IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Docket No. 63 MAP 2012

Robinson Township, Washington County, Pennsylvania, Brian Coppola, Individually and in his Official Capacity as Supervisor of Robinson Township, Township of Nockamixon, Bucks County, Pennsylvania, Township of South Fayette, Allegheny County, Pennsylvania, Peters Township, Washington County, Pennsylvania, David M. Ball, Individually and in his Official Capacity as Councilman of Peters Township, Township of Cecil, Washington County, Pennsylvania, Mount Pleasant Township, Washington County, Pennsylvania, Borough of Yardley, Bucks County, Pennsylvania, Delaware Riverkeeper Network, Maya Van Rossum, the Delaware Riverkeeper, Mehernosh Khan, M.D.,

v.

Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General 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

Appeal of: Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission & Pennsylvania Department of Environmental Protection and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection

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REPLY OF APPELLANTS

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

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I. ARGUMENT

Appellants the Pennsylvania Public Utility Commission and Chairman Robert F. Powelson (collectively, "the Commission"), as well as the Pennsylvania Department of Environmental Protection and Secretary Michael L. Krancer (collectively, "the Department"), file this reply to the response brief of the Appellees (hereafter, "the Municipalities").

A. Section 3304 of Act 13 does not violate Article I, Section 1 of the Pennsylvania Constitution or the Fourteenth Amendment to the United States Constitution.

The Municipalities concede that the General Assembly has the authority and the power "to preempt local laws, amend existing statutes and take local zoning power away from municipalities." Muni. Br. (63 MAP 2012) at 13 (stating that "[t]o be sure, Petitioners do not dispute this point"). That concession is compelled by cases cited in the Commission's and the Department's opening brief, such as Kline v. City of Harrisburg, 362 Pa. 438, 442-48, 68 A.2d 182, 184-87 (1949). The Municipalities also recognize that the "Commonwealth Court appreciated that the general purposes set forth in Act 13 '. . .are sufficient to have the state exercise its police powers to promote the exploitation of oil and gas resources.'" Muni. Br. (63 MAP 2012) at 16 (quoting Opinion at 32). For all of their rhetoric tossed against Act 13, the Municipalities do not challenge the Commonwealth Court's fundamental conclusion that the General Assembly is empowered to take action to promote development of these resources for the reasons stated expressly in Act 13.

Those concessions should be dispositive of the Municipalities' challenge to the constitutionality of Section 3304 of Act 13, which directs that "all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources" consistent with the provisions of Act 13 as a whole. 58 Pa. C.S. § 3304. In order to avoid that result, the Municipalities spend the first 41 pages of their brief trying to support the

Commonwealth Court's thesis that under a "basic precept" of zoning law, it is an established "constitutional directive" that all "zoning districts" must provide for "compatible uses in like spaces"; that the "General Assembly cannot eliminate the protections afforded to defined zoning districts, including residential districts"; and that "incompatible uses within an otherwise homogeneous zoning district would be unquestionably unconstitutional." Muni. Br. (63 MAP 2012) at 13-14, 31, 38. Notwithstanding the considerable space devoted to this effort, the Municipalities fail to establish the existence of any such "constitutional directive" or to otherwise provide any basis to uphold the Commonwealth Court's ruling.

The Municipalities' basic contention is that they are entitled to impose greater restrictions on oil and gas operations than the General Assembly has seen fit to impose. Throughout their brief, they complain that Act 13 unconstitutionally "restricts" their ability to pass restrictive ordinances. See, e.g., Muni. Br. (63 MAP 2012) at 2-5. As the Municipalities concede, however, the Pennsylvania Constitution guarantees property owners the right to use their property as they see fit, and limits the restrictions a government entity may place on that right. See, e.g., Muni. Br. (63 MAP 2012) at 8. The cases the Municipalities cite stand, at most, for the noncontroversial proposition that the Constitution may *permit* a local government, exercising the powers granted by the General Assembly, to restrict a landowner's use of his property in order to create zones in which only certain uses are allowed. See, e.g., Hopewell Twp. Bd. of Supervisors v. Golla, 499 Pa. 246, 255, 452 A.2d 1337, 1341-42 (1982) (cited on page 9 of the Municipalities' brief) (*striking down* ordinance that restricted landowners' use of their property, notwithstanding municipality's worthy interest in preserving farm land); Hanna v. Bd. of Adjustment, 408 Pa. 306, 183 A.2d 539 (1962) (cited on page 10 of the Municipalities' brief) (on facts of case, rejecting landowner's challenge to zoning board's refusal to permit erection of

gasoline service station in area zoned for residential use). But the Municipalities cite no case, and the Commission and the Department know of none, standing for the proposition that in order to survive a constitutional challenge, a zoning ordinance *must* allow only uses deemed "compatible" and *must* exclude all uses deemed "incompatible," or that the Constitution otherwise empowers municipalities to override an act of the General Assembly based upon these flawed "basic precepts" of zoning law.

