Case No. 21-2315

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SENATOR GENE YAW, et al.,
Appellants,

v.

DELAWARE RIVER BASIN COMMISSION, et al.,
Appellees.

Appeal from the Opinion and Order of the United States District Court for the Eastern District of Pennsylvania dismissing action No. 2:21-cv-00119-PD

BRIEF FOR APPELLEES DELAWARE RIVERKEEPER NETWORK AND MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Because "a federal court always has jurisdiction to determine its own jurisdiction," *Brownback v. King*, 141 S. Ct. 740, 750 (2021) (quoting *United States v. Ruiz*, 536 U.S. 622, 628 (2002)), the Federal District Court for the Eastern District of Pennsylvania had jurisdiction to decide it lacked subject matter jurisdiction over Appellants' claims. Accordingly, the District Court dismissed the claims of Senators Yaw, Baker, and the Senate Republican Caucus with prejudice on June 11, 2021, (JA0007), and dismissed the claims of Damascus Township, Dyberry Township, and Wayne County with prejudice on July 2, 2021. (JA0005).

This Court has appellate jurisdiction because the District Court's Orders dismissing Appellants' claims were "final decisions." 28 U.S.C. § 1291. *See also Camezi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 244 (3d Cir. 2013) ("Generally, a dismissal with prejudice constitutes an appealable final order under § 1291).

II. STATEMENT OF ISSUES ON APPEAL

I. The United States Supreme Court has held that neither individual members of nor subparts of a state legislature has capacity to assert interests belonging to the legislature as a whole. In this case, two senators and a single caucus from a single house of a bicameral legislature allege injuries to "core

legislative functions." Did the District Court correctly decide that Senate Appellants' claimed institutional injuries do not afford them standing?

Suggested Answer: Yes.

II. Pennsylvania's Environmental Rights Amendment requires agencies and entities of the Commonwealth to act as trustees of Pennsylvania's public natural resources. Senate Appellants possess no authority to act towards the trust outside of the legislative context. Did the District Court correctly decide that Senator Yaw, Senator Baker, and the Senate Republican Caucus are not trustees within the meaning of the ERA?

Suggested Answer: Yes.

III. Appellants claim mere "interference" with their ability to exercise their constitutionally-imposed fiduciary duties with no resulting harm to the *corpus* of the trust. Appellants also claim that a potential loss of funds in a hypothetical future circumstance where fracked gas extraction could theoretically result in a financial benefit is an injury to the *corpus* of the trust. Did the District Court correctly decide that these alleged injuries fail to meet the requirements of Article III standing?

Suggested Answer: Yes.

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

In 2016, Wayne Land and Mineral Group, LLC ("WLMG"), filed a complaint in the U.S. District Court for the Middle District of Pennsylvania seeking a declaratory judgment that the Commission lacked authority to obtain project approval for its fracked gas operations

within the Delaware River watershed. *See Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm'n*, No. 3:16-cv-00897-RDM (M.D. Pa.). Appellees Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, are intervenor-defendants in that case.

Wayne Land and Mineral Group came before this Court on two occasions—first, reversing the District Court's order dismissing the case for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm'n*, 894 F.3d 509 (3d Cir. 2018); and second, vacating the District Court's denial of a motion to intervene by three Pennsylvania state senators,[1] and directing the District Court to evaluate the senators' standing to pursue their claim that the Commission lacked authority to regulate fracking in the Delaware River basin. *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm'n*, 595 F.3d 569 (3d Cir. 2020).

On remand, the putative intervenors withdrew their motion for intervention. Mot. to Withdraw, ECF No. 193, *Wayne Land & Mineral Grp.*, No. 3:16-cv-00897-RDM (M.D. Pa. July 1, 2020). The case is currently stayed by stipulation of the parties, pending the outcome of the

[1] Including Appellants Senator Gene Yaw and Senator Lisa Baker.

instant action. *See* Stip. To Stay Case, ECF No. 225, *Wayne Land & Mineral Grp.*, No. 3:16-cv-00897-RDM (M.D. Pa. May 21, 2021). Both cases challenge the Commission's authority to regulate fracking in the Basin.

IV. CONCISE STATEMENT OF THE CASE

A. Relevant Facts

The Delaware River Basin Commission ("Commission") is an agency created by an interstate compact known as the Delaware River Basin Compact ("Compact"), Pub. L. 87-328, 75 Stat. 688 (Sept. 27, 1961) (JA0319–62). The Compact was entered into in 1961 by New York, New Jersey, Pennsylvania, Delaware, and the United States of America to, among other things, "encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin" through "a joint exercise" of the "sovereign right[s] and responsibilit[ies] of the signatory parties" in the "common interests of the people of the region." Compact § 1.3, (JA0326–27).

The Compact created the Commission "as an agency and instrumentality of the governments of the respective signatory parties," *id.* § 2.1 (JA0328), who agreed to grant the Commission jurisdiction

within the limits of the Delaware River Basin ("Basin"). *Id.* § 2.7, (JA0329). The Compact was approved by the Pennsylvania General Assembly, which authorized the "chief executive" to "take such action as may be necessary and proper in his discretion to effectuate the compact." *See* Act of Jul. 7, 1961, P.L. 518, No. 268, § 3; (JA0361). One of the Commission's responsibilities is to "formulate and adopt . . . [a] comprehensive plan . . . for the immediate and long range development and uses of the water resources of the basin . . . ." Compact § 3.2, (JA0329). The Commission also has the authority to control pollution within the Basin to effectuate the comprehensive plan, *id.* Art. 5, (JA0333–34), and to review and approve any project "having a substantial effect on the water resources of the basin." *Id.* § 3.8 (JA0332).

Appellants, through this action, challenge the Commission's prohibition on high volume hydraulic fracturing within the Basin. The prohibition was achieved via a rulemaking amending the Commission's Comprehensive Plan and adopting implementing regulations. *See* Del. River Basin Comm'n, Comprehensive Plan and Special Regulations With Respect to High Volume Hydraulic Fracturing; Rules of Practice and Procedure Regarding Project Review Classifications and Fees, 86 Fed.

Reg. 20,628 (Apr. 21, 2021), (JA0222–32). The prohibition was triggered by the development of new technology that could potentially access the natural gas reserves located in the portion of the Marcellus Shale formation that falls within the Basin. In order to protect water resources within the Basin, including those designated as Special Protection Waters, the Commission's Executive Director notified all natural gas extraction project sponsors that they must apply for and obtain Commission approval prior to commencing a project. *See* Del. River Basin Comm'n, Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations Within the Drainage Area of Special Protection Waters, at 2 (May 19, 2009).

In 2010, the Commission unanimously directed Commission staff to draft proposed regulations for high volume hydraulic fracturing operations, which would then be subject to public notice and comment. Del. River Basin Comm'n, Meeting of May 5, 2010 Minutes at 4–5, https://www.nj.gov/drbc/library/documents/5-05-10_minutes.pdf.

