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IN THE SUPREME COURT OF PENNSYLVANIA

NO. 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

BRIEF OF AMICUS CURIAE, RADNOR TOWNSHIP, IN SUPPORT OF APPELLANT, THE BOROUGH OF WEST CHESTER

Appeal from the Order entered on January 4, 2023 in the Commonwealth Court of Pennsylvania at No. 260 M.D. 2018

GRIM, BIEHN & THATCHER
John B. Rice, Esquire (ID: 46489)
H. Peter Nelson, Esquire (ID: 84987)
Daniel P. Martin, Esquire (ID: 332137)
104 South 6th Street, P.O. Box 215
Perkasie, PA 18944
(215) 257-6811
Attorneys for Amicus Curiae, Radnor Township

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I. STATEMENT OF INTEREST

Radnor Township[1] ("***Radnor***"), by and through its Solicitors, Grim, Biehn & Thatcher, files this Amicus Curiae in support of Appellant, the Borough of West Chester ("***Borough***"). Radnor is a Home Rule Municipality in the Commonwealth of Pennsylvania, with offices located at 301 Iven Avenue, Wayne, Pennsylvania 19087.

Radnor, like West Chester Borough, was developed at a time when little or no consideration was given to the proper management of stormwater runoff from developed properties. Private property owners were happy to direct roof drains, washing machines, swimming pools, and sump pumps to the nearest public road or stream to remove excess water from their property. Federal and state regulations now require individuals and municipalities to manage all stormwater runoff, and for municipalities this does not only apply to runoff from new development, but also to runoff from development which has been in place for several hundred years. With the Borough originally incorporating in 1799 and Radnor incorporating as a Township in 1684, these municipalities are struggling to manage the impact of centuries of development.[2] To meet these requirements and the needs of their

[1] Radnor Township paid for the legal services rendered in drafting and submitting this Amicus Brief.

[2] The Borough became a Home Rule Municipality in 1994, while Radnor became a First Class Township in 1901 and a voter-approved Home Rule Municipality in 1977.

residents, municipalities created stormwater management systems to ensure the proper control and management of stormwater within their boundaries.

To cover the cost of owning and operating a stormwater management system and to address the regulatory requirements under federal and state law, Radnor enacted its own Stormwater Fee Ordinance in 2013 after an extensive study of development levels and the impact of stormwater runoff from privately owned properties into the Radnor stormwater management system ("***System***"). Radnor is home to several schools, colleges, universities, health care facilities, and other institutions who pay little or no real estate taxes yet contribute substantially to stormwater runoff from vast parking areas and other impervious surfaces. Radnor's management of all this stormwater once it leaves the private property constitutes a direct benefit to each of these property owners. While the System's management of stormwater and reduction of pollutants provides substantial environmental benefits and addresses numerous unfunded mandates imposed upon Radnor by state and federal rules and regulations, at the end of the day, the System is simply a service Radnor provides to some of its residents, businesses, and institutions to safely, economically, and legally transport stormwater away from these persons' and entities' properties. Radnor's stormwater fee merely covers the cost of operating, maintaining, renovating, repairing, and upgrading the System. Radnor's stormwater fee program has enabled Radnor to fully provide necessary and required stormwater

management to its residents, businesses, and institutions over the last ten years. The Commonwealth Court's decision in this matter, if not corrected, will have a profound and lasting negative impact on Radnor's ability to manage stormwater and will directly degrade the health, safety, and welfare of the residents, businesses, and institutions currently served by the System.

II. STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS

Your Amicus Curiae, Radnor Township, concurs in and adopts the statements made in the brief of Appellant, the Borough of West Chester, regarding Statement of the Case and Standard of Review.

III. STATEMENT OF QUESTIONS INVOLVED

A. Whether the Commonwealth Court correctly characterized the Stream Protection fee assessed under Section 94A-6(A) of the West Chester Code as a tax rather than a fee.

[Proposed Answer: No]

IV. SUMMARY OF ARGUMENT

First, the Clean Water Act, 33 U.S.C. § 1251 *et. seq.*, requires municipalities, among other entities, to reduce the discharge of pollutants to the maximum extent possible by implementing management practices, control techniques and systems, and design and engineering methods. These requirements are administered and enforced by the Pennsylvania Department of Environmental Protection. The process includes implementing an MS4 plan, which incorporates several stormwater mitigation components. Stormwater systems facilitate the removal of pollutants from the stormwater flowing off private and public property into the local municipal storm system. The Commonwealth Court decision removes direct financial responsibility from those institutions who have the largest areas of impervious surfaces and uncontrolled runoff.

