IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 72 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., Cross-Appellants

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, Cross-Appellees

Cross-Appeal of: ROBINSON TOWNSHIP, *et al.*, From The Order Of The Commonwealth Court Entered On July 26, 2012, Docket No. 284 M.D. 2012

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA INDEPENDENT OIL AND GAS ASSOCIATION, THE MARCELLUS SHALE COALITION, MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, PENNECO OIL COMPANY, INC., AND CHESAPEAKE APPALACHIA, LLC, IN SUPPORT OF CROSS-APPELLEES

Walter A. Bunt, Jr.
Pa. Id. No. 36738
David R. Overstreet
Pa. Id. No. 68950
K&L GATES LLP
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222

Christopher R. Nestor
Pa. Id. No. 82400
K&L GATES LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE CONSTITUTION

STATE STATUTES

COURT RULES

The Pennsylvania Independent Oil and Gas Association, the Marcellus Shale Coalition, MarkWest Liberty Midstream & Resources, LLC, Penneco Oil Company, Inc., and Chesapeake Appalachia, LLC (collectively "Industry Parties"), submit this brief as *Amici Curiae* and pursuant to Pa.R.A.P. 531(a), in opposition to the cross-appeals of the Cross-Appellants ("Municipalities") from the Commonwealth Court's July 26, 2012 order granting the preliminary objections of the Cross-Appellees ("Commonwealth Parties") to Counts IV, V, VI and VII of the petition for review.

I. INTERESTS OF *AMICI CURIAE*

The interests of the Industry Parties in these appeals are set forth in their Brief of *Amici Curiae* Industry Parties in Support of Appellants, the Commonwealth Parties, filed with the Court on September 4, 2012 in Docket No. 63 MAP 2012. Industry Parties incorporate Sections I-III of their prior brief herein by reference.

Industry Parties, except as set forth herein, incorporate and adopt the arguments of the Commonwealth Parties in opposition to the cross-appeals of the Municipalities.

II. SUMMARY OF ARGUMENT

The Commonwealth Court did not err sustaining the Commonwealth Parties' preliminary objections to the Municipalities' petition for review. The Municipalities failed to meet, and their brief in support of their cross-appeals to this Court fails to even acknowledge, their onerous burden to establish that Act 13 of 2012 ("Act 13") "clearly, palpably and plainly" violates the Pennsylvania Constitution.

Act 13 is not a "special law." It does not create a classification of the sort that violates Article III, Section 32 of the Pennsylvania Constitution. The purported classifications created by Act 13 have, moreover, a legitimate governmental purpose – the efficient production and

utilization of the State's natural resources – and are rationally related to serving that purpose, thus satisfying the rational basis test and passing muster under Article III, Section 32 of the Pennsylvania Constitution.

Nor does Act 13 violate Article I, Section 27 of the Pennsylvania Constitution by purportedly denying municipalities the ability to carry out alleged constitutional obligations to protect public natural resources. Article I, Section 27 is not an affirmative grant or expansion of power to municipalities. Rather, the provision guides and tempers municipalities' exercise of authority *otherwise* specifically delegated to them by the Legislature – authority that can be limited or taken away from municipalities by the Legislature. Act 13, moreover, by virtue of the legislative process, embodies the appropriate balance, for purposes of Article I, Section 27, of the environmental and societal concerns associated with the development of oil and gas resources within the Commonwealth and does not violate Article I, Section 27.

III. ARGUMENT

This Court has consistently held that enactments of the Legislature enjoy a strong presumption of constitutionality. *See In the Interest of F.C. III*, 2 A.3d 1201, 1214 (Pa. 2012). All doubts are to be resolved in favor of sustaining the constitutionality of the legislation. *See Estate of Fridenberg v. Commonwealth*, 33 A.3d 581, 591 (Pa. 2011). "[N]othing but a clear violation of the Constitution – a clear usurpation of power prohibited – will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Glancey v. Casey*, 288 A.2d 812, 818 (Pa. 1972). "'The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases; one department of the government is bound to presume that another has acted rightly. The party who

wishes us to pronounce a law unconstitutional, takes upon himself the burden of proving, beyond all doubt, that it is so.'" *Schubach v. Silver*, 336 A.2d 328, 335 n.12 (Pa. 1975) (quoting *Erie & North-East Railroad Co. v. Casey*, 26 Pa. 287, 300 (1856)).

Moreover, one of the most firmly established principles of our law is that the challenging party has a heavy burden of proving an act unconstitutional. *See In the Interest of F.C. III*, 2 A.3d at 1214; *Harrisburg School District v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003). In order for an act to be declared unconstitutional, the challenging party must prove the act "clearly, palpably and plainly" violates the constitution. *In the Interest of F.C. III*, 2 A.3d at 1214; *Zogby*, 828 A.2d at 1087.

