

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE of Ohio ex rel. JACK MORRISON JR.,  
LAW DIRECTOR, CITY OF MUNROE FALLS  
OHIO, et al.

Case No. 2013-0465

Plaintiffs-Appellees,

On appeal from the Summit County  
Court of Appeals, Ninth  
Appellate District

BECK ENERGY CORPORATION, et al.,

Defendants-Appellees

Court of Appeals  
Case No. 25953

BRIEF OF AMICUS CURIAE OHIO LOCAL BUSINESSES

IN SUPPORT OF PLAINTIFF-APPELLANTS STATE OF OHIO ex rel. JACK  
MORRISON, JR., LAW DIRECTOR, CITY OF MUNROE FALLS, OHIO et al.

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## INTRODUCTION AND IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to S.Ct. Prac. R. 6.6, *Amici* Ohio Local Businesses<sup>1</sup> (collectively “*amici curiae*” or “*amici*”), respectfully submit this brief in support of Plaintiffs- Appellants, City of Munroe Falls. *Amici* are a diverse group of locally owned and operated independent businesses, each operating successfully in municipalities in Ohio that are or may endure high volume horizontal drilling and hydraulic fracturing. Each *Amicus* engages in lawful business pursuits and operations, providing goods and services within the State of Ohio, and supporting local, regional, and statewide economies. Together, *Amici* represent vital local industries including agriculture, retail food service, landscaping services, electric services, legal services, real estate, and tourism. *Amici* share a common interest in assuring that local government home rule, provided in the Ohio Constitution, in administering land use controls is preserved to protect local economies and the quality of life for their employees, customers, and clients. They all share a stake in upholding a municipality’s ability to protect the local economic base and sustainable businesses through the exercise of constitutionally-protected zoning powers over potentially detrimental land uses. These home rule powers have enabled municipalities to cultivate, fund, and emphasize certain industries in their respective communities over extended periods of time, in some cases decades. As a result, these industries have become the fabric of their respective community’s character, sustaining the local economy, and in some instances distinguishing a region as a recognizable source of a particular service, product, or pursuit.

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<sup>1</sup> *Amicus Curie Ohio Local Businesses: Athens Electric, Cherry Orchards, Design Council, Donkey Coffee, Enviroscapes Landscaping Design, Fox Natural Builders, The Going Green Store, Green Edge Organic Gardens, Haulin’ Hoof, Herbal Sage, High Bottom Farm, Hyacinth Bean Florist, Laurel Valley Creamery, Mustard Seed Market, Shew’s Orchard, Snowville Creamery, Sticky Pete’s Maple Syrup, Sunpower, Inc., Village Bakery, Wide Angle Ranch, , Zen Small Business Solutions, LLC., Kenneth Messinger-Rapport, Attorney LLC., Patricia Walker, Attorney at Law, Retired business owners Donald Baker & Pam Miller(Gramercy Gallery), Louie Chodkiewz-Real Estate Broker, Shirley Sinn-Oil & Gas Consulting .*

*Amici* limit its brief to support of Plaintiff-Appellant's **PROPOSITION OF LAW ONE:** R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws. As small independent local businesses that rely on local zoning authority to protect their businesses, their workforce, and their customer base, *Amici* business interests are directly affected by the Ninth District Court of Appeals ruling that certain Munroe Falls's local ordinances "are in direct conflict with R.C. 1509.02 and therefore preempted." *State ex. rel Morrison v. Beck Energy Corp.*, 2013-Ohio356, 989 N.E.2d 85 (Ohio Ct. App. 2013).

### STATEMENT OF FACTS

*Amici* incorporates by reference the Statement of Facts set forth in the merit brief of Plaintiff-Appellant, City of Munroe Falls.

### ARGUMENT

#### I. **Ohio's Local Jurisdictions have the Right to Exercise Zoning Authority to Protect Local Businesses and Local Community Values Against Industrial Oil and Gas Production Operations**

Under Article 3, Section 8 of the Ohio Constitution, municipalities "have 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." Ohio Const. art. XVIII, § 3. Known as "home rule," this authority "vests autonomy in local governments, allowing them in varying degrees, to frame and adopt their own charters" Jarit C. Polley, *Uncertainty for the Energy Industry: A Fractured Look at Home Rule*, 34 Energy L.J 262 (2013). The Ohio Supreme Court has held that "Ohio law has long recognized that the enactment of zoning laws by a municipality is an exercise of its police power as described under Section 3, Article XVIII of the Ohio Constitution," and vital for the preservation of local community values and character. *Rispo Realty & Dev. Co. v. City of Parma*, 55 Ohio St. 3d 101,

103, 564 N.E.2d 425, 427 (1990); *Jaylin Investment, Inc. v. Moreland Hills*, 107 Ohio St. 3d 339, 839 N.E.2d 903, ¶ 10 (2006) (holding that “the creation of zoning ordinances by municipalities is a valid legislative function of their police power”).

