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IN THE SUPREME COURT OF PENNSYLVANIA

9 MAP 2023

THE BOROUGH OF WEST CHESTER,
Appellant

v.

PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION AND WEST CHESTER UNIVERSITY OF PENNSYLVANIA OF THE STATE SYSTEM OF HIGHER EDUCATION,
Appellees

On appeal from the January 4, 2023 Order of the
Commonwealth Court of Pennsylvania at No. 260 M.D. 2018

BRIEF OF AMICI CURIAE PENNSYLVANIA AGGREGATES AND CONCRETE ASSOCIATION AND PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

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STATEMENT OF INTEREST

The Pennsylvania Aggregates and Concrete Association ("PACA") is Pennsylvania's leading business association for the crushed stone, ready-mixed concrete, sand and gravel, and cement industries. Its more than 200 members include many small businesses and multi-generational companies, many of whom live in the communities in which the companies operate. PACA believes it is important to do business in an environmentally sound and financially responsible manner.

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

In recent years, many municipalities and municipal authorities across the Commonwealth have issued notices to PACA and PCBI members purporting to assess stormwater charges on member properties and facilities. In many, if not most, cases, these stormwater charges are assessed by municipalities and municipal

authorities who operate municipal separate storm sewer systems ("MS4s")[1] that are subject to National Pollutant Discharge Elimination System ("NPDES") permitting requirements because such systems engage in "point source"[2] discharges of pollutants to waters of the United States. These stormwater charges provide funding for local stormwater management activities and projects that generally benefit the public. Most, if not all, such stormwater charges are calculated (in whole or in substantial part) based on the impervious surface area of the properties in question, sometimes without regard to whether or to what extent such properties (1) actually generate stormwater that discharges into and through MS4 system, (2) receive benefits from the stormwater management programs conducted by the municipality or authority, or (3) already manage the quantity and quality of their own stormwater under NPDES permits issued by the Pennsylvania Department of Environmental Protection ("PADEP"). Such stormwater charges are often imposed on entities, including PACA and PCBI members, who have already incurred

[1] An MS4 is defined by federal regulations as a "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, municipality or other public body that is designed or used for collecting or conveying storm water. 40 C.F.R. § 122.26(b)(8).

[2] A "point source" discharge is one that comes from a discrete, identifiable source, such as a drainage pipe or a treatment plant. *See* 40 C.F.R. § 122.2. This is in contrast to a non-point source discharge, which refers to the combination of stormwater runoff from larger surface areas, such as parking lots.

substantial costs in collecting, treating and managing stormwater, and who contribute little-to-no stormwater to the MS4 system.

No party to this appeal has paid, in whole or in part, for the preparation of this brief.

INTRODUCTION

This case presents a question that is far from unique to West Chester: under what circumstances are stormwater charges imposed by municipalities and municipal authorities taxes or fees? The stormwater charge that the Borough of West Chester ("Borough") imposed on West Chester University ("University") and Pennsylvania State System of Higher Education ("PASSHE") in this case is undoubtedly a tax, as the Commonwealth Court correctly held. The Commonwealth Court's analysis in reaching its conclusion, however, does not lend itself well to the variety of circumstances in which this question arises, and could lead to the conclusion that essentially all stormwater charges—even those that are reasonably designed to compensate the municipality for the provision of identifiable stormwater conveyance and treatment services—are taxes that can be imposed on private property owners, but not tax-exempt governmental and non-profit entities that receive identical services.

PACA and PCBI agree with the Commonwealth Court's judgment in this case, but encourage this Court to adopt a more nuanced test than the one employed

by the Commonwealth Court. Specifically, the Court should hold that a stormwater charge qualifies as a tax if it is not reasonably calibrated to compensate the municipality for its provision of stormwater conveyance and treatment services to the properties being charged, based upon a fair approximation of each property's proportionate contribution of stormwater to the MS4 facilities financed by the fee. Such a services-based test offers the best flexibility for courts to analyze stormwater charges under any set of facts, and brings stormwater charges in line with other types of service fees, such as fees for sewer, wastewater treatment, and water services, and for which municipalities and municipal authorities can collect reasonable fees from taxable and tax-exempt entities alike.

ARGUMENT

I. This case has broad implications and calls for a clearly defined test.

The central question before the Commonwealth Court in this matter was whether the Borough's charging of a "stream protection fee" constituted a tax or a fee. The significance of the Commonwealth Court's answer to this question reaches far beyond this particular dispute.[3] More than 1,000 MS4s exist across the

[3] The Borough and its supporting *amici* acknowledge the broad-reaching implications of this case and the nature of these issues as ones of first impression before this Court. Notably, although the Borough and its supporting *amici* cite to *In re Appeal of Best Homes DDJ, LLC*, Nos. 239 C.D. 2020, 240 C.D. 2020, 2021 Pa. Commw. Unpub. LEXIS 667 (Pa. Cmwlth. Dec. 23, 2021), the unpublished *Best Homes* decision did not have occasion to analyze the questions presented herein with any degree of substance because the appellant failed to present any evidence that the stormwater charges were used for expenses other than the costs of providing

Commonwealth,[4] and many of the municipalities and municipal authorities administering those MS4s are imposing similar stormwater charges on property owners. The circumstances in which stormwater charges are imposed, however, are not uniform. In framing an appropriate test, the Court should consider the following examples of typical situations confronted by PACA and PCBI members:

- A quarry that collects stormwater from a parcel consisting of hundreds of acres, which is conveyed into the quarry pit for storage, settling and reuse. The quarry does not discharge the stormwater to any MS4, nor does it discharge to a stream except under extraordinary (i.e., 100-year) storm events.
- An industrial or manufacturing facility that collects stormwater from its site, which is stored and settled in impoundments, treated and discharged directly to a stream pursuant to a NPDES permit that requires compliance with effluent limitations to protect the stream. The facility does not discharge to an MS4 and does not use the MS4 to convey and discharge the facility's stormwater.

