[J-30B-2023 and J-30C-2023]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

JESSICA SHIRLEY, INTERIM ACTING SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND INTERIM ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD	:	No. 85 MAP 2022
	:	Appeal from the Order of the Commonwealth Court at No. 41 MD 2022 dated June 28, 2022.
	:	ARGUED: May 24, 2023
v.	:	
PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, VINCENT C. DELIBERATO, JR., DIRECTOR OF THE LEGISLATIVE REFERENCE BUREAU, AND AMY J. MENDELSOHN, DIRECTOR OF THE PENNSYLVANIA CODE AND BULLETIN	:	
APPEAL OF: CITIZENS FOR PENNSYLVANIA'S FUTURE, SIERRA CLUB, AND CLEAN AIR COUNCIL,	:	
Possible Intervenors	:	
JESSICA SHIRLEY, INTERIM ACTING SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND INTERIM ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD	:	No. 87 MAP 2022
	:	Appeal from the Order of the Commonwealth Court at No. 41 MD 2022 dated July 8, 2022.
	:	ARGUED: May 24, 2023
v.	:	
PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, VINCENT C. DELIBERATO, JR., DIRECTOR OF THE	:	

LEGISLATIVE REFERENCE BUREAU, AND AMY J. MENDELSOHN, DIRECTOR OF THE PENNSYLVANIA CODE AND BULLETIN	:
APPEAL OF: CITIZENS FOR PENNSYLVANIA'S FUTURE, SIERRA CLUB, AND CLEAN AIR COUNCIL,	:
Possible Intervenors	:

OPINION

JUSTICE DOUGHERTY **DECIDED: July 18, 2024**

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among eleven eastern states of the United States to reduce carbon dioxide (CO_2) emissions by electric power plants.[1] The Pennsylvania Department of Environmental Protection (DEP) developed a rulemaking package (RGGI Regulation) to effectuate Pennsylvania's membership in RGGI. The RGGI Regulation sparked substantial, ongoing litigation. Presently before us are two direct appeals from the Commonwealth Court. Specifically, three nonprofit environmental corporations, Citizens for Pennsylvania's Future, Clean Air Council, and Sierra Club (Nonprofits), appeal the denial of their application to intervene in this litigation. Nonprofits also appeal from the grant of a preliminary injunction of the RGGI Regulation. As explained below, we reverse the denial of intervention, and we dismiss as moot the appeal from the preliminary injunction.

I. Background

[1] The RGGI states are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

Broadly speaking, RGGI applies to fossil-fuel-fired electric power plants located in RGGI states that have a capacity of 25 megawatts or greater. Under RGGI, regulated power plants within RGGI states must buy "allowances" in order to emit CO_2. An allowance represents a limited authorization issued by a participating state to emit one short ton of CO_2 from a regulated source. Regulated power plants purchase allowances at quarterly auctions or on the secondary market. Proceeds from the auction purchases go to the RGGI states. A regulated plant can use allowances issued by any RGGI state to demonstrate compliance with RGGI in any state. Together, the RGGI states have established a regional cap on CO_2 emissions, which sets an overall limit on the total emissions from regulated power plants within the RGGI states. The regional emissions cap amount declines over time so that permissible CO_2 emissions decrease in a planned and predictable way. For example, in 2016, the regional cap was 86,506,875 CO_2 allowances; in 2017, the cap decreased to 84,344,203 allowances; and in 2018, it was reduced to 82,235,598 allowances. To join RGGI, a state must enact a CO_2 Budget Trading Program based on RGGI's model rule.[2]

In 2019, former Governor of Pennsylvania Tom Wolf issued an executive order directing DEP to develop a rulemaking package to join RGGI. Pursuant to the Governor's order, DEP developed the RGGI Regulation, which was adopted by the Environmental Quality Board (EQB), and then approved by the Independent Regulatory Review Commission. The Pennsylvania State Senate Environmental Resources and Energy Committee reported out of committee a concurrent resolution disapproving the RGGI Regulation, and the concurrent resolution was subsequently adopted by the full Senate. Thereafter, the Senate concurrent resolution was reported from the Pennsylvania State

[2] *See generally Elements of RGGI,* https://www.rggi.org/program-overview-and-design/elements (last visited Mar. 15, 2024); *About the Regional Greenhouse Gas Initiative,* https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf (last visited Mar. 15, 2024).

House Environmental Resources and Energy Committee to the full House chamber. DEP twice requested the Pennsylvania Legislative Reference Bureau (LRB) to publish the RGGI Regulation in the Pennsylvania Bulletin. *See* 45 Pa.C.S. §724(a) (requiring preliminary publication of regulations in Pennsylvania Bulletin). LRB, however, denied the requests. The full House adopted the concurrent resolution disapproving the RGGI Regulation, but on January 10, 2022, Governor Wolf vetoed it.

On February 3, 2022, then-Secretary of DEP and Chairman of EQB, Patrick McDonnell,[3] filed a petition for review in the Commonwealth Court's original jurisdiction. The named respondents were LRB; Vincent C. DeLiberato, Jr., Director of LRB; and Amy Mendelsohn, Director of the Pennsylvania Code and Bulletin (LRB Respondents). The petition claimed the RGGI Regulation should be deemed approved by the General Assembly because the House did not adopt the concurrent resolution disapproving the RGGI Regulation within the deadlines set forth in Section 7(d) of the Regulatory Review Act (RRA).[4] Accordingly, the petition sought a writ of mandamus compelling LRB to

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[3] Interim Acting Secretary of DEP and Interim Acting Chairperson of EQB Jessica Shirley has been substituted as a party in this Court. *See* Pa.R.A.P. 502(c). For ease of discussion, we simply refer to this party as DEP.

[4] Section 7(d) provides:

> Upon receipt of the commission's order pursuant to subsection (c.1) or at the expiration of the commission's review period if the commission does not act on the regulation or does not deliver its order pursuant to subsection (c.1), one or both of the committees may, within 14 calendar days, report to the House of Representatives or Senate a concurrent resolution and notify the agency. During the 14-calendar-day period, the agency may not promulgate the final-form or final-omitted regulation. If, by the expiration of the 14-calendar-day period, neither committee reports a concurrent resolution, the committees shall be deemed to have approved the final-form or final-omitted regulation, and the agency may promulgate that regulation. If either committee reports a concurrent resolution before the expiration of the 14-day period, the Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, from the date on which the concurrent resolution has been reported, to adopt the

publish the RGGI Regulation in the Pennsylvania Bulletin. The petition also sought a declaratory judgment that LRB's prior refusal to publish the RGGI Regulation was unlawful, and the RGGI Regulation had been deemed approved by the General Assembly as a matter of law. In addition to its petition for review, DEP filed an application for expedited special and summary relief.

On February 24, 2022, three members of the Pennsylvania House of Representatives — then-Speaker Bryan Cutler, then-Majority Leader Kerry Benninghoff,

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> concurrent resolution. If the General Assembly adopts the concurrent resolution by majority vote in both the Senate and the House of Representatives, the concurrent resolution shall be presented to the Governor in accordance with section 9 of Article III of the Constitution of Pennsylvania. If the Governor does not return the concurrent resolution to the General Assembly within ten calendar days after it is presented, the Governor shall be deemed to have approved the concurrent resolution. If the Governor vetoes the concurrent resolution, the General Assembly may override that veto by a two-thirds vote in each house. The Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, to override the veto. If the General Assembly does not adopt the concurrent resolution or override the veto in the time prescribed in this subsection, it shall be deemed to have approved the final-form or final-omitted regulation. Notice as to any final disposition of a concurrent resolution considered in accordance with this section shall be published in the Pennsylvania Bulletin. The bar on promulgation of the final-form or final-omitted regulation shall continue until that regulation has been approved or deemed approved in accordance with this subsection. If the General Assembly adopts the concurrent resolution and the Governor approves or is deemed to have approved the concurrent resolution or if the General Assembly overrides the Governor's veto of the concurrent resolution, the agency shall be barred from promulgating the final-form or final-omitted regulation. If the General Assembly does not adopt the concurrent resolution or if the Governor vetoes the concurrent resolution and the General Assembly does not override the Governor's veto, the agency may promulgate the final-form or final-omitted regulation. The General Assembly may, at its discretion, adopt a concurrent resolution disapproving the final-form or final-omitted regulation to indicate the intent of the General Assembly but permit the agency to promulgate that regulation.

