IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 20-0530 and 20-0531

ANTERO RESOURCES CORPORATION
Petitioner Below, Petitioner,

vs.

THE HONORABLE MATTHEW R. IRBY, Acting West Virginia State Tax Commissioner, THE HONORABLE DAVID SPONAUGLE, Assessor of Doddridge County, and THE COUNTY COMMISSION OF DODDRIDGE COUNTY, Sitting as the Board of Assessment Appeals,
Respondents Below, Respondents.

Hon. Christopher C. Wilkes
Circuit Court of Doddridge County, Business Court Division
Civil Action Nos. 17-AA-1 and 17-AA-3

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and

No. 20-0579

ANTERO RESOURCES CORPORATION
Petitioner Below, Petitioner,

vs.

THE HONORABLE MATTHEW R. IRBY, Acting West Virginia State Tax Commissioner, THE HONORABLE ARLENE MOSSOR, Assessor of Ritchie County, and THE COUNTY COMMISSION OF RITCHIE COUNTY, Sitting as the Board of Assessment Appeals,
Respondents Below, Respondents.

Hon. Christopher C. Wilkes
Circuit Court of Ritchie County, Business Court Division
Civil Action No. 17-AA-1

REPLY BRIEF OF THE PETITIONER

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The Petitioner, Antero Resources Corporation ("Antero"), objected to the Tax Department's re-valuation on remand because the assessment again did not comply with the "singular monetary average" requirement from Syllabus Point 12 of *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019) ("*Steager*"). The crux of this dispute is whether the "singular monetary average" requirement applies to wells that produce *both* oil *and* natural gas. Contrary to Respondents' arguments,[1] this Court's ruling in *Steager* also encompassed wells that produce both oil and natural gas because those wells are governed by the same State Rules at issue in Case Nos. 18-0124, 18-0125 (the "Prior Appeals" in *Steager*).[2] A "singular monetary average" is also required for the valuation of wells that produce both. Thus, the "weighting methodology"[3] is simply a "pro rata" expression of the industry average which this Court disallowed in *Steager*.

Respondents now argue, however, that the *Steager* "singular monetary average" requirement does not apply to wells that produce both oil and natural gas.[4] This distinction of

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[1] As explained below, Antero's briefs in the Prior Appeals encompassed a challenge to the assessment of wells that produced both oil and natural gas. Antero agrees that the parties primarily—although not exclusively—referenced the Tax Department's application of the percentage deduction and caps in relation to Marcellus Shale horizontal wells due to the materiality of the caps on deductions for Marcellus Shale horizontal wells during earlier phases of Antero's appeal. Following *Steager*, however, the "weighting methodology" now materially alters Antero's tax liabilities in a new way that makes the particular application of a percentage-based deduction in the "weighting methodology" a ripe dispute.

[2] *See* Syl. pt. 12, *id.* (citing W. Va. Code St. R. §§ 110-1J-4.1 and -4.3).

[3] The County refers to the "weighting methodology" as the "Oil and Gas Well Methodology."

[4] As Antero explained, Respondents' distinction of *Steager* is flawed. The State Rules cited as the basis for the ruling in *Steager* apply to "[o]il **and/or** natural gas producing property." *See* W. Va. Code St. R. §§ 110-1J-4.1 (emphasis added). The use of the term "and/or" does not leave room for the Respondent's argument that the opinion does not apply to wells that produce *both* oil *and* gas.

Steager was raised for the first time on remand when the Tax Department applied a percentage-based "weighting methodology" in its re-valuation. Antero disagreed with this interpretation of *Steager* and proffered competing calculations to correct the resulting errors in the re-valuation.

Therefore, Antero's objection does not raise a new claim or seek leave to file an amended petition, as in the cases cited in the County's Response.[5] Antero's objection is based on the re-valuation's non-compliance with the original holding in *Steager*. Antero's objection thus is within the scope of the Court's "Mandate," which incorporated directions from *Steager* to "fix assessments" against Antero to ensure they are "consistent with this opinion" from this Court.[6]

Nevertheless, the County argues that Antero waived the right to challenge the Tax Department's re-valuation error on remand because, in its view, Antero was required to raise its argument in its original appeal to the County <u>before</u> *Steager* was even decided. That is logically impossible. Moreover, the rules governing the preservation and waiver of objections, along with the mandate rule, are not inconsistent with this conclusion, as discussed below.

1. Antero's objection to the Tax Department's percentage-based re-valuation was raised in Antero's initial appeal in 2018 and is a part of the appeals record. The propriety of the Tax Department's percentage-based deductions and caps have been the subject of Antero's objection since the initial appeals were filed in relation to Antero's *ad valorem* tax liability. Indeed, this Court acknowledged Antero's arguments in that respect in *Steager*, noting, "Respondents appealed their gas well valuations to the respective Boards of Assessment Appeals ("Board(s)") for the appropriate county, claiming that their actual expenses were in *excess of the stated percentages* and that the cap resulted in an artificial reduction in the operating expense

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[5] County's Resp. at 10-15 (Nos. 20-0530, 20-0531).

