ORIGINAL

IN THE SUPREME COURT OF OHIO

Rumpke Sanitary Landfill, Inc., *et al.*	:	
Appellees,	:	Supreme Court Case No. 11-0181
v.	:	
Colerain Township, Ohio, *et al.*	:	On Appeal from the
Appellants.	:	Hamilton County Court of Appeals
	:	First Appellate District
	:	Court of Appeals
	:	Case No. C090223

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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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio Township Association ("OTA") and the Coalition of Large Ohio Urban Townships ("CLOUT"), *amici curiae* on behalf of Appellants Colerain Township, Ohio, Colerain Township Board of Trustees, Bernard A. Fiedeldey, Trustee, Keith N. Corman, Trustee, and Jeff Ritter, Trustee, urge this Court to accept jurisdiction over this case in order to reverse the decision in *Rumpke Sanitary Landfill, Inc., et al. v. Colerain Township, Ohio, et al.*, Hamilton County Court of Appeals No. C-090223.

This case is of great public or general interest because it involves an issue that affects all 1,308 townships in Ohio: the scope of the exception to township zoning for "public utilities" under R.C. 519.211, as it relates to the operation of solid waste landfills in Ohio townships.[1] The Hamilton County Court of Appeals' improper interpretation and application of R.C. 519.211 in this case will adversely impact: 1) the fundamental ability of townships in Ohio to regulate land use through zoning; 2) the townships' ability to protect the health, safety and welfare of township residents and property particularly those surrounding a landfill through comprehensive land use plan and zoning; and 3) townships' ability to plan for and mitigate the affects of sanitary landfills on township infrastructure and services.

There can be no question that this case represents an expansion by the court of appeals of the "public utility" exception to township zoning under R.C. 519.211. Appellee Rumpke Sanitary Landfill, Inc. ("Rumpke") is a very large, approximately 500 acre landfill in Hamilton County, Ohio that has been subject to first county, then township zoning for more than sixty (60) years. After decades of local zoning control, when Rumpke's application to the township zoning

[1] R.C. 303.211 provides an identical exception for counties. Any decision in this case would be equally applicable to all of the 88 counties in Ohio who have adopted county zoning resolutions.

authority to rezone yet another 350 acres to expand its landfill use was denied, for the first time Rumpke asserted it was a common law "public utility" exempt from township zoning under R.C. 519.211 and could no longer be regulated by the township's zoning powers.

Relying on a few select facts from the record and even less analysis, the court of appeals determined that Appellee "Rumpke" is a "public utility" free from the township police powers almost exclusively on the fact that a large portion of the solid waste in the Cincinnati area is disposed of in Appellee Rumpke's landfill. The court of appeals ignored the comprehensive statewide scheme for solid waste management and disposal when considering whether Rumpke was a 'common law' public utility. The court of appeals also ignored the other critical "public utility" factors established by this Court in *A & B Refuse Disposers, Inc. v. Ravenna Township Board of Trustees* (1992), 64 Ohio St.3d 385, among other cases. In particular, the court found Rumpke to be a monopoly, yet ignored both the fact and law that this private landfill has no public oversight of its rates and charges, no requirement that its rates be uniform or that it accept all solid waste delivered to the landfill and that it has no statutory obligation to serve the public – only contractual obligations for contracts it chooses to enter. As this Court has held, a promise to be open to the public and accept public waste is not the legal obligation to do so or a characteristic of a public utility. *Marano v. Gibbs,* (1989), 45 Ohio St.3d 310, 311, *A&B Refuse, supra.* Monopolies are disfavored in the law and permitted to exist only when there is adequate assurance the customers and public interests are adequately protected through governmental oversight. They require more regulation, not less as erroneously found by the court below.

Moreover, the court of appeals ignored this Court's holding in *St. Marys v. Auglaize County Board of Commissioners* (2007), 115 Ohio St.3d 387, in which this Court held that the "public utility" in the solid waste industry that provides the essential service of the overall

management of solid waste in a county or region is the local solid waste management district, not an individual landfill. In *St. Marys*, this Court recognized the framework that has been established in Ohio for solid waste disposal, in which "unique governmental-run" solid waste management districts, through uniform fees and rule making, manage solid waste disposal throughout the state. This integrated, state-wide framework for solid waste management substantially impacts the "public utility" analysis for any individual waste disposal facility claiming that exemption. The court of appeals, in its rush to anoint Rumpke a "public utility," failed to consider Rumpke's claim in the context of that framework, or the holding in *St. Marys*.