71 P.S. §745.7(d).

and then-Chairman of the House Environmental Resources and Energy Committee Daryl Metcalfe (Representatives) — filed an application for leave to intervene in DEP's lawsuit. Attached to their intervention application were preliminary objections and an answer in opposition to DEP's application for relief.

The next day, four members of the Pennsylvania Senate — then-President Pro Tempore Jake Corman, then-Senate Majority Leader Kim Ward, Senate Environmental Resources and Energy Committee Chair Gene Yaw, and then-Senate Appropriations Committee Chair Pat Browne (Senators) — also filed an application for leave to intervene. Attached to their intervention application was an answer with new matter and five counterclaims: (1) DEP violated Article II, Section 1 and Article III, Section 9 of the Pennsylvania Constitution,[5] as well as Section 7(d) of the RRA, by sending the RGGI Regulation to LRB for publication before it was approved or deemed approved; (2) the RGGI Regulation exceeds DEP's authority under the Air Pollution Control Act (APCA), 35 P.S. §§4001-4015; (3) the RGGI Regulation violates the General Assembly's exclusive authority to enter into interstate compacts; (4) the RGGI Regulation violates the General Assembly's exclusive authority to impose taxes; and (5) the RGGI Regulation is void *ab initio* because DEP did not follow the public notice and comment procedures required by the Commonwealth Documents Law, 45 P.S. §§1201-1208, and the APCA. Also attached to Senators' intervention application was an answer to DEP's application for

[5] Article II, Section 1 states: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. II, §1. Article III, Section 9 provides: "Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the questions of adjournment or termination or extension of a disaster emergency declaration as declared by an executive order or proclamation, or portion of a disaster emergency declaration as declared by an executive order or proclamation, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill." PA. CONST. art. III, §9.

relief. Senators requested that the court accept these attached pleadings if they were granted permission to intervene. *See* Senators' Application for Leave to Intervene, 2/25/22 at ¶81.

DEP filed written consents to intervention by Senators and Representatives. Accordingly, on March 3, 2022, the Commonwealth Court, per Judge Wojcik sitting as a single judge, granted the applications to intervene and accepted for filing the attached pleadings.

On March 25, 2022, Senators filed an application for a preliminary injunction of the RGGI Regulation. Representatives joined in the application. DEP filed a reply to new matter and answer to Senators' counterclaims. DEP also filed an answer to Senators' application for a preliminary injunction.

On April 4, 2022, the full Pennsylvania Senate held a vote to override Governor Wolf's veto of the General Assembly's concurrent resolution disapproving the RGGI Regulation but was two votes short of the required two-thirds majority. Thereafter, on April 20, 2022, producers of carbon-free energy, Constellation Energy Corporation and Constellation Energy Generation LLC (Constellation) filed an application to intervene in the ongoing litigation, to support DEP and the legality of the RGGI Regulation.

On April 25, 2022, Nonprofits filed an application to intervene in the litigation. Specifically, Nonprofits sought to defend the RGGI Regulation under the Environmental Rights Amendment (ERA).[6] *See* Nonprofits' Application for Leave to Intervene, 4/25/22 at ¶¶6-7, 9, 56-58, 65.

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[6] The ERA provides:

> The 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,

Also on April 25, 2022, in a separate action brought in the Commonwealth Court's original jurisdiction, a collection of nine corporate, nonprofit, and union entities, which we refer to collectively as Bowfin,[7] filed a petition for review requesting the court declare the RGGI Regulation invalid and null and void, and enjoin DEP and EQB from implementing, administering, or enforcing it. Bowfin also separately applied for a preliminary injunction enjoining DEP and EQB from implementing, administering, or enforcing the RGGI Regulation during the pendency of Bowfin's action. Subsequently, the Nonprofits and two additional nonprofit organizations, Natural Resources Defense Council and Environmental Defense Fund, applied to intervene in the Bowfin case, as did Constellation.[8]

Because the original case initiated by DEP and the later Bowfin case involved overlapping issues, the Commonwealth Court held a joint hearing for both cases, on May 10 and May 11, 2022, regarding the applications for preliminary injunction. The court permitted Nonprofits and Constellation to participate in the hearing subject to its future disposition of their pending applications to intervene. The court also held a joint hearing on June 24 and June 27, 2022, regarding the intervention applications filed in both cases. DEP did not raise arguments based on the ERA, but Nonprofits did. On June 28, 2022,

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> the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, §27.

[7] The specific entities are Bowfin Keycon Holdings, LLC; Chief Power Finance II, LLC; Chief Power Transfer Parent, LLC; Keycon Power Holdings, LLC; Genon Holdings, Inc.; Pennsylvania Coal Alliance; United Mine Workers of America; International Brotherhood of Electrical Workers; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

[8] For ease of discussion, the nonprofit organizations involved in the Bowfin case are referred to herein as Nonprofits, together with those in DEP's case.

the Commonwealth Court denied intervention to Constellation and Nonprofits in both cases.

The RGGI Regulation was finally codified in the July 2022 edition of the Pennsylvania Code Reporter, and then at 25 Pa. Code §§145.301–145.409. On July 8, 2022, the Commonwealth Court issued separate orders granting preliminary injunctions of the RGGI Regulation in this case and the Bowfin case. The court required Bowfin to file a bond in the amount of $100,000,000 to secure the injunction in its case.[9]

The Commonwealth Court filed a joint opinion in support of its June 28, 2022 orders denying intervention. The court recognized a person "shall be permitted to intervene" in an action if "the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action." *Ziadeh v. Pa. Legis. Ref. Bureau*, 41 MD 2022 & 247 MD 2022, slip op. at 10 (Pa. Cmwlth., July 8, 2022) (unpublished memorandum) (Wojcik, J.), *quoting* Pa.R.C.P. 2327. The court further observed "an application for intervention may be refused" if "the interest of the petitioner is already adequately represented[.]" *Id.* at 11, *quoting* Pa.R.C.P. 2329. The court determined Nonprofits "failed to prove a legally enforceable interest or injury to . . . themselves." *Id.* at 19. The court also ruled, however, that Nonprofits "provided sufficient credible evidence to establish that they have a legally enforceable interest by virtue of injury to their members." *Id.* at 21.[10] Nevertheless, the court decided Nonprofits' interests were adequately represented by DEP. The court

[9] The court held Senators were not required to file a bond pursuant to *Lewis v. City of Harrisburg*, 631 A.2d 807, 812 (Pa. Cmwlth. 1993) (holding District Attorney was exempt from bond requirement for preliminary injunction under Pa.R.C.P. 1531(b)(1)).

[10] The court excluded the Natural Resources Defense Council from this ruling. *See id.* at 21 n.13 ("[W]e cannot conclude that the Natural Resources Defense Council presented evidence of an injury to one of its members."). The Natural Resources Defense Council applied to intervene in the Bowfin case only, and did not appeal the denial of intervention.

explained that under the ERA and APCA, "the protection of our air resources is of the highest priority" for DEP. *Id.* at 22. It noted "[n]one of the [Nonprofits'] member witnesses could articulate any reason why the DEP is not adequately protecting their interests." *Id.* The court also dismissed as "speculative" Nonprofits' claims that DEP's settlement of the litigation could impact the use of auction proceeds or change the RGGI Regulation. *Id*. at 22-23. In any event, the court opined Nonprofits lack a legally enforceable interest in how the auction proceeds are spent "so long as they are used consistent with the APCA[,]" and any changes to the RGGI Regulation would have to undergo the rulemaking process once again, where Nonprofits would have a say in the proceedings. *Id.* at 23. Finally, the court determined the testimony of Nonprofits' witnesses concerning "poor experiences with government officials" was not indicative of DEP's lack of commitment to defending the RGGI Regulation. *Id.* Accordingly, the Commonwealth Court concluded Nonprofits were not entitled to intervene.

