

In the Commonwealth Court of Pennsylvania

256 MD 2016

WILLIAM J. GREEN, IV, individually and in his official capacity as
Chairman of the School Reform Commission,
Petitioner,

v.

THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of
Pennsylvania; THE SCHOOL REFORM COMMISSION OF THE SCHOOL DISTRICT OF
PHILADELPHIA; and MARJORIE NEFF, in her official capacity as member and
putative Chair of the School Reform Commission,
Respondents.

BRIEF IN OPPOSITION TO GOVERNOR THOMAS W. WOLF'S PRELIMINARY OBJECTIONS

On Original Jurisdiction Petition for Review

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INTRODUCTION

This case hinges on one question: Can the Governor replace the chairman of the School Reform Commission (SRC) absent clear and convincing evidence of malfeasance or misfeasance in office? Under Section 696 of the Public School Code (“section 696”) the answer is a resolute “no.” In creating the SRC, the General Assembly made plain that SRC members, including the Chairman, were to be insulated from political pressure, in part, by mandating that members could be removed “from office” only “upon proof by clear and convincing evidence of malfeasance or misfeasance while in office[.]” 24 P.S. § 6-696(b)(2). The SRC and its Chairman have hard choices to make, and to make those choices they must be isolated from the political whims of the Governor.

Notwithstanding this clear legislative directive, Respondent Governor Thomas W. Wolf (“Gov. Wolf”) purported to remove and replace Petitioner William J. Green, IV (“Green”) from his office as Chairman of the SRC—and now insists that his replacement can continue in Green’s office—absent cause. Green’s removal was unlawful at the time, and is a continuing harm preventing Green from exercising the duties of his office. Green asks this Court to overrule Gov. Wolf’s preliminary objections, grant him summary relief, and direct that he be restored to his lawfully appointed office.

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

“[P]reliminary objections should be sustained only when it appears with certainty that the law will not permit recovery, and any doubt should be resolved in favor of overruling the demurrer.” PG Publishing Co., Inc. v. Governor’s Office of Admin., 120 A.3d 456, 461 n.7 (Pa. Cmwlth. 2015). “If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.” Allegheny Cnty. v. Commonwealth, 490 A.2d 402, 408 (Pa. 1985) (emphasis added).

COUNTERSTATEMENT OF QUESTIONS INVOLVED

- I. WHETHER THE CHAIRMAN OF THE SRC IS AN “OFFICE” ENTITLED TO PROTECTION FROM NO-CAUSE REMOVAL BY THE GOVERNOR**
- II. WHETHER THE GOVERNOR HAS CONSTITUTIONAL AUTHORITY TO REMOVE THE CHAIRMAN OF THE SRC ABSENT CAUSE**
- III. WHETHER GOV. WOLF SUSTAINS THE BURDEN OF DEMONSTRATING TECHNICAL GROUNDS FOR DISMISSAL**

COUNTERSTATEMENT OF THE CASE

On October 30, 2001, amid highly politicized efforts at institutional reform of Philadelphia’s school system, the General Assembly amended section 696 of the Public School Code of 1949 (“section 696”), 24 P.S. § 6-696, to enable the Commonwealth to establish a newly modeled SRC for school districts of the first

class¹ declared by the Secretary of Education to be “distressed,” Act of Oct. 30, 2001, P.L. 828, No. 83 § 1. The new entity would become “an instrumentality of the school district,” effectively replacing the local school board, jointly filled with commissioners (or “members”) by the Governor and the “mayor of the city coterminous with the school district.” 24 P.S. § 6-696(a).

As part of that reform, the General Assembly created the office of Chairman of the SRC, which is filled by the Governor. 24 P.S. § 6-696(a). The Chairman of the SRC serves in a civil office separate and distinct from the other members of the SRC; in fact, the constitutional oath of office taken by the chair specifically identifies the appointment as to the “Officer Title” of “Chairman, School Reform Commission.” See Amended Petition for Review in the Nature of a Complaint for Quo Warranto, Mandamus, Declaratory, and Injunctive Relief (“Amended Petition”), filed May 24, 2016, at Exh. F. The Chair is responsible for “presid[ing] over the work of the entire SRC,” the grave and important work of which includes scheduling SRC meetings, establishing meeting agendas, establishing SRC committees, and appointing committee members. See id. at ¶ 12 & Exh. A. Additionally, the Chairman of the SRC consults directly with the superintendent regarding negotiating strategy on

1. At this time, the School District of Philadelphia is the only school district in the Commonwealth classified as a “school district of the first class.” See 24 P.S. § 2-202.

labor contract issues and assumes the statutory duties of the President of the local board of school directors, whose duties include “execut[ing] any and all deeds, contracts, warrants to tax collectors, reports, and other papers pertaining to the business of the board, requiring the signature of the president.” 24 P.S. § 4-427.

In designating a Chairman as the head of the SRC, the General Assembly made a clean break from prior law. Initially, the law provided for the appointment of a chief executive officer by the Secretary of Education “to oversee and manage the school district” and for a commission chaired by the Secretary. See Act of Apr. 27, 1998, P.L. 270, No. 46, § 3 (former Section 696(a), (d)). This original version of the statute did not give either the chief executive officer or the members of the SRC any insulation. In fact, both the chief executive officer and the membership of the SRC served “at the pleasure of” their appointing authorities. See id.

