ORIGINAL

IN THE SUPREME COURT OF OHIO

Rumpke Sanitary Landfill, Inc.	:	
Appellee,	:	Supreme Court Case No. 09-2004
v.	:	
State of Ohio,	:	On Appeal from the
Appellee,	:	Hamilton County Court of Appeals
and	:	First Appellate District
Colerain Township, Ohio, et al.	:	Court of Appeals
Appellants.	:	Case No. C081097

BRIEF OF *AMICI CURIAE* OHIO TOWNSHIP ASSOCIATION AND COALITION OF LARGE OHIO URBAN TOWNSHIPS IN SUPPORT OF APPELLANTS COLERAIN TOWNSHIP, OHIO, COLERAIN TOWNSHIP BOARD OF TRUSTEES, BERNARD A FIEDELDEY, TRUSTEE, KEITH N. CORMAN, TRUSTEE, AND JEFF RITTER, TRUSTEE

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STATEMENT OF AMICUS INTEREST

Amici curiae, the Ohio Township Association ("OTA") and the Coalition of Large Ohio Urban Townships ("CLOUT"), respectfully request that this Court reverse the decision of the First District Court of Appeals.

OTA is a state-wide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in 87 Ohio counties. OTA has over 5,200 active members, comprised of elected township trustees and township fiscal officers from Ohio's 1,309 townships. OTA has an additional 3,000 associate members who are dedicated to supporting the causes of OTA.

CLOUT is a group of large, urban townships in Ohio that has formed a committee for the purpose of providing its members with a forum for the exchange of ideas and solutions for problems and issues related specifically to the governance of large, urban townships. CLOUT works jointly with the OTA. Membership in CLOUT is limited to those townships having either a population of 15,000 or more residents in the unincorporated area, or a budget of over $3,000,000.[1]

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[1] CLOUT members include: in Butler County: Fairfield Twp., Liberty Twp., West Chester Twp.; in Clermont County: Miami Twp., Pierce Twp., Union Twp.; in Delaware County: Genoa Twp., Liberty Twp., Orange Twp.; Perkins Twp./Erie Co.; Violet Twp./Fairfield Co.; in Franklin County: Jefferson Twp., Madison Twp., Norwich Twp., Prairie Twp., Washington Twp.; Russell Twp./Geauga Co.; Sugarcreek Twp./Greene Co.; in Hamilton County: Anderson Twp., Colerain Twp., Columbia Twp., Delhi Twp., Green Twp., Miami Twp., Springfield Twp., Sycamore Twp., Symmes Twp.; in Lake County: Concord Twp., Madison Twp., Perry Twp.; in Lucas County: Springfield Twp., Sylvania Twp.; in Mahoning County: Austintown Twp., Boardman Twp.; Bethel Twp./Miami Co.; in Montgomery County: Butler Twp., Harrison Twp., Miami Twp., Washington Twp.; in Stark County: Jackson Twp., Lake Twp., Perry Twp., Plain Twp.; in Summit County: Bath Twp., Copley Twp., Springfield Twp.; in Trumbull County: Howland Twp., Liberty Twp., Weathersfield Twp.; in Warren County: Clearcreek Twp., Deerfield Twp., Hamilton Twp.; Perrysburg Twp./Wood Co.

Both OTA and CLOUT believe it is essential that townships that are particularly affected, as here, by proposed legislation that is challenged as unconstitutional be allowed to participate in the legal challenge.

Over 3.8 million Ohio residents live in unincorporated portions of townships in Ohio, and depend on townships to provide basic governmental services and to protect their residents' interests. As statutory entities, the ability of township governments to function properly and to serve their residents is tied directly to state laws that provide their authority to govern. This is particularly true of the power of township zoning, which has been recognized by this Court to be one of the "most essential function[s]" of local government. See *Forest City Enterprises, Inc. v. City of Eastlake* (1975), 41 Ohio St.2d 187, 201.

Appellee Rumpke owns and operates a private sanitary landfill in Colerain Township. The company filed for a zoning change to allow the landfill to expand. The zoning request was denied by the township after public hearings. Rumpke then filed a lawsuit in Hamilton County Common Pleas Court arguing it was not subject to the township's zoning authority because it was a "public utility" under R.C. 519.211. The trial court granted summary judgment for Rumpke and the matter is now before the First District Court of Appeals.