On July 20, 2022, Nonprofits filed the present appeals from the denial of intervention (85 MAP 2022) and the grant of the preliminary injunction (87 MAP 2022). While these appeals were pending in this Court, proceedings continued in the Commonwealth Court. Notably, on November 1, 2023, the Commonwealth Court held the RGGI Regulation "constitutes a tax that has been imposed by DEP and EQB in violation of the Pennsylvania Constitution." *Ziadeh v. Pa. Legis. Ref. Bureau*, 41 MD 2022, 2023 WL 7170737, at *5 (Pa. Cmwlth., Nov. 1, 2023) (unpublished memorandum); *Bowfin Keycon Holding, LLC v. Pennsylvania Dep't of Env't Prot.,* 247 MD 2022, 2023 WL 7171547, at *4 (Pa. Cmwlth., Nov. 1, 2023) (unpublished memorandum). Accordingly, the Commonwealth Court issued orders in this case and the Bowfin case declaring the RGGI Regulation void and permanently enjoining DEP from enforcing it. On December 18, 2023, this Court ordered supplemental briefing regarding whether the

permanent injunction rendered these appeals moot. The parties complied with our order, and we now address Nonprofits' appeals.[11]

II. Intervention (85 MAP 2022)

First, we consider Nonprofits' appeal from the Commonwealth Court's order denying their application for leave to intervene in this case. Nonprofits insist the denial is an immediately appealable collateral order under Pa.R.A.P. 313(b). They assert the issue of intervention is separable from the underlying challenges to the RGGI Regulation. In addition, they maintain their right to intervene is too important to be denied review because they aim to protect their members' health, safety, property rights, and the constitutional right to clean air and preservation of the environment under the ERA. Nonprofits also argue their right will be irreparably lost if review is postponed because a party must appeal a denial of intervention within thirty days or lose the right to appeal the order entirely. *See* Nonprofits' Brief at 3-5.

[11] There have been numerous other related appeals to this Court: 79 MAP 2022 (DEP's appeal from preliminary injunction in this case) (discontinued); 80 MAP 2022 (DEP's appeal from preliminary injunction in Bowfin case) (dismissed as moot); 81 MAP 2022 (Constellation's appeal from denial of intervention in this case) (quashed); 82 MAP 2022 (Constellation's appeal from denial of intervention in Bowfin case) (quashed); 83 MAP 2022 (Constellation's appeal from preliminary injunction in this case) (quashed); 84 MAP 2022 (Constellation's appeal from preliminary injunction in Bowfin case) (quashed); 86 MAP 2022 (Nonprofits' appeal from denial of intervention in Bowfin case) (reversed via contemporaneously filed order); 88 MAP 2022 (Nonprofits' appeal from preliminary injunction in Bowfin case) (dismissed as moot); 89 MAP 2022 (Bowfin's appeal of amount of preliminary injunction bond in Bowfin case) (affirmed by equally divided Court); 106 MAP 2023 (DEP's appeal from permanent injunction in this case) (pending); 107 MAP 2023 (DEP's appeal from permanent injunction in Bowfin case) (pending); 110 MAP 2023 (Nonprofits' appeal from permanent injunction in this case) (pending); 111 MAP 2023 (Nonprofits' appeal from permanent injunction in Bowfin case) (pending); 113 MAP 2023 (Constellation's appeal from denial of intervention in this case) (pending); 114 MAP 2023 (Constellation's appeal from denial of intervention in Bowfin case) (pending); 115 MAP 2023 (Constellation's appeal from permanent injunction in this case) (pending); and 116 MAP 2023 (Constellation's appeal from permanent injunction in Bowfin case) (pending).

As to the merits of the intervention question, Nonprofits argue their members have rights under the ERA, these rights are implicated by this case, and DEP is not adequately protecting these rights. They contend this Court has looked to trust law in addressing questions arising under the ERA, and trust law supports their intervention here. Specifically, they assert private trust law permits beneficiaries to intervene when their interests diverge from those of the trustee, charitable trust law allows for parties with special interests to enforce charitable trusts, and public trust law supports the rights of beneficiaries to intervene in litigation affecting the trust. Nonprofits insist DEP, in its role as trustee under the ERA, has an interest in narrowly interpreting its obligations under the ERA so as not to take on additional trustee duties, which can lead to a divergence in interests. They contend this divergence of interests would be evident if there is a settlement of this case. Indeed, they argue the present record reflects DEP is not adequately representing their interests. Nonprofits emphasize DEP's creation of set-aside accounts, the separate rulemaking petition submitted to DEP by Citizens for Pennsylvania's Future and the Clean Air Council urging adoption of an economy-wide greenhouse gas budget trading program, DEP's failure to present expert evidence regarding environmental harms at the preliminary injunction hearing, its failure to raise arguments under the ERA, and prior disagreements with how funds were disbursed from the Clean Air Fund. *See* Nonprofits' Brief at 16-39.

In response, Senators initially contend the order denying intervention to Nonprofits is interlocutory and unappealable, and therefore Nonprofits' appeal from it should be dismissed. They argue the order is not appealable as collateral because Nonprofits' interests are already adequately represented by DEP, and thus are not important enough to justify appellate review. Moreover, on the merits, Senators allege Nonprofits lack a legally enforceable interest permitting intervention. According to Senators, Nonprofits

seek only to defend their preferred policy while simultaneously injecting political and policy considerations that are wholly inapposite to Senators' counterclaims concerning the separation of powers. They reject Nonprofits' position this case implicates the ERA, but submit that any purported interests under the ERA are indistinguishable from the interests of the public at large, and are already adequately represented by DEP. They contend Nonprofits have not shown their interests diverge from those of DEP, and they are in fact one and the same: to defend the RGGI Regulation. Senators insist the ERA and attendant trust principles do not create any divergence because the ERA is not implicated in the first place, the separate rulemaking and past disagreements do not reflect diverging interests in this case, the prospect of settlement is speculative, and the environmental evidence and arguments Nonprofits fault DEP for failing to present are entirely irrelevant to Senators' counterclaims. Senators allege as well that Nonprofits' own witnesses did not identify any inadequacy in DEP's defense of the RGGI Regulation. Instead, they assert, Nonprofits' witnesses merely recalled past disagreements regarding separate and irrelevant matters, or offered speculation concerning DEP's future defense of the RGGI Regulation. *See* Senators' Brief at 13-41.

Representatives likewise contend the order denying leave to intervene is not an appealable collateral order. In their view, Nonprofits lack a right too important to be denied review. Moreover, Representatives take the position Nonprofits lack a claim that will be irreparably lost if review is postponed to final judgment because they have not alleged any claims against them or Senators, nor have they raised any defenses to Senators' counterclaims. Regarding the substance of the intervention issue, Representatives maintain the Commonwealth Court was correct to conclude Nonprofits' interests are adequately represented by DEP. They argue Nonprofits posit three areas where their interests supposedly diverge from DEP: the distribution of auction proceeds,

the separate rulemaking related to greenhouse gas emissions, and application of the ERA. However, Representatives submit DEP has not yet determined how the auction proceeds will be spent, any eventual spending plan will be subject to public input, and Nonprofits have no legally enforceable interest in how the money is spent so long as it is spent consistently with the APCA. In addition, they assert Nonprofits' interest in a completely different rulemaking is not sufficient to show that their interest in the RGGI Regulation is inadequately represented by DEP. Further, Representatives argue DEP is adequately representing Nonprofits' rights under the ERA since DEP is a trustee with a duty to protect the Commonwealth's public natural resources. They insist this appeal does not involve a question of harm under the ERA, but rather exclusively centers on DEP's disregard of separation of powers. *See* Representatives' Brief at 19-25.