If the court of appeals' decision is not reversed, townships in Ohio will be hindered in their ability to plan and regulate land use to promote health, safety, and general welfare of their residents. Every township and county with an existing landfill that was established and regulated by local zoning is at risk to have the landfill suddenly declare it has achieved "public utility" status and is now exempt from local regulation whenever becomes dissatisfied with those regulations or seeks to expand. Every township and county that does not have a landfill within its jurisdiction is at risk that a landfill will be established because there is not a local provider of this claimed essential service and they are necessary to fill that void.

This case is an aggressive new expansion of the "public utility" exception to township zoning and would allow the unbridled expansion of existing landfills and perhaps new landfills throughout Ohio's townships regardless of the surrounding properties and their uses. Its impact is infinite and timeless since there is little, if any, use of property that has been landfilled in perpetuity, particularly where the OEPA permits broad 'air space' expansion creating a mountain of buried waste, like the Rumpke landfill in Colerain Township. It may take hundreds of acres of waste-filled land out of productive use for economic growth and development in the township

forever. It also allows the potential for private companies to eliminate all competition and hold its customers and the public hostage to whatever rates and services they choose to establish without any public accountability for their rates and services (except by way of contracts they choose to enter) or guarantee that they will actually provide them to the general public or any customer when it is not in their interest to do so.

The court of appeals' decision unduly focused its analysis on one consideration: Appellee Rumpke's position in the waste disposal market. The court of appeals ignored all other evidence showing that in all respects, Appellee Rumpke does not act like a traditional public utility. It does not set its rates based upon its costs. There is no public oversight of regulation or uniformity of its rates (it gives preferential rates to its own hauling companies who are not claiming public utility status) and it has no legal obligation to accept waste from any source. If other courts of appeals follow the lead of the First District, the pool of private business that may qualify as "public utilities" based solely on their prevalence in the local market in their region will be expanded considerably and without limitation as to size or location.

Considering that such common law "public utilities" are not subject to any of the controls or obligations of traditional public utilities (such as rate control and review or taxation as a public utility, or the authority of PUCO), there is a real danger of the creation of private monopolies that are unregulated both as to the current and future use of their land through township zoning and in their relationships with their customers. This is particularly troubling with respect to facilities like landfills, which pose a substantial risk to the health and safety of the public and properties and residents that surround them if not regulated adequately. For those townships with the unfortunate fate of being home to unregulated common law "public utilities," the ability of such townships to meaningfully engage in land use planning in the proximity of the

"public utility" will be largely stripped, as will their ability to have any meaningful input or control regarding the growth of a land use that will undoubtedly draw substantially on the limited resources of the townships to provide public services to that user.

This case presents an issue that is important to townships across Ohio and is of great public interest. This case deals with the very heart of township governance—the limits of the ability of Ohio townships to regulate land use through zoning pursuant to R.C. 519.211. Accordingly, *amici* respectfully urge this Court to accept this case to determine the proper boundaries of the "public utility" exception in R.C. 519.211, reversing the decision of the court of appeals.

STATEMENT OF *AMICI CURIAE* INTEREST

Amici curiae, the Ohio Township Association ("OTA") and the Coalition of Large Ohio Townships ("CLOUT") respectfully request that this Court reverse the decision of the First District Court of Appeals. OTA is a statewide 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 1,308 townships. OTA has an additional 3,000 associate members who are dedicated to supporting 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 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.[2]

As representatives of Ohio townships and counties, OTA and CLOUT have a substantial interest in the adjudication and reversal of the court of appeals' incorrect decision, which impacts the zoning authority of townships.

STATEMENT OF THE CASE AND FACTS

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

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I. A private sanitary landfill is not exempt from township zoning regulations under the comprehensive statutory framework of solid waste disposal and township zoning.

The collection and disposal of solid waste in Ohio is subject to a comprehensive statewide statutory scheme and regulation by various governmental authorities. The Ohio

[2] 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.