Second, the Commonwealth Court's reliance upon *Dekalb County v. United States*, a Federal Claims Court case, is misplaced. The Dekalb Court dealt with a factually and legally dissimilar case in which the federal government was being assessed a stormwater charge that they argued benefitted the community as a whole, and not particular property owners. There are numerous courts throughout the country that have held to the contrary with factual scenarios vastly more similar to the case at bar. These other courts, in holding that a stormwater charge is a fee and not a tax, have focused on the unique benefits conferred upon property owners by

the local government relieving them of their stormwater responsibilities. In this matter, by deploying its stormwater management system, the Borough relieves property owners, such as the University, of large portions of the costs associated with meeting their stormwater obligations by collecting, controlling, and diverting stormwater runoff from the properties owned by these owners.

Third, the Commonwealth Court's decision conflicts with the powers statutorily conferred upon municipalities by both the Municipality Authorities Act and the Second Class Township Code. The Municipality Authorities Act permits authorities that perform storm water planning, management and implementation, to assess reasonable rates upon users that may be based, in whole or in part, on the characteristics of such users' properties. Similarly, the Second Class Township Code allows municipalities to enact fees for the construction, maintenance, and operation of stormwater management facilities and systems, and to prepare management plans. Further, this Code empowers townships to assess reasonable and uniform fees based, in whole or in part, on the characteristics of the property benefitted by the facilities, systems, and management plans. Both the Municipality Authorities Act and the Second Class Township Code provides specific legislative approval for the enactment of a stormwater fee based upon the characteristics of the property, such as the size of a particular property and the level of impervious coverage, which is precisely what the Borough did in the case at bar

V. ARGUMENT

A. The Commonwealth Court erroneously determined that the University received no discrete benefit from the Borough's stormwater system.

The Clean Water Act ("***Act***") was passed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 *et. seq*. Pursuant to the Act, municipalities are required to implement controls "to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods," and other such requirements to effectuate that end. *See id.*; *Norfolk Southern Ry. v. City of Roanoke*, 916 F.3d 315, 317 (4th Cir. 2019).

In this Commonwealth, the requirements of the Act are administered and enforced by the Pennsylvania Department of Environmental Protection ("***DEP***"). DEP regulates municipal storm sewer planning through its MS4 NPDES permitting program. New construction creating impervious surfaces must secure a NPDES permit from DEP. Municipalities located in urbanized areas, as defined by the U.S. Census, must develop and implement an MS4 Plan which includes several stormwater mitigation components, including control of new construction erosion and management and the adoption of stormwater management ordinances for regulation, control, and enforcement of stormwater runoff. If a municipal stormwater system drains into impacted waters of the Commonwealth, then

additional Pollution Reduction Plans or Total Maximum Daily Load Plans may be mandated by DEP. Thus, the issue which the Borough faces, as does Radnor Township, is not one of simply managing flooding; but rather, the comprehensive legal requirement to plan, create, and operate a highly regulated stormwater system that not only controls stormwater flowing off private and public property into the local municipal storm system, but also, removes pollutants (chemical, sedimentary, and thermal) from such flows before they enter any natural waterway or water body.

That being said, and despite the University's protestations and arguments to the contrary, the Borough's stormwater system is simply providing a service to the University, on par with trash pickup or sanitary sewer, and the Borough is just seeking to charge the University an appropriate fee for this service ("***Fee***").[3] At its core, the purpose of a stormwater management system is to remove a waste (stormwater) from a property in a way that does not harm or damage neighboring properties. This is the same as the core purposes of a trash removal service or a sanitary sewer system. Like trash and sanitary sewer, for centuries the offsite impacts of stormwater were not a concern, and stormwater runoff was dealt with only on the property that created it, if at all. Like sanitary sewer, if a property is large enough relative to the development thereon, stormwater can still be handled

[3] In its Briefs to the Commonwealth Court, the University admits that it is legally obligated to pay fees for services. (Respondents' Reply Brief in Further Support of their Preliminary Objection to Petitioner's Action for Declaratory Judgment, p. 7).

onsite without needing an offsite system. Like trash and sanitary sewer before it, state and federal regulations concerning the management of stormwater have become increasingly more onerous and comprehensive over the last fifty years. Simply put, there is no factual or legal reason supporting the Commonwealth Court's disparate treatment of the management of stormwater when compared to the management of solid waste or septic waste.[4] These are all services, and the users of these services should play a fee based on this use. *Supervisors of Manheim Twp. v. Workman*, 350 Pa. 168, 173, 38 A.2d 273, 276 (1944). Just because stormwater management is new to this game does not mean it should be treated any differently from these other types of municipal services.

