IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 63 MAP 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania, BRIAN COPPOLA, Individually and in his Official Capacity as Supervisor of Robinson Township, TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania, TOWNSHIP OF SOUTH FAYETTE, Allegheny County, Pennsylvania, PETERS TOWNSHIP, Washington County, Pennsylvania, DAVID M. BALL, Individually and in his Official Capacity as Councilman of Peters Township, TOWNSHIP OF CECIL, Washington County, Pennsylvania, MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania, BOROUGH OF YARDLEY, Bucks County, Pennsylvania, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, the Delaware Riverkeeper, and MEHERNOSH KAHN, M.D.,

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, in his Official Capacity as Chairman of the Public Utility Commission, OFFICE OF THE ATTORNEY GENERAL, LINDA L. KELLY, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MICHAEL L. KRANCER, in his Official Capacity as Secretary of the Department of Environmental Protection,

Appeal of: PENNSYLVANIA PUBLIC UTILITY COMMISSION, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission and PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection

Appeal from the order of Commonwealth Court at No. 284 MD 2012 dated July 26, 2012.

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, THE PENNSYLVANIA MANUFACTURERS' ASSOCIATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE PENNSYLVANIA BUSINESS COUNCIL, AND THE PENNSYLVANIA CHEMICAL INDUSTRY COUNCIL IN SUPPORT OF APPELLANTS

Patrick H. Zaepfel
Supreme Court Id. No. 71509
Zaepfel Law, P.C.
201 Willow Valley Square
Lancaster, PA 17602
(717) 735-7052

Attorney for Amici Curiae

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The Pennsylvania Chamber of Business and Industry ("PA Chamber"), together with the Pennsylvania Manufacturers' Association, the National Federation of Independent Business, the Pennsylvania Business Council, and the Pennsylvania Chemical Industry Council submit this brief as *Amici Curiae* and pursuant to Pa.R.A.P. 531(a), in support of the appeals of the Appellants ("Commonwealth Parties") from the Commonwealth Court's July 26, 2012 order declaring portions of Act 13 of 2012 facially unconstitutional.

I. THE INTERESTS OF *AMICI CURIAE*

The Pennsylvania Chamber of Business and Industry (the "PA Chamber") is the largest broad-based business association in Pennsylvania.[1] Thousands of members throughout the Commonwealth employ greater than 50 percent of Pennsylvania's private workforce. The PA Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members.

Founded in 1909 by Bucks County industrialist Joseph Grundy, the Pennsylvania Manufacturers' Association ("PMA") is the leading voice for manufacturing in the Commonwealth. A Harrisburg-based statewide non-profit trade organization, PMA represents the interests of the manufacturing sector in Pennsylvania's public policy process.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and

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[1] While they have not officially joined as *amici curiae*, the following other chambers of commerce have authorized the PA Chamber to represent that they join in the positions taken herein: the African American Chamber of Commerce of Western Pennsylvania, the Allegheny Valley Chamber of Commerce, the Bradford Area Chamber of Commerce, the DuBois Area Chamber of Commerce, the Ellwood City Area Chamber of Commerce, the Greater Philadelphia Chamber of Commerce, the Greater Pittsburgh Chamber of Commerce, the Greater Susquehanna Valley Chamber of Commerce, the Meadville-Western Crawford County Chamber of Commerce, the Pittsburgh Airport Area Chamber of Commerce, the Schuylkill Chamber of Commerce, the Slate Belt Chamber of Commerce and the Somerset County Chamber of Commerce.

protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide, including over 14,000 in Pennsylvania, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The Pennsylvania Business Council ("PBC") envisions a Commonwealth in which residents enjoy a very high quality of life in sustainable communities, where those who are seeking employment find high quality jobs with good compensation, and where those who invest their capital and hard work can grow firms that flourish and are profitable. To create and renew this vision of Pennsylvania, the PBC works aggressively to: define key long-term public policy strategies and solutions that make the Commonwealth more competitive; and elect candidates for office who offer the best capacity to create and sustain a better Pennsylvania.

The Pennsylvania Chemical Industry Council ("PCIC") is Pennsylvania's premier advocacy organization and information resource to energize stakeholders for an improved business climate for the Commonwealth's chemical and related industries. PCIC's mission is to continually improve the business climate of the chemical and related industries in the Commonwealth through public policy advocacy, communication, education and the responsible management of chemicals.