Pending final adoption of regulations, the Commission resolved to postpose consideration of any pending natural gas projects within the Basin. *Id.* This postponement amounted to a *de facto* moratorium on

fracked gas drilling within the Basin.[2] Draft regulations were published in December 2010[3] and revised in 2011 and 2017.[4]

On February 25, 2021, after considering the administrative record created through rulemaking, the Commission concluded that high volume hydraulic fracturing and related activities "pose significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation of the water resources of the Delaware River Basin and to Special Protection Waters of the Basin" and that

> controlling future pollution by prohibiting high volume hydraulic fracturing in the Basin is required to effectuate the Commission's Comprehensive Plan, avoid injury to the waters of the Basin as contemplated by the Comprehensive Plan and protect the public health and preserve

[2] On June 14, 2010, the Commission's executive director supplemented her May 19, 2009 determination to include wells intended solely for exploratory purposes. *See* Del. River Basin Comm'n, Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities Within the Drainage Area of Special Protection Waters (June 14, 2010).

[3] Del. River Basin Comm'n, Proposed Amendments to the Water Quality Regulations, Water Code, and Comprehensive Plan to Provide for Regulation of Natural Gas Development Projects, 76 Fed. Reg. 295 (Jan. 4, 2011).

[4] Del. River Basin Comm'n, Administrative Manual and Special Regulations Regarding Natural Gas Development Activities; Additional Clarifying Amendments, 83 Fed. Reg. 1586 (Jan. 12, 2018)

> the waters of the Basin for uses in accordance with the Comprehensive Plan.

Del. River Basin Comm'n, Resolution No. 2021-01 (Feb. 25, 2021) (JA0225–26). The adoption of the prohibition replaced the Executive Director's May 19, 2009, June 14, 2010, and July 23, 2010, and the Resolution for the Minutes of May 5, 2010 expired by its own terms. (JA0226).

B. Procedural History

On January 11, 2021, Senator Gene Yaw, Senator Lisa Baker, and the Pennsylvania Senate Republican Caucus, in their official capacities and as purported trustees of the natural resources of the Commonwealth of Pennsylvania, (collectively, "Senate Plaintiffs" or "Senate Appellants"), as well as Damascus Township, in its official capacity and as trustee of the natural resources of the Commonwealth of Pennsylvania, filed an action against the Commission in the United States District Court for the Eastern District of Pennsylvania seeking a declaration that either "the Commission's moratorium on the construction and operation of wells natural gas extraction [sic] violates the terms of the [Compact]" or, if the Commission's moratorium was valid, that it "constitutes a regulatory

taking without just compensation under the Fifth Amendment to the United States Constitution." (JA0073–74).

Appellees Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, "Riverkeeper") were granted leave to intervene as defendants on February 25, 2021. (JA0188). Riverkeeper filed a motion to dismiss the complaint on March 10, 2021, on the basis that the moratorium was no longer in effect as of the adoption of the prohibition in Resolution No. 2021-01, and that Plaintiffs' claims were therefore moot, or in the alternative, that none of the plaintiffs had standing to pursue their claims. (JA0189–232). On March 19, 2021, sixteen Pennsylvania State Senators (collectively, "Senator Intervenors") were granted leave to intervene as defendants. (JA0284). Bucks County and Montgomery County were granted leave to intervene as defendants on April 20, 2021. (JA0625).

On March 31, 2021, plaintiffs, now joined by Dyberry Township, Carbon County, and Wayne County (collectively with Damascus Township, "Municipal Plaintiffs" or "Municipal Appellants"), in their official capacities and as trustees of the natural resources of the Commonwealth of Pennsylvania, filed an Amended Complaint seeking

substantially the same relief sought in the initial Complaint, but this time as applied to the Commission's prohibition on fracking. (JA0290–375).

On April 15, 2021, the Commission, (JA0558–91), Riverkeeper, (JA0414–44), and Senator Intervenors, (JA0377–413), all moved to dismiss Plaintiffs' Amended Complaint. The Motions to Dismiss argued that Plaintiffs lacked standing, and that Plaintiffs failed to state a claim upon which relief could be granted. Plaintiffs filed their opposition on April 29, 2021 (JA0662–94). Replies were filed May 13, 2021, (JA0739–81), and Plaintiffs filed a sur-reply on May 20, 2021. (JA0782–96).

Amicus Curiae briefs were filed by Widener University Commonwealth Law School Environmental Law and Sustainability Center, Citizens for Pennsylvania's Future, and Clean Air Council, (JA0593–615), Members of the Democratic Caucus of the Pennsylvania House of Representatives, (JA0626–56) and Members of the Republican Caucus of the Pennsylvania House of Representatives. (JA0695–737).

On June 11, 2021, Judge Paul S. Diamond dismissed the claims of Senate Plaintiffs with prejudice due to lack of standing and dismissed the claims of Municipal Plaintiffs without prejudice due to lack of standing,

while providing Municipal Plaintiffs an opportunity to file a Second Amended Complaint on or before July 1, 2021. (JA0007). When that date passed without Muncipal Plaintiffs having filed a Second Amended Complaint, Judge Diamond dismissed the claims of Municipal Plaintiffs with prejudice. (JA0005). On July 12, 2021, Appellants filed a Notice of Appeal in this Court. (JA0001–03).

C. Ruling Presented for Review

Appellants seek review of the District Court's June 11, 2021 Order granting all Defendants' motions to dismiss, dismissing Senate Plaintiffs' claims with prejudice, and dismissing Municipal Plaintiffs' claims without prejudice. (JA0050).

In the memorandum accompanying the Order, the District Court applied Supreme Court precedent and explained that "legislator-plaintiffs proceeding on their own behalf are without standing to allege an institutional injury" and that "[t]his same standing limitation applies to legislative constituencies, such as party caucuses." (JA0058). The court went on to analyze the Amended Complaint's allegations of harm to the Commonwealth and its citizens, concluding that "these very general allegations confer standing on no one." (JA0059–60). The remaining

injuries alleged by Senate Plaintiffs, the District Court held, were "quintessentially 'institutional injuries'" that could not afford them standing. (JA0060–61).

The District Court rejected arguments put forth by Senate Plaintiffs based on the Pennsylvania courts' prudential standing doctrine, declining to "exchange Article III authority for friendlier state standards." (JA0063–64). Again, examining state law, but in the context of the Pennsylvania Constitution's Environmental Rights Amendment ("ERA"), Pa. Const. art. I, § 27, the District Court found no supporting authority for Senate Plaintiffs' contentions that they were "trustees" within the meaning of the ERA. (JA0064–65). Even if Senate Plaintiffs were trustees, the court reasoned, alleged interference with trustee duties through government regulation did not constitute an injury-in-fact to either Senate Plaintiffs, or to the trust itself. (JA0066).

Regarding the Municipal Plaintiffs' claims, the District Court acknowledged that they were indeed trustees with obligations under the ERA but held that they suffered no injury as a result of the Commission's regulation. (JA0066). Any potential loss of funding from the Well Fund, the court reasoned, was too theoretical to meet the requirement that an

injury be actual and imminent. (JA0066–67). The District Court also held that the "numerous factors" controlling the viability of any fracking project, as well as the General Assembly's "substantial discretion" in allocating Well Fund money prevented the alleged injury from being traceable or redressable, as required by Article III. (JA0067).