This similarity between stormwater management services and trash and sanitary sewer services is further clarified when the University's arguments against viewing stormwater management as a service are applied to trash and sanitary sewer services. Below, we have applied these arguments to other types of municipal services to highlight how off-base these contentions are and how wrong the University is in arguing that stormwater management is not a service:

- The Borough's Stormwater Fee is an assessment – An assessment is a statutorily created way for municipalities to pay for the construction of public improvements such as curbs, sidewalks, sanitary sewer lines, water lines, etc. The various Pennsylvania municipal codes specifically grant this power. *See* 8 Pa.C.S.A. chpt. 21A; 53 P.S. §67508 & §67612.

[4] In fact, Pennsylvania state law contemplates combined sewer systems that collect, manage, and treat sewage and stormwater. 8 Pa.C.S.A. §2000.

Assessments can only be used for the construction of improvements, not their operation or maintenance. *Id.*; *see Workman*, 350 Pa. at 173, 38 A.2d at 275. Moreover, the Codes set forth a strict process on how an assessment is determined and charged. *Id.* Lastly and most relevant for this matter, a municipality which charges an assessment for the construction of a sanitary sewer line is not then precluded from charging a fee for the use, operation, and maintenance of that line or any other part of the sanitary sewer system. Likewise, the fact that a municipality could charge an assessment for certain work does not prohibit it from charging a fee for that work instead. *See* 8 Pa.C.S.A. §2061 & §2062. This happens all the time with sanitary sewer and public water systems.

- The Fee is not for any service being provided to the University in particular – Sanitary sewer service is not provided to any one customer in particular, nor is trash service or public water or electricity, etc. There is no legal requirement that a service must be provided to one user "in particular" before that user can be charged a fee.

- Funds raised by the Fee go to projects not benefiting the University – The is no legal requirement that funds raised by a Fee be specifically earmarked to benefit the payor of that Fee. Sanitary sewer and public water systems use monies from their fees to pay for projects that only benefit a small subset of users. For example, many sanitary sewer systems have pump stations that only service a small number of properties connected to the system. There is no legal requirement that the fees from other users not be used to construct, operate, or maintain this pump station nor does the fact that the sewer system operator use such fees for this purpose turn these fees into a tax. Under the various municipal codes, municipalities can set up separate sewer districts, but they are not obligated to. *See* 53 P.S. §67507.

- The Borough is not making any improvements to the University's property in conjunction with the Fee – When a municipality puts in a new sanitary sewer, it intentionally does not make any improvements to any of the properties that will connect to the sewer line. Those improvements are the responsibility of the private property owner. This division of responsibilities does not preclude the municipality from assessing a fee against such properties for use of the sanitary sewer system.

- The Fee is not proportional to the service provided – Both the University and the Commonwealth Court focused on how the Fee is assessed (amount of impervious surface on a property) and that this is not a precise measurement of the benefit received by the property owner; comparing this method of calculation to the fees charged for water or gas service. Such comparisons are nonsensical, and when compared to the calculations of sanitary sewer or trash fees, these arguments fall apart. Sanitary sewer fees are not based on amount of sewage produced. At best, they are based on water usage (regardless if the user has a pool or a lawn-watering fetish), or many times it is just a flat fee. *See also*, 8 Pa.C.S.A. §2061 & §2062. Similarly, trash fees are not based on the amount, type, weight, or bulk of the trash being picked up in the cans or even the number of cans being picked up. Generally, it is just a flat fee. There is no legal or factual support for the University's claim that the Fee is a tax because it fails to precisely measure the services being used by the University. *Workman*, 350 Pa. at 173, 38 A.2d at 276 (fees "must be reasonably proportional to the value of the product or service received").

