IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Docket 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, Mehernosh Khan, 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 of Pennsylvania, 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,

Appellees

BRIEF OF APPELLEES PENNSYLVANIA PUBLIC UTILITY COMMISSION, CHAIRMAN ROBERT F. POWELSON, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND SECRETARY MICHAEL L. KRANCER

Appeal from the Commonwealth Court order of July 26, 2012, in No. 284 M.D. 2012

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

I. COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Did the Commonwealth Court correctly hold that Act 13 is not a "special law" under Article 3, Section 32 of the Pennsylvania Constitution?

Commonwealth Court answer: yes.

2. Did the Commonwealth Court correctly hold that Act 13 is neither an unconstitutional taking for private purposes nor an improper exercise of the Commonwealth's eminent domain power under Article 1, Sections 1 and 10 of the Pennsylvania Constitution?

Commonwealth Court answer: yes.

3. Did the Commonwealth Court correctly reject the Municipalities' claim that Article 1, Section 27 of the Pennsylvania Constitution, which establishes the Commonwealth as trustee of Pennsylvania's natural resources, gives local governments the power to challenge a statute duly passed by the General Assembly?

Commonwealth Court answer: yes.

4. Did the Commonwealth Court correctly reject the Municipalities' claim that the review procedures set forth in Section 3305(a) and (b) of Act 13 violate the separation of powers doctrine?

Commonwealth Court answer: yes.[1]

5. Did the Commonwealth Court correctly dismiss the claims of the Delaware Riverkeeper Network, Maya van Rossum, and Dr. Khan?

Commonwealth Court answer: yes.

[1] The Municipalities have apparently abandoned their claims under Counts IX and X, which alleged that Act 13's setback, timing and permitting requirements were unconstitutionally vague.

II. COUNTERSTATEMENT OF THE CASE

This is a civil action in which the Cross Appellants (collectively, "the Municipalities") seek to enjoin and declare unconstitutional parts of Act 13 of 2012. The Municipalities' Statement of the Case provides an incomplete, one-sided discussion of only those specific sections of Act 13 that the Municipalities challenge, primarily involving restrictions upon, and review processes for, local zoning ordinances and the possible consequences if a municipality enacts an invalid ordinance. The constitutionality of particular provisions, however, cannot be considered in isolation from the Act as a whole. See Br. for the Pennsylvania Public Utility Commission and Chairman Robert F. Powelson (collectively, "the Commission"), and the Pennsylvania Department of Environmental Protection and Secretary Michael L. Krancer (collectively, "the Department"), No. 63 MAP 2012 (Sept. 4, 2012).

As set forth in the Statement of the Case in the Commission and the Department's September 4 brief, Act 13 is a comprehensive legislative action expressly designed to balance optimal development of Commonwealth oil and gas resources with health, safety, environmental and property interests. Among other things, the General Assembly set statewide standards for oil and gas operations, including specific provisions designed to protect environmental, safety and property interests; imposed impact fees that redistribute industry revenue to communities affected by Marcellus Shale operations; and preempted certain local ordinances while expressly preserving local control in other areas. As the Commonwealth Court readily recognized, the reasons for the Act, set forth in 58 Pa. C.S. § 3202, "are sufficient to have the state exercise its police powers to promote the exploitation of oil and gas resources." Robinson Twp. v. Com., No. 284 M.D. 2012, 2012 WL 3030277, at *14 (Pa. Cmwlth. July 26, 2012).

III. SUMMARY OF ARGUMENT

The Commonwealth Court considered and rejected each of the claims the Municipalities assert in their cross appeal, and those rulings should be affirmed. As set forth in the Commission and the Department's September 4 brief in 63 MAP 2012, Act 13, like any duly enacted statute, is presumed constitutional. The Municipalities – who ask this Court not just to reverse the Commonwealth Court's rulings but to enter judgment in their favor – have the heavy burden of showing that Act 13 clearly, palpably and plainly violates constitutional rights. This they have not done. Instead, they speculate on what might conceivably happen under Act 13.[2] They attack the alleged motives of the Commonwealth government in supporting and enacting Act 13. And while the Municipalities concede that zoning restrictions can limit the constitutional right to free use of one's property, they argue that they somehow have a constitutionally protected right to impose even greater restrictions on land use than the General Assembly has decided is appropriate. That illogical position disregards the unassailable truth that municipalities obtain their existence and their enumerated powers solely from the General Assembly.

Viewing the provisions of Act 13 through the lens of the presumption of constitutionality and the heavy burden placed on challengers, the Commonwealth Court correctly dismissed each Count at issue here. As discussed below:

- Act 13 is not a "special law" under Article 3, Section 32 of the Pennsylvania Constitution: the General Assembly's decision to regulate oil and gas operations is rationally related to a legitimate state purpose, and the Act applies uniformly across the Commonwealth.

- Act 13 is not an unconstitutional taking: the Act provides limited authority to public utilities – not private companies as the Municipalities contend – to exercise eminent domain, and the Municipalities have not alleged that any property has been or is in imminent danger of being taken.

[2] As set forth in the Commission's and the Department's September 4 brief, this case involves non-justiciable political questions and is not ripe for review.

- Article 1, Section 27 of the Pennsylvania Constitution, which establishes the Commonwealth as trustee of Pennsylvania's natural resources, limits but cannot expand the Municipalities' statutory authority.

- The review procedures set forth in Section 3305(a) and (b) of Act 13 do not violate the separation of powers doctrine: among other things, Section 3305 expressly preserves the courts' role as final arbiter, and the provision allowing municipalities to seek advisory opinions from the Commission is a common, and proper, delegation of power to an agency.

Finally, the Commonwealth Court correctly dismissed the claims of the Delaware Riverkeeper Network, Maya van Rossum and Dr. Khan. Those parties lack standing because they have no "substantial, direct, and immediate interest" in the subject matter of the litigation, and, regardless, their claims fail to state a cause of action.

