

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PATRICK J. McDONNELL, SECRETARY :
OF THE DEPARTMENT OF :
ENVIRONMENTAL PROTECTION :
and CHAIRPERSON OF THE :
ENVIRONMENTAL QUALITY :
BOARD, :

Petitioner, :

v. :

PENNSYLVANIA LEGISLATIVE :
REFERENCE BUREAU, VINCENT C. :
DeLIBERATO, JR., DIRECTOR OF THE :
LEGISLATIVE REFERENCE BUREAU, :
and AMY J. MENDELSON, DIRECTOR :
OF THE PENNSYLVANIA CODE and :
BULLETIN, :

No. 41 MD 2022

Respondents, :

SENATE PRESIDENT PRO TEMPORE :
JAKE CORMAN, et al., :

Senate Intervenor :
Respondents, :

HOUSE SPEAKER BRYAN CUTLER, :
et al., :

House Intervenor :
Respondents. :

BRIEF OF AMICI CURIAE
WIDENER UNIVERSITY COMMONWEALTH LAW SCHOOL
ENVIRONMENTAL LAW AND SUSTAINABILITY CENTER
AND ROBERT B. MCKINSTRY, JR.
IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Widener University Commonwealth Law School Environmental Law and Sustainability Center and Robert B. McKinstry, Jr. (“*amici*”) file this brief pursuant to Pa. R.A.P. 531, which provides that anyone interested in questions in any matter pending in an appellate court may file an *amicus curiae* brief during merits briefing.

Widener University Commonwealth Law School Environmental Law and Sustainability Center’s Director, Professor John Dernbach, has written widely on Article I, § 27 of the Pennsylvania Constitution (“Environmental Rights Amendment” or “ERA”). Professor Dernbach has authored the chapter on Section 27 for both editions of a treatise on Article I of the state constitution and helped assemble the legislative history of Article I, § 27.¹ He has also authored or coauthored numerous articles on the ERA and public trust law.² The Supreme

¹ See John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 Widener L.J. 181 (2015); see also John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Showing Source Documents*, (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660; John C. Dernbach, *Natural Resources and the Public Estate*, in *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 793 (Geo. T. Bisel Co., Ken Gormley & Joy G. McNally eds. (2d ed. 2020)).

² See, e.g., John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 Widener Commonwealth L. Rev. 147 (2021); John C. Dernbach, *The Role of Trust Law*

Court has cited Professor Dernbach's scholarship on this issue in its landmark decisions in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), and *Pa. Env. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF II*). Widener University Commonwealth Law School's Environmental Law and Sustainability Center explores these issues and other ways that the law can be used to protect land, air, and water for future generations, and helps educate the next generation of lawyers.

Robert B. McKinstry, Jr. is the principal author of an article arguing that Article I, § 27 should be applied to climate change. Robert B. McKinstry, Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 9 Mich. J. Env't'l & Admin. L 50 (2018). He also is the principal author of a 2018 petition to the Environmental Quality Board (EQB) to adopt a regulation using a cap-and-trade program to reduce Pennsylvania's greenhouse gas emissions to zero by 2050.

Amici focus this brief on the ERA. *Amici* have a specific interest in ensuring that the ERA be interpreted in a manner that vindicates the constitutional environmental rights of Pennsylvania citizens and preserves the constitutional trust protecting Pennsylvania's natural resources.

Principles in Defining Public Trust Duties for Natural Resources, 54 U. Mich. J.L. REF. 77 (2020).

In compliance with Pa. R.A.P. 531(b)(2), no other person or entity other than *amici* or their counsel paid for or authored this brief.

SUMMARY OF ARGUMENT

Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. Art. I, § 27.

This brief focuses on the Commonwealth's statutory authority, as supported by Article I, § 27, to adopt the Regional Greenhouse Gas Initiative (RGGI) Regulation being challenged here. 52 Pa. Bull. 2471 (April 23, 2022), to be codified at 25 Pa. Code 145. The application for a preliminary injunction should be denied because the regulation and Pennsylvania's participation in RGGI are not only statutorily authorized by the Pennsylvania Air Pollution Control Act (APCA) and other statutes; they are also authorized and required to satisfy the Commonwealth's obligations to the people under Article I, § 27. Pollution from greenhouse gas (GHG) emissions poses an existential threat to Pennsylvania's environment and to the wellbeing of this and future generations of Pennsylvanians. The Administration, as a trustee, is required to do what it can to prevent and minimize the adverse impacts of climate change.

The APCA and other statutes clearly authorize regulations limiting pollution. Because GHG emissions constitute pollution, these provisions

authorize emission controls of the kind effectuated by the RGGI Regulation. That authority and the authority provided by another statute to cooperate with other states in complementary air pollution control programs have been used to establish cap-and-trade programs and emission allowance auctions in the past. This authority equally supports the RGGI Regulation.

