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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| PETERS BROTHERS TRUCKING, INC.; H.R. EWELL, INC.; MOTOR TRUCK EQUIPMENT COMPANY d/b/a KENWORTH OF PENNSYLVANIA; TRANSTECK, INC.; and PENNSYLVANIA MOTOR TRUCK ASSOCIATION,<br><br>Petitioners,<br>v.<br><br>PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PENNSYLVANIA; and RICHARD NEGRIN, in his official capacity as Acting Secretary of the Department of Environmental Protection.<br><br>Respondents. | No. 272 M.D. 2023 |

**PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS**

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## INTRODUCTION

The Petitioners, Peters Brothers Trucking, Inc., H.R. Ewell, Inc., Motor Truck Equipment Company d/b/a Kenworth of Pennsylvania ("MTE"), Transteck, Inc., and Pennsylvania Motor Truck Association (collectively "Truckers") face a Hobson's Choice. They must choose, daily, between complying with unlawfully imposed regulatory standards from California or ignoring those standards and incurring liability under the Air Pollution Control Act (the "APCA").

The Truckers have only one avenue to escape these perils. They need a judgment from this Court that they have no legal obligation to abide by California's stringent new regulations. Specifically, the Truckers need a declaration that 25 Pa. Code Chapter 126, Subchapter E ("Pennsylvania HDD Regulation"), is unlawful because it blindly incorporates California regulation on a rolling basis. Further, they seek a declaration that the Environmental Quality Board ("EQB") lacked authority, and acted in violation of separation of powers, in adopting California's latest regulatory requirements for heavy diesel trucks.

The Respondents, the Pennsylvania Department of Environmental Protection ("DEP") and the EQB (collectively the "Agencies"), have raised preliminary objections. But those objections should be overruled. The agencies have failed to prove "clear and free from doubt" that this case should be dismissed. *Duquesne Light Co. v. Commw., Dep't of Env't Prot.*, 724 A.2d 413, 416 (Pa. Commw. Ct. 1999).

The Agencies would deny the Truckers even the opportunity to obtain a judgment as to whether they are bound to comply with (unlawfully imposed) regulatory standards from California. In their view, the Truckers must violate those standards, risk major liability, and then wait to be sued before they may have their day in Court. But the Declaratory Relief Act provides a right to a declaration precisely to avoid this Catch-22 scenario. Therefore, because the Truckers have properly invoked this Court's jurisdiction, Respondents' standing and ripeness objections should be overruled.

Further, this Court should overrule the Agencies' remaining preliminary objections—all of which go to the merits. Those arguments largely rest on a mistaken premise. The Agencies insist that a rolling incorporation of California standards is necessary because the Clean Air Act ("CAA") prohibits states from enforcing outdated California standards. But when California changes its standards, Pennsylvania should simply default to baseline emission standards from the U.S. Environmental Protection Agency ("EPA"), which is permissible under the CAA. Therefore, if the Commonwealth wishes to adopt the latest California standards, it must propose a new rule—knowing the standards that will apply if finalized—and abide by proper rulemaking procedures.

## JURISDICTION

This Court has original jurisdiction because it concerns the validity of Pennsylvania statutes and regulations promulgated by state agencies. 42 Pa. C.S. § 761(a). The Court is authorized under the Declaratory Judgments Act, 42 Pa. C.S. § 7532, to provide declaratory relief because there is a controversy between the parties as to their rights and legal obligations.

## STATEMENT OF FACTS

The Truckers are small businesses and an association representing the trucking industry—including companies that rely on diesel trucks to provide freight services, and dealerships that sell those trucks in Pennsylvania. The Truckers are all obligated to comply with regulations promulgated by the EQB. *See* 35 P.S. § 4008 (providing that it is "unlawful" for anyone to violate "the rules and regulations adopted under this act ..."). And they face the prospect of enforcement actions, from DEP, or citizen suits from third parties, if they ignore EQB regulations. *See* 35 P.S. § 4013.6(c) (authorizing third party lawsuits). Additionally, they face potential misdemeanor charges if they should "willfully or negligently" violate EQB regulations. 35 P.S. § 4009(b)(1).

Here the Truckers contest the validity of EQB regulations governing the sale and acquisition of heavy-duty diesel ("HDD") trucks because those regulations incorporate problematic standards from California on a rolling basis. *See* 25 Pa.

Code § 126.503(a) (providing that no "person may [] sell, import, deliver, purchase, lease, rent, acquire or receive a new heavy-duty diesel engine or vehicle" that is not California-compliant). Finalized over twenty years ago, the Pennsylvania HDD Regulation automatically incorporates *any changes* to California's HDD emission standards and warranty requirements. *See* Respondents' Prelim. Objects. ¶¶ 29, 103−05.

## I. Pennsylvania's Rolling Incorporation of California Law

### A. Newly Incorporated California Emission Standards

At the time the Pennsylvania HDD Regulation was finalized in 2002, California already required more stringent emission standards than the EPA under the CAA. *See* 32 Pa. Bull. 2328−29. But the California Air Resources Board recently amended the California Code to impose a schedule of progressively more stringent emission standards for Model Year 2024−2031 vehicles. *See* Complaint, Exhibit A, Final Regulation Order, Amendments to Title 13, California Code of Regulations; Prelim. Objects. ¶ 38. And as Respondents admit, those new California standards were incorporated—***automatically***—into the Pennsylvania HDD Regulation under 25 Pa. Code § 126.503(a) ("Rolling Emissions Regulations"). *See* Resp. Br. at 18 (stating that California's new emission standards were "automatically incorporated into the Pennsylvania HDD Regulation."); Petitioners' Complaint, Exhibit C, Letter to Hon. Daryl D. Metcalfe, Chairman of Env't Res. & Energy Committee (Nov. 3,

2021) ("DEP Letter") (confirming "[t]he Department interprets the Pennsylvania regulation adopting sections of California's regulation to be a continuing adoption including ***any changes*** which California may make to its regulation.") (emphasis added).

For the Truckers, these new, and dramatically more stringent, emission standards are problematic. Dealers like MTE and Transteck are required to sell only California-compliant vehicles. *See* Complaint ¶¶ 62−64. Conversely, trucking companies like Peters Brothers and H.R. Ewell are prohibited from purchasing trucks that do not meet California's more demanding emission standards for new heavy diesel trucks. *Id*. at 59, 65−66. As a result, they now have fewer options when upgrading their fleets. *Id*. And worse, California's increasingly stringent emission standards are expected to dramatically increase the cost of acquiring new heavy diesel trucks. *Id*. *See* Resp. Br. at 20 (admitting these emission standards raise costs and create scarcity of compliant HDD vehicles).

California regulation—and, by incorporation, the Pennsylvania HDD Regulation—will require especially stringent emission standards for Model 2027 diesel trucks. *See* 13 CCR § 1956.8. Those vehicles will come to market in 2026, and MTE and Transteck will likely begin negotiating pre-sales by late summer of 2025. *See* Complaint Exhibit G, Declaration of Kenton Good ¶ 25; Exhibit I, Declaration of Shawn Brown ¶¶ 14−15. At that time, MTE and Transteck anticipate

a marked drop in sales because trucking companies will face sticker shock with higher costs for California-compliant trucks. *See* Exhibit G, Good Decl. at ¶ 15. And companies like Peters Brothers and H.R. Ewell will be forced to pay significantly higher prices when upgrading their fleets. *See* Complaint at ¶¶ 66−67.

**B. Newly Incorporated California Extended Warranty Requirements**

EQB regulation, 25 Pa. Code § 126.521, requires that any HDD engine sold in Pennsylvania must comply with California's emission system warranty requirements ("Rolling Warranty Regulation"). Until recently, the California Code required that new trucks had to be sold with a warranty covering the engine's emission systems only for the first 100,000 miles or five years. *See* 13 CCR § 2036(c); *accord* Complaint at ¶ 45; Prelim. Objects. ¶ 34. But after recent amendments, the California Code now requires extended warranties covering up to 350,000 miles—depending on the class of the vehicle for 2022−26 Model Year engines. *See* 13 CCR § 2036(c); Complaint at ¶ 45. And the California Code will require still more extensive warranty coverage for model years 2027−31. *See* 13 CCR § (c)4(C).

The Rolling Warranty Regulation imposes unnecessary costs for companies like Peters Brothers. *See* Complaint at ¶ 60. While others may elect to purchase extended warranties, Peters Brothers would rather decline extended coverage because it has capable mechanics on its payroll already. *Id*. Yet if Pennsylvania

dealerships comply with the Rolling Warranty Regulation, Peters Brothers will have no option but to pay for California compliant extended warranties going forward—or to buy and register trucks elsewhere. *Id*.; *see also* Complaint, Exhibit F, Declaration of Brian Wanner ¶ 17 (stating that Peters Brothers intends to begin buying its trucks in Wisconsin if forced to buy extended warranties in Pennsylvania). Meanwhile, Pennsylvania dealerships risk losing business if Peters Brothers or other PMTA members should begin buying and registering trucks in other states to avoid this mandate. *See* Complaint at ¶¶ 58−61.

