

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION | 1 |
| II. | STATEMENT OF JURISDICTION..... | 4 |
| III. | SCOPE AND STANDARD OF REVIEW | 4 |
| IV. | STATEMENT OF THE QUESTIONS INVOLVED | 4 |
| V. | STATEMENT OF THE CASE..... | 5 |
| | 1. PGE Submits a Permit Application for the Yanity Well. | 6 |
| | 2. Grant Township Formulates its Strategy for Prohibiting the Yanity Well. | 7 |
| | 3. EPA Issues the Yanity Well Permit and Grant Township Implements its Strategy by Passing the Community Bill of Rights Ordinance. | 8 |
| | 4. PGE Challenges the Community Bill of Rights Ordinance in Federal Court. | 9 |
| | 5. EPA Denies Appeals and Issues the Final Permit Under the SDWA for the Yanity Well. | 9 |
| | 6. The Federal Court Invalidates the Community Bill of Rights Ordinance Under the Second Class Township Code and Grant Township Adopts the Home Rule Charter..... | 9 |
| | 7. The Department Issues a Permit for the Yanity Well and Institutes This Action..... | 11 |
| | 8. The Federal Court Holds That Grant Township’s Community Bill of Rights Ordinance Violated PGE’s Constitutional Rights..... | 11 |
| | 9. The Federal Court Holds That the Same Provisions in Highland Township’s Home Rule Charter Are Unconstitutional..... | 12 |
| | 10. The District Court Sanctions CELDF and Awards PGE Attorney’s Fees Against Grant Township..... | 13 |
| | 11. The Department Rescinds PGE’s Permit for the Yanity Well..... | 14 |
| | 12. PGE Challenges the Home Rule Charter in Federal District Court and Grant Township Moves to Have That Challenge Be Resolved in Commonwealth Court..... | 15 |
| | 13. Grant Township Decides to “Press Forward.” | 16 |
| VI. | SUMMARY OF THE ARGUMENT | 17 |
| VII. | ARGUMENT..... | 21 |
| | A. The Doctrine of Res Judicata/Collateral Estoppel Mandates Finding That the Home Rule Charter is Unconstitutional. | 21 |

| | | |
|-------|--|----|
| 1. | The Federal District Court Previously Ruled That the Provisions Incorporated in the Home Rule Charter Violate the Equal Protection Clause. . | 22 |
| 2. | The Federal District Court Previously Ruled That the Provisions Incorporated in the Home Rule Charter Violate the Petition Clause..... | 23 |
| 3. | The Federal District Court Previously Ruled That the Provisions Incorporated in the Home Rule Charter Violate PGE’s Substantive Due Process Rights. | 24 |
| 4. | PGE Has Demonstrated That the Doctrine of Res Judicata/Collateral Estoppel Applies Here. | 24 |
| B. | Even if a Finding that the Home Rule Charter is Unconstitutional Is Not Mandated by Res Judicata/Collateral Estoppel, Longstanding Precedent Demonstrates that the Home Rule Charter is Unconstitutional Under the Equal Protection Clause, Petition Clause, and Due Process Clause as a Matter of Law. | 26 |
| 1. | The Home Rule Charter Violates the Equal Protection Clause. | 26 |
| 2. | The Home Rule Charter Violates the Petition Clause. | 31 |
| 3. | The Home Rule Charter Violates PGE’s Substantive Due Process Rights. | 34 |
| C. | The Home Rule Charter is Preempted by the Federal Safe Drinking Water Act. | 39 |
| D. | Grant Township Can Bring Its Claims Under Article I, Section 27 Before the Environmental Hearing Board. | 43 |
| VIII. | CONCLUSION..... | 44 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Cases | |
| <i>Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Bd. of Twp. of O'Hara</i> , 676 A.2d 1255 (Pa. Cmwlth. 1996) | 35 |
| <i>Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of Rogers</i> , 27 F.3d 1499 (10th Cir. 1994) | 41 |
| <i>Borough of Duryea, Pa. v. Guarnieri</i> , 564 U.S. 379 (2011) | 31 |
| <i>Cali v. City of Philadelphia</i> , 177 A.2d 824 (Pa. 1962) | 26 |
| <i>California Coastal Comm. v. Granite Rock Co.</i> , 480 U.S. 572 (1987) | 39 |
| <i>Callaghan v. Haverford Twp.</i> , No. 1544 CD 2010, 2011 WL 10845813 (Pa. Cmwlth. July 25, 2011) | 22 |
| <i>Center for Coalfield Justice v. DEP</i> , 2017 EHB 799, EHB Docket No. 2014-072-B (Adjudication issued Aug. 15, 2017) | 43 |
| <i>Center for Coalfield Justice v. DEP</i> , 2018 EHB 323, EHB Docket No. 2018-028-R (Opinion issued Apr. 24, 2018) | 43 |
| <i>Cindrich v. Fisher</i> , No. 440 MD 2010, 2017 WL 4803880 (Pa. Cmwlth. Oct. 25, 2017) | 25 |
| <i>Citizens United v. Fed. Election Com'n</i> , 558 U.S. 310 (2010) | 31 |
| <i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985) | 27 |
| <i>City of Philadelphia, Board of License & Inspection Review v. 2600 Lewis, Inc.</i> , 661 A.2d 20 (Pa. Cmwlth. 1995) | 37 |
| <i>Colorado Dep't of Public Health and Env't v. U.S.</i> , 693 F.3d 1214 (10th Cir. 2012) | 41 |
| <i>Com. v. Burnsworth</i> , 669 A.2d 883 (Pa. 1995) | 36 |

| | |
|---|------------|
| <i>Com. v. Clark</i> , 14 Pa. Super. 435 (1900)..... | 27, 28, 35 |
| <i>Com. v. Omar</i> , 981 A.2d 179, 185 (Pa. 2009)..... | 4 |
| <i>Com. v. Stinnett</i> , 514 A.2d 154 (Pa. Super. 1986)..... | 27 |
| <i>Dept. of Transp. v. Middaugh</i> , 244 A.3d 426 (Pa. 2021)..... | 36 |
| <i>In re District Attorney</i> , 756 A.2d 711 (Pa. Cmwlth. 2000)..... | 26 |
| <i>Council 13, Am. Fed’n of State, Cty. & Mun. Employees, AFL-CIO ex rel. Fillman v. Rendell</i> , 986 A.2d 63 (Pa. 2009)..... | 42 |
| <i>Farley v. Zoning Hearing Bd. of Lower Merion Twp.</i> , 636 A.2d 1232 (Pa. Cmwlth. 1994)..... | 24 |
| <i>First Nat. Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)..... | 34 |
| <i>Flagg v. Int’l Union, Sec., Police, Fire Prof. of Am., Local 506</i> , 146 A.3d 300 (Pa. Cmwlth. 2016)..... | 4 |
| <i>Friends of Lackawanna v. DEP</i> , 2017 EHB 1123, EHB Docket No. 2015-063-L (Adjudication issued Nov. 8, 2017)..... | 43 |
| <i>Frost v. Corp. Com. of Oklahoma</i> , 278 U.S. 515 (1929)..... | 28 |
| <i>G.C. Murphy Co. v. Com., Unemployment Comp. Benefits</i> , 471 A.2d 1295 (Pa. Cmwlth. 1984)..... | 31 |
| <i>Germantown Cab Co. v. Phila. Parking Auth.</i> , 206 A.3d 1030 (Pa. 2019)..... | 36 |
| <i>Gibraltar Rock, Inc. v. DEP</i> , 258 A.3d 572 (Pa. Cmwlth. 2021)..... | 37 |
| <i>Gresock v. City of Pittsburgh Civil Service Com’n.</i> , 698 A.2d 163 (Pa. Cmwlth. 1997)..... | 35 |

| | |
|---|---------------|
| <i>Gulf, C. & S.F. Ry. Co. v. Ellis</i> , 165 U.S. 150 (1897)..... | 35 |
| <i>Hayes v. Erie Ins. Exchange</i> , 425 A.2d 419 (Pa. 1981)..... | 27 |
| <i>Kalimootoo v. Middle Smithfield Twp.</i> , No. 125 CD 2019, 2019 WL 5884598 (Pa. Cmwlth. Nov. 12, 2019) | 35 |
| <i>Kurtz v. City of Pittsburgh</i> , 31 A.2d (Pa. 1943)..... | 27, 32 |
| <i>Kuwait & Gulf Link Transp. Co. v. Doe</i> , 92 A.3d 41 (Pa. Super. 2014)..... | 31 |
| <i>Lehigh Valley Power Com. v. Pa. Public Utility Com’n.</i> , 563 A.2d 548 (Pa. Cmwlth. 1989) | 25 |
| <i>Logan v. DEP</i> , 2018 EHB 71, EHB Docket No. 2016-091-L (Adjudication issued Jan. 29, 2018)..... | 43 |
| <i>Lower Southampton Twp. v. Dixon</i> , 756 A.2d 147 (Pa. Cmwlth. 2000)..... | 31, 32 |
| <i>MD Mall Assocs. v. CSX Transp., Inc.</i> , 715 F.3d 479 (3d Cir. 2013)..... | 39 |
| <i>Monell v. Dept. of Soc. Svcs. of City of N.Y.</i> , 436 U.S. 658 (1978)..... | 27 |
| <i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992)..... | 39 |
| <i>Morris v. Com.</i> , 538 A.2d 1385 (Pa. Cmwlth. 1988)..... | 27 |
| <i>Nebbia v. New York</i> , 291 U.S. 502 (1934)..... | 35 |
| <i>Nixon v. Com.</i> , 839 A.2d 277 (Pa. 2003)..... | 36 |
| <i>Pa. Gen. Energy Co. v. Grant Twp.</i> , 139 F. Supp. 3d 706 (W.D. Pa. 2015)..... | 9 |
| <i>Pa. Gen. Energy Co. v. Grant Twp.</i> , No. 14-209, 2017 WL 1215444 (W.D. Pa. Mar. 31, 2017) | <i>passim</i> |

| | |
|--|---------------|
| <i>Pa. Gen. Energy Co. v. Grant Twp.</i> , No. 14-209, 2018 WL 306679 (W.D. Pa. Jan. 5, 2018) | 2, 8, 13 |
| <i>Pa. Gen. Energy Co. v. Grant Twp.</i> , No. 14-209, 2019 WL 1436937 (W.D. Pa. Mar. 31, 2019) | 2, 14 |
| <i>Peake v. Com.</i> , 132 A.3d 506 (Pa. Cmwlth. 2015) | 4 |
| <i>Planned Parenthood of S.E. Pa. v. Casey</i> , 505 U.S. 833 (1992) | 35 |
| <i>Plyler v. Doe</i> , 457 U.S. 202, 216 (1982) | 27 |
| <i>S.D. Mining Assoc. v. Lawrence Cty.</i> , 155 F.3d 1005 (8th Cir. 1998) | 39 |
| <i>Santa Clara Cty. v. So. Pac. R. Co.</i> , 118 U.S. 394 (1886) | 34 |
| <i>Schneider v. N.J.</i> 308 U.S. 147 (1939) | 32 |
| <i>Seneca Resources Corp. v. Highland Twp.</i> , No. 16-cv-289, 2017 WL 4354710 (W.D. Pa. Sept. 29, 2017) | <i>passim</i> |
| <i>Ulsh v. Zoning Hearing Bd. of Lower Paxton Twp.</i> , 22 A.3d 244 (Pa. Cmwlth. 2018) | 21, 22 |
| <i>United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass’n</i> , 389 U.S. 217 (1967) | 31, 32 |
| <i>William Goldman Theatres, Inc. v. Dana</i> , 173 A.2d 59 (Pa. 1961) | 32 |
| <i>Wolff Chem. Co. v. City of Philadelphia</i> , 66 A. 344 (Pa. 1907) | 27 |
| <i>Wyoming et al. v. Zinke</i> , 871 F.3d 1133 (10th Cir. 2017) | 40 |
| <i>Zampogna v. Law Enforcement Health Benefits, Inc.</i> , 81 A.3d 1043 (Pa. Cmwlth. 2013) | 31 |
| Constitutions | |
| Pennsylvania Const. Art. I, § 27 | <i>passim</i> |

| | |
|------------------|---------------|
| U.S. Const. | <i>passim</i> |
|------------------|---------------|