Yet upon subsequent amendments to section 696, all instances of the “serve at the pleasure of” language were intentionally deleted and replaced with statutory safeguards meant to protect the SRC as an independent body. Instead, SRC members may be removed “from office” only “upon proof by clear and convincing evidence of malfeasance or misfeasance in office,” and only then “with a written statement of the reasons for removal and an opportunity for a hearing[.]” 24 P.S. § 6-696(b)(2). Additionally, the legislature further ensured the independence of

the SRC by giving members fixed terms—staggered both with each other’s terms and with the term of the Governor, 24 P.S. § 6-696(b), and prohibited members of the SRC from holding any other political office or becoming an officer of a political party, *id.* at (b)(6).

The purpose and scope of these amendments were not lost on members of the General Assembly, who clearly understood that the intent of the change was to prevent the next Governor from influencing the operations of the Philadelphia School District. From the floor debate in the Pennsylvania House in 2001:

The SPEAKER. The gentleman, Mr. Perzel, indicates he will stand for interrogation. You may begin[, Mr. Belfanti], on the question of concurrence.

Mr. BELFANTI. Thank you, Mr. Speaker.

. . . . What about the next Governor 14 months or 15 months from now who would like to be able to remedy the Philadelphia School District problem? He will have no tools at his disposal because he will be stuck with a commission that was appointed by a lameduck Governor. Is that not the case?

Mr. PERZEL. That is correct.

Mr. BELFANTI. That is correct. I predicted that.

So we are going to give the Governor, the 14-month lameduck Governor, some tools for the next 7 years^[2] or the next 5 years, and his term expires in 14 months. The next Governor, who would like the ability to address the Philadelphia school problem, will have no ability unless we repeal this act. Is that not correct? The

2. In order to create staggered terms, the initial term of two SRC members was seven years. 24 P.S. § 6-696(b)(1)(i).

commission will call all the shots for the next Governor and the next Secretary of Education.

Mr. PERZEL. For the next 5 to 7 years. I have explained that several times, Mr. Speaker.

58 Pa. House L.J. 1903 (Oct. 23, 2001) (emphasis added). Likewise, a detractor in the Pennsylvania Senate remarked (with some sarcasm):

I also want to thank you, quite sincerely thank you from the bottom of my heart, as someone who is deeply involved in the Casey campaign, by admitting defeat this early.^[3] This bill clearly contemplates that you are never going to have the Governor, at least not in the next 8 years, and that is why you have so craftily drafted it so that Bob Casey, when he becomes Governor, will not be able to change this board.

54 Pa. Senate L.J. 1013-14 (Oct. 23, 2001).

In January 2014, years after the amendments to section 696 were enacted, then-Governor Tom Corbett nominated Green to fill the office of then-Chairman Pedro Ramos, who had resigned. Amended Petition, at ¶ 18 & Exh. B. The Pennsylvania Senate confirmed his nomination, id. at ¶ 19 & Exh. C, and Green

3. Of course, Bob Casey Jr. would go on to lose the nomination in 2002 to Ed Rendell. See James O'Toole, Primary 2002: Rendell wins easily over Casey, PITTSBURGH POST-GAZETTE, May 22, 2002, available at <http://old.post-gazette.com/election/20020522govrace0522p1.asp>.

received his fixed, five-year commission,⁴ designating his term as January 18, 2014, through January 18, 2019,⁵ id. at ¶ 20 & Exh. D.

On February 18, 2014, Governor Corbett officially appointed Green to the office of Chairman of the SRC. Id. at ¶ 21 & Exh. E. Green then took the constitutional oath of office as Chairman of the SRC and began performing the powers and duties of Chairman. Id. at ¶ 22 & Exh. F. Following his lawful appointment as Chairman of the SRC, Green diligently fulfilled the duties of his post for more than one year.

As required by law, in February of 2015, Bill Green scheduled a vote on 39 pending charter school applications.⁶ Despite opposition from Gov. Wolf, Green supported, and the SRC approved, 5 of 39 new charter school applications.⁷

4. By this time, all SRC members appointed by the Governor received five-year terms. See 24 P.S. § 6-696(b)(1)(v)(A).

5. Gov. Wolf's term will expire before Green's term concludes. See Pa. Const. art. IV, § 3.

6. Meeting minutes from February 18, 2015, are available at http://webgui.phila.k12.pa.us/uploads/c_/Td/c_TdLB5KtO6xNPdb9ti1tQ/Minutes-2.18.15-Posting.pdf. See also Holly Otterbein, SRC Approves 5 of 39 New Charter School Applications, PHILADELPHIA, Feb. 18, 2015, available at <http://www.phillymag.com/news/2015/02/18/src-approves-5-new-charter-schools-philadelphia-update/>.

7. See supra at n.6; see also ABC 6 Action News, Gov. Wolf Confirms Bill Green Replaced as SRC Chair, Mar. 2, 2015, available at <http://6abc.com/education/gov-wolf-confirms-bill-green-replaced-as-src-chair/539951/>.

Respondent Commissioner Marjorie Neff (“Neff”) did not vote to authorize a single charter school, just as the Governor had requested.⁸

Immediately following this vote, Gov. Wolf purported to remove Green from his office and appoint a “new chairman to serve effective immediately.” Id. at ¶ 24 & Exh. G. Green was not provided with “proof by clear and convincing evidence of malfeasance or misfeasance in office,” “with a written statement of the reasons for removal,” or “an opportunity for a hearing.” 24 P.S. § 6-696(b)(2); Petition, at ¶¶ 25-26 & Exh. G.