In their reply brief, Nonprofits argue Senators and Representatives have waived any challenge to the Commonwealth Court's finding that Nonprofits, by virtue of injury to their members, have legally enforceable health and environmental interests, by failing to dispute it in their briefing. They claim they are not seeking intervention merely to defend the RGGI Regulation or to further a particular policy preference, but also to protect their rights under the ERA. Nonprofits assert the possibility that the rights of a putative intervenor are adequately represented by an existing party goes to the substance of the intervention question, not the preliminary jurisdictional issue of whether the collateral order doctrine is satisfied. They contend a party seeking appeal through the collateral order doctrine need not be a plaintiff raising a claim, but can be any party presenting an important question for resolution. Nonprofits submit this case implicates the ERA and also involves a separation of powers issue. *See* Nonprofits' Reply Brief at 2-16.

In Nonprofits' supplemental brief, they contend their appeal was not rendered moot by the permanent injunction. They claim this Court can still provide meaningful relief by

allowing them to participate in DEP's appeal from the permanent injunction, as well as their own appeal from the permanent injunction. They argue an appeal of an order denying intervention is not rendered moot by the entry of final judgment in the underlying action pursuant to *Atticks v. Lancaster Township Zoning Hearing Board*, 915 A.2d 713, 716 (Pa. Cmwlth. 2007) ("Neighbors did not choose to pursue an appeal from the interlocutory order; instead, they waited until the trial court issued its final order and then appealed that part of the order denying their Petition. We reject the Atticks' argument that Neighbors' decision to postpone their appeal rendered that appeal moot."). Alternately, Nonprofits insist their appeal of the permanent injunction subsumes their challenge to the denial of intervention under the merger rule, which treats any prior interlocutory orders as merging into the final judgment. Finally, they submit a decision finding their appeal moot would violate their state constitutional rights to appeal and to procedural due process. *See* Nonprofits' Supplemental Brief at 2-8, 17-23.[12]

Senators maintain the appeal is moot. They claim Pa.R.C.P. 2327 permits intervention in a pending action only, and the underlying action is no longer pending as a result of the Commonwealth Court's grant of a permanent injunction. Thus, they argue, any decision by this Court regarding the propriety of the denial of intervention would have no effect. They assert *Atticks* conflicts with *In re Barnes Foundation*, 871 A.2d 792 (Pa. 2005), and should not be followed. *See Barnes,* 871 A.2d at 794 ("[A] common pleas court's order denying intervention is one type of order which must be appealed within thirty days of its entry under Rule of Appellate Procedure 903, or not at all, precisely because the failure to attain intervenor status forecloses a later appeal."). Senators emphasize Nonprofits have not suggested any of the limited exceptions to the mootness

[12] In addition to addressing mootness, Nonprofits argue their appeals at 110 MAP 2023 and 111 MAP 2023 should not be quashed, and that their present appeal at 85 MAP 2022, as well as their appeal at 86 MAP 2022, should be consolidated with the appeals at 106 MAP 2023, 107 MAP 2023, 110 MAP 2023, and 111 MAP 2023. *See id.* at 8-17.

doctrine apply. They contend dismissing their appeal as moot would not violate Nonprofits' rights because there is no constitutional right to appeal in the absence of a live case or controversy. They likewise dispute Nonprofits' claim of a due process violation, arguing a prerequisite to such a claim is the deprivation of a right, and Nonprofits have no right to a substantive decision on the intervention issue where there is no case or controversy. *See* Senators' Supplemental Brief at 8-14.

Representatives also take the position Nonprofits' appeal is moot. They submit there is no case or controversy in which Nonprofits have a stake in the outcome; Nonprofits thus lack a legally enforceable interest in the case. Additionally, Representatives claim a decree authorizing Nonprofits' participation could have no practical effect because Nonprofits did not raise any claim or defense under the ERA in the Commonwealth Court and instead mirrored the advocacy of DEP. As such, Representatives contend Nonprofits have no claim that is irreparably lost if the appeal is dismissed. They also note Nonprofits can raise their ERA arguments in *amicus curiae* briefs to this court. *See* Representatives' Supplemental Brief at 7-10.

A. Appealability

Preliminarily, we address whether the order denying intervention is appealable. *See Commonwealth v. Kennedy*, 876 A.2d 939, 943 (Pa. 2005) (holding appealability of order "is an issue of this Court's jurisdiction to entertain an appeal of such an order."). Whether an order is appealable "is a question of law." *Rae v. Pa. Funeral Dirs. Ass'n*, 977 A.2d 1121, 1126 n.8 (Pa. 2009). "As such, our standard of review is *de novo* and our scope of review is plenary." *Id.* Pennsylvania law "allow[s] for an appeal as of right from an order denying intervention in circumstances that meet the requirements of the collateral order doctrine as embodied in [Pa.R.A.P.] 313." *Barnes*, 871 A.2d at 794. Rule 313 provides:

> **(a) General Rule.** An appeal may be taken as of right from a collateral order of a trial court or other government unit.
>
> **(b) Definition.** A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313. Thus, a party may appeal as of right from an interlocutory order denying intervention "if the order satisfies the three requirements set forth in Rule 313(b) — separability, importance, and irreparability." *Shearer v. Hafer*, 177 A.3d 850, 858 (Pa. 2018). "[A]n order is separable from the main cause of action if it is entirely distinct from the underlying issue in the case and if it can be resolved without an analysis of the merits of the underlying dispute." *K.C. v. L.A.*, 128 A.3d 774, 778 (Pa. 2015) (quotation marks and citation omitted). A right is important if "the interests that would potentially go unprotected without immediate appellate review . . . are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *Ben v. Schwartz*, 729 A.2d 547, 552 (Pa. 1999) (citation omitted). "Further, the right[ ] involved must implicate interests deeply rooted in public policy [and] going beyond the particular litigation at hand." *Shearer*, 177 A.3d at 859 (quotation marks and citation omitted, alteration in original). Finally, the irreparability prong is met if the "claim . . . will be irreparably lost if appellate review is postponed until final judgment." *Brooks v. Ewing Cole, Inc.*, 259 A.3d 359, 372 (Pa. 2021). "We construe the collateral order doctrine narrowly, and insist that each one of its three prongs be clearly present before collateral appellate review is allowed." *Commonwealth v. Pownall*, 278 A.3d 885, 903 (Pa. 2022) (quotation marks and citation omitted). "This approach avoids undue corrosion of the final order rule and prevents delay resulting from piecemeal review of trial court decisions." *Id.*

Here, each of the three requirements of the collateral order doctrine is established. First, the issue of whether Nonprofits are entitled to intervene in the litigation is distinct from, and can be decided without intruding into, the underlying dispute concerning the legality of the RGGI Regulation. As detailed below, the question of Nonprofits' intervention involves consideration of whether they are entitled to party status pursuant to Pa.R.C.P. 2327 and Pa.R.C.P. 2329. This analysis does not overlap with an assessment of the lawfulness of the RGGI Regulation. The first prong of the collateral order doctrine is met. *See K.C.*, 128 A.3d at 779 (order denying petition to intervene in child custody matter separable from main cause of action).

Second, Nonprofits claim the right to intervene to protect, *inter alia*, environmental well-being. *See* Nonprofits' Brief at 4. This interest is significant and shared by the public at large. *See Franklin Twp. v. Pa. Dep't of Env't Res.*, 452 A.2d 718, 720 (Pa. 1982) ("Aesthetic and environmental well-being are important aspects of the quality of life in our society[.]"). Hence, the importance prong is satisfied here.

Third, a party who is denied intervention and who satisfies the requirements of Rule 313 must appeal from the order denying intervention within thirty days of its entry or lose the right to appeal the order entirely. *See K.C.*, 128 A.3d at 780; *Barnes*, 871 A.2d at 794. Consequently, Nonprofits' claim to intervention will be lost forever if they are not permitted to appeal from the decision denying intervention.

Appellees' arguments in opposition to application of the collateral order doctrine are unpersuasive. Whether DEP is adequately representing Nonprofits' interests is irrelevant to the importance inquiry. Simply because an existing party may satisfactorily represent a putative intervenor's interests does not mean those interests are not significant. Shared interests may nonetheless be important ones. Similarly, whether Nonprofits have raised unique claims or defenses against appellees is not relevant to the

irreparability prong. The pertinent "claim" in this context is Nonprofits' claim to intervention, and this claim will be irretrievably lost if they are not permitted to appeal from the denial of intervention. *See K.C.*, 128 A.3d at 780.

