

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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No. 21-2315

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GENE YAW, Senator; LISA BAKER, Senator; THE PENNSYLVANIA SENATE  
REPUBLICAN CAUCUS, IN THEIR OFFICIAL LEGISLATIVE CAPACITIES  
AND AS TRUSTEES OF THE NATURAL RESOURCES OF THE  
COMMONWEALTH OF PENNSYLVANIA; DAMASCUS TOWNSHIP, IN ITS  
OFFICIAL CAPACITY AND AS TRUSTEE OF THE NATURAL RESOURCES  
OF THE COMMONWEALTH OF PENNSYLVANIA; DYBERRY TOWNSHIP;  
WAYNE COUNTY; CARBON COUNTY

v.

THE DELAWARE RIVER BASIN COMMISSION

DELAWARE RIVERKEEPER NETWORK; MAYA K. VAN ROSSUM;  
SENATOR STEVEN SANTARSIERO; SENATOR CAROLYN COMITTA;  
SENATOR AMANDA CAPPELLETTI; SENATOR MARIA COLLETT;  
SENATOR WAYNE FONTANA; SENATOR ART HAYWOOD; SENATOR  
VINCE HUGHES; SENATOR JOHN KANE; SENATOR TIM KEARNEY;  
SENATOR KATIE MUTH; SENATOR JOHN SABATINA; SENATOR NIKIL  
SAVAL; SENATOR JUDY SCHWANK; SENATOR SHARIF STREET;  
SENATOR TINA TARTAGLIONE; SENATOR ANTHONY WILLIAMS;  
BUCKS COUNTY; MONTGOMERY COUNTY

(Intervenors in District Court)

Gene Yaw, Senator; Lisa Baker, Senator, The Pennsylvania Senate Republican  
Caucus, In their Official Legislative Capacities and as Trustees of the natural  
resources of the Commonwealth of Pennsylvania; Damascus Township, In its  
Official Capacity and as Trustees of the natural resources of the Commonwealth of  
Pennsylvania; Dyberry Township; Wayne County,

Appellants

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On Appeal from the United States District Court  
For the Eastern District of Pennsylvania  
(D.C. Civ. No. 2:21-cv-00119-PD)

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**BRIEF OF AMICI CURIAE**  
**WIDENER UNIVERSITY COMMONWEALTH LAW SCHOOL,**  
**ENVIRONMENTAL LAW AND SUSTAINABILITY CENTER;**  
**CITIZENS FOR PENNSYLVANIA’S FUTURE (PENNFUTURE); AND**  
**CLEAN AIR COUNCIL**  
**IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMING THE**  
**DISTRICT COURT’S DISMISSAL FOR LACK OF STANDING**

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Dated: November 3, 2021

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**DISCLOSURE STATEMENTS PURSUANT TO FED. R. APP. P. 29**

Pursuant to the Federal Rules of Appellate Procedure, Rule 29(a)(2), undersigned counsel for amici curiae states that all parties have consented to the filing of this brief.

Pursuant to Rule 29(a)(4)(E), undersigned counsel states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than amici curiae and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit L.A.R. 26.1, undersigned counsel for amici curiae states that Widener University Commonwealth Law School Environmental Law and Sustainability Center, Citizens for Pennsylvania's Future (PennFuture), and Clean Air Council are non-profit organizations that do not have any parent corporations and do not issue stock, so there is no publicly held corporation owning 10% or more of any amicus curiae's stock.

Dated: November 3, 2021

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**TABLE OF CONTENTS**

DISCLOSURE STATEMENTS PURSUANT TO FED. R. APP. P. 29 .....i

CORPORATE DISCLOSURE STATEMENT .....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES .....iv

INTEREST OF AMICI..... 1

SUMMARY OF ARGUMENT .....4

ARGUMENT .....8

I. THE APPELLANTS LACK ERA STANDING BECAUSE THEY HAVE FAILED TO RAISE ANY CLAIM FOR RELIEF BASED ON ANY ALLEGED VIOLATION OF THEIR PURPORTED ERA RIGHTS AND DUTIES .....8

II. THE APPELLANTS MISCONSTRUE THE PURPOSE AND SUBSTANCE OF TRUSTEE RIGHTS AND RESPONSIBILITIES UNDER THE ERA.....11

A. The ERA Recognizes Publicly Enforceable Environmental Rights as a Limit on Governmental Power; It is Not a Grant of Governmental Authority.....11

B. Trustees Have a Duty to “Conserve and Maintain” Public Natural Resources for the Benefit of Present and Future Generations, Not to Exploit Them for Economic Benefit .....15

C. The Public Natural Resources to Which the Trust Applies Are Primarily Physical Natural Resources, Not Financial Receipts From the Use or Sale of These Resources.....20

III. THE DISTRICT COURT PROPERLY DECIDED THAT THE ERA DOES NOT ESTABLISH STANDING FOR THE APPELLANTS.....23

A. The Individual Legislators and the Senate Republican Caucus Are Not Trustees of the ERA’s Public Trust.....	23
B. To the Extent that Any Appellants are Trustees, They Have Not Alleged a Concrete Injury in Fact .....	25
CONCLUSION.....	28
CERTIFICATE OF WORD COUNT COMPLIANCE.....	30
CERTIFICATE OF BAR MEMBERSHIP.....	30
CERTIFICATE OF IDENTICAL BRIEFS .....	30
CERTIFICATE OF VIRUS SCAN .....	30
CERTIFICATE OF SERVICE .....	31

