IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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79 MAP 2022

RAMEZ ZIADEH, ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD,

Appellant

v.

PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, *et al.*

Appellees

Appeal from the Order of the Commonwealth Court at No. 41 M.D. 2022, entered on July 8, 2022

BRIEF OF AMICI CURIAE PENNSYLVANIA MANUFACTURERS' ASSOCIATION, INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA, PENNSYLVANIA ENERGY CONSUMER ALLIANCE, PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED

Cases **Page**

Cases **Page**

Cases **Page**

Constitution

Statutes

Rules of Court

Regulations

Other

Other **Page**

I. INTRODUCTION

It has long been the law in Pennsylvania that to constitute a valid fee, a charge imposed by an administrative agency must bear a reasonable relationship to the cost of regulation. *See, e.g., National Biscuit Co. v. City of Philadelphia*, 374 Pa. 604, 98 A.2d 182 (1953). If the charge raises revenue disproportionate in amount to the cost of regulation, then it is a tax, and under Pennsylvania's constitution only the General Assembly may levy a tax.

The Department of Environmental Protection and the Environmental Quality Board (hereinafter referred to collectively as "DEP") contend that the RGGI regulation's mandate for fossil-fuel fired generators of electricity to purchase CO_2 allowances is a fee authorized by Section 6.3(a) of the Air Pollution Control Act ("APCA"), 35 P.S. § 4006.3(a). The sale of CO_2 allowances, however, will generate almost $800 million dollars in revenue per year – more than four times the General Assembly's appropriation to DEP for the 2022-2023 fiscal year – only six percent of which will be needed to administer the RGGI program. Given this disparity between the revenue that the RGGI regulation will generate and the cost of administering the RGGI program, Judge Wojcik concluded that the Senate Intervenors and the Bowfin Petitioners have raised a substantial legal question concerning whether the RGGI regulation imposes a fee or an unlawful tax.

Judge Wojcik was right. This case presents a substantial legal question concerning whether the RGGI regulation levies an unlawful tax. Before DEP proceeds with its plan to drive fossil-fuel fired generators out of business, while at the same time collecting hundreds of millions of dollars per year to spend as it pleases; before DEP further escalates the already-increasing price of electricity for the Commonwealth's consumers; and before DEP causes Pennsylvania businesses to relocate to neighboring states not subject to RGGI, like Ohio and West Virginia, thereby undermining Pennsylvania's role as an energy-exporter, the Commonwealth Court, and ultimately this Court, should decide whether the RGGI regulation unlawfully imposes a tax.

The Pennsylvania Manufacturers' Association, Industrial Energy Consumers of Pennsylvania, the Pennsylvania Energy Consumer Alliance, the Pennsylvania Chamber of Business and Industry and the National Federation of Independent Business respectfully submit this brief as *amici curiae* in support of affirmance of the Commonwealth Court's grant of a preliminary injunction. They will argue that the Court should decide the substantial legal question of whether RGGI's mandate to purchase CO_2 allowances constitutes a fee or an unlawful tax before DEP is permitted to implement the regulation.[1]

[1] Pursuant to Pa.R.A.P. 531(b)(2), *amici* state that no party, counsel for a party, or person other than *amici*, their members or counsel authored any portion of this brief or made any monetary contribution intended to fund this brief's preparation and

II. STATEMENT OF INTEREST

Since its founding in 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for Pennsylvania manufacturing, its 540,000 employees on the plant floor, and the millions of additional jobs in supporting industries. From its headquarters in the Frederick W. Anton, III, Center across from the State Capitol Building, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs in Pennsylvania. PMA has forcefully advocated for forward-looking strategies that will ensure a secure, stable supply of market-priced energy for Pennsylvania's businesses and citizenry.

Founded in 1982, Industrial Energy Consumers of Pennsylvania ("IECPA") is an association of large, energy-intensive, trade-exposed industrial entities. Its members are "energy-intensive" because they consume large amounts of energy, which means that small changes in energy rates can lead to large increases in cost. Its members are "trade-exposed" because they cannot pass cost increases on to customers without risking the loss of those customers to global competition. As a voice for large energy consumers in Pennsylvania, IECPA has played a critical role in the restructuring of the electric and natural gas industries and supports and

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submission. *Amici* are filing this same brief in the appeal docketed to No. 80 MAP 2022.

promotes competitive energy markets and regulatory structures that facilitate consumers' use of those markets.

