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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CRONIN, Petitioner, v. PENNSYLVANIA LABOR RELATIONS BOARD, Respondent.	Appeal from a Collateral Order of the Pennsylvania Labor Relations Board (Case No. PERA-R-17-40-E) **537 CD 2018** **ANSWER TO PLRB'S APPLICATION TO QUASH PETITION FOR REVIEW AND NEW MATTER**

Petitioner Michael Cronin ("Mr. Cronin"), by and through undersigned counsel, hereby answers Respondent Pennsylvania Labor Relations Board's ("PLRB's") Application to Quash the Petition for Review ("PLRB's Application"):

INTRODUCTION

The PLRB continues to discard traditional concepts of notice and the opportunity to be heard. Not only does the PLRB defend its blanket prohibition on individuals intervening or participating in an administrative proceeding at which their rights are at stake, but it also imposes on Mr. Cronin unknown, unknowable, and ultimately inconsistent paths by which he could or should have challenged the PLRB's determination below. As a result, without this Court's intercession, Mr. Cronin is left without any clarity as to how he should proceed when the same administrative proceeding begins again without him.

The PLRB's only answer is that Mr. Cronin should wade into the same murky waters in less than a year, PLRB's Appl. ¶ 41,[1] and presumably appeal only *after* an election imposes new regulatory regimes and responsibilities on him, his fellow students, and his university, *id.* at ¶¶ 33–34. Yet the PLRB never abandons its premise—that it will categorically deny individuals the opportunity to intervene or participate in representation proceedings—virtually guaranteeing the same denial of intervention when Mr. Cronin or any one of the other 3,800 graduate assistants attempts to intervene before the next election. *See* 43 P.S. § 1101.605(7)(i). Dismissal of this matter would foster confusion and create unnecessary urgency in less than a year, when the situation likely to come before this Court will mirror what the Court already has before it today.

ANSWER

1. ADMITTED.

2. ADMITTED.

3. ADMITTED.

4. ADMITTED. Mr. Cronin's request to intervene or participate was addressed to the Secretary of the PLRB.

[1] The PLRB admits that Mr. Cronin's situation is capable of repetition "at least sometime after April 24, 2019." ¶ 41. But its math is based on when a new election may occur. *See* 43 P.S. § 1101.605(7)(i). In fact, a Petition for Representation—and Mr. Cronin's next request to intervene or participate—may be filed even earlier.

5. ADMITTED that the letter reads as quoted; however, all legal analysis, determinations, or conclusions contained in the letter are DENIED.

6. ADMITTED.

7. ADMITTED.

8. ADMITTED. By way of further response, Mr. Cronin filed exceptions acknowledging that, under the PLRB's Rules and Regulations ("PLRB's Rules"), "exceptions are not permitted or required" in this instance and were merely "entered in an abundance of caution to ensure preservation of appellate review in the event that [denial of his request to intervene] is not deemed collateral in nature." Certified R. 360.

Indeed, section 95.96(a) of the PLRB's Rules specifically *forecloses* exceptions to, among other orders, "final orders or procedural orders of the [PLRB] *or its designated agents*":[2]

> No exceptions may be filed to orders directing elections issued by the Board Representative under § 95.91(k)(2) (relating to hearings), orders directing the canvassing of challenged ballots, final orders or procedural orders of the Board or its designated agents.

34 Pa. Code § 95.96(a). A Board Representative is such a designated agent. *See* 34 Pa. Code § 95.91(k)(2)(i) ("The Board Representative will be designated by the [PLRB] at

[2] Therefore, had Mr. Cronin proceeded only with his exceptions—exceptions that would have been dismissed as *unauthorized*—he would have missed the window during which he could have filed the instant appeal.

a regular meeting of the Board and the designation will be recorded in the minutes of the [PLRB] meeting."). The PLRB cannot insulate itself from review by designating an agent to perform PLRB duties and then specifically preventing administrative recourse.

9. ADMITTED.

10. ADMITTED.

11. ADMITTED. As stated in Mr. Cronin's Application for Relief Seeking Expedited Consideration of Appeal, Mr. Cronin anticipated potential challenges to the election results and wished to expedite the appeal in order to intervene or participate before the PLRB ultimately adopted, rejected, or modified the Hearing Examiner's February 6, 2018 Proposed Order. Pet'r's Appl. for Relief Seeking Expedited Consideration of Appeal ¶¶ 13–17.

12. ADMITTED.

13. ADMITTED.

14. ADMITTED.

15. ADMITTED.

16. ADMITTED.

17. ADMITTED.

18. ADMITTED.

19. ADMITTED.

20. DENIED as a conclusion of law. By way of further response, Mr. Cronin appeals under the collateral order doctrine, which permits appeal of an admittedly nonfinal order. *See* Pa. R. App. Proc. 313; *Fayette Cty. Office of Planning, Zoning & Cmty. Dev. v. Fayette Cty. Zoning Hr'g Bd.*, 981 A.2d 336, 340 (Pa. Cmwlth. 2009) ("The Official Note to Rule 341 explains that an order denying a petitioner the right to intervene no longer may be deemed a final order within the meaning of Rule 341. The Note further states that, in appropriate cases, such an order might fall under Pa. R.A.P. 312 (relating to interlocutory appeals by permission) or Pa. R.A.P. 313 (relating to collateral orders).").