Not only is the Municipalities' position not supported by any of the cases on which they rely, it is directly undermined by cases cited by the Commission and the Department, which the Municipalities ignore. For example, this Court in Olon v. Commonwealth, Department of Corrections, 534 Pa. 90, 626 A.2d 533 (1993), upheld a state statute authorizing the acquisition of a former college and conversion of that property into a state prison. See Comm'n & Dep't Br. (63 MAP 2012) at 15, 19 (citing Olon). The college was located across two township lines. In one of them, the property was located in a zoning district that permitted only residential uses; in the other, the property was zoned only for educational/institutional use. Both townships sued, claiming the legislation should be enjoined on the basis that use of the property as a prison "would violate the local zoning ordinances." 534 Pa. at 92, 626 A.2d at 534. In other words, the townships claimed that converting the property into a prison would be incompatible with the uses prescribed under their respective zoning ordinances. This Court rejected that argument out of hand, explaining that "[i]n authorizing the acquisition of the Polish National Alliance College property to be used specifically as a state correctional institution, the General Assembly clearly expressed an intent to override local zoning ordinances which prohibited such use of the property." 534 Pa. at 95, 626 A.2d at 535; accord HSP Gaming, L.P. v. City Council for the City of Phila., 595 Pa. 508, 532, 939 A.2d 273, 287 (2007) ("A political subdivision has no power to

override the statutory provisions of the Gaming Act regarding the situs of a licensed gaming facility or to use its authority to zone to impede implementation of the Gaming Board's decision in that regard."); Kline v. City of Harrisburg, 362 Pa. 438, 450, 68 A.2d 182, 187 (1949) ("[A] zoning ordinance is confined by the limitations fixed in the enabling statute, and a particular zoning ordinance or provision thereof may be declared void because it exceeds the power granted by the zoning statutory or charter provision.").

It is difficult to imagine a better example of an "incompatible" use of property within a zoning district than what this Court faced in Olon: a decision by the General Assembly to locate a prison inside a district zoned purely for residential use. Yet, this Court upheld the General Assembly's right to "override" local zoning ordinances "which prohibited such use of the property." 534 Pa. at 95, 626 A.2d at 535. That result is the antithesis of the position advocated by the Municipalities and undermines the lower court's decision based on the so-called "basic precept" of zoning law. If such a basic precept existed, then the result in Olon should have favored the townships. The Municipalities, apparently lacking an effective response, simply ignore Olon in their brief.

In short, it is clear, and abundantly so, that the Municipalities do not like Act 13, just as a subset of them did not like the General Assembly's decision to locate a prison within their borders in the Olon case. But the Court pushed aside the challenge in Olon, on the basis of the General Assembly's prerogative to "override" local zoning ordinances, and the Municipalities' challenge to Section 3304 of Act 13 fails for essentially the same reason. The fact that Section 3304 requires the Municipalities to amend their zoning ordinances to permit what could be characterized as "incompatible" uses gets them nowhere, since essentially that same argument was presented to and rejected by this Court nearly 20 years ago in Olon.

