

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. 13-0465  
 Plaintiffs-Appellants, )  
 ) On Appeal from the Ninth Appellate  
 v. ) District Court of Appeals, Summit County,  
 ) Ohio (Case No. 25953)  
 BECK ENERGY CORPORATION, et al., )  
 )  
 Defendants-Appellees. )

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BRIEF OF AMICUS CURIAE OHIO AGGREGATES ASSOCIATION, OHIO READY MIXED  
 CONCRETE ASSOCIATION AND FLEXIBLE PAVEMENTS OF OHIO IN SUPPORT OF  
 APPELLEES BECK ENERGY CORPORATION AND JOSEPH WILLINGHAM

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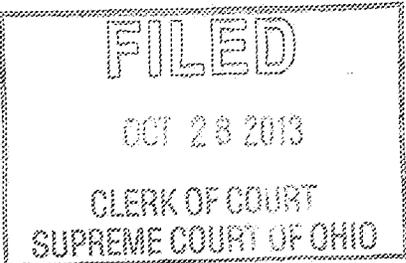
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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Aggregates Association ("Ohio Aggregates") is a non-profit business association that represents all of Ohio's industrial minerals mining operations, with the exception of coal. Ohio Aggregates members are essential suppliers of construction materials, both natural and manmade, such as limestone, sand and gravel aggregates, salt, clay, shale, gypsum, industrial sand, building stone, lime, cement and recycled concrete. Statewide, the mineral and aggregate industry employs nearly 5,000 Ohioans and results in the indirect employment of another 40,000 Ohioans in supporting industries. Production of crushed stone, sand and gravel and supporting industries contribute an annual total of \$38 billion to the national economy. In Ohio, the industry's non-fuel raw mineral production alone is valued at over one billion dollars. Historically, at least 50% of all the materials produced for infrastructure projects are purchased with tax dollars.

The Ohio Ready Mixed Concrete Association ("Ohio Concrete") is a non-profit trade association representing the concrete producers, the concrete contractors, the cement industry, and various other supporting associated members in the state of Ohio. Ohio Concrete members produce concrete, aggregates and other essential building materials used in the construction industry in the state of Ohio. Members of Ohio Concrete directly employ over 6,000 Ohioans, and thousands more indirectly.

Flexible Pavements of Ohio ("FPO") is a trade association representing the interests of the Ohio asphalt paving industry. The FPO membership is comprised of asphalt mixture producers, contractors, supporting companies to the industry, architect, engineering firms and local public agencies. The asphalt industry adds to Ohio's wealth,

with plants and equipment worth \$663 million. Ohio's 176 asphalt plants provide almost 4,800 jobs with a total annual payroll of almost \$234 million and pay taxes of almost \$24 million. In addition, more than 1,300 truckers are hired each year with a payroll of \$106 million. Every paved road, every four-lane highway, and every parking lot contributes to the economic health of the state. Asphalt paving is designed and mixed in-state, incorporating Ohio aggregates, recycled Ohio pavement and other recycled products, heated to paving consistency on-site and laid down by Ohio workers. Ohio's asphalt industry spent \$723.3 million last year on raw materials and fuel, plus \$26.3 million on Ohio-generated electricity.

*Amici's* members are located across the state of Ohio and run the gamut in size and organization; some members are small, family-owned companies, whereas others are multi-national corporations. Despite these differences, *Amici's* members have unifying characteristics in that they are heavily regulated by the Ohio Environmental Protection Agency and other state agencies. As a result of these industries being heavily regulated, they all have a strong interest in ensuring that each respective industry is subject to a consistent set of state-wide regulations as opposed to a number of potentially conflicting local ordinances and rules.

## **INTRODUCTION**

The State of Ohio plays a unique role in the development of oil and gas resources within the nation. While Ohio played a part in the early stages of oil exploration in the United States, the recent development of oil and gas resources from shale formations has thrust Ohio into the national spotlight. The people of Ohio, through the General Assembly, have determined that the most fair and efficient method

of developing Ohio's resources is through a centralized and coordinated effort as opposed to a patchwork system in which rules vary from municipality to municipality. As a result, the General Assembly made a policy decision to appoint the Ohio Department of Natural Resources ("ODNR") as the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations" throughout the state. See R.C. 1509.02.

*Amici* recognize that this centralized system not only promotes fairness and efficiency throughout Ohio, but also serves as an example to other states regarding the most effective way to develop resources. The City of Munroe Falls (the "City") argues on appeal, however, that it should be allowed to impose, through its municipal ordinances, onerous conditions on oil and gas development notwithstanding the fact that the ODNR has addressed those same concerns through its approval process. The City thus asks this Court to disregard the well-settled test, as articulated by this Court, for determining whether a municipal ordinance unconstitutionally conflicts with a state statute. The City's position would not only thwart the fair and efficient statewide development of oil and gas resources contrary to the policy decision of the General Assembly, but it would also require this Court to deviate from its precedents in determining whether a municipal ordinance conflicts with a statute.

