

**In the United States Court of Appeals  
for the Third Circuit**

Docket No. 11-1690

MFS, INC.,

*Appellant,*

v.

THOMAS A. DILAZARO,  
SEAN L. ROBBINS,  
MARK WEJKSZNER, and  
MICHAEL BEDRIN,

*Appellees.*

On Appeal from the Final Judgment of the United States  
District Court for the Eastern District of Pennsylvania,  
Entered February 16, 2011

**PROPOSED BRIEF OF AMICI CURIAE  
PENNSYLVANIA STATE NURSES ASSOCIATION,  
PHYSICIANS FOR SOCIAL RESPONSIBILITY—PHILADELPHIA,  
CLEAN AIR COUNCIL,  
and  
CITIZENS FOR PENNSYLVANIA'S FUTURE  
IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE**

Charles McPhedran, Esq.  
PA Attorney I.D. No. 60123<sup>1</sup>  
EARTHJUSTICE  
156 William Street, Suite 800  
New York, NY 10038  
(212) 791-1881 ext. 8234 (tel.)  
(212) 918-1556 (facsimile)  
[cmcphedran@earthjustice.org](mailto:cmcphedran@earthjustice.org)

Adam H. Cutler, Esq.  
PA Attorney I.D. No. 76605  
PUBLIC INTEREST LAW CENTER  
OF PHILADELPHIA  
1709 Benjamin Franklin Pkwy, 2<sup>nd</sup> Fl.  
Philadelphia, PA 19103  
(215) 627-7100 ext. 224 (tel.)  
(215) 627-3183 (facsimile)  
[acutler@pilcop.org](mailto:acutler@pilcop.org)

---

<sup>1</sup> Admission pending in New York.

**CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF  
FINANCIAL INTEREST PURSUANT TO FED. R. APP. P. 26.1**

Amici Curiae Pennsylvania State Nurses Association, Physicians for Social Responsibility—Philadelphia, Clean Air Council, and Citizens for Pennsylvania’s Future jointly make the following disclosures:

- 1) For non-governmental corporate parties please list all parent corporations:

**None/not applicable.**

- 2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party’s stock:

**None/not applicable.**

- 3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

**None/not applicable.**

- 4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors’ committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant:

**None/not applicable.**

Dated: Sept. 19, 2011

s/ **Charles McPhedran**

---

Charles McPhedran, Esq.  
Counsel for Pennsylvania State Nurses  
Association, Physicians for Social  
Responsibility—Philadelphia, Clean Air Council,  
and Citizens for Pennsylvania’s Future

## TABLE OF CONTENTS

	<b>Page</b>
I. STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE.....	1
II. SUMMARY OF ARGUMENT.....	3
III. ARGUMENT.....	4
A. This Appeal Presents Critical Issues Affecting Public Health and the Environment.....	4
B. To Achieve the Goals of Environmental and Public Health Statutes, Regulators Must Be Able to Enforce the Law.....	6
C. The Public Interest Requires the Vigorous Exercise of Government Discretion, within Constitutional Limits.....	9
D. The Lower Court’s Decision Was Correct as a Matter of Law, and Recognized the Need for Agencies to Act in the Public Interest.....	14
CONCLUSION.....	18