21. ADMITTED.

COUNT I: COLLATERAL ORDER

22. The foregoing paragraphs are realleged and incorporated by reference as if set forth fully herein.

23. ADMITTED. By way of further response, denials of intervention are generally considered "collateral orders" for purposes of Pennsylvania Rule of Appellate Procedure 313. *See In re Barnes Found.*, 871 A.2d 792, 795 (Pa. 2005) ("It is desirable to insist that timely appeal be taken from the denial [of intervention], rather than permitting appeal from the denial upon entry of a final judgment disposing of the claims among the parties.") (quoting 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3902.1 (2d ed. 2005)); *see, e.g.*, *Markham v. Wolf*, 136 A.3d 134, 138 n.4

(Pa. 2016) ("We have jurisdiction over Appellants' appeal from the Commonwealth[Court]'s order [denying intervention] pursuant to Pa.R.A.P. 313.").

24. DENIED as misstatements of fact and as conclusions of law. For clarity, Mr. Cronin filed his request to intervene or participate on March 23, 2018, after the Hearing Examiner issued the proposed Order Directing Submission of Eligibility List ("Proposed Order" or "ODSEL") but *before* such Proposed Order was "adopt[ed], reject[ed], or modif[ied]" by the PLRB's Board Representative, 34 Pa. Code § 95.91(k)(2)(ii), and *before* the Board Representative ordered an election, *see id.*, both of which occurred on March 28, 2018. The representation election did not begin until April 10, 2018. PLRB's Appl. ¶¶ 6–7.

Further, Mr. Cronin could not have "intervened" pursuant to section 95.14(10) of the PLRB's Rules, as he is neither an "employe representative" nor seeking such status. *See* 34 Pa. Code § 95.14(10).[3] Instead, Mr. Cronin sought to intervene or participate under the PLRB's Rules—which purport to allow for intervention or participation, 34 Pa. Code § 95.44[4]—and the General Rules of Administrative Practice and Procedure ("GRAPP"), 1 Pa. Code § 35.28(a).

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[3] Section 95.14(10) of the PLRB's Rules reads, in full:

> A 1% showing of interest among employes within the requested unit is required before another employe representative may be placed on the ballot. A 10% showing of interest among employes within the requested unit is required before another employe representative may be permitted to intervene as a party.

[4] Section 95.44 of the PLRB's Rules provides, in full:

25. DENIED as misstatements of fact and conclusions of law. Mr. Cronin did not attempt "to disrupt and stop the representation election," as the PLRB alleges. PLRB's Appl. ¶ 25. The PLRB's own procedures permitted Mr. Cronin to request intervention or participation, 34 Pa. Code § 95.44(a), and, upon successful entry to the proceeding as a party, to have the PLRB review and potentially stay the election during its review pursuant to section 95.91(k)(2)(iii) of the PLRB's Rules. Unfortunately, PLRB maintains a blanket prohibition on individual intervention or participation.

Equally erroneous, the PLRB alleges that Mr. Cronin's rights are not important enough to merit review. However, whether individuals have an opportunity to be heard when their interests are threatened by unwanted exclusive representation is an issue of constitutional import. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The

> (a) Motions to intervene shall be in writing, specify the grounds for intervention, be signed and verified, and a copy shall be served upon the parties to the proceedings. Proof for motions to intervene shall be filed with the Board.
> (b) In representation proceedings, the hearing examiner may, subject to § 95.11 (relating to request for certification) permit public employers, public employes and employe organizations to participate as parties without formal intervention, upon a showing of good cause which reasonably prevented them from having filed a timely motion to intervene.
> (c) The Board or a member of the Board, or the hearing examiner, as the case may be, may, by orders, permit intervention in person, by counsel, or by other representative to the extent and upon the terms as they may deem proper.

fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); *R. v. Dep't of Pub. Welfare*, 636 A.2d 142, 153 (Pa. 1994) (adopting *Mathews*' methodology to assess due process claims brought under Section 1 of Article I of the Pennsylvania Constitution). And Mr. Cronin is not the only graduate assistant targeted for exclusive representation without due process;[5] the Coalition for Graduate Employees, NEA/PSEA ("Coalition") may seek another election for 3,800 graduate assistants at the Pennsylvania State University ("Penn State"), *see* 43 P.S. § 1101.605(7)(i), and another putative employe organization now seeks to unionize 2,000 more graduate assistants at the University of Pittsburgh. *See* Pet. for Representation of United Steelworkers (filed Dec. 15, 2017), https://www.hr.pitt.edu/sites/default/files/PetitionForRepresentation-GraduateStudentUnion.pdf.

