No. 22-1581

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CITY OF WILMINGTON, DELAWARE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in Case No. 1:16-cv-01691-MHS, Judge Matthew H. Solomson

REPLY BRIEF OF APPELLANT

Paul T. Nyffeler
HUNTON ANDREWS KURTH LLP
951 East Byrd Street
Richmond, VA 23219
pnyffeler@huntonak.com
(804) 344-8837 (phone)
(804) 788-8218 (fax)

Dated: October 5, 2022

Counsel for Plaintiff-Appellant
City of Wilmington, Delaware

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-1581

Short Case Caption City of Wilmington, Delaware v. United States

Filing Party/Entity City of Wilmington, Delaware

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Signature: /s/Paul T. Nyffeler

Name: Paul T. Nyffeler

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
City of Wilmington, Delaware		

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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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I. ARGUMENT

The United States' response fails to justify the court's ruling against Wilmington, merely confirming that the court's suspicions were not grounded in evidence in the trial record (and possibly caused by the United States choosing not to put on the defense it promised). It also confirmed *de novo* review was legally unjustified. If not reversed here, the United States will continue refusing to comply with the same requirements (including interest) and administrative authority as those experienced by the citizens of Wilmington, Delaware.

A. THE WETLANDS THAT WERE NEVER THERE.

In its Response, the United States attempts to contest Wilmington's assertion that "the court assumes, without evidence, that acquiring more accurate data would reveal 'a monumental difference between actual and correct charges -- say, one leading to a million-dollar overcharge….'" Appellant Br. 52-53 n.8, 60 (quoting Appx0057 n.22). This "is simply not true," the United States argues, because the "court accurately described the implications of the City's position that, in the absence of an appeal, it would not label any gap, no matter how large, as unreasonable." U.S. Br. 32 n.3. If the United States had followed its prior practice (and Delaware

law) by paying the charges under protest and promptly suing for a determination regarding compliance with 33 U.S.C. § 1323, the charges might no longer be presumed reasonable and correct as a matter of law. *See, e.g., United States v. City of Renton*, Case No. C11-1156JLR, 2012 U.S. Dist. LEXIS 73261 (W.D. Wash. May 25, 2012); *Murphy v. Wilmington*, 11 Del. 108, 138 (1880); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Wilmington Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978). The court's concerns about the potential for "excessive" charges comes only by impermissibly "second-guessing" Wilmington's City Council, given that the Ordinance assesses charges across Federal and privately owned property alike.[1] *South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988). Notwithstanding baseless assertions that Wilmington's "estimated impervious area… was ***presumably overstated***," without actual evidence that a "gap" existed for the Properties,

[1] Despite its stated concern that Wilmington's observation that "nondiscriminatory" and "proportionate contribution" can overlap renders the latter synonymous, the United States does not dispute that stormwater charges assessed on both federal and private property in a manner bearing no relationship a property's contribution to stormwater pollution could be simultaneously nondiscriminatory and disproportionate. *Compare* U.S. Br. 36 *with* Appellant Br. 42.

or even a suggestion of what the United States might have appealed regarding the Properties' stormwater charges, the United States only highlighted that the court's findings of fact, which cannot "be the result of mere surmise and conjecture," were "based on probabilities, not on possibilities…." U.S. Br. 48 (emphasis added); *Kentwood Lumber Co. v. Ill. C.R. Co.*, 65 F.2d 663, 665 (5th Cir. 1933).

Such speculation's roots are irrelevant. Given that (a) the final opinion never disclosed the evidentiary bases for the United States' speculative inaccuracies, and (b) the United States' response adduces no evidence in the record "on which the [Court of Federal Claims] rationally could have based its decision," this is simply an example of a court abusing its discretion on evidentiary matters, basing its ruling on clearly erroneous factual findings. *Heat & Control, Inc. v. Hester Indus.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986) (internal quotations and citations omitted).

Yet Wilmington remains troubled. What gap? The United States' response points to no evidence adducing the source of this speculation. The court's expectation that something ***must*** be wrong with stormwater charges assessed pursuant to an Ordinance applied faithfully to every other parcel in Wilmington turns the factual inquiry in this case and the

"more likely than not" evidentiary standard on their heads. Given that New Castle County's property records indicate the Properties are vacant and no evidence suggests they are not, what does the court mean by "the reality of the Properties' physical characteristics" when insisting there is doubt that their "reality" reflects the characteristics expected of typical vacant properties? Appx0052. If the disputed charges involved, not vacant properties, but the federal district courthouse in Wilmington, would the court assume, without evidence, that the courthouse went missing? If the court did not believe the County's property records when they declared the Properties to be vacant, what did it think they were? Did it suspect the Corps turned them into concrete parking lots? Erected multi-story condominiums? Built a military base? Did it worry the United States sold the Properties outright and failed to notify New Castle County? Each of these suppositions, without a basis in evidence, are as likely as one another to have occurred at the Properties; none are more probable than the Properties are typical vacant lots, based on undisputed County records. And there is no basis whatsoever for inferring that any given parcel (vacant lot, grocery store, residential plot, etc.) differ in any meaningful, measurable way from those land use descriptions ***without***

evidence. This is why findings of fact must be decided on evidence, which is not whatever a judge might imagine. *Cf. Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 445 (1st Cir. 1989) (courts reviewing jury verdicts cannot "ignore uncontradicted evidence offered by the opposing party" or "accept unreasonable inferences based on conjecture or speculation.") (internal citations omitted).

