

ORIGINAL

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. 13-0465
)
) On Appeal from the Ninth Appellate
) District Court of Appeals, Summit County, Ohio
) (Case No. 25953)
)
)
)

BRIEF OF AMICUS CURIAE OHIO OIL AND GAS ASSOCIATION IN SUPPORT OF APPELLEES BECK ENERGY CORPORATION AND JOSEPH WILLINGHAM

Jack Morrison, Jr. (0014939)
 Thomas M. Saxer (0055962)
 Thomas R. Houlihan* (0070067)
 *Counsel of Record
 AMER CUNNINGHAM CO., L.P.A.
 159 S. Main Street, Suite 1100
 Akron, Ohio 44308-1322
 Tel: (330) 762-2411
 Fax: (330) 762-9918
 Houlihan@Amer-law.com

*Counsel for Plaintiff-Appellant
 City of Munroe Falls*

Barbara A. Tavaglione (0063617)
 9191 Paulding Street NW
 Massillon, Ohio 44646
 Tel: (330) 854-0052
 bartavaglione@gmail.com

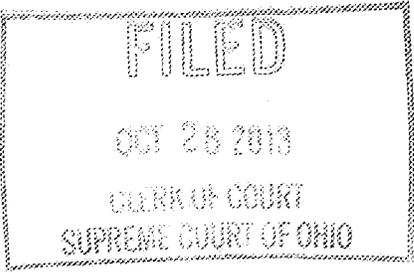
*Counsel for Amicus Curiae People's Oil
 and Gas Collaborative - Ohio*

John K. Keller* (0019957)
 *Counsel of Record
 VORYS, SATER, SEYMOUR AND PEASE
 LLP
 52 East Gay Street
 P.O. Box 1008
 Columbus, Ohio 43216-1008
 Tel: (614) 464-6389
 Fax: (614) 719-4794
 jkkeller@vorys.com

*Counsel for Defendants-Appellees
 Beck Energy Corporation and Joseph
 Willingham*

Meleah Geertsma* (PHV #4257-2013)
 *Counsel of Record
 Katherine Sinding (PHV #4256-2013)
 Peter Precario (0027080)
 NATURAL RESOURCES DEFENSE
 COUNCIL
 20 N. Wacker Drive, Suite 1600
 Chicago, Illinois 60606-2600
 Tel: (312) 663-9900
 Fax: (213) 234-9633
 mgeertsma@nrde.org

Counsel for Municipal Amicus Curiae



David C. Morrison (0018281)
MORRISON & BINDLEY
987 Professional Parkway
Heath, Ohio 43056
Tel: (740) 323-4888
Fax: (740) 323-1000
dm.morrisonbindley@alink.com

Counsel for Amicus Curiae City of Heath

Richard C. Sahli (0007360)
981 Pinewood Lane
Columbus, Ohio 43230-3662
Tel: (614) 428-6068
Fax: (740) 323-1000
rsahli@columbus.rr.com

and

Deborah Goldberg (PHV #4255-2013)
EARTHJUSTICE
156 William Street, Suite 800
New York, NY 10038-5326
Tel: (212) 845-7376
Fax: (212) 918-1556
dgoldberg@earthjustice.org

*Counsel for Amicus Curiae Health
Professionals*

Trent A. Dougherty (0079817)
OHIO ENVIRONMENTAL COUNCIL
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
Tel: (614) 487-7506
Fax: (614) 487-7510
tdougherty@theoec.org

*Counsel for Amicus Curiae Ohio Local
Businesses*

William J. Taylor (0015709)
Scott D. Eickelberger (0055217)
Kincaid, Taylor & Geyer
50 North Fourth Street
P.O. Box 1030
Zanesville, Ohio 43701-1030
T: (740) 454-2591
F: (740) 454-6975
wjt@kincaidlaw.com
scott@kincaidlaw.com

