

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CITY OF PHILADELPHIA,	:	
BOROUGH OF WEST CHESTER,	:	
BOROUGH OF NARBERTH, and	:	No. 42 MD 2021
LOWER MERION TOWNSHIP,	:	
	:	
Petitioners	:	
	:	
v.	:	
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA and	:	
THE PENNSYLVANIA	:	
GENERAL ASSEMBLY,	:	
Respondents	:	

**APPLICATION FOR LEAVE TO INTERVENE BY CLEAN AIR COUNCIL
AND PENNENVIRONMENT**

CLEAN AIR COUNCIL
Joseph Otis Minott (Pa. Bar No.36463)
Ernest Logan Welde (Pa. Bar No. 315012)
135 South 19th Street, Suite 300
Philadelphia, PA 19103
joe_minott@cleanair.org (215) 567-4004 (x116)
lwelde@cleanair.org (215) 567-4004 (x126)

Attorneys for Proposed Intervenors: Clean Air Council and PennEnvironment

I. INTRODUCTION

On March 3, 2021, the City of Philadelphia, Borough of Narberth, Borough of West Chester, and Lower Merion Township filed a Petition for Review to this Court seeking declaratory and injunctive relief against the Commonwealth of Pennsylvania and the General Assembly. The act complained of was the unconstitutional insertion of Section 1706-E(d), or the “plastics preemption provision” into the Fiscal Code Amendments, known as Act 23.

This plastics preemption provision blocked all municipalities in Pennsylvania from enacting or enforcing any legislation that would seek to reduce the amount of single-use plastic or polystyrene in that municipality.

Clean Air Council and PennEnvironment (together “Intervenors”) respectfully submit this Application for Leave to Intervene as co-petitioners, pursuant to Pa.R.A.P. 1531(b) and, through Pa.R.A.P. 1517, Pa.R.Civ.P. 2327-2329. In support of this request, Intervenors aver as follows:

II. FACTS

1. Clean Air Council is a Pennsylvania nonprofit corporation with offices at 135 S. 19th St., Suite 300, Philadelphia, PA 19103 and 200 1st Ave., Suite 200, Pittsburgh, PA 15222.

2. PennEnvironment is a Pennsylvania nonprofit corporation with offices at 1429 Walnut St., Suite 1100, Philadelphia, PA 19102 and 1831 Murray Ave., Suite 216, Pittsburgh, PA 15217.

3. Intervenors both share similar, longstanding missions that aim to protect Pennsylvania’s environment and the health of its citizens through advocacy, public education, government oversight, and litigation.¹

4. Intervenors are membership-based organizations, and pledge to protect Pennsylvania’s environment and safeguard the health of all from environmental hazards.

5. Intervenors have members throughout Pennsylvania.

6. The Pennsylvania government and its agencies hold the public natural resources in trust for the benefit of the people, the beneficiaries. *Pa. Env’tl. Def. Found. v. Commonwealth*, 640 Pa. 55, 94 (2017).

7. This trustee-beneficiary relationship creates a legally enforceable right, held by the beneficiaries “to seek to enforce the obligations” of the trustee. *Id.* at 98 (citing *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 684 (2013)).

¹ Clean Air Council has been in existence since 1967 and PennEnvironment since 2002; both organizations have similar missions—to protect the environment and everyone’s health. Clean Air Council’s mission “is dedicated to protecting and defending everyone’s right to a healthy environment.” See <https://cleanair.org/mission-and-vision/>, last visited March 15, 2021. PennEnvironment’s mission “is to transform the power of our imaginations and our ideas into change that makes our world a greener and healthier place for all.” See <https://pennenvironment.org/feature/pae/about-us>, last visited March 15, 2021.

8. These are rights that are directly at issue in this case, and as explained below, Intervenors, and their members will be directly impacted by the relief sought by Petitioners.

9. The degradation, diminution, and depletion of Pennsylvania's natural resources are a constant and increasing threat to Intervenors' ability to fulfill their missions, and to their members' health, use and enjoyment of these resources, and in some cases, their livelihoods.

10. Intervenors seek leave to intervene in order to assert the interests of their organizations and their members in the continued protection of Pennsylvania's environment.

11. Pending before the Court is a Petition for Review, filed March 3, 2021, addressed to the Court's original jurisdiction.

12. The Petition states that the Commonwealth and General Assembly (together "Respondents") violated multiple parts of the Pennsylvania Constitution when, on May 29, 2020, the Pennsylvania General Assembly passed an amendment to the Fiscal Code, known as Act 23, and which, the Governor signed into law. *Section 1706-E(d) of Act 23.*

13. Act 23 had the immediate effect of preempting any municipality in Pennsylvania from enacting or enforcing legislation that would attempt to curtail its residents' use of plastic and polystyrene, also known as Styrofoam.

14. Due to the continuing threat that both plastic and polystyrene present to the preservation of Pennsylvania's environment, Petitioners' requested relief in this case is vital in order to "prevent and remedy the degradation" of Pennsylvania's environment and natural resources.

III. APPLICANTS ARE ENTITLED TO INTERVENE

a. Rule 2327 of the Pennsylvania Rules of Civil Procedure

15. A party may intervene in an action if one or more criteria is met under Pa.R.Civ.P. Rule 2327.

16. Intervenors satisfy the criteria for intervention under Pa.R.Civ.P. Rule 2327(3) and (4).

17. Pa.R.Civ.P. Rule 2327(3) allows for intervention if that party "could have joined as an original party in the action"

18. Respondents added preemption language to the fiscal code making it unlawful for any municipality to enact or enforce legislation that would minimize the amount of plastic and polystyrene within a municipality. The presence of plastic and polystyrene degrades, diminishes, and depletes resources such as the air and water, and the esthetic values of the environment that are included in the trust described in Pennsylvania's Constitution.