Statutes

| | |
|--|--------------|
| 42 Pa. C.S. § 761(a) | 4 |
| 52 Pa. C.S. § 2962(c) | 11 |
| 58 P.S. § 2301, <i>et seq.</i> | 5, 6, 11 |
| 35 P.S. § 6018.101, <i>et seq.</i> | 5, 11 |
| 42 U.S.C. § 300f, <i>et seq.</i> | 3, 5, 20, 43 |

Regulations

| | |
|--------------------------|----|
| 40 C.F.R. § 144.1. | 40 |
| 40 C.F.R. § 144.3. | 30 |
| 40 C.F.R. § 144.31 | 30 |
| 40 C.F.R. § 144.32 | 30 |

Other Authorities

| | |
|--------------------------|------|
| Pa. R.A.P. 1532(b) | 1, 4 |
|--------------------------|------|

Pennsylvania General Energy Company, L.L.C. (“PGE”) hereby submits this Brief in Support of its Application for Summary Relief under Pa. R.A.P. 1532(b).

I. INTRODUCTION

Grant Township’s Home Rule Charter: (i) prohibits any corporation from depositing in Grant Township waste from oil and gas extraction; (ii) invalidates any permit issued to any corporation authorizing the depositing of such waste; (iii) invalidates any state law inconsistent with these prohibitions; and (iv) deprives any corporation alleged to violate the Home Rule Charter of standing to challenge the Home Rule Charter in court on the basis of preemption or lack of authority. The question of whether Grant Township’s Home Rule Charter violates PGE’s rights under the United States Constitution is settled law. It is settled by over one hundred years of United States Supreme Court precedent and precedent of the Pennsylvania Supreme Court and the Commonwealth Court.

Significantly, it also became settled law in prior litigation between Grant Township and PGE on exactly the same issues. In *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2017 WL 1215444 (W.D. Pa. Mar. 31, 2017), attached as Exhibit 1 to PGE’s Application for Summary Relief,¹ the federal district court held that the provisions in Grant Township’s Community Bill of Rights Ordinance, which were subsequently incorporated into the Home Rule Charter that replaced the Ordinance, violated PGE’s rights under the Equal Protection Clause, the Petition Clause, and the Due Process Clause of the United States Constitution.

That holding could not have come as a surprise to Grant Township. Counsel for PGE advised Grant Township that any ordinance or home rule charter containing those prohibitions would violate PGE’s constitutional rights. But Grant Township did not have to accept PGE’s

¹ Each exhibit referenced throughout PGE’s Brief in Support of its Application for Summary Relief has been attached to PGE’s Application for Summary Relief.

admonition. Grant Township's own counsel, the Community Environmental Legal Defense Fund ("CELDF"), stated the exact same thing. CELDF helped draft Grant Township's Community Bill of Rights Ordinance and Home Rule Charter, represented Grant Township in defense of both in federal court, and represents Grant Township in this action. The then Executive Director of CELDF conceded that if Grant Township adopted these prohibitions, "they are acting not only illegally, but they are acting unconstitutionally."

CELDF was right. Not only did the federal district court hold that Grant Township had violated PGE's constitutional rights, but the district court also sanctioned and reported CELDF's counsel to the Disciplinary Board of the Supreme Court of Pennsylvania for advancing legal arguments in support of these prohibitions against PGE that were "unfounded," "bad faith," and contrary to constitutional protections for PGE recognized pursuant to "over one hundred years of Supreme Court precedent." *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2018 WL 306679 (W.D. Pa. Jan. 5, 2018), Exhibit 2. The federal district court then awarded PGE legal fees against Grant Township. *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2019 WL 1436937 (W.D. Pa. Mar. 31, 2019), Exhibit 3. As set forth in more detail in the Statement of Undisputed Facts, the district court decisions were not the only time that the language in the Grant Township Home Rule Charter had been adjudged unconstitutional. The Western District of Pennsylvania held that similar prohibitions and provisions in Highland Township's Community Bill of Rights Ordinance and Home Rule Charter were similarly unconstitutional.

Remarkably, Jon Perry, Chairman of the Grant Township Board of Supervisors and Grant Township's corporate designee witness,² testified at his deposition that despite (i) his oath of office to uphold the United States Constitution, (ii) his awareness of the legal fees awarded against Grant

² Mr. Perry testified that: (i) he was authorized to testify on behalf of Grant Township; (ii) he has been a supervisor for seven years; and (iii) he is the current Board Chairman. (J. Perry Tr. at 17:15-18:17, Exhibit 4).

Township, and (iii) his awareness of the sanctions against Grant Township's counsel, he did not care that the federal district court held that the prohibitions enacted by Grant Township violated PGE's federal constitutional rights. Instead, Mr. Perry articulated Grant Township's intention to "press forward," to litigate in a new forum, and to attempt to seek a different result from a Pennsylvania state court on the exact same issues.

PGE's Application for Summary Relief aims instead to "press stop" to Grant Township's blatant forum shopping and impermissible attempt to raise issues that were correctly decided in federal court and for which Grant Township is collaterally estopped from re-litigating. Grant Township and CELDF have pursued this issue unsuccessfully in multiple cases for over eight years. Simply stated, it is settled law that the prohibitions in Grant Township's Home Rule Charter violate PGE's constitutional rights, and therefore PGE respectfully requests that the Home Rule Charter be invalidated on that basis.

The Home Rule Charter is invalid for another reason. It is preempted by the federal Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* ("SDWA"). Specifically, Section 301 of the Home Rule Charter prohibits disposal of waste from oil and gas extraction into underground injection wells in Grant Township, which the SDWA expressly authorizes and regulates and for which the United States Environmental Protection Agency ("EPA") has issued a permit to PGE to do. In fact, the Western District of Pennsylvania previously held that the same prohibition in a home rule charter was preempted by the SDWA.

Issues relating to the constitutionality of the Home Rule Charter and preemption of the Home Rule Charter by the SDWA are questions of law especially appropriate for summary relief. They can be decided solely based upon the text of the Home Rule Charter. Further, there are no

disputed issues of material facts related to the history of the litigation between PGE and Grant Township cited herein.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter under Section 761(a) of the Judicial Code, 42 Pa. C.S. § 761(a).

III. SCOPE AND STANDARD OF REVIEW

Under Pa. R.A.P. 1532(b), “[a]t any time after filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” Applications for summary relief before the Commonwealth Court are evaluated according to summary judgment standards, viewing the evidence in the light most favorable to the non-moving party and entering judgment if there are no issues of material fact and the right to relief is clear. *Flagg v. Int’l Union, Sec., Police, Fire Prof. of Am., Local 506*, 146 A.3d 300, 305 (Pa. Cmwlth. 2016).

“A challenge to the constitutionality of a statute presents a pure question of law, over which the court’s standard of review is *de novo* and the scope of review is plenary.” *Peake v. Com.*, 132 A.3d 506, 516 n. 14 (Pa. Cmwlth. 2015) (citing *Com. v. Omar*, 981 A.2d 179, 185 (Pa. 2009)).

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. **Question:** Under the res judicata/collateral estoppel doctrine, is PGE entitled to summary relief invalidating the Home Rule Charter because a federal district court held the same provisions unconstitutional in prior litigation between PGE and Grant Township?

Answer: Yes.

2. **Question:** Does the Home Rule Charter violate the Equal Protection Clause of the United States Constitution because there is no rational basis for treating corporations differently from individuals engaging in the activity prohibited by the Home Rule Charter?

Answer: Yes.

3. **Question:** Does the Home Rule Charter violate the Petition Clause of the United States Constitution by prohibiting PGE's access to the courts to challenge the Home Rule Charter?

Answer: Yes.

4. **Question:** Does the Home Rule Charter violate PGE's substantive due process rights by denying corporations such as PGE their rights under the First and the Fourteenth Amendments of the United States Constitution?

Answer: Yes.

5. **Question:** Is the Home Rule Charter preempted by the Federal Safe Drinking Water Act?

Answer: Yes.

V. STATEMENT OF THE CASE

A. Procedural History

On March 27, 2017, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") filed a Petition for Review in this matter challenging Grant Township's Home Rule Charter ("Home Rule Charter" or "Charter"), arguing, among other things, that the Pennsylvania Oil and Gas Act, 58 P.S. § 2301 *et seq.* ("Oil and Gas Act") and the Pennsylvania Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* ("SWMA") preempt the Home Rule Charter. On May 8, 2017, Grant Township filed an answer to the Department's Petition for Review and set forth New Matter and Counterclaims. In Counts 3 and 4 of the Counterclaims, the

only Counts that survived preliminary objections, Grant Township asserts that the Home Rule Charter enforces the Township's rights under Article I, Section 27 of the Pennsylvania Constitution, and therefore cannot be preempted by the Oil and Gas Act and the SWMA, and that the Department has violated Article I, Section 27.

On February 19, 2021, the Commonwealth Court granted PGE's unopposed petition to intervene in this action. On March 10, 2021, PGE filed an Adoption of Petitioner's Petition for Review and an Answer to Township's New Matter and Counterclaims. In response to paragraph 64 of Grant Township's New Matter, PGE averred that the Home Rule Charter is invalid because it violates PGE's constitutional rights and is preempted by the SDWA. In addition, in response to paragraph 64 of Grant Township's New Matter and paragraph 16 of Grant Township's Counterclaims, PGE averred that the doctrine of res judicata/collateral estoppel bars Grant Township from re-litigating the constitutionality of its Home Rule Charter. PGE averred that these matters were fully litigated and finally adjudicated in *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2017 WL 1215444 (W.D. Pa. Mar. 31, 2017), Exhibit 1.

