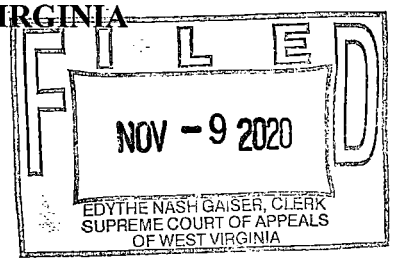
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0579



ANTERO RESOURCES CORPORATION,
Petitioner Below, Petitioner,
v.

THE HONORABLE DALE STEAGER, WEST VIRGINIA TAX COMMISSIONER, THE HONORABLE ARLENE MOSSOR, ASSESSOR OF RITCHIE COUNTY, AND THE COUNTY COMMISSION OF RITCHIE COUNTY,
Respondents Below, Respondents.

Honorable Christopher C. Wilkes, Judge
Circuit Court of Ritchie County
Civil Action No. 17-AA-1

BRIEF OF THE PETITIONER

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2. The June 2020 Guidance clarifying the availability of *ad valorem* tax deductions for postproduction expenses under existing law must be applied retroactively to pending disputed tax years under settled administrative law, thus warranting reversal.

3. The Tax Department's refusal—without explanation—to apply the June 2020 Guidance retroactively to pending disputed tax years is arbitrary and capricious under the West Virginia State Administrative Procedures Act and violates due process, thus warranting reversal.

4. The Tax Department's *ad valorem* tax regime—which bars deductions for postproduction expenses—undervalues the wells of in-state natural gas sellers while overvaluing the comparable wells of out-of-state sellers and therefore violates state and federal equal protection principles, thus warranting reversal.

5. The Tax Department's *ad valorem* tax regime—which bars deductions for postproduction expenses—benefits in-state natural gas sellers at the expense of out-of-state sellers and therefore violates dormant Commerce Clause principles, thus warranting reversal.

II. STATEMENT OF THE CASE

A. INTRODUCTION

This matter comes before the Court for the second time following a successful appeal by Antero Resources Corporation ("Antero") as part of consolidated proceedings in *Steager v. Consol Energy, Inc.*, Case No. 18-0124 (the "Prior Appeal"). Antero and the Respondents herein, the County Commission of Ritchie County sitting as a Board of Assessment Appeals (the "BAA"), the Honorable Arlene Mossor, Assessor of Ritchie County, and the Honorable Dale W. Steager, State Tax Commissioner (the "Tax Commissioner" or "Tax Department") were parties to the Prior Appeal, which resulted in a decision reported in *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019) (hereinafter "*Steager v. Consol Energy*").

In *Steager v. Consol Energy*, this Court affirmed, in part, reversed, in part, and remanded for further proceedings consistent with this Court's opinion following a decision by the Circuit Court of Ritchie County in the Business Court Division. This Court held that the legislative rule for calculating operating expense deductions from producing oil and natural gas wells' property tax assessments, W. Va. Code St. R. §§ 110-1J-1, *et seq.*, "requires the use of a singular monetary average [operating expense] deduction" in valuing producing oil and natural gas wells.[1]

This Court concluded that "the business court's relief erroneously required use of a percentage, rather than a monetary average operating expense deduction and reversed to that extent. However, 'this Court does not have the authority to fix the assessment of [Antero's] property . . . [Rather,] the trial court is invested by statute with such authority and the case [should] be remanded for that purpose.' *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 240, 210 S.E.2d 641, 649 (1974); *see also Matter of U.S. Steel Corp.*, 165 W. Va. 373,

[1] Syl. Pt. 12, *id.*

379, 268 S.E.2d 128, 132 (1980) ("This Court does not have the authority to fix assessments because such authority is vested by statute in the circuit courts."). Consequently, we remand to the business court for entry of an order consistent with this opinion." *Id.* at 225, 832 S.E.2d at 151.

Upon remand, Antero provided a list of wells for tax year 2016 ("TY2016") to facilitate a re-valuation by the Tax Commissioner consistent with this Court's opinion to the Circuit Court to fix the assessment.[2]

The Tax Department's "re-valuation" of the wells for TY2016, however, resulted in a $212,702 change to the appraised value originally calculated by the Tax Department.[3] Despite this Court's direction not to apply a "percentage, rather than a monetary average operating expense deduction," *id.*, the Tax Commissioner applied a "weighting methodology" to value Antero's horizontal Marcellus Shale wells that produced both oil and natural gas for TY2016.[4] This methodology results in varying monetary averages of operating expenses for such wells based on the amount of oil produced by the well. Antero, on the other hand, valued operating expenses using a singular monetary average of $150,000 for produced natural gas and a singular monetary average of $5,750 for produced oil, as required by the Supreme Court in *Steager v. Consol Energy*.[5]

Following re-valuation, the Petitioner and Respondents filed cross-motions for summary judgment. The Circuit Court granted summary judgment in favor of the Respondents and denied the Petitioner's motion based on the conclusion that the Tax Department's re-valuation was "fair" and "reasonable" and a proper application of this Court's decision in *Steager v. Consol Energy*. Petitioner disagrees.

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[2] A.R. 1025.

[3] A.R. 1026.

[4] A.R. 908.

[5] A.R. 908–909.

What is more, even though West Virginia constitutional and statutory law require taxation to be equal and uniform and in proportion to the property's value,[6] Respondents have persisted—without ever offering an explanation—in permitting natural gas well owners such as Antero to deduct only a standardized sum purportedly representing the "average annual industry operating expenses per well."[7] As Antero argued in *Steager v. Consol Energy*, this "average" does not accurately account for postproduction expenses—i.e., expenses that a well owner incurs to get its product to the point of sale, including expenses for gathering, compressing, processing, and transporting gas to the market. And because producers that sell their gas primarily out of state, such as Antero, incur higher, non-deductible postproduction expenses than producers that sell their gas primarily within West Virginia, out-of-state sellers are taxed at higher rates—solely because they sell their gas across state lines. This is unconstitutional. Indeed, Respondents' approach undervalues the wells of in-state natural gas sellers while overvaluing the comparable wells of out-of-state sellers, in violation of state and federal equal protection principles. Respondents have conceded that the tax regime's purpose is to discriminate against interstate commerce in favor of local interests, as the Tax Department has repeatedly stated during public hearings that Antero should simply "sell [its] gas at the wellhead" in West Virginia if it wants to "pay less taxes" than it must pay by selling its product in other states.[8] This violates dormant Commerce Clause principles. Reversal is required on these constitutional grounds as well.