*Counsel for Amicus Curiae Ohio Oil and
Gas Association*

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STATEMENT OF INTEREST OF AMICUS CURIAE OHIO OIL AND GAS ASSOCIATION

The Ohio Oil and Gas Association, one of the largest and most active state-based oil and natural gas associations in the nation, has represented Ohio's oil and gas producing industry since 1947. Its 3,300 members are involved in all aspects of the exploration, development, production and marketing of crude oil and natural gas resources in the State of Ohio. They include companies that explore for, develop and produce Ohio's crude oil and natural gas resources, as well as industries and individuals who are allied to the exploration and production process, including suppliers of oilfield tubulars, equipment and material; pressure pumping, cementing and well stimulation services; geophysical and wireline formation evaluation services; providers of contract drilling and workover services; oilfield trucking and construction; produced water injection and transportation; the crude oil refining industry; the mid-stream natural gas gathering and processing industry; and the interstate natural gas transmission industry and providers of professional services. Because of the small size of many of the Association's members, they often rely on the Association as their primary source of information on industry trends, activities, tax changes, legislation and regulatory matters. The Association frequently participates in federal and state regulatory actions affecting the oil and gas industry.

INTRODUCTION

The oil and gas industry has been a driving force of the Ohio economy for over 150 years, creating productive Ohio jobs and generating substantial tax revenues. Ohio is on the brink of fostering decades of continuous economic growth as development of the Utica Shale gas formation begins. Concerns regarding potential environmental,

health and local economic impacts of oil and gas development have accompanied this potential for economic growth. The General Assembly considered all of these factors and recognized that the regulation of this valuable industry is a "matter of statewide interest." Thus, the legislature reposed in the Division of Oil and Gas Resources Management of the Ohio Department of Natural Resources (the "Division") the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations." R.C. 1509.02.

As a result, Ohio now has a centralized and uniform regulatory process that will permit the State to protect the health, safety and welfare of all Ohioans while maximizing the economic potential that the Utica Shale formation offers. This uniform regulatory system is staffed by subject-matter experts who have a responsibility to consider the same factors that local zoning ordinances might address. In contrast to the limited resources often available to local communities, which thus must make zoning decisions without a sound scientific basis, the state experts are in a position to apply the best available scientific and technical expertise to the safety issues and environmental matters that concern both the state and local communities.

The statewide system of regulation has addressed safety issues and environmental matters with the best resources to study them and now stands in the shoes of local governments in providing those local protections through the process of state regulation and permitting. Local zoning ordinances that conflict with the uniform statewide system created by the General Assembly not only create an unnecessary patchwork of regulations that will delay, frustrate and, in certain circumstances, prohibit

oil and gas development that the State has duly permitted; they also are plainly unconstitutional.

Amici supporters of the City of Munroe Falls contend that the regulatory plan enacted by the Ohio General could have some negative impact on local economies. This argument fails to recognize that the Court's determination of this legal issue is a matter of law alone. Moreover, Appellant's *amici* supporters ignore the legitimate interest of the state of Ohio in protecting the safety and health of all Ohioans and their communities while promoting the substantial economic benefits that will accrue to Ohioans, as well as the state and local governments. These benefits include not only significant tax revenues but also thousands of jobs and income that the oil and gas industry will contribute to the Ohio economy if permitted to operate efficiently under a single set of regulations at the statewide level. Reversal of the Ninth District decision could have a material adverse impact on the state and local governments as well as the oil and gas industry at this crucial time and, as a result, a significant negative effect on the Ohio economy, while also undermining the safe, efficient and uniform regulatory system that the General Assembly has established.

STATEMENT OF FACTS

Amicus Curiae Ohio Oil and Gas Association adopts the statement of facts set forth by Appellees in their merits brief.

ARGUMENT

Appellants' Proposition of Law One:

R.C. Chapter 1509 does not divest municipalities of their power to enact and enforce zoning laws.

Amici's Counter-Proposition of Law:

The General Assembly has created a statewide system to safely and efficiently regulate the permitting, location and spacing of oil and gas wells and production operations, and pre-empted local zoning ordinances that conflict with this statewide system.

A. The General Assembly Has Given the ODNR Exclusive Authority to Regulate All Aspects of the Location, Drilling and Operation of Oil and Gas Wells and Production Activities in Ohio.