26. DENIED as a conclusion of law. By way of further response, Mr. Cronin's rights would have been irreparably lost if review were postponed until final judgment. As a result of the PLRB's denial of Mr. Cronin's request to intervene or participate—and the parties' decision not to request PLRB review of the Proposed Order or the Board Representative's adoption thereof—Mr. Cronin was unable to

[5] "An issue is sufficiently important for immediate review under Rule 313(b) if it involves rights 'deeply rooted in public policy going beyond the particular litigation at hand.'" *CAP Glass, Inc. v. Coffman*, 130 A.3d 783, 790 (Pa. Super. 2016) (quoting *Ben v. Schwartz*, 729 A.2d 547, 552 (Pa. 1999)).

secure PLRB review before the election or file exceptions after the election. *See Kurtzman v. Hankin*, 714 A.2d 450, 452 (Pa. Super. 1998) (concluding that rights would have been irreparably lost because "there [wa]s no other way for [the possible intervenor] to obtain a remedy but through intervention in this case."); *see also K.C. v. L.A.*, 128 A.3d 774, 780 (Pa. 2015) (analyzing the irreparability requirement of the collateral order doctrine and remarking that "requiring a party who has satisfied the requirements of the collateral order doctrine to timely appeal from the denial of intervention, rather than wait to appeal that denial after final judgment, [i]s the preferred approach in such circumstances, as it would avoid the 'risk [of] interference with trial court proceedings taken after the denial of intervention, a prospect far costlier than insisting that the applicant appeal the denial without waiting to see whether the outcome of the proceedings leaves intervention still desirable.'" (quoting *Barnes*, 871 A.2d at 795)).

27. DENIED as a conclusion of law. Again, denials of intervention are generally considered "collateral orders" for purposes of Pennsylvania Rule of Appellate Procedure 313. *See Barnes*, 871 A.2d at 795 ("It is desirable to insist that timely appeal be taken from the denial [of intervention], rather than permitting appeal from the denial upon entry of a final judgment disposing of the claims among the parties.") (quoting 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3902.1 (2d ed. 2005)); *see, e.g.*, *Markham*, 136 A.3d at 138 n.4 ("We have jurisdiction over

Appellants' appeal from the Commonwealth[Court]'s order [denying intervention] pursuant to Pa.R.A.P. 313.").

COUNT II: STANDING

28. The foregoing paragraphs are realleged and incorporated by reference as if set forth fully herein.

29. ADMITTED. By way of further response, Mr. Cronin has a direct interest in the denial of his request to intervene or participate in then-ongoing proceedings at which his interests were threatened. It is undisputed that Mr. Cronin was within the bargaining unit over which the Coalition sought to exercise exclusive representation before the PLRB. *See* Proposed Order at Certified R. 159–188. Exclusive representation, by definition, necessarily "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[6] Meanwhile, although Penn State opposed such unionization, it did not call any graduate assistants to testify during PLRB proceedings, *see* Hearing Transcript at Certified R. Volume 3, and it declined to

[6] "In any unit where an exclusive bargaining representative has been designated, an employee cannot go to his employer, ask him for a raise, more responsibility, a day off, or discuss grievances with him. Instead, he must act through his union representative." James E. Bond, *The National Labor Relations Act and the Forgotten First Amendment*, 28 S.C. L. Rev. 421 (1977).

request that the PLRB review the Hearing Examiner's Proposed Order or the Board Representative's adoption thereof.

With respect to Mr. Cronin's standing before the PLRB, the threat of forced union representation—here, the Coalition's filing of the Petition for Representation and the Hearing Examiner's decision allowing unionization of graduate assistants—constitutes harm sufficient to confer standing. *See, e.g.*, *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1289 (11th Cir. 2010) ("Taken together, the allegations in Mulhall's complaint yield a strong inference that the organizing assistance is a critical ingredient for Unite's success, and that, if provided, it will substantially increase the likelihood that Mulhall will be unionized against his will. That 'probabilistic harm' is a cognizable injury for purposes of standing.").[7]

30. ADMITTED in part; DENIED in part. ADMITTED that Mr. Cronin ultimately sought the enforcement of longstanding Pennsylvania Supreme Court precedent establishing that individuals paid to perform work primarily for educational or training purposes are not "public employes" under PERA. *See Phila. Ass'n of Interns & Residents v. Albert Einstein Med. Ctr., Temple Univ.*, 369 A.2d 711 (Pa. 1977) ("*PAIR*"). DENIED, however, that his request to intervene or participate required an immediate

[7] Pennsylvania courts look to federal courts in making determinations as to standing. *See Housing Auth. of the Cty. of Chester v. Pennsylvania State Civil Serv. Comm'n*, 730 A.2d 935, 939 (Pa. 1999).

ruling on the merits; instead, Mr. Cronin sought to intervene or participate in an administrative proceeding where his interests were clearly threatened.

