IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKET NO. 284 M.D. 2012

ROBINSON TOWNSHIP, ET AL.
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Respondents.

PETITIONERS' BRIEF PURSUANT TO MARCH 13, 2014 ORDER OF COURT

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I. STATEMENT OF JURISDICTION

Petitioners brought their Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief (hereinafter, "Petition for Review") pursuant to the Declaratory Judgments Act, 42 Pa. C.S. § 7531 et seq. Pursuant to an appeal and cross-appeal heard by the Pennsylvania Supreme Court's in its exclusive jurisdiction, 42 Pa. C.S. § 723(a), this matter was remanded to the Commonwealth Court for further consideration in its original jurisdiction.

The Commonwealth Court has original jurisdiction over this action on remand pursuant to 42 Pa. C.S. § 761(a)(1) because this action has been filed against the Commonwealth government and officers thereof acting in their official capacities.

II. ORDER OR OTHER DETERMINATION IN QUESTION

VI. Conclusion and Mandate

For these reasons, the Commonwealth Court's decision is affirmed in part and reversed in part. We hold that:

A. Brian Coppola; David M. Ball; Maya van Rossum; Robinson Township; Township of Nockamixon; Township of South Fayette; Peters Township; Township of Cecil; Mount Pleasant Township; Borough of Yardley; and the Delaware Riverkeeper Network state justiciable claims. The Commonwealth Court's decision on this question is, therefore, affirmed in part and reversed in part.

B. Dr. Mehernosh Khan also states a justiciable claim. The Commonwealth Court's decision on this issue is reversed, and Dr. Khan's claim is remanded for resolution on the merits.

C. Sections 3215(b)(4), 3215(d), 3303, and 3304 violate the Environmental Rights Amendment. We do not reach other constitutional issues raised by the parties with respect to these provisions. As a result, the Commonwealth Court's decision is affirmed with respect to Sections 3215(b)(4) and 3304 (on different grounds), and reversed with respect to Sections 3215(d) and 3303. Accordingly, application and enforcement of Sections 3215(b)(4), 3215(d), 3303, and 3304 is hereby enjoined.

D. The remaining parts of Section 3215(b) are not severable from Section 3215(b)(4) and, as a result, the application or enforcement of Section 3215(b) is enjoined in its entirety. Moreover, Sections 3215(c) and (e), and 3305 through 3309 are not severable to the extent that these provisions implement or enforce those Sections of Act 13 which we have found invalid and, in this respect, their application or enforcement is also enjoined.

E. The Commonwealth Court erred in sustaining the Commonwealth's preliminary objections to Counts IV and V of the citizens' petition for review. The lower court's decision in these respects is reversed and the citizens' claims are remanded for decision on the merits.

F. The citizens failed to state a claim in Count VII of the petition for review; in this respect, the Commonwealth Court's decision is affirmed on different grounds.

G. Upon remand, the Commonwealth Court is also directed to address whether any remaining provisions of Act 13, to the extent they are valid, are severable. The Commonwealth Court may request additional briefing from the parties on the issue of severability.

Jurisdiction relinquished.

Robinson Twp. v. Com., 83 A.3d 901, 999-1000 (Pa. 2013).

III. STATEMENT AND SCOPE OF STANDARD OF REVIEW

Petitioners have moved for summary relief pursuant to Pa. R.A.P 1532(b) which provides as follows:

> At any time after the filing of a petitioner for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.

An application for summary relief on a petition for review may be granted if a party's right to judgment is clear and no material issues of fact are in dispute. *Hospital & Healthsystem Ass'n of Pa. v. Com.*, 77 A.3d 587, 602 (Pa. 2013). "A fact is considered material if its resolution could affect the outcome of the case under the governing law." *Id.* (internal citations omitted).

Issues which involve the proper interpretation of constitutional and statutory provisions pose questions of law. *Alliance Home of Carlisle, PA v. Bd. of Assessment Appeals*, 919 A.2d 206, 214 (Pa. 2007).

IV. STATEMENT OF QUESTION INVOLVED

1. Is Section 3218.1 of Act 13 unconstitutional as a "special law," pursuant to Article III, Section 32 of Pennsylvania Constitution, that treats citizens utilizing private drinking water sources differently from citizens utilizing public drinking water facilities for the sole and unique benefit of the oil and gas industry?

Suggested Answer: Yes.

V. STATEMENT OF THE CASE

a. Form of Action and Procedural History

On February 14, 2012, Governor Corbett signed Act 13 of 2012 into law, codified as 58 Pa. C.S. §§ 2301-3504. Act 13 was enacted to amend the Pennsylvania Oil and Gas Act. On March 29, 2012, Petitioners filed a fourteen-count Petition for Review in this Honorable Court's original jurisdiction. The Petition for Review challenged Act 13's constitutionality and sought declaratory and injunctive relief.

On April 30, 2012 the Commonwealth parties filed preliminary objections to the Petition for Review. On May 7, 2012, Petitioners filed a motion for summary judgment, which by Order dated May 10, 2012, this Honorable Court converted into a motion for summary relief pursuant to Pa. R.A.P. 1532(b). On May 14, 2012, Petitioners filed an answer and brief in opposition to the Commonwealth's preliminary objections.

On May 21, 2012, the Commonwealth filed an answer and brief in opposition to Petitioners' motion for summary relief. The PUC, its Chairman, the DEP, and its Secretary ("PUC and DEP") also filed a cross-motion for summary relief on May 21, 2012. On June 4, 2012, Petitioners filed an answer to that cross-motion.

On June 6, 2012, an *en banc* panel of this Honorable Court heard oral argument on the Commonwealth parties' preliminary objections, Petitioners' motion

for summary relief, and the PUC and DEP's cross-motion for summary relief.

On July 26, 2012, this Honorable Court entered an Opinion and Order ("July 26 Order"), which: (1) sustained the Commonwealth's preliminary objections as to Counts IV, V, VI, VII, IX, X, XI and XII of the Petition; (2) granted Petitioners' motion for summary relief as to Counts I, II, III and VIII of the Petition; and (3) denied the Commonwealth's cross-motion for summary relief in its entirety. The Commonwealth parties filed timely Notices of Appeal and Jurisdictional Statements with the Pennsylvania Supreme Court. On August 10, 2012, Petitioners filed a consent motion to consolidate these two appeals. On August 17, 2012, Petitioners filed corresponding cross-appeals with the Pennsylvania Supreme Court including appeal of this Honorable Court's dismissal of Petitioners' Count IV of the Petition for Review raising claims of unconstitutional special laws.

On October 17, 2012 the Pennsylvania Supreme Court heard oral argument on the Commonwealth parties' appeal as well as Petitioners' cross-appeal. On December 19, 2013, the Pennsylvania Supreme Court announced the judgment of the Court that garnered a plurality of votes affirming, in part, the decision of this Honorable Court regarding the zoning provisions of Act 13, on other grounds. With respect to other challenged provisions of Act 13, a majority of Justices of the Pennsylvania Supreme Court's remanded Petitioners' claims raised in Counts IV, V, XI and XII of the Petition for Review for decision on the merits by this Honorable

Court. Respondents, PUC and the Department, subsequently requested reconsideration of the Supreme Court's decision which was denied by a majority of the Court.

Pursuant to this Honorable Court's Order of March 13, 2014, Petitioners submit this brief in support of their request for summary relief relative to Count IV of the Petition for Review – specifically, Petitioners' allegations regarding the unconstitutionality of Section 3218.1 of Act 13:

> Petitioners shall file their brief in support of their contention that 58 P.S. § 3218.1 of the Act which provides that the distinction that public water well owners but not private water suppliers are to receive notice of a spill resulting from drilling operations is unconstitutional because it is a special law or violates equal protection.

March 13, 2014 Order of Court.

Appended to this brief for this Honorable Court's consideration on other Counts on remand before this Court are portions of Petitioners' Petition for Review and briefs previously filed with this Honorable Court and the Pennsylvania Supreme Court dealing with Count V, Count XI and Count XII of the Petition for Review. *See*, Petition for Review (without exhibits), attached hereto as **Exhibit 1**; *see also*, Petitioners' Brief in Support of Motion for Summary Judgment filed with the Commonwealth Court (without exhibits), attached hereto as **Exhibit 2**; Petitioners' Brief in Opposition to Preliminary Objections filed with the Commonwealth Court (without exhibits), attached hereto as **Exhibit 3**; Brief of Cross-Appellants, Docket

Nos. 72/73 MAP 2012, filed with the Pennsylvania Supreme Court, attached hereto as **Exhibit 4**; Reply Brief of Cross-Appellants, Docket Nos. 72/73 MAP 2012, filed with the Pennsylvania Supreme Court, attached hereto as **Exhibit 5**.

b. Prior Determination

All prior determinations are listed above. The December 19, 2013 opinion of the Pennsylvania Supreme Court is currently reported as *Robinson Twp. v. Com.*, 83 A.3d 901 (Pa. 2013).

c. Statement of Facts

As noted above, Act 13 amended the Pennsylvania Oil and Gas Act enacting sweeping changes to the prior regulatory scheme of oil and gas operations within the Commonwealth which the Pennsylvania Supreme Court held to be a "remarkable...revolution." *Robinson Twp.*, 83 A.3d at 971. Section 3218.1 of the Act, entitled "Notification to Public Drinking Water Systems," provides that:

> Upon receiving notification of a spill, the department shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that the event occurred. The notification shall contain a brief description of the event and any expected impact on water quality.

58 Pa. C.S. § 3218.1.

As a result of this provision, potentially affected public drinking water facilities will be notified by the Pennsylvania Department of Environmental Protection (the "Department") in the event an oil and gas driller spills any of its hazardous

contaminants on land or into the water of the Commonwealth. By the terms of the Act, no other notifications to any other drinking water sources that could be affected are required after a spill. Notably, a majority of oil and gas operations take place in rural areas where public water facilities are not available and Pennsylvania citizens rely upon private well and spring water as their primary drinking source. According to the U.S. Census Bureau, more than three (3) million residents in Pennsylvania rely on private well water for drinking, and approximately 20,000 new water wells are drilled each year.[1]

[1] Bryan R. Swistock, M.S., et al., "Drinking Water Quality in Rural Pennsylvania and the Effect of Management Practices," PENN STATE UNIVERSITY, January 2009, at p. 5. (*available at*: www.rural.palegislature.us/drinking_**water**_quality.pdf); *see also*, Water Resources Education Network, "Groundwater: A Primer for Pennsylvanians," at p. 5 (*available at*: http://wren.palwv.org/library/documents/Groundwater_Primer.pdf) ("About four and a half million Pennsylvanians (37 percent of the population) use groundwater from wells and springs for their drinking water and other domestic uses. . . .")

VI. SUMMARY OF ARGUMENT

Section 3218.1 of Act 13 ("the Act") violates Article III, Section 32 of the Pennsylvania Constitution. It creates an unconstitutional distinction between public drinking water supplies and private water wells in violation of the equal protection principles embodied in Article III, Section 32 of the Pennsylvania Constitution. Section 3218.1 is a special law that treats citizens utilizing public drinking water sources differently than citizens utilizing private drinking water sources for the sole and unique benefit of the oil and gas industry. The difference provided for between public drinking water facilities and citizen owners of private drinking water wells must be justified on the basis of some legitimate state interest and there must be a reasonable relationship between the two. The Commonwealth has failed to provide reasoning to justify the differential treatment provided for in Section 3218.1.

As the Pennsylvania Supreme Court explained:

> [T]he required inquiry is into the effect of the provisions challenged by the citizens, with respect to whether the admitted different treatment of the oil and gas industry represented by Act 13 rests upon some ground of difference that is reasonable rather than arbitrary and has a fair and substantial relationship to the object of each challenged provision. To illustrate the point, it is simple enough to explain why the oil and gas industry is *sui generis*, and simple enough to declare that a statutory scheme designed to facilitate extraction promises economic benefits. ***But, those facts hardly explain why, for example, in the event of a "spill," notice is required to public water suppliers but not to owners of private wells.***

Robinson Twp. v. Com., 83 A.3d 901, 988-989 (Pa. 2013) (internal citations omitted) (emphasis added).

VII. ARGUMENT

Section 3218.1 of Act 13 is unconstitutional because it is a "special law" prohibited by Article III, Section 32 of the Pennsylvania Constitution. Section 3218.1 runs afoul of the Pennsylvania Constitution because it treats citizens utilizing private drinking water sources differently than citizens utilizing public drinking water facilities for the sole and unique benefit of the oil and gas industry. There is no other reason to differentiate between notice of a spill, particularly when private water sources actually have a *greater* need for notification than public facilities. The only reason for the difference in treatment is clear – a desire to mask the true effects of the oil and gas industry on rural communities, which are experiencing the brunt of oil and gas development.

The sections that follow detail: 1) the constitutional standards in Article III, Section 32; 2) how Section 3218.1 violates those standards; and 3) that the General Assembly lacks the power to make *unconstitutional* classifications.