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[6] W. Va. Const. art. X, § 1; W. Va. Code §§ 11-6K-1(a), 11-6k-2(5).

[7] W. Va. Code St. R. § 110-1J-4.3; *see also, e.g.*, A.R. 922–23, Tax Dep't, Admin. Notice 2020-08 (Jan. 30, 2020), https://tinyurl.com/y7dbda73 (setting tax year 2020's "average annual industry operating expenses per well").

[8] Tr. of Oct. 10, 2019 Hrg. Before Harrison Cty. Comm'n at 33; Tr. of Oct. 7, 2019 Hrg. Before Tyler Cty. Bd. of Assessment Appeals at 27; Tr. of Oct. 8, 2019 Hrg. Before Doddridge Cty. Comm'n at 29., attached as Exhibits 7–9 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix.

Moreover, just 15 days after the Circuit Court's order on appeal here, the Tax Commissioner issued new guidance, dated June 30, 2020 (the "June 2020 Guidance"), clarifying that West Virginia law *allows* deductions for actual postproduction expenses after all.[9] The basis for the change was that the previous disallowance "overvalued" gas wells for tax purposes, exactly as Antero has argued in this lawsuit for years.[10] Respondents, however, have refused to apply this clarification of the law to prior tax years without explanation. This violates the West Virginia State Administrative Procedures Act ("State APA") and fundamental due process principles and thus requires reversal on its own. Indeed, the June 2020 Guidance is an "interpretive rule" under the State APA that merely clarifies existing law, and rules that merely clarify existing law apply to pending disputes—such as Antero's pending tax disputes here—and avoid any presumption against retroactivity. As such, Respondents must apply the June 2020 Guidance to Antero's pending tax disputes, and their failure to explain why they have refused to do so is arbitrary and capricious under the State APA and runs afoul of basic due process protections.[11]

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[9] Exhibit 3 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix.

[10] A.R. 835–81, 907, 908–24, 939–45.

[11] On October 9, 2020, the Tax Commissioner issued still another new guidance purporting to "withdraw[]" its June 2020 Guidance upon which Antero's Rule 60(b) and preliminary injunction motions before the Circuit Court are based and asserting that "continued denial of these deductions [for postproduction expenses] does not over-value the oil and gas wells in this State" (the "October 2020 Withdrawal"). Exhibit 2, Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix at 2. This is yet another about-face from prior agency policy, and during pending litigation no less! The October 2020 Withdrawal is retaliatory and invalid, and Antero has filed before the Circuit Court a motion for supplemental briefing and for a hearing to demonstrate why that is so. Antero has also filed a motion to supplement the record in this appeal with both new guidance documents, and as explained *infra* at note 50, the Court can judicially notice these documents in any event.

It is bedrock administrative law that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). "About-faces must be reasoned," otherwise they are arbitrary, capricious, and invalid. *Osei v. INS*, 305 F.3d 1205, 1210 (10th Cir. 2002).

The October 2020 Withdrawal violates these principles, as the Tax Commissioner "failed to give any persuasive justification for the abrupt change in the Agency's position." *Ramirez v. U.S. Customs &*

For all these reasons, the Court should reverse.

B. STATEMENT OF FACTS

Antero owns and operates numerous Marcellus Shale horizontal wells which are oil and natural gas producing properties subject to annual *ad valorem* taxation by the Assessor of Ritchie County, based on valuations by the Tax Commissioner, and subject to appeal to the Ritchie County Commission sitting as the Board of Assessment Appeals.

By legislative rule, the Tax Commissioner fixes the property tax value for oil and natural gas producing properties by applying "a yield capitalization model to the net receipts (gross receipts less royalties paid less operating expenses) for the working interest and yield capitalization model applied to the gross royalty payments for the royalty interest."[12] Operating expenses are determined by "the average annual industry operating expenses per well. The average annual industry operating expenses shall be deducted from working interest gross receipts to develop an income stream for application of a yield capitalization procedure."[13]

Border Prot., 477 F. Supp. 2d 150, 157 (D.D.C. 2007). First, the Tax Commissioner is wrong that the June 2020 Guidance effected a "substantive change" in the law that could be accomplished only through a "legislative rule." (Oct. 2020 Guidance at 1.) The June 2020 Guidance—on its face and in its effects—merely clarified *existing* law, thus rendering it a valid "interpretive rule" under the State APA. *See, e.g.*, *Appalachian Power Co. v. Tax Dep't*, 466 S.E.2d 424, 434 (W. Va. 1995). And the Tax Commissioner is also wrong that this Court's decision in *Steager v. Consol Energy* created a "precedent" that these deductions are barred and which the June 2020 Guidance therefore violates. (Oct. 2020 Guidance at 2.) Rather, this Court merely found the Tax Commissioner's interpretations reasonable—it did not in any way bar other interpretations, such as the interpretation set out in the June 2020 Guidance. *Steager v. Consol Energy* thus has no bearing on the June 2020 Guidance's validity, despite the Tax Commissioner's attempts to hide behind it. The Tax Commissioner's justifications for the October 2020 Withdrawal are legally invalid; the retaliatory October 2020 Withdrawal is arbitrary and capricious and thus void; and the June 2020 Guidance remains in effect and must be applied retroactively. Because the June 2020 Guidance and October 2020 Withdrawal present significant issues on appeal, Antero respectfully requests that this Court order supplemental briefing.

[12] W. Va. Code St. R. § 110-1J-4.1 (2005).

[13] *Id.* § 110-1J-4.3.

As Antero argued in *Consol Energy*, however, this "average" does not accurately account for postproduction expenses—i.e., expenses that a well owner incurs to get its product to the point of sale, including expenses for gathering, compressing, processing, and transporting gas to the market. And because producers that sell their gas primarily out of state, such as Antero, incur higher, non-deductible postproduction expenses than producers that sell their gas primarily within West Virginia, out-of-state sellers are taxed at higher rates—solely because they sell their gas across state lines.[14] Respondents' "average," moreover, dramatically undercounts Antero's actual postproduction expenses while over-counting the much-smaller operating expenses of in-state sellers, thus giving in-state sellers a tax windfall and competitive advantage at Antero's expense, even though their property is comparable.[15]

Originally, the Tax Department valued Antero's producing Marcellus Shale oil and gas wells at $194,400,979 for TY2016 by application of its annual published Administrative Notice 2016-08, which provided that "[f]or Marcellus horizontal wells the maximum operating expense allowed is 20% of the gross receipts derived from gas production, not to exceed $150,000."[16] On appeal to the BAA, the Tax Department argued that its valuation was correct under the applicable law and legislative rules. The BAA adopted the Tax Department's valuation.