But why is the court worrying about "a monumental difference between actual and correct charges" that might have resulted in "a million-dollar overcharge" when the evidence proves this never happened? Appx0057 n.22. The only discussion of the court's concerns over a hypothetical "million dollar overcharge" in the record occurred during a pretrial hearing, where it posed a hypothetical involving federal property containing "a lot of wetlands" and where assessed stormwater charges jumped from $1,000 per quarter to $5,000,000 without justification.[2] The

[2] *See* Appx0026 (18:9-19:7). During that hearing, counsel for Wilmington struggled to answer the court's questions because the evidence to be presented at trial suggested no unexpected increases. *Id.* (19:8-20:1). But the possibility of a hypothetical million dollar overcharge on federal properties containing "a lot of wetlands" would "be in the long run" a "serious problem" for the court. Appx0027-0028 (24:24-25:9). At trial, Wilmington presented evidence that unexpected overcharges resulting from clerical errors are correctable retroactively. Appx0159-0160 (232:18-233:12).

United States stipulated that three months' worth of the Properties' stormwater charges was "about $45,540" when Congress amended 33 U.S.C. § 1323. Appx2058. The trial evidence revealed no million-dollar overcharge, and the United States was careful after that hearing never to say or suggest that the Properties contained wetlands (because if it did, it would have the burden of proving its "affirmative defense regarding the [alleged] inadequacy of the City's appeal process under the exhaustion doctrine…"). U.S. Br. 55.

Without guidance from the court, Wilmington can only guess why it mentions a hypothetical that never happened when concluding Wilmington's stormwater charges are actually unreasonable. Appx0057 n.22. But Wilmington's best guess, given the limited insight into the court's thoughts, is that the court, after presiding over numerous disputes between the parties, came to presume that the Properties contained wetlands and expected Wilmington to prove they did not. Denying Wilmington's motion *in limine* that sought to exclude evidence of wetlands on the Properties, the court intended to allow a defense witness to testify about wetlands so that Wilmington could explore the "weight" of his testimony "on cross-examination." Appx0019. When discussing the

court's intention to apply *de novo* review at trial, the court explained during a pretrial hearing that it would not disregard the trial testimony of defense witnesses "saying, yes, there are wetlands" despite contemporaneous evidence of some "government official's" "mistaken belief" "that there were no wetlands" on federal property "they never visited…."[3] Appx0029 (30:13-31:16). When Wilmington's case-in-chief ended during trial and again in its final opinion, the court declared its expectation that Wilmington carry its burden of proof without any "entitlement to cross-examine the other side's witnesses." Appx0211-0212 (440:22-441:1); *see* Appx0049 (same with citations). But why would the court feel Wilmington needed reminding of a failure to cross-examine testimony never offered? By calling no witnesses at trial, the United States withheld the very evidence of wetlands Wilmington's motion *in limine* sought to exclude. *See* Appx0012-0020. If the court truly presumed (without evidence) that runoff-diminishing wetlands were present, its refusal to accept circumstantial evidence to prove Wilmington's stormwater charges were

[3] During the pretrial hearing, no actual evidence was discussed, and this imaginary "government official" was proposed within a hypothetical of the court's creation. Appx0029 (30:13-17); *see* Section I.B.3 *infra*.

"based on some fair approximation of the proportionate contribution of the [Properties] to stormwater pollution (in terms of… runoff from the [Properties])" might make more sense logically (but not legally). 33 U.S.C. § 1323(c)(1)(A).

Wilmington need not explain the evidentiary bases of a ruling giving dispositive weight to the United States' speculation and conjecture; neither can overturn or rebut New Castle County's property records or all other evidence Wilmington presented at trial. *See Charlson Realty Co. v. United States*, 181 Ct. Cl. 262, 278 (1967). But Wilmington cannot resolve its suspicion that the United States benefited from a defense it never put on involving wetlands no evidence suggests were ever there.

B. NO EVIDENCE REBUTS WILMINGTON'S TRIAL EVIDENCE PROVING ITS CHARGES ASSESSED ON THE PROPERTIES, MORE LIKELY THAN NOT, COMPLIED WITH 33 U.S.C. § 1323.

1. Wilmington's Stormwater Charges Are Proportionate, Reasonable, and Nondiscriminatory.

Surprisingly, Wilmington and the United States are in agreement[4] on what § 1323 obligated Wilmington prove:

> The Federal-Facilities Section does not define "reasonable services charges" in terms of the *methodology* that is used to estimate runoff or stormwater pollution. *See* 33 U.S.C. § 1323(c)(1)(A). Rather, liability turns on the *application* of the methodology to a property for purposes of estimating that property's relative contribution to stormwater pollution. *Id.* To that end, the statute requires that charges be based upon "some fair approximation" of the property's "proportionate contribution . . . to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff)." *Id.*

U.S. Br. 36-37 (emphasis in original). Notwithstanding the numerous technical challenges in the United States' response here, the court accepted the testimony of Wilmington's expert that the stormwater charges assessed on properties in Wilmington pursuant to the Ordinance are, "in technical terms, reasonable," "nondiscriminatory," and "based on some

