In the Supreme Court of Pennsylvania
Middle District

No. 5 MAP 2015

HERDER SPRING HUNTING CLUB,

Appellee,

v.

HENRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE; DAVID KELLER; MICHAEL EGOLF; and their heirs, successors, executors, administrators and assigns,

Appellants.

BRIEF OF *AMICI CURIAE* TRUSTEES OF THE THOMAS E. PROCTOR HEIRS TRUST; TRUSTEES OF THE MARGARET O.F. PROCTOR TRUST; HOYT REALTY, LLC; AND THORNE HERITAGE RESOURCES, LLC

Appeal from the Superior Court's May 9, 2014 Judgment at No. 718 MDA 2013, reversing the March 25, 2013 Judgment of the Court of Common Pleas of Centre County at No. 2008-3434

Paul K. Stockman (Pa. I.D. No. 66951)
Jamie A. Edwards (Pa. I.D. No. 309493)
MCGUIREWOODS LLP
625 Liberty Avenue, 23rd Floor
Pittsburgh, Pennsylvania 15222-3142
(412) 667-6000

Counsel for All Amici Curiae

Robert L. Byer (Pa. I.D. No. 25447)
DUANE MORRIS LLP
600 Grant Street, Suite 5010
Pittsburgh, Pennsylvania 15219-2802
(412) 497-1083

Counsel for Amicus Curiae *Trustees of the Thomas E. Proctor Heirs Trust*

March 9, 2015

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INTERESTS OF *AMICI CURIAE*

Amici curiae are two trusts (through their trustees) and two limited liability corporations who own or manage, in the aggregate, all or part of the oil and gas beneath more than 180,000 acres of north-central Pennsylvania. *Amici* together represent more than 240 individuals and organizations domiciled in Pennsylvania and throughout the United States. Included among *Amici*'s beneficiaries or members are, *inter alia*, a farmer and volunteer fireman, a housewife, a postal worker, an opera singer, a forestry specialist, a commercial fisherman, a schoolteacher, a rancher, a dance instructor, an artist, a librarian, a federal judge, an electrical engineer, a dentist, at least three members of the clergy, a number of retirees, decorated war veterans, a charitable trust, at least four children under the age of twelve.

Amici's members or beneficiaries are descendants of three entrepreneurial families, who with others formed a leather business, the U.S. Leather Company, in the early 1890s. After acquiring large tracts of forest in north-central Pennsylvania (needed for the hemlock bark then used as a key ingredient in leather tanning), these entrepreneurs conveyed the surface estates to subsidiaries of U.S. Leather Company, but reserved their rights to the underlying oil, gas, coal and other subsurface interests (as Appellants did here). These deeds, with their accompanying reservations, were duly recorded and have always been available for all to see in the public record. *Amici* have succeeded to these severed oil, gas and subsurface rights:

- The Thomas E. Proctor Heirs Trust (Charles Rice Kendall and Ann P. Hochberg, Trustees) was created in 1980 to manage in coordinated fashion the Pennsylvania oil, gas, coal and mineral rights originally reserved by Thomas Emerson Proctor, Sr. and his wife Emma Proctor. The Thomas E. Proctor Heirs Trust currently holds an undivided 93.75% interest in roughly 100,000 acres of oil, gas and mineral rights, located principally in Lycoming, Sullivan and Bradford Counties, on behalf of 109 individual beneficiaries.
- The Margaret O.F. Proctor Trust (Bank of America, N.A. and John J. Slocum, Jr., Trustees), a testamentary trust created upon the death of the widow of one of Thomas E. Proctor, Sr.'s grandsons, holds the remaining 6.25% interest in the oil, gas and mineral rights previously reserved by Thomas E. Proctor.
- Hoyt Realty, LLC (a limited liability company organized under the laws of the State of Colorado, and qualified to do business in Pennsylvania) was formed to acquire, own, possess and manage the oil, gas and other subsurface rights originally owned and possessed by Hoyt Brothers or its owners (William, Mark, Oliver, Edward, Theodore and George Hoyt, individually or jointly with their spouses or others). Since its founding in 2010, sixty-six of the Hoyts' heirs, successors and assigns have assigned their subsurface interests to Hoyt Realty, LLC; as a

result, Hoyt Realty, LLC now owns approximately 90% of an oil and gas estate that is estimated to involve approximately 55,000 acres in Pennsylvania.

- Thorne Heritage Resources, LLC (a limited liability company organized under the laws of the State of Delaware, and qualified to do business in Pennsylvania) was formed to manage and administer the rights, title and interests once owned and possessed by Samuel Thorne and Jonathan Sterling, trustees for Jonathan Thorne, deceased. Since its founding in 2012, sixty-six heirs, successors and assigns have appointed Thorne Heritage Resources, LLC as their agent and attorney-in-fact to pursue and defend claims involving an undivided 74.53% of approximately 26,500 acres of oil, gas and other subsurface interests in Sullivan County.

In the decades since *Amici*'s predecessors reserved their oil, gas and other subsurface interests in the 1890s, *Amici* and their predecessors have actively managed those property rights. In so doing, *Amici* have repeatedly been required to confront claims by surface owners (really, a few large landholders), seeking to quiet title to the underlying oil and gas in favor of the surface owners and thereby divest *Amici* of their oil and gas rights. These surface owners have contended – as Appellee Herder Spring Hunting Club has argued in this case – that their predecessors' purchase of the surface estate at a tax sale years after the recorded severance of the non-producing oil and gas interests nonetheless conveyed the

entire tract, including the previously-severed, legally-separate subsurface estate. Importantly, as was also the case here, surface owners have argued that tax sales divested *Amici* of their valuable property rights even though those tax sales went forward without any effective notice to *Amici* or their predecessors and despite the fact that the deeds reserving *Amici*'s subsurface rights were duly recorded in the very courthouses from which the tax sales were conducted. Further, the surface owners maintain that these sales divested *Amici* of their property rights even though *Amici*'s predecessors had properly declared their interests for assessment in the "whole" pre-severance property, well before any subsequent conveyances of just the surface estates were recorded by deeds containing exceptions and reservations by *Amici's* predecessors of pre-existing oil and gas interests.

As a result, while a decision in favor of Appellee Herder Spring would not by itself be dispositive of *Amici*'s rights, *see infra* §III.B (discussing some of the issues that the Superior Court's decision does ***not*** resolve, and that will – if this Court affirms – require further litigation), *Amici* have a direct interest in the outcome of this case. *Amici* therefore write separately, in support of Appellants, to emphasize:

- that the Superior Court's ruling does violence to the plain language of the Act of March 28, 1806, P.L. 644, and other core principles of Pennsylvania jurisprudence;
- that the Superior Court's ruling, by giving tax sales preclusive effect in the complete absence of effective notice or a realistic opportunity to participate, offends principles of procedural due

process mandated by the United States and Pennsylvania Constitutions;

- that the Superior Court's bid for certainty is both mistaken (in that it provides no actual certainty, and merely invites future disputes) and inappropriate (in that it countenances unjust and unconstitutional deprivations of property for no reason other than inertia); and
- that the Superior Court's ruling would give rise to unconscionable absurdities and perverse incentives.

SUMMARY OF ARGUMENT

This appeal gives the Court an opportunity to vindicate the Commonwealth's long tradition of due process, reversing an unjust ruling that, if allowed to stand, would be a blot on its nearly four-century history of freedom and fair play. According to the Superior Court, an unseated land tax statute from 1806 purportedly permits the divestiture of valuable non-producing oil and gas rights. Moreover, the Superior Court ruling countenances such divestitures even though the tax sales at issue were conducted under circumstances that by design obscured the attempted confiscation from the true owners and effectively guaranteed that these owners could not and would not appear to contest their property's attempted expropriation. While these attempted forfeitures were purportedly justified by the alleged non-payment of *ad valorem* property taxes assessed years after the subsurface interests were duly severed from the unseated surface estate by exceptions and reservations in recorded deeds, there was no legal authority even to assess or tax the property rights at issue (the inchoate ownership of, and right to extract, subsurface oil and gas), let alone to seize these subsurface property rights.

The statute on which the Superior Court relied in upholding the confiscation of Appellants' property, Act of March 28, 1806, P.L. 644, in no way puts owners of severed subsurface estates on notice that their property could be confiscated:

- At the outset, the statute by its terms applied only to "lands," and the tax status of fugacious oil and gas as "land" (as compared, for example, to coal) was ambiguous at best, at least

absent some legitimate basis for valuing these resources in place. Accordingly, giving the statute the strict construction demanded by Pennsylvania law, no tax could properly be levied on reserved oil and gas, and the failure to pay any such invalid tax could not justify forfeiture of these property rights.