It is with this exceedingly strong presumption of the validity of legislation when subject to constitutional challenge that this Court reviews the Commonwealth Court's decision sustaining the Commonwealth Parties' preliminary objections to the Municipalities' claims that Act 13 is facially unconstitutional.

A. The Commonwealth Court Did Not Err In Rejecting The Municipalities' Claim That Act 13 Constitutes A "Special Law."

The Municipalities assert that Act 13 is a "special law" which creates unconstitutional distinctions between Pennsylvania municipalities and the drilling industry and other industries in violation of Article III, Section 32 of the Pennsylvania Constitution.[1] Act 13, however, is a

[1] Those distinctions, according to the Municipalities' petition for review, are as follows. First, the Municipalities contend that Section 3304 of Act 13, 58 Pa.C.S. § 3304, which mandates *uniformity* among municipal ordinances regulating oil and gas operations, provides special treatment to the oil and gas industry that is not afforded to other industries. (R. 104a-110a) [Petition for Review, ¶¶ 132-149]. Second, the Municipalities contend that the attorney's fees and costs provision in Section 3307 of Act 13, 58 Pa.C.S. § 3307, places "excessively onerous" punishments upon municipalities when dealing with regulation of the oil and gas industry versus other industries. (R. 110a-113a) [Petition, ¶¶ 150-161]. Finally, the Municipalities assert that Section 3218.1 of Act 13, 58 Pa.C.S. § 3218.1, which addresses certain spill notification obligations of the Pennsylvania Department of Environmental Protection ("PaDEP"), creates an unconstitutional distinction between public drinking water supplies and private drinking water supplies. (R. 113a-115a) [Petition, ¶¶ 162-166]. The Commonwealth Court addressed

"general law" and not the type of "special law" that Article III, Section 32 was intended to prevent. The Municipalities, moreover, fail to establish that there is no conceivable legitimate governmental purpose related to the purported "classifications" they identify in Act 13. Accordingly, the Commonwealth Court did not err in rejecting the Municipalities' "special law" claim.

1. Article III, Section 32 – The Applicable Standard.

Article III, Section 32 of the Pennsylvania Constitution provides, in pertinent part:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts...
>
> 7. Regulating labor, trade, mining or manufacturing. ...
>
> Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

PA. CONST. art. III, § 32.

As explained by this Court:

> [A] special law is the opposite of a general law. A special law is not uniform throughout the state or applied to a class. A general law is. It is well known that the Legislature has classified cities and counties. A law dealing with all cities or all counties of the same class is not a special law, but a general law, uniform in its application. But a law dealing with but one county of a class consisting of ten, would be local or special.

Appeal of Torbik, 696 A.2d 1141, 1146 (Pa. 1997) (quoting *Heuchert v. State Harness Racing Commission*, 170 A.2d 332, 336 (Pa. 1961)).

Article III, Section 32, the underlying purpose of which is analogous to federal principles

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each of these purported classifications in its decision. *See Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, 2012 Pa. Commw. LEXIS 222, at *56-*60 (Pa. Cmwlth. July 26, 2012)

of equal protection, does not "vitiate the Legislature's power to classify, which necessarily flows from its general power to enact regulations for the health, safety, and welfare of the community," nor does it "prohibit differential treatment of persons having different needs." *Pa. Tpk. Comm'n v. Commonwealth*, 899 A.2d 1085, 1094 (Pa. 2006) (quoting *Zogby*, 828 A.2d at 1088). Rather it requires only that a classification be rationally related to serving a legitimate governmental purpose. *Id.* at 1095; *see also Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 204 (Pa. 1975).

A classification will be held unconstitutional only if it is based upon artificial or irrelevant distinctions used for the purpose of evading the constitutional prohibition:

> Legislation for a class distinguished from a general subject is not special but general; and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones, used for the purposes of evading the constitution prohibition. *If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is not wisdom, but good faith in the classification.*

Freezer Storage, Inc. v. Armstrong Court Company, 382 A.2d 715, 718 (Pa. 1978) (emphasis added). *See also Pa. Tpk. Comm'n*, 899 A.2d at 1095.

A legitimate governmental purpose includes any objective involving the health, safety, or welfare of the community. *See Zogby*, 828 A.2d at 1088. A classification is rationally related to serving a legitimate governmental purpose if it has "some relationship to" the purpose and "the relationship is objectively reasonable." *Plowman v. Commonwealth Dep't of Transp., Bureau of Driver Licensing*, 635 A.2d 124, 127 (Pa. 1993). In applying the rational basis test:

> [A] court is free to ***hypothesize*** the reasons the legislature might have had for its classification. The courts do not require record evidence to justify the classification nor do they require the legislative history to show that the legislature had considered the particular rationale that satisfies the court.

