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Attorneys for Petitioners
William and Jean Haas

WILLIAM and JEAN HAAS,

Petitioners,

v.

PENNSYLVANIA PUBLIC
UTILITIES COMMISSION,

Respondents.

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: **IN THE COMMONWEALTH**
: **COURT OF PENNSYLVANIA**
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**PETITION FOR REVIEW ADDRESSED
TO THIS COURT'S ORIGINAL JURISDICTION**

I. INTRODUCTION

1. This is an action for declaratory and injunctive relief by Petitioners, who own and regularly use several real properties in Pennsylvania, seeking to establish that Act 129 of 2008, 66 Pa.C.S. § 2807(f), violates the Pennsylvania and United States Constitutions. Act 129, according to Respondent Pennsylvania Public Utility Commission, mandates that all customers of electric utilities serving over 100,000 customers, including Petitioners, must agree to accept exposure to radiofrequency

electromagnetic energy ("RF") from a metering device known as a wireless smart meter installed on each property, with no "opt-out" or exception or even possibility of non-application, for any reason, including health, safety, or privacy concerns. Customers who will not agree to accept this violation of their privacy and bodily integrity in the sanctity of their homes are punished by complete denial of electric service.

2. Because of Act 129, Petitioners have, against their express wishes, been forced to accept wireless smart meters on certain of their properties; on other properties, they face termination of electric service because of their refusal to accept installation of wireless smart meters. Petitioners believe that they have a right not to be exposed to this physical force. They are also concerned that RF emissions from wireless smart meters are potentially harmful to their health and the health of their friends and family members who stay on their properties. The presence of wireless smart meters causes them psychological distress, makes them uncomfortable in their own homes, and severely limits their right to use their properties free from unreasonable governmental intrusion.

3. Act 129 severely impinges on Petitioners' fundamental constitutional rights to privacy, bodily integrity, the free use of their property without unreasonable interference by the government, and the protection against unreasonable searches and seizures. It is thus subject to strict scrutiny, and may be deemed constitutional only if it is necessary to vindicate a compelling public interest, and is as narrowly drawn as possible.

4. Act 129, and specifically its “no opt-out” component, is not necessary to vindicate *any* public interest, far less a compelling one. The inability of Petitioners and other persons who object to mandatory RF exposure in their homes to be exempted from forced installation of wireless smart meters at best serves the administrative convenience of certain electric utility companies, which is not even arguably a matter of public concern or interest, far less a compelling one. Moreover, Act 129, by its clear terms, exempts mandatory wireless smart meter installation for customers of electric utility companies with less than 100,000 customers, such that many electric customers in this Commonwealth are, by definition, exempt from its requirements. Therefore, there can be “compelling” public interest in not allowing customers of the larger electric utility companies subject to Act 129’s requirements to be similarly exempt from mandatory smart meter installation.

5. Moreover, Act 129 is not narrowly drawn, but is overly expansive by design, without providing any relief or accommodation to citizens like Petitioners who are merely asserting their right to be free of governmentally mandated intrusion into their homes, properties, and bodies.

6. Virtually every other state that requires smart meters provides for an opt out, which proves that the burden of giving customers the choice could be readily achieved.

7. This case, at its most basic, is about the sanctity of the home. *See Commonwealth v. Shaw*, 383 A.2d 496, 499 (Pa. 1978) (“Upon closing the door of one’s home to the outside world, a person may legitimately expect the highest degree of privacy known to our society.”). That concept is built into the very fabric of the United

States and Pennsylvania constitutions. This matter seeks to vindicate the sacred right to be let alone, free from unwanted governmental intrusion into Petitioners' property, their privacy and, indeed, their very bodily integrity.

8. RF is undeniably a very real physical force. Petitioners do not believe that the government has the right to force this unwanted exposure on them, their family, and their friends through the mandatory installation of an RF-emitting device on their own properties. One cannot think of a similar case where the government *mandates* that citizens accept into their homes a force-emitting device that makes them highly uncomfortable in the sanctity of those very homes, disrupts their peace of mind, and could possibly cause them physical harm.

9. Petitioners realize that many, if not most, other people do not share their concerns about RF exposure. However, those concerns must be respected unless compelling governmental interests exist to override them and there is no narrower way to further those interests. Respondent cannot possibly make such a showing.

10. This Court should therefore declare Act 129 unconstitutional and allow Petitioners, and similarly situated persons, to opt out of mandatory wireless smart meter installation on their properties; and should further enjoin Respondent Pennsylvania Public Utility Commission from requiring public utility companies to install wireless smart meters in all homes, without exception, per its current policies and procedures that it claims are mandated by Act 129.

