SUPREME COURT OF NEW JERSEY
Docket No. 089658

	: A Petition for Certification from the
IN THE MATTER OF	: June 26, 2024 Judgment of the:
THE CERTIFICATES OF	:
NICHOLAS CILENTO,	: SUPERIOR COURT OF NEW JERSEY
	: APPELLATE DIVISION
NEW JERSEY	: Docket No. A-3586-21
DEPARTMENT OF EDUCATION,	:
STATE BOARD OF EXAMINERS	: Sat Below:
	: Hon. Francis J. Vernoia, J.A.D.
	: Hon. Katie A. Gummer, J.A.D.
	:
	:
	: On Appeal from the Final Administrative
	: Decision of the Commissioner
	: of Education
	:
	: Comm. of Education Dec. No. 131-22
	: State Bd. of Examiners Dkt. No. 2021-123
	: Agency Dkt. No. 9-12/21A
	:
_____	: *Administrative Action*

PETITION FOR CERTIFICATION OF PETITIONER NICHOLAS CILENTO

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Date: July 22, 2024 (Amended July 30, 2024)

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PRELIMINARY STATEMENT

Can one state agency take diametrically opposed actions, issuing completely incompatible final decisions based upon a single factual record? Faced with this novel and complex legal issue, the Appellate Division peremptorily stated: "Yes." This Court should grant Certification and hold otherwise.

The crux of all teacher disciplinary proceedings is the teacher's fitness to discharge the duties and functions of his position. *In re Grossman*, 127 N.J. Super. 13, 29 (App. Div. 1974); *In re Young*, 202 N.J. 50, 66 (2010). Teacher discipline is litigated in two forums: **[1]** teacher tenure cases brought pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 (the "TEHL"); and **[2]** licensure / Order to Show Cause ("OSC") cases brought by the Department of Education ("DOE"), State Board of Examiners (the "Examiners"). N.J.S.A. 18A:6-38, N.J.A.C. 6A:9B-4.6.

Both cases arise under the DOE. However, different actors within the DOE issue the Final Administrative Decisions ("FADs") therein. Teacher tenure case FADs are issued by statutorily appointed arbitrators. N.J.S.A. 18A:6-17.1. Licensure case FADs are issued by the Commissioner of Education (the "Commissioner"). See N.J.A.C. 6A:9B-4.18, N.J.A.C. 6A:4-4.3(a).

Petitioner Nicholas Cilento ("Mr. Cilento) was the subject of two contradictory FADs. The first FAD (the "Tenure FAD"), issued in a teacher tenure

case, maintained him in his tenured teaching position with the Woodbridge Township School District Board of Education ("Woodbridge"). The second FAD (the "License FAD") was issued in a licensure case / OSC. It was premised solely upon the findings made in the Tenure FAD. The License FAD suspended Mr. Cilento's Teaching Certificate, terminating his tenure in Woodbridge, *de jure*. See N.J.S.A. 18A:26-2; N.J.S.A. 18A:27-2; N.J.S.A. 18A:29-1. Thus, upon a single factual record, the DOE first ordered that Mr. Cilento keep his job, and then ordered that he be fired.

The Appellate Division overlooked this conundrum and its profound ramifications. Instead, it relied lockstep upon its recent decision in *Morison v. Willingboro Bd. of Ed.*, 478 N.J. Super. 229, 313 A.3d 93 (2024), Supreme Court Dkt. No. 089327, *cert. den.* July 18, 2024.

Morison contemplated a tenure case FAD, but no license FAD. Neither the Appellate Division, nor this Court, were presented with the foundational legal question—incompatible final agency action. For this critical reason, this Court should grant here the certification that it denied in that case.

By affirming the License FAD, the Appellate Division countenanced opposite outcomes with an identical origin. This is irrational government action, *ipse dixit*, in violation of Due Process, and Fundamental Fairness.