MS4 service, or that the amount of the charge was not proportional to the services provided. Thus, the court in *Best Homes* did not have the ability to appropriately consider and articulate a test that considers the full scope of these issues.

[4] Municipal Stormwater, Pennsylvania Department of Environmental Protection, https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Stormwater/pages/default.aspx (stating that, in Pennsylvania, "there are two Large MS4s, no Medium MS4s, and 1059 Small MS4s").

- A facility that collects, settles and treats its stormwater, controlling the volume and rate of runoff from the property as well as the loading of sediment and other pollutants, before discharging it to an MS4, thereby substantially lowering the burden on the MS4 operator.
- A railroad with a rail right-of-way running through a forested area of a township over which the municipal authority seeks to impose a stormwater fee, claiming the right-of-way qualifies as impervious surface, even though the runoff is absorbed into adjacent ground and never reaches an MS4 inlet.

A test to determine whether a stormwater charge constitutes a tax or a fee must be able to address and appropriately apply to any of these various circumstances.

In this case, the Commonwealth Court correctly held that the Borough's "stream protection fee" was a tax, and this Court should affirm the Commonwealth Court's judgment. The Commonwealth Court's analysis, however, arguably does not account for the variety of circumstances under which stormwater charge disputes can arise. In the view of the Commonwealth Court, the Borough's stream protection fee, which was calculated based on a lot's impervious surface area, was a tax because it was predicated not on the *benefits* derived by the payors, but on the payors' anticipated *burden* on the Borough's stormwater system. *Borough of W. Chester v. Pa. State Sys. of Higher Education*, 291 A.3d 455, 464 (Pa. Cmwlth. 2023) ("Opinion"). The court reasoned that the benefits of the stormwater

charge—flood prevention and pollution control—are enjoyed by the general public, not just the property owners who pay stormwater charges. *Id.*

Under the Commonwealth Court's analysis, however, nearly *all* municipal stormwater charges in Pennsylvania would qualify as taxes, since they all can be characterized as providing those same types of widely shared benefits, and are (at least loosely) designed to charge more to property owners that impose more significant burdens on municipal stormwater systems. This is despite the fact that, in some circumstances, a municipality may actually provide direct benefits to property owners that directly discharge stormwater runoff to the MS4. Such property owners receive discrete benefits because, in the absence of the MS4, they would face both common law and statutory obligations to adequately control and safely discharge stormwater runoff themselves.[5]

In other words, the Commonwealth Court's "burdens/benefits" test allowed the court to reach the correct conclusion in *this* case, but it may not allow courts to reach the correct result in *all* cases. For this reason, PACA and the PCBI

[5] *See Ridgeway Court, Inc. v. Landon Courts, Inc.*, 442 A.2d 246, 248 (Pa. Super. 1981) (finding landowner liable for damage to neighboring property where the landowner failed to control stormwater runoff after changes to his land altered the natural watercourse and resulted in artificially increased stormwater drainage on neighboring property); *Kowalski v. TOA PA V, L.P.*, 206 A.3d 1148, 1165 (Pa. Super. 2019) (affirming finding of liability against landowner whose stormwater management system resulted in excess water flow onto neighboring property). *See also* 32 P.S. § 680.13 ("Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property.").

respectfully request that this Court affirm the Commonwealth Court's judgment but enunciate a more nuanced test that considers whether a stormwater charge compensates for *services* rendered by an MS4, is commensurate with the services provided to each property owner, and is used to pay only for expenses related to the provision of those services. This "services" test will provide courts with the flexibility to analyze stormwater charges in a variety of circumstances while providing a consistent framework across the Commonwealth.

II. Stormwater charges are not regulatory fees but may be service fees.

At the outset, it is important to distinguish between a service fee and a regulatory fee. The Borough below attempted to argue that its stream protection fee was a "regulatory fee," which could be imposed on state entities and others. The Commonwealth Court did not specifically address this point in its Opinion, but well-established Pennsylvania law makes it clear that such stormwater charges do not qualify as regulatory fees.

A regulatory fee often takes the form of a licensing or permit fee. As this Court explained:

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

> exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

National Biscuit Co. v. City of Philadelphia, 98 A.2d 182, 188 (Pa. 1953). The central thread connecting the four *National Biscuit* factors is a regulatory program for which fees are charged to the regulated entities to cover the regulatory authority's costs of implementing that program.