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Bass v. Attardi</i> , 868 F.2d 45 (3d Cir. 1989) .....	12
<i>Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.</i> , 574 F.3d 214 (3d Cir. 2009) .....	10
<i>Butz v. Economou</i> , 438 U.S. 478 (1978).....	10, 17
<i>Commonwealth v. Locust Point Quarries, Inc.</i> , 396 A.2d 1205 (Pa. 1979).....	5
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	8, 12, 17
<i>In re City of Philadelphia Litig.</i> , 49 F.3d 945 (3d Cir. 1995) .....	8, 10, 17
<i>Keystone Redevelopment Partners, LLC v. Decker</i> , 631 F.3d 89 (3d Cir. 2011) .....	10
<i>Lauren W. v. DeFlaminis</i> , 480 F.3d 259 (3d Cir. 2007) .....	10, 11, 13, 16
<i>McLaughlin v. Watson</i> , 271 F.3d 566 (3d Cir. 2001) .....	8, 17
<i>Newman v. Beard</i> , 617 F.3d 775 (3d Cir. 2010) .....	10
<i>People of Three Mile Island v. Nuclear Regulatory Com'rs</i> , 747 F.2d 139 (3d Cir. 1984) .....	8, 11, 17
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974).....	9
<i>Transtech Industries, Inc. v. A &amp; Z Septic Clean</i> , 5 F.3d 51 (3d Cir. 1993) .....	12, 13, 17

**STATUTES**

21 U.S.C. § 393 .....6  
29 U.S.C. § 651 .....6  
30 U.S.C. § 801 .....6  
42 U.S.C. § 1983 .....3  
42 U.S.C. § 7401(b)(1) (2011).....7  
35 P.S. § 4004(2).....7  
35 P.S. § 4004(8).....7  
35 P.S. § 4004(9)(i).....7  
35 P.S. § 4004(10).....7  
35 P.S. § 4004(27).....7, 9  
35 P.S. § 6020.102(1)(2011).....7

**OTHER AUTHORITIES**

40 C.F.R. § 81.339 .....6  
Art. I, § 27 of the Pennsylvania Constitution .....5  
Department of Environmental Protection, “Donora Smog”,  
[http://www.portal.state.pa.us/portal/server.pt?open=514&objID=588401  
&mode=2](http://www.portal.state.pa.us/portal/server.pt?open=514&objID=588401&mode=2) .....5

## **I. STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE**

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae Pennsylvania State Nurses Association (PSNA), Physicians for Social Responsibility—Philadelphia (“PSR—Philadelphia”), Clean Air Council, and Citizens for Pennsylvania’s Future (“PennFuture”) (collectively, “Amici”) respectfully submit this brief in support of Appellees Thomas A. DiLazaro, Sean L. Robbins, Mark Wejkszner, and Michael Bedrin.<sup>2</sup> For the reasons described herein, this Court should affirm the judgment of the district court.

This case involves the enforcement of air pollution standards by the Pennsylvania Department of Environmental Protection (DEP) against the MFS, Inc. plant in Bethlehem, Pennsylvania. The Amici, organizations that pursue the goals of ensuring the protection of public health and the environment, are profoundly interested in this case because its outcome will affect the ability and willingness of government employees to do their jobs of protecting public health and the environment.

The PSNA is a statewide professional organization. PSNA’s Environmental Health Task Force develops, implements, and advocates on environmental issues

---

<sup>2</sup> By letter dated September 13, 2011, amici curiae requested consent from the parties to the filing of this Brief. In separate correspondence dated September 14, 2011, counsel for MFS, Inc. (“MFS”) declined to consent, and counsel for Appellees consented.

that could impact nurses and the patients they care for. PSNA supports strong environmental and public health programs to protect nurses and patients, including effective enforcement of the law to achieve environmental and public health benefits.

PSR—Philadelphia is the Philadelphia, Pennsylvania, chapter of Physicians for Social Responsibility. PSR—Philadelphia “mobilizes individuals, health professionals and community organizations to promote non-violence, to safeguard the environment and to ensure universal access to health care.”<sup>3</sup> Among other goals, the national organization and its local chapters focus on environmental issues that impact health and well-being.

The Clean Air Council is a member-supported, non-profit environmental organization dedicated to protecting everyone's right to breathe clean air. The Clean Air Council works through public education, community advocacy, and government oversight to ensure enforcement of environmental laws. The Clean Air Council strongly believes that the integrity of environmental enforcement and the protection of public health would be jeopardized if the district court's judgment were overturned.