In fact, Gov. Wolf’s reasons for removing Green were purely political. As Wolf’s spokesperson stated:⁹

Wolf thought it was irresponsible to approve five new charter schools at a time when the school district cannot afford the approval of any new charter schools. However, the governor made this move because he believes the district cannot continue down its current path, which is putting our children at a disadvantage. The governor named Marjorie Neff as chair because he supports [Wolf’s] vision for the School District of Philadelphia.

8. Id.

9. Holly Otterbein, The Brief: Is Bill Green’s Political Future Over?, Philadelphia, Mar. 2, 2015, available at <http://www.phillymag.com/citifed/2015/03/02/the-brief-bill-greens-political-future-over/>; see also ABC 6 Action News, Gov. Wolf Confirms Bill Green Replaced as SRC Chair, Mar. 2, 2015, available at <http://6abc.com/education/gov-wolf-confirms-bill-green-replaced-as-src-chair/539951/>.

The same day Gov. Wolf illegally removed Green, Gov. Wolf informed Neff that she was being appointed the new Chairman, “effective immediately.” Amended Petition, at ¶ 27 & Exh. H. To this day, Neff continues to serve as Chair and perform the duties Green is entitled to exercise under the law.¹⁰ Green presently continues to serve as a member of the SRC, despite his sudden and unlawful removal as Chairman, and his term lasts until January of 2019.

On April 19, 2016, Green filed a Petition for Review and Application for Summary Relief with this Court seeking a writ of quo warranto,¹¹ a writ of mandamus,¹² and declaratory¹³ and injunctive relief. On May 24, 2016, following preliminary objections, Green filed his Amended Petition and an Amended Application for Summary Relief (“Amended Application”), both of which are now pending before this Court. In his Amended Petition, Green seeks a writ of quo warranto, a writ of mandamus directing Wolf to reinstate and recognize Green as

10. Notably, Neff’s term as Commissioner ends in January of 2017, which would allow Gov. Wolf to appoint yet another Chairman contrary to the law during his current term as Governor.

11. See Spykerman v. Levy, 421 A.2d 641, 648 (Pa. 1980) (“[Q]uo warranto action is the sole and exclusive method to try title or right to public office.”).

12. See Arneson v. Wolf, 117 A.3d 374, 396 (Pa. Cmwlth. 2015), aff’d and adopted, 124 A.3d 1225 (Pa. 2015) (holding that mandamus is proper remedy to seek reinstatement to office properly held).

13. 42 Pa.C.S. §§ 7531-7541.

Chairman of the SRC, a writ of mandamus directing the SRC to reinstate and recognize Green as Chairman of the SRC, and declaratory and injunctive relief.

On July 5, 2016, Gov. Wolf filed preliminary objections (“POs”) to the Amended Petition, as well as an answer and new matter to the Amended Application. Green answered Gov. Wolf’s new matter on July 19, 2016, and now answers Gov. Wolf’s POs.

SUMMARY OF ARGUMENT

Gov. Wolf cannot sustain his heavy burden of essentially proving gubernatorial authority to continue meddling with the SRC. Gov. Wolf’s removal of Green was an ultra vires attack on the integrity of an independent office, and Gov. Wolf has a legal duty to correct it. Gov. Wolf’s defense that the Chairman of the SRC is not a “civil office” for purposes of section 696 are specious at best, yet become even less convincing when, in the next breath, Wolf claims the constitutional power to remove the Chairman as a “civil officer[] . . . remov[able] at the pleasure of the power by which they shall have been appointed.” Pa. Const. art. VI, § 7 (emphasis added). Moreover, Gov. Wolf cannot successfully strip Green of the protections of that office without creating an absurd result and reducing section 696’s language to mere surplusage. Finally, Gov. Wolf’s arguments for technical dismissal of this case are little more than smoke and mirrors.

ARGUMENT

Gov. Wolf cannot demonstrate gubernatorial entitlement to continue meddling with the SRC—essentially what is required to demonstrate that Green is not entitled to relief on any theory of law—and all he offers this Court is flawed logic. Instead, this Court should overrule Gov. Wolf’s preliminary objections and provide the relief requested in the underlying Amended Petition. Otherwise, this Court functionally authorizes Gov. Wolf to continue controlling the SRC, destroying it as an independent body.

I. THE CHAIRMAN OF THE SRC IS AN “OFFICE”

Contrary to Gov. Wolf’s assertions, POs, at ¶¶ 38-39, the office of Chairman of the SRC falls squarely within the definition of “public office” or “civil office,” entitling the holder of that office to protection under section 696. As a result, Gov. Wolf’s POs insisting on his right to remove the Chairman of the SRC absent cause must be rejected.¹⁴

Section 696 provides, in pertinent part:

Except as authorized in this subsection, no commission member may be removed from office during a term. The Governor may, upon proof by clear and convincing evidence of malfeasance or misfeasance in office, remove a commission member prior to the expiration of the term.

14. Gov. Wolf’s “Preliminary Objection VII” directly advances this flawed argument, but other POs hinge on its success.

Before a commission member is removed, that member must be provided with a written statement of the reasons for removal and an opportunity for a hearing in accordance with 2 Pa.C.S. [§§ 501-508] (relating to practice and procedure of Commonwealth agencies) and [§§ 701-754] (relating to judicial review of Commonwealth agency action).

