

EXHIBIT A

granted. In support of this motion, the Democratic Senator Intervenors respectfully rely on their attached memorandum of law.

WHEREFORE, the Democratic Senator Intervenors respectfully request that the Court dismiss Plaintiffs' Complaint in its entirety.

DATED: _____, 2021

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By: _____

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I. INTRODUCTION

In 1971, after being unanimously approved by two different sessions of the Pennsylvania Legislature, the Environmental Rights Amendment to the Pennsylvania Constitution (“ERA”) was ratified by a nearly four-to-one margin of Pennsylvania voters.¹ The Amendment provides that

[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27.

As authoritatively established by the Pennsylvania Supreme Court—in a case involving, not coincidentally, the same industrial activity (high-volume hydraulic fracturing, known as “fracking”) and statute (Act 13 of 2012, P.L. 87) championed by Plaintiffs here—the ERA’s “express purpose ... [is] to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality.” *Robinson Twp. v. Washington Cnty.*, 83 A.3d 901, 953 (Pa. 2013). Thus, “economic development cannot take place at the expense of an unreasonable degradation of the environment.” *Id.* at 954. Relatedly, the ERA *rejects* the “proprietary theory” of natural resources, whereby government “measur[es] it gains by the balance sheet profits and appreciation it realizes from its resources

¹ See *Robinson Twp. v. Washington Cnty.*, 83 A.3d 901, 961-62 (Pa. 2013).

operations.” *Id.* at 956. Instead, the ERA imposes a fiduciary duty on the Commonwealth, as trustee, to “conserve and maintain” Pennsylvania’s public natural resources for the benefit of all Pennsylvanians. *Id.* at 957. That is, “the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depleting would occur through state action or ... because of the state’s failure to restrain the actions of private parties.” *Id.*

Plaintiffs’ Complaint seeks to stand this constitutional Amendment on its head. According to Plaintiffs’ characterization, the ERA somehow *requires* that Pennsylvania’s natural resources be liquidated so as to maximize “revenue” generation. (Compl. ¶ 83; *accord* Compl. ¶ 26.) In the same vein, the Commonwealth’s fiduciary duty to “conserve and maintain” Pennsylvania’s public natural resources for the benefit of “generations yet to come,” Pa. Const. art. I, § 27, has become, in Plaintiffs’ telling, a “duty” to extract and monetize Pennsylvania’s natural resources to ensure that the Commonwealth’s coffers are as full as possible in the present (Compl. ¶ 70). Entirely absent from the Complaint is any consideration of the pollution and other environmental harm caused by this exploitation. Plaintiffs’ interpretation of the ERA is, in a word, perverse.

Based on this upside-down premise, Plaintiffs challenge what they variously characterize as the Delaware River Basin Commission’s (“DRBC”) “de facto

moratorium” or “blanket ban,” since 2010, on fracking within the Delaware River Basin (the “Basin”), which was instituted because of concerns about water pollution. According to the Complaint, the DRBC’s moratorium exceeds the Commission’s authority under the Delaware River Basin Compact, an interstate compact among the four states spanned by the Basin. Plaintiffs also contend that the moratorium constitutes a “regulatory taking” of state-owned and private property—and even go so far as to allege that it violates the Federal Constitution’s guarantee that each state have a republican form of government.

The Complaint should be dismissed for several reasons. First and foremost, Plaintiffs—two individual Pennsylvania State Senators, the Pennsylvania Senate Republican Caucus, and Damascus Township—lack standing to assert their claims. None of the Plaintiffs is alleged to own property affected by the DRBC’s fracking moratorium. And notwithstanding the Complaint’s strained efforts, none of the Plaintiffs have standing to assert the Commonwealth’s purported interests in its property or its laws. Nor does the ERA somehow provide Plaintiffs with a ticket to federal court. Just as Plaintiffs cannot twist the ERA into a constitutional imperative to extract and monetize natural resources, regardless of the environmental consequences, neither can they convert the ERA’s “public trust” theory into an exemption from the standing strictures of the Federal Constitution. In sum, Plaintiffs have failed to plead a particularized, concrete injury satisfying

the case-or-controversy requirements of Article III, and this Court thus lacks subject-matter jurisdiction to proceed.

Independently, Plaintiffs' claims asserting regulatory takings and violation of the Republican Form of Government Clause fail as a matter of law. By its nature, a regulatory takings claim of the sort Plaintiffs allege here turns on the specific facts regarding the particular property at issue; it is legally insufficient simply to assert that a regulation has prohibited a particular technique of extracting natural gas. Plaintiffs have not identified any particular property, let alone alleged any specific facts about any such property. Accordingly, they have failed to plead a claim for regulatory taking. In addition, Plaintiffs' takings claims are plainly time-barred.