[4] Wilmington disputes that the phrase "*property or facility's pollutant quantities or runoff volume*," described with emphasis on page 9 of the United States' brief, is found in 33 U.S.C. § 1323(c)(1)(A).

fair approximation of the… proportional contribution of properties to stormwater pollution." Appx0172 (282:16-25); *see also* Appx0187 (344:10-14); Appx0171-0172 (280:13-282:3); Appx0210-0211 (436:16-437:1). The United States argues that Wilmington failed to satisfy the "reasonable certainty" test the court created for complying with 33 U.S.C. § 1323(c)(1)(A). U.S. Br. 31-32; *see* Appx0054-055. But the United States never disputes that Wilmington's expert answered that question when asked by the court during trial and explained that the Ordinance was comfortably between two extremes of unreasonableness, a description satisfying the "reasonable certainty" test. *See* Appellant Br. 23-24.

At trial, Wilmington presented a roadmap of circumstantial evidence that linked, step by step, the undisputed evidence establishing that the Ordinance's reliance on New Castle County property records as a "fair and equitable basis" on which to assess stormwater charges, to the United States' stipulation that New Castle County's land use records declare the Properties to be vacant, to undisputed evidence that the delinquent stormwater charges were assessed on the Properties as required by the Ordinance and Delaware law requiring "each contributor of runoff… pay to the extent to which runoff is contributed." Appx1081-1082;

Del. Code Ann. tit. 7, § 4005(c); *see* Appellant Br. 37-38 (describing circumstantial evidence, with record citations).

Despite the United States putting on no evidence, the court declared itself unconvinced, refusing to infer that, "***by extension***, the charges must be characterized as reasonable" because Wilmington had failed to rule out all possible doubt. Appx0058 (quoting Appx0187 (342:22-343:5)) (emphasis added); *see* Appx0056. For example, the court held that Wilmington failed to prove that a parcel's land use label, more likely than not, is tied to the parcel's "contribution to stormwater pollution" because "[t]he County land-record tax classifications have nothing to do with stormwater runoff…." Appx0051. Under this logic, where "one can reasonably determine… that it is raining outside" based on unrebutted circumstantial evidence of "observing a person entering a room with a dripping wet umbrella," the United States might argue against reaching that conclusion by speculating, for example, that they may have been strolling through wetlands. *United States v. Dove*, 916 F.2d 41, 46 (2nd Cir. 1990).

After repeating the court's conclusion, the United States asserted numerous speculative justifications for rejecting Wilmington's evidence:

maybe Wilmington misapplied Dr. Chow's research[5]; maybe Dr. Chow's research did not account for the (attorney-alleged but unproven) "unique" nature of land cover of vacant parcels in Wilmington[6]; maybe the County's land use codes are inaccurate[7]; maybe some properties were incorrectly classified in the "vacant" stormwater property category and should have been charged more[8]; maybe "the actual characteristics of properties within a particular tax-record category is relatively [too] small" (or too large)[9]; maybe Wilmington should have used "actual data

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[5] *See* U.S. Br. 22; *but see* Appx0228.

[6] Appx0107 (23:12-15) (defendant's opening statement); *see* U.S. Br. 21-22.

[7] In fairness, the United States never alleged any of the County's records were ***actually*** inaccurate, instead merely faulting Wilmington for not double-checking them. *See* U.S. Br. 22. Given its lack of evidence, either the United States believed conducting such a labor-intensive search would be unproductive or did so and found no errors.

[8] Other than parks and cemeteries, vacant properties are assessed the Ordinance's lowest stormwater charge per square foot among all nonresidential categories. *See* Wilmington Code § 45-53(d)(3). Besides, if such misclassifications occurred, Wilmington's administrative appeal process provides an appropriate remedy for misclassification. *Id.*, § 45-53 (d)(7).

[9] U.S. Br. 23-24; *see also id.* 25-26 (assumed runoff coefficient approximating "measure of imperviousness may differ from the actual imperviousness that exists in a specific property," which might not be federally-

gleaned from aerial imagery" like it does for "residential properties"[10]; maybe there is an undiscovered variation in the Properties' characteristics so vast that, in only uncovered, might result in a "million-dollar overcharge…."[11]

The court's reliance on the United States' speculation, whose response confirms were never based on evidence, creates two problems in this appeal. First, in the weighing of evidence under the "preponderance of the evidence" standard of proof, circumstantial evidence must be distinguished "from mere speculation—the former yields a preponderant probability, the latter only a mere possibility." *Lublin Corp. v. United*

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owned, and which "may be significantly lower [or higher] than that determined using the runoff coefficient approach.") (quoting Appx0220).

[10] U.S. Br. 28-29. This assertion is demonstrably false. Out of the roughly 26,000 parcels in Wilmington, it relied on "aerial imagery" for only "60 condominium properties…." Appx0046; *see* Appx0137 (144:17-22); Wilmington Code § 45-53(d)(2). When assessing stormwater charges on residential properties, the Ordinance requires reliance on County property records, too. *See* Appx0046; Wilmington Code § 45-53(d)(1). Not only has the United States never indicated how using aerial imagery would prove the Properties' stormwater charges to be unfair, but Wilmington's expert testified that more precise techniques only guarantee additional expense, not more accurate approximations of stormwater pollution contribution. *See* Appx0177 (304:16-305:11).

