

In the
Supreme Court of Ohio

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

Plaintiffs-Appellants,

v.

BECK ENERGY CORPORATION, et al.,

Defendants-Appellees.

Case No. 2013-0465

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

Court of Appeals Case
No. 25953

MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF APPELLEES BECK ENERGY CORPORATION, et al.

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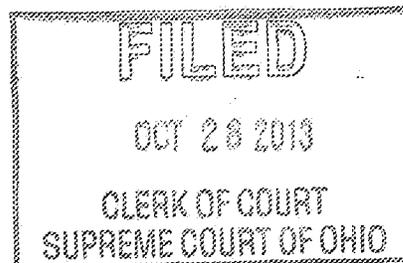


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INTRODUCTION

This case is about whether local municipalities can adopt ordinances interfering with the State's comprehensive permitting regime for oil and gas operations, a regime designed to balance the efficient extraction of Ohio's abundant natural resources with safety, environmental, and aesthetic concerns. State law directs the Ohio Department of Natural Resources to undertake that delicate balance, giving it the "sole and exclusive authority to regulate the permitting" of oil and gas operations. R.C. 1509.02. The State's permitting scheme—enacted under R.C. Chapter 1509 ("Oil and Gas Chapter") and its related rules—"constitute[s] a comprehensive plan with respect to all aspects of" oil and gas production. *Id.* Under this plan, Beck Energy Corporation obtained a state permit authorizing it to drill for oil and natural gas under a mineral-rights lease with a private-property owner who resides in the City of Munroe Falls. Even though the permit grants Beck Energy a right to drill a new well, the City of Munroe Falls sued to enjoin Beck Energy's drilling activities because the City had enacted an oil and gas permitting scheme of its own. A person who violates the City's permitting requirements faces both a \$1,000 fine and up to six months' imprisonment for each day of drilling. The trial court granted the City an injunction, but the court of appeals reversed in relevant part, holding that the Ohio Constitution's Home Rule Amendment does not authorize a municipality to enact a permitting scheme prohibiting someone from engaging in an activity the State has licensed the person to do.

This Court should affirm that decision for two reasons. *First*, the Court's precedents establish that a municipality cannot enforce its own licensing or permitting scheme in an area where the State has established a statewide permitting scheme. A state permit grants its holder the right to engage in a particular activity. An ordinance that forbids a state permit holder from engaging in that activity until he or she acquires a municipal permit covering the same activity conflicts with state law. Accordingly, this Court has struck down several municipal permitting

schemes that purported to regulate areas covered by state permits—using a boat on city waters, selling alcohol, operating a trailer park, and working as a private investigator, to name a few. The Court has reasoned that, if municipalities can impose additional conditions not contemplated by the General Assembly, they will have effective veto power over decisions made at the state level and can thereby subvert state interests. The Home Rule Amendment therefore does not authorize municipalities to require municipal permits in the face of state permitting schemes covering the same area.

These principles resolve this case: Because Beck Energy has a permit from the State allowing it to drill for oil and gas, Munroe Falls cannot forbid the company from drilling without a municipal drilling permit. The state statute expresses the General Assembly’s intent to grant the Ohio Department of Natural Resources the “sole and exclusive authority to regulate the permitting” of oil and gas operations. R.C. 1509.02. No oil and gas permitting schemes by municipalities can stand. The specifics of the City’s permitting scheme also conflict with state law. Even though the State imposes a permitting fee, the City requires an additional fee; even though the State imposes a surety-bond requirement, the City requires an additional bond; and even though the State does not limit how many wells an owner may drill, the City caps the number of wells an owner may simultaneously drill at two. If anything, the concerns in this Court’s home-rule cases against local interference are heightened where, as here, the underlying regime requires the State to carefully weigh—on a statewide level—the total economic benefits from any particular state permit against its potential negative externalities. Given its statewide perspective and its technical expertise, the Ohio Department of Natural Resources is best positioned for this sort of analysis. In sum, the City’s permitting scheme conflicts with the state

scheme both in its structure and in its particulars, and this interference disturbs the balance of interests that the Ohio Department of Natural Resources has been tasked with undertaking.

Second, Munroe Falls waived any claim that the statute is not a general law. In the lower courts, the City argued only one prong of the general-law test—that the statute merely limits municipal power. Because the City does not present that argument here, the argument cannot supply grounds for reversal. And the City affirmatively waived any argument about the other prongs of the “general law” test by agreeing that “[w]hile prongs 1, 2 and 4 may be met, prong 3 is not.” Munroe Falls Br. at 17 (9th Dist. Aug. 22, 2011); *see* Opp. Jur. at 9 (noting the waiver). Yet now, for the first time, Munroe Falls raises a different prong—that the state law does not “apply to all parts of the state alike and operate uniformly throughout the state.” The City’s failure to advance a uniformity argument below—indeed, the City’s *concession* that the statute operates uniformly—means it has lost its right to raise a uniformity argument in this Court. In any event, the argument lacks merit. The law does not target only certain parts of the State or operate differently based on geography; it is a uniform, comprehensive permitting scheme. And given that prospectors have found commercial quantities of oil and gas in 67 of Ohio’s 88 counties, the City cannot tenably claim that the Oil and Gas Chapter has a sufficiently disparate impact on different parts of the State to disqualify it from general-law status. Given the City’s waiver and the shortcomings of its uniformity argument, Munroe Falls cannot prevail on general-law grounds.

Because the City’s permitting scheme conflicts with state law and because Munroe Falls has waived any general-law argument, the Court should affirm.

STATEMENT OF AMICUS INTEREST

This case presents the question whether a municipality can prohibit, with threat of imprisonment, drilling operations approved by the General Assembly’s comprehensive,

statewide permitting scheme regulating the production of oil and gas. The Division of Oil and Gas Resources Management, a division of the Ohio Department of Natural Resources, has primary responsibility for enforcing Ohio's laws governing oil and gas production. R.C. Chapter 1509. The State of Ohio has a strong interest in achieving the unifying objectives of the state statutes at issue here because those statutes are designed to prevent the patchwork of unwarranted local burdens that would result if state permits could be trumped by local ordinances. A patchwork approach would lead to uneven, sporadic extraction of Ohio's natural resources when assessed from a statewide perspective, and would create inefficiencies that hinder this longstanding and important portion of Ohio's economy. The State thus filed a brief in the district court of appeals in this case.