II. JURISDICTION AND VENUE

11. This Court has jurisdiction to hear this matter under the Declaratory Judgments Act, 42 Pa. C.S. §§ 7531-7541, *Delaware Valley Apt. House Owner's Ass'n*

v. Commonwealth, Dep't of Revenue, 389 A.2d 615, 622 (Pa. Commw. 1978) (Commonwealth Court has jurisdiction to hear declaratory judgment action challenging constitutionality of state law); and under 42 Pa. C.S. § 761(a)(1) (Commonwealth Court's original jurisdiction extends to "all civil actions or proceedings ... [a]gainst the Commonwealth government.").

12. Venue is proper in this Court (Dauphin County) because the Respondent's principal office is located here.

III. PARTIES

13. Petitioners William and Jean Haas, husband and wife, are the owners of several real estate properties, described below, in Pennsylvania.

14. Petitioners have standing to bring this constitutional challenge because they are suffering a direct harm from Act 129. They have been forced by their electric utility, with the full backing and, indeed, directive, of Respondent, to accept the denial of electric service at several of their properties, including their Pennsylvania primary residence, because they are unwilling to allow forced RF exposure from smart meters installed on these properties. At several other properties they own they have been forced by this same utility with Respondent's backing to accept RF exposure for the people who live or visit at those properties, because it would be too difficult for those same people to do without electric service. But for Act 129, Petitioners would have not suffered this injury. *See Funk v. Wolf*, 144 A.3d 228, 243-44 (Pa. Commw. 2016) (a person has standing if he has a substantial interest in the outcome of the litigation, meaning his interest surpasses that of all citizens in procuring obedience to the law).

15. Respondent is the Pennsylvania Public Utilities Commission, a Pennsylvania administrative agency with its main office in Harrisburg, Pennsylvania.

16. Respondent is the administrative body that is charged with regulating electric utilities in Pennsylvania, including regarding the installation of smart meters pursuant to Act 129. Respondent also is the agency charged with adjudicating consumer complaints that a utility's service violates the Pennsylvania Public Utility Code.

IV. FACTUAL ALLEGATIONS

Respondent and PPL Forced Mr. and Mrs. Haas to Accept Forced RF Exposure or Face Shutoff of Electric Service

17. Mr. and Mrs. Haas are the owners of several real estate properties in Pennsylvania.

18. All these properties are in the service area of PPL Electric Utilities ("PPL").

19. Mr. and Mrs. Haas live part of the year in one of their Pennsylvania properties.

20. Another property consists of a café, attached apartment, and attached house. They own and frequent the café, and their property manager lives in the apartment with his family. The attached house is used for guests. The remaining properties owned by the Petitioners in Pennsylvania are used by their family and friends, both for short and extended stays.

21. Petitioners receive electric service for all their properties from PPL.

22. Petitioners have six accounts with PPL for electric service at their Pennsylvania properties at issue.

23. PPL until recently had used powerline carrier meters installed on Petitioners' properties to measure electric usage. These are known as analog meters that use power lines as a means of communicating usage data to PPL. These meters emit no RF.

24. In or around August 2018, PPL notified Petitioners that it intended to install new wireless smart meters on all of their properties. Unlike the existing meters, these new meters emit RF, as discussed in more detail below.

25. On October 25, 2018, Petitioner William Haas, acting on behalf of Petitioner Jean Haas as well, filed six complaints with the Respondent against PPL averring that installation of the new meters on their properties violated PPL's duty under 66 Pa. Code §§ 1501 and 1502, which he alleged require safe services to each individual customer based on their unique needs.

26. PPL filed answers to the complaints. In its answers, PPL contended that it was required to install smart meters at Petitioners' properties subject to the requirements of Act 129. PPL thus affirmed that it was proceeding to install wireless smart meters at Petitioners' properties specifically because it was, in its view, required to do so pursuant to Act 129, despite Petitioners' express wish to be exempt from mandatory installation due to their concerns over the health and safety of the smart meters.

27. In January 2019, pursuant to a motion to consolidate filed by PPL, the presiding Administrative Law Judge (“ALJ”), Elizabeth H. Barnes, consolidated the six matters.

28. Petitioner William Haas did not further participate in the litigation and the case was dismissed by ALJ Barnes with prejudice in a decision dated July 1, 2019.