Accordingly, the District Court dismissed Plaintiffs' claims for lack of standing. (JA0068).

V. SUMMARY OF ARGUMENT

Supreme Court precedent instructs that individual legislators and subparts of a legislature cannot assert an injury to an interest that is borne by the legislature as a whole, known as an institutional injury. Senate Appellants allege here an injury to their interest in exercising their legislative powers—a quintessential institutional injury. Contrary to Senate Appellants' foreboding premonitions of a "legislative standing" doctrine unmoored from Article III, the Supreme Court presents clear and applicable guidance to federal courts based in the familiar standards governing injury-in-fact.

Appellants also base their standing arguments on Pennsylvania's Environmental Rights Amendment, which creates a trust for the

purposes of conserving and maintaining Pennsylvania's public natural resources. The Commonwealth serves as trustee, which the Pennsylvania Supreme Court explains includes all agencies and entities of the Commonwealth. While Municipal Appellants are trustees, Senate Appellants are not because they have no independent trustee responsibilities separate from their role as legislators within the General Assembly, itself a trustee.

Ultimately, Appellants' misguided utilization of the Environmental Rights Amendment is most clear in their articulation of injury. Characterizing the Commission's prohibition as "interference" with their trustee duties, Appellants ask this Court to embark in uncharted waters of Pennsylvania constitutional law and sanction a new cause of action available to Commonwealth trustees. This Court should decline this venture without clear guidance from the Pennsylvania Supreme Court. Appellants' arguments concerning the Well Fund are not only speculative, but are also based on a fundamental misunderstanding of the value of the ERA trust, which is not monetary but rather measured by the degree to which the people's environmental rights are guaranteed.

VI. ARGUMENT

A. Standard of Review

This Court's review of the District Court's grant of motions to dismiss for lack of standing is plenary. *Leuthner v. Blue Cross & Blue Shield of N.E. Pa.*, 454 F.3d 120, 124 (3d Cir. 2006) (first citing *Jordan v. Fox Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994), and then citing *Miller v. Rite-Aid Corp.*, 334 F.3d 335, 340 (3d Cir. 2003)).

Standing is a constitutional prerequisite to invoking the federal courts' subject matter jurisdiction and derives from the requirement that federal courts resolve only "cases" and "controversies." U.S. Const. art. III, § 2. The parties invoking federal jurisdiction bear the burden of demonstrating that they have standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). "The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry 'often turns on the nature and source of the claim asserted.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citations omitted) (first citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); and then quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of

the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012) (quoting *Warth*, 422 U.S. at 498–99). "To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" *TransUnion*, 141 S. Ct. at 2203 (quoting Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983)).

The standing doctrine consists of three elements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). When "a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element" of standing. *Id.* (alteration in original) (quoting *Warth*, 422 U.S. at 518). In evaluating a plaintiff's standing, the court must "careful[ly] . . . examin[e] . . . a complaint's allegations to ascertain whether the particular plaintiff is entitled to an

adjudication of the particular claims asserted." *In re Schering-Plough Corp.*, 678 F.3d at 245 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

An injury-in-fact is "'the invasion of a concrete and particularized legally protected interest' resulting in harm 'that is actual or imminent, not conjectural or hypothetical.'" *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (quoting *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014)). A concrete injury is one that is "real, distinct, and palpable, as opposed to merely abstract." *Id.* (quoting *N.J. Physicians, Inc. v. President of the United States*, 653 F.3d 234, 238 (3d Cir. 2011)). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). "Plaintiffs do not allege an injury-in-fact when they rely on a 'chain of contingencies' or 'mere speculation.'" *Id.* (quoting *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 364 (3d Cir. 2014)).

To show causation, the alleged injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (quoting *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137–38 (3d Cir. 2009)). Finally, it must be likely that the alleged injury will be redressed

by a favorable decision from the court. *Id.* (quoting *Lujan*, 504 U.S. at 561).

B. Senate Appellants do not have standing to remedy alleged institutional injuries to the General Assembly as a whole.

Senate Appellants unsuccessfully attempt to evade clear and binding precedent on the issue of whether they can assert an injury in their official capacity as legislators by way of a generalized harm to the General Assembly as an institution. Senate Appellants beseech this court to apply the familiar Article III standing rubric without what they deem a "legislative standing" overlay. Rather than being based in additional prudential, separation-of-powers, or political question concerns, however, the line of cases holding that individual legislators lack standing to vindicate institutional harms is based on the familiar rule that an injury must be "concrete and particularized."

Senate Appellants fare no better in pursuing a "vote nullification" theory. Hypothetical future legislation that may conflict in some undefined way with the Commission's prohibition cannot be the basis for an argument that Senate Appellants' votes have been nullified. Instead, Senate Appellants merely describe the manner in which federal preemption operates and allege that they are injured by it.

Finally, perhaps acknowledging that Article III case law is not in their favor, Senate Appellants resort to Pennsylvania's prudential standing doctrine, which allows legislators to bring actions vindicating legislative authority based on their "special status" as legislators. This more relaxed standard, however, is not an interest created by state law that can be translated into a legally protectible interest for Article III purposes. To hold otherwise would blow a hole in the federal courts' standing doctrine and allow state court standards to supplant it.

Because Senate Appellants fail to establish an injury-in-fact, the District Court correctly concluded that they lack standing to pursue their claims in this case.

1. The injuries pled by Senate Appellants are institutional in nature and are foreclosed by Supreme Court precedent.

Senate Appellants accuse the District Court of "engrafting its own framework of a specialized set of standing rules" to deny them standing in this case. *See* Appellants' Br. at 13. To the contrary, the District Court applied Supreme Court precedent based on well-established Article III standing jurisprudence. (JA0033). Senate Appellants label this precedent as "prudential" without citing to any authority designating it as such or explaining what makes these holdings "prudential." Although many

federal court cases involving lawmaker plaintiffs have also touched on additional separation-of-powers concerns and the political question doctrine, reliance on those principles is not necessary for this Court to affirm the District Court's finding that Senate Appellants lacked standing in this case. The Supreme Court's rule against unauthorized subparts of a legislative body asserting an institutional injury belonging to the legislature as a whole is founded squarely in the familiar injury-in-fact requirement of the traditional standing analysis.

Senate Appellants argue that there are "no special standards for determining Congressional standing questions," citing to a D.C. Circuit opinion from 1977—decided well before modern Supreme Court precedent on legislative standing. In that case, *Harrington v. Bush*, a member of the United States House of Representatives sought a declaration that certain actions by the Central Intelligence Agency were illegal, and an injunction prohibiting it from using congressionally-approved funds. 553 F.2d 190, 193 (D.C. Cir. 1977). The D.C. Circuit concluded that the appellant lacked standing in his capacity as a Congressman, while noting that the source for legislative standing principles is "to be found in the opinions of the Supreme Court." *Id.* at

204. Citing to Supreme Court precedent, the *Harrington* court emphasized that "'the gist of the question of standing' is whether the party has 'alleged such a personal stake in the outcome of the controversy as to assure (the) concrete adverseness which sharpens the presentation of issues.'" *Id*. at 206 (alteration in original) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

This "personal stake" requirement has long been a part of the "requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Intern., Inc. v. Static Control Components*, 572 U.S. 118, 125 (2014) (quoting *Lujan*, 504 U.S. at 560). Consequently, when faced with a "claim of standing . . . based on a loss of political power, not loss of any private right," the Supreme Court found that certain members of Congress challenging the Line Item Veto Act did not suffer an injury sufficiently particularized or concrete to satisfy Article III. *Raines*, 521 U.S. at 821.