The Appellate Division failed to recognize the Tenure FAD for what it is—

a Final Agency Decision of the DOE. It further failed to appreciate that the Arbitrator and Commissioner are both the face of the same governmental entity, equally charged with ensuring teacher fitness. Consequently, it failed to apply necessary principles of agency comity and privity, *res judicata*, and collateral estoppel between the Arbitrator, and the Examiners/ Commissioner in the context of their adjudicatory function.

As made clear, *infra*, the Supreme Court should grant Certification, determine no state agency can act at such cross-purposes, and reverse the Judgment of the Appellate Division.

STATEMENT OF MATTER INVOLVED

Mr. Cilento was a highly-regarded tenured Special Education teacher employed by Woodbridge, who suffered from alcoholism. **Da16-Da17**. He consumed a *de minimis* amount of alcohol at school. A breath test revealed no detectible alcohol. His students were unaware and unaffected. He successfully completed alcohol rehabilitation. **Da16-Da19; Da22-Da25**.

Woodbridge certified tenure charges against Mr. Cilento. **Da1-Da12**. Pursuant to N.J.S.A. 18A:6-16, the DOE assigned an arbitrator (the "Arbitrator") to hear the case. **Da14.** After a plenary hearing, she issued her Opinion and Award—the Tenure FAD. **Da15-Da27**. She determined that while Mr. Cilento had engaged in conduct unbecoming, suspension, not termination, was the appropriate

penalty. **Da22-Da26**. Neither party sought judicial review as permitted by N.J.S.A. 18A:6-17.1(e). Mr. Cilento resumed his career as a "Highly Effective" Special Education Teacher. **Da29-Da42**.

Subsequently, the Examiners issued Mr. Cilento an OSC based exclusively upon the Tenure FAD. **Da43-45**. Mr. Cilento opposed the OSC. There was no further factfinding, hearing, or record. The Examiners merely allowed Mr. Cilento to submit argument as to penalty. **Da47**. The Examiners then issued an Order of Suspension ("OOS") based exclusively upon the facts found in the Tenure FAD. **Da46-Da49**.

Woodbridge summarily terminated Mr. Cilento's tenured employment. **Da50**. He appealed the OOS to the Commissioner pursuant to N.J.A.C. 6A:4-1.3(b). The Commissioner then issued the License FAD, affirming the OOS. **Da51-Da55**. Mr. Cilento took appeal to the Appellate Division. **Da56-Da59**.

Relying entirely upon *Morison, supra*, the Appellate Division affirmed the License FAD. **1a.** There, the Appellate Division held that a teacher tenure FAD did not estop the Examiners from prosecuting an OSC. The Court opined that the tenure hearing process, and the license revocation process, were separate proceedings, with "major differences", including the trier of fact, and procedures for review. *Morison*, 313 A.3d at 102-103.

On July 9, 2024, Mr. Cilento filed his Notice of Petition for Certification.

9a. This Petition follows.

QUESTION PRESENTED

1: Can a single state agency issue incompatible Final Agency Decisions based upon a single, identical factual record?

ERRORS COMPLAINED OF

I: THE APPELLATE DIVISION FAILED TO RECOGNIZE THE TENURE FAD AS A FINAL AGENCY DECISION OF THE DOE

The Appellate Division's exclusive reliance on *Morison* (**See 6a-7a**) requires presentation and analysis of that decision's errors as well. Preliminarily, *Morison* failed to recognize and treat the Tenure FAD as a Final Agency Decision of the DOE. It described tenure and licensure proceedings as "distinct and dissimilar". Among the "major differences" identified by the Court was that between arbitrators and Administrative Law Judges ("ALJs"). The latter, the Court emphasized, are "public official[s] appointed by the governor with the advice and consent of the Senate." *Morison*, *supra*, 313 A.3d at 92-93, *emphases added*. The implication is that a teacher tenure hearing is somehow a less substantive / important proceeding, decided by a subordinate, "subcontracted authority" in the form of a mere arbitrator. This view of the tenure process and its statutorily appointed arbitrators is wholly unsupported by the applicable statutory scheme.