This Court's decision in *National Biscuit* is consistent with the First Circuit's decision in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992), which the Commonwealth Court and several *amici* cite. *See* Opinion at 462; Br. of Lower Swatara Township at 25-26; Br. of PMAA at 18; Br. of Radnor Township at 20. In *San Juan Cellular*, the First Circuit described a spectrum of charges with a "classic regulatory fee" on one end and a "classic tax" on the other. A fee is "imposed by an agency upon those subject to its regulation," whereas a tax is imposed on all citizens to raise money that is spent for the benefit of the community at large. *San Juan Cellular*, 967 F.2d at 685. To determine whether a charge that falls somewhere in the middle is a tax or a fee, courts have considered the ultimate use of the revenue. *Id.* Revenue used to provide general public benefits would tend to be viewed as a tax, whereas revenue that "provides more narrow benefits to regulated companies or defrays the agency's costs of regulation" would be construed as a regulatory fee. *Id.*

Similarly, in *White v. Commonwealth Medical Professional Liability Catastrophe Loss Fund*, 571 A.2d 9 (Pa. Cmwlth. 1990), the Commonwealth Court considered whether certain surcharges imposed on medical professionals constituted taxes or regulatory fees. *White*, 571 A.2d at 10. The surcharges supported a special fund to cover professional liability judgments that exceeded the physicians' basic malpractice insurance coverage. *Id*. The court applied the *National Biscuit* factors and determined that the surcharge was akin to a license fee, not a tax, because it did not produce a high level of revenue in comparison to the cost of administering the fund and making payments in connection with the professional liability claims, which the court viewed as "part of the [fund administrator's] cost of supervision and regulation." *Id.* at 11-12. PennFuture, in its *amicus* brief, suggests that *White* supports a view that stormwater charges are also regulatory fees. Br. of PennFuture at 17. The court in *White*, however, specifically found that the surcharge was imposed on regulated entities to cover the government's cost of supervision and regulation.

They key component in *National Biscuit, San Juan Cellular*, and *White,* therefore, is that a regulatory fee is *imposed on regulated entities* by the agency conducting or overseeing the regulation. That is simply not the situation with stormwater charges. The Pennsylvania Municipal Authorities Association ("PMAA"), in its *amicus* brief supporting the Borough, circumvents this fact by

suggesting that stormwater charges are part of a "comprehensive regulatory scheme." Br. of PMAA at 18. PMAA cites to *Norfolk Southern v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019), where the Fourth Circuit Court of Appeals, while acknowledging that stormwater charges defray the *municipality's* costs of *complying* with regulations imposed on it, nevertheless determined that "a classic regulatory fee is designed to address harmful impacts of otherwise permissible activities, and to ensure that the actors responsible for those impacts bear the costs of addressing them." *Norfolk Southern*, 916 F.3d at 322. Not only is this flatly inconsistent with *National Biscuit*, but the Fourth Circuit did not cite to any authorities supporting its notion that a regulatory fee simply is one "designed to address harmful impacts," or that a tax becomes a fee if it can be linked to some "comprehensive regulatory scheme." *Id.*

If a charge becomes a regulatory fee simply because it is designed to "address harmful impacts of otherwise lawful activities," then every excise tax would suddenly transform into a regulatory fee that an unelected body is empowered to impose. Taxes on cigarettes, for instance, are designed to address concerns with the harmful impacts of nicotine addiction. *East Coast Vapor, LLC v. Pennsylvania Department of Revenue*, 189 A.3d 504, 516 (Pa. Cmwlth. 2018) (noting that cigarette taxes are intended to address concerns about young people using cigarettes and becoming addicted to nicotine). This does not render them

regulatory fees; in fact, it is well-established that cigarette taxes are excise taxes under Pennsylvania law. *Secretary of Revenue v. John's Vending Corp.*, 309 A.2d 358, 361 (Pa. 1973) (noting that cigarette taxes were meant "to raise revenue by means of an excise tax on cigarettes"). Moreover, this Court has made clear that excise taxes and regulatory or license fees are not interchangeable. *Pittsburgh Milk Co. v. Pittsburgh*, 62 A.2d 49, 52 (Pa. 1948) ("A license fee is not the equivalent of or in lieu of an excise or a property tax, which are levied by virtue of the government's taxing power solely for the purpose of raising revenue."). Deciding that a charge is a regulatory fee, therefore, simply because it addresses harmful impacts is illogical and overbroad.

Further the "comprehensive regulatory scheme" test is not workable as a means of determining whether a charge is a tax or a fee. Even the Fourth Circuit, in an earlier decision considering a charge associated with a different "comprehensive regulatory scheme," determined that the charge was ***not*** a fee. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130 (4th Cir. 1999) (finding that charges assessed to entities disposing of waste into landfills, to provide funding for landfill facilities that did not meet federal environmental regulations, qualified as taxes). If a charge associated with a "comprehensive regulatory scheme" can be a fee in one case and a tax in another, when construed by the same court, one wonders how such a test can ever be of value to future courts.