Even if the statutory authority were not clear, Article I, §27 requires that any ambiguity be resolved in favor of a regulation that promotes the Constitutional purpose. Article I, § 27 applies to climate change, and imposes numerous obligations on the Commonwealth that are fulfilled by adoption of the RGGI Regulation. Under longstanding principles of statutory construction, any doubt about the statutory authority for the RGGI Regulation should be resolved in favor of vindicating the rights of Pennsylvanians under Article I, § 27.

I. THE AIR POLLUTION CONTROL ACT AND OTHER STATUTES AUTHORIZE ADOPTION OF THE RGGI REGULATION TO CONTROL GREENHOUSE GAS (GHG) EMISSIONS.

The Pennsylvania Air Pollution Control Act (“APCA”), 35 Pa. Cons. Stat. § 4001-4015, and the Pennsylvania Uniform Interstate Air Pollution Agreements Act (“Interstate Act”), 35 Pa. Cons. Stat. §§ 4101-4105, authorize participation in an interstate auction-cap-and-trade program by way of the RGGI Regulation. The APCA authorizes the EQB to adopt air pollution regulations., 35 Pa. Cons. Stat. § 4005, and authorizes DEP to administer air regulatory programs of the kind

contained in the RGGI Regulation, *id.* § 4004. The Interstate Act authorizes interstate agreements and cooperation such as the RGGI program. 35 Pa. Cons. Stat. §4203.

A. The APCA Imposes a Duty to Regulate GHG Emissions Independent of Any Mandate Under the Federal Clean Air Act.

The APCA both authorizes EQB to adopt regulations limiting GHG emissions such as the RGGI Regulation and establishes the EQB’s duty to do so, even without considering the Commonwealth’s duty as a trustee under the ERA.

The APCA provides the EQB with the authority and creates a duty to:

Adopt rules and regulations, for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth or to such parts or regions or subregions thereof specifically designated in such regulation which shall be applicable to all air contamination sources regardless of whether such source is required to be under permit by this act.

35 Pa. Cons. Stat. § 4005(a)(1). Those rules and regulation may, among other things, “prohibit or regulate any process or source or class of processes or sources.” *Id.* The APCA further authorizes DEP to:

Prepare and develop a general comprehensive plan for the control and abatement of existing air pollution and air contamination and for the abatement, control and prevention of *any new* air pollution and air contamination . . . and to submit a comprehensive plan to the [EQB] for its consideration and approval.

Id. at § 4004(18) (emphasis added).

The APCA defines “air contaminant” to include a “gas,” which would therefore include GHGs. *See id.* § 4003 (definition of “air contaminant”). The APCA defines “air contamination” as the “presence in the outdoor atmosphere of an air contaminant which contributes to any condition of air pollution.” 35 Pa. Cons. Stat. § 4003 (definition of “air contamination”). It further defines “air pollution” as:

The presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes or any other source of any . . . gases, vapors, . . . or any other matter in such place, manner or concentration inimical or which may be inimical to the public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.

Id. § 4003 (definition of “air pollution”). Abundant evidence supports the conclusion of DEP and the EQB that GHGs constitute air pollution because they are adversely affecting “public health safety and welfare” as well as “human, plant, or animal life,” and unreasonably interfere with “the comfortable enjoyment of life or property.” This evidence includes DEP’s *Pennsylvania Climate Impacts Assessment 2021*³ and the northeast U.S. chapter in the U.S. Global Change Research Program’s Fourth National Climate Assessment.⁴ This

³ PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA CLIMATE IMPACTS ASSESSMENT 2021 (2021), <https://tinyurl.com/ysvw7ber>.

⁴ Lesley-Ann L. Dupigny-Giroux et al, *Northeast*, in U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, IMPACTS, RISKS, AND ADAPTATION IN THE UNITED

evidence is summarized in the preamble to the final RGGI Regulation. 52 Pa. Bull. at 2472-74. The evidence also includes the large number of scientific studies on which the U.S. EPA based its formal finding that carbon dioxide and other greenhouse gases “endanger both the public health and the public welfare of current and future generations.”⁵

The Pennsylvania Climate Change Act, 71 Pa. Cons. Stat. §§ 1361.1-1361.9, should be read *in pari materia* with the APCA to support the conclusion that the EQB has the authority and duty to adopt the RGGI Regulation pursuant to the APCA. *See* 1 Pa. Cons. Stat. § 1932. The Climate Change Act requires the DEP prepare a report on GHG impacts every three years and develop a climate change action plan for submission to the *Governor* identifying “cost-effective strategies for reducing and offsetting GHG emissions.”⁶ *See* 71 Pa. Cons. Stat. §§ 1361.3, 1361.7 (emphasis added). This provision would not make sense unless the APCA authorized regulation of GHGs. The fact that the plan is

STATES; FOURTH NATIONAL CLIMATE ASSESSMENT Vol. II (2018), https://nca2018.globalchange.gov/downloads/NCA4_Ch18_Northeast_Full.pdf.