- The Fee is based on the burden the payor puts on the stormwater system instead of the benefit received by the payor – Sanitary sewer fees are based on the burden each property places on the sewer system, not the benefit received. A property with a functioning onlot sanitary sewer system receives no benefit when it is forced to connect to a sanitary sewer system. Moreover, as stated above, many sanitary sewer systems charge a flat fee without any regard to the number of persons using the system or the amount of sewage placed into the system. Likewise, trash fees are not based on the benefit received, but rather, just on the cost of servicing that property; a single person pays the same fee as a family of ten. For how other fees were calculated, *see Rizzo v. City of Phila.*, 668 A.2d 236, 238 (Pa. Commw. Ct. 1995).

- The Fee is assessed against the vast majority of properties in the Borough – The University argues that the Fee must be viewed as a tax since almost all the properties in the Borough must pay it instead of a distinct subset. This is solely due to the density of the Borough and has nothing to do with the classification of the Fee as a fee for service or a tax. If every property in a municipality is hooked into the public sanitary sewer system, that does not make the charge for the use of that system a tax instead of a fee. There are many municipalities

(Bedminster Township, Bucks County and Lower Frederick Township, Montgomery County, for example) where the municipal stormwater system only services a fraction of the geographical area of the municipality and thus, a fee for this service would only be charged to these properties. This is very similar to where a sanitary sewer system only services a portion of a municipality, and all the other properties are served by onlot systems. It would be illogical to find stormwater charges to be a tax in dense municipalities and a fee in more rural municipalities.

- The Borough's stormwater system provides benefits to the public at large – Both the University and the Commonwealth Court raise this issue of all the benefits the stormwater system provides to the public as a reason why the Fee must be viewed as a tax. Obviously, sanitary sewer systems and trash pickup services both provide numerous benefits to the public, probably more than to the individual using these services, but that does not mean sewage or trash fees should be viewed as taxes for this reason. Public water systems also provide numerous benefits to the public. This is not an either/or issue. Just because the public benefits from the Borough operating a stormwater sewer system (or sanitary sewer, trash service, public water system, etc.) and such a system protects and serves the general health, safety, and welfare of the public, does not mean that the users of this stormwater system are not receiving a service that they must pay a fee for.

- Properties not paying the Fee benefit from the Stormwater System – Both the University and the Commonwealth Court point to the fact that properties not connected to the Stormwater System and/or not paying the Fee are benefiting from this System as a reason why the Fee should be viewed as a tax. This happens with sanitary sewer systems, but no one is arguing this means their fees should be considered taxes. Clearly, the benefits of properly collecting and treating sewage benefits a huge number of people and properties with absolutely no connection with the sanitary sewer system undertaking this collection and treatment. So why should a stormwater system be treated differently.

- The Borough is required to provide stormwater management to meet state and federal environmental mandates – Any municipality providing sanitary sewer or trash services must meet comprehensive state and federal regulations in providing these services, but this fact does not

prevent them from charging a fee for these services. In fact, a sanitary sewer system must comply with the Clean Water Act, just like a stormwater system and likewise, must obtain and operate under an NPDES permit, just like a stormwater system. Same could be said regarding a municipal public water system; surely the University does not believe it should get its drinking water for free because such a system operates under and complies with numerous state and federal regulations.

- The University is not receiving a benefit because it has immunity to most common law suits – In one of its Briefs to the Commonwealth Court, the University argues that since it could just discharge its stormwater at its property edge with impunity and without liability, it is not receiving any benefit through its use of the Borough's stormwater system. So, in other words, if the University was using the Borough's sanitary sewer system to dispose of its sewage, it could refuse to pay the fees related to this service just because it could dump this sewage at its property boundaries and not be worried about being sued? Looking past the ludicrous nature of this argument and not getting sucked into the rabbit hole of whether or not the University's sovereign immunity would truly protect it concerning such intentional actions, this contention completely ignores the fact that the University opted to use the Borough's stormwater system instead of dumping this stormwater.[5] Just because the University has options concerning the management of its stormwater, that does not mean it does not receive a benefit from the option it chooses. For example, someone using a public water system who has the option to use well water instead still receives a benefit from the public water system for the water received. Moreover, the fact options exist does not turn the fee for the option chosen into a tax.

- Use of the Borough's stormwater system, and thus payment of the Fee, is not voluntary – The University contends throughout its filings with the Commonwealth Court that the Fee must be considered a tax since the University did not voluntarily agree to use the stormwater system, and the Commonwealth Court agreed with this claim. Ignoring the fact that this contention contradicts the University's prior argument that it

[5] Moreover, as the University proudly stated multiple times to the Commonwealth Court, it has its own NPDES permitted stormwater system, which would not allow the University to just "dump" its stormwater at the edge of its property.

