IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 72 & 73 MAP 2012

ROBINSON TOWNSHIP, ET AL.
Cross-Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Cross-Appellees

REPLY BRIEF OF CROSS-APPELLANTS

Cross-Appeal From The Order Of The Commonwealth Court Entered
On July 26, 2012, Docket No. 284 M.D. 2012

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I. Summary of Argument

The Commonwealth repeatedly mischaracterizes Petitioners' claims and repeatedly asserts that Act 13 is constitutional, simply because the General Assembly has the power to legislate. In legislating, however, the General Assembly must respect the Constitution. The General Assembly cannot choose to favor the oil and gas industry simply because it wants to. The General Assembly cannot violate the Constitutionally-mandated separation of powers. The General Assembly cannot authorize takings for merely private purposes. The General Assembly cannot require municipalities to breach their obligations under Article 1, Section 27 of the Pennsylvania Constitution. In enacting Act 13, the General Assembly violated each of these dictates. Act 13 is therefore unconstitutional.

II. Argument

A. Act 13 Is A Special Law Because The Statutory Classifications Made By The General Assembly Are Not Reasonably Related To A Legitimate State Purpose

The Commonwealth continually maintains, and has argued repeatedly in its briefs, that the General Assembly may permissibly create statutory classifications in the law without violating Article III, Section 32 of the Pennsylvania Constitution. See Brief of Agency Appellants, at pp. 6-7; see also Brief of Attorney General, at p. 24. Petitioners do not dispute this point. However, the Commonwealth's argument essentially states that because the General Assembly maintains this power, the classifications found within Act 13 are *automatically* constitutional. See Brief of Agency Appellants, at p. 7. This extension is clearly unsupported and unwarranted. If the Commonwealth's position were to be accepted as true, the equal protection principles embodied in Article III, Section 32 would be of no effect and judicial review of the same would be rendered meaningless.

Rather, as is well-settled in Pennsylvania law and was recognized by the Commonwealth Court, "[a]ny distinction between groups must seek to promote a legitimate state interest or public value and bear a reasonable relationship to the object of the classification." See July 26 Opinion, at p. 38 (citing Pennsylvania Turnpike Com'n v. Com., 587 Pa. 347, 363-64, 899 A.2d 1085, 1094-1095 (2006)). Consequently, a "legitimate state interest" alone is not sufficient to sustain constitutional scrutiny.[1] The means used to achieve that goal must be reasonably related and justified by this relationship to the larger state interest; in other words, the means and the goal must have a relationship such that they *rationally fit together*. This Honorable Court correctly recognized this principle in Pennsylvania Turnpike Com'n:

> While recognizing the fact that there may be a legitimate state interest undergirding the Act, we are constrained to conclude that the Act here constitutes special legislation in violation of Article III, Section 32 **because the narrow classification in the Act, as written, does not bear a reasonable relationship to that purpose**. This Court can discern no significant distinctions between the Commission's first level supervisors and other publicly employed first level supervisors to justify such special differential treatment.

587 Pa. at 368, 899 A.2d at 1097. (emphasis added).

While the Commonwealth acknowledges this constitutional standard, its argument pays only lip service to the relationship necessary to justify statutory classifications made. See Brief of Agency Appellants, at p. 6-8. Simply because a classification is made by the General Assembly does not conclusively mean that it is constitutionally sound. The Commonwealth fails to address the distinctions made in Act 13 and fails to provide any rationale or reasoning to show how these distinctions are rationally related to a legitimate state purpose. Likewise, the Commonwealth does not address how the numerous classifications in Act 13 in fact promote, or bear a reasonable relationship to, any public interest. See Brief of Agency Appellants, at pp. 7-8.

[1] Further, the purposes in Section 3202 only apply to Chapter 32, and therefore cannot be imputed to the zoning provisions of Chapter 33.

In order for any distinction creating such an unequal disparity to be constitutional, such a showing is required, *at a minimum*.

Neither the Commonwealth nor the Commonwealth Court could provide any rationale to support how the classifications identified by Petitioners bear any reasonable relationship to a proper state purpose. The record below is void of any proper state purpose other than catering to a favored industry.[2] For example, Petitioners present the following lines of inquiry:

- What is the rational basis for permitting solely the oil and gas industry to entirely bypass the statutory baselines underlying the constitutionality of zoning, including already-established and designated zoning districts, comprehensive plans and orderly development of the community?

- What is the rational basis for providing a local review period solely for oil and gas resources that may not exceed thirty (30) days for permitted uses or one-hundred twenty (120) days for conditional uses?

- What is the rational basis for imposing onerous punishment provisions upon local governments, including the imposition attorney fees and costs, solely when regulating the oil and gas industry?

- What is the rational basis for providing notification of a spill, and potential contamination, to public drinking water facilities and not to residents who rely upon private drinking water supplies where most drilling activity is occurring?

The Commonwealth has failed to address these pivotal questions because these provisions of Act 13 are not supported by any rational relationship to a proper state purpose.

The Commonwealth has been unable to provide any reasonable and rational justification for the preferential treatment of the oil and gas industry above all others because such a rational relationship does not exist. This fact alone is evidence that Act 13 was about "favoritism," which Article III, Section 32 prohibits. Harrisburg School Dist. v. Zogby, 574 Pa. 121, 136, 828

[2] Moreover, the very fact that the legislature would cause injury to the residential character of neighborhoods by introducing several industrial and hazardous uses that are exempt from numerous federal regulations, and then deny local approval and speed up instead of expand any time for municipal review, is the antithesis of a legitimate state purpose.

A.2d 1079, 1088 (2003). Legislative classifications must be founded on "real distinctions in the subjects classified and not on artificial *or irrelevant* ones used for the purpose of evading constitutional prohibition." Harrisburg School Dist. v. Hickok, 563 Pa. 391, 397, 761 A.2d 1132, 1136 (2000)(citing Freezer Storage v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715, 718 (1978)) (emphasis added).