[6] 242 W. Va. at 225, 832 S.E.2d at 151; *see also* A.R. 2036 (No. 20-0530), A.R. 2036 (No. 20-0531), A.R.906 (No. 20-0579).

deduction where their expenses exceeded the cap."[7] The Court then concluded that "the business court's relief erroneously required use of a percentage" due to language in the governing State Rules requiring that "[t]he average annual industry operating expenses shall be deducted from working interest gross receipts."[8] In that regard, Antero's briefs in the Prior Appeals,[9] broadly challenged the Tax Department's valuation for *all producing wells*, arguing that the Tax Department "did not properly address the various operating expenses incurred by producers of horizontal Marcellus Shale *oil and gas* wells."[10] Indeed, the Tax Department argued "the business court *erred by utilizing and/or permitting the use of a percentage* to deduct operating expenses because the Rule requires an 'average,' stating: "The average of a bunch of numbers is a number.'"[11] This Court noted, "If so, this merely begs the question as to why the Tax Department utilized a percentage in the first instance."[12] Moreover, Antero's original appeals to the county commissions, sitting as boards of assessment appeals, challenged the assessment of "all producing well types." As explained in Antero's briefs in the Prior Appeals, "For tax year 2016, Antero submitted information showing average operating expenses for *all producing well types* in West

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[7] *Steager*, 242 W. Va. at 215, 832 S.E.2d at 141 (footnotes omitted) (emphasis added). This statement accurately summarized Antero's position in the Prior Appeals, where it argued, for example, "that use of its actual operating expenses represents the best method to determine the fair market value, for its producing wells, as required by the State Constitution and West Virginia Code, and its initial letter requesting a hearing was based on application of actual expenses in calculating the fair market value of Antero's wells." A.R. 1738 (No. 20-0530), A.R. 1738 (No. 20-0531), A.R. 729 (20-0579); *see also* A.R. 1739 (Antero also noted that "section 4.3 of the Rule contemplates a single average annual industry operating expense for wells," and that "*the Tax Department uses different averages and caps for different types of wells*, despite no express discussion of this methodology in the Rule.") (emphasis added) (No. 20-0530), A.R. 1739 (No. 20-0531), A.R. 730 (20-0579).

[8] *Steager*, 242 W. Va. at 225, 832 S.E.2d at 151 (quoting W. Va. Code St. R. §§ 110-1J-4.3).

[9] A.R. 1696-1761 (No. 20-0530), A.R. 1696-1761 (No. 20-0531), A.R. 700-749 (No. 0579).

[10] A.R. 1697 (emphasis added) (No. 20-0530), A.R. 1697 (No. 20-0531), A.R. 701 (No. 20-0579).

[11] *Steager*, 242 W. Va. at 224, 832 S.E.2d at 150 (emphasis added).

[12] *Id.* at 224 n.23, 832 S.E.2d at 150 n.23.

Virginia," which was submitted as a hearing Exhibit.[13] The "weighting methodology" for oil and natural gas wells is simply a specific application of the same "percentage expression of the operating expense deduction" valuation method that was disallowed in *Steager*.[14] The weighting methodology—like all percentage expressions of the operating expense deduction—was encompassed within Antero's general objection to assessments of "all producing well types," and the Court's ruling covered all wells subject to the same "singular monetary average" requirement.

In that regard, Respondents' characterizations of Antero's original objection, the issues in the Prior Appeals, and the Court's ruling are overly narrow. While Antero's challenge of the "cap" imposed by Administrative Notice 2016-08 was a clear focus of the Prior Appeal, Antero also raised the issue whether the Tax Department properly applied the statute and fairly assessed the fair market value for producing wells because Antero's actual operating expenses exceeded the percentage assigned by Tax Department. As noted in *Steager*, "Antero maintained that its actual expenses were 23% for tax year 2016 and 36% for tax year 2017, respectively," exceeding the 20% allowance for operating expenses under the annual administrative notices.[15] Antero thus maintained that "the Tax Department incorrectly and *unfairly ignored the actual operating expenses* and instead relied on the maximum calculations found in its valuation variables document and administrative notice. By failing to consider Antero's actual operating expenses, the Tax Department overvalued Antero's wells and did not assess them at their true and actual value."[16]

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[13] *See* A.R. 1737 (emphasis added) (No. 20-0530), A.R. 1737 (No. 20-0531), A.R. 60 (No. 20-0579).

[14] *See* Syl. Pt. 12, *Steager, supra.*

[15] *Steager*, 242 W. Va. at 215 n.4, 832 S.E.2d at 141 n.4.

[16] A.R. 1704 (emphasis added) (No. 20-0530), A.R. 1704 (No. 20-0531), A.R. 707 (No. 20-0579).

Finally, as explained in Antero's Reply in Opposition to the Respondents' Motion for Summary Judgment, under the Tax Department's pre-*Steager* percentage-based calculation, the "weighting methodology" was "moot" because the 30% average utilized for operating expenses associated with oil producing wells was higher than the 20% average utilized for horizontal Marcellus Shale wells. Applying the "weighting methodology" in the context of weighing a higher percentage for oil producing wells would have resulted in a higher overall operating expense percentage, resulting in effectively no change to Antero's tax liability. However, the Tax Department's application of the "weighting methodology" between two "singular monetary values" following remand results in a material change in Antero's tax liability. For this reason, Antero did not specifically reference the "weighting methodology" issue in the Prior Appeals because it was not, at the time, material to Antero's tax liability.[17] The "weighting methodology" was, however, generally addressed in Antero's broader challenge to the Tax Department's original valuations that included the same percentage-based average deductions this Court invalidated.

Thus, the Tax Department quotes Antero's Reply out of context.[18] Antero stated that it did not "*specifically* raise the issue of 'weighting.'"[19] It did not, however, concede that the "weighting methodology" was not *generally* raised in the Prior Appeals as a component of Antero's broader challenge that the original valuations did not reflect the actual operating expenses or the true and accurate value of the properties at issue. The Tax Department omits the word "specifically" when it quotes Antero's reply, which leads to the mischaracterization that "Antero acknowledges that it chose not to 'raise the issue of weighting.'"[20] Read in its full context, Antero's reply statement

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[17] A.R. 2097 n.3 (No. 20-0530), A.R. 2103 n.3 (No. 20-0531), A.R. 943 n.3 (No. 20-0579).

