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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BOWFIN KEYCON HOLDINGS, LLC, *et al.*, Petitioners, v. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD, Respondents.	No. 247 M.D. 2022

BRIEF OF AMICI CURIAE STATES OF NEW YORK, CONNECTICUT, MAINE, MARYLAND, NEW JERSEY, RHODE ISLAND, THE COMMONWEALTH OF MASSACHUSETTS AND THE CITY OF NEW YORK IN OPPOSITION TO PETITIONERS' APPLICATION FOR SUMMARY RELIEF

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
BRIAN LUSIGNAN
Assistant Solicitor General
MICHAEL J. MYERS
Senior Counsel
MORGAN COSTELLO
Assistant Attorney General of Counsel

LETITIA JAMES
Attorney General
State of New York
The Capitol
Albany, New York 12224
(518) 776-2399

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STATEMENT OF INTEREST OF AMICI[1]

The States of New York, Connecticut, Maine, Maryland, New Jersey, Rhode Island, and the Commonwealth of Massachusetts are participants in the Regional Greenhouse Gas Initiative (RGGI). The City of New York, a municipal corporation organized under the laws of the State of New York, is the largest city in the RGGI region. The undersigned parties (collectively, the Amici States) submit this brief in opposition to the applications for summary relief filed by the Petitioners in No. 247 M.D. 2022 (Bowfin Petitioners) and the Senate Intervenor-Respondents in No. 41 M.D. 2022 (Senate Intervenors), applications that seek to permanently enjoin implementation of the "CO_2 Budget Trading Program," Pa. Bull. Vol. 52, Part II, at 2471 (April 23, 2022) (the RGGI Rule).[2] The RGGI Rule, promulgated by the Pennsylvania Environmental Quality Board, would allow the Commonwealth of Pennsylvania to participate in RGGI's market-based cap-and-invest

[1] The content of the briefs filed by the undersigned parties in 41 M.D. 2022 and 247 M.D. 2022 is identical.

[2] No person or entity, other than the Amici States and their counsel, paid for or authored this brief in whole or in part.

program, which is designed to reduce the collective emissions of carbon dioxide (CO_2) pollution from power plants in participating states.[3]

The Amici States have a strong interest in supporting Pennsylvania's participation in RGGI. In our experience, RGGI has served to amplify the market forces already working to reduce greenhouse gas emissions from power plants in our states, and simultaneously to stimulate economic growth and lower electricity prices without causing adverse effects on grid reliability. There is thus no basis to credit the dire contrary predictions of the RGGI Rule's challengers.

Greenhouse gas emissions—particularly emissions of CO_2—from power plants make a substantial contribution to global climate change. As the Pennsylvania Environmental Quality Board explained in adopting the RGGI Rule, states have "already begun to experience adverse impacts from climate change, such as higher temperatures, changes in

[3] RGGI, Inc., 101 Fact Sheet (updated Sept. 2022), https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf (RGGI 101 Fact Sheet). Not including Pennsylvania, the participation of which has been stayed by this Court, eleven northeastern and mid-Atlantic states currently participate in RGGI: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Virginia. This brief does not necessarily represent the opinions or views of any RGGI state that has not joined the brief.

precipitation and frequent extreme weather events, including large storms, flooding, heat waves, heavier snowfalls and periods of drought." 52 Pa. Bull. at 2472. The City of New York, as a coastal city, is particularly at risk from rising sea levels, more intense storms, larger storm surges, and other adverse impacts from global climate change.

Power plants are among the largest sources of CO_2 emissions, *id.*, and states have taken the lead on curbing CO_2 emissions from power plants. But because electricity flows freely between states through "an interconnected 'grid' of near nationwide scope," individual states and cities are limited in their ability to regulate directly greenhouse gas pollution from out-of-state power plants. *See Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266-68 (2016) (describing evolution and current functioning of electrical grid). Multistate cap-and-invest programs (a form of, and sometimes generically referred to as, cap-and-trade programs) such as RGGI allow states with shared environmental goals to work together to reduce greenhouse gas pollution from power plants in a consistent, regional manner. *See* 52 Pa. Bull. at 2482.