31. ADMITTED.

32. ADMITTED in part; DENIED in part. It is ADMITTED that this case is technically moot, in the sense that there is no active administrative proceeding to which this Court can remand with instructions. However, even if a case is technically moot, this Court may hear a case "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest or where a party will suffer some detriment without the court's decision." *Pub. Def.'s Office of Venango Cty. v. Venango Cty. Ct. of Common Pleas*, 893 A.2d 1275, 1279–80 (Pa. 2006) (quoting *Sierra Club v. Pennsylvania Pub. Util. Comm'n*, 702 A.2d 1131, 1135 (Pa. Cmwlth. 1997)); *see, e.g.*, *Sierra Club*, 702 A.2d at 1134 ("The present case is technically moot because the petitioners have not intervened in the appeal from the PUC's decision in the underlying rate case and thus no longer have use for a transcript. Nevertheless, the court regards the issue presented here as one likely to be repeated yet evade review, and also one involving an important public interest."). This appeal should be heard for the following reasons:

a. First, this matter is capable of repetition but likely to evade review because "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Consol Pennsylvania Coal Co., LLC v. Dep't of Envtl. Prot.*, 129 A.3d 28, 42

(Pa. Cmwlth. 2015). As the PLRB admits, unionization of graduate assistants is entirely capable of repetition "at least sometime after April 24, 2019." PLRB's Appl. ¶ 41. And the PLRB's Application is itself evidence that, in the future, it would continue to employ its blanket prohibition on intervention by individuals and incorrectly insist that the possible intervenor wait until after the Coalition wins an election to appeal, *see id.* at ¶¶ 33–34.

b. Second, whether individuals may petition their government when their interests are threatened by unwanted exclusive representation is an issue important to the public interest. The Coalition sought to unionize nearly 3,800 graduate assistants at Penn State, Coalition's Pet. for Representation at Certified R. 1–2, and another putative employe organization now seeks to unionize 2,000 graduate assistants at the University of Pittsburgh. *See* Pet. for Representation of United Steelworkers (filed Dec. 15, 2017), https://www.hr.pitt.edu/sites/default/files/PetitionForRepresentation-GraduateStudentUnion.pdf.

c. Finally, Mr. Cronin will suffer some detriment should this appeal be dismissed. In addition to the fact that he may face another union election within the next year, he will also be without

meaningful guidance as to how he can intervene, participate, or appeal the denial of such requests to the PLRB or this Court.

DENIED that this Court should dismiss this appeal on standing or mootness grounds.

33. DENIED. By way of further answer, the Coalition secured a Proposed Order, adopted by the Board Representative, determining that graduate assistants, including Mr. Cronin, may be subjected to exclusive representation under PERA. As the PLRB admits, the Coalition may seek a new election after April 24, 2019. PLRB's Appl. ¶ 41.

34. DENIED as a conclusion of law. By way of further answer, Mr. Cronin was aggrieved when his request to intervene or participate was denied. Although Penn State opposed the Petition for Representation, it did not call any graduate assistants to testify during PLRB proceedings, *see* Hearing Transcript at Certified R. Volume 3, and it declined to request that the PLRB review of the Hearing Examiner's Proposed Order or the Board Representative's adoption thereof. As a result, the Proposed Order—which determined that Mr. Cronin and other Penn State graduate assistants are "public employes" under PERA—went unchallenged before the election. Ultimately, allowing such determination to become part of the final order, to which neither party excepted, makes it far easier for the Coalition or some other employee organization to make repeated attempts at an election and certification, to which Mr. Cronin is opposed.

35. DENIED as a conclusion of law.

COUNT III: MOOTNESS

36. The foregoing paragraphs are realleged and incorporated by reference as if set forth fully herein.

37. ADMITTED in part; DENIED in part. ADMITTED that Mr. Cronin ultimately sought the enforcement of longstanding Pennsylvania Supreme Court precedent establishing that individuals paid to perform work primarily for educational or training purposes are not "public employes" under PERA. *See PAIR*, 369 A.2d 711. DENIED, however, that his request to intervene or participate required an immediate ruling on the merits; instead, Mr. Cronin sought to intervene or participate in the administrative hearing where his interests were clearly threatened.

38. ADMITTED.

39. ADMITTED.

40. ADMITTED in part; DENIED in part. It is ADMITTED that this case is technically moot, in the sense that there is no active administrative proceeding to which this Court can remand with instructions. However, even if a case is technically moot, this Court may hear a case "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest or where a party will suffer some detriment without the court's decision." *Pub. Def.'s Office*, 893 A.2d at 1279–80 (quoting *Sierra Club*, 702 A.2d at 1135); *see, e.g.*, *Sierra Club*, 702 A.2d at 1134 ("The present case is technically moot

because the petitioners have not intervened in the appeal from the PUC's decision in the underlying rate case and thus no longer have use for a transcript. Nevertheless, the court regards the issue presented here as one likely to be repeated yet evade review, and also one involving an important public interest."). This appeal should be heard for the following reasons:

a. First, this matter is capable of repetition but likely to evade review because "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Consol Pennsylvania Coal,* 129 A.3d at 42. As the PLRB admits, unionization of graduate assistants is entirely capable of repetition "at least sometime after April 24, 2019." PLRB's Appl. ¶ 41. And the PLRB's Application is itself evidence that, in the future, it would continue to employ its blanket prohibition on intervention by individuals and incorrectly insist that the possible intervenor wait until after the Coalition wins an election to appeal, *see id.* at ¶¶ 33–34.