In its most recent decision evaluating a legislator's standing, *Virginia House of Delegates v. Bethune-Hill*, the Supreme Court considered an appeal filed by the Commonwealth of Virginia's House of Delegates (a single house of a bicameral state legislature), seeking review

of a District Court's invalidation of legislative redistricting within Virginia. 139 S. Ct. 1945, 1949–50 (2019). Because the state Attorney General had decided not to pursue an appeal, the Supreme Court was required to determine whether the House of Delegates had standing to appeal on its own. *Id*. at 1950.

The Court first held that the House of Delegates did not have standing to appeal in the State's interest "separately from the State of which it is a part" after the Attorney General decided to forego appeal. *Id*. at 1949–50. Similarly here, Senate Appellants lack standing to challenge the Commission's prohibition separately from the Commonwealth of Pennsylvania, which through its duly-authorized representative voted in favor of adopting the prohibition. (JA0393).[5] Thus, like the *Bethune-Hill* plaintiffs, Senate Appellants here have not been authorized to represent the Commonwealth's interest as a sovereign,[6] nor have they been authorized to represent the General

[5] *See also* Del. River Basin Comm'n, Meeting of Feb. 25, 2021 Minutes, at 2 (Feb. 25, 2021) https://www.state.nj.us/drbc/library/documents/2-25-21_minutes_wSig_Att.pdf (statement of Governor Tom Wolf in support of Resolution No. 2021-01).

[6] Appellants' footnote 18 in their brief before this Court describes the *Bethune-Hill* Court's analysis of state law in answering the question

Assembly's interest as a legislative body, as evidenced by the competing filings in the District Court among different Pennsylvania legislators and caucuses. (JA0233–67), (JA0377–413), (JA0626–56).

Senate Appellants instead adopt the alternative theory presented in *Bethune-Hill*—that they have standing in their own right via the "depriv[ation] of their lawmaking authority" and the hypothetical nullification of "any legislation, now or in the future on this subject."[7] Appellants' Br. at 42. This claim runs headlong into the Supreme Court's holding and fails: "Just as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Bethune-Hill*, 139 S. Ct. at 1953–54 (citation omitted) (citing *Raines*, 521 U.S. at 829).

The power to make laws, or legislate, is a power vested in Pennsylvania's General Assembly. *See* Pa. Const. art. II, § 1. *See also id.* art. I, §§ 10, 12 (powers of eminent domain and suspending laws). Thus,

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whether the plaintiffs in that case could represent the state's interests—*not* the question of whether the plaintiffs had standing to vindicate their own interests *qua* legislators independent from the state or its legislative body.

[7] "This subject" is not identified or defined in Senate Appellants brief.

as made clear in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, an "institutional plaintiff," such as the entirety of a state legislature, may "assert[] an institutional injury," but where that injury necessarily impacts all members of a legislature equally, individual members thereof do not have a "personal stake" sufficient to support standing. 576 U.S. 787, 802 (2015) (citing *Raines*, 521 U.S. at 821, 829, 830). The *Bethune-Hill* court, contrasting the facts before it with those in *Arizona*, reaffirmed that subparts of a legislature—in that case, one house of a bicameral legislature—lacked standing to assert "interests belonging to the legislature as a whole." *Bethune Hill*, 139 S. Ct. at 1953–54. Once again, this rule is not based on any additional prudential concerns, separation-of-powers concerns, or the political question doctrine, but rather the injury-in-fact element of Article III's case-or-controversy requirement. Accordingly, Senator Yaw, Senator Baker, and the Senate Republican Caucus, as individual legislators and subparts of the General Assembly, cannot assert injury to an interest belonging to the General Assembly as a whole.

2. Senate Appellants fail to establish injury under the "vote nullification" theory.

Senate Appellants continue to muddy clear principles of standing, essentially arguing that *Bethune-Hill's* holding regarding institutional injury is rendered valueless by its subsequent discussion of the vote nullification theory. Appellants' Br. at 18–19. Senate Appellants offer no support beyond mere speculation (running counter to a straightforward reading of *Bethune-Hill*) that the case would have been decided differently had plaintiffs successfully pled a permanent deprivation of a legislative power. Instead, plaintiffs in that case would still be unable to overcome the stumbling block of attempting to assert an institutional injury, regardless of whether the injury was a permanent deprivation of legislative power. *See Bethune-Hill*, 139 S. Ct. at 1953–54 (citing *Raines*, 521 U.S. at 829).

Reading *Bethune-Hill* and *Arizona* together, both stand for the proposition that individual legislators and subparts of legislatures do not have standing to assert injury to the legislature as a whole, *and* in order to prevail on an institutional vote nullification theory, institutional plaintiffs (not individual plaintiffs or caucuses) would need to establish permanent deprivation of the institution's ability to carry out a power it

once held (such as redistricting). Senate Appellants here do not represent the General Assembly as a whole, and thus cannot vindicate the alleged injuries to the General Assembly's lawmaking, law suspending, and eminent domain powers.

Even if Senate Appellants were authorized to represent the interests of the General Assembly as a whole, the powers identified are not nullified by the Commission's regulations, but rather may continue to be exercised by the General Assembly subject to the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2. *See also Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 627 n.8 (2013) ("[A] congressionally approved compact, as a federal law, pre-empts any state law that conflict with the Compact."). In essence, Senate Appellants' simple recognition of federal preemption is not a "concrete and particularized" injury, but rather a "generalized grievance[] about the conduct of government or the allocation of power in the Federal System." *Valley Forge Christian College v. Ams. United for Separation of Church*

& State, 454 U.S. 464, 479 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).[8]

Senate Appellants get no help from *Arizona*, which not only emphasized that institutions are the proper parties to seek redress for institutional injury, but also identified a specific legislative action that would be completely nullified—the act of redistricting. 576 U.S. at 800–04. Here, Senate Appellants merely reference a nebulous category of legislative acts—those that would conflict with the Commissions' regulations. *See* Appellants' Br. at 48–49. This tautological acknowledgment of federal preemption does not satisfy the requirement that an injury be "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual and imminent, not conjectural

[8] The *Lexmark* Court specifically recognized that the federal courts' "reluctance to entertain generalized grievances—*i.e.*, suits 'claiming only harm to the plaintiff's and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large'"—is not a principle of so-called "prudential" standing, but rather generalized grievances are "barred for constitutional reasons." *Lexmark*, 572 U.S. at 127 n.3 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992)) (cleaned up).

or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting Lujan, 504 U.S. at 560).