Pennsylvania's participation in RGGI would achieve still greater reductions of greenhouse gas emissions from power plants. Pennsylvania's electricity generation sector has the fifth highest emissions of greenhouse gases of any state electricity generation sector in the country. *See* 52 Pa. Bull. at 2475. Additionally, Pennsylvania is part of the PJM Interconnect, a regional transmission organization that operates the wholesale electricity market in all or part of 13 states, including RGGI participants Delaware, Maryland, New Jersey and Virginia. *See* Fed. Energy Regulatory Comm'n, PJM, https://www.ferc.gov/industries-data/electric/electric-power-markets/pjm (last visited Oct. 14, 2022). Moreover, reducing greenhouse gas emissions from power plants has the co-benefit of reducing other pollutants, such as fine particulate matter, that travel from Pennsylvania to nearby Amici States.[4] The Amici States thus have a strong interest in supporting Pennsylvania's participation in the RGGI program.

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[4] In the first five years of RGGI's operation, the program resulted in 300-830 lives saved, more than 8,200 asthma attacks avoided, 39,000 lost work days averted, and $5.7 billion in health savings and other benefits over the first five years of the program. *See* Michelle Manion, et al., *Analysis of the Public Health Impacts of the Regional Greenhouse Gas Initiative* (Jan. 2017), *available at* https://www.abtassociates.com/insights/publications/report/analysis-of-the-public-health-impacts-of-the-regional-greenhouse-gas; *accord* 52 Pa. Bull. at 2506.

BACKGROUND[5]

In the mid-2000s, in response to a lack of federal leadership in addressing the huge quantities of CO_2 pollution emitted by fossil-fuel fired power plants, the governors of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont signed non-binding memoranda of understanding in which they agreed to propose for legislative or regulatory approval within their respective states a cap-and-invest program to limit power plant CO_2 emissions.[6] Representatives of the participating states, following extensive outreach to the public and regulated entities, developed a model rule in 2006 to facilitate a consistent approach within each state.[7] Through independent state statutes or regulations based on the model rule, each state established its own budget trading program to limit emissions of CO_2 from fossil-

[5] While the parties' briefs provide detailed descriptions of the Pennsylvania rulemaking at issue, we provide additional background to describe the genesis of RGGI and our experience participating in that program.

[7] The 2006 Model Rule, as well as more recent versions of the model rule and information regarding the public outreach process, are available at https://www.rggi.org/program-overview-and-design/design-archive/mou-model-rule (last visited Oct. 14, 2022).

fueled power plants in that state.[8] Although many states passed enabling legislation to specifically authorize participation in RGGI, New York (like Pennsylvania) formalized its participation in RGGI by regulations promulgated pursuant to existing statutory authority. *See* N.Y. CO_2 Budget Trading Program, N.Y. Comp. Codes R. & Reg., tit. 6, part 242; CO_2 Allowance Auction Program, N.Y. Comp. Codes R. & Reg., tit. 21, part 507.

RGGI took effect in 2009, and its basic framework has remained unchanged. Participating states, through independent regulatory action, establish a regional cap on CO_2 emissions from power plants located within those states.[9] Based on each state's share of the total regional cap, each state receives a number of "allowances" for emissions from power plants located within that state.[10] Each allowance authorizes a power plant to emit one ton of CO_2.[11] Over the course of a three-year control period, a power plant must acquire a sufficient number of allowances to

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[8] Links to the implementing statutes and regulations in RGGI states are available at State Statutes & Regulations, https://www.rggi.org/program-overview-and-design/state-regulations (last visited Oct. 14, 2022).

[9] *See* RGGI 101 Fact Sheet, *supra* n.3.

[10] *Id.*

[11] *Id.*

cover its actual emissions of CO_2 during that control period.[12] Over time, the regional emissions cap (and thus the total number of available allowances) declines so that CO_2 emissions from power plants in the region decrease.[13]

Although participating states retain discretion to decide how to distribute allowances, most RGGI allowances are sold at quarterly online auctions organized and run by a third-party non-profit, the Regional Greenhouse Gas Initiative, Inc. (RGGI, Inc.).[14] Allowances generally are sold, rather than given away, to prevent regulated entities from realizing windfalls, as has occurred when cap-and-trade programs have distributed free emission credits.[15] Auction proceeds are distributed back

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[12] *Id.*

[13] *See* RGGI, Inc., Elements of RGGI, https://www.rggi.org/program-overview-and-design/elements (last visited Oct. 14, 2022). As states have joined RGGI, the emissions cap has sometimes increased to reflect the amount of greenhouse gas emissions expected in the new participating state and maintain the overall stringency of the program.