The Pennsylvania Energy Consumer Alliance's ("PECA") members include businesses, manufacturers, colleges and other organizations that support pro-growth energy policies in the Commonwealth in order to keep energy costs in Pennsylvania at competitive levels for large energy consumers. PECA focuses its efforts on ensuring that the leaders of Pennsylvania's government (1) understand the impact that energy and energy policy have on business, (2) prioritize the importance of energy to Pennsylvania's economy, and (3) balance legislative and regulatory initiatives to enhance opportunities for business growth in the Commonwealth.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business association in Pennsylvania. It has close to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private workforce. Members range from small companies to mid-size and large business enterprises. The PA Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and

all 50 states. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. In Pennsylvania specifically, NFIB represents nearly 13,000 small businesses, spanning virtually every sector of the Commonwealth's economy. Small businesses consistently rank energy-related costs as a significant obstacle to maintaining their operations.

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

"Appellate courts review a trial court order granting or denying a preliminary injunction for an abuse of discretion." *Marcellus Shale Coalition v. Department of Environmental Protection of the Commonwealth of Pennsylvania*, 646 Pa. 482, 500, 185 A.3d 985, 995 (2018). *See also Wolk v. The School District of Lower Merion*, 228 A.3d 595, 610 (Pa. Cmwlth. 2020), *appeal denied* 240 A.3d 108 ("Appellate review of a preliminary injunction is 'highly deferential' and is limited to determining whether the trial court abused its discretion.") (quoting *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 828 A.2d 995, 1000 (2003)).

"Under this highly deferential standard of review, an appellate court does not inquire into the merits of the controversy, but examines the record 'to determine if there were any apparently reasonable grounds for the action of the court below.'" *SEIU Healthcare Pennsylvania v. Commonwealth of Pennsylvania*, 628 Pa. 573,

583, 104 A.3d 495, 501 (2014) (quoting *Summit Towne Centre*, 573 Pa. 637, 828 A.2d at 1000). *See also Marcellus Shale Coalition*, 646 Pa. at 500, 183 A.3d at 995-996 (same) (quoting *Brayman Construction Corp. v. PennDOT*, 608 Pa. 584, 602, 13 A.3d 925, 935-36 (2011)). An appellate court will reverse an order granting a preliminary injunction ["'o]nly if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied....'" *Id.* The Court's "scope of review in preliminary injunction matters is plenary." *SEIU*, 628 Pa. at 583, n. 7, 104 A.3d at 501, n. 7.

IV. STATEMENT OF THE QUESTION INVOLVED

1. Because the revenue expected to be generated by the sale of CO_2 allowances bears no reasonable relationship to the cost of administering the RGGI program or supervising fossil-fuel fired generators of electricity, does whether the regulation's mandate to purchase CO_2 allowances constitutes an unlawful tax present a substantial legal question?

Suggested response: ***Yes.***

(Answered in the affirmative by the Commonwealth Court)

V. SUMMARY OF ARGUMENT

The Commonwealth Court correctly determined that whether the RGGI regulation's mandate to purchase CO_2 allowances constitutes a fee authorized by Section 6.3(a) of APCA or an unlawful tax presents a substantial legal question.

Amici believe that, because the revenue which the requirement to purchase CO_2 allowances will generate bears no reasonable relationship to the cost of administering the RGGI program or supervising fossil-fuel fired generators of electricity, the RGGI regulation levies an unlawful tax, designed to generate hundreds of millions of dollars of revenue each year for DEP to "invest" in yet-to-be-identified projects. Despite DEP's assertion to the contrary, Section 6.3(a) of the APCA does not authorize the assessment of this new carbon tax in the guise of a fee. Interpreting Section 6.3(a) as DEP suggests would render it unconstitutional as an unlawful delegation of legislative power.

Ultimately, electric generators required to purchase allowances will pass the cost of DEP's proposed new carbon tax on to the thousands of members of the business community represented by *amici* in the form of substantially higher electricity rates. This will irreparably harm the manufacturers and other industrial and commercial users forced to pay those higher rates with no hope of recovering their increased costs, and permanently damage the Commonwealth's competitive position by rendering it more difficult for Pennsylvania to retain existing businesses and attract new ones.

As the Commonwealth Court recognized, "[i]t would not be prudent to enforce the Rulemaking, with its attendant duties on the DEP and financial and administrative impacts on covered sources, while the challenges to the Rulemaking

raise substantial legal issues." *Ramez Ziadeh, Acting Secretary of the Department of Environmental Protection and Acting Chairperson of The Environmental Quality Board v. Pennsylvania Legislative Reference Bureau*, No. 41 M.D. 2022, slip op. at 19-20 (Cmwlth. Ct., Wojcik, J., July 8, 2022) (footnote omitted). *Amici* respectfully request the Court to affirm the Commonwealth Court's order preliminarily enjoining the implementation of the RGGI regulation.