Prior the passage of Act 13 of 2012 ("Act 13"), the *Amici Curiae* advocated for a streamlined, commonsense law that would allow for the development of the Commonwealth's newly-available natural gas resource in the most efficient manner. The *Amici Curiae* are committed to working with businesses and lawmakers who support the Marcellus Shale industry

in order to ensure responsible expansion that benefits the state's economy, the nation's energy independence, and the lives of current and future Pennsylvanians, all without jeopardizing environmental protection.

II. INTRODUCTION

Act 13 helps ensure that the Commonwealth remains a competitive Marcellus Shale drilling state, while providing important protections for public health and the environment. The Act reflects recommendations that were carefully and thoughtfully developed by the Governor's Marcellus Shale Advisory Commission after months of research, discussion and input on how to responsibly grow and regulate the industry, and bring jobs, business opportunities and additional revenue to the Commonwealth.

Maintaining the proper balance between state and local authority in the regulation of the Commonwealth's natural resources is a serious challenge to both judicial and legislative wisdom. On the one hand, land use regulation is an important function traditionally associated with police power. This police power is partially delegated by the Legislature to municipalities pursuant to the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 et seq. ("MPC"). On the other hand, the efficient development and distribution of the Commonwealth's natural resources is an activity likely to affect more than one municipality, and its effect on commerce, both intra- and interstate, is significant enough that uncontrolled regulation by municipalities can patently interfere with the broader interests of this Commonwealth and, indeed, the nation as a whole.

Act 13 achieves the proper balance. A key component of Act 13 is its requirement for uniform regulatory standards at the state level. The current, confusing hodge-podge of local ordinances affecting oil and gas development, even if well intended, make it very difficult for drillers operating in multiple jurisdictions to be in compliance and to effectively and efficiently

operate. The *Amici Curiae* understand that companies involved in Marcellus Shale drilling in the Commonwealth strive to make sure they are in full compliance with laws and regulations; and that citizens residing in communities where drilling and other development activity is taking place want assurance that those companies are following the rules. The best way to ensure both is to adopt rules that are consistent throughout the Commonwealth.

Issues surrounding natural gas drilling are complex and often technical, and, while areas of the state are flourishing as a result of this industry, there are many factors that could impact the level of drilling operations in Pennsylvania moving forward. The ability to develop, and availability of, adequate infrastructure to get the product to market strongly influence the growth of the industry, as does the comparative advantage or disadvantage of operating in the Commonwealth versus in competing Marcellus Shale states.

Given these realities and the tremendous economic potential of natural gas development, it is essential that regulatory oversight is done right. Act 13 is the culmination of the General Assembly's efforts to provide a regulatory mechanism that protects human health and the environment and provides for greater uniformity of local regulation. Act 13 addresses these concerns and, through it, the General Assembly seeks to balance considerations inherent with the growth of the gas industry and the ripple effect that such growth occasions. The Commonwealth Court's highly fractured decision, however, undermines the very foundation of that legislative balancing by removing a central and necessary component – uniformity of local regulation.

In so doing, the Commonwealth Court second guesses the sound and balanced legislative decisions of the General Assembly and, in the process, prevents the Commonwealth from acting in the best interests of <u>all</u> of its citizens in the safe and reasonable development of its natural resources. Based on projections of the potential development of the Marcellus Shale play, this

places at risk billions of dollars of revenue, and tens of thousands of jobs, for the Commonwealth and its citizens. The General Assembly has, through Act 13, set out its legislative determination of the proper compromise of competing interests regarding the burgeoning gas industry, but the Commonwealth Court's decision throws this balancing act asunder.

At the same time, the Commonwealth Court bestows upon municipalities derivative standing to challenge Act 13 by "borrowing" the personal rights of a select group of residents – those hypothetically harmed by oil and gas development. The Commonwealth Court then compounds this error by concluding the personal rights "borrowed" by municipalities include a previously unrecognized, but now *constitutionally protected*, life, liberty or property right in preventing neighbors from making annoying, unpleasant or simply unpopular decisions on the use of their land.

The decision below must be reversed. Municipalities cannot "borrow" the personal rights of select residents and it is not their responsibility, as creatures and arms of the Commonwealth, to advocate for select groups of residents over the rights of others. These residents, moreover, whose personal rights are being "borrowed," do not have the newly found constitutional right bestowed on them by the Commonwealth Court's decision. The due process clauses of the United States and Pennsylvania Constitutions do not protect one private property owner from another. Failing to reverse the Commonwealth Court may have ramifications well beyond the Marcellus Shale, as every unpopular siting decision would face the risk of a new constitutional claim created by the decision. The chilling effect of such claims will have ramifications throughout the Commonwealth, in every industry. The *Amici Curiae* respectfully request that this Court reverse the Commonwealth Court.

