RONALD DONNERSTAG, KRISTIN LANKO, LISA SNIDER, WENDY VACANTE, MATTHEW DELPRETE, PATRICIA FORTUS, JAIME CESTARE, SCOTT ALFANO, AND LYNNE SWEEZO,	:	SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION
	:	DOCKET NO. A-000366-23T4
	:	
	:	CIVIL ACTION
	:	
Complainants-Appellants,	:	ON APPEAL FROM THE FINAL DECISION OF THE SCHOOL
v.	:	ETHICS COMMISSION
	:	DKT. NO. C19-22
HEATHER KOENIG, CENTRAL REGIONAL BOARD OF EDUCATION, OCEAN COUNTY,	:	
	:	
	:	FILED APRIL 16, 2024
	:	
Respondent-Respondent.	:	

COMPLAINANTS-APPELLANTS' BRIEF IN SUPPORT OF THEIR APPEAL FROM DECISIONS OF THE SCHOOL ETHICS COMMISSION

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PRELIMINARY STATEMENT

The New Jersey School Ethics Commission's (Commission) Final Decision in this matter is contrary to a robust body of the Commission's own caselaw, does not comport with the evidence in the record, and is repugnant to the statutory mandate set out for the Commission in the School Ethics Act (Act). As a result, the Commission's August 22, 2023 Final Decision in this matter must be reversed as being arbitrary, capricious, and unreasonable.

The New Jersey Legislature tasked the Commission with enforcing a Code of Ethics for school board members who engage in "conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22. The Legislature further mandated that the Commission must "ensure the uniform maintenance of those standards." Id.

To that end, the Commission developed a clear and consistent body of decisional law relating to social media use by school board members. In doing so, the Commission carefully weighed the First Amendment rights school board members enjoy as individuals alongside the State's compelling interest in ensuring school boards maintain the public's trust. The Commission has long held that when school board members make social media posts from accounts they used to campaign for their seats, those school board members have a duty to affirmatively disclaim their school board membership to mitigate the risk of compromising the Board. In fact, the Commission reaffirmed this line of cases in an opinion it published only six days before the filing of the underlying Complaint in this matter. However, in deciding the matter below, the Commission abjectly failed to apply this well-established standard.

In the matter now being appealed, Central Regional School Board (Board) member Heather Koenig (Respondent or Koenig) campaigned for her seat on the Board from her Facebook account, posted a picture of herself swearing in as a

member of the Board from that account, and clearly and unequivocally stated from this same Facebook account that she was a "member of the Central Regional BOE." From this same Facebook account, Koenig claimed Black people often fake hate crimes, called Governor Murphy a "Tyrannical POS" for extending New Jersey's School Mask Mandate, and openly told school district teachers to drop out of their union, causing the Board to become ensnared in litigation. At no time did Respondent's posts or account contain a disclaimer making clear that she was speaking in her individual capacity and not on behalf of the Board.

As a result, members of the school community protested Respondent at meetings of the Board, which was clearly reflected by news articles, Board minutes, and even Respondent's own admissions – all of which were in the record. The Board itself even passed two separate Resolutions condemning Respondent's Facebook posts and had to set aside significant time at Board meetings to address public complaints specifically regarding Respondent's social media use.

Consequently, Administrative Law Judge Tama Hughes (ALJ Hughes) found in her Initial Decision that Respondent had violated the Act through her failure to affirmatively disclaim her membership on the Board. ALJ Hughes cited to the Commission's robust body of decisional law on the issue and recommended the penalty of "censure" in accordance with those prior Commission decisions.

Inexplicably, however, the Commission then decided to ignore its own precedent entirely, asserting that Respondent's Facebook account "lacked a nexus" to her Board membership based on the erroneous conclusion that "her Facebook page did not make any reference to the Board nor her membership on the same." This finding was contrary to clear, unambiguous, and abundant evidence in the record. It is obvious from the record that Respondent not only held herself out as a Board member from her Facebook page, but that members of the school community

protested her at ***meetings of the Board***, meaning that they not only ***could*** have seen her as speaking in her role as Board member, but that they ***actually did*** see her as speaking in this role, thereby compromising the Board. The ***Board itself*** was also subjected to litigation as a direct result of Respondent's social media use.

Further, no party to the matter before the Commission ever sought the relief issued. Respondent neither cross-moved for summary decision in her favor nor filed exceptions from ALJ Hughes's Initial Decision. As a result, by "rejecting" the grant of Appellants' Motion for Summary Decision, the Commission effectively denied Appellants' Motion for Summary Decision. The appropriate remedy when summary decision is denied without cross-motion is to proceed to a hearing, not to ***dismiss the Complaint altogether***. By *sua sponte* dismissing the Complaint itself, the Commission erred as a matter of law.

The Commission also erred in its prior July 26, 2022 decision granting Respondent's Motion to Dismiss in Lieu of an Answer in part. In doing so, the Commission improperly weighed the facts in the light most favorable to the party moving for dismissal of Counts 2 and 3, it made plain errors in its factual findings, it inserted facts not in the record, and it fundamentally misconstrued an applicable Executive Order, which Respondent ***has openly admitted*** to violating at Board meetings while a sitting Board member. The Commission also erred in dismissing Count 5 of the Complaint in its July 26, 2022 decision by directly contradicting its own Advisory Opinion as to an important jurisdictional issue. As that decision is now ripe for appeal under N.J.C.R. 2:2-3(a)(2), it is also being appealed herein.

For all the reasons that follow, Appellants now request that the Appellate Division 1) reverse the School Ethics Commission's Final Agency Decision which dismissed the entire Complaint outright, and 2) reinstate Counts 2, 3, and 5 of the Complaint.

PROCEDURAL HISTORY

On March 3, 2022, Complainants-Appellants Ronald Donnerstag, Wendy Vacante, Jaime Cestare, Kristin Lanko, Matthew Delprete, Scott Alfano, Lisa Snider, Patricia Fortus, and Lynne Sweezo (collectively, Appellants) filed a Complaint before the Commission, asserting violations of N.J.S.A. 18A:12-24.1(a) and (e) of the School Ethics Act (Act) regarding Respondent's actions which are listed in the Complaint. (Ca196-232). Respondent is currently a member of the Central Regional Board of Education (Board).

On Friday, April 8, 2022, Respondent filed a Motion to Dismiss in Lieu of an Answer. On May 2, 2022, Appellants filed their Brief in Opposition to Respondent's Motion to Dismiss. (Ca175-195).[1] On June 3, 2022, Appellants filed a Motion to Supplement the Record with documents which had not been made available to Appellants at the time any prior motion or response had been filed. (Ca074-105). On June 6, 2022, the Commission granted that Motion to Supplement the Record. (Ca014) ("On June 3, 2022, [Appellants] filed a 'Motion to Supplement the Record,' with several exhibits, which was granted by the Commission's Staff, as Respondent did not object.")

On July 26, 2022, the Commission issued its decision on Respondent's Motion to Dismiss. (Ca165-174). In doing so, the Commission denied the motion as to Counts 1 and 4 of the Complaint, but granted the motion as to Counts 2, 3, and 5 of the Complaint. (Ca172-173).

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[1] While Appellants note that briefs are generally prohibited under N.J.C.R. 2:6-1, the limited attached briefs in the present matter go to what facts and evidence were in the record before the Commission and ALJ Hughes when the underlying decisions were made, and are therefore "germane to the appeal" pursuant to N.J.C.R. 2:6-1(a)(2).

The Commission dismissed Counts 2 and 3, calling Respondent's well-documented and public violations of New Jersey's School Mask Mandate as set out in Executive Order 251 (EO 251) a "personal decision," which was never asserted by Respondent and was entirely absent from the record. (Ca172). The Commission also stated that Respondent never encouraged anyone else to defy EO 251 (Ca172), though there was abundant evidence in the record showing Respondent did precisely that, including witness certification and Respondent's own written words. (Ca137-138 – Requests for Admission [RQA] 11, 12, 14, 15, 16, Ca144-145 – Responses to RQA 11, 12, 14, 15, 16); (Ca200-201, Ca204, Ca222-223, Ca226, Ca228).

In Dismissing Count 5 of the Complaint, the Commission stated that it had no jurisdiction over a transparently racist Facebook post made by Respondent, because it was initially posted after Respondent was elected to her seat on the Board, but before she was formally seated. (Ca172).This directly contradicted a prior Advisory Opinion issued by the Commission. (Ca194). The parties were not allowed a chance to be heard on this jurisdictional issue.

On August 1, 2022, Appellants filed a Motion for Leave to Appeal an Interlocutory Decision with the Commissioner of Education. On August 11, 2022, the Commissioner issued an Order denying Appellants' Request for Leave to File an Interlocutory Appeal as to the dismissal of Counts 2, 3, and 5 of the Complaint. (Ca160). The Commissioner did not address the merits or whether the School Ethics Commission erred in dismissing these counts. Id.

Respondent filed its first Answer on September 6, 2022, which contained a one sentence blanket denial. (Ca161-162). Respondent then filed an Amended Answer on January 3, 2023 (Ca163-164). No defenses were raised in either Answer. See N.J.A.C. 6A:28-7.2(a) (Answers before the Commission must "fully and completely advise the parties and the Commission as to the nature of respondent's defenses for each

allegation."); (Ca031) ("First, respondent failed to raise any affirmative defenses in both her initial answer and her amended answer. Therefore, such a defense is unsupported by the pleadings.")

This matter was then transferred to the Office of Administrative Law for discovery and a hearing. On February 28, 2023, following the exchange of discovery, Appellants filed a Motion for Summary Decision. (Ca041-Ca060). Appellants attached a number of Exhibits to this Complaint. (Ca061-Ca160). Based on the evidence in the record, Appellants asked ALJ Hughes to find that Respondent had violated the Act as to the remaining Counts 1 and 4 of the Complaint. (Ca041-Ca060). In doing so, Appellants expressly reserved the right to appeal the Commission's July 26, 2022 decision on Respondent's Motion to Dismiss pursuant to N.J.C.R. 2:2-3(a)(2) once a final order has issued as to all claims as to all parties pursuant to N.J.C.R. 2:2-3(b). (Ca058-059). Respondent did not file any cross-motion.

On June 9, 2023, ALJ Hughes issued her Initial Decision granting Complainant's Motion for Summary Decision and issuing the penalty of "censure." (Ca019-040). In doing so, ALJ Hughes found that Respondent had violated the Act as to Count 1 by making a public social media post from a Facebook page on which she held herself out as a Board member, "that explicitly urged Board employees to drop their membership with CREA [Central Regional Education Association] and NJEA [New Jersey Education Association]." (Ca027). In doing so, ALJ Hughes cited to a robust body of caselaw issued by the Commission on school board member social media use. (Ca027-031). ALJ Hughes found that, by making the post that was the subject of Count 1, Respondent "not only had the ability to compromise the Board," as the Board negotiates directly with these unions, but that this post had directly resulted in litigation against the Board, and that Respondent's actions "brought into

question the Board's ability to fairly and impartially negotiate its labor contract." (Ca031). She found that, not only did this post have the potential to compromise the Board in violation of the Act, but that "it did compromise the Board" in violation of the Act. Id.

ALJ Hughes also found that Respondent had violated the Act by making a social media post on a Facebook page from which she held herself out as a Board member which called Governor Murphy a "Tyrannical POS" for extending New Jersey's School Mask Mandate and urged community members to flout the applicable Executive Order. (Ca032-Ca035). In so finding ALJ Hughes held that "her posting effectively urged others to take action against [Executive Order 251]," that Respondent "led by example by refusing to wear a face mask at the Board meetings in utter disregard of EO 251 and Board members' obligation to abide by and enforce EO 251 within the school district," and that "by her own admission" Respondent had violated EO 251 at Board meetings, the purpose of which "was to urge others" to do the same. (Ca034-35).

ALJ Hughes found that "[s]everal of Respondent's postings on Facebook have been the subject of community criticism at Board meetings and caused the Board to take official action to formally condemn and denounce certain posts, request the Respondent remove the posts, and publicly comment that no one Board member has the authority to speak for the Board." (Ca024). She had thus committed violations of the Act.

ALJ Hughes specifically found that Respondent had held herself out as a member of the Board on her Facebook page. (Ca021, Ca032, Ca034). ALJ Hughes stated:

> It is undisputed that Respondent used her Facebook account as a platform for her election to the Board. It is also undisputed that she also used it to publicize that she had been elected to the Board and was a sworn member. It is this very same public platform that

> she used post-election to reach this same constituency – however, now she used it as a sitting Board member which carries greater weight, to promote action that was contrary to the Boards' obligations under the law. Such action on her part was not only violative of her ethical obligations as a Board member, it also compromised the Board.
>
> (Ca032).

ALJ Hughes filed her Initial Decision with the School Ethics Commission pursuant to N.J.S.A. 18A:12-29 on June 9, 2023. Then, on August 22, 2023, the School Ethics Commission issued a 4 page "Final Decision," which "rejected" ALJ Hughes Initial Decision on the asserted basis that there was not a "sufficient nexus" between Respondent's public Facebook account and her Board membership. (Ca016). Ignoring abundant evidence in the record that Respondent repeatedly and consistently held herself out as a Board member, the Commission held that "there is no factual evidence" that she held herself out as a Board member, and asserted that "her Facebook page did not make any reference to the Board nor her membership on same." (Ca017). This was factually incorrect, as was reflected by abundant evidence in the record at the time. Appellants filed their appeal on October 5, 2023, Appellate Division Docket Number A-000366-23T4, and now seek reversal of that decision on an appeal as of right to the Appellate Division pursuant to N.J.C.R. 2:2-3(a)(2).

STATEMENT OF FACTS

All facts as stated in the Complaint before the School Ethics Commission (196-232), as well as all facts and documents encompassed by Appellants' Motion for Summary Decision (Ca041-160), and in the record more generally, are hereby relied on and incorporated by reference. The facts most salient to this appeal are as follows:

1. On October 8, 2021, Respondent made a Facebook post which asked members of the school community to vote for her in her campaign for a seat on the Central Regional Board of Education. (Ca216).

2. On October 8, 2021, Respondent made a Facebook post which contained a picture of a ballot with her name on it, asking community members to vote for Respondent in her campaign for a seat on the Central Regional Board of Education. (Ca218).

3. On December 5, 2021, after winning her seat on the Board, Respondent made a Facebook post which contained a picture of a Black man, and which stated:

> IF AMERICA WAS FILLED WITH AS MUCH WHITE SUPREMACY & RACISM AS THE MEDIA SAYS THERE WOULDN'T BE A NEED TO FAKE HATE CRIMES
>
> THIS IS MAGA COUNTRY
>
> (Ca232).

This post remained public and Respondent refused to take it down until the underlying ethics matter was filed and the Board itself issued a Resolution demanding that she take it down. (Ca075-076).

4. On December 9, 2022, Respondent shared a post from "unmasknjschools.com" which stated that Governor Murphy's pandemic response "on children" "needs to end now!" (Ca228).

5. On January 4, 2022, Respondent shared a banner to her Facebook page which stated:

> MERISSA BORAWSKI – HEATHER KOENIG
> CENTRAL REGIONAL BOARD OF ED
>
> (Ca220).

6. On January 7, Respondent posted a photograph of herself swearing into her position on the Board to her Facebook page at a January 6, 2024 Board meeting. (Ca222-223). Below this photo, she responded to a question from a community member as to what her position was with the statement "I was elected onto the central regional board of education (BOE) come on man LOL" indicating that it was common knowledge to her Facebook followers that she was a sitting Board member. (Ca223).

7. On January 6, 2022, Respondent refused to wear a mask while a seated Board member at a meeting of the Board. (Ca200, Ca223); (Ca137 at RQA 11, Ca145 at Response to RQA 11).

8. On January 9, 2022, Respondent made a Facebook post which compared COVID-19 safety measures to domestic abuse. (Ca230).

9. On January 10, 2022, Respondent made a Facebook post which called Governor Murphy a "Tyrannical POS" for extending New Jersey's School Mask Mandate. (Ca226). This same post indicated that school community members must either flout the School Mask Mandate or "bend and repeat." Id.