PennFuture is a statewide, public interest, membership organization, whose purposes include advocating and litigating on behalf of the environment and public

---

<sup>3</sup> PSR—PHILADELPHIA, [www.psrphila.org](http://www.psrphila.org) (last visited Sept. 13, 2011).

health, air quality, and water quality in Pennsylvania. PennFuture is interested in ensuring that government regulators can vigorously enforce environmental laws without fear of being held personally liable for doing so, which could have a chilling effect on enforcement and a negative impact on the environment.

## **II. SUMMARY OF ARGUMENT**

At stake in this appeal is whether state government agencies will be able to provide fundamental public health protections such as clean air and safe water. As found in prior court decisions, agencies must be able to vigorously exercise their authority to protect the public interest. In Pennsylvania, citizens depend on agency employees to exercise their discretion under the Air Pollution Control Act (APCA) to the fullest to achieve that law's purposes and protect the public health and safety from dangerous air pollution.

This Court should affirm the judgment of the trial court below vacating the jury's multi-million dollar damages verdict on Appellant MFS, Inc.'s (MFS) claims against four current and former employees of the Pennsylvania Department of Environmental Protection. Unwarranted litigation seeking personal liability under 42 U.S.C. § 1983 against individual state employees will chill the exercise of discretionary authority in enforcing environmental laws and regulations. Further, reversing the trial court's ruling, against the weight of the evidence of record, would send the message that regulated entities can strategically file lawsuits



against officials who undertake discretionary regulatory actions against them. Such lawsuits would chill enforcement, induce skilled employees to consider leaving their jobs, and discourage talented applicants from seeking agency jobs. A reversal on appeal would thereby endanger public health and the environment, with ripple effects far beyond the named parties to this case. Courts should give rigorous scrutiny to Section 1983 claims against public officials at the dispositive motion stage, rather than extend litigation and put state employees through the expense of trials where the evidence does not measure up as a matter of law, as on the record below.

### **III. ARGUMENT**

#### **A. This Appeal Presents Critical Issues Affecting Public Health and the Environment.**

This appeal requires this Court to decide how state officials may effectuate public health and environmental protections in light of the constitutional protections afforded citizens against in their interaction with state government. This outcome of this case is of urgent concern to anyone who wants to breathe clean air and drink safe water.

This is an appeal from a judgment of the district court that vacated a jury verdict imposing personal liability totaling \$6.5 million against three current employees and one former employee of the Pennsylvania Department of Environmental Protection (DEP). The case arose from longstanding disputes

between DEP and MFS, Inc. regarding air pollution and air quality permits at the MFS plant in Bethlehem, Pennsylvania.

Air pollution has long been a critical public health issue in Pennsylvania, home of the notorious Donora Smog that killed 20 and sickened thousands in 1948.<sup>4</sup> Today, Pennsylvania's Constitution and statutes offer protection from harmful air pollution:

The Commonwealth is committed to the conservation and maintenance of clean air by Art. I, § 27 of the Pennsylvania Constitution. To that effect, through Section 4002 of the Air Pollution Control Act, the legislature has declared as policy the protection of air resources to the degree necessary for the protection of the health, safety and well-being of the citizens; the prevention of injury to plant and animal life and property; the protection of public comfort and convenience and Commonwealth recreational resources; and the development, attraction and expansion of industry, commerce, and agriculture. *In sum, protection of air resources is a matter of highest priority in the Commonwealth.*

*Commonwealth v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1209 (Pa. 1979) (citing *Commonwealth v. Bethlehem Steel Corp.*, 469 Pa. 578, 367 A.2d 222 (1976), *cert. denied*, 430 U.S. 955 (1977) (internal footnotes omitted; emphasis added)); *see also* Pa. Const. Art. I, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of

---

<sup>4</sup> Pennsylvania Department of Environmental Protection, “Donora Smog”, <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=588401&mode=2> (last visited September 17, 2011).

the environment.”) (2011, enacted 1971). However, serious public health challenges remain across the state and near local hot spots.<sup>5</sup>

The MFS plant was the source of hazardous air pollutants as well as nuisance odors; citizens and local officials complained about air pollution from the plant.<sup>6</sup> DEP responded to these complaints by enforcing the law. At stake in this appeal is the ability of state officials at DEP and other agencies to do the right thing and protect the public by enforcing the law again in future.