This case presents a municipality’s exercise of its home rule authority through properly enacted zoning ordinances, to protect its residents, businesses, and local character against a perceived state law preemption of this authority. Yet, this Court has warned that should tread lightly, as “[a] statute which attempts to limit the ability of political subdivisions to zone their communities as they see fit, strikes at the heart of municipal home rule.” *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, 970 (2002).

This Court has articulated a three part test for determining if home rule is preempted: “A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.” *See Id.* As Plaintiff-Appellant has shown in its Merit Brief in this proceeding, Ohio’s Oil and Gas Laws fail this test as it concerns possible preemption of municipal zoning. *See* Plaintiff-Appellant Merit Brief at 12-20. Yet, preemption is not merely legally and facially deficient under the facts of this case, but poses great risk to local businesses and local communities throughout much of Ohio.

**a. Today’s Oil and Natural Gas development is an intensive industrial activity that poses potential and significant risks to the natural and human resources of a locality that small local businesses rely**

This case cannot be viewed in a vacuum of one drilling operation in one small town, but in the greater context of the new world of oil and natural gas drilling in Ohio. Drilling is not new to Ohio; nor, for that matter, is hydraulic fracturing. What is new is the sheer industrial scale

of these operations. High-volume, horizontal hydraulic fracturing now makes it possible to reach natural gas reserves that underlie much of the state of Ohio. This massive drilling requires more land to be cleared, more water to be used, and more chemicals than conventional oil and gas drilling. The decision of this Court will apply to *all* types of drilling permitted under Chapter 1509; from conventional shallow vertical wells to the new unconventional and industrial scale deep shale horizontal wells using high-volume hydraulic fracturing.

This rush to unconventional gas drilling is enormous. Currently, just 27 months after the first horizontal shale well was drilled in Ohio's Utica formation, there have already been over 800 permits approved by the Department of Natural Resources.<sup>2</sup> Such a rush for these industrial scale operations poses risks to Ohio's communities and local natural resources. Many of the small local business, like *Amici*, in Ohio's shale corridor utilize and rely upon local natural resources to operate and maintain their businesses – the same natural resources that are either consumed by the influx of the oil and gas industry, or are otherwise compromised by this industrial activity. Thus, *Amici* are concerned about the potential risks to the air, land, and water quality posed by industrial scale drilling and fracking.

The risks that concern *Amici* are not speculative, but inherent in the industrial scale of these operations. Chesapeake Energy CEO, Aubrey McClendon, in an April 2011 interview, acknowledged that: "There are issues with drilling wells . . . [w]e can tear up a road, we can be noisy, we can create dust, we can hurt somebody, and sometimes there is a lack of transparency about operations." Barnett Goldsmith, *McClendon to business journalists: 'Get the Real Story'*,

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<sup>2</sup> According to ODNR's Official Website (<http://oilandgas.ohiodnr.gov/shale#SHALE>) there have been 870 permits approved for Utica Shale as of August 31, 2013.

Houston Business Journal, (2011). The types of impacts to a local community admitted to by the head of what is today one of Ohio's biggest shale players are the exact ills that zoning ordinances are designed to protect against.

However, the risks identified by Mr. McClendon, represent only the beginning of a myriad of nuisance, noxious, and negative effects that can injure local community character if zoning is not maintained as a way of protection. Over the past few years the state of New York has been conducting a statewide Supplemental Generic Environmental Impact Statement (SGEIS), to prepare that state for the onslaught of unconventional drilling operations. N.Y. State Dep't of Env'tl. Conservation (DEC), *Revised Draft Supplemental Generic Environmental Impact Statement* (2011). The SGEIS so far has identified five main impacts: water resource impacts; ecosystems and wildlife; air pollution; visual noise and community character; and transportation. *Id.* While each of these potential risks pose threats to local independent businesses such as *Amici*, *Amici* will limit its brief to a discussion of the risks from (i) air pollution and (ii) water resource impacts.