1. Pennsylvania's prohibition against "special laws" requires equal treatment of similarly situated persons.

Article III, Section 32 of the Pennsylvania Constitution provides:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

> 1. Regulating the affairs of counties, cities, townships, wards, boroughs, or schools districts,
>
> ***
>
> 7. Regulating labor, trade, mining or manufacturing.
>
> ***
>
> Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

PA. CONST. Art. III, Sec 32.

As explained by the Pennsylvania Supreme Court in the matter *sub judice*, "[o]ver time, Section 32 – akin to the equal protection clause of the Fourteenth Amendment – has been recognized as implicating the principle 'that like persons in like circumstances should be treated similarly by the sovereign.'" *Robinson Twp. v. Com.*, 83 A.3d 901, 987 (Pa. 2013) (*citing*, *Pennsylvania Turnpike Com'n v. Com.*, 899 A.2d 1085, 1094 (Pa. 2006)); *see also*, *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 155 (Pa. 1981).

Article III, Section 32 of the Pennsylvania Constitution was adopted to end "[t]he evil [of] interference of the legislature with local affairs without consulting the localities and the granting of special privileges and exemptions to individuals or favored localities." *Harrisburg School District v. Hickok*, 781 A.2d 221, 227 (Pa. Cmwlth. 2001). Thus, when the General Assembly classifies or distinguishes between groups in a law, the classification or distinction 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.*, 899 A.2d 1085, 1094-1095 (Pa. 2006). A classification may be deemed *per se* unconstitutional if the class consists of one type of member and is substantially closed to other members. *Id.* Furthermore, a classification will violate the principles of equal protection if it does not rest upon a difference which bears a reasonable relationship to the purpose of the classification. *Cf. In re Williams*, 234 A.2d 37, 41 (Pa. Super. 1967). Thus, the General Assembly is prohibited from passing any "special law" for the benefit of one group to the exclusion of others that are similarly-situated. *See*, *Laplacca v. Philadelphia Rapid Transit Co.*, 108 A. 612 (Pa. 1919).

A classification is unconstitutional if it is based upon artificial or irrelevant distinctions used for the purpose of evading the constitutional prohibition. *See*, *Harrisburg School District v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000). "*[M]anifest peculiarities* within a legislative class . . . provide the only permissible justification for a legislative override of the uniformity required by Article III, Section 32." *Wings Field Preserv. Ass., L.P. v. Com., Dept. of Transp.*, 776 A.2d 311, 317 (Pa. 2001)(emphasis added). Those peculiarities "clearly distinguish[] those of one class from each of the other classes and imperatively demand[] legislation for each class separately that would be *useless and detrimental to the others*." *Id.*, quoting *Allegheny County v. Monzo*, 500 A.2d 1096, 1105 (Pa. 1985)(emphasis added).

2. Section 3218.1 of Act 13 violates equal protection principles by denying notice of an oil and gas-related spill to citizens reliant on private water supplies, despite these citizens' greater need for such notice than those reliant on public water.

Act 13 is a "special law" because the statutory classification made in Section 3218.1 is not reasonably related to a legitimate state purpose. The constitutional prohibition against special laws was adopted to put an end to privileged legislation enacted for private purposes. *Harrisburg School Dist. v. Hickok*, 761 A.2d 1132 (Pa. 2000). Catering to an industry not in need of special protection was the initial catalyst for the Pennsylvanian equal protection constitutional amendment which sought to ensure equal treatment of similarly-situated people. *Id.* at 1136. Section 3218.1 of Act 13 therefore achieves precisely what Article III, Section 32 of the Pennsylvania Constitution prohibits – like persons, all of the citizens of Pennsylvania who drink or use water, in like circumstances, are not being treated similarly by the sovereign.[2] *See*, *Robinson Twp. v. Com.*, 83 A.3d 901, 987 (Pa. 2013) (*citing*, *Pennsylvania Turnpike Com'n v. Com.*, 899 A.2d 1085, 1094 (Pa. 2006)). The only reason for such difference

[2] In fact, this also demonstrates a breach by the General Assembly of its fiduciary obligations under Article I, Section 27. The General Assembly, as a trustee, has a duty of impartiality, meaning that it must treat the beneficiaries of the public trust – present and future generations of Pennsylvanians – equitably in light of the purposes of the trust. *Robinson Twp. v. Com.*, 83 A.3d 901, 957, 959, 980-81, 984 (Pa. 2013)(plurality). Section 3218.1 favors those on public water supplies (usually those in suburban and urban areas) differently than those on private water (typically rural communities), to the detriment of the health and environmental quality enjoyed by public trust beneficiaries in rural communities.

in treatment is to keep rural communities in the dark about the true impacts of the oil and gas industry on their communities and individuals' private water supplies.

As will be detailed below: a) both private and public water supply owners have a need for notification of oil and gas related spills, yet Section 3218.1 only requires notice to public water supply owners; b) private water supply owners, in reality, have a *greater* need for notification due to the greater presence of gas development in rural areas, and the greater reliance on private water supplies in rural areas; c) existing notification requirements are sorely inadequate; and d) there is nothing special about the oil and gas industry that warrants this lack of notification at the expense of the health and environment of rural communities.

a. Both private and public water supply owners have a need for notification of oil and gas related spills, yet Section 3218.1 only requires notice to public water supply owners.

As explained above, Section 3218.1 provides that, "[a]fter receiving notification of a spill, the department shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that the event occurred …" 58 Pa. C.S. § 3218.1. Therefore, pursuant to the terms of Section 3218.1 of the Act, the Pennsylvania Department of Environmental Protection (the "Department") is required to notify *only public drinking sources* if a spill occurs as a result of oil and gas drilling activities. This leaves private well owners completely in the dark and unaware of the harm that may be coming to his or her family and any expected impact on their water

quality. Further, no other provision in Pennsylvania statutory law requires that the Department provide notice to Commonwealth citizens reliant on private drinking water sources, including well water, of oil and gas-related spills that could affect their drinking water.

By way of illustration, a recent spill of 480 gallons of diesel fuel was not reported to the local municipality or nearby residents, potentially jeopardizing water supplies, children and farm animals. *See*, Diesel Spill Polluted Greene County Waterway, attached to Petition for Review as Exhibit 45, attached hereto as **Exhibit 6**. Currently, Department regulations require only that oil and gas operators report spills and releases *to the Department*. 25 Pa. Code §§ 78.66, 91.33.[3] Once the Department is notified of a release pursuant to these regulations, there are no additional statutory requirements that would trigger an obligation of the Department to alert owners of private water supplies to such a spill or the expected impact on their water like that which is now required of the Department under Act 13 for public drinking water facilities.[4]

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[3] Importantly, the Act places the burden *upon landowners* to notify the Department if they have suffered from pollution or diminution of a water supply as a result of drilling if they want an investigation conducted as to whether their water has already been contaminated. 58 Pa. C.S. § 3218(b). This statutory section evidences that the Department has no obligation to provide notice to landowners who rely upon private drinking water sources and merely reacts to a complaint of impact to a water supply. It is only upon receipt of this notice by an already-affected private water user that an investigation will be conducted by the Department as to whether an oil and gas-related spill has affected their drinking water. *See*, *Id.*

[4] The Department's mission statement is as follows: "The Department of Environmental Protection's mission is to protect Pennsylvania's air, land and water from pollution and to provide for the health and safety of its citizens through a cleaner environment. We will work as partners

Notably, in the absence of Section 3218.1, neither public nor private water supply owners would receive notice of a spill. In recognition of this deficiency, Section 3218.1 of Act 13 statutorily mandated an affirmative duty upon the Department to provide notice of spills or releases *to public water facilities*. In doing so, *notwithstanding the outstanding need for notice to both private and public water sources*, Section 3218.1 of Act 13 omitted any similar requirement to provide notice of spills or releases to owners of private water sources.

To illustrate the situation in the absence of Section 3218.1, Department regulations dictate that owners or operators responsible for reportable releases take "corrective action" to: "(1) prevent the substance from reaching the waters of this Commonwealth; (2) recover or remove the substance which was released; (3) dispose of the substance in accordance with this subchapter or as approved by the Department." 25 Pa. Code § 78.66(e). Notably, there is no affirmative requirement upon the oil and gas industry to alert surrounding residents using private water supplies for drinking and bathing among the "corrective actions" required by the Department. A party responsible for a spill, not the Department, is only required to notify downstream users of the water, "*if reasonably possible to do so*." 25 Pa. Code § 91.33(a)(emphasis added). While Department regulations require a responsible party to take action to prevent injury and

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with individuals, organizations, governments and businesses to prevent pollution and restore our natural resources." (*available at*: http://www.depweb.state.pa.us).

pollution as a result of a spill, a nearby resident who depends on a private water as his/her families' drinking, bathing and cooking water source can similarly take action to protect himself *only if he has notice of the incident and the possibility that the potential harm exists*. 25 Pa. Code § 91.33(b) (emphasis added).

Thus, although Section 3218.1 instituted notice to public water supply owners, the General Assembly chose to continue to keep private well owners in the dark about nearby oil and gas-related spills, despite the need of *both* to be aware of such spills, and the potential impact on the water that they rely on. Further, as will be illustrated, private well owners actually have a *greater* need for notification than public water supply owners.

b. Private water supply owners, in reality, have a *greater* need for notification due to the greater presence of gas development in rural areas, and the greater reliance on private water supplies in rural areas.

The fact that Section 3218.1 continues to deny private water supply owners notice of oil and gas-related spills is even more egregious because private water supply owners actually have a *greater* need for such notification than public water supply owners.

First, the majority of drilling is occurring in more rural areas serviced by private water sources.[5] Rural families and their livelihoods are often dependent on

[5] *See*, Department of Environmental Protection January 2014 Map of Oil and Gas Wells Drilled in Pennsylvania, attached hereto as **Exhibit 7**.

water wells and springs that have run for decades or longer, providing drinking water for people and pets, and water for livestock and irrigation. *See*, Affidavits of Swartz and Kowalchuk, attached as Exhibits 15 and 16 to Petitioners' Brief in Opposition to Preliminary Objections, attached hereto as **Exhibit 8**; *see also*, *Robinson Twp*, 83 A.3d at 922, 938. In contrast, public water supplies are typically located in more suburban and urban areas, where gas development is either more difficult due to population density, and relatedly, to more significant community opposition.

Despite the facts, Section 3218.1 provides no notice of oil and gas related spills to rural families, even though gas development is more common in rural areas, and even though these families, their pets, their livestock, and in many cases, their livelihoods, are dependent on private water supplies. The Commonwealth has failed to provide any legitimate basis for the distinction between public and private drinking water supplies in such a situation. The rationale for the exception embodied by Section 3218.1 suggests "special" treatment for the oil and gas industry so that it can operate in rural areas without communities having a full understanding of its impact on their water supplies, their communities, their health, their livelihoods, and the food supply. This provision bears no rational basis to any legitimate public interest.

As indicative of the need for notification to private water sources and as cited by the Pennsylvania Supreme Court, Stacey Haney, a life-long resident of Amwell

Township, a rural area located in Washington County, Pennsylvania, lived approximately 1500 feet from drilling operations known as the Yeager Drill Site. *See*, Affidavit of Stacey Haney, attached as Exhibit 6 to Petitioners' Brief in Support of Motion for Summary Judgment, attached hereto as **Exhibit 9**; *see also*, *Robinson Twp.*, 83 A.3d at 937. As drilling commenced, there was a noticeable change in the quality of Stacey's air and water. *Id.* at ¶¶ 12-15. Stacey states as follows:

> [O]nce drilling and fracking operations began at the Yeager Drill Site, when running water to take a bath, my bathtub filled up with black sediment and again smelled like rotten eggs. As a result, my entire family stopped bathing in our bath tub. Shortly after noticing the change in our air and water quality, our family dog became ill, refused to drink our well water and subsequently died. Thereafter, our 4H prize goat aborted its fetuses which were deformed and later died after consuming our well water.

Id. at ¶ 13.

Stacey and her two children began feeling ill and suffering from a variety of health problems. *Id.* at ¶¶ 16-17. Based on her physician's advice, she and her children abandoned their farmhouse. *Id.* at ¶ 18.

In addition, unlike private water supply sources, public drinking water facilities already routinely test, monitor and treat the drinking water being supplied to ensure compliance with drinking water standards.[6] As a result, there are no special

[6] *see also*, Water Resources Education Network, "Groundwater: A Primer for Pennsylvanians," at p. 5 (*available at*: http://wren.palwv.org/library/documents/Groundwater_Primer.pdf) ("Water supplied by a public water system is tested and treated so users can be assured that their water is

circumstances or need that would justify public drinking water supplies receiving the benefit of notification *to the exclusion* of owners of private water wells used for drinking water. Quite the contrary, it is the Pennsylvania citizens who rely upon private water wells that can in fact demonstrate a special need for notification. Private water wells are neither publicly monitored nor routinely tested and are far more susceptible to contamination from a spill or release as a result of oil and gas operations.