1. The State has fully occupied the field of regulating oil and gas wells in Ohio.

The General Assembly took affirmative action in 2004 to provide that the oil and gas industry, and the economic potential that it represents, will grow safely and efficiently under a uniform statewide system. The legislature expressly determined that "[t]he regulation of oil and gas activities is **a matter of general statewide interest that requires uniform statewide regulation,**" and amended R.C. 1509.02 to create "**a comprehensive plan with respect to all aspects of the locating, drilling, and operating of oil and gas wells within this state.**" R.C. 1509.02 (emphasis added). Accordingly, the General Assembly gave the Division the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells" in R.C. 1509.02. The General Assembly has twice since clarified and strengthened the Division's exclusive regulatory authority. See 2010 Am.Sub.S.B. No. 165 (amending R.C. 1509.02 to include authority over "production operations"); 2011 Am.Sub. H.B. No. 153 (amending R.C. 1509.02 to include authority over "well stimulation," "completing," "construction" of sites, and "permitting related to those activities").

2. The General Assembly created a uniform regulatory system that maximizes safety and considers the health, welfare and concerns of local communities.

With oil and gas regulation centralized at the state level, Ohio has been able to put into place a comprehensive program that is safe and efficient. Uniform regulation allows for effective development of Ohio's oil and gas resources. Rather than exposing oil and gas developers to hundreds of different sets of regulations created by each of Ohio's cities, villages and townships, all developers must now follow a single set of comprehensive and consistent regulations enforced by subject-matter experts at the state level. A single set of uniform regulations is especially important in the oil and gas field because drilling units can be very large and can cross local-government borders. If each local government were permitted to enact conflicting regulations governing oil and gas development, it would lead to delays and inefficiencies that unnecessarily would drive up the costs of development, resulting in higher costs to consumers.

Although the General Assembly preempted local governments from regulating oil and gas wells by means of zoning ordinances, the General Assembly has not ignored local government interests. Indeed, the system created by the General Assembly requires state officials to consider many of the same factors and concerns that local zoning ordinances might otherwise address. A permit from the Division is required to drill a well for oil and gas. See R.C. 1509.05 and R.C. 1509.06. For new wells within an urbanized area, neighbors and local governments are provided the opportunity to comment on permit applications. R.C. 1509.06(A)(9). Oil and gas wells are subject to minimum distance restrictions regarding property lines, nearby buildings, streets and roads. R.C. 1509.021. There is a comprehensive set of terms and conditions regarding safety, protection of public and private water supplies, "fencing and screening" of wells,

and mitigation of noise associated with oil and gas wells. R.C. 1509.03. The General Assembly made the policy decision that these considerations are best evaluated at the statewide level by subject-matter experts who are responsible and accountable to the entire state.

State regulation of oil and gas drilling thus does not take place at the expense of local interests, as the City and its *amici* maintain. On the contrary, the regulatory process incorporates those interests. The ODNR regulations enforce on a statewide basis the accommodation of local interests that results from the regulatory process, which systematically protects the people and communities that are located in the midst of the intensive economic development activity that oil and gas drilling recently has fostered in the state of Ohio.

By centralizing the regulatory system and relying on state officials with the requisite subject-matter expertise, Ohio has created some of the most comprehensive and effective oil and gas regulations in the nation. In 2011, the State Review of Oil and Natural Gas Environmental Regulations, Inc. ("STRONGER"), comprised of industry experts, environmental/public interest community leaders and regulators, analyzed Ohio's hydraulic fracturing regulatory program. See STRONGER, "Ohio Hydraulic Fracturing Review" (2011) ("STRONGER Report").¹ STRONGER concluded that Ohio's hydraulic fracturing regulatory program was "well-managed, professional and meeting its program objectives," and made recommendations to improve Ohio's regulations. STRONGER Report, at 4–7. The General Assembly considered those recommendations and continued to improve and strengthen Ohio's regulation of the oil and gas industry, especially in the area of hydraulic fracturing. 2012 Am.Sub. S.B. 315

¹ The report is available at <http://www.strongerinc.org/content/ohio>.

(increasing regulatory requirements regarding hydraulic fracturing); 2013 Am.Sub.H.B. 59 (revising restrictions regarding disposal, storing and sampling of byproducts associated with oil and gas development).

Affirmance of the Ninth District decision will allow Ohio to continue to regulate the oil and gas industry safely under a uniform statewide system. Application of statewide regulations by subject-matter experts, with input from local governments, will permit safe and full realization of the economic potential of the Utica Shale formation.