**TABLE OF AUTHORITIES**

**Cases**

*In re Sparks’ Estate*,  
 196 A. 48 (Pa. 1938)..... 16

*L.A. All. for Human Rights v. County of Los Angeles*,  
 Nos. 21-55395, 21-55404, 21-55408,  
 2021 U.S. App. LEXIS 28824 (9th Cir. Sep. 23, 2021) ..... 9

*Pa. Env’tl. Def. Found. v. Commonwealth*,  
 161 A.3d 911 (Pa. 2017) (“*PEDF II*”)..... *passim*

*Pa. Env’tl. Def. Found. v. Commonwealth*,  
 214 A.3d 748 (Pa. Commw. Ct. 2019) (“*PEDF III*”)..... 19

*Pa. Env’tl. Def. Found. v. Commonwealth*,  
 255 A.3d 289 (Pa. 2021) (“*PEDF IV*”)..... 18, 19, 20, 21, 25

*Robinson Township v. Commonwealth*,  
 83 A.3d 901 (Pa. 2013) ..... 2, 10, 17, 20, 21, 25

*Spokeo, Inc. v. Robins*,  
 136 S. Ct. 1540 (2016) ..... 5, 9, 25

*Struthers Coal & Coke Co. v. Union Trust Co.*,  
 75 A. 986 (Pa. 1910)..... 16

*TransUnion LLC v. Ramirez*,  
 141 S. Ct. 2190 (2021) ..... 8, 9, 10

*Uzuegbunam v. Preczewski*,  
 141 S. Ct. 792 (2021) ..... 8

*Zauflik v. Pennsbury Sch. Dist.*,  
 104 A.3d 1096 (Pa. 2014) ..... 1

**Constitutional Provisions**

PA. CONST. art. I, § 25 ..... 14

PA. CONST. art. I, § 27 ..... *passim*

PA. CONST. art. II, § 1 ..... 24

**Statutory and Regulatory Provisions**

58 Pa. C.S. § 2314.....28

18 C.F.R. § 440.3 .....27

**Other Authorities**

Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. BAR ASS’N Q. 421, 425 (1970), reprinted in Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2269, 2273 (1970) .....16

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)) ..... 1

John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *Envtl. L.* 463 (2015) .....2

John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 *U. Mich. J.L. Ref.* 77 (2020).....2

John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I: An Interpretative Framework*, 103 *Dick. L. Rev.* 693 (1999) ..... 1

John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II Environmental Rights and Public Trust*, 104 *Dick. L. Rev.* 97 (1999) .....2

John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 Widener Commonwealth L. Rev. 147 (2021)..... 1

John C. Dernbach, Kenneth T. Kristl, & James R. May, *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 Rutgers L. Rev. 803 (2018)..... 1

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) ..... 1

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*, Widener Law School Legal Studies Research Paper Series no. 14-18 (2014), *available at* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660) ..... 1, 12

Meeting Minutes, DRBC Meeting of February 25, 2021, *available at* [https://www.state.nj.us/drbc/library/documents/2-25-21\\_minutes\\_wSig\\_Att.pdf](https://www.state.nj.us/drbc/library/documents/2-25-21_minutes_wSig_Att.pdf)..... 28

Restatement (Third) of Trusts § 76 (Am. Law Inst. 2007)..... 26

Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992) ..... 5



## INTEREST OF AMICI

Amicus curiae Widener University Commonwealth Law School

Environmental Law and Sustainability Center’s Director, Professor John Dernbach, has written widely on Article I, Section 27 of the Pennsylvania Constitution (the “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.<sup>1</sup> He helped assemble the legislative history of Section 27.<sup>2</sup> Professor Dernbach has also authored or coauthored numerous articles on the ERA.<sup>3</sup> The Pennsylvania Supreme Court cited his work extensively

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<sup>1</sup> See 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)).

<sup>2</sup> 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*, *Widener Law School Legal Studies Research Paper Series* no. 14--18, 71 (2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474660) (hereinafter “Legislative History”). In Pennsylvania law, legislative history is a relevant consideration in interpreting constitutional provisions if the words are not explicit. *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014), quoting *Robinson Township v. Commonwealth*, 83 A.3d 901, 946 (Pa. 2013) (plurality).

<sup>3</sup> 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, Kenneth T. Kristl, & James R. May, *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 *Rutgers L. Rev.* 803 (2018); John C. Dernbach, *Taking the*

in its landmark decisions in *Robinson Township v. Commonwealth*, 83 A.3d 901, 944–45 n.3, 953, 954, 955, 959, & 962 & n.49 (Pa. 2013), and *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 924–25 & n.14, 930, 936, 942 n. 4, 944, 947 (Pa. 2017). He has also written widely on public trust law.<sup>4</sup> Widener University Commonwealth Law School’s Environmental Law and Sustainability Center explores these 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.