Indeed, in the matter *sub judice*, with regard to Petitioners' claims of special law, the Pennsylvania Supreme Court explained:

> [T]he required inquiry is into the effect of the provisions challenged by the citizens, with respect to whether the admitted different treatment of the oil and gas industry represented by Act 13 rests upon some ground of difference that is reasonable rather than arbitrary and has a fair and substantial relationship to the object of each challenged provision. To illustrate the point, it is simple enough to explain why the oil and gas industry is *sui generis*, and simple enough to declare that a statutory scheme designed to facilitate extraction promises economic benefits. ***But, those facts hardly explain why, for example, in the event of a "spill," notice is require to public water suppliers but not to owners of private wells.***

Robinson Twp. v. Com., 83 A.3d 901, 988-989 (Pa. 2013) (internal citations omitted) (emphasis added).

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safe. Rural homeowners with their own wells are responsible for the safety of their own water supply.")

Section 3218.1 constitutes an unconstitutional "special law" in violation of the equal protection principles embodied in the Article III, Section 32 of the Pennsylvania Constitution. It creates a classification between citizens using public drinking water facilities and citizens using private drinking water sources in order to provide the oil and gas industry with special treatment in order to lessen its burden associated with regulatory compliance and to mask the true effects of the industry on individuals' private water supplies and on rural communities where these operations occur most often. This distinction bears no rational relationship to any legitimate state interest and cannot be justified on the basis of public health, safety or welfare.

c. Existing notification requirements are sorely inadequate.

In addition to what has been described above as to the lack of notice in the absence of Section 3218.1, the current regulatory treatment of oil and gas operations in Pennsylvania further illustrates the lack of notice to the millions of Pennsylvania citizens reliant on private water wells for drinking water.

The Program Manager of the Department's Oil and Gas Program for the Southwest Region of Pennsylvania recently revealed, in testimony given under oath, a draconian system where a citizen dependent on well water as their drinking water source may never receive notification of a spill even in the event that an up-gradient neighbor's water has been confirmed to be impacted and contaminated as a result of oil

and gas operations. *See*, Deposition Transcript of Alan Eichler, selected pages attached hereto as **Exhibit 10**. Following a spill or other release, despite no provision in the law authorizing this action, the Department's practice is that if a settlement is reached between an oil and gas operator and an affected resident whose water has become contaminated by oil and gas operation spills or releases and not safe to drink, a Notice of Violation may not be issued[7] as a result of impact to a private drinking water supply nor will a formal determination follow from the Department indicating that the contamination of drinking water has occurred.[8] *Id.* at 253-255. Where there is no Notice of Violation, determination, or other penalty assessed, the Department's Program Manager of the Oil and Gas Program testified that, in the circumstances where the operator enters into a settlement agreement with a citizen where the citizen's water was impacted and contaminated from drilling operations, spills and releases, *there are no means* for the public to find out that neighboring water supplies had been contaminated as a result of oil and gas drilling operations. *Id.* As a result, a citizen of the

[7] This is despite the fact that the discharge of residual waste onto the ground by oil and gas drilling activities is a violation of Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301, and constitutes *unlawful conduct* as well as *public nuisance* under Sections 302 and 601 of the Act. 35 P.S. §§ 6018.302, 6018.601. Likewise, water mixed with drilling pit fluid constituents that are discharged into the waters of the Commonwealth, *in any amount*, is an "industrial waste" as that term is defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1. Waters of the Commonwealth, as is defined by Section 1 of the Clean Streams Law, includes ground water.

[8] Importantly, violations are considered by the Department when deciding whether to issue future permits to drill gas wells. 58 Pa. C.S. § 3211(e.1). Where no violation exists of record, it is unclear how the Department or the public may consider an applicant's true violation history.

Commonwealth, who depends on well water or spring water, may live next door and down-gradient from another individual whose water has been negatively impacted and contaminated by drilling and spills of hazardous chemicals – and may never know it nor is the Department under Act 13 obligated to provide notice. In many of these cases, the neighboring property owners will likely draw from the same underground water source or aquifer. Despite the fact that the Department, the oil and gas operator, and the neighbor know that contaminants exist in the aquifer, other residents would not be aware of any potential issues with their drinking water until they began personally experiencing the detrimental effects associated with using contaminated water for drinking, bathing and cooking.

Furthermore, even if the Department had issued a Notice of Violation, unless a neighbor has the Internet, is monitoring the Department website, and understands what to look for, the Department is still not obligated to report or warn of a spill of residual waste or of the potential peril that awaits an unsuspecting family using their private water source for drinking and bathing.

Even more problematic, the Department does not know all of the chemicals used at drill sites and placed into the Pennsylvania environment. *See*, *infra*. Therefore, it is unclear how the Department can fully determine the potential impact of a release upon a private water source without knowing the chemical composition that make-up the fluids contained in the spill. Current disclosure requirements mandate that an operator

report the chemical content of its hydraulic fracturing fluid to a chemical disclosure registry, such as "Frac-Focus." *See*, 58 Pa. C.S. § 3222.1; *see also*, 58 Pa. C.S. § 3203. However, the law provides an exemption from disclosure of "trade secret" or "confidential proprietary information." 58 Pa. C.S. § 3222.1(b)(3).

In many cases, the Department is merely provided with Material Safety Data Sheets ("MSDS") and well record and completion reports from oil and gas operators submitted to the Department, neither of which contain a full list of the chemical constituents and components of those products used or brought to a drill site. For example, in well record and completion reports, the operator is to identify all products that were used to stimulate each well at a well site. However, if the MSDS for a particular product is incomplete or fails to list all of the chemicals contained in that product, the Department and the operator have no way of identifying the chemicals utilized in stimulating that well. *See*, Department Well Completion Record with referenced MSDS, attached hereto as **Exhibit 11**. Other products utilized by operators may hold the complete chemical make-up as proprietary. *See*, MSDS for Drispac, attached hereto as **Exhibit 12**. Thus, when the operator "discloses" a product's chemical content information to Frac-Focus the information of what chemicals were used to stimulate a well is incomplete. *See*, Frac-Focus Hydraulic Fracturing Fluid Product Component Information Disclosure, attached hereto as **Exhibit 13**. ("All component information listed was obtained from the supplier's Material Safety Data Sheets

(MSDS). As such, the Operator is not responsible for inaccurate and/or incomplete information.")[9]

MSDS themselves often fail to disclose full components of products and may contain a percentage of a product's make-up is unaccounted for. Furthermore, a combination of drilling muds, flowback water, drilling fluids, hydraulic fracturing chemicals and frac-water is often mixed and brought together from multiple sites and housed in "impoundments." It is unclear how the Department would identify the components of these mixtures, often referred to as "frac-water" or "recycled water," or the water containing the degradation of chemicals or what chemicals formed as a result of chemical reactions, and concoctions in order to provide notice of its potential impact to surrounding landowners if and when a leak has occurred.[10] The Department, therefore, is unable to independently protect private water sources short of giving notice of a spill to Commonwealth citizens depending on private water wells as a drinking

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[9] Frac-focus reports only the information the operator provides. If the MSDS are lacking or the manufacturer of the product claims that the ingredients are proprietary, neither the industry nor the Department, which derives its knowledge from industry submission of MSDS, will know all of the chemicals being used or spilled during drilling processes in the Commonwealth. It is generally the manufacturers of the products that hold the "proprietary formula" or trade secrets who refuse to disclose that information to the industry, the Department or Pennsylvania citizens.

[10] In 2011, the United States House of Representatives Committee on Energy and Commerce reported that between 2005 and 2009, fourteen (14) oil and gas service companies used more than 2,500 hydraulic fracturing products containing 750 chemicals and other components. *See*, *Chemicals Used in Hydraulic Fracturing*, UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE, April 2011, at p. 5, attached hereto as **Exhibit 14.**

water source. Without notice, Pennsylvania citizens using water wells for their drinking water cannot protect themselves by testing, stopping use or by means of water replacement until the citizens are assured the harm has passed.[11]

d. There is nothing special about the oil and gas industry that warrants this lack of notification at the expense of the health and environment of rural communities.

As already demonstrated, there is no reason for providing notification of an oil and gas-related spill to public drinking water facilities and not to residents who rely upon private drinking water supplies where most drilling activity is occurring. Consequently, rather than seeking to serve a legitimate state purpose, the General Assembly enacted "special" legislation – Section 3218.1 – requiring notice of spills *only to public drinking water facilities* in order to lessen the economic burden that may be felt by the oil and gas industry if notice were also required to owners of private water sources, and to hide the true impacts of the oil and gas industry on rural communities and citizens utilizing private water sources for drinking, bathing and

[11] In a letter to a Pennsylvania citizens, Respondent, former Secretary of the Department, addressed how the Department responds to "complaints" evidencing the policy of reaction and not proactive involvement after a spill occurs and before a complaint is received. Former Secretary Krancer confirmed that since 2009, twenty-five (25) cases of private water wells were impacted as a result of oil and gas operations. *See*, April 12, 2013 Letter from Secretary Krancer, attached hereto as **Exhibit 15**. Furthermore, following an appeal to the Commonwealth Court for access to Department records, a Times Tribune reporter's investigation revealed that oil and gas development *damaged at least 161 water supplies* in Pennsylvania between 2008-2012. *See*, Sunday Times review of DEP drilling records water damage, murky testing methods, attached hereto as **Exhibit 16**; *see also*, *Com. Dept. of Environmental Protection v. Legere*, 50 A.3d 260 (Pa. Cmwlth. 2012).

cooking.

Unlike private water sources, public water facilities are centralized and, as explained above, routinely monitored, tested and treated. In contrast, numerous well owners may surround a shale gas well site or a centralized wastewater impoundment.[12] Requiring that an oil and gas operator report spills to owners of private water sources could create an additional monetary burden[13] to the oil and gas industry because homeowners in the potential pathway of a spill may **rightly** demand water testing or a replacement water source until a threat has passed or the water is deemed safe for them, their children and their animals to drink. As such, Section 3218.1 was drafted to unequally benefit the industry at the expense of Commonwealth citizens without any rational basis to do so.

Section 3218.1 relieves the industry of the potential financial hurdles that would occur as a result of a release or spill. Expenditures for water testing and/or water replacement by the oil and gas industry may be necessary to ensure that proper

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[12] The Oil and Gas Act provides for pre-drilling water testing and establishes a rebuttable presumption that a well operator is responsible for pollution of a water supply as a result of drilling or alteration of an oil or gas well if certain criteria are met. 58 Pa. C.S. § 3218(c). Notably, this presumption does not apply to impacted water supplies surrounding centralized wastewater impoundments that could remain in place for decades. Furthermore, wastewater transfer lines connecting centralized impoundments can run for miles between drill sites. Leaking within these lines which are subject to changing weather is not abnormal and is more likely or as likely to result in spills that could impact private drinking water sources.

[13] In the case of a gas well site, the operator should have identified nearby water wells within a particular distance of the wellpad, allowing it to more easily notify surrounding landowners. 58 Pa. C.S. § 3211.

precautions are in place to allow Commonwealth citizens to protect themselves from any harm. 25 Pa. Code § 78.51. Under the current scheme, the Department and the industry are merely reactive rather than proactive, and wait for a complaint by a citizen that his or her water tastes bad, looks bad, smells bad or a family member, pet or farm animal has become sick, and possibly died, from drinking the water before the Department will act and perhaps reveal that a spill has occurred. Section 3218.1 relieves the oil and gas industry from having to address its true impact on rural communities, their water supplies, and their health and may respond only after a citizen has personally been affected by the spill and files a complaint with the Department. *See*, 58 Pa. C.S. § 3218(b).

The Commonwealth has been unable to provide any rationale to justify how this preferential treatment of the oil and industry bears a reasonable relationship to a proper state purpose. As evidenced above, in light of the need for notification in rural areas where private water is relied upon for drinking, bathing and cooking by millions of Pennsylvania citizens, such a rational relationship simply does not exist. This fact alone is evidence that this legislation was about "favoritism," which Article III, Section 32 prohibits. *Zogby*, 828 A.2d at 1088. 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, 761 A.2d 1132, 1136 (Pa. 2000).

The unequal distinctions between millions of Pennsylvania citizens made in Section 3218.1 certainly cannot be advanced as a reasonable nor rational means to an end when the alleged purpose of Act 13 was to protect the health, safety and welfare of all citizens of the Commonwealth equally. In effect, the General Assembly has created unequal treatment, for millions of Pennsylvania citizens that rely upon private water well sources as their primary drinking water, without good cause or a proper state purpose in violation of equal protection principles. The fact that the Department has the directive and the ability to inform public drinking water facilities of a spill that could affect public drinking water illustrates the unequal treatment to millions of Pennsylvania citizens as the information exists, but will be provided to only some and not all of our citizens.

This Honorable Court previously relied upon case law concerning the Bituminous Coal Mines Act which contains classifications unique to the coal industry. *See*, *Robinson Twp. v. Com.,* 52 A.3d 463, 486-487 (Pa. Cmwlth. 2012); *see also*, *Read v. Clearfield Co.*, 12 Pa. Super. 419 (1900); *Dufour v. Maize*, 56 A.2d 675 (Pa. 1948). However, the distinctions provided for in that Act were reasonably related to characteristics that were entirely unique to the mining of bituminous coal. In particular, the *Dufour* court stated that, "[t]hese are substantial and real differences which, in our opinion, justify the classification made by the act." 56 A.2d at 677. Any such differences must be "founded on real distinctions in the subjects

classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition." *Id.* This type of classification was justified as a proper use of **police power**; in other words, it provided protection for the health, safety and welfare of the community. *Read*, 12 Pa. Super. at 427.