As set forth below, in response to arguments of amicus supporters of the City, the policy decisions of other states have no bearing on the home rule analysis that is before this Court. Consequently, *Amici* Ohio Aggregates, Ohio Concrete and FPO urge this Court to apply Ohio's test for determining whether the City's ordinances conflict with

R.C. Chapter 1509. Application of this Court's precedents demonstrates that the decision of the Ninth District Court of Appeals should be affirmed.

### STATEMENT OF FACTS

*Amici* adopt the Statement of Facts set forth by Appellees Beck Energy Corporation and Joseph Willingham 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*

#### ***Appellees' Counter-Proposition of Law:***

*Section 3, Article XVIII of the Ohio Constitution preserves to the State the authority to enact general laws, such as R.C. Chapter 1509, that prevail over conflicting local zoning ordinances.*

The City and *Amici Curiae* Health Professionals direct the Court's attention to case law, statutes and rules from other states. To varying degrees, those states have permitted local laws to regulate the oil and gas industry. The authorities upon which the City and its *Amici* rely, however, do not advance their argument that this Court should reverse the decision of the Ninth District. The legal authorities from the other states lack any precedential authority in the sovereign State of Ohio, and either implicate arguments that would more appropriately be directed toward the General Assembly or employ a preemption analysis that is not relevant to the home rule provisions of the Ohio Constitution.

**A. The Decisions of Other States to Allow Municipalities to Govern Regulation of Oil and Gas Exploration Involve Policies for a Legislature to Consider, and Are Not Relevant to the Issues in This Appeal.**

The City and its *Amici* note that several other oil and gas producing states have managed significant production of oil and gas despite allowing municipalities to regulate the oil and gas industry. See Appellant's Merit Brief at 21-22. The policy decisions of those states, however, are irrelevant to the home-rule preemption analysis at issue here. The City's and its *Amici's* arguments would be better directed toward the Ohio General Assembly.

**1. Other States Have Made a Policy Decision to Allow Different Levels of Local Regulation.**

As noted by the City and its *Amici*, Texas permits municipalities to prohibit oil and gas development but also manages to produce large amounts of oil. However, the ability of Texas (with its vast reserves) to produce significantly more oil than Ohio is irrelevant to the issues in this case, notwithstanding Texas's policy of allowing municipalities to enact zoning laws that prohibit drilling. Supporters of the City's and *Amici's* position could certainly urge the Ohio General Assembly to consider Texas's experience if the lawmakers were to amend R.C. Chapter 1509. Nevertheless, the fact that Texas produces large amounts of oil in spite of a municipality's ability to prohibit drilling is *irrelevant* to the analysis of whether there is an unconstitutional conflict between R.C. Chapter 1509 and the City's ordinances.

The arguments as to other prolific oil-producing states such as Louisiana and Oklahoma suffer from the same infirmity. Even though those states apparently have adopted policies that grant municipalities more authority over oil-and-gas activity than have the people of the State of Ohio, those policies are not relevant to the issues before

this Court. The fact that Louisiana's oil and gas statutes may not preempt certain zoning ordinances has no bearing on whether, under Ohio law, the City's ordinances conflict with R.C. Chapter 1509. The City's assertion that Oklahoma municipalities may enact zoning laws to regulate drilling of oil and gas likewise sheds no meaningful light on whether the City's ordinances conflict with R.C. Chapter 1509.

The arguments based on the decision of a Kentucky appellate court in *Blancett v. Montgomery*, 398 S.W.2d 877 (Ky. 1966), are likewise beside the point. The City notes that the court held in *Blancett* that zoning was "one of the 'basic powers' of municipalities." Appellee's Merit Brief at 22. But that conclusion has no bearing on whether the Munroe Falls ordinances and R.C. Chapter 1509 conflict under Ohio law.

Additionally, the decisions of the Colorado Supreme Court relied upon by the City and its *Amici* do not dictate a different result in this case. See, e.g., Appellant's Merit Brief at 22, citing *Voss v. Lundvall*, 830 P.2d 1061 (Colo. 1992); Brief of *Amici Curiae* Health Professionals at 23-24, citing *Board of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045 (Colo. 1992). The *Voss* case addressed a municipality's *total ban* on drilling and the *Bowen/Edwards* case analyzed whether a county's laws were *completely preempted* by state law. See *Voss*, 830 P.2d at 1066; *Bowen/Edwards*, 830 P.2d at 1055.

Those cases have no effect on the analysis of whether the Munroe Falls ordinances conflict in a particularized way with R.C. Chapter 1509. Significantly, if the *Voss* case were relevant, it would be important to note that the Colorado court made clear that "in the event of a conflict [between a state statute and a municipal ordinance],

the state statute supersedes the conflicting provision of the ordinance." *Voss*, 830 P.2d at 1066.