[18] *See* Tax Comm'r's Resp. at 17 (Nos. 20-0530, 20-0531, 20-0579).

[19] A.R. 2097 (emphasis added) (No. 20-0530), A.R. 2103 (No. 20-0531), A.R. 943 (No. 20-0579).

[20] Tax Comm'r's Resp. at 17 (Nos. 20-0530, 20-0531, 20-0579).

merely clarified why the "weighting methodology" was not *specifically* referenced in the Prior Appeals: because it was not material until after *Steager*. Nevertheless, the impropriety of the "weighting methodology"—like all percentage-based valuations—was encompassed by the parties' Prior Appeals and is now a component of the Mandate in this matter that must be followed.

In summary, Respondents mischaracterize Antero's arguments in the Prior Appeal, this Court's ruling, and now the Mandate in an overly narrow way that obscures the fact that Antero's position has always been that the Tax Department's valuation does not reflect the "true and actual value,"[21] of "all producing well types,"[22] specifically including the assessment of "horizontal Marcellus Shale *oil and gas* wells."[23]

2. Antero's objection to the Tax Department's new application of the "weighting methodology" is consistent with *Steager*'s Mandate. In *Steager*, this Court directed the Circuit Court to "fix assessments" against Antero on remand to ensure they are "consistent with this opinion." The Court explained that "[t]his Court does not have the authority to fix assessments because such authority is vested by statute in the circuit courts."[24] Under these directions, upon remand, the Circuit Court accepted proffers from Antero, the County, and the Tax Department for the re-valuation of Antero's *ad valorem* tax liability.[25] Antero provided lists of wells to be re-valued according to *Steager*, which included wells producing natural gas and wells producing *both*

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[21] A.R. 1704 (No. 20-0530), A.R. 1704 (No. 20-0531), A.R. 707 (No. 20-0579).

[22] A.R. 1737 (No. 20-0530), A.R. 1737 (No. 20-0531), A.R. 60 (No. 20-0579).

[23] A.R. 1697 (No. 20-0530), A.R. 1697 (No. 20-0531), A.R. 701 (No. 20-0579).

[24] *Steager*, 242 W. Va. at 225, 832 S.E.2d at 151 (quoting *Matter of U.S. Steel Corp.*, 165 W. Va. 373, 379, 268 S.E.2d 128, 132 (1980)).

[25] A.R. 2199 (No. 20-0530), A.R. 2206 (No. 20-0531), A.R. 1027 (No. 0579).

oil *and* natural gas.[26] The Tax Department then provided a re-valuation based on Antero's list,[27] and Antero filed a motion explaining why the Tax Department's application of the weighting methodology fails to comply *Steager*'s holding.[28] The Circuit Court found that "the parties do not dispute the list of which wells . . . should be re-valued."[29] Similarly, the parties did not raise objections to the soundness of Antero's and the Tax Department's differing calculations based on their differing applications of *Steager*. The crux of the parties' dispute is thus a legal question—not a factual one—whether *Steager* applies to wells that produce both oil and natural gas.

The facts about which wells are at issue and their production quantities were not genuinely in dispute. In that context, the Circuit Court was right to accept proffers of the parties' competing spreadsheet calculations based on their differing applications of *Steager*. To the extent that the County disputed the facts underlying these competing calculations, it should have raised that objection in its Response to Antero's Motion for Summary Judgment,[30] not for the first time here.[31]

Moreover, the Circuit Court's review of the proffered competing corrective spreadsheets is consistent with the Mandate or the statute. The Mandate authorized the Circuit Court to accept proffers of evidence for the re-valuation of Antero's producing wells to ensure that the assessment applies a "singular monetary average." As this Court explained, circuit courts are vested with

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[26] A.R. 2045-50 (No. 20-0530), A.R. 2045-52 (No. 20-0531), A.R. 915 (No. 20-0539).

[27] A.R. 2045-50 (No. 20-0530), A.R. 2045-52 (No. 20-0531), A.R. 915 (No. 20-0539).

[28] A.R. 2037-62 (No. 20-0530), A.R. 2045-52 (No. 20-0531), A.R. 915 (No. 20-0539).

[29] A.R. 2199 (No. 20-0530), A.R. 2206 (No. 20-0531), A.R. 1027 (No. 0579).

[30] A.R. 2182-94 (No. 20-0530), A.R. 2189-2201 (No. 20-0531).

[31] Indeed, in its Response at pages 15 to 18, the County still does not dispute the underlying facts supporting the parties' cross-motions for summary judgment, which are the list of wells for re-valuation and their production quantities. While the Respondent questions the "Petitioner's revaluation spreadsheet," located at A.R. 2037-50 (No. 20-0530), A.R. 2061-2064 (No. 20-0531), the Respondent contrarily fails to question the Tax Department's competing spreadsheet. Antero's spreadsheet, however, like the Tax Department's, is simply a summary of Antero's legal argument for how to apply *Steager* to the undisputed facts in calculating a proper re-valuation on remand.

authority to fix assessments by statute.[32] The statute, in turn states that "the circuit court shall, by an order entered of record, correct the assessment, and fix the assessed value of the property" if it determines that any property has been assessed at more than sixty percent of its true and actual value.[33] In other words, the Circuit Court is empowered to correct the assessments directly and is not required to remand to the county commissions for corrections. The Circuit Court did not exceed its reviewing and correction authority by accepting the parties' proffers of competing spreadsheets showing corrective calculations following *Steager*.[34]

The Court's Mandate thus required the Circuit Court to "fix assessments" against Antero "consistent with this opinion," based on what has become a new legal dispute about what *Steager* requires for the re-calculation, as shown by the parties' competing submissions. Antero's position is that the re-valuation is inconsistent with *Steager* and thus violates the Mandate. Antero is within its right to assert this objection to a re-valuation offered for the first time on remand because the Court's direction to "fix assessments . . . consistent with this opinion" necessarily means that Antero has a right to raise any *inconsistency* with the Court's opinion through this later appeal.