3. The power to make a classification does not grant the power to make *any* classification or give any benefit – anything less reads Article III, Section 32 out of the Pennsylvania Constitution entirely.

The Commonwealth has maintained that the General Assembly may permissibly create statutory classifications in the law without violating Article III, Section 32 of the Pennsylvania Constitution. *See*, Supreme Court Brief of PUC and DEP, at pp. 6-7, Docket No. 72 MAP 2012; *see also*, Supreme Court Brief of Attorney General, at p. 24, Docket No. 73 MAP 2012. Petitioners do not dispute this point. However, the Commonwealth's argument essentially states that because the General Assembly constitutionally maintains this power, any classifications found in Act 13 are constitutional enactments of the legislature. *See*, Supreme Court Brief of PUC and DEP, at p. 7, Docket No. 72 MAP 2012. 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. *See*, *Robinson Twp.*, 83 A.3d at 974.

Rather, as is well-settled in Pennsylvania law and as was recognized by this Honorable 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." *Robinson Twp. v. Com.*, 52 A.3d 463, 486 (Pa. Cmwlth. 2012) (*citing*, *Pennsylvania Turnpike Com'n v. Com.*, 587 Pa. 347, 363-64, 899 A.2d 1085, 1094-1094 (2006)). A classification may be deemed *per se* unconstitutional if the classified class consists of one type of member and is substantially closed to other members. *See*, *In re Williams*, 234 A.2d 37 (Pa. Super. 1967). Consequently, a "legitimate state interest" alone is not sufficient to sustain constitutional scrutiny. 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 relationship between the means and 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.

899 A.2d at 1097. (emphasis added); *see also*, *Harrisburg School District v. Zogby*, 574 Pa. 121, 828 A.2d 1079. 1088-1089 (2003) (differential treatment is appropriate "provided the classifications at issue bear a reasonable relationship to a legitimate state purpose."); *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."); *Wilkinsburg Police Officers Ass'n (Harder) v. Commonwealth*, 535 Pa. 425, 636 A.2d 134, 140 (1993) (statutory classifications must have a rational relationship 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.").

While the Commonwealth allegedly acknowledges this constitutional standard, it pays only lip service to the relationship necessary to justify statutory classifications made. Simply because a classification is made by the General Assembly does not conclusively mean that it is constitutionally sound. *See*, *Robinson Twp.*, 83 A.3d at 951. ("The General Assembly's declaration of policy does not control the judicial inquiry into constitutionality.") The Commonwealth has failed

to address what sort of real differences exist between citizens using public and private water sources in order to justify the differential treatment each receive regarding notification following a spill as a result of drilling activities. Likewise, the Commonwealth has failed to demonstrate how the classification in fact promotes, or bears a reasonable relationship to, a public interest. In order for any distinction creating such an unequal disparity to be constitutional, such a showing is required, *at a minimum*.

Section 3218.1 of Act 13 creates a distinction which is entirely arbitrary – the General Assembly recognized the need for public water sources to receive notification of nearby spills and failed to provide any justification why the same need does not inhere to owners of private water sources. This sort of special privilege afforded to a selected group rests on an entirely artificial and arbitrary distinction in violation of Article III, Section 32. *See, Laplacca v. Philadelphia Rapid Transit Co.*, 108 A. 612 (Pa. 1919). Consequently, Section 3218.1 of Act 13 violates Article III, Section 32 of the Pennsylvania Constitution.

Petitioners are therefore entitled to judgment as a matter of law and request that this Honorable Court enter an order declaring Section 3218.1 of Act 13 unconstitutional and directing the Department to treat all Pennsylvania citizens equally and provide notice to owners of all water sources, regardless of their distinction of users of public or private drinking water.

VIII. CONCLUSION

Based upon the foregoing, there is no rational basis that could sustain the distinction made in Act 13 to benefit the oil and gas industry and to fail to provide notice of spills and releases to owners of private drinking water sources. This statutory classification in Act 13 fails to serve or further a legitimate state purpose. Therefore, this Honorable Court should declare Section 3218.1 unconstitutional as a matter of law and enter an Order requiring that the Department provide notification of spills to owners of private water sources in addition to public drinking water facilities.

WHEREFORE, Petitioners respectfully request that this Honorable Court:

1) Declare Section 3218.1 of Act 13 unconstitutional as a special law in violation of Article III, Section 32 of the Pennsylvania Constitution; and
2) Issue an Order requiring the Commonwealth, through the Pennsylvania Department of Environmental Protection, to provide individuals and/or entities that utilize non-public drinking water with the same notice, rights and protections as Section 3218.1 affords to public water facilities.

Respectfully Submitted:

BY: _____

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CERTIFICATE OF COMPLIANCE

I, John M. Smith, certify that, based on the word count system used to prepare the foregoing Petitioners' Brief Pursuant to March 13, 2014 Order of Court, the Petitioners' Brief Pursuant to March 13, 2014 Order of Court contains 7584 words, exclusive of the cover page, the Table of Contents, the Table of Citations, the signature block, exhibits and the certifications. This submission therefore complies with the word count limits of Pa. R.A.P. 2135(a).

DATE: 3/31/2019

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CERTIFICATE OF SERVICE

I, John M. Smith, do hereby certify that a true and correct copy of the foregoing Petitioners' Brief Pursuant to March 13, 2014 Order of Court was served via United States First-Class Mail on this 31st day of March 2014, to the following:

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EXHIBIT 1

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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.,	Docket No. 284 MD 2012 TYPE OF PLEADING: **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF** Filed on behalf of: Petitioners
Petitioners, vs. 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 Respondents.	Counsel for Petitioners: John M. Smith, Esquire Pa. I.D. No. 75663 Smith Butz, LLC 125 Technology Drive, Suite 202 Bailey Center I, Southpointe Canonsburg, PA 15317 (724) 745-5121 Jonathan M. Kamin, Esquire Pa. I.D. No. 81958 Goldberg, Kamin & Garvin LLP 1806 Frick Building Pittsburgh, PA 15219 (412) 281-1119 Jordan B. Yeager, Esquire Pa. I.D. No. 72947 Curtin & Heefner LLP Heritage Gateway Center 1980 South Easton Road, Suite 220 Doylestown, PA 18901 (267) 898-0570 William A. Johnson, Esquire Pa. I.D. No. 14906 23 East Beau Street Washington, PA 15301 (724) 225-3955 Susan J. Kraham, Esquire Pa. I.D. No. 310292 Columbia University School of Law 435 West 116th Street New York, New York 10027 (212) 854-500

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBINSON TOWNSHIP, Washington County, Pennsylvania, et al. Petitioners, vs. COMMONWEALTH OF PENNSYLVANIA, et al. Respondents.	)	Docket No. TYPE OF PLEADING: **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complain or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Dauphin County Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
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for domestic, commercial, agricultural or industrial use," municipalities face the risk that such laws would now be preempted by Act 13. This provision bears no rational basis to any legitimate public interest and serves to violate § 10604.

166. Act 13 creates a distinction which is entirely arbitrary – the need for public water sources to receive notification of spills and not private water sources is not unique. This sort of special privilege afforded to a selected group rests on an entirely artificial and arbitrary distinction in violation of Article III, Section 32. *See*, *Laplacca v. Philadelphia Rapid Transit Co.*, 108 A. 612 (Pa. 1919).

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article III, Section 32 of the Pennsylvania Constitution;

II. For a decree to permanently enjoin future application of Act 13; and

III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT V – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

V. Petitioners seek a declaration that Act 13 is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth's eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.

167. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

168. Section 3241 of Act 13, entitled "eminent domain," states that, "[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 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."

169. The United States and Pennsylvania Constitutions mandate that private property can only be taken to serve a public purpose. *In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246 (Pa. 2010). Private property cannot be taken for the benefit of another private property owner. *Kelo v. City of New London*, 545 U.S. 469 (2005).

170. The Pennsylvania Supreme Court has maintained that to satisfy this obligation of serving a "public purpose," the public must be the primary and paramount beneficiary of any taking. *In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010). In considering whether a primary public purpose was properly invoked, the Pennsylvania Commonwealth Court has looked for the "real or fundamental purpose" behind a taking. *In re Opening a Private Rd. for Benefit of O'Reilly Over Lands of (a) Hickory on Green Homeowners Ass'n & (b) Mary Lou Sorbara*, WL 1709846 (Pa. Commw. Ct. 2011) (on remand from the Pennsylvania Supreme Court). Stated otherwise, the true purpose must primarily benefit the public. *Id.*

171. The question that must be asked is what public purpose is being served by the appropriation of an interest in real property by a corporation for the storage of natural gas? If such is deemed a "public purpose," then any oil and gas corporation by analogy should have the right by use of eminent domain powers to acquire real property for the placement of above-ground storage of natural gas, including the use of storage tanks.

172. Moreover, Section 3241 is inconsistent with the limitations on the use of eminent domain under the Property Rights Protection Act. 26 Pa. C.S.A. § 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. Specifically, the appropriation of an interest in real property by a corporation for the storage of natural gas is not listed as an exception under § 204(b).

173. Because it cannot be justified on the basis of any paramount public purpose, Section 3241 of Act 13 facilitates an unconstitutional taking of private property for a private purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

I. For a decree declaring and adjudging that Act 13 is an unconstitutional taking in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution;

II. For a decree to permanently enjoin future application of Act 13; and

III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT VI – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

IV. Petitioners seek a declaration that Act 13 unconstitutionally violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources.

174. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

175. Article I, Section 27 of the Pennsylvania Constitution states the following:

> The people have a right to clean air, pure water, and to the preservation of 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 people.

Pa. Const. Art. I, Sec. 27 (the "Environmental Rights Amendment").

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1061(b)(2) and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of the Due Process Clause of the United States Constitution;

II. For a decree to permanently enjoin future application of Act 13; and

III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT XI – DECLARATORY JUDGMENT

Mehernosh Khan, M.D., v. Commonwealth of Pennsylvania et al.

XI. Petitioners seek a declaration that Act 13 is an unconstitutional "special law" in violation of Article III, Section 32 of the Pennsylvania Constitution which restricts health professionals' ability to receive and disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry.

249. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

250. The General Assembly, through Section 3222.1(b)(11) of Act 13 created an unconstitutional special law that is solely applicable to and only favors the natural gas industry. Section 3222.1(b)(11) imposes restrictions on health professionals' abilities and obligations to disclose critical diagnostic information necessary for medical treatment solely because such information has been deemed by the natural gas industry as "proprietary" or a "trade secret." The General Assembly has singled out the natural gas industry for special treatment and protection not afforded to any other industry:

> 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.

Act 13, § 3222.1(b)(11).

251. Chemicals, including products with multiple chemical compounds and so called "proprietary or trade secret substances," are used daily in a wide spectrum of occupations and industries throughout Pennsylvania. The widespread use of chemicals in a myriad of daily activities can result in human exposure with adverse health effects that may result in disease, illness, and the exacerbation of pre-existing conditions in a person.

252. To prevent such illnesses from occurring, companies in the business of manufacturing chemical products are required to create Material Safety Data Sheets (MSDS) that identify each chemical component of the product it is selling. Within that MSDS sheet, a chemical product manufacturer is required to list not only the toxicity of each chemical constituent that makes up the product, but also all of the known adverse health effect, of each chemical component. *See*, OSHA Law & Regulations, Hazard Communication Standard, attached hereto as Exhibit 46.

253. In practical effect, under the Hazard Communication Laws promulgated by the Occupational Safety and Health Administration, for example, an employer must provide copies of, or access to, every MSDS for every product used or found in that work place so that proper worker precautions, health and safety protections, and disclosures are made. *See*, Exhibit 46. In the event that a human exposure to any of these chemicals results in an adverse health effect, the worker has information available to him regarding his exposures to share with his treating physicians.

254. The sharing of this information between patient and doctor is not only critical to determine what the disease is, but is equally as important to share between treating physicians, like emergency room doctors, and specialists to afford a patient competent medical care and treatment.

255. In order for a physician to completely and properly treat a patient, it is imperative that a physician make a proper and correct diagnosis of the aliment. To do so, a doctor must consider all of the patient's symptoms as well as his/her occupational, social, medical, and environmental history to perform what is known as a differential diagnosis. A differential diagnosis is a process by which a doctor "rules in" or takes into consideration and then "rules out" specific illness or disease process based upon a full disclosure of all of a patient's symptoms, prior medical history, as well as occupational and environmental exposures.

256. Once a differential diagnosis is made, a doctor, in order to give competent medical care, must perform what is known as a differential etiology. In this process, a doctor is required to "rule in" and then "rule out" all possible causes of the patient's disease or illness. It is critically imperative when performing a differential etiology that the doctor has complete information regarding all of the patient's past medical, social, occupational and environment exposure history to properly determine the source or cause of the patient's illness or disease.