In 2008, the Ohio legislature passed an amendment to R.C. 519.211 that clarified the definition of public utility to make privately-held and operated landfills subject to township zoning.[2] Prior to the effective date of the new law, Rumpke filed a challenge to the amendment in this case claiming that the amendment as part of the budget bill violated the single subject rule. Rumpke urged, and the trial court and Court of Appeals agreed, that only the State of Ohio was a possible party and excluded Colerain Township, the affected township, from participating

[2] The amendment was Amended Substitute House Bill No. 562 ("Am.Sub.H.B.562").

as either a necessary party or one allowed intervention. The State of Ohio, however, does not have zoning authority, and other than being the originator of the statute at issue, has no connection to its enforcement or interest in its preservation. Ignoring this, the courts below enjoined this portion of the act from being effective and ignored a number of suspicious sections also alleged to violate the rule. This conclusion was drawn below even though the claimed interest to Rumpke was that the lawsuit it has pending against the township would be affected. Rumpke then argued that while it potentially affected the township, the other party had no interest.

The central issue before this Court is whether the most effective advocate for preserving challenges to a township's powers is the township that is precluded from a defense that directly affects it, and whether the Court of Appeals erred by applying an artificial test for township standing in constitutional challenges to township authority that does not take into account the very real interest that townships have in litigating the validity of the laws that empower them.

STATEMENT OF FACTS

OTA and CLOUT hereby adopt, in its entirety, and incorporate by reference, the statement of the case and facts contained within the Merit Brief of Appellants Colerain Township, Ohio; Colerain Township Board of Trustees; Bernard A. Fiedeldey, Trustee; Keith N. Corman, Trustee; and Jeff Ritter, Trustee ("Appellants").

ARGUMENT

Proposition of Law No. I.

A township is an interested and necessary party to a constitutional challenge brought by a property owner within the township's jurisdiction to a law passed by the General Assembly that directly affects the township's police powers over that owner's property and pending litigation.

In this case, there are at least a few basic truisms on which all of the parties should be able to agree. The first is that the law favors including parties to litigation in which their interests are at stake. In fact, R.C. 2721.12 requires that interested parties or parties who claim an interest be included in declaratory judgment actions. Their exclusion is a jurisdictional defect. Second, a party who initiates litigation against a township on the very issues presented by the declaratory judgment action should not be able to manipulate the litigation process to exclude the voice of the very township affected (in this case, to gain a tactical advantage in another case). Finally, it cannot be disputed that in *this* case, the real issue is township zoning and the preservation of the integrity of the law regarding township zoning. Township zoning is of paramount importance not just to the townships that have that authority, but to their millions of residents who depend on townships to control land use. See *Forest City Enterprises, Inc. v. City of Eastlake* (1975), 41 Ohio St.2d 187, 201, citing *Village of Belle Terre v. Boraas* (1974), 416 U.S. 1, 13 ("[Z]oning is a complex and important function of the state. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."). It is within this context that this Court must decide whether the lower courts erred when they excluded Appellants from participation on the merits of this action, and abided Appellee Rumpke's efforts to keep Appellants from protecting their interests in this case.

The central issue of concern to the *amici* is the harmful effect to Ohio townships and counties resulting from the erroneous decision of the Court of Appeals finding that a township is not an interested and necessary party in a declaratory judgment action challenging the constitutionality of law that directly affects the ability of that township to regulate property within its jurisdiction. This is especially true when, as here, Rumpke already sued Colerain Township on the issue of "what is and is not a public utility" under R.C. 519.211 and the case was still pending. It is only when the legislature sought to better define the township's authority to regulate private landfills that Rumpke claimed that Colerain Township did not have an interest in the validity of R.C. 519.211 and sought to exclude Colerain Township's participation in this case. The Court of Appeals erred in narrowly interpreting R.C. 2721.12 under these circumstances, finding that the township had insufficient "legal interest" in the case to support intervention under R.C. 2721.12, even where the township established that it had a real and tangible interest in the survival of the law being challenged by Appellee. The township had at least the same legal interest in defending its position and the affect the decision had on its position in the first lawsuit as Rumpke. If left to stand as precedent, this decision will undermine the ability of townships and counties to participate in cases dealing with the constitutionality of the very provisions of the Ohio Revised Code that give them their authority to govern.