Therefore, contrary to the County's argument, the mandate rule does not preclude Antero's arguments but, instead, directs the Circuit Court to fix the assessments for all producing wells

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[32] *Steager*, 242 W. Va. at 225, 832 S.E.2d at 151.

[33] W. Va. Code § 11-3-25(d).

[34] *In re Stonestreet*, 147 W. Va. 719, 131 S.E.2d 52 (1963) also does not suggest a different conclusion. There, the petitioners failed to file with the Circuit Court certified copies of the record of appeal from the Board of Review and Equalization. *Id.* at 722, 131 S.E.2d at 54. The circuit court therefore did not have a record for review and denied the petition. This Court agreed with the respondent that "inasmuch as the petition . . . was not accompanied by any record, papers or orders, certified in the manner provided by the foregoing sections, the application of the petitioners for a review of the assessment was properly refused by the circuit court by its order entered June 18, 1962." *Id.* at 723, 131 S.E.2d at 55. In this case, by contrast, the record before the Board of Assessment Appeals was filed with the Circuit Court, which invoked the Circuit Court's authority to make a review and corrections to fix the assessments.

consistent with *Steager*. Unlike in *State ex rel. Frazier & Oxley, L.C. v. Cummings*,[35] where the circuit court on remand allowed the plaintiff to file an amended complaint to assert a new claim, here Antero is asking the Court to apply its prior ruling to its existing claim under W. Va. Code § 11-3-25(c) that it was wrongly assessed. By contrast, corrections to the Tax Department's new valuation errors are encompassed by the Court's direction to "fix assessments . . . consistent with this opinion," and not foreclosed by the mandate rule.

Finally, it bears emphasis that the Respondents' utilization of the mandate rule in this context is impractical and unfair. In effect, the Respondents argue that Antero should have anticipated the Tax Department's flawed distinction of an opinion that was yet to be issued, waiving Antero's right to challenge an argument that was yet to be made, without similarly preventing the Respondents from utilizing their own new interpretation of *Steager* for the same case. Antero cannot waive its right to challenge an argument that has not yet been made.

B. THE JUNE 2020 GUIDANCE MUST BE APPLIED TO ANTERO'S OPEN TAX DISPUTES UNDER STATE APA AND DUE PROCESS PRINCIPLES.

Antero's brief also established that the Tax Department's June 2020 Guidance—which allows deductions for actual expenses and concedes that the prior approach of disallowing these deductions "overvalues" natural gas wells for tax purposes—merely clarifies existing state tax law and thus must be applied to Antero's open tax disputes.[36] As such, the Tax Department's decision to apply the June 2020 prospectively to only tax year 2021, and its later arbitrary and retaliatory attempt to "withdraw" the Guidance, both violate the State APA and state and federal due process principles. The Tax Department's and County's responses are meritless.

1. The Tax Department and County, first, say this Court should not consider the June

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[35] 214 W. Va. 802, 591 S.E.2d 728 (2003).

[36] Antero's Br. at 19-24 (No. 20-0530), 18-23 (Nos. 20-0531, 20-0579).

2020 Guidance or Antero's State APA and due process arguments because the Business Court did not address them below and Antero "waived" them.[37] The argument is disingenuous. The Business Court did not address the June 2020 Guidance—not because of any conduct by Antero—but because the Tax Department waited to issue the June 2020 Guidance until *after* the Business Court entered the orders now on appeal. The Tax Department admits the "order on appeal was entered by the Business Court on June 15, 2020"—yet it hides the June 2020 Guidance's issuance date by calling it a mere "notice issued ... *in June of 2020*."[38] That is improper. The June 2020 Guidance was issued on June 30, 2020—15 days *after* the orders now on appeal—meaning the Business Court *could not* have considered the Guidance in its June 15, 2020 orders.[39] And, as the Tax Department recognizes, Antero in no way slept on its rights to "waive" its arguments.[40] Instead, Antero immediately sought Rule 60(b) relief based on the June 2020 Guidance and, to ensure preservation of these issues, included its State APA and due process arguments in these appeals. The Tax Department then engaged in extremely arbitrary conduct. It contended that the

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[37] Tax Dep't's Resp. at 21-25, 32-34 (Nos. 20-0530, 20-0531, 20-0579); County's Resp. at 19-20 (Nos. 20-0530, 20-0531).

[38] *Compare* Tax Dep't's Resp. at 22 (Nos. 20-0530, 20-0531, 20-0579) *with id.* at 8.