257. Many times, in particular with exposure induced diseases, an emergency room doctor or primary care physician must, in order to properly and competently diagnose and treat a patient, refer such a patient to a specialist like an occupational or environmental physician or toxicologist, doctors trained to diagnose and treat patients with illnesses and diseases resulting from chemical exposures in the workplace and living environments. In that referral relationship, the emergency room doctor or primary care physician must share with the specialist his/her

knowledge of the patient's exposures including any and all chemical exposures whether they are proprietary or not in order for the specialist to competently diagnose and treat that patient.

258. A physician's ability to share not only diagnostic test results, like MRIs, x-rays, or blood tests, but a patient's history of exposure to specific chemicals and the dose and duration of the patient's exposure to those chemicals, even if only qualitative, is not only necessary to properly treat and diagnose a patient but is an essential tool of practicing competent medicine. It is for this reason alone that many hospitals, doctors' offices, and treating institutions have computerized all patients' files so they can be accessed by all of the patient's doctors in order to accurately and consistently share critical patient specific information to properly treat each individual patient.

259. As such, without complete information, such as a full chemical exposure history, a doctor could very easily improperly diagnose and treat a patient, making his/her illness worse not better, and thus, opening himself up to a claim of medical malpractice.

260. Pennsylvania law re-emphasizes the importance of openness among health professionals in the process of evaluating and treating illness by imposing numerous affirmative duties on health professionals to ensure that critical and essential information related to the treatment of human illnesses is shared and readily available:

a. Physicians are **required** to keep medical records that:
    i. Accurately, legibly, and **completely** reflect the evaluation treatment of the patient. 49 Pa. Code §16.95(a);
    ii. Must contain clinical information pertaining to the patient that has been accumulated by the physician or the physician's agents. 49 Pa. Code §16.95(c);
    iii. Must contain diagnoses, findings, or results of pathologic or clinical laboratory examination, radiology examination, medical and surgical treatment and other therapeutic procedures. 49 Pa. Code §16.95(d);

b. Healthcare practitioners have an obligation to report certain diseases, infections and medical conditions, including cancer. 28 Pa. Code §27.21a(b)(2);

c. Practitioners regulated by the Pennsylvania Board of Medicine are subject to disciplinary action if the offer, undertake or agree to treat a disease by a secret method, procedure treatment or medicine or by refusing to disclose the means, method, or procedure that the practitioner has treated a human condition to the Board of Medicine upon demand of the Board. 49 Pa. Code §16.61(a)(12);

d. Practitioners regulated by the Pennsylvania Board of Medicine are subject to discipline if they fail to act in such a manner as to present an immediate and clear danger to public health or safety. 63 P.S. §422.41(9).

261. Knowledge and the sharing of information has been the keystone to the development of medical knowledge and treatment techniques for centuries. In fact, **Pennsylvania laws** impose mandatory obligations on health professionals to report their findings in their medical records, thereby sharing with other health care professionals. 35 P.S. §§ 563.1-563.13. *See*, Pennsylvania Record Keeping Requirements, attached hereto as Exhibit 47. Section 3222.1(b)(11) of Act 13 prohibits health professionals from making **any** disclosure of information that they receive regarding chemicals that the natural gas industry deems as "proprietary" or "trade secrets" **even when such a disclosure is necessary to treat a particular patient or to protect public health**. *See*, Act 13 §3222.1(b)(11). Under Section 3222.1(b)(11) of Act 13, health professionals are prohibited from sharing with other physicians any knowledge that they have gained from disclosures by the natural gas industry related to "proprietary" substances or "trade secrets" for any purpose other than treating an emergent condition. *Id.*

262. Thus, under Act 13, an emergency room doctor who sees a patient with a suspected chemically induced disease who is provided by the industry with a disclosure of the chemicals the patient was exposed to would be prohibited from practicing competent medicine as he would not be permitted to share that disclosed chemical exposure information with the specialist he is referring the patient to in order to receive the proper medical care.

263. Moreover, Act 13 only requires the dissemination of trade secret or propriety chemical information from the industry in "emergency" situations, this restriction again, forces doctors to practice irresponsible and dangerous medicine.

264. According to the list of chemical additives used in the hydraulic fracturing process that the industry has disclosed, many of them contain toxic, hazardous, and cancer causing agents like benzene. Benzene has been rated a Class I carcinogen by the International Agency for Research on Cancer (IARC), the cancer research arm of the World Health Organization (WHO). Obtaining a rating of a Class I carcinogen by IARC means that it has been determined by physicians around the world, through shared information, human and animal studies that a particular chemical causes cancer in human beings. Benzene has been rated a Class I carcinogen primarily on its ability to cause leukemia, in particular acute myeloid leukemia (AML), according to IARC's monograph on benzene. However, as demonstrated by IARC's research, benzene does not cause cancer in an "emergency situation" or within hours or days of exposure. Rather, benzene's ability to cause leukemia may manifest itself over a period of years, sometimes within five years and sometimes as long as twenty years after a person's initial exposure to it.

265. Under Act 13, a patient presenting a doctor with symptoms of AML would not do so under an "emergency" situation given the number of years it takes to develop the disease after a patient's first exposure. As such, under Act 13, that patient's doctor would be unable, even upon request to obtain "trade secret or proprietary" information regarding the chemicals the patient was exposed to determine if the patient's AML was caused by exposure to oil and gas hydraulic fracturing products. Thus, the ability of the doctor to perform half of his **required** medical analysis, the differential etiology, what **caused** the patient's AML, is eliminated.

266. The ability to determine the cause of the patient's AML, in this example, is paramount to practicing competent medicine because if the doctor determines the cause to be benzene in a propriety chemical used in the oil and gas industry, and the patient is still working or living near and being exposed to that oil and gas source of benzene, the doctor needs to know that information to recommend the greatest deterrent for reoccurrence and exacerbation of that AML, removal of the patient from the exposure source, benzene in that proprietary oil and gas hydraulic fracturing product.

267. Act 13, strips physicians of their ability to practice competent medical care and in turn opens them up to unintentionally committing malpractice by not being afforded the ability to obtain all proprietary and/or trade secret chemical information simply because a patient does not present with symptoms that rise to the level of an immediate or "emergency" situation.

268. As such, with respect to human medical conditions potentially related to or caused by exposure to chemicals deemed "trade secrets" or "proprietary" by the natural gas industry, the Pennsylvania General Assembly has decreed that there will be no body of medical knowledge developed through the interchange of ideas between health professionals, health professionals have no right to access such "trade secrets" or "proprietary" information in a non-emergent situation and that health professionals are not permitted to use any knowledge or experience they have gained treating one patient exposed to such substance to diagnose and assist another patient in a similar situation.

269. Section 3222.1(b)(11) of Act 13 requires health professionals to disregard general ethical duties and affirmative regulatory and statutory obligations and hide information that they have gained solely because it was produced by an industry favored by the General Assembly.

270. The numerous ethical, regulatory, and statutory obligations of health professionals that are apparently no longer applicable to situations involving potential exposure to a chemical

deemed a "trade secret" or "proprietary" by the natural gas industry exemplify how Section 322.1(b)(11) of Act 13 is a special law.

271. As noted *supra*, the General Assembly is permitted to make distinctions between members in a class if such designation is based on manifest peculiarities that distinguish a subgroup from the general class. *Appeal of Ayars* 122 Pa. 266, 281, 16 A. 356, 363 (1889). However, when the General Assembly makes a distinction between members of a class that is artificial and arbitrary, such legislation is an unconstitutional special law. *See,* Pa. Const. Art. 3 § 32; *See, Commonwealth v. Puder,* 261 Pa. 129, 136, 104 A. 505, 506 (1918).

272. The artificiality of the distinction between the natural gas industry and all other educational, commercial and industrial users of chemicals is readily apparent when one analyzes Section 3222.1(b)(11) of Act 13 in conjunction with the aforementioned list of health professionals' obligations. For decades, humans have developed medical conditions as a result of exposure to chemical substances and health professionals have had affirmative duties and obligations to make record of this information have shared it with colleagues. Now, despite this history, the General Assembly, in an effort to promote and protect the natural gas development industry, has prescribed a regime of rules and regulations, manifested through Section 3222.1(b)(11) of Act 13 that apply **only** to that particular industry despite the fact that "trade secrets" or chemical exposure is not unique to this industry. *LaPlacca v. Philadelphia Rapid Transit Co.*, 265 Pa. 304, 308, 108 A. 612, 613. (Pa. 1919).

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article III, Section 32 of the Pennsylvania Constitution;

II. For a decree to permanently enjoin future application of Act 13; and

III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT XII – DECLARATORY JUDGMENT

Mehernosh Khan, M.D., v. Commonwealth of Pennsylvania et al.

XII. Petitioners seek a declaration that Act 13's restriction on health professionals' ability to disclose critical diagnostic information is an unconstitutional violation of the single-subject rule enunciated in Article III, Section 3 of the Pennsylvania Constitution.

273. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

274. The expressed purpose of Act 13, as prominently displayed on the cover of its predecessor, House Bill 1950, was to amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes.

275. Section 3222.1(b)(11) of Act 13 imposes restrictions upon health professionals' ability to disclose and share information related to medical treatment.

276. Health professionals are regulated under Title 35 of the Pennsylvania Consolidated Statutes and the subjects of restrictions on health professionals in their care of patients is wholly different than amendment of statutes related to oil and gas development.

277. Because section 3222.1(b)(11) of Act 13 promulgates statutory restrictions on health professionals who are not within the regulatory scheme of Title 58, the Act violates the single-subject requirement of Article III, Section 3 of the Pennsylvania Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article III, Section 3 of the Pennsylvania Constitution;

II. For a decree to permanently enjoin future application of Act 13; and

III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT XIII – PRELIMINARY INJUNCTION

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

278. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

279. Act 13 is an unconstitutional legislative enactment in violation of the Pennsylvania and United States Constitution.

280. The issuance of a preliminary injunction is necessary to prevent immediate and irreparable harm to Petitioners that cannot be compensated by monetary damages alone.

281. Petitioners will be significantly irreparably injured by enforcement of the Act as it will cost considerable money to amend ordinances, change zoning districts and revise entire comprehensive plans of the Municipal Petitioners. Additionally, Act 13 places a burden upon Petitioners to either act in violation of the U.S. and Pennsylvania Constitutions or statutory law. Petitioners face the possibility of attorney fees and costs, and potential civil liability from taxpayers and residents. The harm to the Petitioners is immediate, and the Petitioners have no other lawful means with which to stay the enactment of Act 13 which is unconstitutional.

282. These injuries cannot be quantified and the Petitioners have no adequate remedy at law regarding the same.

283. The injunctive relief sought by the Petitioners will not result in greater harm to the Defendants than would be suffered by the Petitioners if the injunctive relief is not granted.

284. Granting the Petitioners the request preliminary injunctive relief is in the public interest.

EXHIBIT 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKET NO. 284 M.D. 2012

ROBINSON TOWNSHIP, ET AL.
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Respondents.

PETITIONERS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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I. Statement of Jurisdiction

Petitioners brought their Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to the "Declaratory Judgments Act," 42 Pa. C.S. § 7531 et seq. The Commonwealth Court has original jurisdiction over this action pursuant to 42 Pa. C.S. § 761(a)(1) because this action has been filed against the Commonwealth government and officers thereof acting in their official capacities.

II. Determination in Question

As this matter is before the Court in its original jurisdiction, there is no lower court or administrative agency determination in question.

III. Statement of Scope and Standard of Review

As the Petition was addressed to the Court's original jurisdiction, there is no lower court order or administrative agency determination to review.

The standard for summary judgment, including in declaratory judgment actions, is that summary judgment is appropriate where, "the record clearly shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Certain Underwriters at Lloyds v. Hogan, 852 A.2d 352, 354 (Pa. Super. Ct. 2004) (citing Harleysville Insurance Companies v. Aetna Casualty and Surety Insurance Company, 795 A.2d 383, 385 (2002)). See also Pa. R.C.P. 1035.1, 1035.2.

When considering a motion for summary judgment, a material fact is one whose "resolution could affect the outcome of the case under the governing law. . . . [T]he substantive law defines which facts are material . . . ." Strine v. Com., 894 A.2d 733, 737-38 (Pa. 2006) (internal citations omitted).

IV. Statement of Questions Involved

1. Whether Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th Amendment to the United States Constitution as Act 13's zoning scheme is an improper exercise of the Commonwealth's police power?

   Suggested Answer: Yes.

2. Whether Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans?

   Suggested Answer: Yes.

3. Whether Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because the allowance of oil and gas development activities as a use permitted by right in every zoning district constitutes an improper use of police power?

   Suggested Answer: Yes.

4. Whether Act 13 violates Article III, Section 32 of the Pennsylvania Constitution because Act 13 is a "special law" that treats local governments differently and was enacted for the sole and unique benefit of the oil and gas industry?

   Suggested Answer: Yes.

5. Whether Act 13 is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth's eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution?

   Suggested Answer: Yes.

6. Whether Act 13 violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligations as trustees of Pennsylvania's public natural resources?

   Suggested Answer: Yes.