We are likewise not persuaded by the arguments raised in Justice Mundy's concurring and dissenting opinion (Mundy CDO). Regarding the importance prong, Justice Mundy emphasizes there are other important interests at stake in this litigation besides "the environment," such as "the availability of affordable electricity for low-income citizens and the presence of jobs in Pennsylvania's energy sector." Mundy CDO at 3. We don't disagree, but we fail to see how this undermines Nonprofits' satisfaction of the importance prong. Nonprofits' important environmental interests are not rendered any less so by the presence of other significant concerns. In addition, Justice Mundy "would . . . conclude there is no important right, deeply rooted in public policy and shared by the public at large, to have the government require that Pennsylvania's electricity producers participate in RGGI through the administrative regulation challenged in this matter." *Id.* at 4. However, the importance prong simply requires the appellant to have an important interest, not necessarily a meritorious claim to relief. In *Ben*, for instance, this Court held an interlocutory appeal from an order dismissing a motion to quash a subpoena on privilege grounds "met" "[t]he importance criterion" (as well as the two other prongs of the collateral order standard) but ultimately concluded there was "no merit to the . . . claim of privilege[.]" 729 A.2d at 552-53.

Regarding the irreparability prong, Justice Mundy insists the relevant "claim" under this prong is not Nonprofits' claim to intervention; rather, the "claim" under the third prong "substantially overlap[s]" with the "right" under the importance prong. Mundy CDO at 6. This is contrary to the basic rule of construction that when a rule or statute uses different words, it is presumed the words have different meanings. *See, e.g.*, *HTR Restaurants,*

Inc. v. Erie Insurance Exchange, 307 A.3d 49, 67 (Pa. 2023). If the "claim" under the third prong were synonymous with the "right" under the second prong, Rule 313 would not have used distinct words to refer to the same thing.[13] Similarly, because the pertinent "claim" for purposes of the irreparability prong is the claim to intervention, not the underlying right or interests sought to be validated thereby, Justice Mundy's assertion Nonprofits' "environmental interests are fully vindicable through the legislative process" is inapt. Mundy CDO at 7. Any conceivable redress via the legislative process obviously cannot possibly include an order granting Nonprofits' claim to intervene in this case. Their claim to intervention, the sole focus of the analysis under the irreparability prong, is vindicable solely through the judicial process.

Justice Brobson's Concurring and Dissenting Opinion (Brobson CDO) also contends the "right" under prong two and the "claim" under prong three are coextensive. However, in contrast to Justice Mundy, who argues both prongs require consideration of the underlying interests at stake, Justice Brobson insists these separate requirements each involve the claim to intervention. *See* Brobson CDO at 3 ("[A]s with all orders denying intervention, the 'right involved' is the right, under Rule 2327 of the Pennsylvania Rules of Civil Procedure, to intervene."). This argument too contravenes the fundamental

[13] Neither of the cases cited by Justice Mundy — *Commonwealth v. Harris*, 32 A.3d 243 (Pa. 2011), and *Commonwealth v. Wright*, 78 A.3d 1070 (Pa. 2013) — holds the "right" under the second prong and the "claim" under the third prong are one and the same. *See* Mundy CDO at 6 n.2. On the contrary, these decisions reiterate the diverging language employed by the Rule itself. *See Harris*, 32 A.2d at 248 ("Pennsylvania Rule of Appellate Procedure 313(b) permits a party to take an immediate appeal as of right from an otherwise unappealable interlocutory order if the order meets three requirements: (1) the order must be separable from, and collateral to, the main cause of action; (2) the **right** involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until after final judgment, the **claim** will be irreparably lost.") (emphasis added); *Wright*, 78 A.3d at 1077 ("[A] non-final ruling is appealable where three conditions are satisfied: (1) it is separable from and collateral to the main cause of action; (2) the **right** involved is too important to be denied review; and (3) if review is postponed, the **claim** will be irreparably lost.") (emphasis added).

interpretive principle that the choice of distinct words in Rule 313 indicates distinct meanings. *See, e.g.*, *HTR Restaurants*, 307 A.3d at 67. As each of the three elements of the collateral order doctrine is satisfied here, the Commonwealth Court's denial of intervention is appealable as of right under Rule 313, and we have jurisdiction over the appeal.

B. Mootness

We turn to the issue of mootness. Mootness is a prudential rather than jurisdictional concern, but "[t]his Court generally will not decide moot questions." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 599 (Pa. 2002). "An issue before a court is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Yount v. Pa. Laws. Fund for Client Sec.*, 291 A.3d 349, 354 (Pa. 2023), *quoting Commonwealth v. Holt*, 273 A.3d 514, 549 (Pa. 2022); *see also Burke ex rel. Burke v. Indep. Blue Cross*, 103 A.3d 1267, 1271 (Pa. 2014) ("The claim of mootness . . . stands on the predicate that a subsequent change in circumstances has eliminated the controversy so that the court lacks the ability to issue a meaningful order, that is, an order that can have any practical effect."). "[A]n issue may become moot during the pendency of an appeal due to an intervening change in the facts of the case[.]" *Pilchesky v. Lackawanna Cnty.*, 88 A.3d 954, 964 (Pa. 2014). We have recognized exceptions to the mootness doctrine "for issues that are of great public importance or are capable of repetition while evading review." *Burke,* 103 A.3d at 1271, *quoting Commonwealth ex rel. Kearney v. Rambler*, 32 A.3d 658, 663 (Pa. 2011). Also, we have indicated mootness may not preclude review "where a party will suffer some detriment without a court decision." *Pilchesky*, 88 A.3d at 964-65; *accord Commonwealth, Dep't of Env't Prot. v. Cromwell Twp., Huntingdon Cnty.*, 32 A.3d 639, 652 (Pa. 2011); *Pub. Def's*

Off. of Venango Cnty. v. Venango Cnty. Ct. of Common Pleas, 893 A.2d 1275, 1279-80 (Pa. 2006).

Presently, this Court's decision regarding Nonprofits' intervention can have a practical effect on the existing controversy. If we determine the Commonwealth Court abused its discretion in denying intervention, then Nonprofits should be parties with standing to pursue their appeal of the permanent injunction docketed at 110 MAP 2023. On the other hand, if we conclude Nonprofits were properly denied intervention, their appeal of the Commonwealth Court's final judgment would have to be quashed. "[T]he general rule is that only parties may appeal a decision." *Barnes,* 871 A.2d at 794; *see* Pa.R.A.P. 501 ("Except where the right of appeal is enlarged by statute, any **party** who is aggrieved by an appealable order, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom.") (emphasis added). A putative intervenor "unsuccessful in [its] effort to intervene in the [trial court] proceedings[has] no greater rights than would be available to any other non-party[.]" *Barnes,* 871 A.2d at 794. Because our resolution of Nonprofits' appeal from the denial of their motion to intervene will impact ongoing litigation, the appeal is not moot. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 593 (9th Cir. 2023) ("Generally, if the underlying litigation is complete, an appeal of a denial of intervention is moot and must be dismissed. . . . But if we could permit the proposed intervenors to participate in ongoing district court proceedings or in an appeal of a district court's merits decision, that would amount to 'effectual relief,' so the intervention dispute would remain alive."); *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 475 (4th Cir. 2015) ("[D]ismissal of the underlying action does not automatically moot a preexisting appeal of the denial of a motion to intervene."); *Alt. Rsch. and Dev. Found. v. Veneman*, 262 F.3d 406, 410 (D.C. Cir. 2001) ("[O]ur jurisdiction to review th[e] denial [of intervention] is not affected by the fact that the

district court denied intervention after the stipulated dismissal was entered; the dismissal does not render the appeal moot. . . . If this court were to conclude that [appellant] was entitled to intervene in the litigation, [appellant] would have standing to appeal the district court's denial of the Rule 60(b) motion attacking the stipulated dismissal, and we would review that Rule 60(b) denial.") (emphasis omitted); *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 n.3 (11th Cir. 1996) (holding appeal from denial of intervention was not mooted by subsequent final judgment because "[i]f we conclude that [appellant] is entitled to intervene as of right, then [appellant] has standing as a party to appeal the district court's judgment based on the approved settlement agreement, and we would review that judgment.").