[11] Appx0057 n.22; *see* U.S. Br. 32 n.3.

States, 106 Fed. Cl. 669, 676 (2012). Thus, in every instance where Wilmington's circumstantial evidence creates one reasonable inference after another, the court clearly erred by giving the United States' conjecture more weight than Wilmington's unrebutted evidence. Second, amongst all potential, unstated grounds for the ruling, the United States cannot rule out the court's expectation, disclosed pretrial, that Wilmington would need to disprove assumed characteristics about the Properties by cross-examining a trial witness the United States conspicuously failed to call to the stand. *See* Section I.A *supra*.

Once Wilmington established its stormwater charges on the Properties were assessed pursuant to the Ordinance, this connection, by itself, is evidence more than adequate to carry Wilmington's burden of proof. *See City of Cleburne*, 473 U.S. at 440; *Wilmington Med. Ctr.*, 382 A.2d at 1342; *Baker*, 485 U.S. 505, 525 n.15. Wilmington maintains, and the United States never disputes, that any owner contesting the reasonableness of charges assessed pursuant to its Ordinance or the correctness of a parcel's land use declared in governmental property records bears ***at least*** the burden of producing clear and convincing evidence to the contrary. *See* Appellant Br. 55 (quoting Fed. R. Evid. 301; *Jazz Photo Corp.*

v. United States, 439 F.3d 1344, 1352 (Fed. Cir. 2006)). Instead of challenging the legal burdens it should face when contesting Delaware or Wilmington law, the United States instead argues that the only law applicable here is Federal law, specifically 33 U.S.C. § 1323(a). U.S. Br. 27. As discussed in Section I.E below, 33 U.S.C. § 1323 waived the United States sovereign immunity and made it subject to, and obligated to comply with, local requirements and administrative authority for not only "reasonable service charges," but also permitting, recordkeeping, reporting, and (when required of local nongovernmental entities) paying prejudgment interest. Moreover, 33 U.S.C. § 1323 renders inapposite the cases that the United States cites, which compare taxes and fees. U.S. Br. 27 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930)). To the extent any "federal rights" may be involved here, § 1323 requires measuring them against the rights of similarly situated "nongovernmental entities." *Id.*; *see* 33 U.S.C. § 1323(a), (c). Thus, the court's factual conclusions remain clearly erroneous because the United States presented no evidence at trial, let alone clear and convincing evidence, that could overturn these legal presumptions.

Excluding pretrial speculation about alleged wetlands on the Properties—the presence of which the United States conspicuously failed to suggest during trial, let alone attempt to prove using witnesses or even a photograph—the United States failed to adduce any evidence in the trial record providing a reason to doubt the assessment of the New Castle County's property records that the Properties are vacant properties or believe they behave differently from other vacant properties regarding stormwater pollution contributions. Because the court's findings are "contrary to the overwhelming weight of the unchallenged documentary and testimonial evidence" and can only leave this Court "with the definite and firm conviction that a mistake had been committed…," they are "clearly erroneous" and must be reversed. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1581 n.46 (Fed. Cir. 1987) (citation omitted).

2. The United States' Justifications For The Court's Ruling Rely On An Expectation For Special Treatment, Which, If Followed, Would Be Unlawful.

The United States' defense of the court's findings that Wilmington failed to prove its charges complied with 33 U.S.C. § 1323 is irreconcilable with both that statute and the U.S. Constitution. For example, the court refused to accept that the Ordinance's stormwater rate methodology

might be "'within a reasonable spectrum of approaches'" and yet the stormwater charges assessed on the Properties "might 'not accurately reflect'" their specific contributions to stormwater pollution in terms of runoff and still comply with § 1323. Appx0059. Because the United States introduced no evidence into the record, there is no basis to believe such a situation is probable, let alone possible.

The United States acknowledges "it would be infeasible for Wilmington to measure the actual stormwater pollution, discharge, or runoff that occurs from each and every parcel in its corporate boundaries." U.S. Br. 34. But it also asserts that as long as Wilmington measures the actual stormwater pollution, discharge, or runoff from ***only*** the Federal properties and assesses charges within an undefined "gap" of its choosing between their approximate and actual contributions, the stormwater charges should be paid. *Id*. If not, the court apparently would require Wilmington to revise its laws to specially accommodate the federal property. *See* Appx0062 n.28. Such a construction would allow the Federal Government, not merely its courts, to impermissibly second-guess the fairness of state and local utility rates. *See Baker*, 485 U.S. at 525 n.15.