IV. ARGUMENT

A party challenging the constitutionality of a statute bears a heavy burden. A statute is presumed valid, and can be found unconstitutional only if it "clearly, palpably and plainly" violates constitutional rights. Com. v. MacPherson, 561 Pa. 571, 580, 752 A.2d 384, 388 (2000). That standard applies to – and defeats – every one of the constitutional challenges the Municipalities have asserted in this case. See, e.g., Harrisburg Sch. Dist. v. Zogby, 574 Pa. 121, 135-38, 828 A.2d 1079, 1087-89 (2003) (applying strong presumption of validity and upholding statute challenged as an unconstitutional "special law"); Eagle Envtl. II, L.P. v. Com., Dep't of Envtl. Prot., 584 Pa. 494, 515-17, 884 A.2d 867, 880-81 (2005) (same; rejecting claim that General Assembly unconstitutionally delegated authority); Redevelopment Auth. of City of York v. Bratic, 45 A.3d 1168, 1178 (Pa. Cmwlth. 2012) (same; rejecting constitutional challenge to provisions of Urban Redevelopment Law regarding blighted property); Plaxton v. Lycoming County Zoning Hearing Bd., 986 A.2d 199, 205, 213 (Pa. Cmwlth. 2009) (same; rejecting claim that ordinance violated Pennsylvania Constitution Art. I, § 27).

A. The Commonwealth Court ruled correctly that Act 13 is not an unconstitutional "special law."

Count V of the Municipalities' Petition for Review asserted a claim under Article III, Section 32 of the Pennsylvania Constitution, which provides that the General Assembly "shall pass no local or special law in any case which has been or can be provided for by general law[.]" According to the Municipalities, Act 13 is a "special" law because, on the one hand, it treats oil and gas operations differently from other enterprises, and, on the other, because it could have a different impact on differently situated communities and property owners. Br. of Cross Appellants at 17-29. The Commonwealth Court properly dismissed Count V, holding that, "while Act 13 does treat the oil and gas industry differently from other extraction industries, it is

constitutional because the distinction is based on real differences that justify varied classifications for zoning purposes." Robinson Twp., at *16.

1. The General Assembly may create statutory classifications.

The purpose of Section 32 is to prevent the General Assembly from granting special privileges to "one person, one company or one county," not to prevent it "from creating statutory classifications to meet diverse needs." Wings Field Preserv. Assocs., L.P. v. Com., Dep't of Transp., 776 A.2d 311, 316 (Pa. Cmwlth. 2001). The timeless words of this Court stated more than a century ago apply equally here:

> All legislation is necessarily based on a classification of its subjects, and, when such classification is fairly made, laws enacted in conformity thereto cannot be properly characterized as either local or special. A law prescribing the mode of incorporating all railroad companies is special, in the narrow sense that it is confined in its operations to one kind of corporations only, and, by the same test, a law providing a single system for organization and government of boroughs, in the state, would be a local law; ***but every one conversant with the meaning of those words, when used in that connection, would unhesitatingly pronounce such statutes general laws.***

Appeal of Ayars, 122 Pa. 266, 281-82, 16 A. 356, 363 (1889) (emphasis added).

As this Court has recognized, the General Assembly's power to classify "necessarily flows from its general power to enact regulations for the health, safety, and welfare of the community." Legislative classifications must be sustained if they bear a "reasonable relationship to a legitimate state purpose," and must be deemed reasonable "if any state of facts reasonably can be conceived to sustain" them. The Court is "free to hypothesize reasons the Legislature might have had for the classification," and where, as here, the General Assembly has codified the reasons for a statute, the codified findings are entitled to "great weight." Harrisburg Sch. Dist. v. Zogby, 574 Pa. 121, 135-38, 828 A.2d 1079, 1087-89 (2003).

Considering these exacting standards, coupled with the presumption of constitutionality, the Commonwealth Court correctly rejected the Municipalities' claim that Act 13 is a special

law. Act 13 indeed focuses on oil and gas operations, for reasons the General Assembly specifically articulated – to permit optimal development of oil and gas resources while protecting health, safety, property and the environment. See 58 Pa. C.S. § 3202. These are legitimate state interests, as the Commonwealth Court acknowledged, and the Municipalities do not suggest otherwise. See Robinson Twp., at *14. Moreover, the provisions the General Assembly adopted in pursuit of these interests – Act 13's regulation of oil and gas operations, environmental and safety measures, provisions for protecting landowners, imposition of impact fees to benefit affected communities, and distinction between areas that require uniformity and those that can be left to local control – apply uniformly, across the Commonwealth.

So long as the General Assembly "could reasonably have believed" the classifications underlying the Act serve legitimate state purposes, its judgment must be upheld. Zogby, 574 Pa. at 139-41, 828 A.2d at 1090-91. As this Court's precedent confirms, that standard is satisfied here. See, e.g., id. (based on factors legislature *could* have considered, statute that allowed mayors of certain medium-sized cities to assume control of failing school districts was "reasonably related" to legitimate public interest and was not an unconstitutional special law, even though it applied to a very limited number of districts and was arguably aimed only at Harrisburg); Baltimore & Ohio R. Co. v. Com., Dep't of Labor, 461 Pa. 68, 84, 334 A.2d 636, 644 (1975) (upholding law singling out railroads for wage regulation because challenger did not show legislature's distinctions had no rational basis, and Court noted various reasonable factors the legislature *might* have considered); Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 14, 331 A.2d 198, 204 (1975) (law that confined loans to nursing homes that complied with certain regulations was not unconstitutional special law; legislature may create statutory classifications that have "some rational relationship to a proper state purpose," and classification

was rationally related to proper purpose of ensuring loan recipients were fit institutions for patient care); see also Freezer Storage, Inc. v. Armstrong Cork Co., 234 Pa. Super. 441, 446-47, 341 A.2d 184, 186-87 (1975) (statute limiting liability of persons who design or construct real property improvements was not unconstitutional special legislation; protected class was "a broad class and no distinctions are made within it").

2. The Municipalities misstate the governing standards.

The Municipalities challenge the Commonwealth Court's ruling based on a fundamental misconstruction of the governing standards. The Municipalities argue that a class consisting of "one type of member" is per se unconstitutional (citing Pennsylvania Tpk. Comm'n v. Com., 587 Pa. 347, 899 A.2d 1085 (2006)); that legislative distinctions must be based on "manifest peculiarity" (citing Wings, supra); and that the Commonwealth Court was required to justify "[e]ach and every difference provided for" in Act 13 (citing nothing). See Br. of Cross Appellants at 18, 19, 24. The Turnpike case, however, held that the General Assembly could not create a class with just one *member* – i.e., an "immutable class of one." See Pennsylvania Tpk. Comm'n, 587 Pa. at 369, 899 A.2d at 1098 (statute enacted to require Turnpike Commission, alone among public employers, to engage in collective bargaining with first level supervisors was an unconstitutional special law). In Wings, the question was whether the General Assembly, after having legitimately classified counties according to their population, could then single out just one county in a particular class for special treatment. The Wings court held this was not proper absent "[m]anifest peculiarities *within a legislative class*[.]" Wings, 776 A.2d at 317 (emphasis added; internal quotations and citation omitted).