> could just dump its stormwater at its property line, voluntariness has nothing to do with whether or not a charge is a fee. Sanitary sewer fees are not voluntary. If you buy a house connected to a sanitary sewer system, you have to pay the fee. If a new sanitary sewer line is installed in front of your property, the municipality can force you to connect to it and use it, even if you have properly functioning onlot sewer system. 8 Pa.C.S.A. §2051; 53 P.S. §67502; *see Southwest Delaware Cty. Municipal Auth. v. Aston*, 413 Pa. 526, 539, 198 A.2d 867, 874 (1964). Same goes for a public water system or a public electric system. Likewise, if a municipality establishes a municipal trash collection service, you can be forced to use it. 53 P.S. §67101. In fact, most municipal fees are not voluntarily, at least not in the way the University is using this term, but this does not mean the University can then avoid paying them.

These comparisons create a clear picture of why the Fee should be viewed as a fee and not a tax. Moreover, they show that the Borough in creating and assessing this Fee has not concocted some novel revenue raising device, but rather, has established an appropriate charge for a service which is very similar to multiple other services commonly provided by municipalities. When extrapolated to these other services, the University's arguments suddenly become a claim that it does not have to pay for any municipal service provided to it which clearly is an improper reading of its sovereign immunity powers. The University has to make these absurd arguments because otherwise it has nothing to base its claims on. This matter is very straightforward, Borough is providing a service which the University is obligated to pay for; it is not allowed to use this service for free. Likewise, if the Commonwealth Court's decision in this matter is extrapolated to other municipal charges, not a single one would be found to constitute a fee.

The Commonwealth Court decision, if permitted to stand, will remove direct financial responsibility from those institutions who have the largest areas of impervious surfaces and uncontrolled runoff, such as West Chester University, and other colleges, universities, churches, schools, hospitals and other tax-exempt bodies. The benefit these organizations receive is from the local municipal government assuming responsibility for this highly regulated activity not only for existing constructed improvements but for future expansions of these institutions.

B. The Commonwealth Court's reliance on *Dekalb County*, a federal claims court case, is misplaced.

The Commonwealth Court relied heavily upon *Dekalb County v. United States*, 108 Fed. Cl. 681 (2013) as persuasive authority in coming to its decision that the West Chester stormwater fee is a tax. In *Dekalb*, the Court of Federal Claims resolved whether a state or local entity could assess a stormwater management fee on the federal government. *See Dekalb*, 108 Fed. Cl. at 687. The *Dekalb* Court dealt with an ordinance that imposed stormwater fees via an annual assessment that was generally based on the impervious surface area of the property. *Id.* at 686. In deciding whether the stormwater fee in that case was a fee or a tax, the *Dekalb* Court employed and adopted the "San Juan Cellular Test" which inquires 1) which governmental entity imposes the charge; 2) which parties must pay the charge; and

3) for whose benefit are the revenues generated by the charge spent.[6] *Id.* at 699. The *Dekalb* Court held that the stormwater fee assessed by the county against the federal government was a tax, and therefore, barred by the Supremacy Clause of the United States Constitution that forbids state taxation of federal entities. *See id.* at 704, 699-701. The reasoning for such a holding was that the charges are set by the county's legislative body, they are imposed on every owner of developed property in the unincorporated portion of the county, and they are used to provide benefits that are enjoyed by the public as a whole. *Id.* at 704.[7]

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[6] Under the third factor of the San Juan Cellular Test, a charge is more likely to be a tax where if its primary purpose is to raise revenue for general government activity that benefits the entire community. *See Norfolk Southern Ry. v. City of Roanoke*, 916 F.3d 315, 320 (4th Cir. 2019).