This construction is also infeasible and practically impossible to satisfy. If the special inspection results in charges on federal property greater than would have resulted for similarly situated property owned by nongovernmental entities—just as if Wilmington's Ordinance singled out federally-owned property for substantive or procedural requirements inapplicable to property owned by nongovernmental entities—the Federal Government would, without hesitation, wield *United States v. Washington* to strike down Wilmington's actions as violating the Supremacy Clause by "facially singl[ing] out the Federal Government for unfavorable treatment…." U.S. Br. 52 (citing 142 S. Ct. 1976, 1984 (2022)). Conversely, if the special assessment results in lower charges in the form of stormwater credits or land cover adjustments that nongovernmental owners normally apply to Wilmington to receive, then the United States is no longer being held to the same state and local requirements and administrative authority as are nongovernmental entities in Wilmington's efforts to control and abate water pollution. *See* 33 U.S.C. § 1323(a). The only solution that might satisfy the United States' demands would be to individually assess every property, regardless of ownership, and charge each according to their "actual" contributions to stormwater pollution, a

solution all agree is infeasible. U.S. Br. 34. The United States offers no solutions for ensuring perfect approximations of all properties' actual stormwater pollution contributions without individually assessing all properties or offering owners administrative relief, but "just take care of Uncle Sam" would be unfair, unlawful, and/or unconstitutional.

The United States is wrong, and all parts of 33 U.S.C. § 1323 should be read together. Stormwater charges must be based on some fair approximation of parcels' proportionate contributions to stormwater pollution, parcels owned by the Federal Government and nongovernmental entities should receive the same treatment, and any owner with evidence demonstrating a gap between their parcel's actual contributions to stormwater pollution should work with the City to obtain credits or appeal their charges before seeking assistance with the courts.

3. *De Novo* Review Was Improper.

The court considered the EPA "2008 publication 'on a clean slate' without deference to the agency," as one might on *de novo* review, "and deemed the publication to be irrelevant." U.S. Br. 43 (citing Appx0030; Appx0061). This determination was incorrect in multiple ways.

First, this case is nothing like a tax refund suit, as the United States contends, where "factual issues are tried *de novo* in [the U.S. Court of Federal Claims], with no weight given to subsidiary factual findings made by the [Federal agency] in its internal administrative proceedings." U.S. Br. 43-44 (quoting *Schnie v. United States*, 151 Fed. Cl. 1, 10 (2020)). The 2008 EPA brochure was not produced within an administrative proceeding. *See* Appx1082 ("This document is not law or regulation…."). Yet even if it were, the Federal agency's "assessment… 'is presumed to be correct….'" *Schnie*, 151 Fed. Cl. at 10 (citation omitted). Tax refund suits are entitled to "a trial *de novo*" because that is what the "tax laws contemplate…." *George E. Warren Corp. v. United States*, 135 Ct. Cl. 305, 314 (1956). And for disputes subject to the Contracts Dispute Act (CDA), its "plain language" requires *de novo* review but prevents a contractor, who brought suit after the Federal Government's agent issues a decision, from any presumption of correctness from it. *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994) (citing 41 U.S.C. § 609(a)(3)). As neither the court nor the United States explained how the tax laws, the CDA, or any other "specific statutory authorization" justified application of *de novo* review, its application here was erroneous. *Consolo v. Fed.*

Maritime Comm'n, 383 U.S. 607, 619 n.17 (1966); *see* Appx0031 (37:32-38:2). This, therefore, was ***not*** "a *de novo* proceeding, in which the plaintiff bears the burden of proof, including both the burden of going forward and the burden of persuasion." *Sara Lee Corp. v. United States*, 29 Fed. Cl. 330, 334 (1993). Moreover, not only are "factual findings made by the [Federal agency]" entitled to some weight, anyone contesting those findings—including the United States—must "'come forward with evidence to rebut the presumption'" of their correctness. *Schnie*, 151 Fed. Cl. at 10; *see Jazz Photo Corp.*, 439 F.3d at 1352 (United States failed "to offer any evidence, much less clear evidence to the contrary, that would rebut this presumption….").

Second, notwithstanding the erroneous application of *de novo* review, the court deemed irrelevant the 2008 EPA brochure based on a legal conclusion that Wilmington never intended it to prove, thereby denying Wilmington the factual probative value the court said it would consider. Wilmington never suggested that the 2008 EPA was a ***legal*** admission to the amendments Congress made three years later. *See* Appx0061. Because the elements of the "reasonable service charges" analysis that Congress ultimately added to 33 U.S.C. § 1323 present a

mixed question of law ***and fact***, Wilmington offered the 2008 EPA brochure as part of the "historical facts in the case at hand…" when determining whether Wilmington's stormwater charges "satisfy the legal test governing the question to be answered." *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1192 (Fed. Cir. 2018); *see Norfolk Monument Co. v. Woodlawn Mem'l Gardens, Inc.*, 394 U.S. 700, 702-03 (1969) (reasonableness of rules is factual question). In other words, the EPA's assessment of how Wilmington's Ordinance assesses stormwater charges on properties are ***factual*** conclusions—which have never been retracted by EPA nor contested by the United States since 2008—that should have been weighed against the ***legal*** elements of § 1323(c)(1)(A). Therefore, EPA's admission—that Wilmington's reliance on County property records to estimate nonresidential properties' impervious area "by applying predefined stormwater coefficients to the total property area" for properties in the City allows it "to recover costs related to stormwater management on a fair and equitable basis"—was a fact that should have supplemented Wilmington's other trial evidence to prove that its stormwater charges were "reasonable [and] nondiscriminatory," "based on some fair approximation of the proportionate contribution of the property or facility to stormwater

pollution….” Appx1081-1082; 33 U.S.C. § 1323(c)(1)(A). This would have been the kind of “contemporaneous” evidence that this Court and the Supreme Court have explained deserves more weight than conflicting “oral testimony” (which the United States never offered). *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948); *see Cucuras v. Sec’y of Health & Human Servs.*, 993 F.2d 1525, 1528 (Fed. Cir. 1993). Because EPA’s 2008 brochure have never been retracted, revised, or refuted, the admissions it contains remain relevant in 2008, in 2011, during trial, and today.