While it may be true that the oil and gas industry and, more importantly, the natural resources underlying the Commonwealth, have provided an economic boost to some Pennsylvania communities, this alone cannot serve to justify the classifications and benefits given to the industry when many industries are in the same position. See R.1263a-64a. The General Assembly's unequal distinctions are not a reasonable or rational means to an end when the oil and gas industry was thriving without any special and/or exclusive statutory assistance. See R. R.1259a-60a. The General Assembly has created unequal treatment without the need for it and without good cause or a proper state purpose in violation of equal protection principles.

There is no rational relationship between Act 13's preferential zoning treatment for oil and gas development, and any unique differences between the oil and gas industry and other industries, including energy and extraction industries. The fit is incongruous and therefore unconstitutional. Zoning uniformity would benefit all statewide industries, as can be seen by the amicus briefs filed by the coal industry, an electric company, and the Pennsylvania Chamber of Business and Industry. Act 13's legislative classifications — preferential treatment for the oil and gas industry compared to all other industries, *including other energy industries and other natural resource extraction industries* — are merely "artificial and irrelevant" distinctions between similarly situated entities. Harrisburg School Dist., 563 Pa. at 397, 761 A.2d at 1136; Appeal of Ayars, 122 Pa. 266, 281, 16 A. 356, 363 (1889).

Contrary to the Commonwealth's contention, Petitioners' assertion—that the differences provided for in Act 13 must be justified—is a correct statement of the governing standards. Cf. Brief of Agency Appellants, at p. 8. In fact, this premise derives directly from Article III, Section 32 and the subsequent case law that has interpreted that provision. See, e.g., Ligonier Tavern, Inc. v. Workers' Compensation Appeal Bd. (Walker), 552 Pa. 237, 714 A.2d 1008, 1011 (1998) ("Neither the equal protection guarantee of the federal constitution nor the corresponding protection in our state constitution forbids the drawing of distinctions, so long as the distinctions have a rational basis and relate to a legitimate state purpose."); Commonwealth v. Hicks, 502 Pa. 344, 466 A.2d 613, 615 (1983) ("[T]he prohibition against special legislation contained in Article III, Section 32 of the Pennsylvania Constitution also requires that legislative classifications have some rational relation to a proper state purpose."). As Petitioners have noted, "Any distinction between groups must seek to promote a legitimate state interest or public value, and bear a "reasonable relationship" to the object of the classification. Pennsylvania Turnpike Com'n v. Com., 587 Pa. at 363-65, 899 A.2d at 1094-1095; Wings Field Preserv. Assocs., L.P. v. Com., Dept. of Transp., 776 A.2d 311, 316-17 (Pa. Commw. Ct. 2001); See Brief of Cross-Appellants, at p. 17-18. The General Assembly cannot escape these constitutional constraints by creating any classification in law it deems worthy if such a classification cannot be justified by a reasonable relationship to a legitimate state purpose.

The Commonwealth has attempted to mischaracterize Petitioners' argument in order to divert this Honorable Court's attention away from an inability to otherwise meet the standard of review.[3] Act 13, by its terms, creates a class of one—the oil and gas industry—and provides it

[3] The Commonwealth also raises a new argument as to whether the allegedly "incidental" operation of a statute affects whether a law is special legislation. Brief of Agency Appellants, at pp. 9-10. However, the Commonwealth never raised this argument below and therefore failed to

treatment distinct from all other industries, including similarly-situated energy and extraction industries. Nothing unique distinguishes the oil and gas industry from other similarly-situated industries to justify Act 13's distinctions, such as local zoning, and medical diagnosis and treatment. See R.1263a-64a. These distinctions are not related in any way to anything inherently different about the oil and gas industry, except the legislature's unconstitutional desire to provide it with a unique set of benefits.

Based upon the foregoing, there is no rational basis that could sustain the distinctions made in Act 13 to benefit the oil and gas industry. The statutory classifications in Act 13 fail to serve or further a legitimate state purpose. Therefore, this Honorable Court should declare these provisions unconstitutional, and reverse the Commonwealth Court's decision as to Count IV.

B. Act 13 Is Unconstitutional Because It Authorizes Takings For Private Purposes

Section 3241 of Act 13 authorizes unconstitutional takings of private property for a private purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution. The Commonwealth Court's decision dismissing Count V should therefore be reversed.

Section 3241 of Act 13, entitled "eminent domain," states, in part:

> [e]xcept as provided in this subsection, a corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth may appropriate an interest in real property

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preserve it. Further, this new argument is not prompted by anything new Petitioners have stated, but rather refers back to Petitioners' prior arguments as they were set forth before the Commonwealth Court. See Brief of Agency Appellants, at p. 9 (citing Brief of Cross-Appellants); cf., e.g., R.744a-52a. As such, the Commonwealth's "incidental operation" argument is not properly before this Court. Moreover, despite the Commonwealth's assertion, Petitioners have simply not argued that Act 13's impact on local municipalities is incidental. Act 13 likewise regulates local municipalities to the extent it limits their ability to draft local ordinances unique to their community for the protection of distinctive regional characteristics, a police power that this Court found to be a proper and prudent exercise. See Huntley, *infra*. Likewise, Act 13's special treatment of the oil and gas industry — e.g., for zoning, for medical care, and for drinking water notification — does not correlate to any unique differences that distinguish this industry from other energy or extraction industries.

> located in a storage reservoir or reservoir protective area for injection, storage and removal from storage of natural gas or manufactured gas in a stratum which is or previously has been commercially productive of natural gas.