29. Shortly after September 27, 2019, Petitioners received from PPL letters that advised that PPL intended to terminate electric service on October 14, 2019, unless Petitioners gave PPL access to install new meters. The termination notices sent by PPL to Petitioners explicitly stated that PPL was required to install smart meters on his properties “to comply with state regulations....”

30. On October 9, 2019, counsel for Petitioners emailed counsel for PPL and informed him that Petitioners were preparing to file a claim in Commonwealth Court taking the position that the applicable Pennsylvania statutory and regulatory scheme relating to smart meters violates the United States and Pennsylvania Constitutions, and requested that PPL not shut off the electricity or install smart meters at any of the Haas properties until after the conclusion of the litigation.

31. On October 11, 2019, counsel for PPL emailed counsel for Petitioners and refused this request.

32. On that same date, counsel for Petitioners emailed counsel for PPL and stated that, given PPL’s position that it would not agree to hold off on installation of smart meters pending the lawsuit, Petitioners believed that they had no choice to but to accept shutoff of electric service at three of their properties, including their Pennsylvania residence, and to accept installation of smart meters at the remaining

three properties. They chose to accept the smart meters at three properties because it would be too difficult for the people who live at or visit those properties to be without electric service.

33. PPL responded that it would terminate service at two of the properties as requested, that it had already installed a smart meter at one of the properties, and that it would install smart meters at the three other properties. Petitioners replied to PPL that they would prefer to accept termination of electric service rather be forced to accept exposure to a smart meter at any of their properties other than the three where it would be too difficult to be without service.

Objective Evidence Supports the Conclusion That RF Exposure from Smart Meters Could Be Unsafe

34. Electromagnetic energy is one of the four physical forces in the universe. It falls across a spectrum by frequency or wavelength. The spectrum includes RF as well as other ranges of frequencies of electromagnetic energy, such as infrared radiation, visible light, ultraviolet radiation, X-rays, and gamma rays.

35. The electromagnetic energy emitted by a smart meter, a wireless device, is in the RF range, just like the energy emitted by a cell phone.

36. Smart meters and cell phones emit a comparable level of RF, approximately one to two watts measured at the source.

37. The actual exposure of any human to RF will vary depending on numerous factors, including the distance between the source of the RF and the human body and how often the device emits RF.

38. In November 2018, the National Toxicology Program (“NTP”), a sub-agency of the U.S. Department of Health and Human Services, published a “Fact Sheet” with information about possible harmful biological effects from RF exposure, based on studies it had conducted. A copy of the NTP Fact Sheet is available at https://www.niehs.nih.gov/health/materials/cell_phone_radiofrequency_radiation_studies_508.pdf.

39. The NTP is an agency with primary jurisdiction in the federal government for determining health and safety of RF exposure. According to its website, it is an interagency program composed of, and supported by, three government agencies within the Department of Health and Human Services: the National Center for Toxicological Research of the Food and Drug Administration; the National Institute of Environmental Health Sciences of the National Institutes of Health; and the National Institute for Occupational Safety and Health of the Centers for Disease Control and Prevention.

40. As stated in the Fact Sheet, the NTP conducted studies of rats and mice exposed to RF to clarify potential health hazards. The studies cost \$30 million and took more than ten years to complete, making them “the most comprehensive assessment, to date, of health effects in animals exposed to RFR.” *Id.* at 1.

41. The studies reported “clear evidence” of tumors in the hearts of male rats resulting from exposure to low levels of RF. *Id.*

42. The NTP cautioned that the findings from the studies cannot be directly applied to humans, because of differences in exposure.

43. But the NTP also noted that “the studies question the long-held assumption that radio frequency radiation is of no concern as long as the energy level is low and does not significantly heat the tissues.” *Id.* at 2.

44. This is significant because some people and organizations, usually associated with the electric utility industry, have argued that RF exposure from cell phone and wifi devices like smart meters is safe because it falls below limits for RF exposure that the Federal Communications Commission (“FCC”) set in 1996.

45. The FCC limits were designed to protect against potential harm from levels of RF exposure sufficient to produce heating, based on the assumption that RF exposure at lower levels could not cause heating and therefore could not cause harm.

46. The FCC has noted that the scientific literature contains reports of a wide range of what are known as “non-thermal effects,” i.e., biological effects at low levels of RF exposure that are insufficient to heat tissue, but it decided that the possibility of harm from such low levels of RF exposure was ambiguous and unproven.

47. The statement from the NTP quoted *supra* is directly inconsistent with the premise of the FCC Limits, that low levels of RF are of no concern as long as they do not heat the tissue.

