IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 104 & 105 MAP 2014

ROBINSON TOWNSHIP, ET AL.
Designated Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Designated Appellees

BRIEF OF DESIGNATED APPELLANTS

Appeal of the Pennsylvania Public Utility Commission & PUC Chairman Robert F. Powelson and Cross-Appeal of Nockamixon Township, et al. of the Order Of The Commonwealth Court Entered On July 17, 2014, Docket No. 284 M.D. 2012

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I. Statement of Jurisdiction

The Supreme Court of Pennsylvania has jurisdiction over the appeal and cross-appeal under 42 Pa.C.S. § 723(a) and Pa.R.A.P. 1101(a)(1). Section 723(a) provides the Supreme Court with "exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court." 42 Pa. C.S. § 723(a); see also Rule 1101(a)(1). Designated Appellants commenced the action in the Commonwealth Court through a Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief ("Petition") under the Court's original jurisdiction. Petition, at 7; see 42 Pa.C.S. § 761(a)(1). Pa.R.A.P. 903(b) permits cross-appeals.

The appeal and cross-appeal are taken from a final order of the Commonwealth Court pursuant to Pa.R.A.P. 341. Consistent with Pa.R.A.P. 341(b)(1), the July 17 Order disposed of all claims by dismissing Designated Appellants' claims on Counts IV, V, XI, and XII of the Petition for Review and making a determination on severability of certain provisions of Act 13 of 2012.

II. Order or Other Determination in Question

AND NOW, this 17th day of July, 2014, Counts IV, V, XI and XII of Petitioners' petition for review are dismissed, and the application and enforcement of 58 Pa.C.S. § 3302 as it relates to Chapter 33 of Act 13, and 58 Pa.C.S. §§ 3305, 3306, 3307, 3308 and 3309(a) in their entirety are hereby enjoined.

/s/
DAN PELLEGRINI, President Judge

III. Statement of Scope and Standard of Review

"Because the issues involve the proper interpretation of constitutional and statutory provisions, they pose questions of law. As such, this Court's scope of review is plenary and our standard of review is *de novo*." Alliance Home of Carlisle, PA v. Bd. of Assessment Appeals, 919 A.2d 206, 214 (Pa. 2007).

IV. Statement of Questions Involved In Cross-Appeal

1. Did the Commonwealth Court err in dismissing Count IV and in not finding that Section 3218.1 of Act 13 is unconstitutional to the extent that it requires notice to only public drinking water systems following an oil or gas-related spill, but not private water suppliers, and is therefore a "special law" and/or violates equal protection in violation of Article III, Section 32 of the Pennsylvania Constitution?

Suggested Answer: Yes.

Answer Below: No.

2. Did the Commonwealth Court err in dismissing Count V and in not finding that Section 3241 of Act 13 is unconstitutional to the extent that it confers the power of eminent domain upon a corporation empowered to transport, sell, or store natural gas in this Commonwealth to take property of others for its operations, therefore permitting a taking for private purpose in violation of the Fifth Amendment of the United States Constitution and Article I, Sections 1 and 10 of the Pennsylvania Constitution?

Suggested Answer: Yes.

Answer Below: No.

3. Did the Commonwealth Court err in dismissing Counts XI and XII and in not finding that Sections 3222.1(b)(10) and (b)(11) are unconstitutional to

the extent that their prohibitions on what information health professionals may disclose constitutes a special law and/or violates constitutional equal protection guarantees in Article III, Section 32 of the Pennsylvania Constitution, and/or violates the single-subject rule in Article III, Section 3 of the Pennsylvania Constitution?

Suggested Answer: Yes.

Answer Below: No.

V. Statement of the Case

1. Form of Action and Procedural History

Designated Appellants ("Citizens") will not recount the entire procedural history of this litigation. Also, for purposes of this brief, Citizens will not recount the procedural history most relevant to the severability issue, which Citizens will brief later. Below is a summary of the procedural history most relevant to the issues in this brief.

On February 14, 2012, Governor Corbett signed Act 13 of 2012 ("Act 13," "the Act") into law, codified as 58 Pa. C.S. §§ 2301-3504. Act 13 amended the Pennsylvania Oil and Gas Act to establish, in part, a uniform zoning scheme for oil and gas development that applied to every zoning district in every Pennsylvania municipality.

On March 29, 2012, Citizens filed a Petition for Review in the Commonwealth Court challenging Act 13's constitutionality. On April 11, 2012, the Commonwealth Court granted Citizens' Application for Preliminary Injunction. The Court issued an order and decision on the merits on July 26, 2012 ("July 26 Order"). The July 26 Order found certain provisions of Act 13 unconstitutional and permanently enjoined them. It also dismissed Citizens' claims on Counts IV and V, and dismissed Dr. Khan's claims in Counts XI and XII due to lack of standing.

Respondents filed timely appeals to the Supreme Court, which were docketed as 63 and 64 MAP 2012. On August 17, 2012, Citizens filed corresponding cross-appeals, which were docketed at 72 and 73 MAP 2012 (collectively, "primary appeals").

On December 19, 2013, this Honorable Court issued a decision in the primary appeals, which is reported as Robinson Twp. v. Com., 83 A.3d 901 (Pa. 2013). Regarding the issues in this brief, this Court remanded various issues to the Commonwealth Court. These included consideration of Count IV (regarding a special law challenge Section 3218.1 on notice of spills); Count V (regarding Section 3241 and eminent domain); and on Counts XI and XII (regarding special law and single-subject rule challenges to physician restrictions in Sections 3222.1(b)(10) and (b)(11)).

The Commonwealth Court held a status conference on March 10, 2014, and issued an order on March 13, 2014, outlining how briefing was to proceed on remand. The Court asked for briefing on severability, and on Section 3218.1 (regarding notice of spills). It requested that the parties attach to their briefs previously-written material on Section 3241(a) (regarding eminent domain) and Section 3222.1(b)(10) and (b)(11) (regarding physician restrictions).

On July 17, 2014, the Commonwealth Court dismissed Citizens' remaining claims, and ruled on severability ("July 17 Order"). The PUC parties in this matter

filed a timely appeal of that decision in regard to severability, and Citizens subsequently filed a timely cross-appeal of the dismissal of their remaining claims.[1]

2. Prior Determinations

All relevant prior determinations are listed above. The opinions for the July 17 Order are currently reported as Robinson Township v. Commonwealth, 96 A.3d 1104 (Pa. Commw. Ct. 2014), and a copy of the opinions and the July 17 Order is attached as Exhibit A.

3. Judges Whose Determination Is To Be Reviewed

An *en banc* panel of the Commonwealth Court in 284 MD 2012 entered the July 17 Order. President Judge Dan Pellegrini authored the majority opinion, and was joined in full by Judge Bonnie Brigance Leadbetter and Judge Simpson. Judge Kevin Brobson authored a dissenting opinion relating to the majority's severability analysis. Judge Patricia A. McCullough authored an opinion concurring in part with the majority's decision, and dissenting as to the majority's dismissal of two counts: 1) Count IV regarding notice of spills, and 2) Count XI

[1] As the Designated Appellants, this Brief only addresses those issues in Designated Appellants' cross-appeal. Severability will be addressed in response to the Designated Appellees' brief.

regarding Dr. Khan's special law challenge to Sections 3222.1(b)(10) and (b)(11) of Act 13.

4. 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.

Because of this provision, the Pennsylvania Department of Environmental Protection (the "Department") will notify potentially affected *public* drinking water facilities in the event an oil and gas driller spills any hazardous contaminants on land or into the water of the Commonwealth. By the Act's terms, 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 occur in rural areas where public water facilities are not available and Pennsylvania citizens rely upon private well and spring water as their primary drinking water 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.[2]

Section 3241 authorizes the appropriation of interests in real property for the injection, storage, and removal of natural gas without a requirement that the public purpose be served.

The Act also includes provisions requiring that physicians 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, doctors in non-emergency situations 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 to the blanket confidentiality requirements. 58 Pa. C.S. § 3222.1(b)(10), (b)(11).

[2] Approximately 4.5 million Pennsylvanians rely upon groundwater from wells and springs for drinking water and other domestic uses. R.1307a.

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 using public drinking water sources differently than citizens using private drinking water sources, and does so for the sole and unique benefit of the oil and gas industry. The difference provided for between public drinking water facilities and citizens' 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 justify the differential treatment in Section 3218.1 where the Commonwealth in fact regulates private water supplies within other sections of the Act.

As a result, the Commonwealth Court erred in dismissing Count IV of the Petition for Review. This Honorable Court must strike the unconstitutional distinction found in Section 3218.1 to provide notification to both public and private drinking water sources alike.

Section 3241 is facially unconstitutional because it authorizes private corporations to take interests in real property for the storage of natural gas without any public purpose being served.

Sections 3222.1(b)(10) and (b)(11) is also unconstitutional as a special law and/or due to violations of the single-subject rule. These provisions extensively alter and interfere with physician-patient relations and medical care and treatment in Pennsylvania shalefield communities, and do so for no reason other than to benefit the oil and gas industry.

VII. Argument

A. Section 3218.1 of Act 13 is unconstitutional because it treats citizens with private drinking water differently than citizens with public drinking water solely to benefit the oil and gas industry, in violation of Article III, Section 32 of the Pennsylvania Constitution.

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 violates the Pennsylvania Constitution because it treats citizens using private drinking water sources differently than citizens using public drinking water facilities, and does so 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. Furthermore, the Commonwealth has undertaken the obligation of regulating private water sources *in other sections of the Act*, most noticeably the immediately prior Section 3218, such that regulation of private water supplies in Section 3218.1 would be both feasible and appropriate. Therefore, the only reason for the different 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 shale gas development.

The Commonwealth Court erred in finding that "valid distinctions" exist to support the disparate treatment between public and private water supplies. The rationale accepted by the Commonwealth Court for the Commonwealth's failure to

give notice to owners of private drinking water sources cannot withstand review by this Honorable Court.

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 establishes a prohibition on "special laws." As explained by this Honorable Court in this matter, "[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 Pa. 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).

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. Pa. Turnpike Com'n, 899 A.2d at 1094-1095. 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. Ct. 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. Put simply, no valid justification exists to rationalize the differential treatment between private and public water supplies. The Commonwealth Court erred as a matter of law in finding that such a justification exists. In doing so, the Commonwealth Court failed to recognize that the Pennsylvania Department of Environmental Protection (the "Department") has the ability to provide notice to private water supplies, including that the Department regulates private water supplies under the Act. The Commonwealth Court upheld the constitutionality of Section 3218.1 solely upon the belief that private water supplies are not routinely regulated such that the Department would be unable to locate and notify owners of private water supplies upon the occurrence of a spill.

As outlined in detail herein, the Commonwealth Court's reliance upon this reasoning is misplaced. The Department is capable of providing notice to private water well owners, and private water well owners are in the greatest need of that notice. Therefore, Section 3218.1 must fall as neither the Commonwealth Court nor the Department has offered a legitimate basis for the distinction that can withstand scrutiny by this Honorable Court.

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) in reality, private water supply owners 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; d) notification of spills to owners of private water sources is feasible and appropriate as the Commonwealth has undertaken the obligation to regulate private water sources under the Act; and e) 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.

Pursuant to the terms of Section 3218.1, the Department is required to notify *only public drinking sources* if a spill occurs as a result of oil and gas development activities. This leaves private well owners completely in the dark and unaware of the harm that may be coming to their families and any expected impact on their water quality. Further, no other provision in Pennsylvania statutory law requires the Department to provide notice to citizens reliant on private drinking water sources

(including well water) of oil and gas-related spills that could affect their drinking water.[3]

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 statutorily mandated an affirmative duty upon the Department to provide notice of spills or releases *to public water facilities*. In doing so, *despite the outstanding need for notice to both private and public water sources*, Section 3218.1 omitted any similar requirement to provide notice of spills or releases to owners of private water sources.

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. While the Commonwealth Court found that the Commonwealth has a legitimate state interest in protecting public water supplies, 96 A.3d at 1112, there

[3] 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 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., 83 A.3d at 957, 959, 980-81, 984 (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.

must also be a rational basis for excluding private water supplies from that same protection. Where a legitimate state interest exists through Section 3218.1 in protecting public water supplies, a legitimate state interest would inherently exist in protecting private water supplies when it has been established that *private water supplies necessitate and warrant that same protection to an even greater degree*.

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.

According to the U.S. Census Bureau, more than three (3) million residents in Pennsylvania rely on private well water for drinking. R.1307a. In addition to this basic fact, the majority of drilling is occurring in rural areas serviced by private water sources. R.1481a. Rural families and their livelihoods are often dependent on 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 Affs. of Swartz and Kowalchuk, R.1191a-R.1206a (also at R.1483a-1498a); 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, or relatedly, to more significant community opposition.

The rationale for the exception in 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.[4] This provision is not rationally related to any legitimate public interest.

Also, 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. R.1319a-1320a. 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 owners of private water wells used for drinking water. Quite the contrary, Pennsylvania citizens who rely upon private water wells are the ones who can 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 Citizens' special law claims, this Honorable Court has already 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

[4] Stacey Haney, whose situation this Honorable Court previously recognized, never received notice of spills occurring at the drill site neighboring her home. See Aff. of Stacey Haney R.828a-R.833a (also at R.1500a-1505a); see also Robinson Twp., 83 A.3d at 937.

> 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).

Moreover, the Commonwealth Court itself even acknowledged "that the majority of gas drilling occurs in rural areas, that there is a greater reliance on private water supplies in such areas, and that private wells are not subject to the routine testing and monitoring of public water systems...." 96 A.3d at 1112. These facts are undisputed and can hardly explain how a need for notification of spills to owners of private water sources is ameliorated while notice of spills to public water facilities is provided for. To overcome this strong showing of need, the Commonwealth must set forth some legitimate basis for the distinction. It is not enough for the Commonwealth Court to pronounce that protecting public water serves a legitimate state interest. 96 A.2d at 1112. Importantly, the *classification itself* between public and private water must promote a legitimate public interest. This showing simply has not been made. For any distinction creating such an unequal disparity to be constitutional, such a showing is required, at a minimum, by Pennsylvania Turnpike Commission v. Com., 899 A.2d 1085, 1094 (Pa. 2006).

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.