Third, during the pretrial hearing, when Wilmington’s counsel confirmed they were not “arguing for some other standard of review,” they were arguing against appellate standard of review entirely. Appx0030 (33:12-18). Responding to a question why the United States insisted on an appellate standard of review, the court first explained that under *de novo* review, “if as a matter of ***law*** the cost is not reasonable, who cares what the [Federal contracting officer] thought about it.” Appx0028 (26:14-27:9) (emphasis added). The court then stated that even under its understanding of *de novo* review, regarding “the evidentiary… weight of a particular government official’s view at the time,” the court was “not required to give deference to [those views] as a ***legal*** matter.” Appx0029

(30:15-17, 22-23) (emphasis added). As a ***factual*** matter, however, the court acknowledged that such views might be "more probative of reality" and stressed that when balancing speculation not grounded in fact versus live expert testimony at trial, the court would value testimony over speculation. *Id.* (30:13-31:16). When Wilmington's counsel subsequently challenged the applicability of an appellate standard of review at trial, the court insisted that *de novo* review applied, stated that Wilmington can "argue that the facts that you present are more probative of some particular conclusion," and asked whether Wilmington was "arguing for some other standard of review?" Appx0029-0030 (32:12-33:14). Counsel for Wilmington said "No," and the court acknowledged the issue was preserved for appeal. Appx0030 (33:15, 34:10-11).

Yet, when it came time to assess the factual probative value of the 2008 EPA brochure (which the court had not seen until after trial was suspended), the court refused, excluding as irrelevant the defendant's contemporaneous admission that several factual elements of the legal cause of action had been meet because, at the time, the defendant was ignorant of the future legal ramifications of those admissions. *See* Appx0060-0061; Appx2137-2142. Because the court erred by applying *de*

novo review in this case, the 2008 EPA brochure was denied the factual evidentiary weight it deserves.

C. 33 U.S.C. § 1323 Obligated the United States to Exhaust Wilmington's Administrative Remedies, But There Was Nothing to Appeal.

The United States' silence at trial rendered its prior assertions of administrative futility impossible to assess: if the United States refuses to disclose any relief to which it felt entitled or when that entitlement began, then it has failed to prove Wilmington's administrative appeal process was incapable of granting this undisclosed remedy at all times. *See Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990). However, the United States never denies that if it was required to exhaust Wilmington's administrative remedies, any suggestion that the United States' failure to exhaust undisclosed remedies should be excused is an affirmative defense that it alone must bear. *See* U.S. Br. 55-56. Confronted before this Court with explaining why no administrative appeal was filed within the 73 days between January 4 and March 18, 2011—when Congress amended 33 U.S.C. § 1323 and the first disputed stormwater charge was assessed, respectively—the United States refuses to answer, coyly asking why "the

Corps" (not the Properties' owner, defendant United States) "would seek an appeal prior to receiving the first disputed charge." U.S. Br. 54; *see* Pub. L. No. 111-378, 124 Stat. 4128 (Jan. 4, 2011); Appx0281; Appx0303; Appx0325; Appx0347; Appx0369. The United States knows why it needed to file an appeal before the bill issued: "[u]nder Wilmington's system, any approved stormwater fee adjustments will become effective ***only from the billing period in which the application is received***; ***no retroactive adjustments for prior billing periods are allowed***." Appx2155 (emphasis added). The catch was that the United States would need to unambiguously declare its grounds for appeal (if any) before the first invoices issued (or the next invoices, if it could not pull together its appeal in time, or the next invoices, etc.). The Article III case-or-controversy requirement exists to deprive federal courts from engaging in this kind of "academic exercise in the conceivable." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 566 (1992) (internal quotations and citations omitted). This "controversy" became moot when the United States "declined to pursue its appeal." *Karcher v. May*, 484 U.S. 72, 83 (1987).

Nevertheless, the United States argues that because the court ruled that "the Clean Water Act does not require the United States to file an

administrative appeal prior to challenging the charges in this litigation," its affirmative defense was never involved. Br. 55. But the court initially acknowledged that Wilmington never suggested that failing to exhaust administrative remedies barred ***all*** challenges in this litigation: "Plaintiff differentiates between 'site-specific' challenges to the charges and challenges based on Plaintiff's 'general methodology,' and asserts that only the latter can be challenged in this forum." Appx00003 n.2. Although the United States never did, if Wilmington's "general methodology" were challenged by, for example, evidence that Wilmington's charges were not being "used to pay or reimburse the costs associated with [Wilmington's] stormwater management program," then exhaustion would not have been required before raising such challenges in court because they are uncorrectable within Wilmington's administrative process. Appx0003 n.2; 33 U.S.C. § 1323(c)(1)(B); *see Levinson v. Del. Comp. Rating Bureau*, 616 A.2d 1182, 1188-89 (Del. 1992). If, however, the United States had put on evidence in its defense and attempted to contest Wilmington's stormwater charges in matters within the administrative authority of Wilmington's appeal process (e.g., witness testimony that wetlands on