10. On January 12, 2022, Respondent made a Facebook post which stated:

> Teachers...OPT OUT OF NJEA!!! If you don't know...YOU CAN!!
> And thanks to a Federal ruling a few years back...They still have to represent you!!! #UNENROLL #RISE UP
> (Ca214)

11. On January 20, 2022, Respondent again refused to wear a mask at a meeting of the Board. (Ca200-201); (Ca137 at RQA 14, Ca145 at Response to RQA 14). At this meeting she was asked to wear a mask, and replied "I'm not wearing a mask." (Ca200-201).

12. In response to Respondent's January 10, 2022 Facebook posts which implored teachers to drop out of their unions – with which the Board negotiates labor contracts – the Board issued a Resolution on March 7, 2022, stating that Respondent must "refrain from encouraging or discouraging an employee from joining, forming, or assisting an employee organization" in accordance with the "Workplace Democracy Enhancement Act." (Ca072).

13. The Public Comment portions of the March 7, March 17, and April 28, 2022 Board meetings primarily consisted of students and parents expressing deep concern over Respondent's Facebook posts. (Ca073); Ca085-087; Ca098-099). Many students and parents spoke about how Respondent's posts impacted their experience in the District. (Ca193) (*Asbury Park Press* Article: "Several students - and parents - fought back tears as they told their stories."). There was even a protest outside the school on March 17, 2022. (Ca086) (Board minutes: "Ms. Miller stated that there was an organized protest outside the school.").

14. As Respondent refused to take down her December 5, 2021 "Hate Crimes" Facebook post well into her membership as a sitting Board member, on March 17, 2022, a majority of the Board adopted a Resolution formally requesting that "Board Member Koenig" remove specific Facebook posts which the Board stated were "racist and/or biased against African-Americans." (Ca075-076) ;(Ca086) (*Asbury Park Press* Article: "The Board's actions came in response to racially charged social media posts made by Board member Heather Koenig."); (Ca100-105) (*PATCH* Article: "Board members Merissa Borawski and Heather Koenig have been under fire since March for racist social media posts,

copies of which have been shared throughout the community and sparked complaints at board meetings.")[2]

15. On April 21, 2022, the Central Regional Education Association (CREA) and the New Jersey Education Association (NJEA) filed an Unfair Practice Charge against the Board before the New Jersey Public Employment Relations Commission, based specifically on Respondent's January 10, 2022 Facebook posts telling teachers to drop out of the CREA and the NJEA. (Ca107-114). This post is the subject of Count 1 of the Complaint in this matter. (Ca199-200).

16. On April 28, 2022, members of the Central Regional School District Community again voiced their protest of Respondent's social media posts at a meeting of the Board. (Ca098-099) (See, e.g., "Joshua Miller stated that his daughter attend Central Regional and he addressed Mrs. Koenig online posts"; "Dinah Vazquez addressed Mrs. Borawski and Mrs. Koenig"). Respondent – and the Board itself – were asked to take accountability for Respondent's posts. (Ca099) ("Ms. Parker stated that it is disgusting and insane for not taking accountability.") Instead of taking accountability, Respondent grinned. (Ca098**)** (Board minutes: "Melissa Lugo stated stop with the grin while defending the posts.").

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Appeals to the Appellate Division may be taken as of right to review final decisions or actions of any state administrative agency. N.J.C.R. 2:2-3(a)(2). A final agency decision has been described as one in which the agency communicates written notice of the finality of its decision. Silviera-Francisco v. Bd. of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016) (citing Bouie v. N.J. Dep't of Cmty. Affairs, 407 N.J.Super. 518, 527, 972 A.2d 401 (App. Div.2009)).

The Court will uphold a final agency decision unless it is arbitrary, capricious, or unreasonable, unsupported by substantial credible evidence in the record as a whole, offensive to the federal or state constitution, or inconsistent with the

[2] A Complaint was also filed by Appellants before the Commission against Board member Merissa Borawski with regard to her social media posts. This Complaint was also dismissed by the Commission on August 22, 2023, and is being appealed simultaneously with the present appeal (App. Div. No. A-000367-23T4).

administrative agency's statutory mission. See In re Stallworth, 208 N.J. 182, 194 (2011); Circus Liquors, Inc. v. Middletown Tp., 109 N.J. 1, 9-10 (2009); Hemsey v. Board of Trustees, PERS, 198 N.J. 215, 223 (2009).

In determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court will consider:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of the legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot., 101 N.J. 95, 103 (1985).

The Appellate Division will reverse the final order of an agency that is not supported by substantial credible evidence in the record as a whole. In re Stallworth, *supra*, 208 N.J. at 194. Where the agency has made certain findings of fact, the Appellate Court will consider whether the agency's findings could reasonably be reached, on sufficient credible evidence present in the record, considering the proofs as a whole. Jackson v. Concord Company, 54 N.J. 113, 117 (1969).

Appellate review of legal questions is *de novo*. L.A. Bd. of Educ. of Trenton, 221 N.J. 192, 204 (2015); Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dept. of Envtl. Prot., 191 N.J. 38, 48 (2007); In re Taylor, 158 N.J. 644, 656-58 (1999). While the Appellate Division will give weight to an agency's interpretation of a statutory scheme, such interpretations need not be adopted where they are plainly unreasonable. In re Advisory Op. No 01-2008, 201 N.J. 254 (2010).

In passing the School Ethics Act (Act) into law, the Legislature found and declared:

> a. In our representative form of government it is essential that the conduct of members of local boards of education and

> local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> N.J.S.A. 18A:12-22.

Subsection (e) of the Act's Code of Ethics for school board members states:

> e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
>
> N.J.S.A. 18A:12-24.1(e)

II. APPEAL OF FINAL AGENCY DECISION (Ca014-017)

A. THE COMMISSION'S FINAL DECISION WAS UNSUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD AND MUST BE REVERSED (Ca014-017)

A reviewing Court may reverse the decision of an administrative agency where it is arbitrary, capricious, or unreasonable, or is not supported by substantial credible evidence in the record as a whole. See, e.g., Dennery v. Bd. of Educ. of Passaic Cty. Reg'l High Sch. Dist. No. 1, Passaic Cty., 131 N.J. 626, 641 (1993). In the present matter, the Commission's Final Decision was not supported by substantial credible evidence in the record as a whole. On the contrary, abundant evidence in the record directly contradicts the erroneous factual assumptions the Commission's Final Decision relied on.

Here, the Commission's Final Decision to dismiss the Complaint outright hinged entirely on the proposition that "there is an insufficient nexus between Respondent's personal Facebook page and her membership on the Board" based on

the erroneous conclusion that Respondent "did not make any reference to the Board nor her membership on the same" from her Facebook account. (Ca016-017). This conclusion is directly contrary to abundant evidence in the record for at least the following 8 reasons:

- Respondent repeatedly campaigned for her seat on the Board from her Facebook account (Ca216, Ca218, Ca220); (Ca136 at RQA 2, Ca144 at Response to RQA 2);
- Respondent posted pictures of herself swearing in as a Board member (Ca222-224); (Ca136 at RQA 3, Ca144 at Response to RQA 3);
- Respondent posted a comment that specifically stated "I was elected onto the central regional district board of education (BOE) come on man LOL" (Ca224);
- Within 5 days of posting this photograph and making this comment, Respondent made the social media posts that are the subject of Counts 1 and 4 of the Complaint (Ca199-201);
- The school community protested Respondent and the Board as a direct result of Respondent's Facebook posts at meetings of the Board and in her role as Board member (Ca075-076, Ca086, Ca098-099, Ca100-105);
- The Board was subjected to litigation as a direct result of Respondent's public social media posts (Ca107-114, Ca199-200, Ca214);
- The Board passed two official Resolutions denouncing Respondent's public social media posts (Ca072, Ca075-076); and
- Respondent admitted in discovery – which was attached to the Motion for Summary Decision – that she actually compromised the Board by making the social media posts which were the subject of the underlying motion. (Ca136-137 at RQAs 2, 3, 4, 5, 6, 7, 8, Ca144-145 at Response to RQAs 2, 3, 4, 5, 6, 7, 8,).

It was abundantly clear from evidence in the record before the Commission that Respondent had publicly campaigned for her seat on the Board from her Facebook account, that she posted photographic evidence of herself swearing in as a Board member, that she made a clear statement that she was a Board member, and – as the Commission even admits – that she was speaking on Board issues while a sitting Board member. (Ca016) ("... the subject matter of the Facebook posts ... may relate to the business of the Board ...). As a result, members of the Central Regional School

District community protested the Board itself and Respondent in her role as Board member at meetings of the Board, as evidenced in Board minutes and news articles that were in the record at the time the Commission issued its Final Decision. (Ca075-076, Ca86, Ca098-099, Ca100-105).

First, Respondent Koenig repeatedly campaigned for her seat on the Board from her Facebook page. (Ca216, Ca218, Ca220); (Ca136 at RQA 2, Ca144 at Response to RQA 2). Attached to the Complaint was a series of posts Koenig made from her Facebook page which asked Central Regional School District community members to vote for her and her running mate Merissa Borawski. Id. The Complaint itself clearly stated – as to each Count that was subject to the Commission's Final Decision – that at the time each post was made, "Koenig's page was public as indicated by the earth-shaped symbol in the top left corner of the post, just below Koenig's name," that "Koenig Repeatedly used this Facebook account to campaign for her position on the Board (Exhibit 2, Exhibit 3, and Exhibit 4) and posted a picture of herself being sworn in as a member of the Central Regional Board of Education (Exhibit 5)," and that "Koenig held herself out as a member of the Central Regional Board of Education on her Facebook page." (Ca199-212).

Next, as noted above, attached to the Complaint was an actual photograph Respondent posted to her Facebook page of herself swearing in as a member of the Board. (Ca222). Also attached to the Complaint was a comment Koenig made below this picture in which she stated – while a sitting Board member – "I was elected onto the central regional district board of education (BOE) come on man LOL" (Ca223-224). As a result, ALJ Hughes found in her Initial Decision, as an "**UNDISPUTED FINDING OF FACT**":

> On January 7, 2022, respondent was sworn in as a member of the Central Regional Board of Education (Board). Pictures of her swearing in as a Board member were posted on her public Facebook page. Respondent utilized her Facebook account to

> advertise/campaign to become a member of the Board. She also published a picture of herself on her Facebook account when she was sworn in as a Board member.
>
> Respondent's Facebook allows public access to certain parts which means that anyone in the community can see what is posted on the public aspect of her account. By her own admission, some of respondent's Facebook friends – which includes parents, teachers, students, and staff, are aware that she is a Board member.
>
> (Ca021).

ALJ Hughes then stated "[t]hree days after she was sworn in, on January 10, 2022, respondent posted a statement on her Facebook account" which was the subject of Count 1 of the Complaint, calling Governor Murphy a "Tyrannical POS" for extending the New Jersey School Mask Mandate. (Ca021). Then, only two days after that, "respondent posted on her Facebook account a statement that teachers should opt out of the New Jersey Education Association." (Ca022). This post stated in all caps "OPT OUT OF NJEA!!!" and stated that teachers could opt out of union membership "thanks to a Federal ruling a few years back," clearly referring to Janus v. AFSCME, 138 S.Ct. 2448 (2018). (Ca022). ALJ Hughes found that "[t]he posting was public and there was no disclaimer to the effect that the statements were her own personal opinions, and not that of the Board or Board members." (Ca023).

ALJ Hughes then found:

> It is undisputed that respondent used her Facebook account as a platform for her election to the Board. It is also undisputed that she also used it to publicize that she had been elected to the Board and was a sworn member. It is this very same public platform that she used post-election to reach this same constituency – however, now she used it as a sitting Board member which carries greater weight, to promote action that was contrary to the Board's obligations under the law. Such action on her part was not only violative of her ethical obligations as a Board member, it also compromised the Board.
>
> (Ca032).

Next, Respondent even outright admitted in her discovery admissions which were attached to Appellants' Motion for Summary Decision that she held herself out as a Board member on her Facebook page and that, in doing so, she actually compromised the Board:

- You used the Facebook account that is the subject of the Complaint to campaign for your seat on the Board.

  ADMIT __X__ DENY _____

- On January 7, 2022, you shared a series of pictures which showed you being sworn in as a member of the Board.
  ADMIT __X__ DENY _____

- At the time you made the January 10, 2022 post that is the subject of Count 4 of the Complaint, some of your Facebook friends were members of the Central Regional School District community, including but not limited to parents, teachers, students, and staff.

  ADMIT __X__ DENY _____

- Your posts on Facebook have been the subject of criticism during the public comment portion of Board meetings in 2022.

  ADMIT __X__ DENY _____

  (Ca136-137 at RQAs 2, 3, 5, 8, Ca144-145 at Response to RQAs 2, 3, 5, 8,).

These admissions were specifically raised by Appellants in their Motion for Summary Decision. (Ca051). ALJ Hughes also stated in her Initial Decision "by her own admission, some of Respondent's Facebook friends – which includes parents, teachers, students, and staff, are aware that she is a Board member" and that "[t]he posting was public and had no disclaimer to the effect that the statements were her own personal opinions, and not that of the Board or Board members." (Ca021).

Despite photographic evidence of Respondent swearing in as a Board member, despite Respondent actually typing out that she "was elected onto the central regional board of education," despite repeatedly campaigning for her seat on the Board from the same Facebook page, and despite Respondent's own clear admissions that she

held herself out as a Board member on her Facebook page, and that she actually compromised the Board, the Commission still shockingly stated:

> In this matter, the Commission finds that, while the subject matter of the Facebook posts– opting out of the union and masking in schools – may relate to the business of the Board, there is an insufficient nexus between Respondent's personal Facebook page and her membership on the Board, such that a reasonable member of the public would not perceive that respondent is speaking pursuant to her official duties.
>
> The posts at issue do not mention Respondent's membership on the Board ***nor does she advertise or rely upon her board membership when publishing material on her social media page.*** In short, ***there is no factual evidence*** that the statements/posts on her Facebook account were made as a member of the Board, or had the appearance of being representative of, or attributable to the Board. [...] ***her Facebook page did not make any reference to the Board nor her membership on the same***
>
> (Ca016-017) (emphasis added).

This assertion is directly contrary to abundant evidence in the record, it altogether ignores ALJ Hughes' factual findings, and it is demonstrably factually incorrect. Respondent posted a photograph of herself swearing in to the Board on her Facebook page, she stated in plain language that she was now a Board member, and within 5 days, while the prior posts were still up, made both posts that were the subject of Appellants' Motion for Summary Decision. (Ca199-202; Ca214-226). It is difficult to imagine better evidence that Respondent held herself out as a Board member when she made those posts. As a result, the Board itself issued two Resolutions denouncing her posts – following protest against the Board directly caused by Respondent. (Ca072, Ca075-076). It is frankly absurd to say there is "no factual evidence" tying her Facebook account to her Board membership, and that her page "did not make any reference to the Board of her membership on same." (Ca016-017). She made repeated references to her Board membership. The Commission's

finding to the contrary was at least clear error, and was most certainly not supported by substantial evidence in the record at the time. Dennery, 131 N.J. at 641 (1993).

Further, if there was truly no nexus between Respondent's Board membership and her Facebook account, as the Commission erroneously held, members of the Central Regional School District community would not have protested Respondent ***at meetings of the Board***. It is unmistakably clear from the Board minutes and news articles that documented these protests against the Board and Respondent in response to her Facebook posts, that the community outcry was a result of the clear connection between her Board membership and her Facebook posts. (Ca075-076, Ca86, Ca098-099, Ca100-105).

In fact, the news articles in the record clearly identified Koenig in her role as Board member and clearly showed that the public protested Koenig ***in her role as Board member at meetings of the Board as a result of her Facebook posts***. (Ca101-105) ("Students and community members once again gathered Thursday to protest the social media posts of two Central Regional Board of Education members, again urging the district to take action"; "On Thursday, the school board was voting on a social media policy for board members that was introduced at the March 17 meeting, in response to the community's uproar over posts by both Koenig and Borawski."). Not only was there a justifiable impression that Koenig engaged in conduct which violated the public trust, the public itself actually stated that such public trust was violated – to the Board and Koenig in her role as Board member – at meetings of the Board.