A citizen dependent on well water for their drinking water 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 because of oil and gas operations. See Deposition Transcript of Alan Eichler, R.1507a-1510a. Following a spill or other release, despite no provision in the law authorizing this action, the Department's practice has been that, if a confidential settlement is reached between an oil and gas operator and an affected resident whose water has become contaminated by oil and gas operation spills and not safe to drink, the Department may not issue a Notice of Violation[5] on impact to a private drinking water supply, nor will a formal determination follow from the Department indicating that drinking water

[5] This is despite the fact that the discharge of residual waste onto the ground by oil and gas drilling activities violates Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301, and constitutes *unlawful conduct* and a *public nuisance* under Sections 302 and 601 of that 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*, constitute an "industrial waste" as defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1. "Waters of the Commonwealth," as defined by Section 1 of the Clean Streams Law, includes groundwater.

contamination has occurred.[6] R.1507a-1510a. If an operator enters into a settlement agreement with a citizen because the citizen's water was impacted and contaminated from drilling operations, spills and releases, the public *has no way* to discover that oil and gas drilling operations contaminated neighboring water supplies. R.1507a-1510a. Consequently, a Commonwealth citizen who depends on well water or spring water may live next door and down-gradient from another person whose water has been negatively impacted and contaminated by drilling and spills of hazardous chemicals – and may never know it. And, the Department under Act 13 does not have to provide notice.[7] In many 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. See R.828a-R.833a (also at R.1500a-1505a).

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[6] Importantly, the Department considers violations when deciding whether to issue gas well permits. 58 Pa. C.S. § 3211(e.1). If no violation exists of record, it is unclear how the Department or the public may consider an applicant's true violation history.

[7] Also, the citizen will be completely lost as to what chemicals to test their water for, since neither the Department nor the gas company knows all of the chemicals used at drill sites and placed into Pennsylvania's environment. R.2130a-2231a. (Citizens' Response to Industry Amici Supplemental Memorandum of Law).

d. Notification of spills to private water owners is feasible and appropriate as the Commonwealth has undertaken the obligation to regulate private water supplies within the confines of the Act.

The Commonwealth Court erred as a matter of law in concluding that there are "valid distinctions supporting disparate treatment under 58 Pa. C.S. § 3218.1...." 96 A.3d at 114. As explained above, while the Court found that the Commonwealth had a legitimate interest in protecting public water supplies, the rationale offered for not similarly giving notice of spills to protect private water supplies is unavailing. The Department has the ability to provide notice to owners of private water sources.

In an attempt to support its statement that valid distinction exists to justify Section 3218.1's disparate treatment, the Commonwealth Court alleges that "private water supplies are not regulated by the [Department] and have been omitted and are specifically exempt from many statutes such as the Safe Drinking Water Act, the Water Rights Act, and the relevant DEP regulations." 96 A.3d at 1112-1113. However, what the Commonwealth Court fails to address is that *this very Act* that contains Section 3218.1 regulates private water supplies. Therefore, even though private water supplies may not be regulated in statutes such as the Safe Drinking Water Act or the Water Rights Act, there was a recognition, in the context of regulating the oil and gas industry specifically, that corresponding regulation of private water supplies is both necessary and prudent.

Specifically, Section 3218 of the Act, entitled "Protection of Water Supplies" requires an operator to replace or restore an impacted public *or private water supply*. 58 Pa. C.S. § 3218(a). The Department must then ensure that the restored or replaced water, whether a public or private source, meets the standards of the Safe Drinking Water Act or is comparable to the pre-impact water quality. Id. Furthermore, the Act establishes a presumption that oil and gas drilling operations are the cause of water pollution if, in the case of an unconventional well, the water supply is located within 2,500 feet and the pollution occurs within twelve (12) months. Id. at § 3218(c). An oil and gas operator must then provide a temporary water supply if the affected supply falls within the presumption zone. Id. at § 3218(c.1). This section applies to both public and private water supplies. Finally, an operator may rebut this presumption if it has conducted pre-drilling water testing and that testing demonstrates the existence of pollution prior to oil and gas activities being undertaken. Id. at § 3218(d).

As a result of the foregoing, the Act itself is internally inconsistent as to protection of public and private water supplies, and the Commonwealth Court's reliance upon the fact that private water supplies are not routinely regulated in other circumstances is unavailing. The Commonwealth Court provided that Section 3218.1 created a "reasonable classification" because private water sources "have historically been omitted from statutes regulating the public potable water supply and notice regarding potentially hazardous conditions that may exist in the public water

supply...." 96 A.3d at 1113. Yet, as demonstrated above and distinct from other statutes, the Oil and Gas Act does regulate private water and addresses potentially hazardous conditions that may exist in a private water supply because of oil and gas activities. Thus, there is no reasonable justification to exclude from that regulatory scheme notification to private water well owners upon the occurrence of a spill when, up until that point, private and public drinking water sources were treated equally. Through Section 3218, the General Assembly already started down the path of protecting these owners of private water sources – it simply did not finish. In doing so, it created a classification in Section 3218.1 violating provisions of our Constitution that require equal protection under the law. There is no reasonable classification.

Citizens concede that there may be inherent differences between public water sources and private water sources. Yet, as demonstrated herein, Section 3218.1's preferential treatment does not relate to any such inherent differences. In other words, there is no rational relationship between the unique qualities and concerns solely associated with public water and the preferential treatment Act 13 provides for. The fit between the two is incongruous such that one does not even attempt to address the other because, as shown above, it is *private water sources* that in fact require the additional protection. Citizens use both to drink, and a spill and release of chemicals does not distinguish between from where a water source originates.

The Commonwealth Court additionally alleged that it would not be feasible for the Department to provide notice to private well owners because of the Department's lack of information on private well locations or ownership. 96 A.3d at 1114. The Commonwealth Court buttressed its concerns in light of "the breadth of the trigger for the [Department's] notice obligation under [Section 3218.1]...." Id. However, Section 3218.1 limits the Department's notification obligation to water "that could be affected by the event." Therefore, the Department's obligation may vary depending on the size of the incident, but it will always be appropriately limited based upon the incident that occurred. In other words, the Department would only be required to notify water supplies within the vicinity that could be affected. This will always be a finite number.

Also, it is not impossible for the Department to locate and notify private water sources surrounding a drill site upon the occurrence of a spill. Certainly, the Department could easily locate residences within the area. More importantly, Section 3211 of the Act requires well operators to list on their permit applications, in the case of an unconventional well, the name of all surface landowners and water purveyors whose water supplies are within 3,000 feet of the vertical well bore. 58 Pa. C.S. § 3211(b). This permit application is filed with the *Department*. Additionally, because of the existence of pre-drill testing as provided for in Section 3218, the Department

has access for a list of water sources, at the very least, within 2500 feet of a natural gas drilling operation. And yet, these sources, if private, get no notice of a spill.

Further, despite its reliance upon the argument that notification to private water well owners would not be feasible for the Department, the Commonwealth Court explains:

> Even though it is not required to do so, in the event of a spill, the [Department] will, in all likelihood, **canvas areas to identify individuals served by private wells and notify them of the spill and aid them in getting alternative water supplies to protect the public which it is charged to protect**.

96 A.3d at 1114. Thus, while the Commonwealth Court relies upon the "impossibility" of giving notice to rationalize the distinction made in Section 3218.1, in the same breath, it exposes the possibility.

The Commonwealth Court's reasoning does not address these points raised herein by Citizens. For a classification made in the law to be constitutional, there must be a legitimate state interest or public value at stake and the classification must bear a reasonable relationship to furthering that interest. The act of foregoing protection of private water supplies when otherwise, under the Act, public and private water supplies are regulated and treated similarly, can never be a means to a public-interest end. Furthermore, a valid classification cannot be one which is maintained by allowing for an unconstitutional infringement upon citizens' rights to clean water. The Commonwealth Court could not provide a reasonable and

rational justification for the preferential treatment because the legislature itself could not provide one when enacting the law. It was, undoubtedly, privileged legislation enacted solely for the benefit of the Pennsylvania oil and gas industry. Harrisburg School Dist. v. Hickok, 761 A.2d 1132 (Pa. 2000).

e. 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 – by 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 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.[8] Requiring that an oil and gas operator report spills to owners of private water sources could create an additional monetary burden 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. Thus, 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 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. R.828a-R.833a (also at R.1500a-1505a). Section 3218.1 relieves the oil and gas industry from having to address its true impact on rural communities,

[8] The presumption zone described above, including water replacement, 58 Pa. C.S. § 3218(c), notably does *not* apply to impacted water supplies surrounding centralized wastewater impoundments that could remain in place for decades. Also, wastewater transfer lines connecting centralized impoundments can run for miles and are prone to leakage.

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 failed to justify at all how this preferential treatment of the oil and industry bears a reasonable relationship to a proper state purpose. As evidenced above, given the need for notification in rural areas where millions of Pennsylvania citizens rely on private water for drinking, bathing and cooking, 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 based 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, 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.

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. Citizens 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 this Honorable Court recognized, "[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. Commw. Ct. 2012) (citing Pa. Turnpike Com'n v. Com., 899 A.2d 1085, 1094-1094 (Pa. 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. Ct. 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, 828 A.2d 1079, 1088-1089 (Pa. 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), 714 A.2d 1008, 1011 (Pa. 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, 636 A.2d 134, 140 (Pa. 1993) (statutory classifications must have a rational relationship to a legitimate state purpose); Commonwealth v. Hicks, 466 A.2d 613, 615 (Pa. 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 the General Assembly makes a classification 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 that justify the differential treatment each receive regarding notification following an oil or gas-related spill. Likewise, the Commonwealth has failed to demonstrate how the classification in fact promotes, or bears a reasonable relationship to, a public interest. For any distinction creating such an unequal disparity to be constitutional, such a showing is required, *at a minimum.*

Section 3218.1 creates an entirely arbitrary distinction – 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 apply 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 violates Article III, Section 32 of the Pennsylvania Constitution.

Citizens respectfully request that this Honorable Court overturn the decision of the Pennsylvania Commonwealth Court and enter an order striking from Section 3218.1 the unconstitutional classification that provides notice of a spill only to public water facilities. This course of action will direct 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.

B. Section 3241 Of Act 13 Authorizes Unconstitutional Takings For Private Purposes And Is An Improper Appropriation Of Eminent Domain Power In Violation Of The Fifth Amendment Of The United States Constitution And Article I, Sections 1 And 10 Of The Pennsylvania Constitution.

The Commonwealth Court held in its July 17, 2014 Opinion that Section 3241 of Act 13 ("Section 3241") only conferred eminent domain power upon "Public Utilities" to condemn property for the injection, storage and removal of natural gas. The express language of Act 13 does not support the Commonwealth Court's holding, and the Commonwealth Court erred in reaching this conclusion.

Section 102 of the Public Utility Code defines "Public Utility" as:

> (1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
>
> (i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity or steam for the production of light, heat, or power to or for the public for compensation.

66 Pa.C.S. §102(1)(i).

However, Section 102 states that the term "Public Utility" ***does not include*** "[a]ny producer of natural gas ***not engaged in distributing such gas directly to the public*** for compensation." 66 Pa.C.S. § 102(2)(iii) (emphasis added). The PUC's guidelines for determining public utility status are based on fact specific criteria that the PUC reviews for each applicant seeking public utility status in Pennsylvania. 52 Pa. Code § 69.1401. The PUC grants or denies such applications

based on the criteria. Also, there are companies that might otherwise qualify as public utilities, but that desire not to be regulated as public utilities.

For example, on January 19, 2010, Laser Northeast Gathering Company ("Laser") filed an application for a Certificate of Public Convenience. Laser Northeast Gathering Co., No. A-2010-2153371, at 2 (Pa. Pub. Util. Comm'n June 14, 2011). Laser's primary business function is "to construct, build, own and operate natural gas gathering and transportation facilities and to provide gathering and transportation services to producers..." Id. at 5. After submission, Laser decided to withdraw its application for a Certificate of Public Convenience on September 8, 2011, and Laser thus remains a non-public utility, empowered to transport natural gas, in Pennsylvania. Laser Northeast Gathering Co., No. A-2010-2153371, Petition to Withdraw (Pa. Pub. Util. Comm'n June 14, 2011). Under Section 3241, Laser would be able to condemn private property in order to inject, store or remove from storage natural gas even though it falls outside of the definition of "Public Utility" under Pennsylvania law.

Section 3241 expressly appropriates eminent domain powers to these companies, even though these rights can then be used for a private purpose. The appropriation of these very public rights, for very private purposes, is prohibited under the United States and Pennsylvania Constitutions.

In Kelo v. City of New London, the United States Supreme Court stated that "[the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a benefit on a particular private party. " Kelo v. City of New London, 545 U.S. 469, 477 (citing Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984)). The Kelo Court also noted that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." Kelo, 545 U.S. at 477 (citing Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403 (1896)).

This Court further examined the issue of private takings in the context of the Private Road Act in the case of In re Opening Private Rd. for Benefit of O'Reilly ("O'Reilly"), 5 A.3d 246 (Pa. 2010). In O'Reilly, this Court held that takings, to be Constitutional, must have a "public purpose" and that a "public purpose" exists ***only*** when the public is the "primary and paramount beneficiary of any taking." O'Reilly, 5 A.3d at 258 (emphasis added). Stated otherwise, the true purpose of the taking must primarily benefit the public.

This Court's decision in O'Reilly is also consistent with Pennsylvania's Eminent Domain Code. Section 204 of Pennsylvania's Eminent Domain Code provides:

> § 204 **Eminent domain for private business prohibited**
>
> (a) **Prohibition** – Except as set forth in subsection (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).

The takings authorized by Section 3241 are nothing more than governmental authorization to confer a private benefit upon the natural gas companies operating in the Commonwealth. There is no legitimate governmental purpose effectuated by the authorization of purely private taking of private property for the economic benefit of certain natural gas companies. Section 3241's unconstitutional appropriation is exacerbated by the fact that there is no requirement that the natural gas companies benefitting from these powers provide any service directly to the public. Given the foregoing, there is no way that the Section 3241 can meet its burden under the United States Constitution to demonstrate that the statute does not appropriate eminent domain rights for private takings, nor can Section 3241 meet its burden under the Pennsylvania Constitution to demonstrate that its authority can only be used when the public is the primary and paramount beneficiary of such appropriation.

Therefore, this Court should declare Section 3241 of Act 13 to be unconstitutional under the Fifth Amendment of the United States Constitution and Article I, Sections 1 and 10 of the Pennsylvania Constitution.

C. Sections 3222.1(b)(10) And (b)(11) Are An Unconstitutional Special Law Because They Provide Extensive Trade Secret Protection To The Gas Industry That Is Enjoyed By No Other Industry And Which Substantially Interferes

With Medical Care And Public Health Knowledge Relative To Fracking Chemicals.

As discussed 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 must seek to promote a legitimate state interest or public value, and bear a "reasonable relationship" to the object of the classification. Pa. Turnpike Com'n v. Com., 899 A.2d 1085, 1094-1095 (Pa. 2006).