- The statute by its terms applied only to those ***"becoming*** a holder of unseated lands by gift, grant or other conveyance," and not to those ***retaining*** a partial real property interest after conveying the remainder of the property.
- The statute explicitly provided a remedy ***other than forfeiture*** for non-compliance (namely, a four-fold tax penalty), a remedy that Pennsylvania law tells us is taxing authorities' ***exclusive*** recourse.

More troublingly, the Superior Court's construction of the statute blatantly conflicts with constitutional norms. It has been "[a]n elementary and fundamental requirement of due process" for generations that there be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The following corollary principles are equally well-established:

- Notice purely by publication – the only notice that appears to have been provided here – is constitutionally "inadequate to inform those who could be notified by more effective means

such as personal service or mailed notice," particularly when (as here) it "'does not even name those whose attention it is supposed to attract."' *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-96 (1983) (quoting *Mullane*, 339 U.S. at 315). In truth, such notice – "designed primarily to attract prospective purchasers to the tax sale," *id.* at 799 – cannot be regarded as anything "more than a feint," *Mullane*, 339 U.S. at 315.

- This constitutional requirement cannot be abridged by the fiction that the taxes at issue here were assessed purely against the land, and that the county tax sale proceeded *in rem* against the property itself. "[T]he requirements of the Fourteenth Amendment … do not depend upon a classification for which the standards are so elusive and confused generally," and "the power of the State to resort to constructive service" does not turn "upon how its courts or this Court may regard this historic antithesis." *Mullane*, 339 U.S. at 312-13.
- Nor can due process be undercut by the fiction that non-resident landowners are deemed to have caretakers looking out for their property interests. "'[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.'" *Jones v. Flowers*, 547 U.S. 220, 232 (2006) (quoting *Mennonite*, 462 U.S. at 799). Admittedly, "the government may hold citizens accountable for tax

> delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." *Id.* at 234.

The Superior Court's ruling is not only unsound as a matter of law, however; it also is unsound as a matter of policy and practicality. The Court justified holding its nose, in the face of an outcome that the Court candidly admitted was "unduly harsh," 93 A.3d at 493, simply because it was unwilling to disturb what it assumed was a settled expectation from 1935. In fact, there was no settled expectation or accepted understanding that a surface owner's default would carry with it a windfall in the form of the restoration of previously-severed oil and gas rights. On the contrary, the Superior Court's view (that duly-recorded severed oil and gas estates could be divested by a tax sale, following non-payment of taxes assessed solely against the surface) is historically inaccurate. In *Amici's* experience, surface owners buying property at tax sales routinely accepted that their purchase did not convey subsurface rights severed before the assessment out of which the sale arose. The case reporters reflect this shared understanding. The arguments presented here emerged only after surface owners' other machinations proved to be less-than-satisfactory vehicles for seizing previously-severed subsurface rights. In brief, the Superior Court's ruling perverts, rather than vindicates, the ***actual*** historical understanding of tax sales.

Nor would it be correct to assume that the Superior Court's ruling would afford repose, or minimize future disputes about historical tax sales. In fact,

if the Superior Court's ruling were to stand (in contravention of the statutory language, Pennsylvania jurisprudence, and constitutional command), there still would remain substantial questions about the validity and scope of individual sales that would need to be decided on a case-by-case basis. In short, rather than providing repose, the Superior Court's ruling just shifts the focus of argument to other issues; a ruling in Appellants' favor, by contrast, would resolve this issue once and for all time.

Finally, the Superior Court's ruling, if allowed to remain in place, countenances intolerable absurdities that run contrary to both logic and experience. For example, the Superior Court's rationale leaves subsurface landowners at the mercy of their successors-in-title, potentially depriving subsurface owners of valuable property rights because strangers who have later come to own the surface cannot pay their taxes. It also would allow owners of subsurface oil and gas to be deprived of their property because they failed to declare for assessment oil and gas rights that could not legally be taxed under Pennsylvania law.

Therefore, *Amici Curiae* ask the Court to vacate the judgment of the Superior Court, holding that tax sales of unseated land do not convey non-producing oil and gas rights that were previously severed and duly recorded unless those rights were explicitly, and properly, assessed.

ARGUMENT

I. The Superior Court's Ruling Does Violence to the Plain Meaning of the Statute at Issue and Bedrock Principles of Pennsylvania Jurisprudence.

As an initial matter, the statute that purported to require declaration of the property rights at issue here did not, by its terms, even permit local authorities to assess or tax subsurface oil and gas. And the statute certainly did not permit local authorities to seize and sell property rights as a penalty for failure to declare severed oil and gas interests for assessment and taxation. The Superior Court's contrary holding rests on a misreading of the plain text of the statute at issue.

In determining the effect of the tax sale at issue, "we start," as always, "by analyzing the express words of the statutes." *City of Phila. v. Com., Bd. of Fin. & Revenue,* 803 A.2d 1262, 1266 (Pa. 2002). When those words are clear and unambiguous, that is also where we stop. *See* 1 PA.C.S. §1921(b).

The only statutory provision on which the tax sale at issue here has been predicated is the following:

> [I]t shall be the duty of every holder of unseated lands within this commonwealth, who has not complied with the injunctions required by the second section of the act to which this is a supplement, to furnish to the commissioners of the proper county, on or before the fourth Monday of November next, a statement signed by such holder or his, her or their agent, containing a description of each and every tract so held, the name of the person or persons to whom the original title from the commonwealth passed, and the nature, number and date of such original title; and ***it shall be the duty of every person hereafter <u>becoming</u> a holder of unseated <u>lands</u> by gift, grant or other conveyance, to furnish a like statement,*** together with the date of the conveyance to such holder, and the name of the grantor, within one year, from and after such conveyance; and

> ***on failure of any holder of unseated <u>lands</u> to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made when discovered, <u>four times the amount of the tax</u> to which such tract or tracts of land would have been otherwise liable,*** and to enforce the collection thereof, in the same manner that taxes due on unseated lands are or may be assessed and collected

Act of March 28, 1806, P.L. 644 (emphasis added).[1] The underlined terms – "lands," "becoming" and "four times the amount of the tax" – are dispositive of the issues presented here, when given their plain meaning and construed in light of established principles of Pennsylvania law. Simply put, the Act of March 28, 1806 on its face compels the conclusion that the tax sale at issue in this case conveyed only the surface estate, and did not affect title to the previously-reserved and recorded oil and gas rights. The plain language of the statute also mandates the further conclusion that all other tax sales that similarly purport to divest owners of duly-recorded reserved oil and gas rights are equally ineffective.

A. Severed Oil and Gas Rights Are Not "Lands," and Their Owners Thus Had No Obligation to Report Them for Assessment and Taxation Under the Act of March 28, 1806.

As an initial matter, the Act of March 28, 1806 by its terms requires landowners only to report unseated "lands," and severed oil and gas rights cannot reasonably be construed to be "lands" that must be reported under the terms of that statute, and that can be assessed, taxed, and sold for non-payment.

[1] The Act of March 28, 1806 was subsequently repealed and reenacted, in substantially-identical terms, by the Act of May 22, 1933, P.L. 853, §409, and was compiled at 72 P.S. §5020-409, which in turn was largely repealed by the Act of October 27, 2010, P.L. 895, §6(2). For convenience, *Amici* cite the original statute.

Indeed, this Court has declared that oil and gas are not "lands" that may be assessed and taxed, largely because "a typical layperson's understanding of the term 'lands' referred to surface rights or any physical improvement 'permanently affixed' to the ground." *Coolspring Stone Supply, Inc. v. C'ty of Fayette*, 929 A.2d 1150, 1155 (Pa. 2007) (citing and quoting *Indep. Oil & Gas Ass'n v. Bd. of Assessment Appeals*, 814 A.2d 180, 184 (Pa. 2002) [*IOGA*]). This is due principally to "the physical nature of oil and gas." *Id.* In particular, "[l]and is defined as, *inter alia,* 'the solid part of the earth's surface not covered by water' and as 'a specific part of the earth's surface,'" whereas, "[b]y contrast, neither oil nor gas is a solid structure on the earth's surface." *Id.* at 1155-56 (citations omitted). *See also IOGA*, 814 A.2d at 185 (Nigro, J., concurring) ("oil and gas are of a fundamentally different character than real estate").[2]

Even if severed oil and gas interests could, in the abstract, have been assessed and taxed as real estate, the law at the time of the tax sale at issue made