48. Another report by the NTP confirms that there is a basis in scientific literature to state that, at the very least there could be adverse biological effects from low levels of RF exposure below the FCC limits, and that claims that RF exposure at levels below the FCC limits has been proved conclusively safe are therefore wrong.

Dr. Ronald Melnick, a retired NIEHS/NTP toxicologist and one of the original scientists associated with the NTP cell phone RFR studies, spoke on the utility of the NTP data on

cellphone RFR for assessing human health risks. He provided background information about the history of the project, which began with the original nomination in 1999. *The initial objectives were to test the null hypothesis—that cell phone RFR at non-thermal exposure intensities is incapable of inducing adverse health effects—and to provide dose-response data that could be used to assess potential human health risks for any detected adverse effects. The results described in the technical reports “show quite clearly” that the null hypothesis has been disproven, with many adverse effects identified.* Dr. Melnick delineated the adverse effects observed and described their levels of evidence of carcinogenicity. He pointed out that even a small increase in cancer risk could have a serious public health impact due to the widespread use of cell phones.

Draft NTP Technical Reports on Cell Phone Radiofrequency Radiation; March 26-28, 2018, at 20 (available at https://ntp.niehs.nih.gov/ntp/about_ntp/trpanel/2018/march/peerreview20180328_508.pdf) (emphasis added).

49. The FCC has acknowledged that its primary jurisdiction does not lie in health and safety and that it relies on other federal agencies for guidance on those subjects.

50. The NTP has publicly advised that it has reported its findings set forth in the November 2018 Fact Sheet to the FCC. The FCC has not yet taken any public action on that report.

51. The NTP has announced the further studies on the possible health effects of low-level RF exposure.

52. Based on these statements by the NTP, as well as other evidence, it is accurate to state that, at the very least, it is scientifically possible that exposure to

levels of RF below the FCC limits could cause harm to humans, just as it caused tumors in the hearts of male rats by a “clear evidence” standard in the NTP studies.

53. This is consistent with the classification of such exposure in 2011 (prior to the most recent NTP findings) as a “possible carcinogen” by the International Agency for Research on Cancer, which is part of the World Health Organization, based on “limited evidence” of carcinogenicity.

54. This is also why the NTP continues to study the effects on humans of RF exposure.

Respondent Has Consistently Maintained that Act 129 Requires Smart Meters for All, With No Possibility for Opt-Out or Non-application Under Any Circumstances

55. Respondent has consistently ruled in cases filed by individual customers that Act 129 mandates that wireless smart meters must, *without exception*, be installed in the homes of all electrical consumers in the Commonwealth. Smart Meter Procurement and Installation Implementation Order at 14, No. M-2009-209655 (June 24, 2009) (“The Commission believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters system wide when it included a requirement for smart meter deployment ‘in accordance with a depreciation schedule not to exceed 15 years.’”). On this basis, Respondent found in all subsequent cases that have considered the issue that customers may not opt out of wireless smart meter installation. *See, e.g., Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655, Order and Opinion at 23 (Pennsylvania PUC, , Aug. 17, 2016) (“In 2013, the Commission concluded that there is no provision in the Code, the Commission’s Regulations or Orders that allows a PECO customer to ‘opt out’ of smart

installation.”) (citing *Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176, Order and Opinion (Pennsylvania PUC, Jan. 24, 2013)).

56. In a “Smart Meter Q&A” publication,¹ Respondent, in response to the question, “Are smart meters required in Pennsylvania?”, states: “Yes. Pennsylvania’s Act 129 of 2008 requires the state’s seven largest electric distribution companies (EDCs) to develop energy efficiency and conservation (EE&C) plans and adopt other methods of reducing electricity used by customers – including the use of smart meters by their customers.” Another section of that publication, in answer to the question, “Can I opt out of the charge if I don’t want a smart meter?”, Respondent states: “No. State law does not allow a customer to ‘opt out’ of their EDC’s smart meter program or surcharge. Installation of a smart meter is a condition of service.” Respondent reinforced that position in its January 15, 2016 Communications Plan, which was submitted as a proposed exhibit in the administrative proceedings before Respondent initiated by Petitioner William Haas. In that document, PPL stated that it was installing “new” meters to “bring us into full compliance with state-mandated regulations on electric meter technology.” It also reinforced that customers cannot opt out of smart meter installation: “State law and regulations mandate this metering technology for all electric utility customers and do not provide for an opt-out option.”

57. Respondent, both in administrative decisions, and in its public statements, has consistently and unwaveringly taken the position that Act 129 requires the installation of smart meters without exception and without any

¹ http://www.puc.pa.gov/General/consumer_ed/pdf/13_Smart%20Meters.pdf

possibility of opting out; and PPL has taken the same position with regard to Petitioners and other customers .