III. ARGUMENT

A. Municipalities Lack Standing To Assert The Due Process Rights Of Certain Residents.

This Court should correct the fundamental error by the Commonwealth Court and reaffirm that municipalities cannot assert the personal rights (here, the right to due process of law) of select residents against the Commonwealth. *See City of Pittsburgh v. Commonwealth of Pennsylvania,* 535 A.2d 680, 682 (Pa. Cmwlth. 1987), *aff'd,* 559 A.2d 513 (Pa. 1989) (". . . inasmuch as a municipality is merely a creature of the sovereign created for the purpose of carrying out local government functions, the municipality has no standing to assert the claims of its citizens against the Commonwealth."). Contrary to decisions by this Court, the Commonwealth Court has decided to effectively *empower* municipalities, as creatures of the State, to bring claims sourced in the personal, constitutional rights of one resident, or a select groups of residents, against the Commonwealth and, presumably, private parties.

The Commonwealth Court was confronted with an obstacle to its invocation of "substantive due process" as a basis for revisiting the wisdom of the General Assembly's exercise of the police power and, in its zeal to avoid the obstacle and reach its goal, created bad law. The majority could not revisit the wisdom of the uniformity provisions of Act 13 through a "due process" inquiry until it first found that the municipalities, or municipal officials acting in their official capacity, can assert alleged personal constitutional rights on behalf of residents. This obstacle was the well settled law that neither Article I, Section 1 of the Pennsylvania Constitution nor Section 1 of the 14th amendment to the United States Constitution confer enforceable rights on municipalities. *See Commonwealth v. East Brunswick Township*, 956 A.2d 1100, 1107-1109 (Pa. Cmwlth. 2008); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); *Trenton v. New Jersey*, 262 U.S. 182, 187-188 (1923). Article I, Section 1 of the

Pennsylvania Constitution and Section 1 of the 14th amendment to the United States Constitution, however, protect the citizens of this Commonwealth *from* unwarranted actions by government actors, such as municipalities; they do not protect municipalities and municipal officials from action by the sovereign. *Id.* Moreover, to the extent municipalities may have standing to sue to protect their proprietary interests, *see, e.g., City of Philadelphia v. Commonwealth of Pennsylvania*, 838 A.2d 566 (Pa. 2003), they cannot assert the rights of others, including the rights of individuals under the federal and state constitutions.[2]

The majority below overcame the obstacle by setting out the novel proposition that municipalities and their officials can, through *parens patriae*, "borrow" the personal constitutional rights and alleged injuries of unidentified residents who *might* be negatively impacted by oil and gas operations (there was no actual evidence of such injuries in the record). By holding that the municipalities' zoning interests are "inextricably bound" with those of one or a select group of hypothetical property owners, the Commonwealth Court has created a form of representational, or associational, standing for municipalities not previously recognized by the courts of this Commonwealth. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *24 (municipalities' claims that they are required to pass unconstitutional zoning amendments "are inextricably bound" with the rights of unnamed property owners who are purportedly adversely affected by Act 13, thus conferring standing on the municipalities).

The decision below must be reversed. A municipality, for reasons extending well beyond this case, should not be afforded standing to advance the personal rights of a single resident, or

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[2] As the Commonwealth Court recognized, fundamentally the standing requirement in Pennsylvania "is to protect against improper plaintiffs." *See Robinson Twp. v. Commonwealth*, 2012 Pa. Commw. LEXIS 222, at *13 (Pa. Cmwlth. July 26, 2012) (quoting *Application of Biester*, 409 A.2d 848, 851 (Pa. 1979)). This Court has concluded that, because the standing question often turns on the nature and source of the claims asserted, it must be examined on a claim-by-claim basis. *See Fumo v. City of Philadelphia*, 972 A.2d 487, 502 n.7 (Pa. 2009).

even a select group of residents, within its borders. Municipalities cannot rely on the doctrine of *parens patriae*, as suggested by the Commonwealth Court, nor should they be permitted to proceed under a form of representational or association standing. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at *18 (suggesting that municipalities and municipal officials can assert *parens patriae*).