(i) Hazardous air emissions are released from a variety of sources throughout the fracking process. *See* Theo Colborn, Kim Schultz, Lucille Herrick, and Carol Kwiatkowski, "An exploratory study of air quality near natural gas operations." *Hum Ecol Risk Assess.* (2012). These include hydrogen sulfide, volatile organic compounds, sulfur dioxide, BTEX (benzene, toluene, ethylbenzene and xylene), as well as methane and natural gas. *See* DSGEIS at 6-102 to 6-107, 6-169 to 171. Known public health effects from these air emissions include reproductive, respiratory, and blood disorders, as well as central nervous system and neurological effects. *See*

Natural Resources Defense Council, *Gasping for Air: Toxic Pollutants Continue to Make Millions Sick and Shorten Lives*, NRDC Health Facts, NRDC Website

<http://www.nrdc.org/health/files/airpollutionhealthimpacts.pdf>.

A three-year monitoring program of Garfield County, Colorado revealed that air pollution caused by hydraulic fracturing is connected with acute and chronic illnesses. Harmful chemicals, including known carcinogen benzene, were found in the fumes. Residents living within half a mile of a hydraulic fracturing site were found to be at greater risk than residents living further from the sites. Lisa M. McKenzie, et al. *Human health risk assessment of air emissions from development of unconventional natural gas resources*. *Science of the Total Environment* (2012).<sup>3</sup>

One group of local governments in New York, the Tompkins County Council of Governments, in order to assist its communities in the preparation for the onslaught of industrial natural gas development, conducted its own impact assessment. Tompkins County Council of Governments. *Community Impact Assessment: High Volume Hydraulic Fracturing*. Rhinebeck: New York (2011). This assessment, designed to see how local government zoning can coexist with natural gas development, showed “air quality impacts from [hydrofracking] include emissions from a variety of stationary and mobile sources.” *Id.* at 57. Air pollution, it was found comes from diesel engines from trucks and heavy equipment, exhaust from drill rigs, venting and flaring of natural gas. *Id.* Further, the heavy truck traffic not only brings increased diesel pollution, but a potential increase in accidents and road damage. *Id.* at 70-1. Since these industrial operations can take anywhere from 900 to 1,300 truckloads of materials including drilling rig equipment, water, chemicals, sand, and waste fluids, local communities will

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<sup>3</sup> Available at: <http://www.ncbi.nlm.nih.gov/pubmed/22444058>.

experience additional risks to public safety and infrastructure due to significant increases in heavy truck traffic.

(ii) Water impacts from hydrofracturing the Utica shale that covers much of Eastern Ohio stand to hit local communities, and their local businesses, in three separate ways. First, these large operations can strain local water supplies. Each production operation requires the use of approximately 5.6 million gallons of water for each “frack” and a single well could be fracked multiple times. David J. Lampe, *Environmental Impacts of Horizontal Gas Well Drilling and Hydrological Fracturing*. *Journal of Appalachian Studies* 18, no. 1/2: 34-38. An average family of four in Ohio uses about 400 gallons of water per day. U.S. Environmental Protection Agency, *Water Sense, Indoor Water Use in the United States*, USEPA Website, <http://www.epa.gov/WaterSense/pubs/indoor.html> (last accessed September 3, 2013). By comparison, the water used in one “frack” would supply approximately 50 households with water for an entire year. The withdrawal of such large amounts of water from local resources already is threatening small streams and tributaries in Ohio.

Secondly, contamination of *underground* sources of drinking water may occur due to faulty well construction or through the presence of naturally-occurring underground fissures and faults or previously unregistered abandoned mines or wells. A recent peer-reviewed study from Duke University tested 68 privately owned wells in the Marcellus shale region in Pennsylvania for evidence of gas and chemical contamination. Stephen G. Osborn, Avner Vengosh, Nathaniel R. Warner, and Robert B. Jackson, *Methane contamination of drinking water accompanying gas-well drilling and hydraulic fracturing*. *Proceedings of the National Academy of Science Early*

Edition.1-5. (2011).<sup>4</sup> Although some methane was present in nearly all wells, results showed that wells near fracking sites had a 17% higher concentration of this gas. *Id.* A further study of water samples from 426 wells in Pennsylvania, it's shown that brine and other chemicals typically thought to exist deep underground and below the water line do migrate up to shallow water. This finding strongly suggests that natural, and potentially unknown, hydraulic pathways exist between deep formation and shallow aquifers. See Nathaniel R. Warner, et. al., *Geochemical evidence for possible natural migration of Marcellus Formation brine to shallow aquifers in Pennsylvania.* PNAS Early Edition (2012).<sup>5</sup>

Finally, contamination of surface waters may occur from surface level spills accidents, or dumping; sedimentation from runoff of new well pads and roads; and through inappropriate placement of new pipeline infrastructure. See, e.g., Pa. Dep't of Env'tl. Protection, "DEP Investigating Lycoming County Fracking Fluid Spill at XTO Energy Marcellus Well," News Release, November 22, 2010.<sup>6</sup> Local businesses, just like local residents need a secure source of water. If that source is contaminated or compromised, especially for a food based business, it could mean lights out for some small businesses.