[2] Although this Court has ruled that *IOGA*'s specific holding – that Section 201(a) of the General County Assessment Law, Act of May 22, 1933, P.L. 853, §201(a), 72 P.S. §5020-201(a), did not permit the *ad valorem* taxation of oil and gas interests – did not retroactively apply to require municipalities to refund taxes that had already been paid, *see Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274 (Pa. 2007), this Court should not read *Oz Gas* more broadly to limit *IOGA*'s essential holding. The result in *Oz Gas* was strongly influenced by the "potentially devastating consequences to taxing entities" that would result if the Court required tax refunds. 938 A.2d at 285. Here, by contrast, the equities favor Appellants: they have been deprived of valuable property rights contrary to the governing statute and in violation of constitutional norms, and application of *IOGA* here does not threaten the integrity of the public fisc.

clear that oil and gas could be considered taxable "land" ***only*** if there were some basis for discovering and valuing it:

> [I]t is important to keep in mind the fact that the right to tax depends upon the valuation and assessment of a definite estate in land. ***If there is no land, there is nothing to tax, and this principle applies as well to minerals as to surface.*** Because there may be a reservation of oil and gas by the grantor of the surface, or there may be an express grant of all the oil and gas underlying one or several tracts of land, it does not follow that in point of fact there is any such estate in existence. When the assessor goes upon the land, it is his duty to make a valuation upon information or knowledge which will furnish some definite fixed basis of valuation. ***A mere naked reservation of oil and gas in a deed without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes.***

F.H. Rockwell & Co. v Warren C'ty, 77 A. 665, 666 (Pa. 1910) (emphasis added).[3]

At a minimum, the Act of March 28, 1806 is ambiguous as to whether or not oil and gas interests are "lands" that are subject to assessment and taxation, an ambiguity that is even deeper when one attempts to stand in the General Assembly's shoes.[4] That ambiguity is itself dispositive on this question, however,

[3] To the extent *Rockwell* held that oil and gas are taxable at all, this Court has specifically rejected it, observing that *Rockwell* "did not contemplate whether any particular statutory provision permitted the taxation of oil and gas interests," even though the Court has "repeatedly instructed that an enactment of the General Assembly is necessary for a tax to be valid." *Coolspring*, 929 A.2d at 1157 n.9.

[4] *See Brown v. Personeni*, 192 A. 109, 110 (Pa. 1937) ("The language of a statute, as of every other writing, is to be construed in the sense which it had at the period when it was passed." (internal quotation and alteration omitted)). Oil and gas development were of course unknown in 1806; this Court's first decision on the subject, however, held that oil, as "a fluid, like water," is "not the subject of property except while in actual occupancy," and that "a right to take all the oil that

(footnote continued on next page)

and mandates the conclusion that the term "lands," as used in the Act of March 28, 1806, does not include severed oil and gas rights. After all, it is an elementary principle of Pennsylvania law – and has been for generations – that "provisions that impose taxes are strictly construed in favor of the taxpayer and against the taxing authority. Accordingly, provisions defining what property is subject to the tax … are interpreted strictly in favor of the taxpayer." *Greenwood Gaming & Entm't, Inc. v. Com., Dep't of Revenue,* 90 A.3d 699, 710-11 (Pa. 2014) (citations omitted); *see also* 1 PA.C.S. §1928(b)(3) (provisions imposing taxes "***shall*** be strictly construed" (emphasis added)). Put otherwise, because "[t]he grant by the Legislature of the right to levy taxes is to be strictly construed and is not to be extended by implication," any provision that may "be deemed uncertain or of doubtful meaning … ***must*** be construed in favor of the taxpayer." *Sch. Dist. of Phila. v. Frankford Grocery Co.,* 103 A.2d 728, 741 (Pa. 1954) (emphasis added; citations omitted); *accord Tech One Assocs. v. Bd. of Prop. Assessment, Appeals & Review,* 53 A.3d 685, 696 (Pa. 2012) ("[A]ny doubt or ambiguity in the interpretation of their terms must ... be resolved in favor of the taxpayer."); *Boyd v. Hood,* 57 Pa. 98, 101 (1868) ("A tax law … cannot be extended by construction to things not named or described as the subject of taxation.").

(footnote continued from previous page)
may be found in a tract of land, cannot be a corporeal right." *Dark v. Johnston,* 55 Pa. 164, 168 (1867). In so ruling, the Court specifically distinguished a conveyance of oil from "a grant of all the coal or ore within a tract of land." *Id.*

In sum, the Act of March 28, 1806 requires the declaration of, and permits the assessment of taxes on, only "lands," and as a matter of law severed oil and gas interests cannot qualify. Accordingly, the tax sale at issue here did not, and could not, convey the severed rights.

B. Owners Who Sell Surface Rights and Reserve Oil and Gas Do Not "Become" Owners of Unseated Land Who Are Obligated to Report the Severance on Pain of Forfeiture.

The Superior Court also misconstrued the Act of March 28, 1806 in finding that it applies to landowners (such as Appellants' predecessors) who sell the surface estate but retain ownership of the oil and gas estate. In particular, the Superior Court held that a "person who severed rights to unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued." 93 A.3d at 471-72. The Superior Court relied principally on the trial court's opinion in *Hutchinson v. Kline* (affirmed *per curiam* by this Court), which opined that "when the mineral rights were severed from the surface rights the [mineral owners] should have given notice of this fact to the commissioners or to the assessor." 49 A. 312, 317 (Pa. 1901).

The statute in fact says nothing of the sort. Rather, the statute by its terms applied only to those ***"becoming*** a holder of unseated lands by gift, grant or other conveyance," and not to those ***retaining*** a partial real property interest after conveying the remainder of the property. In light of their choice of the word "become," the drafters of the Act of March 28, 1806 clearly presupposed that the

duty to report applied to those ***acquiring*** property rights. *See, e.g.*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), *available at* http://webstersdictionary1828.com/Home?word=Become (defining "become" as "[t]o pass from one state to another; to enter into some state or condition, by a change from another state or condition, or by assuming or receiving new properties or qualities, additional matter, or a new character; as, a cion becomes a tree").

The overall structure of the Act of March 28, 1806 reinforces this conclusion. The statute first places an ***initial*** obligation on holders of unseated lands, by November 24, 1806, to declare their properties to the county commissioners. Then, the statute goes on to obligate "every person ***hereafter becoming*** a holder of unseated lands … to furnish a like statement," within a year, that also identifies "the date of the ***conveyance to such holder***, and the name of the grantor" (thereby allowing taxing authorities (i) to identify more specifically the property as it now stood, recognizing the possibility of partial conveyances, and (ii) to determine the respective responsibility for taxes between the former and current owner). In short, the Act of March 28, 1806 clearly imposes the onus of making a report on the ***new*** grantee of rights, and not on the original grantor. *See generally Com. v. Office of Open Records*, 103 A.3d 1276, 1285 (Pa. 2014) ("[S]tatutory language must be read in context, … together and in conjunction with the remaining statutory language, and construed with reference to the entire statute as a whole" (citation and internal quotation omitted)).

In consequence, in this case, any default in complying with the Act of March 28, 1806 rests on the part of the grantee, and cannot be laid at the feet of

Appellants' predecessors. Under these circumstances, it would be unjust to divest Appellants of their property because of ***another's*** failure to comply with the law.[5]

C. At Worst, the *Exclusive* Penalty for Failure to Report Unseated Lands for Assessment Is Four-Fold Taxation, Not Summary Expropriation Without Notice.

Finally, the Superior Court effectively struck out that provision of the Act of March 28, 1806 that provided a specific penalty – four-fold taxation – contravening both general principles of statutory construction and this Court's specific holdings on the construction of tax laws. As this Court has made clear:

> [T]he remedies given by these statutes for the collection of taxes are ***exclusive***. When a statute provides a remedy by which a right may be enforced, no other remedy than that afforded by the statute can be used. The Act of March 21, 1806, P.L. 558, section 13, 46 P.S. §156, provides that: "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued …."

Derry Twp. Sch. Dist. v. Barnett Coal Co., 2 A.2d 758, 760 (Pa. 1938) (emphasis added).

Indeed, this Court has made the same observation in the context of the very statute at issue:

> Owners of unseated lands are for the most part non-residents, far away from their property. Under these circumstances, to erect the high standard of diligence thus set up for us, where the

[5] Conversely, it would be equally unfair to the oil and gas owner if the new owner reported the acquired unseated lands without disclosing that the oil and gas had been reserved. In that case, surface estate owners could be rewarded for making inaccurate or even fraudulent overstatements of their ownership interest.

> penalty of its non-observance is so greatly disproportioned, as is the loss of a man's whole estate to the pittance of tax imposed upon it, is to exact a duty most onerous, and higher than the law itself has given us. The penalty of the law for a failure to make a return of land for taxation is fourfold taxation, but not confiscation of estate. We should not be wiser than the law.

City of Phila. v. Miller, 49 Pa. 440, 450 (1865).