Antero appealed the valuation for TY2016 to the Circuit Court of Ritchie County, and the case was referred to Business Court Division. Antero argued that Administrative Notice 2016-08, and thus the Tax Commissioner's assessment, violated the legislative rule by applying a sliding

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[14] For example, in tax year 2019, Respondents' ad valorem taxation methodology resulted in an average assessed value per well for Antero's wells that was $1,401,455 higher than a local competitor's average assessed value per well, solely because Antero incurred higher postproduction expenses to get its gas to out-of-state markets.

[15] Indeed, under Respondents' "average" framework, Antero has only been permitted to deduct from 9% to 15% of its actual operating expenses dating back to tax year 2017.

[16] A.R. 916.

scale or pro rata operating expense deduction with a cap. Following the Circuit Court's decision in favor of Antero, the Respondents appealed to the West Virginia Supreme Court of Appeals, which was considered as part of consolidated proceedings in the Prior Appeal.

This Court issued an opinion affirming, in part, reversing, in part, and remanding. In Syllabus Point 8, this Court held,

> West Virginia Code of State Rules § 110-1J-4.3 (2005) does not permit the imposition of a "not to exceed" limitation on the operating expense deduction authorized thereunder and use of such limitation along with a percentage deduction violates the "equal and uniform" requirement of West Virginia Constitution Article X, Section 1, as well as the equal protection provisions of the West Virginia and United States Constitutions.[17]

Thus, the Court affirmed the Circuit Court's opinion insofar as it required a re-valuation without applying a "cap" or maximum deduction.[18]

This Court reversed, in part, however, insofar as the relief directed by the Circuit Court authorized the Tax Commissioner to apply a percentage-based deduction for operating expenses, rather a monetary average operating expense deduction, holding,

> The provisions contained in West Virginia Code of State Rules §§ 110-1J-4.1 and 110-1J-4.3 (2005) for a deduction of the average annual industry operating expense requires the use of a singular monetary average deduction.[19]

Thus, the Court reversed with instructions to the Circuit Court to fix the TY2016 assessment without applying a cap or maximum deduction, or a percentage or sliding scale.[20] Antero's calculation of the values of the wells reduced the value from $194,400,979 to $191,083,218.[21]

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[17] Syl. Pt. 8, *Steager v. Consol Energy, supra.*

[18] *Id.* at 225, 832 S.E.2d at 151.

[19] Syl. Pt. 12, *id.*

[20] *Id.* at 225, 832 S.E.2d at 151.

[21] A.R. 1025.

However, the Tax Department's "re-valuation" of the wells for TY2016 resulted in a $212,702 change to the appraised value originally calculated by the Tax Department based on the application of a "weighting methodology."[22]

Antero and Respondents filed cross-motions for summary judgment.[23] The Circuit Court concluded that, despite this Court's requirement to apply a "singular monetary average," the Tax Commissioner's "weighting methodology" nevertheless "utilized data, in the form of gross receipts, to accurately comport which amount of the $150,000 figure and which amount of the $5,750 figure would apply to wells producing oil and gas."[24]

The Circuit Court distinguished *Steager v. Consol Energy*, concluding that Syllabus Point 8 does not apply. While acknowledging that this Court rejected the application of a "sliding scale" or "pro rata" operating expense deduction, the Circuit Court concluded that this Court's opinion was not intended to address wells that produce both oil and gas, and that the Tax Department's application of operating expenses was "fair" and "reasonable."[25]

The Circuit Court denied Antero's Motion for Summary Judgment and granted the cross-Motion for Summary Judgment filed by the Tax Commissioner and the Assessor of Ritchie County.[26]

On June 30, 2020—just 15 days after the Circuit Court's orders—the Tax Commissioner issued the June 2020 Guidance clarifying that West Virginia regulations allow deductions for

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[22] A.R. 908.

[23] A.R. 907–924, 925–938.

[24] A.R. 1031.

[25] A.R. 1030–31.

[26] A.R. 1032.

actual postproduction expenses.[27] There, the Tax Commissioner explained that the basis for the change was that the previous disallowance "overvalued" gas wells for tax purposes—the very argument that Antero has asserted in this lawsuit for years.[28] This clarification is inconsistent with Respondents' position over the past five years, during which they have defended the tax, with no deduction for actual postproduction expenses, in litigation against Antero.

Despite conceding that disallowing deductions for actual postproduction expenses "overvalued" gas wells contrary to the express statutory directive requiring a tax based on "true and actual value,"[29] Respondents have nonetheless dictated—without explanation—that they will continue to disallow such deductions at least until tax year 2021.[30] Respondents have thus refused to apply their clarification of the law to prior tax years, which is especially problematic for the 2020 tax year, as Respondents have just last month issued their tax bills to Antero for this year. Respondents therefore had ample opportunity to apply the clarified tax system in the June 2020 Guidance to Antero's 2020 tax year—yet they have refused.

Based on Respondents' change of position, on August 19, 2020, Antero filed before the Circuit Court (1) a motion under W. Va. Rule of Civil Procedure 60(b) seeking relief from that court's June 15, 2020 orders and (2) a motion for a preliminary injunction to enjoin Respondents from disallowing the deduction of actual expenses to tax years with pending disputes in light of the June 2020 Guidance's clarification that actual expense deductions are in fact permitted under

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[27] Exhibit 3 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix.

[28] A.R. 835–81, 907, 908–24, 939–45.

[29] W. Va. Code § 11-6K-1.

[30] *See* Exhibits 3–6, Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix. *But see supra* n.11 (discussing the October 2020 Withdrawal of the June 2020 Guidance).

West Virginia law. Antero also challenged Respondents' disallowance of deductions for actual postproduction expenses on constitutional grounds in these motions. The Circuit Court heard oral argument and testimony on August 24, 2020. Pursuant to the Circuit Court's orders, the parties filed supplemental briefing on issues discussed on the record at oral argument. Antero has also filed before this Court a motion to supplement the record with critical information on Respondents' recent changes of position. At the time of this brief's filing, Antero's Rule 60(b) and preliminary injunction motions remain pending before the Circuit Court.[31]

III. SUMMARY OF ARGUMENT

A. Respondent's "weighting methodology" applies the same improper "sliding scale" or "pro rata" percentage-based valuation of monetary average operating expenses this Court rejected in Syllabus Point 12, *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019), which instead requires the Tax Commissioner to apply a **singular monetary average** (i.e., not a percentage) in valuing operating expenses for natural gas wells. Antero respectfully requests that this Court reverse the order of the Circuit Court denying Petitioner's motion for summary judgment and granting Respondents' motions for summary judgment.