**B. To Achieve the Goals of Environmental and Public Health Statutes, Regulators Must Be Able to Enforce the Law.**

The goal of environmental, public health, and workplace safety statutes is to protect the public from pollution, unsafe food, and hazardous workplace conditions.<sup>7</sup> Environmental statutes are premised on legislative findings that pollution threatens public health and safety, and they establish regulatory schemes

---

<sup>5</sup> For example, all or part of 22 Pennsylvania counties fail to attain national standards designed to protect public health from fine particle pollution. 40 C.F.R. § 81.339.

<sup>6</sup> A12, A15, A17-A18, A23-A29, A31-A35, A38-A39, A44-A51, and A54-A57.

<sup>7</sup> For example, the United States Food and Drug Administration is authorized by federal statute to promote the public health and to protect the public from food-borne illnesses, poorly manufactured pharmaceuticals, and chemical exposures and other adverse health effects resulting from food, medicine and medical devices, and cosmetic products. *See* 21 U.S.C. § 393. The Occupational Health and Safety Administration’s principal purpose is to protect workers of covered employers from unsafe and unhealthy conditions in the workplace. *See* 29 U.S.C. § 651. Federal mine safety and health laws protect workers from hazards associated with coal and other mining activities. *See* 30 U.S.C. § 801.

that are intended to reduce those threats.<sup>8</sup> To this end, legislative bodies have granted governmental agencies the power to exercise discretionary authority. Agencies are entrusted with the implementation and enforcement of these laws, and the protection of public health and the environment depends upon the ability of agency employees to play their enforcement role effectively. In other words, citizens rely every day on public government officials for protection from threats to the public health.

Law enforcement is essential to the credibility and success of public health and environmental laws. In Pennsylvania, the APCA provides broad powers and duties to the DEP, including investigatory powers,<sup>9</sup> the issuance of orders to prevent air pollution,<sup>10</sup> the initiation of prosecutions and proceedings to compel compliance,<sup>11</sup> and “any and all other acts and things not inconsistent with any provision of this act, which it may deem necessary or proper for the effective enforcement of this act and the rules and regulations promulgated under this act.”<sup>12</sup>

---

<sup>8</sup> The purposes of the federal Clean Air Act include: “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1) (2011). At the state level, the Pennsylvania General Assembly found in the Hazardous Sites Cleanup Act: “The citizens of this Commonwealth have a right to clean water and a healthy environment, and the General Assembly has a responsibility to ensure the protection of that right.” 35 P.S. § 6020.102(1)(2011).

<sup>9</sup> 35 P.S. §§ 4004(2),(8).

<sup>10</sup> 35 P.S. § 4004(9)(i).

<sup>11</sup> 35 P.S. § 4004(10).

<sup>12</sup> 35 P.S. § 4004(27).

These tools, and their judicious employment by Pennsylvania DEP, are indispensable to clean air and other environmental progress. Achieving these statutory objectives depends on the men and women of DEP to implement the law by developing clean air plans and issuing permits setting pollution limits, among many other things. These same DEP employees must also be willing to take enforcement action, as authorized by statute, when necessary to protect the public health.