Nor does the Supreme Court's 1939 decision in *Coleman v. Miller*, 307 U.S. 433 (1939), call *Raines* or *Bethune-Hill* into question. In *Coleman*, senators from the State of Kansas filed a mandamus in the Supreme Court of Kansas challenging the adoption of a resolution ratifying a proposed amendment to the United States Constitution pursuant to Article V, which had passed in the Kansas Senate by a vote of twenty-one to twenty. *Id.* at 435–36. The twenty-first vote had been cast by the Lieutenant Governor, who was the presiding officer of the Senate. *Id.* at 436. All twenty senators who had voted against the resolution participated in the challenge to the Lieutenant Governor's right to cast the tie-breaking vote. *Id.* The Supreme Court held that the senators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes," which, but for the Lieutenant Governor's action, "would have been sufficient to defeat ratification." *Id.* at 438.

As the *Raines* Court explained:

> our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that

> legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

521 U.S. at 823. Appellants in *Raines* urged that the "effectiveness" of their votes in future appropriations bills would be compromised by the Line Item Veto Act, much like Senate Appellants here urge that their lawmaking authority is compromised as it pertains to some future hypothetical legislative enactment contrary to the Commission's regulation. *See id.* at 825. The Supreme Court rejected this formulation as "pull[ing] *Coleman* too far from its moorings" and failing to appreciate the "vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here." *Id.* at 825–26. Similarly, this Court should reject Senate Appellants' arguments concerning potential future conflict between state legislation and the Commission's prohibition as an abstract dilution of institutional power insufficient to satisfy Article III.

3. Senate Appellants cannot rely on Pennsylvania's prudential standing doctrine to create a "state interest" that can be vindicated in federal court.

The *Bethune-Hill* Court did not, as Appellants urge this Court to do, examine state standing jurisprudence before concluding that a

subpart of the Virginia legislature "lacks capacity to assert interest belonging to the legislature as a whole." 139 S. Ct. at 1953–54 (citing *Raines*, 521 U.S. at 829). Instead, the Court examined cases interpreting Article III. *See, e.g. Raines*, 521 U.S. at 829, *Arizona*, 576 U.S. at 787, *Coleman*, 307 U.S. at 433.

The cases cited by Appellants in support of their "legally protected interest in forestalling the usurpation of the state's lawmaking power," Appellants' Br. at 42, each identify that interest after an examination of legislative standing doctrine in Pennsylvania courts, not, as Appellants suggest, directly interpreting the provisions of the Pennsylvania Constitution vesting legislative powers in the General Assembly. *See, e.g., Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009) ("In Pennsylvania, the requirement of standing is prudential in nature."); *Scarnati v. Wolf*, 135 A.3d 200, 210 (Pa. Commw. Ct. 2015), *rev'd on other grounds*, 173 A.3d 1110 (Pa. 2017) (applying Pennsylvania state standing jurisprudence); *Allegheny Reproductive Health Ctr. v. Pa. Dept. of Human Servs.*, 225 A.3d 902, 911 (Pa. Commw. Ct. 2020) (applying Pennsylvania legislative standing jurisprudence in determining whether putative intervenor met standard in Pa.R.C.P. 2327(4)).

Senate Appellants repeatedly attempt to collapse the distinct questions of whether they have identified an interest created by state law and whether that interest is sufficient to confer standing in court, in what the District Court recognized as "little more than a legalistic sleight of hand." (JA0062). They argue that, because Pennsylvania courts recognize the interest in applying state prudential standing principles, that judicial recognition in and of itself is the "state law" that created the interest. According to Senate Appellants' analysis, any interest recognized under Pennsylvania courts' prudential standing doctrine is by default sufficient to establish standing in federal court because it is an "interest created by state law." This formula is untenable, as it erases federal court precedent interpreting Article III and replaces it wholesale with the Pennsylvania courts' doctrine of standing.

Senate Appellants raise the specter of possible "distortion" of legislative standing jurisprudence, describing a scenario in which the District Court's decision may be read as eliminating the possibility that a state legislator may assert *any* injury in their official capacity. Senate Appellants cite to the Tenth Circuit's opinion in *Kerr v. Hickenlooper*,

wherein the court compared *Coleman*, *Powell v. McCormack*,[9] *Raines*, and *Arizona*, and reached the reasonable conclusion that while *Coleman* and *Powell* acknowledged that legislators may suffer an injury in their official (as opposed to personal) capacity, *Raines* and *Arizona* stood for the proposition that where all members of a legislature are equally impacted by a harm, that harm is an "institutional injury" that cannot be vindicated by individual legislators. *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–16 (10th Cir. 2016).

Again, urging this Court to abandon decades of Supreme Court precedent on the issue, Senate Appellants refer to *dicta* in a footnote of the D.C. Circuit's 1977 decision in *Harrington*. *See* 553 F.2d at 199 n.41. In that footnote, the court describes an alleged "institutional injury" as "an indirect or derivative argument in which the harm is traced through from the institution to the individual member," *id*., based in part on its own decision in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), a case cited disapprovingly by the *Raines* Court. 521 U.S. at 820 n.4. In short, this Court should not adopt as Article III law *dicta* based on

[9] 395 U.S. 486 (1969). The Supreme Court in *Powell* heard a claim from a duly-elected candidate for the United States House of Representatives challenging his exclusion from that body on constitutional grounds.

precedent from another circuit that has been expressly rejected by the Supreme Court.

C. Senate Appellants are not trustees within the meaning of Pennsylvania's ERA.

Senate Appellants purport to bring their action in their capacity as trustees of the natural resources of the Commonwealth of Pennsylvania. (JA0290). However, neither Senator Yaw, Senator Baker, nor the Senate Republican Caucus are trustees under Pennsylvania's ERA. Pennsylvania's Constitution is one of the very few state constitutions in the nation that recognizes the integral role that the environment plays in the preservation of individual rights. *See* Pa. Const. art. I, § 27. Within Article I, which reserves certain powers to the people, "everything . . . is excepted out of the general powers of government and shall forever remain inviolate." *Id*. § 25. Pennsylvania's ERA 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.

Id. § 27. The first clause of the provision is "a prohibitory clause . . . [that] places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional." *Pa. Envtl. Def. Found. v. Commw.* (*PEDF II*), 161 A.3d 911, 931 (Pa. 2017) (citing *Robinson Twp. v. Commw.*, 83 A.3d 901, 951 (Pa. 2013) (plurality)). The second clause recognizes a right to "common ownership by the people, including future generations, of Pennsylvania's public natural resources." *Id.* The third clause, relevant here, "establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries." *Id.* at 931–32 (citing *Robinson Twp.*, 83 A.3d at 955–56).

In the legislative history associated with the ERA, a statement from then-Representative Franklin L. Kury explained that "the amendment declares and places the responsibility for preserving Pennsylvania's environment where the responsibility basically belongs—on state government." John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, Remarks, June 2, 1969, H. Journal pp. 721–25, Rep.

Kury (available at http://ssrn.com/abstract=2474660). The Pennsylvania Supreme Court has, in turn, made clear that "trustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality." *PEDF II*, 161 A.3d at 931 n.23.

These duties, however, did not fundamentally change the structure of Pennsylvania's government, but rather serve as an enforceable guidepost in the functioning of state government. "The plain intent of the provision is to permit the checks and balances of government to operate *in their usual fashion* for the benefit of the people in order to accomplish the purposes of the trust." *Robinson Twp.*, 83 A.3d at 956 (plurality) (emphasis added).