[39] This Court denied Antero's request to include the June 2020 Guidance in the record on appeal—but as noted before, this Court can—and should—still take judicial notice of this publicly issued government document and the publicly issued government document purporting to "withdraw" the June 2020 Guidance, the latter of which is readily available on the Tax Department's website. (The Tax Department has improperly removed the June 2020 Guidance from its website, during pending litigation concerning the effect of that very Guidance no less, further demonstrating its efforts to shield government conduct from state judicial review). *See* Notice of Withdraw of Important Notice to Producers of Natural Gas and Oil for Property Tax Year 2021, W. Va. State Tax Dep't (October 9, 2020), https://tinyurl.com/yhr8ceeo. As Antero explained before, Antero's Br. at 19 n.50 (No. 20-0530), 18 n.50 (Nos. 20-0531, 20-0579), "[c]ourts 'may take judicial notice on [their] own,' and judicial notice may be taken 'at any stage of the proceeding.'" *Appalachian Mountain Advocs. v. WVU*, No. 19-0266, 2020 WL 3407760, at *4 n.3 (W. Va. June 18, 2020) (memorandum decision) (citing R. Evid. 201(c)–(d)). "[C]ourts 'may, and should, take notice ... of current events of a public nature.'" *Id.* (citation omitted). Courts "are not required to close [their] eyes to things which are in plain view, especially in matters which concern the government of the State, of which [courts] are a part.'" *Id.* (citation omitted).

[40] Tax Dep't's Resp. at 8 (Nos. 20-0530, 20-0531, 20-0579)

Business Court lacked jurisdiction to address the June 2020 Guidance *because of these appeals* raising the same issues—an argument the Business Court erroneously adopted. So, the Tax Department is improperly trying to have it both ways here: It urged the Business Court to reject consideration of the June 2020 Guidance because *this Court* was considering the issue in *these appeals*, and now it says this Court, too, cannot consider the June 2020 Guidance because *the Business Court* did not consider the issue below, at the Tax Department's urging. Effectively, then, the Tax Department's position is that Antero has *no state judicial forum* for review of the June 2020 Guidance, which is untenable as a "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[41]

Respondents' other procedural arguments are meritless as well. The Tax Department, for example, admits this Court has broad discretion to consider "constitutional issues" when they are "controlling,"[42] such as Antero's due process arguments. Yet the Tax Department claims this discretion does not apply because the June 2020 Guidance somehow "could have been raised on the first appeal" before this Court in *Steager*. That is equally disingenuous. This Court decided *Steager* on June 5, 2019—391 days *before* the Tax Department issued its Guidance on June 30, 2020.[43] Antero thus could not have raised, and this Court could not have addressed, the June 2020 Guidance in *Steager*—time travel is not yet possible. The Tax Department also says this Court's discretion to consider constitutional issues does not apply because Antero's June 2020 Guidance arguments are based on disputed facts.[44] That is wrong too. *None* of the facts are disputed, as *all* of them appear on the face of the publicly issued June 2020 Guidance itself. Thus, under the Tax

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[41] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[42] Tax Dep't's Resp. at 23 (Nos. 20-0530, 20-0531), Tax Dep't's Resp. at 22 (No. 20-0579).

[43] *See Steager*, 242 W. Va. 209, 832 S.E.2d 135 ("Filed: June 5, 2019").

[44] Tax Dep't's Resp. at 24-25 (Nos. 20-0530, 20-0531, 20-0579).

Department's own standard, this Court should decide Antero's due process claim, as it is "purely legal in nature and lends itself to satisfactory resolution on the existing [public] record."[45]

2. The Tax Department and County next contend that this Court cannot consider the June 2020 Guidance's effect on Antero's open tax disputes under law-of-the-case principles because *Steager* already held that the Tax Department's disallowance of deductions for actual expenses is lawful.[46] That is mistaken. In *Steager*, the Tax Department was defending its decision to *disallow* these deductions under its then-reading of the applicable legislative rules—a reading *Steager* upheld as a "reasonable" use of discretion given the rules' "silence" on the issue.[47] Then, exercising the very discretion that *Steager* affirmed, the Tax Department decided to *allow* these deductions after all through the June 2020 Guidance, in response to which Antero argued that the June 2020 Guidance merely clarifies existing law and thus must be applied to Antero's open tax disputes. *Steager* thus had nothing to do with—and certainly did not resolve for law-of-the-case purposes—the June 2020 Guidance's effect. Nor could it have done so, since the June 2020 Guidance was issued *more than a year after Steager* was decided in June 2019. Moreover, the legislative-rule provision at issue in *Steager* is different from the legislative-rule provision that the June 2020 Guidance clarifies. *Steager* analyzed the State's interpretation of the word "operating expenses" found in W. Va. Code St. R. § 110-1J-3.16 and thus dealt with "*below* the line" deductions.[48] The June 2020 Guidance, in contrast, clarifies a different provision, W. Va. Code St. R. § 110-IJ-3.8, defining "[g]ross receipts ... at the field line point of sale," and thus deals with

[45] Tax Dep't's Resp. at 24 (Nos. 20-0530, 20-0531, 20-0579) (quoting *State v. Greene*, 196 W. Va. 500, 505, 473 S.E.2d 921, 926 (1996) (Cleckley, J., concurring)).

[46] Tax Dep't's Resp. at 30-32 (Nos. 20-0530, 20-0531, 20-0579); County's Resp. at 21-23 (Nos. 20-0530, 20-0531).

[47] *Steager*, 242 W. Va. at 221-24, 832 S.E.2d at 147-150.

[48] *See id.*

"*above* the line" deductions.[49] So law-of-the-case principles do not apply, as *Steager* did not resolve (and could not have resolved) *any* issues about the June 2020 Guidance.

3. Last, the Tax Department says Antero's State APA and due process arguments concerning the June 2020 Guidance fail on the merits, but the Tax Department is wrong there too.