Federal courts, including the Third Circuit, have long recognized the “public interest in encouraging the vigorous exercise of official authority,” particularly in connection with the exercise of regulatory agency discretion. *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982); *see People of Three Mile Island v. Nuclear Regulatory Com’rs*, 747 F.2d 139, 143 (3d Cir. 1984) (quoting *Harlow*, among other U.S. Supreme Court precedents, for the proposition that “the public interest is served by ‘encouraging the vigorous exercise of official authority’”); *see also McLaughlin v. Watson*, 271 F.3d 566, 570 (3d Cir. 2001) (quoting same proposition); *In re City of Philadelphia Litig.*, 49 F.3d 945, 960-61 (3d Cir. 1995) (same). Thus, public policy necessitates that regulators be free to extend that discretion to the maximum extent appropriate to ensure preservation of public health and safety and the protection of natural resources – if necessary, by acting, as the Supreme Court has recognized, “swiftly and firmly at the risk that action

deferred will be futile or constitute virtual abdication from office.” *Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974); *see also* 35 P.S. § 4004(27) (APCA’s “necessary or proper” clause). If a public officer charged with enforcing laws and regulations governing public health and safety or the environment feels unduly constrained in exercising her official authority, then the public and the environment can no longer be ensured of the benefit of the full protections for which those laws and regulations were enacted and promulgated.

**C. The Public Interest Requires the Vigorous Exercise of Government Discretion, within Constitutional Limits.**

While state governmental officials have broad discretion to serve public health interests under many environmental laws, including those at issue in this appeal, the U.S. Constitution also places boundaries around state governmental officials’ discretion to act. As the court below correctly recognized, officials may not retaliate for a legitimate exercise of the First Amendment right to petition for redress of grievances; may not deprive a person of constitutionally protected property or liberty interests without due process of law; may not act in arbitrary and wrongful ways that shock the conscience in violation of substantive due process rights; and may not treat similarly situated persons or entities differently

without (at a minimum) a rational basis for doing so. A64-A65, A84-A85, A97-A98, A109.<sup>13</sup>

The Constitution places these limits on governmental officials to ensure accountability without undermining legitimate statutory purposes. Indeed, the inquiry in which courts engage when evaluating a defense of qualified immunity reflects a balancing of competing values: the importance of a damages remedy for conduct that rises to the level of a constitutional violation, on the one hand, against “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority,” on the other. *Butz v. Economou*, 438 U.S. 478, 504-06 (1978). “In making this balance, courts recognize that officials often must ‘act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.’” *In re City of Philadelphia Litig.*, 49 F.3d at 961 (Greenberg, J.) (quoting *Scheuer*, 416 U.S. at 246).

The Third Circuit has strongly cautioned against the dangers created when the specter of personal liability inhibits the appropriate discretionary actions of public officials. In *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007), the

---

<sup>13</sup> See also *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) (First Amendment retaliation); *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 574 F.3d 214, 219 (3d Cir. 2009) (procedural due process); *Newman v. Beard*, 617 F.3d 775, 782 (3d Cir. 2010) (substantive due process); *Keystone Redevelopment Partners, LLC v. Decker*, 631 F.3d 89, 109 (3d Cir. 2011) (equal protection).

unanimous panel discussed the causation element in First Amendment retaliation claims and its importance in mitigating the chilling effect of such claims:

A court must be diligent in enforcing these causation requirements because otherwise a public actor cognizant of the possibility that litigation might be filed against him, particularly in his individual capacity, could be chilled from taking action that he deemed appropriate and, in fact, was appropriate... We recognize that often public actors such as those in this case must make a large number of decisions in charged atmospheres thereby inviting litigation against themselves in which plaintiffs ask courts to second guess the actors' decisions.

*Lauren W.*, 480 F.3d at 267-68 (internal footnote omitted). By this holding, the Third Circuit recognizes the danger of encouraging First Amendment retaliation claims, and the obligation of courts to hold these claims to strict causation requirements.