24 P.S. § 6-696(b)(2) (emphasis added) (footnote omitted).

“A person will be deemed a public officer if the person is appointed or elected to perform duties of a grave and important character, and which involve some of the functions of government, for a definite term.”¹⁵ Arneson v. Wolf, 117 A.3d 374, 403-04 (Pa. Cmwlth. 2015), aff’d and adopted, 124 A.3d 1225 (Pa. 2015) (quoting Werner v. Zazyczny, 681 A.2d 1331, 1337 (Pa. 1996)). More broadly, Merriam-Webster defines “office” chiefly as

- a: a special duty, charge, or position conferred by an exercise of governmental authority and for a public purpose : a position of authority to exercise a public function and to receive whatever emoluments may belong to it.
- b: a position of responsibility or some degree of executive authority

15. In a departure from earlier filings, and perhaps in recognition that his previous arguments lack merit, in his Brief filed August 2, 2016, Gov. Wolf no longer attempts to argue that the SRC Chair is not performing duties “of a grave and important character.” Instead, he seeks to have the Court apply an entirely new standard that a person cannot be deemed a “public officer” unless the duties of the office in question are specifically enumerated in enabling statutes. This standard is a clear departure from current Court precedent focusing on the character of the duties performed and the term of the appointment.

Merriam-Webster.com, available at <http://www.merriam-webster.com/dictionary/office>. And Black’s Law Dictionary defines “public office” as “[a] position whose occupant has legal authority to exercise a government’s sovereign powers for a fixed period.”

Governor Wolf argues, in his POs, that the duties of the Chairman are not important enough and do not sufficiently involve the functions of government to merit the “public office” designation.¹⁶ This line of argument is either laughable—considering the Governor’s apparent interest in who serves as Chairman of the SRC—or it betrays a profound misunderstanding of the work of the SRC and its Chairman.

The General Assembly tasked the Chairman of the SRC with the work of spearheading educational reform through the SRC, an institution itself armed with “sweeping powers” greater than those granted to any “‘other governing body of a school district in Pennsylvania.’ ”¹⁷ See 24 P.S. § 6-696(a). The Chairman of the SRC is responsible for “presid[ing] over the work of the entire SRC,” including scheduling

16. See Gov. Wolf’s Brief in Support of Preliminary Objections, at p. 10.

17. Philadelphia Fed’n of Teachers v. Sch. Dist. of Philadelphia, 109 A.3d 298, 318 (Pa. Cmwlth. 2015) (quoting Sch. Reform Comm’n v. Philadelphia Fed’n of Teachers, Local 3, AFT, AFL-CIO, 95 A.3d 269, 270 (Pa. 2014) (Castille, C.J., dissenting)).

SRC meetings, establishing meeting agendas and SRC committees, appointing committee members, and consulting directly with the superintendent regarding negotiating strategy on labor contract issues. Amended Petition, at ¶ 12 & Exh. A. Additionally, the Chairman of the SRC is the equivalent of the President of the local board of school directors—also unquestionably an “officer”¹⁸—whose duties include “execut[ing] any and all deeds, contracts, warrants to tax collectors, reports, and other papers pertaining to the business of the board, requiring the signature of the president.”¹⁹ 24 P.S. § 4-427.

These functions have a direct and substantial impact on the priorities of the SRC and allow the Chairman to uniquely impact the direction of the SRC’s work. As the equivalent of the President of the local board of school directors, for instance, the Chairman may withhold his signature from documents not furthering reform in Philadelphia, a “negative” power among the Chairman’s most powerful tools to achieve progress and belongs distinctly to him as the Chairman. See 24 P.S. § 4-427. In setting the SRC’s agenda, the Chairman may exclude certain matters from

18. Similarly, the Pennsylvania Supreme Court has held that the position of school superintendent is an “office” for constitutional purposes. Burger v. Sch. Bd. of McGuffey Sch. Dist., 923 A.2d 1155 (Pa. 2007).

19. Wolf has not seriously disputed this contention. See Gov. Wolf’s Answer and New Matter to Petitioner’s Amended Application in the Form of a Motion for Summary Relief, at p. 4, ¶ 13.

the SRC's consideration, color the debate on a topic by deciding what speakers present their viewpoint, or insist on revisiting a particular issue until satisfactory resolution is achieved. He exerts a similar influence by deciding whether to create committees on various topics and by appointing or refusing to appoint certain committee members who may have interest or expertise in an area.

Of course, this is precisely what the General Assembly intended by the term "Chairman." Traditionally, the term describes a distinct "presiding officer" with at least the following duties:

- 1) To open the meeting at the appointed time by taking the chair and calling the meeting to order, having ascertained that a quorum is present.
- 2) To announce in proper sequence the business that comes before the assembly or becomes in order in accordance with the prescribed order of business, agenda, or program, and with existing orders of the day.
- 3) To recognize members who are entitled to the floor.
- 4) To state and to put to vote all questions that legitimately come before the assembly as motions or that otherwise arise in the course of proceedings . . . and to announce the result of each vote; or, if a motion that is not in order is made, to rule it out of order. . . .
- 5) To protect the assembly from obviously frivolous or dilatory motions by refusing to recognize them.
- 6) To enforce the rules relating to debate and those relating to order and decorum within the assembly.
- 7) To expedite business in every way compatible with the rights of members.

- 8) To decide all questions of order, subject to appeal . . .
..
- 9) To respond to inquiries of members relating to parliamentary procedure or factual information bearing on the business of the assembly.
- 10) To authenticate by his or her signature, when necessary, all acts, orders, and proceedings of the assembly.
- 11) To declare the meeting adjourned when the assembly so votes or—where applicable—at the time prescribed in the program, or at any time in the event of a sudden emergency affecting the safety of those present.