Also fatally flawed is Plaintiffs' claim for violation of the Federal Constitution's Republican Form of Government Clause. As an initial matter, the Supreme Court has held that claims under the Clause are not justiciable. But even assuming a justiciable claim could potentially be pled, Plaintiffs have not done so. The Complaint does not target an act purporting to dissolve the General Assembly or abolish the independence of the Pennsylvania judiciary. What Plaintiffs contest is a moratorium on a particular industrial activity, a moratorium that was unanimously approved by the members of an interstate agency—including Pennsylvania's Governor—in order to protect interstate water resources subject to

an interstate compact duly ratified pursuant to Pennsylvania’s law-making process. However much Plaintiffs may dislike the moratorium as a matter of policy, Pennsylvania remains a commonwealth in form as well as name.

II. RELEVANT BACKGROUND²

A. The Delaware River Basin Compact and Commission

Spanning Pennsylvania, New Jersey, Delaware, and New York, the Delaware River Basin is a watershed covering approximately 13,600 square miles that drain into the Delaware River and its tributaries. The Basin provides drinking water to 13.3 million people; 5.6 million residents of Pennsylvania live within its boundaries. Del. River Basin Comm’n, State of the Basin Report at PDF pp. 3, 12 (July 25, 2019),

https://www.state.nj.us/drbc/library/documents/SOTBreport_july2019.pdf.

Recognizing that the water in the Basin has an “interstate regional character” and is a common resource over which local, State, and National interests have “joint responsibility,” the governments of the four Basin states and the United States Congress entered into the Delaware River Basin Compact (“Compact”) in 1961.

Compact at 1, <https://www.state.nj.us/drbc/library/documents/compact.pdf>.

² For purposes of this motion only, the Democratic Senator Intervenors accept the truth of the well-pled factual allegations in the Complaint. *See Anspach v. City of Phila.*, 503 F.3d 256, 260 (3d Cir. 2007). This Court need not, however, “credit ‘bald assertions’” or “‘legal conclusions masquerading as factual conclusions.’” *Id.* In deciding a motion to dismiss, the Court may also consider documents relied on in the complaint and take judicial notice of matters of public record. *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014).

Because “[t]he water resources of the basin are functionally inter-related, and the uses of these resources are independent,” the signatories wished to replace the “duplicating, overlapping, and uncoordinated administration” of these water resources by a multiplicity of state, interstate, and federal agencies—which had proven grossly inadequate and unsatisfactory—with “a comprehensive plan administered by a basin wide agency.” *Id.* at 1, 4. This joint reform effort was expressly intended to promote, among other things, “effective ... abatement and control of stream pollution.” *Id.* at 1. To that end, the Compact established the DRBC “as an agency and instrumentality of the governments of the respective signatory parties.” *Id.* at 5.

To ensure its efficacy, the Compact endowed the DRBC with significant authority and responsibilities. Among other things, the Compact prohibits all “project[s] having a substantial effect on the water resources of the basin” unless and until they are “submitted to and approved by the [DRBC].” *Id.* § 3.8.

B. The DRBC Actions Challenged by Plaintiffs

The Complaint challenges what it describes as the DRBC’s “categorical[] prohibit[ion on] natural gas extraction within the Basin” “since 2010,” (Compl. ¶ 72), “which [the] Commission has described as a *de facto* moratorium” (*id.* ¶ 73). Although Plaintiffs assert that “the extant moratorium was instituted by way of a notice letter and continues to be enforced by *fiat*” (*id.* ¶ 74), that allegation is at

odds with the public record. Although the Executive Director of the Commission did send out notice letters stating her “determinations” concerning natural gas extraction activities in the Basin,³ the Commission also acted as a whole. In May 2010, the Commission unanimously adopted a resolution directing Commission staff to develop regulations to govern the Commission’s review of applications for fracking projects, and postponing consideration of all applications until those regulations have been adopted.⁴ The DRBC’s moratorium on approval of new fracking projects was based on its “recognition that as a result of water withdrawals, wastewater disposal and other activities, natural gas extraction projects in shale formation could individually or cumulatively affect the water quality of Special Protection Waters [in the Basin] by altering their physical, biological, chemical or hydrological characteristics.”⁵

³ See Del. River Basin Comm’n, Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formation Within the Drainage Area of Special Protection Waters (May 19, 2009), <https://www.state.nj.us/drbc/library/documents/EDD5-19-09.pdf>; Del. River Basin Comm’n, Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formation Within the Drainage Area of Special Protection Waters (June 14, 2010) (“Supplemental Determination”), <https://www.state.nj.us/drbc/library/documents/SupplementalEDD6-14-10.pdf>.