7. Whether Act 13 violates the doctrine of Separation of Powers because it permits the Pennsylvania Public Utility Commission, to play an integral role in the exclusively legislative function of drafting legislation and to render opinions regarding the constitutionality of legislative enactments, infringing on a judicial function?

   Suggested Answer: Yes.

8. Whether Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection without any definitive standards?

   Suggested Answer: Yes.

9. Whether Act 13 is unconstitutionally vague because its setback provisions, timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited?

   Suggested Answer: Yes.

10. Whether Act 13 is an unconstitutional "special law" in violation of Article III, Section 32 of the Pennsylvania Constitution because it restricts health professionals' ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry?

    Suggested Answer: Yes.

11. Whether Act 13's restriction on health professionals' ability to disclose critical diagnostic information is an unconstitutional violation of the single-subject rule enunciated in Article III, Section 3 of the Pennsylvania Constitution?

    Suggested Answer: Yes.

V. Statement of the Case[1]

Form of Action and Procedural History

On March 29, 2012, Petitioners filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief (hereinafter "Petition for Review") pursuant to the "Declaratory Judgments Act," 42 Pa. C.S. § 7531 et seq.

After a hearing, the Court granted, in part, Petitioners Application for Preliminary Injunction, stating, in part,

> To the extent that Chapter 33 or any other provision of Act 13 may be interpreted to immediately pre-empt pre-existing local ordinances, a preliminary injunction is issued pending further order of Court. Additionally, the Court agrees with petitioners that 120 days is not sufficient time to allow for amendments of local

[1] Petitioners incorporate their initial Petition for Review, its Ex., and all Affidavits and reports submitted as Ex. with the current motion.

ordinances and, therefore, will preliminarily enjoin the effective date of Section 3309 for a period of 120 days.

April 11, 2012 Order. On April 27th, the Court denied the application to modify the April 11th Order, which had been filed by the Public Utilities Commission ("PUC") and the Department of Environmental Protection ("DEP") The DEP and PUC have filed an appeal to the Pennsylvania Supreme Court concerning the preliminary injunction order. That appeal is pending.

The Commonwealth Respondents filed Preliminary Objections with a supporting Memorandum of Law on April 30, 2012.

Factual Background

1. Act 13's Zoning Provisions

On February 14, 2012, Pennsylvania Governor Thomas W. Corbett signed HB 1950 into law as Act 13 of 2012 (hereinafter, "Act 13"). Act 13 amends the Pennsylvania Oil and Gas Act (hereinafter, "Oil and Gas Act"), 58 P.S. § 601.101 et seq., to establish, in part, a uniform zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania.

The Act's restrictions on local ordinances are threefold. First, Section 3302 resembles the former preemption provision in the old Oil and Gas Act and was "not intended to change or affect . . . section 602[2] of the Oil and Gas Act." 58 Pa. C.S. § 3302; Section 4(4) of HB 1950. Second, Section 3303 expands the Act's scope to preclude local regulation of oil and gas operations where operations are covered by "environmental acts"[3]—state environmental laws, or

[2] Section 602 of the Oil and Gas Act was the prior preemption provision interpreted in a series of cases including Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 600 Pa. 207, 964 A.2d 855 (2009).

[3] "'Environmental acts.'" All statutes enacted by the Commonwealth relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by the department or by another Commonwealth agency, including an independent

federal laws dealing with oil and gas operations—including where local governments are given the authority to regulate under those laws. 58 Pa. C.S. § 3303.

Third, Section 3304 creates a uniform zoning scheme for local ordinances dealing with "oil and gas operations." Specifically, it sets forth a list of requirements that a local ordinance must follow in order to provide for the required "reasonable development of oil and gas resources."[4] 58 Pa. Cons. Stat § 3304(a) & (b). Further, it defines "oil and gas operations" broadly to include activities ranging from (among other activities) well location assessment such as seismic testing, drilling, hydraulic fracturing, pipeline operations, processing plants, compressor stations, and ancillary equipment. 58 Pa. Cons. Stat § 3301.

Section 3304 restricts a municipality's ability to specify which types of oil and gas operations are permitted in which zoning districts, and how to classify those permitted uses. For example, each municipality must allow "oil and gas operations," except for natural gas processing plants, in all zoning districts. See 58 Pa. C.S. § 3304(b)(1) & (b)(5)-(b)(8). Municipalities must allow impoundment areas as uses permitted by-right in all zoning districts, including residential districts, so long as they are not closer than 300 feet from an existing building. 58 Pa. C.S. § 3304(b)(6). Operators often use impoundment areas to store thousands to millions of gallons of hydraulic fracturing wastewater. Under the Act, impoundment areas, because they are now uses permitted by-right in residential districts, receive similar treatment as residential uses such as single-family dwellings.

To illustrate, Municipal Petitioner Cecil Township's R-2 Medium Density Residential Zoning District allows as permitted uses by right farms, single-family dwellings, two-family

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agency, and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations." 58 Pa. Cons. Stat. § 3301.

[4] The Municipalities Planning Code requires zoning ordinances to "provide for the reasonable development of *minerals* in each municipality." 53 P.S. § 10603(i) (emphasis added).

dwellings, multi-family dwellings, planned residential developments, customary accessory uses such as satellite dishes and garages, home offices and essential services. Houses of Worship and Daycare Centers are conditional uses, which means that although the use may be authorized, the use may only be constructed upon demonstration to the Cecil Township Board of Supervisors that the development plans satisfy ordinance standards following a duly advertised public hearing allowing for participation by potentially affected landowners.

Now under Act 13, Municipal Petitioner Cecil Township must allow impoundment areas of hydraulic fracturing wastewater as permitted uses by right. The result is that the approval of construction of a church or daycare center in the R-2 Zoning District will require greater local scrutiny than the approval of wastewater impoundments because the latter will be not be subject to any local scrutiny at all. Likewise, under the Act, municipalities have a highly-restricted ability to prohibit or classify as a conditional use drilling operations in residential districts, and this ability is limited to distances of 300 or 500 feet. As such, drill pads construction and drilling, hydraulic fracturing, and well completion operations are now also placed on par with residential uses by Act 13.

In addition, natural gas compressor stations must be a use permitted by-right in agricultural and industrial zoning districts and a conditional use in all other districts, so long as the compressor station is not closer than seven-hundred fifty (750) feet from an existing building and two-hundred (200) feet from any property line, and the noise level does not exceed either 60dBa at the nearest property line or an applicable federal standard. 58 Pa. C.S. § 3304(b)(7). Natural gas processing plants must be a use permitted by-right in all industrial zoning districts and a conditional use in agricultural zoning districts so long as they also meet the basic requirements listed above.

Also, municipalities cannot impose more stringent conditions, requirements, or limitations on the construction of oil and gas operations than those placed on construction activities for other industrial uses within the municipality's boundaries.[5] Similarly, municipalities cannot impose more stringent conditions or limitations on structure height, screening, fencing, lighting, or noise for permanent oil and gas operations than those imposed on other industrial uses or land development in the particular zoning district where the oil and gas operations are situated. See 58 Pa. C.S. § 3304(b)(7)(ii) & (b)(8)(ii).

Municipalities also cannot impose limits or conditions on subterranean operations, hours of operations of compressor stations and processing plants, or hours of operation for oil or gas well drilling, or for drilling rig assembly and disassembly. 58 Pa. C.S. § 3304(b)(10). Any setbacks in the Act cannot be increased. 58 Pa. Cons. § 3304(b)(11).

Lastly, Act 13 mandates no more than a 30-day review period for uses permitted by-right where a complete application is submitted, and no more than a 120-day review period for conditional uses. 58 Pa. C.S. § 3304(b)(4).

2. Ordinance Review Process; Challenges, Timing

The Act creates a pre-enactment advisory role for the Pennsylvania Public Utilities Commission ("PUC"). It also establishes a local ordinance review process where the PUC or the Commonwealth Court are the first reviewers of a zoning ordinance.[6]

Prior to enacting an ordinance, the Act empowers the PUC to provide advisory opinions to municipalities on whether a proposed local ordinance dealing with oil and gas operations

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[5] This is so even though all other industrial uses would be limited to industrial districts and would be prohibited in other districts, such as residential, agricultural, commercial, village, institutional and resource protection districts.

[6] For other validity challenges, the municipality's zoning hearing board would generally review the challenges first and they would not arrive at the Commonwealth Court until after an appeal from a Common Pleas Court decision.

violates either the MPC or the various restrictions on municipal authority contained in Act 13. 58 Pa. C.S. § 3305(a). The PUC's pre-enactment opinion is advisory in nature, and cannot be appealed. 58 Pa. C.S. § 3305(a)(3). The Act exempts the PUC from following Commonwealth agency, Sunshine Act, and PUC hearing procedures. 58 Pa. C.S. § 3305(c).

After an ordinance is enacted, a gas operation owner or operator or an "aggrieved" individual, can request a similar PUC review. 58 Pa. C.S. § 3305(b). Again, the Act exempts the PUC from following Commonwealth agency, Sunshine Act, and PUC hearing procedures. 58 Pa. C.S. § 3305(c). For post-enactment reviews, the PUC's order can be appealed to the Commonwealth Court. 58 Pa. C.S. § 3305(b)(4). Although the PUC's order becomes a record before the Court, the Court will conduct a *de novo* review. 58 Pa. C.S. § 3305(b)(4).

Rather than utilize the PUC, or the typical municipal zoning hearing board process, any person aggrieved by an ordinance's enactment or enforcement can challenge the ordinance in Commonwealth Court without going to the PUC first. 58 Pa. C.S. § 3306 (1) & (2)(granting private right of action). Any post-enactment determination by the PUC will become a part of the record before the Court. 58 Pa. C.S. § 3306 (3).

The direct consequence of an invalid ordinance is that the municipality will lose access to impact fee funds until the ordinance is amended, or the municipality reverses an unfavorable determination on appeal. 58 Pa. C.S. § 3308. Also, a municipality faces the threat of paying the other party's attorney fees and costs if a court finds that the ordinance was enacted or enforced "with willful or reckless disregard" of the MPC and Act 13's limitations on local zoning authority. 58 Pa. C.S. § 3307 (1).

Under the Second Class Township Code, township supervisors can be assessed a surcharge by the township auditor, regardless of whether the supervisor intended to violate Act

13, the MPC, or the Pennsylvania or U.S. Constitutions. 53 P.S. § 65907. If found to have acted, or failed to act, in violation of the law, supervisors can face a summary offense. 53 P.S. § 65801.

Originally, all municipalities were required to bring all zoning ordinances into conformity with Act 13 *within 120 days* of the effective date of Act 13. 58 Pa. C.S. § 3309(b). This Court's preliminary injunction postponed the effective date of Section 3309 for 120 days from the April 11, 2012 order, providing municipalities more time to review and revise local ordinances.

3. Limits on Physician Disclosures

The Act includes provisions that requires that doctors who are seeking access to chemical information in order to treat in emergency situations must agree to keep the information confidential. 58 Pa. C.S. § 3222.1(b)(11). Further, for doctors in non-emergency situations, they must provide a written statement of need and a confidentiality agreement before being able to receive the information. 58 Pa. C.S. § 3222.1(b)(10). The express language of the Act contains no exceptions for disclosure of the information given to the doctors. 58 Pa. C.S. § 3222.1(b)(10), (b)(11).

VI. Summary of Argument

Summary judgment is appropriate on each Count of the Petition. Act 13 of 2012, 58 Pa. C.S. § 2301 et seq. ("Act 13") violates the United States and Pennsylvania Constitutions. Act 13 establishes a one-size-fits-all zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania; establishes an extra-judicial ordinance review process; and imposes a gag rule on physicians. As a result, Act 13 violates Article I, Sections 1 and 27, and Article III, Sections 3 and 32 of the Pennsylvania Constitution; Section 1 of the 14th Amendment to the United States Constitution; Due Process Principles; and the Doctrine of Separation of Powers.

Act 13 mandates that Petitioners allow the industrial activity of "oil and gas operations," except for natural gas processing plants and compressor stations, as a use permitted by right in ***all*** zoning districts. Municipalities are required to allow impoundments for drilling wastewater in ***all*** zoning districts, including residential districts. Natural gas compressor stations ***must*** be permitted by right in agricultural and industrial zoning districts and a conditional use in all other districts. Natural gas processing plants must be a permitted use by right in all industrial zoning districts and a conditional use in agricultural zoning districts.

Act 13's promulgation of a uniform set of land-use regulations governing oil and gas operations throughout the Commonwealth constitutes a single set of statewide zoning rules applicable only to the oil and gas industry. Act 13's broad brush approach and failure to account for the health, safety and welfare of citizens, the value of properties, adequate open spaces, traffic, congestion, the preservation of the character of residential neighborhoods and beneficial and compatible land uses, results in an improper use of the Commonwealth's police power and is therefore unconstitutional.

In addition, Act 13 constitutes an unconstitutional "special law" in violation of the equal protection principles embodied in the Pennsylvania Constitution, Article III, Section 32. It creates a classification between the oil and gas industry and other taxpaying citizens, businesses and industries by giving the oil and gas industry special treatment and essentially exempting it from the local zoning controls and regulatory procedures otherwise applicable to all other applicants seeking to develop land within a municipality. These distinctions bear no rational relationship to any legitimate state interest and cannot be justified on the basis of public health, safety or welfare.