B. In addition, the Tax Department's recently issued June 2020 Guidance, which clarifies that deductions for postproduction expenses are allowed and confirms Antero's argument that Respondents' prior approach unlawfully overvalues natural gas wells, is an "interpretive rule" under the State APA that merely clarifies existing law. As such, it must be applied retroactively to pending disputes over prior tax years, and this Court should reverse.

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[31] *See* Exhibit 1, Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix. Instead of addressing these issues for the first time on appeal, this Court could also remand the case to allow the Circuit Court to rule on issues relating to the Tax Department's June 2020 Guidance (and purported withdrawal of that guidance through the October 2020 Withdrawal) in the first instance.

C. Finally, the Court should reverse based on Antero's State APA and constitutional arguments. Without explanation, Respondents have arbitrarily refused to apply the June 2020 Guidance retroactively, in violation of the State APA and due process principles. Moreover, Respondents disallowance of deductions for actual postproduction expenses (1) undervalues the wells of in-state natural gas sellers while overvaluing the comparable wells of out-of-state sellers, thus violating state and federal equal protection principles, and (2) benefits in-state natural gas sellers at the expense of out-of-state sellers, thus violating dormant Commerce Clause principles.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent requests Rule 20 Oral Argument, pursuant to W. Va. R. App. P. 20, because this matter presents an issue of first impression regarding the Tax Department's methodology regarding *ad valorem* property taxation of producing oil and natural gas wells.

V. ARGUMENT

A. STANDARD OF REVIEW

"[J]udicial review of a decision of a board of equalization and review regarding a challenged tax assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A."[32] "In such circumstances, a circuit court is primarily discharging an appellate function little different from that undertaken by [the West Virginia Supreme Court of Appeals. . ..]; consequently, [the West Virginia Supreme Court of Appeals'] review of a circuit court's ruling in proceedings under § 11-3-25 [the statute addressing appeals of Board of Equalization and Review and Board of Assessment Appeal

[32] *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000) (footnote omitted).

decisions to circuit court] is *de novo*.[33] Moreover, where a case "presents additional issues of law by way of [a] constitutional challenge, . . . we apply a *de novo* standard of review."[34] Accordingly, this Court's review is "plenary."[35]

Generally, the taxpayer's burden before the board of equalization and review or the board of assessment appeals is to show by clear and convincing evidence that the valuation, and assessment, of its property is erroneous:

> 5. "As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct.... The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous." Syllabus point 2, in part, *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993).
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> 6. "A taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous." Syllabus point 5, in part, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14 , 672 S.E.2d 150 (2008).[36]

However, "[t]here must be a proper assessment before there can be a presumption that the assessment is correct, and where it appears that there was no proper assessment there can be no presumption in favor of the correctness of the assessment."[37] Furthermore, "[p]ursuant to *In Re [Tax Assessments Against] Pocahontas Land Co.*, [citation omitted] once a taxpayer makes a

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[33] *Cf. Wheeling-Pittsburgh Steel Corp. v. Rowing*, 2015 W. Va. 286, 293, 517 S.E.2d 763, 770 (1999); *see also* Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (holding that "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review.").

[34] *Steager v. Consol Energy*, 242 W. Va. at 217, 832 S.E.2d at 143 (quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)).

[35] *Id.*

[36] Syl. Pts. 5-6, *Stone Brooke Ltd. P'ship v. Sisnni*, 224 W. Va. 691, 688 S.E.2d 300 (2009); *Century Aluminum of W. Va. v. Jackson Cty. Comm'n*, 229 W. Va. 215, 728 S.E.2d 99 (2012).

[37] *In Re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 61, 303 S.E.2d 691, 699 (1983).

showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence."[38] Generally, in regard to ad valorem property taxation challenges, this Court will not reverse an assessment made by a board of equalization and review [or board of assessment appeals] and approved by the circuit court when the assessment is supported by substantial evidence unless plainly wrong.[39]

Here, the Circuit Court improperly affirmed the decision of the Ritchie County Commission sitting as a Board of Assessment Appeals, finding that the Tax Commissioner's re-valuation of operating expenses for TY2016 following remand was "fair" and "reasonable," despite applying a "weighting methodology" in light of this Court's clear direction not to apply a percentage-based valuation in Syllabus Point 12, *Steager v. Consol Energy*, *supra*. Antero urges this Court to apply the foregoing standards to this case, and reverse the decision of the Circuit Court because it is not based on the substantial evidence and is "plainly wrong" or based on an "error of law."

B. THE CIRCUIT COURT'S BUSINESS COURT DIVISION INCORRECTLY DETERMINED THAT THE TAX COMMISSIONER HAD NOT VIOLATED THIS COURT'S REQUIREMENT THAT THE VALUATION OF ANTERO'S WELLS MUST BE BASED UPON THE APPLICATION OF A "SINGULAR MONETARY AVERAGE."

In *Steager v. Consol Energy*, this Court found that "neither West Virginia Code of State Rules § 110-1J-4.1 nor § 110-1J-4.3 provide for a 'sliding scale' or pro rata operating expense deduction."[40] Instead, this Court held that "this clear, simply-stated regulation under any common-sense reading plainly contemplates use of a monetary average, which must be applied evenly

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[38] *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 786 n.23, 687 S.E.2d 768, 785 n.23 (2009).

[39] Syl. Pt. 1, *Century Aluminum*, 229 W. Va. at 216, 728 S.E.2d at 100.

[40] *Steager v. Consol Energy*, 242 W. Va. at 225, 832 S.E.2d at 151. W. Va. Code St. R. §§ 110-4.1 and 4.3 require the use of "average industry operating expenses" for purposes of valuing producing oil and natural gas wells under the Tax Department's net receipts capitalization valuation model.

across the board to avoid an unconstitutionally impermissible application. We therefore hold that the provisions contained in West Virginia Code of State Rules §§ 110-1J-4.1 and 110-1J-4.3 for a deduction of the average annual industry operating expense ***requires the use of a singular monetary average deduction.***"[41]

This holding overturned the Circuit Court's decision to approve the Tax Commissioner's application of a percentage deduction to value Antero's operating expense deduction, rather than a monetary operating expense deduction.