Local businesses require not only natural resources, but human resources as well. A viable and dependable work force is needed to keep local businesses up and running. Sustaining both local customer base as well as attracting customers from around the state, region, and beyond is a constant concern for *Amici* and similar businesses. The risks to human health from

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<sup>4</sup> Available at: <http://www.pnas.org/content/108/20/8172.long>.

<sup>5</sup> Available at <http://www.pnas.org/content/109/30/11961>

<sup>6</sup> Available at: (<http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=15315&typeid=1>).

any industrial operation, if permitted to usurp local zoning protections of residential areas, can have devastating impacts to the customers and workforce of businesses like *Amici*.

**b. Ohio's local jurisdictions utilize zoning and land use controls to preserve resources and community values**

The risks from industrial oil and gas drilling are many, but not all that different from other heavy industrial land uses. Industrial land uses that create heavy traffic, air pollution, and other nuisances, are properly segregated from other land uses based on a localities zoning plan. As has been recognized for nearly a century, the segregation of residential, business and industrial land uses make it easier to provide for safety precautions "suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 394, 47 S.Ct. 114, 120, 1926 WL 21336, 71 L.Ed. 303 (1926).

As the U.S. Supreme Court aptly, and famously, stated, a "nuisance may be a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Id.* at 388. Therefore, even if oil and gas development did not carry with it the above referenced environmental risks and public nuisances, local governments have the right to deem it the wrong thing in a residential or commercial business environment. Land uses that pass state minimum technical and safety standards still may be improper for local residential or commercial business zone, and that local community has the "[p]ower to forbid erection of particular building or for particular use is to be determined, not by abstract consideration of building or use, but by consideration in connection with circumstances and locality." *Id.* However, as this Court has discerned, local governments may balance items such as "the control of traffic, volume of traffic, burden of traffic, effect upon valuation of property, . .

., land use consistent with the general welfare and development of the community as a whole” when utilizing its zoning authority. *Willott v. Vill. of Beachwood*, 175 Ohio St. 557, 560, 197 N.E.2d 201 (1964). These types of issues and concerns of a local character do not necessarily come from the state’s minimum standards under Chapter 1509.

Yet, in lieu of locally adopted land use controls that most other industries have to follow and abide, Defendant-Appellee looks to force upon the City of Munroe Falls, and similarly situated local jurisdictions, non-conforming industrial land uses in any and all zoning districts. Defendant-Appellee looks to write into the law a “right to drill” and carving out special treatment for one particular industry, and replace the traditional local control of land use and zoning into the hands of the state. Further, such a ruling would put the State of Ohio in a de facto position of picking local economic winners and losers, and *Amici* fear they will be on the losing end.

Zoning, as the Supreme Court has outlined, is “not confined to elimination of filth, stench and unhealthy places;” local governments have the prerogative to “lay out zones where family values, youth values and blessings of quiet seclusion and clean air make the area a sanctuary for people.” *Village of Belle Terre v. Boraas* 416 U.S. 1, 4-5, 94 S.Ct. 1536, 1539-40 (1974). *Amici* businesses, themselves, are subject to local zoning, and have thrived because of the protections zoning provides to *everyone*. *Amici* recommend that the Court overrule the lower court’s finding that zoning this industry is preempted by the state’s Oil & Gas Drilling Law.

**c. Ohio’s Oil and Gas Law is not designed to address local concerns with industrial oil and gas production**

Adherence to the lower court’s ruling that Chapter 1509 preempts municipal zoning will not merely allow a “pig in the parlor;” it would allow noxious land use in any zone of any

municipality that happens to sit atop certain geologic formations. Not only that, it would allow such *de facto* de-zoning of much of Ohio without providing for mitigation for long-term community impact, including local economic development concerns that do not include oil and natural gas production.

Under the theory that “the regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation,” the Ohio General Assembly, codified in R.C. §1509.02, purports to give the Ohio Department of Natural Resources’ Division of Oil and Gas Resources Management “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state.” R.C. §1509.02. The General Assembly, through a number of amendments to Chapter 1509 since the state Department of Natural Resources was granted “sole and exclusive authority” in 2004, has provided the Division of Oil and Gas Resources Management a framework to address technical and safety aspects of oil and gas drilling – addressing issues such as proper well casing (1509.17), pooling and unit size to protect correlative rights (1509.25-1509.29), and enforcement of those standards (1509.04). However, never in those iterations has the General Assembly never explicitly limited or usurped municipal zoning over this industrial activity. Such explicit limitation is evidenced in current law where “[n]o political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or condition for the construction or operation of a hazardous waste facility” permitted under Chapter 3734. R.C. §3734.05(E). *See also* R.C. §3772.26 (concerning zoning of certain casino operations).