Martin v. Unemployment Comp. Bd. of Review, 466 A.2d 107, 111-12 (Pa. 1983) (internal

citations omitted, emphasis added). *See also Pa. Tpk. Comm'n*, 899 A.2d at 1095 (citing *Zogby*, 828 A.2d at 1089). And, the court "need not specifically conclude that the subject statute [and the classification it creates] will be absolutely successful in accomplishing its objective." *Plowman*, 635 A.2d at 127.

2. Act 13 Is Not A Special Law.

The Municipalities' claim fails because Act 13, on its face, does not create a classification of the sort that violates Article III, Section 32 of the Pennsylvania Constitution.

The distinction between "special" legislation within the proscription of Article III, Section 32, and "general" legislation that is not, is illustrated by this Court's decisions regarding the Legislature's authority to enact legislation addressing the problem of the City of Harrisburg's troubled public schools. In *Harrisburg Sch. Dist. v. Hickok*, 761 A.2d 1132 (Pa. 2000), relied upon by the Municipalities, this Court held that the classification of the Harrisburg School District in the so-called "Reed Amendment" to the Educational Empowerment Act, Act 16 of 2000, violated Article III, Section 32 of the Pennsylvania Constitution.[2] This Court held that a classification consisting of "a school district of the second class with a history of low test performance which is coterminous with the city of the third class which contains the permanent seat of government" was simply another means to refer to the Harrisburg School District. Finding that there could never be but one member of the class (even in the unlikely event that the

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[2] The Education Empowerment Act, Act 16 of 2000, 24 P.S. §§ 17-1701-B *et seq.*, was enacted in 2000 and authorized the Secretary of Education to replace a local school board with a "board of control" where students in the district had a history of low test scores. Before the board of control was appointed, the school district was given an opportunity to develop an improvement plan. Only if the affected school district did not meet the goals established in the plan within three years would the board of control assume the powers of the school board. 24 P.S. § 17-1703-B, § 17-1705-B, § 17-1706-B. While this provision applied to second class school districts in general, the Harrisburg School District was treated differently. Where other school districts would have an opportunity to implement an improvement plan, a board of control would be immediately appointed not by the Secretary of Education, but by the mayor of Harrisburg, who at that time was Stephen Reed. *See Hickok*, 761 A.2d at 1135.

capital was moved to another city), this Court affirmed the holding by the Commonwealth Court that the Reed Amendment was *per se* unconstitutional as "special legislation." *Hickok*, 761 A.2d at 1136.

The Legislature subsequently redrafted the Reed Amendment to address the constitutional infirmity identified by this Court in *Hickok*. In Act 91, Act of Nov. 22, 2000, P.L. 672, No. 91, the classification language of the Reed Amendment was replaced with a class described as:

> a school district of the second class which has a history of extraordinarily low test performance, which is coterminous with a city of the third class that has opted under the "Optional Third Class City Charter Law" or 53 Pa. C.S. Pt. III Subpt. I to be governed by a mayor-council form of government and which has a population in excess of forty-five thousand . . . .

Zogby, 828 A.2d at 1083. The school district and individuals residing in the school district alleged that the classification, which included other school districts as potential members of the class, was redrafted to avoid the special legislation prohibition and was not a rational classification. On preliminary objections, the Commonwealth Court found Act 91 suffered the same infirmities as Act 16, characterizing the law as prohibited special legislation. *See Harrisburg School District v. Zogby*, 789 A.2d 797 (Pa. Cmwlth. 2002), *rev'd Zogby*, 828 A.2d at 1084.[3]

On appeal, this Court disagreed. This Court determined that because it was possible in the future for other school districts to be included in the same class, the class was not closed. Accordingly, the classification was determined to be constitutional. *Id.* at 1091. This Court also held that *even if* the Legislature intended to target the City of Harrisburg, legislative motivation

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[3] Although it found Act 91 to be unconstitutional, the Commonwealth Court observed that "the merits of the legislative scheme or the motives behind its passage are irrelevant. The touchstone of legislation is not that it is laudable or even that it reflects the public will, but that it is also within the limits of our Constitution." *Id.* at 801.

was irrelevant if the class as defined in the legislation was "reasonably related to the Commonwealth's legitimate interest in, and the General Assembly's constitutional duty to ensure, the existence of a 'thorough and efficient system of public education.'" *Zogby*, 828 A.2d at 1091 (citations omitted).