58 Pa. C.S. § 3241.

The Commonwealth and PUC argue that Petitioners have set forth no facts to demonstrate that any of the Petitioners' property is in imminent danger of being taken; thus, Petitioners' claim is not ripe for consideration. Although already addressed in their Appellate brief, Petitioners do not allege that they have had property condemned nor do they argue that this is an eminent domain case. To the contrary, Petitioners assert ***that Section 3241 of Act 13 is unconstitutional on its face.*** "[P]rivate property can only be taken to serve a public purpose" and that "to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking." In re Opening Private Road for Benefit of O'Reilly, 607 Pa. 280, 299, 5 A.3d 246, 258 (2010). Section 3241 of Act 13 does not meet this constitutional threshold.[4]

While not addressed by the Commonwealth Court in its July 26, 2012, Opinion and Order, both the Commonwealth and PUC again argue that the power of eminent domain set forth in Section 3241 is limited to only public utilities; and not "any oil and gas company." The Commonwealth and the PUC argue that only public utilities are "empowered" to transport, sell or store natural gas or manufactured gas in this Commonwealth. The express language of Act 13 does not support their position. At a minimum, oil and gas companies and their transporters cannot meet the definition of a "public utility" as they are not producers of natural gas engaged in distribution of such gas directly to the public for compensation. See 66 Pa.C.S. §102.

Moreover, glaringly absent from Section 3241 is any language limiting the eminent domain power to only "public utility" corporations. Private oil and gas companies and their

[4] See Brief of Cross-Appellants, pp. 29-31.

transporters throughout this Commonwealth "transport, sell or store natural gas." Thus, if Section 3241 is found Constitutional, these oil and gas companies and their transporters would also enjoy the power of eminent domain pursuant to Section 3241.

Section 3241 is also inconsistent with the limitations on the use of eminent domain under the Property Rights Protection Act. 26 Pa. C.S. § 201 *et seq*. Pursuant to the Act, except as set forth in § 204(b), "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited." 26 Pa. C.S. § 204(a). Specifically, the appropriation of an interest in real property by a corporation for the storage of natural or manufactured gas is not listed as an exception under § 204(b), nor clearly covered under the definition of "public utility." Moreover, as explained above, Section 3241 is not limited to only public utilities but includes other private companies that transport, sell or store natural gas in the Commonwealth.

C. Act 13 Violates Article I, Section 27 Of The Pennsylvania Constitution

The Commonwealth's arguments against Petitioners' Section 27 claims are premised on mischaracterizations of the municipalities' position.

The Commonwealth agencies argue that "Section 27 cannot be used to expand a government entity's powers beyond those granted by the General Assembly." Brief of Agency Appellants, at 13 (citing Belden & Blake Corp. v. Comm. Dep't of Conserv. & Natural Res., 600 Pa. 559, 567, 969 A.2d 528, 532-33 (2009) and Community Coll. of Delaware County v. Fox, 20 Pa. Commw. 335, 342 A.2d 468 (1975)). This argument mischaracterizes Petitioners' claim. Municipal Petitioners do not assert that Section 27 expands their powers. Rather, Section 27 limits their powers. Section 27 limits the ability of Municipal Petitioners to act in a manner that fails to "conserve and maintain" Pennsylvania's public natural resources "for the benefit of all

the people." Section 27 prevents municipalities from enacting zoning provisions that violate the public trust.

Similarly, Section 27 limits the General Assembly's powers. If, however, the Commonwealth's position were accepted, it would allow the legislature to trump constitutional mandates, effectively creating a bar to judicial review. Instead, Section 27 acts as a limit on the General Assembly's power, and this Court, by carrying out its responsibility for judicial review, serves as the arbiter of whether the General Assembly has acted within its Constitutional limitations.

The Commonwealth agencies also conflate two distinct aspects of Chapter 33 of Act 13. In their brief, the Commonwealth agencies argue that "[t]he General Assembly, through Act 13, has expressly preempted and superseded local regulation of oil and gas operations." Brief of Agency Appellants, at 15 (citing 58 Pa.C.S. §§ 3302 and 3303). What the Commonwealth misses is that the preemption provisions of Sections 3302 and 3303 are limited to "oil and gas operations" and therefore maintain the "how" versus "where" distinction recognized by this Court in Huntley & Huntley, Inc. v. Borough of Oakmont, 600 Pa. 207, 964 A.2d 855 (2009). Section 3304, however, does not constitute a complete preemption of municipal zoning. Rather, Section 3304 directs municipalities how to carry out their zoning authority. In carrying out that authority, municipalities are obligated to do so in a manner that respects the Constitution. If in conflict, as they are here, the directives of the Constitution trump the directives of the General Assembly.

The Commonwealth also sets up a false dichotomy concerning who has "power to protect public natural resources" under Article I, Section 27. Brief of Attorney General, at 28. The Commonwealth mischaracterizes Petitioners' position as resting on a notion that "Article I,

Section 27 of the Constitution grants municipalities the power to protect public natural resources ***as against*** the Legislature." Id.; see also id. at 29 ("The Municipalities' argument is ultimately based on the false premise that Article I, Section 27 grants municipalities power as against the Legislature"). The Constitutional mandate applies to each component of the Commonwealth, from the legislature to the executive branch to the courts, and from state government to local government. Brief of Cross-Appellants, at pp. 32-34.[5] Municipal Petitioners are not in a competition with the legislature over which entity has singular responsibility for the Constitutional mandate. Rather, Article I, Section 27 mandates a set of shared responsibilities that all arms and branches of our government must honor.

Indeed, as the Commonwealth now concedes, "the Municipalities indisputably are bound by Section 27 (and thus can fairly be characterized as 'trustee' ....)." Brief of Agency Appellants, at 15. No legislative enactment can validly authorize municipalities to violate the strictures of Article I, Section 27 or of any other part of the Constitution. Municipalities, in carrying out their zoning authority, are constitutionally obligated to "conserve and maintain [Pennsylvania's public natural resources] for the benefit of all the people." Art. I, Sec. 27.