b. Second, whether individuals may petition their government when their interests are threatened by unwanted exclusive representation is an issue important to the public interest. The Coalition sought to unionize nearly 3,800 graduate assistants at Penn State, Coalition's Pet. for Representation at Certified R. 1–2,

and another putative employe organization now seeks to unionize 2,000 graduate assistants at the University of Pittsburgh. *See* Pet. for Representation of United Steelworkers (filed Dec. 15, 2017), https://www.hr.pitt.edu/sites/default/files/PetitionForRepresentation-GraduateStudentUnion.pdf.

c. Finally, Mr. Cronin will suffer some detriment should this appeal be dismissed. In addition to the fact that he may face another union election within the next year, he will also be without meaningful guidance as to how he can intervene, participate, or appeal the denial of such requests to the PLRB or this Court.

DENIED that this Court should dismiss this appeal on standing or mootness grounds.

41. ADMITTED in part, DENIED in part. It is ADMITTED that the underlying situation is capable of repetition, as the PLRB's allegation demonstrates. It is DENIED that such repetition could occur only after April 24, 2019. Section 605 of PERA prevents *elections* from occurring within one year of a previous election, but a Petition for Representation may arguably be filed sooner. *See* 43 P.S. § 1101.605(7)(i).

42. DENIED. The PLRB cannot reasonably insist that the issues involved in this appeal would "not necessarily evade review," PLRB's Appl. ¶ 42, when, at the same time, it argues that denial of intervention or participation (1) does not qualify as an immediately appealable collateral order, *id.* at ¶¶ 22–27; (2) works no harm on Mr.

Cronin, *id.* at ¶ 33; and (3) cannot be appealed until after the Coalition wins an election, *see id.* at ¶¶ 33–34. The fact is, when the Coalition returns for its next election and Mr. Cronin files another request to intervene or participate, it is highly unlikely he will be able to wade through whatever requirements or delays may be imposed by the PLRB prior to seeking review, then secure review in a manner sufficient to enable meaningful intervention or participation in the continuing proceedings below. The PLRB's stated position *in this case* ensures that the intervention or participation issue evades review.

43. ADMITTED in part; DENIED in part. It is ADMITTED that this case is technically moot, in the sense that there is no active administrative proceeding to which this Court can remand with instructions. However, even if a case is technically moot, this Court may hear a case "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest or where a party will suffer some detriment without the court's decision." *Pub. Def.'s Office*, 893 A.2d at 1279–80 (quoting *Sierra Club*, 702 A.2d at 1135; *see, e.g.*, *Sierra Club*, 702 A.2d at 1134 ("The present case is technically moot because the petitioners have not intervened in the appeal from the PUC's decision in the underlying rate case and thus no longer have use for a transcript. Nevertheless, the court regards the issue presented here as one likely to be repeated yet evade review, and also one involving an important public interest."). This appeal should be heard for the following reasons:

a. First, this matter is capable of repetition but likely to evade review because "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Consol Pennsylvania Coal,* 129 A.3d at 42. As the PLRB admits, unionization of graduate assistants is entirely capable of repetition "at least sometime after April 24, 2019." PLRB's Appl. ¶ 41. And the PLRB's Application is itself evidence that, in the future, it would continue to employ its blanket prohibition on intervention by individuals and incorrectly insist that the possible intervenor wait until after the Coalition wins an election to appeal, *see id.* at ¶¶ 33–34.

b. Second, whether individuals may petition their government when their interests are threatened by unwanted exclusive representation is an issue important to the public interest. The Coalition sought to unionize nearly 3,800 graduate assistants at Penn State, Coalition's Pet. for Representation at Certified R. 1–2, and another putative employe organization now seeks to unionize 2,000 graduate assistants at the University of Pittsburgh. *See* Pet. for Representation of United Steelworkers (filed Dec. 15, 2017), https://www.hr.pitt.edu/sites/default/files/PetitionForRepresentation-GraduateStudentUnion.pdf.

c. Finally, Mr. Cronin will suffer some detriment should this appeal be dismissed. In addition to the fact that he may face another union election within the next year, he will also be without meaningful guidance as to how he can intervene, participate, or appeal the denial of such requests to the PLRB or this Court.

DENIED that this Court should dismiss this appeal on standing or mootness grounds.

COUNT IV: EXHAUSTION OF ADMINISTRATIVE REMEDIES

44. The foregoing paragraphs are realleged and incorporated by reference as if set forth fully herein.

45. ADMITTED. By way of further response, Mr. Cronin filed exceptions acknowledging that, under the PLRB's Rules, "exceptions are not permitted or required" in this instance and were merely "entered in an abundance of caution to ensure preservation of appellate review in the event that [denial of his request to intervene] is not deemed collateral in nature." Certified R. 360.