**C. The Risk in Noncompliance**

By statute, DEP is required to enforce EQB regulation—including incorporated standards from California. But without explanation, DEP adopted a temporary policy of nonenforcement as to the Rolling Emission Regulations and the Rolling Warranty Regulation.[1] *See* Resp. Br., Exhibit E, Suspension of the Pennsylvania HDD Emissions Control Program, 51 Pa.B 7000 (Nov. 6, 2021) (asserting only that the DEP was exercising "enforcement discretion"). Going forward, the Department is set to begin enforcement on January 3, 2026—*i.e.*, when

[1] The Agencies now assert that DEP decided to suspend enforcement because the trucking industry needed more "time to comply with the [California's] Warranty Amendment[,]" and because there were few available engines and vehicles that would satisfy California's new emission standards. Resp. Br. at 20. But while such policy considerations should motivate the EQB to promulgate new regulations to reject California's problematic standards—they do not explain the *legal basis* for the DEP's policy of nonenforcement.

Model Year 2027 vehicles come to market. *See* Resp. Br., Exhibit F, Suspension of the Pennsylvania HDD Emissions Control Program, 53 Pa.B. 3166 (June 10, 2023).

Still, the Truckers must ensure compliance now—or risk liability for third-party citizen suits. When DEP declines to pursue enforcement actions, the APCA authorizes "any person" to sue over violation of EQB regulations. 35 P.S. § 4013.6(c). Private litigants may seek damages of up to $25,000 *per day* for each violation. *Id*. (cross-referencing section 4009.1). Further, violations are second-degree misdemeanors, punishable by up to $50,000 and up to two (2) years imprisonment *for each offense*. *Id*. § 4009(b)(1). And the APCA provides for a seven-year statute of limitations running "from the date the offense is discovered." *Id*. § 4010.3.

## II. EQB's Cited Rulemaking Authority and Statutory Background

### A. EQB's 2002 Rulemaking

When promulgating the Pennsylvania HDD Regulation, the EQB invoked two sources of delegated rulemaking authority. First, the EQB asserted that it had authority to adopt California standards because the APCA broadly delegates power for the Board to "[a]dopt rules and regulations, for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth." 35 P.S. § 4005(a)(1). This authority allows for direct regulation of the sources of pollution.

But the parties dispute whether this delegation authorized the EQB's rolling incorporation of California's emission standards and warranty requirements.

Second, the EQB asserted that it had authority to promulgate its Rolling Emissions Regulations because the APCA delegates authority to impose "rules and regulations designed to reduce emissions from motor vehicles." *Id*. § 4005(a)(7). The EQB acknowledges that the Board is required to consult the Pennsylvania Department of Transportation ("PA-DOT") when imposing such rules. And the Board, in fact, consulted with PA-DOT when finalizing its Rolling Emissions Regulations in 2002. But the Board did not consult with PA-DOT about the development of emission standards developed and finalized in California in 2021. *See* Pet. at 19 ("The standards set forth in Title 13 of the California Code were not developed in consultation with [PA-DOT]."); Resp. Br. at 43. Nonetheless, those newly incorporated emission standards now govern HDD trucks in Pennsylvania. Resp. Br. at 18 (acknowledging that new California emission standards were "automatically incorporated into the Pennsylvania HDD Regulation.").

**B. Pennsylvania's Choice to Follow Federal or California Standards**

With enactment of the CAA, Congress established a system of "cooperative federalism" to achieve the goal of improving air quality throughout the nation. *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). EPA is charged with establishing national ambient air quality standards ("NAAQS"). 42 U.S.C. §§ 7408–

09. And the states have the "primary responsibility" to meet those standards. 42 U.S.C. § 7407(a). But the States retain "wide discretion" in deciding how to achieve that end. *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). *See* Resp. Br. at 7 (acknowledging that the States retain "broad" discretion to decide upon "methods and particular control strategies" for achieving air quality standards).

If areas within a state are deemed in "non-attainment," the state is responsible for developing a state implementation plan ("SIP") for improving air quality. *See* 42 U.S.C. § 7502. A SIP must contain basic elements. *See* 42 U.S.C. § 7511a. But Congress left broad discretion to the states to figure out how best to meet federal air quality goals in consideration of localized needs and concerns. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."); *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981) ("The great flexibility accorded the states under the Clean Air Act is … illustrated by the sharply contrasting, narrow role to be played by EPA.").

Among the choices left to the states is the option to adopt either baseline vehicle emission standards set by EPA, or to adopt more stringent standards from

California.[2] 42 U.S.C. § 7507(1). Therefore, the choice to adopt California standards is left to state lawmakers. But the Pennsylvania General Assembly has left that question unanswered. Rather than giving direction as to whether to follow California or EPA standards, the Assembly simply delegated unguided authority for the EQB to "[a]dopt rules and regulations to implement the provisions of the Clean Air Act." 35 P.S. § 4005(a)(8).[3]

## STANDARD OF REVIEW

"Preliminary objections shall be sustained only when they are clear and free from doubt." *Duquesne Light*, 724 A.2d at 416. The objecting party must demonstrate "with certainty that the law would not permit [judgment for] the plaintiff upon the facts averred." *D'Elia v. Folino*, 933 A.2d 117, 121 (Pa. Super. Ct. 2007) (quoting *Lovelace v. Pa. Prop. & Cas. Ins. Guar. Ass'n*, 874 A.2d 661, 664 (Pa. Super. Ct. 2005). "[W]here any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the

[2] The CAA generally preempts states from creating their own emission standards; however, California alone is permitted to impose heightened emission restrictions—subject to EPA approval waiving federal preemption. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dep't of Env't Conservation*, 17 F.3d 521, 525 (2d Cir. 1994) (explaining that California was permitted to impose more stringent standards because of the State's "unique problems and pioneering efforts" in addressing air pollution). But once EPA grants California's waiver, other states may choose to adopt California's heightened standards or to continue following baseline federal standards. *See* 42 U.S.C. § 7543.

[3] The EQB never claimed that it was relying on this authority when promulgating the Pennsylvania HDD Regulation. *See* Prelim. Objects. ¶ 29. Nor could it. Nothing in the CAA compels the Board to adopt California emission standards or extended warranty requirements. *See Train*, 421 U.S. at 79 (emphasizing that States have broad discretion in deciding how to achieve and maintain NAAQS).

preliminary objections." *Pa. State Lodge, Fraternal Order of Police v. Commw., Dep't of Conservation & Nat. Res.*, 909 A.2d 413, 416 (Pa. Commw. Ct. 2006).

## ARGUMENT

### I. Response to Preliminary Objection One: The Truckers Have Standing and a Ripe Case Because the EQB Regulation Currently Requires Them to Comply with Regulatory Standards from California

The Agencies object that the Truckers lack standing to bring this lawsuit on the view that their claims are not yet ripe. But the Truckers have pled facts sufficient to demonstrate a here-and-now injury. And those well-pled facts are presumed true. *See Grand Central Sanitary Landfill, Inc. v. Commw., Dep't of Env't Resources*, 554 A.2d 182, 184 (Pa. Commw. 1989) (stating this Court must accept "as true all well-pleaded facts which are material and relevant.").

#### A. DEP's Short-Term Policy of Nonenforcement Does Not Relieve the Truckers of the Obligation to Comply with EQB Regulations

The Agencies argue that there is no present injury because the DEP is not currently enforcing the EQB's HDD Regulation. Resp. Br. at 23−29. But the Agencies are wrong in asserting that DEP's temporary policy of nonenforcement "allows" the Truckers to buy and acquire trucks that do not meet California's emission standards and extended warranty requirements. On its face, DEP's public notice stated that: "The Department's exercise of enforcement discretion does not protect a manufacturer, distributor, seller, renter, importer, leaser or owner of a retail

outlet from the possibility of legal challenge by third persons under 25 Pa. Code Chapter 126, Subchapter E." *See* Complaint, Exhibit E.

A plaintiff has standing to bring a lawsuit so long as they are subjected to regulation mandating that they must take some action or restricting them from engaging in their preferred conduct. *See Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481(Pa. 2021) ("*Papenfuse*") (concluding that imposition of contested regulation presents a "real and concrete" controversy). The Declaratory Judgments Act, 42 Pa. C.S. § 7541(a), in turn, provides "remedial" relief to settle "uncertainty and insecurity with respect to rights, status, and other legal relations" when a party is subject to objectionable regulation. *See EQT Prod. Co. v. Dep't of Env't Prot. of Commw.*, 130 A.3d 752, 758 (Pa. 2015) (affirming that pre-enforcement review is appropriate so long as the contested regulation imposes a "direct and immediate" burden). Moreover, the Declaratory Judgments Act is to be "liberally construed and administered." 42 Pa. C.S. § 7541(a).