Senate Appellants brought this action "as trustees of the natural resources of the Commonwealth of Pennsylvania," (JA0290), alleging that they "cannot allow the Trust's corpus to be managed in a manner inconsistent with the ERA" and that they "may bring and defend action that impact the Trust, and take reasonable steps to increase the value of the Trust's assets." (JA0296). The District Court evaluated these claims,

and concluded that "Senators Yaw and Baker are not ERA trustees because they are individual legislators, not Commonwealth agencies or entities." (JA00065). The District Court further concluded that the Senate Republican Caucus was also not a trustee for ERA purposes, as plaintiffs produced no authority for their assertion other than a Pennsylvania Commonwealth Court decision holding that the Caucus was entitled to sovereign immunity, with no discussion of the ERA at all. (JA00065). *See Precision Mktg., Inc. v. Commw., Republican Caucus of the Sen. of Pa./AKA Sen. of Pa. Republican Caucus*, 78 A.3d 667, 675 (Pa. Commw. Ct. 2013). Because no Pennsylvania court has held that an individual legislator or a party caucus is a trustee under the ERA, the District Court correctly declined to find standing on that basis.

Senate Appellants' arguments on appeal are vague, contradictory, and contain assertions unmoored from their contexts. As a prime example, Senate Appellants refer to a quote from Pennsylvania Supreme Court Justice Wecht's concurring opinion in *PEDF IV*: "members of the General Assembly are constrained to abide by the terms of the ERA." *Pa. Envtl. Def. Found. v. Commw.* (*PEDF IV*), 255 A.3d 289, 316 (Pa. 2021) (Wecht, J., concurring). That phrase, read in context, clearly applies to

the members of the General Assembly acting together in their legislative capacity, rather than describing fiduciary duties imposed on individual lawmakers. *See id.* ("What the Majority holds today is that the General Assembly is bound by the terms of the ERA and cannot *through legislation* supplant the mandate of the Constitution." (emphasis added)).

Senate Appellants also claim that their trustee obligations "are not legislative in nature," yet in the next breath base their trustee status on the Caucus's "defined role integral to the legislative process." Appellants' Br. at 50–51, 54. The arguments put forth by Senate Appellants tend to prove that the Caucus *exists*, but fail to establish that the Caucus has freestanding trustee obligations apart from the General Assembly. While Senate Appellants correctly note that the federal courts are "bound to apply [constitutional provisions] in the same manner [they] would be applied by the Supreme Court of Pennsylvania," they provide no support for the necessary predicate that the Supreme Court of Pennsylvania would identify the Caucus as trustee. *Transport Workers Union of Am., Local 290 ex rel. Fabio v. Southeastern Pa. Transp. Auth.*, 145 F.3d 619, 624–25 (3d Cir. 1998). Ultimately, Senate Appellants fail to identify any specific independent authority possessed by the Caucus that would have

any bearing on the trust created by the ERA, which would be required for any trustee duties to exist.

Senator Yaw identified his role as the recipient of a report as evidence of his "oversight" responsibilities, but again, Senate Appellants fail to identify an independent power or authority exercised by Senator Yaw that would require compliance with ERA trustee duties. The Well Fund is not administered by Senator Yaw, rather, it is administered by the Treasury Department in accordance with statutory directives, enacted by the entirety of the General Assembly. (JA0301). Thus, any duty to "keep adequate records of the administration of the trust," assuming *arguendo* that such a duty is imposed by the ERA, is undertaken by the Treasury Department, not Senator Yaw. The only specifically identifiable role with regard to the trust is Senator Yaw's "statutory duty and right to receive a detailed annual report of the Well Fund's expenditures." (JA0301). *See also* 58 Pa.C.S. § 2314(h)(i) (stating that the chairman of the Senate Environmental Resources and Energy Committee, among several other legislators, is entitled to receive annual report). Mere receipt of a report, without more, does not require the exercise of any fiduciary duties.

Finally, with regard to Senator Baker, Senate Appellants once again attempt to import Pennsylvania court standing precedent to support Senator Baker's alleged interest—asking this court to adopt what they call a "special interest paradigm" extrapolated from a Pennsylvania Commonwealth Court decision rendered prior to the Pennsylvania Supreme Court's 2013 interpretation of the ERA which restored the trust paradigm. *See Robinson Twp. v. Commw.*, 52 A.3d 463, 476 (Pa. Commw. Ct. 2012), *rev'd on other grounds*, 83 A.3d 901 (Pa. 2013) ("As local elected officials acting in their official capacities for their individual municipalities and being required to vote for zoning amendments they believe are unconstitutional, Coppola and Ball have standing to bring this action"). Senator Baker claims that she has decision-making power over the Trust and is directly involved in its administration, presumably in her role as a legislator. But again, this contradicts Senate Appellants' argument that their role as trustee is not legislative in nature, and even if Senator Baker was asserting an injury to her legislative authority, that injury is institutional and cannot be vindicated by a subsection of the General Assembly. *See Bethune-Hill*, 139 S. Ct. at 1953–54.

Senate Appellee's vague references to non-legislative trustee duties, without more, cannot separate them from the institutional body to which they belong, which itself, as a branch of government within the Commonwealth, is a trustee of the ERA. The D.C. Circuit's opinion on a substantially similar issue is instructive—in that case, Alaska state legislators claimed that certain provisions of federal law "interfered with [plaintiffs'] state duties, and . . . nullified their legislative prerogatives" including the duty and authority "to protect and preserve the public trust for all citizens of the State of Alaska." *Alaska Legis. Coun. v. Babbitt*, 181 F.3d 1333, 1337 (D.C. Cir. 1999). The D.C. Circuit reasoned that the Alaska legislators were not "deprive[d] of something to which they are personally entitled," and that "their loss (or injury) is a loss of political power, a power they hold not in their personal or private capacities, but as members of the Alaska State Legislature." *Id.* at 1337–38. Similarly here, to the extent that Senate Appellants have a trustee role under the ERA, it is in their collective capacity as legislators within the General Assembly. For the reasons described in Section B.1, *supra*, any claim based on that institutional interest must fail.

D. Appellants fail to articulate an injury to the trust sufficient to confer standing on either Senate Appellants or Municipal Appellants.

Municipal Appellants are ERA trustees. *See PEDF II*, 161 A.3d at 931 n.23 ("Trustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality.") As explained in Section C, *supra*, Senate Appellants are not trustees within the meaning of Pennsylvania's ERA. The following discussion assumes for the purpose of argument that all Appellants are trustees, as both Senate Appellants and Municipal Appellants alleged identical injuries in their capacities as trustees. Pls' Am. Compl. at ¶¶ 29–30 (JA0296), ¶ 67 (JA0303–04), ¶¶ 70–72 (JA0304), ¶ 76 (JA0305), ¶ 91–94 (JA0308).