[7] The Commonwealth Court's reliance on *Dekalb* in this matter is misplaced for several reasons. First, the *Dekalb* Court reached its decision by applying the San Juan Cellular Test to the facts at hand. The Commonwealth Court did not apply the San Juan Cellular Test to this matter, but rather, just cherry-picked excerpts from the *Dekalb* Decision to support its holding. Second, while *Dekalb* addressed an issue involving the Supremacy Clause, the vast majority of the cases cited by it were all seeing if the challenged charge constituted a tax under the Federal Tax Injunction Act ("***TIA***") which generally prohibits federal courts from hearing challenges to state and local taxes. This raises a few concerns since in these cases the governmental entity involved generally argues the charge is a tax to get the TIA to apply, instead of arguing it is a fee to avoid tax immunity which is the situation in this matter. Also, TIA cases solely involve the jurisdiction of the federal courts and do not get to the underlying question raised by the suit. Most importantly, the federal courts liberally apply the TIA and thus are much more likely to find a charge to be a tax which the TIA applies to. *McLeod v. Columbia Cty.*, 254 F.Supp.2d 1340, 1345 (S.D. Ga. 2003) (TIA broadly defines what constitutes a state tax). Thus, the fact the *Dekalb* Court found the charge in question to be a tax has little persuasive value in this case where neither the Supremacy Clause nor the TIA is involved. *McLeod v. Columbia Cty.*, 278 Ga. 242, 245, 599 S.E.2d 152, 155-56 (2004) (district court's analysis "differs from state law determinations, because the concept of a tax under the TIA is broadly construed"). Third, as argued by the University in one of its briefs to the Commonwealth Court, there is not a lot of consistency between various state and federal taxation immunity/exemption statutes and principles, so courts should be very particular and conscientious when citing to another jurisdiction's opinion in these types of matters. (Respondents' Brief in Support of their Preliminary Objection to Petitioner's Action for Declaratory Judgement, p. 13.) In relying upon *Dekalb* almost exclusively in reaching its decision in this matter, the Commonwealth Court provided very little explanation why this particular decision out of Georgia

While the *Dekalb* Court looked at the Supremacy Clause in determining the tax issue, many state courts have held otherwise. For example, the Georgie Supreme court held that the stormwater fees assessed via ordinance were a fee and not a tax, emphasizing the special and unique benefit conveyed to the property owners. *See Unified Gov't of Athens-Clarke County v. Homewood Vill.*, 739 S.E.2d 316, 318 (Ga. 2013). In *United Govt't*, the court dealt with a virtually identical factual scenario to the case at bar in that an ordinance imposed a utility charge for the stormwater management services that were supplied to residential and nonresidential developed property, but not to undeveloped property, which actually contributes to the absorption of stormwater runoff. *Id.* Additionally, the cost of the stormwater services was properly apportioned based primarily on impervious surface area. *Id.* The court held that the stormwater charge was a fee, and not a tax, due to the benefit conferred upon the property owner as the services were designed to implement federal and state policies through control and treatment of polluted stormwater contributed by those properties. *Id.*; *see also McLeod v. Columbia County*, 599 S.E.2d 152, 155 (Ga. 2004) (explaining that a charge is not a tax where its object

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involving federal law was so applicable to this Pennsylvania matter to the exclusion of all other cases, such as the Georgia Supreme Court decision in *McLeod* or the Florida Supreme Court decision in *Sarasota Cty. v. Sarasota Church of Christ*, 667 S2d 180 (Fla. 1995). *See also, Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 929 (9th Cir. 1996) ("the characterization of a payment as a tax in certain contexts has no talismanic significance especially when the term is used in the context of an elaborate statutory scheme")(internal quotations omitted); *San Juan Cellular Tel. Co. v. PSC*, 967 F.2d 683, 687 (1st Cir. 1992).

and purpose is to provide compensation for services rendered). Georgia has taken a firm stance that stormwater utility charges amount to a fee, and not a tax, along with various other states. *See Green v. Vill. of Winnetka*, 135 N.E.3d 103 (Ill. App. Ct. 2019) (holding that a stormwater charge is a fee and not a tax); *Steeplechase Vill., Ltd. v. City of Columbus*, 2020 Ohio App. LEXIS 4848 (2020) (holding that stormwater charges are fees because they are imposed to address the specific issue of the necessity for the maintenance, repair, and operation of the stormwater system and the stormwater charges were imposed by a government in return for a service that government provided); *City of Lewiston v. Gladu*, 40 A.3d 964 (Me. 2012) (holding that a stormwater charge is a fee because the charge was used to cover the costs of regulating stormwater runoff and there was an individualized benefit to the owner of the property due to having stormwater managed comply with state and federal laws); *Fred Nackard Land Co. v. City of Flagstaff*, 2005 Ariz. Super. 1105 (Coconino Cty. Sup. Ct. 2005) (finding a charge to be a fee where it is collected and used exclusively for stormwater management service operations and not deposited in the City's general fund); *Sarasota County v. Sarasota Church of Christ*, 667 So. 2d 180 (Fl. 1995) (holding that a stormwater charge was a fee because it was used to fund utility services and those services provided a special benefit to developed properties through the treatment of polluted stormwater contributed by serviced properties).