There is no requirement that a plaintiff must violate a regulation and wait for an enforcement action or a third-party lawsuit to raise a legal challenge. As the Supreme Court has explained, "our jurisprudence in pre-enforcement declaratory judgment cases … has developed to give standing to plaintiffs to challenge laws before the laws have been enforced against them and before enforcement has been threatened." *Papenfuse*, 261 A.3d at 488–89. Our courts regularly "afford[] standing

to plaintiffs in pre-enforcement declaratory judgment actions challenging the legality or constitutionality of statutes." *Id*. at 482; *see also infra* at 29−32 (explaining that due process requires the availability of pre-enforcement challenges).

Here the Truckers are suffering injury because they are required to comply with the Pennsylvania HDD regulation, or else incur major penalties—including staggering civil and criminal penalties. *Supra* at 7−8. And unfortunately, DEP's short-term policy of nonenforcement does not relieve the Truckers of their obligation to comply with California standards incorporated into the Pennsylvania HDD Regulation. Therefore, regardless of whether DEP is currently enforcing the EQB's regulations, the Truckers *must* comply.

As the Agencies acknowledge, the Truckers can be sued by private parties if they fail to comply. *See* Resp. Br. at 28 (acknowledging that third parties may currently bring a lawsuit should the Truckers fail to comply with California's warranty requirements).[4] The Truckers also face immediate criminal liability if they fail to comply. *See* 35 P.S. § 4009(b)(1). Therefore, the Truckers are entitled to declaratory relief. *See Arsenal Coal Co. v. Commw., Dep't of Env't Res.*, 447 A.2d

[4] The Respondents allege that third parties cannot yet bring a lawsuit alleging violation of new California emission standards because EPA has yet to issue a preemption waiver for those standards. But as explained, *infra* at 19−22, the Truckers nonetheless face the risk of litigation if they should fail to comply with newly incorporated emission standards from California.

1333, 1340 (Pa. 1984) (affirming that a plaintiff is not limited to "challenging [] regulation through noncompliance...").

The Agencies argue that no one can say with certitude whether a third party will bring a lawsuit. Resp. Br. at 27−29. That misses the point. The Truckers are injured because they must choose, here and now, whether to comply with unlawfully imposed California standards or *risk* liabilities. *See EQT Prod.*, 130 A.3d at 758. Either way, they suffer injury. Even if enforcement may not come until some future point, they still must presently conform to avoid intolerable risk. *See Bayada Nurses, Inc. v. Commw., Dep't of Lab. & Indus.*, 8 A.3d 866, 876 (Pa. 2010) (pre-enforcement challenge was ripe even though two years had passed without agency enforcement). And keep in mind, private enforcement actions can be brought for conduct that occurs now a full seven years after it is discovered. *See* 35 Pa. C.S. § 4010.3. This uncertainty creates a ripe challenge.

The Supreme Court's decisions concerning nearly identical regulatory challenges confirm that the State cannot force regulated parties to choose between Charybdis and Scylla without affording an opportunity to clarify their rights and legal duties. For example, in *Bayada Nurses*, 8 A.3d at 876, a company sought to contest the Department of Labor's interpretation of wage and hour law. The case was justiciable even though the Department had not initiated an enforcement action against the company. *Id.* And, as here, there was no certitude that anyone would

bring suit if the company should ignore the Department's interpretation. Nonetheless, the Court held that there was a live justiciable controversy because the plaintiff was (as here) "faced with the option of … risk[ing] penalties and fines, including criminal sanctions, or complying with what it believes to be the Department's erroneous interpretation and awaiting a judicial determination in subsequent litigation, in the interim bearing the not insignificant cost of compliance." *Id.*

As the Supreme Court explained in its seminal decision on this issue, when "[t]he alternative to challenging the regulation through noncompliance is to submit to the regulations," a plaintiff clearly has a ripe interest in an administrative challenge. *Arsenal Coal*, 447 A.2d at 1340. Therefore, the Truckers may challenge the Pennsylvania HDD Regulation, even before any enforcement action has been brought, given their "potential exposure to potent, ongoing civil penalties." *See EQT Prod.*, 130 A.3d at 758.

Plainly, this Court can provide immediate practical relief through a declaration that the EQB's rolling incorporation of California law is unlawful and unenforceable. What is more, the Truckers face imminent injuries because DEP's policy of nonenforcement expires, by its own terms, when MY 2027 vehicles come to market. *See* Resp. Br., Exhibit F (stating "the Department will suspend enforcement … until January 2, 2026" and that "[m]anufactuers will be required to

meet the Program's requirements beginning with MY 2027 HDD vehicles and engines.").[5] By the time they might hope to obtain a final decision on the merits, the Truckers will likely be negotiating sales for MY 2027 vehicles. *See, e.g.*, Exhibit G, Good Decl., ¶ 25 (stating that Transteck anticipated negotiating sales for MY 2025 vehicles beginning in August 2023). This alone is reason to allow this case to proceed.

None of the cases cited by the Agencies support their contention that this case is moot. They cite *Brouillette v. Wolf*, 213 A.3d 341 (Pa. Commw. Ct. 2019), for the proposition that a declaratory judgment is inappropriate unless events have occurred to give rise to a justiciable dispute.[6] *See* Resp. Br. at 24. But as set forth already, there is nothing left for the Agencies to do to make the challenge justiciable. The relevant events occurred when (1) the EQB finalized regulation adopting California standards on a rolling basis; and (2) California adopted amendments to its Code of Regulations that were automatically incorporated into the Pennsylvania HDD Regulation. And now that the California standards are automatically incorporated in

[5] The Agencies suggest that it is possible that the DEP might extend its policy of nonenforcement indefinitely. Resp. Br. at 24 (suggesting it is "uncertain whether" enforcement will ever occur). But DEP has no authority to amend or nullify existing regulations in this manner. Only the EQB has rulemaking authority under the APCA. And even if DEP had authority to change the applicable rules, the agency would have to go through formal rulemaking procedures to relieve the Truckers of their existing legal obligations. *See Borough of Bedford v. Commw., Dep't of Env't Prot.*, 972 A.2d 53, 63−64 (Pa. Commw. Ct. 2009) (emphasizing that once an agency has adopted a rule, "the agency is bound ... until the agency repeals it ...").

[6] *South Whitehall Twp. Police Service v. South White Twp.*, 555 A.2d 793 (Pa. 1989), merely affirmed a general rule that a plaintiff must have standing. No one disputes that point.

Pennsylvania law, the Truckers face immediate liability if they fail to follow them. *See* 35 P.S. § 4013.6(c) (authorizing "any person" to bring a lawsuit for violation of EQB regulation); *id*. § 4009(b)(1) (authorizing criminal prosecution for violations). For that matter, this case is easily distinguishable from *Am. Council of Life Ins. v. Foster*, 580 A.2d 448, 450 (Pa. Commw. Ct. 1990), because this case concerns final regulation from the EQB, whereas there were only "proposed regulations" in *Foster*.

The Agencies cite *Kane v. UPMC*, 129 A.3d 441 (Pa. 2015). But this case is inapposite.[7] *Kane* concerned the interpretation of a portion of a consent decree that contemplated the Commonwealth filing for supplemental relief as might become necessary to "effectuate compliance with the consent decree." *Id*. at 473. That is far different from the present dispute over the lawfulness of regulations that are *currently binding* on the Truckers. And unlike in *Kane*, the Truckers seek a declaration as to whether they must abide by contested regulations.

Finally, the Agencies cite *Yocum v. Commw., Pa. Gaming Bd.*, 161 A.3d 228 (Pa. 2017), for the proposition that a claim is nonjusticiable where it is based on speculative injuries. But there is nothing speculative about the fact that the Truckers

[7] Likewise, *DeNaples v. Pennsylvania Gaming Control Bd.*, 150 A.3d 1034 (Pa. Commw. Ct. 2016), is irrelevant. *DeNaples* merely concluded that an issue was unripe where a casino sought an interpretation over a Gaming Control Board order for which the Board had not "had an opportunity" to make a decision. By contrast, in the present case the EQB made a definite decision interpreting the APCA as authorizing contested Pennsylvania HDD Regulation. *See* Resp. Br. at 11−19. And DEP has made clear that it construes the HDD Regulation as self-amending whenever California updates its regulatory standards. *Id*.

are currently subjected to the Pennsylvania HDD Regulation. They are injured because they have no choice but to comply if they wish to avoid both civil and criminal liability. *See Commw., Off. of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014) (chiding that it "border[ed] on the frivolous" to challenge standing when regulated parties brought a pre-enforcement challenge to policy that changed their legal obligations).

**B. New Heightened Emission Standards Are Already in Effect**

Separately, the Agencies argue that the Truckers cannot claim present injury from the EQB's Rolling Emissions Regulations on the view that California's new HDD emission standards do not yet apply in Pennsylvania. This is wrong. And this assertion is contradicted by the Agencies' pleadings and public statements.

The Agencies admit that EQB's regulations automatically incorporate any changes to Title 13 of the California Code of Regulations. *See* Resp. Br. at 18 (acknowledging that California's new emission standards were "automatically incorporated into the Pennsylvania HDD Regulation."). They admit further that California amended its code to impose more stringent emission requirements "for 2024 and subsequent MY HDD engines and vehicles" and that those new standards "became effective in California" in December 2021. Prelim. Objects. at ¶ 38. Of course, the Agencies confirmed this by letter in 2021. *See* Complaint, Exhibit C,

DEP Letter. Therefore, the Truckers reasonably understand that they are subject to California's new emission standards.