The General Assembly, through Sections 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, more crucially, to preventing doctors and others from sharing that information with patients and for the development of medical and public health knowledge. Act 13 restricts health professionals' abilities to disclose critical diagnostic information necessary for medical treatment solely because the natural gas industry deems such information "proprietary" or a "trade secret." No other law is so restrictive in the use of trade secret information – not federal worker protection rules, and not federal and state chemical disclosure provisions that apply to other industries. The General Assembly has unconstitutionally singled out the natural gas industry for special treatment and protection at the expense of public health and welfare.

Section 3222.1(b)(11) of Act 13 states that in emergencies, if a physician determines that knowledge of "the specific identity and amount" of trade secret chemicals "are necessary for emergency treatment, the vendor, service provider or operator shall immediately disclose the information to the health professional" if the physician verbally acknowledges "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." If requested, the "health professional *shall provide* . . . a written *statement of need* and a *confidentiality agreement* 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)(requiring confidentiality agreement and statement of need prior to access in non-emergencies).

To understand how these two provisions give more protection to the gas industry and interfere more with physician-patient relations and public health in shalefield communities than existing law, the sections that follow review: 1) general issues relative to chemical exposure, basic contours of the physician-patient relationship, and physician ethical and legal obligations; and 2) how other federal and state laws respect the physician-patient relationship and balance trade secret protection without infringing on that

relationship, physician obligations, and development of public health knowledge. We will then contrast this to Act 13.

1. General Overview Of Chemical Exposure Diagnosis And Treatment And Medical Professional And Ethical Obligations

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 chemical usage can lead to human exposure with adverse health effects that may result in disease, illness, and the exacerbation of pre-existing conditions.

Information sharing 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. For a physician to completely and properly treat a patient, a physician must 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.[9]

[9] 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.

Once a differential diagnosis is made, a physician, in order to give competent medical care, must perform what is called 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 physician 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 or primary care physician must refer a patient to a specialist or consult with one to properly and competently diagnose and treat a patient. In that referral relationship, the emergency room 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 or blood tests, *and* 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 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. It imposes 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 duties include requirements concerning accurate and complete medical records, including records that contain diagnoses and findings. 35 P.S. §§ 563.1-563.13; 49 Pa. Code § 16.95. Also included are obligations to report certain diseases and medical conditions, including cancer. 28 Pa. Code § 27.21a(b)(2). Upon demand of the Board of Medicine physicians cannot refuse to disclose a particular treatment method or procedure. 49 Pa. Code § 16.61(a)(12). Physicians risk discipline by the Pennsylvania Board of Medicine if they act "in such a manner as to present an immediate and clear danger to public health or safety." 63 P.S. § 422.41(9). 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, R.595a-R.604a. This knowledge and information-sharing has been central to the development of medical knowledge and treatment techniques for centuries.

2. Other Federal And State Laws Respect Existing Obligations And Established Methods Of Medical And Public Health Activities Around Chemical Exposure Issues

As can be seen, information-sharing simply among treating medical professionals is crucial. A physician may rely on multiple specialists in the diagnosis and treatment process, including some who may not be physicians but are still central to chemical exposure issues, such as toxicologists. Equally important is open communication with the patient, documenting information in medical records, and preventing known dangers to public health. In issues of emerging science and public health knowledge, such as health impacts from shale gas development, the ability to connect illnesses or patterns of illness to particular exposures is also important – not just to better protect the community, but also to help medical professionals more quickly diagnose and treat patients.

Other federal and state laws balance the need for trade secret protection and respect for the physician-patient relationship. These laws do so by allowing both physicians and other health professionals (including non-physician experts) access to trade secret information while also delineating strict rules on confidentiality agreements and substantiation of trade secret claims.

These laws are instructive. The federal Emergency Planning and Community Right-to-Know Law ("EPCRA") and a similar state law, the Pennsylvania Hazardous Material Emergency Planning and Response Act ("Pa.

Chemical Disclosure Law"), both address health professionals and trade secret issues, regardless of who is being treated (i.e. a worker exposed to chemicals, or a community member). Similarly, the federal Occupational Health and Safety Administration's ("OSHA") regulations address trade secrets and health professionals who treat injured workers, including medical records of injured workers.[10]

These features include, among others:

- Express statements that the laws do ***not*** override health care professionals' information-sharing, ethical, and record-keeping obligations. See 42 U.S.C. § 11041(a)(1) & (a)(3), 35 P.S. § 6022.304(b); 29 C.F.R. § 1910.1020(a).
- Physicians and nurses can access trade secret information in an emergency situation without a pre-disclosure confidentiality agreement (written or verbal). 42 U.S.C. § 11042(b), 35 P.S. § 6022.205(a)(4)[11]; 29 C.F.R. §§ 1910.1020(f), 1910.1200(i).
- While the laws allow a company to require a confidentiality agreement

[10] Because OSHA regulations impact only certain workers exposed to chemicals (and not all in the community who may be exposed to chemicals), the regulatory scheme is narrower in scope in that it focuses only on workers. Thus, it is not fully identical to the community-wide focus of EPCRA, the Pa. Chemical Disclosure Law, or Act 13's provisions, but still manages not to infringe on the physician-patient relationship.

[11] The provision obligates covered entities to comply with the provision of EPCRA that governs disclosure to health professionals.

after the emergency passes, these laws still trust the physician or nurse to do what they need to do to diagnosis and treat the patient, and to address a confidentiality agreement later, if requested, that addresses each person involved in the treating process.

- Express allowance of access to trade secret information for non-physician specialists in non-emergency situations including epidemiologists and toxicologists. Cf. 42 U.S.C. § 11043(a), (c), & (d); 35 P.S. § 6022.205(a)(4); 29 C.F.R. §§ 1910.1020, 1910.1200(i). Such access is not limited to diagnosis and treatment but includes studies and other assessments to help prevent injury and disease. In fact, OSHA allows broad access to not simply trained health professionals, but workers also.[12]

- Restrictions on the types of provisions that may be included in a confidentiality agreement. 42 U.S.C. § 11043(d); 40 C.F.R. § 350.40(f)(iii); 35 P.S. § 6022.205(a)(4); 29 C.F.R. §§ 1910.1020(f), 1910.1200(i)(4). For example, OSHA's Hazard Communication Standard prohibits penalty bonds because, given the amount of risk associated with them, they "could easily act as an absolute barrier to

[12] An earlier version of OSHA's Hazard Communication Standard was successfully challenged as being *too* restrictive because it *only* allowed health professionals access to trade secret information, and not also workers. See United Steelworkers of Am., AFL-CIO-CLC v. Auchter, 763 F.2d 728 (3d Cir. 1985).

access." 48 Fed. Reg. 53280, 53319 (Friday, November 25, 1983); see also 40 C.F.R. § 1910.1020(f); 40 C.F.R. § 350.40(f)(iii) (prohibiting penalty bonds).

- Requirement for companies to substantiate trade secret claims. 42 U.S.C. § 11042; 40 C.F.R. § 350.1. OSHA also provides a remedy for those denied access to information. 29 C.F.R. §§ 1910.1020(f), 1910.1200(i); see also 48 Fed. Reg. 53314-15 (noting that "excessive denial of information on unsubstantiated trade secret grounds" was a problem).

As can be seen through a brief review of other federal and state laws governing disclosure of chemicals and trade secrets, a balance has been struck repeatedly that respects commercial enterprise while not interfering with and altering development of medical and public health knowledge and the very basic interactions necessary to the physician-patient relationship.

3. The Physician Gag Rule In Act 13 Differs Sharply From Existing Laws And Overreaches To Interfere With Medical And Public Health Activities In Shalefield Communities And Understanding Of Public Health Impacts

Section 3222.1(b)(10) and (b)(11) of Act 13 stand in stark contrast to the laws just described. The General Assembly essentially stripped out all the protections and respect for medical care and public health measures present in the other laws described above, and just left trade secret protection. Consequently, the "physician gag rule" overreaches extensively into the physician-patient

relationship, interferes with diagnosis and treatment of chemical exposure, and blocks information from being used for preventative health measures and research to help shalefield communities understand the extent to which shale gas development is negatively impacting their health.

First, Act 13 does *not* expressly state that it does not override health care professionals' information-sharing and record-keeping obligations. Thus, under the Act's express language, the physician cannot even share information with her own patient so that the patient can make an informed medical decision. Withholding information exposes the physician to patient claims over violation of the duty to obtain the patient's informed consent.

Second, Act 13 lacks limitations on the provisions that can or cannot be included in confidentiality agreements. Act 13 gives the Environmental Quality Board ("EQB") complete discretion over the terms of these confidentiality agreements.[13] 58 Pa.C.S. § 3222.1(b)(10)-(b)(11); 58 Pa.C.S. § 3274; cf. 42 U.S.C. § 11043(d). Further, the EQB is not the entity in the Commonwealth generally charged with public health regulation. To date, neither the EQB nor any other agency has issued any regulations on confidentiality agreements under Act 13

[13] The Act also lacks recourse for a physician or nurse improperly denied access to chemical information.

either. Indeed, public statements by Pennsylvania officials reflect confusion over who actually has to make the regulations governing these agreements.[14]

Third, unlike the laws mentioned, Act 13 burdens physician use of information from the very beginning of an emergency. This occurs because the Act requires verbal acknowledgements of both confidentiality and an assertion by the physician that the information will be used solely for the health needs asserted *at the beginning of the emergency*, regardless of whatever issues may arise during the particular treatment process. Unlike the other laws described, the Act does not trust that the physician or nurse will use chemical information solely for patient treatment or diagnosis, including consultation with relevant experts if needed. The law does not allow the physician and the chemical information holder to sit down after the emergency has passed and hash out an agreement based on what the physician deemed necessary for patient treatment. Rather, the Act holds the physician to whatever she said based on her initial assessment of the situation, even if the initial assessment was preliminary and could not foresee the need for specialists. Also, the Act does not protect the physician against the chemical

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[14] "More guidance on how the disclosure rule would be implemented was expected when the Department of Environmental Protection released a draft of its new oil and gas regulations in mid-December. But health care access to frack fluid data was not addressed. ***DEP spokesman Eric Shirk said it doesn't fall within the agency's purview.***" http://www.post-gazette.com/business/2013/12/29/Pa-Act-13-ruling-revives-questions-on-doctor-gag-order/stories/201312290098 (emphasis added). This is despite the fact that the EQB is the entity that crafts environmental regulations that DEP enforces, including the oil and gas regulations mentioned in the quote.

information holder when the time comes for a confidentiality agreement. It equally does not provide protection when the chemical information holder discovers that the physician's initial assessment of the situation was incorrect and the physician needed to involve multiple non-physician specialists to treat the patient. As noted by OSHA itself, restrictions on the terms of confidentiality agreements are important to prevent physicians from simply avoiding seeking the information in the first place due to fear of being bankrupted by a large corporation. 48 Fed. Reg. 53319 (Friday, November 25, 1983).

These risks to the physician of being sued simply for meeting her professional and ethical obligations for communication with specialists and patients creates a perverse incentive for physicians to simply avoid obtaining the information in the first place. However, avoiding obtaining the information in the first place carries its own risks because the patient's illness could worsen due to the lack of chemical information. The patient might then sue on the grounds that the physician *could* have obtained the information to better diagnose and treat the patient. The same result could occur if the physician sought the information and made the patient's condition worse due to her inability to consult with a specialist for fear of being sued by a gas company.

Act 13 also bars access to trade secrets and confidential proprietary information for preventative public health assessments, including assessments of

the hazards of exposure to chemicals posed to those living in a local community. In addition, the bar on allowing access to non-physician specialists such as epidemiologists and toxicologists in non-emergencies makes tracing a person's illness to a particular chemical exposure much more onerous. Consequently, the connections between shale gas development and adverse health effects will be hidden.

To illustrate, benzene[15] is one of the many chemical additives that the gas industry has disclosed as being used in the hydraulic fracturing process. The International Agency for Research on Cancer ("IARC"), the cancer research arm of the World Health Organization ("WHO") has rated benzene a Class I carcinogen. This Class I IARC rating 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's Class I designation is due primarily to its ability to cause leukemia, specifically acute myeloid leukemia ("AML") R.479a-481a. 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

[15] "New study shows gas workers could be exposed to dangerous levels of benzene" http://stateimpact.npr.org/pennsylvania/2014/08/28/new-study-shows-gas-workers-could-be-exposed-to-dangerous-levels-of-benzene/; "Benzene and worker cancers: 'An American tragedy'," http://www.publicintegrity.org/2014/12/04/16320/benzene-and-worker-cancers-american-tragedy; "New battlefront for petrochemical industry: benzene and childhood leukemia," http://www.publicintegrity.org/2014/12/08/16356/new-battlefront-petrochemical-industry-benzene-and-childhood-leukemia

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, the Act prohibits these physicians from sharing any information received from the natural gas industry with specialists to whom the patient is referred. Such a barrier impacts the doctor's ability to determine the cause of the patient's AML and ultimately, to practice competent medicine.

When the physician determines the cause to be benzene in a proprietary gas industry chemical, and the patient is still working or living near and being exposed to that natural 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 natural gas hydraulic fracturing product. However, with the barriers Act 13 imposed, doctors cannot share information with specialists to reach those determinations. Further, doctors cannot share the information necessary to create or revise protocols to protect natural gas industry workers or community members exposed to fracking chemicals.

Given Act 13's onerous system, the level of risk either to avoid obtaining the information or to obtain the information is extremely high and differs markedly from other established federal and state laws on trade secrets and medical and public health issues. Either way a physician operates, she is at risk of being sued for malpractice, or for breaching confidentiality to a gas company.

4. The Physician Gag Rule's Special Treatment Of The Gas Industry Is Not Connected To Any "Manifest Peculiarity" Of The Industry And Therefore The Gag Rule Is A Special Law.

The physician gag rule merely serves to make medical care and treatment in shalefield communities so fraught with risk that communities that already struggle to obtain good public health and medical expertise will find more barriers in the way. Further, the gag rule makes it extremely difficult to connect illness from fracking chemical exposure to gas development due to its special bar on use of information for preventative health purposes.

To enact such a law that is so contrary to the public health, safety, and welfare is suspect enough, but on top of that, the gag rule is not connected to or justified by any "manifest peculiarit[y]" of the gas industry. Allegheny County v. Monzo, 500 A.2d 1096, 1105 (Pa. 1985) (citing Commonwealth v. Gumbert, 100 A. 990, 991 (Pa. 1917)). It is therefore an unconstitutional special law.