On a Federal level, the United States Court of Appeals for the Fourth Circuit has also found that a stormwater charge is a fee because the charge forms part of a comprehensive regulatory scheme. *See Norfolk Southern Ry. v. City of Roanoke*, 916 F.3d 315, 321 (4th Cir. 2019). In *Norfolk Southern*, the court considered a stormwater ordinance that was enacted due to the necessity of a sustainable source of revenue for stormwater management activities to protect the general health, safety, and welfare of the residents of the city. *Id.* at 318. In enacting the ordinance, the city explained that the properties with higher amounts of impervious surface contribute greater amounts of stormwater and pollutants to the city's stormwater management system and that the owners of those properties should carry an appropriate burden of the cost of the system. *Id.* While the ordinance imposed the stormwater utility charge based upon the aforementioned impervious surface justification, the owners of properties affected could apply for credits against the charge imposed upon them. *Id.* The *Norfolk Southern* Court held that the stormwater charge was not a tax because its purpose was to further regulatory mandates that benefited the properties serviced. *Id.* at 321-22.

In applying the San Juan Cellular Test noted above, the *Norfolk Southern* Court found that the first factor weighed in favor of the charge being a tax as it was passed by a legislative body, the second factor was inconclusive as the charge was assessed according to runoff contributions rather than ability to pay, and the third

factor weighed in favor of the charge being a fee as it was part of a comprehensive regulatory scheme to benefit properties serviced. *Id.* at 322. The Court noted that the third factor, describing to whom the benefit is conferred, is the most important and controlling factor in deciding whether a stormwater charge is a fee or a tax. *Id.* The Court held that the because the charge is implemented according to a regulatory nature, which resulted in a special and unique benefit to the property owners, the stormwater charge was a fee, and not a tax. *See id.*

As noted in the cases above, as well as mentioned by the Commonwealth Court, the chief test for determining whether a stormwater utility charge is a fee or a tax is the San Juan Cellular Test. *See above*. In this matter, nearly identical to *Norfolk Southern*, the first two factors result in a similar conclusion. The first factor weighs in favor of the Fee being a tax as it is imposed by a governing body.[8] As for the second factor, the parties that must pay the Fee are the property owners of the developed land that create stormwater runoff and are benefitted by the Borough's stormwater system (i.e., Appellees). Lastly, and most importantly, the revenues generated by the Fee are placed in a separate budgetary account and spent solely for the benefit of those properties serviced by the stormwater system, such as Appellees' properties.

[8] For most types of Pennsylvania municipalities, this factor is useless since townships and boroughs only have a legislative body (no independent executive branch) which enacts all charges.

The benefits conferred upon Appellees are plentiful. Each owner of developed property in this Commonwealth has a responsibility to manage stormwater runoff from its own property so as to not adversely impact downstream properties as required by applicable law. By deploying its stormwater management system, the Borough relieves the owners of the developed properties of large portions of the costs associated with meeting those obligations by collecting and diverting stormwater runoff from those properties. This benefit, as it was in *Norfolk Southern*, is conferred as part of a comprehensive regulatory scheme that alleviates the costs and responsibilities of the property owners. Moreover, the revenue generated by stormwater fees is not used to fund general benefits for the public at large. Rather, the funds are used to implement and sustain the benefits given to the owners of these specific developed properties that are serviced by the Borough. This last, and most heavily weighted, San Juan Cellular factor confirms that the Borough's stormwater charge is a fee, and not a tax.

C. The Commonwealth Court's decision is in conflict with recent amendments to the Pennsylvania Second Class Township Code and the Pennsylvania Municipality Authorities Act.

Section 5607 of Title 53 of Pennsylvania Consolidated Statutes provides that "[i]n the case of an authority that performs storm water planning, management and implementation, reasonable rates may be based in whole or in part on property characteristics, which may include installation and maintenance of best management

practices approved and inspected by the authority." 53 Pa.C.S. § 5607(34) (emphasis added). Municipal Authorities do not have the power of taxation; however, the Commonwealth Court's decision leaves open an attack that any such fee is a tax. The legislature, in enacting this provision, clearly intended to permit Municipal Authorities to enact stormwater regulations and fees to address the requirements of DEP and federal agencies. If permitted to stand, the Commonwealth Court's decision will trigger additional litigation over the precise issue before this Court and will prevent remedial efforts at stormwater management underway or planned in many communities.

