

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE INTEREST OF THE <i>AMICUS CURIAE</i>	6
STATEMENT OF THE CASE AND FACTS.....	7
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	8
<u>Proposition of Law No. 1:</u> R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws.....	8
<u>Proposition of Law No. 2:</u> Municipal ordinances seeking to protect residents by requiring holders of a permit issued pursuant to R.C. 1509.02 to provide information to the municipality are not in conflict with R.C. 1509.02.....	8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

**EXPLANATION OF WHY THIS CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST**

This case presents the critical issue of whether Ohio's oil and gas regulatory scheme pursuant to Ohio Revised Code Chapter 1509 acts to supersede and preempt a municipality's constitutional right to enact and enforce its local ordinances to control oil and gas drilling activity within its borders.

In this case of first impression, at issue is the "Home Rule Amendment" at Section 3, Article XVIII of the Ohio Constitution, which gives municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 880 N.E.2d 906 (2008), ¶ 7. On the other side is R.C. 1509.02, the state's comprehensive oil and gas permitting statute, which the General Assembly amended in Sub. H.B. 278 in 2004 to give the state regulating agency "sole and exclusive authority" to regulate the permitting, location and spacing of oil and gas wells and production within the state. Municipalities have an interest in protecting the health and welfare of their citizens and communities, through local zoning or other applicable ordinances, while state lawmakers and the oil and gas industry have an interest in statewide regulation and uniformity. Instead of striking a balance or seeking to preserve a municipality's constitutional right to regulate and protect its citizens, the court of appeals in this case chose to support the state's effort to regulate all aspects of oil and gas regulations in Ohio.

There is no doubt that Ohioans are in the midst of an oil and gas "boom." According to a 2012 study by the Ohio Shale Coalition, the total economic output from the Utica Shale development is expected to rise to \$9.6 billion by 2014 along with a creation of over 65,000

jobs.¹ With this economic opportunity comes a potential price, however, in the form of the abrogation of Ohio's local regulatory authority under the Home Rule provision. This case clearly involves a substantial constitutional question invoking the jurisdiction of this court.

The implication of the decision of the court of appeals in this case is that the state can issue a permit to drill anywhere, including residential areas, while those in the best position to determine appropriate land use in their communities, the local governments, are helpless to do anything about it. Pick up the local section in any newspaper in Eastern Ohio and inevitably there is a story describing the discontent and frustration of city officials whose hands are tied trying to respond to the outrage of their constituents over the prospect (or result) of oil and gas drilling in their neighborhoods. The following are just a few examples within the past month:

1. The City of Stow's Public Improvements Committee proposed legislation that would request the state return control of the placement of oil and gas wells to municipalities, in response to a drilling company horizontally fracturing and activating a natural gas well on the property of the Church of New Hope:

"If local residents don't want a well in their suburban neighborhood, they should have a say in the matter. That's all we are asking. Let the residents, through their local representatives, have some control over this."

Brian Reali, City of Stow Law Director.²

2. A Youngstown activist group delivered a petition signed by 3000 residents seeking a "Community Bill of Rights" to give local lawmakers say over how and where gas and oil companies drill within Youngstown city limits. Residents believe the drilling process has been rushed because of an economic boom, which if left unchecked, may threaten the environment and human health. The solution is local control.

Said one resident:

¹ Joe Geisy, *businessjournaldaily.com*, *Ohio Shale Coalition Study: 65,380 New Jobs*, <http://businessjournaldaily.com/economic-development/ohio-shale-coalition-study-65680-new-jobs-2014-2012-2-29> (last visited March 20, 2013).

² Heather Beyer, *ohio.com*, *Stow Working to Regain Control of Oil, Gas Wells*, <http://www.ohio.com/news/local/stow-working-to-regain-control-of-oil-gas-wells--1.376810> (last visited March 15, 2013).