Environmental Protection Agency provides environmental regulation this Court has determined to be separate and distinct from the concern involved in the regulation of public utilities. *See* R.C. Chapter 3734. Solid Waste Management Districts ("SWMD") plan and provide for the safe and sanitary management of solid waste generated within the districts territory and have been determined by this Court to be a public utility. *See* R.C. Chapter 3734 and 343 and *St. Mary's, supra* at ¶54-68. Political subdivisions of the state (counties, townships and municipalities) provide comprehensive land use regulations for the location of trash hauling facilities and sanitary landfills. R.C. Chapters 519, 303 and 713. Political subdivisions, including townships, counties, municipalities, solid waste management authorities and joint solid waste management districts may own and operate sanitary landfills and must set rates following public hearings based upon the cost of providing the service to the general public. R.C. 343.01, 505.27 and 717.01. There is no state or local regulation of the rates of collection or disposal of solid waste by private haulers or landfills to protect members of the public from disparate treatment in the acquisition of the hauling or disposal of trash. *See A & B Refuse* at 389. It is within this comprehensive framework that the court of appeals was required to consider whether a privately-owned sanitary landfill was exempt from township police powers, zoning, planning and regulation. *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Ohio St. 408, cited and relied upon in *A & B Refuse* at 425 and *St. Mary's* at ¶54.

In declaring a single, privately owned and operated, for-profit landfill to be a "public utility" exempt from the zoning component of this statutory framework, the court of appeals misunderstood and ignored this comprehensive statutory framework for solid waste management and disposal in Ohio. This scheme was neither raised nor considered by this Court in *A & B Refuse* because the comprehensive legislation establishing statewide solid and hazardous waste

management policies and programs had just been adopted and was in the process of being implemented when that case was pending.[3] It is clear from its decision that the court of appeals did not look beyond this Court's decision in *A & B Refuse* to find that Rumpke is a public utility. The problem with this analysis—a problem that needs to be rectified by this Court—is that, as to the solid waste industry in Ohio, *A & B Refuse* has been superseded by developments in the law regulating the solid waste industry that have occurred after *A & B Refuse* was decided—namely, the establishment of a statewide framework of single and multi-county solid waste management districts under R.C. Chapters 3734 and 343. The decision of this Court in *St. Marys* recognized those developments by finding that a SWMD to be a public utility under R.C. 519.211. The court of appeals in this case failed to make the distinction between the state regulations in place to protect members of the public from disparate treatment in solid waste disposal and the acquisition of sanitary land fill services as this court did in *St. Mary's* and private solid waste landfills like the one at issue here.

In *St. Marys*, the primary issue was whether Auglaize County was contractually obligated to pay for post-closure expenses related to a landfill. As part of its decision, however, this Court determined that the local solid waste management district was a "public utility" under the *A & B Refuse* analysis. Specifically, this Court found that the district provided the "essential service" of

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[3] Effective June 24, 1988, the General Assembly enacted Am.Sub.H.B. No. 592, 142 Ohio Laws, Part III, 4418, thereafter codified in, inter alia, R.C. Chapters 343 and 3734, which established statewide solid and hazardous waste-management policies and programs, vested the director of the OEPA with wide ranging authority to adopt rules governing solid-waste facilities, and mandated each county to create a county solid waste management district or to join with other counties in creating a joint solid waste management district. *See National Solid Wastes Management Association v. Stark-Tuscarawas-Wayne Joint Solid Waste Management District*, 124 Ohio St.3d 197, 200, 2009-Ohio-6765, ¶15-16 and *Danis Clarkco Landfill Company v. Clark Cty. Solid Waste Management District* (1995), 73 Ohio St.3d 590, 596-598. When *A & B Refuse* was decided in 1992, districts were just being formed and solid waste management rules and plans adopted.

controlling the management of all of the solid waste in the county, which meant planning for and ensuring that there was sufficient capacity for solid waste disposal for the future. This Court held that the SWMD was a public utility because the district had the authority to levy fees, set uniform rates for these fees based on cost of service (not market conditions), and to make rules for the management of solid waste. Taken together, these attributes protecting members of the public from disparate treatment in and assurance of solid waste disposal services qualified the solid waste management district as a public utility.

St. Marys is a recognition of the true nature of the solid waste management system that has been established in Ohio. Ohio has an inter-related system of management districts ensuring that at any given time, and for the next ten (10) years, there is sufficient solid waste capacity in every part of the state. The location of those facilities is established by local zoning and environmental effects are regulated by the OEPA. The General Assembly recognized the importance of township and county zoning in the regulation of sanitary landfills when it granted solid waste management districts the express authority to adopt rules that would exempt the owner or operator of any existing or proposed solid waste facility from compliance with any amendment to a township (and county) zoning resolution that rezoned or redistricted the land upon which a landfill or expansion was proposed within two years prior to the owner or operator's application for a permit from the OEPA to open a new or modify an existing solid waste facility. R.C. 3734.53(C)(4). If sanitary landfills were exempt from zoning, no such provision would be necessary.