While the Department of Natural Resources has the expertise to determine the technical aspects of drilling, it is the local communities who have the expertise in determining what is appropriate to sustain the local economy, “as these local authorities are presumed to be familiar

with local conditions and to know the needs of the community.” *Downing v. Cook*, 69 Ohio St.2d 149, 151, 431 N.E.2d 995, 997 (1982), *Allion v. Toledo*, 99 Ohio St. 416, 124 N.E. 237, paragraph one of the syllabus (1919). To protect the lives and livelihoods of Ohioans from the environmental and human health risks associated with large scale drilling and production, there is utility and necessity to have both strong and consistent statewide technical and safety standards for the operations *and* local zoning power to preserve local resources, local economies, and local values.

## **II. Protection of Home Rule and Local Zoning and Land Use Control Authority Provides Local Governments the Authority to Preserve the Sustainable Local Economy**

Many of the communities represented by the *Amici* have experienced decades of intense industrial activity, and heavy mineral extraction that has come and gone. Nevertheless, zoning authority and home rule powers have permitted these communities to develop a local economy, and preserve certain types of businesses and industries that are important and recognized parts of the community’s identity. Today’s increase of industrial scale drilling generates potential for industrial scale impacts which can permanently alter the character of a local community, its residents, and especially its businesses.

A town that has invested in its local character and its local businesses in order to sustain a vibrant local economy should retain the right to decide where, within the bounds of its zoning law, heavy industrial land uses occur. If a municipality chooses to roll the dice with oil and gas drilling in an otherwise non-conforming zoning district, that should be their prerogative, just as the case of a municipality who chooses to zone oil and gas production. Home rule authority, embodied by local zoning and land uses controls allows local jurisdictions to balance economic

interests in a way that best suits its location, resource, and growth plan. The state's permitting program under Chapter 1509 does not provide for such balancing of economic interests, and should not. What is necessary to sustain a local economy is and has been the purview of municipalities, and municipalities have embodied this privilege through thoughtful, transparent, and comprehensive zoning and land use planning controls.

A new industry's presence in a locality and its effect on the economic base is an issue that can only, and should only, be addressed by the local community. Local businesses that have located in municipalities now feeling the influx of a new type of drilling industry have heightened concerns over their municipality's ability to preserve home rule authority in administering land use controls proper for that locale and the economic development plan of the area.

**a. Agribusiness depends on zoning to keep industrial impacts to the environment and rural character from injuring its business**

According to the Ohio Farm Bureau Federation, food and agriculture is Ohio's top industry, contributing \$93.8 billion to Ohio's economy with actual farm gate receipts of \$7.2 billion. *Ohio Farm Bureau*. "Education and Reference: FAQs", OFBF Website.<sup>7</sup> There are 75,700 farms in the state on 14.3 million acres of land in farms with the average farm size being 188 acres. *Id.* Despite the recent surge of oil and natural gas development in the area, agriculture is a mainstay of the economy in any parts of the 32 counties in Appalachian Ohio that make up a bulk of the state's shale gas corridor. Holmes County ranks second in the state in oats and hay production as well as in cattle and dairy farming. Ohio University Voinovich School for Leadership and Public

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<sup>7</sup> Available at: <http://ofbf.org/education-and-reference/faq/>

Affairs, "Economic History of Appalachian Ohio", Appalachian Ohio Website.<sup>8</sup> Holmes County also makes Swiss cheese products that are popular throughout the Midwest. *Id.* In Harrison County, traditionally known for raising sheep, the predominant cash crops are oats, hay, corn, soybeans, and wheat with winery operations also getting under way. *Id.* In 2000, the agricultural industry in Highland County generated over \$42 million in sales of soybeans, corn, tobacco, beef, and dairy products. *Id.*