“The cities can’t do anything right now because the ODNR - they have the final say so. We’re trying to put it back to the power of the people, the power back of local government.”³

3. State Representative Robert F. Hagan (D-Youngstown) introduced two bills in February, 2013 that aim to protect the public from potential negative consequences of fracking, prompted in part by the recent revelation that hundreds of gallons of brine and oil were illegally disposed of near Youngstown. House Bill 41 will provide local governments and municipalities the authority to enact and enforce health and safety standards for oil and gas drilling and exploration. Currently, the Ohio Department of Natural Resources has the sole and exclusive authority in overseeing these standards.

“We learned this morning that over 250,000 gallons of brine and oil have been dumped into the Mahoning River, and yet it has been twelve days since the incident and the public still has no knowledge of what chemicals were released into our water,” Rep. Hagan said. “The public, especially the emergency responders and cleanup crews, have a right to know what sort of hazardous materials with which we are dealing.”⁴

Also at issue for these local governments in their land use planning and zoning are the nuisances created by oil and natural gas drilling in the community. Zoning regulations are borne from the interest that cities have in preventing nuisances, especially with respect to industrial operations in residential neighborhoods. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S. Ct. 114, 118 (1926). The term “nuisance” designates a distinct tort, consisting of anything wrongfully done or permitted that unreasonably interferes with another in the enjoyment of his property. *Taylor v. Cincinnati*, 143 Ohio St. 426, 436, 55 N.E.2d 724. The right of quiet enjoyment includes the right to peaceably enjoy the use of your property and to be free from loud noises caused by large tractor-trailers and drilling rigs, offensive odors, visual

³ Andrew Donofrio, thenewsoutlet.org, *Protesters Push for Local Control over Fracking; Apologize to Mahoning River*, <http://thenewsoutlet.org/2013/02/protesters-push-for-local-control-over-fracking-apologize-to-mahoning-river> (last visited March 15, 2013).

⁴ Robert F. Hagan press, [www.ohiohouse.gov](http://ohiohouse.gov), *Too Many Questions Remain in D&L Criminal Waste Dumping Scheme*, <http://ohiohouse.gov/robert-f-hagan/press/too-many-questions-remain-in-dl-criminal-waste-dumping-scheme> (last visited March 15, 2013).

blight, or the diminution of your property values from suddenly living in an industrial zone.⁵

Homeowners are finding out the hard way that wells are destroying the beauty, safety and economic value of their neighborhoods.⁶

This trend of discontent is growing not only across Ohio towns and cities, but in other states with expanding oil and gas operations and a similar local “Home Rule” form of government under their state constitutions. In Colorado, for instance, residents are pressuring their local governments for protection from industrial light, noise, vibration and pollution within city limits while Colorado state officials insist they alone have the right to regulate how and where the industry does its drilling (under Colorado’s comprehensive Oil and Gas Conservation Commission rules, similar to Ohio Chapter 1509).⁷ Closer to home, New York and Pennsylvania have also had recent landmark lower court decisions in the battle for regulatory control between municipal governments and state governments in oil and gas exploration.

In New York, like Ohio, there is a “Home Rule” provision and a New York statute stating that it supersedes local ordinances to control drilling operations. Still, in February 2012, the New York Supreme Court upheld a ban of oil and gas drilling activities within the borders of the town of Dryden. The court found that the statute does not expressly preempt municipal land use decisions and zoning laws, stating:

“A clear legislative intent to preempt local zoning authority is not apparent from the fact that the OGSML (state statute) does not specifically provide a mechanism for consideration of local concerns. Rather, by construing the OGSML in accordance with its plain meaning – i.e., as superseding only local regulations of operations – it may be

⁵ Estimate of homes near gas wells not financeable: “No existing dwelling can be located within 300 feet of the boundary of an active or planned dwelling site.” Jerome Nagy, Senior Regulatory Policy Representative, National Association of Realtors. See U.S. Department of Housing and Urban Development Handbook at <http://portal.hud.gov/hudportal>.

⁶ David S. Glasier, *news-herald.com*, *Bill Sparks Controversy, Residents, officials say Ohio Drilling Law has Caused Problems*, <http://www.news-herald.com/articles/2008/10/27/news/doc> (Last viewed March 18, 2013).