The *Norfolk Southern* rubric, which PMAA espouses, would upend decades of Pennsylvania precedent and confer exceptionally broad powers on municipalities and municipal authorities to impose "fees" on entities who are not themselves the subject of regulation, or to impose fees that bear no relation to the cost of regulation. Under the PMAA's argument, virtually any time a municipality or municipal authority is subject to a federal or state regulation that requires it to do something to address or correct that municipality's or authority's actions or impacts, then any type of charge it assesses against its property owners to recoup its costs would be a "fee" rather than a tax. Essentially, PMAA would argue that if the state required the municipality to pave its streets and sweep them to avoid having dirt wash into streams, then the municipality could impose a charge on each property based on property acreage or property value in order to recoup the capital and operating cost of complying with the state's regulation, and that charge would *ipso facto* be a "fee" rather than a "tax" irrespective of whether it was tied to services and/or direct benefits provided to the properties being assessed. *National Biscuit* and its progeny do not allow for such a broad understanding of a regulatory fee, and this Court should reject the overbroad and undefined *Norfolk Southern* approach.

When applying *National Biscuit*, it is clear that stormwater charges do not meet the definition of a regulatory fee. The municipalities or municipal authorities

imposing the stormwater charges are not the regulating authorities. This is not a scenario where, for example, a municipality with a regulatory program to inspect rental properties imposes fees on landlords to cover the cost of implementing the inspection program. *Greenacres Apartments, Inc. v. Bristol Tp.*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984). Rather, the municipalities and municipal authorities are themselves the *regulated* entities.

The Borough's ordinance acknowledges this fact, stating that the stormwater charge is "an assessment levied by the Borough to cover the cost of constructing, operating, and maintaining stormwater management facilities and to fund expenses related to *the Borough's compliance* with PADEP NPDES permit requirements under applicable state law based on the impact of stormwater runoff from impervious areas of developed land in the Borough." R. 54a. When a municipality or municipal authority utilizes an MS4, they must comply with federal and state regulations to control and reduce the loadings of pollutants discharged from their municipally-owned and operated storm sewer system into waters of the United States and waters of the Commonwealth. 40 C.F.R. § 122.26(a)(3), (a)(9); 25 Pa. Code § 92a.32(c). They must obtain an NPDES permit that includes "terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. § 122.34(a). The

NPDES Permits issued to each municipality and authority require implementation of best management practices to reduce pollutant loadings. And the operators of such MS4 systems must also develop a stormwater management program that focuses on six minimum control measures:

1. public education and outreach on storm water impacts;
2. public involvement/participation, including public participation in developing, implementing, and reviewing the municipality's storm water management program;
3. detecting and eliminating illicit discharges or dumping into the MS4;
4. controlling stormwater runoff from construction sites;
5. developing, implementing, and enforcing a program to address post-construction stormwater runoff from new development and redevelopment projects that disturb one or more acres of earth; and
6. developing and implementing an operational program to prevent or reduce pollutant runoff from municipal operations.

Id. at § 122.34(b)(1)-(6).

These regulatory requirements are imposed *on the owners and operators of the MS4* who hold the NPDES Permits governing such systems, not property owners who connect to the MS4. With limited exceptions, such municipalities and municipal authorities are not exercising regulatory powers with respect to properties within their service areas. The exceptions are situations where the municipality enacts rules for controlling stormwater runoff from construction sites and the post-construction operations of new development projects. But in those

cases, the municipality or authority typically assess a separate permit application or plan review fee to the entities engaged in such construction or new development.[6]

In contrast to a regulatory fee, the Borough's "steam protection fee" and similar stormwater charges attempt to defray the cost to the municipality or municipal authority of *complying with their own regulatory obligations* as the owner/operator of an MS4 system, not to reimburse the cost of implementing a regulatory program adopted by the municipality which specifically applies to the property owners being charged. Thus, by definition, such stormwater charges do not constitute regulatory fees.[7] However, as discussed below, they can constitute service fees if they are fairly based on stormwater conveyance and treatment services provided to specific property owners that discharge to the MS4, and if the funds are used only to cover the costs associated with providing that MS4 service.

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[6] *See* West Chester Code §§ 97-9 and 97-54 (relating to fees for review, approval, and inspection of land development plans and construction); § 97-45 (relating to soil erosion and sedimentation control plan requirements in connection with land development).

[7] Stormwater charges also are not "impact fees" as Lower Swatara Township suggests. Br. of Lower Swatara Township at 8-9. Nothing in the statutory authorizations for stormwater fees, such as the Municipal Authorities Act, 53 Pa.C.S. § 5607(d)(9), (d)(34), refers to stormwater fees as "impact fees" or characterizes them as mitigating for "unrestricted stormwater runoff." Br. of Lower Swatara at 9. Further, even if they were "impact fees," that characterization still would not justify imposing the fees on properties that do not contribute stormwater to the MS4 or that appropriately control the quantity and quality of their own stormwater before that stormwater is released into the MS4 (e.g., pursuant to permits issued by PADEP as it appears is the case with the University).

III. The test for whether a stormwater charge is a tax or a fee should focus on services provided and whether the fees are limited to paying for those services.