Respondent stated clearly, in plain text and with photographic evidence, that she was a Board member from her Facebook account. (Ca222-224). Then, within 5 days, she made the Facebook posts that were the subject of Appellants' Motion for Summary Decision. (Ca199-202; Ca214-226). Then, Respondent was protested at

meetings of the Board as a result of the Facebook posts which addressed Board issues. (Ca075-076, Ca86, Ca098-099, Ca100-105). News articles and Board minutes clearly reflected that she was being protested in her role as Board member because she held herself out as a Board member from her Facebook account. Id. If this is not a "sufficient nexus" between her Facebook posts and her Board membership, it is difficult to imagine how such a nexus could ever exist.

Next, in the record before the Commission was an Unfair Practice Charge filed against the Board on behalf of the CREA and the NJEA in direct response to the post that constituted Count 1 of the present matter, which told teachers to drop out of their unions. (Ca094-102; Ca165-166; Ca180). This post – which stated "Teachers ... OPT OUT OF THE NJEA!!!" – was made mere days after Respondent had posted the picture of her swearing in to the Board and typed out that she was a member. (Ca108-Ca115). That is why ALJ Hughes found:

> It is clear that Respondent's unilateral actions in sharing a post that lobbied teachers to "rise up" and "opt out of the NJEA," not only had the ability to compromise the Board, but it did compromise the Board. This is evidenced by the litigation filed against it – specifically, the Unfair Practice Charge filed by the NJEA and CREA. Respondent's actions also brought into question the Board's ability to fairly and impartially negotiated its labor contract in accordance with WDEA. The Board in an attempt to distance itself from Respondent's actions and reinforce its commitment to meet its ethical obligations, passed a resolution disavowing Respondents' statements and reaffirming their commitment to uphold the code of ethics and its obligations under WDEA
>
> (Ca031).

In fact, the Resolution to which ALJ Hughes refers specifically stated:

> **WHEREAS**, the Board is cognizant of its obligations under the Workplace Democracy Enhancement Act ("The WDEA") to, among other things, refrain from encouraging or discouraging an employee from joining, forming, or assisting an employee organization; and
> **WHEREAS**, the Board discourages anyone from making any statements discouraging an employee from joining, forming or assisting an employee organization

(Ca072).

At its very next meeting, ten days later, on March 17, 2022, the Board adopted another Resolution addressing Respondent's Facebook posts, stating specifically:

> **WHEREAS**, the Board finds it necessary and appropriate to adopt a social media policy for Board Members to ensure that the District has a policy in place addressing the use of social media by individual Board Members; it is
> **NOW, THEREFORE RESOLVED**, that the Central Regional High School District Board of Education hereby adopts District Policy No. 0179 on an emergency basis, to be effective immediately upon adoption; and
> **BE IT FURTHER RESOLVED**, that, in accordance with District Policy, the Board formally requests Board Members Borawski and Koenig immediately remove the aforementioned social media posts.
>
> (Ca075-076).

As a result of foregoing, the Commission's contention that "her Facebook page did not make any reference to the Board nor her membership on same," and that, as a result, "there is no factual evidence that the statements/posts on her Facebook account were made as a member of the Board, or had the appearance of being representative of, or attributable to the Board" (Ca016-017), is directly contrary to abundant evidence in the record for at least 8 reasons set out above.

As a result of at least these 8 reasons, the Commission's Final Decision and outright dismissal of the Complaint must be reversed as not being supported by substantial evidence in the record. Dennery, 131 N.J. at 641 (1993).

B. THE COMMISSION'S FINAL DECISION WAS CONTRARY TO A ROBUST BODY OF THE COMMISSION'S OWN CASELAW; WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE; AND WAS INCONSISTENT WITH THE COMMISSION'S STATUTORY MISSION (Ca014-017).

An appellate court will reverse an administrative agency decision that is arbitrary, capricious, unreasonable, or not supported by substantial credible evidence in the record as a whole. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). In

determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court will consider:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of the legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot., 101 N.J. 95, 103 (1985).

Here, the Commission's August 22, 2023 Final Decision was arbitrary, capricious, unreasonable, and was directly contrary to a robust body of caselaw the Commission had already developed on this issue pursuant to its statutory mandate.

The School Ethics Commission was created by action of the Two Hundred Fourth Legislature of the State of New Jersey, as approved by the Governor of the State of New Jersey, and enshrined in the School Ethics Act as Public Law 1991, Chapter 393 during its Second Annual Session of the 1991 Legislative Session. In creating the School Ethics Commission, the Legislature found and declared:

> a. In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> N.J.S.A. 18A:12-22.

In 2001, the School Ethics Act was amended to include the Code of Ethics that is the subject of this appeal. New Jersey Legislature, Bill A1755, Session 2000-2001,

Approved P.L. 2001, c. 178, *available at* https://njleg.gov/bill-search/2000/A1755. The Code of Ethics, including N.J.S.A. 18A:12-24.1(e), which is specifically the subject of this appeal, was added to the School Ethics Act by a New Jersey Assembly vote of 69-0, and a New Jersey Senate vote of 35-0. Id. This bill was then signed into law on July 26, 2001 as Public Law, Chapter 178. Id.

As noted above, N.J.S.A. 18A:12-24.1(e) states:

> e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

As a result, the express legislative mission of the School Ethics Commission in this instance is to ensure that board members avoid conduct which creates a justifiable impression among the public that the public trust is being violated. N.J.S.A. 18A:12-22(a). The Legislature specifically tasked the Commission with doing so by mandating that it issue discipline in a "uniform" manner when a school board member takes action that may compromise the board. N.J.S.A. 18A:12-22(b); N.J.S.A. 18A:12-24.1(e).

Here it was unequivocal from the record before the Commission that Respondent engaged in conduct that created a justifiable impression among the public that the public trust was being violated, and that she did so by taking action which may have – and actually did – compromise the Board. This was plainly evidenced by news articles stating that she had compromised the Board, by Board minutes which showed that she had compromised the Board, and by two Board Resolutions which directly found that she had compromised the Board. (Ca075-076, Ca86, Ca098-099, Ca100-105). As a result ALJ Hughes' Initial Decision stated, in the section of her Initial Decision entitled "**UNDISPUTED FINDINGS OF FACT**":

> Several of respondent's postings on Facebook have been the subject of community criticism at Board meetings and caused the Board to take official action to formally condemn and denounce certain posts, request the respondent to remove the posts, and

> publicly condemn and denounce certain posts, and publicly comment that no one Board member has the authority to speak for the Board.
>
> (Ca024).

As a result, ALJ Hughes found:

> As previously determined, respondent used her Facebook account when she campaigned to get on the Board and when she was sworn in as a Board member. It is also the same platform that she used after she became a Board member to publish her opinions, political viewpoints, and/or calls for action. When she became a member of the Board, not only did her Facebook rhetoric take on greater weight, it also carried the potential to be viewed as Board endorsement or action. The latter point is evidenced by the multiple Board resolutions that were passed disavowing respondent's postings and demanding that they be taken down and the litigation that was filed against the Board.
>
> (Ca034).

Nowhere in the Commission's Final Decision does the Commission state that these findings were not credible, that they were disputed, or that they were incorrect. As a result of this clear evidentiary record, ALJ Hughes found:

> In this case, the record reflects that the respondent engaged in conduct that did indeed violate the standards established by the Legislature.
>
> (Ca035).

It was plain from the record before the Commission that Respondent engaged in conduct that created a justifiable impression among the public that the public trust was being violated, and that she did so by taking action which may have – and actually did – compromise the Board. Despite this clear record and undisputed factual and legal findings, the Commission chose to abrogate the statutory mission from which it was born – to ensure that board members avoid conduct which creates a justifiable impression among the public that the public trust is being violated. N.J.S.A. 18A:12-22(a). ALJ Hughes reached this conclusion by reviewing the Commission's prior holdings directly on point with the present matter.

The Commission has clearly and unequivocally addressed school board member social media use in a robust body of case law it inexplicably ignored in deciding this matter below. In Melnyk v. Fiel, SEC Docket No. C64-18 (2019) (Ca269), cited by the parties and ALJ Hughes (Ca027-29; Ca048), the Commission held:

> Although Respondent argues that the statements attributed to her by Complainant were not made in her capacity as a Board member, and do not relate to her Board membership or to Board actions, the Commission finds that the statements on her Facebook page are clearly linked to her Board membership (and candidacy). Respondent's Facebook page is clearly marked with the banner, "Re-Elect Maryann Fiel to the Highlands Elementary Board of Education," but does not appear to have a disclaimer noting that the statements are her own and unrelated to the Board. Thus, it is reasonable for a member of the public, such as Complainant, to perceive the statements as being made by Respondent in her capacity as a Board member.
>
> Id. at 4.

The Commission in Melnyk went on to explain that such a disclaimer would need to be very prominent in order to counteract the presumption that a school board member who holds themself out as a board member on their personal social media page – by posting a campaign banner from that page – may be perceived as speaking from their official position:

> A prominent disclaimer (caps/bold), such as, "***THE FOLLOWING STATEMENTS ARE MADE IN MY CAPACITY AS A PRIVATE CITIZEN, AND NOT IN MY CAPACITY AS A BOARD MEMBER. THESE STATEMENTS ARE ALSO NOT REPRESENTATIVE OF THE BOARD OR ITS INDIVIDUAL MEMBERS, AND SOLELY REPRESENT MY OWN PERSONAL OPINIONS***," may have avoided the appearance – actual or perceived – that the statements were made in Respondent's capacity as a Board member. The Commission additionally notes that, even if an appropriate disclaimer is used, the substance of a post/statement can, nevertheless, render the disclaimer meaningless.
>
> Id. at n1 (emphasis in original).

In I/M/O Daniel Leonard, SEC Docket Nos. C56-19 and C57-19 (Consolidated) (2021) (Ca250), cited by the parties and ALJ Hughes (Ca028-29, Ca049-050, Ca055), the Commission held:

> In finding a violation of N.J.S.A. 18A:12-24.1(e), ALJ Pelios appropriately concluded that Respondents action constituted "private action that may compromise the Board." In discussing the legislative intent for the School Ethics Act, ALJ Pelios properly highlighted that Board members "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(a). The Commission notes that board members do not surrender the rights that they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." Brown at 7.
>
> [...]
>
> ***Further, the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked."*** Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public.
>
> I/M/O Leonard at 6 (emphasis added).

The Legislature's mandate that the Commission uphold these standards for school board member social media use was also cited by the Commission itself in Advisory Opinion A03-07 (2007), as cited by ALJ Hughes in her Initial Decision:

> the Legislature has established specific standards to guide the conduct of board members to ensure and preserve public confidence. See, N.J.S.A. 18A:12-22. These Standards, set forth at N.J.S.A. 18A:12-24 and N.J.S.A. 18A:12-24.1, must be applied by the Commission in determining whether a board member's conduct is allowable under the Act. As [relevant case law] demonstrate[s], there are times when a board member's expression of opinion is permissible under the Act and there are

> times when such conduct is not permissible. The Commission believes that the standards established by the Legislature do not sharply curtail a board member's First Amendment rights. Rather, the standards provide the commission with guidance in balancing a board member's rights as a private citizen with the interest of the Legislature in ensuring that a board member preserves public confidence and avoids conduct that would violate the public trust or create a justifiable impression among the public that such trust is being violated. See, N.J.S.A. 18A:12-22(a). Therefore, in exercising their rights as private citizens, board members must ensure that such activity does not violate these standards.
>
> The Commission notes that board members do not surrender the rights that they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." Brown at 7. In Brown, the Commission found that respondent, a board of education member, violated the Code when he posted a message on his Facebook page ("Now if we could only do something about our local terrorists that destroy dreams and burn futures"), the Superintendent's photo came up as a result of the post, and he did not remove it. ***Further, the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked.***" Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public. As ALJ Pelios discussed, Respondent's post had the potential to discourage members of the public, namely members of the Muslim community, to engage with the Board "given what may seem to be an apparent bias." As such, ALJ Pelios' determination is entirely appropriate.
>
> (Ca030-031) (emphasis added).

It was undisputed that Respondent repeatedly campaigned for her seat on the Board from her Facebook page, including sharing campaign banners precisely like the one in Melnyk. (Ca220) (campaign banner stating "MERISSA BORAWSKI HEATHER KOENIG CENTRAL REGIONAL BOARD OF ED"); (Ca218) (picture of ballot with Respondent's name highlighted with the word "VOTE"); (Ca216) (Facebook posts telling Central Regional community members to vote for Respondent

and Merissa Borawski). Again, Respondent also posted an actual picture of herself swearing in as a Board member with the words "I was elected onto the central regional board of education" below. (Ca223-224). It was also undisputed that Respondent posted no Melnyk disclaimer from her Facebook account at any time. (Ca021, Ca023). ALJ Hughes directly addressed respondent's failure to issue a Melnyk disclaimer, stating that in Melnyk, "the SEC noted the lack of disclaimer, finding it would be 'reasonable for a member of the public, such as the complainant, to perceive the statements as being made by Respondent in her capacity as a Board member,'" and that Respondent's postings were "public and there was no disclaimer to the effect that the statements were her own personal opinions, and not that of the Board or Board members." (Ca021, Ca023, Ca031).

In fact, on February 25, 2022 – a mere ***six days*** before Appellants filed the Complaint with the Commission that is the subject of this appeal – the Commission issued Advisory Opinion A02-22 (2022). (Ca233). A02-22 unequivocally reiterates and reaffirms the Commission's prior guidance on social media use by school board members, stating:

> Since the advent of social media, the Commission has received numerous complaints about whether a Board member's speech, including posts on social media, violates the Act because the Board member either failed to disclaim, or insufficiently disclaimed, their speech. In a recent decision, which is informative here, the Commission stated:
>
> > ... Now, more than a decade later, when the use of social media and online publications has become commonplace, prolific, pervasive, and often times divisive, and given that there has been a significant influx in the number of complaints filed with the Commission regarding use (or nonuse) of disclaimers in electronic publications (not just social media), ***it is now more crucial than ever to underscore and emphasize that when Board members want to speak as private citizens, they must include an appropriate disclaimer that makes the capacity in which they are speaking clear and unambiguous.*** In addition, even if an appropriate disclaimer is used, a school official must never negate the import of the disclaimer by

> proceeding, under the purported protection of the disclaimer, to discuss or comment on Board business or matters in a way that leads a member of the public to believe that the individual is speaking on behalf of, and as a representative of, the Board.
>
> Advisory Opinion A02-22 (2022) (Ca233) (citing I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18, at 12) (emphasis added).

Published only six days prior to the filing of Appellants' Complaint before the Commission, this should have been the standard applied to the matter below.

ALJ Hughes even cited to I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18 (2021) (Ca236), as affirmed by Advisory Opinion A02-22 above, in determining the appropriate penalty. (Ca037). As the Commission made clear in I/M/O Treston, "there is a robust body of decisions and advisory opinions which school officials can utilize to determine when, and how, a disclaimer must be used on social media when speaking in their personal/private capacity in order to avoid running afoul of the Act." Id at 9.

In I/M/O Treston, the Commission specifically cited to Melnyk, holding:

> More specifically, and although Respondent Fiel argued that the statements attributed to her by Complainant Melnyk "were not made in her capacity as a Board member, and [did] not relate to her Board membership or to Board actions," the Commission found that "the statements on her Facebook page [were] clearly linked to her Board membership (and candidacy)," her social media page did not have a disclaimer noting that the statements made were her own and unrelated to the Board, and that, as a result, "it [was] reasonable for a member of the public ... to perceive the statements as being made by Respondent in her capacity as a Board member." C64-18.

The Commission in I/M/O Treston then reaffirmed Melnyk's instruction as to the issuance of disclaimers, stating:

> A prominent disclaimer (caps/bold), such as, "***THE FOLLOWING STATEMENTS ARE MADE IN MY CAPACITY AS A PRIVATE CITIZEN, AND NOT IN MY CAPACITY AS A BOARD MEMBER. THESE STATEMENTS ARE ALSO NOT REPRESENTATIVE OF THE BOARD OR ITS INDIVIDUAL MEMBERS, AND SOLELY REPRESENT MY***

> ***OWN PERSONAL OPINIONS***," may have avoided the appearance – actual or perceived – that the statements were made in Respondent's capacity as a Board member. The Commission additionally notes that, even if an appropriate disclaimer is used, the substance of a post/statement can, nevertheless, render the disclaimer meaningless.
>
> I/M/O Treston at 8 (emphasis in original).