First, the Tax Department says its own June 2020 Guidance is "ineffective and void" and was "withdrawn" in October 2020 because it did not go through the State APA's "mandatory procedures" requiring notice and comment.[50] This is meritless. Indeed, the Tax Department's own logic demonstrates that its attempt to withdraw the June 2020 Guidance was arbitrary and capricious and thus invalid under the State APA and due process principles. The Tax Department repeatedly claims that "*all rules*" must go through notice-and-comment procedures under the State APA.[51] The State APA defines a "rule" broadly as any "statement[s] of policy or interpretation ... affecting ... rights, privileges or interests" or that purports to "repeal" a prior agency pronouncement.[52] Under this broad definition, the Tax Department's original decision to disallow deductions for actual expenses in *Steager* was unquestionably a State APA "rule," as was the Tax Department's decision to issue the October 2020 Withdrawal purportedly repealing the June 2020 Guidance. Yet *neither* "rule" went through notice-and-comment procedures, even though the Tax Department now tells this Court that "*all* rules" must do so to be valid.[53] So, the Tax Department has set up the following convenient rule for itself: It must follow the State APA's "mandatory

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[49] June 2020 Guidance at 1 (discussing W. Va. Code St. R. § 110-IJ-3.8).

[50] Tax Dep't's Resp. at 26 (Nos. 20-0530, 20-0531, 20-0579). Notably, the Tax Department's argument here requires consideration (and thus judicial notice of) another publicly issued government document—the October 2020 Withdrawal (*see* https://tinyurl.com/yhr8ceeo).

[51] Tax Dep't's Resp. at 26 (Nos. 20-0530, 20-0531, 20-0579).

[52] W. Va. Code § 29A-1-2(j).

[53] Tax Dep't's Resp. at 26 (Nos. 20-0530, 20-0531, 20-0579).

procedures" when it wants to *reduce* tax liability (*e.g.*, through the June 2020 Guidance), but it is free to defy those same "mandatory procedures" when it wants to *increase* tax liability (*e.g.*, through the original decision to disallow the deductions, and through the October 2020 Withdrawal reinstating that disallowance). That is arbitrary and capricious, as an agency cannot flit "serendipitously from case to case, like a bee buzzing from flower to flower, making up its rules and policies as it goes along."[54] Besides, the June 2020 Guidance is best characterized as "mere instructions" that clarify the State's tax approach based on statutes and legislative rules that remain unchanged and that therefore avoid the State APA's definition of a "rule" and its alleged "mandatory procedures."[55] The October 2020 Withdrawal also fails entirely to mention—let alone to consider—reliance interests and is invalid on that separate ground as well. "When an agency changes course," as the Tax Department did here through the October 2020 Withdrawal, "it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account," and "[i]t would be arbitrary and capricious to ignore such matters."[56] "Yet that is what the [State] did" here by failing to even mention reliance.[57] The October 2020 Withdrawal is thus invalid for this additional reason alone. And the "effect of invalidating an agency rule is to reinstate the rule previously in force," the June 2020 Guidance.[58]

Second, the Tax Department says the June 2020 Guidance cannot be applied to open tax disputes because "retroactive agency rulemaking" is prohibited.[59] Of course *truly* "retroactive"

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[54] *Hoover v. Berger*, 199 W. Va. 12, 19, 483 S.E.2d 12, 19 (1996).

[55] *See* W. Va. Code §§ 29A-1-2(j) ("'Rule' … does not include … mere instructions"), 29A-3-1 (requiring procedures only for "rules").

[56] *Dep't of Homeland Sec. v. Regents of Univ. of California*, 140 S. Ct. 1891, 1915 (2020).

[57] *Id.*

[58] *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc); *see also, e.g.*, *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (same).

[59] Tax Dep't's Resp. at 27-29 (Nos. 20-0530, 20-0531, 20-0579).

rules are disfavored—*i.e.*, rules that "operate[] upon transactions which have been completed or upon rights which have been acquired ... prior to [the rules'] passage,"[60] as they could be used "as a means of retribution against unpopular groups or individuals."[61] So, that is why Antero relies on a settled *exception* to this rule against retroactivity to argue that the June 2020 Guidance must be applied to open tax disputes: Rules that merely *clarify* existing law are *not* impermissibly "retroactive" and so *must* be applied to open disputes—*i.e.*, disputes in which "transactions," by definition, have not "been completed" and concerning "rights" that have not "been acquired" definitively.[62] As Antero explained before, the June 2020 Guidance merely clarifies existing tax statutes and legislative rules, and must be applied to Antero's open tax disputes.[63]

Third, the Tax Department says Antero's due process arguments fail because the Tax Department's conduct is "not arbitrary or capricious in any sense."[64] This goes nowhere. The Tax Department has repeatedly flip-flopped its position on deductions for actual expenses without any reasoned explanation or consideration of reliance interests. Initially, in *Steager*, the Tax Department took the position that the deductions were not allowed, without going through any of the notice-and-comment procedures that it now claims "all rules" must follow.[65] Then, the Tax Department issued the June 2020 Guidance, allowing the deductions after all and admitting that its prior position overvalued wells for tax purposes—yet without any explanation, the Tax

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[60] *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 617, 803 S.E.2d 582, 587 (2017).

[61] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

[62] *See Martinez*, 239 W. Va. at 617, 803 S.E.2d at 587; *see, e.g.*, *Williams v. Dep't of Motor Vehicles*, 187 W. Va. 406, 410, 419 S.E.2d 474, 478 (1992).