⁴ Del. River Basin Comm’n, Meeting of May 5, 2010 Minutes at 5, https://www.state.nj.us/drbc/library/documents/5-05-10_minutes.pdf. On February 25, 2021, the Commission issued final regulations prohibiting fracking in the Basin. Del. River Basin Comm’n, Resolution No. 2021-01 (Feb. 25, 2021), https://www.nj.gov/drbc/library/documents/Res2021-01_HVHF.pdf.

⁵ Del. River Basin Comm’n, Supplemental Determination at 1.

C. Plaintiffs' Allegations

The bulk of the Complaint's allegations appear devoted to establishing Plaintiffs' standing rather than supporting the substance of their legal claims.⁶ Thus, they point out that Pennsylvania's legislative power is vested in the General Assembly and that the Senate Republican Caucus is "one of two ... subparts" of one of two components of the General Assembly. (Compl. ¶ 20.) Plaintiffs further allege that the "General Assembly enacted a detailed regulatory scheme" (Act 13 of 2012) providing for fracking, including in the Basin, and "providing for payment of various fees" to the Commonwealth in connection with fracking activity. (*Id.* ¶¶ 46-47.) These fees are paid into the Commonwealth's "Well Fund." (*Id.* ¶¶ 46-47.) According to the Complaint, the DRBC's moratorium has impaired the intent of this legislation, usurped the Legislature's authority, and

⁶ The two individual Senator Plaintiffs in this case twice sought—and were denied—intervention in a challenge to the Commission's fracking moratorium currently pending in the Middle District of Pennsylvania, *Wayne Land and Mineral Group, LLC v. Del. River Basin Comm'n*, 3:16-CV-897 (M.D. Pa.). The *Wayne Land* litigation and the Senators' attempts to intervene are discussed in detail in the Memorandum of Law in Support of the Democratic Senators' Motion to Intervene in this case. For purposes of this motion, however, it is worth noting that the Middle District ruled that many of the same assertions the Senators make in their Complaint in this case (presumably in an attempt to establish standing) did not give rise to the significant protectable interest that is required for intervention pursuant to Federal Rule of Civil Procedure 24. Specifically, the court determined that although the Commonwealth was a party to the Compact, the individual senators were not, *Wayne Land & Min. Grp., LLC v. Del. River Basin Comm'n*, 331 F.R.D. 583, 593 (M.D. Pa. 2019), *vacated on different grounds and remanded*, 959 F.3d 569 (3d Cir. 2020), that the Senators did not have a significant protectable interest, as purported "trustee[s] regarding the Commonwealth's natural resources," *id.* at 597, and that the Senators' characterization of the responsibilities of trustee under the ERA was "at odds with the Pennsylvania Supreme Court's discussion of the contours of the Constitutional Amendment establishing the [natural resources] trust," *id.* at 598.

denied the Well Fund money it would otherwise have received. (*Id.* ¶¶ 47-54, 57, 62, 75-77.) Plaintiffs allege that the moratorium has similarly denied the Commonwealth fees it would have received were it able to allow fracking on state-owned land located in the Basin. (*Id.* ¶¶ 65-70.) In Plaintiffs’ view, by reducing the amount of revenue derived from fracking, the moratorium has “impair[ed] the growth of the ... assets” in the public trust established by the Environmental Rights Amendment. (*Id.* ¶ 62.)

Notably, the Complaint does *not* allege that Damascus Township owns any land with natural-gas reserves subject to the moratorium. Plaintiffs do suggest, however, that the moratorium has deprived the Township of Well Fund money that the Commonwealth would otherwise have distributed to it. (*Id.* ¶ 86.)

The Complaint asserts four Counts. Count I contends that the moratorium “exceeded the scope of authority granted [to the DRBC] under ... Section 3.8 of the Compact.” (*Id.* ¶ 94.) Count II alleges that the moratorium constitutes a regulatory taking of state-owned property for purposes of the Federal and Pennsylvania Constitutions. (*Id.* ¶ 101.) Because the Compact does not allow the DRBC to exercise “the power of eminent domain” over the “property of a signatory state,” Compact § 14.14, Plaintiffs seek a declaration that the moratorium exceeds the Commission’s authority under the Compact. In the alternative,

Plaintiffs seek a declaration that the moratorium is a taking “requiring provision of just compensation for the diminution of the property seized.” (Compl. at 17.)