VI. ARGUMENT

A. THE COMMONWEALTH COURT DETERMINED CORRECTLY THAT WHETHER THE RGGI REGULATION'S MANDATE TO PURCHASE CO_2 ALLOWANCES CONSTITUTES A FEE OR AN UNLAWFUL TAX PRESENTS A SUBSTANTIAL QUESTION OF LAW

"To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *SEIU*, 628 Pa. at 590-91, 104 A.3d at 506. *See also Marcellus Shale Coalition*, 646 Pa. at 499, 185 A.3d at 995 ("In the context of a motion for a preliminary injunction, only a substantial legal issue need be apparent for the moving party to prevail on the clear-right-to-relief prong."); *Wolk*, 228 A.3d at 611 (same).[2]

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[2] Additionally, "[w]here the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established." *SEIU*, 628 Pa. at 594, 104 A.3d at 508. *See also Wolk*, 228 A.3d at 611 ("Statutory violations constitute irreparable harm *per se*, which relieve[] the trial court of undertaking the balance of the harm inquiry."). This is because "when the

The Commonwealth Court determined correctly that the Senate Intervenors and the Bowfin Petitioners demonstrated a clear right to relief because whether the RGGI regulation's mandate to purchase CO_2 allowances constitutes an unlawful tax presents a substantial legal question.

1. The Requirement to Purchase Allowances Is a Tax, Not a Fee

As a condition of obtaining and maintaining a permit to operate a "CO_2 budget unit," the RGGI regulation requires a fossil-fuel fired electricity generator to purchase "one CO_2 allowance for each ton of CO_2 emitted from the budget unit each year."[3] 52 Pa.B. 2481, 25 Pa. Code § 145.306 (c)(2). This is the guts of the RGGI program. By compelling fossil-fuel fired electricity generators to make the Hobson's choice of collectively spending hundreds of millions of dollars per year on CO_2 allowances or shutting down, DEP hopes to reduce greenhouse gas emissions by forcing these generators out of business.[4]

Legislature declares particular conduct to be unlawful, it is tantamount to categorizing it as injurious to the public." *SEIU*, 628 A.3d at 596, 104 A.3d at 509. (citing *Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400, 406 52 A.2d 317, 321 (1947)).

[3] A "CO_2 budget unit" is "a unit that serves an electricity generator with a nameplate capacity equal to or greater than 25 MWe" which supplies more than 10 percent of its annual gross generation to the electric grid. 25 Pa. Code §§ 145.304(a) and 145.305(a).

[4] DEP suggests that the choice to purchase allowances is voluntary. Having to choose, however, between shuttering a valuable asset that until the adoption of the

DEP currently contends that the cost to purchase the allowances is in effect a license fee that Section 6.3(a) of APCA authorizes DEP to impose on the operators of fossil-fuel fired power plants.[5] Section 6.3(a) provides, in relevant part, that "[t]his section also authorizes the board by regulation to establish fees to support the

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RGGI regulation had been operating lawfully and profitably and spending hundreds of millions of dollars per year to purchase CO_2 allowances is really no choice at all.

[5] Perhaps reflecting the difficulty of its position, DEP's characterization of RGGI's mandate to purchase CO_2 allowances has evolved during the course of this litigation:

- In its brief filed on April 25, 2022, in opposition to the Senate Intervenors' application for preliminary injunction, DEP argued that "[t]he primary purpose of a licensing fee is to defray the cost of administering a regulatory program, whereas the primary purpose of a tax is to generate revenue unrelated to such costs. The charges associated with purchase of an emissions allowance under the RGGI Regulation, however, fall into *neither* category." (*Petitioner's Brief in Opposition to Senate Intervenor Respondents' Application for Special Relief in the Nature of a Preliminary Injunction*, p. 20) (emphasis in original).

- At the preliminary injunction hearing before the Commonwealth Court on May 10, 2022, Counsel for DEP stated that "[t]he other issue is whether this [the requirement to purchase allowances] is a tax. Your Honor, this is a license fee....You don't have to emit carbon. But under the regulation if you do emit it, you have to buy the allowance to do so. That's a license. It's a license fee." (N.T., May 10, 2022, p. 30, lines 5-6, 12-15).

- And in its post-hearing brief filed on June 6, 2022, DEP contended that "[t]he charges associated with the purchase of an emissions allowance through the RGGI auction process are fees authorized under Section 6.3(a) of the APCA, 35 P.S. § 4006.3(a), not taxes that must be enacted by the General Assembly." (*Post-Hearing Memorandum of Law of Pennsylvania Department of Environmental Protection and Environmental Quality Board in Opposition to Applications for Preliminary Injunction*, p. 19).

air pollution control program authorized by this act and not covered by fees required by section 502(b) of the Clean Air Act." 35 P.S. 4006.3(a). This Court set forth the "distinguishing features" of a license fee 70 years ago in *National Biscuit Co. v. City of Philadelphia*, 374 Pa. 604, 98 A.2d 182 (1953):

> The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

National Biscuit Co., 374 Pa. at 615-616, 98 A.2d at 188. *See also Mastrangelo v. Buckley*, 433 Pa. 352, 386, 250 A.2d 447, 464 (1969) (A license fee "must be commensurate with the expense incurred...in connection with the issuance and supervision of the license or privilege.").