A recent study of twenty-four farms that have been impacted by drilling, particularly in terms of cattle illness, found a clear connection between these deaths and industrial natural gas development. Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human And Animal Health*, in 22 *New Solutions* 51, 72 (2012).<sup>9</sup> Generally exposure in the chosen cases occurred through well or stream contamination, either due to spills or known reasons. In one case a farmer had two groups of cattle that were kept in different locations. *See Id.* One group of cattle was exposed to fracturing fluid when wastewater was dumped into the creek that was being used a water source. Of the sixty exposed, twenty-one died while sixteen did not produce calves the next spring. Of the cows that were not exposed there were no fatalities and only one failed to calve. The study also records incidents of domestic animals licking wastewater off of roads or finding access to waste water pits and drinking the fluid, with these animals dying within days. Finally, health impacts on humans were recorded in the same places as they were seen in animals. These impacts included burning eyes and trouble breathing. *See Id.*

Such threats to animal livestock, coupled by negative impacts to environmental integrity from large scale drilling, have unique concern for organic and natural farming agri-businesses

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<sup>8</sup> Available at: [http://www.firstohio.com/Economic/ED\\_history.aspx](http://www.firstohio.com/Economic/ED_history.aspx).

<sup>9</sup> The report can be accessed at [http://www.psehealthyenergy.org/Impacts\\_of\\_Gas\\_Drilling\\_on\\_Human\\_and\\_Animal\\_Health](http://www.psehealthyenergy.org/Impacts_of_Gas_Drilling_on_Human_and_Animal_Health)

such as many of the *Amici*. One of the country's fastest growing sectors of agribusiness is natural and organic farming. Organic farming had growth in 2010 of 7.7 percent over the previous year, outpacing the meager 0.6 percent growth of total food sales. Organic Trade Ass'n, *2011 Organic Industry Survey* 5 (2011).<sup>10</sup> In Ohio, more than 400 farms on nearly 53,000 acres of pasture and cropland are dedicated to organic farming, which is the eleventh highest in the nation. See U.S. Dep't of Agriculture, Economic Research Service, Data Sets, Table 4: Certified organic pasture and cropland (2010).<sup>11</sup> Many of the *Amici* represent Eastern Ohio's share of the organic farming growth, and fear that risks from industrial scale drilling will ruin the future of that industry in the region.

*Amicus* Snowville Creamery has put its home of Pomeroy, Ohio on the map as a sustainable agri-business hub and agri-tourism destination. Since starting the Snowville Creamery in Pomeroy six years ago, dairy industry veteran Warren Taylor has built it into one of the country's best-known sustainable food companies. He employs 40 people full-time and ships dairy products across the Midwest, including cream used in the acclaimed Jeni's Splendid Ice Creams out of Columbus. *Amicus* Snowville relies on unadulterated natural resources to produce its natural and organic dairy products, and its customer base continues to grow because of a trust in the purity of its products. In a recent interview published in Midwest Energy News, Taylor stated that "[m]y business will be destroyed economically if there are any incidences here with contamination of water. We've been told by scores of customers if there was fracking taking

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<sup>10</sup> Overview available at <http://www.ota.com/pics/documents/2011OrganicIndustrySurvey.pdf>. In Pennsylvania alone, there are over 37,000 acres of pasture and cropland dedicated to organics, and more than 350 organic farms. See U.S. Dep't of Agric, Econ. Research Service, *Table 4: Certified organic pasture and cropland, 2008, by State*, Available at <http://www.ers.usda.gov/Data/Organic/>.

<sup>11</sup> Available at <http://www.ers.usda.gov/Data/Organic/> (last visited June 7, 2012).

place anywhere near the facility, they wouldn't buy our milk." Kari Lyderson, *U.S. Chamber's fracking job boom: Behind the numbers*, Midwest Energy News (January 10, 2013).<sup>12</sup>

Mr. Taylor's sentiment might as well be attributed to all organic and sustainable agribusinesses in Eastern Ohio. Local control is an issue that concerns any business owner and especially ones whose sole income is derived from the yields of crops that are planted and irrigated. Amicus High Bottom Farm, a producer of naturally fed, hormone free, antibiotic free, free range hens. Amicus Green Edge Organic Gardens is a family owned organic farm in rural Amesville, Ohio. This agrarian enterprise creates many full-time year round jobs as well as several seasonal and part-time positions, and stays dedicated to producing the highest quality certified organic produce. The 120-acres of rolling hills and fertile bottomland is tended primarily by hand. Water for irrigation comes from a series of spring-fed ponds on the property, and greenhouses and grow-rooms ensure a year-round selection of 100% certified organic produce and seasonal vegetables, micro greens, and specialty mushrooms. Thus, potential risks to water quality used to grow this produce from industrial drilling can compromise Green Edge's organic status, and the trust retail and wholesale customers have for their produce.