Instead of considering these authorities, the Superior Court relied upon an unsupported surmise from judicial silence:

> The four-fold penalty was in place when *Hutchinson* and *Roaring Creek [Water Co. v. Northumberland County Commissioners*, 1 Northumb. 181 (C.C.P. Northumberland C'ty 1889)] were decided. We have no reason to believe that either our Supreme Court or the Northumberland County Court were unaware of the four-fold statutory provision. Although not explained in either of those decisions, that penalty was not applied. We will not retroactively apply that provision where the courts of that era did not see fit to utilize the penalty in this circumstance.

93 A.3d at 471 n.10. The fact that prior decisions did not reach out to decide an issue that apparently had not been raised by the parties is not a suitable justification for overlooking the argument now, especially when the intent that the Superior Court inferred from silence is inconsistent with this Court's explicit holdings.

Moreover, the Superior Court appears to have effectively stricken the four-fold tax – at a minimum, as a practical matter – from the statutory text. But it is a basic principle of statutory construction that a statute should not be construed in a manner that renders part of it mere surplusage. *See, e.g., Wayne M. Chiurazzi Law Inc. v. MRO Corp.*, 97 A.3d 275, 292 (Pa. 2014) ("Every statute shall be

construed, if possible, to give effect to all its provisions…. [W]e are not permitted to ignore the language of a statute, nor may we deem any language to be superfluous. Governing presumptions are that the General Assembly intended the entire statute at issue to be effective and certain ….” (citations and internal quotations omitted)); *see also* 1 PA.C.S. §§1921(a), 1922(2).

In short, even if Appellant’s predecessors-in-title were required to report their severed oil and gas interests (even though they were not “land,” and even though Appellants’ predecessors did not “become” holders of lands by selling only the surface), the exclusive remedy was not expropriation through sale, but was an assessment of four-fold taxation. For this further reason, the Superior Court’s decision contravenes the statutory text and should be vacated.

II. The Regime Endorsed by the Superior Court Violates the Due Process Guarantees of the United States and Pennsylvania Constitutions.

More troublingly, the Superior Court’s decision gives official *imprimatur* to official acts that simply cannot be squared with basic principles of due process. Under the relevant statutes providing for tax sales of unseated land, the ***only*** notice that is required to be given is publication in local newspapers. *See generally* Act of March 13, 1815, P.L. 177, §I, 72 P.S. §6001; Act of March 9, 1847, P.L. 278, §§I-II, *as amended,* 72 P.S. §6002. There is no indication in the record here that there was any effort to provide notice beyond publication.[6] Under these circumstances, the tax sale at issue here offends the “elementary and

[6] Indeed, the record does not even reflect that notice by publication was in fact made in the manner provided by statute.

fundamental requirement of due process" that there be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

A. Notice by Publication, Without More, Is Not Constitutionally Sufficient.

The law is clear: notice purely by publication – the only notice that appears to have been provided here – is "not reasonably calculated to provide actual notice of the pending proceeding" where, as here, the public record enables more precise identification of and service to interested parties, and is therefore constitutionally "inadequate to inform those who could be notified by more effective means such as personal service or mailed notice." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).

As the Supreme Court has made clear, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. The difficulty that notice by publication has in satisfying this basic standard are well-understood, as explained in *Mullane*:

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the

> back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

Id. Accord Walker v. City of Hutchinson, 352 U.S. 112, 117 (1956) ("In too many instances notice by publication is no notice at all."); *City of N.Y. v. N.Y., N.H. & H.R. Co.,* 344 U.S. 293, 296 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice."). In fact, the reality – as Justice Marshall noted in *Mennonite* – is that notice by publication is "designed primarily to attract prospective purchasers to the tax sale." 462 U.S. at 799.

As a result, Supreme Court precedent makes clear that, when the owner of a property right can be ascertained from public records, personal notice is required, and constructive notice by publication is not, and cannot be, "due process of law" within the meaning of the Fourteenth Amendment. *See Mennonite,* 462 U.S. at 798 ("When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service."); *Schroeder v. City of N.Y.,* 371 U.S. 208, 211, 212-13 (1962) (notice by posting and publication is insufficient where the property owner's identity was "readily ascertainable" from deed records); *Walker*, 352 U.S. at 116 (1956) (notice only by publication is insufficient where the property owners were listed in official

records). *See also* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 768 (2000) (reading *Mennonite* as having "resolved any lingering doubts" that "names and addresses available from the deed records must be used to provide notice to interested parties").

This Court's precedents are in accord,[7] repeatedly overturning tax sales where the only notice to the holder of a valuable property right was constructive notice by publication. For example, in *In re Upset Sale, Tax Claim Bureau of Bucks County*, 479 A.2d 940, 946 (Pa. 1984), the Court held that a real estate tax sale law providing only for constructive notice by publication violated the due process rights of a judgment creditor "[w]hen the judgment creditor is identified in a judgment that is publicly recorded."[8] Notice by publication, the Court observed, "advises the general public only that a piece of real estate is to be sold," and "does not inform individuals who have property interests that their interests may be affected by the tax sale. Such individuals are entitled to more than a 'squib' in a local newspaper or county law journal buried between the

[7] The guarantee, in Article I, Section 1 of the Pennsylvania Constitution, of the right of "acquiring, possessing and protecting property" "amounts substantially to" and is "not distinguishable from" the Fourteenth Amendment's right to due process of law. *R. v. Com., Dep't of Pub. Welfare*, 636 A.2d 142, 152 (Pa. 1994) (quoting *Wilcox v. Pa. Mut. Life Ins. Co.*, 55 A.2d 521, 526 (Pa. 1947), and *Best v. Zoning Bd. of Adjustment*, 141 A.2d 606, 609 (Pa. 1958)).

[8] Accordingly, it is simply not the case that "[t]he record of the deed creating a separate estate in the minerals would not be notice to the assessor or the commissioners, as they were not bound to search or examine the records," as the Superior Court found, 93 A.3d at 471, quoting an unsupported statement in the trial court opinion in *Hutchinson v. Kline*, 49 A. 312, 318 (Pa. 1901).

automobile sales and want ads." *Id.* at 945. *Accord First Pa. Bank v. Lancaster C'ty Tax Claim Bureau*, 470 A.2d 938, 942 (Pa. 1983) (relying on *Mennonite*); *Luskey v. Steffron, Inc.*, 336 A.2d 298, 299 (Pa. 1975) (citing *Mullane*).

> Somehow, over the years, taxing authorities have lost sight of the fact that it is a momentous event under the United States and the Pennsylvania Constitutions when a government subjects a citizen's property to forfeiture for the non-payment of taxes. We have had occasion before to note that we hold no brief with wilful, persistent and long standing tax delinquents, but at the same time, we have also observed that the "strict provisions of the Real Estate Tax Sale Law were never meant to punish taxpayers who omitted through oversight or error ... to pay their taxes." … "[T]he purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes." The collection of taxes, however, may not be implemented without due process of law that is guaranteed in the Commonwealth and federal constitutions; and this due process, as we have stated here, requires at a minimum that an owner of land be actually notified by government, if reasonably possible, before his land is forfeited by the state….

Tracy v. Chester C'ty, Tax Claim Bureau, 489 A.2d 1334, 1339 (Pa. 1985) (citations omitted; quoting *Ross Appeal*, 76 A.2d 749, 753 (Pa. 1950), and *Hess v. Westerwick*, 76 A.2d 745, 748 (Pa. 1950)).

These federal and state constitutional guarantees control here, and demonstrate that the tax sale at issue – announced, at most, only through publication (of a notice identifying another's property), even though the severances were set forth in publicly-recorded deeds – violated the "elementary and fundamental" principles of due process owed to Appellants' predecessors, *Mullane*, 339 U.S. at 314, and cannot be given effect.

B. The Fiction That Taxes Were Assessed Against the Property Itself, and That the Tax Sale Was an Action *in Rem*, Does Not Justify a More Relaxed Application of Due Process's Notice Requirement.

Nor can due process be undercut by the fiction that the taxes at issue here were assessed purely against the unseated land, and not against its owners, and that the county tax sale proceeded *in rem*.[9] To reach this conclusion, one need look no further than *Mullane,* the seminal case on the due process right to notice.