the Properties possibly decreased "actual" stormwater runoff as compared to the stormwater pollution estimated by the Ordinance), the United States would have to prove that its failure to exhaust Wilmington's administrative remedies was excusable. *See* U.S. Br. 55. However, assessing stormwater runoff requires technical expertise, *see, e.g.* Appx0476 (appeals require documents from surveyors or engineers), and the Ordinance gave Wilmington's Commissioner discretion to decide appeals, City Code § 45-53(d)(7). The United States knew that either of these factors would be fatal to proving its failure to exhaust Wilmington's administrative remedies was justifiable under both federal and Delaware law. *See Ross v. Blake*, 578 U.S. 632, 643 (2016); *Levinson*, 616 A.2d at 1188-89. Rather than subject their witnesses to cross-examination while invoking an affirmative defense it knew was unprovable, the Department of Justice retreated to a common strategy of those defending the guilty: call no witnesses, argue the fantastic in an attempt to raise doubts, and hope the trier of fact fails to notice that the defendant's side of the scales of justice stand empty while the (City) Government's side overflows with admitted, persuasive trial evidence (even if circumstantial). *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003).

In this case, the United States' strategy prevailed. The court failed to require the United States to say what it would have appealed, carry the burden of proof in its affirmative defense, or adduce any evidence whatsoever.

Regardless, the United States and the court are wrong to assert that Wilmington's unused (and apparently unneeded) administrative appeal process is not a procedural requirement "respecting the control or abatement of water pollution." U.S. Br. 47; 33 U.S.C. § 1323(a); *see* Appx0072. Wilmington's administrative appeal process allows an owner to inform Wilmington that its property's contributions to stormwater pollution are lower than the approximated contribution that its stormwater charges were based on. *See* Appx0003-0007 (quoting City Code § 45-53(d)(7)). Indeed, the court noted in a pretrial hearing that an owner may decide that the financial benefit of a successful appeal may be too small to justify the effort. *See* Appx0026 (18:9-16). Moreover, Wilmington's stormwater management program is undisputedly about controlling and abating water pollution. *See* Appx0050 n.15; City Code § 45-53(d). Given that the United States never contested that Wilmington's stormwater charges are "used to pay or reimburse the costs associated with [its]

stormwater management program," Wilmington's administrative appeal process to adjust those costs are procedural requirements associated with a program "respecting the control or abatement of stormwater pollution." *See id.*; 33 U.S.C. § 1323(a), (c)(1)(B).

Additionally, the United States completely fails to dispute that its "subjugation to local 'administrative authority' includes a State or local government's authority to 'establish and administer' their water pollution control program." Appellant Br. 65 (quoting *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 206 n.15 (1976)). Assuming, for argument's sake, that the Properties contained wetlands and that the United States asserted that this unproven speculation was grounds for lower stormwater charges, compliance with administrative authority would require exhaustion because Wilmington was empowered and capable of granting such (unrequested, purely hypothetical) relief. *See id.* (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021)).

Moreover, the United States' suggestion that the "1977 amendments to section 1323(a) did not alter the Supreme Court's definition of 'requirements' in *EPA v. California*" is demonstrably incorrect. U.S. Br. 50 (no citation provided). *EPA* and its sister opinion were decided on the

lack of sovereign immunity waiver for the procedural requirements of permitting in the CWA and CAA, respectively. *See EPA*, 426 U.S. at 211 (adopting logic of *Hancock*); *Hancock v. Train*, 426 U.S. 167, 182 (1976). The 1977 amendments, adopted after those cases, added the sentence declaring that "requirements" would include not only "any requirement respecting permits," but also "any requirement, whether substantive or procedural," "any recordkeeping or reporting requirements…, and any other requirement, whatsoever." 33 U.S.C. § 1323(a). Citations to other cases that focus on permitting requirements without addressing administrative authority or appeals in anyway do not undermine Wilmington's point. *See* U.S. Br. 49-50 and cases cited therein. The United States' attempt to distinguish *Ohio v. U.S. Army Corps of Engineers* similarly fails, because there, like here, the administrative appeal was a procedural requirement respecting a substantive, non-permit requirement. *See* Br. 51-50 (citing 259 F. Supp. 3d 732 (E.D. Ohio 2017)).

D. THE UNITED STATES NEVER ATTEMPTED TO CARRY THE BURDEN OF PROOF FOR ITS AFFIRMATIVE DEFENSE THAT ITS FAILURE TO EXHAUST REMEDIES WAS EXCUSABLE.