Furthermore, Act 13 violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources. Act 13 prevents Municipal Petitioners from carrying out their constitutional obligation to protect public natural resources, by removing from Municipal Petitioners all meaningful authority over where oil and gas development will proceed in their respective municipalities.

Further, Act 13 creates unconstitutional advisory and adjudicatory roles for the Pennsylvania Public Utilities Commission ("PUC"), and is unconstitutionally vague.

Finally, the Act unconstitutionally restricts health professionals' ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry. The Act, enacted through unconstitutional legislative procedures, requires health professionals to disregard general ethical duties and affirmative regulatory and statutory obligations and hide information that they have gained solely because it was produced by an industry favored by the General Assembly.

Section 3218.1 provides that, "[a]fter receiving notification of a spill, the department shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that the event occurred ..." As a result of this provision, potentially affected public drinking water facilities will be notified by the DEP in the event an oil and gas driller spills any of its hazardous contaminants on land or into water. Under the Act, no other notifications to any other drinking water sources are required after a spill and possible contamination. The Act creates an unconstitutional distinction between public drinking water supplies and private water wells in violation of equal protection principles.

The General Assembly has failed to provide any legitimate basis for the distinction between public and private drinking water supplies. While public drinking water has the benefit of receiving notification of a spill, it is also already routinely tested to ensure compatibility with drinking water standards. As a result, there are no special circumstances or need that would justify public drinking water supplies receiving the benefit of notification to the exclusion of private water wells. Quite the contrary, it is private water wells which can in fact demonstrate a special need for notification. Private water wells are neither publicly monitored nor routinely tested and are far more susceptible to contamination. As the majority of drilling is ongoing in more rural areas serviced by private water sources, the rationale for this exception suggests "special" treatment, different from all other uses in a municipality.

This sort of special privilege afforded to a selected group rests on an entirely artificial and arbitrary distinction in violation of Article III, Section 32. Consequently, Act 13 violates Article III, Section 32 of the Pennsylvania Constitution and Petitioners are entitled to judgment as a matter of law.

5. Petitioners Are Entitled To Summary Judgment On Count V Because Act 13 Is An Unconstitutional Taking For A Private Purpose And An Improper Exercise Of The

Commonwealth's Eminent Domain Power In Violation Of Article I, Sections 1 And 10 Of The Pennsylvania Constitution

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 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 United States and Pennsylvania Constitutions mandate that private property can only be taken to serve a public purpose. In re Opening Private Rd. for Benefit of O'Reilly, 5 A.3d 246 (Pa. 2010). Private property cannot be taken for the benefit of another private property owner. Kelo v. City of New London, 545 U.S. 469 (2005).

The Pennsylvania Supreme Court has maintained that to satisfy this obligation of serving a "public purpose," the public must be the primary and paramount beneficiary of any taking. In re Opening Private Rd. for Benefit of O'Reilly, 5 A.3d 246, 258 (Pa. 2010). In considering whether a primary public purpose was properly invoked, the Pennsylvania Commonwealth Court has looked for the "real or fundamental purpose" behind a taking. In re Opening a Private Rd. for Benefit of O'Reilly Over Lands of (a) Hickory on Green Homeowners Ass'n & (b) Mary Lou Sorbara, WL 1709846 (Pa. Commw. Ct. 2011) (on remand from the Pennsylvania Supreme Court). Stated otherwise, the true purpose must primarily benefit the public. Id.

Act 13 is not supported by any public purpose being served by the appropriation of an interest in real property by a corporation for the storage of natural gas.[20] If this use is a "public purpose," which Petitioners do not concede, then any oil and gas corporation by analogy could

[20] Petitioners recognize that this provision also existed in the Oil and Gas Act prior to the enactment of Act 13.

have the right by use of eminent domain powers to acquire real property for storage reservoirs and for protective areas around those reservoirs.

Moreover, Section 3241 is 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," which are those entities allowed to engage in the transportation and sale of gas. See 66 Pa. C.S. § 102. Further, nothing in Section 3241 necessarily limits the eminent domain power to public utility corporations.

Because it cannot be justified on the basis of any paramount public purpose, Section 3241 of Act 13 facilitates an unconstitutional taking of private property for a private purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution. Petitioners are therefore entitled to judgment as a matter of law.

6. Petitioners Are Entitled To Summary Judgment On Count VI Because Act 13 Denies Municipalities The Ability To Fulfill Their Constitutional Obligations To Protect Public Natural Resources Under Article I, Section 27 Of The Pennsylvania Constitution

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

Article I, Section 27 of the Pennsylvania Constitution states the following:

> The people have a right to clean air, pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations

Act 13 by issuing the permit within the express time constraints, or to violate the statutory—and constitutionally required—procedures it is required to follow *for every single other use*. This again requires Municipal Petitioners to violate the law and their oaths of office. See Ex. 4, 5, & 10.

As with other practical considerations and effects that the General Assembly wholly failed to consider with this special law for the oil and gas industry, Act 13 is entirely silent upon what it means for a municipality to "permit" these industrial uses. The necessary and inevitable result of this is that municipalities are left to either follow the procedural requirements imposed upon them by statute for every single use and risk violating Act 13—and face the severe sanctions it imposes—or purportedly comply with Act 13 and ignore these procedural requirements necessary for municipality's actions in zoning to be constitutional.

Act 13 is therefore unconstitutionally vague and invalid under the Due Process Clause of the United States Constitution. Petitioners are therefore entitled to judgment as a matter of law.

10. Petitioners Are Entitled To Summary Judgment On Count XI Because Act 13 Restricts Health Professionals' Ability To Disclose Critical Diagnostic Information When Dealing Solely With Information Deemed Proprietary By The Natural Gas Industry

As described earlier, Article III, Section 32 of the Pennsylvania Constitution was enacted to end the practice of privileged legislation enacted for private purposes. Harrisburg School Dist. v. Hickok, 761 A.2d 1132 (Pa. 2000). Any legislative classification or distinction between 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., 899 A.2d 1085, 1094-1095 (Pa. 2006).

Section 3222.1(b)(11) of Act 13 states:

> 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)(11) (emphasis added); see also, 58 Pa. C.S. § 3222.1(b)(10).[25]

The General Assembly, through Section 3222.1(b)(10) and (11), created an unconstitutional special law because there is no legitimate state interest in restricting, solely to benefit the natural gas industry, doctors' access to information, and to preventing doctors from sharing that information with patients and for the development of medical knowledge. Act 13 imposes restrictions on health professionals' abilities to disclose critical diagnostic information necessary for medical treatment solely because such information has been deemed by the natural gas industry as "proprietary" or a "trade secret."

The General Assembly has singled out the natural gas industry for special treatment and protection at the expense of public health and welfare. Chemicals, including products with multiple chemical compounds and so-called "proprietary or trade secret substances," are used daily in a variety of occupations and industries throughout Pennsylvania. Such widespread use of chemicals can lead to human exposure with adverse health effects that may result in disease, illness, and the exacerbation of pre-existing conditions.

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[25] The Petition at ¶¶ 263, 265, and 267 incorrectly stated that Act 13 does not provide for access to information for non-emergency doctors. Under Act 13, non-emergency doctors have a right of access but only where need is shown *and* a confidentiality agreement is executed. This correction does not change the substance of Petitioners' claim.

The sharing of information between patient and doctor is critical to determine what the disease is. Information-sharing between treating physicians, like emergency room doctors, and specialists is equally as important to afford a patient competent medical care and treatment. In order for a physician to completely and properly treat a patient, it is imperative that a physician properly and correctly diagnose the aliment. To do so, a doctor must consider all of the patient's symptoms as well as his/her occupational, social, medical, and environmental history to perform what is known as a differential diagnosis.[26]

Once a differential diagnosis is made, a doctor, in order to give competent medical care, must perform what is known as a differential etiology. In this process, a doctor must "rule in" and then "rule out" *all* possible causes of the patient's disease or illness. When performing a differential etiology, it is crucial that the doctor has complete information about all of the patient's past medical, social, occupational, and environment exposure history to properly determine the source or cause of the patient's illness or disease. Often, particularly with exposure-induced diseases, an emergency room doctor or primary care physician must refer a patient to a specialist in order to properly and competently diagnose and treat a patient. In that referral relationship, the emergency room doctor or primary care physician must share with the specialist his/her knowledge of the patient's exposures, including any and all chemical exposures regardless of whether they are proprietary, so that the specialist can competently diagnose and treat the patient.

A physician's ability to share both diagnostic test results, like MRIs, x-rays, or blood tests, *and* a patient's history of exposure to specific chemicals and the dose and duration of the

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[26] A differential diagnosis is a process by which a doctor "rules in," or takes into consideration, and then "rules out" a specific illness or disease process based upon a full disclosure of all of a patient's symptoms, prior medical history, and occupational and environmental exposures.

patient's exposure to those chemicals, even if only qualitative, is necessary to properly treat and diagnose a patient. It is also an essential tool of practicing competent medicine. Without complete information, such as a full chemical exposure history, a doctor could improperly diagnose and treat a patient, making the patient's illness worse and risking a claim of medical malpractice.

Pennsylvania law emphasizes the importance of openness among health professionals in the process of evaluating and treating illness. State law imposes numerous affirmative duties on health professionals to ensure that critical and essential information related to the treatment of human illnesses is shared and readily available. These include that:

a. Physicians are **required** to keep medical records that:
    i. Accurately, legibly, and **completely** reflect the evaluation treatment of the patient. 49 Pa. Code §16.95(a);
    ii. Must contain clinical information pertaining to the patient that has been accumulated by the physician or the physician's agents. 49 Pa. Code §16.95(c);
    iii. Must contain diagnoses, findings, or results of pathologic or clinical laboratory examination, radiology examination, medical and surgical treatment and other therapeutic procedures. 49 Pa. Code § 16.95(d);

b. Healthcare practitioners have an obligation to report certain diseases, infections and medical conditions, including cancer. 28 Pa. Code § 27.21a(b)(2);

c. Practitioners regulated by the Pennsylvania Board of Medicine are subject to disciplinary action if the offer, undertake or agree to treat a disease by a secret method, procedure treatment or medicine or by refusing to disclose the means, method, or procedure that the practitioner has treated a human condition to the Board of Medicine upon demand of the Board. 49 Pa. Code § 16.61(a)(12);

d. Practitioners regulated by the Pennsylvania Board of Medicine are subject to discipline if they fail to act in such a manner as to present an immediate and clear danger to public health or safety. 63 P.S. § 422.41(9).

Knowledge and information-sharing has been the keystone to the development of medical knowledge and treatment techniques for centuries. Further, Pennsylvania law imposes mandatory

obligations on health professionals to report their findings in their medical records, which can be shared with other health care professionals. 35 P.S. §§ 563.1-563.13. See Pennsylvania Record Keeping Requirements, Petition for Review Ex. 47.

Despite the importance and necessity of such information-sharing, Section 3222.1(b)(10) and (b)(11) of Act 13 prohibit health professionals from making *any* disclosure of information that they receive regarding chemicals that the natural gas industry deems as "proprietary" or "trade secrets" *even when such a disclosure is necessary to treat a particular patient or to protect public health.* See 58 Pa. C.S. § 3222.1(b)(10) & (b)(11).

Thus, under Act 13, an emergency room doctor who sees a patient with a suspected chemically induced disease and receives from the industry a disclosure of the chemicals to which the patient was exposed would be prohibited from practicing competent medicine as he could not share that information with the specialist to whom the patient is being referred for treatment.

These same problems present themselves in Section 3222.1(b)(10), which restricts doctors in non-emergency situations from disclosing information to patients, and also affirmatively requires a doctor in a non-emergency situation to show a need for the information before the information can be obtained. These barriers

> may result in delays in medical treatment and care being offered by physicians to persons exposed, injured, or poisoned by chemicals and/or products used in oil and/or gas-related operations. Aside from the obvious logistical problems . . . , this requirement may very well result in an lack of timely and/or appropriate medical treatment being offered to chemically-exposed patients. Hence, medical treatment may be hampered and patient care may suffer, all of which may result in substandard medical care. . . . Based on a reasonable degree of biomedical ethics certainty, the practical effects of Act 13 on physicians will more likely than not raise biomedical ethics questions, issues, and dilemmas for physicians, which may result in substandard medical care being given to oil and/or gas well site-related chemically exposed patients. The provisions of Act 13 in relation to the disclosure by companies of information on the identity of certain chemicals to physicians may have deleterious effects on physician practices and patient care.

Ex. 7, at 15 & 16-17; see also Ex. 7 at ¶¶ 1, 4-7. Act 13 forces doctors to practice irresponsible and dangerous medicine.