Similarly, the Second Class Township Code established that a Township can enact fees for the "construction, maintenance and operation of storm water management facilities, systems and management plan...and can...assess reasonable and uniform fees based in whole or in part on the characteristics of the property benefitted by the facilities, systems and management plans." 53 P.S. § 67705(a). Much like the Municipality Authorities Act, the Second Class Township Code provides specific legislative approval for the enactment of a stormwater fee based upon the "characteristics of the property," which can only mean the size of a particular property and the level of impervious coverage. This is precisely what West Chester Borough and Radnor Township have done to address hazards of

extreme stormwater runoff and the regulatory requirements delegated by the state and federal government.

VI. CONCLUSION

For the reasons articulated, Radnor Township respectfully requests that the Commonwealth Court decision be reversed and that this Honorable Court sustain the West Chester Stormwater fee ordinance, due to the unique benefit conferred upon both public and private property owners.

Respectfully submitted,

GRIM, BIEHN & THATCHER

By: _____

John B. Rice, Esquire
H. Peter Nelson, Esquire
Daniel P. Martin, Esquire
Attorneys for Amicus Curiae, Radnor Township

GRIM, BIEHN & THATCHER
BY: JOHN B. RICE, ESQUIRE
Attorney I.D. #46489
H. PETER NELSON, ESQUIRE
Attorney I.D. #84987
DANIEL P. MARTIN, ESQUIRE
Attorney I.D. #332137
104 South Sixth Street
P.O. Box 215
Perkasie, Pennsylvania 18944
(215) 257-6811

IN THE SUPREME COURT OF PENNSYLVANIA

THE BOROUGH OF WEST CHESTER	:	No. 9 MAP 2023
Appellant	:	
v.	:	
PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION AND WEST CHESTER UNIVERSITY OF PENNSYLVANIA OF THE STATE SYSTEM OF HIGHER EDUCATION	:	
Appellees	:	

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial*

Courts that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

GRIM, BIEHN & THATCHER

By: _____

John B. Rice, Esquire
H. Peter Nelson, Esquire
Daniel P. Martin, Esquire
Attorneys for Amicus Curiae, Radnor Township

GRIM, BIEHN & THATCHER
BY: JOHN B. RICE, ESQUIRE
Attorney I.D. #46489
H. PETER NELSON, ESQUIRE
Attorney I.D. #84987
DANIEL P. MARTIN, ESQUIRE
Attorney I.D. #332137
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I, Daniel P. Martin, Esq., counsel for Amicus Curie, Radnor Township, hereby certify that the attached Amicus Brief, filed with the Pennsylvania Supreme Court on July 13, 2023, complies with the word count limits of Pa.R.A.P. 2135 in that it contains 6,925 words, excluding the parts of the Brief exempted by Pa.R.A.P. 2135(b). This

word court was done by Microsoft Word 365, which was the word processing program used to prepare the Brief of Amicus Curie.

Respectfully submitted,

GRIM, BIEHN & THATCHER

By: _____

John B. Rice, Esquire
H. Peter Nelson, Esquire
Daniel P. Martin, Esquire
Attorneys for Amicus Curiae, Radnor Township

GRIM, BIEHN & THATCHER
BY: JOHN B. RICE, ESQUIRE
Attorney I.D. #46489
H. PETER NELSON, ESQUIRE
Attorney I.D. #84987
DANIEL P. MARTIN, ESQUIRE
Attorney I.D. #332137
104 South Sixth Street
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CERTIFICATE OF SERVICE

Daniel P. Martin, Esquire of Grim, Biehn & Thatcher, Solicitors for Amicus Curie, Radnor Township, hereby certifies that he did serve a copy of the foregoing

Amicus Brief by first class United States Mail, postage prepaid, upon the following:

Michael S. Gill, Esq.
118 W. Market St., Suite 300
West Chester, PA 19383
[*Attorney for Appellant*]

Stephen R. Kovatis, Esq.
1600 Arch Street
Philadelphia, PA 19103
[*Attorney for Appellees*]

Amy Dreibelbis, Esq.
Pennsylvania Judicial Center
Suite 4500
P.O. Box 62575
Harrisburg, PA 17106

Respectfully submitted,

GRIM, BIEHN & THATCHER

By: _____
John B. Rice, Esquire
H. Peter Nelson, Esquire
Daniel P. Martin, Esquire
Attorneys for Amicus Curiae, Radnor Township