Again, this body of caselaw requiring a Melnyk disclaimer from Facebook accounts used to campaign for school board seats was reaffirmed ***only six days*** before Appellants filed their Complaint in the present matter. Advisory Opinion A02-22 (2022) (Ca233).

It is clear from this well-established body of caselaw that – pursuant to the Legislature's mandate in creating the Commission – there is an affirmative duty to disclaim when school board members make social media posts that could otherwise compromise the board. These cases were cited by the parties and ALJ Hughes, as they are clearly the gold standard on this issue. However, this line of cases was inexplicably nowhere to be found in the Commission's analysis in the present matter.

Instead, the Commission relied only on a case in which a school board member claimed that his Facebook account had been hacked and that he had not made the Facebook posts at all. (Ca016) (citing to Hodrinksky v. Faussette, SEC Docket No. C11-21 (2021)) (p.5 "... Respondent again maintains that his social media account was compromised/hacked, and denies that he ever made the comments or posted the information ...."). Notably, Hodrinsky was also decided on a motion to dismiss, not on a motion for summary decision, and is procedurally inapplicable to the present matter which was before the Commission. Leonard, Melnyk, and Brown, *supra* – which actually address the precise issues that were before the Commission in this matter – were inexplicably ignored by the Commission as if they had never happened.

Though the Commission itself clearly and publicly reaffirmed this line of cases in Advisory Opinion A02-22 (2022) – ***a mere six days before the filing of the***

present Complaint – it arbitrarily applied an entirely different standard altogether in deciding this case. This was highly improper. Mary Carter Paint Co. v. Federal Trade Commission, 333 F.2d 654, 660 (1964) ("But the law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another rule for Tuesday, a rule for general application, but denied outright in a specific case."); I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18 (2021) (Ca236) (p. 9 "there is a robust body of decisions and advisory opinions which school officials can utilize to determine when, and how, a disclaimer must be used on social media when speaking in their personal/private capacity in order to avoid running afoul of the Act.")

Abandoning its carefully-developed and well-established caselaw on social media posts by school board members in the present matter clearly violates the Legislature's mandate as set out in the Act:

> To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism ***to ensure uniform maintenance of those standards*** among them.
>
> N.J.S.A. 18A:12-22(b) (emphasis added).

The Commission was created with an express legislative purpose – to uniformly and consistently apply the Act to school board members. It failed to do so here.

As a result, it is clear that the Commission issued its August 22, 2023 Final Decision in this matter in an arbitrary, capricious, and unreasonable manner, and that it did so contrary to sufficient credible evidence in the record. That being the case, the Appellate Division must now reverse that decision.

C. THE COMMISSION'S OUTRIGHT DISMISSAL OF APPELLANTS' AMENDED COMPLAINT IN ITS FINAL AGENCY DECISION WAS SO PROCEDURALLY FLAWED AS TO REQUIRE REVERSAL (Ca014-017).

No one sought relief issued by the Commission in this matter. The legal issue before the Commission was whether to adopt, modify, or reject the Initial Decision of ALJ Hughes. N.J.A.C. 1:1-18.6. ALJ Hughes' Initial Decision had granted Appellants' Motion for Summary Decision. (Ca037-038).

Respondent did not cross-move for summary decision in her favor. As a result, "rejecting" the Initial Decision which granted summary decision in favor of Appellants effectively denied Appellants' Motion for Summary Decision. If Appellants' Motion for Summary Decision was denied, the matter should have properly been sent back to the Office of Administrative Law for a hearing.[3] The Complaint should not have been dismissed outright. Doing so was procedurally improper. For that reason, this procedurally flawed decision should be reversed.

By both denying Appellants Motion for Summary Decision and also denying an opportunity for an evidentiary hearing, the Commission has deprived Appellants of due process. See, e.g. Angus v. Board of Educ. of Borough of Metuchen, 475 N.J. Super. 362, 367 (App. Div. 2023) ("The standard governing agency determinations for summary decision under N.J.A.C. 1:1-12.5 is substantially the same as that governing motion under Rule 4:46-2 for summary judgment in civil litigation."); N.J.C.R. 4:46-2(c) ("The judgment or order ***sought*** shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together

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[3] Appellants specifically stated in their Brief in Support of their Motion for Summary Decision that "in the event that this motion is denied or denied in part, [Appellants] request a full hearing as to any and all factual issues that require determination, or that Your Honor determines have not yet been sufficiently factually established." (Ca060).

with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that ***the moving party*** is entitled to judgment or order as a matter of law.") (emphasis added).

Put simply, there was no cross-motion for the Commission to rely on to dispose of this matter at the summary decision stage. Respondent failed to cross-move altogether, and never requested that the matter be dismissed or that summary decision be granted in her favor. No party to this matter sought the relief granted. This was improper at the summary decision state pursuant to Angus, 45 N.J.Super. at 367 (App. Div. 2023) and N.J.C.R. 4:46-2(c).

Further, the Commission had already heard Respondent's Motion to Dismiss at an earlier stage in litigation. On July 26, 2022, based on Respondent's Motion to Dismiss in Lieu of an Answer, the Commission specifically determined that Counts 1 and 4 of the Complaint should not be dismissed under its standard for complaint dismissal. (Ca165-174). In its decision on that Motion to Dismiss, the Commission specifically "denied" the motion "as to the alleged violations of N.J.S.A 18A:12-24.1 in Count 1 and Count 4." (Ca173). Now, for reasons it has failed to articulate, the Commission has changed its mind and decided to *sua sponte* "dismiss" the Complaint outright. (Ca017) ("As such, the Commission dismissed the above-captioned matter.") The Commission essentially invented procedural grounds that did not exist to issue relief it was never asked to issue – converting a non-existent cross-motion from Respondent back into a Motion to Dismiss it had already heard and decided – and improperly dismissed the entire Complaint in doing so.

In fact, not only was there no cross-motion for summary decision filed by Respondent – meaning that no party to this matter ever sought the relief the Commission issued – but Respondent ***did not even file exceptions*** to ALJ Hughes' Initial Decision, as is noted in the Commission's own decision. (Ca015) ("The parties

did not file exceptions to the Initial Decision"). Respondent never even took issue with ALJ Hughes's Initial Decision or the penalty of "censure" she applied. Quite frankly, it appears Respondent would have been happy to walk away from this litigation with a "censure" if the Commission had not gone rogue.

The Commission also improperly avoided statutorily required review by the Commissioner of Education by "dismissing" the Complaint and stating that this matter "is appealable only to the Superior Court-Appellate Division." (Ca017).

Despite "rejecting" ALJ Hughes's Initial Decision, the Commission largely agreed with ALJ Hughes's characterization of Respondent's social media posts. The Commission stated in its Final Decision:

> [The Commission] would be remiss if it did not address the divisive, inflammatory, and hostile nature of Respondent's public postings. Calling the Governor a "Tyrannical POS" and encouraging people to drop out of the NJEA runs counter to the level of decorum expected from a publicly elected school official who is charged with serving New Jersey's student population.
>
> (Ca017).

The Commission further stated that "board members should recognize and refrain from inappropriate communications that have no place in the educational setting." (Ca017). As the body with the exclusive statutory mandate to issue uniform discipline when school board members engage in "divisive, inflammatory, and hostile" "communications that have no place in the educational setting," the Commission was required to issue a penalty and to refer that penalty to the Commissioner of Education for review. N.J.S.A. 18A:12-22.

The Commissioner of Education is the body with the statutory authority to review penalties under the Act. N.J.A.C. 6A:28-10.12 ("The Commissioner shall act upon the Commission's recommendation regarding the sanction pursuant to N.J.S.A. 18A:12-29(c)."); N.J.A.C. 6A:28-11.1 ("Any appeal of the Commission's determination regarding a violation of the Act shall be to the Commissioner in

accordance with N.J.S.A. 6A:4."). By simultaneously rebuking Respondent for her Facebook posts and dismissing the Complaint altogether, and by stating that this matter "is appealable only to the Superior Court-Appellate Division" (Ca017), the Commission has improperly circumvented this statutorily required review.

As a result of the procedurally improper *sua sponte* dismissal of the Complaint without a cross-motion for summary decision having been filed by Respondent, because Respondent did not even file exceptions to the Initial Decision, because the Commission had already clearly held that Counts 1 and 4 should not be dismissed, and because the Commission improperly circumvented the Commissioner of Education's statutory review of penalty, the Commission's Final Decision must be reversed.

III. APPEAL OF THE COMMISSION'S JULY 26, 2022 DECISION ON RESPONDENT'S MOTION TO DISMISS (Ca165-174)

In addition to appealing the Commission's August 22, 2023 Final Decision in this matter, Appellants now also appeal the Commission's July 26, 2022 Decision granting in part and denying in part Respondent's Motion to Dismiss. (Ca165-174). Pursuant to N.J.C.R. 2:2-3(b), final judgements, appealable as of right, "are judgments that finally resolve all issues as to all parties." As a result, the Commission's July 26, 2022 was not appealable as of right pursuant to N.J.C.R. 2:2-3(a)(2) until a Final Decision issued from the Commission as to all issues as to all parties. Accordingly, in filing their Motion for Summary Decision, Appellants expressly reserved the right to appeal the Commission's July 26, 2022 decision on Respondent's Motion to Dismiss pursuant to N.J.C.R. 2:2-3(a)(2) once a final order has issued as to all claims as to all parties pursuant to N.J.C.R. 2:2-3(b). (Ca058-059). They do so now.

As noted above, a reviewing court may typically make three inquiries regarding decisions of state agencies: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency bases its action; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Matter of Musick, 143 N.J. at 216 (1996). A reviewing court may reverse the decision of an administrative agency where "it is arbitrary, capricious, or unreasonable or is not supported by substantial credible evidence in the record as a whole." Dennery v. Bd. of Educ. of Passaic Cty. Reg'l High Sch. Dist. No. 1, Passaic Cty., 131 N.J. 626, 641 (1993).

In determining whether to grant a Motion to Dismiss, "the [School Ethics] Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation(s), if true, could establish a violation of the Act." N.J.A.C. 6A:28-8.3; See also Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (dismissal on motion inappropriate if case supported by a scintilla of evidence).

Appellants pled violations of two provisions of the School Ethics Act in their Complaint: N.J.S.A. 18A:12-24.1(a) and (e).

N.J.S.A. 18A:12-24.1(a) states:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

N.J.S.A. 18A:12-24.1(e) states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

On July 26, 2022, the School Ethics Commission dismissed Count 5 as to N.J.S.A. 18A:12-24.1(e) and dismissed Counts 2 and 3 as to both N.J.S.A. 18A:12-24.1(a) and (e). **(**Ca143-144).

A. THE COMMISSION ERRONEOUSLY DISMISSED COUNT 5, AS APPELLANTS REASONABLY RELIED ON AN ADVISORY OPINION OF THE COMMISSION (Ca172-173; Ca194).

The Facebook post that is the subject of Count 5 was posted from Respondent's public Facebook account on December 5, 2021, it contained a picture of a Black man, and it stated:

> IF AMERICA WAS FILLED WITH AS MUCH WHITE SUPREMACY & RACISM AS THE MEDIA SAYS THERE WOULDN'T BE A NEED TO FAKE HATE CRIMES
>
> THIS IS MAGA COUNTRY
>
> (Ca232).

This is precisely the type of transparently racist Facebook post that the School Ethics Commission has repeatedly found to violate N.J.S.A. 18A:12-24.1(e) of the Act. One of the many examples of this is found in I/M/O Daniel Leonard, SEC Docket Nos. C56-19 and C57-19 (Consolidated) (2021) (Ca250), in which the Commission held:

> Complainants alleged that on April 12, 2019, Respondent shared a Facebook post from the "Rant Nation with Graham Allen" site to his personal Facebook page. The shared post appears to link to a video purporting to show United States Representative Ilhan Omar. The post additionally contains a picture of Congresswoman Omar wearing a hijab – a head scarf worn by many Muslim women. In sharing the post, Respondent commented, "Terrorist ... 100%."
>
> [...]
>
> In finding a violation of N.J.S.A. 18A:12-24.1(e), ALJ Pelios appropriately concluded that Respondents action constituted "private action that may compromise the Board." In discussing the legislative intent for the School Ethics Act, ALJ Pelios properly highlighted that Board members "must avoid conduct

> which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(a). The Commission notes that board members do not surrender the rights that they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." Brown at 7. In Brown, the Commission found that the respondent, a board of education member, violated the Code when he posted a message on his Facebook page ("Now if we could only do something about our local terrorists that destroy dreams and burn futures"), the Superintendent's photo came up as a result of the post, and he did not remove it. Further, the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public. ***As ALJ Pelios discussed, Respondent's post had the potential to discourage members of the public, namely members of the Muslim community, to engage with the Board "given what may seem to be an apparent bias." As such, ALJ Pelios' determination is entirely appropriate.***
>
> Id. at 1, 6 (emphasis added).

Nonetheless, the Commission broke with this precedent and dismissed the transparently racist post that constitutes Count 5 in the present matter, claiming it lacks jurisdiction over this post. (Ca172-173). In doing so, the Commission directly contradicted an Advisory Opinion it publicly issued in 2018 which clearly stated that it has jurisdiction over newly elected school board members who have not yet been seated. Advisory Opinion 36-17 (2018) states in relevant part:

> ***Similar to all other newly elected,*** as well as currently seated, ***Board members, this Board member is bound by and charged with*** understanding and ***complying with the ethical standards set forth in the Act.***
>
> (Ca194) (emphasis added).

By abandoning its own precedent, which was reasonably relied on by Appellants, the Commission has denied Appellants due process and the right to be heard on this issue. The minimum requirements of due process are notice and the opportunity to be heard. Cleveland Bd. of Educ. v. Loudermill 470 U.S. 532, 533 (1985); Nicoletta v. N. Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 165 (1978). In fact, the New Jersey Supreme Court explicitly held in Silviera-Francisco v. Bd. of Educ. of City of Elizabeth, 224 N.J. 126 (2016), that:

> Notice and an opportunity to respond to an issue raised by a party or a court are fundamental elements of due process and a fair hearing. Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 389, 709 A.2d 779 (1998). ***Therefore, a court that recognizes a jurisdictional defect should notify the parties and permit them to address the issue of the court's jurisdiction***. N.J. Office of Emp. Relations v. Commc'n Workers of Am., 154 N.J. 98, 108, 711 A.2d 300 (1998).
>
> Id. at 141 (emphasis added).

Here, Appellants had no notice of the Commission's abandonment of its prior holding as to what point in time jurisdiction over school board members is triggered under the School Ethics Act. As a result, Appellants had no opportunity to be heard on the matter. Pursuant to the Court's holding in Silviera-Francisco, this violated their right to due process.

As Appellants argued in their Opposition to Respondent's Motion to Dismiss:

> Importantly, the Commission has already addressed the issue of "newly elected" Board members and whether they are subject to the School Ethics Act, specifically defining "newly elected" Board members in N.J.A.C. 6A:28-1.2, and stating in Advisory Opinion 36-17 (Jan. 3, 2018) that:
>
> > Similar to all other newly elected, as well as currently seated, Board members, this Board member is bound by and charged with understanding and complying with the ethical standards set forth in the Act.
> >
> > https://www.nj.gov/education/legal/ethics/advisory/cat1/A36-17.pdf
>
> (Ca194).

This opinion clearly states that an elected but not yet seated member of a board of education is subject to the School Ethics Act. However, in the July 26, 2022 Commission decision now being appealed the Commission narrowed its own jurisdiction from its prior opinion, abruptly and without notice, stating:

> Finally, in Count 5 of the Complaint, Complainants argue that on December 5, 2021, which was after Respondent was elected to serve on the Board, but, importantly, prior to the time she was sworn-in as a member of the Board, Respondent posted or shared an image on her public Facebook page (which she used to campaign for her seat on the Board), and the content of that posting/image violated N.J.S.A. 18A:12-24.1(e). Regardless of whether the substance of Respondent's post may have violated the cited provision of the Code, because the conduct at-issue occurred before Respondent was a school official within the meaning of the Act (as her term had not yet officially begun), the Commission is compelled to dismiss the allegations in this Count.
>
> (Ca172).