To illustrate, benzene is one of the many chemical additives that the industry has disclosed as being used in the hydraulic fracturing process. Benzene has been rated a Class I carcinogen by the International Agency for Research on Cancer ("IARC"), the cancer research arm of the World Health Organization ("WHO"). An IARC rating of a Class I carcinogen means that, based on determinations by physicians around the world, through shared information, and human and animal studies, benzene causes cancer in human beings. Benzene has been rated a Class I carcinogen primarily on its ability to cause leukemia, specifically acute myeloid leukemia ("AML"), according to IARC's monograph on benzene. However, as indicated by IARC's research, benzene does not cause cancer in an "emergency situation" or within hours or days of exposure. Rather, benzene's ability to cause leukemia may manifest itself over a period of years, sometimes within five years and sometimes as long as twenty years after a person's initial exposure.

A physician seeing a patient with AML symptoms would do so many years after the potential first exposure, and would require the assistance of a number of specialists to properly diagnose and treat the illness. However, like emergency room doctors, these physicians are prohibited from sharing any information received from the natural gas industry with specialists to whom the patient is referred. The doctor must also demonstrate a need for the information for the information to be provided. These barriers impact the doctor's ability to determine the cause of the patient's AML and ultimately, to practicing competent medicine.

When the doctor determines the cause to be benzene in a proprietary chemical used in the oil and gas industry, and the patient is still working or living near and being exposed to that oil

and gas source of benzene, the doctor needs to know that information and to have consulted with the proper specialists to recommend a deterrent. The greatest deterrent for reoccurrence and exacerbation of that AML, may in fact be removal of the patient from the exposure source, benzene in that proprietary oil and gas hydraulic fracturing product. However, with the barriers imposed by Act 13, doctors cannot share information with specialists to reach those determinations. Further, doctors cannot access and share the information necessary to create or revise protocols to assist and protect oil and gas industry workers exposed to these chemicals on a daily basis.

As such -- with respect to human medical conditions potentially related to or caused by exposure to chemicals deemed "trade secrets" or "proprietary" by the natural gas industry -- the General Assembly has decreed that there will be no body of medical knowledge developed through the interchange of ideas between health professionals, and that health professionals are not permitted to use any knowledge or experience they have gained treating one patient exposed to such substance to diagnose and assist another patient in a similar situation.

Section 3222.1(b)(10) and (b)(11) of Act 13 requires health professionals to disregard general ethical duties and affirmative regulatory and statutory obligations and to hide information that they have gained solely because it was produced by an industry favored by the General Assembly. See Ex. 7, at 15 & 16-17; see also Ex. 7 at ¶¶ 1, 4-7.

The numerous ethical, regulatory, and statutory obligations of health professionals that are apparently no longer applicable to situations involving potential exposure to a chemical deemed a "trade secret" or "proprietary" by the natural gas industry exemplify how Section 3222.1(b)(11) of Act 13 is a special law.

For decades, humans have developed medical conditions as a result of exposure to chemical substances, and health professionals have had affirmative duties and obligations to make record of this information have shared it with colleagues. Now, despite this history, the General Assembly has prescribed a regime of rules and regulations that apply *only* to that particular industry despite the fact that "trade secrets" or chemical exposure is not unique to this industry. LaPlacca v. Philadelphia Rapid Transit Co., 265 Pa. 304, 308, 108 A. 612, 613 (Pa. 1919). Petitioners are therefore entitled to judgment as a matter of law.

11. Petitioners Are Entitled To Summary Judgment On Count XII Because Act 13's Restriction On Health Professionals' Ability To Disclose Critical Diagnostic Information Violates The Single-Subject Rule Enunciated In Pa. Const. Article III, Section 3

The Pennsylvania Constitution states, "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof." Pa. Const. Art. III, Sec. 3. Article III, Section 3 contains two requirements, that a bill: 1) not contain more than one subject; and 2) clearly express that subject in its title.[27] Stilp v. Commonwealth, 905 A.2d 918, 955 (Pa. 2006).

Under the single-subject rule, there must be "a single unifying subject to which all of the provisions of the act are germane." Id. at 396. Also, that subject cannot be so broad as to eliminate the purpose of Section 3, which seeks "to place restraints on the legislative process and encourage an open, deliberative, and accountable government." City of Philadelphia, 838 A.2d at 585 (citing Pennsylvania AFL-CIO v. Commonwealth, 757 A.2d 917, 923 (Pa. 2000)).

To illustrate, the Supreme Court struck down a law that purported to deal with the broad subject of "municipalities." City of Philadelphia, 838 A.2d at 589-91. The Court found "no

[27] This restriction also violates this second requirement, as the title says nothing about restrictions on doctors, further exacerbating the problem created by its last-minute addition into the Act.

single unifying subject to which all of the provisions of the act are germane," as the final act covered issues ranging from a partial repeal of the Pennsylvania Intergovernmental Cooperation Authority, to an addition of a chapter on contractors' bonds. Id. In contrast, the Court upheld the 2005 pay raise law finding that all provisions related to compensation of government officials. Stilp v. Commonwealth, 905 A.2d at 956.

As for Act 13, the bill in its various iterations broadly dealt with regulation of the oil and gas industry. This included the imposition of an impact fee and changes to environmental protection requirements. During conference committee, a provision was inserted dealing with oil and gas operators' duty to disclose hydraulic fracturing chemicals. At the same time, the legislature restricted doctors in their ability to inform patients exposed to hydraulic fracturing chemicals. Further, it placed on doctors the burden of showing a need for such information in order to treat patients. Rather than regulating the oil and gas industry, the legislature restricted doctors' ability to treat patients, a provision that would not have garnered sufficient support to pass as its own law, see City of Philadelphia, 838 A.2d at 586, given the number of duties this provision impinges upon and the harms that will result. Petitioners are therefore entitled to judgment as a matter of law.

VIII. Conclusion

For the foregoing reasons, Petitioners respectfully request the Court enter Summary Judgment in their favor. Should the Court deny Petitioners' motion, in whole or in part, Petitioners respectfully request a hearing on the merits.

Respectfully ~~submitted~~,

By: _____

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EXHIBIT 3

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKET NO. 284 M.D. 2012

ROBINSON TOWNSHIP, ET AL.
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Respondents.

PETITIONERS' CONSOLIDATED BRIEF IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS

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I. STATEMENT OF JURISDICTION

Petitioners brought their Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief (hereinafter, "Petition for Review") pursuant to the "Declaratory Judgments Act," 42 Pa. C.S. § 7531 et seq. The Commonwealth Court has original jurisdiction over this action pursuant to 42 Pa. C.S. § 761(a)(1) because this action has been filed against the Commonwealth government and officers thereof acting in their official capacities.

II. DETERMINATION IN QUESTION

As this matter is before the Court in its original jurisdiction, there is no lower court or administrative agency determination in question.

III. STATEMENT AND SCOPE OF STANDARD OF REVIEW

As the Petition was addressed to the Court's original jurisdiction, there is no lower court order or administrative agency determination to review.

In reviewing Preliminary Objections pursuant to Pa. R.C.P. 1028, the Court should accept averments in the Petition for Review as true and draw all reasonable inferences from the pleading in the light most favorable to the nonmoving party. Gallo v. Nationwide Insurance Co., 791 A.2d 1193 (Pa. 2002); Juban v. Schermer, 751 A.2d 1190 (Pa. 2000). "Preliminary objections may be filed by any party to any pleadings and are limited to the following grounds . . . legal insufficiency of a pleading (demurrer) . . . ." Pa.R.C.P. 1028(a)(4). The standard of review for preliminary objections in the nature of demurrer in Pennsylvania is well-settled:

> All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

Mahoney v. Furches, 503 Pa. 60, 66 (1983) (internal citations and quotations omitted).

To the extent that Respondents claim a lack of sufficiency, Petitioners respectfully incorporate their Summary Judgment Motion[1], Brief in Support and supporting exhibits, all which flow directly from the averments made in the Petition for Review. In light of the expedited case management order, Petitioners request leave to amend their Petition for Review consistent with the facts and exhibits set forth in Petitioners' Summary Judgment submittals.

Respondents have raised a Preliminary Objection to the Petition for Review pursuant to Pa. R.C.P. 1028(a)(5), challenging Petitioners' standing and capacity to sue. The commentary to Pa. R.C.P. 1028 states that "Preliminary objections raising an issue under subdivision (a)(1), (5), (6), (7) or (8) cannot be determined from facts of record." (emphasis added). Secondary legal authority suggests that evidence, depositions and discovery may be used to ascertain a party's capacity to sue when it is challenged by a Preliminary Objection filed pursuant to Pa.R.C.P. 1028(a)(5). See Standard Pennsylvania Practice §25:94.

Respondents' file this Consolidated Brief in Opposition to Respondents' Preliminary Objections in response to Preliminary Objections filed separately by the Commonwealth of Pennsylvania, Office of the Attorney General, Linda L. Kelly, the Pennsylvania Public Utility Commission, Robert F. Powelson, the Pennsylvania Department of Environmental Protection, and Michael L. Krancer.

IV. STATEMENT OF QUESTIONS INVOLVED

1. Whether Petitioners present a sufficient direct, substantial and immediate interest in the outcome of the litigation to confer standing to challenge the constitutionality of Act 13?
   Suggested Answer: Yes.

2. Whether Petitioners' request for judicial review of the constitutionality of Act 13 presents a justiciable question properly within the province of the judiciary?
   Suggested Answer: Yes.

[1] By way of May 10, 2012 Court Order, this Court converted Petitioners' Summary Judgment Motion into a Motion for Summary Relief pursuant to Pa. R.A.P. 1532(b). Solely for the purposes of this Consolidated Brief, Petitioners will continue to refer to their Motion and Brief as originally titled.

3. Whether Petitioners' facial challenge to the constitutionality of Act 13 presents an imminent and ripe claim for judicial review?
   Suggested Answer: Yes.

4. Whether Petitioners' Counts I-XII raise legally sufficient claims alleging violations of the Pennsylvania Constitution, the United States Constitution, Due Process Principles and the Separation of Powers Doctrine?
   Suggested Answer: Yes.

V. STATEMENT OF THE CASE

1. Form of Action and Procedural History

On March 29, 2012, Petitioners filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief[2] ("Petition for Review") pursuant to the "Declaratory Judgments Act," 42 Pa. C.S. § 7531 et seq. requesting that this Honorable Court declare that provisions of Act 13 violate the United States Constitution and the Pennsylvania Constitution and enjoin the implementation of the unconstitutional provisions of Act 13.

The Commonwealth Respondents filed Preliminary Objections with a supporting Memorandum of Law on April 30, 2012. Petitioners filed a Motion for Summary Judgment with a supporting Brief on May 7, 2012.[3] By way of a May 9, 2012 Court Order, this Court scheduled argument on Respondents' Preliminary Objections and Petitioners' Motion for Summary Judgment for the June 2012 en banc session before the Commonwealth Court.

2. Factual Background

On February 14, 2012, Pennsylvania Governor Thomas W. Corbett signed HB 1950 into law as Act 13 of 2012, 58 Pa. C.S. § 2301 *et seq.* (hereinafter, "Act 13"). Act 13 amends the Pennsylvania Oil and Gas Act (hereinafter, "Oil and Gas Act"), 58 P.S. § 601.101 *et seq.*, to establish, in part, a uniform zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania and allows for oil and gas operations in all

[2] Petitioners incorporate their initial Petition for Review and its corresponding Exhibits.
[3] See supra, at fn. 1.

zoning districts. For a detailed factual background of Act 13's terms, see Petition for Review, at ¶¶ 83-89; see also Petitioners' Brief in Support of Motion for Summary Judgment (hereinafter "Summary Judgment Brief"), at "Factual Background".

VI. SUMMARY OF ARGUMENT

1. Petitioners each have legal standing to challenge the constitutionality of Act 13 and assert the claims stated in the Petition.

    a. Municipal Petitioners have standing because they have a direct, substantial and immediate interest in local government functions and their ability to pass effective legislation.

    b. Individual Petitioners have standing to challenge the constitutionality of Act 13 because they face direct, substantial and immediate harm to their individual property and financial interests.

    c. Mehernosh Khan, M.D. has standing to challenge the constitutionality of Act 13 because he has a direct, substantial and immediate interest in the controversy and his ability to effectively and treat his patients.

    d. The Delaware Riverkeeper Network has associational standing to challenge the constitutionality of Act 13 because the organization's members have a direct, substantial and immediate interest in protection of the Delaware River Basin from industrial activity.

2. Petitioners' claims raise questions solely regarding the constitutionality of Act 13 which are properly addressed by the judicial branch through judicial review.

    a. Act 13 is subject to judicial review because of Petitioners' constitutional challenge.

    b. The Commonwealth's exercise of its police power is limited by non-discretionary constitutional restraints and therefore may be reviewed for its constitutionality.

3. Petitioners' pre-enforcement challenge to the constitutionality of Act13 presents a ripe claim for judicial review because of the imminent hardship imposed on Petitioners by enforcement of Act 13.

4. Petitioners' Counts I-XII raise legally sufficient claims alleging violations of the Pennsylvania Constitution, the United States Constitution, Due Process Principles and the Separation of Powers Doctrine.

VII. ARGUMENT

1. Petitioners each have legal standing to challenge the constitutionality of Act 13 and assert the claims stated in the Petition.