Citizens for Pennsylvania’s Future (“PennFuture”) is a Pennsylvania-based nonprofit organization whose mission includes protecting our air, water, and land, and empowering citizens to build sustainable communities for future generations. Since PennFuture’s founding in 1998, protection of water resources and air quality across Pennsylvania has been a focus of the organization’s legal, policy, and advocacy work. Members of PennFuture regularly use and enjoy Pennsylvania’s environment and water resources throughout the Delaware River Basin.

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*Pennsylvania Constitution Seriously When It Protects the Environment: Part I: An Interpretative Framework*, 103 Dick. L. Rev. 693 (1999); and John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II: Environmental Rights and Public Trust*, 104 Dick. L. Rev. 97 (1999).

<sup>4</sup>John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. Mich. J.L. Ref. 77 (2020); John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Env’tl. L. 463 (2015).

Clean Air Council is a member-supported, non-profit environmental organization dedicated to protecting everyone's right to a healthy environment. The Council is headquartered in Philadelphia and works through public education, community advocacy, and government oversight to ensure enforcement of environmental law.

Amici have a long-standing interest in the health and wellbeing of Pennsylvania residents and are committed to preserving and protecting Pennsylvania's natural resources. 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.

## SUMMARY OF ARGUMENT

In their attempt to establish standing, the Appellants have argued that they are trustees of the Pennsylvania natural resources trust established under Article I, Section 27 of the Pennsylvania Constitution (the “Environmental Rights Amendment,” or “ERA”), and that their purported legal rights and duties as ERA trustees have been violated.

The Environmental Rights Amendment 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. Only a handful of other states have a similar provision in their constitutions, and there is nothing like it in the federal Constitution. *See Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 918 (Pa. 2017) (hereinafter “*PEDF II*”).<sup>5</sup>

Amici primarily submit this brief to explain why Appellants’ arguments fundamentally misconstrue the ERA and the emerging body of state case law interpreting the ERA. At its core, the ERA is a constitutional constraint on government authority that serves to protect individual environmental rights and public natural resources. Thus, the ERA does not grant the governmental

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<sup>5</sup> For an explanation of numbering, see *infra* note 9.

Appellants any legal interest that could possibly be violated by the ban on unconventional gas drilling (or fracking) imposed by the Delaware River Basin Commission (“the Commission”) here.

This Court probably does not need to wade very far into the state law issues raised by Appellants’ ERA arguments. As the District Court explained in its concise and cogent opinion, the Appellants failed to allege that a violation of *any* of their legal rights—including their purported ERA trustee rights—resulted in a concrete injury in fact, that is fairly traceable to the conduct of the Commission, and that is likely to be redressed by a favorable judicial opinion. *See* JA0014–25; *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Thus, regardless of the precise contours of Appellants’ rights and duties under the ERA, Appellants have failed to establish that any alleged violation of such rights resulted in any concrete Article III injury.

In fact, the four counts in the Appellants’ complaint do not even include a claim for relief based on a violation of the ERA, let alone specify the harm resulting from any such violation. *See* JA0310–15. Therefore, this Court’s analysis of the ERA standing issue can probably begin and end with that basic failure.<sup>6</sup> But to the extent that this Court determines that a complete understanding

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<sup>6</sup> So limiting the ERA analysis would serve the interests of not only brevity, but also comity. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1675–81 (1992)

of the ERA is necessary for the standing analysis here, Amici write to ensure that the Court has before it the proper background on that state constitutional provision.

The second and third sentences of the ERA (its public trust clause) recognize a fundamental public right to have the Commonwealth conserve and maintain public natural resources for the benefit of present and future generations.

Appellants allege that they have public trust duties under Section 27 which require them to seek unconventional gas development in the Delaware River Basin and convert those natural resources into money. Appellants then suggest that they are harmed by the Commission's infringement of their interest in converting natural gas resources into money.

But Section 27 imposes no such duties and grants Appellants no such interest. First, the ERA recognizes publicly enforceable environmental rights as a limit on governmental power; it is not a grant of governmental authority. Second, trustees have a duty to "conserve and maintain" public natural resources for the benefit of present and future generations, not to exploit them for economic benefit. Third, the public natural resources to which the trust applies are primarily physical

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(warning against "the intrusion of the federal courts in the lawgiving function of state courts" and emphasizing the importance of "demonstrating respect for the state judiciary's primary role in interpreting state law").

natural resources, not financial receipts from the use or sale of these resources (as Appellants suggest).

Finally, to the extent that any Appellants are ERA trustees, they have alleged no injury in fact. The Commission's action banning high volume hydraulic fracturing ("fracking") in the Delaware River Basin is entirely consistent with trustee obligations under the ERA and so results in no injury to any ERA trustee.

Appellants are asking this Court to interpret a constitutional provision recognizing the rights of Pennsylvanians to a clean environment as instead requiring the development of an industrial practice that the Commission has determined to present a high risk of gravely polluting the Delaware River Basin. This Court should reject this request and affirm the District Court's order of dismissal.