If municipalities are forced to comply with Act 13 and enact zoning ordinance provisions that allow oil and gas operations in all zoning districts, without regard to the presence of Pennsylvania's public natural resources, municipalities will be violating Section 27. As such, Act 13 must be declared unconstitutional.

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[5] The Commonwealth parties and *amici* state repeatedly that "municipalities are creatures of the state." Brief of Attorney General at 29; see also, e.g., Brief of Agency Appellants, at 13 ("Municipalities are created by the Commonwealth"). To be precise, municipalities are creatures of the Pennsylvania Constitution, which specifically requires the General Assembly to provide for local government. Pa. Const., Art. IX, § 1. Further, it is an oversimplification to suggest that municipalities exist as entities that are wholly distinct from the "Commonwealth." Rather, municipalities are *part of* the Commonwealth.

D. Act 13 Violates The Doctrine Of Separation Of Powers Because The Statutory Scheme Usurps Judicial And Legislative Authority

The Commonwealth asserts that Act 13 does not violate the doctrine of separation of powers by arguing that each of the functions delegated to the PUC, when looked at separately, are constitutional. See Brief of Agency Appellants, at pp. 18, 20-21; see also Brief of Attorney General, at pp. 30-31. More specifically, the Commonwealth argues that the PUC does not usurp judicial authority because its power to review local ordinances is subject to judicial review such that the PUC is not making constitutional determinations. See Brief of Agency Appellants, at pp. 17-19. In addition, the Commonwealth argues that the PUC does not usurp legislative authority because it merely issues non-binding advisory opinions based upon agency expertise. See Brief of Agency Appellants, at pp. 20-21; see also Brief of Attorney General, at pp. 30-31. The Commonwealth's reasoning fails to account for effect that Act 13's separate provisions have when they are combined. When Act 13's provisions are examined together as one scheme, under which the PUC exercises a unique combination of powers, the effect is a fundamental violation of separation of powers.

Each delegation of power from the General Assembly cannot be examined in a vacuum, but must be looked at cumulatively in order to discern the effect of the scheme. Section 3305(a) and 3305(b) do not stand alone. Rather, they are part of a larger scheme in which control is centrally held by the PUC to act as "judge, jury and prosecutor." Preliminary review and post-enactment enforcement of local ordinances by the PUC results in the PUC engaging in the legislative task of drafting and the judicial task of adjudication. Combined, the effect coerces municipalities to present their zoning ordinances to the PUC for review and to accede to the PUC's determinations or face various potential penalties, including the loss of impact fee monies. This represents the "carrot" and "stick" approach described by Petitioners in their initial

brief. See Brief of Cross-Appellants, at pp. 45-47.

The Commonwealth attempts to characterize Petitioners' arguments as nothing more than "*ad hominem* attacks on the General Assembly, the Governor and the Commission." Brief of Agency Appellants, at p. 17. This characterization is false. Petitioners' arguments are not personal attacks against the General Assembly, the Governor or the Commission. Rather, Petitioners' arguments stem from these governmental bodies' lack of regard for the Constitution as shown through the enactment of Act 13. Petitioners' "true grievance" is that the General Assembly is constrained by the Constitution and must act within its bounds. The General Assembly must respect the checks put in place in order to ensure a fair balance and separation between the branches of government. See Brief of Agency Appellants, at p. 17.

Petitioners do not contend they have "constitutional rights *as against* the General Assembly." See Brief of Agency Appellants, at p. 20 (emphasis added). Instead, Petitioners simply contend that the General Assembly is not exempt from constitutional restraints.

1. Section 3305(a) – PUC Advisory Opinions

The Commonwealth repeatedly argues that the PUC advisory opinions are not problematic because they are not binding upon municipalities nor must municipalities seek such opinions. See Brief of Agency Appellants, at p. 20; see also Brief of Attorney General, at p. 31. This assertion fails to account for the practical effect imposed upon municipalities by the PUC review processes. The scheme of Act 13 is designed to cause municipalities to submit proposed ordinances to the PUC for an "advisory" review, and also to cause municipalities to accept and adopt the PUC's recommendations. The PUC's intrusion into the legislative process through the rendering of advisory opinions is designed to cause municipalities to follow the advice of the PUC because municipalities will be anxious to seek the PUC's guidance to avoid sanctions that

could result from not seeking or ignoring the PUC's input. See 58 Pa.C.S. §§ 3305(a), 3307.

Because these PUC determinations are not appealable and are issued without the opportunity for a hearing, municipalities will have no basis to question the justification of the PUC's opinion. Rather, municipalities, in practical effect, will be forced to accept the PUC's opinion and its re-drafting of the municipal ordinance. To act otherwise will place municipalities and municipal officials at significant risk for an adverse legal decision in the future. The risk is so great that it has the practical effect of dissuading any municipality from disagreeing with the PUC. As the PUC's decisions at this stage cannot be appealed, they will serve as the first, last and only determination regarding the contents of a local zoning ordinance, thereby usurping the functions of the legislature and judiciary in violation of the doctrine of separation of powers.

Additionally, contrary to the Commonwealth's argument, the PUC is not merely "carrying out legislative guidance" through the process of "administration" of the law. See Brief of Agency Appellants, at pp. 20-21. Rather, the PUC is being given the task of re-writing ordinances and thereby drafting legislation for local government. This is not merely an issue of delegation and deferment to agency expertise. It is clear that the General Assembly envisioned a both legislative and judicial roles for the PUC that work together and result in a violation of separation of powers principles, in order to strong-arm municipalities to enact pro-industry regulations. A municipal Solicitor or Board that disagrees with a PUC advisory position is placed in the untenable position of drafting ordinances that it believes serves to protect the health, safety and welfare of its citizens (the legislative function), that is contrary to PUC "advice." Unfortunately, the PUC advisors/legislators then become the PUC judiciary and will be called upon to adjudicate or pass judgment on the various ordinances and legislation that failed to heed PUC advisory directives. Confronted with such a scenario, and as much as $500,000 in

impact fees and the payment of attorney's fees at risk, the inevitable result is that a Board or Solicitor will be faced with a "Hobson's choice" and have to follow what the PUC directs and essentially yield its legislative duties to the Governor-appointed PUC.