Declaratory judgment actions are statutory proceedings under R.C. Chapter 2721. R.C. 2721.12(A) provides that "when declaratory relief is sought under this chapter in an action or proceeding, all persons **who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding**." When any statute is alleged to be unconstitutional, the attorney general must be served with a copy of the complaint, but the attorney general is not a party. The attorney general represents the state but the "state" has no

zoning powers. Those powers are relegated to counties, townships, and cities, and it is those local governments that are the enforcing authorities of zoning. When township or municipal authority is involved, an affected local government must be permitted to be party to and participate in the declaratory judgment proceedings that will shape its own fate. See R.C. 2721.12(A) which expressly provides that any "**declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding.**"

The core of the Court of Appeals' analysis as to Colerain Township's intervention in this case is its misplaced reliance on this Court's decision in *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263. In fact, the Court of Appeals' entire decision on this issue is based on the misapplication of the distinction that this Court drew in *Driscoll* between parties with a "practical interest" in the outcome of a declaratory judgment action and those with a "legal interest." *Driscoll* dealt primarily with a *res judicata* question and is a wholly different case than this one. In fact, in *Driscoll*, the township involved was undeniably a proper party where the zoning issues were contested. The Court of Appeals ignored that *Driscoll* should not have been the foundation on which the Court of Appeals rested its decision to exclude Appellants in this matter.

Driscoll involved several separate actions. In 1971, a developer filed to rezone its property to allow for an apartment development. The township denied the rezoning. The developer then brought a declaratory judgment action to declare the zoning on the property unconstitutional. The township was a party. The adjacent property owners were not parties to the suit. The court found the zoning applied by the township was unconstitutional and allowed the apartments and that decision was not appealed by the township. The developer then obtained building permits for the apartments. In a subsequent 1973 injunction suit brought by the

township, the township argued that because neighbors were not parties, the previous action was void. The developer asserted that the 1971 declaratory judgment action was *res judicata* as to issues raised in the later action regarding the zoning. In resolving this issue of the necessity of the neighbors being parties, this Court pointed out that while the adjacent owners may have had a "practical interest" in the prior action (as people physically affected by the development), they did not have sufficient "legal interest" that their absence in the prior case justified voiding that case. That is, this Court preserved the effectiveness of the prior final judgment by holding that the adjacent owners were not necessary parties under R.C. 2721.12 and their absence was not a jurisdiction defect. Importantly, it is worth noting that in *Driscoll*, there was no dispute that the township was a proper party in both cases. The analysis of R.C. 2721.12 arose only when the township attempted to use the absence of a non-party in the case as a jurisdictional "sword" to invalidate the prior decision.

Driscoll is a far cry from the facts in the present case. The analysis above was a minor issue of the larger issues of whether the court would allow a township to have a second opportunity to defend the constitutionality of a zoning that was previously declared unconstitutional. *Driscoll* did not analyze the interests of townships or counties as the intervening parties under R.C. 2721.12. *Driscoll* did not analyze or discuss the interests that townships and counties have in constitutional challenges to the state laws that define their power to govern. Certainly, there is nothing in *Driscoll* that supports the Court of Appeals' reasoning that a governmental entity's standing to be a party to and intervene in a constitutional challenge to a statute that substantially and immediately affects the regulatory authority of the township depends entirely on the nature of the constitutional challenge. In short, the Court of Appeals' analysis depends on a case that has little applicability or relevance to the facts in this case.

Appellants have consistently cited numerous cases suggesting that where a constitutional challenge affects the regulatory authority of a governmental entity, the enforcing governmental authority is a necessary party under R.C. 2721.12. See *Barnesville Edn. Assn. OEA/NEA v. Barnseville Exempted Village School Dist. Bd.*, Belmont App. No. 06 BE 32, 2007-Ohio-1109; *Klein v. Leis* (2002), 146 Ohio App.3d 526. The decisions in those cases, which were decided after *Driscoll*, did not adopt the distinction urged by the lower court in determining whether governmental entity at issue was a necessary party. In those cases, the reviewing courts determined that the enforcing governmental entity whose authority was at issue necessarily had a sufficient "interest" in the outcome of the case, as that term is used in R.C. 2721.12, and must be a party to the action. *Amici* agree with the Appellants that these cases are far more applicable to the case at bar than *Driscoll*, as they address the fundamental issue here, which is whether a governmental entity whose statutory authority to govern is challenged as unconstitutional, on whatever grounds, is a proper party in defense of that authority. *Driscoll* simply does not reach this issue, to any extent.