As the Commonwealth Court has explained repeatedly, in order to be a valid license fee, the fee must bear some reasonable relationship to the cost of regulation; if it raises an amount of revenue disproportionate to the cost of regulation, then it is a tax:

> A license fee is distinguishable from a tax which is a revenue producing measure characterized by the production of a high proportion of income relative to the costs of collection and supervision. Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee.

Thompson v. City of Altoona Code Appeals Board, 934 A.2d 130, 133 (Pa. Cmwlth. 2007) (citations omitted). *See also, e.g., Costa v. City of Allentown*, 153 A.3d 1159, 1165 (Pa. Cmwlth. 2017), *appeal denied* 643 Pa. 108 ("[A] license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of the business.'") (quotation omitted); *Commonwealth v. Tobin*, 828 A.2d 415, 424-425 (Pa. Cmwlth. 2003), *appeal denied* 576 Pa. 726 ("An administrative fee may be charged to defray the cost of inspections. But, such a fee cannot be a revenue raising measure or it is an invalid tax.") (citations omitted); *City of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973) ("The common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.").

It does not matter whether the charge is labeled a "fee" or an "allowance." "[I]t is the nature and apparent purpose of the charge which controls its classification." *National Biscuit Co.*, 374 Pa. at 626-627, 98 A.2d at 193. *See also White v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund*, 571 A.2d 9, 11 (Pa. Cmwlth. 1990) ("The question of whether an enactment is a tax or regulatory measure is determined by the purposes for which it is enacted and not by its title.").

"[T]he crucial factor" in determining whether a particular charge "constitutes a valid regulatory fee is whether the charge is intended to cover the cost of administering a regulatory scheme or providing a service." *Rizzo v. City of Philadelphia*, 668 A.2d 236, 239 (Pa. Cmwlth. 1995). "Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee." *Talley v. Commonwealth of Pennsylvania*, 553 A.2d 518, 519 (Pa. Cmwlth 1989). *See also Greenacres Apartments, Inc. v. Bristol Township*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984) ("A license fee, of course, is a charge which is imposed...for the privilege of performing certain acts, and which is intended to defray the expense of regulation. It is to be distinguished from a tax, or revenue producing measure, which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision.").

The sale of CO_2 allowances will generate an enormous amount of revenue. DEP initially projected that, in RGGI's first year, the sale of 61 million allowances would generate approximately $198 million of income. 52 Pa.B. No. 17, p. 2509. This figure was based on an estimated price of $3.24 cents per allowance. *Id.* At the March 9, 2022, auction, however, the sale price per allowance was $13.50; at the June 1, 2022, the sale price per allowance rose to $13.90; and at the September 7,

2022, auction the sale price per allowance was $13.45.[6] To date in 2022, the average sale price per allowance has been $13.62, more than four times DEP's estimate.

Since Governor Wolf initiated the RGGI rulemaking process on October 3, 2019, the allowance price has increased by 159 percent, from $5.20 at the September 4, 2019, auction to $13.45 at the September 7, 2022, auction.[7] (Given this range of auction prices during the relevant time period, it is difficult to discern how DEP settled on a price of $3.24 per allowance for its modeling.) Using the $13.50 allowance price from the March 9, 2022, auction, the Commonwealth's Independent Fiscal Office estimated that the approximately 58 million allowances that DEP expects to sell during the first year of the program's operation would yield revenue in the amount of approximately $781 million.[8] If the $13.62 average price per allowance in 2022 is used, the revenue figure swells to $790 million.

DEP estimates that only six percent of the auction proceeds will be needed "for any programmatic costs related to administration and oversight of the CO_2

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[6] *RGGI Auction Results, Allowance Prices and Volumes*, https://www.rggi.org/Auctions/Auction-Results.

[7] *RGGI Auction Results, Allowance Prices and Volumes*, https://www.rggi.org/Auctions/Auction-Results/Prices-Volumes.

[8] (*March 29, 2002, Testimony of Matthew Knittel, Director of the Independent Fiscal Office, Before the Joint Hearing of the Senate Environmental Resources and Energy and Community, Economic and Recreational Development Committees*, community.pasenategop.com/wp-content/uploads/sites/56/2022/03/knittel-rev.pdf).