The distinction, *Mullane* observed, was not one that had any analytical soundness: "American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not required because the action was *in rem*." 339 U.S. at 312. Accordingly, *Mullane* refused to permit "the requirements of the Fourteenth Amendment" to "depend upon a classification for which the standards are so elusive and confused," and so the Court did "not rest the power of the State

[9] The concept that a proceeding *in rem* is against the property itself is ***unquestionably*** a fiction. As Justice Holmes stated more than 100 years ago, "all proceedings, like all rights, are really against persons." *Tyler v. Judges of the Court of Registration,* 55 N.E. 812, 814 (Mass. 1900). *See also Shaffer v. Heitner,* 433 U.S. 186, 212 (1977) (expressly recognizing that it is a "fiction" that "an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property"); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L.REV. 1121, 1135 (1966) ("A distinction has traditionally been drawn between jurisdiction over 'persons' and jurisdiction over 'things,' but … [the] distinction does not seem apt or particularly useful. Adjudication always involves the determination of rights and duties of persons, natural or artificial. Things have no rights or duties but are the subjects or objects of rights and duties").

to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis." *Id.* at 312-13.[10]

In the ensuing years, the Supreme Court repeatedly held governments to the same constitutional notice standard set on in *Mullane* and its progeny, even though the actions at issue were among those classically seen as actions *in rem. See, e.g.*, *Schroeder v. City of N.Y.*, 371 U.S. 208 (1962) (condemnation action); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (condemnation action); *Covey v. Town of Somers,* 351 U.S. 141 (1956) (*in rem* tax foreclosures).

Greene v. Lindsey, 456 U.S. 444 (1982), is instructive:

> Appellants argue that because a forcible entry and detainer action is an action *in rem*, notice by posting is *ipso facto* constitutionally adequate….
>
> As in *Mullane,* we decline to resolve the constitutional question based upon the determination whether the particular action is more properly characterized as one *in rem* or *in personam*…. [A]ll proceedings, like all rights, are really against persons. In this case, appellees have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes. In light of this deprivation, it will not suffice to recite that because the action is *in rem*, it is only

[10] *See also* Note, *Requirements of Notice in* In Rem *Proceedings,* 70 HARV. L.REV. 1257, 1260-61, 1263 (1957) ("Some courts have justified … minimal requirements of notice on the ground that the proceeding was an action brought against the property itself and therefore the presence of interested parties was unnecessary, even though their right to appear was acknowledged," but *Mullane* held that "these traditional procedural classifications were now so confused that they could not always in themselves provide a legitimate test of the power of the state to acquire jurisdiction."). Justice Traynor was blunter: "It is time we had done with mechanical distinctions between *in rem* and *in personam* …." Roger J. Traynor, *Is This Conflict Really Necessary?,* 37 TEX. L.REV. 657, 663 (1959).

> necessary to serve notice "upon the thing itself." The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests.

Id. at 450-51 (citations, internal quotations and footnotes omitted).

In sum, as Justice Scalia wrote in *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990), "all suits against absent nonresidents" are "on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact."

C. The Fictional "Caretaker Theory" Does Not Justify a Different Outcome.

The requirement, as a matter of due process, that owners receive proper notice of proceedings affecting their property cannot be abridged by the fiction that non-resident landowners are deemed to have caretakers looking out for their property, or by the assumption that landowners should know all laws that might affect their property (and thus should expect that their property can be seized and sold for non-payment of taxes) – the so-called "caretaker theory."[11]

As an initial matter, the "caretaker theory" is a fiction that has no empirical validity in the industrial era, of which oil and gas development was an indispensible part. As one commentator noted, "[c]aretaker theory … preserves a doctrine that owes more to a time when husbandry was a document occupation

[11] *See generally* Jonathan W. Still, Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 (1975); *see also* Joshua Siebert, Note, *Here's Your Hat, What's Your Hurry? Why "Caretaker Theory" Has Overstayed Its Welcome in Due Process Notice Jurisprudence*, 64 U. PITT. L.REV. 589 (2003).

among landholders (or, rather, their lieges), and when statutes were few and far between; it preserves a rigid framework that creates unnecessary hardships for holders of interests in property." Siebert, 64 U. PITT. L.REV. at 612-13 (2003).

This Court has also recognized, in *Luskey v. Steffron, Inc.*, 336 A.2d 298 (Pa. 1975), that the "caretaker theory" is out of step with a post-agrarian society, in holding that service by posting and local publication was insufficient to satisfy due process: "While this type of notice may have been sufficient in the time when the owners of real estate either resided on their real estate or lived in close proximity to it, such is not the situation today. In today's urban society, the owners of real estate often live far removed from the area wherein their property is situated," and the Court thus found it inappropriate "[t]o expect a record owner to visit his property periodically to check for sheriff's handbills or to read the newspaper of the district where his property is located …." *Id.* at 299.

Equally suspect is the presumption that owners who fail to pay taxes know that their property may be sold:

> The only basis for the presumption that the delinquent taxpayer knows what will happen is the general legal fiction that "everyone knows the law." In reality, this is a rather dubious assumption. Since landowners will have had prior experience with the annual assessment of taxes on their property, it is safe to assume that they will know that taxes are due each year on their land. But, since most owners pay their taxes every year, they will not have had prior experience with the tax sale system; it is doubtful that they will know the consequences of missing a tax payment….

Still, 84 YALE L.J. at 1511-12. Even more dubious is this presumption's predicate:

> [T]he argument that an owner who does not pay his taxes knows that his land will be sold assumes what should be its conclusion – that the taxes actually were not paid. Any tax sale procedure necessarily involves a determination that the taxes were in fact not paid. At least in the first instance, this is an administrative determination made by local officials, who can and do make mistakes. A determination that taxes have not been paid cannot be assumed to be correct until the owner is notified of the determination and given an opportunity to challenge it. An owner who has in fact paid his taxes will have absolutely no reason to expect his land to be sold, even if he is completely familiar with the tax sale statute.

Id. at 1513-14.

Accordingly, both the Pennsylvania and United States Supreme Courts have abandoned the "caretaker theory" in the context of tax sales or other administrative or judicial proceedings that divest citizens of their property, holding that "'[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.'" *Jones v. Flowers*, 547 U.S. 220, 232 (2006) (quoting *Mennonite*, 462 U.S. at 799). The discussion in *Jones* is instructive:

> The common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property. We have previously stated the opposite: An interested party's "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." It is at least as widely known that arrestees have the right to remain silent, and that anything they say may be used against them, but that knowledge does not excuse a police failure to provide *Miranda* warnings….
>
> ….
>
> Jones should have been more diligent with respect to his property, no question. People must pay their taxes, and the

> government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking.

Id. at 232-34 (citations and internal quotations omitted). *Accord Mennonite,* 462 U.S. at 799 ("Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated…. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.")

The only occasion on which the Supreme Court still relies on "caretaker theory" is in the context of self-executing statutes; statutes of limitation are the paradigmatic case. Property owners are deemed to be aware of the application of self-executing laws of general application that can affect their property rights. *See* Siebert, 64 U. PITT. L.REV. at 613. For example, in *Texaco, Inc. v Short,* 454 U.S. 516 (1982), an Indiana statute provided that severed oil and gas rights that had not been used twenty years would automatically revert to the surface owner, without further administrative or judicial intervention, after a two year grace period, unless the owner of the oil and gas filed a statement of claim to preserve their rights.[12] There, the Court held that individual notice that the rights

[12] Interestingly, Pennsylvania's Dormant Oil and Gas Act is diametrically opposed, making clear that "[i]t is not the purpose of this act to vest the surface owner with title to oil and gas interests that have been severed from the surface estate." Act of Jul. 11, 2006, P.L. 1134, §2, 58 P.S. §701.2.

would expire was not required as a matter of due process, *see id.* at 531-38, because "the State may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of claim," *id.* at 538.

These authorities, by their terms, do not apply here, where the forfeiture of oil and gas rights was not self-executing, but rather required the active intervention of local authorities. In situations such as this, *Texaco* and its progeny make clear that individual notice is required. For example, in *Texaco*, the Court made clear that, "before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause – including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard – must be provided." *Id.* at 534.

The *Texaco* Court analogized the situation before it to a statute of limitations, holding that the appellants' due process claim:

> has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, ***although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding.***

Id. at 536 (emphasis added).

The Court clarified the limited impact of *Texaco* on principles of due process six years later, in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), which held that creditors of an estate were entitled to individual notice

that Oklahoma's nonclaim statute had started to run. The Court distinguished *Texaco,* because "it is the 'self-executing feature' of a statute of limitations that makes *Mullane* and *Mennonite* inapposite…. The State has no role to play beyond enactment of the limitations period…. Here, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated…. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." *Id.* at 486-87.[13]

As a final observation, "caretaker theory" is especially inapplicable in cases involving tax sales of severed oil and gas rights. As noted above, there was – at a minimum – considerable doubt as to whether severed oil and gas rights even were taxable as "lands," particularly where (as here) there was no prior history of nearby oil and gas production. *See supra* §I.A. As such, reasonable holders of oil and gas rights, exercising appropriate diligence to comply with applicable laws and to safeguard their property rights, could reasonably have concluded that there was no obligation to declare severed rights for taxation, and thus no cause to remain on guard for potential tax sales.