19. As the beneficiaries of this trust, Intervenors could have initiated this proceeding in their own right, and, as such could have been an original party in this action.

20. As Intervenors' missions indicate, Intervenors exclusively focus on protecting the environment and eliminating environmental hazards that harm the health of their members.

21. Intervenors have dedicated vast amounts of time and resources in furthering their missions, and specifically have worked throughout Pennsylvania to minimize the incalculable amount of plastic and polystyrene litter, and prevent further damage to Pennsylvania's environment from these specific sources. *See* Exhibit A.

22. Intervenors represent members who have been profoundly affected by the degradation, diminution, and depletion of Pennsylvania's environment stemming from the absurd, unabated abundance of plastic and polystyrene waste. *Id.*

23. Intervenors have demonstrated their commitment to the interests directly at issue in this case and continue to suffer direct and immediate harm from the unmitigated, crushing presence of the products that Respondents have preempted local municipalities from regulating. *Id.*

24. Intervenors represent members who continue to suffer direct and immediate harm from the persistent presence of these products.

25. Intervenors and their members are afforded protection through the Pennsylvania Constitution as beneficiaries of this trust.

26. Intervenors satisfy the requirement of Pa.R.Civ.P. Rule 2327(3).

27. Intervenors and their members qualify for intervention because their Application for Intervention satisfies Pa.R.Civ.P. Rule 2327(4).

28. Pa.R.Civ.P. Rule 2327(4) allows for intervention if “the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.”

29. The Pennsylvania Constitution guarantees that the state’s resources will be preserved for the people, and that the people have a common property interest in these resources. Pa. Const. art. I, § 27.

30. The Pennsylvania Supreme Court has found that this Constitutional Amendment provides the people a legally enforceable interest in the determination of an action when those interests are at stake. *Pa. Env'tl. Def. Found.* at 98 (citing *Robinson Twp.* at 684).

31. A judgment against Petitioners will result in the continuation of the harms outlined in Petitioners’ Petition for Review, and those are some of the same harms, among others, that Intervenors and their members complain of.

32. If Respondents had not preempted Petitioners from enforcing existing legislation that would limit the amount of plastic and polystyrene entering their

jurisdictions, Petitioners would have already been able to achieve a reduction in the amount of plastic and polystyrene that enters their municipalities and the environs.

33. A reduction in plastic and polystyrene would immediately benefit Pennsylvania's natural resources due to the attendant reduction of toxic chemicals and unnatural materials introduced into the environment from the production, transportation, use, and disposal of the products made from plastic and polystyrene, as well as a reduction in wildlife deaths and injuries due to consumption of the waste and entanglement in it.

34. If Respondents are allowed to continue to block municipalities from reducing the presence of these products that degrade, diminish, and deplete Pennsylvania's resources, Intervenors and their members will continue to suffer harm.

35. The outcome of this case will have an immediate and direct impact on those legally enforceable interests of Intervenors and their members in the protection of Pennsylvania's natural resources, and they will be bound by the Court's determination of constitutionality.

36. Because Intervenors have a legally enforceable interest in this case, and Intervenors will be bound by the judgment, Intervenors satisfy the requirement of Pa.R.Civ.P. Rule 2327(4).

b. Rule 2329 of the Pennsylvania Rules of Civil Procedure

37. None of the grounds upon which this Court may deny a Petition to Intervene under Pa.R.Civ.P. Rule 2329 apply.

38. This Court may refuse intervention if Intervenors' claims are "not in subordination to and in recognition of the propriety of the action." Pa.R.Civ.P. Rule 2329(1).

39. Intervenors do not present any claims that exceed those of Petitioners. In fact, Intervenors' claims match those of Petitioners as stated in the filed Petition for Review, and, as such, the Intervenors' Application for Intervention does not violate Pa.R.Civ.P. Rule 2329(1).

40. This Court may refuse intervention if "the interest of the petitioner is already adequately represented." Pa.R.Civ.P. Rule 2329(2).

41. Intervenors' interests are separate and distinct from any party currently named in the pleadings.

42. Intervenors are environmental nonprofit groups whose missions are to protect Pennsylvania's environment from degradation, diminution, or depletion, and to protect the health of their members from the type of harm that results from the production, transportation, use, and disposal of plastic and polystyrene.

43. Intervenors have focused on reducing the copious amount of these items by advocating for the enactment, and enforcement of legislation by municipalities in Pennsylvania, encouraging municipalities to better manage the pollution created

from these items, advocacy to the General Assembly and the Governor on the benefits of reducing the volume of these items, and educating the public as to the harms these items present. By inserting Section 1706-E(d), the Commonwealth of Pennsylvania and the General Assembly have harmed Intervenors and prevented them from achieving their mission.

44. Intervenors' members have suffered, and continue to suffer harm from the production, transportation, use and disposal of these items.

45. Intervenors' members' use and enjoyment of Pennsylvania's resources is diminished due to the ubiquity of these products.

46. Intervenors' interests, as environmental and health-based nonprofits, are not represented in this action.

47. Intervenors' members' interests, as the people who use and enjoy Pennsylvania's resources, and who are the *cestui que trust* are not represented in this action.

48. When questions arise as to the administration of the trust, the beneficiaries have a unique voice and a right to be part of the legal proceedings that will determine the answers to the questions. *See* 42 Pa. C.S. § 7535.

49. Intervenors and their affected members have different and distinct interests than any party in this action and those interests are not represented by the municipalities currently prosecuting this case.

50. As such, these facts should allow this Court to enter an order allowing intervention under Pa.R.Civ.P. Rule 2329(2).

51. This Court may refuse intervention if “the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa.R.Civ.P. Rule 2329(3).

52. Intervenors submitted this Application for Intervention soon after the Petition for Review was submitted, the named Respondents have not yet answered, and no scheduling has occurred.