Count III asserts a regulatory taking claim with respect to private property rather than state-owned land. Plaintiffs seek a declaration that, because the moratorium is a regulatory taking, it exceeds the eminent domain powers granted to the DRBC under the Compact. Alternatively, Plaintiffs request a declaration that just compensation is constitutionally required. (*Id.* at 19.)

Most dramatically, Count IV contends that the moratorium has “deprived 5.5 million Pennsylvanians of their ability to choose their laws and governmental structure,” thereby violating the Federal Constitution’s guarantee of a republican form of government. *See* U.S. Const. art IV, § 4.

III. ARGUMENT

A. Plaintiffs Lack Standing

This lawsuit is barred at the threshold because Plaintiffs lack standing to bring it. The Supreme Court’s standing jurisprudence requires that, to invoke the limited subject-matter jurisdiction of federal courts under Article III of the Constitution, plaintiffs must adequately allege “such a personal stake in the outcome of the controversy as to ... justify the exercise of the court’s remedial powers on their behalf.” *Town of Chester*, 137 S. Ct. 1645, 1650 (2017). More specifically, plaintiffs “must demonstrate (1) an injury-in-fact, (2) a sufficient

causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.” *Finkelman v. Nat’l Football League*, 810 F.3d 187, 193 (3d Cir. 2016). “To establish injury in fact,” in turn, “a plaintiff must show that he or she is suffering an invasion of a legally protected interest that is concrete and particularized”—meaning that “it must affect the plaintiff in a personal and individual way”—“and actual or imminent, not conjectural or hypothetical.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *see also Town of Chester*, 137 S. Ct. at 1650 (“a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought”). “These requirements are unyielding.” *Finkelman*, 810 F.3d at 189. Because none of the Plaintiffs satisfies them, this Court lacks subject-matter jurisdiction, and the only proper course is to “announc[e] th[at] fact and dismiss[] the cause,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998).

1. The Senator Plaintiffs Lack Standing

Senators Yaw and Baker and the Republican Senate Caucus (collectively, the “Senator Plaintiffs”) lack standing because they fail to plead a particularized interest in the litigation. The law on legislator standing is well developed. Such standing is narrowly circumscribed, as “[c]oncerns for separation of powers and the limited role of the judiciary” are “particularly acute in legislator standing cases.” *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 265 (3d Cir. 2009).

The Supreme Court’s precedent “stands ‘at most’ ‘for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.’” *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019) (quoting *Raines v. Byrd*, 521 U.S. 811, 823 (1997)); *see also Raines*, 521 U.S. 811 (individual legislators lacked standing to challenge Line Item Veto Act on grounds that it diluted their Article I voting power). That precedent also makes “clear” that “a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.” *Corman v. Torres*, 287 F. Supp. 3d 558, 567 (M.D. Pa. 2018) (three-judge panel). Such inadequate harm includes an asserted “institutional injury” in the form of “the diminution of legislative power.” *Id.* (quoting *Raines*, 521 U.S. at 821); *accord Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016).

That authority is dispositive here because the Senator Plaintiffs do not *even* allege an injury to the interest of the Pennsylvania Legislature as a body. Rather, they contend that they have an interest because DRBC’s moratorium allegedly exceeded the scope of the authority contractually ceded to the Commission by the Compact’s signatories. But the General Assembly is not a signatory to the Compact; the Commonwealth is. That the Commonwealth’s ratification took the

form of a statute passed by the Legislature (*and signed by the Governor*), containing legislative findings, does not avail Plaintiffs. Nor do their assertions that the moratorium has somehow stymied the purpose of Act 13 or other Pennsylvania statutes or—more generally—undermined Pennsylvania’s sovereignty. This is because, as the case law recognizes, “once a bill has become law, a legislator’s interest in seeing that the law is followed is no different from a private citizen’s general interest in proper government.” *Goode v. City of Phila.*, 539 F.3d 311, 317 (3d Cir. 2008). Indeed, legal threats to the validity or operation of an enacted statute are typically cognizable injuries only with respect to the state as a whole, not to the legislature as a particular organ of government. *See Bethune-Hill*, 139 S. Ct. at 1953 (“This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law’s passage.”). Even more so, then, Plaintiffs have no standing to complain that the moratorium has allegedly reduced the value of state-owned land⁷ or the Commonwealth’s receipt of fracking-related fees.