⁷ Bruce Finley, *DenverPost.com*, *Oil and Gas Drilling Fuels Debate Over Self-Government, State Interest*, <http://cpf.cleanprint.net> (last visited March 15, 2013).

harmonized with those statutes that grant the zoning power to local municipalities. Under this construction, local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC (the state regulatory agency) regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by law.” (Emphasis added).

Anschutz Exploration Corporation v. Town of Dryden and Town of Dryden State Board, 2012 NY SlipOp 22037 (Decided February 21, 2012). Despite several courts upholding local drilling ordinances, New York’s highest court has not addressed the issue given the hydraulic fracturing moratorium issued by the governor in December 2010.

In *Robinson Township v. Commonwealth of Pennsylvania*, Case No. 284 (Decided July 26, 2012), the Commonwealth Court of Pennsylvania found provisions of Act 13 (the state’s sweeping oil and gas regulatory statute) that attempted to preempt local zoning and environmental laws unconstitutional. One provision specifically provided that local zoning ordinances must authorize oil and gas operations as a permitted use in all zoning districts, including residential districts.⁸ The court majority held that such a provision violated substantive due process under the state constitution and Fourteenth Amendment to the U.S. Constitution because it forced municipalities to enact zoning ordinances that permit oil and gas regulations in all zoning districts, including residential districts. *Id.*

Although obviously not controlling, these cases are instructive on how other lower state courts have handled near-identical cases such as this, and underscores how the instant case presents not only a substantial constitutional question, but also a case of great public interest and general interest in Ohio, as well as other jurisdictions. Amicus curiae respectfully requests this court to accept jurisdiction over this case to review the case on its merits, pursuant to S.Ct.Prac.R. 5.02(A)(1),(3).

⁸ 58 Pa. Cons. Stat. 3304(b)(5)

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The People's Oil and Gas Collaborative – Ohio (POGCO) is a grassroots movement focused solely on oil and gas issues in Ohio. Since its founding in 2007, POGCO, formerly known as Northeast Ohio Gas Accountability Project or NEOGAP, has united and represented citizens who are directly affected by the impacts of oil and gas development in Ohio and sought to work in a nonpartisan effort for reform at local, state and federal levels. POGCO utilizes public education, legislative initiatives and community partnerships in its mission to provide surface owners, oil and gas employees and citizens living near operations fair and equal treatment under the law with regard to health, safety and property rights.

<http://ohiogasdrilling.com/>.

POGCO offers an *amicus* memorandum in this case because it is in the unique position to provide the Court with the insight and perspective from the very people at the heart of this matter: Ohio citizens. POGCO has an interest in the outcome of this case because it encompasses and is the voice of the residents of Ohio's cities grappling with the negative effects of oil and natural gas drilling in their neighborhoods and communities. POGCO's members and volunteers have personally experienced the effects from the lack of local control in their cities, as well as the threat of mandatory pooling under the statute. The group's founder and director, Kari Matsko, has been instrumental in bringing forth amendments to R.C. Chapter 1509: She co-wrote and drafted SB 196 (introduced by Senator Grendall) and, while SB 165 in 2010 was enacted instead, several of POGCO's recommendations were incorporated as a result. The Ohio Department of Natural Resources appointed Ms. Matsko to the rule-making work group, where some of the rules created were improvements to amend SB 165, such as requirements for drilling

units to be “compact” and composed of “contiguous” land (R.C. 1509.24) and noise mitigation for the purposes of the drilling and operations of a well (R.C. 1509.03(6)).

POGCO recognizes the importance of this case to preserve local regulatory authority under Ohio’s Home Rule provision, and respectfully offers its perspective to aid the Court in the decision whether or not to accept jurisdiction to decide the issue on the merits.