Following remand, the Tax Department again applied a percentage deduction, using a new percentage-based "weighting methodology" formula, which was again approved by the Circuit Court. This weighting methodology, however, is just another variant of the same sliding-scale that was rejected by this Court previously in this case in the Prior Appeal.

Specifically, for TY2016, the Tax Department states in an administrative notice[42] that "[i]n instances where the well is producing both oil and gas, the allotted maximum ordinary operating expense" will vary "depending on the percentage of gas versus oil receipts involved." "For Marcellus horizontal wells the allotted maximum operating expense will vary between $5,750 and $150,000 depending on the percentage of gas versus oil receipts involved."[43] The Circuit Court approved this "weighting methodology" for valuing operating expense deductions for wells producing both oil and natural gas.

The Tax Commissioner's weighting methodology for calculating operating expenses under this section of the administrative guidance is an improper percentage-based calculation because

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[41] *Steager v. Consol Energy*, 242 W. Va. at 225, 832 S.E.2d at 151 (emphasis added).

[42] A.R. 916–917, "Administrative Notice 2016-08, Property Tax, State Tax Commissioner's Statement for the Determination of Oil and Gas Operating Expenses for Property Tax Purposes for Tax Year 2016, Pursuant to § 110 CSR 1J-4.3."

[43] A.R. 917.

the valuation results in a "sliding scale" or "pro rata" amount of operating expense depending on the amount of oil produced by the well: the more oil produced by a well, the lower the amount of operating expenses allowed.

While the Circuit Court acknowledged that this Court rejected a similar percentage-based operating expense deduction in Syllabus Point 12, *Steager v. Consol Energy*, the Circuit Court nevertheless concluded that *Steager v. Consol Energy* applies to producing wells for oil or natural gas, but not for wells that produce both oil and natural gas.[44]

There is no basis for the Circuit Court's distinction between wells that produce either oil or natural gas, and wells that produce both oil and natural gas. To the contrary, the general method of valuation formula requiring the application of a yield capitalization model specifically applies to "[o]il *and/or* natural gas producing property."[45] The Circuit Court's distinction is "plainly wrong" and an "error of law" in light of specific direction that the same model apply to "oil *and/or* natural gas producing property."

The problems caused by the applying the weighting methodology for horizontal Marcellus Shale wells was brought to the attention of the Tax Department for tax year 2018, at which time the weighting methodology was eliminated for horizontal Marcellus Shale producers.[46] For tax years 2018-19, if a horizontal Marcellus Shale well produced both oil and natural gas, "the allotted maximum operating expense is $5,750 for the oil and $175,000 for the gas."[47] Identical language

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[44] A.R. 1030–31.

[45] W. Va. Code St. R. § 110-1J-4.1 (emphasis added).

[46] The change reflects the fact that the legislative rule separately defines "natural gas producing property," W. Va. Code St. R. § 110-1J-3.10 and "oil producing property," W. Va. Code St. R. § 110-1J-3.15. The Tax Department also requires separate reporting of natural gas receipts and oil receipts on its annual property tax return.

[47] A.R. 918–921, "Administrative Notice 2018-08, Property Tax, State Tax Commissioner's Statement for the Determination of Oil and Gas Operating Expenses for Property Tax Purposes for Tax Year 2018,

was used in 2020, although with a lower singular monetary average of $125,000 used for the natural gas produced by horizontal Marcellus Shale wells.[48]

The Tax Department's decision to eliminate the weighting methodology for horizontal Marcellus Shale producers was administrative, with no change in the law leading to the change. Quite simply, the Tax Department recognized that a weighting methodology does not make sense for a horizontal Marcellus Shale well, and that the operating expenses should be applied separately to the natural gas revenue stream and the oil revenue stream.

Nevertheless, the Tax Department insists upon using its old "weighting methodology" for this matter, despite the fact that this method violates the "singular monetary average" of operating expenses mandated by the Supreme Court in *Steager v. Consol Energy.* Application of the weighting methodology results in the 24 wells that produce both oil and gas having various operating expense monetary averages, ranging from $120,432 to $143,098.[49] Application of the Supreme Court's decision results in a singular monetary average of operating expenses being applied to these wells: $150,000 to the natural gas produced and $5,750 to the oil produced.

Pursuant to § 110 CSR 1J-4.3" and "Administrative Notice 2019-08, Property Tax, State Tax Commissioner's Statement for the Determination of Oil and Gas Operating Expenses for Property Tax Purposes for Tax Year 2019, Pursuant to § 110 CSR 1J-4.3." Submitted as Exhibits C and D to Antero's Motion for Summary Judgment filed with the Circuit Court.

[48] A.R. 922–923, "Administrative Notice 2020-08, Property Tax, State Tax Commissioner's Statement for the Determination of Oil and Gas Operating Expenses for Property Tax Purposes for Tax Year 2020, Pursuant to § 110 CSR 1J-4.3." Submitted as Exhibit E to Antero's Motion for Summary Judgment filed with the Circuit Court.

[49] A.R. 924.

C. THE JUNE 2020 GUIDANCE APPLIES RETROACTIVELY, AND RESPONDENTS HAVE ARBITRARILY AND CAPRICIOUSLY CONCLUDED OTHERWISE, THUS WARRANTING REVERSAL.

Separately, the Court should reverse based on the June 2020 Guidance.[50] As explained above, just 15 days after the Circuit Court's orders on appeal here, the Tax Commissioner issued the June 2020 Guidance, clarifying that West Virginia law *allows* deductions for actual postproduction expenses after all and requiring well owners "to provide the gross receipts from field line sales of natural gas and oil."[51] The basis for the change was that the previous disallowance "overvalued for property tax purpose" natural gas wells, exactly as Antero has argued in this lawsuit for years.[52] Yet despite effectively conceding that Antero was correct all along and that deductions for actual expenses should be allowed, Respondents have nonetheless dictated—without explanation—that the June 2020 Guidance applies prospectively only and that Respondents will thus continue to disallow such deductions until tax year 2021.[53]

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[50] Antero has filed a motion for leave to include the June 2020 Guidance in the record on appeal, but this Court can also take judicial notice of the Tax Commissioner's administrative guidance. "Courts 'may take judicial notice on [their] own,' and judicial notice may be taken 'at any stage of the proceeding.'" *Appalachian Mountain Advocates v. W. Va. Univ.*, 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.* (quoting *State ex rel. City of Charleston v. Sims*, 132 W. Va. 826, 847, 54 S.E.2d 729, 741 (1949)). "While courts will not take judicial notice of every current event, '[they] 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.* (quoting *State ex rel. City of Charleston*, 132 W. Va. at 847, 54 S.E.2d at 741). The Tax Commissioner's own guidance, which clarified the law on the very question of law presented here just fifteen days after the order below, only for the Commissioner to attempt to reverse course again months later, should therefore be judicially noticed.