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 cannot use any knowledge or experience gained treating one patient exposed to such substance to diagnose and assist another patient in a similar situation. Act 13 plainly does not allow use of the information for preventative health assessments, or to help other medical facilities in the gasfields develop protocols to more quickly identify illnesses, rashes, or other ailments associated with fracking chemical exposure. See Robinson Twp. v. Com., 96 A.3d 1104, 1125-26 (Pa. Commw. Ct. 2014)(J. McCullough, dissenting in part). This hinders the ability of physicians to more rapidly treat and understand chemical exposures of community members and workers. Further, Section 3222.1(b)(10) and (b)(11) require 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 R.856a & R.857a-858a; see also R.835-836a at ¶¶ 1, 4-7.

In finding that the gag rule provisions did not bar certain types of information-sharing, the decision below incorrectly read into the gag rule more flexibility than the plain language actually allows. For instance, the Court stated that nothing in the restrictions prevent physicians from including the trade secret

information in patient records or evaluations, and that nothing in Act 13 "precludes a physician from sharing with other medical providers any trade secrets that are necessary for the diagnosis and treatment of an individual."
96 A.3d at 1117. However, the plain language of the Act does not provide the types of exceptions the Commonwealth Court describes. If the law intended to provide exceptions, it would have done so expressly, like EPCRA.

In addition, the Commonwealth has not justified the special treatment the law gives to the gas industry – it has not identified any "manifest peculiarit[y]" of the gas industry that justifies such restrictions on doctors solely to benefit the industry. Allegheny County v. Monzo, 500 A.2d 1096, 1105 (Pa. 1985) (citing Commonwealth v. Gumbert, 100 A. 990, 991 (Pa. 1917)). Indeed, the Commonwealth Court conceded that the challenged gag-rule provisions "create a set of disclosure rules different from the norm for other industrial chemical users under OSHA." 96 A.3d at 1117. It concluded that this fact "does not mean that Act 13 constitutes a special law." Id. However, the Court concluded this without any determination that there *is* a legitimate basis for such special treatment. It stated that the physician restrictions reflected a balance between trade secret protection and medical care. However, it found this despite the fact that the gag rule gives broader trade secret protection than existing law. In addition, the Commonwealth itself failed to point to any specific reason for why the gas industry should enjoy

broader trade secret protection than other industries, which ultimately interferes with the physician-patient relationship and development of public health knowledge around shale gas chemical exposure. Indeed, the Commonwealth has admitted that the purpose of Act 13's doctor restrictions is to "protect the economic interests of the oil and gas industry." Cross-Appellees Brief of Attorney General in 72 & 73 MAP 2012, at p. 23. But again, pre-existing trade secret protections under EPCRA and other laws likewise balanced trade secret protections and public health. There is no "manifest peculiarit[y]" pertaining to the oil and gas industry that justifies a different "balance" between trade secret protection and public health restrictions that gives more protection to the oil and gas industry than other industries and in turn interferes with basic medical and public health activities. Allegheny County v. Monzo, 500 A.2d 1096, 1105 (Pa. 1985) (citing Commonwealth v. Gumbert, 100 A. 990, 991 (Pa. 1917)). Certainly, every industry would like to have a law that made it more difficult to connect their activities to potential health impacts, but the fact is that multiple federal and state law strike a far fairer balance for public health and medical care than Act 13. No one in this litigation has identified why the gas industry should have an advantage on hiding health impacts from the public.

The sharp contrast outlined above between Act 13 and other laws such as the EPCRA and the Pa. Chemical Disclosure Law demonstrates the irrationality of the

General Assembly's classification in Act 13. For decades, humans have developed medical conditions due to chemical exposure, and health professionals have had affirmative duties and obligations to record this information and share it with colleagues. Now, despite this history, the General Assembly has prescribed a regulatory regime that applies *only* to the gas industry despite the fact that "trade secrets" or chemical exposure is not unique to this industry. LaPlacca v. Philadelphia Rapid Transit Co., 108 A. 612, 613 (Pa. 1919). Given this situation, this Court should enjoin Act 13's physician restrictions as an unconstitutional special law.

D. Act 13's Restrictions On Physicians Violate The Single-Subject Rule Because They Constitute A Regulation On Medical Practice And Public Health Fields, But Are Placed In A Law All About Regulation Of The Natural Gas Industry.

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.[16] Stilp v. Commonwealth, 905 A.2d 918, 955 (Pa. 2006).

[16] The title of HB1950, which became Act 13, also says nothing about physician restrictions, further exacerbating the problem created by its last-minute addition into the Act.

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 Section 3's purpose, which is "to place restraints on the legislative process and encourage an open, deliberative, and accountable government." City of Philadelphia, 838 A.2d 566, 585 (Pa. 2003) (citing Pennsylvania AFL-CIO v. Commonwealth, 757 A.2d 917, 923 (Pa. 2000)).

Rarely is the call on whether a law satisfies the single-subject rule a straightforward one. One rare more straightforward case involved the Supreme Court's invalidation of 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 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 practice, there is often a fine line between a law that satisfies the single-subject rule, and one that does not. The Court upheld the 2005 pay raise law, finding that all provisions related to compensation of government officials, even though the law dealt with officials in three different branches and in earlier drafts addressed only executive compensation. Stilp v. Commonwealth, 905 A.2d at 956. In another case, the Court upheld a comprehensive bill on gaming regulation

finding that most of the provisions related back to regulation of the gaming industry, even though the law had originally been solely on limited horse racing industry issues. Pennsylvanians Against Gambling Expansion Fund, Inc. ("PAGE") v. Com., 877 A.2d 383, 396 (Pa. 2005). However, the Court invalidated certain money disbursement provisions partly because the ultimate destination of the funds had no relation to gaming.[17] Id. at 402.

In contrast, the Court recently invalidated a law on single-subject grounds that would have allowed counties to abolish the office of jury commissioner. Pennsylvania State Ass'n of Jury Comm'rs v. Com. ("PSAJC"), 64 A.3d 611 (Pa. 2013). The Court saw the law as having a widespread impact in that it affected almost every county in the Commonwealth, rather than addressing one municipality or a single issue such as gaming. Id. at 618. The law also dealt with two different categories of powers (executive and legislative) that boards of county commissioners exercise, and the Court noted that the particular issues in the bill – granting authority to auction private property and farm surplus, and to eliminate an elected public office – had no relation to one another. Id. at 618-19. The bill itself had originally only addressed auction authority. Id. at 619.

[17] The other factor in the Court's decision was whether there was a subsequent check in the process, namely a requirement that an appropriation be made through a subsequent budget process. Id. at 402.

As for Act 13, it falls on the wrong side of the line as in City of Philadelphia and in PSAJC. Indeed, HB1950, which became Act 13, is instructive in understanding the problem here. The bill in its various iterations broadly dealt with regulation of the oil and gas industry, including the imposition of an impact fee and changes to environmental protection requirements. However, during conference committee, a provision was inserted dealing with oil and gas operators' duty to disclose hydraulic fracturing chemicals. And while the Commonwealth Court characterized Sections 3222.1(b)(10) and (b)(11) as extensions of these disclosure obligations, the fault lies in that they reach beyond regulation of an industry (in the form of a disclosure requirement) to extensively alter medical care and treatment and public health measures in communities experiencing shale gas development. These provisions do so in a law that was supposed to only regulate oil and gas operations. The last-minute addition of the provisions in a 174-page, multi-chapter bill went unnoticed to such an extent that not even the Governor knew how the provisions got in the law.[18] It is highly likely that the provision would not have garnered sufficient support to pass as its own law, see City of Philadelphia, 838 A.2d at 586, given the extent to which it disrupts the physician-patient relationship and given the harms that would result. Instead, it was buried

[18] "'We gotta take a look at that,' said Corbett. 'I'm not sure how that got put in there. I don't recall how that got in there.'" http://stateimpact.npr.org/pennsylvania/2012/05/16/governor-corbett-says-doctors-concerns-over-act-13-may-be-moot/

in a large bill presumed to be about regulation of oil and gas, and not about changing the way public health and medicine operate in communities experiencing prolific shale gas development.

Sections 3222.1(b)(10) and (b)(11) reach far beyond established disclosure and trade secret protection standards and far beyond regulation of the gas industry. These provisions fundamentally impact and disrupt the physician-patient relationship and the ability of public health professionals to prevent, study, diagnose, and treat illnesses of shalefield citizens potentially exposed to fracking chemicals. In other words, regulating the gas industry and thus requiring disclosure of information in accordance with already-established laws is one thing. Fundamentally changing how physicians and other public health professionals operate under existing ethical and legal obligations is quite another, and Sections 3222.1(b)(10) and (b)(11) do just that under the guise of gas industry regulation.

As outlined extensively above, federal and state laws in other contexts require disclosure of trade secret information while still respecting a physician's ethical and legal obligations. Other laws allow use of chemical information for forward-looking purposes such as preventative health assessments and creation of protocols to provide faster diagnosis and treatment in emergencies for exposure to chemicals. These laws do not reach beyond of the line of industry regulation and into the realm of medical and public health regulation.

In contrast, Act 13 overreaches. It leaves physicians to wonder whether they will be bankrupted by a drilling company for a perceived misstep that the physician needed to take to comply with other laws and ethical obligations. The perceived level of risk of either being sued for malpractice due to failure to disclose information or failure to get the information and thus treat properly, or being sued by the gas company increases the likelihood that physicians simply will not work in gasfield communities. These communities are already often in rural areas where medical care may be difficult to obtain. Also, the complete bar on use of information for preventative measures makes it more difficult to help citizens protect themselves from fracking operations in their community.

In sum, Section 3222.1(b)(10) and (b)(11) violate the single-subject rule of Article III, Section 3 of the Pennsylvania Constitution because they extensively alter and interfere with physician-patient relations and medical care and treatment in Pennsylvania shalefield communities, rather than regulate the gas industry.

VIII. Conclusion

For the reasons stated above, Citizens respectfully request that this Honorable Court reverse the decision of the Commonwealth Court to the extent that it denied relief on Counts IV, V, XI, and XII, and further respectfully request that the Court enter judgment in favor of Citizens on these claims.

Respectfully Submitted,

BY: */s/ Jordan B. Yeager*

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CERTIFICATE OF COMPLIANCE

I, Lauren M. Williams, certify that, based on the word count system used to prepare the foregoing, that the foregoing contains 13,989 words, exclusive of the caption, title, signature block, exhibits, and certifications. This submission therefore complies with the word count limits of Pa. R.A.P. 2135(a)(1).

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EXHIBIT A

Order and Opinions of the Court Below
Robinson Township v. Commonwealth, 96 A.3d 1104
(Pa. Commw. Ct. 2014)

96 A.3d 1104
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., Petitioners
v.
COMMONWEALTH of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, in his Official Capacity as Chairman of the Public Utility Commission, Office of the Attorney General of Pennsylvania, Linda L. Kelly, in her Official Capacity as Attorney General of the Commonwealth of Pennsylvania, Pennsylvania Department of Environmental Protection and Michael L. Krancer, in his Official Capacity as Secretary of the Department of Environmental Protection, Respondents.

Argued May 14, 2014. | Decided July 17, 2014.

Synopsis

Background: Municipalities and individuals brought petition for review challenging constitutionality of act that set out statutory framework for regulation of oil and gas operations, preempted local regulation of such operations, and gave power of eminent domain to natural gas corporations. The Commonwealth Court, en banc, No. 284 M.D. 2012, Dan Pellegrini, President Judge, 52 A.3d 463, found that the act was unconstitutional in part and enjoined application of certain provisions. On cross-appeals, the Supreme Court, Nos. 63 MAP 2012, 64 MAP 2012, 72 MAP 2012, 73 MAP 2012, Castille, C.J., —— Pa. ——, 83 A.3d 901, affirmed in part, reversed in part, and remanded.

Holdings: The Commonwealth Court, No. 284 M.D. 2012, Pellegrini, President Judge, held that:

[1] statute requiring notice to only public, rather than private, drinking water systems following a spill resulting from drilling operations, was not an unconstitutional special law;

[2] statute that created uniform rules concerning obligation of oil and gas industry to disclose chemical information to physicians for the purpose of medical treatment was not an unconstitutional special law;

[3] statute that created uniform rules concerning obligation of oil and gas industry to disclose chemical information to physicians for the purpose of medical treatment did not violate single subject rule;

[4] statute that set limitations on local oil and gas ordinances was severable; but,

[5] statutes allowing municipalities to request review of, and any person to challenge, local oil and gas ordinance were not severable.

Ordered accordingly.

P. Kevin Brobson, J., dissented and filed opinion.

Patricia A. McCullough, J., concurred in part, dissented in part, and filed opinion.

West Headnotes (18)

[1] **Statutes**
Laws of Special, Local, or Private Nature

Commonwealth Court does not apply state constitution's prohibition of special laws to divest the General Assembly of its general authority either to identify classes of persons and the different needs of a class, or to provide for differential treatment of persons with different needs; Court's constitutionally mandated concerns are to ensure that the challenged legislation promotes a legitimate

state interest, and that a classification is reasonable rather than arbitrary and rests upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation. Const. Art. 3, § 32.

Cases that cite this headnote

[2] **Statutes**
Laws of Special, Local, or Private Nature

Under state constitution's prohibition of special laws, a legislative classification must be based on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. Const. Art. 3, § 32.

Cases that cite this headnote

[3] **Statutes**
Laws of Special, Local, or Private Nature

In reviewing legislation under state constitution's provision prohibiting special laws, a court may hypothesize regarding the reasons why the General Assembly created the classifications; alternately, a court may deem a statute or provision per se unconstitutional if, under the classification, the class consists of one member and is closed or substantially closed to future membership. Const. Art. 3, § 32.

Cases that cite this headnote

[4] **Statutes**
Environment and health

Water Law
Pollution

Statute requiring notice only to public drinking water systems, not to private water suppliers, following a spill resulting from drilling operations was not an unconstitutional special law, although the majority of gas drilling occurred in rural areas, there was a greater reliance on private water suppliers in such areas, and private wells were not subject to the routine testing and monitoring of public water systems, where there were valid reasons for limiting notice to public water suppliers and distinguishing between such public water facilities providing potable water and private water suppliers, as private water supplies were not regulated, and had been omitted and were specifically exempt from many statutes such as the Safe Drinking Water Act, the Water Rights Act, and Department of Environmental Protection regulations. Const. Art. 3, § 32.

Cases that cite this headnote

[5] **Eminent Domain**
Constitutional and statutory provisions

Statute that vested eminent domain power in a public utility possessing a certificate of public convenience to condemn property for the injection, storage, and removal of natural gas for later public use did not violate constitutional provisions that prohibited taking of private property for public use, without just compensation. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 10; 58 Pa.C.S.A. § 3241(a).

Cases that cite this headnote

[6] **Constitutional Law**
Presumptions and Construction as to Constitutionality

Constitutional Law
Intent of and Considerations Influencing Legislature

The Legislature is presumed not to intentionally pass unconstitutional laws, and courts give statutes a constitutional interpretation if that is reasonably possible.