*Amici* Laurel Valley Creamery, and its cheese, has been described as the embodiment of "what southern Ohio tastes like." Lisa Wolfe, *An Edible Art: A Q&A with Celeste Nolan of Laurel Valley Creamery*, *Edible Columbus* (April 10, 2013).<sup>13</sup> Celeste Nolan and her husband, Nick, turn milk from their grass-fed cows that wander the hills of the family farm into quality cheese that they sell in markets across central and southern Ohio. In 2001, the Nolans took over the farm that had been in Nick's family since 1947 and, with a little help from their children, they

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<sup>12</sup> Can be accessed at <http://www.midwestenergynews.com/2013/01/10/u-s-chambers-fracking-job-boom-behind-the-numbers/>

<sup>13</sup> <http://ediblecolumbus.com/item/2342-an-edible-art-a-qa-with-celeste-nolan-of-laurel-valley-creamery>

have been growing in the dairy business ever since. This family farm, and local business success story, depends on an uncompromised environment for raising livestock which may be threatened by unfettered industrial oil and gas production.

*Amicus* Shew's Orchard in Stockport offers a host of naturally grown products for retail sale year round. Shew's offers 30 apple varieties, plums, pears, peaches, and cherries, grass fed Angus beef and lamb. The farm store offers maple syrup, sorgum molassas, popcorn, and woven rag rugs from a neighboring Amish-owned farm, as well as its own homespun yarn and homemade jams and jellies. *Amicus* Shrews is also an agri-tourism destination offering a secluded Rustic Vacation Cabin, available for rent year round, situated in a grove of trees overlooking a bass pond on the back side of the farm. An orchard business is based on people wanting to go to "the country" for a healthy, family experience. Shew's proximity to Burr Oak State Park and to Scenic byway, SR 78, brings in about half of its customers. However, industrializing its neighborhood would take away the rural attraction. Fears of the risks of drilling are real for Shew's since water supply comes from its own well and springs and a dependence on passable roads to take products to market brings trepidation to the owners that they may not be able continue to live and do business there.

Horse enthusiast Gloria Scali started *Amicus* Wide-Angle Ranch to offer basic English or Western Horsemanship, Equitation, Gymkana, and horse owners skills to people and children of all ages, and even support a small local 4-H club. The environmental risks posed by industrial scale drilling have a potential to impact the livestock on the farm, and diminish her customer's experience and with it, her business.

**b. Allowing drilling in Residential Zoning Districts Negatively Impacts Local Businesses like *Amici***

Upholding the lower court's decision to allow Ohio's Oil and Gas Drilling laws to preempt local zoning, can have a real impact on property values. A recent study conducted by Duke University and Resources for the Future found that "negative externalities associated with the process [of shale drilling] may adversely affect the prices of nearby homes." Lucija Muehlenbachs, Elisheba Spiller, and Christopher Timmins, *Shale Gas Development and Property Values: Differences across Drinking Water Sources*, NBER Working Paper No. 18390, (September 2012). Based in Washington County, PA, the study found that property with on-site wells lost 13 percent of their value. *Id.*

An Integra Realty Resources study from Texas concluded that properties with houses that were less than 750 feet away from a drill site experienced an average sales price drop of 2-7 percent. Such a loss of property value could have a definite chilling effect on homeowners' willingness to invest in their homes. Earthworks, *How Fracking Decreases Property Value*, EcoWatch (July 22, 2013). This chilling effect potential is a great concern for local businesses that provide such products and services, like some of the *Amici businesses*, as rooftop solar electricity installation and landscape design.

Amicus Enviroscapes Design is a small landscape design and build firm doing business throughout NE Ohio. Owner/Designer Kathryn Hanratty has built the business with the slogan "Designs with Nature in Mind" and specializes in designing landscapes that help to protect water and habitat. Clients of Enviroscapes Design tend to be people committed to a safe and clean environment. As the number of shale drilling sites and injection wells increase in eastern Ohio, some clients have expressed that they feel they may soon be forced to move away from the area

to protect the health and safety of their families. As a small business in a small niche market, the loss of the families which comprise most of its target market could be devastating.

A similar concern about whether residential customers will have the resources or willingness to invest in products for their home in the face of a neighboring industrial drilling operation is felt by *Amicus Athens Electric*. *Amicus Athens Electric* has 20 years of experience in the renewable energy industry, and over 25 years in electrical contracting, and provide expertise in the design and installation of solar PV systems, as well as full service electrical contracting services.

The potential risks and impacts from industrial scale drilling has the potential to have a chilling effect on the market for local exports of food products and personal goods – especially organics and sustainable living products– that rely on consumer expectations as to purity of local natural resources. *Amicus Mustard Seed Market & Café* is the largest locally-owned retailer of natural and organic products in Ohio, and have been part of the Akron community since 1981. *Amicus Mustard Seed*'s specialty is providing high quality natural and organic foods along with education and information on food issues and the environment. It is strict adherence to organic and natural food standards that have made this business as successful as it is today, and have been for over 30 years, and why its customer base has remained vibrant even during economic downturns.