This Court's more recent decisions in *Pa. Tpk. Comm'n* and *West Mifflin Area School District v. Zahorchak*, 4 A.3d 1042 (Pa. 2010), further illustrate the distinction between "general" legislation and "special" legislation prohibited by Article III, Section 32 of the Pennsylvania Constitution. In *Pa. Tpk. Comm'n*, this Court struck down legislation that, for purposes of labor relations, drew a distinction between first-level supervisors who work for the Pennsylvania Turnpike Commission and all other first-level governmental supervisors that might be covered by such a law based on no rational reason. 899 A.2d at 1095-1096. Importantly, the legislation limited "public employer" to mean *only* the Commission:

> In this case, our analysis above makes it clear that the General Assembly created a class with one member and did so in a fashion that makes it impossible for another member to join the class. The class will never open to more than one member because the General Assembly defined "public employer" as the "The Pennsylvania Turnpike Commission." . . . This legislation is unconstitutional *per se*.

899 A.2d at 1098.

Similarly, in *West Mifflin*, this Court overturned a provision amending the Public School Code where the Duquesne City School District was the *only* Pennsylvania school district that met all the statutory criteria of the provision and the class created by the provision was all but closed to new members. *See* 4 A.3d at 1048. As explained by this Court:

> Given the above, we agree with Appellants that the class created by Section 1607.1 is, at a minimum, "substantially closed" to new members, in violation of the dictates of *Hickock* and *Pennsylvania Turnpike Commission*. It seems clear that the practical effect of Section 1607.1 was, and was always intended to be, to provide a remedy solely for the adverse circumstances obtaining within the

> Duquesne City School District upon elimination of its high school, by giving the Secretary authority to re-assign Duquesne's students to nearby schools, and by assuring that the affected school employees would be given preferential hiring treatment.

4 A.3d at 1049.

Unlike the legislation at issue in *Hickok, Pa. Tpk. Comm'n*, and *West Mifflin*, Act 13 applies *uniformly* throughout the entire Commonwealth - to *each and every* municipality, and to *each and every* entity, regulated by the Act. While Act 13 distinguishes the oil and gas industry from other industries, it applies equally and uniformly throughout the Commonwealth and to all persons and firms and municipalities covered by the legislation. Each municipality, and each regulated entity, is treated alike. None are singled out, as was the case in *Hickok, Pa. Tpk. Comm'n* and *West Mifflin*, for unique or special treatment, or afforded unique or special powers or obligations not shared by other members of the same class.

Act 13, in short, is a "general law" and not the type of "special law" that Article III, Section 32 was intended to prevent. This Court need not proceed any further, therefore, in affirming the Commonwealth Court's rejection of the Municipalities' challenge to Act 13 pursuant to Article III, Section 32.

3. The Purported Classifications Created By Act 13 Have A Legitimate Governmental Purpose.

Even if the Municipalities could establish that Act 13 is a "special law," which they cannot, their claim still fails. The alleged unconstitutional distinctions, as identified by the Municipalities, between the drilling industry and other industries created by Act 13, do not implicate a suspect class, a fundamental right, an important right or a sensitive classification. As such, the "classification" is valid if it has a legitimate governmental purpose and it is rationally related to serving that purpose. *See Pa. Tpk. Comm'n*, 899 A.2d at 1095; *Probst v.*

Commonwealth, Dep't of Transp., Bureau of Driver Licensing, 849 A.2d 1135, 1144 (Pa. 2004). *See also Martin*, 466 A.2d at 113 ("Economic legislation is valid unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational.").

This Court in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont* recognized that the efficient production and utilization of the state's natural resources is a legitimate governmental purpose for legislation. *See Huntley*, 964 A.2d 855, 865-66 (Pa. 2009); *see also Range Resources-Appalachia v. Salem Township*, 964 A.2d 869, 874 (Pa. 2009) (noting the Commonwealth's agreement with appellee's position regarding the need for *statewide uniformity* in the regulation of the oil and gas industry). Act 13 is clearly intended to promote that purpose. *See* 58 Pa.C.S. § 3202. It does so by imposing uniform standards and limitations on the development of oil and gas resources *throughout* the Commonwealth. *See* 58 Pa.C.S. §§ 3201-3309.

The Municipalities "***concede*** that there may be inherent differences between the oil and gas industry and other extraction industries . . . ." Brief of Cross-Appellants (72 MAP 2012), at 20 (emphasis added). They contend, nonetheless, that Act 13's uniform standards and limitations with respect to local ordinances regulating the development of oil and gas resources do not relate to any such differences associated with oil and gas development. *Id.* The development of oil and gas resources, however, presents unique challenges that Act 13's uniform standards and limitations specifically address. As detailed in amicus briefs filed with the Court, the development of oil and gas resources involves a highly complex and interconnected infrastructure, consisting of upstream, downstream and midstream operations, that demands predictability, consistency and, most of all, uniformity of regulation. *See* Brief of *Amici Curiae*