A. The Commonwealth Court's "burdens/benefits" test is too broad.

A test focused on services provided is better able to address and adapt to the various circumstances in which the tax-vs-fee question arises than the Commonwealth Court's "burdens/benefits" test. In conducting its analysis, the Commonwealth Court relied on a decision by the U.S. Court of Federal Claims, *DeKalb County, Georgia v. United States*, 108 Fed. Cl. 681 (Fed. Cl. 2013). *See* Opinion at 464-65. There, DeKalb County sued the United States for unpaid stormwater charges imposed on federal government property owned in the county. *DeKalb County*, 108 Fed. Cl. at 690. The Clean Water Act, as it was written at the time the charges were imposed, required federal property and activities to comply with water pollution regulations, including the payment of "reasonable service charges." *Id.* at 688 (quoting 33 U.S.C. § 1323(a)).[8]

The question before the court in *DeKalb County* was the same presented here: whether the county's stormwater charge was a tax or a fee. The court applied a "burdens/benefits" analysis to the question and decided that the principal purposes of the stormwater ordinance—flood prevention and pollution reduction—

[8] Congress amended Section 1323 in 2011 to clarify that the section allowed for payment of stormwater charges, but the dispute in *DeKalb County* arose while the pre-2011 version was in effect.

benefitted the community as a whole, not just those who paid the charge. *Id.* at 701. Although the county argued that the stormwater system directly benefited property owners by reducing their risk of liability for damage caused by stormwater runoff, the court rejected this argument. *Id.* at 702. In particular, the court reasoned that, even if that were true, there was no apparent relationship between the value of the benefit and the amount of the charge. *Id.* at 703. Instead, the court noted, the county based its stormwater charge on the impervious surface area of a property, which relates more to the burden a property places on a stormwater system than the benefits a property receives from the system. *Id.* Therefore, because the charge provided a general benefit to the community that was not tied to discrete benefits to property owners, the court held that the charge constituted a tax. *Id.* at 704.

Commonwealth Court followed the analysis of *DeKalb County*. The Commonwealth Court noted that the Borough's witness testified that managing stormwater provides a general benefit to the community as a whole. Opinion at 463. Further, the Borough's witness testified that the stormwater system maintained by the University provided the same general benefits to the community as the Borough's MS4. *Id.* at 463-64. The Commonwealth Court also determined that the amount of impervious surface area of a property does not correlate to the level of benefit received by the property owner by the MS4. *Id.* at 464. The

Commonwealth Court reasoned, quoting *DeKalb County*, that the Borough's stormwater charge reflected the anticipated burden a property would impose on the MS4 rather than the benefits provided by the MS4. Therefore, for the same reasons articulated in *DeKalb County*, the Commonwealth Court held that the Borough's stormwater charge constitutes a tax.

This "burdens/benefits" test, however, is overly simplistic. In some circumstances, the use of a municipality's MS4 may offer both discrete benefits to the property owners who use the MS4 to convey and manage the stormwater generated by such properties, as well as general benefits to the community. Stormwater conveyance and treatment may be viewed as a service, similar to supplying water or treating wastewater, and courts have routinely upheld service fees charged by municipalities and municipal authorities to perform these services. *See Borough of North East v. A Piece of Land Fronting on the West Side of South Lake Street*, 159 A.2d 528 (Pa. Super. 1960) (stating that municipalities are entitled to impose sewer charges so long as they are "reasonably proportional to the value of the service rendered and not in excess of it"); *Van Voorhis v. Peters Creek Sanitary Authority*, 430 A.2d 1017 (Pa. Cmwlth. 1981) (upholding sewer tapping fees as "reasonable and properly related to the value of service rendered"). Yet, under the Commonwealth Court's burdens/benefits analysis, sewer charges would also arguably qualify as taxes, because proper treatment of sewage undoubtedly

provides general public benefits, and sewer services are typically based on the "burden" imposed on the municipal sewer system in terms of volume of sewage disposed.

As outlined below, a test based on services rendered offers a more nuanced and comprehensive approach than the Commonwealth Court's burdens/benefits test. A services test recognizes that, in some circumstances, municipalities provide discrete services to properties connected to the MS4. In this regard, the Borough is correct that connection to and use of an MS4 may provide specific benefits to those property owners. *See* Br. of Appellant at 24. Connection to an MS4 is necessarily a prerequisite for a charge to constitute a valid fee, but that does not end the inquiry. The charges must still be reasonably proportionate to the services actually provided to each property and used only to pay for the cost of providing those services. A test focused on services, rather than benefits, as outlined in more detail below, accounts for these additional criteria and allows for a more fulsome analysis of these types of charges. Further, by using a services test, courts can determine whether a stormwater charge constitutes a fee or a tax by considering whether the charge properly credits or exempts properties that control or limit discharges to the MS4.

B. To qualify as a service fee, a stormwater charge must meet two essential criteria.

To determine whether a stormwater charge constitutes a tax or a service fee, courts should consider whether the charge meets two essential criteria: (1) whether the charge is based on some fair approximation of the proportionate contribution of the property or facility to stormwater volumes and pollution being controlled, treated, or managed by the MS4; and (2) whether the proceeds of the fee are used to pay only for expenses associated with the provision of those stormwater conveyance and treatment services.

1. A service fee should be based on a fair approximation of the proportionate contribution of the property or facility to stormwater pollution being controlled, treated, or managed by the MS4.