[63] Antero's Br. at 19-24 (No. 20-0530), 18-23 (Nos. 20-0531, 20-0579); *e.g.*, *Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001) (clarifications apply to open disputes); *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506 (3d Cir. 2008) (same).

[64] Tax Dep't's Resp. at 29-30 (Nos. 20-0530, 20-0531, 20-0579).

[65] *Id.* at 26.

Department refused to apply the June 2020 Guidance's clarification of existing law to open tax disputes, ignoring decades of precedent without explanation.[66] Then, when Antero challenged this refusal in court, the Tax Department abruptly attempted to "withdraw" the June 2020 Guidance, claiming it was invalid because it did not go through notice-and-comment rulemaking—even though neither the original decision to disallow the deductions nor the October 2020 Withdrawal reinstating that disallowance went through those "mandatory" notice-and-comment procedures.[67] The Tax Department has thus defied what it claims are mandatory rules to extract millions of dollars in taxes from Antero, and now it is feigning reverence for those very same rules in an attempt to keep the money. Due process precludes this "[a]rbitrary and irrational" state action.[68]

C. THE STATE'S TAX REGIME VIOLATES EQUAL PROTECTION AND DORMANT COMMERCE CLAUSE PRINCIPLES.

Antero's brief also established that the Tax Department's discriminatory *ad valorem* tax regime also violates settled federal and state equal protection and dormant Commerce Clause principles based in part on admissions at public tax hearings in October 2019.[69] To summarize - Antero chooses to sell its gas out of state, meaning it incurs expenses to get its gas to out-of-state markets that are higher than those incurred by producers who sell their gas only or primarily in West Virginia. Yet the Tax Department gives out-of-state sellers like Antero and in-state sellers the same "average" deduction and does not allow them to deduct their actual expenses. This has a disparate impact on out-of-state sellers like Antero, who incur higher nondeductible actual

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[66] *See* Antero's Br. at 19-24 (No. 20-0530), 18-23 (Nos. 20-0531, 20-0579).

[67] *See id.* at 6 n.11 (No. 20-0530), 5 n.11 (Nos. 20-0531, 20-0579).

[68] *Thomas v. Rutledge*, 167 W. Va. 487, 280 S.E.2d 123, 128 (1981); *see also, e.g., O'Neil v. City of Parkersburg*, 160 W. Va. 694, 702, 237 S.E.2d 504, 509 (1977).

[69] *See, e.g.*, Antero's Br. at 30 & n.107 (No. 20-0530), 28 & n.107 (Nos. 20-0531, 0579) (citing Tr. of Oct. 10, 2019 Hrg. Before Harrison Cty. Comm'n at 33; Tr. of Oct. 10, 2019 Hrg. Before Tyler Cty. Bd. of Assessment Appeals at 27; Tr. of Oct. 8, 2019 Hrg. Before Doddridge Cty. Comm'n at 27).

expenses to get their gas to out-of-state markets. The regime thus effectively operates as a tax on conducting business across state lines and gives a windfall to and effectively subsidizes in-state sellers at the expense of out-of-state sellers, in violation of equal protection and dormant Commerce Clause principles. The Tax Department's responses are, again, meritless.

1. The Tax Department, first, says this Court should not exercise its discretion to consider these dispositive constitutional issues because Antero could have raised them in *Steager* and because they turn on disputed facts.[70] Yet again the argument is disingenuous. ***First***, Antero's equal protection and dormant Commerce Clause arguments are based on the June 2020 Guidance and the Tax Department's discriminatory admissions on the record at public tax hearings in *October 2019—four months after* this Court's June 2019 decision in *Steager*—that Antero should simply "sell [its] gas at the wellhead" in West Virginia if it wants to "pay less taxes." Antero thus could not have raised these later admissions in *Steager*—again, time travel is not yet possible. (For the same exact reasons, the Tax Department's law-of-the case contentions as to Antero's equal protection and dormant Commerce Clause arguments[71] are meritless, as *Steager* did not and could not have decided those arguments.) ***Second***, Antero's equal protection and dormant Commerce Clause arguments turn—not on any disputed facts—but on the admissions of the Tax Department during these public hearings, which appear in black and white in the transcripts and cannot be disputed by the Tax Department. So once again, under the Tax Department's own legal standard, this Court should consider these constitutional issues, as they are "purely legal in nature" and lend themselves to "satisfactory resolution on the existing [public] record."[72]

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[70] Tax Dep't's Resp. at 23-25, 32-34 (Nos. 20-0530, 20-0531, 20-0579).

[71] *Id.* at 30-32.

[72] *Id.* at 24 (quoting *State v. Greene*, 196 W. Va. 500, 505, 473 S.E.2d 921, 926 (1996) (Cleckley, J., concurring)).

2. Last, the Tax Department says Antero's equal protection and dormant Commerce Clause arguments fail on the merits.[73] The Tax Department is incorrect.