Indeed, section 95.96(a) of the PLRB's Rules specifically *forecloses* exceptions to, among other orders, "final orders or procedural orders of the [PLRB] *or its designated agents*":

> No exceptions may be filed to orders directing elections issued by the Board Representative under § 95.91(k)(2) (relating to hearings), orders directing the canvassing of challenged ballots, final orders or procedural orders of the Board or its designated agents.

34 Pa. Code § 95.96(a). A Board Representative is such a designated agent. *See* 34 Pa. Code § 95.91(k)(2)(i) ("The Board Representative will be designated by the [PLRB] at a regular meeting of the Board and the designation will be recorded in the minutes of the [PLRB] meeting.").

46. DENIED as a conclusion of law. By way of further response, as the PLRB recognizes elsewhere in its Application, the PLRB has dismissed the Petition for Representation below, PLRB's Appl. ¶ 32, calling into question whether the PLRB can grant Mr. Cronin's requested relief at this time.

47. ADMITTED.

48. DENIED. The PLRB cites from a decision involving a hearing examiner's proposed order, which is different in kind from a decision of the Board Representative designated by the PLRB to act as its agent.[8] The distinction is important because the PLRB's Rules permit for exceptions to proposed orders of hearing examiners, *see* 34 Pa. Code § 95.98(a), but specifically *foreclose* exceptions to, among other orders, "final orders or procedural orders of the [PLRB] or its designated agents":

> No exceptions may be filed to orders directing elections issued by the Board Representative under § 95.91(k)(2) (relating to hearings), orders directing the canvassing of

[8] *See* 34 Pa. Code § 95.91(k)(2)(i) ("The Board Representative will be designated by the [PLRB] at a regular meeting of the Board and the designation will be recorded in the minutes of the [PLRB] meeting.").

> challenged ballots, final orders or procedural orders of the Board or its designated agents.

34 Pa. Code § 95.96(a).

49. ADMITTED in part; DENIED in part. It is ADMITTED that the PLRB cannot address Mr. Cronin's exceptions at this time. However, it is DENIED that Pennsylvania Rule of Appellate Procedure 1701 is the only reason; the PLRB has dismissed the Petition for Representation below, calling into question whether the PLRB can grant Mr. Cronin's requested relief at this time.

50. ADMITTED in part; DENIED in part. It is ADMITTED that the PLRB cannot address Mr. Cronin's exceptions at this time. However, it is DENIED that Pennsylvania Rule of Appellate Procedure 1701 is the only reason; the PLRB has dismissed the Petition for Representation below, calling into question whether the PLRB can grant Mr. Cronin's requested relief at this time.

51. DENIED as a conclusion of law. By way of further answer, as this Court has recognized, "[t]he exhaustion of administrative remedies requirement is a judge-made rule intended to prevent premature judicial intervention into the administrative process." *Ramos v. Allentown Educ. Ass'n*, No. 150 M.D. 2016, 2016 WL 7383800, *9 (Pa. Cmwlth. Dec. 21, 2016). But it "is neither inflexible nor absolute." *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 793 (Pa. 1977). "Where the administrative process has nothing to contribute to the decision of the issue and there are no special reasons for postponing its immediate decision, exhaustion should not be required."

Ohio Cas. Group of Ins. Cos. v. Argonaut Ins. Co., 525 A.2d 1195, 1197–98 (Pa. 1987) (quoting *Borough of Green Tree v. Bd. of Prop. Assessments*, 328 A.2d 819, 824 (Pa. 1974)). Here, even if Mr. Cronin could have taken additional measures prior to appeal—and no such measures appeared to exist—the PLRB does not represent that anything different would have happened had Mr. Cronin taken the PLRB's preferred course of administrative action; in fact, the PLRB defends its decision below.

COUNT V: PRESERVATION

52. The foregoing paragraphs are realleged and incorporated by reference as if set forth fully herein.

53. ADMITTED.

54. ADMITTED. By way of further response, Mr. Cronin filed exceptions acknowledging that, under the PLRB's Rules, "exceptions are not permitted or required" in this instance and were merely "entered in an abundance of caution to ensure preservation of appellate review in the event that [denial of his request to intervene] is not deemed collateral in nature." Certified R. 360.

Indeed, section 95.96(a) of the PLRB's Rules specifically *forecloses* exceptions to, among other orders, "final orders or procedural orders of the [PLRB] *or its designated agents*":

> No exceptions may be filed to orders directing elections issued by the Board Representative under § 95.91(k)(2) (relating to hearings), orders directing the canvassing of challenged ballots, final orders or procedural orders of the Board or its designated agents.

34 Pa. Code § 95.96(a). A Board Representative is such a designated agent. *See* 34 Pa. Code § 95.91(k)(2)(i) ("The Board Representative will be designated by the [PLRB] at a regular meeting of the Board and the designation will be recorded in the minutes of the [PLRB] meeting.").

55. ADMITTED.

56. ADMITTED. Again, the PLRB's Rules foreclose the filing of exceptions to, among other orders, "final orders or procedural orders of the [PLRB] or its designated agents." 34 Pa. Code § 95.96(a).