In 2012, the Legislature passed the TEACH NJ Act[1], divesting ALJs and the Commissioner of their authority to hear and review teacher tenure cases, respectively[2]. The Legislature instead vested that authority exclusively in statutorily appointed arbitrators.

The TEACH NJ Act established a panel of arbitrators to hear teacher tenure cases. N.J.S.A. 18A:6-17.1 It imposed rigorous training and credentialing requirements upon them. They must serve on the American Arbitration Association panel of labor arbitrators, and be members of the National Academy of Arbitrators. They must undergo tenure-case-specific training, and possess knowledge and expertise vis-à-vis school employment; conduct unbecoming a teacher; the tenure laws and applicable precedent; and the factors to be considered in deciding unbecoming conduct tenure cases. N.J.S.A. 18A:6-17.1. Neither ALJs; the Examiners; nor the Commissioner are subject to these exacting standards.

The Commissioner is required to refer tenure charges to these arbitrators for hearing and disposition. N.J.S.A. 18A:6-16. After the hearing, the arbitrator issues the Final Agency Decision on behalf of the DOE. N.J.S.A. 18A:6-9; N.J.S.A. 18A:6-17.1(e). Only the courts can review these arbitral decisions. *Ibid.*

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[1] P.l. 2012, c.26

[2] Before the TEACH NJ Act, the Commissioner issued tenure case FADs. Research does not disclose a single instance where the Examiners issued an OSC to a teacher who was maintained in their tenured employment as the result of a Commissioner-issued tenure FAD.

These are public sector arbitrations, and the arbitrators must apply and follow New Jersey law. *See In the Matter of City of Camden*, 429 N.J. Super. 309, 332 (App. Div.), *certif. den.* 215 N.J. 485 (2013); *Faherty v. Faherty*, 97 N.J. 99,112-113 (1984). Stringent evidentiary rules and timelines obtain (See N.J.S.A. 18A:6-17.1(b)—(h)). Litigants receive procedural and substantive safeguards analogous to those of our courts. *Cf. Winters v. North Hudson Reg.'l Fire*, 212 N.J. 67, 87 (2012) (discussing the application of collateral estoppel to administrative proceedings that provide adequate process).

Tenure cases are "contested cases" as defined by the Administrative Procedure Act, N.J.S.A. 52:14B-1, et. seq.. For purposes thereof, arbitrators are the "head of the agency" since they are the "highest authority" within the DOE that is authorized to render an adjudication thereupon. See N.J.S.A. 52:14B-2. In sum: the Arbitrator was the statutorily appointed agent of the DOE who had the "last word" in an administrative tenure proceeding prior to judicial review. Her Opinion and Award were, ineluctably, a New Jersey Final Agency Decision of the DOE.

The Tenure FAD was neither a private sector, nor "second-class" Final Agency Decision; rather, it is coequal in standing, force, and effect to any FAD issued by the Commissioner. This being the case, the question sidestepped by the Appellate Division returns to view: how can one state agency do two different things, based on the same underlying facts?

II: THE APPELLATE DIVISION COUNTENANCED ARBITRARY AND IRRATIONAL GOVERNMENT ACTION

It is beyond peradventure that opposite outcomes from a government agency in the same case constitutes irrational and arbitrary government action.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Beyond considerations of Due Process, New Jersey's doctrine of fundamental fairness prohibits such arbitrary government action. As this Court stated in *Doe v. Poritz*, 142 N.J. 1, 108-109 (1995):

> New Jersey's doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental *procedures* that tend to operate arbitrarily. [It] serves, depending on the context, as an augmentation of existing constitutional protections or as an independent source of protection against state action…."
>
> ….In addition, this doctrine has been invoked when the actions of government, though not quite rising to the level of a constitutional violation, nonetheless included aspects of unfairness which required this Court's intervention….
>
> Fundamental fairness is a doctrine that is an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees. The doctrine effectuates imperatives that government minimize arbitrary action, and is often employed when narrowed constitutional standards fall short of protecting individual defendants against unjustified harassment, anxiety, or expense.