The Agencies now assert that the EPA must first give its blessing before amendments to the California Code will trigger substantive obligations under the rules governing HDD emission standards in Pennsylvania. Resp. Br. at 26−27. But that conflicts with the Agencies' repeated assertion that the Pennsylvania HDD Regulation *automatically* incorporates amendments to the California Code. *See* Complaint, Exhibit C, DEP Letter (affirming DEP's position that the EQB's regulations include "any changes which California may make to its regulation.").

Moreover, in support of the construction that automatic incorporation occurs here, the Agencies point to section 1937(a) of the Pennsylvania Statutory Construction Act, which states:

> A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation *with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation*, as in force at the time of application of the provision of the statute in which the reference is made, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made.

1 Pa. C.S. § 1937(a) (emphasis added).

The Truckers have no basis to contest the Agencies' rolling incorporation interpretation. The EQB's Rolling Emissions Regulations provide that all HDD trucks sold or purchased in Pennsylvania must meet "all applicable requirements" of

Title 13 of the California Code. 25 Pa. Code § 126.503. Therefore, when California amends its code (as happened in 2021), those amendments apply automatically in California. *See* Resp. Br. at 26 (acknowledging that California's new emission standards were "incorporated by reference in 2021.").

It is true that *California* cannot lawfully enforce its new emission standards without the EPA's approval—which is still forthcoming. But unfortunately, the EQB's current regulations automatically incorporate California's amendments once finalized without pre-conditions. The Rolling Emissions Regulations simply do not condition the applicability of new California standards on EPA's approval. *See* 25 Pa. Code § 126.502 (providing, without caveat, that the Pennsylvania HDD Regulation applies to all "new [HDD] vehicles with a GVWR of greater than 14,000 pounds … starting with model year beginning after May 11, 2004, and each model year thereafter.") Therefore, the Truckers are already subject to California's new emission standards.

DEP is fixated on potential defenses should an enforcement action be brought (publicly or privately); however, the issue is whether the Truckers must comply now or face *risk*—"potential exposure to potent, ongoing civil penalties …" *See EQT Prod.*, 130 A.3d at 758. And as DEP acknowledges, private enforcement remains possible *today.* Resp. Br. at 28.

The Truckers' challenge became ripe as soon as they faced the choice between "comply[ing] with what [they] believe[] to be the Department's erroneous interpretation" and risking liability should they fail to comply. *See Bayada Nurses,* 8 A.3d at 876. One should hope that the Truckers would have a defense if they were immediately facing an enforcement action or lawsuit.[8] But in any event, they are entitled to a determination as to whether they are legally obligated to abide by new HDD emission standards set forth in Title 13 of the California Code of Regulations—as amended in 2021.

## II. Response to Preliminary Objection Two: Nothing in the APCA Precludes Pre-Enforcement Judicial Review of the Truckers' Procedural, Ultra Vires, and Constitutional Claims

The Agencies maintain that this suit is barred under 35 P.S. § 4004.2(e), which provides: "No person may file a preenforcement review challenge under this section based in any manner upon the standards set forth in subsection (b) of this section." But this suit does not "in any manner" allege a violation of the "standards set forth in [section 4004.2(b)]." The Truckers do not invoke section 4004.2(b). And neither their procedural, ultra vires nor constitutional arguments tack with the sort of

[8] The Truckers agree that it violates the CAA for any state to enforce heightened emission standards from California before the EPA issues a waiver from federal preemption; however, that does not change the fact that Pennsylvania has already "incorporated" new and more stringent standards from California. Resp. Br. at 26. And this puts the Truckers in a bind because no one wants to face the exorbitant costs of litigating a case like this—even if there might be an affirmative defense.

statutory arguments that a litigant would make if asserting a violation of the "standards set forth in subsection (b)."

### A. This Lawsuit Is Not Based Upon the Standards in Section 4004.2(b)

Subject to exceptions, section 4004.2(b) provides grounds for invalidating an EQB regulation that is "more stringent" than the standards required by the CAA. But section 4004.2(e)'s pre-enforcement bar applies to arguments concerning the Board's "determin[ation] that it is reasonably necessary for a control measure or other requirement to exceed minimum Clean Air Act requirements." *See id.* Thus, a party may raise an objection concerning the Board's reasoning in departing from the the default federal standard only in a defensive posture. *Id.* § 4004.2(e). But section 4004.2(b) and (e) are inapposite here because the Truckers ***do not*** argue that the Pennsylvania HDD Regulation is more stringent than necessary.[9]

To provide context, section 4004.2(a) provides specific authority for the EQB to adopt regulations as "reasonably required" to "achieve and maintain the ambient air quality standards" under section 109 of the CAA. In turn, section 4004.2(b) imposes a limitation in generally prohibiting the EQB from adopting "more stringent" standards "than those required by the Clean Air Act." Therefore, a party

[9] If the General Assembly had intended a categorical prohibition on pre-enforcement challenges to EQB regulation aimed at attaining or maintaining NAAQS, the Assembly would have said just that. Instead, the text of section 4004.2(e) only precludes claims alleging violation of the standards set out in section 4004.2(b)—which are not in dispute here.

might wish to argue that EQB regulation is more stringent than necessary to comply with the CAA. But that is not what the Truckers argue. Not one of their claims requires any showing that the Pennsylvania HDD Regulation is more stringent than required by the CAA. That is simply not an element of their procedural, ultra vires or constitutional claims.

First, the Truckers' procedural claims do not hinge on the substance of the challenged rules. The only elements that the Truckers must prove to prevail on these procedural claims are: (1) the agency has adopted new rules, and (2) the agency failed to comply with required procedures. Therefore, Claims V−VII do not "in any manner" allege violation of section 4004.2(b)'s prohibition on unnecessarily burdensome substantive rules.

Second, the Truckers' ultra vires claims do not rest upon an assertion that the EQB has adopted more stringent pollution control standards than necessary to ensure compliance with the CAA. The Truckers do not argue that the EQB imposed too stringent emission standards. Nor do the Truckers argue that the EQB's extending warranty requirements are too demanding.

Claim I simply alleges that the EQB lacks statutory authority to regulate emission system warranties. For this claim, it matters not whether the EQB has imposed more stringent standards than necessary under the CAA. That is so because the Truckers maintain the General Assembly has delegated *no authority at all* for

regulation of this sort. Therefore, the Truckers are not, "in any manner[,]" arguing a violation of the standard set forth in section 4004.2(b).

Likewise, Claim II is distinct from the sort of claim a party might advance under section 4004.2(b). The argument here is that the EQB has no authority to adopt emission standards developed by authorities in California without first consulting the PA-DOT. *See* 35 P.S. § 4005(a)(7). For this ultra vires claim, it does not matter whether the EQB has adopted more stringent standards than necessary. All that matters is that the APCA required consultation with the PA-DOT. And that did not happen here.

Third, the Truckers' constitutional claims do not implicate the sort of arguments a litigant would advance under section 4004.2(b). In Claims III and IV, the Truckers contend that the General Assembly *failed to provide any standard* to guide the exercise of rulemaking discretion. Accordingly, the Truckers' nondelegation claims are not "based in any manner upon the standards set forth in subsection (b)," and are not subject to section 4004.2(c)'s bar on pre-enforcement judicial review.

Of course, the Agencies would prefer it if the Truckers were challenging the stringency of the Pennsylvania HDD Regulation under section 4004.2(b). But they cannot impute arguments to the Truckers that they are not advancing. (For that

matter, there is no reason to think the Truckers would even consider raising the sort of arguments that the Agencies wish they had.)[10]

The Agencies insist that any suit challenging EQB regulation promulgated to "achieve or maintain" the CAA's ambient air quality standards will "necessarily implicate" section 4004.2(b) and (e). *See* Resp. Br. at 29, 31. But they do not cite any case law to support their curious interpretation. To the contrary, they acknowledge that Pennsylvania courts generally allow pre-enforcement challenges to "regulations that have a 'direct and immediate' effect on [] industry." Resp. Br. at 29.

And the general presumption of judicial review applies here. *See Machipongo Land & Coal Co. v. Commw., Dep't of Env't Res.*, 648 A.2d 767, 770 (Pa. 1994) (*Machipongo I*), *opinion vacated in part on re-argument*, 676 A.2d 199 (Pa. 1996) (*Machipongo II*) ("Generally speaking, pre-enforcement/non-administrative challenges to EQB regulations may normally be brought in the Commonwealth Court."). For one, 42 Pa. C.S. § 761(a)(1) explicitly provides that this Court has "original jurisdiction" in all challenges to "the Commonwealth government," save a

[10] It is not clear that there would be any basis to raise such an argument. Section 4004.2(e) does not prohibit the EQB from adopting more stringent standards when "the Board determines that it is reasonably necessary for a control measure or other requirement to exceed minimum [CAA] requirements in order for the Commonwealth: [t]o achieve or maintain ambient air quality standards." Because the Agencies insist that the EQB made this determination here, it is doubtful anyone could invoke section 4004.2(b)—even in a defensive posture.

few careful exceptions—none of which are relevant here.[11] And as explained *infra* at 29−32, a presumption of judicial review is necessary to avoid violating due process.