The exercise of *parens patriae* requires that sovereign or quasi-sovereign interests are implicated, and, contrary to the suggestion of the court below, its exercise cannot be premised on the personal rights of one resident or a select group of residents. *See Commonwealth v. TAP Pharm. Prods.*, 885 A.2d 1127, 1143-44 (Pa. Cmwlth. 2005) (exercise of *parens patriae* requires quasi-sovereign interest, rather than simply representing the interests of individuals who could have pursued their own claims); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) ("In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest."). Personal rights, such as those secured by the Bill of Rights and including due process rights necessarily are not sovereign interests. The Bill of Rights protects citizens from the sovereign; it does not create rights that the sovereign may assert against itself, whether under a theory of *parens patriae* or otherwise. *See East Brunswick Township*, 956 A.2d at 1108 ("Article 1 of the Pennsylvania Constitution sets forth a Declaration of the Rights of individual citizens, not the rights of municipal corporations. It protects individuals 'against infringement by government.'"); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) ("It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment ... *Williams* and *Trenton* [teach that] a municipality may not bring a constitutional challenge

against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights."); *Harris v. Angelina County*, 31 F.3d 331, 339 (5th Cir. 1994) (political subdivisions lack Fourteenth Amendment or other constitutional rights against the creating state); *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 505 (6th Cir. 1986) (a municipal corporation, in its own right, receives no protection from the equal protection or due process clauses *vis-a-vis* its creating state.).[3]

Similarly, municipalities cannot assert "associational" standing on behalf of their residents. This Court has determined that an association, as a representative of its members, may have standing in appropriate circumstances to bring a cause of action even in the absence of injury to itself. *See Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).[4] Municipalities are not "associations" that were established

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[3] Moreover, because municipalities are not sovereigns, but are instead political subdivisions of the sovereign - the Commonwealth of Pennsylvania - they cannot invoke the doctrine of *parens patriae* to assert the interests of their residents. *See County of Monroe v. Consolidated Rail Corp.*, 1983 U.S. Dist. LEXIS 18883, at *3 (M.D. Pa. Mar. 2, 1983) ("Since Monroe County is not a 'sovereign,' and gains its status as a political subdivision derivatively from the Commonwealth of Pennsylvania, a *parens patriae* argument must fail."); *see also United States v. W.R. Grace & Co.-Conn.*, 185 F.R.D. 184, 190 (D.N.J. 1999); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 n.7 (5th Cir. 1976). To the extent *parens patriae* can be asserted by a home rule municipality, such authority is, nonetheless, subject to being limited or fully reclaimed by the Legislature and is further subject to the general limitations on its exercise – that is, a home rule entity cannot merely litigate as a volunteer for the personal claims select groups of it citizens.

[4] In *Warth*, the United States Supreme Court laid out three requirements for associational standing: 1) the association's members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit. *See* 422 U.S. at 511, 515; *see also Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977). This Court's case in *Pa. Med. Soc'y*, just because it does not set forth the full test for associational standing, does not stand for the proposition that associational standing is easier to meet under Pennsylvania law. Rather, it demonstrates that the courts have been concerned with other aspects of the standing test – usually, whether the association is required to allege harm to itself. *See Pa. Med. Soc'y*, 39 A.2d at 278. Pennsylvania courts, including this Court, certainly look to federal law for guidance in interpreting associational standing. *Id.*; *see also Housing Authority of the County of Chester v. Pennsylvania Civil*

to promote or serve the interests of a limited group in a very specific area. Their residents, moreover, are not "members" of any group. Municipalities, instead, are political subdivisions that serve the general interests of ***all*** of their respective residents, as directed by the Legislature, and not the particular interest of single resident or even the shared interest of select residents. *See Prince George's County v. Levi*, 79 F.R.D. 1, 5, (D. Md. 1977) ("It cannot be seriously argued that the residents of Prince George's County are 'members' of an organization of the same name for standing purposes"). Allowing municipalities to invoke associational standing would, moreover, simply restate the concept of *parens patriae*, but *without* the limitations on the exercise of such authority, as explained above. *See Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521, 1524 (D. Mass. 1991) (following *Prince George's County*).[5]

It is almost certain that municipalities, citing the decision below, will now appear in court advancing what were purely private claims to be brought by private parties. For example, consistent with the opinion of the court below, it appears that municipalities will now have a right to advance private claims by one property owner against another. In fact, if the Commonwealth Court's reasoning is carried to its logical conclusion, municipalities now may have a constitutional *obligation* to bring such claims given the corresponding, but flawed, scope of the due process protections of Article I, Section 1 of the Pennsylvania Constitution also announced by the majority decision. The idea that the Commonwealth's more than 2,000

Service Commission, 730 A.2d 935, 939 (Pa. 1999). It is difficult to conceive of how a municipality borrowing the rights of its "member" residents for standing can ever meet the second and third criteria of the *Warth/Hunt* associational standing test. A municipality has no organizational purpose, beyond that supplied by the Pennsylvania Constitution and Legislature. It is, moreover, the individual residents' purported property rights that the municipality is seeking to borrow, thus requiring the participation of the individual "members" in the lawsuit.