This Circuit has also recognized, in discussing the defense of qualified immunity, that “the public interest is served by ‘encouraging the vigorous exercise of official authority’ and by not discouraging qualified men and women from entering public service because of the fear of substantial personal liability.” *People of Three Mile Island*, 747 F.2d at 143 (3d Cir. 1984) (quoting *Harlow*, 457 U.S. at 814, and citing *Butz*, 438 U.S. at 506, and *Scheuer*, 416 U.S. at 240-42). Qualified immunity for executive agency personnel is justified by interests such as “the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence



of able people from public service.” *Transtech Industries, Inc. v. A & Z Septic Clean*, 5 F.3d 51, 58 (3d Cir. 1993) (quoting *Harlow*, 457 U.S. at 816). “Finally, there is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).<sup>14</sup>

Applying these standards to clean air issues in Pennsylvania illustrates the challenges faced by government officials. To protect air quality, DEP officials must assemble adequate resources, obtain data on plant emissions and on pollution

---

<sup>14</sup> The Third Circuit cited with approval a similar policy argument about the chilling effect created by the threat of individual liability in *Bass v. Attardi*, 868 F.2d 45 (3d Cir. 1989). As in this case, *Bass* involved civil rights claims against public officials, although in *Bass* the officials, members of a municipal planning board, performed quasi-judicial functions and accordingly the panel’s opinion addressed the defense of absolute immunity. The Third Circuit panel found persuasive support in an opinion that Judge Greenberg had written in a New Jersey Superior Court case before being confirmed to the Third Circuit:

We think that the public interest requires that persons serving on planning boards considering applications for development act with independence and without fear that developers, who will frequently have significant financial resources and the ability to litigate, not bring them into court. The possibility of facing expensive and aggravating litigation as a result of making a decision on an application for development may in a subtle way impact on the decision making process.

*Bass*, 868 F.2d at 50 n. 11 (quoting *Anastasio v. Planning Board*, 209 N.J. Super. 499, 526, 507 A.2d 1194, 1208, *certification denied*, 107 N.J. 46, 526 A.2d 136 (1986)).

levels in the ambient air, and address repeat violations. On top of these and other impediments, the threat of personal liability for doing their jobs would be an overwhelming obstacle. If reinstated by this Court, the shocking jury verdict against current and former DEP staffers in this case would tip the balance described in the preceding paragraphs strongly against effective agency action. Such damage awards impair the ability of DEP staffers to do their job, including aggressive enforcement of the law when necessary. *See Lauren W.*, 480 F.3d at 267 (chilling effect). If DEP managers are reluctant to take action against a violator, or if DEP is unable to recruit and retain good enforcement personnel, the agency's ability to protect the public health will suffer.

For this reason, lawsuits against agency personnel in their individual capacity must be carefully examined by the courts. Because the district court determined correctly that the jury verdict was unwarranted on the facts of the case, Amici support the post-trial ruling in favor of defendants. However, an earlier ruling in favor of the defendants at summary judgment and on reconsideration of summary judgment would have addressed the threat of financial catastrophe for defendants posed by this and similar litigation at a much earlier stage in the proceedings. When adjudicating claims against state officials, courts must consider the impact of extended litigation itself. *Transtech Indus.*, 5 F.3d at 58.

A reversal of the district court's ruling in this case would leave regulators who exercise discretionary authority in greater peril of being dragged into court to face the threat of significant verdicts for damages.<sup>15</sup> In the face of financial implications that would be devastating to anyone, not least those working for the benefit of the public on a government salary, agency personnel would be deterred from taking strong enforcement action, in direct contravention of the public interest. This Court should affirm the district court ruling to prevent this outcome, and should clarify that such matters should be resolved at the summary judgment stage to avoid the chilling effect of extended litigation.

**D. The Lower Court's Decision Was Correct as a Matter of Law, and Recognized the Need for Agencies to Act in the Public Interest.**

Amici submit that, as demonstrated by the opinion and record below, MFS could not prevail on its claims as a matter of law. The jury verdict was unwarranted on the facts of the case, but also because it would deter state employees from vigorously enforcing state law. We urge this Court to affirm the decision below to discourage extended litigation in the future when government officials act to enforce environmental laws in a good faith exercise of discretion.