The cases the Municipalities cite do not prevent the General Assembly from setting statewide standards for an industry, as it did in Act 13, and do not authorize (much less require) a reviewing court to parse through a law in infinite detail in order to justify every arguable

distinction the General Assembly made. Instead, those cases confirm that the General Assembly *may* make classifications, and if its judgments are conceivably rational, that is the end of a reviewing court's inquiry.[3]

3. The impact a law may have when it is applied does not make it "special."

In addition to claiming that Act 13 is "special" because of its treatment of the oil and gas industry (a challenge which fails for the reasons set forth above), the Municipalities make a series of other convoluted arguments that boil down to complaints about how the Act allegedly operates and a claim that the law has potentially different *impacts* on differently situated communities and property owners. See, e.g., Br. of Cross Appellants at 22-29 (complaining, among other things, about potential financial hardship to municipalities, that "one-size-fits-all" aspects of Act 13 affect densely populated less than undeveloped communities, and that private water users may receive different information than public facilities receive). The Municipalities do not cite a single case, however, holding that a law can be struck down as "special" because of the impact it may have when applied. Indeed, this Court has consistently held that "[t]he constitutional restrictions on special legislation apply to direct legislation, not to the incidental operation of statutes constitutional in themselves upon other subjects than those with which they directly deal." Stull v. Reber, 215 Pa. 156, 161, 64 A. 419, 420 (1906).

Act 13 is directed toward balancing economic development with other interests, including public safety, protection of property and environmental protection. The impact it may have on

[3] The Municipalities also cite self-serving affidavits from their own witnesses, which are irrelevant to the purely legal issues here and, with respect to the Municipalities' request for judgment in their favor, violate Pennsylvania's long-standing Nanty-Glo rule. See Pa.R.C.P. No. 1035.2, Note ("Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact for purposes of summary judgment (citing Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932))).

different communities and others is not a ground for finding it a special law. See, e.g., id. (rejecting argument that act that required public schools in municipalities to exclude unvaccinated students was special legislation because it did not cover students in other public schools; "the act is in no proper sense a regulation of school districts" but is a general statute aimed at protection of public health, and impact on school districts is incidental); Nether Providence Sch. Dist. v. Montgomery, 38 Pa. Super. 483, 485-86 (1909) (act empowering township school directors to act as board of health, aimed at preventing spread of infectious diseases, was not special legislation; though act incidentally affected school districts, it was enacted to protect public health and applied to townships state wide), aff'd sub nom., Sch. Dist. of Nether Providence Twp. v. Montgomery, 227 Pa. 370, 76 A. 75 (1910); Young v. Fetterolf, 320 Pa. 289, 301-02, 182 A. 676, 681 (1936) ("a statute, general in form and covering every county in the state, cannot be deemed local on account of varying results arising from the exercise of local option"); Com., Dep't of Labor & Indus. v. Altemose Constr. Co., 28 Pa. Cmwlth. 277, 287-88, 368 A.2d 875, 881-82 (1977) (statute authorizing Secretary of Labor and Industry to determine prevailing minimum wage rate in each locality was general rather than special legislation, even though wage rates varied from locality to locality; statute applied "throughout the State" and the procedures governing the secretary's decisions were uniform). The principles set forth in these cases apply equally here: Act 13 is general, not special legislation.

B. The Commonwealth Court correctly rejected the Municipalities' claim that Section 3241 allows private persons to "take" private property for non-public purposes.

Count V of the Municipalities' Petition asserted that Section 3241 of Act 13 unconstitutionally allows private corporations to "take" interests in real property for a private purpose. The Commonwealth Court rejected this Count on two grounds: first, that the

Municipalities "have failed to allege and there are no facts offered to demonstrate that any of their property has been or is in imminent danger of being taken, with or without just compensation," and second, that if the Municipalities "had an interest that was going to be taken, we could not hear this challenge in our original jurisdiction because the exclusive method to challenge the condemnor power to take property is the filing of preliminary objections to a declaration of taking." Robinson Twp., at *17.

The Commonwealth Court correctly dismissed Count V. The Municipalities have not alleged any actual "taking" of private property has occurred, let alone a taking without just compensation; they contend only that Section 3241 "authorizes" improper "takings." Br. of Cross Appellants at 29. Such a speculative claim is not ripe for consideration. See Borough of Centralia v. Com., 658 A.2d 840, 842 (Pa. Cmwlth. 1995) (upholding dismissal of taking claim as unripe when there were "no averments of existing facts" that would establish a taking). The Commonwealth Court was also correct that, if the eminent domain powers of Section 3241 actually were exercised, it could not entertain a challenge to such actions in its original jurisdiction. In re Redevelopment Auth. of City of Philadelphia, 891 A.2d 820, 824 (Pa. Cmwlth. 2006) ("Preliminary objections filed pursuant to Section 406(a) of the Eminent Domain Code . . . are the exclusive method for resolving challenges to the power or right of the condemnor to appropriate the condemned property unless previously adjudicated, the sufficiency of the security, any other procedures followed by the condemnor or the declaration of taking[.]" (citing In re Stormwater Mgmt. Easements, 829 A.2d 1235 (Pa. Cmwlth. 2003))), aff'd in part, rev'd in part on other grounds, 595 Pa. 241, 938 A.2d 341 (2007).

Even more fundamentally, however, the Municipalities' insistence that Section 3241 authorizes a private party to exercise eminent domain for private purposes is simply wrong.

Section 3241 grants limited eminent domain power to "a corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth." 58 Pa. C.S. § 3241(a). The only corporations that are "empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth" – and thus, the only entities authorized to appropriate property interests under Section 3241 – are public utilities holding valid certificates of public convenience issued by the Commission. 6 Pa. C.S. §§ 102, 1101. The empowering legislation requires a public utility exercising eminent domain in connection with oil or gas operations to do so "for the public." 15 Pa. C.S. § 1511(a)(2), (a)(3). The Municipalities' notion that Section 3241 somehow opens the door for "any oil and gas corporation" to use "eminent domain powers to acquire" land for storage reservoirs has no basis in fact or law.[4]

C. The Commonwealth Court correctly rejected the Municipalities' claim that Act 13 violates Article I, Section 27 of the Pennsylvania Constitution.