Pursuant to this Court's scheduling orders, fact discovery has been completed and Grant Township has served its expert reports.

B. Statement of Undisputed Facts

1. PGE Submits a Permit Application for the Yanity Well.

On May 2, 2013, PGE submitted an application to EPA under the SDWA for a Class II-D underground well injection permit for the Yanity well (the "Yanity Well") located in Grant Township. *See* Exhibit 5. PGE's application sought authorization to convert the existing Yanity Well from a production well to an injection well to inject fluids produced at other PGE oil and gas wells into the Yanity Well.

2. Grant Township Formulates its Strategy for Prohibiting the Yanity Well.

Beginning in 2013, CELDF began advising Grant Township on their legal options for opposing an underground injection well permit for the Yanity Well. (J. Perry Tr. at 33-34). CELDF advised Grant Township, and Grant Township agreed, that the traditional approach of appealing permits was a “waste of time.” (J. Perry Tr. at 59:5-11, 61:21-62:2). CELDF instead advocated to Grant Township to pass a Community Bill of Rights Ordinance (“Community Bill of Rights Ordinance” or “Ordinance”) prohibiting the underground injection of wastes from oil and gas extraction in Grant Township. (J. Perry Tr. at 62:20-63:1).

Thomas Linzey was the Executive Director of CELDF and was directly involved in advising Grant Township. (J. Perry Tr. at 35:10-24). Mr. Linzey provided legal representation to Grant Township regarding the legality of its Community Bill of Rights Ordinance and ultimately its Home Rule Charter. (J. Perry Tr. at 35:21-36:4).

Mr. Linzey stated as follows:

Under the law, [the Yanity Well] permit legally overrides anything the community can do. So if the community wants to ban the frack well, the community can’t. They are legally prevented from doing so, and in fact, if they move to ban the frack, they are acting not only illegally, but they are acting unconstitutionally.

(J. Perry Tr. at 38:8-17, Exhibit 4; Troutman Tr. at 56:18-24, 57:1-7, Exhibit 6).³

³ Melissa Troutman directed a documentary entitled “Invisible Hand,” focusing on Grant Township’s Community Bill of Rights Ordinance. (Troutman Tr. at 19:18-20:17). Ms. Troutman confirmed that she recorded Mr. Linzey’s quote above, that she remembers him saying it, that it was included in her documentary, and no one has told her that any statement in the documentary was false. (Troutman Tr. at 56:12-57:7). An excerpt from the documentary containing Mr. Linzey’s statement has been provided at this link: <https://mankogold.sharefile.com/share/view/sfa0dbbabad1f40c8827c45cb778c426e>.

3. EPA Issues the Yanity Well Permit and Grant Township Implements its Strategy by Passing the Community Bill of Rights Ordinance.

On March 19, 2014, EPA issued a Class II-D underground injection well permit to PGE for the Yanity Well. *See* Exhibit 7. The permit was appealed to EPA's Environmental Appeals Board by several Grant Township residents. *Id.*

Grant Township decided not to wait for the outcome of that appeal, but rather decided, upon issuance of the EPA permit, to take steps to prohibit the operation of the Yanity Well. (J. Perry Tr. at 56:12-20). To that end, on June 3, 2014, Grant Township adopted the Community Bill of Rights Ordinance. *See* Exhibit 8. Immediately prior to the vote at a public meeting to approve the Community Bill of Rights Ordinance, counsel for PGE advised the Grant Township Board of Supervisors that the proposed Ordinance suffered numerous insurmountable legal deficiencies, including the annulling of constitutional rights afforded to corporations by the United States Supreme Court, as determined at least once before by a federal district court with regard to a similar ordinance drafted by CELDF. *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2018 WL 306679, at *10 (W.D. Pa. Jan. 5, 2018), Exhibit 2.

Grant Township's Community Bill of Rights Ordinance contained the following provisions:

- Section 3(a) prohibits any corporation or government (but not an individual) from depositing of waste from oil and gas extraction, including discharging into an underground injection well.
- Section 3(b) invalidates any permit issued to a corporation (but not an individual) that violates the Ordinance;
- Section 4(a) imposes criminal liability on any corporation or government (but not an individual) for a violation of the Ordinance;
- Section 5(a) strips corporations of their rights as a "person" under the United States Constitution, including the right to challenge the Ordinance in court; and

- Section 5(b) renders invalid any state law to the extent it violates the Ordinance.

See Exhibit 8.

4. PGE Challenges the Community Bill of Rights Ordinance in Federal Court.

On August 18, 2014, PGE filed a Complaint in federal district court, which PGE amended on September 16, 2014, challenging the Community Bill of Rights Ordinance. Exhibit 5. The Complaint, among other things, sought to invalidate the Ordinance (i) as beyond the authority of Grant Township under Pennsylvania's Second Class Township Code, and (ii) as a violation of PGE's rights under the United States Constitution. *Id.*

5. EPA Denies Appeals and Issues the Final Permit Under the SDWA for the Yanity Well.

On August 21, 2014, EPA's Environmental Appeals Board issued an order denying the appeals of the EPA permit for the Yanity Well. *See* Exhibit 7. In its order, the Environmental Appeals Board confirmed that EPA's underground injection well program has primacy in Pennsylvania and that Pennsylvania is not authorized to administer that program. Exhibit 7.⁴ On September 11, 2014, EPA issued the final permit for the Yanity Well. *See* Exhibit 11.

6. The Federal Court Invalidates the Community Bill of Rights Ordinance Under the Second Class Township Code and Grant Township Adopts the Home Rule Charter.

On October 14, 2015, the federal district court granted, in part, PGE's Motion for Judgment on the Pleadings, holding that Sections 3(a), 3(b), 4(b), 4(c), 5(a), and 5(b) of the Ordinance violated or were preempted by the Pennsylvania Second Class Township Code. *See Pa. Gen.*

⁴ Scott Perry, the Deputy Secretary for the Department's Office of Oil and Gas Management confirmed EPA's primacy under the SDWA over the regulation, permitting, and enforcement of underground injection wells in Pennsylvania, and further that this SDWA program has not been delegated to the Commonwealth. (S. Perry Tr. at 182:5-183:9, Exhibit 10).

Energy Co. v. Grant Twp., 139 F. Supp. 3d 706 (W.D. Pa. 2015), Exhibit 12. The district court allowed PGE's claims that Grant Township had violated PGE's constitutional rights to proceed.

Grant Township had already determined that if the district court were to invalidate its Community Bill of Rights Ordinance under the Second Class Township Code, Grant Township would adopt the same prohibitions in the form of a Home Rule Charter. (J. Perry Tr. at 74:2-75:1). Consistent with that strategy, three weeks after the district court invalidated the Community Bill of Rights Ordinance, on November 3, 2015, Grant Township adopted its Home Rule Charter. *See* Exhibit 13. CELDF again advised Grant Township on the adoption of that Home Rule Charter. (J. Perry Tr. 74:19-21).

As reflected on Exhibit 9, the relevant provisions of the Home Rule Charter are the same as those in Grant Township's Community Bill of Rights Ordinance:

- Like Section 3(a) of the Ordinance, Section 301 of the Charter prohibits any corporation or government (but not an individual) from discharging oil and gas extraction waste into an underground injection well;
- Like Section 3(b) of the Ordinance, Section 302 of the Charter invalidates any permit issued to a corporation (but not an individual) that violates the Charter;
- Like Section 4(a) of the Ordinance, Section 303 of the Charter imposes criminal liability on any corporation or government (but not an individual) for a violation of the Charter;
- Like Section 5(a) of the Ordinance, Section 401 of the Charter strips corporations of their rights as a "person" under the United States Constitution, including the right to challenge the Charter in court; and
- Like Section 5(b) of the Ordinance, Section 306 of the Charter renders invalid any state law to the extent it violates the Charter.

Grant Township conceded that these provisions in its Charter and Ordinance are the same. (J. Perry Tr. at 76-86).

7. The Department Issues a Permit for the Yanity Well and Institutes This Action.

On March 27, 2017, the Department issued a permit to PGE under the Oil and Gas Act and the SWMA authorizing a change in the status of the Yanity Well for use as an injection well. On that same day, the Department filed its Petition for Review before the Commonwealth Court challenging the Home Rule Charter. In its Petition for Review, the Department sought declaratory relief that: (i) Sections 301, 302, and 306 of the Charter are expressly preempted by Section 3302 of the Oil and Gas Act; (ii) Sections 301, 302, and 306 of the Charter are impliedly preempted by the Oil and Gas Act and Solid Waste Management Act; (iii) Sections 301, 302, and 306 of the Charter violate the Home Rule Charter and Optional Plan Law, 52 Pa. C.S. § 2962(c); and, (iv) Section 303 of the Charter is void and unenforceable as to the Commonwealth based on sovereign immunity.

8. The Federal Court Holds That Grant Township's Community Bill of Rights Ordinance Violated PGE's Constitutional Rights.

On March 31, 2017, the federal district court granted, in part, PGE's Motion for Summary Judgment holding that Grant Township's Community Bill of Rights Ordinance violated PGE's rights under the United States Constitution. *See Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2017 WL 1215444 (W.D. Pa. Mar. 31, 2017), Exhibit 1. Specifically, the district court held that the Ordinance violated the Equal Protection Clause because there was no rational basis for prohibiting underground injection of oil and gas extraction waste by a corporation or government, but not by an individual.

The district court also held that the Ordinance violated the Petition Clause of the United States Constitution because it attempted to deny PGE the right to challenge the Ordinance in court. Finally, the district court held that several provisions of the Ordinance were arbitrary and irrational,

denied PGE its property rights, imposed criminal liability without due process of law, denied equal protection of laws, and therefore the Ordinance denied PGE its substantive due process rights.

Board Chairman Perry conceded in his deposition that for purposes of whether these provisions violate PGE's constitutional rights, it did not matter whether they were contained in the Ordinance that was invalidated by the district court or the Home Rule Charter that Grant Township adopted to replace the Ordinance:

Q: Did you believe somehow that a Home Rule Charter allowed you to do what was unconstitutional under your Community Bill of Rights Ordinance?

A: No

(J. Perry Tr. at 109:12-15).