At the most basic level, the Court of Appeals' decision should be reversed because it is simply wrong. The decision relegates to the attorney general the choice of whether to defend a lawsuit challenging a law that affects the basic zoning authority of a township, while at the same time denying the township in which Rumpke is located from having any say in defense of the same law. The decision prevents a township from participating in a case in which that township's very ability to regulate the single largest industrial property owner within its jurisdiction, a very large private solid waste landfill, hangs in the balance. It is obvious that the Appellee sued the "State of Ohio" and opposed the intervention of the Appellants in the action because the

Appellants realize that the township had the greatest interest in and motivation to defend this case vigorously. As it stands, the 60,000 residents of Colerain Township have no say.

From a broader perspective, the Court of Appeals' decision is also harmful to the law relating R.C. 2721.12 and standing for Ohio townships in declaratory judgment actions where their authority it challenged. As set forth above, over 3.8 million Ohioans live in townships. Because townships are creatures of statute, and their source of authority is derived solely from the acts of the General Assembly, the constitutionality of those acts necessarily makes townships interested parties to those challenges. In particular, the townships that are affected by the outcome of those challenges and their representative organizations are the best, most interested and often the most knowledgeable of all possible parties in such action. Clearly here, the township in which Rumpke's landfill is located should have a say in Rumpke's claim that the townships cannot regulate private landfills by zoning. If the Court of Appeals' decision at issue is left to stand, unmodified by this Court, a rather large and inviting door will be left open to private parties to initiate actions to attack the constitutionality of statutes empowering townships while at the same time excluding townships from participating in those actions, on the grounds that the defense of those statutes should be left to the state, alone.

In its decision, the Court of Appeals, through its strained interpretation of a minor aspect of *Driscoll*, has set up a "practical interest v. legal interest" test to be applied universally for standing of townships in declaratory judgment actions that has not existed previously. There is no basis in R.C. 2721.12 for such a test, and if this decision is not reviewed and reversed, it will stand as an invitation for private parties to continuously litigate whether townships truly have sufficient legal interest in declaratory judgment actions in which the authority of the township is challenged. A review of the *Driscoll* decision does not suggest that this Court's intention in that

case was to set up a very narrow test (that is not in the statute) for who is an "interested" party based on a distinction between "practical" and "legal interests." Certainly, the basic law of standing requires that in order to be a party to a lawsuit, one must show that it will be harmed by an adverse decision by the court. At a minimum, the township should have been allowed intervention as a right when it petitioned to participate. However, showing harm under a basic standing analysis and navigating a new "practical interest" test are two different things.

The Court of Appeals' decision opens the door for parties seeking to challenge the constitutionality of statutes to simply name the "State of Ohio" as the only party in an action, and exclude all other governmental entities—no matter how closely tied to the outcome of the action—on the basis that non-state entities have only a "practical interest" or nominal interest in the outcome of the case, not a sufficient interest. For townships and counties, this is particularly ruinous. Townships and counties have only the authority they are given by the General Assembly. Under the Court of Appeals' analysis here, the interests of townships and counties is always practical, not legal, because enacting empowering statutes are always the product of the General Assembly, not townships and counties. It would appear to defy common sense to say that the entities whose basic authority to govern is at issue in a declaratory judgment action do not have standing simply because the township is not the creator of the authority, only its beneficiary and enforcer. That is especially true here where Rumpke sued the township on its regulatory powers placing in issue the very thing the General Assembly sought to clarify. The reality is that once a bill like the one at issue here is passed, the *only* governmental entity with *any* real interest in its survival is the local entity whose authority it affects, not the state from which the law originated.