STATEMENT OF THE CASE AND FACTS

A. The General Assembly has regulated oil and gas drilling and production operations in Ohio for 130 years.

Nearly two centuries ago, the first oil-producing well in the United States was drilled in Noble County, Ohio. Edd Pritchard, *Ohio's Past Is Filled with Oil Booms*, Canton Repository at 6 (Apr. 28, 2013). Commercial production of oil and gas accelerated after the Civil War, and, by 1896, Ohio produced more oil than any other State in the Nation. Ohio Legislative Service Commission, *Staff Research Report No. 63, Oil and Gas Law in Ohio* 5, 12 (Jan. 1965) ("LSC Staff Report"). That year, Ohio wells generated over one-third of the oil produced in the United States—23.9 million barrels, to be precise, an output that even today would rank third among all States. *Id.* at 12; see U.S. Energy Information Administration, *Rankings: Crude Oil Production*, available at <http://1.usa.gov/16TNGs6> (last visited Oct. 28, 2013).

This nineteenth-century boom led to Ohio's first regulation of oil and gas production in 1883. See H.B. No. 925, 80 Ohio Laws 190-91. To remove any doubt that the Legislature had

the power to regulate in this area, the people of Ohio amended the state constitution in 1912 to authorize the General Assembly “to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals.” Ohio Const. art. II, § 36. Oil and gas production declined over the first half of the twentieth century, however, and the Legislature passed few laws regulating the industry. LSC Staff Report at 5, 12. Most oil and gas laws of this period were enacted to protect coal mines near oil wells and were administered by the Division of Mines. *Id.* at 15. The laws did not address broader drilling safety or natural-resource conservation.

All of that changed in 1961, when oil prospectors discovered a large volume of oil in Morrow County. *Id.* at 12-13. The Morrow County boom drove an increase in oil production in Ohio from 14,000 barrels per day in 1961 to between 40,000 and 50,000 barrels per day in 1965. *Id.* at 13. The discovery also prompted the General Assembly to reform Ohio’s oil and gas rules. Ohio’s outdated laws had proved “inadequate to handle” the boom, *id.*, and irresponsible producers engaged in “many improper practices.” Ohio Legislative Service Commission, *Report of Committee to Study Oil and Gas Laws in Ohio* 1 (Dec. 28, 1964). Ohio’s inability to manage the increase in oil production “brought much unfavorable criticism on the state.” LSC Staff Report at 13.

In 1965, the General Assembly responded to the laws’ shortcomings by enacting a comprehensive, statewide scheme for regulating oil and gas production. *See* Am. Sub. H.B. No. 234, 131 Ohio Laws 458-87 (1965). The law created a Division of Oil and Gas within the Ohio Department of Natural Resources, transferring authority from the Division of Mines. *Id.* at 460. It also created a “Chief” of the new Division and vested in the Chief rulemaking authority “for the administration, implementation, and enforcement” of Ohio’s oil and gas laws. *Id.* at

460-61. The law required persons seeking to drill a new well to obtain a permit, provide details about the proposed well, pay a fee, and file a surety bond before commencing operations. *Id.* at 461-64.

Since enactment of this 1965 law, the General Assembly has sought to balance the State's interest in a uniform, predictable system of statewide regulation with municipalities' interest in local control. Notwithstanding the Division of Oil and Gas's broad powers to regulate production, the 1965 Act reserved to municipalities the authority to "enact[] and enforc[e] municipal ordinances regulating health and safety standards for the drilling and exploration for oil and gas." *Id.* at 486-87. In a formal opinion, then-Attorney General William Saxbe explained that this reservation of power gave municipalities the authority to "enact local police regulations for the regulation of the drilling for gas and oil and the production of gas and oil so long as such regulations do not conflict with 'general laws.'" 1964 Ohio Att'y Gen. Op. No. 1178, syll. ¶ 3, at 2-234, *available at* <http://bit.ly/1g3nH57> (last visited Oct. 28, 2013).

Recognizing the redundancy of some local requirements, the General Assembly in 1980 prohibited counties and townships from "requir[ing] any permit or license" for oil and gas drilling and from imposing fee, bond, or insurance requirements on drillers. Am. Sub. H.B. No. 264, 138 Ohio Laws, Part I, 2333. Yet the Act permitted local officials to continue "enacting and enforcing health and safety standards for the drilling and exploration for oil and gas." *Id.* at 2332. This Court noted that the General Assembly's 1980 effort "attempt[ed] to strike a balance between those aspects of oil and gas well exploration and drilling which are reserved for state regulation and those areas which local governments . . . may permissibly regulate." *Newbury Twp. Bd. of Trs. v. Lomak Petroleum, Inc.*, 62 Ohio St. 3d 387, 389 (1992).

B. In 2004 and 2010, the General Assembly enacted legislation creating a comprehensive, statewide plan governing oil and gas drilling operations in Ohio.

Over time, however, the severity of some local regulations upset this state-local balance. Municipalities opposed to drilling enacted onerous regulations designed to push oil and gas production from their borders. Some municipalities went so far as to ban drilling altogether. *See, e.g.,* former Tallmadge Ordinance 95-1991 (Sept. 1991). Even local regulations enacted with a good-faith regulatory purpose created in the aggregate a patchwork of inconsistent policies that impeded drilling efficiencies. What is more, local regulators lacked both the expertise and the statewide focus of the Ohio Department of Natural Resources. Whereas federal and state regulators regularly consider nationwide or statewide issues—such as consumer energy prices, statewide economic development, dependence on foreign oil, and the effect of drilling on large oil and gas fields that span multiple communities—local regulators had more parochial concerns. This divergence in perspectives caused inconsistent regulations for oil and gas drillers, and both hindered private-property owners wishing to develop their mineral rights and slowed the State’s progress in natural-resource development.

As a result, the General Assembly in 2004 and 2010 enacted legislation concentrating the authority to regulate drilling at the state level. *See* 2010 Sub. S.B. No. 165; Sub. H.B. No. 278, 150 Ohio Laws, Part III, 4157-74. Two components of these acts are particularly relevant here. The first is their grant of oversight to the Division of Oil and Gas Resources Management. In its current form, the law vests the Division with the “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. That section further provides both that the “regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation” and that the Oil and Gas Chapter and its related rules “constitute a comprehensive plan with respect to all aspects