Here, the case for the doctrine's application is compelling. To be clear, the objectionable action is not the nature or severity of the penalty imposed by the

License FAD[3]. Rather, it is the arbitrariness, uncertainty, irrationality, and inconsistency presented by disparate and incompatible government action.

This Court should reject this disparate agency action upon one factual record as violative of Due Process; Fundamental Fairness; and the obvious legislature intent, and reverse the Appellate Division on such grounds.

III: THE APPELLATE DIVISION NEGLECTED TO APPLY THE DOCTRINES OF COMITY AND AGENCY PRIVITY

The Examiners play three roles in the licensure case / OSC process: **[1]** investigative; **[2]** prosecutorial; and **[3]** adjudicatory. These separate roles form the critical distinction between *Morison, supra*, and this case[4]. First, based upon information they gather / receive, the Examiners initiate OSCs. N.J.A.C. 6A:9B-4.6(a). Next, represented by a Deputy Attorney General ("DAG") the Examiners are the prosecuting party when OSCs are tried at the Office of Administrative Law

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[3] Since loss of license terminates tenured employment, mooting any tenure case proceedings, a licensure FAD would never precede a teacher tenure case FAD. If this were somehow possible, however, it would still be the last-issued, inconsistent FAD which runs afoul of these principles. This would be the case whether the second-issued FAD is more or less favorable to the subject teacher. In other words, this Petition does not concern Mr. Cilento's right to "pick his penalty." Rather, it concerns his right to be free of government at cross-purposes.

[4] Absent bias, this combination of roles is not constitutionally unsound. *Matter of Seidman*, 37 F.3d 911, 924-925 (3d. Cir. 1994). This is the case because agency administrators are presumed to be "capable of judging a particular controversy fairly on the basis of its own circumstances." *Ibid, internal citations omitted.*

("OAL"). Initial Decisions issued by ALJs in OSC cases are filed with the Examiners, and an aggrieved party may file exceptions with the Examiners. See N.J.A.C. 6A:9B-4.17(b)[5]. The Examiners then issue the order of suspension / revocation—the intermediate adjudicatory step in the licensure case / OSC process. See N.J.A.C. 6A:9B-4.7(a). Appeals of Examiner determinations are made to the Commissioner. N.J.A.C. 6A:9B-4.18; N.J.A.C. 6A:4-3.1(b). Commissioner decisions, such as the License FAD, are appealable to the Appellate Division. N.J.A.C. 6A:4-1.3(a); N.J.A.C. 6A:4-4.3(a).

Unlike *Morison*, This Petition is solely addressed to the **adjudicatory** functions of the Examiners / Commissioner. The relief Mr. Cilento seeks would neither affect nor impair the Examiners' other roles.[6]

The Arbitrator, Examiners, and Commissioner all play an adjudicative role under the auspices of the DOE. In that adjudicatory capacity, they have the same duty and obligation—ensuring teacher fitness. They are different faces of what is, as a matter of law, a single governmental entity. As such, in the exercise of their

[5] Indeed, it is not uncommon for an aggrieved DAG to file exceptions on behalf of the Examiners, with the Examiners.

[6] In other words, the Examiners would remain free to independently investigate / prosecute an OSC; prove at an OAL hearing that Mr. Cilento had engaged in additional conduct unbecoming beyond that found in the Tenure FAD; and impose a commensurately more severe penalty than that imposed by the Tenure FAD.

adjudicative role, they are bound by principles of agency privity.

This principle was described by the Supreme Court in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940):

> There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.……But here the authority of the Commission is clear……It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials.

Id. at 402-404, *internal citations omitted*; *see also Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980) *Mervin v. FTC*, 591 F.2d 821, 830 (D.C. Cir. 1978) (recognizing privity between officers of the same government).