Adoption of the Court of Appeals' decision would force Ohio courts to engage in a whole new analysis about whether a party's interest is "practical" or "legal" in declaratory judgment actions, at least where the constitutionality of a state law is challenged. In this case, the Court of Appeals apparently concluded that Colerain Township's interest was only "practical" because the basis for the challenge was procedural, i.e. single subject rule, and not substantive.[3] According to Appellee Rumpke, because the alleged basis for the invalidity of the law is that the General Assembly did not follow the correct procedure in passing the offending law, the "state" alone is the proper defendant. Upon analysis, it is not the procedure. In a single subject case, the party challenging the legislation must show it has no relationship to the subject of the bill. In this case, the bill that was challenged was the budget bill. The township should be allowed to show a budgetary connection that sufficiently ties the amendment to the subject of the bill. Denying the township the right to even participate takes the most effective advocate out of the case and the very goal Rumpke sought.

Basing a decision to exclude a party from participation on an artificial distinction is problematic. First, the distinction between the concepts of "procedural" and "substantive" has always been a difficult distinction to make for courts, a difficulty that this Court has commented on in the past. See, e.g., *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 56, ("[t]he distinction between substantive and procedural law is artificial and illusory"); *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 33-34 ("[t]he remedial procedural versus substantive dichotomy is seldom an easy distinction to make"); *Cook v. Matvejs* (1978), 56 Ohio St.2d 234, 237 (conceding there is a "somewhat muddled distinction" between procedural and substantive rights). Creating a test for

[3] While the challenge may have been procedural, there is no question that the motivation for the challenge is substantive, as Appellee chose to challenge only the provisions of the offending bill that affected the fortunes of the Appellee, not the entire bill.

standing for governmental entities in constitutional challenges that require courts to determine whether the plaintiff's grounds for the challenge are "procedural" or "substantive" opens the door for an unnecessary and messy case-by-case analysis. Second, the Court of Appeals' decision ignores the fact that regardless of the nature of the constitutional challenge, the effect on the governmental entity—in this case Colerain Township—is the same. It does not matter whether the attack is on procedural grounds or substantive grounds, it is still an attack on the authority of a local governmental entity and the entity whose authority is being attacked has a real interest in defending that authority. In this case, that interest is the ability to impose reasonable zoning controls on the growth of a large, intense industry in the middle of the township.

The far better alternative to excluding parties claiming an interest automatically as determined by the Court of Appeals' decision is a rule that would provide that where a constitutional challenge attacks the statutory authority of a local governmental entity, the local government whose authority is attacked may intervene in the action as a party "claim[ing] any interest that would be affected by the declaration" under R.C. 2721.12(A). This is especially true where, as here, the township has a specific and direct interest in the amendments applicable and is in a lawsuit to defend its powers.

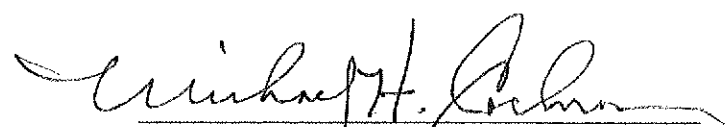
Accordingly, local governments that have an interest in challenges would be able to intervene as of right, but the challenger would need not name every (or any) local government to go forward in the case. In this case, Appellee could have named no township or county initially, but if not so named, any township or county could intervene and participate in the defense of the challenged statute, irrespective of the basis for challenge. This approach strikes a balance between administrative efficiency for the Plaintiff (in avoiding naming thousands of townships

and all 88 Ohio counties as defendants) and protecting the interests of local governments like townships and counties that have a real stake and interest in the outcome of the survival of the challenged law.[4] The alternative urged by the Appellee and adopted by the Court of Appeals ignores the very real interests of townships and counties in defending the laws that empower them.

CONCLUSION

For the reasons set forth above and those argued in the Merit Brief of the Appellants, *Amici Curiae*, the Ohio Township Association and the Coalition of Large Ohio Urban Townships, respectfully request that this Court reverse the decision of the First District Court of Appeals.

Respectfully submitted,



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[4] As a practical matter, it would seem unlikely that a flood of townships and counties would rush to intervene in actions in which they did not have a direct interest, like Colerain Township does in this case. For instance, in this case, the only townships that would likely be interested in the amendment to R.C. 519.211 enough to seek intervention are those townships with landfills within their borders. The only result of the rule set forth above would be that *if* a local government's authority was implicated and the local government was interested enough to intervene, it would be permitted to do so as a party claiming an interest under R.C. 2721.12.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following parties via regular U. S. mail, postage pre-paid, on this 26th of March, 2010:

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