---

<sup>15</sup> The verdict in favor of MFS below awarded damages against Mr. DiLazaro in the amount of \$2,600,000; against Mr. Bedrin in the amount of \$1,625,000; against Mr. Robbins in the amount of \$1,625,000, and against Mr. Wejkszner in the amount of \$650,000 (A7).

The district court below evaluated the Appellees' Rule 50(b) motion under the proper standard of review, viewing all of the evidence in the record in the light most favorable to MFS as the non-moving party, and concluded that the jury's verdict could not stand as a matter of law on any of MFS's claims. The evidence on the record below does not support a finding that the Appellees were motivated by animus toward MFS, but rather shows that they were simply doing the jobs as regulators that the public relies on them to do.

For example, consider MFS's claims regarding procedural due process. A88-A97. MFS claims that Appellees unlawfully deprived them of liberty and property without due process of law. The Court below agreed that MFS demonstrated property and liberty interests subject to procedural due process protection. A93. However, the Court below reviewed the evidence regarding the element of "due process of law" for each procedural due process claim, and ruled for Appellees on these claims as a matter of law A93-A97. As the district court recognized "[t]he laws and regulations promulgated to insure clean air give broad discretion to regulators," and the DEP parties were "responsible for regulating a company that has the potential to cause great harm to the environment if certain procedures or standards were not followed." A107. The "tough" permit conditions at issue in this case "were necessary to protect the environment and concomitantly the public." A104. This is exactly what environmental regulators

are supposed to do under the environmental statutes that empower these regulators – exercise their discretionary authority to protect the public from harm.

The district court was clearly concerned about the chilling effect that high damage awards would have on DEP regulators’ ability to enforce environmental laws and regulations for the public’s benefit. Referring to the Third Circuit’s opinion in *Lauren W.*, the district court found:

This case falls squarely within the admonition of the Third Circuit. Defendants acted appropriately in a ‘charged atmosphere.’ At the same time that the PaDEP and Defendants had to assuage the feelings of angry residents living close to the plant, the Department and its employees attempted to enforce environmental statutes and regulations without forcing a viable business in Pennsylvania to shut down. Defendants’ actions were appropriate given the circumstances.”

A 86; A84-A85, A104-A106. Here, the district court properly recognized, just as the Third Circuit cautioned in *Lauren W.*, that courts must be diligent in enforcing causation requirements in cases involving retaliation claims, lest public actors be chilled from taking appropriate actions. A86. In dispensing with MFS’s supposed evidence of antagonism, the district court correctly understood that the proffered evidence merely showed that the DEP employees were doing their jobs by proposing lawful terms in a draft permit and preparing an internal memorandum. “If such conduct of a regulator could amount to antagonism under the law, it would inhibit a public employee from performing his or her duties in the best interest of

the public. The kind of inference [on antagonism] MFS seeks to be drawn from the evidence cannot be countenanced.” A84-A85.

The district court’s rationale is consistent with longstanding precedent recognizing the need for vigorous exercise of official discretion. *See Harlow*, 457 U.S. at 806-07; *Butz*, 438 U.S. at 504-06; *McLaughlin*, 271 F.3d at 570; *In re City of Philadelphia Litig.*, 49 F.3d at 960-61; *Transtech Indus.*, 5 F.3d at 58; *People of Three Mile Island*, 747 F.2d at 143. However, if this Court were to reverse the district court’s judgment and reinstate the jury’s verdict, regulators at DEP and other agencies will be subject to a flood of similar strategic lawsuits against discretionary regulatory actions. To avoid future liability, capable officials would hesitate to utilize the full scope and breadth of their discretionary authority when faced with reasonable evidence of violations. Qualified individuals may find careers outside of public service to avoid the cost of defending against claims, much less the financially devastating implications of an adverse verdict. The end result will be a public that is exposed to serious public health risks from weak enforcement of the law. To avoid these consequences, and to give effect to statutes meant to protect the public health and the environment, this Court must affirm the decision below.