As the Advisory Opinion on this issue was unquestionably clear, and as Appellants had every reason to rely on the Commission's outlining of its own jurisdiction, it was unnecessary to point out what is obvious from the record: that the post that is the subject of Count 5 ***was still public and available well into Respondent's term as a Board member***. (Ca232; Ca075-076). Respondent had been sworn in for weeks while this transparently racist post was still up and public. Leaving this post up while she was a sitting Board member was clearly a reason the public protested the Board in the first place. Hence, the Board itself passed a Resolution in March – months after she was sworn in – requesting that she remove it. (Ca075-076). This Resolution was attached to Appellants' Opposition Brief and was in the record when the School Ethics Commission decided the Motion to Dismiss.

As stated in the Board's Resolution from March 17, 2022:

> **WHEREAS**, the Board has been recently made aware of certain social media postings which have been made by and/or attributed to certain individual Board members which are viewed by many – including the

> Board – to convey sentiments and/or messages which are racist and/or biased against African Americans.
>
> [...]
>
> **BE IT FURTHER RESOLVED**, that, in accordance with District Policy, the Board formally requests Board Members Borawski and Koenig immediately remove the aforementioned social media posts.
>
> (Ca075-076).

This Resolution was a direct reaction to the public outcry that ensued once Respondent took her seat and did not delete this reprehensible post, among others. The record is replete with the community outrage directed at the Board which was caused by Respondent's transparently racist Facebook posts, among others. (Ca193) (*Asbury Park Press* Article: "Central Regional parents, students: School Must Fight Racism After Board Member's Postings"); (Ca075-076) (March 17, 2022 Board Resolution: "the Board has been recently made aware of certain social media postings which have been made by and/or attributed to certain individual Board members which are viewed by many – including the Board – to convey sentiments and/or messages which are racist and/or biased against African Americans"); (Ca086-087) (Minutes of March 17, 2022 Board Meeting: public comment section filled with school community members addressing Respondent's racist posts); (Ca098-099) (Minutes of April 28, 2022 Board meeting: public comment section filled with school community members addressing Respondent's racist posts); (Ca100-105) (*Patch* Article: "Central Regional Board OKs Social Media Policy After Racist Posts"). Parents and students spoke passionately at Board meetings, condemning and repudiating Respondent's racist Facebook posts and pleading with the Board to act. (Ca100-105) (*Patch* Article: "You deserve to be off that board," "you have no place here," "you women brought the ugly to us," "'insane' that neither Borawski nor Koenig were taking any accountability," "It's disgusting, and it's inhumane, and it's sad. It's sad!" "It's ugly and it's disgusting.").

Despite all this evidence that Respondent actually compromised the Board with her transparently racist post – by posting it after she was elected and by refusing to take it down after she was a sitting Board member – the Commission stated that it had no jurisdiction to hear that Count. This decision lacks fair support in the record. Saccone v. Bd. of Trustees of Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014). Quite the opposite, this finding is directly contrary to the evidentiary record. *Contra* Dennery v. Bd. of Educ. of Passaic Cty. Reg'l High Sch. Dist. No. 1, Passaic Cty., 131 N.J. 626, 641 (1993)(Appellate Division should reverse agency decision where it "is not supported by substantial credible evidence in the record as a whole").

By this holding, the Commission implies, for example, that if an elected school board member holds up a sign that says "Black People Lie!" – the apparent message of Respondent's "Hate Crimes" posts – that Board member could then continue to hold that sign up at a meeting of the Board while a seated member because the conduct began prior to his/her swearing in. This is an absurd result that is contrary to public policy. This decision must be reversed.

Appellants relied on Advisory Opinion 36-17 which clearly states "***newly elected, as well as currently seated Board members*** ... [are] bound by and charged with understanding and complying with the ethical standards set forth in the Act." (Ca194). The Commission failed to abide its prior jurisdictional holding without giving Appellants notice or an opportunity to be heard on this issue. The Commission also ignored clear evidence in the record that plainly cured this jurisdictional issue by showing that this noxious post ***was still public and available well into Respondent's term as a Board member***, and actually compromised the Board. (Ca232; Ca075-076).

That being the case, Appellants respectfully request that the Appellate Division reverse the Commission's dismissal of Count 5 as to N.J.S.A. 18A:12-24.1(e).

B. THE COMMISSION ERRONEOUSLY DISMISSED COUNTS 2 AND 3 BASED ON FACTS NOT IN THE RECORD AND OTHER PURPORTED FACTS CONTRADICTED BY THE UNCONTESTED RECORD (Ca172).

In determining whether to grant a Motion to Dismiss, "the [School Ethics] Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation(s), if true, could establish a violation of the Act." N.J.A.C. 6A:28-8.3; see also Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (dismissal on motion inappropriate if case supported by a scintilla of evidence). The Commission erred by doing precisely the opposite with regard to dismissing Counts 2 and 3, by not only viewing facts in the light most favorable to the party moving for dismissal, but also by inserting facts into its Decision that were not in the record at all, and which are actually contradicted by the record. Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974) (factual findings inconsistent with the evidentiary record not to be relied upon).

At the time Respondent refused to wear a mask at multiple meetings of the Board, New Jersey Executive Order 251 (2021) (EO 251) was in place, which stated:

> 1. All public, private, and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools (collectively "school districts"), must maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises
> [...]
> 4. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.
>
> https://nj.gov/infobank/eo/056murphy/pdf/EO-251.pdf

As was clearly pled, "Executive Order 251 was in effect as of that date and therefore Heather Koenig should have been masked when she attended and performed her duties as a board of education member in a Central Regional school building." (Ca200-201). Appellants provided a notarized certification of an eyewitness who stated that Respondent was asked to wear a mask in accordance with EO 251 and that she affirmatively refused and stated "I'm not wearing a mask." (Ca200-201, Ca204). Appellants even provided photographic evidence of Respondent's refusal to abide by EO 251's requirements for school board members. (Ca222-223).

In fact, respondent even admitted in discovery that she affirmatively broke the law and she gave her reason why:

- You have refused to wear a mask at meetings of the Board, including but not limited to the January 6, 2022 meeting of the Board.

  ADMIT __X__ DENY _____

- You have refused to wear a mask at meetings of the Board, including but not limited to the January 20, 2022 meeting of the Board.

  ADMIT __X__ DENY _____

- You have refused to wear a mask while on school district premises in violation of Executive Order 251 because you believe Executive Order 251 violates your freedoms as an American citizen.

  ADMIT __X__ DENY _____

  (Ca137-138 – RQAs 11, 14, 16; Ca145 – Responses to RQAs 11, 14, 16)

These clear admissions show that the Commission was incorrect to assume that Respondent's decision was "a personal decision" or that "[t]here is no suggestion that Respondent encouraged other members of the Board, members of the public, teaching staff members (if they were present), or students (if they were present) to defy the Executive Order." (Ca172). Rather, it was plainly a decision intended to inspire

others to break the law. It was a conscious decision to break the law while a sitting Board member at meetings of the Board. Enforcing uniform disciplinary action when Board members purposely and consciously break laws relating to schools while sitting in their official position at a Board meeting is precisely what the Legislature created the Commission to do. N.J.S.A. 18A:12-22; N.J.S.A. 18A:12-24.1(a), (e).

ALJ Hughes even stated in her Initial Decision on the Motion for Summary decision that "[b]y her own admission, Respondent refused to wear a face mask at Board meetings and posted commentary to her Facebook page calling Governor Murphy a 'tyrannical POS' for extending the school mask mandate under EO 251. The purpose of her posting was to urge others to take a stand against the mask mandate." (Ca022). ALJ Hughes then found that "respondent led by example by refusing to wear a face mask at the Board meetings in utter disregard of EO 251 and Board members' obligation to abide by and enforce EO 251 within the school district." (Ca035). It is obvious from this finding that the Commission's dismissal of Count 5 as to N.J.S.A. 18A:12-24.1(a) and (e) was premature.

Further, as to Count 3, the School Ethics Commission stated "[t]here is no suggestion that Respondent encouraged other members of the Board, members of the public, or students to defy the Executive Order." (Ca172). This is a factual assumption inappropriately viewed in the light most favorable to the moving party. *Contra* Brill v. Guardian Life Ins., 142 N.J. at 540 (1995). Not only this, but the record is replete with evidence that Respondent publicly encouraged others to flout Executive Order 251. For example:

- The refusal to mask that is the subject of Count 3 took place on January 20, 2022. (Ca200-201).
- On January 10, 2022, only ten days prior, Respondent made a public post from her Facebook account calling Governor Murphy a "Tyrannical POS" for enacting New Jersey's School Mask Mandate, and specifically telling members of the community that they could either oppose the Mask Mandate or "bend and repeat." (Ca201). Respondent demands, in

the same post, that parents must "remember your rights and start to stand for them and your children." Respondent cannot be speaking to anyone but school district parents here. This was the same Facebook account she campaigned on, and the same account to which she posted a picture of herself swearing in as a Board member just 3 days prior. (Ca223).

- On January 9, 2022, one day before she called Governor Murphy a "Tyrannical POS" for extending New Jersey's School Mask Mandate, Respondent posted on Facebook comparing pandemic safety measures to domestic violence. (Ca230)
- On December 9, Respondent posted a posted a picture of Governor Murphy from a website clearly identified as "unmasknjschools.com" which stated that "Murphy's pandemic response on children" "needs to end NOW!" (Ca228).
- Again, importantly, Respondent clearly admitted that she "refused to wear a mask while on school district premises in violation of Executive Order 251." (Ca138 – RQA 16; Ca145 – Responses to RQA 16)

As ALJ Hughes correctly found, "respondent led by example by refusing to wear a face mask at the Board meetings in utter disregard of EO 251 and Board members' obligation to abide by and enforce EO 251 within the school district." (Ca035).

Lastly, the Commission states, on the masking issue, that Respondent's public violation of EO 251 was a "personal decision for which she, and she alone, could face consequences." (Ca172). However, ***the School Ethics Commission is the body with statutory mandate to issue those consequences***. A local board of education has no authority to impose discipline on a board member for violating the School Ethics Act without those charges first being heard by the School Ethics Commission. That task is solely the jurisdiction of the Commission. N.J.S.A. 18A:12-22. That is precisely what was before the Commission in this matter. In dismissing these Counts on this basis, the Commission has abrogated its statutory mandate to apply discipline for school board members in a uniform manner.

EO 251 was an order with the full force of law when the refusals to mask that are the subject of Counts 2 and 3 occurred. EO 251 was an order dealing directly with

New Jersey schools, and it specifically required that members of a governing body – such as the Board – comply with the order. There is photographic evidence and witness certification that Respondent knowingly and willfully violated this order. This was an unambiguous violation of N.J.S.A. 18A:12-24.1(a) and (e). Respondent even subsequently admitted to violating EO 251 in discovery. To dismiss these alleged violations on a Motion to Dismiss, without even transmitting them to the Office of Administrative Law for factual determinations, renders N.J.S.A. 18A:12-24.1(a) and (e) toothless and meaningless.

All of this being the case, Appellants respectfully request that the Appellate Division reverse the Commission's dismissal of Counts 2 and 3 of the Complaint in this matter with regard to N.J.S.A. 18A:12-24.1(a) and (e) as being arbitrary, capricious, and unreasonable.

CONCLUSION

For all the reasons above, Appellants respectfully request that the Appellate Division issue an order:

1. School Ethics Commission's August 22, 2023 Final Decision
   a. Reversing the School Ethics Commission's August 22, 2023 Final Agency Decision;
   b. Finding that Respondent violated N.J.S.A. 18A:12-24.1(e) with regard to Counts 1 and 4 of the Complaint; and
   c. Reinstating the penalty of "censure."
2. School Ethics Commission's July 26, 2022 Decision on Respondent's Motion to Dismiss in Lieu of an Answer
   a. Reversing the School Ethics Commission's July 26, 2022 dismissal of Count 5 as to N.J.S.A. 18A:12-24.1(e);
   b. Reversing the School Ethics Commission's July 26, 2022 dismissal of Counts 2 and 3 as to N.J.S.A. 18A:12-24.1 (a) and (e); and
   c. Reinstating Counts 2, 3, and 5 of the Complaint for further proceeding before the Office of Administrative Law.

Respectfully submitted,
SELIKOFF & COHEN, P.A.
Attorney for Appellants

DATED: April 16, 2024

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RONALD DONNERSTAG, KRISTIN LANKO, LISA SNIDER, WENDY VACANTE, MATTHEW DELPRETE, PATRICIA FORTUS, JAIME CESTARE, SCOTT ALFANO, AND LYNNE SWEEZO, :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000366-23T4
Complainants-Appellants,	CIVIL ACTION
v.	ON APPEAL FROM THE FINAL DECISION OF THE SCHOOL ETHICS COMMISSION AGENCY DKT. NO. C20-22
HEATHER KOENIG, CENTRAL REGIONAL BOARD OF EDUCATION, OCEAN COUNTY,	
Respondent-Respondent.	

RESPONDENT-RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO THE APPEAL FROM DECISIONS OF THE SCHOOL ETHICS COMMISSION

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PROCEDURAL HISTORY

This action was initiated on March 3, 2022 with the filing of a Complaint ("the Complaint") on behalf of Complainants/Appellants Ronald Donnerstag, Wendy Vacante, Jaime Cestare, Krisin Lanko, Matthew Delprete, Scott Alfano, Lisa Snider, Patricia Fortus and Lynne Sweezo (collectively "Complainants") against Respondent Heather Koenig ("Respondent") with the School Ethics Commission ("Commission"). Cal 96-Ca232.[1]

On April 11, 2022, Respondent filed a Motion to Dismiss the Complaint in Lieu of an Answer. Ral0-Rall.Complainantsopposedthemotion. Ra4-Ra5. The Commission issued on Decision on Motion to Dismiss ("the Decision") dated July 26, 2022. Cal66-Cal 73. In the Decision, the Commission partially granted Respondent's motion by dismissing Complainant's allegation in Count 4 that Respondent violated *N.J.S.A.* 18A:12-24(a) and dismissed Counts 2, 3 and 5 in their entirety. Cal 71-Cal 72. The Decision also directed Respondent to file an answer to the remaining counts of the Complaint and referred the matter to the Office of Administrative Law (OAL) Cal 73.

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[1] The following references to Complainants' appellate brief the appendices of the parties will be used in this brief:

"Cb" to designate Complainants' brief;
"Ca" to designate Complainants' appendix;
"Ra" to designated Respondents appendix.

Complainants moved for leave to appeal from the Decision to the Commissioner of Education and Respondent cross-moved for leave to appeal. Ra6. The Acting Commissioner denied the motions. Cal60

On September 6, 2022, Respondent filed an Answer to the Complaint and filed an Amended Answer to the Complaint on January3, 2023. Ca161 to Cal64.

On February 28, 2023, Complainants filed a Motion for Summary Decision with the OAL. Ca41-Ca16 Respondent opposed the motion. Ra9. On June 9, 2023, the Hon. Tama B. Hughes, A.L.J. issued an Initial Decision. Ca 9-Ca40. Judge Hughes granted Complainants Motion For Summary Decision, sustaining the charges of violation of *N.J.S.A.* 18A:12-24.l(e)set forth in Counts 1 and 4 of the Complaint. (Cal 9). She further ordered that Respondent be censured for violating the School Ethics Act subject to review by the Commission. Cal 9-Ca20.

On August 22, 2023, the Commission issued its Final Decision. Ca15-Cal 8. It rejected Judge Hughes' Initial Decision and dismissed the matter. Ca17, Ca18. The Final Decision stated that it was a final agency decision appealable to the Appellate Division. Cal 7.

Complainants have filed an appeal of the Commission's decisions to the Court. Ca1-Ca13).

STATEMENT OF FACTS

Respondent was sworn in as a member of the Central Region Board of Education, Ocean County ("the Board") on January 7, 2022. Ca2. Approximately two months later, on March 3, 2022, Complainants filed a Complaint with the Commission alleging that Respondent violated the School Ethics Act. Cal 96-Ca232.

In Count 1 of the Complaint, Complainants allege that Respondent's January 12, 2022 post on Respondent's personal Facebook post encouraging teachers to "'OPT OUT OF NJEA' . . .could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public." Ca199-Ca200. They further allege that Respondent "held herself out as a member of' the Board on her Facebook page. Ca200.

In Count 2 of the Complaint, Complainants allege that Respondent's January 7, 2022 Facebook post showing pictures of herself being sworn as member of the Board along with her family not wearing face masks "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public." Ca200. They further allege that Respondent "held herself out as a member of' the Board on her Facebook page. Ca200.