## ARGUMENT

### **I. The Appellants Lack ERA Standing Because They Have Failed to Raise Any Claim for Relief Based on Any Alleged Violation of Their Purported ERA Rights and Duties.**

The Appellants have not raised a single claim for relief based on their purported rights and duties under the ERA. *See* JA0310–15. Nor could they, as a matter of well-established ERA law. *See* Section II, *infra*. Tellingly, the Appellants seek no compensatory damages—or even nominal damages, *see Uzegebunam v. Preczewski*, 141 S. Ct. 792, 801 (2021)—for any alleged violation of the ERA or diminution of the public trust corpus. Nor, in this declaratory judgment action, do Appellants seek declaratory relief based on any alleged violation of their ERA rights or interference with their ERA duties. Rather, Appellants seek only a declaratory judgment stating that the Commission’s regulations banning fracking in the Delaware River Basin: (1) are unauthorized by the Delaware River Basin Compact; and/or (2) violate the Takings Clause of the U.S. Constitution, the Takings Clause of the Pennsylvania Constitution, the regulatory takings provision of the Compact, or the U.S. Constitution’s guarantee of a republican form of government. *See* JA0310–15.

Lacking any ERA claim for relief, the Appellants cannot establish any concomitant ERA injury sufficient to confer Article III standing. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (“If the plaintiff does not claim to



have suffered an injury . . . there is no case or controversy for the federal court to resolve.”) (quotation marks and citation omitted); *L.A. All. for Human Rights v. County of Los Angeles*, Nos. 21-55395, 21-55404, 21-55408, 2021 U.S. App. LEXIS 28824, at \*11 (9th Cir. Sep. 23, 2021) (holding that the district court “did not have the authority to issue an injunction based on claims not pled in the complaint,” and “because [plaintiffs] did not bring most of the claims upon which relief was granted, they failed to put forth evidence to establish standing”). To the extent that the Appellants’ complaint, even liberally construed, alleges any ERA injury that might be remedied by the declaratory relief that Appellants seek, the allegations appear to be that: “The Commission’s prohibition interferes with the ability of the Senate Plaintiffs and Municipal Plaintiffs to manage and act in the Trust’s best interests and precludes them from exercising their constitutionally imposed fiduciary duties relative thereto.” JA0308. Even accepting the Appellants’ erroneous interpretation of their ERA trustee duties, *cf.* Section II, *infra*, the Appellants have alleged only a bare violation of or interference with their exercise of those duties without alleged harm.

The Supreme Court has long held that such a bare legal violation, “divorced from any concrete harm,” does not “satisfy the injury-in-fact requirement of Article III.” *Spokeo, Inc.*, 136 S. Ct. at 1549; *see also Ramirez*, 141 S. Ct. at 2205 (reiterating that “an injury in law is not an injury in fact”). The Appellants spend

the vast majority of their brief arguing only that their alleged legislative and ERA trustee interests are “legally protected.” Appellants’ Br. at 11, 22, 40–46; *see also id.* at 50–63 (arguing that Appellants “have an alleged interest under the ERA” which is “cognizable”). Their limited discussion of injury, *see id.* at 47–48, 60–63, is simply an argument that a bare legal violation is sufficient to confer standing. *See id.* at 63 (arguing that interference with the Appellants’ ERA duties “is a *per se* injury, [and] thereby obviates the need for a detailed showing of financial harm” or any other concrete harm). The Appellants’ erroneous arguments for *per se* legal injury, *cf. Ramirez*, 141 S. Ct. at 2205, highlight the fact that they have no concrete ERA injury.

This basic failure to meet the Article III standing requirements is by itself sufficient for this Court to affirm the District Court’s dismissal of the complaint without fully articulating the contours of the Appellants’ alleged “*per se*” legal injury under the ERA. That said, to the extent that the Court determines that an analysis of the Appellants’ ERA rights and duties is necessary, Amici explain below how the Appellants have misconstrued those rights and duties.

## **II. Appellants Misconstrue the Purpose and Substance of Trustee Rights and Responsibilities under the ERA.**

### **A. The ERA Recognizes Publicly Enforceable Environmental Rights as a Limit on Governmental Power; It is Not a Grant of Governmental Authority.**

Appellants admit that, under Article I, Section 27, “the public natural resources of the Commonwealth are held in trust for the benefit of the people....” JA0296. The complaint, however, is utterly silent about vindication of these public environmental rights; it asks for no relief that would in any way protect the public’s environmental rights. Instead, Appellants repeatedly assert their rights as trustees, as if the ERA is a grant of power or authority to them to seek the exploitation of natural resources for *economic* benefit. But the ERA was not adopted for that purpose; quite the opposite, it was adopted to guarantee specific *environmental rights* to the public by limiting governmental power.

As the Pennsylvania Supreme Court has recognized, the ERA is located in Article I, which contains Pennsylvania’s Declaration of Rights, the state’s analogue to the U.S. Bill of Rights. *PEDF II*, 161 A.3d at 916, 918. “The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government; additionally, ‘particular sections of the Declaration of Rights represent specific limits on governmental power.’” *Robinson Township v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) (plurality) (citations

omitted). The placement of Section 27 in Article I, along with such rights as the right to property (Section 1), religious freedom (Section 3), freedom of speech (Section 7), and security from searches and seizures (Section 8), was no accident. As then-Rep. Franklin Kury, the chief legislative sponsor of the amendment, explained when he introduced the resolution that would become Article I, Section 27:

Mister Speaker, I rise to introduce a natural resource conservation amendment to Pennsylvania's Bill of Rights. I do so because I believe that the protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life – indeed to life itself – as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and privacy.