Cases that cite this headnote

[7] **Mines and Minerals**
Oil and gas

Statutes
Environment and health

Statute that created uniform rules concerning obligation of oil and gas industry to disclose chemical information to physicians for the purpose of medical treatment was not an unconstitutional special law; law did not single

out a particular member of either group for special treatment, and reflected the balance struck by the General Assembly among the need to disclose confidential and proprietary information for medical treatment, the public's interest in protecting trade secrets, and the industry's interest in protecting its proprietary information. Const. Art. 3, § 32; 58 Pa.C.S.A. § 3222.1(b)(10, 11).

Cases that cite this headnote

[8] **Health**

Records and duty to report; confidentiality in general

Health

Records and duty to report; confidentiality in general

Information regarding a patient's treatment and his or her medical records are generally confidential and information obtained thereby or contained therein is generally not subject to release without the patient's consent. Health Insurance Portability and Accountability Act of 1996, § 262(a), 42 U.S.C.A. § 1320d–6; 45 C.F.R. §§ 164.500–164.534; 28 Pa.Code §§ 5.53, 27.5, 27.31(d), 103.22(b)(3, 4), 115.27, 563.9, 601.36(d); 31 Pa.Code § 146b.11(a); 49 Pa.Code § 25.213.

Cases that cite this headnote

[9] **Statutes**

Purpose of single-subject rule

Statutes

Purpose of rule that title expresses subject of statute

Dual requirements of constitutional provision of clear expression and single subject are interrelated, as they both act to proscribe inserting measures into bills without providing fair notice to the public and to legislators of the existence of the same; on the other hand, bills are frequently amended as they pass through the Legislature, and not all additions of new material are improper. Const. Art. 3, § 3.

Cases that cite this headnote

[10] **Statutes**

Acts Relating to One or More Subjects; Single-Subject Rule

Statutes

Title as means of effecting principal object of statute

The strictures of constitutional provision requiring clear expression and single subject are often satisfied where the provisions added during the legislative process assist in carrying out a bill's main objective or are otherwise germane to the bill's subject as reflected in its title. Const. Art. 3, § 32.

Cases that cite this headnote

[11] **Statutes**

Acts Relating to One or More Subjects; Single-Subject Rule

Statutes

In general; construction of title

Exercising deference by hypothesizing reasonably broad topics is appropriate to some degree, because it helps ensure that constitutional provision requiring clear expression and single subject does not become a license for the judiciary to exercise a pedantic tyranny over the efforts of the Legislature. Const. Art. 3, § 3.

Cases that cite this headnote

[12] **Mines and Minerals**

Oil and gas

Statutes

Environment and health

Statute that created uniform set of state-wide rules concerning obligation of oil and gas industry to disclose chemical information to physicians for the purpose of medical treatment did not violate single subject rule; all provisions related to the trade secrets and confidential proprietary information regarding the chemicals used in the hydraulic fracturing of unconventional wells and under what limited circumstances this information must be reported

and released. Const. Art. 3, § 3; 58 Pa.C.S.A. § 3222.1.

Cases that cite this headnote

[13] **Statutes**

Effect of Partial Invalidity; Severability

Generally, the doctrine of severability requires that upon finding an application or textual component of a statute to be unconstitutional, a court may, in appropriate circumstances, excise the unconstitutional part rather than declare the entire statute invalid.

Cases that cite this headnote

[14] **Statutes**

Effect of Partial Invalidity; Severability

In general, a statute may be partially valid and partially invalid, and if the provisions are distinct and not so interwoven as to be inseparable, the courts should sustain the valid portions.

Cases that cite this headnote

[15] **Statutes**

Effect of Partial Invalidity; Severability

In determining the severability of a statute, the legislative intent is of primary significance.

Cases that cite this headnote

[16] **Statutes**

Effect of Partial Invalidity; Severability

For a portion of a statute to be severable, the legislating body must have intended that the act be separable, and the statute must be capable of separation in fact; thus, the valid portion of the enactment must be independent and complete within itself.

Cases that cite this headnote

[17] **Statutes**

Trade or business

Statute that prohibited local ordinances adopted pursuant to the Municipalities Planning Code or the Flood Plain Management Act from containing provisions that imposed conditions, requirements, or limitations on the same feature of oil and gas operations regulated by chapter of statute governing oil and gas development was severable and had to be severed after the Supreme Court struck as unconstitutional the only operative provisions of chapter of statutes governing local oil and gas operations ordinances; the language was necessarily incapable of execution. 32 P.S. §§ 679.101–679.601; 53 P.S. §§ 10101–11202; 58 Pa.C.S.A. § 3302.

Cases that cite this headnote

[18] **Statutes**

Carriers and public utilities

Statutes that allowed a municipality to request the Public Utilities Commission (PUC) to review a proposed local ordinance to issue an opinion regarding whether it violated the Municipalities Planning Code or chapter of statute relating to oil and gas development and provided that any person aggrieved by the enactment or enforcement of a local ordinance that violated the Municipalities Planning Code or the chapter to bring an action in the Commonwealth Court to invalidate the ordinance or enjoin its enforcement were not severable after the Supreme Court struck as unconstitutional all substantive provisions in chapter of statutes governing local oil and gas operations ordinances; General Assembly implemented a statutory scheme that was intended to have uniform regulations with uniform methods of determining whether a local ordinance violated any of the provisions of the Act with uniform consequences if a municipality failed to comply, but the overall scheme could not be implemented. 58 Pa.C.S.A. §§ 3305(a)(1), 3306.

Cases that cite this headnote

West Codenotes

Held Unconstitutional as Not Severable
58 Pa.C.S.A. §§ 3302, 3305, 3306, 3307, 3308, 3309(a).

Recognized as Unconstitutional
58 Pa.C.S.A. §§ 3215(b)(4), (d), 3303, 3304.

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BEFORE: DAN PELLEGRINI, President Judge, and BONNIE BRIGANCE LEADBETTER, Judge, and ROBERT SIMPSON, Judge, and P. KEVIN BROBSON, Judge, and PATRICIA A. McCULLOUGH, Judge.

OPINION BY President Judge PELLEGRINI.

This matter is presently before us on remand from a Supreme Court "mandate" directing us to consider the constitutionality of certain provisions of Act 13[1] to address several claims that we did not address because we incorrectly found that the person(s) asserting the right did not have standing or that the claim could not be brought in a petition for review in our original jurisdiction. *See Robinson Township v. Commonwealth*, ——Pa.——, 83 A.3d 901, 999–1000 (2013) (*Robinson Township II*).[2] While the Supreme Court affirmed our holding that ***1109** 58 Pa.C.S. §§ 3215(b)(4) and 3304 were unconstitutional (on different grounds), remand was necessary because the Court reversed our dismissal of claims brought under Article 1, Section 27 of the Pennsylvania Constitution[3] by finding that 58 Pa.C.S. §§ 3215(d) and 3303[4] were also unconstitutional under that provision and enjoined their enforcement. As a result, our Supreme Court further directed us to address whether any of the relevant provisions of Act 13 are severable.

1 58 Pa.C.S. §§ 2301–3504. Act 13 repealed Pennsylvania's Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101–601.605 (repealed), and replaced it with a codified statutory framework regulating oil and gas operations in Pennsylvania, but also added many new provisions which the Petitioners have challenged as unconstitutional.

2 The full history of this case may be found in *Robinson Township II* and this Court's prior opinion in *Robinson Township v. Commonwealth*, 52 A.3d 463 (Pa.Cmwlth.2012) (*Robinson Township I*).

3 Article 1, Section 27 states:

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

Pa. Const. art. 1, § 27.

4 58 Pa.C.S. § 3303 provides, in relevant part, that "environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth ... preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter." In turn, 58 Pa.C.S. § 3301 defines "environmental acts" as "[a]ll statutes ... relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by [the Department of Environmental Protection (DEP)] or by another Commonwealth agency ... and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations."

In addition, 58 Pa.C.S. § 3302 provides, in pertinent part:

> Except with respect to local ordinances adopted pursuant to the [Pennsylvania Municipalities Planning Code (MPC), Act of July 31,

> 1968, P.L. 805, *as amended,* 53 P.S. §§ 10101–11202,] and the [Flood Plain Management Act, Act of October 4, 1978, P.L. 851, 32 P.S. §§ 679.101–679.601], all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32. The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations as provided in this chapter.

To comply with the Supreme Court "mandate," the parties have agreed that only the following issues need to be addressed:

- Whether notice to only public drinking water systems following a spill resulting from drilling operations,[5] but not private water suppliers, is unconstitutional because it is a special law and/or violates equal protection;[6]

5 58 Pa.C.S. § 3218.1 states that "[u]pon receiving notification of a spill, [DEP] 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."

6 Article 3, Section 32 of the Pennsylvania Constitution provides, in relevant part:

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

Pa. Const. art. III, § 32.

- *1110 • Whether those provisions of Act 13 prohibiting health professionals from disclosing to others the identity and amount of hydraulic fracturing additives received from the drilling companies impedes their ability to diagnose and treat patients,[7] is unconstitutional because it is a special law and/or violates equal protection and violates the single subject rule;[8]

7 58 Pa.C.S. § 3222.1(b)(10) and (11) states:

> (10) A vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following:
>
> (i) The information is needed for the purpose of diagnosis or treatment of an individual.
>
> (ii) The individual being diagnosed or treated may have been exposed to a hazardous chemical.
>
> (iii) Knowledge of information will assist in the diagnosis or treatment of an individual.
>
> (11) If a health professional determines that a medical emergency exists and the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator shall immediately disclose the information to the health professional upon a verbal acknowledgment by the health professional that the information may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential. The vendor, service provider or operator may request, and the health professional shall provide upon request, a written statement of need and a confidentiality agreement from the health professional as soon as circumstances permit....

8 Article 3, Section 3 of the Pennsylvania Constitution states, in pertinent part, "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title...." Pa. Const. art. III, § 3.

- Whether conferring the power of eminent domain upon a corporation empowered to transport, sell, or store natural gas[9] in this Commonwealth to take the property of

others for its operations is unconstitutional because it permits a taking for private purpose; [10] and

- Whether 58 Pa.C.S. §§ 3302 and 3305 to 3309, which authorizes the Public Utility Commission (PUC) to review local zoning ordinances and to withhold impact fees from local governments, are severable from the enjoined provisions of Act 13.

*1111 I.

As noted above, 58 Pa.C.S. § 3218.1 states that "[u]pon receiving notification of a spill, [DEP] 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." In Count IV of their Petition for Review, Petitioners [11] argue that this is a special law and violates equal protection because it only requires notice to public water supply owners and leaves private well owners and other drinking water sources completely in the dark and unaware of the harm to the water supply in the event of an oil or gas drilling-related spill. They argue that private well owners have a greater need for notification under Act 13 because the majority of gas drilling occurs in rural areas; that there is a greater reliance on private water sources by residents and businesses in such rural areas; and that the dangers posed by drilling are increased because private wells are not subject to the routine testing and monitoring of public water systems. Petitioners claim that there is no justification for treating private wells differently than public water sources for the purposes of notification under Act 13.

[1] [2] [3] As the Supreme Court explained in *Robinson Township II:*

> First adopted in the Pennsylvania Constitution of 1874, Section 32 of Article III was intended to end "the flood of privileged legislation for particular localities and for private purposes which was common in 1873." Over 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."
>
> This Court does not apply Section 32 to divest the General Assembly of its general authority either to identify classes of persons and the different needs of a class, or to provide for differential treatment of persons with different needs. Our constitutionally mandated concerns are to ensure that the challenged legislation promotes a legitimate state interest, and that a classification is reasonable rather than arbitrary and "rest[s] upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation." A legislative classification must be based on "real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition." In its review, a court may hypothesize regarding the reasons why the General Assembly created the classifications. Alternately, a court may deem a statute or provision *per se* unconstitutional "if, under the classification, the class consists of one member and is closed or substantially closed to future membership."

83 A.3d at 987–88 (citations omitted).

While Act 13 does not define "public drinking water facility," Section 3 of the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. § 721.3, defines

9 58 Pa.C.S. § 3241(a) provides, in relevant part:

> **(a) General rule.**—Except 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....

10 Article I, Section 1 states, "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those ... of acquiring, possessing and protecting property...." Pa. Const. art. I, § 1. In addition, Article I, Section 10 provides, in relevant part, that "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. art. I, § 10. Likewise, the Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

11 By order dated April 7, 2014, this Court granted Robinson Township's unopposed application to withdraw and directed the Chief Clerk to mark this matter closed and discontinued only as to Robinson Township.

"public water system" as "[a] system for the provision to the public of water for human consumption which has at least 15 service connections or regularly serves an average of at least 25 individuals *1112 daily at least 60 days out of the year...." [12, 13] In addition, Section 1 of the Water Rights Act, Act of June 24, 1939, P.L. 842, 32 P.S. § 631, defines "public water supply agency" as "any corporation or any municipal or quasi-municipal corporation, district, or authority, now existing or hereafter incorporated under the laws of the Commonwealth ... and vested with the power, authority, right, or franchise to supply water to the public in all or part of any municipal or political subdivision of the Commonwealth...." 58 Pa.C.S. § 3218.1 promotes the Commonwealth's legitimate interest in protecting the public water supply by ensuring that any public drinking water facilities that could be affected by a spill or contamination are notified of the event and any expected impact on water quality. [14]

12 Likewise, the federal Safe Drinking Water Act defines "public water system" as "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals...." 42 U.S.C. § 300f(4)(A).

13 Public water systems are either community water systems, defined as "[a] public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents," or noncommunity water systems, defined as "[a] public water system that is not a community water system." 35 P.S. § 721.3. In turn, a nontransient noncommunity water system is defined as "[a] noncommunity water system that regularly serves at least 25 of the same persons over 6 months per year," and transient community water system is defined as "A public water system which is not a community, nontransient noncommunity, bottled or vended water system, nor a retail water facility or a bulk water hauling system." 25 Pa.Code § 109.1. Finally, a public water system includes "[a]ny collection, treatment, storage and distribution facilities under control of the operator of such system;" "[a]ny collection or pretreatment storage facilities not under such control which are used in connection with such system;" and "[a] system which provides water for bottling or bulk hauling for human consumption." 35 P.S. § 721.3.