This Court's analysis and conclusion in Olon also dispose of the Municipalities' effort to mischaracterize the requirements of Section 3304 as illegal "spot zoning." According to the Municipalities, a "spot zoning" case stems from "the recognition that incompatible uses within an otherwise homogeneous zoning district would be unquestionably unconstitutional." Muni. Br. (63 MAP 2012) at 31 (citing nothing in support of that broad proposition). That contention fails in the face of the rationale and result in Olon, where this Court approved what "unquestionably" was an "incompatible use within an otherwise homogeneous zoning district," on the unassailable basis that it was within the General Assembly's prerogative to override local zoning ordinances to the contrary. In any event, the Municipalities seriously distort the applicable standards. In the case on which they principally rely, this Court defined "spot zoning" "as a singling out of one lot or a small area for different treatment," and held that the township in that case could not "freeze" the development of a particular parcel. In re Realen Valley Forge Greenes Assoc., 576 Pa. 115, 133, 838 A.2d 718, 729 (2003) (cited on pages 30-33 of the Municipalities' brief); see also Plaxton v. Lycoming Cty. Zoning Hearing Bd., 986 A.2d 199, 211 (Pa. Cmwlth. 2009) (rejecting "spot zoning" challenge to ordinance amendments that permitted wind energy facilities, by right, in all agricultural, countryside and RP districts, because amendments were not confiscatory and were not "enacted to prevent any lawful use of land"; "[t]o the contrary, the ordinance amendments permit a use by right in several zoning districts where that use was not specifically allowed under the prior ordinance"). The geographic "legislative focus" of Section 3304, like Act 13 as a whole, is the Commonwealth. Thus, Section 3304's comprehensive, state-wide approach to furthering the uniformity of zoning ordinances to achieve the valid state objectives of Act 13 renders meritless the attempt to equate Section 3304 to illegal spot zoning.

In light of all of the above, Section 3304 is constitutional.

B. Section 3215(b)(4) does not violate Article II, Section 1 of the Pennsylvania Constitution.

The opinion below and now the Municipalities' response brief cite Pennsylvanians Against Gambling Expansion Fund v. Commonwealth, 583 Pa. 275, 877 A.2d 383 (2005) ("PAGE"), as purportedly dispositive of whether 58 Pa. C.S. § 3215(b)(4) is constitutional under Article II, Section 1 of the Pennsylvania Constitution.[1] But PAGE was not a watershed moment in non-delegation jurisprudence. It did not, in this Court's own words, "herald a new, broader reading of the anti-delegation clause." Casino Free Philadelphia v. Pa. Gaming Control Bd., 594 Pa. 202, 207, 934 A.2d 1249, 1253 (2007). Instead, PAGE represents "an application of an established standard, namely, that basic policy choices must be made by the Legislature." Id. As PAGE and Casino Free make plain, the be all-end all of an anti-delegation challenge remains whether basic policy choices were made by the Legislature and whether, in making those choices, the Legislature appropriately guided and restrained an agency's discretion in implementing those choices. PAGE, 583 Pa. at 333, 877 A.2d at 418.

As set forth in the opening brief of the Commission and the Department, Section 3215(b)(4) satisfies this constitutional test. The Legislature made the basic policy choice in Section 3215(b) about where well sites can be located in proximity to Commonwealth waters. It further made the choice that if wells cannot fit within those bounds for various location-specific reasons, the well sites can move closer to Commonwealth waters if safeguards (i.e., "additional measures, facilities or practices") "necessary to protect the waters of this Commonwealth" are

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[1] The Municipalities cite only four cases in their response to the Commission's and the Department's arguments regarding the constitutionality of Section 3215(b)(4): (1) PAGE; (2) Eagle Envtl. II, LP v. Com., Dep't of Envtl. Prot., 584 Pa. 494, 884 A.2d 867 (2005); (3) Archbishop O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957); and (4) Belovsky v. Redevelopment Auth. of City of Philadelphia, 357 Pa. 329, 54 A.2d 277 (1947). See Muni. Br. (63 MAP 2012) at 43, 45-46. With the exception of PAGE, each of the other three cases found the challenged law constitutional under Article II, Section 1.

employed. See § 3215(b)(4); Comm'n & Dep't Br. (63 MAP 2012) at 27-28 (citing same). The phrase "necessary to protect the waters of this Commonwealth" (as well as the policy aims of Chapter 32 of Act 13) guides the Department's exercise of its limited discretion to review a well site plan to look for necessary safeguards.

Further, although the Municipalities complain about the Legislature's failure to define the phrases "additional measures, facilities or practices..." and "necessary to protect...," see Muni. Br. (63 MAP 2012) at 43, this Court has repeatedly made clear that every phrase of a legislative enactment need not be defined in exacting detail to secure constitutionality. See Casino Free, 594 Pa. at 206-07, 934 A.2d at 1252-53 (observing the Legislature is not required "to provide a detailed how-to manual within each and every legislative act" and rejecting anti-delegation challenge where statute did not define phrase "social effect"); see also Belovsky v. Redevelopment Auth. of City of Philadelphia, 357 Pa. 329, 342, 54 A.2d 277, 283 (1947) (observing even though Urban Redevelopment Law did not precisely define "blighted" area, statute comported with Constitution because, *inter alia*, "it was obviously impossible for the legislature to make detailed provisions or blueprints in advance for each operation"). It is enough for constitutionality if basic guidelines are set forth in a given law. See Casino Free, 594 Pa. at 206-07, 9314 A.2d at 1252-53 ("The Legislature is not constitutionally required to micromanage the administrative agencies it creates."). This is precisely the case with Act 13 and Section 3215(b)(4).