58. Respondent, taking its reasoning even further, has consistently also held that that it lacked authority to order as relief for a proven statutory violation of Section 1501 that an electric utility install an alternative to a smart meter on the homes of electric customers. *See, e.g., Maria Povacz v. PECO Energy Company*, Docket No. C-2015-2475023, Order at 6 (Pennsylvania PUC, June 30, 2015) (“The Commission cannot grant the relief of precluding PECO from installing a smart meter upon the service property as requested by the Complainant.”). Respondent recently reiterated this position. In a brief filed by Respondent before this Court, it stated: “The application of Section 1501 does not eliminate of affect the mandatory installation of smart meters under Section 129.” (Brief of Respondent Pennsylvania Public Utility Commission at 29, *Mary Paul v. Pennsylvania Public Utility Comm’n*, No. 460 C.D. 2019, at 29 (Pa. Commw. Nov. 7, 2019)).

59. In sum, Respondent has at all times maintained: (a) that Act 129 requires the installation of smart meters on the properties of all large utility customers; (b) that Act 129 does not allow customers to opt out of smart meter installation; and, therefore, (c) that a customer may not obtain as relief in a proceeding before Respondent that an alternative to a wireless smart meter be installed, even if the customer establishes a statutory violation of Section 1501.

60. Respondent, in accordance with its view of Act 129, has never allowed a customer to refuse installation of a wireless smart meter in the customer’s home.

61. This Court arguably has concurred with Respondent's interpretation of Act 129, having referred to "Act 129's compulsory installation" requirement. *Romeo v. Pennsylvania Public Utility Comm'n*, 154 A.3d 422, 427-28 (Pa. Commw. 2017).

62. For all these reasons, Petitioners' continuing their action against PPL would have been futile and brought Petitioners no relief. Respondent has consistently found that customers cannot opt out of what it views as Act 129's mandatory installation requirement; and further found that, even if a petitioner established a violation of the Public Utility Code, Respondent nevertheless cannot order as relief in an administrative proceeding that an alternative to a wireless smart meter on their properties.

63. Accordingly, even if Petitioner William Haas had, at great expense, continued with his complaints before Respondent, he would not have obtained the relief he sought.

64. Moreover, Respondent in the administrative proceedings could not have considered or decided the present constitutional challenge to Act 129. *Delaware Valley Apt. House Owner's Ass'n v. Commonwealth, Dep't of Revenue*, 389 A.2d 615, 619 (Pa. Commw. 1978) ("the determination of the constitutionality of enabling legislation is not a function of the administrative agencies thus enabled").

V. CLAIMS

COUNT I

**(Violation of Petitioners' Substantive Due Process
Rights Guaranteed by the Pennsylvania
and United States Constitutions)**

65. Petitioners incorporate the foregoing paragraphs as if fully set forth herein.

66. Act 129 violates the substantive due process rights of Petitioners and similarly situated persons who object to the forced installation of wireless smart meters on their property.

67. Act 129 substantially interferes with several of Petitioners' fundamental rights that are guaranteed by the Pennsylvania and United States Constitutions. Specifically, Act 129 causes direct harm to Petitioners' right to privacy; to their right to bodily integrity; to their right to free enjoyment of the use of their property without unreasonable governmental interference; and to their right to be free from unreasonable searches and seizures.

68. PPL, in installing smart meters at Petitioners' properties is doing so because of Act 129, which, as interpreted by Respondent, *mandates* the installation of wireless smart meters with no exceptions or opt-outs. *Barasch v. Pennsylvania Public Utility Comm'n*, 576 A.2d 79, 87 (Pa. Commw. 1990) (Commission's action in approving tariff to allow Caller ID constituted state action, and court considered constitutional challenges to tariff on merits).

69. Pursuant to Act 129, the legislature has, by legislative fiat, ordered PPL, an electric utility with over 100,000 customers, to install smart meters on Petitioners' properties.

70. Respondent has consistently enforced Act 129 by not allowing any electricity consumer covered by its scope to opt out of having a wireless smart meter installed either in consumers' homes, or immediately outside their homes, on the consumers' property.

71. PPL, due directly to Act 129 and Respondent's consistent position that no consumer may opt out of having a wireless smart meter installed on their property, has taken the position that it is required to install wireless smart meters on Petitioners' properties, and has, in fact, done so.