2. Section 3305(b) – PUC Ordinance Review

As explained in Petitioners' initial brief, Act 13 allows for the PUC to review the enactment or enforcement of municipal ordinances for compliance with Act 13 or the Municipalities Planning Code. The Commonwealth denies the constitutional violation inherent in this scheme asserting that -- because an opportunity for appeal is present -- the Commonwealth Court *might* be the final arbiter of the validity of an ordinance in *some* cases. See Brief of Agency Appellants, at pp. 17-18. This argument fails to account for the interplay between Section 3305(b) and other sections of the Act.

The Commonwealth assumes that the courts will have an opportunity to review an ordinance following the PUC's review thereby removing any usurpation of the judicial function from the judicial branch. The Commonwealth has reasoned that, because of this process, the PUC will not ultimately determine the constitutionality of any ordinances. However, the Commonwealth's assumption is predicated upon the belief that all PUC determinations will in fact be appealed to the Commonwealth Court. The process is designed to dissuade appeals. In order for the Commonwealth to be right, each and every PUC determination must be appealed, which begs the question, what is the need for PUC involvement? If the constitutional determination by the PUC is a final determination, how does the PUC's decision ***not*** result in a violation of separation of powers?

In many cases, a municipality, industry, or an aggrieved landowner may choose to not appeal and allow the PUC determination to stand out of concerns for costs, sanctions, delay in

receipt of budgeted and expected impact fees or attorney's fees being imposed. In those cases, the PUC will be the final word on the validity of a municipal ordinance and, as a result, will determine this constitutional question. The Commonwealth fails to account for this likely occurrence. The risk of sanctions, especially in the form of monetary penalties, is so great that it has the practical effect of dissuading any municipality from appealing a PUC decision.[6] The result will be that in most, if not all, instances the PUC will serve as the first, last and only determination about the constitutionality of a zoning ordinance. As a result of this carefully planned statutory scheme, few, if any proceedings concerning the validity and constitutionality of oil and gas ordinances would reach the Commonwealth Court or this Court. In fact, the Commonwealth agrees that "binding, judicial determination[s] ...can only be made by the judicial branch." See Brief of Attorney General, at p. 31. Is an unappealed PUC decision not a binding, judicial determination that is being made by a body other than the judicial branch?

The actual effect of Sections 3305-3308 of Act 13, when read together, allows the PUC to exercise almost unlimited control in determinations about the constitutionality and validity of legislative enactments. Contrary to the Commonwealth's argument otherwise, every challenge to a zoning ordinance brought to the PUC will involve a constitutional question and will require a judicial determination. See Brief of Agency Appellants, at p. 19. Zoning is an act which is undertaken pursuant to the sovereign's police powers, and therefore, is only constitutional when those powers are used for proper purposes. The cases Petitioners cited in their initial brief clearly support this proposition. See Brief of Cross-Appellants, at p. 41-42. Zoning allows a

[6] To further illustrate the shift in power, should an oil and gas company violate a local regulation, the MPC limits fines that a municipality may levy to no more than $500.00 per day. 53 P.S. § 10617.2. By contrast, should the local government be found in violation of Act 13, the local government could be sanctioned with attorney's fees by the industry in excess of possibly $1000.00 dollars per hour or more.

sovereign to designate distinct areas of a community where only certain, compatible uses of land are allowed, thus protecting landowners because all property in a particular district is subject to the same restrictions. Village of Euclid, Ohio v. Ambler Realty, Co., 272 U.S. 365, 388 (1926).

To be valid, a zoning ordinance must satisfy the constitutional test that the ordinance promotes the health, safety, general welfare and morals of a community. See id.; Boundary Drive Associates v. Shrewsbury Twp. Bd. of Sup'rs, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). These fundamental prerequisites -- which must be observed for zoning to pass constitutional muster -- are codified in the MPC. 53 P.S. § 10604 ("The provisions of zoning ordinances shall be designed: (1) To promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare . . .").

This Honorable Court has similarly held that the interests underlying zoning are often distinct and therefore each purpose must be analyzed for its propriety accordingly:

> While the governmental interest involved in oil and gas development and in land-use control at times may overlap, ***the core interests in these legitimate governmental functions are quite distinct.*** The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources of the state. A county's ***interest in land-use control***, in contrast, is one of more orderly development and ***use of land in a manner consistent with local demographic and environmental concerns.***

Huntley & Huntley, Inc., 600 Pa. at 225, 964 A.2d at 865.

Therefore, by designating industrial uses as permitted in all zoning districts, Act 13 involves a threshold constitutional question under Article I, Section 1 of the Pennsylvania Constitution that must be addressed by the PUC during the review of any local zoning ordinance. The MPC is likewise the statutory recognition and embodiment of these constitutional directives.

The Commonwealth argues that other administrative agencies make similar determinations. See Brief of Agency Appellants, at p. 21. However, unlike other administrative

agencies, the PUC is not engaged in mere application of the law to a specific set of facts presented to a tribunal. The sole purpose of the PUC under this section of Act 13 is to perform the function of the judicial branch and determine whether a law in the form of a zoning ordinance, not a set of facts, fits within the scheme set forth in other law—Act 13, the MPC, and by proper extension, the Constitution.