It is thus hardly "clear and free from doubt" that the General Assembly intended to preclude procedural, ultra vires and constitutional claims of the sort advanced here. *Duquesne Light*, 724 A.2d at 416. Absent an unequivocally clear statement to the contrary, judicial review is available when a plaintiff is forced to choose between complying with unlawful regulation or violating that regulation and incurring liability. *Cf. Sackett v. E.P.A.*, 566 U.S. 120, 130–31 (2012) (emphasizing a presumption of judicial review). Therefore, this Court should affirm that pre-enforcement judicial review is available under the Declaratory Judgments Act.

### B. Section 4004.2(e) Only Applies When the EQB Invokes Rulemaking Authority Under Subsection (a)

Additionally, the pre-enforcement bar invoked by the Agencies doesn't apply because the agencies promulgated the challenged regulation under a different source of authority. 35 P.S. § 4004.2(e) is only relevant in cases where the EQB invokes its

[11] *Accord Machipongo II*, 676 A.2d 199, 201 (Pa. 1996) (affirming that challenges to DEP rules, including "pre-enforcement challenges, will rest with the Commonwealth Court unless the claim falls within one of the exceptions enumerated in Section 761(a)(1)"); *Nat'l Solid Wastes Mgmt. Ass'n v. Casey*, 580 A.2d 893, 898 (Pa. Commw. Ct.1990) ("Challenges to regulations [issued by DEP] both on constitutional grounds and invalidity have been permitted by this Court as proper under the Declaratory Judgments Act[.]"); *EQT Prod.*, 130 A.3d at 758 (affirming that challenges to DEP rules "are a proper subject of pre-enforcement judicial review" under the Declaratory Judgments Act).

authority to promulgate regulations under section 4004.2(a). That is so because section 4004.2(e) concerns claims advanced under section 4004.2(b), which applies only in review of regulations promulgated "under subsection (a) of this section …." But the EQB did not invoke section 4004.2(a) as the basis for its rulemaking authority when finalizing the Pennsylvania HDD Regulation. *See* Prelim. Objects. at ¶ 29 ("[T]he EQB used its statutory authority under section 5(a)(1) and (7) of the APCA … to adopt … the Pennsylvania HDD Regulation.").

Nothing in the record supports the EQB's claim that it was exercising its rulemaking authority under section 4004.2(a). *See* Resp. Br. at 31. Rather, the pleadings establish that the EQB was exercising authority exclusively under 35 P.S. § 4005(a)(1) and (7)—not section 4004.2. *Id*. at 13. And the Agencies are wrong in asserting that this doesn't matter.

The Agencies argue that "any rulemaking under section 5(a) of the APCA, 35 P.S. § 4005(a), necessarily implicates the limitations in section 4.2(a) of the APCA, 35 P.S. § 4004.2(a)." *Id*. at 31. But section 4004.2(a) is not a limitation on rulemaking authority delegated to the EQB under other provisions. Rather, section 4004.2(a) provides its own well of broad authority to promulgate any rule "reasonably required" to attain and maintain ambient air quality standards.[12] Section

[12] The only possible interplay between sections 5 and 4.2 is 35 P.S. § 4005(a)(8), which provides the EQB with authority to promulgate "rules and regulations to implement the provisions of the

4004.2(b) imposes the relevant limitation on the exercise of that authority. But it has no bearing on rules promulgated under section 5 of the APCA. *See* 35 P.S. § 4004.2(b) (limiting only "control measures … adopted *under subsection (a) of* ***this*** *section* …") (emphasis added).

The Agencies cannot argue that they were silently invoking section 4004.2(a) when promulgating the rule here. Such *post hoc* rationalization is impermissible. *See Crown Castle NG E. LLC v. Pennsylvania Pub. Util. Comm'n*, 234 A.3d 665, 690 (Pa. 2020) (emphasizing that "a court should decline to defer to a merely convenient litigating position or post hoc rationalization advanced to defend past agency action against attack."). As this Court has said before, a "reviewing court … may not supply a reasoned basis for the agency's action that the agency itself has not given." *Cary v. Bureau of Pro. & Occupational Affs.*, 153 A.3d 1205, 1210 (Pa. Commw. Ct. 2017).

### C. The Bar on Pre-Enforcement Review Must be Narrowly Construed to Avoid Violating Due Process

Finally, this Court should construe section 4004.2(e) as allowing the Truckers' claims to avoid grave due process concerns. *See Commw. v. Veon*, 150 A.3d 435, 443 (Pa. 2016) (statutes are construed to avoid constitutional doubt). Both the U.S. Constitution's Due Process Clause and the Pennsylvania Constitution

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Clean Air Act." But the EQB did not assert that it was acting under section 4005(a)(8) when it finalized the Pennsylvania HDD Regulation. *See* Resp. Br. at 13.

guarantees litigants "the opportunity to be heard 'at a meaningful time and in a meaningful manner'" when suffering injury. *S.F. v. Pennsylvania Dep't of Hum. Servs.*, 298 A.3d 495, 510 (Pa. Commw. Ct. 2023) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). And here, the Truckers have a right to know what the law is.

The Truckers cannot be forced to suffer injury—in being subjected to regulations—without any opportunity to probe their legality, short of violating those regulations and awaiting the hammer to drop. The U.S. Supreme Court made this clear in *Ex parte Young*, 209 U.S. 123 (1908). In that case, the Court held that a state statute was unconstitutional to the extent it would impose "enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of [the regulation]." *Id*. at 148.

The State cannot condition due process rights on a requirement that the Truckers must commit an act that subjects them to criminal prosecution or ruinous civil penalties. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (explaining that, under *Ex parte Young*, there is a due process problem if the "practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts"); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336–37 (1920) (holding that a state cannot condition judicial review on a litigant risking $500 per day in penalties: "judicial review beset by such deterrents does not satisfy the

constitutional requirements ….”). Therefore, the Truckers must be allowed pre-enforcement review because they cannot risk violating the Pennsylvania HDD Regulation.

To deny pre-enforcement review would be tantamount to denying any opportunity for judicial review. *See Ex parte Young*, 209 U.S. at 148 (“[T]o impose upon a party … the burden of obtaining a judicial decision … only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, … is, in effect, to close up all approaches to the courts, and [] prevent any hearing upon the question [of] whether … [the regulation is] invalid.”). Here the Truckers would incur civil liability of up to $25,000 for a single violation. And there is no good faith exception that would absolve them of liability. *Cf. Reisman v. Caplin*, 375 U.S. 440, 446−47 (1964) (affirming that *Ex Parte Young* infirmity can be avoided only if good faith operates as a complete defense to liability). On the contrary, if the Truckers were to intentionally violate EQB regulations to test their validity they would risk criminal liability—including imposition of a fine of up to $50,000, or up to two years in prison. *See* 35 P.S. §§ 4013.6(c), 4009(b)(1).

No person should have to risk such liability. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010*)* (“We normally do not require plaintiffs to ‘bet the farm … by taking the violative action’ before ‘testing the validity of the law.’”) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118,

129 (2007)); *see also U.S. Army Corps. of Engineers v. Hawkes Co.*, 578 U.S. 590, 603 (2016) (Kennedy, J., concurring) (agreeing that the Clean Water Act must be construed to allow pre-enforcement review to "comport[] with due process"). And if judicial review is denied on this ground, as the Agencies contend, the Truckers request leave to file an amended complaint to challenge the legality of section 4004.2(e)'s bar to pre-enforcement litigation.

## III. Response to Preliminary Objection Three: The Truckers Have Stated a Cognizable Claim Because Nothing in the Statute Authorizes the EQB to Regulate Consumer Warranties

The Agencies argue that Claim I is foreclosed because the General Assembly delegated "broad regulatory authority 'for the prevention, control, reduction and abatement of air pollution [under section 5(a)(1) of the APCA]" and because "Section 5(a)(8) … grants the EQB regulatory authority to 'adopt rules and regulations to implement the provisions of the [CAA].'" Prelim. Objects. ¶¶ 74−75. Neither argument has merit.

The EQB's rulemaking authority, under 35 P.S. § 4005(a)(1), is limited to adopting rules regulating the "*sources"* and the "processes" that yield air pollution. The General Assembly explicitly limited the authority to make rules "for the prevention, control, reduction and abatement of air pollution," in stating that this was an authorization to make "regulation which shall be *applicable to all air contamination sources* …." *Id*. (emphasis added). Likewise, in providing examples

of permissible regulation, under section 4005(a)(1), the Assembly repeatedly affirmed that the delegation was limited to the direct regulation of the physical "sources" and "processes" that may contribute to air pollution. For example, section 4005(a)(1) authorizes the EQB to "establish maximum allowable emission rates" from the "sources" of pollution. Likewise, the EQB can "prohibit or regulate" the use of "certain fuels," the "open burning" of fires, or any other "processes or sources" of pollution. *Id*.