## CONCLUSION

To fulfill their statutory mission to protect public health and the environment, agency officials must be able to enforce the law without fear of unwarranted litigation for damages. Amici urge that the judgment of the district court be affirmed.

Respectfully submitted,

**s/ Charles McPhedran**

---

Charles McPhedran, Esq.  
PA Attorney No. 60123<sup>16</sup>  
EARTHJUSTICE  
156 William St., Suite 800  
New York, NY 10038  
(212) 791-1881 x8234  
[cmcphebran@earthjustice.org](mailto:cmcphebran@earthjustice.org)

Adam H. Cutler, Esq.  
PA Attorney No. 76605  
PUBLIC INTEREST LAW CENTER  
OF PHILADELPHIA  
1709 Benjamin Franklin Parkway, 2<sup>nd</sup> Floor  
Philadelphia, PA 19103  
(215) 627-7100 x224  
[acutler@pilcop.org](mailto:acutler@pilcop.org)

Counsel for Amici Curiae  
Pennsylvania State Nurses Association,  
Physicians for Social Responsibility—  
Philadelphia, Citizens for Pennsylvania's  
Future, and Clean Air Council

---

<sup>16</sup> Admission pending in New York.

## **CERTIFICATE OF BAR MEMBERSHIP**

I hereby certify that I am a member in good standing of the Bar of the U.S. Court of Appeals for the Third Circuit. I was admitted to this Bar in 1998.

## **CERTIFICATE OF WORD COUNT**

I hereby certify that the foregoing Brief satisfies the word count requirement established by Fed. R. App. P. 29(d) and 32(a)(7)(B). According to the word count feature of Word 2010, the text including footnotes contains 4,815 words.

## **CERTIFICATE OF SERVICE**

I certify that on September 19, 2011, I caused the foregoing Motion for Leave to File Brief of Amici Curiae in Support of Appellees and in Support of Affirmance to be filed with the clerk through the Court's CM/ECF system, which served through email all parties or their counsel of record as listed below:

Thomas J. Zagami, Esq.  
Thomas J. Zagami, P.A.  
10500 Little Patuxent Parkway  
Suite 650  
Columbia, MD 21044  
tzagami@kpklegal.com

John J. Gibbons, Esq.  
Kevin McNulty, Esq.  
Gibbons P.C.  
One Gateway Center  
Newark, NJ 07102-5310  
jgibbons@gibbonslaw.com  
kmcnulty@gibbonslaw.com

Wayne C. Stansfield  
Henry F. Reichner  
Reed Smith LLP  
1650 Market St.  
2500 One Liberty Place  
Philadelphia, PA 19103-7301  
wstansfield@reedsmith.com  
hreichner@reedsmith.com

Attorneys for Appellant



Claudia M. Tesoro, Esq.  
Randall J. Henzes, Esq.  
Office of Attorney General  
3rd Floor  
21 South 12th St.  
Philadelphia, PA 19107  
ctesoro@attorneygeneral.gov  
rhenzes@attorneygeneral.gov

Douglas G. White, Esq.  
Department of Environmental Protection  
2 East Main St.  
Norristown, PA 19401  
douwhite@pa.gov

Attorneys for Appellees

**CERTIFICATION OF IDENTICAL ELECTRONIC AND PAPER COPIES**

I hereby certify that the text of the electronically-filed Brief and the text of the ten hard copies furnished to the Court by First Class Mail are identical.

**CERTIFICATION THAT VIRUS SCAN WAS PERFORMED**

I hereby certify that the foregoing Brief was tested for viruses before being filed with the ECF system using Symantec Endpoint Protection software. No viruses were detected.

Executed on September 19, 2011.

**s/ Charles McPhedran**  
Charles McPhedran, Esq.  
Earthjustice