It is of course true, as Senators note, that the Commonwealth Court issued a final order permanently enjoining the RGGI Regulation. Yet, this does not mean there is no live controversy remaining. Nonprofits appealed the permanent injunction (110 MAP 2023), as did DEP (106 MAP 2023) and Constellation (115 MAP 2023). The litigation is not over, and we can still practically affect the case by resolving the intervention question. *Cf. West Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011) ("[Appellant] appeals from the denial of its motion to intervene in a case that the district court has since decided, . . . from which neither party has appealed. Because the underlying litigation is over, we cannot grant [appellant] any 'effective relief' by allowing it to intervene now. The appeal is therefore moot."). Moreover, Representatives' contention Nonprofits lack a legally enforceable interest incorrectly conflates the mootness issue with the distinct question of intervention. *See* Representatives' Supplemental Brief at 7-8. A legally enforceable interest is a requirement for intervening in a civil case, not a component of the mootness inquiry. *See* Pa.R.C.P. 2327(4). Whether a claim will be "irreparably lost" in the absence of an appeal

is likewise not a part of the mootness inquiry. *See* Representatives' Supplemental Brief at 9. Rather, this is an element of the collateral order doctrine. *See* Pa.R.A.P. 313(b). We are not convinced by appellees' arguments the appeal is moot.

C. Merits

Turning to the merits of the intervention issue, "[i]t is well established that a 'question of intervention is a matter within the sound discretion of the court below and unless there is a manifest abuse of such discretion, its exercise will not be interfered with on review.'" *Wilson v. State Farm Mut. Auto. Ins. Co.*, 517 A.2d 944, 947 (Pa. 1986), *quoting Darlington v. Reilly*, 69 A.2d 84, 86 (Pa. 1949). Discretion is abused "if, in reaching a conclusion, [the] law is overridden or misapplied, or the judgment exercised is manifestly unreasonable or lacking in reason[.]" *In re Deed of Tr. of Rose Hill Cemetery Ass'n Dated Jan. 14, 1960*, 590 A.2d 1, 3 (Pa. 1991).

Unless our appellate rules prescribe otherwise, the practice relating to pleadings in cases arising in the Commonwealth Court's original jurisdiction pursuant to a petition for review are governed by the appropriate Rules of Civil Procedure. *See* Pa.R.A.P. 1517 ("Unless otherwise prescribed by these rules, the practice and procedure under this chapter relating to pleadings in original jurisdiction petition for review practice shall be in accordance with the appropriate Pennsylvania Rules of Civil Procedure, so far as they may be applied."); *see also* Pa.R.A.P. 106 ("Unless otherwise prescribed by these rules the practice and procedure in matters brought before an appellate court within its original jurisdiction shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas, so far as they may be applied."). Pursuant to Pa.R.C.P. 2327, "[a]t any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein" if:

> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) **the determination of such action may affect any legally enforceable interest of such person** whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. 2327 (emphasis added).

Whether a potential party has a legally enforceable interest permitting intervention under Rule 2327(4) "turns on whether they satisfy our standing requirements." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016); *see also See Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 843 (Pa. 2024) ("To intervene, the prospective intervenor must first establish that she has standing."). "Generally, the doctrine of standing is an inquiry into whether the [potential party] has demonstrated aggrievement, by establishing a substantial, direct and immediate interest in the outcome of the litigation." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (quotation marks and citation omitted). "[A] 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law[.]" *Pa. Med. Soc'y v. Dep't of Pub. Welfare of Com.*, 39 A.3d 267, 278 (Pa. 2012). "[A] 'direct' interest requires a showing that the matter complained of caused harm to the party's interest." *Id.* An interest is "immediate" if that "causal connection" is not remote or speculative. *Id.* An association has standing as a representative of its members, even in the absence of injury to itself, if it establishes at least one of its members has standing individually. *See Robinson*, 83 A.3d at 922; *Pa. Med. Soc'y*, 39 A.3d at 278.

Under Pa.R.C.P. 2329, an application for intervention satisfying Rule 2327(4) or falling within one of the other classes enumerated in the rule "may be refused" if:

> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
>
> (2) the **interest of the petitioner is already adequately represented**; or
>
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa.R.C.P. 2329 (emphasis added). The word "adequately" in Rule 2329(2) means representation "to a satisfactory or acceptable extent."[14] Thus, the mere fact an existing party may align with the putative intervenor's legally enforceable interests "is not determinative of whether such representation is adequate so as to support the refusal of intervention, where it is also shown that such party is not effectively representing the [intervenor's] interests." 7 Goodrich-Amram 2d §2329:7. In other words, "[t]he phrase 'adequately represented'" calls for "both an inquiry whether there is of record a [party] who technically represents the interests of the [intervenor] and also an inquiry whether such representatives are in fact performing their function of representation in a proper and efficient manner." *Id.* "Reading Rule 2329 in conjunction with Rule 2327, . . . the effect of Rule 2329 is that if the petitioner is a person coming within one of the classes described in Rule 2327, the allowance of intervention is not discretionary, but is mandatory, unless one of the grounds for refusal of intervention enumerated in Rule 2329 is present." *In re Pa. Crime Comm'n*, 309 A.2d 401, 408 n.11 (Pa. 1973) (quotation marks and citation omitted).

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[14] *Adequately*, GOOGLE DICTIONARY, https://www.google.com/search?q=adequately&rlz=1C1CHBF_enUS941US941&oq=adequately&gs_lcrp=EgZjaHJvbWUyCQgAEEUYORiABDIHCAEQABiABDIHCAIQABiABDIHCAMQABiABDIHCAQQABiABDIHCAUQABiABDIHCAYQABiABDIHCAcQABiABDIHCAgQABiABDIHCAkQABiABKgCCLACAQ&sourceid=chrome&ie=UTF-8 (last visited Apr. 2, 2024).

Presently, Nonprofits established "a substantial, direct and immediate interest in the outcome of the litigation" entitling them to intervention under Rule 2327(4). *Robinson*, 83 A.3d at 917. They presented the testimony of individual members regarding alleged harms they are suffering due to CO_2 emissions from fossil-fuel-fired power plants. Specifically, Margaret Church testified she is a member of Citizens for Pennsylvania's Future and the Environmental Defense Fund who has lived in Bethlehem, Pennsylvania for over fifty years. Ms. Church claimed that in the last twenty-five years, the heat, rain, and flooding in her area have all gotten worse, changes she attributed to climate change. She alleged that as a "senior[,]" the hotter temperatures cause her to worry about dehydration and overheating. Accordingly, she monitors the weather and does not go outside to do yard work if it is too hot. She also monitors the air quality because if it is not good, she experiences breathing difficulties and is unable to do what she wants to do outside. She testified that on poor air quality days, she must stay inside, which leaves her feeling sluggish and depresses her mood. In addition to these personal impacts, Ms. Church expressed concern about the adverse effects of climate change on the lives of her children and grandchildren, especially her young grandson with asthma. *See* N.T. Intervention Hearing, 6/24/22 at 156-59, 161-68.

Echo Alford testified she is a member of the Clean Air Council who lives in Boothwyn, Pennsylvania, two miles from the Marcus Hook Energy Center, a fossil-fuel-fired power plant. She averred the plant causes poor air quality, which can exacerbate her asthma and allergies and prevent her from spending time outdoors. She checks the air quality to determine whether it is safe for her to go outside. She also stated the plant produces "strange" smells, which can cause stomach aches, dizziness, lightheadedness, and headaches. She noted too that her fourteen-year-old son likewise suffers from breathing issues, as well as frequent bloody noses. She asserted she is "most definitely"

concerned about pollution from the plant, and her concerns are "often at the forefront of [her] mind[.]" *See* N.T. Intervention Hearing, 6/27/22 at 14-18, 21.