Thus, the relevant inquiry here is whether Ohio law recognizes a conflict between R.C. Chapter 1509 and the City's ordinances. As Appellee argues, and the Ninth District concluded, application of this Court's precedents shows that R.C. Chapter 1509 and many of the City's ordinances conflict. R.C. Chapter 1509 preempts those ordinances.

Furthermore, California's oil and gas statute confirms that the City's and its *Amici's* arguments are better suited to a legislative debate than a judicial inquiry. In California, the legislature has decided that its oil and gas statutes "shall not be deemed a preemption" of local laws, including zoning laws. See Cal. Pub. Res. Code § 3690. Thus, the California statute shows that legislatures can, and do, decide that oil-and-gas statutes should not be construed to preempt municipal zoning ordinances.

**2. The Ohio General Assembly Has Made a Policy Decision on Oil-and-Gas Regulation that Only the General Assembly Can Amend.**

The people of Ohio, through the General Assembly, have chosen not to adopt a policy that would allow municipalities to enact laws that conflict with the statewide regulation of oil and gas resources. Instead, the General Assembly chose to make the ODNR the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations" throughout the state. See R.C. 1509.02. Thus, the City's references to states that have adopted different policies do nothing to support the City's position regarding the issues before this Court. To the contrary, the laws of those states actually show that the City is seeking relief from the wrong branch

of government. The arguments derived from the laws and decisions of other states would more properly be directed toward the General Assembly.

**B. The Analysis in Cases from Other States Is Not Relevant to Whether the City's Ordinances and R.C. Chapter 1509 Conflict.**

The City and *Amici* Health Professionals also imply that case law from other states shows that this Court should reverse the Ninth District's decision. The reliance on those cases is misplaced. The analysis from those cases is inapplicable to whether the City's ordinances conflict with R.C. Chapter 1509.

**1. Pennsylvania Does Not Have a Home Rule System, So a Comparison to Ohio's System is Not Relevant.**

The recent Pennsylvania decision in *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2013), employs an analysis that is irrelevant to this appeal. Pennsylvania does not have a home rule system like Ohio's. Instead, all municipal authority is conferred by statute. *Id.* at 480. The plaintiffs in *Robinson Twp.* were various municipalities challenging the constitutionality of a state law ("Act 13") that the municipalities claimed encumbered them with conflicting obligations in light of their zoning responsibilities. *Id.* at 481.

Under Pennsylvania's Municipalities Planning Code ("MPC"), the municipalities were required to adopt a land use (zoning) plan. *Id.* at 482. Pennsylvania also enacted Act 13, which preempted all local zoning laws to the extent that they affect oil and gas regulation. *Id.* at 483. The court held that Act 13 required municipalities to violate the MPC by forcing the municipalities to permit industrial oil and gas operations where such land uses may be incompatible with local zoning laws. *Id.* at 484-85. Thus, the requirement that a municipality adhere to the MPC, which addressed environmental and demographic concerns, as well as Act 13, which addressed oil and gas concerns,

created conflicting obligations. *Id.* at 485. As a result, the court held that the municipalities stated a substantive due process claim against the Commonwealth. *Id.*

The issues in *Robinson Twp.* are not relevant to this appeal. Pennsylvania's method of granting municipal power, which is unlike Ohio's, set the stage for the dispute in that case. All municipal power in Pennsylvania is granted by statute, and the statutes at issue in *Robinson Twp.* (*i.e.*, the MPC and Act 13) subjected the municipalities to conflicting obligations.

By contrast, the Ohio home rule system does not create such a conflict. The authority of an Ohio municipal corporation to enact zoning ordinances is a self-executing authority under the home-rule provision of the Ohio Constitution. See Ohio Constitution, Section 3, Article XVIII; see also *Morris v. Roseman*, 162 Ohio St. 447, 450 (1954). As a result, enabling legislation like the MPC or Act 13 is unnecessary for a municipality to create zoning laws. See *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 270, 407 N.E.2d 1369 (1980). Thus, a municipality would not be subject to inconsistent statutory obligations. However, under certain circumstances, including the circumstances of this case, a state statute that conflicts with a local ordinance preempts the ordinance. See *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 9. This is a well-established principle of Ohio jurisprudence, and the *Robinson Twp.* decision has no effect on that analysis.

Additionally, the pre-Act 13 case law dealing with preemption in Pennsylvania is irrelevant because the statutes at issue are unlike Ohio's. For example, in *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009), the Pennsylvania Supreme Court addressed an oil and gas statute that preempted all

municipal ordinances that imposed limitations on "oil and gas well operations regulated" by the oil and gas laws or that "accomplish the same purposes" of the oil and gas laws law. *Id.* at 212. The court held that zoning laws did not relate to oil and gas well operations and that the MPC (mentioned above) served a different purpose than the oil and gas laws. *Id.* at 223, 225. Thus, under that analysis Pennsylvania determined that a municipality could prohibit oil and gas drilling through zoning ordinances.