53. Intervenors are well established nonprofits and have participated in many proceedings before the Commonwealth Court.

54. Intervenors’ prompt intervention does not delay the timely advancement of the action, prejudice the trial or the adjudication of the rights of the parties, or otherwise harm the parties.

55. As such, these facts should allow this Court to enter an order allowing intervention under Pa.R.Civ.P. Rule 2329(3).

IV. RELIEF REQUESTED

56. Intervenors seek relief such that this Court will declare Section 1706-E(d) of Act 23 unconstitutional and permanently enjoin Respondents from enforcing Section 1706-E(d) of Act 23.

57. Consistent with Pa.R.Civ.P. Rule 2328(a), Intervenors have included the Petition for Review that will be filed if permitted to intervene as Exhibit A.

V. CONCLUSION

58. In conclusion, Intervenors respectfully request that the Court grant this Petition to Intervene in the above-captioned proceeding, and direct Intervenors to file their Petition for Review, attached as Exhibit A.

Respectfully Submitted,



Joseph Otis Minott (Pa. Bar No.36463)
Ernest Logan Welde (Pa. Bar No. 315012)
135 South 19th Street, Suite 300
Philadelphia, PA 19103
joe_minott@cleanair.org (215) 567-4004 (x116)
lwelde@cleanair.org (215) 567-4004 (x126)

Dated: April 13, 2021

VERIFICATION

I am authorized to make this verification on behalf of Clean Air Council. I have personal knowledge of the statements made in the foregoing Application to Intervene, and verify that those statements are true and correct to the best of my own personal knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

/s/ Eric Cheung
Signature

Eric Cheung, Deputy Director
Name and Position

Date: April 13, 2021

VERIFICATION

I am authorized to make this verification on behalf of PennEnvironment. I have personal knowledge of the statements made in the foregoing Application to Intervene, and verify that those statements are true and correct to the best of my own personal knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

/s/David Masur

Signature

David Masur, Executive Director

Name and Position

Date: April 13, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CITY OF PHILADELPHIA,	:	
BOROUGH OF WEST CHESTER,	:	
BOROUGH OF NARBERTH, and	:	No. 42 MD 2021
LOWER MERION TOWNSHIP,	:	
	:	
Petitioners	:	
	:	
v.	:	
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA and	:	
THE PENNSYLVANIA	:	
GENERAL ASSEMBLY,	:	
Respondents	:	

[PROPOSED] ORDER

Now, this ___ day of _____, 2021 upon consideration of the Petition to Intervene filed by Clean Air Council and PennEnvironment and any response thereto, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the Petition is **GRANTED**.

SO ORDERED BY THE COURT:

Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CITY OF PHILADELPHIA, :
BOROUGH OF WEST CHESTER, :
BOROUGH OF NARBERTH, : No. 42 MD 2021
LOWER MERION TOWNSHIP, :
[PROPOSED] CLEAN AIR COUNCIL, :
and PENNENVIRONMENT :

Petitioners :

v. :

THE COMMONWEALTH OF :
PENNSYLVANIA and :
THE PENNSYLVANIA :
GENERAL ASSEMBLY, :

Respondents :

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL EQUITY JURISDICTION

CLEAN AIR COUNCIL
Joseph Otis Minott (Pa. Bar No. 36463)
Ernest Logan Welde (Pa. Bar No. 315012)
135 South 19th Street, Suite 300
Philadelphia, PA 19103
joe_minott@cleanair.org (215) 567-4004 (x116)
lwelde@cleanair.org (215) 567-4004 (x126)

Attorneys for Proposed Petitioners: Clean Air Council and PennEnvironment

NOTICE TO DEFEND

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

You Should Take This Paper To Your Lawyer At Once. If You Do Not Have A Lawyer, Go To Or Telephone The Office Set Forth Below. This Office Can Provide You With Information About Hiring A Lawyer. If You Cannot Afford To Hire A Lawyer, This Office May Be Able To Provide You With Information About Agencies That May Offer Legal Services To Eligible Persons At A Reduced Fee Or No Fee.

**Dauphin County Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CITY OF PHILADELPHIA,	:	
BOROUGH OF WEST CHESTER,	:	
BOROUGH OF NARBERTH,	:	No. 42 MD 2021
LOWER MERION TOWNSHIP,	:	
[PROPOSED] CLEAN AIR COUNCIL,	:	
and PENNENVIRONMENT	:	
	:	
Petitioners	:	
	:	
v.	:	
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA and	:	
THE PENNSYLVANIA	:	
GENERAL ASSEMBLY,	:	
Respondents	:	

**PETITION FOR REVIEW
ADDRESSED TO THE COURT’S ORIGINAL EQUITY JURISDICTION**

I. INTRODUCTION AND BASIS FOR JURISDICTION

1. Clean Air Council (the “Council”) and PennEnvironment (together “Petitioners”) respectfully petition this Court under Chapter 15 of the Pennsylvania Rules of Appellate Procedure to declare Section 1706-E(d) of Act 23 unconstitutional.¹

¹ 2020 Act 23 Fiscal Code Amendments, HB 1083 (available at <https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2020&sessInd=0&act=23>).

2. Petitioners are environmental, health-based nonprofits that work throughout Pennsylvania to advocate for the protection of the environment, and to ensure that all people have a healthy environment in which to live.

3. Petitioners' members are among the most focused and concerned residents in Pennsylvania when it comes to environmental protection and the harms caused by pollution of the air, water, and soil.

4. On May 29, 2020 the General Assembly passed and Governor Tom Wolf signed into law 2020 Act 23, also known as the Fiscal Code Amendment.