1969 Pa. Legislative Journal-House at 485–86 (statement of Rep. Franklin Kury), in *Legislative History* at 7–8.<sup>7</sup>

The text of the amendment itself further underscores the recognition of environmental rights in the public. Each of the three sentences in the ERA refers to “the people.” The Pennsylvania Supreme Court in *PEDF II* explained that the amendment recognizes two sets of rights in the people. 161 A.3d at 930–31. Each of these sets of rights imposes a limit on the power of the Commonwealth. The first sentence or clause 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

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<sup>7</sup> See also *Legislative History* at 14–15, 66–68.

environment.” Art. 1, § 27. This sentence, the Court said, “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.” 161 A.3d at 931.

The second and third sentences, the Court said, create a constitutional public trust. *Id.* at 931–32. These sentences, the ERA’s public trust clause, provide: “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.” Art. I, § 27. The public trust clause, of course, is the part of the ERA being invoked by the Appellants. Under this clause, the Court noted, the Commonwealth is the trustee. 161 A.3d at 932. The corpus, or body of the trust, is public natural resources, which the Court held includes state parks and forests, as well as the oil and gas they contain. *Id.* at 916. The people, including present and future generations, are “the named beneficiaries” of this trust. *Id.* at 931–32. The Court also explained that “all agencies and entities of the Commonwealth government, both statewide and local,” have a constitutional trust responsibility. *Id.* at 931 n.23. Under this trust, the Court said, the Commonwealth has two duties: “First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from

direct state action or from the actions of private parties.... Second, the Commonwealth must act affirmatively via legislative action to protect the environment.” *Id.* at 933. These trust duties, of course, limit the Commonwealth’s power to act contrary to these duties.

The public has the right to have the Commonwealth perform these duties. These are actual rights under the Pennsylvania Constitution coequal to those of freedom of speech and religion. They cannot be denied, altered, or abridged by the state; and they are not mere considerations or statements of aspiration. As Article I, Section 25 (Reservation of Powers in People) states:

To guard against the transgressions of the high powers which we have delegated, we declare that everything *in this article* is excepted out of the general powers of government and shall forever remain inviolate.

PA. CONST. art. I, § 25 (emphasis added).

Because Article I, Section 27 is (of course) in Article I, the rights it recognizes are “excepted out of the general powers of government and shall forever remain inviolate.” It recognizes public rights as a limit on, and not a source of, governmental authority. Properly understood, that limitation provides no basis for the Appellants to assert any Article III injury here.

B. Trustees Have a Duty to “Conserve and Maintain” Public Natural Resources for the Benefit of Present and Future Generations, Not to Exploit Them for Economic Benefit.

The ERA was adopted in response to Pennsylvania’s long history of environmental degradation from the exploitation of natural resources. *PEDF II*, 161 A.3d at 916–19. To curb that exploitation and degradation, the ERA makes the Commonwealth the trustee for “public natural resources.” Art. I, § 27. For the public trust clause, the core obligation is clear: the Commonwealth trustees must “conserve and maintain” the trust corpus—public natural resources—for the benefit of present and future generations. Appellants’ complaint is utterly silent on this fundamental obligation.

The use of trust language in the public trust clause, the *PEDF II* Court stated, indicates the value of drawing on pre-existing trust law principles to determine their meaning. *Id.* at 930, 932. Thus, in exercising its public trust duties, the Commonwealth is bound by the trust duties of prudence (exercising “such care and skill as a man of ordinary prudence would exercise in dealing with his own property”), loyalty (managing the trust corpus “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries”), and impartiality (managing “the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust”). *Id.* at 932–33 (citations omitted).

Even when the trustee says it is acting to protect the beneficiaries by spending the money for them for non-trust purposes, the *PEDF II* Court said, the trustee cannot use trust assets for these other purposes. *Id.* at 933. “Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee’s fiduciary duties.” *Id.* at 933 (citing *Struthers Coal & Coke Co. v. Union Trust Co.*, 75 A. 986, 988 (Pa. 1910); *In re Sparks’ Estate*, 196 A. 48, 57 (Pa. 1938)). ERA trustees cannot evade their duty to conserve and maintain public natural resources. A recurring theme in the *PEDF II* Court’s opinion is that the Commonwealth must hold public natural resources as a trustee, and not as a proprietor. *Id.* at 932, 935, 939. The Court explained:

As a trustee, the Commonwealth must deal “with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.” 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 its resources operations.”<sup>8</sup>

Under trust law, the Court held, “proceeds from the sale of trust assets are trust principal and remain part of the corpus of the trust.” *Id.* at 935. Royalties received

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<sup>8</sup> 161 A.3d at 932 (citing Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. BAR ASS’N Q. 421, 425 (1970), reprinted in Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2269, 2273 (1970)) (internal citations omitted).



from the sale of oil and gas are such proceeds, the Court held, and must therefore be managed as public natural resources. *Id.*

Based on that analysis, the Court held unconstitutional under Section 27 state legislation that transferred a substantial share of royalty proceeds from oil and gas leasing on public lands to the Commonwealth's General Fund, where it could be spent for a variety of unrelated purposes. The Court said: "Without any question, these legislative enactments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations." *Id.* at 938 (citing *Robinson Township*, 83 A.3d at 950). A fundamental problem with the state's position, the Court reasoned, is that the state was acting as a proprietor and not as a trustee of public natural resources: "By arguing that proceeds obtained from the sale of our natural resources are not part of the corpus of the trust, the Commonwealth improperly conceives of itself as a mere proprietor of those public natural resources, rather than as a trustee." *Id.* at 935.

