen a defendant's right to have his case tried by an impartial judge is compromised, there is structural error that requires automatic reversal.")

It is well-established that where a court operates under a structural error, prejudice is presumed. *See Bruckshaw v. Frankford Hosp. of City of Phila.*, 58 A.3d 102, 113-14, n.6 (Pa. 2012); *In re K.J.H.*, 180 A.3d 411, 413 (Pa. Super. 2018). Therefore, it was unnecessary for the Commonwealth Court to conduct a "harmless error analysis." (Opening Br. at 1-2, 13, 17).

Not only does the law compel that result, it also makes good sense. Where an error goes to the heart of the adjudicative process, the harm to the litigants is in the deprivation of process itself – in this case, that Prospect was subject to adjudications issued by an individual who was no longer a judge when he entered them. As the Commonwealth Court found, those orders were also defective on the merits – but it is enough that they were not entered by a judge.

The Commonwealth Court specifically found that the structural error caused by former Judge Braxton's forfeiture of his judicial office was non-waivable. *In re Prospect Crozer LLC*, 283 A.3d at 443. Citing former Chief Justice Saylor's concurring opinion in *Commonwealth v. Martin*, 5 A.3d 177, 218-19 (Pa. 2010), the School District suggests that whether a structural error is waivable requires a fact-specific determination. (*See* Opening Br. at 18). However, in that case, the factual record needed further development to determine whether a structural error had occurred in the first place before deciding whether it was waivable. Here, the structural error is established by undisputed evidence, and any necessary development of the record was accomplished when the Commonwealth Court remanded for additional factfinding.

Further, this Court has subsequently held that at least certain species of structural errors are non-waivable. In *In re T.S.*, 192 A.3d 1080 (Pa. 2018), this Court decided that the failure to provide an attorney to represent a child's legal interests in a proceeding to terminate parental rights was a structural error. The court reasoned that the nature of the structural error prevented the child from raising the issue, so the failure of any other party – including the child's parent – to raise the issue could not have constituted waiver. *Id.* at 1088. Here, Prospect could not have raised the structural error during the trial court proceedings since former Judge Braxton had already vacated his office but had actively misled the parties about that fact.

The United States Supreme Court held that a structural error involving the qualification of a jurist was non-waivable in *Khanh Phuong Nguyen v. United States*, 539 U.S. 69 (2003). There, the petitioners were sentenced on federal narcotics charges and took an appeal to the Ninth Circuit Court of Appeals. *Id.* at 72. The panel that heard the cases consisted of two Article III judges of that court and the Chief Judge of the District Court for the Northern Mariana Islands, an Article IV territorial-court judge who was sitting by designation. *Id.* at 72-73. The petitioners did not object to the composition of the panel before

the cases were submitted, nor did they seek reconsideration on that basis. *Id.* at 73. The United States Supreme Court granted certiorari and held that the Article IV judge was not a "district judge" so his inclusion on the panel was improper. *Id.* at 76. Even though the parties did not object before the Ninth Circuit, the Supreme Court vacated the panel's decision and remanded to the Ninth Circuit for consideration by a properly constituted panel. Indeed, the Supreme Court made clear that "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel." *Id.* at 80-81.[12]

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[12] The Supreme Court rejected the Solicitor General's argument that the judgment should remain undisturbed under the de facto officer doctrine, which in some cases "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." 539 U.S. at 77 (quoting *Ryder v. United States*, 515 U.S. 177, 180 (1995)). The Court explained that the de facto officer doctrine applies "when there is a 'merely technical' defect of statutory authority" not where there is a "violation[] of a statutory

Footnote continued on next page

That conclusion was well-supported by the Supreme Court's precedent. *See id.* (citing Supreme Court authority). In one case, "a judgment of the Circuit Court of Appeals was challenged because one member of that court had been prohibited by statute from taking part in the hearing and decision of the appeal." *Id.* (citing *Am. Constr. Co. v. Jacksonville, T & K. W. R. Co.*, 148 U.S. 372 (1893)). There, the Court reasoned that "[i]f the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error, or certiorari." *Id.* (quoting *Am. Constr. Co.*, 148 U.S. at 387). In another case, the Supreme Court vacated an appellate decision "even though the parties had consented in the Circuit Court of Appeals to the participation of a District Judge who was not permitted by statute to consider the appeal." *Id.* (citing *William*

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provision that 'embodies a strong policy concerning the proper administration of judicial business' even though the defect was not raised in a timely manner." *Id.* at 78.