Count VI of the Municipalities' Petition asserted a claim under Article I, Section 27 of the Pennsylvania Constitution, which provides:

> **Natural resources and the public estate**
>
> 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.

According to the Municipalities, this provision imposes upon them an independent constitutional obligation to protect the environment, which they translate into an independent constitutional right to oppose actions of the General Assembly with which they disagree. The

[4] The Municipalities' argument (at page 31) that Section 3241 is inconsistent with the Property Rights Protection Act, 26 Pa. C.S. § 204(a), which prohibits the use of eminent domain "to take private property in order to use it for private enterprise," fails for the same reason. Section 204(b)(2)(i) of that Act specifically exempts a "public utility as defined in 66 Pa. C.S. § 102" from the prohibition of Section 204(a).

Commonwealth Court correctly dismissed Count VI, holding that Act 13 had preempted whatever obligations the Municipalities had to plan for environmental concerns for oil and gas operations, and the Municipalities therefore did not state a cause of action under Section 27. Robinson Twp., at *18. The fundamental defect in the Municipalities' Section 27 claim is essentially the same one that requires dismissal of Counts I-III, discussed in detail in the Commission and Department's September 4 brief. See Br. for Commission and Department at 14-16, 19. Municipalities are created by the Commonwealth, and have only the powers the Legislature has delegated to them. Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, 600 Pa. 207, 220, 964 A.2d 855, 862 (2009). "Even where the state has granted powers to act in a particular field . . . such powers do not exist if the Commonwealth preempts the field. . . . [L]ocal legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow." Id. (acknowledging that legislature could prohibit local government from exercising land-use authority over areas of oil development or operations, but finding that statute at issue in that case did not do so).

Consistent with these fundamental principles, Pennsylvania courts have held that Section 27 cannot be used to expand a government entity's powers beyond those granted by the General Assembly. See, e.g., Belden & Blake Corp. v. Com., Dep't of Conservation & Natural Res., 600 Pa. 559, 567, 969 A.2d 528, 532-33 (2009) (neither Section 27 nor enabling statute gave DCNR authority to impose unilateral conditions on subsurface owners); Cmty. Coll. of Delaware Cty. v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975). As stated in Fox, while Section 27 requires government entities to balance environmental and social concerns, Section 27 "cannot legally operate to expand the powers of a statutory agency . . . . *On the contrary, it could operate only to limit such powers as had been expressly delegated by proper enabling*

legislation." 20 Pa. Cmwlth. at 358, 342 A.2d at 482 (emphasis added). The concurring opinion in that case made the point even more clearly: "Assuming Article I, Section 27, to be self-executing, it is my opinion, as I believe to be the opinion of the majority, that a particular department or agency of our State government enjoys the role of 'trustee' of our natural resources and public estate strictly within the limits of the power and authority conferred upon that particular department or agency by the legislature. Simply by invoking Article I, Section 27, neither it nor a third party can enlarge its 'trustee' role beyond the parameters of its statutory power and authority." 20 Pa. Cmwlth. at 360, 342 A.2d at 483 (Bowman, P.J.).

In Fox, the Department of Environmental Resources granted a county authority a permit to run sewer lines along a stream. Neighboring landowners appealed to the Environmental Hearing Board, which vacated the permit and ruled that the DER should not have issued the permit without analyzing the environmental impact of sewer line construction. According to the Board, the DER is generally required either to ensure that the factors relevant under Section 27 have been considered in the municipal planning process or to consider those factors itself. The authority appealed to the Commonwealth Court, which reversed the Board's ruling and held – as set forth above – that Section 27 can limit an agency's statutory powers, but cannot expand them. Because the relevant statute did not give the DER the authority to overrule local government planning and zoning decisions, neither did Section 27. 20 Pa. Cmwlth. at 358, 342 A.2d at 482. Years later, the Commonwealth Court applied the same reasoning in rejecting a township resident's argument that the township breached its obligations under Section 27 when it approved a subdivision: "although [plaintiff] cites to the Pennsylvania Constitution, that document cannot empower or require an agency to exceed the bounds of its legislative duties and

powers." Morris v. S. Coventry Twp. Bd. of Sup'rs, 836 A.2d 1015, 1024-25 (Pa. Cmwlth. 2003).

Under the authorities just discussed, while the Municipalities indisputably are bound by Section 27 (and thus can fairly be characterized as "trustees" along with the Commonwealth) when they exercise their statutorily delegated powers, Section 27 does not give them powers *beyond* what the General Assembly has bestowed. The General Assembly, through Act 13, has expressly preempted and superseded local regulation of oil and gas operations. 58 Pa. C.S. § 3302 (preempting and superseding local ordinances which regulate features of oil and gas operations regulated by Chapter 32); 58 Pa. C.S. § 3303 (preempting and superseding local ordinances regulated by environmental acts). Through the legislative process that enacted Act 13, the General Assembly balanced the concerns addressed by Section 27, and Section 27 does not confer on the Municipalities the power to challenge the General Assembly's judgments. The Commonwealth Court's dismissal of Count VI should be affirmed.[5]

D. The Commonwealth Court correctly held that Section 3305 does not violate the separation of powers doctrine.

In Count VII of their Petition, the Municipalities challenged the review procedures set forth in Section 3305(a) and (b) of Act 13, which provide as follows:

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[5] Although the Commonwealth Court reached the right result on Count VI, the Court misdescribed the Fox case. See Robinson Twp., at *18. The facts and holding of Fox are summarized above: contrary to the Commonwealth Court's description, the case did not involve a suit against the sewer authority; neither the sewer authority nor anyone else argued that Section 27 named only the Commonwealth as trustee of natural resources; and the case did not hold that "*local* agencies were subject to suit under Section 27 because of statutory obligations they were required to consider or enforce[.]" Id., at *18 (emphasis original). The Fox court did make clear that the statute at issue *in that case* vested decisionmaking power in local agencies, not the DER, and that any government body may be impacted by Section 27 when it discharges its statutory responsibilities. In that context, the Court stated that "the trustee is the Commonwealth, and the ***DER*** is not necessarily the only appropriate agency of the Commonwealth to take action." 20 Pa. Cmwlth. at 356 n.11, 342 A.2d at 480 n.11 (emphasis added).