Budget Trading Program (5% for the Department and 1% for RGGI, Inc.)." 52 Pa.B. No. 17, p. 2508. This means that if the sale of allowances generates $790 million in income in the program's first year, only six percent of that amount, or $47.4 million, would be used "to defray the expense of regulation." *Greenacres*, 482 A.2d at 1359. $742.6 million would remain at DEP's disposal. To put this amount of money in perspective, it represents 1.74 percent of the Commonwealth's entire $42,765,617,000.00 budget for 2022-2023; it is more than four times the General Assembly's $183,009,000.00 appropriation to DEP for 2022-2023; and it is more than the General Assembly's 2022-2023 appropriations for DEP, the Department of Revenue ($196,824,000.00), the Department of Agriculture ($226,459,000.00) and the Department of General Services ($133,796,000.00), combined.[9]

Under the long-established case law of both this Court and the Commonwealth Court, the RGGI regulation's requirement that operators of fossil-fuel fired electric generation plants purchase CO_2 allowances cannot constitute a fee when that "fee" bears no reasonable relationship to the cost of administering the RGGI program, or, for that matter, to regulating fossil-fuel fired generators of electricity. As recognized by the Pennsylvania House and Senate Environmental

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[9] Budget.pa.gov/Publications%20and%20Reports/CommonwealthBudget/Documens/2022-23%20Enacted%20Budget/2022-23%20Enacted%20Budget%20Line%20Item%20Appropriations.pdf.

Resources and Energy Committees, 52 Pa.B. No. 17, p. 2492, the mandate to purchase CO_2 allowances is not a fee at all. It is, rather, a revenue-generating tax, designed to produce hundreds of millions of dollars of income for DEP to use as it sees fit.[10]

Because it imposes a carbon tax, the RGGI regulation is constitutionally invalid and the Commonwealth Court rightly enjoined its implementation. *See Costa*, 153 A.3d at 1165 ("[A] license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of the business.'"); *Tobin*, 828 A.2d at 424-425 ("An administrative fee may be charged to defray the cost of inspections. But, such a fee cannot be a revenue raising measure or it is an invalid tax.") (citations omitted); *Talley*, 553 A.2d at 519 ("Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee."); *Greenacres*, 482 A.2d at 1359 ("A license fee...is to be distinguished

[10] If the goal of the RGGI regulation was simply to reduce greenhouse gas emissions by fossil-fuel fired electricity generators, then it is difficult to see why DEP could not have achieved that goal by giving the allowances away, or pricing them so that they would generate only enough revenue to cover the cost of administering the program. As the number of allowances made available decreases, the generators would have little choice but to reduce their carbon emissions or risk running afoul of the regulation. Offering the allowances for sale at auction seems deliberately calculated not to reduce carbon emissions, but, rather, to raise revenue that DEP then hopes to "invest" in yet-to-be-determined programs unrelated to the regulation of fossil-fuel fired generators.

from a tax, or revenue producing measure, which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision.").[11]

DEP attempts to rely on the Commonwealth Court's decision in *White v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund*, *supra*, to support its argument that the mandate to purchase allowances constitutes a fee and not a tax. *White* does not support DEP's position.

In *White*, a Pennsylvania-licensed physician challenged an annual surcharge placed on health care providers to fund a "contingency fund" created by Section 1301.701((e) of the Health Care Services Malpractice Act, 40 P.S. § 1301.701(e)(1), to pay "awards, judgments and settlements for loss or damages" that exceeded the amount of the provider's malpractice insurance. *White*, 571 A.2d at 568-569. The Act set the surcharge at "'an amount sufficient to reimburse the fund for the payment of all claims paid and expenses incurred during the preceding calendar year and to

[11] DEP may try to rely on *California Chamber of Commerce v. State Air Resources Board*, 216 Cal.Rptr. 694 (Cal. App. 5th 2017), to argue that the carbon tax it seeks to impose is a fee and not a tax, but the cap-and-trade program at issue in *California Chamber* was promulgated pursuant to an enabling act; it included legislation directing how auction proceeds were to be spent; the program operated differently; and the case was decided under California law, the principal issue being whether the cap-and-trade program constituted a tax within the meaning of California's Proposition 13.

provide an amount necessary to maintain an additional $15,000,000.'" *White*, 571 A.2d at 569 (quoting 40 P.S. § 1301.701(e)).

Unlike RGGI's mandate to purchase CO_2 allowances, the fee at issue in *White* was established by statute, not by regulation. While the fund's director set the amount of the annual surcharge, subject to the Insurance Commissioner's approval, the Act set forth the formula for determining the fee and set forth very specifically how the funds raised were to be used. After first acknowledging that "[a] tax is characterized by the production of large income and the high proportion of income relative to the cost of collection and supervision," the *White* Court held that the surcharge was a fee and not a tax because "[i]n addition to the expense involved in administering the Fund, a part of the cost of supervision and regulation is the actual payment of claims to patients," and that, "viewed in the context of the total legislative scheme of the Act, the surcharge does meet the requirements set forth in *National Biscuit*." *White*, 571 A.2d at 571 A.2d at 573 (footnote omitted).