[14] *Id.*

[15] *See* Paul J. Hibbard, et al., *The Economic Impacts of the Regional Greenhouse Gas Initiative on Nine Northeast and Mid-Atlantic States*, at 11 (April 17, 2018), *available at* https://www.analysisgroup.com/globalassets/uploadedfiles/content/insights/publishing/analysis_group_rggi_report_april_2018.pdf. For example, when the European Union implemented a cap-and-trade program for the power sector and distributed free emission credits, regulated entities increased rates in anticipation of greater regulation and, when the regulatory burdens proved

to participating states to invest in programs that further the purposes of RGGI, including reducing demand to lower consumers' energy bills. States can thus provide direct electric bill subsidies for low-income households. They can also invest in programs that create incentives to increase energy efficiency or to accelerate the deployment of renewable energy technologies.[16]

The RGGI program includes safeguards to ensure market stability. For example, there is a minimum reserve price at which allowances can be sold at a RGGI auction.[17] Participating states also maintain reserves of allowances to provide market stability in the event that the cost of reducing emissions is either higher or lower than expected.[18]

Under the RGGI program, power plants can choose the most cost-effective method of complying with the overall emissions cap. In addition

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less expensive than anticipated, pocketed the surplus. *See* Bruce R. Huber, *How Did RGGI Do It? Political Economy and Emissions Auctions*, 40 Ecology Law Quarterly 59, 73-74 (2013), *available at* https://scholarship.law.nd.edu/law_faculty_scholarship/473/.

[16] *See*, *e.g.*, RGGI, Inc., *The Investment of RGGI Proceeds in 2020* (May 2022) at 3, *available at* https://www.rggi.org/investments/proceeds-investments ($196 million in investment proceeds from auctioning allowances estimated to result in, inter alia, $1.9 billion in lifetime energy bill savings to 65,000 households and 800 businesses).

[17] RGGI 101 Fact Sheet, *supra* n.3.

[18] *Id.*

to purchasing allowances at an auction or on a secondary market, power plants may comply with the requirements of the program by reducing their CO_2 emissions—for instance through heat-rate improvements or fuel switching—or by obtaining emissions "offsets," which are project-based greenhouse gas reductions or the sequestering of greenhouse gas emissions from sources that are not subject to the budget trading program.[19]

The RGGI states have engaged in periodic reviews to evaluate the success of the program and to propose appropriate changes or new program elements.[20] After program reviews completed in 2013 and 2017, the RGGI states implemented changes through independent regulatory action that improved program design and further reduced the regional emissions cap. A third program review is currently underway.

Since its inception, RGGI has been a voluntary program in which states are free to participate and from which they can unilaterally leave. For example, New Jersey, one of the original RGGI participants, left in

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[19] *See* Elements of RGGI, *supra* n.13; RGGI, Inc., Emissions, https://www.rggi.org/allowance-tracking/emissions (last visited Oct. 14, 2022).

[20] Materials related to the periodic program reviews are available at https://www.rggi.org/program-overview-and-design/program-review (last visited Oct. 14, 2022).

2011, but resumed participation in 2020. Virginia began participating in RGGI in 2021. In 2019, Pennsylvania announced its intention to become a participant in RGGI, leading to this litigation.

ARGUMENT

The Amici States agree with Pennsylvania that none of the challengers' arguments has merit. We write to address two issues for which our experience is especially salient. First, participation in RGGI has not transformed the regulated industries in or the economies of participating states, but has instead amplified market trends to decrease CO_2 emissions further while stimulating economic growth. Second, the RGGI Rule does not commit Pennsylvania to a binding interstate agreement. RGGI is a wholly voluntary program in which states may participate – and from which they may leave – pursuant to their own legislative or regulatory processes.

POINT I

RGGI HAS WORKED IN TANDEM WITH MARKET TRENDS TO REDUCE GREENHOUSE GAS EMISSIONS WITHOUT ADVERSE IMPACTS TO THE ECONOMY OR GRID RELIABILITY

The Amici States' experience belies the dire predictions made by the challengers here that the RGGI Rule will hurt Pennsylvania's

economy and electrical grid while not effectively reducing greenhouse gas emissions. (*See* Bowfin Br. at 2, 32, 37; Senate Intervenors' Br. at 2, 7.)