Further, the published notices required that the property be identified only by "the township or townships in which the said tracts of land are respectively

[13] For this reason, it is simply incorrect to say (as have some attorneys representing surface owners seeking to gain title to severed oil and gas rights), that *Texaco v. Short* renders the Pennsylvania "tax washing" scheme constitutionally sufficient, even absent individual notice.

situated, the number of acres contained in each tract, and the names of the warrantees or owners thereof." Act of March 13, 1815, P.L. 177, §I, 72 P.S. §6001. Consequently, even a diligent review of the published legal notices would not necessarily have put holders of severed oil and gas rights on notice of the potential loss of their rights: they may be unaware of the identity of those owning the surface at the time, or the original warrantees, and (if the surface has been subdivided) even the number of acres at issue would not be a useful datum.

In sum, the relevant statutes – to the extent they permit tax sales of duly-recorded severed oil and gas interests after notice by publication only, *see* Act of March 13, 1815, P.L. 177, §I, 72 P.S. §6001; Act of March 9, 1847, P.L. 278, §§I-II, *as amended*, 72 P.S. §6002 – violate basic principles of due process. Accordingly, tax sales conducted under those statutes, absent efforts to ascertain and provide notice to all interested property owners, are unconstitutional and void as they respect the holders of duly-recorded severed oil and gas rights.[14]

[14] The Court of course can construe the Act of March 28, 1806 so as to avoid this constitutional infirmity, by ruling that it does not apply to oil and gas interests severed by a deed reservation or exception, *see supra* §I, applying the presumption "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 PA.C.S. §1922(3). Indeed, this Court has said that it is its "bounden duty" to "construe a statute, if at all possible, so as not to render it unconstitutional." *Petition of Stieska*, 135 A.2d 62, 65 (Pa. 1957). Here, such a construction is not only possible, but is in fact required.

III. The Superior Court's Desire for Certainty Is Both Mistaken and Misguided.

The Superior Court was fully aware of the injustice that would result from its interpretation of the consequences of historical tax sales, and thus from its decision purporting to give them broad-reaching effect: the deprivation of a party of valuable property rights, without prior notice, under circumstances that are dubious at best. The Superior Court recognized that its "resolution of this matter is at odds with modern legal concepts" and "may be seen as being unduly harsh." 93 A.3d at 473. Nonetheless, the Superior Court held its nose and upheld the validity of these questionable tax sales largely because of a desire to ensure repose: "[w]e do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done." *Id.*

The Superior Court's implicit desire for repose does not support its decision. It is simply incorrect for the Superior Court to assume – as it necessarily did – that its ruling vindicated well-settled historical understandings about the effect of tax sales on severed oil and gas rights, or that a contrary view merely reflects a "modern sensibility." *Id.* Nor is it the case that a ruling invalidating "tax washes" would cause chaos and upend thousands of long-held tenures of ownership. Further, the Superior Court's ruling will not reduce litigation: as shown by *Amici*'s experiences since the Superior Court's ruling, it merely will shift the parties' attention to other infirmities in the tax sale process, and in the specific tax sales that are the subject of ongoing challenges.

A. A Ruling Invalidating Illegal Tax Sales of Duly-Recorded Severed Oil and Gas Interests Will Not Disrupt Settled Expectations or Cause an Explosion of Title Litigation to Challenge Old Tax Sales.

First, there was no settled expectation or accepted understanding that a surface owner's default would carry with it a windfall in the form of the restoration of previously-severed oil and gas rights. On the contrary, the current contention that duly-recorded severed oil and gas estates could be divested by tax sales (for nonpayment of taxes assessed long after the severance) is a relatively-recent phenomenon.

Historically, the default of a surface owner was ***not*** seen to enable the joinder of previously-severed oil and gas rights at an ensuing tax sale. Generations of Pennsylvanians and Pennsylvania state and federal courts all took this Court at its word when it held, in *F.H. Rockwell & Co. v Warren C'ty*, 77 A. 665, 666 (Pa. 1910), that oil and gas could be considered taxable "land" only if there were some basis for discovering and valuing it, and that "[a] mere naked reservation of oil and gas … without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes."

For example, in *New York State Natural Gas Corp. v. Swan-Finch Gas Development Corp.*, 278 F.2d 577 (3d Cir. 1960), *aff'g* 173 F. Supp. 184 (W.D. Pa. 1959), the court recognized the historical understanding that *Hutchinson v. Kline*, 49 A. 312 (Pa. 1901), "is predicated upon the well established rule that a tax deed conveys only such interest as was actually assessed to the defaulting taxpayer." *Id.* at 579 (citations omitted). "Thus, it is an essential presupposition

… that the assessment in question did in fact include an evaluation of natural gas rights and a taxing of this interest." *Id.* (citing and quoting *Rockwell*).

> Thus, to justify a finding that the general mineral assessments in question were in fact assessments of natural gas it would have had to appear that there was some reason to believe at the time of the assessments in question that gas of commercial potential was present under Warrant 2001 and that it had value which could be estimated. However, the present record shows that until very recently it was the consensus of geological experts that the only gas bearing sand in the general area did not extend under Warrant 2001…. On this basis, and properly, the court below ruled that the mineral assessments in question 'were not intended to and did not include the natural gas'. In these circumstances the purchasers of mineral rights at tax sales cannot have acquired natural gas rights.

Id. at 580.

Other cases are in accord, and further demonstrate that the current view of *Hutchinson* and the Act of March 28, 1806 is a relative novelty. *See, e.g.*, *Day v. Johnson,* 31 Pa. D. & C. 3d 556, 560 (C.C.P. Warren C'ty 1983) (holding that tax sale of the surface did not convey reserved oil and gas rights, because the separate estate "was never produced and therefore never assessed or charged with taxes"; as a result, "there could be no delinquency thereof that could have been sold by the treasurer in 1934"); *New Shawmut Mining Co. v. Gordon,* 43 Pa. D. & C. 2d 477, 488-494 (C.C.P. Clearfield C'ty 1963); *Kline v. Lawrence County Comm'rs,* 84 Pa. D. & C. 1, 11 (C.C.P. Lawrence C'ty 1951) (the commissioners could only "sell … such title as the commissioners had"; because this did not "include separate estates in the minerals," and because purchaser "was put upon notice by the record of the severance of the coal," he "could not get more than the

commissioners had to sell"). *See also Meske v. Hull*, Nos. 2009-CV0117 and 2011-CV-33, slip op. at 9 (C.C.P. Sullivan C'ty, Apr. 23, 2013), *available at* http://www.naturalgasforums.com/pdf_downloads/20130423-meske-v-davidge-order-opinion.pdf.[15]

In *Amici's* experience, surface owners buying property at tax sales routinely accepted that their purchase did not convey subsurface rights. The record in this case reveals this very fact: Appellee's counsel, at the time they purchased the surface, located the reservation of oil and gas in the chain of title and included the deed provision making the conveyance subject to "all reservations and exceptions as are contained in the chain of title." (R.116a.) While this provision speaks in general terms, *Amici* are aware of many subsequent deeds given by tax sales purchasers that made explicit reference to prior reservations of oil and gas by *Amici*'s predecessors-in-title. In short, the Superior Court's ruling perverts, rather than vindicates, the ***actual*** historical understanding of tax sales.[16]

[15] Relatedly, a tax sale was understood to convey reserved or excepted oil and gas rights when the sale was the result of non-payment of taxes assessed ***prior to the reservation or exception***. *See, e.g., Proctor v. Sagamore Big Game Club*, 265 F.2d 196, 200 (3d Cir. 1959) (severance of oil and gas rights in 1894 did not affect title to property sold for non-payment of 1892 and 1893 taxes). For example, in *Proctor*, the court observed that "[i]f there had been a severance of the title of the gas from the title of the surface prior to the assessments for 1892 and 1893, and if each of the several interests had been separately assessed, a tax sale would have carried with it the title only to the particular estate as to which taxes were in default. But there had been no such prior severance." *Id.* at 199 n.4.

[16] Further, any minimal reliance interest that may be present here is fundamentally different from those involved in *Butler v. Charles Powers Estate*, 65 A.3d 885 (Pa. 2013). The rule at issue there – that oil and gas are rebuttably presumed ***not*** to be "minerals," as that term appears in a deed – was known to

(footnote continued on next page)

Nor is there any reason to believe that a ruling in favor of Appellants (and in favor of the consistent application of due process principles), holding that tax sales could not convey previously-severed oil and gas rights, would give rise to a tsunami of title litigation or call into question a large number of titles. As one often-cited commentary on the subject has observed, the application of due process principles "would not necessarily defeat all titles based on tax deeds. First, not every deed would be challenged; the owner may in fact have abandoned the property. Second, the doctrine of adverse possession would defeat challenges to most older deeds." Jonathan W. Still, Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505, 1517 (1975).