STATEMENT OF THE CASE AND FACTS

In February 2011, Appellee Beck Energy applied for and obtained a well permit from the Ohio Department of Natural Resources (ODNR), Division of Mineral Resource Management to drill a gas well on property within the City of Munroe Falls. Shortly thereafter the city and its Law Director, Appellant Jack Morrison, Jr. (“the city”) issued a Stop Work Order alleging noncompliance with several city ordinances governing its activity. The local ordinances encompassed street and right-of-way ordinances, zoning ordinances (including a requirement to obtain a permit), and ordinances specific to oil and gas drilling within the city. The city also applied for a preliminary and permanent injunction from the trial court.

In May 2011, the trial court granted the injunction and ordered Beck Energy to comply with all of the city ordinances at issue. The trial court found that, despite the encompassing language contained in R.C. 1509.02, local subdivisions retain an interest in regulating oil and gas production in their communities.

Beck Energy appealed to the Ninth District Court of Appeals, and in February 2013 the court of appeals affirmed the trial court regarding the street and right-of-way ordinances (provided they are not enforced in a discriminatory manner), but reversed the trial court regarding the remaining ordinances. The court of appeals held that the remaining zoning and drilling ordinances were in conflict with the R.C. 1509.02 and therefore preempted by state law.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws.

Proposition of Law No. 2: Municipal ordinances seeking to protect residents by requiring holders of a permit issued pursuant to R.C. 1509.02 to provide information to the municipality are not in conflict with R.C. 1509.02.

Land use regulations were first addressed by the US Supreme Court in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926) after the onset of the industrial revolution. The Court noted that “with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands.” *Id.* at 386. The Court further upheld the extension of municipal police power to allow for restrictive zoning practices for the prevention of injury to people and property. *Id.* at 387. Munroe Falls’ zoning and drilling ordinances were a valid exercise of local police power under the “Home Rule” Amendment at Section 3, Article XVIII of the Ohio Constitution. *Garcia v. Siffrin Residential Ass’n*, 63 Ohio St.2d 259, 270, 407 N.E. 1369, 1377 (1980).

The court of appeals erroneously held that R.C. 1509.02 was a “general law” and that Munroe Falls’ zoning and drilling ordinances were in conflict with R.C. 1509.02 and therefore preempted by state law. To be a general law, with which local ordinances may not conflict, a statute must 1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally. *Canton v. State*, 95 Ohio St.3d 149, 766 N.E.2d 963 (2002).

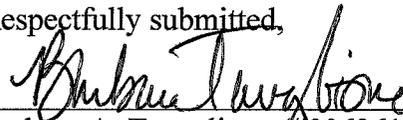
The court of appeals also erred when it found that the Munroe Falls' ordinances requiring the submission of information to the municipality to allow the municipality to protect the interests of its residents, is in conflict with R.C. 1509.02, where R.C. 1509.02 does not contain an express statement preempting local zoning. *Fondessy Enters. Inc. v. City of Oregon*, 23 Ohio St.3d 213, 492 N.E.2d 797 (1986).

The guidance of this court is needed to clarify these important issues on appeal.

CONCLUSION

For the reasons discussed above, this case involves a substantial constitutional question and issues of important public and general interest. *Amicus curiae* POGCO requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Barbara A. Tavaglione (#0063617)

9191 Paulding Street NW

Massillon, Ohio 44646

Phone: 330-854-0052

bartavaglione@gmail.com

COUNSEL FOR *AMICUS CURIAE*

PEOPLE'S OIL AND GAS

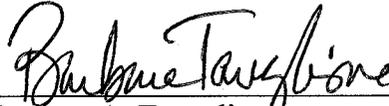
COLLABORATIVE – OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following persons, by regular U.S. Mail on this 22 day of March, 2013:

Thomas R. Houlihan
AMER CUNNINGHAM CO., L.P.A.
159 S. Main Street, Suite 1100
Akron, Ohio 44308-1322

John R. Keller
Robert J. Krummen
VORYS SATER SEYMOUR & PEAS
525 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216



Barbara A. Tavaglione
COUNSEL FOR *AMICUS CURIAE*
PEOPLE'S OIL AND GAS COLLABORATIVE -
OHIO