Like the state in *PEDF II*, Appellants are seeking public financial benefits from unconventional gas drilling because they are "facing significant budgetary shortfalls" that impair "their ability to fund governmental programs." JA0309. The complaint expresses no interest in the conservation and maintenance of public natural resources, and does not acknowledge the trustee's duties of prudence, loyalty, and impartiality toward those resources. If anything, the complaint

expresses loyalty toward those who would exploit public natural resources. The economic benefits from unconventional gas development in the Delaware River Basin that Appellants so plainly seek put them in the position of proprietors, measuring their gains “by the balance sheet profits” as well as “appreciation” realized from “resources operations.” *PEDF II*, 161 A.3d at 932 (citation omitted). Just as the Pennsylvania Supreme Court did in *PEDF II*, this Court should reject Appellants’ claim to be acting properly as trustees under Section 27.

Appellants also ignore the responsibility of ERA trustees to both present and future generations. The ERA states that public natural resources are to be conserved and maintained for the benefit of “all the people, including generations yet to come.” The complaint, however, is utterly silent on the cross-generational equity component of the trust.

ERA trustees have a responsibility to both present and future generations, the Pennsylvania Supreme Court held in 2021. *Pa. Env'tl. Def. Found. v. Commonwealth*, 255 A.3d 289 (Pa. 2021) (“*PEDF IV*”).<sup>9</sup> In its 2017 *PEDF II* decision, the Supreme Court remanded to the Commonwealth Court the issue of how the state could spend non-royalty money (bonus, rental, and penalty money) from leasing on state land. 161 A.3d at 936. On remand, the Commonwealth

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<sup>9</sup> See *id.* at 292 n.3 for an explanation of the numbering of these cases—all of which have identical captions.

Court used a 1947 trust law statute to decide that the state must spend two-thirds of this money to conserve and maintain public natural resources, but that the state could spend one-third of this money free and clear of the trust. It reasoned that the present generation is like a life estate beneficiary under the kind of trusts governed by that statute, and that future generations are like remaindermen or successor beneficiaries. *Pa. Env'tl. Def. Found. v. Commonwealth*, 214 A.3d 748 (Pa. Commw. 2019) (“*PEDF III*”).

In its 2021 decision, the Pennsylvania Supreme Court reversed, holding that the state must spend all money received from bonus, rental, and penalty payments to conserve and maintain public natural resources. The text of Section 27, the Court held, does not contain any language allowing diversion of any money received from gas leases to non-public trust purposes. *PEDF IV*, 255 A.3d at 310–14. The Supreme Court also held that the “cross-generational” nature of the trust beneficiaries forbade the expenditure of trust money for the present generation only. Future generations are not successor beneficiaries to the present generation, the court explained; they are simultaneous beneficiaries with the present generation. *Id.* at 310.

The explicit inclusion as simultaneous beneficiaries of the future generations of Pennsylvanians creates a cross-generational dimension and reminds the Commonwealth that it may not succumb to “the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office.” *Robinson Twp.*, 83 A.3d at 959 n.46.

*Id.*

The Appellants in this case, similarly, have focused on the financial benefits to the present generation of exploiting public natural resources—including balancing government budgets. There is not a word in their complaint or their brief about benefiting future generations. Like the Pennsylvania Supreme Court, this Court should reject their claim to be acting as proper ERA trustees.

C. The Public Natural Resources to Which the Trust Applies Are Primarily Physical Natural Resources, Not Financial Receipts From the Use or Sale of These Resources.

Public natural resources<sup>10</sup> under the ERA are primarily physical resources. These include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Robinson Township*, 83 A.3d at 901 (plurality). The term includes state forests and parks as well as the gas lodged in the shale under these forests and parks. *PEDF II*, 161 A.3d at 931. Water resources in

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<sup>10</sup> While the complaint occasionally refers to “public natural resources,” JA0296, JA0308, both its caption and introduction refer to Appellants as “trustees of the natural resources of the Commonwealth of Pennsylvania.” *See* JA0290. Because Appellants seek the conversion of natural resources to money, they cannot plausibly claim that money from the conversion of non-public natural resources is nonetheless money within the trust. There is no authority under Article I, Section 27 for this broader claim.

Pennsylvania protected by the Commission's decision are also public natural resources.