Alaska Legislative Council v. Babbitt, 181 F.3d 1333 (D.C. Cir. 1999), cited approvingly in *Russell v. DeJongh*, 491 F.3d 130 (3d Cir. 2007), is particularly instructive because of its similarities with this case. In *Babbitt*, individual Alaskan

⁷ Or, for that matter, privately owned land. Plaintiffs fail to plead standing under either of their two counts claiming that the moratorium constitutes a regulatory taking. “It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.” *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001).

state legislators, as well as the Alaska Legislative Council, brought suit challenging federal management of fish and wildlife on federal public lands. The plaintiffs complained that the federal government had intruded upon Alaska’s sovereign “prerogatives in the management of fish and wildlife.” 181 F.3d at 1338. As the D.C. Circuit explained, “[t]he resulting injury is not to the Legislature and it is not to the individual legislators. It is to the State itself.... If [the challenged federal statute] diminishes the State’s authority, it injures state sovereignty, not legislative sovereignty.” *Id.* at 1338-39; *accord State ex rel. Tenn. Gen. Assembly v. U.S. Dep’t of State*, 931 F.3d 499, (6th Cir. 2019) (Tennessee General Assembly lacked standing to seek relief for “alleged injury to Tennessee’s sovereignty”), *cert. denied*, 141 S. Ct. 549 (2020).

Plaintiffs can represent the Commonwealth’s interests only if the Commonwealth has authorized them to do so. *See Bethune-Hill*, 139 S. Ct. at 1951-52 (Virginia House of Delegates could not represent Virginia’s interests in litigation; by statute, the state had authorized its Attorney General to represent its interests); *Tenn. Gen. Assembly*, 931 F.3d at 514-17. It has not. “By statute in Pennsylvania, the Attorney General”—not the General Assembly, and not any individual legislators—“is responsible for vindicating the sovereign interests of the Commonwealth.” *Del. Valley Citizens’ Council for Clear Air v. Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982) (citing 71 Pa. Stat. § 732-204(c)).

Even if Plaintiffs had asserted an injury to an interest that truly belonged to the Pennsylvania Legislature, rather than to the Commonwealth, they would still fail to establish standing. As the Supreme Court has made pellucidly clear, “individual [legislators] lack standing to assert the institutional interests of a legislature.” *Bethune-Hill*, 139 S. Ct. at 1953. Indeed, even “a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.” *Id.* at 1954. As two individual Senators and one of two Senate caucuses, the Senator Plaintiffs fall well short of Article III’s standing bar. *See Babbitt*, 181 F.3d at 1337-38.

Nor can the Senator Plaintiffs predicate standing on their purported status as “trustees” of the public natural resources trust created by the ERA. This is true for several reasons. First, Plaintiffs’ theory—namely, that such trustees have a fiduciary duty to maximize the revenue derived from liquidating natural resources—rests on a gross misapprehension of the interests protected by the ERA. As the Pennsylvania Supreme Court has explained, “the corpus of the trust” at issue consists of “the public natural resources” themselves. *Robinson Twp.*, 83 A.3d at 957. Although the court has explained “that proceeds from the sale of oil and gas from [the ERA’s] public trust remain in the corpus of the trust,” *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 933 (Pa. 2017), Plaintiffs completely misinterpret that pronouncement. It does *not* mean that the

Commonwealth has a fiduciary duty to maximize those proceeds. To the contrary, it means that those proceeds, to the extent they are realized, must be devoted to “preventing and remedying the degradation, diminution and depletion of our public natural resources.” *Id.* at 936. Put simply, the constitutional duty or interest invoked by Plaintiffs does not exist.

Second, Plaintiffs fail to cite any Pennsylvania authority, let alone federal authority, suggesting that a “trustee” under the ERA has standing, based on that status alone, to bring suit challenging actions restricting extraction of natural resources. That is because no such authority exists.

Third, even if Pennsylvania law did recognize such standing, it would not avail Plaintiffs here. It is well settled that “standing in federal court is a question of federal law, not state law.” *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013); accord *Finkelman*, 810 F.3d at 203; see also *Hagy v. Demers & Adams*, 882 F.3d 616, 624 (6th Cir. 2018) (“the doctrine of supplemental jurisdiction does not alter Article III’s standing requirements”). The recent decision in *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722 (7th Cir. 2020) (Barrett, J.), is particularly on point. The plaintiffs in that case brought state-law claims and claimed standing under Illinois’s “public trust doctrine.” It was undisputed that plaintiffs would have had standing, under this doctrine, to assert their claims in state court. *Id.* at 729-30. Nonetheless, the plaintiffs’ federal action had to be dismissed because they could

not show the particularized, concrete injury required by Article III. *Id.* at 730-32.