While the EQB plainly has authority to require "installation" of devices or other components to control emissions from vehicles, that authority cannot be extended to require warranty coverage. *See Sunrise Energy, LLC v. FirstEnergy Corp.*, 148 A.3d 894, 907 (Pa. Commw. Ct. 2016) ("Any power exercised by an agency must be conferred by the legislature in express terms."); *Pennsylvania Ass'n of Life Underwriters v. Dep't of Ins*., 371 A.2d 564, 566 (Pa. Commw. Ct. 1977) ("[a]dministrative agencies are not empowered to make rules and regulations which ... exceed the powers given them by the statutes and the law"). Whereas emission control systems directly regulate the *physical sources* and *processes* contributing to pollution, warranty regulations do not. Rather than directly regulating the physical sources or processes leading to pollution, California's extended warranty requirements amount to financial regulation over the transaction of purchasing a new

HDD vehicle. But the General Assembly did not authorize the EQB to impose financial regulations.

The Agencies fail to advance any argument for why the EQB has specific authority to impose warranty requirements regulating the sale of HDD trucks. They merely assert that the EQB has authority "to reduce air pollution." Resp. Br. at 34. But the Truckers have shown that section 4005(a)(1) gives only limited authority to regulate the "*sources"* and the "processes" that yield air pollution—as opposed to a general police power to impose any conceivable regulation that might (indirectly) affect air pollution.

The Agencies also claim authority to impose extended warranty requirements under 35 Pa. Stat. § 4005(a)(8), which allows the EQB to promulgate regulation to implement the CAA. But the EQB did not invoke that section when promulgating the Pennsylvania HDD Regulation. Resp. Br. at 13 (explaining that the EQB invoked "section 5(a)(1) and (7) of the APCA"). And even if it had, the authority to "implement the provisions" of the CAA could not justify imposing California's extended warranty requirements because nothing in the CAA compelled the Commonwealth to adopt California's approach to HDD warranties. *See Union Elec.*, 427 U.S. 246 at 250 (affirming the states retain broad discretion to develop strategies for attaining and maintaining federal air quality standards).

## IV. Response to Preliminary Objection Four: The Truckers Have Stated a Cognizable Claim Because the Statute Requires the EQB to Consult with PA-DOT Before Imposing New Emission Standards

The Agencies argue that Claim II fails because the EQB consulted with the PA-DOT when promulgating the Pennsylvania HDD Regulation—as is required by 35 Pa. Stat. § 4005(a)(7), when the Board seeks to promulgate a "regulation designed to reduce emissions from motor vehicles." Resp. Br. at 43. But the APCA's consultation requirement exists to ensure that the agency with expertise in transportation issues has a say in the development of substantive rules affecting motor vehicles. As such, it would make no sense to construe the APCA as authorizing a rolling incorporation of California emission standards without ensuring opportunity for the PA-DOT to review and comment on new substantive changes before they become effective in the Commonwealth.

The fact that the EQB consulted with the PA-DOT over twenty years ago is beside the point. The text makes clear that the Assembly wanted to ensure that the PA-DOT will be involved in the development of new rules affecting motor vehicles. Accordingly, it is only reasonable to construe section 4005(a)(7) as prohibiting any approach that works substantive changes to the rules governing motor vehicles without ensuring meaningful opportunity for the PA-DOT to provide input. *Cf*. Resp. Br. at 20 (acknowledging that incorporating new California standards is problematic because it raises costs for HDD vehicles and creates scarcity problems). PA-DOT's

input from twenty years ago, long before California conceived of the standards that now automatically control in Pennsylvania, is utterly meaningless. Therefore, because the Agencies acknowledge that there was no opportunity for consultation with the PA-DOT before California's latest emission standards went into effect, Resp. Br. at 17−18, this Court must hold those standards null and void.[13]

The Agencies do not cite any case supporting their view that section 4005(a)(7) authorizes a one-time consultation for regulation that will thereafter impose dramatically different rules with every regulatory change in California. They cite only *Mercury Trucking v. Pennsylvania Public Utility Comm'n*, 55 A.3d 1056 (Pa. 2012), for the basic proposition that statutes are construed to give effect to the plain language. But the plain language doesn't help the Agencies because section 4005(a)(7) requires consultation with PA-DOT for every imposition of a new "rule." And, crucially, Pennsylvania law recognizes imposition of a new "rule" anytime an agency changes the standards affecting the rights and obligations of private parties. *See infra* at 44. The only statutory reading that makes sense, and makes the consultation between agencies meaningful, is one that requires consultation when the public's substantive obligations *change*. The Agencies' view would render consultation a meaningless formality that is easily evaded.

[13] The Truckers no longer argue that vehicle emission rules must come from the Secretary of Transportation. Such rules may come from the EQB—but only after consultation with the PA-DOT.

The Agencies ultimately fall back on an argument that the statute must be construed to allow a rolling incorporation because the CAA requires the Commonwealth to maintain continued alignment with new California standards. But there is no reason why the Commonwealth must unthinkingly follow California regulators because the CAA allows states a *choice* to adopt California standards, or not. *See Union Elec.*, 427 U.S. at 250; *see also* Resp. Br. at 7 (emphasizing Pennsylvania retains "broad" discretion under the CAA). As such, when California changes its vehicle emission standards, the default federal standards become operative in the Commonwealth. If the EQB believes it prudent to adopt new California standards it must then go through a new rulemaking, and consult with PA-DOT. *But see* Resp. Br. at 20 (acknowledging that there are compelling reasons for the Agencies to conclude it is currently imprudent to adopt California standards). What the EQB can't do, however, is keep changing the substantive requirements for regulated parties without observing any procedural safeguards.

## V. Response to Preliminary Objection Five: The Truckers Have Stated Cognizable Nondelegation Claims Because the General Assembly Failed to Make Basic Policy Choices to Govern EQB's Discretion

The Agencies argue that the Truckers' nondelegation claims (Claims III and IV) fail because they say that the General Assembly made a "basic policy choice" in deciding that "there must be rules in place to reduce motor vehicle emissions and that the EQB" should make those rules. Prelim. Objects. at ¶ 93. Likewise, they

contend the Assembly made a sufficient "policy choice" in deciding that "Pennsylvania should 'implement the provisions of the [CAA],'" through EQB regulation. *Id*. at ¶ 94. But the fact that the Assembly decided to delegate open-ended rulemaking powers for the EQB to reduce emissions or to "implement" the CAA does resolve the nondelegation issue. *See Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 833 (2017) ("legislative power consists of the power 'to make laws, and not to make legislators.'") (quoting John Locke, Second Treatise of Government 87 (R. Cox ed.1982)). On the contrary, in failing to point to anything guiding or channeling the agency's exercise of discretion, the Agencies have only highlighted the constitutional problem. *See* Resp. Br. at 50 (emphasizing that the EQB has authority to adopt any amendment to Title 13 of the California Code "without [any] specific limitations").

The nondelegation doctrine prohibits the General Assembly from delegating its lawmaking powers to a state agency. *See U.S. Organizations for Bankruptcy Alternatives, Inc. v. Dep't of Banking*, 991 A.2d 370, 374 (Pa. Commw. Ct. 2010) (affirming that the General Assembly must provide meaningful direction and impose restraints when delegating rulemaking authority); *see also* Resp. Br. at 46−47 (acknowledging this "axiomatic" rule).[14] The doctrine requires that the Assembly

[14] The Respondents cite *Eagle Environmental II, L.P. v. Commw., Dep't of Env't Prot.*, 884 A.2d 867 (Pa. 2005), and *Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030 (Pa. 2022). But those cases merely confirm that the General Assembly must decide basic policy and

must (1) resolve the truly important decisions and (2) provide a governing standard to control the exercise of discretion when delegating rulemaking authority. *See Protz*, 161 A.3d at 833 (explaining these rules "ensure[] that duly authorized and politically responsible officials make all of the necessary policy decisions, as is their mandate per the electorate."). For example, in *Protz*, the Supreme Court held that the Assembly failed both to decide "any particular 'polic[y]'" or to provide adequate standards when it enacted a rolling incorporation of standards developed by the American Medical Association. 161 A.3d at 835.

Therefore, in Claim III, the Truckers allege that the APCA violates the nondelegation doctrine if the statute is construed as delegating an unfettered power for the EQB to regulate *anything* that even indirectly affects air emissions because—at that point—every activity would fall within the EQB's regulatory purview. *See Commw. v. Sessoms*, 532 A.2d 775, 784 (Pa. 1987) (affirming that "legislation must contain adequate standards to guide and restrain the exercise of delegated administrative functions, including rule making; and that ... the Legislature must set limits on such an agency's power ...") (Papadakos, J., concurring). Likewise, in Claim IV, the Truckers allege that the APCA violates the nondelegation doctrine if

provide adequate standards to control discretion. Here the Assembly did not decide basic policy as to when Pennsylvania should be aligned with California or baseline federal HDD emission and warranty standards; the APCA provides no standards governing the exercise of discretion on this matter.

the statute is construed as delegating such an open-ended authority as to allow the Board to adopt *any emission control standard* that California regulators might conceive. *See Protz*, 161 A.3d at 836 (holding a rolling incorporation unconstitutional). The common thread in both claims is that the General Assembly has decided nothing of consequence concerning *how* the EQB can exercise its regulatory authority.