of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state.” *Id.*

The State’s “exclusive” authority includes “permitting related to” oil and gas operations. *Id.* Starting in 1980, Ohio law prohibited counties and townships from “requir[ing] any permit or license” for oil and gas drilling. Am. Sub. H.B. No. 264, 138 Ohio Laws, Part I, 2333. That exclusion grew broader in 2004, when the General Assembly granted the Ohio Department of Natural Resources the “sole and exclusive authority to regulate the permitting . . . of oil and gas wells.” Sub. H.B. No. 278, 150 Ohio Laws, Part III, 4163, 4173. The Department’s exclusive authority forbids any local government—county, township, or municipality—from creating its own permitting scheme. *See* Legislative Service Commission Bill Analysis, Sub. H.B. No. 278 (2004) (“The act repeals all provisions of law that granted or alluded to the authority of local governments to adopt concurrent requirements with the state concerning oil and gas exploration and operation.”). Now, individuals must acquire a permit from the Chief of the Division of Oil and Gas Resources Management before drilling. R.C. 1509.05. Each application for a permit must contain comprehensive details of the proposed drilling operation, and the applicant must pay a fee. R.C. 1509.06(A), (G). The Oil and Gas Chapter additionally requires applicants to obtain insurance covering personal-injury and property-damage liabilities incurred by the drilling operations. R.C. 1509.07(A)(1). Well owners must also obtain a surety bond (or another similar alternative) that the owner will forfeit in the event of failure to comply with any statute, rule, or permit condition related to the well. R.C. 1509.07(B).

The second provision of the Oil and Gas Chapter directly at issue here reserves certain powers to other agencies and municipalities. More particularly, the General Assembly has carved out three specific exceptions to the Division’s “sole and exclusive authority.” First, the

Division's authority over drilling remains subject to federal laws governing water-pollution control in wetlands. R.C. 1509.02 (citing R.C. 6111.02-.028). Second, the law preserves the authority of the Director of the Ohio Department of Transportation to regulate vehicles traveling on the state highways. *Id.* Third, and most relevant to this case, the Oil and Gas Chapter reserves to municipalities the power to regulate the streets and highways in their jurisdictions and the vehicles that travel on their roads, "provided that" they do not use their authority "in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations." *Id.* (citing R.C. 723.01, 4513.34).

In addition to these explicit reservations of authority, the law preserves local involvement by providing municipal officials notice and opportunities for comment throughout the permitting process. An applicant for a drilling permit who seeks to drill in an "urbanized area" must provide a "sworn statement that the applicant has provided notice" to "the executive authority of the municipal corporation or the board of township trustees of the township, as applicable, in which the well is to be located." R.C. 1509.06(A)(9). If the well is to be a horizontal well (unlike the one at issue here), the applicant must also attempt to enter into an agreement with "each county, township, and municipal corporation" concerning the local "roads, streets, and highways" that the applicant will use traveling to and from the well site. R.C. 1509.06(A)(11). On the agency side, the Chief of the Division of Oil and Gas Resources Management must publish a "weekly circular" to the "county engineer of each county that contains active or proposed drilling activity." R.C. 1509.06(B). The Chief must also provide municipalities and townships with copies of all drilling permit applications filed for proposed wells in those localities, if the localities have requested notice. *Id.* Finally, the Chief has the authority to attach

terms and conditions to drilling permits, in order to take local conditions into account. *See* R.C. 1509.03; R.C. 1509.06(F), (H); Ohio Adm. Code 1501:9-1-08(A).

Taken together, these provisions confirm the General Assembly's intent to have uniform, comprehensive authority over drilling in Ohio. To achieve this goal, the Division of Oil and Gas Resources Management has "sole and exclusive authority" to regulate in the area. Yet the law protects local interests by reserving to municipalities the power to regulate their streets and highways and by guaranteeing local input throughout the permitting process.

C. Beck Energy acquired a permit to drill for oil and gas on private property in the City of Munroe Falls, and the City sued to enjoin drilling.

On February 16, 2011, the Ohio Department of Natural Resources issued a permit authorizing Beck Energy to drill a new oil and gas well on Joseph Willingham's property in the City of Munroe Falls. The company's proposed well would be a traditional vertical well, not a newer type of horizontal well. The permit included several terms and conditions, in addition to those mentioned above, designed to protect local interests. For example, the permit required Beck Energy to "notify the municipal water well field officials at least 24 hours" before drilling began. Beck Energy Permit, Municipal Wellhead Protection Area Conditions at 1. It also enumerated several requirements touching on issues such as vegetation, drainage, parking, noise mitigation, fencing, and reclamation. Beck Energy Permit, Urbanized Area Permit Conditions at 1-2; *see State ex rel. Morrison v. Beck Energy Corp.*, No. 25953, 2013-Ohio-356 ¶ 4 (9th Dist.) ("App. Op."). By its terms, the permit "granted permission to" Beck Energy to "drill [a] new well." Beck Energy Permit at 1.

Appellant City of Munroe Falls is a municipality in Summit County. It sued to enjoin the drilling operations on Willingham's land, asserting that Beck Energy could not drill without first complying with eleven of the City's ordinances. App. Op. ¶ 5. Five of the ordinances, taken

together, establish a municipal permitting scheme governing oil and gas drilling. *Id.* ¶¶ 45-49 (citing Munroe Falls Ordinances 1329.03-.06 and 1163.02). The permitting scheme provides that no one may drill an oil or gas well unless they have obtained a “permit” (sometimes called a “conditional zoning certificate”) from the City. *See* Munroe Falls Ordinances 1329.03 (titled “Permit Required”), 1163.02. To obtain a permit from the City, an individual must pay a nonrefundable \$800 fee, secure a \$2,000 performance bond, and attend a public hearing at least three weeks before drilling. Munroe Falls Ordinances 1329.03-.06; App. Op. ¶¶ 45-49. Failure to comply with these requirements subjects a person to a \$1,000 fine and up to six months’ imprisonment for each day of drilling operations. Munroe Falls Ordinance 1329.99. The remaining six ordinances, which are not at issue here, govern the use of streets and highways within the city limits. *See* App. Op. ¶ 50.

In a four-page opinion, the trial court granted the City’s motion for a preliminary injunction. *See State ex rel. Morrison v. Beck Energy Corp.*, No. 2011-04-1897 (Summit C.P. May 3, 2011) (“Tr. Op.”). The trial court did not doubt that the ordinances were exercises of the City’s police power, rather than of local self-government. *See id.* at 2-3. Nor did the trial court doubt that the relevant state statutes were general laws. *Id.* at 2. Instead, the court held that the City could enforce its permitting scheme because the ordinances do not conflict with the state statutes. *Id.* at 3-4.