In contrast to the statutory scheme considered in *White*, the hundreds of millions of excess dollars which DEP expects the allowance auctions to generate annually bear no relationship to the administration of the RGGI program or the cost of supervising fossil-fuel fired generators of electricity. As noted above, only six cents out of every dollar of the carbon tax which DEP seeks to levy will be needed to pay the cost of administering the RGGI program. Section 6.3(a) contains no

guidelines for how DEP should spend the other 94 cents of every dollar generated by the "fee." DEP says it would use the revenue for "investments" in such vague categories of expenses as "energy efficiency initiatives" like "upgrading appliances and lighting, weatherizing and insulating buildings, upgrading HVAC and improving industrial processes." 52 Pa.B. No. 17, p. 2508.[12] Other types of "investments" which DEP might make include projects like "abandoned oil and gas well plugging, electric vehicle infrastructure, carbon capture, utilization and storage, combined heat and power, energy storage, repowering projects and vocational trainings, among others." *Id.* None of these expenses, however, bear any relation to the RGGI program or the regulation of fossil-fuel fired generators of electricity.

The only apparent limit on DEP's discretion to spend over $740 million of newfound money each year may be found in DEP's own regulation relating to the use of funds deposited into the Clean Air Fund. 25 Pa. Code § 143.1. But Section 143.1 really contains no limit at all, since it provides that "the full and normal range of activities of the Department shall be considered to contribute to the elimination of air pollution," and it allows money to be spent for such things as the "[p]urchase

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[12] As IECPA noted in its submission to the Independent Regulatory Review Commission ("IRRC"), Pennsylvania already has a robust energy efficiency and conservation regime, implemented by the Pennsylvania Public Utility Commission, which has cost Pennsylvania's energy consumers well over $2 billion since its inception in 2009, with over $1 billion of the expense coming from the large industrial and manufacturing community alone. (*August 10, 2021, IEPCA Submission to IRRC*, p. 5).

of contractual services and consultation from firms or individuals with air pollution or other relevant expertise," "[e]xtraordinary costs of litigation," and "the costs of a public project necessary to abate air pollution whether or not the exclusive purpose of that project is the abatement of air pollution." 25 Pa. Code 143.1(b)(3), (5) and (6).

The excess proceeds from the allowance sales will be "found money" – money that DEP alone, absent any legislative guidance, will decide how to spend. For this reason, the RGGI regulation imposes a carbon tax, not a license fee. *White* not only does not hold to the contrary, but because the fund at issue in *White* was created by the General Assembly in a duly enacted law which specifically prescribed how the fee was to be determined and how the funds raised were to be spent, *White* supports the argument that RGGI's mandate to purchase CO_2 allowances constitutes an unlawful tax.

Because RGGI's requirement to purchase allowances imposes a tax and not a fee, and Section 6.3(a) of APCA by its plain language only permits the imposition of fees, the Commonwealth Court correctly held that the Senate Intervenors and the Bowfin Petitioners applications for preliminary injunction presented a substantial legal question concerning the regulation's validity.[13]

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[13] The Commonwealth Court identified another legal question raised by the regulation, noting that "it is unclear under what authority the DEP may obtain the auction proceeds for Pennsylvania allowances purchased by non-Pennsylvania

2. Section 6.3(a) of APCA Does Not Authorize DEP to Impose a Carbon Tax Under the Guise of a Fee

Article 2, Section 1 of Pennsylvania's Constitution vests the legislative power of the Commonwealth "in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. Art. II, § 1. "[T]he power to tax is a legislative power...." *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 A.2d 168, 218, 346 A.2d 269, 294 (1975). *See also Mastrangelo*, 433 Pa. at 362-363, 250 A.2d at 452 ("The power of taxation, in all forms and of whatever nature lies solely in the General Assembly of the Commonwealth acting under the aegis of our Constitution."); *Wilson v. School District of Philadelphia*, 328 Pa. 225, 229, 195 A. 90, 94 (1937) ("The taxing power, one of the highest prerogatives, if not the highest, of the Legislature, must be exercised through representatives chosen by the people.").

While this Court has said that the General Assembly can delegate the power of taxation to municipalities, the governing bodies of which are themselves elected,

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covered sources not subject to the DEP's regulatory authority and which are not tethered to CO_2 emissions in Pennsylvania." *Ziadeh*, No. 41 M.D. 2022, slip op. at 33; *Bowfin KeyCon Holdings, LLC v. Pennsylvania Department of Environmental Protection*, No. 247 M.D. 2022, slip op. at 27 (Cmwlth. Ct., Wojcik, J., July 8, 2022). The Court recognized that Section 6.3(a) does not authorize DEP to collect funds from persons or entities outside of Pennsylvania which DEP does not regulate and over which it has no jurisdiction. This aspect of the regulation further removes it from *National Biscuit's* formulation of a license fee, because DEP cannot regulate, and will incur no expense regulating, fossil-fuel fired generators of electricity situated outside the Commonwealth.