It is no answer for the Agencies to respond that the General Assembly decided that the EQB should write rules to reduce air emissions from vehicles. *See* Resp. Br. at 47.[15] That argument is no different than saying the Assembly's choice to delegate any regulatory responsibility to an agency is sufficient. But the Supreme Court has made clear that the Constitution requires limits on how that responsibility is exercised. *See Protz*, 161 A.3d at 836. And it isn't good enough for the agency to give away its decision entirely to some other body. *See id.* If the APCA truly gives the EQB a blank check to adopt *any rule* that California might, then the Assembly has failed to decide anything other than that someone else who sits outside of the Commonwealth and is completely unaccountable to the regulated public in this State, should make the basic policy decisions affecting Pennsylvanians. The

[15] The Agencies cite *Marcellus Shale Coal. v. Dep't of Env't Prot. of Commw.*, 292 A.3d 921, 949 (Pa. 2023), for the proposition that the General Assembly can delegate rulemaking authority on issues of a "highly complex and technical" nature. But it may not do so without providing "adequate standards" to channel the exercise of discretion. *See Sessoms*, 532 A.2d at 784 (Papadakos, J., concurring).

Pennsylvania Supreme Court rejected a nearly identical argument in *Protz*: "We [] find unavailing [the] suggestion that the General Assembly's prospective adoption of future editions of the [American Medical Association's] Guides constitutes a 'policy decision'" because such reasoning "would render the non-delegation doctrine a nullity[.]" *Protz*, 161 A.3d at 836−37.

The Agencies say that the Assembly imposed "boundaries" by prohibiting the EQB from adopting fuel standards from California under section 4005(a)(7). But as they acknowledge, this in no way controls or guides the EQB's exercise of discretion in deciding whether to adopt "California emission standards or any other California engine or vehicle requirements." Resp. Br. at 48. Indeed, this leaves open the "wide field of [all] legislative possibilities"—in violation of the nondelegation doctrine. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935).

The Agencies next argue that "the General Assembly established standards to guide and restrain the EQB's exercise of discretion" because the EQB is charged with implementing the CAA. Resp. Br. at 48−49. But that tells us nothing about whether the Assembly wanted to pursue California's regulatory approach, much less whether it wanted that outcome in 2002 or to the end of time. Again, the CAA leaves it to the States to decide whether to adopt baseline EPA standards, or to adopt more stringent California standards. *See Train*, 421 U.S. at 79 (emphasizing that the CAA leaves the States with broad latitude to formulate policies best suited for their

concerns). And there simply is no criteria to guide the EQB in deciding whether and under what circumstances to follow California's (ever more ambitious) model; the APCA is utterly silent on that question. *See W. Philadelphia Achievement Charter Elementary Sch. v. Sch. Dist. of Philadelphia*, 132 A.3d 957, 967 (Pa. 2016) (affirming that a statute runs afoul of the nondelegation doctrine unless it "requires the person with delegated powers to make particularized findings that certain prerequisites are met" before authorizing regulation) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431−32 (1935)).

Relatedly, the Agencies claim that section 4004.2 provides standards to guide the EQB in making these decisions. But section 4004.2 is not a limitation on the EQB's rulemaking authority under section 4005. *Supra* at 28−29. And even if there is interplay with section 4005, nothing in section 4004.2 provides direction for the EQB in choosing between baseline EPA standards and more stringent standards from California.

Section 4004.2(a) merely authorizes the EQB to adopt rules that it may deem "reasonably required" to ensure compliance with the CAA; however, *everything* is left to the EQB's discretion. Likewise, section 4004.4(b) states that the EQB is not limited to adopting baseline EPA standards when "the board determines that it is reasonably necessary" to adopt more stringent standards to achieve or maintain ambient air quality standards. And, critically, the Agencies' argument that it is

within the EQB's discretion to adopt any conceivable rule that California might adopt belies their claim that the APCA provides limiting governing standards. *See Protz*, 161 A.3d at 836.

Lastly, the nondelegation doctrine requires procedural "safeguard[s] against the arbitrariness of *ad hoc* decision making." *Protz*, 161 A.3d at 834 (quoting *Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 203–04 (Pa. 1975)). In *Tosto*, the Supreme Court concluded that there were adequate safeguards in part because the statute required the agency to provide public notice of new rules. 331 A.2d at 204. But there is no such requirement here if the EQB is allowed to adopt a rolling incorporation under the APCA. *See Sch. Dist. of Philadelphia*, 132 A.3d at 967 (finding it problematic that there was "no requirement that the [agency] hold hearings or explain the grounds for its [] decisions"). At its core, nondelegation doctrine ensures that the General Assembly maintains control over regulatory actions. But the EQB's actions have proven that no such control exists here.

## VI. Response to Preliminary Objection Six: The Truckers Have Stated Cognizable Claims Because the New Rules Were Developed in California Without Conformance to Pennsylvania Procedures

The Agencies object that Claims V−VII are foreclosed as a matter of law. Those claims allege violations of the procedures required for new rules set forth in the Commonwealth Documents Law, the Regulatory Review Act, and the Administrative Code. Specifically, the Truckers allege the Agencies have imposed

new rules (imported from California) without first: (1) allowing opportunity for notice-and-comment in the Pennsylvania Bulletin; (2) submitting the required cost-benefit analysis to the Independent Regulatory Review Commission; and (3) providing required analysis as to the need for adopting new rules and the impact on Pennsylvania small businesses.

The Agencies argue that these claims all fail because the EQB followed required procedures when finalizing the Pennsylvania HDD Regulation in 2002. Resp. Br. at 51−54. But, since then, the EQB has effectively promulgated new regulations with adoption of *new substantive rules* from California. That is because the Pennsylvania HDD Regulation is not static. Rather, it is a self-amending regulation. *See* Resp. Br. at 53 (stating that "amendments to the Final Pennsylvania HDD Regulation are adopted by operation law.").

A "rule" is defined broadly as any regulatory change that "has the effect of a 'binding norm'"—i.e., which affects the rights and legal obligations of Pennsylvanians. *Borough of Bedford v. Commw., Dep't of Env't Prot.*, 972 A.2d 53, 64 (Pa. Commw. Ct. 2009). As such, recent changes to the emission standards and warranty requirements governing Pennsylvania businesses constitute new rules. And these new rules should have been subject to a fresh comment period, as well as review and analysis from Pennsylvania officials.

The Agencies admit, the 2002 Regulation incorporates any amendments to Title 13 of the California Code automatically. Resp. Br. 53. But this approach unlawfully circumvents the procedural requirements that the General Assembly established to ensure serious consideration of the impacts of new regulation, and denies Pennsylvanians opportunity to engage in the rulemaking process. *See Auto. Serv. Councils of Pennsylvania v. Larson*, 474 A.2d 404, 406 (Pa. Commw. Ct. 1984) (raising "major concern" about any approach that would "bypass" procedural rules intended to enable "the public's input as to future proposed regulations.").

The Agencies argue that rolling incorporation is necessary to ensure compliance with the CAA. But nothing in the CAA mandates that Pennsylvania must remain tied to California in perpetuity. *See Train*, 421 U.S. at 79. Therefore, when California revises its standards, Pennsylvania may choose to follow suit with its own rulemaking, or default back to federal baseline standards. But Pennsylvania may not do what the Agencies did here—cast all procedural safeguards aside when deciding on new rules for the citizens of the Commonwealth.

Finally, the Agencies rely on the Pennsylvania Statutory Construction Act. *See* Resp. Br. at 53. But they cite no case holding that an agency may evade its obligation to comply with Pennsylvania rulemaking procedures when imposing new rules. They rely only on a Superior Court decision, which did not address the

procedural claims presented here. *See Estate of Chennisi*, 272 A.3d 67 (Pa. Super. 2022) (concerning statutory incorporation of federal standards in a probate case).

## VII. Response to Preliminary Objection Seven: The Truckers Have Stated a Cognizable Claim Because the Regulatory Review Act Is Enforceable Through a Declaratory Relief Action

The Agencies object that Claim VI fails as a matter of law because the Regulatory Review Act does not provide a cause of action. Resp. Br. at 55−57. But this Court recognizes that when an agency unlawfully adopts rules without submitting required analysis to the Regulatory Review Commission, affected parties are entitled to declaratory relief. *See Borough of Bedford*, 972 A.2d at 62 (affirming that regulation should be declared null and void if the agency failed to comply with the Review Act); *Physicians Ins. Co. v. Callahan*, 648 A.2d 608, 615 (Pa. Commw. Ct. 1994) (concluding that regulations promulgated without complying with the Review Act are "invalid and unenforceable").