⁵ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009) (codified at 40 C.F.R. ch. I). The finding was upheld in *Coalition for Responsible Regulation v. Environmental Prot. Agency*, 684 F.3d 102 (D.C. Cir. 2012), *rev'd in part on other grounds sub nom. Utility Air Regulatory Group v. Environmental Prot. Agency*, 134 S. Ct. 2427 (2014).

⁶ Although the Act also requires the Plan to recommend legislative changes, this should not be read to suggest that existing law does not authorize comprehensive regulation.

submitted to the administrative rather than the legislative branch suggests that the General Assembly contemplated that the administration could implement those strategies through rulemaking and other actions already authorized by the General Assembly. Thus, DEP has authority under existing law to regulate emissions of GHGs through adoption of regulations by EQB.⁷

Case law supports this conclusion. In *Commonwealth, Department of Environmental Resources v. Pennsylvania Power Co.*, 384 A.2d 273, 284-85 (Pa. Commw. Ct.1978) *rev'd in part on other grounds*, 426 A.2d 995 (1980), the Commonwealth Court held that the APCA authorized regulations more stringent than federal regulations. The Court held: “After careful consideration of the CAA, the APCA and the pertinent legislative histories thereto, we must agree with DER and conclude that the purpose behind the APCA and the provisions contained

⁷ The APCA’s limitations on the stringency of certain regulations do not apply to regulations limiting GHG emissions. Section 4004.2 of the APCA prohibits regulation beyond that necessary to meet the minimum requirements of the federal Clean Air Act for purposes of implementing section 109 of the Clean Air Act, which relates to “criteria pollutants” governed by National Ambient Air Quality Standards (“NAAQS”). *See* 35 Pa. Cons. Stat. § 4004.2 (2018). There is no NAAQS for GHGs.

The prohibition on establishing “a more stringent performance or emission standard for hazardous air pollutant emissions from existing sources” than federal section 112 standards, 35 PA. CONS. STAT. § 4006.6(a), does not apply because GHGs are not “hazardous air pollutants.” 42 U.S.C. § 7412(b)(1) (list of hazardous air pollutants that does not include GHGs); *see PPL Generation, LLC v. Commonwealth, Dep’t of Env’tl. Prot.*, 986 A.2d 48, 50-51 (Pa. 2009).

therein is to provide the people of this Commonwealth with air which is of a higher quality than that required by federal law.” 384 A.2d at 284.

B. DEP has the Authority to Regulate GHGs from Stationary Sources Under the Federal Clean Air Act.

The APCA provides DEP with the authority to regulate air pollution in accordance with the federal Clean Air Act., 42 U.S.C. §§ 7401-7671q. The APCA provides that DEP “shall have the power and its duty shall be to [i]mplement the provisions of the Clean Air Act in the Commonwealth.” 35 Pa. Cons. Stat. § 4004(1). The Act further provides that the EQB “[s]hall have the power and its duty shall be to [a]dopt rules and regulations to implement the provisions of the Clean Air Act,” which “shall be consistent with the requirements of the Clean Air Act and the regulations adopted thereunder.” *Id.* § 4005(a)(8). These provisions suggest that the EQB has broad authority to promulgate regulations consistent with the requirements of the Clean Air Act.

GHGs are pollutants under the Clean Air Act. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 528-530 (2007). *See also Funk v. Wolf*, 144 A.3d 228, 250, n.17 (Pa. Commw. Ct. 2016), *aff'd without opinion*, 158 A.3d 642 (Pa. 2017). DEP therefore must regulate those gases, at least to the extent set out in the federal Clean Air Act. At a minimum, this mandate requires regulation of any new or modified major stationary source emitting 75,000 tons or more of greenhouse gases if that source also emits other pollutants regulated under the

Clean Air Act. *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302 (2014) (“*UARG*”).⁸ Such emissions are subject to a case-by-case “best available control technology” determination, which DEP has the authority to make under the Clean Air Act. *Alaska Dep’t of Environmental Conservation v. EPA*, 540 U.S. 461 (2004). Thus, DEP has the authority to regulate greenhouse gas emissions for stationary sources under the Clean Air Act.

C. Participation in the RGGI Interstate Trading Program is Authorized by the Interstate Act and the APCA, and RGGI Does Not Constitute a Compact Requiring Further Legislative Authorization.

Participation in the RGGI interstate trading program is also specifically authorized by the Pennsylvania Uniform Interstate Air Pollution Agreements Act (“Interstate Act”), 35 Pa. Cons. Stat. §§ 4101-4106. The RGGI program and the RGGI Regulation have been crafted to meet the requirements of the Interstate Act such that participation in the RGGI program does not constitute a compact

⁸ In *UARG*, the U.S. Supreme Court upheld EPA regulation requiring control of greenhouse gases emitted by sources otherwise subject to Prevention of Significant Deterioration (PSD) review in quantities of at least 75,000 tons per year of carbon dioxide equivalent. *Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements*, 80 Fed. Reg. 50,199 (Aug. 19, 2015).

requiring submission to the General Assembly or approval by Congress under the Compacts Clause of the United States Constitution. U.S. Const. art. I, § 10 cl. 3.