Indeed, the PUC has been tasked with undertaking the exact legal question and analysis presented to this Court in Huntley to the extent it must determine whether a local ordinance has been preempted by the Oil and Gas Act. This Honorable Court has explained that, "[t]he application of the doctrine of preemption to invalidate [a local ordinance] raises a pure question of law." Fross v. Allegheny County, 610 Pa. 421, 20 A.3d 1193, 1202 (2011). "Aggrieved" operators or individuals may also challenge a local zoning ordinance as "vague" and therefore unenforceable, which likewise presents a constitutional inquiry. Eagle Environmental II, L.P. v. Com., Dept. of Env'tl Protection, 584 Pa. 494, 517, 884 A.2d 867, 881 (2005).

Interpretation of purely legal questions is and has always been the sole function of the judicial branch and cannot be delegated. Further, because of the constitutional dimension to each and every zoning enactment, the PUC is being called upon to interpret the constitutionality of laws. As a result, use of the PUC is not simply an administrative remedy; the analysis of the validity of a zoning ordinance is necessarily a legal question involving an evaluation of the **constitutionality** of the zoning ordinance. As previously set forth, only judicial bodies are permitted to make determinations about the constitutionality of a zoning ordinance. First Judicial Dist. of Pennsylvania v. Pennsylvania Human Relations Commission, 556 Pa. 258, 727 A.2d 1110, 1112 (1999). The result of the foregoing scheme presents a clear violation of the doctrine of separation of powers, which is well established and embodied in Article II, Section 1 of the

Pennsylvania Constitution.

Act 13 fundamentally upsets the notions of separation of powers and checks and balances that have been the hallmark of our government since the 1780's, with the legislature in charge of making laws, the executive overseeing enforcement and the judicial responsible for interpretation. Wayman v. Southard, 23 U.S. 1 (1825). Each branch of government has its own unique powers that are not shared with other branches. Citizens' Savings and Loan Ass'n v. City of Topeka, 87 U.S. 655 (1874). By Act 13, the PUC, an administrative agency appointed by the executive branch, has been delegated a purely judicial function that is violative of separation of powers principles. Accordingly, it is respectfully requested that this Honorable Court reverse the decision of the Commonwealth Court as it relates to Count VII.

E. Dr. Khan, The Delaware Riverkeeper Network, And Maya Van Rossum Have Standing And Dr. Khan Is Entitled To Summary Relief

Act 13 substantially, directly and immediately impacts Dr. Khan, the Delaware Riverkeeper Network ("DRN"), and Maya van Rossum. Dr. Khan is a practicing physician in Allegheny County now subject to restrictions that threaten his ability to effectively treat his patients, including communicating with necessary specialists. DRN's members live, work, and recreate in areas protected by local ordinances, protections that Act 13 will eviscerate. The Commonwealth now raises new arguments that were previously waived and misrepresents Petitioners' interests in order to minimize Act 13's impact. Petitioners respond to each of these points, including the Commonwealth's discussion of the merits of Dr. Khan's claims.

1. Dr. Khan Has Standing And Is Entitled To Summary Relief

In attacking Dr. Khan's standing and the merits of his claims, the Commonwealth makes a number of incorrect assertions in order to avoid the fact that Act 13 impacts Dr. Khan as a practicing physician in gas drilling country. Each of these assertions, including a newly-raised

and incorrect claim about federal chemical disclosure laws, will be addressed in turn. Dr. Khan has standing, and this Honorable Court should therefore consider Dr. Kahn's claims and grant summary relief, or remand to the Commonwealth Court for such consideration.

a) Dr. Khan's Standing

The Commonwealth first incorrectly asserts that Dr. Khan assumes that he can "freely obtain and disclose proprietary information from other entities." Brief of Agency Appellants, at p. 28. The Commonwealth also incorrectly claims that Dr. Khan seeks to use the information for *non*-medical purposes. Brief of Attorney General, at p. 23. Nothing Petitioners have set forth supports such statements.

Dr. Khan is concerned with his basic ethical and legal obligations to his patients as a practicing doctor in the Commonwealth of Pennsylvania, and how Act 13 conflicts with and impinges on those obligations. He is likewise concerned with how these restrictions threaten his ability to competently practice medicine and to properly treat his patients. Act 13 burdens information-sharing in the patient treatment process, including between doctors and specialists, raising significant threats to patient health.[7] These are concrete and real risks that Dr. Khan now faces given Act 13's restrictions.

The Commonwealth tries extensively to belittle such risks, including by newly and wrongly claiming that Act 13's restrictions are equivalent to standards under federal chemical disclosure laws. Brief of Agency Appellants, at pp. 25-26. The Commonwealth has never before claimed that Dr. Kahn lacks standing on this basis, and therefore waived this issue. Further, even if this new argument were properly before this Court, Act 13's doctor restrictions are not "the

[7] Further, Act 13 prevents valuable and proper information sharing between medical professionals for the purpose of building a medical and public health base of knowledge to address adverse health effects of oil and gas operations and develop proper treatment protocols.

Pennsylvania equivalent" of standards under the federal Emergency Planning and Community Right-to-Know Act ("EPCRA").[8] Brief of Agency Appellants, at 25. If this were so, Act 13 would be superfluous. Rather, Act 13 is more restrictive than the EPCRA and its state counterpart, the Pennsylvania Hazardous Material Emergency Planning and Response Act ("Pa. Chemical Disclosure Law"). The Commonwealth's misrepresentations cannot detract from the fact that Dr. Khan is indeed subject to new restrictions under Act 13 that prevent him from communicating as he needs to in order to treat his patients effectively and to fulfill his ethical and legal obligations as a doctor in the Commonwealth of Pennsylvania.

First, while the EPCRA and its Pennsylvania counterpart are explicit in that they do not override health care professionals' information-sharing and record-keeping obligations, Act 13 contains no such limitation. Cf. 42 U.S.C. § 11041(a)(1) & (a)(3), 35 P.S. § 6022.304(b). Second, unlike EPCRA, Act 13 burdens doctors' communication from the very beginning of an emergency by requiring verbal acknowledgements of both confidentiality and that the information will be used solely for the health needs asserted *at the beginning of the emergency*, regardless of whatever issues may arise during the particular treatment process. 58 Pa.C.S. § 3222.1(b)(11); cf. 42 U.S.C. § 11043(b).