HENRY M. ROBERT, III ET AL., ROBERT'S RULES OF ORDER NEWLY REVISED § 47 (10th ed. 2000)

(internal cross-references omitted).²⁰

In fact, the General Assembly has elsewhere made clear that it considers the position of Chairman to be a distinct “office.” In the Philadelphia Regional Port Authority Act, for example, the General Assembly required that “the Governor shall

20. Gov. Wolf misguidedly derides as “extraneous materials” well-accepted authority defining the terms “office” and “chairman.” Resort to such well-accepted authority is entirely appropriate, if not necessary, to plain-language analysis. See Commonwealth v. Shiffler, 879 A.2d 185 (Pa. 2005) (“In reading the plain language, ‘[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage,’ while any words or phrases that have acquired a ‘peculiar and appropriate meaning’ must be construed according to that meaning.”) (quoting 1 Pa.C.S. § 1903(a)). After all, the General Assembly was well acquainted with the traditional authority on parliamentary procedure and surely intended the words enacted to be generally understood. See St. Ignatius Nursing Home v. Dep’t of Pub. Welfare, 918 A.2d 838, 845 (Pa. Cmwlth. 2007) (“[I]n ascertaining the common and approved usage or meaning of a word, we may resort to the dictionary.”).

select one member as chairman of the board for a term of two years whenever the office of chairman is vacant” 55 P.S. § 697.5(f) (emphasis added). And under different appointment models, the General Assembly, in creating the Turnpike Commission and Tuition Account Programs Advisory Board, provided that members of the respective bodies must appoint a member to fill “the office of chairman,” and “the office of chairperson,” respectively. 74 Pa.C.S. § 8105(e); 24 P.S. § 6901.304(c) (emphases added); see also 53 P.S. § 28202(b) (“[T]he appointed members shall select a chairperson from among themselves at the initial organizational meeting of the board and upon any subsequent vacancy in the office of chairperson.”) (emphasis added).

Gov. Wolf also ignores the General Assembly’s obvious intent, through section 696, to shield the SRC and its Chairman from gubernatorial meddling. First, the General Assembly staggered the terms of the SRC members with one another and with the Governor’s term,²¹ making clear—were it not already clearly outlined in section 696(b)(2)—that the Governor cannot remove officers at his pleasure.²²

21. In fact, Green’s term began before Gov. Wolf entered office and will end after Gov. Wolf’s current term ends. Amended Petition, at ¶ 20 & Exh. D.

22. Gov. Wolf attempts to convince this Court that the “fixed-and-staggered” rule should not apply to section 696 because the rule only applies “when the statute is otherwise silent on the issue.” Gov. Wolf’s Brief in Support of Preliminary Objections, at p. 22. Perhaps Gov. Wolf has forgotten his own argument that section 696 is silent with respect to his ability to remove the Chairman of the SRC.

See Arneson, 117 A.3d at 382 (“[U]nbridled power by the governor to remove [such an officer] without cause would nullify the intent that the [officer’s] terms overlap the Governor’s terms of office.”); see, e.g., Bowers v. Pennsylvania Labor Relations Bd., 167 A.2d 480 (Pa. 1961); Watson v. Pennsylvania Turnpike Comm’n, 125 A.2d 354, 357 (Pa. 1956).

Second, despite the availability of alternative models, the General Assembly made the SRC structurally and functionally independent from the office of the Governor. Funding for the SRC, for one, is not left to the discretion of the Governor but is determined by the General Assembly. See 24 P.S. §§ 25-2501—25-2599.5. And as an “instrumentality of a school district,” completely outside of the Commonwealth government, the SRC is even further removed from the control of the Governor. 24 P.S. § 6-696(a). Additionally, the Governor has the power to appoint just three of the SRC’s five members and possesses no oversight or supervision capabilities. 24 P.S. § 6-696(b)(1). The SRC is built to address local concerns completely outside of the Governor’s sphere of authority: two of its five members are appointed by the “mayor of the city coterminous with the school district” and “must be residents of the school district.” 24 P.S. § 6-696(a).

See id. at p. 14. Of course, the plain language of section 696 also protects the Chairman from no-cause removal by the Governor.

Third, the General Assembly demonstrated its intent to insulate the SRC from political influence by prohibiting appointees from holding any other public office or serving as an officer of a political party. 24 P.S. § 6-696(b)(6). The prohibition protects SRC members from outside pressures and also prevents them from using their positions for mere political gain. It would be absurd, given that the General Assembly was concerned with these political influences, to assume that legislators nevertheless intended to allow political interference from the Governor.

But nowhere is the General Assembly's intent more clear than the words of the statute itself, and to hold that "office" in section 696 does not include the office of Chairman would render its statutory terms meaningless. The General Assembly could have omitted—but did not—the phrase "from office" from the sentence "no commission member may be removed from office during a term" to read: "no commission member may be removed during a term." Instead, it chose to insert the phrase "from office" within section 696(b)(2), words that would be redundant were statutory protections meant to apply only to the office of member. See Commonwealth v. Ostrosky, 909 A.2d 1224, 1232 (Pa. 2006) ("The legislature, however, is presumed not to intend any statutory language to exist as mere surplusage and, accordingly, courts must construe a statute so as to give effect to every word.").