The Interstate Act encourages DEP to coordinate and cooperate with “State and local authorities of other states affected by air sheds or regional air masses lying partly within another state or states, or moving between or among this State and another state or states.” 35 Pa. Cons. Stat. §§ 4103(a); *see also id.* § 4101 (making it the policy of Pennsylvania to encourage interstate cooperation and agreements). The APCA also authorizes DEP to cooperate with other states and interstate agencies to control and prevent air pollution, and “where appropriate formulate interstate air pollution control compacts or agreements for the submission thereof to the General Assembly.” 35 Pa. Cons. Stat. § 4004(24). These statutory authorizations, coupled with the broad authorizations in the APCA to address air pollution and to implement the federal Clean Air Act, authorize Pennsylvania to develop and participate in interstate trading arrangements, including RGGI. *See* 35 Pa. Cons. Stat. § 4103(b).

The Interstate Act establishes limits for interstate agreements, but these do not apply to RGGI. The Interstate Act prohibits DEP from delegating its enforcement authority to other states or agencies and limits appropriation authority and authority to pledge credit. 35 Pa. Cons. Stat. § 4105. These limitations do not apply to RGGI, because the RGGI program relies solely on voluntary coordination

among the participating states, where each state relies upon its own statutes and regulations and each state enforces its own requirements.

The prohibition against delegation of authority in the Interstate Act and the requirement in the APCA for submission of “compacts and agreements” to the General Assembly are directed to binding arrangements requiring Congressional consent under the Compacts Clause of the U.S. Constitution. U.S. Const. art. I, § 10 cl. 3. The RGGI program is specifically designed so as not to trigger these requirements. It is implemented through a non-binding memorandum of understanding under which each state enacts and enforces its own laws and regulations; it therefore does not require Congressional approval under the Compacts Clause or require legislative approval under the APCA. Accordingly, Pennsylvania’s voluntary participation in the RGGI program is authorized under existing law and does not require further approval by either the General Assembly or the United State Congress.

II. THE RGGI REGULATION FURTHERS THE COMMONWEALTH’S OBLIGATION TO THE PEOPLE UNDER ARTICLE I, §27 TO REDUCE GHG EMISSIONS.

A. Under Article I, § 27, the People Have a Right To a Climate That is Not Unreasonably Disrupted by GHG Pollution.

Although climate is not expressly protected under Article I, § 27 of the Pennsylvania Constitution, section 27’s language and legislative history, as well as the reasoning of *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013)

(plurality) (“*Robinson Township*”), *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (“*PEDF II*”), and *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 255 A.3d 289 (Pa. 2021) (“*PEDF IV*”), all compel the conclusion that a climate free of human disruption is protected by Article I, § 27.

1. First Clause (Right to Clean Environment)

The right to a natural climate unaffected by climate disruption is included within section 27’s first clause, which protects the people of Pennsylvania’s right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” Pa Const. art. I, § 27, cl. 1. GHG emissions interfere with the public’s right to clean air. In the preamble to the final RGGI Regulation, the EQB found that GHG emissions adversely affect air quality. 52 Pa. Bull. at 2472-74. A warming climate also will likely lead to greater water pollution, increased flooding, and sea level rise, thus compromising the people’s right to clean water. *Id.*

The *Robinson Township* plurality “recognize[d] that, as a practical matter, air and water quality have relative rather than absolute attributes.” *Robinson Twp*, 83 A.3d at 953. As is the case with most conventional water and air pollutants, carbon dioxide is a naturally occurring substance necessary for life and the maintenance of the climate, and it is only when the concentration of the pollutant

becomes too high that natural processes are disrupted. For example, when Article I, § 27 recognizes a right to “pure water,” this means water with levels of nutrients that support the normal functioning of aquatic ecosystems, and that conserve and maintain public natural resources, but not so high as to cause eutrophication.⁹ Likewise, when section 27 recognizes a right to “clean air,” it means, as applied to carbon dioxide, levels necessary to support plant life and ecosystems, among other things, but not so high as to disrupt ecosystems, as will occur in climate disruption. 52 Pa. Bull. at 2472-73. Similarly, “pure water” means water with levels of carbon dioxide that support the normal functioning of aquatic ecosystems, and that conserves and maintains public natural resources, but not so high as to acidify the water and disrupt those natural systems.

A stable climate also provides critical natural and historic values of the environment. There can be little doubt that the relatively stable climate that has persisted since the end of the last Ice Age facilitated the rise of civilization.¹⁰ As also found in the Preamble, a stable climate also prevents the increasing incidence

⁹ Nitrogen compounds and phosphorus in water are necessary for supporting the plant life that supports the aquatic ecosystem, but when levels of these substances become too high eutrophication occurs and depletes oxygen, killing aquatic organisms and disrupting aquatic ecosystems. Likewise, chromium is a heavy metal essential to life that we include in vitamin pills, but at too high a level it becomes a poison.