The Regulatory Review Act requires that the EQB must submit new rules to the Independent Regulatory Review Commission before they go into effect. 71 P.S. § 745.5. Specifically, the EQB was required to provide analysis as to the impact on "small businesses" and potentially "less costly alternative[s]." *Id*. § 745.5(9)−(10.1). None of that happened here because the Board adopted new emission standards and warranty requirements from California without ensuring review by any

Pennsylvania official. Therefore, these new rules are invalid and the Truckers are entitled to a declaration relieving them of any duty to comply.

The Agencies rely on *Marcellus Shale Coalition v. Department of Environmental Protection*, 193 A.3d 447, 468 (Pa. Commw. Ct. 2018), in arguing that "a party may not challenge the validity of a regulation based on the sufficiency of the information submitted to the Independent Regulatory Review Commission." Prelim. Objects. at ¶ 29. But unlike in *Marcellus Shale Coalition*, the EQB failed to submit *anything* to the Review Commission before its new emission standards and warranty requirements went into effect.[16] So this is not a dispute about the sufficiency of the EQB's submissions to the Commission. And the Agencies have no authority for the proposition that a total failure to submit anything to the Review Commission is immune from judicial review.[17]

What is more, there is every reason to conclude that failure to submit a regulatory review analysis mattered here because the Agencies admit that the new California standards are causing major problems within the Pennsylvania trucking industry. *See* Resp. Br. at 20 (acknowledging that there are compelling policy

[16] *Marcellus Shale Coalition* emphasized that there was "no evidence to suggest that the IRRC's review of the Public Resource Regulations was in any way thwarted by the lack of a more specific cost estimate[,]" and that this was the reason for concluding there was "no clear right to relief on this point." 193 A.3d at 468−69. By contrast, the Regulatory Review Act is necessarily thwarted when an agency completely fails to submit new rules to the Review Commission—as in this case.
[17] Respondents cite *Mercury Trucking*, 55 A.3d at 1067−68. But that case did not concern the Regulatory Review Act.

reasons for the Commonwealth to default to baseline federal HDD standards). The Agencies admit that the new rules make California-compliant trucks more costly and that there is a shortage of California-compliant trucks in the Pennsylvania market. *Id*. Accordingly, the Agencies should have considered "less intrusive or less costly alternative methods of achieving" their regulatory goals before allowing amendments to the Pennsylvania HDD Regulation. 71 P.S. § 745.5(10.1)(iv).

Finally, the Respondents complain that it would be burdensome and would create confusion if the EQB was required to comply with the Regulatory Review Act. But the Legislature adopted these procedural requirements because they promote important public values and better regulation. Granted, sometimes it is inconvenient for government actors to follow the law. But that's a feature, not a quirk, of Constitutional order. As the U.S. Supreme Court emphasized in *Sackett*, the rule of law "repudiat[es] [] the principle that [administrative] efficiency … conquers all." 566 U.S. at 130. And in any event, it would be simple for the regulated community and DEP to adhere to default EPA standards during any rulemaking process.

## VIII. Response to Preliminary Objection Eight: The Truckers Had No Available Administrative Remedies to Pursue

The Agencies argue that the Truckers should have pursued administrative remedies before filing this lawsuit. Resp. Br. at 57−59. But while they cite various cases for the basic proposition that a party must exhaust administrative procedures

before bringing a lawsuit, none of those cases support their assertion that the Truckers had available administrative remedies here.[18]

This Court recognizes that a petitioner is entitled to immediate relief when subjected to self-executing regulations. *See Machipongo I*, 648 A.2d at 770 (affirming the general rule that "pre-enforcement/non-administrative challenges to EQB regulations may [] be brought in the Commonwealth Court.");[19] *Arsenal Coal*, 447 A.2d at 1338 (emphasizing that it is "clear[ly]" appropriate to "invoke[e] the original equitable jurisdiction of the Commonwealth Court in a case seeking preenforcement review … to the validity of regulations promulgated by an administrative agency ..."). Even the Agencies acknowledge that pre-enforcement challenges are justiciable when they "have a 'direct and immediate' effect on the industry." Resp. Br. at 29. Therefore, there can be no question that the Truckers are entitled to bring this action because they are currently subject to new California standards. *See supra* at 12−22.

The Agencies offer no rationale for why the administrative exhaustion doctrine should apply here where the Truckers are currently subject to burdensome new standards. The lynchpin of their exhaustion argument is the errant contention

[18] *See* Resp. Br. at 58−59 (citing *Marsteller Cmty. Water Auth. v. Commw., Dep't of Env't Res.*, 519 A.2d 1112 (Pa. Commw. Ct. 1987)); *Petsinger v. Dep't of Labor & Indus.*, 988 A.2d 748 (Pa. Commw. Ct. 1993); *Mueller v. Pa. State Police Headquarters*, 532 A.2d 900 (Pa. Commw. Ct. 1987).

[19] This opinion was vacated in part (on other grounds) after argument. *See* 676 A.2d 199 (1996).

that the Truckers are not yet injured. But again, the Truckers are currently suffering injury. *See supra* at 12−19 (explaining that the Truckers risk major liability if they fail to comply—notwithstanding the DEP's temporary policy of nonenforcement).

The exhaustion doctrine typically concerns administrative avenues for obtaining a final decision as to whether the regulation in question definitively applies to the complaining party. For this reason, the exhaustion doctrine generally applies in the context of permitting or licensing regimes, where the agency is vested with a degree of discretion to apply contested regulations (or not) when reviewing a specific permit or license application. *E.g.*, *Duquesne Light*, 724 A.2d at 417 (distinguishing between cases where a party is "immediately subject to the regulations upon their promulgation," and situations where a party is only made "subject to the regulations … after" applying for a discretionary permit). But here the Truckers were "automatically" subjected to new California standards. Resp. Br. at 18. And, as this Court has affirmed numerous times, there are no administrative remedies available for self-executing regulations of this sort.

One could say that ripeness and exhaustion overlap in pre-enforcement challenges, like this, where a plaintiff seeks to contest ongoing regulatory obligations. As the Supreme Court explained in *Bayada Nurses*, the "availability of a pre-enforcement challenge in the regulatory context, [] create[s] an exception to

the general rule requiring exhaustion of administrative remedies." 8 A.3d at 875. And that is true even if there are other conceivable remedies.

For example, in *Bayada Nurses*, a lawsuit challenging an agency's interpretation of a wage and hour law was allowed to proceed, notwithstanding the fact that the plaintiff might have petitioned the agency to change its interpretation. *Id.* at 874−75. The Supreme Court explained, "a pre-enforcement regulatory challenge [is] appropriate where there [is] a direct and immediate regulatory impact on the governed industry, and [the] petitioner [has] alleged it would suffer ongoing uncertainty in its day-to-day operations and would sustain substantial expense complying with the challenged regulations while it proceeded through [a] administrative process." *Id.*; *see also Arsenal Coal*, 447 A.2d at 1338 (holding that a statutory remedy was inadequate because it would have been a "lengthy process" that "would [have] result[ed] in ongoing uncertainty in [] day to day business operations ...").

The Agencies contend that the Truckers should petition the EQB to initiate a new rulemaking process or should ask the Independent Regulatory Review Commission to nudge the EQB into amending the Pennsylvania HDD Regulation. Resp. Br. at 57−59. But "inadequate or incomplete" remedies do not require exhaustion. *Donahue*, 98 A.3d at 1234. And begging DEP to simply change its mind in the future is hardly a substitute for judicial review because the Truckers face

jeopardy *now*. *See Bayada Nurses*, 8 A.3d at 873 (confirming that a regulated party should not have to sit in "administrative limbo," caught between noncompliance and possible liability for abiding by an invalid regulation).

Even if a request for new rulemaking was viewed as a potential administrative remedy (it is not), it would be futile for the Truckers to pursue that course. *See Donahue*, 98 A.3d at 1235 (confirming that a party doesn't have to exhaust an "administrative process [that] has nothing to contribute to the decision of the issue."). There is no reason to believe that the EQB would voluntarily amend the Pennsylvania HDD Regulation to untether the Commonwealth from California regulation. After all, the Agencies vigorously argue that the CAA requires a rolling incorporation of California regulation. (They are wrong). And further, it would be futile to pursue a new administrative process that sheds no new light on whether it was permissible for the Agencies to automatically adopt California's standards.

## CONCLUSION

For the foregoing reasons, Respondents have failed to carry their burden of proving "free and clear from doubt" that this case should be dismissed. Petitioners therefore respectfully request that this Court overrule all eight Preliminary Objections.

DATED: November 30, 2023.

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT

I certify as required by Pa.R.A.P. 2135(a) that the foregoing brief contains 12,523 words in compliance with the length of brief requirement.

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## CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

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.

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## CERTIFICATE OF SERVICE

This is to certify that on this 30th day of November, 2023, I electronically filed the foregoing document with the Clerk of the Court via the CM/ECF system, which will cause a copy to be served upon counsel of record.

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