The intent, again, was to create an SRC impervious to the influence of a (then-incoming, then-unknown) governor. The interrogation from the House floor is worth repeating, with emphases:

Mr. BELFANTI. . . . What about the next Governor 14 months or 15 months from now who would like to be able to remedy the Philadelphia School District problem? He will have no tools at his disposal because he will be stuck with a commission that was appointed by a lameduck Governor. Is that not the case?

Mr. PERZEL. That is correct.

Mr. BELFANTI. That is correct. I predicted that.

So we are going to give the Governor, the 14-month lameduck Governor, some tools for the next 7 years^[23] or the next 5 years, and his term expires in 14 months. The next Governor, who would like the ability to address the Philadelphia school problem, will have no ability unless we repeal this act. Is that not correct? The commission will call all the shots for the next Governor and the next Secretary of Education.

Mr. PERZEL. For the next 5 to 7 years. I have explained that several times, Mr. Speaker.

58 Pa. House L.J. 1903 (Oct. 23, 2001) (emphases added). And from the Senate floor:

I also want to thank you, quite sincerely thank you from the bottom of my heart, as someone who is deeply involved in the Casey campaign, by admitting defeat this early. This bill clearly contemplates that you are never going to have the Governor, at least not in the next 8 years, and that is why you have so craftily drafted it so

23. In order to create staggered terms, the initial term of two SRC members was seven years. 24 P.S. § 6-696(b)(1)(i).

that Bob Casey, when he becomes Governor, will not be able to change this board.

54 Pa. Senate L.J. 1013-14 (Oct. 23, 2001) (emphasis added).

In sum, each of the points above, standing alone, is enough to reach the conclusion that the Chairman of the SRC is an “office,” but combined, the evidence is overwhelming. The plain meaning of the term “office,” the specific use of the terms “from office” in section 696’s removal provision, the General Assembly’s use of fixed staggered terms, the changes in the statutory language that created the Chairman, the Legislature’s removal of the phrase “serves at the pleasure of,” colloquies on the House and Senate floors, and this Court’s precedent create an avalanche of evidence. As reflected on Green’s oath of office, which reads “Officer Title: Chairman, School Reform Commission,” Amended Petition, at ¶ 21 & Ex. E, the Chairman of the SRC is an “office” entitled to protection from no-cause removal under section 696. This Court should therefore reject Gov. Wolf’s argument that the Chairman of the SRC is not an “office” and overrule Gov. Wolf’s POs.

II. GOV. WOLF HAD NO CONSTITUTIONAL AUTHORITY TO REMOVE THE CHAIRMAN OF THE SRC

Next, Gov. Wolf argues that he has constitutional authority to remove the Chairman of the SRC, citing Article VI, section 7, of the Pennsylvania Constitution.²⁴

24. Article VI, section 7, provides, in full:

Gov. Wolf's Brief in Support of Preliminary Objections, at pp. 11-13. But his argument only backfires.

First, by its own language, Article VI, section 7, applies to only "civil officers," precisely the description of the Chairman that Gov. Wolf seeks to avoid. If Gov. Wolf invokes this constitutional provision, he must also admit that the position of Chairman is an "office" for purposes of section 696. And once Gov. Wolf admits that the position of Chairman of the SRC is an "office," he runs inescapably into section 696's prohibition on no-cause removal provision of SRC members "from office." 24 P.S. § 6-696(b)(2).

Perhaps Gov. Wolf fails to fully appreciate that, notwithstanding Article VI, section 7, "[w]here the legislature creates a public office, it may impose terms and limitations as to the office's tenure and the removal of an incumbent," exactly what

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed. All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.

the General Assembly did here. Venesky v. Ridge, 789 A.2d 862, 864 (Pa. Cmwlth. 2002), aff'd, 809 A.2d 899 (Pa. 2002); see also Commonwealth ex rel. Sortino v. Singley, 392 A.2d 1337, 1339 (Pa. 1978) (“Whether an appointed civil officer . . . is subject to removal at the pleasure of the appointing power depends upon legislative intent, ‘to be gleaned from the statute creating or regulating the office.’”). Indeed, section 696’s clear prohibition easily distinguishes this case from Venesky, 789 A.2d at 866, where this Court held that the Governor could remove a game commissioner without cause. Unlike section 696, the statute at issue in Venesky was devoid of any restrictions on removal of a commissioner, had no provision staggering the terms of commissioners, and vested all appointments with the Governor. Id. at 865.

Yet even if section 696 were less than clear, Gov. Wolf fails to meaningfully distinguish Pennsylvania Supreme Court precedent limiting executive removal powers in similar situations.²⁵ See Gov. Wolf’s Brief in Support of Preliminary

25. See, e.g., Arneson v. Wolf, 124 A.3d 1225 (Pa. 2015); Singley, 392 A.2d 1337 (holding that a mayor cannot remove members of Redevelopment Authority during their terms absent cause); Bowers, 167 A.2d 480 (holding that the Governor could not remove Pennsylvania Labor Relations Board member during his term absent cause); Commonwealth ex rel. Hanson v. Reitz, 170 A.2d 111 (Pa. 1961) (holding that a mayor lacked authority to remove member of Urban Redevelopment Authority absent cause); Watson, 125 A.2d 354 (holding that Governor could not remove member of Turnpike Commission during his term absent cause).