Finally, PAGE demonstrates that in evaluating the constitutionality of a given provision under the anti-delegation clause, it is appropriate to compare the challenged provision with other provisions found constitutionally sound in prior cases. See PAGE, 583 Pa. at 331-34, 877 A.2d at 416-18 (citing cases). This is the appropriate course here with Section 3215(b)(4). As such,

this Court must decide if Section 3215(b)(4) is more like the passage in PAGE found unconstitutional ("The board may, in its discretion consider such local zoning ordinances when considering an application for a slot machine license."), or more like the following passages, found constitutional:

- "The public interest of the citizens of this Commonwealth and the social effect of gaming shall be taken into consideration in any decision or order made pursuant to this part." 4 Pa. C.S. § 1102; Casino Free, 594 Pa. at 205, 207, 934 A.2d at 1251, 1253 ("We ... find that Section 1102 does not violate the anti-delegation clause. Petitioners, by isolating the 'social effect' language from the rest of Section 1102, attempt to portray the Legislature as having given scant direction to the Board to execute or administer its responsibilities. This blinkered reading of Section 1102 produces a false picture.").

- "[W]henever the Department of Licenses and Inspections ... or any Public Health Department ... certifies a dwelling as unfit for human habitation, the duty of any tenant of such dwelling to pay, and the right of the landlord to collect rent shall be suspended[.]" 35 P.S. § 1700-1; DePaul v. Kauffman, 441 Pa. 386, 390 n.1, 392, 272 A.2d 500, 502 n.1, 504 (1971) ("In terms of specificity, the standards of 'fit for human habitation' and 'unfit for human habitation' contained in the Rent Withholding Act compare favorably with the majority, if not all, of the standards judicially approved in the state and federal cases [cited in opinion].").[2]

- "It shall be unlawful for any person to: (1) Drill, alter, operate or utilize an oil or gas well without a permit or registration from the department as required by this act or in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department." 58 P.S. § 601.509(1) (Oil and Gas Act, now repealed); Pa. Indep. Petroleum Producers v. Com., Dep't of Envtl. Res., 106 Pa. Cmwlth. 72, 83-84, 525 A.2d 829, 835-36 (1987) ("We find that the provisions now found in the Act are consistent with the stated purposes and

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[2] DePaul collects cases and holdings on the anti-delegation clause, stating as follows:

> In Archbishop O'Hara's Appeal, 389 Pa. 35, 50, 131 A.2d 587, 594 (1957), the standard of 'the promotion of the health, safety, morals and general welfare * * *' was deemed sufficient to limit the administrative exercise of the zoning power to grant or refuse a special exception. The similarly general standard of 'detrimental to welfare, health, peace and morals of the inhabitants of the neighborhood' was held to provide adequate guidance for the administrative refusal of a liquor license in Tate Liquor License Case, 196 Pa. Super. 193, 173 A.2d 657 (1961). See also Dauphin Deposit Trust Co. v. Myers, 388 Pa. 444, 451, 130 A.2d 686, 689 (1957) (statement that 'adequacy or inadequacy of banking facilities' a proper criterion).

441 Pa. at 392, 272 A.2d at 503.

contain adequate standards to guide [the Environmental Quality Board] in promulgating regulations."), aff'd per curiam, 520 Pa. 59, 550 A.2d 195 (1988).

The Commission and the Department submit that Section 3215(b)(4) is substantially closer to those provisions above found constitutional than the standardless provision found unconstitutional in PAGE. Section 3215(b)(4) represents a limited, appropriate grant of discretion to the agency tasked with implementing this State's environmental policies, and the provision does not, in any way, offend the Constitution. For these reasons, and for the reasons set forth in the opening brief in this appeal, this Court should find Section 3215(b)(4) complies with Article II, Section 1 of the Pennsylvania Constitution.