Based on the circumstances raised in *PEDF II*, the Pennsylvania Supreme Court has also held that royalties paid to the state for oil and gas drilling on state forests and parks are also part of the trust corpus subject to the ERA. *Id.* at 935. In its 2021 *PEDF IV* decision, the Supreme Court applied similar reasoning to determine that bonus, rental, and penalty payments under these same leases are also part of the trust corpus subject to the ERA. 255 A.3d at 314. Critically, however, these moneys do not represent a net addition to the public trust. At most, these moneys are intended as a substitute for the natural trust resources extracted and lost to the people of the Commonwealth. The extraction of the gas, plus any environmental damage caused during the drilling and production processes, means a loss to the public—present and future generations—of public trust resources. At best, royalties and other proceeds received from the drilling process, which *must* be used to conserve public natural resources, result in a measure of counterbalance to the damage done to the public trust by the resource extraction and depletion.

To attempt to bolster their erroneous argument for unconventional gas development in the Delaware River Basin, Appellants' complaint describes the Section 27 trust primarily in financial and economic terms. They argue that the Commission's prohibition on fracking diminishes the value of public natural

resources. JA0311–314. The complaint also identifies numerous other environmental funds that, it suggests, would receive more money if the Commission’s prohibition on fracking is lifted. JA0300–305. Appellants, who are all governmental officials or entities, even invoke private landowners to make this claim. The Commission’s action, they say, “is not only interfering with the reasonable investment-backed expectations of the landowners, but also directly and substantially impairing the growth of the Trust’s assets.” JA0303–304.

These claims turn Section 27—the Environmental Rights Amendment—upside down. At its core, the public trust clause of the ERA is about public rights in actual public natural resources—land, water, minerals, and the like. The public trust clause is supported by the ERA’s first clause, which recognizes a public right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” Art. I, § 27. This first clause also applies to public natural resources; that is, both clauses apply here. Thus, Section 27, including its public trust clause, is intended to protect physical public natural resources, including the values in those resources (“natural, scenic, historic, and esthetic”), as well as the quality of those resources (“clean air, pure water”).

The Appellants do not allege or argue that the Commission’s action somehow fails to protect public water resources in the Pennsylvania part of the Delaware River Basin. Rather, to adopt Appellants’ argument is to say that the

ERA *requires* the liquidation of public natural resources for cash—that this actually improves the public trust. If that is the case, the ERA means nothing. It cannot be overstated that the *Environmental* Rights Amendment is first and foremost directed at protection of actual public natural resources. Appellants’ argument is no different than saying that the First Amendment to the U.S. Constitution requires suppression of speech or that the Second Amendment requires the confiscation of arms. If this Court adopts that view, it would subvert the will of the Pennsylvania General Assembly and the voters, would turn Pennsylvania Supreme Court precedent on the ERA upside down, and would so corrupt the ERA as to make it meaningless in the protection of environmental constitutional rights of Pennsylvanians.

**III. The District Court Properly Decided that the ERA Does Not Establish Standing for the Appellants.**

A. The Individual Legislators and the Senate Republican Caucus are Not Trustees of the ERA’s Public Trust.

In their complaint, Senators Yaw and Baker and the Senate Republican Caucus describe themselves as “trustees,” and claim to file their complaint “to prevent diminution of the Trust’s corpus” and to “take reasonable steps to increase the value of the Trust’s assets.” JA0296. The claimed trusteeship authority of these Appellants does not exist. As the District Court properly held, there is no authority in Pennsylvania law for the proposition that individual state legislators or

the Senate Republican Caucus are trustees. To be sure, there is no question that the legislature—the General Assembly—is a trustee. *See PEDF II*, 161 A.3d at 931 (stating that all statewide entities of the Commonwealth government have a trust responsibility), 933 (stating that this responsibility extends to the adoption of necessary legislation). The General Assembly is not a party here, and there is no allegation that the state-level Appellants are acting on behalf of the General Assembly. Senators Yaw and Baker are members of the General Assembly, but individual members acting on their own are not trustees. The Senate is only one part of the state legislature; the House of Representatives is the other. PA. CONST. art. II, § 1 (“The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”). Thus, none of the state-level Appellants is a Section 27 trustee.

At page 52 of their Brief, Appellants misleadingly quote a Pennsylvania Supreme Court concurrence to argue that the Court should set aside these inconvenient facts in favor of finding that individual legislators have standing based on their legislative interests. They write, “[s]imilarly, the ‘members of the General Assembly are constrained to abide by the terms of the ERA.’ *Pa. Env’tl. Def. Found. v. Commonwealth*, 255 A.3d 289, 316 (Pa. 2021) (*PEDF II*) [sic] (Wecht, J. concurring) (emphasis added).” The actual full statement from *PEDF IV* is: “*Like all Pennsylvanians*, members of the General Assembly are constrained to



abide by the terms of the ERA.” *Id.* (emphasis added). The obvious meaning is that Pennsylvanians must abide by the ERA, not that members of the General Assembly are specially situated so that they have standing.

B. To the Extent that Any Appellants are Trustees, They Have Not Alleged a Concrete Injury in Fact.

As distinct from the state Appellants, the local government Appellants are Section 27 trustees for public natural resources. *PEDF II*, 161 A.3d at 932 n.23; *Robinson Township v. Commonwealth*, 83 A.3d at 913. Even so, none of the Appellants, even the local government Appellants, have standing under the ERA. Not only have they failed to raise a claim for relief under the ERA, Section I, *supra*, they have not suffered a concrete injury in fact. *See Spokeo*, 136 S. Ct. at 1547.