9. The Federal Court Holds That the Same Provisions in Highland Township's Home Rule Charter Are Unconstitutional.

With the advice of CELDF, on January 9, 2013, Highland Township adopted a Community Bill of Rights Ordinance. *See Seneca Resources Corp. v. Highland Twp.*, No. 16-cv-289, 2017 WL 4354710 (W.D. Pa. Sept. 29, 2017), Exhibit 14. Seneca Resources Corporation ("Seneca") challenged that ordinance in federal court on state and federal constitutional grounds because it prevented Seneca from converting a natural gas production well into an injection well. *See Seneca Resources Corp. v. Highland Twp.*, No. 1:15-cv-60 (W.D. Pa.). Highland Township resolved that litigation by entering into a Consent Decree, entered by the district court, in which Highland Township agreed that its ordinance violated state law and the United States Constitution. *See* Exhibit 15. Highland Township later voiced regret that the "Board of Supervisors had allowed itself to be guided by CELDF in adopting the Ordinance." *See* Exhibit 16.

Despite those admissions, and again with the advice of the CELDF, on November 8, 2016, Highland Township adopted its Home Rule Charter. As reflected in Exhibit 9, the Highland

Township Home Rule Charter contains the same relevant prohibitions and provisions that are in the Grant Township's Home Rule Charter. (*See also* J. Perry Tr. 96-102). Seneca challenged the Highland Township Home Rule Charter in federal court on the basis that it violated Seneca's constitutional rights and that the SDWA preempted Highland Township's Home Rule Charter.

The federal district court in *Seneca Resources Corp. v. Highland Twp.*, No. 16-cv-289, 2017 WL 4354710 (W.D. Pa. Sept. 29, 2017), Exhibit 14, made no distinction between these prohibitions whether they came in the form of an ordinance or a home rule charter: in either case the provisions violated Seneca's constitutional rights under the Petition Clause and Seneca's substantive due process rights.⁵ The district court held further that the SDWA preempted Highland Township's attempt to prohibit underground injection wells.

10. The District Court Sanctions CELDF and Awards PGE Attorney's Fees Against Grant Township.

As of the beginning of 2018, a federal district court in Pennsylvania had on three separate occasions held the same prohibitions crafted by CELDF for Grant Township and Highland Township had violated the United States Constitution. So, on motion by PGE, on January 5, 2018, the district court imposed monetary sanctions of \$52,000 against CELDF lawyers Mr. Linzey and Elizabeth Dunne and referred Mr. Linzey to the Disciplinary Board of the Supreme Court of Pennsylvania for the positions he asserted in support of Grant Township's Community Bill of Rights Ordinance. *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2018 WL 306679 (W.D. Pa. Jan. 5, 2018), Exhibit 2.

In imposing sanctions, the district court noted that it had examined CELDF's federal environmental litigation over the past fifteen years in Pennsylvania and found that CELDF had pursued the same legal arguments in favor of local ordinances to invalidate corporate rights in each

⁵ Seneca did not move for judgment on the pleadings on its Equal Protection Clause claim.

case. And in each case, the courts had found these legal arguments “wanting, lacking argument predicated in law or facts, and failing to justify setting aside historically well-settled legal precepts.” *Id.* at *19. The district court emphasized that CELDF’s “presentation of identical theories over the course of fifteen years eliminates any claims of novelty or plausibility, and cannot be excused as a good faith course of conduct.” *Id.* at *20. The district court concluded by characterizing CELDF’s conduct as evincing “bad faith” and “the invocation of the courts for purposes unrelated to the just resolution of legal causes.” *Id.* at *21.

The district court did not absolve Grant Township of responsibility either. In 2019, in *Pa. Gen. Energy Co. v. Grant Twp.*, No. 14-209, 2019 WL 1436937 (W.D. Pa. Mar. 31, 2019), the district court awarded to PGE \$102,979.18 in attorney’s fees and costs for prevailing on its constitutional claims against Grant Township. *See* Exhibit 3.

11. The Department Rescinds PGE’s Permit for the Yanity Well.

In light of the continued existence of the Grant Township Home Rule Charter, by letter of March 19, 2020, the Department rescinded the permit it had issued for the Yanity Well, stating that PGE could re-apply “should the conflicting provisions of Grant Township’s Home Rule Charter be changed to allow injection wells or adjudicated as no longer lawfully prohibiting that injection use.” *See* Exhibit 17. PGE appealed the Department’s rescission of the permit for the Yanity Well to the Pennsylvania Environmental Hearing Board (“EHB”) and Grant Township intervened in that appeal. *See Pa Gen. Energy Co. v. DEP*, EHB Docket No. 2020-046-R. In that appeal, Grant Township has asserted the same arguments as it did in its counterclaims in this action, namely that the provisions of the Home Rule Charter prohibiting the injection of waste from oil and gas extraction into the Yanity well enforce the Township’s rights under Article I,

Section 27 and that the Department has violated Article I, Section 27.⁶ *See* Exhibit 18. The EHB stayed the appeal pending the outcome of this action.

12. PGE Challenges the Home Rule Charter in Federal District Court and Grant Township Moves to Have That Challenge Be Resolved in Commonwealth Court.

After rescission of the permit issued by the Department for the Yanity Well and the stay of PGE's appeal of the rescission of that permit by the EHB, on December 9, 2020, PGE filed a complaint in federal district court challenging Grant Township's Home Rule Charter. *See* Exhibit 19. PGE's Complaint avers, among other things, that the district court had already held the same provisions in the Home Rule Charter to be unconstitutional and that the SDWA preempts the Charter's prohibition on underground injection wells.

Board Chairman Perry conceded that Grant Township did not want the federal courts to hear and decide that issue again:

Q: Is it fair to say that you prefer to have these issues decided in state court because you disagreed with the decisions that you got in federal court?

A: Yes.

(J. Perry Tr. at 118:6-10).

For this reason, Grant Township filed a motion to dismiss PGE's federal action based on the *Younger* abstention doctrine asserting that the "state proceeding affords Plaintiff an adequate opportunity to raise its federal claims." *See* Exhibit 20. Grant Township and PGE resolved that motion by agreeing to stay the federal action so that PGE could intervene in this action and pursue

⁶ However, Board Chairman Perry testified that he did not even know what Article I, Section 27 is or whether Grant Township relied upon Article I, Section 27 before the EHB or in the federal court actions. (J. Perry Tr. at 42:20-43:19).

its federal claims before the Commonwealth Court. (J. Perry Tr. at 116:8-17). On February 19, 2021, the Commonwealth Court granted PGE's unopposed petition to intervene. *See* Exhibit 20.

13. Grant Township Decides to "Press Forward."

Board Chairman Perry testified that he was aware that the federal district court held that the Community Bill of Rights Ordinance violated PGE's constitutional rights. (J. Perry Tr. at 103:5-24). He testified that he was aware that his lawyers from CELDF were sanctioned for pursuing the defense of the Ordinance, one of his lawyers was referred to the Disciplinary Board of the Supreme Court of Pennsylvania, and that PGE was awarded attorney's fees from Grant Township in that litigation. (J. Perry Tr. at 106:7-18; 108:15-19).

Board Chairman Perry testified further that he took an oath of office to uphold the Federal Constitution. (J. Perry Tr. at 105:22-25). He then testified, however, that he was unaffected by the federal court decisions:

Q: Do you find it troubling, sitting here today, that a federal court said that you violated an entity's federal constitutional rights by an action that you took and approved? Namely, the passing of the Community Bill of Rights Ordinance?

A: No.

(J. Perry Tr. at 106:1-6).

When asked whether he considered the legality of the Home Rule Charter in light of the federal court opinions, the sanctioning of his attorneys, and the award of attorney's fees against the Township, Mr. Perry testified "no." (J. Perry Tr. at 108:21-109:4). And when asked "as a result of all that did you do anything regarding the Home Rule Charter?" Board Chairman Perry testified: "we pressed forward." (J. Perry Tr. at 109:5-7).

VI. SUMMARY OF THE ARGUMENT

PGE's application is ripe for summary relief. Issues relating to the constitutionality of the Home Rule Charter and preemption of the Home Rule Charter by the SDWA are questions of law that can be decided based upon the language of the Home Rule Charter. Moreover, there are no disputed facts as to the history of the litigation between PGE and Grant Township as set forth in the Statement of the Case. On issues related to the history of the litigation, PGE's Application for Summary Relief is based solely on the Home Rule Charter, the Ordinance, the Highland Township Home Rule Charter, other public documents, prior court decisions or filings in those actions, and the deposition testimony of the Township's own witnesses, primarily Grant Township's corporate designee who is the Chairman of the Grant Township Board of Supervisors.

The federal district court in *Pa. Gen. Energy Co. v. Grant Twp.*, 2017 WL 1215444, at *14-15 (W.D. Pa. Mar. 31, 2017), Exhibit 1, held that provisions in Grant Township's Community Bill of Rights Ordinance that were subsequently incorporated into the Home Rule Charter violated PGE's rights under the United States Constitution. *See* Exhibit 1; Exhibit 9. Res judicata/collateral estoppel bars Grant Township from re-litigating these issues in this matter. The doctrine of res judicata/collateral estoppel gives conclusive effect to a prior adjudication if: (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and, (5) the determination in the prior proceeding was essential to the judgment. The record demonstrates that all of these conditions have been satisfied. PGE and Grant Township directly and fully litigated to a final judgment the constitutionality of the provisions now contained in the Home Rule Charter. Therefore, res judicata/collateral estoppel dictate that the district court's

holding that the provisions of the Ordinance that have been incorporated into the Home Rule Charter violate the Equal Protection Clause, the Petition Clause, and the Due Process Clause should be given conclusive effect in this matter.

Separate and apart from res judicata/collateral estoppel, longstanding precedent from the United States Supreme Court, the Pennsylvania Supreme Court, and the Commonwealth Court support and/or were relied upon in the district court's holding that the Home Rule Charter violates PGE's constitutional rights. Section 301 of the Home Rule Charter treats corporations differently from similarly situated individuals in that it prohibits only corporations from engaging in the deposit of waste from oil from gas extraction, while permitting the same activity by individuals. Section 302 of the Home Rule Charter further invalidates any permit lawfully issued to corporations (not individuals). Section 303 imposes criminal liability on corporations (not individuals) for violating the Charter and strips corporations of their status as a "person" under the United States Constitution. It is well settled that corporations and individuals are similarly situated for the purpose of the Equal Protection Clause, and as both corporations and individuals are subject to the extensive federal regulations pertaining to underground injection control wells, there is no basis for their disparate treatment under the Home Rule Charter. In fact, Grant Township testified that it would have the same concerns regarding underground injection activity whether conducted by a corporation or an individual. *See infra* at Section VII(A)(1). As the district court held in addressing the same provisions, "there is no evidence of a rational relationship between the disparate treatment of corporations and the stated goals of the Ordinance. If these goals can only be achieved through the elimination of fracking, it makes no constitutional sense to allow the same activity by individuals." *Pa. Gen. Energy Co. v. Grant Twp.*, 2017 WL 1215444, at *13 (W.D.

Pa. Mar. 31, 2017), Exhibit 1. Accordingly, the Home Rule Charter violates the Equal Protection Clause of the United States Constitution.