Industry Parties (63 MAP 2012) at 6-12; Brief of *Amicus Curiae* National Association of Royalty Owners, Pennsylvania Chapter (63 MAP 2012) at 6-8. Balkanization and inconsistency by municipalities located anywhere among the production, transmission and distribution chain has the ability to hold the Commonwealth's oil and natural gas resources hostage. *Id.*[4]

Judge Brobson, in his dissenting opinion below rejecting the Municipalities' flawed substantive due process claims, recognized that the efficient production and utilization of the State's oil and gas resources presented unique challenges and that Act 13's uniform standards and limitations were rationally related to addressing those challenges:

> Oil and gas deposits can exist in a residential district just as easily as they might exist in an industrial district. What a local municipality allows, through its comprehensive plan, to be built above ground does not negate the existence and value of what lies beneath.
>
> The General Assembly recognized this when it crafted Act 13 and, in particular, Section 3304. It decided that it was in the best interest of all Pennsylvanians *to ensure the optimal and uniform development of oil and gas resources in the Commonwealth, wherever those resources are found. To that end, Act 13 allows for that development under certain conditions, recognizing the need to balance that development with the health, safety, environment, and property of the citizens who would be affected by the development.*
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> * * *
>
> . . . Section 3304 of Act 13 is a valid exercise of the police power. *The law promotes the health, safety, and welfare of all Pennsylvanians by establishing zoning guidance to local municipalities that ensures the uniform and optimal development of oil and gas resources in this Commonwealth. Its provisions strike a balance both by providing for the harvesting of those natural resources, wherever they are found, and by restricting oil and gas operations* based on (a)

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[4] The Legislature was entitled to consider and give such weight as it saw fit to the entire spectrum of information and opinion available to it when it passed Act 13. *See, e.g., Tosto v. Pennsylvania Nursing Home Loan Agency*, 331 A.2d 198, 202 (Pa. 1975). Among the many resources that was available to the Legislature regarding the unique nature of the oil and gas industry versus other industries operating in Pennsylvania was the Governor's Marcellus Shale Advisory Commission Report (July 22, 2011), the purpose of which was to outline a comprehensive, strategic plan for the responsible development of oil and gas resources in the Commonwealth. The report is available at:

http://www.portal.state.pa.us/portal/server.pt/community/marcellus_shale_advisory_commission/20074.

> type, (b) location, and (c) noise level. The General Assembly's decision, as reflected in this provision, does not appear arbitrary, unreasonable, or wholly unrelated to the stated purpose of the law.

Robinson Twp., 2012 Pa. Commw. LEXIS 222, at *83-*84, *92 (Brobson, J., dissenting) (emphasis added).

Additionally, as recognized by the Commonwealth Court below, this Court has previously upheld legitimate classifications in the mineral extraction industry. *See Robinson Twp.*, 2012 Pa. Commw. LEXIS 222, at * 59-*60 (citing *Dufour v. Maize*, 56 A.2d 675 (Pa. 1948) and *Durkin v. Kingston Coal Co.*, 33 A. 237 (Pa. 1895)). In *Dufour*, for example, this Court rejected a "special law" challenge to the Bituminous Coal Open Pit Mining Conservation Act, which required operators of bituminous open-pit coal mines to implement certain conservation measures not required of other miners. The Court held that the Legislature could rationally conclude that this form of mining posed environmental problems different from those posed by other forms of mining. *Id.* at 677-678.

Here, for the reasons above, the Legislature could rationally conclude that the development of oil and gas resources in this Commonwealth presents unique challenges and requires uniform standards and limitations on the development of those natural resources *throughout* the Commonwealth. The Municipalities' burden is to prove that there is *no conceivable* legitimate governmental purpose related to the purported "classifications" it identifies in Act 13. Since at least one public purpose can be perceived, as recognized by both *Huntley* and *Range*, this Court need not concern itself with any of the conclusory and self-serving statements by the Municipalities to support their contention that Act 13's purported classifications bear no rational relationship to any proper state purpose.

The purported classifications created by Act 13 have a conceivable legitimate

governmental purpose and are rationally related to serving that purpose, satisfying the rational basis test and, therefore, passing muster under Article III, Section 32 of the Pennsylvania Constitution.

B. The Commonwealth Court Did Not Err In Rejecting The Municipalities' Claim That Act 13 Violates Article I, Section 27 Of The Pennsylvania Constitution.

The Municipalities contend that Act 13 unconstitutionally violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources.

The Commonwealth Court rejected this claim by the Municipalities, concluding that Section 3303 of Act 13, which broadly preempts local regulation of oil and gas operations regulated by "environmental acts," "relieved [the Municipalities] of their responsibilities to strike a balance between oil and gas development and environmental concerns under the MPC." *See Robinson Township,* 2012 Pa. Commw. LEXIS 222, at *67.