14 In enacting the Safe Drinking Water Act, the General Assembly declared in Section 2 that: "(1) [a]n adequate supply of safe, pure drinking water is essential to the public health, safety and welfare and that such a supply is an important natural resource in the economic development of the Commonwealth[;] (2) [t]he Federal Safe Drinking Water Act provides a comprehensive framework for regulating the collection, treatment, storage and distribution of potable water[; and] (3) [i]t is in the public interest for the Commonwealth to assume primary enforcement responsibility under the Federal Safe Drinking Water Act." 35 P.S. § 721.2(a). The General Assembly also declared that "[i]t is the purpose of this act to further the intent of section 27 of Article I of the Constitution of Pennsylvania by: (1) [e]stablishing a State program to assure the provision of safe drinking water to the public by establishing drinking water standards and developing a State program to implement and enforce the standards[;] (2) [d]eveloping a process for implementing plans for the provision of safe drinking water in emergencies[;] (3) [p]roviding public notice of potentially hazardous conditions that may exist in a water supply." 35 P.S. § 721.2(b).

[4] While we acknowledge that the majority of gas drilling occurs in rural areas, that there is a greater reliance on private water suppliers in such areas, and that private wells are not subject to the routine testing and monitoring of public water systems, there are valid reasons for limiting notice to public water suppliers and distinguishing between such public water facilities providing potable water and private water suppliers under 58 Pa.C.S. § 3218.1. Private water supplies are not regulated by the DEP [15] and have been omitted and *1113 are specifically exempt from many statutes such as the Safe Drinking Water Act, the Water Rights Act, and the relevant DEP regulations. [16]

15 Section 4(a) of the Water Well Drillers License Act, Act of May 29, 1956, P.L. 1955, 32 P.S. § 645.4(a), requires a Department of Conservation and Natural Resources (DCNR) license to drill water wells and Section 10(a), 32 P.S. § 645.10(a), requires every licensed water well driller to keep a record of each well that is drilled upon a DCNR form "setting forth the exact geographic location and log of the well containing a description of the materials penetrated, the size and depth, the diameters and lengths of casting and screen installed, the static and pumping levels, and the yield and such other information pertaining to the construction or operation of the well or wells as [DCNR] may require...." However, under 32 P.S. § 645.4(b), the licensing requirements do not apply to "[a]ny farmer performing any function on any land owned or leased by him for farming purposes," or "[a]ny

natural person drilling a well on land owned by him or of which he is a lessee and used by him as his residence."

16 *See, e.g.,* 25 Pa.Code §§ 109.1–109.1307.

Given that the DEP doesn't regulate private water sources and that they have historically been omitted from statutes regulating the public potable water supply and notice regarding potentially hazardous conditions that may exist in the public water supply, the General Assembly's distinction between private water supplies and public drinking water facilities in 58 Pa.C.S. § 3218.1 is a reasonable classification related to the legitimate state interest promoted by that section.[17] As noted by ***1114** the Commonwealth, while private water supplies can be easily substituted, such as that provided to both public and private water sources in 58 Pa.C.S. § 3218(a), public water supplies cannot be quickly remedied or replaced due to the expansive nature of the system. Given the breadth of the trigger for the DEP's notice obligation under 58 Pa.C.S. § 3218.1, covering any spill at any location near or far from a well, and DEP's lack of information on private well location or ownership, it is not feasible to require DEP to identify private wells that may be potentially affected by a spill and it is impossible for DEP to provide notice to these unknown private well owners. These are valid distinctions supporting disparate treatment under 58 Pa.C.S. § 3218.1 and Petitioners' claim to the contrary is without merit. Failing to recognize this distinction may also have the unintended consequence of applying many standards applicable to public water suppliers to well owners.

17 The provisions of 58 Pa.C.S. § 3218.1 only apply to the DEP's duty to notify public drinking water facilities upon notification of a spill. In order to protect fresh groundwater, 58 Pa.C.S. § 3217(a) requires well operators to control and dispose of brines produced from the drilling, alteration or operation of a well consistent with the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1–691.1001; 58 Pa.C.S. § 3217(b)-(d) provides that casings must comply with the DEP regulations to prevent the migration of gas or fluids or the pollution or diminution of fresh groundwater. 58 Pa.C.S. § 3218.2 requires that "[u]nconventional well sites shall be designed and constructed to prevent spills to the ground surface or spills off the well site;" outlines the containment practices and materials and capacity that can be stored, and requires a plan to be submitted to the DEP describing the equipment and practices to be used.

In addition, the DEP's regulations at 25 Pa.Code § 78.66(b) states that "[i]f a reportable release of brine on or into the ground occurs at the well site, the owner or operator shall notify the appropriate regional office of [DEP] as soon as practicable, but no later than 2 hours after detecting or discovering the release." 25 Pa.Code § 78.66(c) provides that the notification shall be by telephone and identify the responsible company and the time, place and cause of the release; any available information regarding the contamination of surface water, groundwater or soil; and the remedial actions planned, initiated or completed. Likewise, 25 Pa.Code § 91.33(a) states, in pertinent part, "[i]f, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, ... it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises [or] facility ... from or on which the substance is discharged or placed to immediately notify [DEP] by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters."

Moreover, 58 Pa.C.S. § 3218(a) provides that "a well operator who affects a public or private water supply by pollution or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply...." That section also provides that the DEP "shall ensure that the quality of a restored or replaced water supply meets the standards established under ... the Pennsylvania Safe Drinking Water Act...." 58 Pa.C.S. § 3218(b) states that "[a] landowner or water purveyor suffering pollution or diminution of a water supply as a result of the drilling, alteration or operation of an oil or gas well may so notify [DEP] and request that an investigation be conducted ...;" 58 Pa.C.S. § 3218(b.2) requires the DEP to establish a single statewide toll-free number to report cases of water contamination associated with oil and gas drilling; and 58 Pa.C.S. § 3218(b.4) requires the DEP to publish on its website lists of confirmed cases of water supply contamination resulting from hydraulic fracturing.

Accordingly, even though we dismiss Count IV of the petition for review, that does not mean that in the event of a spill that either the DEP or the drilling company should not or will not use its best efforts to notify the affected community, even though it is not required to do so. Just as there is no affirmative requirement to notify individuals of an oncoming flood or fire, public entities as of course notify those in the path of danger. Even though it is not required to do so, in the event

of a spill, the DEP will, in all likelihood, canvas the areas to identify individuals served by private wells and notify them of the spill and aid them in getting alternative water supplies to protect the public which it is charged to protect. Likewise, drilling companies should make similar undertakings as good corporate citizens, not to mention that it is their actions that necessitate the warning.

II.

[5] [6] In Count V of the petition for review, Petitioners allege that 58 Pa.C.S. § 3241(a) violates Article 1, Section 10 of the Pennsylvania Constitution and the Fifth Amendment to the United States Constitution because it permits a corporation to appropriate an interest in property in a storage reservoir or reservoir protective area by eminent domain for the non-public purpose of injecting, storing and removing natural gas.[18] Petitioners argue that Section 204(a) of the Eminent Domain Code also prohibits "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise...." 26 Pa.C.S. § 204(a).

18 "The Legislature is presumed not to intentionally pass unconstitutional laws, and courts give statutes a constitutional interpretation if that is reasonably possible." *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Co.*, —— Pa. ——, 90 A.3d 682, 692 (2014).

However, 58 Pa.C.S. § 3241(a) only vests this eminent domain power in "a corporation empowered to transport, sell or store natural gas in this Commonwealth...." Section 102 of the Public Utility Code defines a "public utility" as "[a]ny person or corporations now or hereafter owning or operating ... equipment or facilities for ... [p]roducing, generating, transmitting, distributing or furnishing natural or artificial gas ... for the production of light, heat, or power to or for the public for compensation," or "[t]ransporting or conveying natural or artificial gas ... by pipeline or conduit, for the public ***1115** for compensation." 66 Pa.C.S. § 102. Section 1103 of the Business Corporation Law of 1988 (Corporation Law) also defines "public utility corporation" as "[a]ny domestic or foreign corporation for profit that ... is subject to regulation as a public utility by the [PUC]...." 15 Pa.C.S. § 1103.[19]

19 The PUC's regulations also define a "public utility," in pertinent part, as "[p]ersons or corporations owning or operating ... equipment or facilities for producing, generating, transmitting, distributing, or furnishing gas for the production of light, heat, or power to or for the public for compensation. The term does not include a producer or manufacturer of gas not engaged in distributing the gas directly to the public for compensation." 52 Pa.Code § 59.1. Pursuant to Section 1102(a)(1)(i) of the Public Utility Code, a public utility is required to obtain a certificate of public convenience from the PUC "[f]or any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized by ... a certificate of public convenience...." 66 Pa.C.S. § 1102(a)(1)(i).

In addition, Section 1511 of the Corporation Law states, in pertinent part:

> **(a) General rule.**—A public utility corporation shall, in addition to any other power of eminent domain conferred by any other statute, have the right to take, occupy and condemn property for one or more of the following principal purposes and ancillary purposes reasonably necessary or appropriate for the accomplishment of the principal purposes:
>
> * * *
>
> (2) The transportation of artificial or natural gas ... for the public.
>
> (3) The production, generation, manufacture, transmission, storage, distribution or furnishing of natural or artificial gas ... to or for the public.

15 Pa.C.S. § 1511(a)(2), (3). As a result, like 58 Pa.C.S. § 3241(a), 15 Pa.C.S. § 1511(a)(2) and (3) also confers upon a public utility the power of eminent domain to acquire property for the transportation, storage, transmission, distribution or furnishing of natural gas to or for the public.

Contrary to Petitioners' assertion, 58 Pa.C.S. § 3241(a) only confers upon a public utility possessing a certificate of public convenience the power to condemn property for the injection, storage and removal of natural gas for later public use. In fact, the prohibition in 26 Pa.C.S. § 204(a) does not apply if "[t]he property is taken by, to the extent the party has the power of eminent domain, ... a public utility." 26 Pa.C.S. § 204(b)(2)(i). Accordingly, we dismiss Count V of the petition for review.

III.

A.

[7] Petitioners allege that 58 Pa.C.S. § 3222.1(b)(10) and (11) is a special law that violates Article 3, Section 32 of the Pennsylvania Constitution because it restricts Mehernosh Khan, M.D.'s (Dr. Khan) ability to disclose critical diagnostic information when dealing with the gas industry's confidential and proprietary information. They contend that those provisions grant the oil and gas industry special treatment concerning a physician's access to proprietary or trade secret information regarding hydro fracturing chemicals and that those provisions serve "no legitimate state interest,"[20] and Petitioners point out ***1116** that, generally, other industries must disclose chemicals.[21] Without sharing that information, Petitioners contend that Dr. Khan cannot make an informed diagnosis of a patient.

20 Petitioners contend that there is no valid state interest in not disclosing this information because for a physician to completely and properly treat a patient, the 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 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. 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 which also requires complete information regarding all of the patient's past medical, social, occupational and environmental exposure history to properly determine the source or cause of the patient's illness or disease. To make a diagnosis, the physician has to share this information with other physicians which Petitioners contend is precluded by the foregoing provisions.

21 Petitioners specifically cite to the Hazard Communication Standard Regulations promulgated by the Occupational Safety and Health Administration (OSHA) which require an employer to provide copies of, or access to, every Material Safety Data Sheet (MSDS) that lists not only the toxicity of each chemical constituent that makes up the product, but also all of the known adverse health effects, of each chemical component. *See* Petitioners' Petition for Review at ¶¶ 251–254.

However, the foregoing provisions create a uniform set of state-wide rules that are equally applicable to members of the oil and gas industry and to all physicians concerning the industry's obligation to disclose chemical information to physicians for the purposes of medical treatment.[22] They do not single out a particular member of either group for special treatment, and they reflect the balance struck by the General Assembly between the need to disclose confidential and proprietary information for medical treatment, the public's interest in protecting these trade secrets, and the industry's interest in protecting its proprietary information.

22 As explained above, "this Court does not apply Section 32 [of the Pennsylvania Constitution] to divest the General Assembly of its general authority either to identify classes of persons and the different needs of a class, or to provide for differential treatment of persons with different needs. Our constitutionally mandated concerns are to ensure that the challenged legislation promotes a legitimate state interest, and that a classification is reasonable rather than arbitrary and 'rest[s] upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation.' " *Robinson Township II*, 83 A.3d at 987 (citations omitted). In addition, in our review, this Court "may hypothesize regarding the reasons why the General Assembly created the classifications." *Id.* (citations omitted).

The Act 13 disclosure requirements do require that operators give to the DEP "completion reports" which are filed with the DEP within 30 days after a well is properly equipped for production of oil and gas. *See* 58 Pa.C.S. §§ 3222(b), (b.1), and 3203 (containing, among other things, a descriptive list of chemical additives intentionally added to fracturing fluid, and their maximum concentration as a percent of mass to the total volume of base fluid, which is typically water but can be unavailable due to trade secret protection for portions of the information provided to DEP. The operators, service companies, or vendors[23] must disclose chemical additives used to fracture unconventional wells to ***1117** the public within 60 days of completion of the well via a public searchable database). *See* 58 Pa.C.S. § 3222.1(d); *http://fracfocus.org/*. Where a trade secret is claimed, operators must nevertheless disclose the chemical family or similar description of the chemical. *See* 58 Pa.C.S. §§ 3222(b)(3) and (4). That the provisions create a set of disclosure rules

different from the norm for other industrial chemical users under OSHA does not mean that Act 13 constitutes a special law.[24]

23 Petitioners' assertion that the complete chemical composition of hydraulic fracturing products is unknown because Act 13 does not include the products' manufacturers within its scope merely exposes a gap in the law and does not support their claim that 58 Pa.C.S. § 3222.1(b)(10) and (11) is a special law that violates Article 3, Section 32 of the Pennsylvania Constitution. Dr. Khan is not precluded from disclosing confidential or proprietary information under 58 Pa.C.S. § 3222.1(b)(10) and (11) if that information has not been disclosed to him because it is either not known or disclosed by those within the scope of that section's disclosure requirements.

24 For a summary of disclosure laws regarding fracking, *see* Matthew McFeeley, *Falling through the Cracks: Public Information and the Patchwork of Hydraulic Fracturing Disclosure Laws*, 38 Vt. L.Rev. 849 (2014).