[5] The Seventh Circuit reached a contrary conclusion in *City of Milwaukee v. Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976). The decision is neither persuasive, nor binding, precedent. The court did not provide any analysis for its conclusion and there is nothing to suggest that the court considered its conclusion in light of the limitations of *parens patriae* standing.

municipalities may, and possibly must, advocate on behalf of select groups of residents that may be adversely affected by particular land uses, as a constitutional matter, is simply unfathomable. Allowing such claims to persist would force municipalities to chose sides among their residents in matters of controversy, which would rob municipalities of any sense of neutrality in overseeing disputes among residents, under the Municipalities Planning Code and otherwise.

In sum, the Commonwealth Court's decision allowing municipalities to "borrow" the personal rights of their residents affords rights and powers to municipalities not afforded to them by the United States and Pennsylvania Constitutions, or by the Commonwealth, as sovereign. *See East Brunswick Township*, 956 A.2d at 1108. The majority decision, and the mischief that it will create, must be corrected by this Court.

B. The Commonwealth Court's Decision Unnecessarily And Improperly Creates New Constitutionally Protected Rights.

Having concluded that municipalities and municipal officials can "borrow" the constitutional rights and related alleged injuries of a select group of hypothetical residents, the majority compounded its error by finding that such residents have a previously unrecognized, but now constitutionally protected, life, liberty or property interest in preventing neighbors from allowing annoying, unpleasant or simply unpopular uses of their land. This finding is necessarily inherent in the majority's reasoning, because the constitutional requirement for due process of law (secured by both the United States and Pennsylvania Constitutions), by its very terms, does not operate in the absence of an actual or threatened deprivation of a protected life, liberty or property interest.

The majority below, although relying on substantive due process, does not expressly identify the life, liberty or property interest allegedly threatened by the uniformity provisions of Act 13. The opinion, however, reveals that the majority determined that a citizen of this

Commonwealth has a life, liberty or property interest in zoning that prevents neighbors from using their land in a way that the citizen finds objectionable. In other words, the majority's reasoning necessarily implies that the due process clause of the Pennsylvania Constitution protects one private property owner from another. This could theoretically extend to any alteration to the zoning *status quo* mandated by the Commonwealth, meaning that the General Assembly no longer controls the vehicle it created for the exercise of its own police power.

The majority's determination, and the corollary proposition that municipalities have a constitutional *right to zone*, or an *obligation* to zone in a certain way to protect "borrowed" rights of select groups of property owners turns Article I of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution on their heads. The Pennsylvania and United States Constitutions protect property owners, such as the members of the *Amici Curiae*, from unwarranted interference with private property rights by municipalities and other state actors. There is no constitutional violation stated, and thus none is stated by a municipality, where the General Assembly acts, in accordance with its constitutional obligation to protect private property rights, to prevent municipalities from adopting or enforcing unnecessary and overreaching restrictions on the right of private property owners to develop their property.

The foregoing necessarily follows from the fact that due process clauses of the United States and Pennsylvania Constitutions forbid *the government* from depriving individuals of life, liberty, or property without due process of law.[6] Those clauses do not give rise to an affirmative duty on the part of a state, or political subdivision thereof, to protect its citizens:

Nothing in the language of the Due Process Clause itself requires the State to

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[6] This Court has held that "the requirements of Article I, Section 1 of the Pennsylvania Constitution are not distinguishable from those of the [Due Process Clause of the 14th Amendment] . . . [thus] we may apply the same analysis to both claims." *Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995).

> protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . . ***Its purpose was to protect the people from the State, not to ensure that the State protected them from each other*** . . . .

DeShaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189, 195 (1989) (emphasis added). Those clauses, moreover, "do[] not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," *Daniels v. Williams*, 474 U.S. 327, 332 (1986). The State, in short, has no obligation to protect private parties from the acts of other private parties.