To the extent the School District would argue that the de facto officer doctrine would apply in this case, it has waived that issue by never raising it in the Commonwealth Court or in this Court, including in its opening brief or petition for allowance of appeal.

Cramp & Sons Ship & Engine Building Co. v. Int'l Curtiss Marine Turbine Co., 228 U.S. 645 (1913)).

In *Nguyen*, the Court recognized that the structural error at issue implicated the violation of a statute that "embodies weighty congressional policy concerning the proper organization of the federal courts" and was not a mere technical error. *Id.* at 79-80. So too, here, Article 5, Section 17 of our Constitution "embodies weighty . . . polic[ies] concerning the proper organization of" our Courts. *Nguyen*, 539 U.S. at 79-80. As such, even if there are some types of structural errors that may be waivable, the structural error at issue here is not among them.

Moreover, the Commonwealth Court correctly recognized that Judge Braxton's forfeiture of his judicial office created a jurisdictional impediment to his issuance of the orders on appeal. *In re Prospect Crozer LLC*, 283 A.3d at 443 ("It is not unlike the well-established principle that parties cannot agree to confer subject matter jurisdiction on a tribunal where it does not exist."). That is consistent with the United States Supreme Court's decision in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). There, the Court considered whether judges on the Court of Claims and the Court of Customs and Patent Appeals were eligible to serve by designation on United States District Courts

and Courts of Appeals. A plurality of the Court rejected the argument that the issue was irrelevant in light of the de facto officer doctrine, explaining that the rule does not apply to an "alleged defect" that implicates the court's jurisdiction or "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business." *Id.* at 535-36. In such cases, the Court "has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the early practicable opportunity." *Id.*

As one court found, "[a] review of decisions from other states suggest that state courts have implicitly followed the factors set forth in *Glidden* and determined that a jurisdictional issue is presented when a challenge to a judge's authority is constitutionally based." *People v. Torkelson*, 22 P.3d 560, 563 (Colo. Ct. App. 2000) (surveying authority and reversing criminal conviction issued by improperly appointed county court judge); *see also, e.g., Olmstead v. District Court*, 403 P.2d 442 (Colo. 1965) (en banc) (voiding a trial court order issued after the expiration of a judge's term); *Trammell v. State*, 785 So.2d 398 (Ala. Crim. App. 2000) (judge who presided in county in which he did not reside, in violation of constitutional and statutory requirements, acted without jurisdiction); *Saylors v.*

State, 836 S.W.2d 769 (Tex. App. 1992) (special judge appointed for sentencing not in accordance with constitution and state statute acted without jurisdiction); *In re Pioneer Mill Co.*, 497 P.2d 549 (Haw. 1972) (holding that de facto officer doctrine does not apply where a judge is disqualified from holding office because of basic constitutional protections designed in part for benefit of litigants, and finding issue to be non-waivable); *Case v. Hoffman*, 74 N.W. 220, 221-22 (Wis. 1898) (holding that decision issued by constitutionally disqualified judge is void, not merely erroneous).

As the Commonwealth Court recognized, former Judge Braxton's forfeiture of his judicial office left him powerless to issue any adjudication. That is consistent with the United States Supreme Court's reasoning in *Nguyen*, *Ryder*, *Glidden*, and other precedent. As such, the orders on appeal are void, and it is well-established that a void judgment may be challenged at any time. *See, e.g., Mother's Restaurant, Inc. v. Krystkiewicz*, 861 A.2d 327, 337 (Pa. Super. 2004) ("The courts of this Commonwealth have long held that an individual may seek to strike a void judgment at any time."); *N. Forests II, Inc. v. Keta Realty Co.*, 130 A.3d 19, 34 (Pa. Super. 2015) ("Unlike fine wine, void judgments in Pennsylvania do not improve with age; void *ab initio*, void for all time.")

2. Prospect was unaware of Judge Braxton's forfeiture of his judicial office until after the orders on appeal were entered.