[8] Moreover, while 58 Pa.C.S. § 3222.1(b)(10) and (11) refer to a written or oral "confidentiality agreement," there is no indication in the statute that such agreement precludes a physician from sharing the disclosed confidential and proprietary information with another physician for purposes of diagnosis or treatment or from including such information in a patient's medical records. 58 Pa.C.S. § 3222.1(b)(11) merely provides "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." Nothing precludes a physician from including the information in patient records, medical treatment or evaluations, including evaluations based on trade secrets that physicians are required to keep. *See* 49 Pa.Code § 16.95. Moreover, nothing in Act 13 precludes a physician from sharing with other medical providers any trade secrets that are necessary for the diagnosis or treatment of an individual. Information regarding a patient's treatment and his or her medical records are generally confidential and information obtained thereby or contained therein is generally not subject to release without the patient's consent.[25]

25 *See, e.g.*, 28 Pa.Code § 5.53 ("Records and reports of examinations of specimens shall be confidential."); 28 Pa.Code § 27.5a ("Case reports submitted to the Department [of Health] or to a [Local Morbidity Reporting Office (LMRO) relating to reportable diseases, infections and conditions] are confidential. Neither the reports, nor any information contained in them which identifies or is perceived by the Department of Health or the LMRO as capable of being used to identify a person named in a report, will be disclosed to any person who is not an authorized employe or agent of the Department or the LMRO, and who has a legitimate purpose to access case information...."); 28 Pa.Code § 27.31(d) ("Reports [of cancer] submitted under this section are confidential and may not be open to public inspection or dissemination. Information for specific research purposes may be released in accordance with procedures established by the Department [of Health] with the advice of the Pennsylvania Cancer Control, Prevention and Research Advisory Board."); 28 Pa.Code § 103.22(b)(3) ("A [hospital] patient has the right to every consideration of his privacy concerning his own medical care program. Case discussion, consultation, examination, and treatment are considered confidential and should be conducted discreetly."); 28 Pa.Code § 103.22(b)(4) ("A [hospital] patient has the right to have all records pertaining to his medical care treated as confidential except as otherwise provided by law or third-party contractual arrangements."); 28 Pa.Code § 115.27 ("All records shall be treated as confidential. Only authorized personnel shall have access to the records. The written authorization of the patient shall be presented and then maintained in the original record as authority for release of medical information outside the hospital."); 28 Pa.Code § 563.9 ("Records shall be treated as confidential. Only authorized personnel shall have access to the records. The written authorization of the patient shall be presented and then maintained in the original record as authority for release of medical information outside the [ambulatory surgical facility]."); 28 Pa.Code § 601.36(d) ("Information contained in the patient's record shall be privileged and confidential. Clinical record information shall be safeguarded against loss or unauthorized use. Written procedures shall govern use and removal of records and conditions for release of information. The patient's written consent shall be required for release of information outside the home health care agency, except as otherwise provided by law or third-party contractual arrangements."); 31 Pa.Code § 146b.11(a) ("A [licensed insurer] may not disclose nonpublic personal health information about a consumer unless an authorization is obtained from the consumer whose nonpublic personal health information is sought to be disclosed."); 49 Pa.Code § 25.213 ("Medical records shall be kept confidential, unless disclosure is required for *bona fide* treatment, with the patient's written consent...."); *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1059 (Pa.Super.2008) ("[The Health Insurance Portability and Accountability Act of 1996

> (HIPAA)] provides for monetary fines and various terms of imprisonment for the wrongful disclosure of individually identifiable health information. 42 U.S.C. § 1320d–6. Additionally, the statute required the Secretary of Health and Human Services to promulgate privacy regulations, which are now codified at 45 C.F.R. §§ 164.500–164.534....").

***1118 B.**

In Count XII of the petition for review, Petitioners allege that 58 Pa.C.S. § 3222.1(b)(11) violates the single subject requirement of Article 3, Section 3 of the Pennsylvania Constitution. Petitioners contend that because health professionals are regulated under Title 35 of the Pennsylvania Consolidated Statutes, and because 58 Pa.C.S. § 3222.1(b)(11) provides statutory restrictions on health professionals that are not within the oil and gas industry regulated by Title 58, the foregoing provision violates the single-subject requirement of Article 3, Section 3.

[9] **[10]** **[11]** Article 3, Section 3 requires that a bill may only contain one subject, which must be clearly expressed in its title. As the Supreme Court has explained:

> In practice, Section 3's dual requirements—clear expression and single subject—are interrelated, as they both act to proscribe inserting measures into bills without providing fair notice to the public and to legislators of the existence of the same. On the other hand, bills are frequently amended as they pass through the Legislature, and not all additions of new material are improper. Rather, the strictures of Article III, Section 3 are often satisfied where the provisions added during the legislative process assist in carrying out a bill's main objective or are otherwise "germane" to the bill's subject as reflected in its title.

City of Philadelphia v. Commonwealth [575 Pa. 542], 838 A.2d 566, 586–87 (Pa.2003) (citations omitted). "We believe that exercising deference by hypothesizing reasonably broad topics ... is appropriate to some degree, because it helps ensure that Article III does not become a license for the judiciary to 'exercise a pedantic tyranny' over the efforts of the Legislature." *Id.* at 588 (citation omitted).

[12] Contrary to Petitioners' assertion, all of the provisions of 58 Pa.C.S. § 3222.1 relate to the trade secrets and confidential proprietary information regarding the chemicals used in the hydraulic fracturing of unconventional wells and under what limited circumstances this information must be reported and released. 58 Pa.C.S. § 3222.1(b)(11) requires oil and gas companies to disclose this confidential information when a health professional requests the information because it is necessary to provide emergency medical treatment to a patient and the professional agrees to only use the information for treatment purposes and to keep it otherwise confidential. 58 Pa.C.S. § 3222.1(b)(11) is merely one small part of the larger scheme of 58 Pa.C.S. § 3222.1, under which this information related to the oil and gas industry must be ***1119** disclosed to a variety of other entities by those participating in the hydraulic fracturing of unconventional wells. The disclosure provisions of 58 Pa.C.S. § 3222.1(b)(11) are germane to the main objective of Act 13, *i.e.*, regulation of the oil and gas industry, and Petitioners' allegation in this regard is patently without merit. *See, e.g., Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth,* 583 Pa. 275, 877 A.2d 383, 396 (2005) ("In contrast to *City of Philadelphia,* in the matter *sub judice,* there is a single unifying subject—the regulation of gaming." The single topic of gaming does not encompass the limitless number of subjects which could be encompassed under the heading of "municipalities" [as in *City of Philadelphia*]. Specifically, "HB 2330 sets forth the legislative intent of regulating gaming, creates the Gaming Control Board, establishes policies and procedures for gaming licenses for the installation and operation of slot machines, enacts provisions to assist Pennsylvania's horse racing industry through other gaming, and provides for administration and enforcement of the gaming law, including measures to insure the integrity of the operation of slot machines."). Accordingly, we again dismiss Counts XI and XII of the petition for review.

IV.

Finally, because our Supreme Court found that 58 Pa.C.S. §§ 3215(b)(4) and (d), 3303 and 3304 are unconstitutional, the matter was remanded to us to determine what other parts of Act 13 are properly enjoined "upon application of severability principles." *Robinson Township II,* 83 A.3d at 999. The

parties have agreed that the only provisions that may be declared unenforceable under the Supreme Court's decision are 58 Pa.C.S. §§ 3302, and 3305 to 3309, all of which give the PUC and this Court jurisdiction to review the provisions of local ordinances to determine whether they comply with Act 13 and, if not, to withhold impact fees imposed for the benefit to alleviate the "impacts" caused by the gas drillers and operators or to impose attorney fees and costs.

[13] [14] [15] [16] Generally, the doctrine of severability requires that upon finding an application or textual component of a statute to be unconstitutional, a court may, in appropriate circumstances, excise the unconstitutional part rather than declare the entire statute invalid. Section 1925 of the Statutory Construction Act provides the standard which a court is to use when determining whether provisions of a statute are severable, stating in relevant part:

> The provisions of every statute shall be severable. If any provision of any statute ... is held invalid, the remainder of the statute ... shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision ... that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925. As this Court has explained, "[i]n general, a statute ... may be partially valid and partially invalid, and if the provisions are distinct and not so interwoven as to be inseparable, the courts should sustain the valid portions. In determining the severability of a statute ... the legislative intent is of primary significance. The legislating body must have intended that the act ... be separable, and the statute ... must be capable of separation in fact. Thus, the valid portion of the ***1120** enactment must be independent and complete within itself." *Pennsylvania Independent Waste Haulers Association v. Township of Lower Merion,* 872 A.2d 224, 228 n. 16 (Pa.Cmwlth.2005) (citing *Saulsbury v. Bethlehem Steel Company,* 413 Pa. 316, 196 A.2d 664, 667 (1964)).

In this case, there are two severability analyses to perform: one is regarding the continued viability of 58 Pa.C.S. § 3302, which is a substantive provision dealing with preemption of the MPC and Flood Plain Management Act; and the second is the continued viability of 58 Pa.C.S. §§ 3305 through 3309, which vests in the PUC and this Court jurisdiction over the determination of whether local ordinances violate Act 13 and the power to impose sanctions.

A.

58 Pa.C.S. § 3302 provides in pertinent part, that "[n]o local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32. The Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations ***as provided in this chapter.***" (Emphasis added).

[17] Our Supreme Court struck as unconstitutional the only operative provisions in Chapter 33 relating to the regulation of oil and gas operations, in particular, 58 Pa.C.S. §§ 3303 and 3304, because those provisions "are incompatible with the Commonwealth's duty as trustee of Pennsylvania's public natural resources [under Article 1, Section 27 of the Pennsylvania Constitution]." *Robinson Township II,* 83 A.3d at 985. Although a more accurate description is that the final sentence of 58 Pa.C.S. § 3302 is necessarily declared unconstitutional, once our Supreme Court declared the only substantive provisions of "this chapter" to be unconstitutional, *i.e.,* 58 Pa.C.S. §§ 3303 and 3304, the Court's declaration also means that this language is necessarily incapable of execution and is severed from the remaining valid provisions of 58 Pa.C.S. § 3302 regarding Chapter 32's regulation of oil and gas operations.

B.

Regarding the severability of 58 Pa.C.S. §§ 3305 through 3309, we must determine whether those provisions are so dependent on and interdependent with the unconstitutional provisions that it cannot be presumed that the General

Assembly would give the PUC jurisdiction to review the validity of local ordinances. In order to make that determination, it is necessary to look at the changes implemented by Chapter 33 from the relevant provisions of the Oil and Gas Act of 1984.

Section 602 of the former Oil and Gas Act, which was replaced by Act 13, prohibited municipalities from regulating "how" oil and gas operations "operate" because that was to be only regulated by the state, but allowed municipalities to use their zoning powers to regulate "where" oil and gas development activities could take place which is necessary to a rational zoning plan and ordinance. *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont,* 600 Pa. 207, 964 A.2d 855 (2009). Also, generally applicable local ordinances, like those implementing the Storm Water Management Act,[26] were not prohibited and could be applied to oil and gas operations to prevent harm to adjoining property ***1121** owners and the public at large. *Range Resources–Appalachia, LLC v. Salem Township,* 600 Pa. 231, 964 A.2d 869 (2009).[27]

26 Act of October 4, 1978, P.L. 864, *as amended,* 32 P.S. §§ 680.1–680.17.

27 The provisions of 58 Pa.C.S. § 3302 mirror those in the former Section 602 of the Oil and Gas Act, 58 P.S. § 601.602, with one notable exception. The former Section 602 provided that "the Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells ***as herein defined.***" (Emphasis added). 58 P.S. § 601.602 (repealed). As noted above, 58 Pa.C.S. § 3302 provides that "the Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations ***as provided in this chapter.***" (Emphasis added). Accordingly, the Commonwealth's reliance on *Range Resources–Appalachia, LLC* and *Huntley & Huntley, Inc.*, interpreting the former valid provisions of Section 602 of the Oil and Gas Act, is misplaced.

Apparently acceding to the oil and gas industry's claims that local ordinances tailored to local conditions were purportedly impeding their oil and gas development and that a uniform law was necessary, the General Assembly enacted Act 13 which contained a number of provisions requiring local governments to enact uniform zoning provisions and preempted them from enacting any other laws that dealt directly with oil and gas operations. For example, generally applicable local ordinances such as those dealing with storm water runoff were prohibited. To make those uniform provisions uniformly enforced, the General Assembly allows a municipality or the oil and gas industry to go directly to the PUC rather than the common pleas courts to determine whether a municipality's ordinance violated the new regulatory scheme set forth in Act 13.

58 Pa.C.S. §§ 3305(a)(1) provides that "[a] municipality may, prior to the enactment of a local ordinance[28] ... request the [PUC] to review a proposed local ordinance to issue an opinion on whether it violates the MPC, this chapter or Chapter 32 (relating to development)." Correspondingly, 58 Pa.C.S. § 3305(b)(1) provides that an owner or operator of an oil or gas operation or a municipal resident "who is aggrieved by the enactment or enforcement of a local ordinance may request the [PUC] to review the local ordinance of that local government to determine whether it violates the MPC, this chapter, or Chapter 32," and the PUC's order may be appealed for *de novo* review by this Court under subsection (b)(4). Likewise, 58 Pa.C.S. § 3306 provides that any person aggrieved "by the enactment or enforcement of a local ordinance that violates the MPC, this chapter or Chapter 32 (relating to development)" may bring an action in this Court "to invalidate the ordinance or enjoin its enforcement" whether or not initial review by the PUC was sought.

28 58 Pa.C.S. § 3301 defines "local ordinance" as "[a]n ordinance or other enactment, including a provision of a home rule charter, adopted by a local government that regulates oil and gas operations."

[18] As to whether the procedural provisions giving the PUC jurisdiction over challenges to local ordinances and impact fees, our Supreme Court has already determined that 58 Pa.C.S. §§ 3305 through 3309 are not severable to the extent that they implement or enforce the invalid Sections of Act 13, namely, 58 Pa.C.S. §§ 3303 and 3304. *See Robinson Township II,* 83 A.3d at 994, 998, 1000. Because we have held that 58 Pa.C.S. § 3302 is not enforceable to the extent that it implements 58 Pa.C.S. §§ 3303 and 3304, and our Supreme Court has found that those provisions are not severable to the extent they implement 58 Pa.C.S. §§ 3303 and 3304, the question is whether the PUC's jurisdiction is so hollowed out that its remaining jurisdiction to consider whether a local ***1122** ordinance violates Chapter 32 is non-severable.

In enacting Act 13, the General Assembly implemented a statutory scheme that was intended to have uniform regulations with uniform methods of determining whether a local ordinance violates any of the provisions of the Act with uniform consequences if a municipality failed to comply. The effect of our Supreme Court's mandate declaring all

the substantive provisions contained in Chapter 33 to be unconstitutional and unenforceable, and our holding that the portions of 58 Pa.C.S. § 3302 purporting to enforce Chapter 33 is likewise unenforceable, is that the statutory scheme cannot be implemented. Local zoning matters will now be determined by the procedures set forth under the MPC and challenges to local ordinances that carry out a municipality's constitutional environmental obligations. Because challenges to those ordinances must be brought in common pleas court, it would further frustrate the purpose of the Act in having a uniform procedure. Accordingly, 58 Pa.C.S. §§ 3305 and 3306 are not severable.