72. PPL has taken its action in installing wireless smart meters on Petitioners' properties over the clear objections of Petitioners, who have consistently asserted that they have real health concerns over the RF emitted by wireless smart meters and do not want them in their homes or on their properties.

73. Under the substantive due process analysis, courts must weigh the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinize the relationship between the law (the means) and the interest (the end). *Nixon v. Commonwealth*, 839 A.2d 277, 286-87 (Pa. 2003).

74. The Constitutions of both Pennsylvania and the United States guarantee a right to privacy to Petitioners, conferring on them the right to make fundamental decisions regarding their lives and their homes and properties without undue governmental interference. *Bowser v. Blair County Children and Youth*

Services, 346 F. Supp.2d 788, 802 (W.D. Pa. 2004); *In re Fiori*, 652 A.2d 1350, 1354 n.3 (Pa. 1995) (“The right to privacy if founded upon both state and federal constitutional guarantees.”); *Commonwealth v. Wiley*, 904 A.2d 905, 909 n.4 (Pa. 2006) (noting that the Pennsylvania constitution offers even greater privacy rights to its citizens than the United States constitution). *See also People v. Cook*, 41 Cal. 3d 373, 379 (Cal. 1986) (“we guard with particular zeal an individual’s right to carry on private activities within the interior of a home..., free from unreasonable governmental intrusion”) (citing, *inter alia*, *Vale v. Louisiana*, 399 U.S. 30, 34 (1976)).

75. Under the Pennsylvania Constitution, the right to privacy is “fundamental” and subject to a strict scrutiny analysis. *Id.* at 286 (noting that the fundamental right to privacy flows from the Constitution’s Article 1, Section 1, which confers on citizens “certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, or acquiring, possessing and protecting property and reputation, and of pursuing their own happiness”). *See also Pennsylvania State Educ. Ass’n v. Commonwealth*, 148 A.3d 142, 150-51 (Pa. 2016) (containing extensive discussion of right to privacy under Article 1, Section 1, and noting that, compared to the “golden, diamond-studded right to be let alone... [e]verything else ... is dross and sawdust”) (quoting *Commonwealth v. Murray*, 223 A.2d 102, 109-10 (Pa. 1966)); *Commonwealth v. Brion*, 652 A.2d 287, 287 (Pa. 1995) (“the right to privacy in one’s domain is sacrosanct”); *Commonwealth v. Schaeffer*, 688 A.2d 1143, 1146 (Pa. 1993) (“For the right to privacy to mean anything, it must guarantee privacy to an individual in his own home.”); *Commonwealth v. Shaw*, 383 A.2d 496, 499 (Pa. 1978) (“Upon closing the door of one’s home to the outside world,

a person may legitimately expect the highest degree of privacy known to our society.”) (internal quotations and citation omitted); *Commonwealth v. Bubonovich*, 2007 WL 4967570, 2 Pa. D & C. 5th 77, 80 (Pa. Com. Pl. Fayette County) (“both the United States Constitution and the Pennsylvania Constitution place a high priority on protecting an individual’s right to privacy in his own home”). The right to privacy under the federal Constitution is also considered “fundamental.” *Paul P. v. Verniero*, 170 F.3d 396, 399 (3d Cir. 1999).

76. Act 129 impinges on that right, by forcing persons to accept into their homes or on their properties a physical force-emitting device of unproven safety and whose presence causes certain citizens, including Petitioners, unhappiness and mental distress, and possibly physical harm. This severely and negatively impacts these persons’ right to feel safe and secure in their own homes, free from unwanted governmental intrusion.

77. Act 129 also substantially interferes with Petitioners’ fundamental right to bodily integrity in that it imposes a governmentally mandated interference with Petitioners’ bodies through RF. *Rideout v. Hershey Medical Center*, 1995 WL 924561 at *14, Pa. D & C. 4th 57 (Pa. Com. Pl., Dauphin County 1995) (the concept of bodily integrity encompasses “the right of every individual to be let alone, free from unwanted restraint, interference, or touching”) (citing *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 110 S. Ct. 2841, 2846-47 (1990)).