The United States' motion bizarrely put its own affirmative defense before the court for RCFC 52(c) adjudication, akin to a defendant moving

for summary judgment upon its own defense. Appx2155-2156. The court's finding that the United States' failure to exhaust Wilmington's appeal process for inadequacy was there by the United States' invitation. *See id.*; U.S. Br. 55; *see* Appx0076. The United States' motion implicitly affirmed it had been "fully heard" on its affirmative defense, a burden of proving which it alone bore, and the text of RCFC 52(c) authorizes judgments only when the court rules ***against*** a party's "claim or defense" despite needing "a favorable finding" for that party's "claim or defense." Wilmington questions not the folly of that request, but the court's ruling that the United States carried its burden of proving that Wilmington's administrative remedies need not "'be pursued and exhausted'" with "'clear evidence that the appeal procedure is inadequate or unavailable…'" when granting its RCFC 52(c) motion. Appx2146 (quoting *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 240 (1946)). Under Federal and Delaware law, for the United States' failure to exhaust administrative remedies involving "facts not properly presented" in an appeal to be excused, it had to prove that "the issues do not involve administrative ***expertise*** or ***discretion*** and only a question of law is involved" or "'the relevant administrative procedure lacks authority to provide ***any*** relief.'" *Levinson*, 616 A.2d

at 1190; *Ross*, 578 U.S. at 643 (emphasis added) (citation omitted); *see also McKart v. United States*, 394 U.S. 185, 197-98 (1969). Therefore, because RCFC 52(c) only authorized the court to have ruled ***against*** the United States on its affirmative defense, the United States' failure to even describe the merits of the its affirmative defense, let alone prove it, require ruling against the United States' affirmative defense on remand.

E. PREJUDGMENT INTEREST IS A LOCAL REQUIREMENT THAT 33 U.S.C. § 1323(a) OBLIGATES THE UNITED STATES TO PAY.

The United States incorrectly believes the "law at issue" here abruptly ends with 33 U.S.C. § 1323. U.S. Br. 57. That statute clearly makes the United States "subject to, and comply with, all… local requirements[and] administrative authority… respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity…." *Id.*; 33 U.S.C. § 1323(a). If the United States is correct that Congress limited "requirements" to merely the payment of "reasonable service charges," the command in its second sentence to construe "requirements" broadly enough to encompass recordkeeping, reporting, permit-related, or "any other requirement, whatsoever" would be superfluous. 33 U.S.C. § 1323(a); *see* U.S. Br. 57-58.

By law, delinquent owners are liable for interest (and costs) in Wilmington's collection suits on unpaid stormwater charges assessed under the Ordinance. *See* City Code § 45-176(c), (d), (f). Should Wilmington prevail on its claims for unpaid stormwater charges, 33 U.S.C. § 1323(a) transforms prejudgment interest under City Code § 45-176 into one of the "any requirements, whatsoever" the United States is subject to and must comply with because § 1323(a) includes no interest exception. Foreseeing potential conflicts with other federal law, Congress purposefully included the word "notwithstanding" in § 1323(a). This third sentence broadened the United States' subjugation to State and local "requirements [and] administrative authority" and rendered undisputable that Wilmington's ordinances, pursuant to the statute's broad waiver, "prevails in the event of a conflict" "***notwithstanding*** any immunity… under any law or rule of law." U.S. Br. 57; 33 U.S.C. § 1323(a) (emphasis added); *Nat'l Ass'n of Mfrs. v. Dep't of the Treasury*, 10 F.4th 1279, 1287 (Fed. Cir. 2021) (citation omitted). Because of the "notwithstanding" provision in § 1323(a), the court erred by concluding that the requirement to pay interest pursuant to Wilmington's ordinance was inferior to the United States' immunity from paying interest pursuant to *Library of Congress v. "Shaw*,

Marathon Oil [*Co. v. United States*], and 28 U.S.C. § 2516(a)…." Appx0079 (citations omitted).

One glaring exception to the "express" requirement for interest waivers was *Shaw*'s discussion of the Federal Tort Claims Act (FTCA), which "necessitated," as the Supreme Court explained, "an unusual statutory exclusion" due to its "specific reference to state law for the rules of decision." *Shaw*, 478 U.S. 310, 318 n.6 (1986) (citing 28 U.S.C. § 2674). If the court's understanding of immunity waivers on interest were correct, then it was the U.S. Supreme Court, not Wilmington, that "apparently fail[ed] to grasp that" because of "the no-interest rule," it was impossible for any "negative implication argument" to have "necessitated" inclusion of the "unusual statutory exclusion" in the FTCA. Appx0080-0081; *Shaw*, 478 U.S. at 318 n.6. In fact, the FTCA did not require anything so broad as "notwithstanding any immunity" to motivate Congress to exclude pre-judgment interest from the broader waiver; merely making the United States liable "in the same manner and to the same extent as a private individual under like circumstances…" sufficed. 33 U.S.C. § 1323(a); 28 U.S.C. § 2674. Given its silence on this particular argument, not even the

United States could defend the court's erroneous conclusion here. *See* U.S. Br. vii (28 U.S.C. § 2674 omitted).

II. CONCLUSION

This Court should vacate the judgment; reverse the grant of the United States' motion for judgment based on partial findings; reverse the denials of Wilmington's motion for partial judgment on the pleadings, motion *in limine*, and motion to reconsider; remand for further proceedings, including completion of trial; and deem inadmissible any evidence the United States could have presented in Wilmington's appeal process.

Date: October 5, 2022

Respectfully Submitted,

/s/Paul T. Nyffeler
Paul T. Nyffeler
HUNTON ANDREWS KURTH LLP
951 East Byrd Street
Richmond, VA 23219
pnyffeler@huntonak.com
(804) 344-8837 (phone)
(804) 788-8218 (fax)

Counsel for Appellant City of Wilmington, Delaware

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July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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