[51] Exhibit 3 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix (emphasis in original).

[52] *Id.*

[53] *See* Exhibits 3–6, Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix. *But see supra* n.11 (discussing the October 2020 Withdrawal of the June 2020 Guidance).

Respondents' conduct violates the State Administrative Procedures Act ("State APA"), and the Court should reverse on that ground. Indeed, the June 2020 Guidance is an "interpretive rule" under the State APA that, by definition and in its effects, "merely clarif[ies] an existing statute or regulation."[54] And rules that are a "mere clarification" of "existing" law apply to pending disputes and avoid any presumption against retroactive application.[55] The June 2020 Guidance therefore must be applied to pending cases, including the prior tax years at issue here, and the Tax Department's failure to explain why it refuses to do so renders its conduct arbitrary and capricious.[56]

To begin with, the procedure followed by the Tax Department establishes that the June 2020 Guidance is an "interpretive rule" under the State APA. That is because the Tax Department undisputedly did not submit the June 2020 Guidance for the required "legislative authorization process" after a notice-and-comment period, prerequisites for a "legislative rule."[57] Instead, the Tax Department simply published the Guidance for the public as an "Important Notice."[58] That ends the inquiry: The rule is interpretive, not legislative, in light of the Tax Department's own

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[54] *Appalachian Power Co. v. West Virginia Tax Dep't*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (W. Va. 1995); *see also* W. Va. Code § 29A-1-2(c) (stating that interpretive rules "provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it"); *accord Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989) ("If the rule in question merely clarifies or explains existing law or regulations, it will be deemed interpretive").

[55] *Williams v. West Virginia Dep't of Motor Vehicles*, 187 W. Va. 406, 410, 419 S.E.2d 474, 478 (1992); *accord, e.g., ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) ("[C]larifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment"); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[C]oncerns about retroactive application are not implicated when an amendment ... is deemed to clarify relevant law"); *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 889 (1st Cir. 1992) (holding that a "clarification" of existing law was "automatically retroactive").

[56] *See, e.g., Williams*, 419 S.E.2d at 478.

[57] *Appalachian Power*, 195 W. Va. at 583, 466 S.E.2d at 434; *see also* W. Va. Code § 29A-3-9 (requiring the Legislature's "permission ... to promulgate [a legislative] rule").

[58] Exhibit 3 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix.

selected process here; interpretive rules merely clarify existing law *by definition* under the State APA; and clarifications to existing law avoid retroactivity problems and therefore must be applied to pending disputes, such as the tax years at issue here.[59]

Moreover, the June 2020 Guidance is also an "interpretive rule" under the State APA that avoids any presumption against retroactivity because it, in its effects, "merely clarif[ies] ... existing statute[s]" and "regulation[s],"[60] and does not "diminish[] substantive rights" or "augment[] substantive liabilities."[61] Nothing in West Virginia statutory law has changed; it still requires "natural resources property" (including natural gas wells) to be taxed according to its "true and actual value."[62] Nothing in the Tax Department's legislative rules concerning ad valorem taxation of natural gas wells has changed either.[63] Moreover, this Court's prior conclusion in *Steager v. Consol Energy* that there is "ambiguity surrounding what expenses qualify as being 'directly related to the maintenance and production' of natural gas" and that "the Rule is silent"[64] make it even clearer that the June 2020 Guidance is a mere clarification of existing law that must be applied to these pending tax disputes. That is because "ambiguity" in the statute or rules indicates that the agency "is clarifying, rather than changing, the law."[65]

Finally, on its face, the June 2020 Guidance contains all the hallmarks of an interpretive rule that clarifies existing law. Indeed, the June 2020 Guidance quotes in full the relevant

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[59] *See, e.g., Williams*, 419 S.E.2d at 478.

[60] *Appalachian Power*, 195 W. Va. at 583, 466 S.E.2d at 434.

[61] *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 618, 803 S.E.2d 582, 588 (2017).

[62] W. Va. Code §§ 11-6K-1(a), 11-6k-2(5).

[63] *See* W. Va. Code §§ 110-1J-1–110-1J-4.

[64] 242 W. Va. at 222, 832 S.E.2d at 148.

[65] *ABKCO Music, Inc.*, 217 F.3d at 691; *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999) ("ambiguity" in the old statute shows that the new statute "clarifies, rather than effects a substantive change to, prior law").

legislative rule that it is clarifying, which has been on the books unchanged for years.[66] The Guidance also attaches a Tax Department graphic—available "*[f]or many years*"—"illustrating the field line point of sale concept" that the Guidance has now clarified applies when gas is "not sold in a field line sales transaction."[67] And the Guidance clarifies that it is "important" for well producers to "appropriately adjust actual gross proceeds of sale to properly reflect the gross receipts [they] would have received had the sales transaction been a field line point of sale," lest their wells be "overvalued for property tax purposes."[68]

The June 2020 Guidance is therefore an "interpretive rule" under the State APA that "merely clarif[ies] ... existing statute[s]" and "regulation[s]" by definition and in its effects,[69] avoids retroactivity problems, and accordingly must be applied to these pending tax disputes.[70]

Because the June 2020 Guidance is an interpretive rule that must be applied to pending tax disputes under settled administrative law, the Tax Department's complete failure to explain its conclusion to the contrary at the time of the Guidance's issuance renders the agency's conduct arbitrary and capricious and thus void under the State APA.[71] Agencies cannot act "simply based upon impulse."[72] Instead, they must "articulate a satisfactory explanation for [their] action including a rational connection between the facts found and the choice made."[73] "The reasoned

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[66] Exhibit 3 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix, at 1 ("'Gross receipts' means total income received from production on any well, at the field line point of sale, during a calendar year before subtraction of any royalties and/or expenses" (quoting W. Va. Code § 110-1J-3.8)); *see also* W. Va. Code St. R. § 110-1J-4.1.

[67] *Id.*

[68] *Id.*

[69] *Appalachian Power*, 195 W. Va. at 583, 466 S.E.2d at 434.

[70] *Williams*, 419 S.E.2d at 478 (applying a "mere clarification of the existing statute" to a pending dispute).

[71] *See* W. Va. Code § 29A-5-4(g)(6).