As a fee for a service, a stormwater charge must be proportional to the property's contribution of stormwater volumes and pollutants to the MS4 system through which a municipality or municipal authority provides the service. *M & D Properties, Inc. v. Borough of Port Vue*, 893 A.2d 858, 862 (Pa. Cmwlth. 2006) ("[F]ees charged by a municipality for services rendered are proper if they are *reasonably proportional* to the costs of the regulation or *the services performed*.") (emphasis added). This aligns with how Pennsylvania courts historically have construed fees for sanitary sewer service. *See, e.g., Hamilton's Appeal*, 16 A.2d 32, 35 (Pa. 1940) (stating that the city's sewer charge must be "reasonably

proportional to the value of the service rendered, and not in excess of it" and noting that a sewer charge "imposed without any regard whatever to the extent or value of the use made of the sewer facilities, or whether any use is made, . . . is, in legal effect, undoubtedly a tax"); *Borough of North East*, 159 A.2d at 530 ("The charge that is made for the sewer service must be based upon actual use[], and must be reasonably proportional to the value of the service rendered and not in excess of it."); *Western Clinton County Municipal Authority v. Estate of Charles R. Rosamilia, Sr.*, 826 A.2d 52, 57 (Pa. Cmwlth. 2003) (stating that sewer rates charged by a municipal authority must be "reasonably proportional to the value of the service rendered").

This consistent view by Pennsylvania courts of how to construe a service fee stands in stark contrast to the courts' views in *Norfolk Southern* (discussed above in Part II) and *City of Key West v. Key West Golf Club Homeowners'*, 228 So.3d 1150 (Fla. 3rd DCA 2017), on which PMAA mistakenly relies. The court in *Key West*, in particular, specifically found that the property owner parties were "non-users or minimal users of the stormwater utility" but held they could still be charged stormwater "fees" because they benefitted generally from the mitigation of "flooding, overdrainage, environmental degradation and water pollution." *Key West*, 228 So.3d at 1155. This is exactly the type of generalized benefit that would tend to cause a charge to be viewed as a tax under Pennsylvania law. *See National*

Biscuit Co., 98 A.2d at 188. Indeed, all residents, whether they own property or not, benefit from efforts to control water pollution. This Court, therefore, should continue to apply the established reasoning of earlier decisions in construing a valid service fee as one that is proportional to the actual services provided.

In *Borough of North East*, for instance, the borough imposed a wastewater fee calculated at 20 percent of a property's water charge. The property owner in the case operated an industrial plant in which 95 percent of the water intake was used for the processing of fruits and ultimately discharged into the property owner's own treatment basin or directly to a creek, with the remaining 5 percent of the water intake being discharged to the borough's sewer system. The borough nevertheless based the property's sewer charge on the entire volume of water supplied to the facility, rather than the volume of wastewater discharged to the borough's sewage treatment system. The trial court held that the fee should be based only on the 5 percent of water intake being returned to the sewer system, and the Superior Court agreed. The Superior Court reasoned that reducing the sewer charge in this way "recognizes that the sewer charge must be based upon the actual use made of the borough sewer system by Welch." *Borough of North East*, 159 A.2d at 531. In fact, the Superior Court noted that a fixed sewer charge that disregards actual use of the system "would be in the nature of a tax rather than a payment for the service rendered." *Id.*

Some PACA and PCBI members similarly have received assessments for stormwater charges that exceed their proportional contribution of stormwater to the municipal stormwater sewer system. Likewise, in this case, West Chester University and PASSHE also were charged for stormwater services that it appears they may not have been actually provided. Notably, the University operated its own MS4 system, collecting and managing its own stormwater pursuant to a separate MS4 NPDES Permit issued by PADEP to the University.[9] The Borough's stormwater charge, like many stormwater charges around the Commonwealth, is based only on the amount of impervious surface area on a property. West Chester Code § 94A-6(B), § 94A-8(A). Although the West Chester ordinance allows property owners to seek credits against the stormwater charge based on steps they take to control and manage stormwater on-site, that credit cannot exceed 60 percent,[10] even for properties that control all of the stormwater runoff generated on their sites.[11] Thus, under a properly formulated services test, the Commonwealth

[9] The Commonwealth Court's Opinion indicates that some of the University's stormwater collected via the University's MS4 system may have subsequently flowed through the Borough's storm sewers, but as noted below, the Borough was using the fees collected from the University for purposes other than the operation of the Borough's MS4 system. Opinion at 460; R. 1690a.

[10] West Chester Borough Stream Protection Fee Program Non-Residential Credit Policies and Procedures Manual at 8.

[11] In its *amicus* brief, Lower Swatara Township cites to *Green v. Village of Winnetka*, 135 N.E.3d 103 (Ill. Ct. App. 2019), for the proposition that stormwater charges are fees and not taxes. Br. of Lower Swatara Township at 15. The *Green* decision, in fact, supports the services test proposed by PACA and PCBI. There, the stormwater ordinance allowed for a *100%* credit of the fee for a parcel that did not discharge into the stormwater system directly or indirectly.

Court's determination that the Borough's stormwater charge constitutes a tax is still correct because the West Chester ordinance imposes a charge that is not reasonably proportional to the service being provided to the University and many other property owners.

More generally, calculating stormwater charges based only on impervious surface is insufficient because impervious surface area does not necessarily correlate to a property's proportional contribution to an MS4 and, therefore, cannot provide an accurate understanding of the value of the services rendered to any particular property. The Borough suggests that impervious surface, itself, is sufficient as a basis for determining the amount of a stormwater charge, but courts have found otherwise. Br. of Appellant at 52-54. As noted by the Commonwealth Court and the *DeKalb County* court, impervious surface area is inadequate as a singular factor to calculate stormwater charges.