RGGI has proved an effective tool to amplify market forces to reduce greenhouse gas emissions. Nationwide, market trends since 2009 have favored decreased reliance on CO_2-intensive coal- or oil-fired power plants, and increased reliance on lower emitting sources, such as natural gas, and zero-emitting sources like solar and wind.[21] Accordingly, greenhouse gas emissions nationwide have been declining. The RGGI emissions cap (along with other programs and policies in some participating states) has amplified these market trends, resulting in an almost 50 percent reduction in CO_2 emissions in the RGGI states between 2008 and 2018, which is roughly double the rate of CO_2 emissions reductions in the rest of the country (excluding California, which has its own cap-and-trade program).[22]

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[21] *See* Brian C. Murray, et al., *Why have greenhouse gas emissions in RGGI states declined? An econometric attribution to economic, energy market, and policy factors*, 51 Energy Economics 581, 583-84 (2015).

[22] *See* Acadia Center, *The Regional Greenhouse Gas Initiative: 10 Years in Review*, at 2 (2019), *available at* https://acadiacenter.org/wp-content/uploads/2019/09/Acadia-Center_RGGI_10-Years-in-Review_2019-09-17.pdf; RGGI 101 Fact Sheet, *supra* n.3; *see also* Murray, *supra* n.21, at 588 (concluding that, after controlling for other factors, "the RGGI program itself appears to be the largest factor" in the decline of CO_2 emissions in the region,

At the same time, by allowing participating states to re-invest auction proceeds in energy efficiency measures, incentives for low- or zero-emitting sources, and direct subsidies to low-income households, RGGI has contributed to a decrease in the average retail electricity prices in the RGGI region of 5.7% from 2008 to 2017, while those prices rose 8.6% in the rest of the country during this same period.[23] And these benefits have been achieved without adverse impacts to grid reliability.[24]

RGGI has also stimulated, not impeded, economic growth.[25] Between 2008 and 2018, the RGGI states' economies grew by 47 percent compared to non-RGGI states (other than California), whose economies grew at a rate of 36 percent. [26] By selling allowances, participating states obtain auction proceeds that they can then invest in energy efficiency, renewable energy, greenhouse gas emissions reductions, and other consumer programs that increase both environmental benefits and economic activity in those states. 52 Pa. Bull. at 2507-08. According to an

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which emissions "would be 24% higher" without the program, accounting for about half of the region's emissions reductions from 2009 to 2014).

[23] Acadia Center, *supra* n.22, at 8.

[24] Hibbard, *supra* n.15, at 11, 49-50.

[25] Acadia Center, *supra* n.22, at 7; Hibbard, *supra* n.15, at 10, 48.

[26] *See* Acadia Center, *supra* n.22, at 7.

independent macroanalysis of RGGI through 2017, the program has created over $4 billion in net economic gains and over 44,000 job years of employment.[27]

And participation in RGGI has caused neither widespread retirement of our fossil fuel-fired power plants nor reconfigurations of our electricity generation resources. (*See* Bowfin Pets.' Br. at 34; Senate Intervenors' Br. at 2.) Consistent with nationwide market trends, some older fossil-fueled plants have chosen to retire, but most of the RGGI states' electricity still currently comes from fossil fuels.[28] By requiring fossil-fueled power plants to account for the costs of allowances, however, RGGI ensures that fossil-fueled power plants do not obtain a competitive advantage by being able freely to emit CO_2 pollution in huge quantities.[29] RGGI gives the owners of fossil fuel power plants an incentive to invest in improvements that will allow them to reduce their CO_2 emissions and operate with fewer allowances in the most cost-effective manner. *See* 52 Pa. Bull. at 2407. These improvements can be made at the power plant

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[27] Hibbard, *supra* n.15, at 10, 48.

[28] *Id.* at 9

[29] *Id.* at 15.