This issue appears novel in New Jersey. Other courts have held that government is bound by the actions of government, and the outcome of litigation to which government is a party. *See, e.g.*, *People v. Sims*, 32 Cal. 3d 468, 651 P.2d 321 (1982) (welfare recipient exonerated of fraud in administrative proceeding could not be criminally prosecuted for same alleged offense). As that court held:

> Here, the district attorney's office, which represents the party to be estopped, and the County, the unsuccessful party in the prior litigation, are "sufficiently close" to warrant applying collateral estoppel. Both entities are county agencies that represented the interests of the State of California at

> the respective proceedings…. "[T]he courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. [Fn. omitted.]" (*Lerner* v. *Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 398 [29 Cal. Rptr. 657, 380 P.2d 97]; see also *Sunshine Coal Co.* v. *Adkins* (1940) 310 U.S. 381, 402-404 [84 L.Ed. 1263, 1275-1277, 60 S.Ct. 907].)

Id. at 487. This Court has acknowledged the importance of agency comity in the face of entwined agency jurisdictional issues and interests. As this Court stated in *Hinfey v. Matawan Reg'l. Bd. of Ed*., 77 N.J. 514 (1978):

> Such considerations make it quite evident that principles of comity and deference to sibling agencies are part of the fundamental responsibility of administrative tribunals charged with overseeing complex and manifold activities that are also the appropriate statutory concern of other governmental bodies…. This is a corollary application of the broader principle that where a court has concurrent, discretionary jurisdiction with another court or an administrative agency, the decision to exercise jurisdiction *vel non* should be fully responsive to the competence, expertise and status of the other tribunal….Comity and deference to cognate tribunals are designed to assure that a controversy, or its most critical facets, will be resolved by the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter.
>
> These precepts, prudently applied, serve as well to circumvent collisions between administrative agencies occupying similar areas and to avoid conflicts in agency decisions over the same subject matter. Other spin-offs or variant applications of the comity doctrine, such as *res judicata,* collateral estoppel, principles of issue preclusion and the single-controversy requirement, have also been constructively applied to administrative agencies to eliminate duplicate and piecemeal litigation.

Id. at 531-532; *see also Lemelledo v. Beneficial Management Corp.,* 150 N.J. 255, 273-274 (1997) (discussing the steps agencies should take to "assure consistent

regulatory results"); *Hackensack v. Winner*, 82 N.J. 1, 33-34 (1980) (discussing application of comity and related principles to avoid "collision" between administrative tribunals); N.J.A.C. 1:1-17.1 et seq. (setting forth regulations for consolidation of agency actions and determination of predominant interest, for purposes, *inter alia*, of avoiding "duplication and inconsistency." N.J.A.C. N.J.A.C. 1:1-17.3(a)(3).

In this past, this Court has brooked little tolerance for inconsistent results arising from public employee discipline matters. As this Court stated in *Winters, supra*:

> No efficient and respected system of justice can permit the spectacle, and resulting disrepute, of inconsistent litigated matters involving the same transactional set of facts, notwithstanding that the forums embrace judicial and quasi-judicial proceedings. The public will neither understand nor appreciate the confounding wastefulness of such a result; and such disrespect of the legislatively created forum for supervision over, and resolution of, public employee discipline in this state should not be permitted.

Id. at 72-73. While factually distinguishable, the principles embraced by this Court in *Winters* are equally applicable here: the inconsistency created by the License FAD is appropriately characterized as a "disreputable spectacle," as therein envisioned by this Court.

The Appellate Division, again invoking *Morison*, characterized licensure proceedings as a rational regulatory function, separate and apart from teacher tenure

cases. **7a**. This misses the point. The validity of the licensure / OCS statutes and regulations neither rationalizes nor exonerates the agency action challenged herein. It does not give the DOE license to act so inconsistently under these circumstances.

By upholding the License FAD, the Appellate Division has taken the position that the DOE has no privity with itself: that it is unbound by its own actions; adjudications; and officers. That concept, relieving government of any internal decisional accountability, should be rejected by this Court.