5. Knowing this was a must-pass piece of budgetary legislation, a small group of legislators inserted an amendment to Section 1706-E that preempted any municipality from enacting or enforcing any legislation that would prohibit or restrict single-use plastic and polystyrene.²

6. This was at least the fifth time that the legislature attempted to preempt municipalities from legislating reductions in plastic or polystyrene. The first three attempts were "one subject" legislation, and those failed. The fourth was in Act 20 of the 2019 Fiscal Code, and that was successful in preempting any municipality from enacting plastic or polystyrene legislation for one year. The fifth, and current,

² Section 1706-E(d) reads "State of emergency.--The General Assembly or a local governmental body or agency may not enact or enforce a law, rule, regulation or ordinance imposing a tax on or relating to the use, disposition, sale, prohibition or restriction of single-use plastics, auxiliary containers, wrappings or polystyrene containers, until July 1, 2021, or 6 months after the order issued by the Governor on March 6, 2020, published at 50 Pa.B. 1644 (March 21, 2020), and any renewal of the state of disaster emergency, whichever is later."

illegally prohibits municipalities from fulfilling their constitutional duties to protect the environment for all people from one of the most pervasive sources of pollution.

7. As of the passage of the 2020 Fiscal Code, three municipalities in Pennsylvania had already passed legislation intended to reduce plastic usage, and one of those, the Borough of Narberth, was already enforcing its plastic legislation. Other municipalities had openly expressed interest in passing similar legislation.

8. Although all three municipal laws are different, there is a common thread: the overwhelming purpose is unequivocally to protect the environment and fulfill their constitutional duty to the people living today and future generations.

9. These municipal laws would have greatly reduced plastic usage within those municipalities if the Commonwealth and the General Assembly (together “Respondents”) had not preempted this type of legislation with the passage of Section 1706-E(d).

10. By banning or charging small fees for certain types of plastic, as the municipalities’ legislation mandated, these municipalities would have ensured that less plastic entered into their jurisdiction. This would have all but guaranteed that less plastic would litter the environment throughout these three municipalities.³

³*Measuring the Effectiveness of Plastic Bag Laws*, PlasticBagLaws.org, available at <https://www.plasticbaglaws.org/effectiveness> (last visited April 1, 2021).

11. Section 1706-E(d) of Act 23 violates at least three sections of Pennsylvania’s Constitution and, as such, is unconstitutional:
- a. Article III, § 1 mandates that “no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.”⁴ Section 1706-E(d) greatly altered the bill on its passage through the House from being a bill focused on revenue to one that blocked implementation and enforcement of existing municipal environmental legislation and usurped constitutional powers from every municipality in the Commonwealth. The drafters of this section changed the original purpose of this funding bill. As such, it violates Article III, § 1 of the Pennsylvania Constitution.
 - b. Article III, § 3 mandates that “no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriations bill or a bill codifying or compiling the law or a part thereof.”⁵ Simply put, Section 1706-E(d) has nothing to do with the finances of the State government. The Act’s title lists the items that the Act legislates, and it does not contain the words plastic or polystyrene, or anything remotely related to preempting municipalities

⁴ Pa. Const. art. III, § 1.

⁵ Pa. Const. art. III, § 3.

from regulating these items in the title. Section 1706-E(d) is its own subject, separate from anything in the title of this bill, or the body of the bill. This section's clear, unequivocal purpose is to ban municipalities from restricting plastic or polystyrene use. This section does not have anything to do with financing the government: it is completely unrelated and is its own subject. As such, Section 1706-E(d) violates Article III, § 3 of the Pennsylvania Constitution.

- c. Article I, § 27, the Environmental Rights Amendment, establishes that the people of Pennsylvania have a right to a clean and preserved environment, and lists Respondents as part of the class of trustees of the natural resources in the Commonwealth. Section 1706-E(d) completely preempts any municipality from addressing and mitigating the environmental and esthetic harms that plastic and polystyrene create. Pursuant to the Environmental Rights Amendment, trustees must conserve and maintain these resources. Single-use plastic and polystyrene are wasteful, destructive to the environment, and diminish the esthetic value of our communities. These products alter the state of the air, water, land, and all other natural resources, and contribute to the decline of ecosystems within these resources. By enacting Section 1706-E(d), Respondents have violated their Constitutional duty, and

prevented other trustees from fulfilling their duty. As such, Section 1706-E(d) violates Article I, § 27 of the Pennsylvania Constitution.

12. Petitioners respectfully request that this Honorable Court find that Section 1706-E(d) of Act 23 violates multiple sections of the Pennsylvania Constitution and preliminarily and permanently enjoin Respondents, their agents, officers, and employees, and all other State officials, from enforcing Section 1706-E(d) of Act 23.

II. JURISDICTION

13. This Court has original jurisdiction over this Petition for Review pursuant to 42 Pa. C.S.A. § 761(a)(1), as this is a civil action against the Commonwealth government.

14. Petitioners have standing to bring this action.

15. Jurisdiction lies exclusively with this Court, as this Petition seeks review of an action of the Commonwealth and the General Assembly; hence, venue is proper as well.

III. THE PARTIES

A. Petitioners

16. Clean Air Council is a Pennsylvania non-profit corporation started in 1967, with a mission to protect and defend everyone's right to a healthy environment.⁶

⁶ *Mission and Vision*, Clean Air Council available at <https://cleanair.org/mission-and-vision/> (last visited April 2, 2021).