The Commonwealth Court's disposition of this claim, while reaching the correct result, incorrectly implies, as contended by the Municipalities, that municipalities have some *inherent* "power" under Article I, Section 27 to protect public natural resources that Act 13 has stripped away. Municipalities in this Commonwealth have no such inherent power and, moreover, the legislative process that resulted in Act 13 achieved the balancing required by Article I, Section 27. The Commonwealth Court should have rejected the Municipalities' claim on these bases, which were advanced by both the Commonwealth Parties and Industry Parties, as *Amici Curiae*, before the court below.

1. Municipalities Have No Inherent "Power" Under Article I, Section 27 To Protect Public Natural Resources.

Article I, Section 27 of the Pennsylvania Constitution, is not an affirmative grant of power to municipalities to protect public natural resources, as the Municipalities assert. *See* Brief of Cross-Appellants (72 MAP 2012) at 34, 38. Article I, Section 27 provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

In *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975), relied upon extensively by the Municipalities, the Commonwealth Court expressly *rejected* the idea that Article I, Section 27 could *expand* the statutory powers of the PaDEP. The court noted that "while Section 27 may impose an obligation upon the Commonwealth to *consider* the propriety of preserving land as open space, *it cannot legally operate to expand the powers of a statutory agency, nor can it expand the statutory powers of the [PaDEP] as a practical matter here.*" *Id.* at 482 (emphasis added). *See also Pennsylvania Game Comm'n v. Department of Environmental Resources*, 509 A.2d 877, 883 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989) ("The invocation of Section 27 before an administrative agency will not empower or require the agency to exceed the bounds of its legislative duties and powers."); *Department of Environmental Resources v. Precision Tube Co., Inc.*, 358 A.2d 137, 140 (Pa. Cmwlth. 1976) (Article I, Section 27 "does not expand the statutory power of [PaDEP] in passing on permit applications to require it to consider additional criteria.").

In reaching its conclusion, the court explained that:

> [t]he language of Section 27, of course, does not specify what governmental

> agency or agencies may be responsible for the preservation of the natural scenic, historic and esthetic values enumerated therein, but it seems clear that many state and local governmental agencies doubtless share this responsibility. The legitimate public interest in keeping certain lands as open space obviously requires that a proper determination of the use to which land shall be adapted must be made, but again this is clearly not a statutory function of the [PaDEP]. On the contrary, we believe that such a determination clearly is within the statutory authority not of the [PaDEP] *but of the various boroughs, townships, counties, and cities of the Commonwealth* ***pursuant to a long series of legislative enactments****. Among these enactments is the Municipalities Planning Code which* ***specifically empowers*** *the governing bodies of these governmental subdivisions* to develop plans for land use and to zone or to regulate such uses. Another such enactment is the Eminent Domain Code under which property may be taken and its owners may be compensated when it is condemned for a proper public purpose. *These municipal agencies have the responsibility to apply the Section 27 mandate* ***as they fulfill their respective roles*** *in the planning and regulation of land use, and they, of course, are not only agents of the Commonwealth, too, but trustees of the public natural resources as well, just as certainly as is the [PaDEP].*

Fox, 342 A.2d at 482 (emphasis added). In other words, as recognized by the Commonwealth Court in *Fox*, Article I, Section 27 is not an affirmative grant or expansion of power to municipalities, to the extent they are trustees, to regulate, but instead guides and tempers municipalities' exercise of statutory authority otherwise *specifically* delegated to them by the Legislature by, for example, the Pennsylvania Municipalities Planning Code.

This Court's plurality decision in *Franklin Township v. Commonwealth*, 452 A.2d 718 (Pa. 1982), also relied upon by the Municipalities, does not require a different conclusion. In that decision, which is not binding in any way on this Court, Justice Larsen concluded that local government is constitutionally charged, by Article I, Section 27, with "protection and enhancement of the quality of life of its citizens." *See* 452 A.2d at 721-722.[5] Justice Larsen did not hold, as the Municipalities contend, that Article I, Section 27 empowers municipalities to act *absent* delegated authority from the Legislature. Justice Hutchinson, in his concurring opinion in

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[5] As this Court has recognized, its plurality decisions are not binding precedent. *See Kelley v. State Employees' Ret. Bd.*, 932 A.2d 61, 67-68 (Pa. 2007).

Franklin Township, recognized the necessity of this conclusion: "I concur in the result reached in this case. However, I must disassociate myself from any *inference* in the Plurality Opinion that article I, section 27 of our Constitution grants local governments, creature of the sovereign, a right to enforce the duties that section imposes on the sovereign." 452 A.2d at 724 (Hutchinson, J., concurring) (emphasis added).