57. ADMITTED that section 35.20 of GRAPP reads as quoted. DENIED, however, that Mr. Cronin was required to proceed under section 35.20 to preserve issues for appeal. *See Sugarhouse HSP Gaming, L.P. v. Pennsylvania Gaming Control Bd.*, 162 A.3d 353, 367 (Pa. 2017). As the Pennsylvania Supreme Court recently explained in *Sugarhouse*, appeal to an agency head under section 35.20 of GRAPP is permissive ("*may* be appealed"); thus, to require that a litigant follow such a procedure, an agency must provide notice through its regulations of such a requirement:

> However, critically, there is nothing in the Board's regulations or in the Administrative Code which provides notice to a litigant pursuing matters before the Board that it must follow these procedural steps and present all alleged claims of error by a hearing officer to the Board in order to preserve such claims for appeal. As discussed above, our Court indicated in *Goods* that notice of such waiver of appellate issues for failing to follow specified agency procedures governing presentation of the issue to the agency for consideration is a fundamental requirement which must

> be included in an agency's regulatory framework in order for waiver to be appropriate under *Dilliplaine*. Thus, as the Board's regulations did not clearly inform a litigant in SugarHouse's position that failure to appeal an adverse decision of a hearing officer to the Board would result in waiver of its appellate challenges to that decision, we will not find its claims waived under these circumstances.

Similarly, here, the PLRB's Rules fail to provide notice to Mr. Cronin or any other litigant in any other PLRB proceeding that section 35.20's permissive language is a requirement. And the order denying Mr. Cronin's request for intervention or participation is likewise devoid of any such notice. *See* Certified R. 357.[9]

58. ADMITTED. By way of further response, Mr. Cronin filed exceptions acknowledging that, under the PLRB's Rules, "exceptions are not permitted or required" in this instance and were merely "entered in an abundance of caution to ensure preservation of appellate review in the event that [denial of his request to intervene] is not deemed collateral in nature." Certified R. 360.

Indeed, section 95.96(a) of the PLRB's Rules specifically *forecloses* exceptions to, among other orders, "final orders or procedural orders of the [PLRB] *or its designated agents*":

[9] To the extent that Mr. Cronin was required to file an appeal to the PLRB in order to preserve issues, Mr. Cronin filed (unauthorized) exceptions on April 17, 2018. PLRB's Appl. ¶ 8. Such a filing was more than sufficient to preserve issues for appeal, particularly given the PLRB's failure to provide notice to Mr. Cronin of any procedural requirements following denial of his request to intervene or participate. *See* PLRB's order denying Mr. Cronin's request for intervention or participation at Certified R. 357.

> No exceptions may be filed to orders directing elections issued by the Board Representative under § 95.91(k)(2) (relating to hearings), orders directing the canvassing of challenged ballots, final orders or procedural orders of the Board or its designated agents.

34 Pa. Code § 95.96(a). A Board Representative is such a designated agent. *See* 34 Pa. Code § 95.91(k)(2)(i) ("The Board Representative will be designated by the [PLRB] at a regular meeting of the Board and the designation will be recorded in the minutes of the [PLRB] meeting.").

59. DENIED. Mr. Cronin was not required to proceed under section 35.20 to preserve issues for appeal. *See Sugarhouse*, 162 A.3d at 367. As the Pennsylvania Supreme Court recently explained in *Sugarhouse*, appeal to an agency head under section 35.20 of GRAPP is permissive ("*may* be appealed"); thus, to require that a litigant follow such a procedure, an agency must provide notice through its regulations of such a requirement:

> However, critically, there is nothing in the Board's regulations or in the Administrative Code which provides notice to a litigant pursuing matters before the Board that it must follow these procedural steps and present all alleged claims of error by a hearing officer to the Board in order to preserve such claims for appeal. As discussed above, our Court indicated in *Goods* that notice of such waiver of appellate issues for failing to follow specified agency procedures governing presentation of the issue to the agency for consideration is a fundamental requirement which must be included in an agency's regulatory framework in order for waiver to be appropriate under *Dilliplaine*. Thus, as the Board's regulations did not clearly inform a litigant in SugarHouse's position that failure to appeal an adverse decision of a hearing officer to the Board would result in

> waiver of its appellate challenges to that decision, we will not find its claims waived under these circumstances.

Similarly, here, the PLRB's Rules fail to provide notice to Mr. Cronin or any other litigant in any other PLRB proceeding that section 35.20's permissive language is a requirement. And the order denying Mr. Cronin's request for intervention or participation is likewise devoid of any such notice. *See* Certified R. 357.[10]

60. DENIED as a conclusion of law.

NEW MATTER

61. The PLRB's position with respect to intervention or participation in representation proceedings is that individuals cannot intervene or participate in their individual capacities.

62. The PLRB's position is that neither section 35.28(a) of GRAPP nor section 95.44(a) of the PLRB's Rules permits individuals to intervene in their individual capacities in the context of representation proceedings.