Objections, at pp. 12-13. Again, section 696 creates fixed terms staggered with other members and with the Governor’s term, provides structural and functional independence of the SRC from the Governor’s office, and prohibits SRC members from engaging in political activity—all evidence of intent to insulate officers from no-cause removal. Knowing the weakness of his arguments and inability to distinguish this precedent, Gov. Wolf is forced to admit that he simply disagrees with the Pennsylvania Supreme Court’s reasoning.²⁶

Ultimately, the Governor’s insistence that section 696 lacks restrictions on removal of the Chairman, POs, at ¶¶ 38-39, hinges on his unsupported theory that the General Assembly unnecessarily added the words “from office” to section 696(b)(2). However, “[t]he legislature . . . is presumed not to intend any statutory language to exist as mere surplusage and, accordingly, courts must construe a statute so as to give effect to every word.” Ostrosky, 909 A.2d at 1232 (Pa. 2006); see 1 Pa.C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all of its provisions.”).

It follows that, even if Gov. Wolf invokes Article VI, section 7, of the Pennsylvania Constitution, he remains bound by the General Assembly’s limitation

26. See Gov. Wolf’s Brief in Support of Preliminary Objections, at p. 13 n.9 (“We believe that Arneson was wrongly decided by this Court and by the Supreme Court . . .”).

of removal on the Chairman of the SRC—and bound to correct his unjustifiable removal of Green. Accordingly, this Court should reject the Governor’s argument for constitutional removal authority and overrule his POs.

III. GOV. WOLF HAS NO TECHNICAL GROUNDS FOR DISMISSAL

Gov. Wolf suggests various technical grounds for dismissal, all of which are without foundation. He seeks to avoid mandamus relief by suggesting that quo warranto relief is appropriate, to avoid quo warranto relief on the ground that only mandamus is proper, and to avoid declaratory relief on the grounds that both quo warranto and mandamus relief are available. He also suggests that a statute of limitations prevents a ruling on the merits, despite the fact that Green’s causes of action are not subject to a statute of limitations analysis. This Court should reject Gov. Wolf’s attempts to avoid a ruling on the merits.

A. Quo Warranto

First, Gov. Wolf argues that quo warranto is an inappropriate means by which Green can establish his right to the office of Chairman of the SRC, apparently preferring that Green bring a mandamus action. Gov. Wolf’s Brief in Support of Preliminary Objections, at pp. 29-30. However, this Court has explained that

[t]he distinction between mandamus and quo warranto is not always susceptible to precise definition and demarcation. Where a public office is contested, the

applicability of one remedy or the other is largely dependent on the operative circumstances of the case.

Gernert v. Lindsay, 2 Pa. Cmwlth. 576, 579 (1971). “Historically, Pennsylvania courts have held that the quo warranto action is the sole and exclusive method to try title or right to public office.” Spykerman v. Levy, 421 A.2d 641, 648 (Pa. 1980).

A private individual has standing to seek writ of quo warranto if the individual has a special interest or right—as distinguished from the general public interest or right—or if the individual has been specially damaged. Id. Gov. Wolf’s purported removal of Green and purported appointment of Neff to the office of Chairman of the SRC was unlawful and prohibited by section 696. Neff cannot lawfully hold the office of Chairman of the SRC and Green remains the only person lawfully entitled to serve as Chairman of the SRC.

Green seeks the removal of Neff as putative Chair of the SRC, a request within this Court’s power to grant through writ of quo warranto. Gov. Wolf’s “Preliminary Objection II” should be overruled.

B. Mandamus

Second, Gov. Wolf argues that mandamus is inappropriate because Green should have sought quo warranto relief. However, the Pennsylvania Supreme Court has long endorsed the use of mandamus in situations closely analogous to

that created by Gov. Wolf here. See, e.g., Arneson, 124 A.3d 1225; Bowers, 167 A.2d 480; Watson, 125 A.2d 354; see also Gernert, 2 Pa. Cmwlth. at 580 (“If he properly holds the office of a member of the Board according to the law, then mandamus is the proper remedy to effectuate such reinstatement . . .”).

“A court of law of competent jurisdiction issues a mandamus to a public official, board or municipality directing them to perform a particular duty which results from their official station or operation of law.” Bronson v. Commonwealth Bd. of Probation and Parole, 421 A.2d 1021, 1023 (Pa. 1980). It follows that mandamus is appropriately used to effect reinstatement of a public official who was wrongfully removed from his lawful office; after all, the public official removed is the only person legally qualified to hold the office. Gernert, 2 Pa. Cmwlth. at 582.

Here, Green was lawfully appointed to the office of Chairman of the SRC and remains the only person lawfully entitled to serve as Chairman of the SRC. Gov. Wolf’s failure to act in accordance with the law is a continuing harm to Green, and Gov. Wolf has a corresponding duty to reinstate Green to office. Accordingly, Gov. Wolf’s “Preliminary Objection IV” should be overruled.

C. Statute of Limitations

Next, Gov. Wolf argues that Green’s claims against Gov. Wolf are time-barred, despite the fact that neither mandamus nor quo warranto claims are

subject to a statute of limitations analysis. Gov. Wolf's Brief in Support of Preliminary Objections, at pp. 31-32. Contrary to Gov. Wolf's assertions, the Pennsylvania Supreme Court has unanimously rejected the notion that a six-month statute of limitations applies to actions in mandamus, Curley v. Wetzel, 82 A.3d 418 (Pa. 2013).