Green, 135 N.E. at 115. Further, the ordinance provided that revenue from the fees could only be used to finance the municipal stormwater system. *Id.* Neither of these provisions are present in the Borough's ordinance. However, if ordinances are framed similar to Winnetka, where credits of up to 100% are available and given based on whether and to what extent actual services are being provided, PACA and PCBI would agree that such ordinances could be found to be fees if administered in a manner consistent with the services test. Likewise, the Ohio Court of Appeals' decision in *Steeplechase Village, Ltd v. City of Columbus*, 2020 WL 7777889 (Ohio Ct. App. Dec. 31, 2020), which Lower Swatara Township also cites, further supports the services test in finding that the stormwater charges at issue there were fees because they were only to be used to maintain, repair, and operate the stormwater system and were tied to services provided. *Steeplechase*, 2020 WL 7777889 at *9-10; Br. of Lower Swatara Township at 19-20.

To be a valid service fee, a stormwater charge must sufficiently account for a property's proportional contribution to an MS4, as the Court of Appeals for the Federal Circuit recently held. *City of Wilmington, Delaware v. United States*, 68 F.4th 1365 (Fed. Cir. 2023). *City of Wilmington*, similar to *DeKalb County*, involved the assessment of stormwater charges to U.S. Army Corps of Engineers property owned by the federal government. In the context of a federal statute that stipulated that federal facilities would be subject to "reasonable service charges" for wastewater and stormwater services,[12] the question in *City of Wilmington*, was whether the city's stormwater charge was reasonable.

The City of Wilmington had established stormwater charges based on a multi-variable calculation. The City categorized properties by looking at land use codes for county tax assessments and then identified a "runoff coefficient" by comparing its land categories to those used in a 1962 study that outlined coefficient ranges for various types of properties. The City then applied the coefficient to the total area of the property to calculate total impervious area, and finally divided the impervious area by an equivalency stormwater unit derived from the size of the median single-family home in order to standardize properties. In general, the court

[12] The court was applying provisions of the Clean Water Act, adopted after the situation addressed in *DeKalb County*, as now reflected in 33 U.S.C. §1323, which require federal entities to comply with state and local requirements "respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity *including the payment of reasonable service charges. ..."* (emphasis added).

took no issue with the city's methodology. *Id.* at 1372. The court found, however, that the city had failed to produce evidence that this general methodology, when applied to the property at issue, met the definition of a "reasonable service charge." *Id.* The court found that the City failed to show that it categorized properties appropriately and that the runoff coefficients used provided a fair approximation of the runoff conditions of most properties in a particular stormwater class. *Id.* at 1373. The court noted that a property's physical characteristics will have a significant impact on the runoff from that property, and the categories and coefficients the City used did not sufficiently account for those characteristics. *Id.* at 1373-74. The court held, therefore, that the stormwater charges were not reasonable service fees. *Id.* at 1374.

The point of *City of Wilmington*, in other words, is not that impervious surface area can or cannot be used as a data point when determining the amount of a stormwater fee, but that impervious surface area, as a general metric, is not inherently sufficient as a basis for determining a fee amount. In its *amicus* brief, PMAA characterizes the court's holding as based on the city's failure to "link the amount of impervious surface on each property to its charge." Br. of PMAA at 25. This misses the court's point, though, that, even when impervious surface area is applied to the fee calculation, there must still be a rational and reasonable relationship between the *actual stormwater contribution* of a particular property,

taking into account the physical characteristics of that property, and the amount of the charge. Any suggestion that *City of Wilmington* sanctions the use of general impervious surface area figures to calculate stormwater charges is inaccurate.

This Court should adopt a similar analysis. For a stormwater charge to constitute a reasonable service fee, rather than a tax, it must be based on a fair approximation of the property's contribution of stormwater volumes and pollutants to the MS4. This requires something more than simply calculating impervious surface area. Further, a stormwater charge must also account for properties that manage their own stormwater, wholly or partially, by offering exclusions or credits up to 100 percent for those properties or portions of properties that do not contribute to the MS4.

If a stormwater charge satisfies this first criterion, then courts should consider whether the revenue generated by the charge is appropriately used only for service-related expenses.

2. To be a service fee, revenue generated by a stormwater charge must be used only for expenses related to the provision of the service.

The second criterion defining a reasonable service fee is the requirement that funds generated by the fee are used only for expenses related to the provision of the service. This, again, aligns a stormwater fee with other types of service fees, such as sewage collection and treatment fees. By statute, municipal sewer fees may

only be used to cover (1) the "operation, maintenance, repair, alteration, inspection, depreciation, or other expenses in relation to such sewer, sewerage system, or sewerage treatment works"; (2) the servicing of any bonds issued to construct or acquire a sewer system; and (3) a 10 percent safety margin. 53 P.S. § 2232. Similarly, under the MAA, municipal authorities may charge service fees

> [f]or the payment of the expenses of the authority, the construction, improvement, repair, maintenance and operation of its facilities and properties, . . . the payment of the principal of and interest on its obligations and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligations[.]