First, the Tax Department is wrong about Antero's equal protection arguments—in fact, the Tax Department's assertions make the equal protection violations even clearer. The Tax Department admits that a state tax regime must treat "'all persons within' a class 'equally.'"[74] But the Tax Department's *only* assertion of equal treatment is that "*none of them*"—*i.e.*, in-state gas sellers and out-of-state gas sellers alike—"are permitted to deduct their [actual] expenses," as they all get the *same* "average" deduction.[75] This explains why the tax regime violates bedrock equal protection principles. In-state and out-of-state sellers are undisputedly selling the same product: Natural gas produced in West Virginia. But in-state sellers incur nondeductible actual expenses to get their gas to West Virginia markets that are lower than out-of-state sellers who must get their gas to markets out of state. Yet the Tax Department gives both sellers *the same deduction*. The Tax Department's regime thus gives in-state sellers a windfall in the form of reduced tax liability while burdening out-of-state sellers with higher tax liability—solely because they choose to sell their gas across state lines. The taxable value of Antero's property is thereby significantly and artificially inflated in relation to local competitors' undisputedly "comparable neighboring property," which is in turn "[i]ntentional[y]" and "systematic[ally] undervalue[d]," given that local sellers do not incur significant, nondeductible postproduction expenses.[76] These "gross disparities in the assessed value of generally comparable property contravene the constitutional right of one

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[73] Tax Dep't's Resp. at 35-38 (No. 20-0530); Tax Dep't's Resp. at 36-38 (Nos. 20-0531, 20-579).

[74] *Id.* at 35 (Nos. 20-0530, 20-0531, 20-0579).

[75] *Id.*

[76] *Allegheny Pittsburgh Coal Co. v. Webster Cty. Comm'n*, 488 U.S. 336, 342, 344 (1989).

taxed upon the full value of his property" and thus deny Antero "equal protection of the law."[77] The Tax Department repeatedly cites *Murray Energy Corp. v. Steager*,[78] but that case explicitly recognizes that "even the uniform use of a [tax] formula"—such as the "average" deduction at issue here—"against indiscriminately valued properties may create equality issues."[79]

Second, the Tax Department is wrong about Antero's dormant Commerce Clause arguments—again, the arguments bring the constitutional violations into sharper relief. To start, the Tax Department contends that "crossing state lines" is somehow "irrelevant" within the *ad valorem* tax regime, as actual expenses cannot be deducted "whether they are incurred in West Virginia or in any other state."[80] This fails. A simplified hypothetical demonstrates why the argument is reductive and flawed. Assume the Tax Department offers all producers the same $100 "average" deduction against actual expenses. And say a West Virginia producer incurs only $50 in actual expenses to get its gas to a local West Virginia market, while Antero incurs $300 to get the same gas to an out-of-state market in Ohio. The West Virginia producer gets a tax windfall in this hypothetical: It gets a $100 deduction against its only $50 in actual expenses. Yet Antero is forced to pay higher taxes: It gets only a $100 deduction against its much-higher $300 in actual expenses, meaning it is effectively taxed on the difference of $200. The *sole reason* for this disparate tax treatment? Antero decided to sell its gas across state lines in interstate commerce. That is the very essence of a dormant Commerce Clause violation. The tax regime illegally taxes gas sales "more heavily" when they "cross[] state lines"[81] and directly benefits local sellers through

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[77] *Id.* at 346.

[78] Tax Dep't's Resp. at 35-36 (Nos. 20-0530, 20-0531, 20-0579).

[79] *Murray Energy Corp.*, 241 W. Va. at 644.

[80] Tax Dep't's Resp. at 36-37 (Nos. 20-0530, 20-0531, 20-0579).

[81] *Armco Inc. v. Hardesty*, 467 U.S. 638, 642-46 (1984).

reduced taxes at out-of-state sellers' expense.[82] Again, the Tax Department has admitted as much by admonishing Antero to simply "sell [its] gas at the wellhead" in West Virginia if it wants to "pay less taxes."[83] The Tax Department's arguments thus founder. The Tax Department also misunderstands its *own* tax regime by arguing that the risk of multiple taxation—a separate dormant Commerce Clause violation in and of itself—is not present here because the "property being taxed is entirely located in [West Virginia]."[84] This is simply wrong. Antero does not pay the taxes at issue based on the value of property statically located in West Virginia—it pays those taxes based on the value *of the gas* that its properties produce.[85] And just like the "rail cars," "vessels," and "aircrafts" that the Tax Department describes as "travel[ing] in interstate commerce,"[86] natural gas can be—and almost *always* is in Antero's case—transported across state lines to be sold in out-of-state markets in interstate commerce. Thus, as Antero's brief explained,[87] the Tax Department's regime subjects Antero to the "risk of a multiple [tax] burden,"[88] and the Tax Department's counterarguments fail.

II. CONCLUSION

Accordingly, Antero respectfully requests that the Court overrule the Circuit Court's orders and remand for a correct assessment.

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[82] *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328-32 (1977).

[83] Tr. of Oct. 10, 2019 Hrg. Before Harrison Cty. Comm'n at 33; *see also* Tr. of Oct. 10, 2019 Hrg. Before Tyler Cty. Bd. of Assessment Appeals at 27 (same); Tr. of Oct. 8, 2019 Hrg. Before Doddridge Cty. Comm'n at 27 (same).

[84] Tax Dep't's Resp. at 37-38 (Nos. 20-0530, 20-0531, 20-0579).

[85] W. Va. Code St. R. §§ 110-1J-3.8, -4.1 (*ad valorem* tax based on "gross receipts" less expenses).

[86] Tax Dep't's Resp. at 37 (Nos. 20-0530, 20-0531, 20-0579).

[87] Antero's Br. at 30 (No. 20-0530), 28 (Nos. 20-0531, 0579).

[88] *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939); *see also, e.g.*, *Maryland Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1794-95, 1801-02 (2015).

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CERTIFICATE OF SERVICE

I certify that on March 10, 2021, I served the foregoing "REPLY BRIEF OF THE PETITIONER" on the Respondents' counsel by email and by having a true copy thereof deposited in the United States mail, postage prepaid, as follows:

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