The same result obtains here.

2. The Township of Damascus Lacks Standing

For the reasons discussed above, the Township of Damascus likewise cannot predicate standing on its alleged status as a “trustee” of the ERA’s natural resources trust. Nor does the Township otherwise plead standing. Unlike the Commonwealth, the Township is not alleged to own any property whose value was diminished by the DRBC’s moratorium. Instead, the Plaintiffs appear to assert that the Township has suffered a cognizable injury because the moratorium has allegedly diminished the fees flowing into the Commonwealth’s Well Fund, some of which ostensibly would have been disbursed to the Township.⁸

This allegation is insufficient to confer standing. “Courts generally refuse to recognize standing based on economic harm that is merely a consequence of an injury suffered by another party.” *Duran v. City of Corpus Christi*, 240 F. App’x 639, 641 (5th Cir. 2007). For that reason, the Third Circuit and other courts have repeatedly held that employees, creditors, and stockholders lack standing to assert claims based on economic harm that is derivative of an alleged injury suffered by

⁸ Notably, the Township has no statutory *right* to these funds. To the contrary, the pertinent statute expressly provides that “[d]istribution of funds under this section ... are contingent on availability of funds in the [Well Fund].” 58 Pa. Cons. Stat. § 2314. Further, any money received from the Well Fund must be used for environmental purposes; it is not available for the municipality’s general use. *See Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 936 (Pa. 2017).

the employer, debtor, or stock company. *See, e.g., Pitchfrod v. PEPI, Inc.*, 531 F.2d 92, 96-98 (3d Cir. 1975); *Jin Fu Zhong v. Sweeny*, No. 08-2204, 2011 WL 1193011, at *8-10 (E.D. Pa. Mar. 29, 2011); *accord Rumber v. D.C.*, 595 F.3d 1298, 1300-01 (D.C. Cir. 2010) (employees and owner of company holding property interest lacked standing to assert takings claim); *Duran*, 240 F. App'x at 641-43; *Pagán v. Calderón*, 448 F.3d 16, 26-30 (1st Cir. 2006). That reasoning applies with even greater force to the Township. Indeed, the Township is at least two steps removed from the party alleged to be directly injured: the moratorium allegedly prevents landowners from engaging in fracking, which in turn diminishes the fees paid into the Commonwealth's Well Fund, which in turn reduces the amount, if any, of the Commonwealth's distribution to the Township. This kind of purely derivative interest does not support standing.⁹

Because Plaintiffs have failed to plead standing with respect to any of their claims, the Complaint must be dismissed.

⁹ For essentially the same reasons, the Township's derivative theory of injury also fails to satisfy Rule 17's requirement that "[e]very action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). "This rule requires that the party who brings an action actually possess, under the substantive law, the right sought to be enforced." *United HealthCare Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 569 (8th Cir. 1996). The purpose of the rule is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17(a), 1966 Advisory Committee Note. That purpose is squarely implicated here, where the Township—and, for that matter, the Senator Plaintiffs—seeks to assert regulatory takings claims on behalf of the Commonwealth and private parties, who presumably would not be bound by a judgment in this case.

B. Plaintiffs’ Regulatory Takings Claims Fail as a Matter of Law

Independent of the Complaint’s pervasive standing defect, Counts II and III fail to state a claim. This is true for at least two reasons: (1) Plaintiffs fail to plead facts making out a regulatory takings claim; and (2) any such claim is time-barred.

1. Plaintiffs Fail to State a Takings Claim

The facts Plaintiffs must plead to survive a motion to dismiss depend on the particular species of takings claim Plaintiffs assert—something Plaintiffs themselves fail to address. The Supreme Court’s case law has “stake[d] out” “two relatively narrow categories” “of regulatory action that generally will be deemed *per se* takings.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The first involves government actions that “require[] an owner to suffer a permanent physical invasion of her property.” *Id.* “A second categorical rule applies to regulations that completely deprive an owner of “*all* economically beneficial us[e]” of her property. *Id.* The current case falls into neither category: The challenged moratorium does not involve any “physical invasion,” and Plaintiffs do not allege that a suspension of approvals of a particular gas-extraction technique effected a “complete elimination of a property’s value,” *id.* at 539.