17. The Council has offices at 135 S. 19th St., Suite 300, Philadelphia, PA 19103 and 200 1st Ave., Suite 200, Pittsburgh, PA 15222.
18. The Council has members and supporters throughout Pennsylvania.
19. PennEnvironment is a Pennsylvania non-profit corporation started in 2002, with a mission to transform the power of our imaginations and our ideas into change that makes our world a greener and healthier place for all.⁷
20. PennEnvironment has offices at 1429 Walnut St., Suite 1100, Philadelphia, PA 19102 and 1831 Murray Ave., Suite 216, Pittsburgh, PA 15217.
21. PennEnvironment has members and supporters throughout Pennsylvania.
22. Petitioners' members and supporters include those who are acutely sensitive to the harm that plastic and polystyrene do to our environment, those whose use and enjoyment of Pennsylvania's natural resources has been curtailed and diminished due to the pervasive amount of plastic and polystyrene pollution, and those who are particularly susceptible to incremental increases in air pollution: the elderly, pregnant women, young children, and people with existing respiratory ailments and heart disease.
23. The City of Philadelphia is a municipal corporation of the first class and political subdivision of the Commonwealth of Pennsylvania. Philadelphia currently

⁷ *About us*, PennEnvironment available at <https://pennenvironment.org/feature/pae/about-us> (last visited April 2, 2021).

has a law that would ban most single-use plastic bags from distribution by retail establishments. Philadelphia has been preempted from enforcing this legislation due to the passage of Section 1706-E(d) of Act 23.

24. The Borough of Narberth is a municipal corporation formed under the Pennsylvania Borough Code and a political subdivision of the Commonwealth. Narberth currently has a law that would place a fee on most single-use plastic bags at the point of sale and ban plastic straws from distribution by retail establishments. Narberth has been preempted from enforcing this law due to the passage of Section 1706-E(d) of Act 23.

25. The home rule municipality of the Borough of West Chester is a municipal corporation and political subdivision of the Commonwealth. West Chester currently has a law that would ban most single-use plastic bags and plastic straws from distribution by retail establishments. West Chester has been preempted from enforcing this law due to the passage of Section 1706-E(d) of Act 23.

26. Lower Merion Township is a first-class township and a political subdivision of the Commonwealth. Lower Merion has expressed its desire to find solutions that would reduce the importation, use, and disposal of plastic in its jurisdiction in order to protect the environment. Lower Merion has been preempted from accomplishing this due to the passage of Section 1706-E(d) of Act 23.

27. The City of Philadelphia, Borough of Narberth, Borough of West Chester, and Lower Merion Township (together “Municipal Petitioners”) initiated this challenge by submitting a Petition for Review to this Court on March 3, 2021 (*hereinafter* “Municipalities’ PFR”).

B. Respondents

28. The Commonwealth of Pennsylvania is a state sovereign governmental unit providing for subnational governance of the Commonwealth of Pennsylvania.

29. The Pennsylvania General Assembly is the legislative body of the Pennsylvania State Government.

IV. General Allegations

A. Background to Article III of the Pennsylvania Constitution

30. Petitioners hereby incorporate and adopt paragraphs 27-30 of Municipal Petitioners’ Petition for Review. *Municipalities’ PFR* pg. 6-7.

B. Background to Article I, Section 27 of the Pennsylvania Constitution

31. Petitioners hereby incorporate and adopt paragraphs 31-34 of Municipal Petitioners’ Petition for Review. *Municipalities’ PFR* pg. 8-9.

32. In addition to protecting our natural resources from degradation, diminution, and depletion, Respondents’ duties as trustees require that “the

Commonwealth must act *affirmatively* via legislative action to protect the environment.”⁸

C. The General Assembly’s Failed Attempts to Enact a Stand-Alone Law Prohibiting Local Legislation Regarding Single-Use Plastics

33. Petitioners hereby incorporate and adopt paragraphs 35-37 of Municipal Petitioners’ Petition for Review. *Municipalities’ PFR* pg. 9.

D. Three Municipalities Pass Ordinances Banning Single-Use Plastic Bags and the General Assembly Includes a Prohibition on Local Legislation Regarding Plastics in the 2019 Fiscal Code Amendment

34. Petitioners hereby incorporate and adopt paragraphs 38-56 of Municipal Petitioners’ Petition for Review. *Municipalities’ PFR* pg. 9-14.

E. Respondents Indefinitely Extend the Prohibition on Local Plastic Laws

35. Petitioners hereby incorporate and adopt paragraphs 58-76 of Municipal Petitioners’ Petition for Review. *Municipalities’ PFR* pg. 14-19.

F. Act 23 Interferes with Municipalities’ Efforts to Enact and Enforce Single-Use Plastics Ordinances

36. Petitioners hereby incorporate and adopt paragraphs 77-79 of Municipal Petitioners’ Petition for Review. *Municipalities’ PFR* pg. 19-20

⁸ *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 640 Pa. 55, 91 (2017) (emphasis added).

37. The City of Philadelphia has delayed the enforcement of its plastic bag ban law. The most recent publication of the date of enforcement is October 1, 2021.⁹

38. Due to the unconstitutional addition of Section 1706-E(d) to Act 23 that indefinitely extends the preemption, Philadelphia is unable to enforce its existing law.

G. Petitioners are Harmed by the State-wide Preemption Against Plastic and Polystyrene

39. The effects of plastic and polystyrene pollution are staggering and ubiquitous. The damage that plastic does to our environment and the species that inhabit it is well documented, and Pennsylvania is not exempt from this.

40. In order to minimize, and hopefully reverse the harms perpetrated upon our environment, Petitioners and their members have worked tirelessly for decades to educate the general public and legislators about the harms that the overuse of plastic and polystyrene products are causing to our natural resources and our health.

41. Beginning in the early 2000s, the Council began to advocate for a more robust recycling program in Philadelphia in order to address the low recycling rate, and the increasing amount of litter. The Council, along with a few other

⁹ *City Provides Update on COVID-19 for Wednesday, December 30, 2020*, City of Philadelphia (Dec. 30, 2020), available at <https://www.phila.gov/2020-12-30-city-provides-update-on-covid-19-for-wednesday-december-30-2020/> (last visited April 2, 2021).

environmental groups, founded the “RecycleNOW” coalition with the mission to “promote expanded recycling in the City of Philadelphia in order to improve the environment, economy, and quality of life in our City” with the ultimate goal of reducing waste and moving Philadelphia to be a zero-waste city.¹⁰ Soon afterwards the city adopted “single-stream” recycling and increased the rate of recycling to once per week instead of biweekly.