IV: THE APPELLATE DIVISION FAILED TO APPLY PRINCIPLES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL

In *Morison, supra*, the Court rejected the application of preclusive principles, finding that there was no privity between the Examiners, and the Willingboro Board of Education. It opined that the Examiners were not a party to the underlying tenure case, and had no ability to participate therein. *Morison, supra,* 313 A.3d at 102.

The preclusion analysis relevant to *Morison* is inapposite to the analysis required here. By summarily relying upon *Morison*, the Appellate Division failed to recognize the critical distinction—incompatible final agency action—and to undertake the necessary application of preclusive principles required by that circumstance.

Here, preclusion does **not** apply between Woodbridge and the Examiners in their respective prosecutorial functions. Rather, *res judicata* and collateral estoppel

apply because the Arbitrator and the Examiners / Commissioner have a coextensive **adjudicatory** position, function, and obligation within the DOE: ensuring the fitness of persons who teach in New Jersey's public schools. The Arbitrator discharged that function in Mr. Cilento's tenure case. The Examiners / Commissioner discharge that function through the OSC process. Preclusion applies by and between the Arbitrator, and Examiners / Commissioner, **solely in the context of this adjudicatory function.**

"In essence, the doctrine of *res judicata* provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." *Velasquez v. Franz,* 123 N.J. 498, 505 (1991) *(internal citations omitted).*

For purposes of *res judicata* a nonparty can be judgment-bound as being in privity with a party. This occurs, for example, where the party otherwise "adequately represented" the interests of the nonparty. *Taylor v. Sturgell,* 553 U.S. 880, 893-895 (2008); *Howell Hydrocarbons, Inc., v. Adams,* 897 F.2d 183, 188 (5th Cir. 1990).

This Court has described privity as being "necessarily imprecise." *Allen v. V. and A. Brothers*, 208 N.J. 114, 139 (2011). It means that the relationship between

the one who is a party on the record and another is close enough to include that other within the *res judicata*. *Ibid, internal citations omitted*.

That condition is satisfied here. The Arbitrator's duty was to uphold and vindicate the interests of the DOE—ensuring Mr. Cilento's fitness to teach[7]. In that essential objective, the Arbitrator, Examiners, and Commissioner are wholly aligned. The Commissioner is a member, *ex officio*, of the Examiners (N.J.A.C. 6A:9B-3.1(a)), and was furnished the Tenure FAD by the Arbitrator. **Da28**. Accordingly, r*es judicata* barred the Examiners from deciding that Mr. Cilento could be separated from his tenured teaching position solely based upon the findings of the Tenure FAD.

Likewise, collateral estoppel is applicable to administrative rulings, subject to adequate procedural safeguards. *Winters*, supra, 212 N.J. at 87. Collateral estoppel requires that: **[1]** the issue to be precluded is identical to the issue decided in the prior proceeding; **[2]** the issue was actually litigated; **[3]** there was a final judgment on the merits; **[4]** the

[7] This is manifested in N.J.S.A. 18A:6-17.1(a)(2), which requires TEACH NJ Arbitrators to receive training as to: "the factors to be considered by arbitrators in deciding tenure charge cases concerning conduct unbecoming by a school employee including, but not limited to, the nature of the alleged offense and the impact, or potential impact, of the employee's conduct on the health and safety of students within the context of the school environment."

determination of the issue was essential to the prior judgment; and **[5]** the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. *In re Mullarkey,* 536 F.3d 215, 225-226 (3d Cir. 2008). All of these elements are met here, since the OSC simply mirrored the tenure charges decided by the Arbitrator in the Tenure FAD.