Plaintiffs’ regulatory takings challenge is thus “governed by the standards set forth in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978).”¹⁰

¹⁰ These federal-law standards also govern takings claims brought under Pennsylvania law. *See Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 763 n.7, 765 (Pa. 2002); *In re*

Lingle, 544 U.S. at 537-38. As courts have emphasized, however, application of that standard requires “essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.” *Hodel v. Va. Surface Min. & Reclamation Ass’n*, 452 U.S. 264, 295 (1981). “These ‘ad hoc, factual inquiries’ must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.” *Id.* (emphasis added). The goal of the analysis is to determine “the severity of the impact of [the challenged regulation] on [the plaintiff’s particular] parcel” of land, and whether “the interference with [the] property is of such a magnitude that ‘there must be an exercise of eminent domain and compensation to sustain [it].’” *Penn Central*, 438 U.S. at 136.

It is easy to see how the application of the *Penn Central* factors will necessarily turn on particular facts regarding the specific property at issue. For example, the “investment-backed expectations” factor requires courts to determine the “reasonable expectations” the owner had for the property “at the time of its acquisition.” *Bridge Aina Le‘A, LLC v. Land Use Comm’n*, 950 F.3d 610, 633 (9th

Condemnation by Municipality of Penn Hills, 870 A.2d 400, 404-05 (Pa. Commw. Ct. 2005). Thus, assuming *arguendo* that Plaintiffs may assert takings claims under Pennsylvania as well as federal law, *but see* Compact § 14.14(b) (DRBC’s “power of condemnation shall be exercised in accordance with the provisions of any federal law applicable to the commission” (emphasis added)), the analysis is the same.

Cir. 2020). For present purposes, that means it would be extremely significant, if not dispositive, if, for example, a specific parcel were acquired before the development of fracking techniques rendering extraction of its natural gas reserves commercially viable. In those cases, the DRBC's moratorium could not have interfered with the owner's investment-backed expectations regarding the property.

The "economic impact of the regulation" will also obviously depend on the particular parcel at issue. As the Supreme Court has explained, the "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017). The "denominator of th[is] fraction," *id.*, at the very least, will vary widely from parcel to parcel.

Plaintiffs do not plead any facts bearing on the "complex of [property-specific] factors" determinative of a *Penn Central* takings claim. *See id.* at 1943. Indeed, Plaintiffs do not identify any specific parcel of property at all. Instead, they sweepingly request a declaration that the DRBC's moratorium effected a regulatory taking with respect to unidentified "state-owned land" and unidentified "private property." (Compl. ¶¶ 102, 106.) Because the Complaint does not come close to alleging facts sufficient to make out a viable regulatory takings claim, Counts II and III fail as a matter of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (it is insufficient to plead facts "merely consistent with" liability; "a

complaint must contain sufficient factual matter” to “allow[] the court to draw the reasonable inference that the defendant *is* liable” under the legal theory asserted (emphasis added)); *Robinson v. Corizon Health, Inc.*, No. 10-7165, 2016 WL 1274045, at *1 n.4 (E.D. Pa. Mar. 30, 2016) (to survive motion to dismiss, plaintiff must “allege sufficient facts to satisfy the [Supreme Court’s] pleading requirements as to each element of the prima facie case of [his] claims”); *see also*, *e.g.*, *Pulte Home Corp. v. Montgomery Cnty.*, 271 F. Supp. 3d 762, 776-777 (D. Md. 2017) (dismissing takings claim after finding the facts pled insufficient to satisfy *Penn Central* test).¹¹

2. Plaintiffs’ Takings Claims Are Time-Barred

In any event, Plaintiffs’ takings claims are time-barred as a matter of law.¹² Under Pennsylvania law, regulatory takings claims “must be filed within six years from the date on which the asserted taking, injury or destruction of the property occurred or could reasonably have been discovered by the [plaintiff].” 42 Pa. Cons.

¹¹ The “character of the governmental action” stands as an additional obstacle to Plaintiffs’ takings claims. It is well settled that “[w]here, as here, the government’s action is aimed at protecting the public health and safety, that fact weighs strongly against finding a regulatory taking.” *McCutchen v. United States*, 145 Fed. Cl. 42, 56 (2019); *see, e.g.*, *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (the government’s decision to declare a portion of a watershed unsuitable for mining under the Surface Mining Control and Reclamation Act was “the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations”).

¹² Although the statute of limitations is an affirmative defense, it may be raised in a motion to dismiss where, as here, “the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.” *Zankel v. Temple Univ.*, 245 F. App’x 196, 198 (3d Cir. 2007) (quoting *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002)).