Appellants argue for the first time on appeal that mere interference with a trustee's performance of its duties, here in the form of government regulation, is a *per se* injury that can be redressed in federal court. By not providing any authority on this point before the District Court below, Appellants have waived this theory. Even in the absence of waiver,

however, Appellants base their claim entirely on private trust law rather than ERA jurisprudence and ask this Court to make new Pennsylvania constitutional law. Nor is Appellants' "interference" theory analogous to a state's interest in protecting state-owned school trust land from flooding.

Ultimately, despite invoking Pennsylvania's constitutional trust, which was created to conserve and maintain the Commonwealth's public natural resources for the benefit of the people, Appellants have alleged no injury to the trust itself apart from complaining of the ill-defined possibility that state funds will be impacted. The trust created by the ERA is not a traditional private trust, in which maximizing the economic value of the trust *res* is often the goal and responsibility of a trustee. It is a trust to ensure the right of the people of Pennsylvania to clean air and pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment, and to ensure the natural resources of the state are conserved and maintained for both present and future generations.

1. Fiduciary "interference" is not an injury and has been waived by Appellants.

As an initial matter, when evaluating Appellants' argument that the Prohibition "interfered with the exercise of their fiduciary duties in managing the trust," the District Court noted that Appellants failed to provide any "authority suggesting that a trustee suffers an injury-in-fact whenever a government regulation limits her discretion in discharging a fiduciary duty . . . ." (JA0066).

Now, Appellants come before this Court armed with a multitude of Pennsylvania private trust law citations, arguing that the Commission's regulation has "precluded [them] from exercising their constitutionally enshrined fiduciary obligations" which may result in Appellants being "held responsible for any attendant breach," that they have a "fiduciary duty to regain control of the Trust" and that "any attempt by a non-trustee to administer the Trust or take control of its corpus is a *per se* injury . . . ." Appellants' Br. at 60, 63. These arguments are raised for the first time on appeal, with no explanation as to whether "exceptional circumstances" justify their consideration, and therefore are waived. *See In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Product Liability Litigation*, 706 F.3d 217, 226–27 (3d Cir. 2013).

Even if this Court exercises its discretion to consider the argument, *see id.*, Appellants' characterization of Pennsylvania constitutional law should be rejected as having no support in ERA jurisprudence. Appellants attempt to adopt and constitutionalize select portions of Pennsylvania private trust law despite the Pennsylvania Supreme Court's repeated admonition that the "plain text of the ERA controls." *PEDF IV*, 255 A.3d at 296. The Commonwealth's trustee duties may be further interpreted and defined in Pennsylvania courts by reference to "case law applying trust principles, the Restatement (Second) of Trusts, the legislative history surrounding the ERA's enactment, and Pennsylvania's Uniform Trust Act." *Id.* at 297. Indeed, the Pennsylvania Supreme Court has instructed that "[trust] principles must be considered alongside the fact that the ERA, unlike virtually any other trust, has a constitutional dimension," and "the ultimate power and authority to interpret the constitutional command regarding the purposes and obligations of the public trust . . . rests with the Judiciary, and in particular with this Court." *Id.* at 309 n.15.

Allowing ERA trustees to pursue legal actions against co-regulators or the federal government to regain control of the trust corpus whenever

a regulation "interferes" with trustees' control would charter a significantly new pathway as far as ERA jurisprudence is concerned. Although "[b]oth federal law and state law . . . 'can create interests that support standing in federal courts,'" *Cottrell v. Alcon Labs.*, 874 F.3d 154, 164 (3d Cir. 2017), here, Appellants are asking this court to both create *and* vindicate the proposed state law interest. In the absence of any Pennsylvania court holding that ERA trustees have a fiduciary duty to regain control of the Trust corpus when there is any interference with trustee discretion, this Court should decline Appellants' invitation to recognize such interference as a *per se* legal injury under state law.

Furthermore, in support of their argument with respect to Senate Appellants, Appellants cite to a Federal Claims court case in which the State of Mississippi, its Secretary of State, its Attorney General, and several county school boards filed a complaint for damages pursuant to the Takings Clause of the Fifth Amendment of the United States Constitution because of the United States Army Corps of Engineers' construction of a water control structure that caused flooding on Public School Trust Lands. *See State of Mississippi v. United States*, 146 Fed. Cl. 693 (2020). To pursue their claims, plaintiffs were required to possess

a property interest as defined by state law. *Id*. at 699. The Federal Claims Court found that the State of Mississippi had standing due to its ownership of the Public School Trust Lands, the Secretary of State had standing due to his statutorily-designated role as trustee to represent the State's interest, the Attorney General had state constitutional authority to act on the State's behalf as titleholder, and the county school boards had standing due to their exclusive right to exclude, use, and benefit from the trust property. *Id*. at 700.

Senate Appellants are not analogous to any of the plaintiffs in *State of Mississippi*, and the statutes and caselaw governing Public School Trust Lands in Mississippi are not "substantially identical" to Pennsylvania's constitutional ERA. Senate Appellants, unlike the State of Mississippi, the Secretary of State, and the Attorney General, *do not* represent the Commonwealth's interest in the public natural resources here—in fact, the Commonwealth through its authorized representative on the Commission voted in favor of the regulations. *See* (JA0393). *See also* Del. River Basin Comm'n, Meeting of Feb. 25, 2021 Minutes, at 2 (Feb. 25, 2021) https://www.state.nj.us/drbc/library/documents/2-25-

21_minutes_wSig_Att.pdf (statement of Governor Tom Wolf in support of Resolution No. 2021-01)

Furthermore, in identifying the county school boards as trustees, the Federal Claims Court referred to Mississippi law that specifically identified them as such. *See State of Mississippi*, 146 Fed. Cl. at 700 (citing *Jones Cty. Sch. Dist. v Dept. of Revenue*, 111 So.3d 588, 596 (Miss. 2013)). No Pennsylvania court has held that individual senators or party caucuses are "trustees" for the purposes of the ERA. *But c.f., e.g.*, *PEDF IV*, 161 A.3d at 939 (naming both the General Assembly and the Governor as ERA trustees); *Marcellus Shale Coal. v. Dept. of Envtl. Prot.*, 193 A.3d 447, 484–85 (Pa. Commw. Ct. 2018) (identifying local government as an ERA trustee). Accordingly, this Court should reject Appellants' new articulation of injury to their alleged administrative duties under the ERA.

2. The corpus of the trust is not harmed by the Commission's prohibition on high-volume hydraulic fracturing.

Beyond any alleged injury to their ability to administer the trust, Appellants also fail to show any harm to the corpus of the trust—the public natural resources. Harm to the trust cannot be shown through a

decrease in funds derived from the conversion of the public natural resources to currency.

In their Amended Complaint, Appellants alleged that, as trustees, they may "take reasonable steps to increase the value of the Trust's assets" in order to prevent the diminution of the trust's corpus. (JA0926). Under the ERA, the role of trustee is limited by the terms of the trust, which "must be construed according to the [settlors'] intentions." *PEDF IV*, 255 A.3d at 296–97 (citing *Robinson Twp.*, 83 A.3d at 956). The Pennsylvania Supreme Court has made clear that the "Commonwealth's obligations must be considered in light of the two rights created by the ERA." *Id.* at 297 (citing *Robinson Twp.*, 83 A.3d at 957). The duties of trustee cannot be reduced to a market-based determination of the public natural resources' monetary value.