Justice Hutchinson's observation in *Franklin Township* is spot on - for the Municipalities' claim to have merit, this Court must conclude that municipalities have *inherent* authority, pursuant to Article I, Section 27 and in the absence of *any* statutory grant of authority by the Legislature, to legislate to protect public natural resources. Article I, Section 27 does not, however, change the foundational principal of state-municipal legal relations in this Commonwealth that municipalities "[a]s creatures of the state, [ ] have no inherent powers, but rather 'possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect.'" *Hoffman Mining Co. v. Zoning Hearing Bd.*, 32 A.3d 587, 593 (Pa. 2011) (quoting *Huntley*, 964 A.2d at 862). *See also Kline v. City of Harrisburg*, 68 A.2d 182, 185 (Pa. 1949); *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1242 (Pa. 2004); *Denbow v. Borough of Leetsdale*, 729 A.2d 1113, 1118 (Pa. 1999). The inevitable, end result of any conclusion that municipalities have such inherent authority pursuant to Article I, Section 27 is readily apparent – municipalities, invoking Article I, Section 27, could legislate contrary to, or to deliberately thwart, acts of the Legislature and, because they would be invoking a constitutional "power" to act, escape preemption. This Court would be left with a battle of dueling claims of constitutional authority to act, by both municipalities and the Legislature, with no clear winner.

In sum, Act 13 does not strip municipalities of any alleged "power" or obligation under

Article I, Section 27 to protect public natural resources. Article I, Section 27 affords municipalities no such inherent power, but instead guides and tempers municipalities' exercise of statutory authority otherwise afforded to them by the Legislature. Act 13, as is the Legislature's prerogative, amends the former Oil and Gas Act to further clarify and define the scope of delegated municipal authority to regulate oil and gas operations. It is within that scope of delegated authority, as defined by the Legislature in Act 13 and other statutory provisions, and *only* within that scope of delegated authority, that municipalities can regulate oil and gas operations at all. *See Hoffman Mining Co., supra.*

2. The Balancing Required By Article I, Section 27 Has Already Been Performed.

The Municipalities contend that "[b]y enacting Act 13, the General Assembly has removed from Pennsylvania municipalities the ability to strike [the] balance between oil and gas development and 'the preservation of the natural, scenic, historic and esthetic values of the environment." Brief of Cross-Appellants (72 MAP 2012) at 34. The Municipalities are mistaken. The *legislative process* that resulted in Act 13 achieved the balancing required by Article I, Section 27.

In *National Solid Wastes Management Association v. Casey*, 600 A.2d 260 (Pa. Cmwlth. 1991), *aff'd*, 619 A.2d 1063 (Pa. 1993), the Commonwealth Court articulated the standard for determining whether a statute constitutes a breach by the Commonwealth, in violation of Article I, Section 27, of its duties as the trustee of a public natural resource.

In *Casey*, then-Governor Casey issued an executive order that imposed various requirements regarding the operation of a municipal waste landfill pursuant to a permit and the circumstances under which such a permit could be acquired. The executive order also required PaDEP (then, the Department of Environmental Resources) to establish certain waste limits and

other standards relative to municipal waste landfills and to create a municipal waste management plan for Pennsylvania. The National Solid Wastes Management Association ("Association") pointed out that some of the executive order's requirements were inconsistent with those articulated in the two principal statutes that address the operation of municipal waste landfills – the Solid Waste Management Act ("Act 97") and the Municipal Waste Planning, Recycling, and Waste Reduction Act ("Act 101") – and the regulations promulgated pursuant to those statutes. The Association argued that the Governor did not have the authority to issue the executive order and that, therefore, it was invalid.

In response, the Governor and PaDEP argued that the statutory and regulatory schemes in question did not, for purposes of Article I, Section 27, serve to fulfill the Commonwealth's duties as the trustee of the public natural resources impacted by municipal waste landfills and, therefore, the provision authorized the Governor to issue the executive order as a means to ensure those duties were fulfilled. The Commonwealth Court rejected this argument, concluding that the legislative process achieves the balancing required by Article I, Section 27:

> Additionally, we find no authority for Executive Order 1989-8 in Article I, Section 27 of the Pennsylvania Constitution, quoted previously. *The balancing of environmental and societal concerns, which the Commonwealth argues is mandated by Article I, Section 27, was achieved through the legislative process which enacted Acts 97 and 101 and which promulgated the applicable regulations.* Article I, Section 27 does not give the Governor the authority to disturb that legislative scheme. Neither does it give him the authority to alter [PaDEP's] responsibilities pursuant to that scheme.

Id. at 265 (emphasis added).