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[8] The EPCRA is a comprehensive federal law that addresses chemical disclosure. 42 U.S.C. §§ 11001-11050. It details procedures for determining when information is a "trade secret," and for ensuring that adverse effects of chemicals withheld as trade secrets are still publicly available. 42 U.S.C. § 11042, see also 42 U.S.C. § 11042(h). It provides for disclosure of chemical information such as material safety data sheets ("MSDSs") to emergency personnel. 42 U.S.C. §§ 11021-22. Also, it provides for disclosure of chemical information, including trade secrets, for both medical treatment and preventative medical or public health assessments. 42 U.S.C. § 11043. The EPCRA does not preempt state law. 42 U.S.C. § 11041(a)(1). The Pennsylvania law that both supplements and complements the EPCRA is the Pennsylvania Hazardous Material Emergency Planning and Response Act ("Pa. Chemical Disclosure Law"). 35 P.S. § 6022.304(a), see 35 P.S. §§ 6022.101-6022.307. Neither the EPCRA nor the Pa. Chemical Disclosure Law preempts or supersedes obligations under other federal or state laws. 42 U.S.C. § 11041(a)(1) & (a)(3), 35 P.S. § 6022.304(b).

Third, unlike EPCRA, Act 13 blocks non-physicians, including epidemiologists and toxicologists, from accessing trade secrets and "confidential proprietary information" for diagnosis and treatment. 58 Pa.C.S. § 3222.1(b)(10)-(b)(11); 58 Pa.C.S. § 3203 (defining "health professional"); cf. 42 U.S.C. § 11043(a), (c), & (d). As illustrated in Petitioners' briefs, this is a significant and dangerous barrier for doctors trying to determine the cause of illnesses as non-physician specialists like toxicologists are integral to the diagnosis and treatment process. R.772a-76a.

Fourth, unlike EPCRA, Act 13 lacks any basic statutory guidelines as to scope and breadth of confidentiality agreements. Act 13 gives the Environmental Quality Board ("EQB") complete discretion over the terms of these confidentiality agreements, creating additional uncertainty for practitioners. 58 Pa.C.S. § 3222.1(b)(10)-(b)(11); 58 Pa.C.S. § 3274; cf. 42 U.S.C. § 11043(d). Lastly, unlike EPCRA, Act 13 bars access to trade secrets and confidential proprietary information for preventative public health assessments, including assessments of the hazards of exposure to chemicals posed to those living in a local community. Cf. 42 U.S.C. § 11043(c)(2)(A).

As such, Act 13 differs sharply from the EPCRA and its state counterpart, reflecting the new restrictions that Dr. Khan must now confront and the new limitations on his ability to properly diagnose and treat his patients. See Bayada Nurses, Inc. v. Com. of Pennsylvania, Dept. of Labor and Industry, 607 Pa. 527, 542-45, 8 A.3d 866, 875-876 (2010); Arsenal Coal Co. v. Com., Dept. of Envtl. Res., 505 Pa. 198, 209-10, 477 A.2d 1333, 1339-40 (1984).

Further, such harm is imminent as Dr. Khan is *currently* a *practicing* physician who serves patients in an area with active gas drilling and development activity—Allegheny County—and not some location far away from hydraulic fracturing. As such, this Court should

reject the Commonwealth's continued arguments that Dr. Kahn's harm is merely speculative.

With standing, the "concern is to distinguish those who have suffered some individual injury from those asserting only the common right of the entire public that the law be obeyed." William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 203, 346 A.2d 269, 287 (1975)(plurality). Dr. Khan is not just some member of the public. Rather, the harm of Act 13's restrictions on Dr. Khan "is removed from the cause by only a single short step." 464 Pa. at 208; 346 A.2d at 289. That "single short step" is the patient's arrival in Dr. Khan's office seeking treatment for a serious illness or other reaction due to direct or ambient exposure to chemicals from hydraulic fracturing operations in both Allegheny and surrounding counties. As much as the Commonwealth attempts to belittle the issue, Act 13 now restricts the doctor's ability to treat his patients in accord with his ethical and legal obligations, threatening the very patients coming in for treatment.[9] Dr. Khan simply cannot ask his patient to wait while he challenges the Act's restrictions because the patient could die in the meantime or suffer serious health complications. As such, Dr. Khan has standing and the Commonwealth Court's decision in this regard should be reversed.

b) Merits Of Dr. Kahn's Claims[10]

Should this Court choose to address the merits of Dr. Khan's claims, rather than remand

[9] In contrast, in Pittsburgh Palisades Park the petitioners could only show remote harm because they would have sooner *benefited* from the statute's operation than have suffered harm; the harm depended on a variety of external events including Gaming Board changes. Pittsburgh Palisades Park, LLC v. Com., 585 Pa. 196, 205, 888 A.2d 655, 660-61 (2005). Further, the petitioners in that case had not even applied for a gaming license, or begun development. Id. at 205, 660-61. Also, the presence or lack thereof of agency regulations has no impact here because Act 13, by its plain language, restricts Dr. Khan's ability to practice medicine in accordance with ethical and legal obligations. Agency regulations cannot change the language of the statute. Likewise, agency regulations cannot make constitutional an otherwise unconstitutional statutory provision.