The flaw in the court of appeals' decision finding that Rumpke is a "public utility" is that the court ignored the entire solid waste management system of the state usurping only the zoning component to grant a single large privately owned and operated landfill a license to expand at its

current location without limitation. A landfill that has been regulated by local zoning for more than sixty (60) years and is already the sixth largest landfill in the country. The court of appeals also ignored the fact that this Court had recently declared a SWMD to be a public utility and did not recognize that Rumpke, as a private landfill, had none of the characteristics of the public utility recognized in *St. Marys*. Management districts *manage* the entire system of solid waste disposal in a county, and have "unique" powers to carry out that task. Rumpke is a private company that is in the business of collecting and disposing of waste for profit. Rumpke does not *manage* solid waste beyond its own facilities. Rumpke does not have uniform fees and is far from public about its rate structure. Other than being a company in the business of waste disposal, Rumpke shares none of the characteristics of the "public utility" recognized in *St. Marys*.

In this case, the court of appeals confused the role of the true public utility in this case—the solid waste management district—and the individual, privately owned facility owner who does not operate in almost any respect like a public utility. In doing so, the court of appeals has diverted from the path this Court has set out in *St. Marys*. *Amici* urge this Court to take jurisdiction of this case to correct the erroneous decision of the court of appeals.

<u>Proposition of Law No. II</u>: A privately owned sanitary landfill cannot be a common law "public utility" exempt from township zoning when there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services.

R.C. 519.211 provides that township zoning does not apply to "the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility." Because the statute does not define the term

"public utility," this Court has supplied a common law definition for the term based on a mixed question of law and fact. *See Marano v. Gibbs, supra.* Since the decision in *Marano*, courts have determined public utility status on a case-by-case basis, applying those factors set out first in *Marano* and then reiterated in *A & B Refuse* and *St. Marys*. While courts have held that "public utility" status does not depend on whether an entity is a statutory public utility, the consistent theme throughout these "public utility" cases has always been that the entity claiming the status must *operate in practice* like a traditional public utility, even if the entity is not a defined, regulated public utility.

Public utilities are legally sanctioned monopolies. See *Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Co.* (1978), 54 Ohio St.2d 147. In exchange for exclusive control over a particular service, the relationship between public utilities and their customers is heavily regulated, to prevent a public utility monopoly from using "its superior bargaining position to dictate unfair or oppressive terms and conditions with customers who have no choice but to accept the conditions along with the service." *Id.* at 154. Accordingly, the State of Ohio, through PUCO, is given the authority to fix rates, regulates service, safety and operations, and regulates the relationship between public utilities and their customers. Without these mechanisms for control, a public utility would simply be an unregulated monopoly with little accountability to either the government or its customer. Such monopolies have long been disfavored in Ohio and in the United States. See, for example, *Knoup v. Piqua Branch State Bank of Ohio* (1853), 1 Ohio St. 603, 614 ("A monopoly is * * * a thing disfavored in law; an abuse, a public nuisance.").

The factors that this Court developed for common law public utilities under *Marano* and *A & B Refuse* reflect this concern that public utilities should be regulated in their relationships

with their customers, and any entity seeking public utility status must show that it is so regulated. For this reason, this Court has held that a putative public utility must show more than it provides an essential service, is open to the public and serves a substantial part of the public. It must also show that it provides the service *indiscriminately and reasonably*, that the service cannot be *arbitrarily withdrawn* by the entity, and that the public has a *legal right to demand* that the entity provide the service. Likewise, the entity must show that its relationship with the public, i.e. its customers, is regulated. See *Castle Aviation, Inc. v. Wilkins* (2006), 109 Ohio St.3d 290 ¶29 (general safety or environmental regulations not sufficient to show public utility status because they "do not control the relation between the business and the public as its customers"). Taken together, these factors require that the entity claiming to be a public utility show that it actually conducts itself like a public utility, in addition to providing an essential service. Without these factors and the requisite public accountability for its rates, charges, and methods of operation along with an obligation to serve, an entity cannot be granted exemption from local governmental regulation through zoning.