B. Local Zoning Ordinances That Conflict with R.C. 1509.02 and Recreate the Inefficient Patchwork of Regulations That the General Assembly Acted to Remedy Are Unconstitutional and Harmful to Ohio's Economy.

The *amici* that support Appellants ask this Court to evaluate the "fairness" of the General Assembly's decision to vest exclusive authority over the permitting, location and spacing of oil and gas wells in Ohio. See, e.g., Brief of Amicus Curiae Ohio Local Businesses at 21. Appellant's *amici* supporters complain that there may even be negative impacts on some business caused by this legislative decision. See generally *id.* These arguments are unpersuasive for two reasons. First, they ask this Court to second-guess the policy decisions made by the General Assembly rather than apply the Court's well-settled home rule legal analysis. Second, they ignore the fact that the safe and efficient development of Ohio's oil and gas resources under a statewide uniform regulatory system could have an enormously positive impact on Ohio's economy.

- 1. The Court should apply its well-established home rule analysis and should not second-guess the policy decisions made by the legislature.**

Amici's fairness arguments, and the potential pros and cons of how to regulate the oil and gas industry, are policy considerations for the legislature; in such instances,

the Supreme Court of Ohio "will not substitute its judgment for that of the legislature." *Pickaway County Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 936 N.E.2d 944, ¶ 44, n.4 (rejecting policy argument that legislative money limit on skill games would stifle economic activity).

The court of appeals recognized that a court's role "is not to make policy decisions" or re-write "state law and regulations" but to "follow the established law in our application of the constitutional home-rule analysis to Munroe Falls' drilling ordinances." *State ex rel. Morrison v. Beck Energy Corp.*, 9th Dist. Summit No. 25953, 2013-Ohio-356, ¶ 3. Here, the General Assembly has concluded that uniform regulation of oil and gas operations at the state level would provide the best opportunity to promote the economic development of the state's natural resources while minimizing potential side-effects. The Court should not disturb that policy decision.

Thus, as set forth more fully in the Appellees' brief, the Court should apply its well-settled home rule test and uphold the Ninth District's decision. The municipal zoning ordinances at issue are preempted by R.C. 1509.02 because the ordinances are an exercise of municipal police power, the statute is a general law, and the ordinances and statute conflict. See *City of Canton v. State*, 95 Ohio St.3d 149, 151, 2002 Ohio 2005, 766 N.E.2d 963, ¶ 9. Local municipalities cannot, by ordinance, prohibit "that which the statute permits." *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, ¶ 53 (citing *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923)). Yet that is exactly what occurred here. The City of Munroe Falls effectively prevented the drilling of a well permitted by the Division. See *Village of Sheffield v. Rowland*, 87 Ohio St.3d 9, 12, 716 N.E.2d 1121 (1999) (holding that an

ordinance was in conflict with a statute because the ordinance prohibited the operation of a facility that the State had licensed under that statute). Thus, the Ninth District properly held that Munroe Falls' zoning ordinances in question are preempted by R.C. 1509.02.

2. The safe and efficient development of Ohio's oil and gas industry will have a significant positive impact on Ohio's economy.

In response to the economic argument of the *amici* for the City, it is important to note that Ohio has long benefitted from the valuable and abundant oil and gas resources located within its borders. The oil and gas industry has created Ohio jobs and generated substantial tax revenues. In 2010, the Ohio oil and gas industry directly supported thousands of jobs, with average salaries ranging from \$38,920 to \$88,335. See Kleinhenz & Associates, *Ohio's Natural Gas and Crude Oil Exploration and Production Industry and the Emerging Utica Gas Formation: Economic Impact Study*, 28 (2011) ("Economic Impact Study").² Without the presence of the oil and gas industry in 2010, Ohio would have lost nearly \$16 million in local income taxes alone. *Id.* at 29.