78. Courts also have recognized that “[i]ndividuals have a constitutional liberty interest in personal bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment.” *Kane v. Barger*, 902 F.3d 185, 192 & n.19 (3d

Cir. 2018) (citing *Phillips v. County. of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008); *Black v. Indiana Area School Dist.*, 985 F.2d 707, 709 n.1 (3d Cir. 1993) (noting that the Fourteenth Amendment protects a liberty interest in bodily integrity)). “The Supreme Court has also specifically observed that ‘the “liberty” interest specially protected by the Due Process Clause includes the right[] ... to bodily integrity.’” *Id.* & n.20 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). The constitutional right to bodily integrity is recognized as “fundamental.” *Washington*, 521 U.S. at 720; *Black*, 985 F.2d at 709 n.1. Governments may violate this right when through their actions (here, through the passage of Act 129) they have created the very condition that causes the violation of bodily integrity. *Morrow v. Balaski*, 719 F.3d 160, 167 (3d Cir. 2013); *Kneipp v. Tedder*, 95 F.3d 1199, 1201 (3d Cir. 1996).

79. It is indisputable that RF is an actual physical force that can come into contact with humans in the same way that the x-rays in the doctor’s office can come into contact with human tissue. The only difference is that x-rays have been proven and are recognized as sources of potential harm, but that should not matter. The government has no right to expose anyone to a physical force in their own home absent some compelling justification and here there is none. There is no exception for forces deemed by the government to be safe or even salutary.

80. Further, RF exposure from smart meters has not been proven safe and is the subject of further study. The long-term health effects from exposure to it are unknown.

81. Just because many or most people willingly accept RF exposure, or cannot avoid it in public places, does not give government the power to *force* it on

people against their wishes by means of a device installed on their homes or properties.

82. Petitioners' right to bodily integrity is clearly violated by the governmentally mandated installation of RF-emitting devices on their properties.

83. Act 129 further violates the rights of utility customers such as Petitioners to the free use and enjoyment of their property without unreasonable governmental interference.

84. Petitioners' right to free use of their property is a "prized and fundamental" constitutional right under the Pennsylvania Constitution. *See Parker v. Hough*, 215 A.2d 667, 669 (Pa. 1966) ("An owner of property in this Commonwealth has a tremendously prized and fundamental Constitutional right to use his property as he pleases, subject to certain [inapplicable] exceptions hereinafter set forth."); *see also Robinson Twp. Washington County v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) (Article 1, Section 1 "right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right [that] does not owe its origin to constitutions [but] existed before them") (quoting *Appeal of Lord*, 81 A.2d 533, 537 (1951)).

85. Act 129 constitutes a governmental interference with Petitioners' right in that it forces them to use their property for an unwanted purpose, for the sole apparent benefit of the administrative convenience of a private utility company, and greatly interferes with the free use of their properties.

86. Petitioners further possess under Article 1, Section 8 of the Pennsylvania Constitution ("the people shall be secure in their persons, houses,

papers and possessions from unreasonable searches and seizures....”) a fundamental right against unreasonable searches and seizures of both their persons and their property.

87. This right is similarly guaranteed by the Fourth Amendment to the United States Constitution. The Supreme Court of the United States has made clear in the Fourth Amendment context that the Constitution protects the fundamental right of citizens to be free from governmental intrusion into their homes. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (the right to be free, except in limited circumstances, from unwarranted governmental intrusions into the privacy of the home is fundamental to our free society); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (at the core of the Fourth Amendment “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”); *Mapp v. Ohio*, 367 U.S. 643, 646 (1961) (Fourth Amendment applies “to all (governmental) invasions ... of the sanctity of a man's home and the privacies of life.”); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (security of privacy in the home against arbitrary governmental intrusion is basic to a free society).

88. The area protected Fourth Amendment includes the curtilage, i.e., area immediately surrounding house, “which we have held enjoys protection as part of the home itself.” *Florida v. Jardine*, 569 U.S. 1, 6 (2013). Thus, even where meters are located outside of the four walls of the home, Fourth Amendment and privacy protections apply.

89. Compared to the federal Constitution, the Pennsylvania Constitution provides for “enhanced” protection from unreasonable searches and seizures, based

specifically on that provision's "strong notion of privacy, which is greater than that of the Fourth Amendment." *Commonwealth v. Waltson*, 724 A.2d 289, 292 (Pa. 1998). "As the [Pennsylvania] Supreme Court has stated repeatedly in interpreting Article 1, Section 8, that provision is meant to embody a strong notion of privacy." *Jones v. City of Philadelphia*, 890 A.2d 1188, 1196 (Pa. Commw. 2006). *See also Commonwealth v. Wiley*, 904 A.2d 905, 909 n.4 (Pa. 2006) (Pennsylvania Constitution places greater importance on privacy than the United States Constitution).

90. That right is especially important in one's home. *Brion*, 652 A.2d at 287; *Shaw*, 383 A.2d at 499; *Bubonovich*, 2007 WL 4967570, 2 Pa. D & C. 5th at 80; *Schaeffer*, 688 A.2d at 1146.