The trial court held that the right-of-way ordinances did not conflict with state law because the Oil and Gas Chapter generally reserves to municipalities the power to regulate the streets and highways in their jurisdictions. *Id.* at 3; *see* R.C. 1509.02 (citing R.C. 723.01, 4513.34). The court then held that the ordinances establishing a municipal oil and gas permitting scheme “do not concern” the areas over which state law asserts “sole and exclusive authority to

regulate.” Tr. Op. at 3; R.C. 1509.02. The court thus determined that the City had a substantial likelihood of success on the merits. Having ruled for the City on the other preliminary-injunction factors as well, the trial court enjoined Beck Energy’s drilling operations until the company complied with the City’s ordinances. See Tr. Op. at 2-4. On the parties’ agreement, the trial court later converted the preliminary injunction to a permanent injunction.

D. The Ninth District held that the City’s drilling ordinances cannot be enforced because they conflict with Ohio’s general laws regulating oil and gas drilling.

Beck Energy appealed to the Ninth District Court of Appeals. Because all members of that court recused themselves from this case, judges from the Eleventh District heard the appeal. App. Op. ¶ 2 n.1. The court of appeals agreed with the trial court that all of the ordinances are exercises of the police power, rather than of local self-government, and that the state statutes are general laws. *Id.* ¶¶ 56-58. The court then turned to the question whether the City’s ordinances conflicted with state law. *Id.* ¶¶ 60-73.

The State of Ohio addressed this question in a brief *amicus curiae* filed in support of neither party. Whereas the City argued that all of its ordinances were valid and Beck Energy argued that all of the ordinances were invalid, the State took a balanced approach. It argued that Munroe Falls’ permitting scheme governing drilling operations conflicts with the Oil and Gas Chapter. But the State sided with Munroe Falls when it came to the City’s right-of-way ordinances. In the State’s view, these ordinances did not conflict with Ohio’s oil and gas laws, as long as the ordinances were not enforced in a manner that “discriminates against, unfairly impedes, or obstructs oil and gas activities and operations.” R.C. 1509.02.

The court of appeals adopted the State’s balance. As for the right-of-way ordinances, it agreed that R.C. 1509.02 generally reserves to municipalities the power to regulate streets and highways in their jurisdictions. App. Op. ¶¶ 60-61; see R.C. 1509.02. And, as for the drilling

ordinances, the court agreed that “the city’s requirement for a permit directly conflicts with the statute, as it could prohibit what the state has permitted.” App. Op. ¶ 65. After the State issued a drilling permit to Beck Energy, “Munroe Falls cannot hinder the drilling activity by requiring a [city] drilling permit.” *Id.* ¶ 66. In sum, the ordinances establishing the City’s oil and gas permitting scheme “are in direct conflict with R.C. 1509.02 and therefore preempted by this state law,” but the City “may enforce ordinances governing rights-of-way and excavations” as long as it does not do so in a manner that discriminates against drilling activities. *Id.* ¶ 74.

The City of Munroe Falls appealed, and this Court accepted review to decide whether the City’s permitting scheme conflicts with state law. *Case Announcements*, 2013-Ohio-0465 at 5 (June 19, 2013). Beck Energy did not appeal the court of appeals’ holding that the City may enforce its right-of-way ordinances. *See* Munroe Falls Br. at 2. Accordingly, the only issue before this Court involves the City’s oil and gas permitting scheme.

ARGUMENT

Amicus Curiae State of Ohio’s Proposition of Law:

Because it establishes a comprehensive permitting scheme designed to bring uniformity to oil and gas extraction throughout the State, R.C. Chapter 1509 displaces any municipal licensing or permitting scheme that purports to set local requirements over oil and gas drilling.

Article XVIII, Section 3 of the Ohio Constitution authorizes municipalities 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.” In challenges to municipal ordinances under the Home Rule Amendment, the Court asks three questions: Is the ordinance “an exercise of the police power, rather than of local self-government”? *Mendenhall v. City of Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270 ¶ 17. Is the state statute a “general law”?

Id. And is the ordinance “in conflict with the statute”? *Id.* If the Court answers all three questions in the affirmative, the ordinance must fall.

The first question is not at issue here. Munroe Falls has never disputed that “the ordinance is an exercise of the police power, rather than of local self-government.” *Id.* The trial court agreed, *see* Tr. Op. at 2-3, and the court of appeals did not disturb that conclusion. App. Op. ¶¶ 54-57. The City does not dispute those holdings now. Instead, the City argues, for the first time in this Court, that the state scheme is not a “general law” because it does not operate “uniformly” throughout the State. And the City contends that its local ordinances do not conflict with the state scheme. Both arguments are mistaken.

A. The City’s argument that the state statute does not qualify as a “general law” is both waived and meritless.

The City argues that the state comprehensive scheme is not a “general law.” A statute is a “general law” if it satisfies a four-prong test. It 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) not merely “grant or limit legislative power of a municipal corporation,” and “(4) prescribe a rule of conduct upon citizens generally.” *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005 syll. In this Court, the City argues only that the state scheme does not apply uniformly. This argument directly conflicts with the City’s position below and, if accepted, would gut most state laws that seek to apply a uniform scheme throughout the State.

1. The City has conceded that its ordinance is an exercise of the police power, and it has waived any argument that the statute is not a general law.

Munroe Falls does not raise in this Court the one general-law prong it challenged below, instead asserting challenges to other prongs of the general-law test that it never presented. In its lower-court papers, the City conceded that “prongs 1, 2 and 4 may be met,” but argued that

“prong 3 is not.” Munroe Falls Br. at 17 (9th Dist. Aug. 22, 2011); Munroe Falls Mem. of Law at 13 (Summit C.P. Apr. 18, 2011). In its brief here, however, the City makes no mention of prong three. Instead, it argues about prong two—namely, that the statute does not “apply to all parts of the state alike and operate uniformly throughout the state.” Munroe Falls Br. at 18-20. It is well established that this Court “will not consider or determine claimed errors which were not raised in either the trial court or in the Court of Appeals.” *Hamlin v. McAlpin Co.*, 175 Ohio St. 517, syll. ¶ 1 (1964). Having identified no mistake in the court of appeals’ analysis, Munroe Falls cannot challenge its judgment.

Making matters worse for the City, it did not merely *forfeit* its uniformity argument by failing to raise it; it affirmatively *waived* the argument by admitting that the statute satisfied the other prongs of the general-law test. Munroe Falls Br. at 17 (9th Dist. Aug. 22, 2011); *see State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1 ¶ 72 (“[W]aiver is the intentional relinquishment or abandonment of a right, as opposed to forfeiture, which is a failure to preserve an objection.”). It is one thing to consider an argument that a party inadvertently overlooked. It is quite another to consider an argument that a party expressly disclaimed.