In other words, by virtue of the legislative process, every statute that addresses or affects a public natural resource embodies the balance required by Article I, Section 27. *Id.*; *see also Eagle Environmental II v. Commonwealth*, 884 A.2d 867, 879 (Pa. 2005) (for purposes of Article I, Section 27, statute inherently embodied the proper "balancing [that] must take place between

protecting the public and the environment and securing proper waste disposal" because, through the legislative process, the "legislature has signaled...the necessary considerations for such a balancing of duties, including the need to protect the health, safety, welfare and property of the people from the dangers of waste disposal and the desire to encourage private enterprise"); *Concerned Residents of the Yough, Inc. v. Dep't of Envtl. Res.*, 639 A.2d 1265, 1275 (Pa. Cmwlth. 1994) ("In [*Casey*], we stated that SWMA, and the regulations promulgated pursuant thereto, indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of solid waste, consequently, the balancing of environmental concerns mandated by Article 1, Section 27 has been achieved through the legislative process.").

Act 13 was specifically enacted to implement the will of the people as expressed in Article I, section 27 of the Pennsylvania Constitution:

> The purposes of this chapter are to:
>
> (1) permit optimal development of oil and gas resources of this Commonwealth consistent *with protection of the health, safety, environment and property of Pennsylvania citizens.*
>
> . . .
>
> (4) Protect the natural resources, environmental rights and values *secured by the Constitution of Pennsylvania.*

58 Pa.C.S. § 3202 (emphasis added). Viewed in that light, it is apparent that the Legislature was concerned about the problems and risks posed by the development of oil and gas resources and has subjected such activity to heavy, uniform statewide regulation. This Court, given the strong presumption of constitutionality that accompanies legislation in this Commonwealth, should give great deference to the Legislature's assessment of the unique challenges posed by the development of oil and gas resources. As stated by this Court in *Commonwealth v. Parker White Metal Co.*:

> [The] presumption [of constitutionality] is further strengthened in this case by the explicit purpose of the Act to implement Article I, section 27 of the Pennsylvania Constitution, a remarkable document expressing our citizens' entitlement and "right to clean air, pure water, and -- to the preservation of the natural, scenic, historic and esthetic values of the environment." The courts of this Commonwealth, as part of a co-equal branch of government, serve as "trustees" of "Pennsylvania's public natural resources," no less than do the executive and legislative branches of government . . . . As one of the trustees of the public estate and this Commonwealth's natural resources, we share the duty and obligation to protect and foster the environmental well-being of the Commonwealth of Pennsylvania. *Failure to act with vigilance "so as best to achieve and effectuate the goals and purposes" of the Solid Waste Management Act would be detrimental to the public health, safety and welfare, and would be a breach of the public trust.*

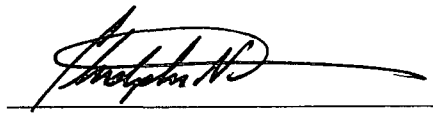
515 A.2d 1358, 1370 (Pa. 1986) (emphasis added).

Act 13, by virtue of the legislative process, embodies the appropriate balance, for purposes of Article I, Section 27 of the "environmental and societal concerns" associated with the development of oil and gas resources within the Commonwealth and does not violate Article I, Section 27. While the Municipalities may wish to "strike that balance," themselves, it is not their prerogative to do so where, as here, the Legislature, as sovereign and trustee, has already acted.

IV. CONCLUSION

This Court should, for the reasons herein and those set forth in the briefs of the Commonwealth Parties in opposition to the Municipalities' cross-appeals: (1) affirm the order of the Commonwealth Court sustaining the preliminary objections of the Commonwealth Parties with respect to the petition for review; and (2) instruct the Commonwealth Court to enter summary relief for the Commonwealth Parties on all counts of the petition for review.

Respectfully submitted,



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Walter A. Bunt, Jr.
Pa. Id. No. 36738
David R. Overstreet
Pa. Id. No. 68950
K&L GATES LLP
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222
Tel: (412) 355-6500
Fax: (412) 355-6501
walter.bunt@klgates.com
david.overstreet@klgates.com

Christopher R. Nestor
Pa. Id. No. 82400
K&L GATES LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
Tel: (717) 231-4500
Fax: (717) 231-4501
christopher.nestor@klgates.com

Attorneys for *Amici Curiae, The Pennsylvania Independent Oil and Gas Association, the Marcellus Shale Coalition, MarkWest Liberty Midstream & Resources, LLC, Penneco Oil Company, Inc., and Chesapeake Appalachia, LLC*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amici Curiae* in Support of Cross-Appellees was served this 18th 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

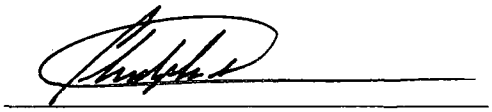
William A. Johnson
23 East Beau Street
Washington, PA 15301

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



Christopher R. Nestor