63. The PLRB's position is that section 95.44(b) of the PLRB's Rules does not permit individuals to participate in their individual capacities in the context of representation proceedings.

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[10] Again, to the extent that Mr. Cronin was required to file an appeal to the PLRB in order to preserve issues, Mr. Cronin filed (unauthorized) exceptions on April 17, 2018. PLRB's Appl. ¶ 8. Such a filing was more than sufficient to preserve issues for appeal, particularly given the PLRB's failure to provide notice to Mr. Cronin of any procedural requirements following denial of his request to intervene or participate. *See* PLRB's order denying Mr. Cronin's request for intervention or participation at Certified R. 357.

64. Instead, the PLRB's position is that only an employe representative may intervene or participate in representation proceedings pursuant to section 95.14(10) of the PLRB's Rules.

65. The PLRB's position is that section 95.14(10) of the PLRB's Rules supersedes GRAPP with respect to intervention in the context of representation proceedings.

66. Accordingly, any request to intervene or participate filed by Mr. Cronin in his individual capacity or by any other individual in their individual capacities in any other representation proceeding will be denied by the PLRB.

67. Contrary to the PLRB's position, the PLRB's Rules do not supersede section 35.28(a) of GRAPP.

68. Neither section 95.14 nor section 95.44 of the PLRB's Rules include statements necessary to supersede section 35.28(a) of GRAPP. *See* 1 Pa. Code § 13.38(a); *Ciavarra v. Commonwealth*, 970 A.2d 500, 503 n.5 (Pa. Cmwlth. 2009) ("If an agency intends that its own regulation supersede the GRAPP, the superseded provision must be expressly cited, along with a statement that the cited provision is not applicable to proceedings before the agency.").

69. In other contexts, in fact, the PLRB has taken the position that GRAPP is entirely consistent with, if not complementary to, the PLRB's Rules concerning intervention. Br. of Resp't PLRB at 8, *Commonwealth v. PLRB*, No. 359 CD 2000, 2000 WL 35603498, at *8–9 (Pa. Cmwlth. June 1, 2000) ("Although the Board's regulations

are silent regarding intervention at times other than pre-hearing, the General Rules of Administrative Practice and Procedure apply by default. Under those rules, intervention may be granted by an agency at any time following the filing of an application and further permit intervention upon good cause shown.").

70. The PLRB's reliance, here and below, on *Official Court Reporters of the Court of Common Pleas of Philadelphia County v. PLRB*, 467 A.2d 311 (Pa. 1983), is misplaced. The plurality opinion issued in *Official Court Reporters* merely concluded that the appellant's preferred[11] route to an appeal—specifically, Pennsylvania Rule of Appellate Procedure 501—was, on its own terms, unavailable to nonparties appealing from final orders. *Id.* at 312–313. In contrast, here, Mr. Cronin is not appealing pursuant to Rule 501.

71. In any event, as this Court has recognized, the plurality opinion in *Official Court Reporters* is not binding precedent. *See Donatucci v. PLRB*, 547 A.2d 857, 861 n.5 (Pa. Cmwlth. 1988) (discussing *Official Court Reporters* and concluding that "[w]e are not bound by the Supreme Court's decision [because] it is a plurality opinion merely announcing the judgment of the Court and, as such, is not binding precedent.").

[11] According to the plurality opinion, the "parties to the appeal had agreed that the issue of standing in th[at] case [wa]s governed by Pa.R.A.P. 501." *Official Court Reporters*, 467 A.2d at 314 n.8.

72. Mr. Cronin should have been permitted to intervene or participate in the proceeding below in his individual capacity. Section 35.28(a) of GRAPP accords standing to individuals seeking to intervene where they assert, for example:

> (2) An interest which may be directly affected and which is not adequately represented by existing parties, and as to which petitioners may be bound by the action of the agency in the proceeding. *The following may have an interest*: consumers, customers or other patrons served by the applicant or respondent; holders of securities of the applicant or respondent; *employes of the applicant or respondent*; competitors of the applicant or respondent.
>
> (3) Other interest of such nature that participation of the petitioner may be in the public interest.

1 Pa. Code § 35.28(a)(2)–(3) (emphases added); *see also* 34 Pa. Code § 95.44. Such interests were asserted below. *See* Mr. Cronin's Mot. to Intervene or Participate at Certified R. 228–282.

73. Moreover, under section 95.44(b), "public employers, *public employes* and employe organizations" may "participate as parties without formal intervention, upon a showing of good cause which reasonably prevented them from having filed a timely motion to intervene." 34 Pa. Code § 95.44(b) (emphasis added).[12]

WHEREFORE, Mr. Cronin requests that this Court deny the PLRB's Application in its entirety.

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[12] Graduate assistants, including Mr. Cronin, were deemed "public employes" by the Hearing Examiner in the underlying proceeding. Proposed Order at Certified R. 159–188. However, Mr. Cronin objected to such characterization. Mr. Cronin's Mot. to Intervene or Participate at Certified R. 236.

Respectfully submitted,

Dated: June 25, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this day via PACFile and first-class mail on the following:

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