(a) Advisory opinions to municipalities.--

(1) A municipality may, prior to the enactment of a local ordinance, in writing, request the commission to review a proposed local ordinance to issue an opinion on whether it violates the MPC, this chapter or Chapter 32 (relating to development).

(2) Within 120 days of receiving a request under paragraph (1), the commission shall, in writing, advise the municipality whether or not the local ordinance violates the MPC, this chapter or Chapter 32.

(3) An opinion under this subsection shall be advisory in nature and not subject to appeal.

(b) Orders.--

(1) An owner or operator of an oil or gas operation, or a person residing within the geographic boundaries of a local government, who is aggrieved by the enactment or enforcement of a local ordinance may request the commission to review the local ordinance of that local government to determine whether it violates the MPC, this chapter or Chapter 32.

(2) Participation in the review by the commission shall be limited to parties specified in paragraph (1) and the municipality which enacted the local ordinance.

(3) Within 120 days of receiving a request under this subsection, the commission shall issue an order to determine whether the local ordinance violates the MPC, this chapter or Chapter 32.

(4) An order under this subsection shall be subject to de novo review by Commonwealth Court. A petition for review must be filed within 30 days of the date of service of the commission's order. The order of the commission shall be made part of the record before the court.

58 Pa. C.S. § 3305(a)-(b).

The Municipalities claim these provisions violate the separation of powers doctrine, insisting that Section 3305(b) gives the Commission power to determine the constitutionality of laws and thereby exercise a judicial function, and that Section 3305(a) gives the Commission power to get involved in drafting legislation. Br. of Cross Appellants at 39-49. The Commonwealth Court summarily rejected both these contentions:

> 58 Pa. C.S. § 3305(a) does not give the Commission any authority over this Court to render opinions regarding the constitutionality of legislative enactments. 58 Pa. C.S. § 3305(a) merely allows the Commission to give a non binding advisory opinion, and although that opinion is not appealable by the municipality, no advisory opinion is.

> Moreover, 58 Pa. C.S. § 3305(b) specifically gives this Court *de novo* review of a Commission final *order* so there is no violation of the Separation of Power doctrine. Accordingly, the Commonwealth's preliminary objection is sustained as to Count VII.

Robinson Twp., at *20.

A simple review of the provisions at issue is enough to show that the Commonwealth Court was correct, particularly in view of the strong presumption that a statute is constitutional. The Municipalities' arguments against the Commonwealth Court's ruling consist primarily of *ad hominem* attacks on the General Assembly, the Governor and the Commission, culminating in a characterization of Act 13 as "a thinly veiled scheme whereby control over oil and gas development is concentrated in the state, led by a pro-industry executive and enforced by the PUC that dissuades municipalities from taking actions to protect their citizens and instead coerces municipalities to present their zoning ordinances to the PUC for review and to accede to the PUC's determinations." Br. of Cross Appellants at 44-45; see also id. at 39-49. That is the Municipalities' true grievance: they do not like the way Act 13 is designed to operate, and do not want to be constrained by the Legislature that created them and granted their powers in the first place. They have not, however, shown that Act 13 violates separation of powers.

1. Section 3305(b) does not empower the Commission to usurp judicial authority.

With respect to the Municipalities' argument that Section 3305(b) authorizes the Commission to decide the constitutionality of laws and thus usurp judicial authority, Section 3305(b) (and 3305(a) as well) explicitly limits the Commission's review to whether a local ordinance "violates the MPC [Municipal Planning Code], this chapter or Chapter 32." 58 Pa. C.S. § 3305(a)-(b). Nothing in either Section 3305 (b) or (a) authorizes the Commission to review the constitutionality of a local ordinance. Moreover, as the Commonwealth Court recognized, Act 13 provides two alternative means for an aggrieved person to challenge an

ordinance, and in both, the judiciary is the final arbiter of whether the ordinance is valid. See 58 Pa. C.S. § 3305(b) (if request is made to Commission, Commission's order is subject to *de novo* judicial review); Section 3306(1) (alternatively, "[a]ny person who is aggrieved by the enactment or enforcement of a local ordinance that violates the MPC, this chapter or Chapter 32 (relating to development) may bring an action in Commonwealth Court to invalidate the ordinance or enjoin its enforcement"). The role Act 13 gives to the Commission does not usurp the authority of the courts. See, e.g., Grant v. GAF Corp., 415 Pa. Super. 137, 163, 608 A.2d 1047, 1060-61 (1992) ("exercise of adjudicative functions by administrative bodies is not a withdrawal of judicial function from courts in contravention of constitutional doctrine of separation of powers"; statute "merely provides an additional administrative remedy"), aff'd per curiam, 536 Pa. 429, 639 A.2d 1170 (1994).

Ignoring the actual provisions of Act 13, the Municipalities set up the following syllogism: freedom to use private property is a constitutional right; zoning ordinances "infringe on those rights;" and, therefore, any issue relating to the validity of a zoning ordinance is a constitutional issue. They then insist that only the judiciary can make determinations involving constitutionality. Br. of Cross Appellants at 40-48. But the cases they cite do not support or even address their ultimate conclusions. See, e.g., Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (resolving landowner's express constitutional challenge to local ordinance restricting use of its property); Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Sup'rs, 507 Pa. 481, 491 A.2d 86 (1985) (same); First Judicial Dist. of Pa. v. Pa. Human Relations Comm'n, 556 Pa. 258, 262-63, 727 A.2d 1110, 1112 (1999) (holding PHRC does not have jurisdiction to adjudicate complaints against judicial branch); Com. v. Mockaitis, 575 Pa. 5,

27, 834 A.2d 488, 501 (2003) (statute that delegated executive responsibility to courts was unconstitutional under separation of powers doctrine).