As with principles of privity and comity, this Court should determine that both r*es judicata* and collateral estoppel barred the Commissioner terminating Mr. Cilento's employment based upon the same factual record that the Arbitrator determined warranted his reinstatement.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

This case presents a "question of general public importance which has not but should be settled by the Supreme Court." *R.* 2:12-4. It addresses a fundamental legal principle which will have statewide application across a broad spectrum of cases and controversies. It concerns the consistency and integrity of administrative processes and proceedings throughout New Jersey. The public must be able to place its trust and repose in a consistent agency adjudicatory system. New Jersey's administrative agencies must be given guidance as to the force and effect of their own actions. Likewise, they must understand the nature and scope of the deference and preclusive effect that they are required to give to other final agency decisions.

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

I: THE APPELLATE DIVISION FAILED TO APPRECIATE THE DIFFERENT ANALYSES REQUIRED IN TENURE AND LICENSURE CASES

Unbecoming conduct which warrants teacher termination can certainly warrant a concomitant delicensure. The obverse, however, is necessarily untrue: legally and logically, conduct insufficient to warrant termination cannot justify delicensure, since licensure is the *sine qua non* of employment. Teacher termination via tenure proceedings requires a multifaceted determination, considering: **[1]** the nature and gravity of the offense; **[2]** the impact on the teacher's career; **[3]** any extenuating or aggravating circumstances; and **[4]** the harm or injurious effect the conduct may have had on the proper administration of the school system. *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967). Contrarily, the only standard applicable to licensure proceedings is a determination that the subject teacher has engaged in conduct unbecoming. *See, e.g., IMO Certificates of Christopher Faley*, State Board of Examiners Dkt. No. 1920-141. Indeed, in the context of licensure proceedings, even a showing of rehabilitation is irrelevant: the sole inquiry is whether the underlying misconduct justifies the delicensure penalty. *See IMO Certificates of Richard Voza*, State Board of Examiners Dkt. No. 0910-166

Harmonizing the statutes and precedent underlying tenure and delicensure proceedings requires acceptance of the principle that conduct insufficient to warrant termination must, necessarily, be insufficient to warrant delicensure. This is the case because the *Fulcomer* analysis prerequisite to the former is unnecessary to the latter. In other words, delicensure must be reserved for the irredeemable case. Absent any such statutory analysis, the Appellate Division summarily determined that Mr. Cilento's delicensure was not "arbitrary, capricious, or unreasonable." **7a-8a**. Since his conduct per the Arbitrator was insufficient to warrant termination in light of the *Fulcomer* standard, a consistent reading of the cognate acts compels the conclusion that this cannot be the case. Under these circumstances, the Appellate Division's decision was judicial legislation which eviscerated the TEHL.

II: THE INCONSISTENCY COUNTENANCED BY THE APPELLATE DIVISION IS UNTENABLE

There are many state agencies. Each has its own actors, policies, objectives, and interests. Allowing such discord within one invites conflict among all. The Appellate Division's decision is a repudiation of all the principles this Court has espoused in *Winters*, *Hinfey*, and *Hackensack, supra*.

Left undisturbed, the Appellate Division's decision is a license for state agencies to further their own ends, wholly unbound by the fact that a presented dispute has already been weighed, measured, and decided by a governmental actor entitled to and worthy of

respect. The result will be duplicative litigation, uncertainty, and systemic untrust. Reversing the Appellate Division will neither hamstring the Examiners, nor denigrate New Jersey's public schools. Instead, it vindicates the Legislature, and its vestiture of authority in the eminently qualified arbitrators that it has charged with ensuring teacher fitness in this State.

CONCLUSION

For all the foregoing reasons, this Court should Grant the Petition for Certification.

Respectfully submitted,
MELLK CRIDGE LLC
Attorneys for Petitioner

s/ Edward Cridge
Edward Cridge, Esq.

CERTIFICATION PURSUANT TO *R.* 2:12-7

The undersigned hereby certifies pursuant to *R.* 2:12-7 that the within Petition represents a substantial question and is filed in good faith and not for purposes of delay.

MELLK CRIDGE LLC
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s/ Edward A. Cridge
Edward A. Cridge, Esq.