C. The Commonwealth Court improperly engaged in judicial second-guessing of non-justiciable political questions reserved for the Legislature.

The Municipalities respond to the Commission's and the Department's justiciability argument by proclaiming that the Commonwealth Court's decision should be affirmed because their "claims raise questions solely regarding the constitutionality of Act 13[,] which are properly addressed by the judicial branch through judicial review." Muni. Br. (63 MAP 2012) at 63. This stock response is misguided.

First, the Municipalities' response misses the point raised by the Commission and the Department in their opening brief. See Comm'n & Dep't Br. (63 MAP 2012) at 34-40. The Commission and the Department do not dispute or contest the ability of the judicial branch to review and assess the constitutionality of legislative enactments. What the Commission and the Department take issue with is exactly what happened here—when the judicial branch goes *beyond* merely assessing the constitutionality of a legislative enactment and substitutes its own policy judgments and preferences for those made by the legislative branch. As set forth in the Commission's and the Department's opening brief, the Commonwealth Court went beyond its limited role in ruling on the constitutionality of Act 13 and engaged in judicial second-guessing

of the General Assembly's admittedly valid exercise of its constitutionally entrusted police powers. See Comm'n & Dep't Br. (63 MAP 2012) at 34-37. And the on-the-record comments of the author of the Commonwealth Court's majority opinion support that conclusion. See Comm'n & Dep't Br. (63 MAP 2012) at 36-37.

Second, the Municipalities' assertion that their claims are limited to "questions solely regarding the constitutionality of Act 13" is inaccurate and not supported by the record. Muni. Br. (63 MAP 2012) at 63-64. Although the Municipalities couch their claims as being "constitutional" in nature, the gravamen of their complaints has always been, and continues to be, that Act 13 is not sound legislative *policy*. Indeed, the Municipalities' Petition for Review is rife with criticisms about the wisdom, reasonableness and propriety behind the General Assembly's policy judgments in enacting Act 13.[3] Likewise, the affidavits submitted by the Municipalities in support of their motion for summary judgment contain a similar multitude of grievances solely related to the soundness of the General Assembly's policy choices.[4] Simply

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[3] See, e.g., Petition at ¶ 96 (R.R. at 86a) (G.A. "failed to undertake **any** localized analysis" (emphasis in original)); ¶ 98 (R.R. at 87a) (G.A. engaged in "mechanical exercise" that was completed "without a diligent inquiry into the land and community to be zoned"); ¶ 99 (R.R. at 88a) (G.A. "failed to account for or undertake any analysis regarding the[] drastic distinctions between various Commonwealth communities"); ¶ 100 (R.R. at 88a) (stating "the state of Texas also has been successfully experiencing shale drilling for years, yet local zoning remains in place demonstrating the lack of necessity for Act 13"); ¶¶ 103-04 (R.R. at 89a-93a) (G.A. "failed to consider [numerous] localized concerns associated with oil and gas operations" that "should weigh heavily against allowing oil and gas operations as a permitted use by right in any district but industrial districts"); ¶ 105 (R.R. at 93a) (claiming Act should have included "further restrictions on drilling activities," including a "limitation to the number of impoundments or compressor stations that may be placed in any particular district," a "limitation on the hours of operations of drill sites, impoundments and other facilities," and a "limitation a the heavy truck traffic to and from these sites").

[4] See, e.g., Aff. of M. Stevenson at ¶ 11 (R.R. at 785a) (concluding that "oil and gas development should be a conditional use" because a "'one size fits all' approach" is "inappropriate in an area where uses of land vary widely"); id. at ¶ 13 (R.R. at 786a) ("Mount Pleasant feels that it is necessary to consider well site applications on a site-by-site basis in light of the fact that each

put, the Municipalities desire nothing more in this case than to have their policy choices substituted for those of the General Assembly in passing Act 13. But the law simply does not support that desire.

D. The Commonwealth Court improperly considered the Municipalities' unripe claims based on speculative and unfounded harms.

The Municipalities' response to the Commission's and the Department's ripeness argument completely ignores those arguments raised in the opening brief, and resorts instead to a baseless attack on the Commission's and the Department's allegedly "gross misrepresentation of the lower Court's opinion." Muni. Br. (63 MAP 2012) at 70.