¹⁰See RICHARD ALLEY, *THE TWO-MILE TIME MACHINE: ICE CORES, ABRUPT CLIMATE CHANGE, AND OUR FUTURE* (Princeton Univ. Press 2000).

of vector-borne diseases and adverse effects from air pollution and protects winter recreation. 52 Pa. Bull. at 2473-74. Climate disruption will impair scenic and esthetic values of the environment by causing dramatic changes in forests and agriculture and by reducing or eliminating key species like trout.¹¹

In *In re Application of Maui Elec. Co.*, 141 P.3d. 1 (Haw. 2017), the Hawaii Supreme Court considered the application of a similar constitutional provision to a case involving a challenge by citizens to a power purchase agreement with a fossil-fuel-fired power plant. The Hawaii Constitution guarantees each person “the right to a clean and healthful environment, as defined by laws relating to environmental quality.” Haw. Const. art. XI, § 9. The Court held that the petitioners demonstrated “a threatened injury to the[ir] right to a clean and healthful environment from the effect of greenhouse gas emissions,” and thus had a right to a hearing on their claims. In other words, the right to a “clean and healthful environment” under the similar Hawaiian Constitutional environmental rights amendment includes a right to be protected against human-caused climate change.

2. *Second Clause (Public Trust)*

The right to a natural climate not unduly compromised by human-caused climate disruption is also included within the second clause’s protection of the

¹¹ *Pennsylvania Climate Impacts Assessment 2021*, *supra* note 3, at 45-48.

public’s right to the conservation and maintenance of public natural resources. The

Robinson Township plurality found:

At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.

Robinson Twp, 83 A.3d at 955; *accord PEDF II*, 161 A.3d at 931. Catastrophic climate disruption would radically impair and possibly eliminate the “wild flora, and fauna (including fish),” public forests and their ecosystems, and game and wildlife.¹²

The Court in *PEDF II* and the *Robinson Township* plurality both cite Article I, §27 ’s legislative history as supporting a broad construction of public natural resources that are made the property of all the people. The *Robinson Township* plurality noted:

[A]fter members of the General Assembly expressed disquietude that the enumeration of resources would be interpreted “to limit, rather than expand, [the] basic concept” of public natural resources, Section 27 was amended and subsequently adopted in its existing, unrestricted, form. The drafters seemingly signaled an intent that the concept of public natural resources would be flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law.

¹² Raymond B. Huey & Peter D. Ward, Hypoxia, *Global Warming and Terrestrial Late Permian Extinctions*, 308 *SCIENCE* 398 (2005); ALLEY, *supra* note 10; Rachel Warren et. al., *The Projected Effects on Insects, Vertebrates, and Plants of Limiting Global Warming to 1.5°C Rather Than 2°C*, 360 *SCIENCE* 791, 791 (May 18, 2018).

Id. (citing 1970 Pa. Legis. Journal–House at 2271–75). The Court in *PEDF II* similarly explained that the removal of the specific list and its replacement with more general language was intended to “discourage courts from limiting the scope of natural resources covered.” *PEDF II*, 161 A.3d at 931.

The climate is not a private resource. Rather, the climate represents the seasonal average ranges of temperature, precipitation and other atmospheric conditions in a particular area over a long period of time.¹³ Climate determines the nature of wild and other naturally occurring vegetation, fish and other wildlife; the amount and quality of ground and surface water; the characteristics of soils; the flow and extent of streams, rivers and wetlands; air quality; and most other characteristics of naturally occurring ecosystems and natural communities. These considerations all compel the conclusion that a stable climate, not disrupted by the types of changes caused by human emissions of GHGs in the atmosphere, should be understood as a public natural resource to which the people have a right and which the Commonwealth has a trustee’s duty to conserve and maintain.

Under Article I, § 27, the Commonwealth does not have a duty to “preserve” Pennsylvania’s climate unchanged. *Robinson Twp.*, 83 A.3d at 948. Indeed, it would be impossible for the Commonwealth to do so, given the international

13. *Climate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/climate>; TIM FLANNERY, *THE WEATHER MAKERS* 19-26 (2005).

nature of the problem and the fact that many future changes will occur because of the current levels of greenhouse gases in the atmosphere. As noted by the *Robinson Township* plurality, the constitutional provision uses the words “conserve and maintain,” rather than “preserve.” *Robinson Twp.*, 83 A.3d at 948. This means that “the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s current and future residents, with the evident goal of promoting sustainable development.” *Id.*

Public trust rights under Article I, § 27 inhere in “all the people including generations yet to come.” Pa. Const. art. I, § 27, cl. 2. The virtual certainty that effects of climate disruption will be inequitably distributed and will have greater impacts on generations yet to come¹⁴ implicates Article I, § 27 even if only some

¹⁴*See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT SUMMARY FOR POLICYMAKERS 17 (2014).

Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread and irreversible impacts globally (high confidence). Mitigation involves some level of co-benefits and of risks due to adverse side effects, but these risks do not involve the same possibility of severe, widespread and irreversible impacts as risks from climate change, increasing the benefits from near-term mitigation efforts.

Id. See also Richard L. Revesz & Matthew R. Shahabian, *Climate Change and Future Generations*, 84 S. CAL. L. REV. 1097 (2010-2011); Kevin Clarke, *How Will Climate Change Affect the Next Generation?* U.S. CATHOLIC (Oct. 2013) 39, <http://www.uscatholic.org/articles/201309/how-will-climate-change-affect-next-generation-27900>.

people are adversely affected. As the *Robinson Township* plurality explained, disparate effects are “irreconcilable with the express command that the trustee will manage the corpus of the trust for the benefit of ‘all the people.’ ” *Robinson Twp.*, 83 A.3d at 980.

B. The RGGI Regulation Furthers the Commonwealth’s Duties to Prevent or Minimize Climate Disruption.

Article I, § 27 imposes specific duties on the Commonwealth as part of its overall responsibility to prevent or minimize climate disruption. The RGGI Regulation furthers each of them.

Under the first clause, the Commonwealth may not act contrary to the people’s right to a natural climate unaffected by climate disruption; “laws of the Commonwealth that unreasonably impair the right are unconstitutional.” *Robinson Twp.*, 83 A.3d at 951; *PEDF II*, 161 A.3d at 931. The RGGI Regulation instead furthers the people right to a natural climate.

Under the second or public trust clause, the Commonwealth, including DEP, has two duties. *See Robinson Twp.*, 161 A.3d at 931 n.23 (explaining that “all agencies and entities of the Commonwealth government, both statewide and local” are trustees); *see also Commw. v. Monsanto Co.*, No. 668 M.D. 2020, 2021 Pa. Commw. LEXIS 591, at *39 (Pa. Commw. Ct. Dec. 30, 2021) (concluding that “DEP has trustee standing under the ERA”) (citing *Robinson Twp.*). The first of the trustee duties is “to prohibit the degradation, diminution, and depletion” of a

natural climate unaffected by human-caused climate disruption, whether harm to the climate results “from direct state action or from the actions of private parties.”

Id. The RGGI Regulation carries out this duty by reducing GHG emissions. The second duty is “to act affirmatively via legislative action” to conserve the natural climate and prevent undue disruption. *Id.* By adopting this regulation, the Commonwealth is acting affirmatively to reduce disruption.

As part of its public trust duties, the Commonwealth must also adhere to the “underlying principles of Pennsylvania trust law in effect at the time of its enactment.” *PEDF IV*, 255 A.3d at 289, *citing PEDF II*, 161 A.3d at 930. These include the general trust principles of prudence, loyalty, and impartiality. In adopting the RGGI Regulation, the Commonwealth is carrying out each of these.

The duty of prudence requires the exercise of “such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” *PEDF II*, 161 A.3d at 932, *citing In re Mendenhall*, 398 A.2d 951, 953 (1979) and quoting Restatement (Second) of Trusts § 174). Prudence requires good judgment and caution, particularly when trust resources are being threatened. *PEDF II*, 161 A.3d at 938. Participating in a well-established, effective program like RGGI is a prudent approach to protecting the public trust resources being adversely affected by GHG pollution.

The duty of loyalty requires the Commonwealth to manage public trust resources “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries.” *PEDF II*, 161 A.3d at 932. Loyalty requires the trustee to manage public natural resources for the trust’s beneficiaries, and not for others. The RGGI Regulation is intended to help protect the people of Pennsylvania—the beneficiaries of the trust—from the adverse effects of climate disruption.

Finally, the duty of impartiality requires the Commonwealth to manage public natural resources so as to “treat all equitably in light of the purposes of the trust.” *PEDF IV*, 255 A.3d at 311, *citing Robinson Twp.*, 83 A.3d at 959. As the Supreme Court made clear in *PEDF IV*, trustees such as DEP have a duty to consider both present and future generations at the same time. *PEDF IV*, 255 A.3d at 301 (“current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the ERA.”). Thus, a Commonwealth trustee cannot be “shortsighted,” putting the current generation ahead of future generations and must instead “consider an incredibly long timeline.” *PEDF IV*, 255 A.3d at 310 (*quoting Robinson Twp.*, 83 A.3d at 959). The RGGI Regulation is designed to protect both present and future generations—both in its requirement for reduced GHG emissions and in the distribution of proceeds from auction revenues to measures that reduce air pollution and, thus, conserve the trust corpus.

C. Article I, § 27 Both Supports and Compels Adoption of the RGGI Regulation Under the APCA.

If there is any doubt about DEP’s statutory authority to implement the RGGI Regulation, the doubt should be resolved on behalf of an interpretation that protects the rights recognized in Article I, § 27. The Commonwealth therefore has an obligation to interpret ambiguous laws in a way that furthers the people’s constitutional right to be protected against human-caused climate change.