(for example, heat rate improvements, carbon-capture systems, or co-firing with lower emitting sources) or through diversification of the owners' fleet of generation sources to include low or zero emission sources. Cap-and-invest programs like RGGI thus provide greater flexibility for regulated sources than traditional command-and-control regulations, which would simply direct all regulated sources to bring their emissions below a set level. 52 Pa. Bull. at 2508-09.[30]

The Amici States' experience also has not borne out concerns that RGGI will prove ineffective to reduce overall greenhouse gas emissions as a result of what is known as "emissions leakage" to other states. (*See* Bowfin Br. at 45-47; Senate Intervenors' Br. at 1 n.1.) Emissions leakage refers to the possibility that, due to the interconnected nature of the electrical grid, emissions reductions in participating states will be offset by emissions increases in non-participating states, where power plants will be subject to relatively fewer regulations. 52 Pa. Bull. at 2495.[31]

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[30] *See* Envt'l Protection Agency, *Tools of the Trade: A Guide to Designing and Operating a Cap and Trade Program for Pollution Control*, at 1-3 (June 2003), *available at* https://www.epa.gov/sites/default/files/2016-03/documents/tools.pdf.

[31] *See generally* Sheryl L. Musgrove, et al., *Emissions Leakage in RGGI: An Analysis of the Current State and Recommendations for a Path Forward*,

RGGI states have been aware of the risk of emissions leakage since the program's inception. The original memorandum of understanding expressly addressed the concern by creating a multistate working group to issue regular reports on whether emissions leakage was in fact occurring and, if so, how to reduce that leakage.[32] The working group has issued eleven reports since 2009, none of which find emissions leakage to be a significant problem.[33] For example, the most recent report states that although the importation of electricity into RGGI states from non-RGGI sources in 2017 to 2019 had increased when compared to the same imports during the 2006 to 2008 period, the CO_2 emissions from those imports had also decreased, thus largely offsetting associated emissions.[34] By monitoring any potential leakage, RGGI states can

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Pace Energy and Climate Center, at 1 (Dec. 5, 2017), *available at* https://peccpubs.pace.edu/getFileContents.php?resourceid=5319719d12c3c3e.

[32] *See* RGGI Memorandum of Understanding, ¶6.A (signed Dec. 2005), *available at* https://www.rggi.org/sites/default/files/Uploads/Design-Archive/MOU/MOU_12_20_05.pdf.

[33] The emissions reports are available at https://www.rggi.org/allowance-tracking/emissions.

[34] CO_2 Emissions from Electricity Generation and Imports in the Regional Greenhouse Gas Initiative: 2019 Monitoring Report, at 8-9 (June 15, 2022), *available at* https://www.rggi.org/sites/default/files/Uploads/Electricity-Monitoring-Reports/2019_Elec_Monitoring_Report.pdf.

assess the need for and enact policies to mitigate or reduce any observed emissions leakages.

POINT II

THE RGGI RULE DOES NOT COMMIT PENNSYLVANIA TO A BINDING INTERSTATE AGREEMENT

The RGGI Rule does not bind Pennsylvania to an interstate agreement. (*See* Senate Intervenors' Br. at 39-59.) To the contrary, RGGI is a wholly voluntary arrangement, and Pennsylvania can unilaterally choose to stop participating in the program through its own regulatory process.

The RGGI Rule does not commit Pennsylvania to joining an interstate agreement that in any way shifts regulatory authority to other RGGI states. States may participate in RGGI through legislation or regulation that must pass through their own constitutional and administrative processes.[35] States that participate in RGGI assume no binding obligations to other states and may leave simply by providing written notice to other states (subject to otherwise applicable state

[35] *See* RGGI, Inc., *New State Participation in RGGI*, https://www.rggi.org/sites/default/files/Uploads/Participation/RGGI_New_State_Participation_Overview.pdf (last visited Oct. 14, 2022).

procedures relating to the repeal of any state statutes or regulations that have been enacted). For example, as earlier explained, *supra* at pp. 9-10, New Jersey left the program in 2011 and has since resumed participation. Participating states thus enjoy the enhanced impact of collective state action without ceding any state authority. *Cf. U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 472-73 (1978) (holding that a similar arrangement did not run afoul of federal Compact Clause).