Before the District Court, Appellants explained that the Commission's prohibition could potentially result in a loss of revenue to the Well Fund, the Marcellus Legacy Fund, the Oil and Gas Lease Fund, the Environmental Stewardship Fund, the Hazardous Sites Cleanup Fund, or other unnamed funds used for trust purposes. (JA0686). This potential loss, they argued, was sufficiently concrete and imminent to

satisfy Article III standing. (JA0686). The District Court rejected these arguments as being too theoretical and conjectural, rather than actual and imminent, as required by Article III. (JA0066–67).

On appeal, Appellants largely abandon this argument, referring only to the Well Fund and claiming that it doesn't matter whether the Well Fund's revenue increases or decreases. *See* Appellants' Br. at 60–61. The simple fact that the Commission's prohibition prevents a hypothetical fracked gas project that would presumably affect the growth of the Well Fund revenue in some unmeasurable way, Appellants argue, should lead this Court to conclude that the trust corpus has been injured. Putting aside the fact that economic injury to a fund is not equivalent to an injury to the trust corpus, this Court's precedent forecloses Appellants' articulation of injury—"Article III *requires* [this Court] to ensure that plaintiffs present more than merely conjectural assertions of injury." *In re Johnson & Johnson Talcum Powder Products Mktg., Sales Practices & Liability Litigation*, 903 F.3d 278, 287 (3d Cir. 2018) (citing *Finkelman*, 810 F.3d at 193).

In *Finkelman*, plaintiffs sought to establish economic injury on the theory that the National Football League's withholding of a certain

number of tickets for select customers caused Super Bowl tickets to be more expensive than they would have been had the tickets not been withheld. 810 F.3d at 190–91. This Court evaluated the economic dynamics of the Superbowl ticket resale market, concluding that it had "no way of knowing whether the NFL's withholding of tickets would have had the effect or increasing or decreasing prices on the secondary market. We can only speculate—and speculation is not enough to sustain Article III standing." *Id.* at 200. Here, Appellants admit that the Well Fund could increase or decrease, and ask this Court to simply accept as injury-in-fact *some* speculative economic effect on the Well Fund. But as this Court has explained, a plaintiff "must allege facts that would permit a factfinder to value the purported injury at something more than zero dollars without resorting to mere conjecture." *In re Johnson & Johnson*, 903 F.3d at 285. The District Court correctly recognized that this alleged injury was too conjectural to satisfy Article III standing, (JA0042) and that Appellants could not establish either traceability or redressability. (JA0042–43).

On appeal, the Appellants put forth an even more tenuous argument, asking this Court to take judicial notice of the allegations made by plaintiffs in *Wayne Land & Mineral Group, LLC v. Delaware*

River Basin Commission, No. 3:16-cv-00897-RDM (M.D. Pa.). These allegations were not considered by the District Court and are not a part of the record. Paragraph sixty-six of Plaintiffs' Amended Complaint merely states: "For instance, a group of landowners in Wayne County expended approximately $750,000 in legal fees to negotiate a lease that was estimated to yield over $187 million during its term, but as a result of the Commission's moratorium, the contract became ineffectual and, thus, was terminated." (JA0303). The District Court held that this "sketchy allegation" did not translate to a current injury on the part of Municipal Appellants. (JA0042).

Perhaps realizing the weakness of their own pleading, Appellants now ask this Court to take notice of a complaint filed by a different party in a different case, by way of reference to this Court's opinion reviewing a District Court's dismissal of that complaint. *See* Appellants' Br. at 64 n.21. In that opinion, this Court recited WLMG's allegation that it owns land within the Basin that "contains shale formations with natural gas reserves" and that WLMG "wants to build a natural gas well pad and related infrastructure on its property, drill an exploratory well targeting the recoverable natural gas in the shale, and if viable, drill a horizontal

well and use fracking to extract gas for sale." *Wayne Land & Mineral Grp.*, 894 F.3d at 519.

Even if this Court were to accept this allegation as true despite it not being pled in Appellants' Amended Complaint, Appellants here fail to show how WLMG's desire to frack on its land, thwarted by a moratorium that is no longer in effect, translates to an injury to the trust corpus caused by the Commission's prohibition that could be redressed by a declaratory judgment in *this* case.

In the event that Appellants *could* identify a fracked gas project that would have gone forward but for the Commission's prohibition, and could quantify the effect of that lost opportunity on Well Fund revenue, and could establish that this loss would be redressable by this Court, the alleged injury would still be based on a fundamental misunderstanding of the trust created by the ERA. "Under Section 27, the Commonwealth may not act as a mere proprietor, pursuant to which it 'deals at arms[']length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from resources operation.'" *PEDF II*, 161 A.2d at 932 (alteration in original) (quoting Pa. L. Journal, 154th General Assembly No. 118, Reg. Sess. 2269, 2273 (1970)). *See also Nat'l Audubon*

Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983) ("[P]ublic trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in *rare cases* where the abandonment of that right is *consistent with the purposes of the trust*." (emphases added)).

A trustee's duty under the ERA is to "'conserve and maintain' our public natural resources in furtherance of the people's specifically enumerated rights." *PEDF IV*, 255 A.3d at 312 (quoting *PEDF II*, 161 A.3d at 934–35). Those rights include the declared environmental rights 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, as well as the right to "common ownership of the people, including future generations, of Pennsylvania's public natural resources." *PEDF IV*, 255 A.3d at 296 (quoting *Robinson Twp.*, 83 A.3d at 954 (plurality)).

The value of the trust is not monetary. Thus, injury to the trust cannot be shown by a mere calculation of funds received or lost—an injury to the trust must be defined in light of the trust *purpose*, which in

the case of the ERA is "the conservation and maintenance of Pennsylvania's public natural resources." *Id*. at 311 (citing *PEDF II*, 161 A.3d at 935). *See also* John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 Univ. of Mich. J. of L. Reform 77, 100–02 (2020) (contrasting the duty to maximize the economic value of school land trusts with the duty to preserve ecological values in natural-resource-based trusts). Appellants' tenuously-alleged economic harm cannot be the basis of an injury to the trust corpus, as it fails to allege an injury to the conservation and maintenance of the public natural resources, or an impairment of those resources resulting in harm to the people's enumerated environmental rights.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's dismissal of Appellants' Amended Complaint.

Dated: October 27, 2021

Respectfully submitted,

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COMBINED CERTIFICATIONS

A. Bar Membership

I hereby certify that I, Kacy C. Manahan, am a member of the Bar of this Court.

B. Type-Volume

I hereby certify that this brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 10,615 words. I also certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook.

C. Service

I hereby certify that on October 27, 2021, I electronically filed the foregoing Brief for Appellees Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

D. Identical Compliance of Briefs

I hereby certify that the text of the electronic brief that is being filed with this Court is identical to the text in the paper copies submitted to the Court.

E. Virus Check

I hereby certify that this filing was scanned for viruses by Bitdefender Total Security on October 27, 2021, and that no virus was detected.

Dated: October 27, 2021

s/ Kacy C. Manahan
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