The oil and gas industry is currently poised to make an even bigger positive impact on Ohio's economy. The Utica Shale formation is an organically-rich geological resource that extends across the eastern half of Ohio and is expected to contain as much as five billion barrels of oil and 15 trillion cubic feet of natural gas. See Thomas and Lendel, et al., *An Analysis of The Economic Potential for Shale Formations in Ohio*, 4 (2011) ("University Report")³ (citing Downing, *Natural gas, oil reserves are big, Ohio is*

² The report is accessible at <http://coldsparkdev.com/oogeep/wp-content/uploads/2013/02/OOGEEP-Economic-Impact-Study-September-2011.pdf>.

³ The report is available at http://urban.csuohio.edu/publications/center/center_for_economic_development/Ec_Impact_Ohio_Utica_Shale_2012.pdf.

estimating, Ohio.com, November 2, 2011⁴ (providing estimate by geologist in charge of ODNR's Division of Geological Survey)). Extraction of oil and gas from the Utica Shale formation has become economically feasible due to recent technological advances in horizontal drilling and hydraulic fracturing techniques. *Id.* at 4–5.

In 2011, several studies were conducted to estimate the potential economic impact that this newly-accessible resource could have on Ohio. One study, conducted by faculty members at Cleveland State University, The Ohio State University and Marietta College, while noting that it had "generally been conservative in its estimates," found that Utica Shale development could support over 60,000 jobs by 2014 and create hundreds of millions of dollars in total state and local tax revenue. *University Report*, at 1–2. A similar study, conducted by an Ohio-based research firm, came to similar conclusions regarding the positive economic potential presented by the Utica Shale formation.⁵ See *Economic Impact Study*, at 10–13. This report estimated Utica shale development could support over 100,000 jobs by 2014 and create nearly two-hundred million dollars in local wage taxes alone. *Economic Impact Study*, at 17.

Results from the early stages of the Utica Shale development have been impressive. The State of Ohio recently found job growth of 16.8% in 2012 in the core shale-related industries of oil and gas extraction, drilling oil and gas wells, support activities for oil and gas operations, oil and gas pipeline construction and pipeline transportation of natural gas. See Ohio Department of Jobs and Family Services, 2012

⁴ The story is available at <http://www.ohio.com/news/local/natural-gas-oilreserves-are-big-ohio-is-estimating-1.243256>.

⁵ This study extended further into the future than did the University Report and measured the indirect benefits that would be realized as a dollar of investment into Ohio's shale play flowed through the economy.

Annual Ohio Shale Report, 3 (2013).⁶ A recent study by global research firm IHS found that Ohio's shale play already supported over 38,000 jobs in 2012.⁷ See IHS, *America's New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy, Vol. 2: State Economic Contributions*, 13, 16 ("IHS Report"). IHS estimated that shale development activities in Ohio contributed over \$4 billion to the state's economy last year. *Id.* at 16.⁸

These economic benefits are having a real and meaningful impact at the local level. Carroll County has been the epicenter for Ohio's shale play, leading all counties for drilling permits issues and wells drilled. See Bell, *Shale energy boom transforming Carroll County, minting millionaires and boosting tax base*, Columbus Business First (September 17, 2013).⁹ Tax revenue in Carroll County grew by \$1 million in 2012 because of increased oil and gas development, and is expected to grow by another \$500,000 in 2013. *Id.* In addition, the oil and gas industry has spent \$40 million widening and paving Carroll County roads over the past two years. *Id.* Previously-closed local businesses have now reopened, new businesses are starting, and established businesses are seeing unprecedented success and hiring new employees.

⁶ The report is available at <http://ohiolmi.com/OhioShale/2012Annual%20Shale.pdf>.

⁷ This number included direct, indirect and induced jobs. "Direct jobs are those created by firms that comprise the oil and gas industry, or by the capital expenditures of the related industries; indirect jobs are those created by suppliers of goods and services to industry. Induced jobs are those that meet the new demand for consumer goods created by the increased income generated by the direct and indirect jobs." IHS Report, at 27.

⁸ Ohio was specially recognized in the IHS report for its efforts to fully realize the local benefits of shale development by 1) training the local workforce, 2) introducing potential suppliers to the oil and gas industry, and 3) supporting oil and gas innovation efforts at Ohio universities. IHS Report, at 18.

⁹ This article can be accessed at <http://www.bizjournals.com/columbus/blog/2013/09/shale-energy-boom-transforming-carroll.html?page=all>.