To be sure, some basic consistency between the RGGI program as enacted in different states is necessary to ensure the program functions properly. To that end, the model rule provides a starting point from which states may work, but states are not required to adopt the model rule as written. The existing statutes and regulations among RGGI states reflects the diversity of approaches states have taken.[36] Indeed, Pennsylvania's RGGI Rule reflects several modifications adopted by the Pennsylvania Environmental Quality Board "in the exercise of its own independent rulemaking authority" to account for "the unique environmental, energy and economic intricacies of this Commonwealth,"

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[36] *See generally* RGGI, Inc., State Statutes & Regulations, https://www.rggi.org/program-overview-and-design/state-regulations (last visited Oct. 14, 2022).

such as allowance set-asides for waste coal-fired units and combined heat and power systems. 52 Pa. Bull. at 2478-79.

Nor have the participating states ceded any authority to RGGI, Inc., which is a 501(c)(3) non-profit corporation created for the purpose of providing scientific and technical advisory services to the RGGI member states in developing and implementing the RGGI program. Instead, RGGI, Inc., merely organizes the allowance auctions, tracks allowances, hires a market monitor, and distributes the auction proceeds to participating states. RGGI, Inc. has no regulatory or enforcement authority. Although each participating state enters into an individual contract with RGGI, Inc., to provide the services described above, those contracts differ depending on applicable state laws.[37] Additionally, those contracts specifically provide that RGGI, Inc., is an independent contractor, not a state agency or instrumentality that can enforce the

[37] *Compare* Delaware Professional Services Agreement (June 13, 2022) (Delaware Contract), *with* State of Maryland, Maryland Department of Environment (MDE), Sole Source Contract (signed October 2021) (Maryland Contract). All contracts between participating states and RGGI, Inc. are available at https://www.rggi.org/rggi-inc/documents (last visited Oct. 14, 2022).

RGGI program.[38] And a participating state can generally terminate its contract with RGGI, Inc., at will or on 30-days written notice by the state, meaning states assume no ongoing responsibilities or liabilities to RGGI, Inc.[39]

CONCLUSION

For the foregoing reasons, the Amici States support the Commonwealth of Pennsylvania's efforts to participate in RGGI and urge this Court to deny the applications for summary relief filed by the Senate Intervenors in 41 M.D. 2022 and the Bowfin Petitioners in 247 M.D. 2022.

Dated: October 14, 2022
Albany, NY

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: /s/ *Brian Lusignan*
BRIAN LUSIGNAN
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 776-2399

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
BRIAN LUSIGNAN
Assistant Solicitor General
MICHAEL J. MYERS
Senior Counsel
MORGAN COSTELLO
Assistant Attorney General
of Counsel

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[38] *See, e.g.,* Delaware Contract, at 8; Scope of Work in Support of Virginia Department of Environmental Quality Implementation of the Virginia Carbon Dioxide (CO2) Budget Trading Program, at 1 (signed Feb. 2021).

[39] *See, e.g.,* Delaware Contract, at 9-10; Maryland Contract, at 46.

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General
165 Capitol Avenue
Hartford, CT 06106

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General
200 St. Paul Place
Baltimore, MD 21202

FOR THE STATE OF NEW JERSEY

MATTHEW J. PLATKIN
Attorney General
R.J. Hughes Justice Complex
25 Market Street, 1st Floor
P.O. Box 112
Trenton, New Jersey 08625

FOR THE CITY OF NEW YORK

SYLVIA O. HINDS-RADIX
Corporation Counsel
100 Church Street
New York, NY 10007

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General
6 State House Station
Augusta, ME 04333-0006

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General
1 Ashburton Place, 18th Floor
Boston, MA 02108

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General
150 South Main Street
Providence, RI 02903

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS

In accordance with Pennsylvania Rule of Appellate Procedure (Pa. R.A.P.) 2135(d), I certify that this filing complies with the length limitation of Pa. R.A.P. 531(b)(3) because, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), this brief contains 3,603 words, as determined by the word processing system used to prepare this brief (Microsoft Word).

Dated: October 14, 2022

/s/ *Brian Lusignan*
Brian Lusignan

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

Dated: October 14, 2022

/s/ *Brian Lusignan*
Brian Lusignan

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae* State of New York, *et al.*, was filed electronically using the PACFile system, which will serve the brief on all attorneys registered to receive service in this matter as required by Pennsylvania Rule of Appellate Procedure 121.

Dated: October 14, 2022

/s/ *Brian Lusignan*
Brian Lusignan