Moreover, weighing against finding those provisions severable is that 58 Pa.C.S. § 3307 (relating to the award of attorney fees and costs in actions brought under 58 Pa.C.S. § 3306), 58 Pa.C.S. § 3308 (relating to the withholding of impact fees for municipalities enacting or enforcing local ordinances that violate the MPC or Chapters 32 or 33), and 58 Pa.C.S. § 3309(a) (relating to the applicability of Chapter 33) are also not severable. The General Assembly intended to apply sanctions for violations of Chapter 33 as well as Chapter 32. Again, that overall uniform scheme is no longer capable of execution as intended by the General Assembly. For that reason and because they are dependent upon 58 Pa.C.S. §§ 3305 and 3306, they are likewise not severable. *See Robinson Township II,* 83 A.3d at 999 ("Moreover, insofar as Section 3215(c) and (e) are part of the Section 3215(b) decisional process, these provisions as well are incomplete and incapable of execution in accordance with legislative intent. Application of Section 3215(c) and (e) is, therefore, also enjoined."). [29]

29 *See also Robinson Township II,* 83 A.3d at 1008 (Concurring Opinion by Baer, J.) ("The thrust of [Petitioners]' substantive due process arguments centered upon Sections 3303 and 3304 of Act 13, which, respectively, set forth: the prohibition of local governments to impose environmental regulations upon oil and gas production; and the zoning-type provisions that every municipality in the Commonwealth must uniformly adhere to or the development of oil and gas resources. Like the [majority], albeit under my substantive due process analysis, I explicitly find that these provisions are unconstitutional. To that end, and for the reasoning given in part V of the lead opinion, I would further enjoin the entirety of Sections 3305 through 3309 as 'incapable of execution' upon the striking of Sections 3303 and 3304.").

Based on the foregoing, we dismiss Counts IV, V, XI and XII of the petition for review and enjoin the application and enforcement of 58 Pa.C.S. § 3302 as it relates to Chapter 33 of Act 13, and 58 Pa.C.S. §§ 3305, 3306, 3307, 3308 and 3309(a) in their entirety.

Judge LEAVITT did not participate in the decision of this case.

ORDER

AND NOW, this *17th* day of *July,* 2014, Counts IV, V, XI and XII of Petitioners' petition for review are dismissed, and the application and enforcement of 58 Pa.C.S. § 3302 as it relates to Chapter 33 of Act 13, and 58 Pa.C.S. §§ 3305, 3306, 3307, ***1123** 3308 and 3309(a) in their entirety are hereby enjoined.

DISSENTING OPINION By Judge BROBSON.

I join in parts I through III of the majority opinion. I respectfully disagree, however, with the majority's conclusion in Part IV.B and the related provisions in its order enjoining application and enforcement of Sections 3305 through 3309 of what is commonly referred to as Act 13, 58 Pa.C.S. §§ 3305–3309, in their entirety.

If I read the majority's analysis in Part IV.A of its opinion correctly, the majority holds that Section 3302 of Act 13, 58 Pa.C.S. § 3302, with the exception of the last sentence in that section, is constitutional and, therefore, remains enforceable as to Chapter 32 of Act 13. This operative statutory language, preserved by the majority's opinion and order, provides:

> Except with respect to local ordinances adopted pursuant to the MPC and the act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions which impose conditions, requirements or limitations on the same features of

> oil and gas operations regulated by Chapter 32 or that accomplish the same purposes as set forth in Chapter 32.

58 Pa.C.S. § 3302. By enacting this statutory language, along with Chapter 32 of Act 13, the General Assembly has preempted the field of regulating the "how" of oil and gas operations within the Commonwealth.[1] *See Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont,* 600 Pa. 207, 964 A.2d 855, 862–63 (2009).

1 Section 4 of the Act of February 14, 2012, P.L. 87 (Act 13), provides that "[t]he addition of Ch. 32 and 58 Pa.C.S. § 3302 is a continuation of the act of December 19, 1984 (P.L. 1140, No. 223), known as the Oil and Gas Act." It further provides that "[a]ny difference in language between 58 Pa.C.S. § 3302 and section 602 of the Oil and Gas Act is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administration and implementation of section 602 of the Oil and Gas Act." Thus, the majority's reasoning for disregarding *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont,* 600 Pa. 207, 964 A.2d 855 (2009), as discussed in footnote 27 of its opinion, ignores and conflicts with Section 4 of Act 13.

Notwithstanding its holding that Section 3302 as it relates to Chapter 32 remains effective and enforceable, the majority holds that the legislatively created procedures and remedies in Sections 3305 through 3309 of Act 13, 58 Pa.C.S. §§ 3305–3309, for review of and/or to challenge local ordinances that violate, *inter alia,* Section 3302 and, by extension Chapter 32 of Act 13, are unenforceable *in toto.* (*See* Maj. Op. at 1121–22.) The majority reasons that the General Assembly's decision to enact these procedures was built upon the continued constitutionality and thus enforceability of Chapter 33. With the Supreme Court's mandate in *Robinson Township v. Commonwealth,* —— Pa. ——, 83 A.3d 901 (2013) (*Robinson Twp. II*), declaring all substantive provisions contained in Chapter 33 of Act 13 unconstitutional and thus unenforceable, the majority concludes that the continued availability of the procedures and remedies for redress of ordinances that violate Chapter 32 would no longer be consistent with the General Assembly's intent when it enacted those procedures and remedies. Accordingly, ***1124** the majority concludes that the procedures and remedies in Sections 3305 through 3309 are not severable from the unconstitutional Sections 3303 and 3304 of Act 13 and, therefore, are no longer available remedies for violations of Section 3302. I respectfully disagree.

As the majority points out, Section 1925 of the Statutory Construction Act of 1972, regarding severability, provides:

> *The provisions of every statute shall be severable.* If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925 (emphasis added). In *Robinson Twp. II,* the Pennsylvania Supreme Court noted that this section creates a presumption of severability. *Robinson Twp. II,* 83 A.3d at 998. Unlike the majority, I do not perceive sufficient evidence of legislative intent within the express statutory language to override the presumption that Sections 3305 through 3309 are severable from invalid Sections 3303 and 3304. To the contrary, the language that the General Assembly chose in Sections 3305 through 3309 supports the presumption.

The remedial provisions in Sections 3305 through 3309 of Act 13 are available in three distinct situations. The first is where a local ordinance may violate the Municipalities Planning Code.[2] The second is where a local ordinance may violate Chapter 33, which includes the severed Sections 3303 and 3304 *as well as the remaining portion of Section 3302* of Act 13. And the third is where a local ordinance may violate Chapter 32 of Act 13. *See* Sections 3305(a)(1), (b)(1); 3306(1); 3308. Accordingly, the General Assembly decided that the procedures and remedies in Sections 3305 through 3309 would be available in each of three distinct circumstances. Unlike the majority, I am hard-pressed to conclude from the statutory language an intent by the General Assembly that links the availability of these remedial provisions *in toto* to the validity of two sections within Chapter 33 of Act 13—*i.e.,* a subset of only one of the three situations where the procedures and remedies are expressly available. I simply do not find sufficient evidence within this language to override the presumption of severability.

2 Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§ 10701–10713.

Unlike the majority, because the provisions in Act 13 that preempt the field with respect to the "how" of oil and gas operations remain effective, including the portion of Section 3302 that prohibits municipalities from entering into this field though local legislation, Sections 3305 through 3309 of Act 13 still have efficacy and are severable from the unconstitutional provisions of Act 13.

CONCURRING/DISSENTING OPINION BY Judge McCULLOUGH.

Respectfully, I concur in part and dissent in part. I agree with the Majority's decision to dismiss Count V and Count XII of Petitioners' petition for review.

***1125** However, I disagree with the Majority's dismissal of Count IV of the petition for review, insofar as it pertains to Petitioners' equal protection challenge to the notice requirements of 58 Pa.C.S. § 3218.1. Pursuant to this statutory proviso, the Department of Environmental Protection (DEP), upon receiving notice of a spill, must notify "public drinking water facilities" of the spill and the expected impact on water quality. *Id.* However, 58 Pa.C.S. § 3218.1 does not require that similar notice be provided to private well owners. At this stage of the proceedings, I cannot conclude that the statute's differentiation between public and private water suppliers bears a rational relationship to a legitimate governmental interest.

Even the Majority concedes "that the majority of gas drilling occurs in rural areas, that there is a greater reliance on private water suppliers in such areas, and that private wells are not subject to routine testing and monitoring of public water systems." (Maj. op. at 1112.) Nonetheless, the Majority upholds the classification predominately on the ground that "DEP doesn't regulate private water sources," "it is not feasible to require DEP to identify private wells that may be potentially affected by a spill," and "it is impossible for DEP to provide notice to these unknown private well owners." (Maj. op. at 1114.)

In my view, the reach of DEP's current regulatory scheme is insufficient to validate the difference in treatment between public and private water facilities. Just because an agency has not handled certain matters in the past does not give the General Assembly a license to draw classifications along those lines. Equally important, and as noted by the Majority, (Maj. op. at 1112–13 n. 15), 32 P.S. § 645.10(a), which has been in effect since 1956, mandates that the Department of Conservation and Natural Resources maintain records setting forth the location of private wells. Consequently, it appears that DEP would be able to obtain this information through inter-agency cooperation.

The Majority anticipates that "[e]ven though [DEP] is not required to do so, in the event of a spill, DEP will, in all likelihood, canvas the area to identify individuals served by private wells and notify them of the spill." (Maj. op. at 1114). While I do not doubt DEP's goodwill, the Majority declines to impose an affirmative legal duty on DEP to provide notice to private well owners. Accordingly, I would conclude that Petitioners stated a viable claim in Count IV.

I also disagree with the Majority's dismissal of Count XI of Mehernosh Khan, M.D.'s claim to the extent that it pleads an equal protection challenge to the disclosure of confidential information under 58 Pa.C.S. §§ 3222.1(b)(10) and (11).

Pursuant to 58 Pa.C.S. §§ 3222.1(b)(10) and (11), a "health professional" may obtain the identity and composition of chemicals used by the oil and gas industry to diagnose and treat an individual who may have been "exposed to a hazardous chemical" or in the case of an immediate "medical emergency." *Id.* However, when the chemicals or compounds are claimed to be a trade secret or confidential proprietary information, the health professional must sign a confidentiality agreement. *Id.* While the range and precise language of the confidentiality agreement is not known, it is a fair inference that a health professional will be unable to share the information in the peer-review setting, publish the clinical findings and proposed treatment plans in medical journals, or coordinate the outcome and treatment plans with other hospitals who later experience the same or a similar case.

***1126** Given these apparent restrictions in the confidentiality agreement, I would conclude that it is not clear and free from doubt that the statutory scheme furthers a legitimate interest because the statute has the effect of severely curtailing the medical community's ability to share and discuss solutions concerning chemical toxicity cases and symptomatic presentations that they may never have encountered. At the very least, the confidentiality agreement should allow open and frank communication throughout the medical community. Accordingly, I would conclude that Dr.

Kahn stated a viable equal protection challenge to 58 Pa.C.S. §§ 3222.1(b)(10) and (11).

Finally, I would clarify the impact of the Majority's holding as to the non-severable provisions of Act 13, and the enjoinder or enforcement thereof. The legislative intent expressed in enacting Act 13 is in furtherance of the legislative policy recognized in *Huntley & Huntley, Inc. v. Borough Council of Oakmont,* 600 Pa. 207, 964 A.2d 855 (2009), that local municipalities may regulate "where" the oil and gas industry may operate but not "how."

As the Majority and our Supreme Court have stated, 58 Pa.C.S. § 3302, a replicate of section 602 of the Oil and Gas Act,[1] 58 P.S. § 601.602, is not severable from the provisions of Act 13 declared to be unconstitutional, namely, 58 Pa.C.S. §§ 3303 and 3304, to the limited extent that 58 Pa.C.S. § 3302 is applied to preempt local municipalities from regulating "where" the oil and gas industry may operate. I would further conclude that 58 Pa.C.S. § 3302 retains application separate and apart from these unconstitutional provisions and is severable insofar as it is consistent with the objectives enunciated in *Huntley & Huntley, Inc.* and does not regulate "where" the operation is located but only "how" or in what manner it is operated, *i.e.,* 58 Pa.C.S. §§ 3201–3215(a), 3216–3274 or "Chapter 32 of Act 13." *See Huntley & Huntley, Inc.,* 964 A.2d at 864; *see also Department of Education v. The First School,* 471 Pa. 471, 370 A.2d 702 (1977) (concluding that a statute was severable and effectual in application where it was unconstitutional as applied to sectarian nonpublic schools, but constitutional as applied to nonsectarian nonpublic schools). The same can be said of 58 Pa.C.S. §§ 3305–3309 insofar as these provisions pertain and apply to the operational dictates of 58 Pa.C.S. §§ 3201–3215(a), 3216–3274. I understand the Majority opinion to be consistent with these observations, (*see* Maj. op. at 1120, 1121–22), and to the extent that it is, I would agree. Therefore, 58 Pa.C.S. §§ 3305–3309 should be severable in this regard also, and I would conclude that 58 Pa.C.S. §§ 3302, 3305–3309 are severable and maintain independent legal validity when applied to the statutory sections of Chapter 32 of Act 13.

[1] Act of December 19, 1984, P.L. 1140, *as amended.*

Moreover, the Majority concludes that Petitioners failed to state cognizable claims challenging the constitutionality of 58 Pa.C.S. §§ 3218.1, 3241(a), and 3222.1(b)(10), (11). In effect, then, these provisions remain constitutional and operative.

In light of the above, and in the proper exercise of judicial restraint given the statutory scheme that is yet remaining, I would conclude that Act 13 is a sustainable piece of legislation to the extent of the noted surviving provisions. The Majority neither declares all of Act 13 to be non-severable nor enjoins the enforcement of Act 13 in its entirety. Although not referenced by the Majority, 45 P.L.E. STATUTES § 180 provides that "[t]he invalidity of a repealing law results in the prior law remaining in effect." Here, Act 13 repealed ***1127** the Oil and Gas Act. Since the Majority has not declared the entirety of Act 13 invalid or non-severable, the principle espoused in 45 P.L.E. STATUTES § 180 should not apply. The question then remains as to the viability of the Oil and Gas Act, which was repealed by Act 13. Because Act 13 has not been declared unconstitutional in its entirety, the prior Oil and Gas Act is still repealed by it. *Cf. Mitchell's Bar & Rest., Inc. v. Allegheny County,* 924 A.2d 730, 736 (Pa.Cmwlth.2007). It is, then, appropriately left to the General Assembly's discretion to determine whether to amend, replace, or repeal the remaining portions of Act 13 and revive the Oil and Gas Act.

With these observations being stated, I respectfully concur in part and dissent in part.

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