Whether any particular challenge to an ordinance would involve constitutional issues, or issues within the delegated power of the Commission, cannot be determined in the abstract, another reason to reject the Municipalities' arguments here. Clearly, not every challenge to a zoning ordinance is automatically a constitutional challenge. For example, if the Commission were asked to review whether a local ordinance restricted oil and gas operations in a manner inconsistent with a provision of Act 13, how would that be a decision on the ordinance's constitutionality? See, e.g., Hoffman Min. Co., Inc. v. Zoning Hearing Bd. of Adams Twp., Cambria Cty., 32 A.3d 587, 590 (Pa. 2011) (addressing whether Surface Mining Act preempted setback provision in local zoning ordinance); cf. Takacs v. Indian Lake Borough Zoning Hearing Bd., 11 A.3d 587 (Pa. Cmwlth. 2010) (claims that zoning ordinances should have been issued by local planning commission and notice required by statute was not given were resolved based on MPC provisions). The Municipalities' blanket contention that an agency such as the Commission cannot address any issue that could have constitutional overtones – even where, as here, the ultimate judgment is reserved for the courts – is also unfounded. See, e.g., Lehman v. Pennsylvania State Police, 576 Pa. 365, 381-82, 839 A.2d 265, 276 (2003) (agencies can address whether statutes or regulations are constitutional as applied; this "permits the agency to exercise its expertise and develop the factual record necessary to resolve the claim").[6]

[6] The Municipalities acknowledge some agencies may exercise "quasi-judicial" powers and decide zoning issues, then say the Commission is *not* exercising quasi-judicial power, but is instead "being used as a means to strong-arm financially-strapped municipalities into accepting a slanted administrative ruling regarding their ordinances." Br. of Cross-Appellants at 44. The claim that the Commission, an independent administrative agency, will not provide a fair review is offensive and baseless – and disregards the fact that the Commission's orders are subject to *de novo* judicial review.

The Municipalities' position comes back to the fundamental error they have made throughout these proceedings: they think constitutional provisions that limit their statutory powers somehow give them constitutional rights as against the General Assembly, in this case, an alleged constitutional right to place more restrictions on landowners' use of property than the General Assembly deemed appropriate. As discussed above in Section IV(C), and in the Commission and Department's Brief for Appellants, the Municipalities are wrong.

2. Section 3305(a) does not empower the Commission to usurp legislative authority.

The Municipalities' argument that Section 3305(a) somehow "empowers" the Commission to usurp legislative authority is equally wrong. See, e.g., Br. of Cross Appellants at 12. Section 3305(a) establishes a procedure under which "[a] municipality *may*" ask the Commission to review a proposed ordinance before it is enacted. 58 Pa. C.S. § 3305(a) (emphasis added). If the Commission is asked to review an ordinance, the Commission's role is to issue a non-binding advisory opinion as to whether the ordinance would violate the MPC or the specified sections of Act 13. Section 3305(a) thus makes the Commission available as a resource to municipalities – it does not give the Commission a legislative role.

The separation of powers doctrine "does not contemplate total separation of the three branches of government, and some powers may overlap." Grant, 415 Pa. Super. at 162-63, 608 A.2d at 1060. "[W]hile the legislature cannot delegate power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act." Harrisburg Sch. Dist. v. Hickok, 762 A.2d 398, 415 (Pa. Cmwlth. 2000) (sustaining demurrer to separation of powers claim where executive branch actor did not make law, but instead merely executed authority granted by

statute); see also, e.g., Pennsylvania Builders Ass'n v. Dep't of Labor & Indus., 4 A.3d 215, 221, 224 (Pa. Cmwlth. 2010) (General Assembly may "authorize an agency to carry out the legislative intent described in general terms through rules, regulations and standards established by the agency"; and may also "delegate authority and discretion in connection with the execution and administration of a law"); Grant, 163 Pa. Super. at 163, 608 A.2d at 1060 ("legislature may leave to administrative officers, boards and commissions the duty to determine whether facts to which the law is restricted exist").

Under many Pennsylvania statutes, agencies that exercise quasi-judicial functions are authorized to render advisory opinions on potential violations of the statute (e.g., State Ethics Commission, 65 Pa. C.S. § 1107(10); Office of Open Records, 65 Pa. C.S. § 67.1310(a)(2); Office of Attorney General, Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1)). So long as the General Assembly made the basic policy choices, which it did here when it enacted Act 13, the advisory opinion process does not intrude on either legislative or judicial prerogatives. The Municipalities' complaint that local governments will likely follow the Commission's advice does not turn this optional procedure into legislative action.

E. The Commonwealth Court properly dismissed the claims of Dr. Kahn, the Delaware Riverkeeper Network, and Maya van Rossum.

The Municipalities, focusing on standing, argue incorrectly that the Commonwealth Court erred in dismissing the claims of Dr. Kahn, the Delaware Riverkeeper Network ("DRN"), and Maya van Rossum and erred in failing to grant leave to amend. Their position suffers from three, equally fatal defects: (1) Dr. Kahn has failed to allege any direct or immediate injury, relying instead on serial "what ifs" and harms that will never arise; (2) even if Dr. Kahn has standing, his individual claims are without merit, affording this Court alternative grounds on which to affirm the order below; and (3) the DRN and van Rossum still rely on speculative

injuries as the basis for standing, but regardless, all claims asserted by the DRN and van Rossum were addressed on the merits, and thus, their standing had no effect on the final order. In light of the above defects, the Commonwealth Court correctly exercised its discretion in declining to grant leave to amend.

But first, the array of Petitioners who joined each particular Count of the Petition for Review is important in the present context. Counts I-X and XIII-XIV were filed on behalf of all Petitioners. See R.R. at 081a, 095a, 099a, 103a, 115a, 117a, 136a, 142a, 145a, 147a, 160a, 161a. Counts XI and XII were filed on behalf of Dr. Kahn alone. See R.R. at 151a, 159a. The Commonwealth Court reached the merits of Counts I-X and XIII-XIV, even after dismissing the DRN and van Rossum for lack of standing, but did not reach the merits of Counts XI and XII due to Dr. Kahn's lack of standing. Robinson Twp., at *10.

1. Dr. Kahn failed to allege, and cannot allege, any present injury sufficient to confer standing.

In Counts XI and XII, Dr. Khan challenges Section 3222.1(b)(10) and (11) of Act 13, which require oil and gas entities to make certain disclosures to medical professionals.[7] A party

[7] Those sections provide:

> (10) A vendor, service company or operator ***shall identify*** the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following:
>
> > (i) The information is needed for the purpose of diagnosis or treatment of an individual.
> >
> > (ii) The individual being diagnosed or treated may have been exposed to a hazardous chemical.
> >
> > (iii) Knowledge of information will assist in the diagnosis or treatment of an individual.

only has standing to advance a claim where it is "aggrieved," meaning the party must show a "substantial, direct, and immediate interest in the outcome of the litigation[.]" See Pittsburgh Palisades Park, LLC v. Com., 585 Pa. 196, 203, 888 A.2d 655, 660 (2005). Each of these interests is defined as follows:

- *Substantial interest:* "A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law."
- *Direct interest:* "A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest."
- *Immediate interest:* "An 'immediate' interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question."