A fundamental presumption of statutory construction is that the General Assembly does not intend to violate the state constitution. 1 Pa. Cons. Stat. § 1922(3) (“In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used. . . That the General Assembly does not intend to violate the Constitution...of this Commonwealth.”). “Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction.” *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017). More recently, the Pennsylvania Supreme Court stated, “we now prudentially apply the cannon of constitutional avoidance which instructs ‘we are bound to interpret a statute, where possible, in a way that comports with the constitution's terms.’” *Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020).

Hartford Accident & Indemnity. Co. v. Insurance Commissioner, 482 A.2d 542 (Pa. 1984), illustrates this principle. There, the Supreme Court decided that gender-based auto insurance rates were "unfairly discriminatory" under a state insurance statute. The decision was based in largely on the Equal Rights Amendment to the state constitution, providing: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. I, § 28. Because of this amendment, the court held, "the statute must be interpreted to include sex discrimination as one type of unfair discrimination." *Hartford Accident & Indem. Co.*, 542 A.2d at 549. The constitution did not merely allow the Insurance Commissioner to interpret the statute in that manner, the court reasoned; the constitution required that interpretation.

Because Article I, § 27 gives certain rights to the "people," it follows that each branch of government has a responsibility to ensure that those rights are protected. When the legislature acts in ways that result in greater protection of those rights, therefore, it is reasonable to conclude that it is fulfilling its constitutional responsibility, whether or not the legislation identifies implementation of Article I, Section 27 as one of its purposes. *See Commonwealth*

v. Parker White Metal Co., 515 A.2d 1358, 1370-71 (Pa. 1986) (describing legislative responsibility for implementation of Article I, Section 27).¹⁵

D. Regulation of GHGs by Auctioning Allowances and Investing the Proceeds in Air Pollution Reduction is Authorized by the APCA and Furthers the Commonwealth's Obligations Under Article I, § 27.

Under RGGI, allowances, each of which authorizes emission of one ton of the regulated pollutant, are auctioned and a portion of the auction revenue (or a portion of the allowances themselves) must be devoted to strategic energy purposes.¹⁶ Under Title IV of the federal Clean Air Act, 42 U.S.C. §§ 7651-7651o, which established a cap-and-trade program for sulfur dioxide emissions to reduce those emissions by 50% between 1990 and 2000, Pennsylvania employed an auction for allowances.

¹⁵ See also *Adams Sanitation Co., Inc. v. Dep't of Env'tl. Protection*, 715 A.2d 390, 394 (Pa. 1998) (rejecting interpretation of The Clean Streams Law that was not based on plain language of statute and that is inconsistent with "the legislative mandate contained in Article I, Section 27"); *National Wood Preservers, Inc. v. Dep't of Env'tl. Resources*, 414 A.2d 37, 41 (Pa. 1980) (claim that Section 316 applies only to pollution caused by mining is inconsistent with statutory language and would "frustrate the Legislature's fulfillment of its obligation" under Article I, Section 27); *Dresser Indus. v. Dep't of Env'tl. Resources*, 604 A.2d 1177, 1180 (Pa. Commw. Ct. 1992) (claim that Section 316 does not apply to the Commonwealth as landowner because it would "frustrate the Legislature's fulfillment of its obligation under Article I, section 27").

¹⁶ See Reg'1 Greenhouse Gas Initiative, *Memorandum of Understanding*, ¶ G(1) (2005) ("25% of the allowances will be allocated for a consumer benefit or strategic energy purposes"), https://www.rggi.org/sites/default/files/Uploads/Design-Archive/MOU/MOU_12_20_05.pdf.

Although the rule of prudence allows considerable discretion in managing a trust, it does not allow the trustee to give away the principal or the income with no benefit to the beneficiaries or to favor one beneficiary over the other. Thus, the state auctions timber, minerals and other renewable and non-renewable resources produced by state forests. The Supreme Court's *PEDF II* and *PEDF IV* decisions indicate that, in the case of GHGs, an auction with a reserve price is constitutionally required to allow the beneficiaries of the environmental trust recognized by Article I, § 27, to benefit from investments that further the purposes of the trust.¹⁷ In *PEDF II*, the Supreme Court held that royalty moneys received from oil and gas drilling on state lands must be spent for public trust purposes. 161 A.3d at 939. In *PEDF IV*, the Supreme Court applied the same conclusion to bonus, rental, and penalty money from oil and gas drilling on state lands. 255 A.3d at 314. Like those moneys, revenues from the auction sale of GHG allowances must be spent for public trust purposes.