42. For some materials, this change in recycling was beneficial; however, for plastic bags and polystyrene it did virtually nothing, as these items are not recyclable in municipal systems.

43. Plastic bags and polystyrene are often the most prevalent items found in litter studies.¹¹ They are lightweight, hence easily transported by even a gentle breeze; they are ubiquitous and cheap; they have almost no redeemable value; and they tend to cling to natural surfaces like tree branches and water.

44. Over the next twenty years, Philadelphia became more and more littered by plastic and polystyrene. In fact, Philadelphia became so littered that year after year it was ranked as one of the most littered cities in America, earning the moniker

¹⁰ *About RecycleNOW*, RecycleNOW, available at <http://www.recyclenowphila.org/about.html> (last visited April 2, 2021).

¹¹ *Top 10 Most Littered Items*, Ukiah Recycles (September 9, 2018) available at <https://ukiahrecycles.com/top-10-littered-items/> (last visited April 2, 2021).

“Filthadelphia.” The city’s streets, parks, storm drains, and waterways were quickly becoming completely littered with plastic and polystyrene.

45. Although Philadelphia has so often been ranked as one of the most littered cities in America, many other communities have faced similar difficulties dealing with the influx of single-use plastic. Many municipalities around the world began to see that plastic and polystyrene were damaging their environments, harming wildlife, and costing a tremendous amount of money. In order to combat these overwhelming problems, many municipalities—and even whole countries—passed legislation to either ban or place a small fee on these items, plastic bags being the most regulated item. In jurisdictions that enacted this legislation, there was an immediate and noticeable reduction in plastic litter in almost every instance.¹²

46. The Council saw the value in such legislation and advocated for it in Philadelphia. In 2009, two members of the Philadelphia City Council (“City Council”) introduced legislation that would apply a fee of \$0.25 on most types of single-use plastic bags and ban certain polystyrene products. The goal of the legislation was to improve the environment and reduce the amount of litter in the city and its environs. The majority of testimony at the hearing was focused on the environment and how this type of legislation would benefit it.

¹² *Measuring the Effectiveness of Plastic Bag Laws*, PlasticBagLaws.org, available at <https://www.plasticbaglaws.org/effectiveness> (last visited April 1, 2021).

47. Many City Council members pointed out the harm that plastic bags inflict on the environment, City Council member Jones stated that the impact from plastic bags “is one of those issues that transcends neighborhoods, transcends economics, transcends racial/social barriers, because these bags know no barriers.”¹³

48. Clean Air Council committed itself to working for the passage of the bill. It held a city-wide contest for Philadelphians to submit pictures of plastic and polystyrene litter. These images were then displayed in the background during the hearing. Clean Air Council testified at the hearing in support of the bill, and it even purchased a plastic bag “monster” outfit that consisted of 500 used plastic bags—the average number each person uses per year.

49. The bill failed, but Clean Air Council did not stop fighting for a reduction in plastic and polystyrene in Philadelphia and other municipalities. The Council endeavored to educate residents of Philadelphia and all of Pennsylvania. The Council’s staff educated people about the problem of plastic waste. The Council purchased thousands of reusable bags and distributed them throughout the city, and it ceased using single-use plastic at all of its events, eventually transitioning to be zero-waste.

¹³ Committee on the Environment, Philadelphia City Council, May 1, 2009 Bill # 090064, pg. 9 18-22.

50. The Council was determined to greatly reduce the number of plastic bags in Philadelphia's environment. So, in 2012 it resumed the effort by researching policies and legislation that would most effectively achieve this goal. Clean Air Council then worked with a City Council member to pass this legislation.

51. Over the course of the following seven years, Clean Air Council dedicated thousands of staff hours, conducted hundreds of hours of public outreach, held and attended multiple press events, sent out many action alerts to its members, and educated lawmakers all in its efforts to pass legislation that would reduce plastic bag usage in Philadelphia, and to block state-wide efforts to preempt this type of legislation from being available to municipalities.¹⁴

52. The Council worked, to varying degrees, with the three municipalities that ultimately passed plastic legislation. The Council was invited by Narberth to speak about the harms that plastic does to the environment and the need for its legislation at its press conference when the law was enacted. The Council continues to work with Lower Merion Township and other municipalities to assist with efforts to reduce plastic pollution.

53. The Council was not alone in its efforts to reduce the environmental burden of plastic and polystyrene in Philadelphia and in other municipalities in

¹⁴ Action alerts are emails sent to members and supporters to inform them of an issue of importance to a sender organization that encourages the recipient to respond by contacting a legislative representative.

Pennsylvania. PennEnvironment has, since its inception in 2002, fought to reduce the negative effects of, and detrimental impacts from, plastic and polystyrene pollution throughout the Commonwealth.

54. PennEnvironment has focused its efforts on advocating at the state and local level by educating communities on the benefits of this type of legislation and working side-by-side with elected officials to research, draft, introduce, and ultimately pass legislation that reduces plastic and polystyrene waste for the betterment of Pennsylvania's environment.

55. PennEnvironment has partnered with community-based organizations throughout the Commonwealth to hold public events aimed at cleaning and removing plastic and polystyrene waste, among other items, from our parks and riverways such as the Heinz Wildlife Refuge and the Wissahickon Creek.

56. Over the years, PennEnvironment has helped to educate and activate its citizen members and volunteers by drafting and distributing dozens of email action alerts about the extensive environmental threats posed by plastic and polystyrene waste.

57. PennEnvironment worked alongside Clean Air Council for years to advocate for the passage of plastic bag legislation in Philadelphia, and also consulted with West Chester and Narberth.