Beck Energy pointed out the waiver in its memorandum opposing jurisdiction, noting that the lower courts both held that R.C. 1509.02 operates uniformly throughout the State and that “the City did not argue otherwise until it appealed to this Court.” Opp. Jur. at 9; *see also id.* at 11 (“The City now argues, for the first time, that R.C. 1509.02 is not a general law because it ‘only applies to half the state.’” (internal alteration omitted)). The City did not respond by arguing that it had in fact preserved a uniformity argument. It instead argued only that the Ninth District was wrong to state that the City “conceded that R.C. § 1509.02 was a general law” and that “Munroe Falls specifically challenged the status of the statute as general law at pages 17-20

of its brief.” Munroe Falls Br. at 18 n.7. Yes and no. Yes, the Ninth District mistakenly stated that the City conceded all prongs of the general-law test. And yes, Munroe Falls made general-law arguments at pages 17-20 of its court of appeals brief. But no, the City did not argue below that the statute fails the uniformity prong. Given that any argument on this score “does not appear in the pleadings” and was not “mentioned in the briefs in the Court of Appeals,” this Court should “not consider” the belatedly raised claim. *Goldberg v. Indus. Comm’n*, 131 Ohio St. 399, 404 (1936).

Far from mere formalisms, this Court’s waiver rules are “deeply embedded” to ensure “the fair administration of justice.” *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St. 3d 78, 81 (1997) (per curiam). First, the waiver rules conserve judicial resources by inducing counsel to bring forward all arguments that will “aid the court” in its consideration. *Id.* Here, the City’s waiver means this Court does not have the benefit of the insights of the lower courts on this issue of first impression. Second, the waiver rules “afford the opposing party a meaningful opportunity” to develop evidence that it may need to preserve a lower-court victory. *Id.* Here, the City’s waiver means Beck Energy had no incentive to introduce evidence below about the statute’s uniform operation. Indeed, given the City’s concession, it is unclear whether the trial court would have allowed Beck Energy to introduce this evidence on an undisputed issue. *See* Ohio Evid. R. 401 (evidence not relevant unless it goes to a “fact that is of consequence to the determination of the action”). Finally, the waiver rules prevent gamesmanship by counsel because they do not allow “a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal.” *Quarto Mining Co.*, 79 Ohio St. 3d at 81. Here, the City’s waiver means it cannot ask this Court to grant an injunction against a party who never had a chance to build a record on the issue. Courts and parties work

from a disadvantage when they must operate on shifting ground. Given the City's unambiguous waiver, Munroe Falls cannot tenably rely on its general-law argument to prevail.

2. The City's uniformity argument would undercut most statewide regimes.

In any event, the City's uniformity argument is meritless. Munroe Falls argues that "oil and gas is not found in economically viable quantities in the Western half of Ohio," Munroe Falls Br. at 20, and therefore, under *City of Canton*, the state law "will effectively apply only" in part of the State. 2002-Ohio-2005 ¶ 30. That argument is wrong on the law and wrong on the facts.

On the law, the Court has long held that this "uniformity" prong is met if the challenged statute "does not limit [its] regulation to certain parts of the state" and does not "provide different rules for different areas." *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St. 3d 553, 2008-Ohio-92 ¶ 21. Put another way, the statute may "not operate differently based on different locations in our state." *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605 ¶ 45. Here, the Oil and Gas Chapter clears those bars. It "subjects every entity" drilling for oil and gas in Ohio "to the same obligations," *Am. Fin. Servs. Ass'n v. City of Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043 ¶ 34, and the "statutes create a process . . . that applies uniformly throughout the state." *In re Complaint of City of Reynoldsburg*, 134 Ohio St. 3d 29, 2012-Ohio-5270 ¶ 45. Contrary to Munroe Falls' argument, it is the City's ordinances—not the State's statutes—that "prevent uniformity," because they subject drillers "to different, nonuniform standards depending on the local municipal regulation." *Am. Fin. Servs. Ass'n*, 2006-Ohio-6043 ¶ 34.

This Court's precedents do not support Munroe Falls' (waived) uniformity argument. Indeed, *City of Canton* (the case on which the City relies) stands for a much narrower principle: State statutes *as written* may not create "nonuniform classification[s]" between municipalities

that are “arbitrary, unreasonable or capricious.” 2002-Ohio-2005 ¶ 30 (quoting *Garcia v. Siffrin Residential Ass’n*, 63 Ohio St. 2d 259, 272 (1980)). In that case, the General Assembly enacted a general rule prohibiting local governments from excluding “permanently sited manufactured homes” from areas zoned for single-family residences. *Id.* ¶ 2 (citing R.C. 3781.184(C)). The same statute, however, contained an exemption from the general rule, allowing private landowners to adopt deed restrictions prohibiting those manufactured homes on their land. *Id.* (citing R.C. 3781.184(D)). As written, the statute created nonuniform classifications between those municipalities with “effective deed restrictions or active homeowner associations” and those without. *Id.* ¶ 30. Moreover, those nonuniform classifications were arbitrary because the exemption’s breadth “wholly defeat[ed]” the statute’s “stated purpose” of “foster[ing] more affordable housing across the state.” *Id.* ¶ 26. *City of Canton* thus allows state statutes to have nonuniform effects so long as the statutes do not create nonuniform classifications between municipalities that are arbitrary, unreasonable, or capricious.

Interpreting *City of Canton* as *Munroe Falls* does to wipe out state laws simply because they might have a geographically disparate impact would also invalidate most state regimes. Many state laws have some geographically disparate impact and, by their nature, apply only to certain parts of the State. Take for example the Chapter titled “Coastal Management,” which governs Lake Erie and its surrounding lands. R.C. Chapter 1506. Needless to say, the “Coastal Management” Chapter will not apply to most Ohio municipalities because most Ohio municipalities (to their tourism bureaus’ chagrin) do not contain Lake Erie coastline. If the “uniformity” prong strikes down all state laws with any geographically disparate impact, the General Assembly cannot enact laws related to Lake Erie. Other statutes that would be struck down include those regulating interstate highways, railroads, rivers, airports, skiing, nuclear

power plants, casino gaming, and public universities, because none of those statutes applies in every Ohio municipality. Precedent, to say nothing of common sense, instructs that *City of Canton* does not sweep as broadly as Munroe Falls claims. *See State ex rel. McElroy v. City of Akron*, 173 Ohio St. 189, 193 (1962) (affirming a statewide licensing scheme for watercraft, in light of the need for “uniform and general regulation by the state,” even though not all municipalities contain boatable waters).