[10] Because the Commonwealth raised a new argument as to existing chemical disclosure laws, Petitioners address the impact of this new argument on the merits of Dr. Khan's claims.

to the Commonwealth Court, this Court should enter judgment in favor of Dr. Kahn on those claims. Act 13's doctor restrictions violate Article III, Section 32 of the Pennsylvania Constitution because they constitute a special law. R.770a-77a. Also, these restrictions violate the single-subject rule in Article III, Section 3 of the Pennsylvania Constitution. R.777a-78a. Rather than restate Petitioners' arguments on the merits of these claims, Petitioners respectfully incorporate arguments previously briefed at R.770a-78a. Petitioners limit the discussion here to the new issues raised in the Commonwealth's briefs.

First, the Commonwealth admits that the purpose of Act 13's doctor restrictions is to "protect the economic interests of the oil and gas industry," rather than to regulate oil and gas development. Brief of Attorney General, at p. 23. There is no "manifest peculiarit[y]" pertaining to the oil and gas industry that justifies such restrictions on doctors solely to benefit the oil and gas industry. Allegheny County v. Monzo, 509 Pa. 26, 44, 500 A.2d 1096, 1105 (1985) (citing Commonwealth v. Gumbert, 256 Pa. 532, 534, 100 A. 990, 991 (1917)).

Second, the sharp contrast outlined above between Act 13 and both the EPCRA and the Pa. Chemical Disclosure Law demonstrates the single-subject violation and the irrationality of the General Assembly's classification in Act 13.[11] Act 13 blocks preventative health assessments of the effects of hydraulic fracturing chemicals, burdens doctors in emergency situations with additional confidentiality requirements, and changes the rules for confidentiality agreements by giving complete discretion over the agreements to the EQB. Act 13 imposes such diagnosis and treatment barriers despite the fact the chemical disclosure laws applicable to all other chemical users and industries do not do so, while still providing trade secret protection.

[11] Contrary to the Commonwealth's argument, the existence of a federal law or purportedly similar statutes in other states is not relevant to whether the physician gag-rule provisions of Act 13 violate the Pennsylvania Constitution. See Brief of Agency Appellants, at p.25 & n.8.

There is no rational reason for such preferential treatment of the oil and gas industry, and the Commonwealth essentially admits as much. Brief of Attorney General, at p. 23 (indicating Act 13's doctor restrictions "protect the economic interests of the oil and gas industry").

Further, the Commonwealth continues to claim that the doctor restrictions are germane to oil and gas regulation.[12] Brief of Agency Appellants, p. 28. They are not. As this Court has noted in rejecting a similar unsuccessful effort to justify differential treatment, "no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough." City of Philadelphia v. Com., 575 Pa. 542, 578, 838 A.2d 566, 588 (2003) (citing Payne v. School Dist. of Borough of Coudersport, 168 Pa. 386, 389, 31 A. 1072, 1074 (1895)(per curiam)). That is the case here. The doctor restrictions in Act 13 do not *regulate* the oil and gas industry. Rather, the provisions only *benefit* the oil and gas industry by giving it additional protection for "trade secret[s] or confidential proprietary information" that other industries do not enjoy.

Indeed, if the legislature had placed Act 13's physician gag order provisions in the Pa. Chemical Disclosure Law, the uniqueness of the carve-out for the oil and gas industry would be even more obvious.[13] The provisions impose physician restrictions that only apply to the oil and gas industry and that are not contained in the chemical disclosure and public health framework that applies to every other chemical user and industry.

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[12] The Commonwealth also claims that a law is not an unconstitutional "special law" if it incidentally impacts those who are not directly the subject of the legislation. Brief of Agency Appellants, at pp.9-10, 28. As noted earlier, the Commonwealth waived this argument by failing to raise it below. Further, even if that contention were true, it would support Dr. Kahn's claim that Act 13 violates the single-subject rule. To say, as the Commonwealth does, that Act 13 only impacts doctors "incidentally" is to acknowledge that Act 13's restrictions on the practice of medicine are unrelated to the expressed subjects of the Act.

[13] Instead, the General Assembly inserted the doctor restrictions into Act 13 during conference committee shortly before the final law was voted on. R.778a.

Act 13's provisions force doctors to risk the health of patients potentially exposed to hydraulic fracturing chemicals because of restricted communication, and a complete bar on preventative health assessments of those same chemicals. As such, this Court should enjoin Act 13's doctor restrictions.

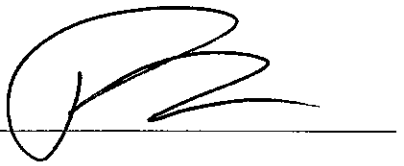
2. DRN And Ms. van Rossum Have Standing

The Commonwealth again attempts to avoid DRN and Ms. van Rossum's standing by falsely claiming that the only interest asserted is in "Act 13's alleged failure to adequately protect the environment." Brief of Attorney General, at p. 22 & n.3, n.4; Brief of Agency-Appellants, at p. 29. As detailed extensively throughout this litigation, DRN's and Ms. van Rossum's interests encompass those of landowners, business owners, and community members who live, work, and recreate in areas ***currently protected by local zoning ordinances.*** Like Petitioners Ball and Coppola, who were found to have standing, DRN Petitioners' property, business, and recreational interests will be severely damaged if Act 13 stands. Act 13 will eviscerate these protective local ordinances without respect for due process and without a meaningful opportunity to be heard. Brief of Cross-Appellants, at p.56-64; see also, e.g., R.1065a-67a (Brief in Response to Preliminary Objections). As such, DRN and Ms. van Rossum have standing.

III. Conclusion

For the foregoing reasons, and those detailed in Petitioners' prior briefs, Petitioners respectfully respect that the Court enter judgment in favor of Petitioners on Counts IV, V, VI, VII, XI and XII.

Respectfully Submitted,

BY: 

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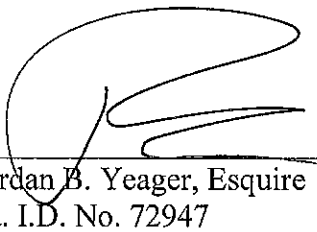

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