91. A violation of the right against unreasonable searches and seizures does not require a tangible intrusion into the home. *Kyllo v. United States*, 533 U.S. 27, 41 (2001) (use of thermal imaging device to obtain information about interior of house was a search); *Florida v. Jardines*, 569 U.S. 1 (2013) ("law enforcement officers' use of drug-sniffing dog on front porch of home, to investigate an unverified tip that marijuana was being grown in the home, was a trespassory invasion of the curtilage which constituted a "search" for Fourth Amendment purposes).

92. The emission of RF waves through a governmentally mandated electronic device placed on Petitioners' properties for the purpose of gathering information clearly constitutes a search of Petitioners' homes, and a seizure of their persons through forced exposure to an unwanted physical force that interacts with Plaintiffs' bodies. *See United States v. Karo*, 468 U.S. 705, 715 (1984).

93. Act 129 severely impacts and impinges upon all of these rights, which are fundamental rights accorded the highest level of protection from governmental overreach.

94. Thus, Act 129 is subject to a “strict scrutiny” analysis, and is constitutional only if it is narrowly tailored to a compelling state interest. *Nixon v. Commonwealth*, 839 A.2d 277, 286-87 (Pa. 2003); *Office of Lieutenant Governor v. Mohn*, 67 A.3d 123, 128 (Pa. Commw. 2013) (government’s intrusion into person’s privacy may be constitutionally justified only where the government interest “is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose”) (quoting *Denencourt v. Commonwealth State Ethics Comm’n*, 470 A.2d 945, 949 (Pa. 1983)); *In re Fiori*, 652 A.2d 1350, 1354 n.3 (Pa. 1995) (“Under the law of this Commonwealth only a compelling state interest will override one’s privacy rights.”).

95. There is no “compelling state interest” to justify the lack of an opt-out provision in Act 129. Whatever the state’s interest in generally upgrading the electrical system through smart meters, there can be no “compelling” need to force a small minority of electrical customers who object to wireless smart meters in their own homes to accept them. This is made clear by the law’s, on its face, exempting from its reach utilities who have fewer than 100,000 customers. If large numbers of electricity customers in Pennsylvania (i.e., all of those served by EDCs with less than 100,000 customers) can be exempted under the terms of the law without damage to the underlying aims of Act 129, there can be no “compelling” reason that small amounts of customers of larger utilities (i.e., those serving over 100,000 households)

cannot be similarly exempted. Further, the lack of an opt-out primarily benefits not the Commonwealth, or its citizens, but instead private utility companies for whom the inability of customers to opt out of coerced wireless smart meter installation may arguably result in administrative convenience to the utility. Such administrative convenience to select private utilities cannot conceivably outweigh the fundamental constitutional rights of customers, including Petitioners, to exclude from their own properties a force-emitting device that they believe can cause them harm.

96. Indeed, any arguable “state interest” in not allowing Petitioners to opt out of forced installation of wireless smart meters on their homes and properties could not conceivably be sufficiently “compelling” as to outweigh the multiple violation of Petitioners’ fundamental rights, and the rights of similarly-situated persons who object to the governmentally-mandated installation of such devices in or near their homes.

97. Moreover, Act 129 is not “narrowly tailored,” as it imposes forced installation of smart meters on all customers of large utilities when there are clearly less intrusive options available, including analog meters; and smart meters where the data collected by the smart meter is transmitted to the utility through means other than RF.

98. It is Petitioners’ constitutional right to make fundamental choices about their homes, properties, bodies, and privacy.

99. The government, absent a compelling state interest, has no right to mandate physical intrusion into these areas. 100. Numerous other jurisdictions

have avoided similar constitutional concerns by allowing consumers who object to wireless smart meters to opt out of their forced installation.

101. Act 129, to the extent that it mandates that all electric utility customers are required to install wireless smart meters on their properties, with no ability to opt out, is unconstitutional.

VI. PRAYER FOR RELIEF

WHEREFORE, Petitioners request that this Court enter judgment in their favor and:

a. Declare that Act 129, and its implementing regulations, are unconstitutional to the extent that they do not allow Petitioners and persons similarly situated to opt out of the installation of wireless smart meters on their properties; and

b. Declare that all electric utilities covered by Act 129 may not require the installation of wireless smart meters on the properties of their customers;

c. Permanently enjoin Respondent from requiring electric utilities to install wireless smart meters in the homes of all customers, without the ability to opt out; and

- d. Grant such other relief as may be just and proper.

Respectfully submitted,

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