The Home Rule Charter also strips PGE of its rights to challenge the Charter in violation of the Petition Clause of the United States Constitution. Specifically, Section 401 of the Home Rule Charter deems that corporations are not “persons” under the Constitution and revokes corporations’ standing to challenge the Charter on the grounds of preemption, lack of authority or otherwise. This same provision has been held as unconstitutional in two separate cases. In *Pa. Gen. Energy Co. v. Grant Twp.*, the district court struck down the same provision, holding that, by “limiting access to courts,” the Ordinance “shuts the courthouse door to litigants, which it cannot constitutionally do.” *Id.* at *14-15. Similarly, in *Seneca Resources Corp. v. Highland Twp.*, the district court granted Seneca’s motion for judgment on the pleadings regarding the same provisions in Highland Township’s Home Rule Charter, holding “[t]he Home Rule Charter attempts to eliminate the ability of corporations to access the courts, which it cannot constitutionally do. Therefore, as a matter of law, [] the Home Rule Charter violates the Petition Clause of the First Amendment.” 2017 WL 4354710, at *9 (W.D. Pa. Sept. 29, 2017), Exhibit 14. Despite these rulings, Grant Township has enacted the same unconstitutional provision in its Home Rule Charter.

The Home Rule Charter also violates PGE’s substantive due process rights. The purpose of the Home Rule Charter is clear: to deprive corporations of their fundamental rights and prevent them from engaging in the disposal of wastes from oil and gas extraction in an underground injection well, which is expressly authorized under federal and state law. The Home Rule Charter, on its face, denies corporations, but not individuals, equal protection under the law by making it unlawful only for corporations to engage in the depositing of waste from oil and gas extraction (Section 301), denies corporations their property rights by invalidating lawfully issued permits

(Section 302), mandates that any corporation that violates any provision of the Charter “shall be guilty of an offense” and “shall be sentenced to pay the maximum fine allowable” which denies corporations due process of law, invalidates any state law inconsistent with the Home Rule Charter (Section 306), and strips corporations of their status as “persons” (Section 401) and all fundamental rights guaranteed to corporations under the United States Constitution.

The above provisions have previously been held to be an unconstitutional violation of substantive due process in the same two previous cases. In *Pa. Gen. Energy Co. v. Grant Twp.*, the district court held that the language in these provisions “runs afoul of constitutional protections afforded to corporations such as PGE and attempts to immunize Grant Township from clashes with current federal and state law.” 2017 WL 1215444, at *16, Exhibit 1. Similarly, in *Seneca Resources*, the district court held that the same provisions in Highland Township’s Home Rule Charter “highlight[] irrational and arbitrary behavior de facto” and found the provisions unconstitutional as “violative of Plaintiff’s substantive due process rights.” 2017 WL 4354710, at *11, Exhibit 14. As the court held in *Pa. Gen. Energy Co. v. Grant Twp.*, the “substantive due process review tests the arbitrariness and irrationality of the result and the efforts of the Ordinance beyond any alleged legitimate reason. Here, a starting point of seeking a clean environment spun out of control into an Ordinance that does much more, including stripping corporations of their federal constitutional rights.” 2017 WL 1215444, at *17, Exhibit 1.

The Home Rule Charter is also preempted by the Federal Safe Drinking Water Act (“SWDA”), 42 U.S.C. § 300 *et seq.* Federal preemption occurs when a state or local law or regulation conflicts with the structure or purpose of a federal statute. This so-called “conflict preemption” occurs when compliance with a state or local law or regulation poses an obstacle to the full achievement of the purpose of the federal law. The purpose of the SDWA is to protect

underground sources of drinking water, including by authorizing, but strictly regulating, underground injection wells through a comprehensive regulatory scheme. Here, Section 301 of the Home Rule Charter prohibits *all* underground injection wells within Grant Township, which the SDWA expressly permits and regulates. Accordingly, the Home Rule Charter presents a clear obstacle to the express purpose of the SDWA and is therefore preempted by the SDWA.

Finally, if this Court holds that the Home Rule Charter is unconstitutional or preempted by the SDWA, Grant Township is not without a forum to litigate its central claim in this matter: that an authorization to operate underground injection wells in Grant Township violates Article I, Section 27. On the contrary, the Township has asserted that exact claim in its appeal of the rescission of PGE's permit for the Yanity Well, arguing that "allowing injection of fracking waste into the Yanity well . . . would violate the Charter as well as Article I, Section 27 Grant Township has a responsibility to protect its residents' right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." *See* Exhibit 18. That appeal is currently stayed pending the outcome of this matter. If the Court invalidates the Home Rule Charter, Grant Township would still have the opportunity in the pending EHB appeal to defend the Department's rescission of the permit for the Yanity Well based on Article I, Section 27 of the Pennsylvania Constitution, and Grant Township would have a right to petition for review of any decision of the EHB to the Commonwealth Court on a fully developed record.

VII. ARGUMENT

A. The Doctrine of Res Judicata/Collateral Estoppel Mandates Finding That the Home Rule Charter is Unconstitutional.

In Pennsylvania, the doctrine of collateral estoppel is subsumed within the concept of res judicata, "which forecloses re-litigation in a later action of an issue of fact or law that was actually litigated and was necessary to the original judgment." *Ulsh v. Zoning Hearing Bd. of Lower*

Paxton Twp., 22 A.3d 244, 249 (Pa. Cmwlth. 2018). “Collateral estoppel applies if: (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment. *Id.* As courts have often recognized, res judicata/collateral estoppel “serves to protect the courts from inefficiency and confusion that re-litigation fosters.” *Callaghan v. Haverford Twp.*, No. 1544 CD 2010, 2011 WL 10845813, at *3 (Pa. Cmwlth. July 25, 2011).

Re-litigation is exactly what Grant Township is attempting in this action. In *Pa. Gen. Energy Co.*, 2017 WL 1215444, the district court held that Sections 3(a), 3(b), 4(a), 5(a), and 5(b) were unconstitutional. After Grant Township’s Ordinance was invalidated, Grant Township adopted its Home Rule Charter, which incorporates sections 3(a), 3(b), 4(a), 5(a), and 5(b) of the Ordinance as Sections 301, 302, 303, 401, and 406 in the Charter. *See* Exhibits 8, 9, and 13.

1. The Federal District Court Previously Ruled That the Provisions Incorporated in the Home Rule Charter Violate the Equal Protection Clause.

The federal district court has already held that the Ordinance violated the Equal Protection Clause because there was no rational basis for treating corporations differently from individuals engaging in the same activity. *Pa. Gen. Energy Co.*, 2017 WL 1215444, at *11-12, Exhibit 1. The court granted PGE’s motion for summary judgment on this basis over the objection of Grant Township, finding that “it makes no constitutional sense to allow the same activity by individuals.” *Id.* at *12. After Grant Township’s Ordinance was struck down, Grant Township adopted the Home Rule Charter, which contains the same language and again applies to corporations and

governments and not individuals. For example, just like Section 3(a) of the Ordinance, Section 301 of the Charter prohibits corporations and governments, but not individuals, from engaging in the depositing of waste from oil and gas extraction. *See* Exhibits 8, 9, 13. Sections 302 and 303 of the Home Rule Charter also make this distinction between corporations and governments on the one hand and individuals on the other. *Id.*

The Home Rule Charter violates the Equal Protection Clause for the same reasons the federal district court previously decided. Grant Township is foreclosed from re-litigating this issue before the Commonwealth Court.

2. The Federal District Court Previously Ruled That the Provisions Incorporated in the Home Rule Charter Violate the Petition Clause.

The federal district court held that Section 5(a) of the Ordinance violated the Petition Clause of the First Amendment of the United States Constitution. *Pa. Gen. Energy Co. v. Grant Twp.*, 2017 WL 1215444, at *14, Exhibit 1. The court granted PGE's motion for summary judgment on this basis over the objection of Grant Township, holding that while "the Ordinance did not actually prevent PGE from filing the instant action, the Ordinance attempted to do so. It is that attempt that runs afoul of the Constitution." *Id.*

After Grant Township's Ordinance was struck down, Grant Township adopted the Home Rule Charter, which incorporates the same language in Section 401 of the Charter that was struck down in Section 5(a) of the Ordinance. *See* Exhibits 8, 9, 13.

Section 401 of the Home Rule Charter violates the Petition Clause for the same reasons the federal court previously decided with respect to Section 5(a) of the Ordinance. Grant Township is foreclosed from re-litigating this issue before the Commonwealth Court.

3. The Federal District Court Previously Ruled That the Provisions Incorporated in the Home Rule Charter Violate PGE's Substantive Due Process Rights.

The federal district court held that the Ordinance violated PGE's Substantive Due Process rights under the Due Process Clause of the United States Constitution. *Pa. Gen. Energy Co. v. Grant Twp.*, 2017 WL 1215444, at *17, Exhibit 1. The district court granted PGE's motion for summary judgment on this basis over Grant Township's objection, holding that the Ordinance was arbitrary and irrational, stating "a starting point of seeking a clean environment spun out of control into an Ordinance that does much more, including stripping corporations of their federal constitutional rights." *Id.*

The court held that Sections 3(b), 4(a), 5(a), and 5(b) were unconstitutional. After Grant Township's Ordinance was struck down, Grant Township adopted the Home Rule Charter, which incorporates Sections 3(b), 4(a), 5(a), and 5(b) of the Ordinance as Sections 302, 303, 401, and 306 in the Charter. *See* Exhibits 8, 9, 13.

The Home Rule Charter violates the Due Process Clause for the same reasons as the federal court previously decided. Grant Township is foreclosed from re-litigating this issue before the Commonwealth Court.

4. PGE Has Demonstrated That the Doctrine of Res Judicata/Collateral Estoppel Applies Here.

It is clear that for each of the provisions struck down in the previous suit, res judicata/collateral estoppel mandates the same result here. In *Farley v. Zoning Hearing Bd. of Lower Merion Twp.*, plaintiffs appealed the zoning board's decision regarding the constitutionality of a zoning ordinance restricting student housing and also sought a preliminary injunction in federal court. 636 A.2d 1232 (Pa. Cmwlth. 1994). The federal court refused to grant the injunction, holding the plaintiffs had failed to show that the ordinance was not rationally related

to a legitimate government interest. Addressing plaintiffs' appeal of the zoning board decision, the Commonwealth Court held that based on the federal court's decision, the plaintiffs were collaterally estopped from asserting their federal constitutional claims. The court held that the "issues in Appellants' federal action included whether the Ordinance violated the equal protection clause of the United States . . . and the due process clause of the United States Constitution. . . . These issues are identical to two of the issues raised in this appeal." *Id.* at 1237. As appellants "had a full and fair opportunity to litigate these issues on the merits, and their disposition was essential to the district court's final judgment," and because the same ordinance at issue in the Commonwealth Court appeal had been addressed by the federal court, collateral estoppel mandated the same result in the Commonwealth Court. *Id.*; see also *Lehigh Valley Power Com. v. Pa. Public Utility Com'n.*, 563 A.2d 548, 556 (Pa. Cmwlth. 1989) (finding collateral estoppel precluded re-litigating issue where similar arguments were rejected in prior suit and the prior decision has not been appealed and remained conclusive); *Cindrich v. Fisher*, No. 440 MD 2010, 2017 WL 4803880, at *8 (Pa. Cmwlth. Oct. 25, 2017) (holding collateral estoppel barred re-litigation of issues where federal court had granted summary judgment on similar claims, which constituted final judgment on the merits, and the parties were "for the most part, the same").