Stat. § 5527(a)(2). Because federal law does not expressly prescribe a statute of limitations for federal takings claims, courts “must look to the most ‘appropriate’ or ‘analogous’ state statute of limitations.” *287 Corp. Ctr. Assocs. v. Twp. of Bridgewater*, 101 F.3d 320, 323 (3d Cir. 1996) (quoting *Wilson v. Garcia*, 471 U.S. 261, 268 (1985)). *287 Corp. Ctr.* held that, in the case of a federal regulatory takings claim, the appropriate analog is either the personal-injury statute of limitations applicable to claims under 42 U.S.C. § 1983 (in Pennsylvania, two years, *see Alexander v. Fletcher*, 367 F. App’x 289, 290 & n.1 (3d Cir. 2010)) or the limitations period for state-law regulatory takings claims (six years, as noted). 101 F.3d at 323-324.

Based on the face of the Complaint, the takings claims alleged by Plaintiffs here accrued no later than “2010,” when the DRBC’s purported “categorical[] prohibit[ion on] natural gas extraction within the Basin” took effect. (Compl. ¶ 72; *see also id.* ¶¶ 101, 106 (alleging that “[t]he Commission’s moratorium ... constitute[d] a regulatory taking of ... property”).) Accordingly, whether the applicable limitations period was two years or six years, it expired long before Plaintiffs commenced this lawsuit in January 2021. For this reason, too, Counts II and III fail as a matter of law.

C. Plaintiffs Have Failed to Plead a Viable Claim Under the Republican Form of Government Clause

Finally, Plaintiffs have also failed to state a claim under the constitutional

clause providing that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. Const., art. IV, § 4.

First, the Supreme Court “has several times concluded ... that the Guarantee Clause does not provide the basis for a justiciable claim.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019); accord *Colegrove v. Green*, 328 U.S. 549, 555 (1946) (plurality opinion) (“Violation of the [Guarantee Clause] cannot be challenged in the courts.”); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912) (such claims are “not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress”); *Parker v. Merlino*, 646 F.2d 848, 856 n.15 (3d Cir. 1981); *Benner v. Wolf*, 461 F. Supp. 3d 154, 168 n.17 (M.D. Pa. 2020).¹³ For this reason alone, the claim must be dismissed.

Second, even assuming *arguendo* that “individuals could utilize the federal courts to enforce the Guarantee Clause” “in unusual and extreme cases, such as the establishment of a monarchy by a state in place of a republican form of government,” this is not such a case. *Largess v. Sup. Jud. Court for State of Mass.*, 373 F.3d 219, 229 (1st Cir. 2004). Plaintiffs’ argument seems to be that, if the DRBC’s moratorium is authorized by the Compact, the Compact violates the

¹³ In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court suggested that “perhaps not all claims under the Guarantee Clause present nonjusticiable questions.” *Id.* at 185. But that statement was dictum, as the Court concluded that petitioners had not made out a Guarantee Clause claim in any event. *Id.* at 185-86. Importantly, the Court has never overruled its earlier nonjusticiability holdings, and Chief Justice Roberts did not refer to the dictum in *New York* in his recent opinion for the Court in *Rucho*, 139 S. Ct. at 2506.

Guarantee Clause because Pennsylvania lacks unilateral, unchecked authority to permit industrial activities affecting interstate water resources within the Basin. This argument overlooks (1) that what Plaintiffs attack, *i.e.*, the ceding of unilateral authority over interstate resources to a joint interstate authority, is the very purpose of interstate compacts, which are expressly authorized by the Constitution, *see Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S 30, 41-42 (1994) (“the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations”); (2) that Pennsylvania voluntarily ratified the Compact, and its representative on the DRBC, the Governor, approved the moratorium; and (3) in any event, there can be no question that the federal government, which is a signatory to the Compact, has constitutional authority to regulate activities affecting interstate water resources; Plaintiffs provide no reason why the exercise of such authority under a congressionally-approved Compact is any less constitutional. *See generally Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 628 n.8 (2013) (congressional approval transforms interstate compact into federal law preempting any conflicting state law under Supremacy Clause). As a matter of law, Plaintiffs’ allegations do not state a violation of the Guarantee Clause.

IV. CONCLUSION

For the foregoing reasons, the Democratic Senator Intervenors respectfully request that the Complaint be dismissed in its entirety.

Respectfully submitted,

DATED: _____, 2021

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