The major flaw with the court of appeals' decision is that it rested its entire decision on the finding that: (1) Rumpke provides an essential service and (2) that it provides the service to a large portion of Hamilton County. While that may be an important and necessary part of establishing a public utility, it is clear under the public utility cases that it is not enough. The court did not address in any way if or how Rumpke operates service indiscriminately and reasonably. Likewise, the court did not cite any evidence that Rumpke customers had a legal right to demand that Rumpke accept waste, or that Rumpke had any legal obligation not to withdraw its services. Finally, the court did not address how the relationship between Rumpke and its customers is regulated. It is important to note that this case is only about the removal of

all local regulations relating to the location of a landfill for the disposal of solid waste. Rumpke has not asked for public utility status of its many trash hauling operations, which are integral to and interrelated with the landfill and part of the same corporate family and expressly subject to township zoning under R.C. 519.211(C). With the exception of the city of Cincinnati who hauls its own solid waste, most of the direct 'customers' dumping at the landfill are Rumpke's own hauling companies.

In fact, substantial evidence was presented to the lower courts that the Rumpke Landfill *does* discriminate in the rates it charges its "customers"[4] by charging non-Rumpke haulers twice the rate to dispose at the landfill, and that rate-making decisions are dictated only by market conditions, without any oversight. The rates in some cases far exceed the landfill's actual cost of disposing of the waste, sometimes by more than 100%. Likewise, Colerain Township provided evidence that, other than contractual obligations, there is no legal authority that could compel the landfill to allow any customer to dispose of their waste, no authority that regulates the landfill's relationship to its "customers," and no legal authority to prevent the landfill from withdrawing its service. This is conduct not characteristic of a public utility. All of this evidence was disregarded. Ignoring all other factors, the court of appeals focused unduly on only the nature of the service provided and Rumpke's claimed monopolistic position in the market. As this Court observed in *Castle Aviation*, "[t]his view is an unduly expansive construction" of *Marano* and *A & B Refuse*. *Id.* at ¶29. If accepted, any private business that provides a large market share of an important service in a community could justifiably claim "public utility" status, even if it, like

[4] Overwhelmingly, the landfill's "customers" are waste hauling companies that bring their waste to the landfill, not individual members of the public. Local political subdivisions typically contract with private hauling companies to provide curb-side hauling service to residents, and those hauling companies in turn contract with the landfill for disposal fees.

Rumpke in this case, exhibits none of the traditional characteristics of public utility with respect to regulation or its relationship to its customers. A gasoline service station or grocery store or chain might meet this broad definition of public utility – both provide essential services, are open to the public, and may even charge uniform rates, yet neither are public utilities.

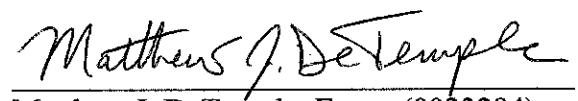
Colerain Township has an obvious and understandable interest in seeing that this Court review and reverse the decision of the court of appeals, as the result of an adverse decision in this case will be the perpetuation of a large, unregulated landfill in the middle of its jurisdiction over which it has very little control to protect its citizenry. From the position of the OTA and CLOUT, however, this case has larger implications. If this case is not reversed, this decision will shift the focus of the "public utility" test from that which was intended in *Marano, A & B Refuse* and *St. Marys*. Those cases recognize that in order for an entity to be declared a public utility, it must act like a public utility and be accountable to the public - like a public utility. The First District has now focused the test singularly on the market share of the entity and the nature of the service provided. If a private business can establish that it is a public utility by showing only that it is the primary local provider of an important service, the number of businesses claiming public utility status, both in the waste industry and beyond it, will rise dramatically, with a commensurate erosion of the zoning authority of townships. This should not be permitted. Accordingly, this Court should accept jurisdiction and reverse the decision of the First District Court of Appeals.

CONCLUSION

By unduly expanding the scope of the "public utility" exception under R.C. 519.211, the decision of the court below undermines the authority of townships throughout Ohio to regulate land use through zoning, as well as the comprehensive framework for the management of solid

waste that was established by statute. The Ohio Township Association and the Coalition of Large Urban Townships urge this Court to accept jurisdiction over this appeal and to reverse the decision of the court below.

Respectfully submitted,



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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 31st of January, 2011:

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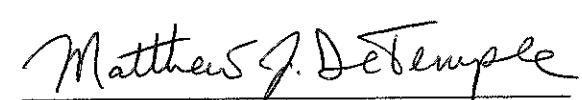

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