In addition, the facts disprove the School District's waiver argument.

As described above, former Judge Braxton's comments in June 2019 indicated only that he intended to commence service on the BRT at some point in the future. (*See* R. 422a at 219:4-20 ("[A]s soon as I leave here, I'm **going to** do that other post")) (emphasis added). As illustrated in *Simmons*, what is Constitutionally forbidden is service in an incompatible position, not mere selection to an incompatible position before serving in it. *See* 281 A.2d at 904. Accordingly, there was no reason for Prospect to object in June 2019.

It was not until after the order on appeal was issued that Prospect became aware of former Judge Braxton's forfeiture of his judicial office. Prospect then acted properly and expeditiously to investigate the circumstances of former Judge Braxton's service on the BRT. *See above* at Counter-Statement of the Case § II.C. The School District introduced no evidence to contradict Prospect's affidavits establishing when it learned of the structural error that renders the orders on appeal void. Indeed, the School District did not even cross-examine Prospect's witnesses, even though they were each available in

Court and could have been called. (*See* R. 309a at 35:10-24, R. 313a at 39:25-40:1, R. 315a at 41:15-17, R. 374a at 100:9-12). Their unrebutted affidavits establish that:

- Mr. McLoughlin viewed a nameplate with former Judge Braxton's name on it at the BRT on or around December 18, 2019. (R. 396a).
- Mr. Kessler was informed by Ms. Gerstein in late January 2020 that she had witnessed former Judge Braxton deciding cases on the BRT in fall 2019. (R. 394a, 398a).
- The Philadelphia Law Department indicated on February 10, 2020 that it appeared that former Judge Braxton was voted onto the BRT on or about May 16, 2019 but could not verify when he commenced his position on the BRT or started receiving compensation in that role. (R. 396a, 400-01a).

Other unrebutted documentary evidence establishes that:

- On June 5, 2020, in response to Prospect's right to know request, the City of Philadelphia indicated that the date of former Judge Braxton's first paycheck on the BRT was June 16, 2019. (R. 391a).

As such, Prospect was not aware until late January 2020 – at the earliest – that former Judge Braxton *may* have commenced service on the BRT before issuing the orders on appeal. The fact that Mr. McLoughlin saw former Judge Braxton's nameplate at the BRT in December 2019 is not dispositive of anything, because the mere presence of his

nameplate would be equally consistent with the possibility that he was preparing to commence service on the BRT in the future, having been appointed to that position. (*See* Opening Br. at 35). As the Commonwealth Court recognized, it was appropriate, in fact entirely proper, for Prospect to investigate the issue before filing a motion to vacate. *In re Prospect Crozer, LLC*, 283 A.3d at 447 ("In any case, [Prospect] acted with due diligence to investigate if and when Senior Judge Braxton began to work for the [BRT] and thereby forfeited his judicial office.") Ultimately, Prospect did not receive actual confirmation of former Judge Braxton's simultaneous service until it received the City of Philadelphia's response to its Right to Know request in June 2020. (R. 390-91a).

The School District's reliance on *Reilly v. Southeastern Pennsylvania Transportation Authority*, 489 A.2d 1291 (Pa. 1985) in support of its waiver argument is misplaced. (*See* Opening Br. at 38-39). In *Reilly*, a personal injury case, this Court held that it was improper for the Superior Court to remand a case to a different trial court judge for a determination whether the original trial court judge should have recused. *Id.* at 214. *Reilly* is distinguishable for several reasons. First, in *Reilly*, the appellant had waived the recusal issue by not filing a recusal motion before the original trial court judge until the eve of trial,

even though appellant was aware of the issue before trial. *Id.* at 1300. By contrast, in this case, Prospect could not have objected to former Judge Braxton's forfeiture of judicial office during the course of trial court proceedings, because former Judge Braxton both failed to disclose that he had commenced service on the BRT and instead expressly misled the parties by making his statement on June 24, 2019, over a week after he received his first paycheck from the City; and Prospect did not learn about it until after former Judge Braxton issued the order on appeal