Regardless, on the facts, Munroe Falls is wrong that “oil and gas is not found in economically viable quantities in the Western half of Ohio.” Munroe Falls Br. at 20. As of 2004, “[c]ommercial quantities of oil and gas ha[d] been found in 67 of Ohio’s 88 counties,” from the State’s northern border to its southern border, and from its western border to its eastern border. Ohio Division of Geological Survey, *Oil and Gas Fields Map of Ohio* at 1-2 (2004), available at <http://www.dnr.state.oh.us/portals/10/pdf/pg01.pdf> (last visited Oct. 28, 2013). That number may grow, given that technological advances continue to open up previously unreachable oil and gas resources. *See* John Nolan, *Exploration Company Hunting for Oil*, Dayton Daily News at A6 (Oct. 16, 2010) (company exploring for oil and gas deposits in five southwestern Ohio counties). Given this, even if Munroe Falls had identified the right legal standard, its claim would still fail on the particular facts of this statutory regime.

At bottom, the City’s uniformity-prong argument is too little, too late. Munroe Falls waived the argument by conceding in both of the lower courts that the statute met the uniformity prong. And in any event, the argument is unsupported by precedent. The City cannot prevail on general-law grounds.

B. The ordinances conflict with the statute.

Munroe Falls has preserved only its argument that its permitting scheme does not conflict with Ohio’s statewide scheme. This Court’s conflict test asks “whether the ordinance permits or

licenses that which the statute forbids and prohibits, and vice versa.” *Vill. of Struthers v. Sokol*, 108 Ohio St. 263, syll. ¶ 2 (1923). Gauged by this test, the City’s drilling ordinances must fall. As a general matter, this Court has repeatedly held that municipalities cannot require an entity to obtain a local permit to undertake conduct that is already authorized by the entity’s state permit. That rule applies straightforwardly to resolve this case. As a specific matter, the City’s particular requirements for obtaining a local permit conflict with the state statute’s specific requirements for obtaining a state permit. That conflict confirms that the City’s ordinances cannot stand.

1. The City’s ordinances violate the rule that a municipality cannot enforce a permitting scheme over an area in which the State has established a comprehensive, statewide permitting scheme.

This Court’s precedents establish that municipal permitting schemes always conflict with comprehensive, statewide permitting schemes. State permits confer upon their holders a right to engage in a particular activity. Municipal ordinances that forbid state permit holders from engaging in that activity unless they also acquire municipal permits conflict with state law because they prohibit what the State permits. The City’s contrary arguments rely on cases outside the home-rule context and home-rule cases whose analyses hurt, rather than help, Munroe Falls.

a. The City’s ordinances conflict with the state regime because they require local permits on top of the state permits.

In at least four different cases, the Court has invalidated municipal permitting schemes that were superimposed on top of statewide permitting schemes. In the first, *State ex rel. McElroy v. City of Akron*, the Court held that Akron could not require a separate city license to operate a boat on city waters. 173 Ohio St. 189, syll. (1962). The Court reasoned that enforcing the separate licensing scheme “would place an undue burden and constitute an unwarranted harassment of those of the general public who wish to enjoy the recreation of boating.” *Id.* at

194. Because this additional burden created a “conflict with the general law” enacted by the General Assembly, Akron’s licensing scheme exceeded the City’s home-rule authority. *Id.*

In the second, *Auxter v. City of Toledo*, the Court held that Toledo could not enforce a licensing requirement governing alcohol sales in the face of a state licensing scheme on the same subject. 173 Ohio St. 444, syll. ¶¶ 2-3 (1962). The owner of a carry-out store held a state permit authorizing him to sell beer and liquor, and he sued for a declaratory judgment that Toledo could not require him to obtain a city license. *Id.* at 445. As in *McElroy*, this Court struck down the municipal licensing scheme because it “prohibit[ed] someone from doing something he had been licensed by the state to do unless and until he paid for and secured a municipal license to do it.” *Id.* at 448. The City scheme thus “conflict[ed]” with the state law. *Id.* syll. ¶ 2.

In the third, *Anderson v. Brown*, this Court held that the Village of Chesapeake could not require a municipal license to operate a trailer park when the State had enacted a trailer-park licensing scheme. 13 Ohio St. 2d 53 (1968). The state license, the Court reasoned, “gives the person to whom it is issued the right to operate such a park.” *Id.* syll. ¶ 3. Necessarily “[i]t follows that” the municipal ordinance forbidding such operation without a village license was “in conflict with” the state statute. *Id.*; *id.* at 58 (citing *Auxter*, 173 Ohio St. 444).

Finally, in the fourth, *Ohio Association of Private Detective Agencies, Inc. v. City of North Olmstead*, the Court applied *McElroy* and *Auxter* to strike down a municipal licensing fee imposed on private investigators. 65 Ohio St. 3d 242 (1992). The State had enacted a statewide regulatory scheme for that profession, and North Olmstead’s local licensing law could not be enforced alongside the state scheme. *Id.* at 245. The city ordinance conflicted with the state statute “inasmuch as the local ordinance restricts an activity which a state license permits.” *Id.*

Taken together, these decisions establish that municipalities cannot enforce a licensing or permitting scheme against a person who holds a state permit on the same subject, absent a legislative statement to the contrary. A straightforward application of that rule suffices to resolve this case. The General Assembly has vested in the Ohio Department of Natural Resources the “sole and exclusive authority to regulate the permitting” of oil and gas operations in Ohio. R.C. 1509.02. That authority includes “*all* aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells.” *Id.* (emphasis added). In the face of that state scheme, the City of Munroe Falls has imposed an additional requirement: “No person, corporation or other entity shall commence to drill a well for oil, gas, or other hydrocarbons” within the City until it has acquired a “permit.” Munroe Falls Ordinance 1329.03(a). Worse yet, any person—including a state permit holder—who drills for oil and gas in Munroe Falls without acquiring a municipal permit faces a \$1,000 fine and up to six months’ imprisonment for each day of drilling operations. Munroe Falls Ordinance 1329.99. Because the City’s permit requirement “prohibit[s]”—indeed, criminalizes—“someone from doing something he had been licensed by the state to do unless and until he paid for and secured a municipal license to do it,” it is “in conflict with” the Oil and Gas Chapter. *Auxter*, 173 Ohio St. at 448.

b. The City’s contrary arguments misinterpret the scope of the state regime because they require local permits on top of the state permits.