In Count 3 of the Complaint, Complainants allege that Respondent's attendance at a January 20, 2022 meeting of the Board without wearing a face

mask in violation of Executive Order 251. "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public." (Ca200-Ca201). They further allege that Respondent swore to uphold the laws, rules and regulations of the State Board of Education. Ca201.

In Count 4 of the Complaint, Complainants allege that Respondent's Facebook posts that are critical of Governor Phil Murphy's face mask mandate "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public." Ca201. They further allege that Respondent "held herself out as a member of' the Board on her Facebook page. Ca201.

Count 5 of the Complaint concerns Respondent's December 5, 2021 Facebook post which contains an image of Jussie Smollett and the statement that "IF AMERICA WAS FILLED WITH AS MUCH WHITE SUPREMACY & RACISM AS THE MEDIA SAYS THERE WOULDN'T BE A NEED TO FAKE HATE CRIMES." Ca202. Complainants allege that this Facebook post was "racist" and "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public." Ca202. They further allege that Respondent "held herself out as a member of' the Board on her Facebook page. Ca202.

In response to Respondent's Motion to Dismiss the Complaint in Lieu of an Answer Ra10-Ra11, the Commission found that:

1. No legal authority supported Complainant's claim that Respondent's conduct alleged in Counts 2-4 of the Complaint violated *N.J.S.A.* 18A:12-24.1(a). Ca171;
2. Asto Count2, "there are absolutely no facts" that suggest that the pictures of Respondent and her family not wearing masks "exceeded the scope of Respondent's duties and responsibilities as a Board member or had the potential to compromise the Board." Cal 72;
3. As to Count 3, Respondent's decision not to wear a mask at a board meeting was a "personal decision" which was unrelated to her duties as a board member and could not have impacted the Board. Cal 72;
4. As to Count 5, the Facebook post in question was posted prior to the time that Respondent was sworn in as a member of the Board and thus the Commission had no jurisdiction to regulate or sanction such conduct. Cal 72.

Accordingly, the Commission dismissed the allegation in Count 4 that Respondent violated *N.J.S.A.* 18A:12-24(a) and dismissed Counts 2, 3 and 5 in their entirety. Cal 72-Cal 73.

In her June 9, 2023, Initial Decision, the Hon. Tama B. Hughes, A.L.J. granted Complainants Motion For Summary Decision, sustaining the charges of violation of *N.J.S.A.* 18A:12-24.1(c) set forth in Counts 1 and 4 of the Complaint. Cal9. She further ordered that Respondent be censured for violating the School Ethics Act subject to review by the Commission. Cal 9-Ca20.

In its Final decision, the Commission ruled that Respondent's Facebook posts regarding opting out of the union and masking in school "may relate to the business of the Board" but

> [t]here is an insufficient nexus between Respondent's personal Facebook page and her membership on the Board such that a reasonable member of the public would not perceive that respondent is speaking pursuant to her official duties.

Ca16. It noted that the Facebook posts do not mention Respondent's membership on the Board and there is no evidence that the posts were made in her capacity as a member of the Board. Cal 7.

Accordingly, the Commission rejected Judge Hughes' Initial Decision and dismissed this matter. Cal 7, Cal 8.

LEGAL ARGUMENT

POINT I

COMLAINANT'S INITIATION OF AND CONTINUED PROSECUTION OF THESE PROCEEDINGS CONSTITUTE A BLATANT ATTEMPT TO CIRCUMVENT THE ELECTION PROCESS AND TO CURTAIL RESPONDENT'S FIRST AMENDMENT RIGHTS.

At the outset, it is respectfully submitted that the Court must view this action in context. It is obvious that Complainants have initiated these proceedings because they disagree with Respondent's views.

If Respondent's views make her unsuitable to serve as a member of the Board, the remedy lies in the election polls, not in proceedings before the Commission. In its Final Decision, the Commission correctly grasped this reality. After finding that that there was an insufficient nexus between Respondent's personal Facebook posts and her membership on the Board (Cal6), the Commission stated that:

> ... [H]ow school officials conduct themselves outside of the scope of their duties as school officials is best addressed at the time of election. It is the public, not the Commission, who ultimately decides which individuals in their community are best suited to serve their students.

Cal 7.

Moreover, in attempting to punish Respondent for expressing her views, Complainants seek to infringe of her First Amendment rights. As the United States Supreme Court has recently reiterated, school personnel do not ""shed their

constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507, 213 L. Ed. 2d 755, 773, 142 S. Ct. 2407, 2413 (2002), *quoting Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503,506, 89 S. Ct. 733, 21 L. Ed. 2d 73 (1969).

Viewed in these contexts, one cannot sense that the Commission's dismissal of the Complaint in this matter was unjust.

POINT II

THE COMMISION'S FINAL DECISION WAS SUPPORTED BY SUBSTANTAL CREDIBLE EVIDENCE.

The decision of an administrative agency will be reversed by a reviewing court only when the agency's decision is arbitrary, capricious, unreasonable or not supported by substantial credible evidence in the record as a whole. *Dennery v. Bd. of Educ. of Passaic Cty. Regional High Sch.,* 131 N.J. 626,641 (1993), *Henry v. Rahway State Prison,* 81 N.J. 571,580 (1980). Complainants have acknowledged this narrow scope of judicial review of decisions of administrative agencies. Cb13; Cb21.

Complainants argue that the Commission's Final Decision was not supported by substantial credible evidence. They take issue with the Commission's finding that there was "an insufficient nexus" between Respondent's Facebooks posts and her membership on the Board, focusing on what they argue is the "erroneous conclusion" that Respondent's Facebook posts

makes no reference to her membership on the Board. Cb14-Cb15 citing Ca16-Ca17. This proposition must be rejected because there are no objectionable posts that identify Respondent as a Board member. The posts speak for themselves. The only posts that refers to Respondent as a member of the Board is her January 7, 2022 post which show her being sworn in as a member of the Board along with comments that follow (Ca223-Ca224) and perhaps her January 4, 2022 post. Ca220. There is nothing insidious or controversial about these posts. The other posts objected to by Complainants clearly contain nothing that references Respondent as a member of the Board. Ca214-Ca218, Ca226-Ca232.

Complainants stress that Respondent held herself as a member of the Board in all her Facebook posts based on the fact that she campaigned for the Board and she posted pictures of her swearing in as Board member. Cb14-Cbl6. These contentions must be rejected. As to the campaigning, it defies logic that Respondent held herself out as a member of the Board based on postings that predate her election to the Board. Complainants' assertion that Respondent's postings of pictures of her swearing in somehow transformed all of her postings into ones in which she held herself out to be a member of the Board is also illogical. The fact that Respondent's "Facebook friends" were aware that she was a Board member (see Cbl5-Cbl6 citing Ca21) does not change that.

Next, Complainants contend that, by responses to requests for admission, Respondent admits that she held herself out as a member of the Board. Cb17, *citing* Ca136-Ca137, Ca144-Ca145. Yet none of the responses cited by Complainants contain such an admission. *ibid.* Nor does either of the resolutions adopted by the Board with regard to Respondent's and fellow Board member Merissa Borawski's social media posts contain findings that Respondent held herself out as a member of the Board in any of her posts. Ca72, Ca75-Ca76.

Complainants also emphasize what they describe as the "community's uproar" over Respondent's and Ms. Borawski's Facebook's posts (Cb19). But public dissatisfaction with the posts does not establish that Respondent held herself out in a member of the Board. In facts, it is questionable whether the evidence that the evidence presented by Complainants actually establish that there was such an "uproar." The minutes of meetings of the Board presented by Complainants include only sporadic complaints about the Facebook posts (Ca62-Ca73; Ca79- Ca99) and the accounts in news articles are written from certain perspectives and therefore cannot be relied on as evidence.

In sum, since there is no evidence that Respondent held herself out as a member of the Board in her controversial Facebook posts, the Commission's finding that there was not a substantial nexus between the posts and her membership on the Board was supported by credible evidence.

POINT III

THE COMMISSION'S FINAL DECISION WAS NOT INCONSISTANT WITH ITS STATUTORY MISSION.

Complainants quote *N.J.S.A.* 18A:12-22 for the proposition that the Commission was created to ensure public confidence and trust in school board members and school officials. Cb22-Cb23. They argue that Respondent's conduct created an impression that the public trust was being violated and compromised the Board. Cb23. As discussed in POINT II above, however, Respondent did not hold herself out as a member of the Board in her Facebook posts. Therefore, her posts did not undermine public confidence in the Board or compromise it.

Complainants further contend that a violation of public trust is evidenced by minutes of meetings of the Board, news articles and two resolutions of the Board. Cb23. As discussed above, however, the meeting minutes include only sporadic complaints about the Facebook posts (Ca62-Ca73; Ca79-Ca99) and the accounts in news articles are written from certain prospectives and therefore cannot be relied on as evidence. As to the resolutions, they make clear that Respondent did not speak for the Board through her Facebook posts (Ca72, Ca99) and therefore did not violate the public trust nor compromise the Board.

Furthermore, Complainant's quotation from Judge Hughes' Initial Decision (Cb24, *quoting* Ca34) implying that Respondent's Facebook posts compromised

the Board by diminishing public trust in it carries little or no weight. This is because, as discussed above, Respondent did not hold herself out as speaking as a member of the Board in the post.

In sum, since the evidence does not show that Respondent's conduct undermined public confidence or trust in the Board or compromised it, the Commission's Final Decision dismissing the Complaint was not contrary to its statutory purpose.

POINT IV

THE COMMISSION DID NOT ERR IN DISMISSING THE COMPLAINT BASED ON THE FACT THAT RESPONDENT'S FACEBOOK POSTS CONTAINED NO DISCLAIMERS.

Complainants make much ado about the fact that Respondent's Facebook posts do not contain disclaimers that makes clear that the contents of the posts represent her own personal opinions and are not representative of the Board. The lack of a disclaimer in Respondent's post does not render the Commission's Final Decision wrong and subject to reversal.

Complainants claim that "such a disclaimer would need to be very prominent in order to counteract the presumption that the school board member [who posts on social media] holds themselves out as a board member. ... " Cb25, *citing Melnyk v. Fief,* SEC Docket No. C64-l 8 (2019) (Ca269-CA273). *Melneyk* contains no such holding. The Commission's opinion in that matter merely notes

that the Facebook post in question does not contain and disclaimer, *id.* at 4, followed by footnote that says that a disclaimer ***"may*** have avoided the appearance -actual or perceived-that the statements were made in Respondent's capacity as a Board member." *Id.* at 4 n. 1. (emphasis added), The footnote went on to say that "even if an appropriate disclaimer is used, the substance of a post/statement can, nevertheless, render the disclaimer meaningless." *Ibid.* This is a far cry from a holding that disclaimers are mandatory and that the absence of a disclaimer creates a "presumption" that the school board members who posts hold themselves out as a member of the board.

Complainants discuss I/M/O *Treston, Randolph Board of Education,* SEC Docket No. C71 -l 8 (2021) (Ca236-Ca249) in support of their argument that school board members must always include a disclaimer in their social media posts. Cb29-Cb30. The Commission's opinion in *Teston* merely quoted the footnote in *Melnyk* and states the following:

> ... [T]here is a robust body of decisions and advisory opinions which school officials can utilize to determine ***when,*** and how a disclaimer must be used on social media (and other online/electronic publications) when speaking in their personal/private capacity in order to avoid running afoul of the Act.

Treston at 9 (emphasis added). Thus, *Teston,* like *Melnyk,* does not reflect an across-the-board requirement that school board members include a disclaimer in all their social media posts. The *Teston* opinion went on to say that:

> These decisions and advisory opinions also make clear the use of a disclaimer does not give a school board official carte blanche to *then* discuss Board business and/or matters in a way that is, or appears to be, on behalf of the Board.

Ibid. Here, Respondent's Facebook posts did nothing of the kind; they did not discuss business of the Board and do not appear to be posted on behalf of the Board. By contrast, the respondent board of education member in *Teston* wrote an op-ed article that endorsed four candidates for election to the board while criticizing complainant, another candidate for election to the board, and contending that she should not be elected. *Id.* at 1, 2-3. The Commission observed that "the power of Board-backed non-endorsement of a candidate cannot be denied." *Id.* at 11.

Complainants also rely on Public Advisory Opinion-A202-22 dated February 25, 2022 (Ca233-Ca235) Cb28-Cb29, Cb30-Cb31. They emphasize that the Opinion was issued six days before the Complaint in this matter was filed. *Ibid.* That fact is meaningless; the important consideration is that the conduct about which Complainants complained took place before Opinion A202-22 was issued. Thus, even if the Opinion could be construed to require disclaimer on all social media posts by school board members, such a mandate could not be fairly applied to support sanctions for conduct that took place before the Opinion was issued. Such a result would be akin to the enforcement of an *ex post facto* law

which is prohibited by both the United States Constitution and the New Jersey Constitution. *U.S. Const.* art. I, § 10, cl. 1; *N.J. Const.* art. IV, § 7, ,r 3; *State v. Hester,* 233 NJ. 381,391 (2018).

Complainants cite *Mary Carter Paint Co. v. Federal Trade Commission,* 333 F.2d654 (5th Cir. 1964), *rev'd. sub nom Federal Trade Commission v. Mary Carter Paint Co.,* 382 U.S. 46, 86 S.Ct. 219, 15 L.Ed.2d 128 (1965). Cb31. Federal court decisions, however, are not binding on New Jersey state courts. *See e.g. Manahawkin Convalescent v. O'Neill,* 426 N.J. Super. 143, 156 (App. Div. 2012), *citing Ryan v. American Honda Motor Co., Inc.,* 186 N.J. 431, 436 (2006). Moreover, Complainants fail to indicate that the language that they quote from in *Mary Carter* appears in a concurring opinion, rather than the majority opinion of the court, 333 F.2d at 660 (Brown, J., concurring) and that the opinion which they cite was reversed by the United States Supreme Court.

In sum, Complainants' argument that the Commission's Final Decision should be reversed because Respondent's Facebook posts did not disclaimers must be rejected.

POINT V.

THE COMMISSION DID NOT ERR IN DISMISSING THE COMPLAINT IN RESPONSE TO COMPLAINANTS' MOTION FOR A SUMMARY DECISION.

Complainants argue that they were denied due process because the Commission dismissed their complaint in the absence of a cross-motion for a summary decision on behalf of Respondent. Cb32-Cb34. This contention must be rejected because *N.J.A.C.* 6:28-9.l(a) reads in applicable part as follows:

> Upon return of a matter from the OAL to the Commission, a hearing before the Commission pursuant to *N.J.A.C.* 6A:28-9.8, or the Commission's summary review of a complaint pursuant to this chapter, the Commission shall determine by majority vote whether the conduct complained of constitutes a violation of the Act or ***whether the complaint should be dismissed.***

(emphasis added). Thus, the Commission acted within its authority to dismiss the Complaint after the matters return from Administrative Law Judge Hughes.

The only authority that Complainants cite in support of their argument is *Angus v. Bd. of Educ. of Boro. of Metuchen,* 475 N.J. Super. 362 (App. Div. 2023) . Cb32-Cb33. *Angus* holds that" [t]he standard governing agency determinations for a summary decision under *N.J.A.C* 1:1-12.5 is 'substantially the same as that governing a motion under *Rule* 4:46-2 for summary judgment in civil litigation'" 475 N.J. Super at 367. The language was followed by a brief discussion regarding how evidence should be considered under the summary judgment standard. *Ibid.*

Angus has nothing do with the issuer of whether an agency can dismiss a complaint upon a motion for a summary decision when the respondent does not file such a motion; in *Angus,* both parties move for a summary decision. *Id.* at 366.

Thus, Complainant's contention that the Commission cannot dismiss a complaint in the absence of a motion or cross motion for a summary decision must be rejected.

POINT VI

THE COMMISSION DID NOT ERR IN STATING THAT ITS FINAL DECISION WAS APPEALABLE TO THE APPELLATE DIVISION RATHER THAN THE COMMISSIONER OF EDUCATION.

The Commission stated that its Final Decision "is a final agency and is appealable to the Superior Court-Appellate Division. *See N.J.A.C.* 6A:28-10.11 and *New Jersey Court Rule* 2:2-3(a)." Cal 7. Despite Complainants' argument that appeal of the Final Decision should be to the Commissioner of Education ("Commissioner"), the Commission's statement is correct.