Under the RGGI Regulation, DEP “will retain control over the proceeds associated with the sale of all of Pennsylvania CO₂ [carbon dioxide]

¹⁷ Unlike other air pollutants which are rapidly removed from the atmosphere, GHGs persist in the atmosphere for decades or millennia in the case of the carbon dioxide from fossil fuel combustion. Thus, someone emitting a ton of GHGs permanently consumes a portion of the corpus of the environmental trust, so that sale of GHG allowances is akin to the sale of mineral rights from state forests addressed in the *PEDF* decisions.

allowances....and will credit the proceeds to the Clean Air Fund.” 25 Pa. Code § 145.401(d). This is consistent with, and furthers, the Commonwealth’s duty as a trustee because the uses of the Clean Air Fund will further reduce GHG emissions and contribute to the preservation of the trust corpus.¹⁸ The Clean Air Fund was established in 1974. 25 Pa. Code ch. 143; 35 Pa. Cons. Stat. § 4001. The Fund is to “be administered by the department for use in the elimination of air pollution.” 35 Pa. Cons. Stat. § 4009.2(a). This, of course, is part of the Commonwealth’s duty under Article I, § 27.

E. An Auction of Permission to Pollute is Not a Tax.

The auction provision of the RGGI Regulation is not a tax that requires further legislative authorization. There is no legal right to pollute. There is no legal right to appropriate the corpus of the environmental trust for private purposes. By causing carbon dioxide pollution through combustion of fossil fuels, a polluter is appropriating a public natural resource, whose ownership is committed to the Commonwealth, including future generations. Requiring that this right be auctioned with an appropriate reserve price means that the polluter must pay for the resources, just as those who acquire other public natural resources (*e.g.*, timber, mineral resources, fish, game) must pay. Charging for the social and

¹⁸ Richard Marcil, *Allocations of Funds Under Pennsylvania’s Regional Greenhouse Gas Initiative Program* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764858.

economic costs of carbon dioxide generation will create a more efficient market for power generation that results in lower GHG emissions.

The California Court of Appeals rejected the argument that a cap-and-trade program distributing allowances by way of an auction with a reserve price was a tax. After examining the attributes of California’s GHG allowance auction, which utilizes a reserve price, the Court concluded that it operated as a sale, not a tax. *Cal. Chamber of Commerce v. State Air Res. Bd.*, 216 Cal. Rptr. 3d 694, 700 (Cal. Ct. App. 2017) (“These twin aspects of the auction system, voluntary participation and purchase of a specific thing of value, preclude a finding that the auction system has the hallmarks of a tax.”). That reasoning applies equally to the RGGI Regulation.

III. THE NEED FOR ADDITIONAL GHG REDUCTIONS BEYOND THOSE PROVIDED IN THE RGGI REGULATION DOES NOT DIMINISH THE COMMONWEALTH’S AUTHORITY AND DUTY UNDER ARTICLE I, § 27 TO PROMULGATE THE RGGI REGULATION.

The emissions reductions required under the RGGI Regulation fall short of the state’s goal of reducing greenhouse gas emissions by 80% from 2005 levels by 2050¹⁹ and the accepted international norm under the United Nations Framework

¹⁹ Pa. Exec. Order 2019-01 (Jan. 18, 2019), <https://www.governor.pa.gov/newsroom/executive-order-2019-01-commonwealth-leadership-in-addressing-climate-change-and-promoting-energy-conservation-and-sustainable-governance/>.

Convention on Climate Change of achieving carbon neutrality by mid-century.²⁰

This is not grounds for invalidating the regulation and the initial reductions it requires.

The U.S. Supreme Court, in *Massachusetts v. EPA*, rejected a virtually identical argument against Massachusetts' standing to challenge EPA's denial of a petition to establish a rule limiting GHG emissions from automobiles under the Clean Air Act:

EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. [citations omitted].

549 U.S. at 524.

The Court reasoned:

While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. [citation omitted]. Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. [footnote omitted]. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

²⁰ United Nations Climate Change, The Paris Agreement, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

549 U.S. at 525-6.

The RGGI Regulation furthers Pennsylvania's constitutional duties to prevent or minimize the adverse effects of climate disruption. Every effort in that direction counts, and many different efforts over time will be needed. The RGGI Regulation may not be sufficient by itself, but it is nonetheless essential.

CONCLUSION

For the reasons set forth herein, *amici curiae* respectfully request that this Court deny the request for a preliminary injunction and allow the RGGI Regulation to take effect, vindicating the rights of Pennsylvanians under Article I, § 27.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS

In accordance with Pa. R.A. P. 2135(d), I, John C. Dernbach, hereby certify that this brief complies with length limitation in Pa. R.A.P. 531(b)(3) in that it contains fewer than 7,000 words, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief, Microsoft Word.

CERTIFICATE OF COMPLIANCE

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

Dated: April 25, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae*, Widener University Commonwealth Law School Environmental Law and Sustainability Center and Robert B. McKinstry, Jr., was filed electronically using the PACFile system. Service will be made on the persons and in the manner set forth on the Proof of Service generated by the PACFile system, which service satisfies the requirements of Pa. R.A.P. 121. The Proof of Service generated by the PACFile system will follow this Certificate of Service in the paper copy of this brief filed with the Court.

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