Laura Jacko testified she is a member of the Sierra Club who lives in Verona, Pennsylvania. Ms. Jacko recounted that her husband, like many people in their region, suffers greatly from asthma, and his flare-ups often coincide with poor air quality days. She stated that when her husband is ill with asthma, he is unable to be productive at work or to handle household responsibilities. He is also unable to join her and her four-year-old son in outdoor activities. She noted her son was born prematurely, which she believes may have been caused by the region's poor air quality, and also suffers from weak lungs, which could progress to asthma in the future. She suffers from eco-anxiety related to climate change and has sought care from a therapist to help her regulate her anxiety. *See id.* at 79-80, 85-88.

Nonprofits also adduced expert testimony concerning the environmental and health impacts of CO_2 emissions and the RGGI Regulation. Dr. Raymond Najjar, a professor of oceanography at Pennsylvania State University, testified that CO_2 emissions, by enhancing the greenhouse effect, are causing the Earth to warm, and Pennsylvania conditions correspond very closely to the global trend of warmer weather. He also explained the release of CO_2 into the atmosphere causes people to become sick from heat-related problems and "makes people die[.]" Indeed, he referenced studies showing the emission of every 5,000 tons of CO_2 leads to one death. Dr. Najjar opined Pennsylvania's implementation of the RGGI Regulation would reduce the amount of CO_2 in the atmosphere and therefore reduce the amount of warming. *See* N.T. Preliminary Injunction Hearing, 5/11/22 at 291, 298-301, 305-06, 313.

In addition, Dr. Deborah Gentile, an allergy and immunology physician and researcher, testified air pollution triggers a variety of ailments, including asthma,

cardiovascular disease, heart attacks, strokes, and congestive heart failure. She explained that children and older individuals are at higher risk for the adverse health effects of air pollution. She stated fossil-fuel-fired power plants emit air pollutants and lead to increased levels of PM2.5, a very small air pollutant that can lodge in individuals' breathing tubes and cause tissue damage, asthma and chronic obstructive pulmonary disease. Dr. Gentile opined: "The RGGI [Regulation] would . . . decrease the ambient air pollution that we're exposed to, and that would translate to decreased asthma attacks, decreased asthma deaths, decreased hospitalizations, increased life spans meaning decreased premature death." Similarly, she stated: "I think that [with] incorporation of the RGGI [Regulation] we are definitely going to see the reductions in these pollutants, and we're definitely going to see these improvements in health outcomes." Conversely, she expressed the view that if the RGGI Regulation is not implemented, "we aren't going to see those health benefits. We're putting people at risk of having these health risks, asthma attacks, hospitalizations, even death." *See id.* at 356, 360-61, 364-65, 369, 373-74.

This evidence sufficed to establish the individual members of Nonprofits – Church, Alford, and Jacko – each have standing. First, their interests in the outcome of the litigation are substantial. The members claim specific harms to their well-being, including hotter and wetter weather, poor air quality, breathing difficulties, forced time inside, exacerbated asthma symptoms, worsened allergies, odd smells, dizziness, lightheadedness, headaches, ill loved ones, and eco-anxiety. These specific interests in the outcome of the litigation go beyond the general interest shared by all Pennsylvanians in procuring obedience to the law. At stake for these individuals is not just fidelity to the law but the quality of their lives. Furthermore, their interests in the outcome of this

injunction litigation are direct: an injunction deprives them of the RGGI Regulation's purported environmental and health benefits, and their ongoing injuries persist or worsen.

Finally, Nonprofits showed their members' interests in the outcome of this litigation are immediate. The causal connection between the RGGI Regulation and the benefits to the members is neither remote nor speculative for standing purposes. Dr. Gentile testified implementation of the RGGI Regulation would "definitely" cause improvements in the environment and better health outcomes. *Id.* at 374. Because the benefits of the RGGI Regulation are not purely conjectural, neither are the harms members will experience if these benefits are denied them. As members of Nonprofits have evidence-based standing individually, it follows Nonprofits have associational standing as representatives of their members. *See Robinson*, 83 A.3d at 922; *Pa. Med. Soc'y*, 39 A.3d at 278. Thus, Nonprofits perforce have legally enforceable interests entitling them to intervention under Rule 2327(4). *See Allegheny Reprod. Health Ctr.*, 309 A.3d at 844; *Markham*, 136 A.3d at 141.

However, while the Commonwealth Court correctly determined Nonprofits satisfied Rule 2327(4), we hold it erred in concluding Nonprofits' interests are adequately represented by DEP, such that their intervention should be denied under Rule 2329(2). The lower court's analysis of the adequate representation question unreasonably omits the fact DEP has never once invoked the ERA in support of the RGGI Regulation. *See Ziadeh*, slip op. at 21-23 (Pa. Cmwlth., July 8, 2022). Although DEP raised other arguments in support of the RGGI Regulation, it made none whatsoever premised upon the ERA. Nonprofits sought intervention, *inter alia*, to fill this void and defend the RGGI Regulation under the ERA. *See* Nonprofits' Application for Leave to Intervene, 4/25/22 at ¶¶6-7, 9, 56-58, 65. Specifically, Nonprofits argued the ERA itself refutes Senators' claim the RGGI Regulation intrudes upon the General Assembly's exclusive authority to

impose taxes. Nonprofits observed that, under Pennsylvania law, a tax is for the purpose of raising general revenue for the government, but under *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), proceeds from the sale of public natural resources under the ERA must be devoted to the conservation and maintenance of those resources, and cannot be appropriated for general budgetary items. Hence, they maintained, this "Court's interpretation of the ERA . . . precludes the possibility that the [RGGI] auction proceeds could somehow be construed as a tax." Nonprofits' Brief in Response to Senate Intervenors' Application for Preliminary Injunction at 21-22 (attached as Exhibit A to application to intervene); *see also* Nonprofits' Brief at 46 ("RGGI auction proceeds are not general revenue and cannot, under the ERA, be treated as general revenue, making one of the hallmark characteristics of taxes inapplicable."); Nonprofits' Reply Brief at 16-20.

Nonprofits' ERA defense is hardly "irrelevant" to this case. Senators' Brief at 36. On the contrary, whatever its ultimate merit, this defense presents a salient and nonfrivolous argument regarding the central question in this litigation of whether the RGGI Regulation is an unconstitutional tax. The argument could benefit Nonprofits and DEP alike. Yet, DEP has never raised it. To be sure, as Justice Brobson correctly notes, not every failure on the part of an existing party to raise an argument favored by a potential intervenor necessarily constitutes inadequate representation warranting intervention. *See* Brobson CDO at 13. Otherwise, putative parties with legally enforceable interests would effectively be able to intervene at will since it is virtually always possible to articulate some new theory in support of a particular outcome. However, under the specific circumstances present here, involving the omission of an obvious, possibly meritorious, and potentially beneficial argument regarding the pivotal issue in the case, we hold adequate representation of Nonprofits by DEP, for purposes of Rule 2329(2), is lacking.

See Ackerman v. North Huntingdon Twp., 228 A.2d 667, 668 (Pa. 1967) (Bielskis were not adequately represented by existing party Crestview where "Crestview's defense to the [ ] action was different from the one presented by the Bielskis"); *see also Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1019-20 (D.C. Cir. 2003) ("an existing party who is ineffectual, incompetent, or unwilling to raise claims or arguments that would benefit the putative intervenor may qualify as an inadequate representative in some cases"); *Daggert v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999) ("Of course, the use of different arguments as a matter of litigation judgment is not inadequate representation *per se*[,] . . . [b]ut one can imagine cases where . . . a refusal to present obvious arguments could be so extreme as to justify a finding that representation by the existing party was inadequate.") (citation omitted); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) ("[I]t may be enough to show [inadequate representation] that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments.").[15]

Senators' arguments that Nonprofits' lack legally enforceable interests miss the mark.[16] Senators focus on disputing whether Nonprofits themselves have legally enforceable interests. *See* Senators' Brief at 20-31. However, standing suffices to prove a legally enforceable interest, *see Markham*, 136 A.3d at 141, and as stated above, an association's standing may be premised on the standing of at least one of its individual

[15] To be clear, a pertinent argument is not necessarily a winning one. Nothing we say here should be construed to decide the ultimate question of the legality of the RGGI Regulation, which we need not (and accordingly do not) reach in these appeals.