South Whitehall Twp. Police Serv. v. South Whitehall Twp., 521 Pa. 82, 86-87, 555 A.2d 793, 795 (1989) (internal citations omitted).

A fundamental tenet of this jurisprudence is that a party cannot advance utterly speculative injuries as the predicate for standing. See, e.g., Pittsburgh Palisades, 585 Pa. at 205, 888 A.2d at 660 (finding no standing where "any possible harm to Petitioners is wholly contingent on future events"). This is precisely the situation before the Court as to the claims by Dr. Kahn. As the Commonwealth Court correctly observed, the "only predicate" for Dr. Kahn's

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> (11) If a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator ***shall immediately disclose the information*** to the health professional upon a verbal acknowledgment by the health professional that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential. The vendor, service provider or operator may request, and the health professional shall provide upon request, a written statement of need and a confidentiality agreement from the health professional as soon as circumstances permit, in conformance with regulations promulgated under this chapter.

58 Pa. C.S. § 3222.1(b)(10)-(11) (emphasis added).

claims is that "'he treats patients in an area that *may likely* come into contact with oil and gas operations.'" Robinson Twp., at *9 (emphasis in Opinion) (quoting Petition for Review at ¶ 35, R.R. at 065a). It was and remains Dr. Kahn's position that he has standing based on the *possibility* that *someday* someone *might* come to him with a chemical injury, that injury *might* be caused by a proprietary chemical (not all fracking chemicals are propriety), a well operator *might* require him to keep the chemical confidential, and Dr. Kahn *might* not be able to treat a patient if forced to abide by a confidentiality agreement, even though he will know completely what the patient was exposed to. See Br. of Cross Appellants at 52. This parade of successive and cumulative "mights" is not enough under Pennsylvania law to confer standing, as the Commonwealth Court correctly observed. See Robinson Twp., at *9 ("However, until [Dr. Kahn] has requested the information which he believes is needed to provide medical care to his patients and that information is not supplied or supplied with such restrictions that he is unable to provide proper medical care, the possibility that he may not have the information needed to provide care is not sufficient to give him standing.").

Not only are these serial "mights" insufficient, Dr. Kahn's most extreme claim – that he *might* not be able to treat a patient and that a "patient could die" or "suffer serious health complications" – is unfounded. Dr. Kahn complains that Section 3222.1(b)(10) and (b)(11) restrain his ability to learn and use appropriate treatment information. But far from being a muzzle on the dissemination of information, paragraphs (b)(10) and (b)(11) actually *require* certain disclosures by entities who might otherwise claim the protection of their trade secrets. See 58 Pa. C.S. § 3222.1(b)(10)-(11) (providing that a vendor "***shall identify*** the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information," and "***shall immediately disclose***" information needed for emergency treatment,

subject to specified conditions and safeguards (emphasis added)). Stated otherwise, paragraphs (b)(10) and (b)(11) require certain entities to disclose all relevant information so doctors can treat their patients. Thus, not only has Dr. Khan not suffered an injury sufficient to confer standing today, but he probably never will.

Moreover, as much as Dr. Kahn appears to believe that Act 13 somehow imposes new and revolutionary restrictions on the practice of medicine, see Br. of Cross Appellants at 54, his belief is wrong. Far from being an innovation in the law, or even an innovation in the law that Dr. Kahn *is already subject to*, Section 3222.1(b)(10)-(11) is nothing more than the Pennsylvania equivalent to an extant federal standard, in place for some two-plus decades. Under the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11001 et seq., enacted in 1986, an "owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970" is compelled, regardless of trade secret claims, to "provide the specific chemical identity, if known, of a hazardous chemical, extremely hazardous substance, or a toxic chemical to any health professional who requests such information in writing if the health professional provides a written statement of need under this subsection *and a written confidentiality agreement* under subsection (d) of this section." 42 U.S.C. § 11043(a) (emphasis added); see also § 11043(b) (making special allowances for medical emergencies, similar to those in Act 13); § 11043(d) (outlining contents of confidentiality agreement, similar to Act 13); 29 C.F.R. § 1910.1200(i) (comparable OSHA regulation).[8] Thus, Dr. Kahn's sensational allegations about

[8] Pennsylvania law is also nearly identical to the chemical disclosure laws in several states. Cf. 2 Colo. Code Regs. § 404-1:205A; Mont. Admin. R. § 36.22.1016; 16 Tex. Admin. Code § 3.29; see also Ark. Admin. Code § 178.00.1-B-19; La. Admin. Code tit. 43, pt. XIX, § 118.

people dying pending court review of the confidentiality requirement are unfounded, as 25 years of practice under the Emergency Planning and Community Right-To-Know Act can attest.

Finally, Dr. Kahn's situation is unlike those in Pennsylvania Dental Association v. Commonwealth, Department of Health, 75 Pa. Cmwlth. 7, 461 A.2d 329 (1983), and Bayada Nurses, Inc. v. Commonwealth, Department of Labor and Industry, 607 Pa. 527, 8 A.3d 866 (2010), on which he primarily relies. Pennsylvania Dental posed the question whether an association of dentists had standing to bring a constitutional challenge to the Department of Health's approval of regulations that purportedly required dentists to disclose patients' private health information. The Commonwealth Court held the association did have standing because of the close relationship between the association and its patients and because of the patients' relative inability to bring their own claims. 75 Pa. Cmwlth. at 10-11, 461 A.2d at 331. That holding has no application here where Dr. Kahn is not invoking group standing, and in fact is pursuing his own claims. See Br. of Cross-Appellants at 56 (stating "Dr. Khan faces the very real threat of violating his legal obligations as a doctor, of medical malpractice, and of harming the health of his patients because of Act 13's confidentiality restrictions"). Further, Pennsylvania Dental supplies no support for a doctor's ability to bring claims based on "harms" that may never come and that unquestionably have not yet arisen.