The same is true here: (1) PGE is challenging the same provisions that were struck down as unconstitutional in *Pa. Gen. Energy Co. v. Grant Twp.* on the same basis; (2) the court previously granted summary judgment in favor of PGE finding each of the provisions unconstitutional; (3) PGE and Grant Township were parties to the previous action; (4) Grant Township had a full and fair opportunity to litigate the constitutionality of the provisions at issue in the prior action and did in fact oppose PGE's summary judgment motion; and (5) the

determination by the court that the provisions were unconstitutional was not only essential to, but also dispositive of the court's judgment.

The fact that the unconstitutional provisions are now incorporated into a home rule charter rather than an ordinance has no effect on the analysis or result, as a "home rule charter must not violate the Constitution of the United States." *In re District Attorney*, 756 A.2d 711, 715 (Pa. Cmwlth. 2000) (citing *Cali v. City of Philadelphia*, 177 A.2d 824, 832 (Pa. 1962) ("No provision of the Home Rule Charter could violate the Constitution of the United States.")). The provisions deprive PGE of its federal constitutional rights regardless of the name at the top of the document. Board Chairman Perry, on behalf of Grant Township, conceded that precise point. *See supra* at Section V(B)(8). Accordingly, under the doctrine of res judicata/collateral estoppel, the Home Rule Charter violates the Equal Protection Clause, the Petition Clause, and PGE's substantive due process rights.

B. Even if a Finding that the Home Rule Charter is Unconstitutional Is Not Mandated by Res Judicata/Collateral Estoppel, Longstanding Precedent Demonstrates that the Home Rule Charter is Unconstitutional Under the Equal Protection Clause, Petition Clause, and Due Process Clause as a Matter of Law.

To the extent that the Court allows Grant Township to re-litigate these issues, precedent of the United States Supreme Court, the Pennsylvania Supreme Court, and the Commonwealth Court demonstrate that the Home Rule Charter is unconstitutional as a matter of law under the Equal Protection Clause, Petition Clause, and Due Process Clause of the United States Constitution.

1. The Home Rule Charter Violates the Equal Protection Clause.

The Home Rule Charter violates the Equal Protection Clause of the United States Constitution because it treats corporations seeking to deposit waste from oil and gas extraction

differently than similarly situated natural persons. Sections 301, 302, 303, and 401 all impose prohibitions or penalties on corporations, but not on individuals.

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. 14 § 1; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). It is well established that corporations are considered “persons” for purposes of constitutional rights, including the Equal Protection Clause. See *Monell v. Dep’t. of Soc. Svcs. of City of N.Y.*, 436 U.S. 658, 687 (1978) (“[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”); *Hayes v. Erie Ins. Exchange*, 425 A.2d 419, 422 (Pa. 1981) (expressly including corporations under the Equal Protection Clause, stating “[t]he Equal Protection Clause [denies] the right to legislate that different treatment be accorded to persons (or corporations) placed by statute into different classes on the basis of criteria wholly unrelated to the objective of the particular statute.”); *Wolff Chem. Co. v. City of Philadelphia*, 66 A. 344, 345 (Pa. 1907) (refusing to “deprive a corporation of equal protection of the laws of the commonwealth which is guaranteed by the fourteenth amendment to the federal Constitution.”); *Com. v. Clark*, 14 Pa. Super. 435, 442 (1900) (“corporations are persons within the provisions of the fourteenth amendment”).

“The Equal Protection Clause prohibits differences in treatment of similarly situated persons based upon . . . classifications lacking in rational justification.” *Com. v. Stinnett*, 514 A.2d 154, 159 (Pa. Super. 1986); see also *Morris v. Com.*, 538 A.2d 1385, 1389 (Pa. Cmwlth. 1988) (the “focus for equal protection is whether the law irrationally distinguishes between similarly situated classes.”); *Kurtz v. City of Pittsburgh*, 31 A.2d, 257 259 (Pa. 1943) (the “underlying

principle . . . is that classification is essentially unconstitutional, unless a necessity therefor exists”); *Pa. Gen. Energy Co. v. Grant Twp.*, 2017 WL 1215444, at *12 (“there is a large body of case law holding that corporations and individuals are similarly situated with respect to the protections afforded by the United States Constitution. . . . PGE maintains that corporations and individuals are similarly situated. This Court agrees.”)

The United States Supreme Court has held further that arbitrary, disparate treatment of corporations and individuals is unconstitutional unless it is rationally related to a legitimate governmental purpose. *See, e.g., Frost v. Corp. Com. of Oklahoma*, 278 U.S. 515, 522 (1929). In *Frost*, the U.S. Supreme Court held that “[t]he purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances.” *Id.* (citation omitted). The challenged provision in *Frost* favored corporations over individuals. However, the Supreme Court found that the arbitrary classification is violative of Equal Protection whether individuals are favored over corporations or vice versa. The Supreme Court stated:

A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. That is to say, mere difference is not enough: the attempted classification ‘must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.’

Id. at 522-23 (citations omitted); *see also Com. v. Clark*, 14 Pa. Super at 441 (finding laws unconstitutional which were applicable to “employees of corporations . . . while denying the same protection to employees of individuals”).

Here, the Home Rule Charter treats corporations and governments seeking to deposit waste from oil and gas extraction within Grant Township differently than similarly situated individuals. In this regard, the Home Rule Charter only applies to corporations and governments seeking to deposit waste from oil and gas extraction, but it does not apply to individuals who engage in the exact same activity.

The district court found the same language in Grant Township's Ordinance violated the Equal Protection Clause.⁷ See Exhibit 1, Exhibit 9. Specifically, the District Court held "there is no evidence of a rational relationship between the disparate treatment of corporations and the stated goals of the Ordinance. If these goals can only be achieved through the elimination of fracking, it makes no constitutional sense to allow the same activity by individuals." *Pa. Gen. Energy Co. v. Grant Twp.*, 2017 WL 1215444, at *13. Under the Home Rule Charter, an individual landowner could apply for the requisite federal and state permits and seek to deposit oil and gas materials into an underground injection well. However, there is no explanation as to why the fear of water contamination and adverse health effects is allayed if an individual rather than a corporation is involved. There is no rational basis for the disparate treatment here. Grant Township has simply targeted corporations, and in this case a specific corporation, PGE, in order to keep PGE from operating the Yanity Well within the Township.

In fact, discovery in this matter has closed and Grant Township has offered no rational basis for prohibiting corporations and governments, but not individuals, from engaging in this

⁷ Section 301 of the Home Rule Charter is a verbatim copy of Section 3(a) of the Ordinance which was struck down by the district court, prohibiting "any corporation or government" from engaging in "[t]he depositing of waste from oil and gas extraction." Further, while Section 3(b) of the Ordinance stated generally that no permit, license or other authority issued which would violate the terms of the Ordinance would be deemed valid," Section 302 of the Home Rule Charter specifies that no permits, licenses, or other authorizations **issued to a corporation** which violate the terms of the Charter shall be deemed valid. See Exhibit 9. Thus, despite the federal court's ruling, Grant Township has not only incorporated the offending provisions into its Home Rule Charter but has actually even more specifically targeted corporations in the Charter.

activity. On the contrary, eight witnesses offered by Grant Township, included Board Chairman Perry, Grant Township's corporate designee, all testified that they would have the same concerns with an individual permitting, constructing, and operating an underground injection well as they do for a corporation. (*See* J. Perry Tr. at 88:4-89:4, Exhibit 4.; Knapp Tr. 25:8-26:13, Exhibit 21; French Tr. 22:2-23:1, Exhibit 22.; Latkanich Tr. 27:4-28:5, Exhibit 23; Atwood Tr. 35:9-19, Exhibit 24; Troutman Tr. 66:15-67:4, Exhibit 6; Wanchisn Tr. 20:14-21:21, Exhibit 25; Pribanic Tr. 70:24-72:6, Exhibit 26).

The district court also relied upon the express regulatory scheme of the SDWA in support of its conclusion that there is no rational basis for singling out corporations in the Home Rule Charter. The district court noted that "the federal regulations on 'Underground Injection Control' wells apply equally to individuals and do not discriminate based on corporate or individual status." *Pa. Gen. Energy Co.*, 2017 WL 1215444 at *12, Exhibit 1. The federal regulations do not define "owner or operator" to include only corporations. *See* 40 C.F.R. § 144.3. Moreover, "person" is defined to mean "an individual, association, partnership, corporation, municipality, State, Federal or Tribal agency, or an agency or employee thereof." 40 C.F.R. § 144.3. Further, the regulations do not prohibit an individual from applying for an underground injection control permit or operating an underground injection well. For example, a sole proprietor can apply for a permit. *See* 40 C.F.R. § 144.31(c); 40 C.F.R. § 144.32(2).

Therefore, individuals and corporations are similarly situated under the law with respect to underground injection wells. Here, however, the Charter defines "person" to specifically exclude corporations. *See* Charter, Article VIII (Definitions), Exhibit 13. For these reasons, the Home Rule Charter violates the Equal Protection Clause.

2. The Home Rule Charter Violates the Petition Clause.

By purporting to revoke PGE's right to challenge its validity, the Home Rule Charter violates PGE's First Amendment rights under the United States Constitution. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Cons. Amend. 1; *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 382 (2011). The First Amendment protects the right of access to governmental mechanisms for the redress of grievances, including the right of access to the courts for that purpose. *See, e.g., Lower Southampton Twp. v. Dixon*, 756 A.2d 147, 149 n.5 (Pa. Cmwlth. 2000) ("Meaningful access to the courts is a fundamental constitutional right, grounded in the First Amendment right to petition and the Fifth and Fourteenth Amendment due process clauses."); *G.C. Murphy Co. v. Com., Unemployment Comp. Benefits*, 471 A.2d 1295, 1298 (Pa. Cmwlth. 1984) (recognizing that the First Amendment prohibits burdening "the exercise of [] constitutional right of access to the courts").