If anything, this case makes this clear: Appellee sought to claim title not only through the 1935 tax deed, but also by contending that it had obtained title through adverse possession. While that effort was unsuccessful in the trial court,

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(footnote continued from previous page)
those drafting instruments for decades, and those drafters were presumed to have incorporated that understanding while drafting contracts that were intended to reflect the parties' actual intent. *See, e.g.*, *Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1, 4 (Pa. 1991) (the Court assumes that the parties know, in drafting contracts, common-law rules of contract interpretation). Accordingly, a redefinition of the term "minerals" in existing instruments would have frustrated the parties' intent, upsetting understandings that had been "the bedrock for innumerable private, real property transactions for nearly two centuries." 65 A.3d at 897. That is not the case here. Further, *Butler* makes clear that even long-standing legal principles (unlike those advocated by Appellee) can give way when there are "compelling reasons of public policy or the imperative demands of justice." *Id.* (internal quotation omitted). As shown above, the Superior Court's rule is abhorrent to constitutional imperatives; its rejection is thus commanded by compelling reasons of public policy and the imperative demands of justice.

that was due to a failure of proof: Appellee could not show that it or its predecessors-in-title had the requisite 21 years of actual, continuous, uninterrupted possession of the oil and gas interests. *See* App'x D to Appellant's Brief.[17]

Moreover, while *Amici* are involved in a number of cases involving the alleged divestiture of severed oil and gas rights through tax sales, these cases can in no way be characterized as a deluge of litigation, particularly when considered in the context of the wave of litigation that has arisen since the explosion of shale gas development in the Commonwealth.

There is an even broader reason why a decision in favor of Appellants and *Amici* would not create great uncertainty or an avalanche of title disputes: as *Mullane* makes clear, the requirements of procedural due process depend upon whether the notice was "***reasonably*** calculated, under ***all the circumstances***, to apprise interested parties of the pendency of the action." 339 U.S. at 314 (emphasis added). In many cases, however, property owners – especially surface owners – actually would have obtained constitutionally-sufficient notice, in that their default would have naturally come to their attention. As such, they stand apart from those in *Amici*'s position: non-residents with no reason to know even

[17] As an aside, adverse possession would be a particularly potent theory if there are challenges to tax sales of surface estates. In most cases, tax sale purchasers would have engaged in a continuous and uninterrupted occupation of the surface, hostile to the owner subject to the tax sale, for well more than 21 years.

that their duly-reported severed oil and gas rights were potentially subject to tax, let alone that their property rights were being divested for non-payment.[18]

To summarize, the Superior Court's decision was predicated upon an erroneous assumption about the historical understanding of Pennsylvania property owners, and a mistaken view of the consequences of its ruling. Whatever virtues finality may have in the abstract, those virtues are simply not present here, and do not justify a ruling that tramples the constitutional rights of oil and gas owners.

B. The Superior Court's Ruling Does Not Promote Certainty, But Merely Shifts the Terrain of Battle.

Equally incorrect is the assumption that the Superior Court's ruling would in fact afford repose. In fact, even if this Court were to affirm, there still would remain significant questions about the validity and scope of individual sales. Consequently, the Superior Court's ruling merely shifts the terrain of battle: instead of an aerial assault on the overall validity of tax sales of severed oil and gas interests, litigants will engage in the litigation equivalent of "house-to-house combat" adjudicating the validity of individual sales.

For example, even if tax sales of the surface estate could theoretically convey a previously-severed, non-producing, duly-recorded oil and gas interest, there remain a number of grounds on which such a sale could be challenged.

[18] By contrast, a ruling against Appellants could well unleash a torrent of quiet title litigation, as surface owners attempt to use old tax sales to seize now-valuable oil and gas rights that they never before believed they could possess.

While an exhaustive recitation of the potential ways a tax sale could be invalidated is unnecessary, a tax sale is void if, *inter alia*:

- There is an explicit recognition of prior reservations of oil and gas in purchasers' post-tax sale deeds (which estops surface owners from contending that the intervening tax sales conveyed both the surface estate and the oil and gas estate). *See, e.g.*, *Elliott v. Moffett*, 74 A.2d 164, 167 (Pa. 1950).
- The rights were purchased by the defaulting party's agent; an agent cannot acquire its principals' property at a tax sale, unless the agent has explicitly relinquished the agency. *See, e.g.*, *Lamb v. Irwin*, 69 Pa. 436, 442 (1871); *Coxe v. Wolcott*, 27 Pa. 154, 159 (1856); *Bartholomew v. Leech*, 7 Watts 472, 473-74 (Pa. 1838).
- The deeds were not delivered or recorded. *See, e.g., City of Scranton v. O'Malley Mfg. Co.*, 19 A.2d 269, 271 (1941).
- The land was in fact seated, not unseated. *See Skinner v. McAllister*, 6 A. 120, 121 (Pa. 1886) (sale of land as unseated that was in fact seated when the assessment was made is invalid).[19]

[19] Whether land is "seated" is a question for the jury. *See, e.g., Watson v. Davidson*, 87 Pa. 270, 274 (1878). A tract will be deemed "seated" when any part of it has been improved (even by an intruder). *See, e.g., Biddle v. Noble*, 68 Pa. 279, 289-90 (1871). Further, if property is used for timbering, or if profits are otherwise drawn from the land (for example, by mining coal or ore), it is "seated." *Watson*, 87 Pa. at 274; *see also Lackawanna Iron Co. v. Fales*, 55 Pa. 90 (1867).

- The taxes had not been due and unpaid for at least one year prior to the sale, as prescribed in the relevant statute. *See* Act of March 13, 1815, P.L. 177, §I, 72 P.S. §6001; *see also Miller v. Hale,* 26 Pa. 432, 437 (1856).
- The taxes were in fact paid. *See, e.g., Reading v. Finney*, 73 Pa. 467, 472 (1873) (explaining that Pennsylvania law has "not neglected to look to the protection of the rights of the owner [of unseated lands] so that if he is not in default in the payment of the taxes on the land demanded of him, his title cannot be divested," and "[h]ence, proof of the actual payment of the tax avoids the sale" even if paid by someone other than the owner); *Ankeny v. Albright*, 20 Pa. 157, 158 (1852) (proof of payment of taxes prior to sale would invalidate the sale).
- Notice by publication (even if it were constitutionally-sufficient) was not given in accordance with the statutory requirements. *See Hess v. Westerwick,* 76 A.2d 745 (Pa. 1950); *Bethlehem-Cuba Iron Mines Co. v. Singer,* 15 Pa. D. & C.2d 68, 70 (C.C.P. Cambria C'ty 1959).[20]
- The assessments were not made in accordance with law. (For example, pursuant to the Act of May 8, 1909, P.L. 491, §3,

[20] Notice was required to be published on three consecutive weeks, at least sixty days in advance of the sale. *See* Act of March 13, 1815, P.L. 177, §I, 72 P.S. §6001; Act of March 9, 1847, P.L. 278, §§I-II, *as amended*, 72 P.S. §6002.

county commissioners were to assess properties within the county every three years, and were not permitted to make any changes to "the valuation of any real estate in any other year than that in which the triennial assessment is made, excepting [1] where buildings or other improvements have been destroyed, or [2] where coal, ore or other minerals assessed under the triennial assessment have been mined out subsequently to such triennial assessment.")

- The assessor improperly carved up tracts to mirror surface ownership, because an assessor was required "to assess and return the lands in his township in single tracts, according to their ownership" and "ha[d] no power himself to cut up the property of a single owner and return it in parcels." *Reading v. Finney*, 73 Pa. 467, 472 (1873); *see also Brown v. Hays*, 66 Pa. 229, 235 (1870).
- Several tracts were lumped together and sold at one time for one price. *See Woodburn v. Wireman*, 27 Pa. 18, 21-22 (1856).

In short, even if this Court were to affirm, there will remain a number of factual and legal issues relating to many of the tax sales that will require further proceedings, rendering the Superior Court's implicit attempt to obtain repose one that has limited usefulness at best, and which may be wholly illusory. By contrast, a ruling in favor of Appellants, holding that tax sales do not convey previously-severed oil and gas rights, would obviate the need for these sorts of proceedings.

C. In Any Event, Principles of Justice and Fairness Should Trump Concerns About Repose.

More important than any such considerations, however, is the fact that a ruling in favor of Appellants and *Amici* would "vindicate the principle that no person should be deprived of his property without adequate notice. In those cases where a challenge was brought, the result would be that the tax sale purchaser would lose his windfall, and the owner would be restored to the excess value of his property. This would not be an unjust result." Jonathan W. Still, Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505, 1517 (1975). This strongly outweighs the Superior Court's mistaken desire for repose, and the fictional supposition on which it replied (e.g., that taxes are assessed against the property itself *in rem*, and that publication is sufficient notice because a property owner is conclusively deemed to be perusing in detail the agate type at the back of rural Pennsylvania newspapers). Even the Superior Court admitted that the outcome was "unduly harsh" and "at odds with modern legal concepts." 93 A.3d at 473.