Bayada Nurses is also unavailing. That case concerned whether a home health care provider could bring a pre-enforcement challenge to a Department of Labor regulation that created ongoing uncertainty for the provider. Far from declaring anything about standing, this Court in Bayada Nurses held that the health care provider's claims were ripe/justiciable due to the immediate impact and day-to-day uncertainty the regulation had on the appellant. 607 Pa. at 538-545, 8 A.3d at 872-76. If that holding about ripeness applies here at all, it provides more

proof that Dr. Kahn lacks standing since he *may never* fall subject to the regulations of Section 3222.1(b)(10)-(11). Thus, even under the case law on which Dr. Kahn relies, he has no standing and has not proffered any reason to reverse the Commonwealth Court's conclusion in that regard.

2. Even if Dr. Kahn has standing, this Court can affirm the dismissal of Counts XI and XII since neither states a claim as a matter of law.

As this Court has long observed, appeals are from lower court orders and not the reasons for those orders. Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 145-46, 189 A.2d 271, 274-75 (1963) ("The only error upon the record is a wrong reason for a right judgment; but as we review not reasons but judgments, we find nothing here to correct." (quotations removed)). For that reason, this Court can affirm on other appropriate grounds. See McAdoo Borough v. Com., Pa. Labor Relations Bd., 506 Pa. 422, 428 n.5, 485 A.2d 761, 764 n.5 (1984); see also Maple Street A.M.E. Zion Church v. City of Williamsport, 7 A.3d 319, 323 n.3 (Pa. Cmwlth. 2010) (while prevailing party could not appeal decision in its favor, it could raise alternative grounds for favorable decision in response to opponent's cross appeal, since court may affirm on any grounds raised below).

Though the Commonwealth Court dismissed Counts XI and XII due to Dr. Kahn's lack of standing, all parties fully briefed the substantive merits of those Counts. See, e.g., R.R. at 667a-668a, 681a-682a (preliminary objections brief of Commission and Department); R.R. at 770a-777a-778a (Municipalities' brief in support of summary judgment). Whether or not Dr. Kahn has standing, this Court, in the interests of judicial economy and rapid conclusion of this case of significant state-wide importance, can affirm the order dismissing Counts XI and XII on the ground that neither states a claim.

In Count XI, Dr. Khan claims that paragraphs (b)(10) and (b)(11) of Section 3222.1 comprise a special law because of their alleged impact on doctors' ability to obtain, and disclose, information from oil and gas entities versus other entities. In Count XII, Dr. Khan alleges that Act 13 violates the Pennsylvania Constitution's single subject rule because, he claims, the challenged paragraphs do not regulate the oil and gas industry.

Both Counts XI and XII fail for essentially the same reason – the overall, unifying purpose of Act 13 is to regulate oil and gas development, not medical professionals. As set forth in Section IV(A) above, the Legislature's classification decisions are rational and the impact a statute (much less a particular paragraph) may have when the statute is applied is not grounds for finding it a special law, even if one accepted Dr. Kahn's dubious assumption that doctors could freely obtain and disclose proprietary information from other entities. With respect to Count XII, a statute does not violate the single subject rule if it has "a single unifying subject to which all of the provisions of the act are germane." Pennsylvanians Against Gambling Expansion Fund, Inc. v. Com., 583 Pa. 275, 296, 877 A.2d 383, 396 (2005). Paragraphs (b)(10) and (b)(11) define the obligations of oil and gas companies to disclose the identity of proprietary chemicals used in hydraulic fracturing. Those provisions are germane to the unifying purpose of the Act: regulation of oil and gas development in this Commonwealth. Act 13 thus does not violate the single subject rule. See Stilp v. Com., 588 Pa. 539, 600-03, 905 A.2d 918, 955-56 (2006) (holding statute that addressed compensation for all three branches of state government did not violate single subject rule, rejecting plaintiff's argument that the subject of the original version of the statute was to ensure the governor was the highest paid executive officer; the single unifying subject of all versions of the statute was compensation for government officials, and all provisions added during the legislative process were germane to that single subject); Barrel of

Monkeys, LLC v. Allegheny Cty., 39 A.3d 559, 566 (Pa. Cmwlth. 2012) (statute that authorized counties to levy drink tax to support transit systems did not violate single subject rule; use of money raised by the tax "is unquestionably germane to the overarching subject of [the statute], transportation."). Therefore, the Commonwealth Court's order dismissing Counts XI and XII can be affirmed on the alternative ground that those Counts fail to state a claim.

3. The Delaware Riverkeeper Network and van Rossum have not been injured by Act 13, and regardless, their lack of standing had no impact on the Commonwealth Court's decision on the merits.

As the Commonwealth Court observed, neither the DRN nor van Rossum has suffered a cognizable injury sufficient to confer standing. See Robinson Twp., at *8. Or, as the Commission and the Department submitted in support of their preliminary objections, both, at best, allege harms that *might* one day occur and both seek only general compliance with the law, neither of which is sufficient to confer standing. See R.R. at 647a-649a (citing, *inter alia*, Boady v. Philadelphia Mun. Auth., 699 A.2d 1358, 1360 (Pa. Cmwlth. 1997)). On appeal, the DRN and van Rossum once again rehash their parade of "what ifs," see, e.g., Br. of Cross-Appellant at 63 (discussing "threat[s]" posed by Act 13), and thus still have done nothing to demonstrate any presently concrete injury.

Notwithstanding this, the Court need not address the standing of the DRN and van Rossum. Those two Petitioners did not seek any unique relief in their own name; instead, they joined with a host of other Petitioners in lodging claims in Counts I-X and XIII-XIV. See R.R. at 081a, 095a, 099a, 103a, 115a, 117a, 136a, 142a, 145a, 147a, 160a, 161a. Since the Commonwealth Court addressed the merits of each of those claims, this Court's review of whether or not the DRN and van Rossum were correctly dismissed yields, at most, an answer to an academic question, irrelevant to the disposition of the pending appeals.

4. The Commonwealth Court did not abuse its discretion in failing to grant leave to amend.

Finally, the Municipalities argue that the Commonwealth Court erred in failing to grant leave to amend to correct the standing deficiencies, though they do not explain how they would do so. See Br. of Cross Appellants at 51, 64. Denying leave to amend was proper where, as here, an amendment would be futile for all the reasons discussed above.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the July 26 Order of the Commonwealth Court dismissing Counts IV, V, VI, VII, IX, X, XI and XII. For the reasons set forth in the Commission's and the Department's brief in 63 MAP 2012, the Court should also reverse the July 26 Order regarding Counts I-III and VIII and dismiss those Counts as well.

Respectfully submitted,

CONRAD O'BRIEN PC

Dated: September 18, 2012

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CERTIFICATE OF SERVICE

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