Appellants’ brief to this Court introduces the argument that it is not economic harm of which they complain, but rather the loss of “asserting control over the Trust’s corpus.” Appellants’ Br. at 58. This argument is specious for the state Appellants because, as detailed in Section III(A) above, state Appellants do not have the authority, as individual legislators or as a caucus, to control and administer trust property.

Appellants’ loss of control argument also fails because all trustees constantly exercise their obligations against a legal backdrop that affects their decisions with regard to the trusts they oversee. For example, trustees of a private trust still

operate against a backdrop of banking regulations and ethical rules that affect how they use and distribute trust property. *See generally* Restatement (Third) of Trusts § 76 (Am. Law Inst. 2007) (“The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.”); *see also PEDF II*, 161 A.3d at 932 (incorporating “Pennsylvania trust law” and citing the Restatement). Trustees of Pennsylvania’s natural resources operate in a legal context that includes numerous federal and state laws. To the extent that this legal background is consistent with the trustee’s obligations, it cannot be a source of harm for either the state or local Appellants. That is particularly true here because a state law claim cannot invalidate a federal decision.

The complained-of act here is the Commission’s action to prohibit fracking in the Delaware River Basin, which is entirely consistent with trustee obligations to conserve and maintain public natural resources, including water resources. As previously stated, the Commission’s action protects the very resources that all ERA trustees are also obligated to protect. This cannot be an injury in fact. The Commission found that high volume hydraulic fracturing would pose an unacceptable risk to the “water resources of the Delaware River Basin,” including waters “considered by the Commission to have exceptionally high scenic, recreational, ecological, and/or water supply values.” 18 C.F.R. § 440.3(a). For the Pennsylvania part of the basin, this decision furthers the public rights in the

first sentence or clause of the ERA to “clean water” and to the “preservation of the natural, scenic, historic, and esthetic values of the environment.” It also furthers the public rights in the ERA’s public trust clause to have public natural resources—particularly water resources—conserved and maintained for the benefit of present and future generations. It is an affirmative action to protect the environment. Such an action cannot be construed to cause injury in fact to the corpus of the trust, its beneficiaries, or any ERA trustees.

Finally, Appellants’ control argument, in addition to posing federalism concerns, ignores Pennsylvania’s role on the Commission. Pennsylvania’s seat on the Commission voted in favor of the action. In casting that vote, Pennsylvania Department of Environmental Protection Secretary Patrick McDonnell, reading a statement from Governor Tom Wolf, stated that the Commission’s action would assist with “preserving the water resources of this unique region for generations to come.” *See Meeting Minutes, DRBC Meeting of February 25, 2021, available at [https://www.state.nj.us/drbc/library/documents/2-25-21\\_minutes\\_wSig\\_Att.pdf](https://www.state.nj.us/drbc/library/documents/2-25-21_minutes_wSig_Att.pdf).* The Governor of the Commonwealth of Pennsylvania and the Department of Environmental Protection are certainly trustees under Section 27 with commensurate responsibilities, *see Robinson Twp.*, 83 A.3d at 955, and Pennsylvania’s vote in favor of the Commission’s action was consistent with their obligations as trustees to conserve and maintain trust resources.

Appellants' chief economic claim against the Commission's action is that it will reduce moneys received to the Unconventional Gas Well Fund, a fund that was established by state law in 2013. *See* 58 Pa. C.S. § 2314(a). Under state law, a fee is charged on all gas produced through unconventional wells, whether on public land or private land. The fee money is deposited in this fund and is then disbursed to all Pennsylvania municipalities for a variety of purposes, some of them specifically designed to offset the impacts of shale gas development. *See id.* § 2314(d). This fund money, however, is a separate pot of money from the royalty, bonus, rental, and penalty money that the state receives through leasing of oil and gas on state lands. The distribution of funds through the Unconventional Gas Well Fund has nothing to do with the ERA public trust. Thus, it cannot possibly be injury in fact to their alleged trustee status.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the District Court's order dismissing the Appellants' complaint for lack of standing.

Respectfully submitted November 3, 2021.

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**CERTIFICATE OF WORD COUNT COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g), I, Paul Jay Cohen, hereby state that the Brief of Amici Curiae contains no more than 6,498 words, as counted by the word processing system used to prepare the Brief. *See* Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i) and 32(f).

**CERTIFICATE OF BAR MEMBERSHIP**

Pursuant to Third Circuit L.A.R. 46.1(e), I, Paul Jay Cohen, hereby certify that I am a member in good standing of the United States Court of Appeals for the Third Circuit.

**CERTIFICATE OF IDENTICAL BRIEFS**

Pursuant to Third Circuit L.A.R. 31.1(c), I, Paul Jay Cohen, hereby certify that the electronic version of the Brief of Amici Curiae filed with the Court via the Court's electronic docketing system is identical to the hard-copy version of this Brief filed with the Court by first-class mail.

**CERTIFICATE OF VIRUS SCAN**

Pursuant to Third Circuit L.A.R. 31.1(c), I, Paul Jay Cohen, hereby certify that a Gmail anti-virus attachment scan was performed on the electronic version of the Brief of Amici Curiae before filing.

Dated: November 3, 2021

/s/ Paul J. Cohen  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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