Id.; O'Brien, *Now, the real Utica shale money begins to flow*, The Business Journal (May 18, 2013).¹⁰

To the extent that the Court chooses to examine the economic impact issues raised by Appellant's *amici* supporters, it should examine those complaints in the context of the broadly positive economic impact that the oil and gas industry has in Ohio. The General Assembly recognized that the safe and efficient development of Ohio's oil and gas resources has the potential to create thousands of jobs and generate millions of dollars in tax revenue for both the State and local governments. To ensure that Ohio continues to safely take advantage of the economic opportunity that Utica Shale development offers to Ohioans, the General Assembly enacted a comprehensive statewide system to regulate the development of the oil and gas industry. The Court should not disturb the General Assembly's policy decision.

CONCLUSION

The oil and gas industry has long been a valuable and beneficial asset of the Ohio economy. It is now poised to expand exponentially, promising many benefits to the Ohio economy. The General Assembly has enacted a uniform statewide regulatory system that will allow this expansion to occur safely. This uniform system addresses the concerns of local governments and requires state officials to consider many of the same issues that might otherwise be addressed by local zoning ordinances. Municipal zoning ordinances, such as the one in question here, unconstitutionally conflict with the General Assembly's legislative determination and could have serious negative consequences on the oil and gas industry and the Ohio economy. Therefore, *amicus*

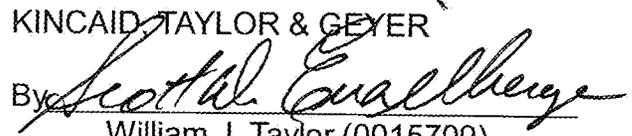
¹⁰ The article can be accessed at <http://businessjournaldaily.com/drilling-down/now-real-utica-shale-money-begins-flow-2013-5-18>.

curiae Ohio Oil and Gas Association respectfully urges the Court to affirm the Ninth District's decision and ensure that Ohioans are permitted to realize the economic benefits associated with the efficient and safe regulation of oil and gas operations in Ohio.

Respectfully submitted,

KINCAID, TAYLOR & GEYER

By



William J. Taylor (0015709)
Scott D. Eickelberger (0055217)

50 North Fourth Street
P.O. Box 1030
Zanesville, Ohio 43701-1030
T: (740) 454-2591
F: (740) 454-6975
wjt@kincaidlaw.com
scott@kincaidlaw.com

*Counsel for Amicus Curiae Ohio Oil and
Gas Association*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following persons, by regular U.S. Mail on this 28th day of October, 2013:

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

*Counsel for Plaintiff-Appellant
City of Munroe Falls*

Barbara A. Tavaglione
9191 Paulding Street NW
Massillon, Ohio 44646

*Counsel for Amicus Curiae People's Oil
and Gas Collaborative - Ohio*

David C. Morrison
MORRISON & BINDLEY
987 Professional Parkway
Heath, Ohio 43056

Counsel for Amicus Curiae City of Heath

Meleah Geertsma
Katherine Sinding
Peter Precario
NATURAL RESOURCES DEFENSE
COUNCIL
20 N. Wacker Drive, Suite 1600
Chicago, Illinois 60606-2600

Counsel for Municipal Amicus Curiae

John K. Keller
VORYS, SATER, SEYMOUR AND PEASE
LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

*Counsel for Defendants-Appellees
Beck Energy Corporation and Joseph
Willingham*

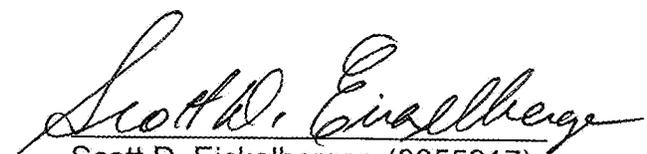
Trent A. Dougherty
OHIO ENVIRONMENTAL COUNCIL
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449

*Counsel for Amicus Curiae Ohio Local
Businesses*

Richard C. Sahli
981 Pinewood Lane
Columbus, Ohio 43230-3662

Deborah Goldberg
EARTHJUSTICE
156 William Street, Suite 800
New York, NY 10038-5326

*Counsel for Amicus Curiae Health
Professionals*


Scott D. Eickelberger (0055217)