And for good reason: Gov. Wolf's failure to act in accordance with the law is a continuing harm not subject to a statute of limitations; as then-Chief-Justice Castille remarked in concurring with the Pennsylvania Supreme Court in Curley:

[E]ven assuming the action sounded in mandamus, the Commonwealth Court incorrectly invoked the six-month statute of limitations found in 42 Pa.C.S. § 5522 to bar this action. The Commonwealth Court relied upon Gleason v. Borough of Moosic, 609 Pa. 353, 15 A.3d 479 (2011), for the proposition that, "In a request for mandamus, the statute of limitations begins to run when the cause of action accrues, i.e., when the injury is inflicted and the right to institute a suit for damages arises." Curley [v. Smeal], 41 A.3d 916, 919 (Pa. Cmwlth. 2012)]. In fact, however, Gleason neither involved a mandamus action, nor did that decision endorse a particular statute of limitations for mandamus actions. Indeed, it is difficult to see how an action properly sounding in mandamus would lend itself to a period of limitations analysis: since a mandamus action alleges a failure to act, there is no action to trigger a specific limitations period.

Curley, 82 A.3d at 419 (Castille, C.J., concurring). Green does not merely assert that his removal was unlawful; he argues that Wolf has a legal duty to reinstate him as Chairman of the SRC. Wolf failed to do that yesterday.

The same rationale would apply with equal force to Green's claims for quo warranto and declaratory relief. With respect to his quo warranto claim, "[a] quo warranto is addressed to preventing a continued exercise of authority unlawfully asserted, rather than to correct what has already been done under the authority." See Spykerman, 421 A.2d at 648 (emphasis added). Likewise, it is difficult to imagine how a declaratory judgment claim concerning continued inaction or exercise of authority could be time-barred.

Moreover, to impose statutes of limitations in this context would create absurd results. A Commonwealth Court judge who is not a member of the bar should not be allowed to remain on the bench simply because he avoided suit for a period of time—he continues to decide cases. Public officials illegally holding office and exercising governmental authority should not be able to continue to do so simply because they were able to get away with it for six months—they continue to govern. This Court cannot attach a point at which the statute would start to run, because the illegal action—or failure to act—persists.

Accordingly, Gov. Wolf's request that this Court apply a statute of limitations in this context should be rejected. This Court should overrule Gov. Wolf's "Preliminary Objection I."

D. Declaratory Relief

Gov. Wolf next argues that declaratory relief is unavailable because Green could successfully regain office through writs of quo warranto or mandamus. Gov. Wolf's Brief in Support of Preliminary Objections, at pp. 32-33. This argument plainly conflicts with what Gov. Wolf has already asserted, but it is also certainly wrong.

In advancing his argument, Gov. Wolf misconstrues Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission, which stands for the entirely uncontroversial proposition that, "[w]here another remedy has already been sought in a pending proceeding, a declaratory judgment action should not ordinarily be entertained." 844 A.2d 62, 67 (Pa. Cmwlth. 2004) (emphasis added). In fact, the Declaratory Judgments Act itself expressly provides that "[t]he availability of declaratory relief shall not be limited by the provisions of 1 Pa.C.S. § 1504 (relating to statutory remedy preferred over common law) and the remedy provided by this subchapter shall be additional and cumulative to all other available remedies except [in enumerated circumstances]." 42 Pa.C.S. § 7541(b).

And contrary to Gov. Wolf's reasoning, the relief requested by Green would not require from this Court equivalent of an "advisory opinion." Gov. Wolf's Brief in Support of Preliminary Objections, at p. 32. To the contrary, Green requests that this Court reach a decision "based on [a] specific set[] of established facts." Rendell v. Pennsylvania State Ethics Comm'n, 938 A.2d 554, 559 (Pa. Cmwlth. 2007).

It follows that this Court should overrule Gov. Wolf's "Preliminary Objection V." Green is entitled to a declaration with respect to Gov. Wolf's removal and replacement of the Chairman of the SRC.

E. Injunctive Relief

Finally, Gov. Wolf's footnoted contention that Green has waived his request for permanent injunctive relief is without foundation. Preliminary Objections to Amended Petition for Review, at ¶ 41 n.4. In fact, Green, in his Amended Application, at p. 8, and Amended Petition, at ¶ 30, n.7, & p. 16, continues to request a permanent injunction as equitable relief.²⁷ The reason is simple: without

27. Moreover, Gov. Wolf is estopped from arguing that including the request for a permanent injunction only in the Amended Petition's "statement of the relief sought" and "prayer for relief" sections has any preclusive effect. Gov. Wolf previously argued that Green should not have stated a standalone claim for permanent injunctive relief, because it is "not a cause of action." Gov. Wolf's Answer and New Matter to initial petition for review, filed May 3, 2016, at ¶ 23; Gov. Wolf's Preliminary Objections to initial petition for review, filed May 18, 2016, at ¶ 45. Green moved the request to a less prominent position in the Amended

a permanent injunction, there would be nothing to stop Gov. Wolf from removing Green in the future.

CONCLUSION

Accordingly, this Court should overrule Gov. Wolf's POs in their entirety. Gov. Wolf violated section 696(b)(2) in removing Green from office without cause, continues to ignore his legal duty to restore Green to office, and now attempts to escape that obligation. Green has raised valid claims and is entitled to proceed to the merits.

Respectfully submitted,

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August 4, 2016

Petition to seek to satisfy Gov. Wolf's previous concern and clearly did not waive the request or remove it in its entirety.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has on this date been served on Respondents, addressed as follows:

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