53 Pa.C.S. § 5607(d)(9). *See also Borough of Port Vue*, 893 A.2d at 862 ("A municipality may not use its power to collect fees for a service as a means of raising revenue for other purposes."); *National Properties, Inc. v. Borough of Macungie*, 595 A.2d 742, 746 (Pa. Cmwlth. 1991) (same).

Here, again, this Court need not disrupt the Commonwealth Court's judgment because the Borough's stream protection charge goes beyond the limits of a service fee. The Borough deposits the payments of the stormwater charge into a special stormwater management fund which is then used not only to pay for construction, operation and maintenance of the stormwater management system, but also more broadly for the "performance of other functions or duties authorized by law in conjunction with the maintenance, operation, repair, construction, design, planning and management of stormwater facilities, *programs and operations*."

West Chester Code § 94A-9(B) (emphasis added). The broad language of the ordinance undoubtedly encompasses more than just the cost of providing the MS4 service. In fact, the Borough's former director of public works confirmed that funds from the stormwater charge also pay for the costs of street sweeping, R. 1690a, and the Commonwealth Court noted that the stormwater charge funded other broader pollution reduction measures, such as stream bank restoration and tree planting. Opinion at 460. These activities, while perhaps consistent with the scope of the Borough's federal Clean Water Act obligations as the operator of an MS4 system, are nevertheless unrelated to actual conveyance and treatment services being provided to property owners. Revenue generated by stormwater service fees should not be used to pay for this broader range of activities.

C. A "services" test harmonizes with established Pennsylvania law.

A services test also harmonizes the analysis of stormwater charges with existing law. First, as discussed above, a services test aligns better with how courts have traditionally analyzed sanitary sewer fees. Second, a services test is also consistent with the MAA. Under the MAA, municipal authorities are authorized to collect fees "at reasonable and uniform rates" to pay for the expenses associated with providing services, including with respect to stormwater management. 53

Pa.C.S. § 5607(d)(9), (d)(34).[13] "This standard mandates that rates be reasonably proportional to the value of the service rendered." *Western Clinton County Municipal Authority*, 826 A.2d at 57. Yet, as explained above, under the Commonwealth Court's analysis, essentially all stormwater charges would qualify as taxes, which municipal authorities have no power to assess under the Pennsylvania Constitution. *Pennsylvania Independent Waste Haulers Ass'n v. County of Northumberland*, 885 A.2d 1106, 1111 (Pa. Cmwlth. 2005) (citing *Evans v. West Norriton Township Municipal Authority*, 87 A.2d 474 (Pa. 1952)) ("It is well-established that a municipal authority, as an appointed body, cannot be delegated any powers of raising revenue."). A test focused on services provided remedies this tension and simply requires that any charge be proportional to stormwater services provided—something that is already required of municipal authorities under the MAA.

D. Public policy favors the "services" test.

The services test is also the best approach from a public policy perspective. Stormwater charges are legitimate fees where they are directly linked to and

[13] In its brief, PMAA specifically cites the MAA's statutory authority for municipal authorities to charge stormwater fees. Br. of PMAA at 12-13. The MAA, however, must still be read in conjunction with the Pennsylvania Constitution's prohibition on delegating to non-elected bodies the power to assess taxes, as discussed herein at page 30. Thus, to be a valid charge under the statute, the fee must directly relate to and be proportional to the service actually provided to each property. The MAA cannot, and does not, authorize municipal authorities to assess fees to properties or portions of properties not actually served by the MS4.

proportionate to services provided to properties that are connected to and receive benefits from an MS4, and where the funds are only used for those purposes. Under those circumstances, the Commonwealth and tax-exempt parties would also be obligated to pay. However, if, as other *amici* argue, a charge can be imposed on any property in the community, irrespective of the extent to which it contributes stormwater volumes or pollutants to the MS4, then property owners would be disincentivized to take appropriate actions on their own lands to avoid or reduce the volume and pollutant loadings of stormwater. Imposing charges based on impervious surface on property owners who (like many PACA and PCBI members) proactively and responsibly collect, settle and store such stormwater on their property, avoiding the placement of a burden on the community MS4 system, both discourages such proactive efforts while in effect requiring them to subsidize management of stormwater volumes and pollutants generated by others who have taken no such efforts. The hallmark of a legitimate charge is a direct and proportionate relationship to a service being provided. Imposing charges to raise revenue to address the stormwater problems created by others has every hallmark of a tax.

CONCLUSION

For the reasons discussed above, PACA and PCBI respectfully request that the Court (1) affirm the judgment of the Commonwealth Court but (2) enunciate a

new test to determine whether a stormwater charge is a tax or a fee based on whether the charge is reasonably proportional to specific stormwater conveyance and treatment services provided.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that, based on the word count feature of Microsoft Word 2010, the foregoing Brief of Amici Curiae complies with the word-count limit described in Pennsylvania Rule of Appellate Procedure 2135(a)(1).

/s/ Tad J. Macfarlan
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CERTIFICATE OF COMPLIANCE

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

/s/ Tad J. Macfarlan
Tad J. Macfarlan

CERTIFICATE OF SERVICE

I certify that, on October 16, 2023, I caused a copy of the foregoing document to be served via the Court's PACFile System upon all persons registered to receive service in this matter.

/s/ Tad J. Macfarlan
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