"the determination of whether the General Assembly has granted to a municipality the power of taxation in a particular area is subject to a strict construction and the grant of such power may not be found by implication." *Mastrangelo*, 433 Pa. at 363, 250 A.2d at 453. Even assuming, *arguendo*, that the General Assembly could delegate the power to tax to an unelected administrative agency, as the Commonwealth Court noted in its Memorandum Opinion in support of its Order granting the Bowfin Petitioners' application for a preliminary injunction, "the delegation must be clearly conferred via statute and any such delegation appears absent from the APCA." *Bowfin*, No. 247 M.D. 2022, slip op. at 27. As this Court said in *Mastrangelo*, "the grant of such power may not be found by implication." *Mastrangelo*, 433 Pa. at 363, 250 A.2d at 453.

"The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty." *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 655, 161 A.3d 827, 833 (2017). Although the General Assembly may confer on another body the discretion to execute a law, the legislative power to do so "is subject to two principal limitations: (1) the basic policy choices must be made by the Legislature; and (2) the 'legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.'" *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania*, 583 Pa. 275,

333, 877 A.2d 383, 418 (2005) (quotation omitted). *See also Protz*, 639 Pa. at 656, 161 A.3d at 834 (same). "Such standards both articulate the 'basic policy choices' made by the General Assembly and serve to confine the exercise of discretion, thus guarding against its arbitrary exercise." *William Penn*, 464 Pa. at 168, 346 A.2d at 292. *See also Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 11, 331 A.2d 198 (1975) ("[W]hen the Legislature delegates policymaking discretion to administrative agencies, it must make the 'basic policy choices' which will serve as standards to guide and restrain the exercise of discretion."); *Phantom Fireworks Showroom, LLC v. Wolf*, 198 A.3d 1205, 1227 (Pa. Cmwlth. 2018) (same).

DEP has acknowledged that the General Assembly has provided DEP with no guidance or parameters concerning how to spend the hundreds of millions of dollars of revenue it stands to collect – as noted above, an amount equal to 1.74 percent of the Commonwealth's entire 2022-2023 budget and four times DEP's 2022-2023 appropriation – by stating that it "plans to develop a draft plan for public comment outlining reinvestment options separate from this final-form rulemaking." 52 Pa.B. No. 17, p. 2507. In partnership with the Delta Institute, DEP plans to develop "a set of Guiding Principles and a final strategy document that will be used to guide the Department's implementation of this final-form rulemaking, including the investment of auction proceeds in projects that benefit communities dependent on fossil-fuel fired EGU's." 52Pa.B. No. 17, p. 2491.

These judgments concerning how to use the revenue generated by a new carbon tax, however, are constitutionally mandated to be made by elected, politically-accountable legislators. Section 6.3(a) of the APCA, upon which DEP relies for its authority to mandate the purchase of CO_2 allowances, contains none of the guidelines or limits on DEP's exercise of its discretion that are required by the non-delegation doctrine. *See, e.g., West Philadelphia Achievement Charter Elementary School v. The School District of Philadelphia*, 635 Pa. 127, 140-141, 132 A.2d 957, 965-966 (2016) ("The Distress Law also lacks any mechanism to limit the SRC's actions so as to 'protect[] against administrative arbitrariness and caprice.'...This is a substantial deficiency because this Court has generally viewed the inclusion of such limitations as a necessary condition to satisfy the non-delegation rule.") (citations and quotation omitted).

This further calls into relief the substantial legal question presented by the Senate Intervenors' and the Bowfin Petitioners' applications for a preliminary injunction. Indeed, if the Court were to interpret Section 6.3(a) as DEP requests, it is difficult to see where DEP's power to tax would end. If DEP can tax the operators of fossil-fuel fired power plants that emit CO_2 into the atmosphere, then presumably DEP can tax the operators of gasoline-powered cars or lawn mowers, diesel-powered trucks, tractors or locomotives, jet airplanes or even a backyard charcoal grill. Taken to its logical limit, DEP contends that Section 6.3(a) confers upon it the power to

reshape the economy in fundamental ways through the imposition of a carbon tax. Despite DEP's assertion that the RGGI regulation "is not a policy decision of such a substantial nature that it requires legislative review," 52 Pa.B. No. 17, p. 2496, surely this is precisely the kind of basic policy choice which should be made in the first instance by our elected General Assembly.

Again, whether the RGGI regulation's mandate to purchase CO_2 allowances constitutes an unlawful tax sets forth a substantial question of law.