That analysis, however, is irrelevant to whether the City's ordinances conflict with R.C. Chapter 1509 in light of the decision of the people, through the General Assembly, to grant the ODNR "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.

## **2. The New York Legislature Granted the State Narrow Authority over Oil and Gas Regulation.**

The City's and its *Amici's* reliance on recent New York case law also is unavailing. Although New York has a home rule system, the scope of the authority of the New York agency that governs oil and gas production is narrower than the authority granted by R.C. 1509.02. The issue in *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 964 N.Y.S.2d 714 (App. Div. 2013), was whether a municipality's ordinances banning all oil and gas exploration were preempted by statutes that the legislature determined "shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries . . . ." N.Y. Env. Cons. Law 22-0303(2).

The New York court determined that "to regulate" referred to the "details or procedure" of the oil and gas industry. 108 A.D.3d at 32. The court also determined

that "the Legislature's intention was to ensure uniform statewide standards and procedures with respect to the technical operational activities of the oil, gas and mining industries in an effort to increase efficiency while minimizing waste, and that the supersession provision was enacted to eliminate inconsistent local regulation that impeded that goal." *Id.* at 34. As a result, the court concluded that, because the ordinances banning drilling did not relate to "the details and procedures" of drilling, they did not conflict with the state statutes governing the oil and gas industry.

In any event, this ruling is not necessarily the last word from the New York judiciary. Review of this decision is pending before the Court of Appeals of New York. See *Matter of Norse Energy Corp. USA v Town of Dryden*, 2013 NY Slip Op 83668, 2013 N.Y. LEXIS 2118 (N.Y. Aug. 29, 2013); see also *Cooperstown Holstein Corp. v Town of Middlefield*, 2013 NY Slip Op 83651, 2013 N.Y. LEXIS 2086 (N.Y. Aug. 29, 2013) (granting leave to appeal a case similar to the *Norse Energy* case).

### 3. The Ohio General Assembly Has Granted Much Broader Authority to the ODNR over Oil-and-Gas Regulation Than the New York Legislature Has Granted.

The Ohio Department of Natural Resources has much broader authority under R.C. Chapter 1509 than its New York counterpart. Under R.C. 1509.02, the ODNR has "sole and exclusive authority to regulate **the permitting, location, and spacing of oil and gas wells and production operations** within the state . . . ." (Emphasis added.) Moreover, "[t]he regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and [R.C. Chapter 1509] and rules adopted under it 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, including site construction and restoration, permitting related to those

activities, and the disposal of wastes from those wells." R.C. 1509.02 (emphasis added). Thus, the fact that the narrow New York statute did not conflict with municipal laws banning oil and gas exploration has no effect on analysis of whether the Munroe Falls ordinances conflict with R.C. Chapter 1509 under Ohio's test for determining when a municipal ordinance and a state statute conflict.

#### **4. The Ninth District Applied the Correct Analysis.**

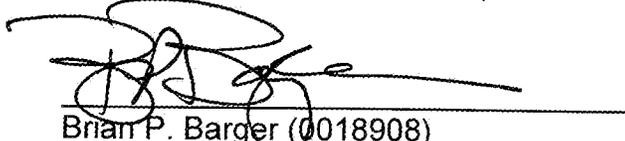
This Court should apply Ohio's test governing whether a state statute and municipal ordinance conflict. Under Ohio's conflict test, a conflict between a state statute and a local ordinance exists whenever "the ordinance prohibits that which the statute permits." *Ohioans for Concealed Carry, Inc. v. 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), paragraph two of the syllabus. That is the test that the Ninth District applied. See *State ex rel. Morrison v. Beck Energy Corp.*, 9th Dist. No. 25953, 2013-Ohio-356, ¶ 38, citing *Clyde* and *Struthers*. Application of this test shows that the City's ordinances requiring a permit, application fees and performance bond prior to drilling conflict with R.C. Chapter 1509. Consequently, Ohio law preempts those ordinances.

#### **CONCLUSION**

The City's and its *Amici's* references to the oil and gas laws and decisions of other states provide no support to the City's position in this appeal. The Ohio Aggregates Association, Ohio Ready Mixed Concrete Association and Flexible Pavements of Ohio respectfully urge the Court to affirm the decision of the Ninth District.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be "B. Barger", written over a horizontal line.

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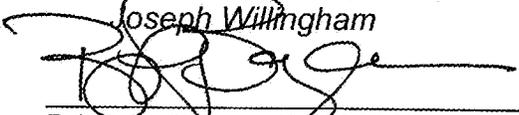
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