The City’s efforts to avoid this conflict lack merit. *First*, it repeatedly seeks to avoid the plain conflict by invoking local governments’ “traditional” power “to place industrial activities in appropriate zones.” Munroe Falls Br. at 5. The City believes that even if the Oil and Gas Chapter empowers the Ohio Department of Natural Resources to enact “technical regulations,” the Chapter should not be interpreted to “strip away the municipalities’ power to place oil and

gas wells in particular zones.” *Id.* at 12. At least two considerations undo this statutory-interpretation argument. The City’s first problem is that both the Oil and Gas Chapter and Beck Energy’s particular permit take into account several land-use topics when granting “permits” over particular locations. For example, the Oil and Gas Chapter and its related rules address “[p]rotection of the public and private water supply,” “[f]encing,” waste containment, “[n]oise mitigation,” and “landscaping.” R.C. 1509.03(A), 1509.06(F), (H). For a well “that is to be located in an urbanized area”—like Beck Energy’s—the Ohio Department of Natural Resources must conduct a “site review to identify and evaluate any site-specific terms and conditions.” R.C. 1509.06(H)(1). In Beck Energy’s case, the Mayor of Munroe Falls attended the site review, and following the site review, the agency imposed on the company 29 conditions. App. Op ¶ 4 (noting “29 Urbanized Area Permit Conditions, which include specific requirements governing tree trimming, fencing, parking, noise, erosion, drainage, landscaping, and site restoration”); Beck Energy Permit, Urbanized Area Permit Conditions at 1-2. In other words, the Oil and Gas Chapter grants the Ohio Department of Natural Resources, not local authorities, the authority to determine whether the location of a particular well makes it the metaphorical “pig in the parlor instead of the barnyard.” *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

The City’s second problem is that its ordinances do not confine drilling to any particular zone and therefore do not themselves even engage in traditional “zoning.” To the contrary, the ordinances “expressly state[]” that their “intent” is to “cause drilling activities to be carried on within the Municipality in non-industrial *and* industrially zoned areas.” Munroe Falls Ordinance 1329.02(a) (emphasis added). To that end, the city council enjoys the “discretion” to choose properties that are “appropriate and compatible” for drilling, as well as the power to grant “exception[s]” to the municipal permitting scheme. Munroe Falls Ordinance 1329.02(a), (c).

The city council's decisions are "final" and "no determination shall serve as a precedent in any other case." Munroe Falls Ordinance 1329.02(c). Far from exercising a "traditional" power "to place industrial activities in appropriate zones," Munroe Falls Br. at 5, the City seeks to employ unchecked discretion to allow (or disallow) drilling on any property.

Second, Munroe Falls argues that its local permits are really "conditional zoning certificates" and so fall within its zoning power. But Munroe Falls' semantics cannot save its ordinances. For one thing, the City refers to the "conditional zoning certificate" as a "permit" throughout its drilling ordinances, including in *all* of the drilling ordinances challenged here. *See* Munroe Falls Ordinance 1329.03 (titled "Permit Required"); Munroe Falls Ordinance 1329.04 (titled "Permit Application and Fee"); Munroe Falls Ordinance 1329.05 (referring to "permit" and "permittee"); Munroe Falls Ordinance 1329.06 (referring to "permit"). In its merits brief, the City elsewhere refers to its power to "*license* an oil and gas operation." Munroe Falls Br. at 18 (emphasis added). More fundamentally, when evaluating home-rule challenges, the Court considers the *substance* of local enactments, not their *labels*. Distinguishing between a permit and a "conditional zoning certificate" would elevate form over substance and allow municipalities to evade the limitations imposed by the Home Rule Amendment simply by renaming their local permits. *See Ohio Ass'n of Private Detective Agencies, Inc.*, 65 Ohio St. 3d at 244 (rejecting a city's attempted distinction between "licensing" and "registration").

Even if the label (rather than the substance) matters, a large body of case law holds that, even outside the municipal-permit context, municipal ordinances cannot extinguish rights granted by state permits. This rule is best illustrated by *City of Westlake v. Mascot Petroleum Co.*, 61 Ohio St. 3d 161 (1991). In that case, after the Ohio Department of Liquor Control issued a permit allowing a service station to sell alcoholic beverages, the City of Westlake sued to

enjoin the business from doing so in light of a zoning regulation that banned alcohol sales at service stations. *Id.* at 161-62. In the face of these conflicting laws, this Court held that “[w]here a business entity operating in a commercial or industrial district has been issued a valid permit for the sale of alcoholic beverages by the Ohio Department of Liquor Control, a municipality is without authority to extinguish privileges arising thereunder through the enforcement of zoning regulations.” *Id.* syll. ¶ 2. So it is true here. Where a person has been issued a valid permit for oil and gas drilling by the Ohio Department of Natural Resources, a municipality is without authority to interfere with the person’s right to drill through enforcement of zoning regulations. Several of this Court’s cases support the same result. *See, e.g., Ohioans for Concealed Carry, Inc.*, 2008-Ohio-4605 ¶ 53 (city ordinance banning concealed handguns in city parks conflicted with state-issued handgun license permitting the carrying of concealed handguns); *Neil House Hotel Co. v. City of Columbus*, 144 Ohio St. 248, syll. ¶ 3 (1944) (city ordinance banning alcohol sales after midnight conflicted with state-issued liquor license permitting alcohol sales until 2:30 a.m.).

Third, Munroe Falls relies on cases upholding local authority to control development through zoning. Munroe Falls Br. at 5-8. But it fails to mention that none of its cases involved whether, under home-rule analysis, a local ordinance conflicted with a state statute. Instead they involve sources of law and legal frameworks not at issue in this case. *See Smith v. Juillerat*, 161 Ohio St. 424 (1954) (retroactive application of municipal ordinance to preexisting lease); *Lomak Petroleum, Inc.*, 62 Ohio St. 3d 387 (zoning authority of township, not charter municipality); *Vill. of Euclid*, 272 U.S. 365 (Due Process Clause of the Fourteenth Amendment); *Cent. Motors Corp. v. City of Pepper Pike*, 73 Ohio St. 3d 581 (1995) (constitutional provision unidentified, but most naturally Due Process and Takings Clauses); *Gerijo, Inc. v. City of Fairfield*, 70

Ohio St. 3d 223 (1994) (same); *Vill. of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69 (1984) (same); *Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St. 3d 28 (1987) (same); *Brown v. City of Cleveland*, 66 Ohio St. 2d 93 (1981) (per curiam) (Equal Protection Clause).

The City manages to identify four cases, in addition to *City of Canton* (discussed above), that engage in conflict analysis under the Home Rule Amendment. But none of these cases helps the City. For starters, none involves a municipal permitting scheme governing an area covered by a state permitting scheme. They are therefore all at least one step removed from the situation here. Moreover, two of the City's cases—*Village of Sheffield v. Rowland*, 87 Ohio St. 3d 9 (1999), and *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44 (1982)—actually support Beck Energy. See *Munroe Falls Br.* at 11-13, 20. The Court held that the ordinances at issue in those cases *conflicted* with state law because they imposed additional conditions beyond what state law required.