Lomas v. Kravitz, 170 A.3d 380 (Pa. 2017), relied upon by the School District, is also distinguishable. (*See* Opening Br. at 38-40). There, one of the litigants was originally represented by an attorney who, before the case concluded, was elected to the bench of the Montgomery County Court of Common Pleas, where the case remained pending before a different judge. It was undisputed that "before trial began, the parties met with [the presiding judge] to discuss whether it was appropriate for him to preside over the trial in light of [the newly-elected judge's] previous representation of [one of the litigants]" and that "the parties agreed to allow [the presiding judge]" to decide the matter. *Id.* at 383. Nevertheless, the party that eventually filed a recusal motion claimed that it was unaware at that time that the newly-elected judge maintained a financial

interest in the outcome of the case. *Id.* However, at trial, the defendant elicited evidence clearly establishing the newly-elected judge's continuing interest in the case. Nonetheless, the defendant took no immediate action.

Then, at a scheduling conference 39 days after the close of trial, the defendants appeared with new counsel and presented the presiding judge for the first time with a "Motion for Recusal, Transfer of Venue, or Assignment to Out-of-County Judge." *Id.* The presiding judge initially granted the motion but subsequently vacated that decision. *Id.* at 385. This Court ultimately held that the defendant in *Kravitz* waived the recusal issue by not raising it "at the earliest possible moment, *i.e.*,, when the party knows of the facts that form the basis for a motion to recuse." *Id.* at 390.

Kravitz is readily distinguishable. First, in *Kravitz*, the party seeking recusal was aware of the facts underlying the recusal motion well before the motion was made. The party was aware before trial that the newly-appointed judge had previously represented the plaintiff, and it was aware no later than the close of trial of that judge's continuing interest in the case. Nevertheless, it waited almost 40 days to file a recusal motion. Here, by contrast, it was not until the order on appeal was entered that Prospect became aware that former Judge

Braxton not only accepted an appointment on the BRT, but actually began service on the BRT.

III. The Petition for Allowance of Appeal was improvidently granted.

As described above, the Commonwealth Court vacated the order on appeal not just because it was void, but also because it contained an inadequate rationale in violation of the Commonwealth Court's precedents.

As an initial matter, the School District's improper accusations that the Commonwealth Court was somehow "biased" in its analysis of the merits is without basis and therefore improper. (Opening Br. at 19, 40, 43). The Commonwealth Court merely concluded what is clear from its precedents: that in a tax assessment case, the trial court is required to provide an explanation when accepting one expert valuation over the other. It also did not "suggest" to the trial court what the ultimate outcome of this case should be; it only directed the trial court to provide an adequately supported opinion – whatever that may be – based on the previously-developed record. *In re Prospect Crozer, LLC*, 283 A.3d at 449-50. To the extent the Commonwealth Court commented on former Judge Braxton's findings on the merits, that is beyond the scope of this Court's allocatur grant, which is limited to its conclusion

that former Judge Braxton vacated his judicial office. Further, the School District's criticism of the Commonwealth Court's conclusions about the merits of these cases improperly invites this Court to review the question on which it denied allocatur.

Indeed, the Commonwealth Court's alternative basis for its holding suggests that the School District's petition to this Court was improvidently granted. Regardless whether this Court concludes that the Commonwealth Court erred, substantively or procedurally, in finding the order on appeal void, the result will be the same – the case will be remanded to the trial court to enter new findings and conclusions, based on the existing record, but with an explanation that is both sufficient and follows valuation methodologies that are recognized and acceptable under Pennsylvania law. As such, this Court's answer to the only question it granted allocatur on will be purely advisory. *See Commonwealth v. Burno*, 192 A.3d 74 (Pa. 2018) (Wecht, J., concurring) ("These discrepancies necessarily render any legal opinion we issue on a question that assumes Burno's legal tenancy provisional and advisory. However, it is not our practice to render such opinions. Consequently, I agree with my fellow Justices that we granted review improvidently . . .")

CONCLUSION

This Court should affirm, or, alternatively, dismiss this appeal as improvidently granted.

September 13, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief is 13,743 words long and therefore complies with the word count limitation in Pa.R.A.P. 2135(a)(1).

September 13, 2023

/s/ Robert L. Byer

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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.

September 13, 2023

/s/ Robert L. Byer