The Municipalities' response offers nothing in support of the Commonwealth Court's *only* stated basis for exercising "equitable jurisdiction" over the Municipalities' otherwise unripe claims, i.e., its faulty conclusion that "the municipalities have alleged that they will be required to modify their zoning codes, and if they fail to do so, they will be subject to penalties and/or prosecution under 58 Pa. C.S. § 3255." See Comm'n & Dep't Br. (63 MAP 2012) at 40-43. In fact, the *only* time that 58 Pa. C.S. § 3255 is even mentioned in the Municipalities' response is in a block quote of the Commonwealth Court's majority opinion. See Muni. Br. (63 MAP 2012) at 69. The Municipalities' response likewise offers nothing to justify why the Commonwealth

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property is different"); Affs. of B. Coppola and D. Ball at ¶ 23 (R.R. at 814a-15a, 823a) ("[t]he fact that Act 13 exists will immediately affect the sale and resale of properties as the industrial nature of drilling and frac ponds are allowed as permitted uses in all zoning districts"); id. at ¶ 23 (R.R. at 815a, 823a) (asking: "What individual, hotel or restaurant would build or invest resources in an area that may have an individual neighbor with increased traffic, noise, emission, dust, and the likelihood of decreased property values?"); Aff. of W. Sadow at ¶ 22 (R.R. at 948a) ("Prior to Act 13, we addressed the[] risks [of oil and gas operations] and carried out our constitutional mandates through zoning provisions that address local community development objectives, local natural resources and existing land uses."); id. at ¶ 25 (R.R. at 948a) ("Act 13 assumes that all municipalities maintain agricultural districts that are separate from residential districts."); Aff. of M. Van Rossum at ¶ 31 (R.R. at 955a) ("I am concerned that gas drilling in the basin—particularly without local zoning protections—will have a deleterious effect on the pristine beauty and irreplaceable environmental resources of the Delaware River Basin.").

Court apparently exercised "equitable jurisdiction" over the Municipalities' challenge to Section 3215(b)(4) of Act 13, which, on its face, has nothing to do with municipalities having to modify their zoning ordinances or allegedly being sanctioned for failing to do so. See Comm'n & Dep't Br. (63 MAP 2012) at 43.

Rather than address these core issues, the Municipalities' response focuses instead on the Commission's and the Department's characterization of the Commonwealth Court's majority opinion as having "acknowledged" that the Municipalities claims were unripe. See Muni. Br. (63 MAP 2012) at 69-70. Yet, this is exactly what the Commonwealth Court did, and the Municipalities concede as much in their response. See Muni. Br. (63 MAP 2012) at 67-70. The Commonwealth Court held that, although the Municipalities claims' were otherwise unripe, it would exercise "equitable jurisdiction" over those claims to allow the Municipalities to raise *pre-enforcement* challenges to Act 13.[5] Opinion at 24 n.17. This was so that the Municipalities would not have to incur the burden, hardships or costs attendant to actually being subjected to the law. Id. And the Municipalities' response adopts and advocates for this same exercise of "equitable jurisdiction" over its otherwise unripe claims. See Muni. Br. (63 MAP 2012) at 67-69. The Municipalities even quote caselaw stating that "equitable jurisdiction" may be exercised "even if the case is not fully developed as [the court] would like," i.e., even if the claims are otherwise unripe. Muni. Br. (63 MAP 2012) at 67 (quoting Twp. of Derry v. Pa. Dep't of Labor & Industry, 932 A.2d 56, 57-58 (Pa. 2007)).

The Commission and the Department have not "gross[ly] misrepresent[ed]" anything in their opening brief. Muni. Br. (63 MAP 2012) at 70. Rather, the plain text of the

[5] "Pre-enforcement" is by definition unripe.

Commonwealth Court's majority opinion makes clear that the majority opinion ventured to address speculative claims and unfounded harms that were unripe for judicial review.

II. CONCLUSION

For the foregoing reasons, and for those set forth in the opening brief, the Commission and the Department request that this Court reverse the July 26 Order of the Commonwealth Court regarding Sections 3304 and 3215(b)(4) and direct that the Municipalities' case be dismissed with prejudice in its entirety.

Respectfully submitted,

CONRAD O'BRIEN PC

Dated: September 25, 2012

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CERTIFICATE OF SERVICE

I, Matthew H. Haverstick, hereby certify that I served the foregoing Reply of Appellants on the following parties via Federal Express and email, which satisfies the requirements of Pa.R.A.P. 121:

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Dated: September 25, 2012

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