[72] *Appalachian Power*, 195 W. Va. at 592, 466 S.E.2d at 443.

[73] *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383-84 (2020).

explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[74] And those genuine justifications must be revealed to the public at the time of the challenged agency action—indeed, "post hoc rationalization" is "impermissible" and cannot be used to support prior agency action.[75] This is particularly true where post hoc rationalization comes—not from the agency itself—but from counsel for the agency during litigation.[76]

In proclaiming that the June 2020 Guidance applies prospectively only, the Tax Department violated all these bedrock principles of administrative law. Nowhere in the June 2020 Guidance itself—nowhere—does the Tax Department even attempt to explain to the public (1) why its new interpretive rule clarifying existing tax law will not be applied to pending tax disputes and (2) why that decision is lawful in light of well-established retroactivity principles (discussed above) making clear that the June 2020 Guidance must be applied to those pending tax disputes. The agency has therefore failed to "articulate a satisfactory explanation for [its] action including a rational connection between the facts found and the choice made,"[77] thus rendering its retroactivity decision arbitrary and capricious.[78] The Court should thus reverse on these grounds.

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[74] *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

[75] *Dep't of Homeland Sec. v. Regents of Univ. of California*, 140 S. Ct. 1891, 1908 (2020); *see id.* at 1909 (the agency's justifications "can be viewed only as impermissible post hoc rationalizations and thus are not properly before us").

[76] *See, e.g., Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (no deference for agency "litigation positions," as they do not "not reflect an exercise of delegated legislative authority and agency expertise"); *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995) (no deference for agency "litigation arguments").

[77] *Little Sisters of the Poor*, 140 S. Ct. at 2383-84.

[78] *See* W. Va. Code § 29A-5-4(g)(6); *cf. Kanawha Eagle Coal, LLC v. Tax Comm'r*, 216 W. Va. 616, 621, 609 S.E.2d 877, 882 (W. Va. 2004) (striking down tax under State APA where the Tax Department "[took] a position markedly at odds with both its previous stance" and "historical view" on the issue).

D. RESPONDENTS' TAX REGIME VIOLATES THE STATE APA AND STATE AND FEDERAL CONSTITUTIONS, THUS WARRANTING REVERSAL.

Finally, the Court should reverse because Respondents' tax regime violates (1) the State APA; (2) the federal and state Due Process Clauses; (3) the federal Equal Protection Clause and state Equal and Uniform Taxation Clause; and (4) the dormant Commerce Clause.

1. Respondents' Tax Regime Violates the State APA.

The State APA requires courts to "reverse, vacate or modify" an "administrative ... decision" that violates "constitutional" provisions, "statutory" provisions, or is "arbitrary or capricious."[79] The *ad valorem* tax violates the State APA in at least three ways.

a. The *ad valorem* tax, first, violates "statutory" provisions.[80] West Virginia statutory law requires gas wells to be taxed according to their "true and actual value."[81] But as discussed below, *infra*, Part IV.D.3, the *ad valorem* tax "grossly" overstates the value of Antero's gas wells far beyond their statutorily required "true and actual value." The tax is thus invalid under the State APA.[82]

b. Respondents' *ad valorem* tax is, second, "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[83] To start, Respondents have provided no rational basis to support the tax.[84] Respondents have instead recently issued guidance in the June 2020 Guidance clarifying that West Virginia regulations actually do allow deductions for well owners' actual postproduction expenses, an about-face from their prior, persistent

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[79] *Kanawha Eagle*, 216 W. Va. at 619 n.10, 609 S.E.2d at 880 n.10 (quoting W. Va. Code § 29A-5-4(g)).

[80] W. Va. Code § 29A-5-4(g)(1).

[81] *Id.* §§ 11-6K-1(a), 11-6k-2(5).

[82] *Id.* § 29A-5-4(g)(1).

[83] *Id.* § 29A-5-4(g)(6).

[84] *See Ashland Specialty Co. Inc. v. Steager*, 241 W. Va. 1, 6, 818 S.E.2d 827, 832 (W. Va. 2018) (an agency's decision is arbitrary and capricious if there is no "rational basis" to support it).

litigation position and effectively a concession that their approach has been wrong all along.[85] This clarification establishes that there is no rational basis to support the disallowance of such deductions, both for prior tax years and open tax years like 2020, thus rendering the tax "arbitrary or capricious."[86] And as explained *supra*, Part IV.C, Respondents' failure to explain why the June 2020 Guidance—an interpretive rule that merely clarifies existing law—will not be applied retroactively to pending disputes is arbitrary and capricious.

In addition, Respondents have conceded that the tax regime's purpose is to discriminate against interstate commerce in favor of local interests: The Tax Department has repeatedly stated during public hearings that Antero should simply "sell [its] gas at the wellhead" in West Virginia if it wants to "pay less taxes" than it must pay by selling its product in other states.[87] Because the only basis that Respondents have provided is unconstitutional and discriminatory, the tax must be invalidated as "arbitrary or capricious."[88]

c. Finally, Respondents' *ad valorem* tax, violates "constitutional" provisions, including (as explained below at pp. 25-28) the federal and state Due Process Clauses, federal Equal Protection Clause, and state Equal and Uniform Taxation Clause, and the dormant Commerce Clause.[89]

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[85] *See* Exhibit 3 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix, at 1

[86] W. Va. Code § 29A-5-4(g)(6).

[87] 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), attached as Exhibits 7–9 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix.

[88] W. Va. Code § 29A-5-4(g)(6); *see Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (striking down agency action because the agency rationale supporting the action was inadequate).

[89] W. Va. Code § 29A-5-4(g)(1).

2. Respondents' Tax Regime Violates State and Federal Due Process Principles.

Respondents' arbitrary conduct also violates due process, another reason to reverse. Both the federal and state Constitutions prohibit deprivations of property without "due process of law."[90] "Arbitrary and irrational" state action "violate[s] the federal and state constitutional guarantees of due process,"[91] and due process "guarantees against arbitrary [government action], demanding that it shall not be unreasonable, arbitrary or capricious and that the requirements therein shall have a real and substantial relation to the purpose of the [action]."[92] The U.S. Supreme Court, moreover, has specifically held that a tax "may be so arbitrary and capricious as to cause it to fall before the due process of law clause."[93]

Respondents' *ad valorem* tax regime violates these principles. For the same reasons that the tax is "arbitrary or capricious" under the State APA (*see supra*, Part IV.D.1), it is also "arbitrary and irrational" under due process doctrine.[94] Respondents have clarified in the June 2020 Guidance that deductions for actual postproduction expenses are allowed after all under West Virginia law and that Respondents' prior litigation position improperly "overvalued" gas wells,[95] contrary to the express statutory directive requiring a tax based on "true and actual value."[96] Yet Respondents have insisted, without any justification, that their improper, discriminatory tax

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[90] U.S. Const. amend. XIV, § 1; W. Va. Const. art. III, § 10.