City of Cincinnati v. Baskin also offers the City little help. 112 Ohio St. 3d 279, 2006-Ohio-6422; see *Munroe Falls Br.* at 17. In that case, the Court held that an ordinance prohibiting the possession of firearms with a capacity of more than 10 rounds did not conflict with a statute prohibiting the possession of firearms with a capacity of more than 31 rounds. 2006-Ohio-6422 syll. The Court found no conflict because the municipal ordinance did not “regulate or prohibit any conduct that the state has authorized,” and the state law contained no “limiting provision or declaration” that municipalities could not regulate firearm possession. *Id.* ¶¶ 23-24. This case is different. *Munroe Falls*' ordinance forbidding state permit holders from drilling unless they acquire municipal permits prohibits conduct that the State has authorized. And the General Assembly declared that municipalities could not regulate oil and gas drilling

when it gave the Ohio Department of Natural Resources the “sole and exclusive authority to regulate the permitting” of oil and gas operations in Ohio. R.C. 1509.02.

The City’s references to *Fondessy Enterprises, Inc. v. City of Oregon* add nothing either. 23 Ohio St. 3d 213 (1986); *see* Munroe Falls Br. at 27-30. In *Fondessy*, the Court considered a state statute prohibiting localities from “requiring any additional zoning or other approval for the construction and operation of a hazardous waste facility” beyond those imposed by a state licensing scheme. 23 Ohio St. 3d at 215 (quoting R.C. 3734.05). The Court held that a city ordinance imposing reporting requirements did not conflict with the statute because the ordinance did not require the facility operator to do “anything other than that which is required in the state law.” *Id.* at 217. Here, however, Munroe Falls’ separate permitting scheme surely does require more than state law requires—namely, a second permit. In fact, *Fondessy*’s logic also supports Beck Energy. It specifies that the city ordinance *would* have been “directly in conflict” with the state law and thus “invalid” if the ordinance had “required that Fondessy *apply for a city permit* for construction or operation of its landfill.” *Id.* (emphasis added). At the end of the day, the City’s cases compel an affirmance here.

All of this boils down to a simple conclusion: Munroe Falls cannot enforce a licensing or permitting scheme that purports to regulate oil and gas drilling, given that the State has already established a comprehensive, statewide permitting scheme in that area.

2. Munroe Falls’ oil and gas permitting scheme conflicts with several specifics of the State’s oil and gas permitting scheme.

The existence of local law prohibiting a state permit holder from drilling unless he also obtains a local permit suffices to establish a conflict in this case. Making matters worse for Munroe Falls, however, the City’s permitting scheme also conflicts with the State’s scheme in many of its particulars. To begin with, the ordinance prohibits drilling that the statute has

blessed. By its terms, the state permit grants Beck Energy permission to “drill [a] new well.” Beck Energy Permit at 1. But the ordinance forbids any person from “drill[ing] a well” until the person has obtained a local permit. Munroe Falls Ordinance 1329.03(a). Because the ordinance prohibits what the statute permits, the two conflict. *See Sokol*, 108 Ohio St. at syll. ¶ 2.

In addition, one of the drilling ordinances provides that “[n]o person, corporation or other entity shall be permitted to drill more than two wells at any one time.” Munroe Falls Ordinance 1329.03(b). The Oil and Gas Chapter contains no such limitation, and indeed contemplates that some entities will drill more than two wells. *See, e.g.*, R.C. 1509.071(A) (establishing bond-forfeiture requirements for owners drilling “three or more wells”); R.C. 1509.27(F) (limiting to five the number of “applications for mandatory pooling orders per year”). In fact, some state requirements govern only those owners with “more than *one hundred* such wells in this state.” R.C. 1509.11(A)(1)-(2) (emphasis added). The City’s limitation on how many wells an owner may drill thus also conflicts with the state scheme.

Munroe Falls Ordinance 1329.04 also requires well owners to pay a nonrefundable \$800 “permit fee.” In light of the General Assembly’s intent for the Ohio Department of Natural Resources to have “sole and exclusive authority” in this area, R.C. 1509.02, that ordinance conflicts with the state statute’s fee schedule for well owners. *See* R.C. 1509.06(G); *see also Ohio Ass’n of Private Detective Agencies, Inc.*, 65 Ohio St. 3d at 245 (municipal fee requirement conflicts with fee requirement of “statewide regulatory program” that contains a “prohibition against the imposition of [municipal] fees”).

The City, moreover, requires a \$2,000 performance bond. Munroe Falls Ordinance 1329.06. That requirement conflicts with the State’s requirement that well owners obtain a surety bond (or another similar alternative), which the owner will forfeit in the event of failure to

comply with any statute, rule, or permit condition related to the well. R.C. 1509.07(B); *see also* R.C. 1509.07(A) (requiring liability insurance). The City's bond requirement cannot be squared with the State's "sole and exclusive authority" in this area. R.C. 1509.02.

Lastly, Munroe Falls requires anyone wishing to drill in the City to attend a public hearing some three weeks before drilling and also to provide notice of the drilling. Munroe Falls Ordinance 1329.05. The state law contains different notice requirements and vests the Chief of the Division of Oil and Gas Resources Management with authority to tailor permit terms and conditions to local circumstances. R.C. 1509.06(B), (F), (H); R.C. 1509.03; Ohio Adm. Code 1501:9-1-08(A). Inasmuch as the local ordinance restricts an activity that a state permit allows, it conflicts with the state statutes.

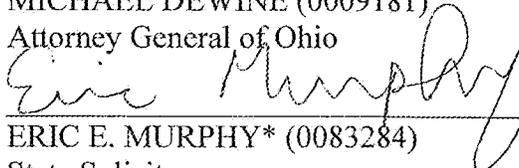
All in all, Munroe Falls' permitting scheme conflicts with the State's permitting scheme in many of its particulars. For this reason, too, the ordinances exceed the City's home-rule authority.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellees Beck Energy Corporation, et al., was served by U.S. mail this 28th day of October, 2013, upon the following counsel:

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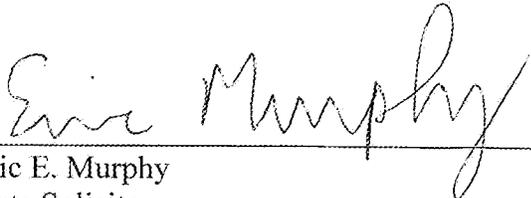
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