3. Ultimately, the Commonwealth's Consumers of Electricity Will Bear the Burden of DEP's Unlawful Carbon Tax

As DEP itself has recognized, electricity generators forced to purchase CO_2 allowances or lose their investment in their business will "most likely incorporate this compliance cost into their offer price for electricity. The price of electricity is then passed onto electric consumers." 52 Pa.B. No. 17, p. 2500. Perhaps said more plainly, RGGI will raise the price of electricity in Pennsylvania because generators will pass the cost of purchasing CO_2 allowances along to their customers.

While DEP has predicted fairly modest increases, as noted by Matthew Knittel, the Director of the Independent Fiscal Office, DEP based those predictions on its flawed assumption that the auction price per allowance would be only $3.57 in 2022. To date in 2022, the price per allowance has averaged $13.62, almost four

times what DEP anticipated.[14] Consequently, electricity prices can be expected to increase by at least approximately four times what DEP had originally estimated.

DEP's carbon tax will fall on the backs of all consumers, but will most negatively impact the manufacturers and other industrial and commercial users of large quantities of electricity represented by *amici*. IECPA estimates that due to the increase in the auction price of CO_2 allowances, the total annual increase in electricity costs in the Commonwealth, including residential, commercial and industrial users, could approach $870 million per year. This represents a projected annual increase for a large manufacturer of the kind represented by IECPA and PECA of roughly $2.7 million per year, which equates to more than 30 manufacturing jobs and 160 supporting jobs for a single large business.

For many of the manufacturers represented by PMA, energy costs are their single largest monthly expense. And NFIB has found that, for approximately 35 percent of the small businesses for which it advocates, energy costs constitute one of their top three expenditures, and concern small businesses more than cash flow, poor earnings and training and managing employees. Each year, America's small businesses, which include individual sole proprietorships, spend close to 60 billion

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[14] Community.pasenategop.com/wp-contnet/uploads/sites/56/2022/03/knittel-rev.pdf.

dollars on energy. These are not costs that can be easily passed on to consumers in a normal environment, let alone an inflationary one.

Likewise, because many of IECPA's and PECA's large industrial users are "trade-exposed," they cannot pass increased electricity costs on to their customers without risking the loss of those customers to global competitors not burdened by a carbon tax. And these "global" competitors are not limited to off-shore companies. If the Commonwealth implements RGGI, Pennsylvania's businesses will now also have to compete with companies in neighboring non-RGGI states which do not have their energy costs artificially inflated by a carbon tax. These costs also threaten to rob manufacturers and industrial users of the resources needed to incorporate clean-air and other environmentally beneficial technologies into their operations.

In short, RGGI threatens to convert Pennsylvania from a state with relatively low electricity rates compared to its neighboring states to a state with artificially high energy costs, which will directly affect the Commonwealth's ability to attract and retain businesses. As IECPA stated in its comments on the RGGI rulemaking submitted to the IRRC, "IECPA is very concerned that adoption of any proposed regulations to comply with RGGI will jeopardize the survival of manufacturing and industrial concerns in Pennsylvania." (*August 10, 2021, IEPCA Submission to IRRC*, p. 7). PECA stated in its comments to the IRRC that "as many PECA members have also heavily invested in cogeneration units and CHP systems, the Proposed

Rulemaking may have unduly punitive effects on such businesses and a chilling effect on additional investment in such systems, which provide measurable efficiency and environmental benefits to the Commonwealth." (*January 14, 2021 PECA Submission to IRRC*, p. 2).

PMA echoed these concerns in its submission to the IRRC, noting that "[a]dding on additional costs will drive manufacturing out of Pennsylvania and make it exceedingly difficult to bring new firms in; essentially making RGGI a hard cap on economic growth in the manufacturing sector....We lose the jobs, we lose the power, and we all pay more for no environmental benefit." (*August 25, 2021, PMA Submission to IRRC*, p. 3).

VII. CONCLUSION

For all of these reasons, and for the reasons set forth in the Briefs of the Senate Intervenors and the Bowfin Petitioners, this Court should affirm the Commonwealth Court's order preliminarily enjoining the implementation of the RGGI regulation.

Dated: November 28, 2022

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CERTIFICATE OF COMPLANCE WITH Pa.R.A.P. 531(b)(3)

I, Charles O. Beckley, II, certify that the foregoing brief contains 6,892 words, exclusive of the materials listed in Pa.R.A.P. 2135(b), which complies with Pa.R.A.P. 531(b)(3). This certification is based on the word count tool of the word processing system used to prepare this brief.

Dated: November 28, 2022

Charles O. Beckley, II

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the United Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 28, 2022

Charles O. Beckley, II

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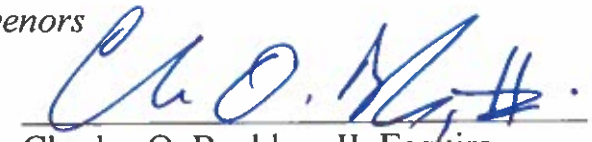

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