[91] *Thomas v. Rutledge*, 280 S.E.2d 123, 128 (W. Va. 1981).

[92] *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 702, 237 S.E.2d 504, 509 (1977).

[93] *Heiner v. Donnan*, 285 U.S. 312, 326 (1932).

[94] *Thomas v. Rutledge*, 167 W. Va. 487, 494, 280 S.E.2d 123, 128 (1981).

[95] Exhibit 3 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix, at 1.

[96] W. Va. Code § 11-6K-1.

approach will be applied until tax year 2021. Such "arbitrary and irrational" action violates due process.[97]

3. Respondents' Tax Regime Violates State and Federal Equal Protection Principles.

Respondent' *ad valorem* tax regime—which has disallowed deductions for actual postproduction expenses—also violates federal and state equal protection principles, another reason to reverse. Both the federal Equal Protection Clause and state Equal and Uniform Taxation Clause bar state action that "selects [particular persons] out for discriminatory treatment by subjecting [them] to taxes not imposed on others of the same class."[98]

Respondents' *ad valorem* tax "practice" violates these principles because it results in "gross disparities in the assessed value of generally comparable property."[99] Antero sells the same product as its local competitors: natural gas produced in West Virginia. Yet solely because Antero chooses to sells its gas out of state—and thus necessarily incurs higher, nondeductible, and thus effectively taxable postproduction expenses than local competitors—Respondents arbitrarily single out Antero for higher *ad valorem* tax treatment. 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.[100] These "gross disparities in the assessed value of generally comparable property"—which are intentional and have persisted since at least tax year 2015 without justification—

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[97] *Cf. Thomas*, 280 S.E.2d at 128.

[98] *Allegheny Pittsburgh Coal Co. v. Webster Cty. Comm'n*, 488 U.S. 336, 342-46 (1989); *see Capitol Cablevision Corp. v. Hardesty*, 285 S.E.2d 412, 419 (W. Va. 1981).

[99] *Allegheny*, 488 U.S. at 338

[100] *Id.* at 342, 344.

"contravene the constitutional right of one taxed upon the full value of his property" and thus deny Antero "equal protection of the law."[101] Indeed, while in private law practice, the Tax Commissioner himself recognized in a July 29, 2016 letter to the Tax Department on a client's behalf that the tax "significantly understat[es] actual operating expenses for" well owners, "fails to acknowledge all expenses needed to get natural gas to a salable state," and causes the "values to be assigned" to gas wells for tax purposes to be "grossly overstated."[102]

4. Respondents' Tax Regime Violates Dormant Commerce Clause Principles.

Last, Respondents' *ad valorem* tax regime—which has disallowed deductions for actual postproduction expenses—also violates dormant Commerce Clause principles. The Commerce Clause's "dormant" aspect "restricts state protectionism"[103] caused by "state taxation."[104] Respondents' *ad valorem* tax framework violates these principles by (1) discriminating against interstate commerce and (2) subjecting Antero to the risk of multiple taxation.

First, the tax "discriminate[s] against interstate commerce."[105] Respondents' bar on deductions for actual postproduction expenses effectively taxes those expenses. And companies selling gas primarily to buyers outside West Virginia, like Antero, incur significantly higher postproduction expenses than companies selling primarily to buyers in West Virginia. Respondents' approach thus illegally taxes gas sales "more heavily" when they "cross[] state

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[101] *Id.* at 346.

[102] Exhibit 2 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix, at pp. 45.

[103] *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

[104] *Maryland Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

[105] *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

lines"[106] and directly benefits local sellers through reduced taxes at out-of-state sellers' expense.[107] Indeed, Respondents have conceded that the tax regime's purpose is to discriminate against interstate commerce in favor of local interests: The Tax Department has repeatedly stated that Antero should "sell [its] gas at the wellhead" in West Virginia if it wants to "pay less taxes" than it must pay by selling its product in other states.[108]

Second, this regime unlawfully exposes Antero to the "risk of a multiple [tax] burden."[109] The ad valorem tax is revenue-based,[110] but "foreign corporation[s]" like Antero must also pay "corporate net income tax."[111] Thus, if "Ohio or any of the other 48 States" hypothetically "imposes a like tax" regime, Antero "will pay" *ad valorem* taxes to West Virginia, corporate income taxes to West Virginia, and corporate income and/or gross-receipts taxes to another state—all based on Antero's West Virginia well revenues—while in-state sellers will pay only *ad valorem* taxes and corporate income taxes to West Virginia. That violates the dormant Commerce Clause.[112]

VI. CONCLUSION

Accordingly, based on the Respondent's failure to apply a "singular monetary average" of operating expenses consistent with this Court's decision in *Steager v. Consol Energy,* Antero

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

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

[108] Tr. of Oct. 10, 2019 Hrg. Before Harrison Cty. Comm'n at 33; Tr. of Oct. 7, 2019 Hrg. Before Tyler Cty. Bd. of Assessment Appeals at 27; Tr. of Oct. 8, 2019 Hrg. Before Doddridge Cty. Comm'n at 29., attached as Exhibits 7–9 to Petitioner's Rule 7(g) Motion for Leave to File Additional Documents with Appendix or Supplemental Appendix.

[109] *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939); *see also Wynne*, 135 S. Ct. at 1794-95, 1801-02.

[110] *See* W. Va. Code St. R. § 110-1J-3.8.

[111] W. Va. Code § 11-24-4(a).

[112] *Wynne*, 135 S. Ct. at 1794-95, 1801-02.

respectfully requests that the Court overrule the Circuit Court's *Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment.* In addition, the Court should reverse because the June 2020 Guidance applies retroactively to the tax years in dispute and because Respondents' tax regime violates the State APA, as well as the State and federal Constitutions.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2020, I served the foregoing **"Brief of the Petitioner"** and **"Appendix Record"** upon counsel of record by e-mail and first class mail as follows:

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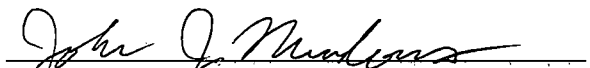

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