58. In addition to community and legislative outreach, PennEnvironment has researched, written, and released multiple studies seeking to investigate and understand what impacts plastic and polystyrene have on our communities' environment, human health, and the planet in general.

59. On March 3, 2021 PennEnvironment released a detailed report titled "Microplastics in PA: A survey of waterways."¹⁵ This study was conducted in order to evaluate the presence of microplastics in Pennsylvania's waterways. Water samples were collected by Pennsylvania citizens and legislators who followed the strict protocols established by the National Oceanic and Atmospheric Administration.

60. Overall, there were 315 samples taken from 53 bodies of water from different parts of the Commonwealth. The main areas of the state where samples were collected were the Pittsburgh, Harrisburg, and Philadelphia regions.

61. The results showed that plastic is everywhere—in every water body. One of the researchers, State Representative Tim Briggs, was quoted as saying "[e]ven

¹⁵ *Microplastics in Pennsylvania: A survey of waterways*, PennEnvironment (March 2021), available at <https://pennenvironment.org/sites/environment/files/reports/PAE%20Microplastics%20Mar21%201.1.pdf> (last visited April 2, 2021). Microplastics are defined as pieces of plastic "less than five millimeters in length (or about the size of a sesame seed)." *What are microplastics?*, National Oceanic and Atmospheric Administration, available at <https://oceanservice.noaa.gov/facts/microplastics.html> (last visited April 2, 2021).

in our most beautiful settings, microplastics show up. This isn't just in suburbs, or the cities . . . it's in every environment in the commonwealth.”¹⁶

62. PennEnvironment has invested tremendous resources and thousands of hours in this outreach. It has developed relationships within communities and legislative offices in order to educate the public about the harms that products like these present to the environment and human health. And it has advocated to protect our natural resources from items like plastic and polystyrene.

63. Despite all of the efforts by Petitioners, plastic and polystyrene pollution is only getting worse. In 2019, only a few weeks after the General Assembly passed its first plastic bag preemption bill, the Executive Director of Keep Philadelphia Beautiful was quoted as saying that “plastic bags are definitely among the top things in terms of the challenges and the litter that we’re seeing on the street every day.”¹⁷ And in 2020, Philadelphia was again ranked, by one study, as the dirtiest city in America.¹⁸

¹⁶ *Pa.’s waterways are full of microplastics, a citizen science study says*, StateImpact Pennsylvania (March 3, 2021), available at <https://stateimpact.npr.org/pennsylvania/2021/03/03/pa-s-waterways-are-full-of-microplastics-a-citizen-science-study-says/> (last visited April 1, 2021).

¹⁷ *Filthadelphia: How did Philly's reputation get trashed?*, 6 ABC Action News (July 16, 2019), available at <https://6abc.com/building-it-better-together-philadelphia-litter-trash-philly/5397430/> (quoting Kelly Offner, Executive Director, Keep Philadelphia Beautiful) (last visited April 1, 2021).

¹⁸ *The Dirtiest And Cleanest Cities In America (The Worst Will Surprise You)*, Forbes (December 31, 2020), available at <https://www.forbes.com/sites/laurabegleybloom/2021/12/31/the-dirtiest-and-cleanest-cities-in-america-the-worst-will-surprise-you/?sh=207200143842> (last visited April 1, 2021).

64. It is not just the end products that harm the environment. Every step in the life cycle of plastic and polystyrene is damaging.

65. The manufacturing of plastic and polystyrene itself “is among the most greenhouse-gas-intensive industries in the manufacturing sector.”¹⁹ Then the emissions from the tens of thousands of trucks needed to deliver these single-use products pollute communities and destroy the roads and bridges. After these products are used once, most are either landfilled or incinerated causing methane and volatile organic chemicals—dangerous greenhouse gasses—to be released into Pennsylvania’s air shed.

66. Plastic and polystyrene products that do not get landfilled or incinerated make their way into our communities where they litter our parks, yards, streets, storm drains, and waterways. The effect of this is clogged storm drains and inlet valves, which can result in flooded homes and neighborhoods; reduced property values; lack of business investment and lower sales for storefronts with littered sidewalks; and it contributes to high levels of depression and crime rates.²⁰ In

¹⁹ *Plastic & Climate: The Hidden Costs of a Plastic Planet*, Center for International Environmental Law, available at <https://www.ciel.org/wp-content/uploads/2019/05/Plastic-and-Climate-Executive-Summary-2019.pdf> (last visited April 2, 2021).

²⁰ *Greening Vacant Lots Reduces Feelings of Depression in City Dwellers, Penn Study Finds*, Penn Medicine News (July 20, 2018) available at <https://www.pennmedicine.org/news/news-releases/2018/july/greening-vacant-lots-reduces-feelings-of-depression-in-city-dwellers-penn-study-finds> (last visited April 2, 2021), *Litter Facts & Myths*, PENNDOT, available at <https://www.penndot.gov/about-us/RoadsideBeautification/LitterFacts/Pages/Litter-Facts-and-Myths.aspx> (last visited April 2, 2021).

addition, it is estimated that the city of Philadelphia spends \$48 million per year to clean up litter.²¹

67. The health of Pennsylvania residents is adversely affected as well.

Ingesting animals that contain plastic passes that pollution to humans, in fact, a recent, small study of human fecal matter showed that plastic was present in 100% of the participants.²² It seems that almost everything we eat, and even the air we breathe is now contaminated with these microplastics.²³

68. The products that are made from plastic and polystyrene are permanently altering the physical nature of the environment throughout Pennsylvania, and our bodies. Our communities are being inundated with these products as litter and microplastics and damaging all aspects of our environment.

²¹ *Philly spends \$48 million a year to clean up litter, Pa. report finds*, Philadelphia Inquirer (February 6, 2020) available at <https://www.inquirer.com/science/climate/philadelphia-pennsylvania-litter-recycling-20200206.html> (last visited April 2, 2021).