The Supreme Court "has recognized that First Amendment protection extends to corporations." *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 342 (2010) (collecting cases); *see also Kuwait & Gulf Link Transp. Co. v. Doe*, 92 A.3d 41, 47 (Pa. Super. 2014) (citing *Citizens United* for proposition that First Amendment rights apply regardless of "the basis of the speaker's corporate identity"); *Zampogna v. Law Enforcement Health Benefits, Inc.*, 81 A.3d 1043, 1047 n. 10 (Pa. Cmwlth. 2013) (noting the *Citizens United* Court specifically established that corporations have rights under the First Amendment) (*rev'd on other grounds*).

"The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America*,

Dist. 12 v. Illinois State Bar Ass’n, 389 U.S. 217, 222 (1967); *see also Lower Southampton Twp.*, 756 A.2d at 149 n.5. “The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints,” and the Supreme Court has therefore “repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State’s legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.” *United Mine Workers of America*, 389 U.S. at 222; *see also Kurtz v. City of Pittsburgh*, 31 A.2d 257, 259 (Pa. 1943) (“although the legislation under attack . . . was ‘humanitarian’, . . . positive constitutional requirements cannot be disregarded because of an act’s beneficent aim”) (internal citations omitted); *Schneider v. N.J.* 308 U.S. 147, 160 (1939) (“Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.”); *William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 61 (Pa. 1961) (citing *Schneider* and stating the “preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment” . . . which “gives these liberties a sanctity and a sanction not permitting dubious intrusions.”)

On its face, the Home Rule Charter purports to strip PGE of its rights to challenge it.

Section 401 of the Charter states:

Corporations that violate this Charter or the laws of the Township, or that seek to violate the Charter or those laws, shall not be deemed to be “persons” to the extent that such treatment would interfere with the rights or prohibitions enumerated by this Charter or those laws, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by the Charter or those laws, including standing to challenge the Charter or laws, the power to assert State

or federal preemptive laws in an attempt to overturn the Charter or laws, or the power to assert that the people of Grant Township lack the authority to adopt this Charter or other Township laws.

Exhibit 13.

The Charter was designed to and does in fact divest corporations,⁸ such as PGE, of their constitutional right to petition the government for redress of grievances in that it strips corporations of: (1) their status as “persons” under the law; (2) their standing to challenge the Charter; (3) their right to assert state or federal preemptive laws in an attempt to overturn the Charter; and, (4) their power to assert that Grant Township lacks the authority to adopt the Charter. As such, the Charter is aimed at suppressing PGE’s fundamental right to lodge a complaint, or seek the assistance of the Court, for the redress of its grievances related to the Charter. Regardless of any secondary motive or goal of Grant Township in adopting the Charter, the Charter cannot abridge PGE’s liberties secured by the First Amendment to the Constitution.

This same provision has been struck down twice as unconstitutional under the Petition Clause. In *Pa. Gen. Energy Co. v. Grant Twp.*, the court struck down Grant Township’s Ordinance containing the same provision at issue, holding that, by “limiting access to courts,” the Ordinance “shuts the courthouse door to litigants, which it cannot constitutionally do.” 2017 WL 1215444 at *14-15 (W.D. Pa. Mar. 31, 2017), Exhibit 1. The same provision was also found unconstitutional in *Seneca Resources Corp. v. Highland Twp.*, 2017 WL 4354710 (W.D. Pa. Sept. 29, 2017), Exhibit 14. There, the court granted Seneca’s motion for judgment on the pleadings, holding that the Home Rule Charter “attempts to eliminate the ability of corporations to access the courts, which

⁸ The provision would be unconstitutional even if it did not single out corporations. It violates First Amendment rights regardless of whether those rights arise from individual or corporate rights to free speech and access to the judicial system.

it cannot constitutionally do. Therefore, as a matter of law, [] the Home Rule Charter violates the Petition Clause of the First Amendment.”⁹ *Id.* at *9.

Like the Township’s prior Ordinance and the Home Rule Charter at issue in *Seneca*, Grant Township’s Home Rule Charter expressly divests corporations such as PGE of their constitutional rights and suppresses PGE’s fundamental right to lodge a complaint or seek the assistance of the Court for the redress of its grievances. For these reasons, the Home Rule Charter violates the Petition Clause.

3. The Home Rule Charter Violates PGE’s Substantive Due Process Rights.

The Home Rule Charter strips PGE of its status as a “person” under the United States Constitution, makes it unlawful for corporations to engage in depositing of waste from oil and gas extraction, invalidates lawful permits, and restricts access to the Courts. These same provisions have been struck down on two occasions as violating substantive due process rights. Grant Township is once again attempting to strip PGE of its substantive due process rights by incorporating these unconstitutional provisions into its Home Rule Charter.

The Due Process Clause of the Fourteenth Amendment provides that the State “shall not deprive any person of life, liberty, or property without due process of law.” U.S. Const. Amend. 14 § 1. It is well settled that a corporation is considered a “person” under the Due Process Clause. *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978); *see also Santa Clara Cty. v. So. Pac. R. Co.*, 118 U.S. 394 (1886) (declining to hear argument on whether the word “person” in the fourteenth amendment applies to corporations stating the entire Court is “of the opinion that

⁹ The Home Rule Charter provision at issue in the *Seneca* case is almost identical to the provision at issue in Grant Township’s Home Rule Charter, except Grant Township’s Charter purports to strip corporations entirely of standing to challenge the Charter. *See* Exhibit 9. Thus, the *Seneca* court’s reasoning applies with even greater force to the Grant Township Home Rule Charter.

it does”); *Com. v. Clark*, 14 Pa. Super. at 442 (“[i]f it be said that corporations are not within the protection of the fourteenth amendment of the federal constitution, that legislation affecting them is permissible which would not be permissible as to natural persons, and, therefore, the classification upon which this act rests was justifiable . . . the argument is based on a false premise”) *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) (“It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States.”).

The United States Supreme Court has held that the Due Process Clause contains a substantive, as well as a procedural component. *See, e.g., Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846-47 (1992) (“it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.”) Where a legislative act is challenged, “[t]he substantive component of due process bars certain arbitrary and wrongful government actions that would deprive an individual of life, liberty or property.” *Kalimootoo v. Middle Smithfield Twp.*, No. 125 CD 2019, 2019 WL 5884598, at *7 (Pa. Cmwlth. Nov. 12, 2019); *see also Gresock v. City of Pittsburgh Civil Service Com’n.*, 698 A.2d 163 (Pa. Cmwlth. 1997) (“[T]he Fourteenth Amendment to the United States Constitution [is] directed at every form of government action.”) “The touchstone of substantive due process is protection of the individual against the arbitrary exercise of the powers of government.” *Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Bd. of Twp. of O’Hara*, 676 A.2d 1255, 1265 (Pa. Cmwlth. 1996); *see also Nebbia v. New York*, 291 U.S. 502, 505 (1934) (holding state laws may not be “unreasonable, arbitrary, or capricious,” and that “the means selected [to achieve a valid governmental objective] shall have a real and substantial relation to the object sought to be attained.”)

When confronted with a constitutional challenge premised upon substantive due process grounds, the threshold inquiry is whether the challenged statute purports to restrict or regulate a constitutionally protected right. *Com. v. Burnsworth*, 669 A.2d 883, 889 (Pa. 1995). If the statute restricts a fundamental right, it must be examined under strict scrutiny. *See Nixon v. Com.*, 839 A.2d 277, 287 (Pa. 2003). Pursuant to that analysis, legislation that significantly interferes with the exercise of a fundamental right will be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose. *Id.* If a fundamental right is not implicated, the challenged law “must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.” *See id.* (finding law unconstitutional under rational basis review, holding while legislature is free to distinguish within a class, any distinctions must satisfy the rational basis test “by having a real and substantial relationship to the interest the [legislature] is seeking to achieve.”); *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1044 (Pa. 2019) (“[T]he fit between the legislative ends and the statutory means must be real and substantial.”) The substantive due process analysis is primarily concerned with whether the government is “treat[ing] individuals with basic fairness.” *Dept. of Transp. v. Middaugh*, 244 A.3d 426, 435 (Pa. 2021).

Here, in enacting the Home Rule Charter, the Township intended to deny corporations, such as PGE, their legal and long-standing constitutional rights, including, but not limited to, their rights under the First and the Fourteenth Amendments of the U.S. Constitution. The Charter, on its face, denies corporations equal protection under the law by making it unlawful only for corporations to engage in the deposit of waste from oil and gas extraction. *See* Home Rule Charter Section 301, Exhibit 13. The Charter, on its face, denies corporations their property rights by

invalidating lawfully issued permits. *Id.* at Section 302; *Gibraltar Rock, Inc. v. DEP*, 258 A.3d 572 (Pa. Cmwlth. 2021) (“When the government issues a license or permit, the license or permit is protected by due process.”); *City of Philadelphia, Board of License & Inspection Review v. 2600 Lewis, Inc.*, 661 A.2d 20, 22 (Pa. Cmwlth. 1995) (“Government licenses to engage in a business or occupation create an entitlement to partake in a profitable activity and, therefore, are property rights.”)

The Charter, on its face, mandates that any corporation that violates any provision of the Charter “shall be guilty of an offense” and “shall be sentenced to pay the maximum fine allowable,” which denies corporations of due process of law. *Id.* at Section 303. The Charter, on its face, strips corporations of their status as “persons” and all fundamental rights guaranteed to corporations under the United States Constitution. *Id.* at Section 401. Section 401 would be unconstitutional even if it applied to both corporations and individuals. *See supra* note 9.

The purpose of the Charter is clear: to deprive corporations of their fundamental rights and prevent them from engaging in lawful injection activities in Grant Township. Accordingly, because the Charter impairs PGE’s fundamental constitutional rights, the Charter must be struck down unless it is narrowly tailored to serve a compelling government interest. The Charter cannot withstand such an analysis.

The Charter goes far beyond what is necessary to serve the interest in the health, safety, and welfare of the Township residents and environment. Grant Township could have drafted a narrow provision, such as a zoning law, that addressed where underground injection activities could take place without including any of the other suspect prohibitions. Instead, Grant Township adopted a Home Rule Charter that seeks nothing short of a total ban and that tramples on corporations’ fundamental right to due process, equal protection, and free speech. As Sections 104

and 107 of the Home Rule Charter state, the purpose of the Charter is not to make Grant Township's resident "safe from," but to make them "free from" activities associated with depositing wastes from oil and gas extraction. The Home Rule Charter is not "narrowly tailored."

Grant Township's own statements further evidence its intent to effect fundamental rights through a complete constitutional overhaul, not a narrowly tailored Charter. As Grant Township has stated:

In the past 150 years, the judiciary has found corporations within the U.S. Constitution and bestowed constitutional rights upon them. By enacting the Community Bill of Rights Ordinance, the people of Grant Township decided that the existing municipal system of law—constrained by precisely the same legal doctrines asserted against the Township by PGE in this action—was failing to provide the most basic constitutional guarantees of American governments.
...