N.J.A.C. 6A:28-10.11 has been recodified as *N.J.A.C.* 6A:28:9.10. *N.J.A.C.* 6A:28:9.10(b) reads as follows:

> A determination to dismiss a complaint shall constitute final agency action, and shall be appealable directly to the Appellate Division of the Superior Court.

Complainants cite *N.J.A.C.* 6A:28-10.12 and *N.J.A.C.* 6A:28-ll.l. Cb34. These regulations have been recodified as *N.JA.C.* 6A:28-9.1 l. *N.JA.C.* 6A:28-

9.11 (c) provides for review by the Commissioner only if the Commission recommends a sanction. The same is true as to *N.J.S.A.* 18A:12-29-29c.

Thus, the Commission correctly stated that its Final Decision was appealable this Court rather than to the Commissioner.

POINT VII

THE COMMISSION DID NOT ERR IN DISMISSING COUNT 5 OF THE COMPLAINT.

In response to Respondent's Motion to the Complaint in Lieu of an Answer, the Commission dismissed Count 5 of the Complaint because Count 5 involve a Facebook post that predated Respondent's being sworn in as a member of the Board. Cal 72. Therefore, the Commission correctly ruled that it had no jurisdiction over the claim alleged in Count 5. Cal 72.

Complainants' major contention in arguing that the Commission erred in dismissing Count 5 is that its decision was contrary to its Advisory Opinion 36-17 (2018) Cb38-Cb40; Cb42. In response to the same contention in *Donnerstag v. Borawski,* Docket No. C20-22 (Ra12-Ra21), the Commission stated in its decision on respondent's motion to dismiss:

> To the extent that Complainants believe that language from Advisory Opinion A36-17 (A36-17), specifically, "Similar to all other newly elected, as well as currently seated, Board members," stands for the proposition that school officials are bound by the standards enumerated in the Act prior to the start of their term, such reliance is

> misplaced. The language in A36-17 was written to ensure that all new Board members understand that, once their term begins, they, like their currently seated colleagues, are immediately bound by the provisions of the Act. Moreover, A36-17 details the Commission's advice regarding the subject school official's prospective behavior and did not in any way suggest that the Commission had the authority to find a violation of the Act and/or recommend a sanction for conduct that occurred prior to the start of a school official's term.

Id. at 9 (Ra20), Certainly, the Commission is in the best position to interpret its own opinions.

Complainants argue that their "due process" rights were violated by the Commission's ruling that it had no jurisdiction over alleged violations of the School Ethics Act that occurred before Respondent was sworn in as a member of the Board because they had no notice that the jurisdictional issue would be addressed by the Commission. Cb39, citing *Silveira-Francisco v. Bd. of Educ. of City of Elizabeth,* 154N.J. 126, 141 (1998). Respondent, however, raised the issue of the application of the Act to posts that predate her membership in the Board in her brief in support of her motion to dismiss. Ra24.[1] In their opposition brief, Complainants responded to this contention. Cb194. Since Complainants had ample notice that the issue would be raised and responded accordingly, their due process argument is baseless.

[1] The undersigned is aware that *R.* 2:6-1(a)(2) generally prohibits the inclusion of briefs in appendices submitted to this court. The brief in support of Respondent's motion to dismiss, however, is included to establish that the Respondent raised the issue below.

Even if the Commission retreated from the position that it took in Advisory Opinion 36-17, none of the cases cited by Complainants at Cb39 establish that a clarification, and even an alteration, of the law by a tribunal deprives a party of due process.

Accordingly, the Commission did not err in dismissing Count 5 of the Complaint. Certainly, the dismissal was not arbitrary, capricious, unreasonable or not supported by substantial credible evidence in the record as a whole such as would call for reversal. *See Dennery v. Bd. of Educ. of Passaic Cty. Regional High Sch., supra,* 131 N.J.at641; *Henry v. Rahway State Prison, supra, 81* N.J. at 580.

Although it is irrelevant to the issue of the Commission's jurisdiction over conduct that takes place before a person becomes a school board member, Complainants rail against what they contend to be a "racist" post that is the basis of Count 5. Cb37-Cb38, Cb14, Cb42. They quote from *I/MIO Daniel Leonard,* SEC Docket Nos. C56-19 C57-19 (Consolidated) (2021) Cb37-Cb38, *Leonard* involve social media posts that were particularly hideous. These posts included those showing United States Representative Ilhan Omar wearing a hijab and referring to her at "Terrorist... 100%." SEC Docket No.: C56-19 and C57-19 at 1. Another contains an article regarding United States Representative Rashida Tlaib's call for a hunger strike in protest of the United States Immigration and Customs Enforcement (ICE) with respondent's comment that "My life would be complete if

she/they die... " *Ibid.* The respondent also posted a photograph of a Barbie doll, with a black eye and facial bruising (apparently from being beaten), dressed in a hijab and holding a quran, stating: "Sharia Barbie comes with a jihad [sic] bruises and quran [-] Stoning accessories available for purchase." *Ibid.* The Commission regarded the posts as "offensive, provocative, disagreeable, or vulgar. ... " *Ibid.*, n. 1.

By contrast, while the post that forms the basis of Count 5 (Ca232) addresses race, the statement contained in that post is not remotely akin to making the statement "'Black people lie"' as Complainants imply (Cb42) because it does not disparage African Americans as a whole. The statement solely references one individual, Jussie Smollett, who was later proven guilty of falsifying evidence of his being the victim of a racially motivated crime. More importantly, the focus of the quoted passage was the simple impression that the media sensationalizes allegations of white supremacy and racism; not that the same do not exist. Moreover, to the extent that some readers could consider Respondent's post to be "racist", it bears no resemblance to the level of racism and depravity exhibited by the respondent's posts in *Leonard* which called for and celebrated death.

Finally, Complainants once again speak of "public outcry" over the Facebook post in question, citing news articles and minutes of meetings of the

Board. Pb41. Once again, this is not supported by the evidence. As noted above, the minutes of meetings of the Board presented by Complainants include only sporadic complaints about the Facebook posts (Ca62-Ca73; Ca79-Ca99) and the accounts in news articles are written from certain perspectives and therefore cannot be relied on as evidence.

POINT VIII

THE COMMISSION DID NOT ERR IN DISMISSING COUNTS 2 AND 3 OF THE COMPLAINT.

Count 2 of the Complaint alleges that Respondent posted pictures of herself with her family as she was being sworn in as a member of the Board on January 7, 2022 without wearing a mask. Ca200. Count 3 alleges that Respondent did not where a mask a January 20, 2022 meeting of the Board. Ca200-Ca201.

In dismissing Count 2, the Commission correctly found that:

> there are absolutely no facts from which the Commission could possibly conclude that the taking of a family photograph, even without a mask, exceeded the scope of Respondent's duties and responsibilities as a Board member and/or had the potential to compromise the Board.

Ca I 72. In dismissing Count 3, the Commission correctly found that Complainants provided no evidence that Respondent's personal decision at a meeting of the Board

> for which she, and she alone, could face consequences related to her duties as a Board member or could have impacted the Board. There is no suggestion that Respondent encouraged other members of the Board, members of the public, teaching staff members (if they were present), or students (if they were present) to defy the Executive Order. Instead, it was a personal decision made by Respondent, and Respondent alone...

Cal 72. Indeed, Respondent's decision not to where a mask when she was sworn in as a Board member and at the January 20, 2022 Board meeting was a personal one.

Moreover, there is no evidence that Respondent, by her failing to wear a mask on both occasions, encouraged other to do so. Complainants quote Judge Hughes' statement that "'respondent led by example in refusing to wear a mask. .'" Cb45, quoting Ca35. The record, however, does not support that statement. Moreover, the statement was completely gratuitous as Counts 2 and 3 relating to Respondent's failure to wear a mask had already been dismissed before this matter was presented to Judge Hughes.

Complainants cite three of Respondent's posts criticizing Governor Murphy's masking mandate. Cb45-Cb46. Criticism of the Governor's masking policy, which every citizen had the right to engage in, does not create an inference that one "leads by example" in not wearing a mask.

Finally, Complainant's take issue with the Commission statement that

Respondent "'could face consequences'" for not wearing a mask at Board meetings. Cb46, *citing* Ca172. They contend that a local board of education has no authority to impose discipline on a board member for violations of the School Ethics Act, citing *N.J.S.A.* 18A:12-22. Cb46. Nothing in *N.J.S.A.* 18A:12-22, however, precludes a local board of education from imposing discipline on its members.

For all these reasons, it is clear that the Commission did not err in dismissing Counts 2 and 3 of the Complaint. Certainly, the dismissal was not arbitrary, capricious, unreasonable or not supported by substantial credible evidence in the record as a whole such as would call for reversal. *See Dennery v. Bd. of Educ. of Passaic Cty. Regional High Sch.*, supra, 131 N.J. at 641; *Henry v. Rahway State Prison, supra,* 81 N.J. at 580.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Final Decision of the School Ethics Commission dated August 22, 2023 and Decision on Motion to Dismiss dated July 26, 2022 must be affirmed in their entirety.

Respectfully submitted,
Gold, Albanese & Barletti, LLC
Attorneys for Respondent
Heather Koenig

By: _____
JAMES N. BARLETTI, ESQ.

Dated: June 20, 2024

RONALD DONNERSTAG, KRISTIN LANKO, LISA SNIDER, WENDY VACANTE, MATTHEW DELPRETE, PATRICIA FORTUS, JAIME CESTARE, SCOTT ALFANO, AND LYNNE SWEEZO,	:	SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION
	:	DOCKET NO. A-000366-23T4
	:	
	:	CIVIL ACTION
	:	
Complainants-Appellants,	:	ON APPEAL FROM THE FINAL DECISION OF THE SCHOOL
v.	:	ETHICS COMMISSION
	:	DKT. NO. C19-22
HEATHER KOENIG, CENTRAL REGIONAL BOARD OF EDUCATION, OCEAN COUNTY,	:	
	:	
	:	FILED AUGUST 16, 2024
	:	
Respondent-Respondent.	:	

COMPLAINANTS-APPELLANTS' REPLY BRIEF IN SUPPORT OF THEIR APPEAL FROM DECISIONS OF THE SCHOOL ETHICS COMMISSION

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PRELIMINARY STATEMENT

> "I was elected onto the central regional district board of education (BOE) come on man LOL"

These are the words Respondent Heather Koenig (Respondent) typed out and publicly posted below multiple pictures of herself swearing in to her seat of public trust as a member of the Central Regional Board of Education (Board). She then made every public post that was the subject of the School Ethics Commission's (Commission) August 22, 2023 Decision within 5 days, and from the very same public account. In doing so, She obviously held herself out as a Board member.

While clearly holding herself out as a member of the Board, and without providing any sort of disclaimer as required by the Commission's well-established caselaw, Respondent engaged in conduct which caused the public to protest the Board, sparked public outcry at meetings of the Board, and caused the Board itself to issue two official Resolutions specifically condemning those statements. Her conduct also directly subjected the Board to litigation being filed against it. In doing so, Respondent clearly engaged in activity which not only had the potential to compromise the Board, but ***actually did*** compromise the Board.

These are the only two elements required. The Appellate Division need go further in its analysis of the Commission's August 22, 2023 Decision.

However, Respondent now attempts to raise a generic First Amendment argument it waived below by failing to raise it in her Answer and her Amended Answer. What is more, the Commission's own decisional law – as exhaustively cited by Appellants and 2 separate Administrative Law Judges (ALJs) – has repeatedly addressed the First Amendment issue. Since Respondents have chosen to raise this waived defense on appeal, Appellants will briefly address it below.

Respondent also appears to call into question the validity of the School Ethics Act (Act) as a whole, making a simultaneously broad-sweeping yet ill-defined

argument that the Legislature should have left all school board member discipline to the electoral process. The Legislature voted unanimously to pass a Code of Ethics for New Jersey school board members into law. Whether Respondent disagrees with this Legislative decision as a matter of policy is of no relevance here. The law is what the law is.

The Legislature tasked the Commission with issuing discipline pursuant to that Code of Ethics in a uniform manner. In accordance with the Legislature's mandate, the Commission issued a robust body of caselaw addressing school board member social media use and disclaimers. In issuing its August 22, 2023 Decision, however, the Commission sharply departed from that line of cases without explanation, and issued a ruling that made no analytical sense in light of its prior decisions. As a result, the Commission's August 22, 2023 Decision must be reversed as arbitrary, capricious, unreasonable, and unsupported by the evidence in the record.

PROCEDURAL HISTORY

Appellants hereby repeat and incorporate their Procedural History as set out in their Brief in Support of Their Appeal filed on April 16, 2024.

STATEMENT OF FACTS

Appellants hereby repeat and incorporate their Statement of Facts as set out in their Brief in Support of Their Appeal filed on April 16, 2024.

LEGAL ARGUMENT

I. RESPONDENT CLEARLY HELD HERSELF OUT AS A MEMBER OF THE BOARD (Ca014-017)

> "I was elected onto the central regional district board of education (BOE) come on man LOL"

Respondent made this public post accompanied by multiple pictures of herself swearing in to her position of public trust at a meeting of the Board. (Ca223). She had previously used this same account to post campaign banners and garner support for

her campaign for a Board seat. (Ca216, Ca218, Ca220, Ca222). It was common knowledge to those viewing her posts from this account that Respondent was a member of the Board. (Ca216, Ca218, Ca220); (Ca136 at RQA 2, Ca144 at Response to RQA 2); (Ca223). This was undisputed below.

ALJ Tama B. Hughes (ALJ Hughes) issued filed her Initial Decision pursuant to N.J.S.A. 18A:12-29 on June 9, 2023, finding that the following was undisputed:

> On January 7, 2022, respondent was sworn in as a member of the Central Regional Board of Education (Board). Pictures of her swearing in as a Board member were posted on her public Facebook page. Respondent utilized her Facebook account to advertise/campaign to become a member of the Board. She also published a picture of herself on her Facebook account when she was sworn in as a Board member.
>
> Respondent's Facebook allows public access to certain parts which means that anyone in the community can see what is posted on the public aspect of her account. By her own admission, some of respondent's Facebook friends – which includes parents, teachers, students, and staff, are aware that she is a Board member.
>
> (Ca021).
>
> It is undisputed that Respondent used her Facebook account as a platform for her election to the Board. It is also undisputed that she also used it to publicize that she had been elected to the Board and was a sworn member. It is this very same public platform that she used post-election to reach this same constituency – however, now she used it as a sitting Board member which carries greater weight, to promote action that was contrary to the Boards' obligations under the law. Such action on her part was not only volatile of her ethical obligations as a Board member, it also compromised the Board.
>
> (Ca032).

Respondent campaigned for her seat from this account. She announced that she took her seat. She stated clearly that she was a sitting member of the Board with photographic and written evidence of same. That is why it is all the more inexplicable that the Commission erred so grievously in stating in its Final Decision that her account does "not mention respondent's membership on the Board nor does she

advertise or rely upon her Board membership when publishing material on her social media page." (Ca017). This was simply not true. The Commission's outcome determinative finding that "there is no factual evidence" tying Respondent's Facebook account to her Board membership was demonstrably false. Id. There was abundant evidence of this.

The Commission's well-established caselaw states clearly that school board members who use their Facebook account to campaign for their seat on a school board must make clear in which capacity they are speaking, and explains why:

> The Commission notes that board members do not surrender the rights they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." [...]
>
> Further the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public.
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> I/M/O Daniel Leonard, Commission Docket Nos. C56-19 and C57-19 (2021) (Ca255) (citing Dunbar Bey v. Brown, Commission Docket No. C25-11 (2011) (Ca275)), reaffirmed, e.g., by I/M/O Christopher T. Treston, Commission Docket No. C71-18 (2021) (236) and Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233).
>
> Although Respondent argues that the statements attributed to her by Complainant were not made in her capacity as a Board member, and do not relate to her Board membership or to Board actions, the Commission finds that the statements on her Facebook page are clearly linked to her Board membership (and candidacy). Respondent's Facebook page is clearly marked with the banner, 'Re-Elect Maryann Fiel to the Highlands Elementary Board of Education,' but does not appear to have

a disclaimer noting that the statements are her own and unrelated to the Board.

Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)), reaffirmed, e.g., Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233); I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243).

There is a robust body of decisions and advisory opinions which school officials can utilize to determine when, and how, a disclaimer must be used on social media when speaking in their personal/private capacity in order to avoid running afoul of the Act.

For example, in Melnyk v. Fiel ... the Commission discussed how failure to include a disclaimer can lead to the belief that the statements made by a school official, even in attempted to be made in their personal/private capacity, can be viewed as those of the Board. Highlands Borough Board of Education, Monmouth County, Commission Docket No. C64-18. More specifically, and although Respondent Fiel argued that the statements attributed to her by Complainant Melnyk "were not made in her capacity as a Board member and [did] not relate to her Board membership or to Board actions," the Commission found that "the statements on her Facebook page [were] clearly linked to her Board membership (and candidacy)," her social media page did not have a disclaimer noting that the statements made were her own and unrelated to the Board, and that, as a result, "it [was] reasonable for a member of the public ... to perceive the statements as being made by Respondent in her capacity as Board member." C64-18 at 4.

I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243) (citing Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)), reaffirmed, e.g., Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233).

Since the advent of social media, the Commission has received numerous complaints about whether a Board member's speech, including posts on social media, violates the Act because the Board member either failed to disclaim, or insufficiently disclaimed, their speech. In a recent decision, which is informative here, the Commission stated:

... Now, more than a decade later, when the use of social media and online publications has become commonplace, prolific, pervasive, and often times divisive, and given that there has been a significant influx

> in the number of complaints filed with the Commission regarding use (or nonuse) of disclaimers in electronic publications (not just social media), ***it is now more crucial than ever to underscore and emphasize that when Board members want to speak as private citizens, they must include an appropriate disclaimer that makes the capacity in which they are speaking clear and unambiguous.*** In addition, even if an appropriate disclaimer is used, a school official must never negate the import of the disclaimer by proceeding, under the purported protection of the disclaimer, to discuss or comment on Board business or matters in a way that leads a member of the public to believe that the individual is speaking on behalf of, and as a representative of, the Board.
>
> Advisory Opinion A02-22 (2022) (Ca233) (citing I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18, at 12) (emphasis added)).

Despite campaigning for the Board from her public Facebook account, announcing she won her seat, and sharing pictures of herself swearing in from this same account, Respondent's account contained no disclaimer. She then made every public post that was the subject of the Commission's August 22, 2023 Decision within 5 days, and from the very same public account.

Pursuant to the Commission's decisional law for well over a decade, and based on the clear and direct evidence presented, Respondent held herself out as a Board member from this same Facebook account. The Commission's finding in its Final Decision that "there is no factual evidence" tying Respondent's Facebook account to her Board membership was made in error, was contrary to the factual findings of ALJ Hughes, and was contrary to all evidence in the record. As a result, the Commission's August 22, 2023 must be reversed as being arbitrary, capricious, unreasonable, and unsupported by the evidence in the record.

II. RESPONDENT ENGAGED IN CONDUCT WHICH NOT ONLY HAD THE POTENTIAL TO COMPROMISE THE BOARD – BUT WHICH ACTUALLY DID COMPROMISE THE BOARD (Ca014-017)

Respondent asserts that "the evidence does not show that Respondent's conduct undermined public confidence or trust in the Board or compromised it." Rb13. On the contrary, the record contains direct evidence – including the Board's own minutes, official Resolutions passed by the Board, actual litigation filed against the Board as a result of Respondent's conduct, and news coverage of Respondent's conduct – which clearly shows that Respondent actually compromised the Board.

The question of whether a member of the school community ***could have*** reasonably perceived Respondent of speaking as a Board member is directly answered by the fact that many members of the public ***did*** perceive her as speaking on behalf of the Board. I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243) (citing Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)). That is why the public protested her at meetings of the Board. (Ca075-076, Ca086, Ca098-099, Ca100-105). That is why newspapers referred to her as a Board member. (Ca100-105). That is why the Board ***itself*** was compelled to pass two Resolutions clarifying that it did not stand behind her public statements and that her statements should not continue to be seen as having been made on behalf of the Board. (Ca072, Ca075-076). Respondent's statements also led directly to litigation being filed against the Board, which was clearly reflected in the record. (Ca107-Ca114); (Ca031) ("...not only had the ability to compromise the Board, but it did compromise the Board. This is evidenced by the litigation filed against it.")

Respondent makes an attempt at circular logic, asserting that "Respondent did not hold herself out as a member of the Board in her Facebook posts. Therefore, her posts did not undermine public confidence in the Board or compromise it." Rb12. First, she clearly held herself out as a member of the Board from her Facebook account as noted above. Treston, Melnyk, and Leonard, supra, all stand for the

proposition that when a school board member campaigns from their public Facebook account – and especially where they actually state they are a school board member and post accompanying pictures – they hold themselves out as school board members. Their posts are then subject to the Act's Code of Ethics and its prohibition on social media use which may compromise the Board. N.J.S.A. 18A:12-24.1(e). Respondent did so by causing protest in the school community, which was recorded in Board minutes and newspaper articles, as well as by subjecting the Board to litigation. This was all clear from abundant evidence in the record.

Respondent also asserts that Respondent was not speaking on Board issues. This was directly contradicted by the Commission's own Final Decision. (Ca016) ("In this matter, the Commission finds that, while the subject matter of the Facebook posts – opting out of the union and masking in schools – may relate to the business of the Board ...."). While a review of Leonard or Treston, supra, clearly show that a school board member can compromise a school board in violation of the Act without speaking directly on school board issues, here even the Commission agreed in its Final Decision that Respondent spoke directly to Board issues. Even the Commission's Statement in Lieu of a Brief in this matter before the Appellate Division acknowledges that. (p. 10 "... the Commission correctly concluded that, although Koenig's speech related to board business...."). It is undisputed that her posts dealt with Board business.

Respondent further asserts that "it is questionable whether the evidence presented by Complainants actually establish that there was such an 'uproar,'"[1]

[1] Respondent repeatedly attributes this word to Appellants, but the only use of the word "uproar" in Appellants initial Brief was a direct quote from a news article. Cb19 ("(Ca101-105) "On Thursday, the school board was voting on a social media policy for board members that was introduced at the March 17 meeting, in response to the community's uproar over posts by both Koenig and Borawski.")

calling the public's demands that the Board and Respondent be held accountable "sporadic," and stating that news articles covering the tumultuous Board meetings are somehow suspect because they are written by people. Rb11. This argument strains credulity. The argument that these documents do not say what they say, or should not be taken at face value, was not raised below, and must be disregarded. It was undisputed below that the Board minutes and news articles reflected actual public outcry from the school district community regarding Respondent's statements.

> Several of Respondent's postings on Facebook have been the subject of community criticism at Board meetings and cause the Board to take official action to formally condemn and denounce certain posts, request the respondent to remove the posts, and publicly comment that no on Board member has the authority to speak for the Board.
>
> (Ca024).

It was obvious below – as it is obvious now – that these events actually occurred. Respondent asks the Appellate Division to deny what it can see with its own eyes. This argument carries no weight and should be disregarded. Respondent clearly compromised the Board in violation of the Act.

III. RESPONDENT'S ILL-DEFINED FIRST AMENDMENT ARGUMENT FAILS BECAUSE IT WAS WAIVED BELOW, AND BECAUSE THE LEGISLATURE AND THE COMMISSION HAVE SPOKEN CLEARLY ON THIS ISSUE (Ca014-017)

Respondent essentially asserts that no school board member could ever make any statement which could be subject to the Commission's jurisdiction. Rb7-8. Respondent provides no First Amendment analysis in support of this proposition, nor does Respondent address the Commission's robust body of caselaw addressing this precise issue. Respondent also waived this affirmative defense below.

First, Respondent waived any such affirmative defense by failing to raise it in both its Answer and its Amended Answer before the Commission. As ALJ Hughes specifically found:

> First, Respondent failed to raise any affirmative defenses in both her initial answer and her amended answer. Therefore, such a defense is unsupported by the pleadings. While counsel raises the argument in his brief, it is just that, an argument without factual support – i.e. certification, affidavit or other competent evidence. Second, even if a First Amendment defense had been raised, there is a balancing that must be done between Respondent's rights as a private citizen and her obligation as a sitting board member to preserve public confidence and avoid conduct which would violate public trust or create a justifiable impression among the public that such trust is being violated. See N.J.S.A. 18A:12-22(a).
>
> (Ca031-032).

In short, Respondent waived her First Amendment defense and, even if she hadn't, that defense fails under applicable law.

Next, the only cases cited by Respondent are inapplicable, as each of those 2 cases refers to the First Amendment rights of public school teachers being disciplined ***by*** a school board. Kennedy v. Bremerton School District, 597 U.S. 507 (2022) ("neither ***teachers nor students*** shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.") (emphasis added) (citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969)). Respondent is neither a teacher or a student. Nor is she an employee of the Board at all. Rather, Respondent ***is a government official and a representative of the school board itself***. Put another way, Respondent is an agent of the government which the First Amendment protects private citizens ***from***, not the other way around.

As the United States Supreme Court held in Kennedy, the case cited by Respondent, this is a crucial distinction:

> Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?
>
> Kennedy, 597 U.S. at 509.

The difference between speaking in one's private capacity and – alternatively – being perceived as speaking on behalf of a school board, is precisely the reason the Commission has developed a robust body of caselaw on the First Amendment and social media disclaimers for school board members. The Commission has set out its First Amendment analysis on this issue time and time again:

> The Commission notes that board members do not surrender the rights they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." [...]
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> Further the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public.
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> I/M/O Daniel Leonard, Commission Docket Nos. C56-19 and C57-19 (2021) (Ca255) (citing Dunbar Bey v. Brown, Commission Docket No. C25-11 (2011) (Ca275)), reaffirmed, e.g., by I/M/O Christopher T. Treston, Commission Docket No. C71-18 (2021) (236) and Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233).
>
> Although Respondent argues that the statements attributed to her by Complainant were not made in her capacity as a Board member, and do not relate to her Board membership or to Board actions, the Commission finds that the statements on her Facebook page are clearly linked to her Board membership (and candidacy). Respondent's Facebook page is clearly marked with the banner, 'Re-Elect Maryann Fiel to the Highlands Elementary Board of Education,' but does not appear to have a disclaimer noting that the statements are her own and unrelated to the Board.
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> Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)), reaffirmed, e.g., Commission's Advisory Opinion A02-22 (February 25,

> 2022) (Ca233); I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243).
>
> For example, in Melnyk v. Fiel ... the Commission discussed how failure to include a disclaimer can lead to the belief that the statements made by a school official, even in attempted to be made in their personal/private capacity, can be viewed as those of the Board. Highlands Borough Board of Education, Monmouth County, Commission Docket No. C64-18. More specifically, and although Respondent Fiel argued that the statements attributed to her by Complainant Melnyk "were not made in her capacity as a Board member and [did] not relate to her Board membership or to Board actions," the Commission found that "the statements on her Facebook page [were] clearly linked to her Board membership (and candidacy)," her social media page did not have a disclaimer noting that the statements made were her own and unrelated to the Board, and that, as a result, "it [was] reasonable for a member of the public ... to perceive the statements as being made by Respondent in her capacity as Board member."
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> I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243) (citing Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)), reaffirmed, e.g., Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233).

It is clear from this body of decisional law that, where a school board member has used their public Facebook account to campaign for their seat on the Board – and certainly where a school board member also posts a picture of herself swearing in and announces that she is a sitting Board member – members of the public might reasonably believe she is speaking in her role as Board member. Here, where Respondent posted numerous campaign banners to her page precisely like the respondent in Melnyk, announced she was taking her seat on the Board, posted pictures of her self swearing in, and typed out the words "I was elected onto the central regional district board of education (BOE) come on man LOL," without any Melnyk disclaimer, it is obvious that members of the public could have reasonably believed she was speaking in her role as Board member. In fact, that is precisely what happened here, as evidenced by Board minutes, news articles, and even official Board Resolutions which were all included in the record before the Commission.

To be perfectly clear – this matter is not about whether Respondent's posts were controversial or whether any particular person or persons disagreed with them. Respondent held herself out as a Board member from the same account she made posts which unquestionably compromised the Board. Appellants are members of the school district community and ***are employees of the Board***. (Ca202-203). The Act was crafted by the Legislature with just such school board employees and community members in mind. That is why the express Legislative intent set out in the Act states:

> The Legislature finds and declares:
>
> a. In our representative form of government it is essential that the conduct of members of local board of education and local school administration hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> N.J.S.A. 18A:12-22.

Respondent violated that public trust. The Act sets out disciplinary actions which must be imposed uniformly to violations of that public trust.

The caselaw is clear on the penalty that should be applied. Here the disciplinary action requested by Appellants is merely a reimposition of the penalty of "Censure." ALJ Hughes in the present matter, and ALJ Belin in the companion case now before the Appellate Division[2], each independently reviewed the Commission's caselaw on penalty, including I/M/O Christopher T. Treston, Commission Docket No. C71-18 (2021), and each independently imposed the penalty of censure. (Ca036-037).

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[2] Ronald Donnerstag, et. al. v. Merissa Borawski, Appellate Division Docket No. A-000367-23T4.

The Commission's long history of applying a censure regarding school board member social media use which tends to compromise the school board obviously passes constitutional muster. While Respondent has failed to make a coherent First Amendment argument or to identify the standard of scrutiny that applies, a mere censure is clearly the least restrictive means of furthering the compelling government interest (the Legislature called it "essential") in upholding the public trust placed in boards of education. As a result, even if Respondent had articulated its First Amendment argument in a manner that comports with constitutional law, it would have failed. See, e.g., Williams-Yulee v. The Florida Bar, 575 U.S. 433 (2015).

The New Jersey Supreme Court and the United States Supreme Court have repeatedly upheld codes of ethics for public officials, including New Jersey's Code of Judicial Conduct, to which Your Honors are subject. The compelling government interest cited in those decisions is the public's trust in those institutions. See, e.g., In re DiLeo, 216 N.J. 449, 471 (2014) ("Consideration of the public's perception of the judiciary is not new to the judicial discipline process. It lies at the core of the Code of Judicial Conduct."). The penalty of censure is regularly applied in those cases. See, e.g., In re Perskie, 207 N.J. 275 (2011).

Respondent waived any First Amendment affirmative defense by failing to raise it in either her Answer or Amended Answer. Even if Respondent had taken the time to make out a coherent First Amendment argument – by applying the appropriate level of scrutiny or referencing any relevant cases – that argument would have failed. As a result, Respondent's ill-defined and improperly raised reference to the First Amendment must be disregarded at this juncture.

Lastly, the Appellate Division's decision in this matter will have widespread consequences in school districts across the State of New Jersey. If the Commission is allowed to simply ignore well over a decade of its own well-established caselaw, there will no longer be any mechanism for holding school board members

accountable for their actions which compromise the school boards on which they sit. The record below was bursting with direct evidence that Respondent actually compromised the Board. Appellants ask only that You believe what You can see with Your own eyes.

In light of all the foregoing, Appellants request that the Commission's August 22, 2023 Final Decision be reversed as being arbitrary, capricious, unreasonable, and not supported by the evidence in the record. Dennery v. Bd. of Educ. of Passaic Cty. Reg'l High Sch. Dist. No. 1, Passaic Cty., 131 N.J. 626 (1993).

CONCLUSION

For all the reasons above, Appellants respectfully request that the Appellate Division issue an order:

1. School Ethics Commission's August 22, 2023 Final Decision

    a. Reversing the School Ethics Commission's August 22, 2023 Final Agency Decision;
    b. Finding that Respondent violated N.J.S.A. 18A:12-24.1(e) with regard to Counts 1 and 4 of the Complaint; and
    c. Reinstating the penalty of "censure."

2. School Ethics Commission's July 26, 2022 Decision on Respondent's Motion to Dismiss in Lieu of an Answer

    a. Reversing the School Ethics Commission's July 26, 2022 dismissal of Count 5 as to N.J.S.A. 18A:12-24.1(e);
    b. Reversing the School Ethics Commission's July 26, 2022 dismissal of Counts 2 and 3 as to N.J.S.A. 18A:12-24.1 (a) and (e); and
    c. Reinstating Counts 2, 3, and 5 of the Complaint for further proceeding before the Office of Administrative Law.

Respectfully submitted,
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