The proper starting point in the due process analysis, overlooked by the majority, is that ***landowners have a constitutional right to use their land for any lawful purpose.*** *See In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727-728 (Pa. 2003); *Hopewell Township Board of Supervisors v. Golla*, 452 A.2d 1337, 1342 (Pa. 1982). "The limit beyond which the power to zone in the public interest may not transcend is the protected property rights of individual landowners." *Realen*, 838 A.2d at 728. Moreover:

> The natural or zealous desire of many zoning boards to protect, improve and develop their community, to plan a city or a township or a community that is both practical and beautiful, and to conserve the property values as well as the 'tone' of that community is commendable. But they must remember that property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish.

Id., quoting *Cleaver v. Board of Adjustment*, 200 A.2d 408, 413 n.4 (Pa. 1964).

Municipalities do not have a right or obligation that is created, protected or granted by the United States or Pennsylvania Constitutions to *limit* the rights of property owners by adopting zoning ordinances. Rather, municipalities' power to regulate land use through zoning is derived

from a specific grant of authority by the General Assembly – the Pennsylvania Municipalities Planning Code – and is not a property right or other interest that is constitutionally protected. *See Hoffman Mining Co. v. Zoning Hearing Bd.*, 32 A.3d 587, 593 (Pa. 2011); *see also Devlin v. City of Philadelphia*, 862 A.2d 1234, 1242 (Pa. 2004) (municipality is powerless to enact ordinances except as authorized by statute, and ordinances not in conformity with the municipality's enabling statute will be void); *Kline v. City of Harrisburg*, 68 A.2d 182, 186 (Pa. 1949) ("It is settled in Pennsylvania that in the absence of the granting of specific power from the Legislature municipalities do not have the authority to pass zoning ordinances.").

Far from restricting or depriving a property owner's constitutionally ordained right to do as he sees fit with his property, Act 13's local ordinance provisions necessarily *restore and expand* such rights. Under Act 13, each and every property owner in the Commonwealth is permitted to do more with his or her property, not less. There is, in short, no deprivation. Act 13, moreover, achieves a valid state objective – efficient production and utilization of the Commonwealth's natural resources – by means that are rationally related to that objective. *See Kahn v. State Board of Auctioneer Examiners*, 842 A.2d 936, 946-947 (Pa. 2004).

In the opinion below, the Commonwealth Court creates a new constitutional right where none in fact exists. There is no constitutionally-protected right to be able to dictate how a neighbor uses his or her property and the MPC does not and cannot create that right. In Act 13, the General Assembly has balanced the needs of the Commonwealth for uniform regulation, land use planning and economic development. This legislative decision removes limitations on the property rights held by individual landowners. This legislative compromise should be upheld, and the Commonwealth Court's decision below should be reversed.

Respectfully submitted,

Date: September 4, 2012

Patrick H. Zaepfel
Supreme Court Id. No. 71509
Zaepfel Law, P.C.
201 Willow Valley Square
Lancaster, PA 17602
(717) 735-7052

Attorney for *Amici Curiae, The Pennsylvania Chamber of Business and Industry, The Pennsylvania Manufacturers' Association, The National Federation Of Independent Business, The Pennsylvania Business Council and The Pennsylvania Chemical Industry Council*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amici Curiae* in Support of Appellants was served this 4th day of September, 2012 by first-class U.S. mail addressed as follows:

John M. Smith
Smith Butz, LLC
125 Technology Drive, Suite 202
Bailey Center I, Southpointe
Canonsburg, PA 15317

Jonathan M. Kamin
Goldberg, Kamin & Garvin LLP
1806 Frick Building
Pittsburgh, PA 15219

Jordan B. Yeager
Curtin & Heefner LLP
Heritage Gateway Center
1980 South Eaton Road, Suite 220
Doylestown, PA 18901

William A. Johnson
23 East Beau Street
Washington, PA 15301

Susan J. Kraham
Columbia University School of Law
435 West 116th Street
New York, NY 10027

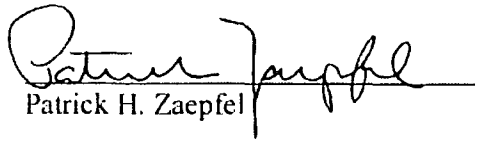
Howard G. Hopkirk
Senior Deputy Attorney General
Pennsylvania Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

James J. Rohn
Mathew H. Haverstick
Conrad O' Brien PC
1500 Market Street
Centre Square, West Tower, Ste. 3900
Philadelphia, PA 19102-1021

Devin J. Chwastyk
McNees, Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Robert A. Jackel
3614 Baring Street, Apt. 4
Philadelphia, PA 19104

Christopher R. Nestor
K&L Gates, LLP
17 North 2nd Street, 18th Floor
Harrisburg, PA 17101-1507



Patrick H. Zaepfel