*Amici Village Bakery*, *Donkey Coffee*, and *The Go Green Store*, are known in their respective small Ohio towns as retailers of , If small retail establishments have their business and customer base disrupted, or even potentially forced out, due to drilling permitted within its zoning district not only will the retail establishment suffer, but their producers/suppliers as well.

**c. Tourism for Small Town Ohio requires protected Communities**

Tourism is big business in Ohio. According to the most recent data, visitor spending of \$26.3 billion generated \$40 billion in total business sales in 2011 as tourism dollars flowed through the Ohio economy. More than 443,000 jobs, with associated income of \$10.5 billion, were sustained by visitors to Ohio last year—this represents 8.7% of total employment in Ohio or 1 in every 11.5 jobs in Ohio is sustained by the tourism economy. Tourism Economics, *The Economic Impact of Tourism in Ohio* (2012). Studies show that visitor expenditures in 2007 had an impact of \$180.4 million in Hocking County alone. This resulted in \$25.6 million in county taxes and employed 982 people. Hocking Hills Tourism Association, *About Hocking Hills Tourism Association*, Blog.1800hocking.com (last accessed on September 3, 2013).

While tourists come for the natural beauty and bucolic setting of Eastern Ohio, they often stay for the small towns and bedroom communities, and the independent businesses that are central to the character of these towns. As stated above, *Amici* Snowville and Shrews Orchard not only produce unique food products, not only provide them to local retailers, but also are known destinations in the rising agritourism industry in Ohio. In Ohio, farm income from agritourism and recreational services more than doubled to nearly \$5 million in 2007 from \$2.2 million in 2002, according to the U.S. Department of Agriculture's five-year farm census. Mary Vanac, "Ohio Farming's New Cash Crop: Agritourism," *Insurance Journal*, October 29, 2012.<sup>14</sup> Agritourism grew to 2.1 percent of farm income in 2007 from 1.4 percent in 2002. *Id.*

A study commissioned by the Southern Tier (Upstate New York) Central Regional Planning and Development Board examined the cumulative impact of drilling and specifically, hydraulic fracturing in both the short and long term. Andrew Rumbach, *Natural Gas Drilling in*

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<sup>14</sup> Available at: <http://www.insurancejournal.com/news/midwest/2012/10/29/268355.htm>

*the Marcellus Shale: Potential Impacts on the Tourism Economy of the Southern Tier*, P. 10.<sup>15</sup>

Cumulatively, however, the regional industrialization associated with widespread drilling could do substantial damage to the region's "brand," threatening the long-term growth of tourism. Increased truck traffic, automobile traffic, air pollution, noise pollution, and industrial accidents, decreased availability of hotel/motel rooms, campground spaces, and RV parking, negative visual impacts from multiple drilling rigs in rural view-sheds, storage facilities, gravel pits, and compressor stations, disruptions to wildlife and hunting grounds, fears over lake and stream pollution and many other associated impacts of drilling will change the character of the region from pristine and rural to gritty and industrial. If so, the region's ability to attract tourism may be damaged in the long-term, as the perception (and reality) of the region as an industrial landscape may far outlast the employment and monetary benefits of gas drilling.

### **CONCLUSION**

As business owners in Ohio, *Amici* are forced to comply with myriad laws at the federal, state and local level. *Amici* believe that exempting one industry such as oil and gas from the rules and regulations that bind all other businesses sets up an unfair advantage. There should be a level playing field for all businesses. *Amici Curiae*, thus, respectfully request this court to overrule the decision of the Ninth District Court of Appeals.

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<sup>15</sup> A copy of the report can be found at [http://www.stcplanning.org/usr/Program\\_Areas/Energy/Naturalgas\\_Resources/STC\\_RumbachMarcellusTourismFinal.pdf](http://www.stcplanning.org/usr/Program_Areas/Energy/Naturalgas_Resources/STC_RumbachMarcellusTourismFinal.pdf)

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Respectfully submitted,



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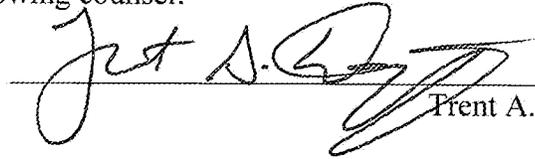
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**CERTIFICATE OF SERVICE**

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