In such situations – particularly when due process is involved – the Supreme Court has not hesitated to abandon historical anachronisms that are unjust. "[T]raditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (internal quotations omitted).

This Court's precedents are in accord. For example, just last year, the Court recognized that "the doctrine of stare decisis is not a vehicle for perpetuating error," and that "precedent is not infallible and judicial honesty demands corrective action in appropriate cases." *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 352 (Pa. 2014). While "stare decisis commands judicial respect for prior decisions of this Court and the legal rules contained in those decisions," the Court's "general faithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle or which are unsuited to modern experience and which no longer adequately serve the interests of justice." *Id.* (citations and internal quotations omitted).

Put otherwise, "[w]hen precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function." *Estate of Fridenberg v. Com.*, 33 A.3d 581, 590 (Pa. 2011) (citation and internal quotations omitted). Indeed, "[c]ourts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life" and "when a rule has been duly tested by experience and found inconsistent with the sense of justice or the social welfare there should be little hesitation in frank avowal and full abandonment." *Pugh v. Holmes*, 405 A.2d 897, 904 (Pa. 1979) (citations and internal quotations omitted). *Accord Hack v. Hack*, 433 A.2d 859, 867 (Pa. 1981) ("This Court has full authority, and the corresponding duty, to examine its precedents to assure that a rule previously developed is not perpetuated

when the reason for the rule no longer exists and when application of the rule would cause injustice.")

Perhaps the most colorful discussion of not only the appropriateness, but necessity, of revisiting historical precedents is Justice Musmanno's opinion in *Flagiello v. Pennsylvania Hospital*, 208 A.2d 193 (Pa. 1965):

> Stare Decisis channels the law. It erects lighthouses and flys the signals of safety. The ships of jurisprudence must follow that well-defined channel which, over the years, has been proved to be secure and trustworthy. But it would not comport with wisdom to insist that, should shoals rise in a heretofore safe course and rocks emerge to encumber the passage, the ship should nonetheless pursue the original course, merely because it presented no hazard in the past. The principle of stare decisis does not demand that we follow precedents which shipwreck justice.
>
> Stare decisis is not an iron mold into which every utterance by a Court – regardless of circumstances, parties, economic barometer and sociological climate – must be poured, and, where, like wet concrete, it must acquire an unyielding rigidity which nothing later can change.
>
> ….
>
> The history of law through the ages records numerous inequities pronounced by courts because the society of the day sanctioned them. Reason revolts, humanity shudders, and justice recoils before much of what was done in the past under the name of law. Yet, we are urged to retain a forbidding incongruity in the law simply because it is old. That kind of reasoning would have retained prosecution for witchcraft, imprisonment for debt and hanging for minor offenses which today are hardly regarded misdemeanors.
>
> ….

> While age adds venerableness to moral principles and some physical objects, it occasionally becomes necessary, and it is not sacrilegious to do so, to scrape away the moss of the years to study closely the thing which is being accepted as authoritative, inviolable, and untouchable.

Id. at 205-06 (citations and footnote omitted).

In brief, to the extent that the Superior Court believed that its decision was constrained by prior rulings, this case begs for a "frank avowal and full abandonment," *Pugh v. Holmes,* 405 A.2d at 904. As discussed at length above, the Superior Court's ruling acted to deprive owners of oil and gas rights of their property, even though owners had no direct notice, or even reason to believe, that their rights were in jeopardy. It does so even though the statute that purportedly directed the outcome is ambiguous at best, and embodies a variety of fictions that are not supportable with logic or data. And most importantly, it produces an outcome that is frankly repugnant to the notions of fair play and substantial justice that motivate the Commonwealth's legal system, and that underpin the guarantees of due process that are required by the Pennsylvania and United States Constitutions.

IV. The Superior Court's Ruling Embodies Unconscionable Absurdities.

As a final observation, the Superior Court's construction of the governing statutes – if it were allowed to stand – would create irreconcilably absurd results. Some of these include the following:

- It would allow a party's property rights to rest upon the performance or default of a stranger. For example, if

successors-in-title to the surface cannot pay property taxes, and subsequent purchasers are able thereby to obtain title to recorded severed oil and gas rights, it penalizes owners of oil and gas for failing to take steps that they were under no legal obligation to take. (Put otherwise, how can it be appropriate for the law to require a subsurface owner to pay another's taxes, when they stand in no fiduciary relationship to each other and are not co-tenants? *See Neill v. Lacy*, 1 A. 325 (Pa. 1885).)

- It also would penalize the holders of oil and gas rights for failing to declare for assessment a property right that, under Pennsylvania precedent in effect at the time, local authorities could not legally tax. *See F.H. Rockwell & Co. v Warren C'ty*, 77 A. 665, 666 (Pa. 1910).
- It would divest owners of their rights even though the only notice they received – insufficient as it was, *see supra* §II – would not necessarily have notified them that their property was in jeopardy.

Further, *Amici*'s practical experience reveals other absurdities that would result from the Superior Court's ruling. For example, despite *Amici*'s search in courthouses and libraries throughout Pennsylvania, they have never encountered unseated land declarations. Accordingly, the Superior Court's ruling

necessarily assumes that ***no*** owners of unseated land in Pennsylvania ***ever*** declared their property, but that assessors somehow knew about the property anyway.[21]

Under these circumstances, basic principles of statutory construction militate against a broad construction of the Act of March 28, 1806, and in favor of the holding that it simply does not apply to severed oil and gas rights. *See*, *e.g.*, 1 PA.C.S. §1922(1) ("the General Assembly does not intend a result that is absurd … or unreasonable").

[21] A more reasonable conclusion is that the declaration required by the Act of March 28, 1806 was accomplished by presentation of a deed for recording.

CONCLUSION

For the foregoing reasons, this Court should VACATE the Superior Court's ruling, reinstate the trial court's judgment in Appellants' favor, and hold that tax sales of unseated land do not convey non-producing oil and gas rights that were previously severed and duly recorded unless those rights were explicitly, and properly, assessed.

Respectfully Submitted,

/s/ Paul K. Stockman

Paul K. Stockman (Pa. Id. No. 66951)
Jamie A. Edwards (Pa. Id. No. 309493)
McGuireWoods LLP
625 Liberty Avenue, 23rd Floor
Pittsburgh, Pennsylvania 15222-3142
(412) 667-6000

Counsel for All Amici Curiae

Robert L. Byer (Pa. I.D. No. 25447)
Duane Morris LLP
600 Grant Street, Suite 5010
Pittsburgh, Pennsylvania 15219-2802
(412) 497-1083

Counsel for Amicus Curiae *Trustees of the Thomas E. Proctor Heirs Trust*

March 9, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), the undersigned certifies that the foregoing Brief of *Amici Curiae* complies with the word count limitation set forth in Pennsylvania Rule of Appellate Procedure 2135 and contains 13,631 words, as calculated by Microsoft Word's word count feature.

/s/ Paul K. Stockman
Paul K. Stockman (Pa. Id. No. 66951)
Jamie A. Edwards (Pa. Id. No. 309493)
McGUIREWOODS LLP
625 Liberty Avenue, 23rd Floor
Pittsburgh, Pennsylvania 15222-3142
(412) 667-6000

Counsel for All Amici Curiae

March 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Brief of *Amici Curiae* upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121 and 122.

Via Federal Express:

Ronald L. Hicks, Jr.
David G. Oberdick
Andrew L. Noble
MEYER, UNKOVIC & SCOTT LLP
535 Smithfield Street, Suite 1300
Pittsburgh, PA 15222-2315
(412) 456-2800

David C. Mason, Esquire
200 North Front Street, Suite 201
Phillipsburg, PA 16866
(814) 342-2240

Jeffrey J. Malak, Esquire
CHARITON, SCHWAGER & MALAK
138 South Main Street
P.O. Box 910
Wilkes-Barre, PA 18703-0910
(570) 704-5715

Brian K. Marshall
MILLER, KISTLER & CAMPBELL
720 S. Atherton St., Suite 201
State College, PA 16801
(814) 234-1500

Laurinda J. Voelcker
VOELCKER LAW OFFICE
17 E. Mahoning Street
Danville, PA 17821
(570) 275-9100

/s/ Paul K. Stockman
Paul K. Stockman (Pa. Id. No. 66951)
Jamie A. Edwards (Pa. Id. No. 309493)
MCGUIREWOODS LLP
625 Liberty Avenue, 23rd Floor
Pittsburgh, Pennsylvania 15222-3142
(412) 667-6000

Counsel for Amici Curiae

March 9, 2015