[16] Representatives do not appear to dispute Nonprofits have legally enforceable interests under Rule 2327(4). *See* Representatives' Brief at 19 ("**[S]ome** of the interests asserted by the Nonprofits are not legally enforceable[.]") (emphasis added); *see also id.* at 20 ("[T]he Commonwealth Court correctly concluded that, to the extent Nonprofits asserted a legally enforceable interest under Rule 2327, those interests were adequately represented by DEP[.]").

members, even if it lacks standing itself. *See Robinson*, 83 A.3d at 922; *Pennsylvania Med. Soc'y*, 39 A.3d at 278. Accordingly, Nonprofits come within Rule 2327(4), irrespective of whether they also have legally enforceable interests in their own right.

Justice Mundy maintains our "approach to intervention in this matter is difficult to reconcile with our prior cases," namely *Crossey v. Boockvar*, 108 MM 2020, and *Allegheny Reproductive Health Center v. DHS*, 309 A.3d 808 (Pa. 2024). *See* Mundy CDO at 12-15. However, *Crossey* involved a *per curiam* order, which granted intervenor status to Republican legislators but denied intervention to Republican organizations.[17] As such, it carries no precedential weight. *See In re Avery*, 286 A.3d 1217, 1228 (Pa. 2022) ("highlighting the well-settled, general principle that this Court's *per curiam* orders carry no precedential value"). Moreover, *Allegheny* involved the distinct question of "individual legislator intervention" and therefore is distinguishable from this case involving the intervention of nonprofit environmental organizations. *Allegheny*, 309 A.3d at 844. Indeed, Justice Mundy herself notes "legislative standing . . . is its own topic[.]" Mundy CDO at 12.

Justice Brobson believes "Nonprofits have no right to the RGGI Regulation[.]" Brobson CDO at 11. But, whether there is a "right to the RGGI Regulation," *i.e.*, whether the RGGI Regulation must be accorded legal effect, is the ultimate issue in this case. Nonprofits do not have to demonstrate their entitlement to relief on the merits in order to

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[17] *See Crossey*, 108 MM 2020, *Per Curiam* Order (filed Aug. 21, 2020) ("**AND NOW**, this 21st day of August, 2020, the petitions of Proposed Intervenors President Pro Tempore Joseph B. Scarnati, III, and Majority Leader of the State Senate Jake Corman; Speaker of the House of Representatives Mike Turzai and Majority Leader of the House Bryan Cutler (subsequently substituted by Speaker of the House of Representatives Bryan Cutler and Majority Leader of the House Kerry Benninghoff) to intervene in this matter are **GRANTED**; the petitions of Proposed Intervenors Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee are **DENIED**, without prejudice to their ability to file briefs as amicus curiae pursuant to Pa.R.A.P. 531.").

establish their standing to intervene. In addition, Justice Brobson contends there are no harms to Nonprofits' members "because the absence of the RGGI Regulation is simply the *status quo*." On the contrary, the *status quo* is that the RGGI Regulation is codified in the Pennsylvania Code. *See* 25 Pa. Code §§145.301–145.409. Although currently subject to an injunction, the RGGI Regulation is not a mere "proposed . . . regulation[]" absent from our present laws. Brobson CDO at 11. Justice Brobson also insists our "view on standing essentially takes the position that an individual or organization that has an interest in the subject matter has standing to intervene in litigation seeking to challenge any proposed regulation or legislation that advances that interest." *Id.* at 12. But this is not so. As we specified above and now reiterate to forestall any possible confusion, standing requires more than a mere "policy or advocacy interest[]" in the outcome of the litigation, Brobson CDO at 8; the interest must be substantial, direct, and immediate. *See Robinson*, 83 A.3d at 917. Nonprofits' significant evidentiary presentation demonstrating environmental, health, and quality-of-life harms to their individual members established such an interest. Finally, regarding adequate representation, Justice Brobson claims "DEP may have had legitimate reasons not to advance [the ERA] argument[,]" and, in any case, Nonprofits can raise the argument as "amicus." Brobson CDO at 13. However, we find it telling that DEP has never actually offered a rationale for ignoring the ERA. Moreover, "[a]n *amicus curiae* is not a party and cannot raise issues that have not been preserved by the parties." *Commonwealth v. Cotto*, 753 A.2d 217, 224 n.6 (Pa. 2000). Accordingly, we reverse the Commonwealth Court's decision denying Nonprofits' application to intervene.[18]

[18] At this juncture, when there are no longer pending proceedings in the Commonwealth Court in which to intervene, remand to the Commonwealth Court is not appropriate, as Nonprofits appear to acknowledge. *See* Nonprofits' Supplemental Brief at 3 ("If this Court determines that the Commonwealth Court erred in denying Nonprofit Intervenors' application for intervention, then Nonprofit Intervenors will immediately be able to participate as parties in the pending merits appeals of the November 1 [o]rders.").

III. Preliminary Injunction (87 MAP 2022)

Nonprofits also separately appeal the Commonwealth Court's grant of the preliminary injunction of the RGGI Regulation. However, the Commonwealth Court's November 1, 2023 permanent injunction of the RGGI Regulation superseded the preliminary injunction, rendering any appeal from the preliminary injunction moot. *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter."); *PG Publ'g Co.*, *Inc. v*. *Pittsburgh Typographical Union #7 (CWA Local 14827)*, 304 A.3d 1227, 1231 n.1 (Pa. Super. 2023) (holding that because trial court granted permanent injunction "any claims arising from the issuance of the preliminary injunction are moot"); *PA Energy Vision, LLC v. South Avis Realty, Inc.*, 120 A.3d 1008, 1012 (Pa. Super. 2015) ("South Avis argues the trial court erred in granting a preliminary injunction. This issue, however, is now moot because the trial court issued a final, permanent injunction."); *Sasinoski v. Cannon*, 696 A.2d 267, 270 (Pa. Cmwlth. 1997) ("[A] preliminary injunction is superseded by a decision on the merits and terminates upon the issuance of the permanent injunction."); *Izenson v. Izenson*, 418 A.2d 445, 446 (Pa. Super. 1980) ("Where a preliminary injunction is in force, the issuance of a permanent injunction terminates the preliminary injunction. . . . Thus, we cannot reach appellant's contention that the preliminary injunction was improperly issued because that injunction is no longer in effect.") (citation and footnote omitted). Indeed, Nonprofits "agree that their appeal of the preliminary injunction at 87 MAP 2022 is moot." Nonprofits' Supplemental Brief at 2.

None of the exceptions to the mootness doctrine applies. Because the preliminary injunction of the RGGI Regulation has been supplanted by the permanent injunction and is no longer in effect, the preliminary order does not carry great public importance, nor

does it risk ongoing detriment to any party. Moreover, although the grant of preliminary injunctive relief in this particular case has evaded review, this is not the norm and preliminary injunctions are not likely to avoid review as a general matter. This Court has repeatedly had the opportunity to review the propriety of preliminary injunctions. *See, e.g.*, *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 185 A.3d 985 (Pa. 2018); *Brayman Const. Corp. v. Com., Dep't of Transp.*, 13 A.3d 925 (Pa. 2011); *Fischer v. Dep't of Pub. Welfare*, 439 A.2d 1172 (Pa. 1982); *Shanaman v. Yellow Cab Co. of Phila.*, 421 A.2d 664 (Pa. 1980); *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383 (Pa. 1978). We decline to consider Nonprofits' admittedly moot appeal from the defunct preliminary injunction.

IV. Mandate

For the foregoing reasons, in the appeal docketed at 85 MAP 2022, the order of the Commonwealth Court is reversed, and the appeal docketed at 87 MAP 2022 is dismissed as moot.

Chief Justice Todd and Justices Donohue and Wecht join the opinion.

Justice Donohue files a concurring opinion in which Chief Justice Todd joins.

Justice Mundy files a concurring and dissenting opinion.

Justice Brobson files a concurring and dissenting opinion.