²² *In a first, microplastics found in human poop*, National Geographic (October 22, 2018) available at <https://www.nationalgeographic.com/environment/article/news-plastics-microplastics-human-feces> (last visited April 2, 2021), *Microplastics Found In The Ocean And In Human Poop*, Forbes (September 3, 2019) available at <https://www.forbes.com/sites/brucelee/2019/09/03/microplastics-found-in-the-ocean-and-in-human-poop/?sh=2f89bd6a37a4> (last visited April 2, 2021).

²³ *A Detailed Review Study on Potential Effects of Microplastics and Additives of Concern on Human Health*, National Center for Biotechnology Information (February 13, 2020) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7068600/> (last visited April 2, 2021). *Reproductive Problems in Both Men and Women Are Rising at an Alarming Rate*, Scientific American (March 16, 2021) available at <https://www.scientificamerican.com/article/reproductive-problems-in-both-men-and-women-are-rising-at-an-alarming-rate/> (last visited April 2, 2021).

69. The act of preempting municipalities from reducing the amount of plastic and polystyrene that is produced, transported, used, and disposed of in each of the municipalities harms Petitioners. If Respondents had not preempted the three municipalities from enforcing their existing laws, and any other municipality that was considering enacting similar legislation, these municipalities would have already begun to reduce the presence of these dangerous products.

70. As every day passes, each of these municipalities is forced to manage an ever-increasing amount of plastic and polystyrene. The damage is not theoretical, it is well-documented, and immediately apparent almost anywhere within Philadelphia and other communities throughout Pennsylvania. These products are permanently altering the physical nature of the environment and all things that rely on it.

71. Petitioners and their members are those who clean their neighborhoods, spend their weekends walking through parks and cleaning up the plastic and polystyrene strewn throughout, monitor and record the amount of plastic within the waterways, and advocate and testify at public hearings in order to convince legislators to clean up the neighborhoods, the parks, the waters, and help unburden their communities from the unbearable pollution that plastic and polystyrene create.

72. Respondents' act of preempting municipalities from enacting and enforcing laws that would have reduced the amount of pollution from plastic and polystyrene has harmed Petitioners and their members as it will prevent these, and all Pennsylvania municipalities, from addressing the serious environmental harm that these items create.

V. COUNTS

COUNT I – VIOLATION OF ARTICLE III, § 3 OF THE PENNSYLVANIA CONSTITUTION

73. Petitioners hereby incorporate and adopt paragraphs 91-97 of Municipal Petitioners' Petition for Review. *Municipalities' PFR* pg. 24-25.

COUNT II – VIOLATION OF ARTICLE III, § 1 OF THE PENNSYLVANIA CONSTITUTION

74. Petitioners hereby incorporate and adopt paragraphs 98-103 of Municipal Petitioners' Petition for Review. *Municipalities' PFR* pg. 25-26.

COUNT III – VIOLATION OF ARTICLE I, § 27 OF THE PENNSYLVANIA CONSTITUTION

75. Petitioners hereby incorporate and adopt paragraphs 104-107 of Municipal Petitioners' Petition for Review. *Municipalities' PFR* pg. 26-27.

WHEREFORE, Petitioners pray for a decree declaring 1706-E(d) unconstitutional.

VI. PRAYER FOR RELIEF

76. Petitioners respectfully request that this Court:

- a. Declare Section 1706-E(d) of Act 23 unconstitutional under Article III, Sections 1 and 3 of the Pennsylvania Constitution.
- b. Declare Section 1706-E(d) of Act 23 unconstitutional under Article 1, Section 27 of the Pennsylvania Constitution.
- c. Preliminarily and permanently enjoin Respondents, their agents, officers, and employees, and all other State officials, from enforcing Section 1706-E(d) of Act 23.
- d. Grant any additional equitable relief as may be appropriate.

Respectfully submitted,



ERNEST LOGAN WELDE
I.D. No. 315012
lwelde@cleanair.org

JOSEPH O. MINOTT
I.D. No. 36463
joe_minott@cleanair.org

Clean Air Council
135 S. 19th Street, Suite 300
Philadelphia, PA 19103
(215) 567-4004

Dated: April 13, 2021

CERTIFICATE OF SERVICE

I, Ernest Logan Welde, hereby certify that on April 13, 2021, the foregoing Petition for Review Addressed to the Court's Original Equity Jurisdiction was served upon the following by PACFile:

The Commonwealth of Pennsylvania

Pennsylvania Office of Attorney General
Strawberry Square, 16th Floor
Harrisburg, PA 17120

The Pennsylvania General Assembly

c/o Senator Jake Corman
Senate President Pro Tempore
350 Main Capitol Building
Senate Box 203034
Harrisburg, PA 17120-3034

c/o Representative Bryan Cutler
Speaker of the House
139 Main Capitol Building
PO Box 202100
Harrisburg, PA 17120-2100



Ernest Logan Welde, Esq.

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

By: Ernest Logan Welde
Attorney ID No. 315012
Clean Air Council
135 S. 19th Street, Suite 300
Philadelphia, PA 19103
lwelde@cleanair.org
(215) 567-4004

VERIFICATION

I am authorized to make this verification on behalf of Clean Air Council. I have personal knowledge of the statements made in the foregoing Petition for Review, and verify that those statements are true and correct to the best of my own personal knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

/s/ Eric Cheung

Signature

Eric Cheung, Deputy Director

Name and Position

Date: April 13, 2021

VERIFICATION

I am authorized to make this verification on behalf of PennEnvironment. I have personal knowledge of the statements made in the foregoing Petition for Review, and verify that those statements are true and correct to the best of my own personal knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

/s/ David Masur

Signature

David Masur, Executive Director

Name and Position

Date: April 13, 2021

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.



Ernest Logan Welde, Esq.

Date: April 13, 2021