Each CBOR calls for constitutional change at the state and national level that will recognize and enforce the right to community local self-government, free from state preemption and corporate interference when local laws are enacted to protect community rights.

Pa. Gen. Energy Co., 2017 WL 1215444, at *16-17 (internal citations omitted), Exhibit 1. These statements demonstrate that Grant Township enacted these provisions in an effort to elevate its rights over those provided by the federal and state law and the United States Constitution. In sum, because the motivation for the Charter is to block corporate rights and to impede Federal Constitutional precedent, the Charter cannot withstand strict scrutiny as it is not narrowly tailored to serve an important governmental interest.

Even under the lesser rational basis standard, the provisions at issue violate PGE's substantive due process rights, and in fact have previously been struck down twice as unconstitutional based on the rational basis standard. In *Pa. General Energy Co. v. Grant Twp.*, the district court held that the language in these provisions "runs afoul of constitutional protections

afforded to corporations such as PGE and attempts to immunize Grant Township from clashes with current federal and state law.” 2017 WL 1215444 at *16, Exhibit 1. Similarly, in *Seneca Resources*, the district court held that provisions that were the same as those at issue in the instant challenge “highlight[] irrational and arbitrary behavior de facto” and found the provisions unconstitutional as “violative of Plaintiff’s substantive due process rights.” 2017 WL 4354710, at *11, Exhibit 14.

For these reasons, the Home Rule Charter violates PGE’s substantive due process rights.

C. The Home Rule Charter is Preempted by the Federal Safe Drinking Water Act.

The Home Rule Charter is preempted by the SDWA. Specifically, Section 301 of the Charter prohibits underground injection wells in Grant Township, which the SDWA expressly permits and regulates.

Federal preemption may be either express or implicit, with implicit preemption being found where the state or local regulation “conflicts with” the structure or purpose of the Federal statute. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). The Charter is subject to “conflict preemption.” There are two types of conflict preemption: (1) where “compliance with both federal and state duties is simply impossible,” and (2) where “compliance with both laws is possible, yet state law poses an obstacle to the full achievement of federal purposes.” *MD Mall Assocs. v. CSX Transp., Inc.*, 715 F.3d 479, 495 (3d Cir. 2013). Section 301 of the Charter poses an obstacle to achieving Congress’s goals under the SDWA and is therefore preempted.

Courts have preempted municipal ordinances that frustrate and, therefore, conflict with a federal statutory purpose. For example, in *S.D. Mining Assoc. v. Lawrence Cty.*, 155 F.3d 1005, 1011 (8th Cir. 1998), the court found that an ordinance that banned mining permitted by the Federal

Mining Act of 1872 was preempted as it “act[ed] as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act.” Here, the creation of the underground injection well program under the SDWA clearly establishes a federally regulated system for locating and permitting underground wells. 42 U.S.C §§ 300f– 300j-2. The underground injection well program is, in its essence, a regulatory program for the purpose of determining the propriety of a given location for an underground well. *See id.*; 40 C.F.R. § 144.1 *et seq.*

The SDWA applies to “each public water system in each State,” 42 U.S.C. § 300g, sets out a comprehensive regime to protect America’s drinking water, and authorizes the federal EPA to set standards for drinking water contaminants therein. 42 U.S.C. § 300g-1; *see also Wyoming et al. v. Zinke*, 871 F.3d 1133 (10th Cir. 2017). In particular, it protects “public water systems” and underground water sources. *See* 42 U.S.C. §§ 300g *et seq.*, 300h *et seq.* (respectively).

Among other things, the SDWA establishes a national program (“the UIC program”) for regulating injection wells in order to protect underground sources of drinking water. *See* 42 U.S.C. §§ 300g, 300h. Part C of the SDWA requires that the Administrator of EPA establish underground injection control regulations in order to protect underground sources of drinking water from contamination by underground injection of wastes. 42 U.S.C. § 300h-1(a), (d). The federal UIC program has primacy over any state program for purposes of permitting, construction, and operation of underground injection wells. *See supra* at Section V(B)(5). EPA can delegate authority to a state to implement the UIC program with EPA oversight, but EPA has not delegated the UIC program in Pennsylvania. *See* Exhibit 6; Exhibit 10.

EPA issued the final permit for the Yanity Well after reviewing PGE's application and responding to public comments and after EPA's Environmental Appeals Board sustained the issuance of the permit in the appeals filed challenging the permit.

Consistent with this regulatory program, the SDWA permit that EPA issued to PGE for the Yanity Well contains conditions that require, among other things, continuous monitoring of injection pressure limits on the volume and nature of injected fluids; automatic shutoff in the event of mechanical integrity failure; well construction and cementing specifications; reporting, logging, and incident notification; and limits on what geologic formations can be injected into and at what specific depths. *See* Exhibit 11.

As in *S.D. Mining Assoc. v. Lawrence Cnty.*, there is a clear conflict between the Home Rule Charter's ban of underground injection wells on the one hand, and EPA's UIC program and issuance of the permit to PGE to construct and operate the Yanity Well within the Township on the other hand. *Id.* (holding ordinance banning mining permitted by the Federal Mining Act of 1872 was preempted as it "act[ed] as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act."); *see also Colorado Dep't of Public Health and Env't v. U.S.*, 693 F.3d 1214, 1223 (10th Cir. 2012) ("conflict preemption occurs when it is impossible for a [regulated] party to comply with both state and Federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (citations omitted); *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of Rogers*, 27 F.3d 1499 (10th Cir. 1994) (striking an ordinance which outright banned activities allowed and regulated under the Resource Conservation and Recovery Act). Clearly, where a local enactment outright bans underground injection wells, there is frustration of the SDWA's intended purpose of creating a program to authorize such wells.

The district court recently found that the same provision in the Home Rule Charter in Highland Township was preempted by the SDWA. *See Seneca Resources Corp. v. Highland Twp.*, No. 16-cv-289, 2017 WL 4354710, at *4-5 (W.D. Pa. Sept. 29, 2017), Exhibit 14; *see also* Exhibit 9. In that case, Section 401 of the Highland Township Home Rule Charter was the same as Section 301 of the Grant Township Home Rule Charter, and the district court held that Highland Township's Home Rule Charter's ban on underground injection wells posed a direct obstacle to the express purpose of the SDWA. Indeed, to allow any municipality in Pennsylvania to prohibit outright underground injection wells would create chaos for the comprehensive regulatory scheme the SDWA establishes. EPA would issue permits and any municipality could render them moot by the stroke of a pen. No clearer case of conflict preemption exists.

Article I, Section 27 of the Pennsylvania Constitution does not change this result. Article I, Section 27 creates rights and imposes obligations on municipalities with respect to environmental rights, but it does not allow municipalities to exercise those rights and obligations to obstruct the express purpose of federal legislation. *See* U.S. Const. art VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Council 13, Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO ex rel. Fillman v. Rendell*, 986 A.2d 63, 81-82 (Pa. 2009) (holding where provision of Pennsylvania Constitution conflicted with federal law, the provision in the Pennsylvania Constitution was preempted as "the Supremacy Clause must prevail").

For these reasons, the Home Rule Charter is preempted by the Safe Drinking Water Act.

D. Grant Township Can Bring Its Claims Under Article I, Section 27 Before the Environmental Hearing Board.

If this Court holds that the Home Rule Charter is unconstitutional or preempted by the SDWA, Grant Township still has a forum to address the issues it has raised in Counts 3 and 4 of its Counterclaims before the Commonwealth Court: the pending appeal before the Environmental Hearing Board. Grant Township is a party to the appeal of the Department's rescission of PGE's permit, which is currently stayed pending the outcome of this action. In that appeal, Grant Township has asserted the same arguments it asserts here, namely that prohibiting the injection of waste from oil and gas extraction into the Yanity well enforces the Township's rights under Article I, Section 27 and that the Department has violated Article I, Section 27.¹⁰

The Board is well-versed in Article I, Section 27 and has developed a construct within which to assess the constitutionality of Department actions under Article I, Section 27. *See, e.g., Center for Coalfield Justice v. DEP*, 2017 EHB 799, EHB Docket No. 2014-072-B (Adjudication issued Aug. 15, 2017), *Friends of Lackawanna v. DEP*, 2017 EHB 1123, EHB Docket No. 2015-063-L (Adjudication issued Nov. 8, 2017), *Logan v. DEP*, 2018 EHB 71, EHB Docket No. 2016-091-L (Adjudication issued Jan. 29, 2018), *Center for Coalfield Justice v. DEP*, 2018 EHB 323, EHB Docket No. 2018-028-R (Opinion issued Apr. 24, 2018). Therefore, Grant Township has an appropriate forum to assert these arguments, and Grant Township would have the right to appeal any decision to the Commonwealth Court on a fully developed record in the Environmental Hearing Board.

¹⁰ Significantly, all of Grant Township's expert reports render opinions directly about the Yanity Well permits issued by the Department. The Commonwealth Court previously sustained preliminary objections holding that any such issues regarding the Yanity Well permits can only be brought in the first instance before the EHB. Therefore, Grant Township has the opportunity and the obligation to raise such issues in the pending EHB appeal not in this matter.

VIII. CONCLUSION

For the reasons stated herein, PGE requests that the Court find that the Home Rule Charter is unconstitutional and/or preempted by the Federal Safe Drinking Water Act and that the Court dismiss the Department's Petition for Review and Counts 3 and 4 of Respondents' Counterclaims as moot.

Respectfully Submitted,

Dated: November 16, 2021

/s/ Robert D. Fox

Robert D. Fox, Esquire
Todd D. Kantorczyk, Esquire
Diana A. Silva, Esquire
Thomas M. Duncan, Esquire
MANKO, GOLD, KATCHER & FOX, LLP
401 City Ave, Suite 901g
Bala Cynwyd, PA 19004
Phone: 484-430-5700
rfox@mankogold.com
tkantorczyk@mankogold.com
dsilva@mankogold.com
tduncan@mankogold.com

*Counsel for Pennsylvania General Energy
Company, L.L.C.*

CERTIFICATION OF COMPLIANCE WITH WORD COUNT

I, Robert D. Fox, hereby certify that the foregoing Pennsylvania General Energy Company, L.L.C.'s Brief in Support of its Application for Summary Relief contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135(a). Excluding the parts of the Brief that are exempted by Pa.R.A.P. 2135(b), there are 13,671 words in the Brief, as counted through the use of Microsoft Word.

Dated: November 16, 2021

/s/ Robert D. Fox

Robert D. Fox, Esquire
MANKO, GOLD, KATCHER & FOX, LLP
401 City Ave, Suite 901g
Bala Cynwyd, PA 19004
Phone: 484-430-5700
rfox@mankogold.com

*Counsel for Pennsylvania General Energy
Company, L.L.C.*