

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO ex rel. JACK MORRISON, JR., LAW DIRECTOR, CITY OF MUNROE FALLS, OHIO, et al.
Plaintiffs-Appellants,
v.
BECK ENERGY COMPANY, et al.
Defendants-Appellees.

Case No. 2013-0465

Appeal from the Summit County Court of Appeals, Ninth Appellate District, Case No. 25953

REPLY BRIEF OF AMICI CURIAE HEALTH PROFESSIONALS IN SUPPORT OF APPELLANTS

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INTRODUCTION

The oil and gas lobby seeks to exempt itself from compliance with long-standing local authority to separate incompatible land uses into distinct zoning districts. The industry insists that it is entitled to drill oil and gas wells and to undertake heavy industrial operations next to residences, hospitals, schools, and town centers, even though the Utica Shale underlies the entire eastern half of Ohio and can be reached through horizontal drilling techniques that may extend a mile underground. The oil and gas industry's self-serving interpretation of the law goes too far. Its broad reading of the state's oil and gas statute would overturn the constitutionally protected authority of municipalities to ensure that lands within their borders are used in a way that fosters orderly economic development, upholds the value of private property, and protects public health and safety. The health professionals ("Amici") submitting this reply brief respectfully urge this Court to find that, contrary to the claims of the oil and gas industry, Ohio's oil and gas statute does not categorically preempt the zoning designations established by localities in this state.

ARGUMENT

Appellee Beck Energy Company ("Beck") and its supporting amici (collectively "Appellees") advocate for an interpretation of the Ohio Revised Code Chapter 1509 ("Chapter 1509") that makes the statute unconstitutional. They claim that the statute completely trumps the constitutionally delegated authority of municipalities to divide incompatible land uses into different zoning districts. But if Chapter 1509 were read in this way, the statute would fail to meet the due process principles that must animate the State's exercise of its police powers. *See infra* Section I. "[I]n construing legislative enactments, courts are bound to interpret them in such a way that they are constitutional, if it is reasonably possible to do so." *Coop. Legislative Comm. of Transp. Bhd. v. Pub. Util. Comm'n*, 177 Ohio St. 101, 103, 202 N.E.2d 699, 701

(1964). Because it is reasonably possible to interpret Chapter 1509 so that it does not preempt local zoning designations, this Court is bound to do so. *See infra* Section II.¹

I. INTERPRETING CHAPTER 1509 TO OVERRIDE LOCAL ZONING DESIGNATIONS WOULD RENDER THE STATUTE UNCONSTITUTIONAL.

The oil and gas industry asserts a special entitlement – to conduct its industrial activities in any zoning district it sees fit, including in districts normally reserved for residences, schools, hospitals, senior homes, churches, and other land uses wholly incompatible with oil and gas drilling. As is explained below, an interpretation of Chapter 1509 to grant such an entitlement renders the statute a discriminatory exercise of the state’s police powers that fails to “bear a real and substantial relation” to public health, safety, and welfare, in violation of the Ohio Constitution. *State v. Thompkins*, 75 Ohio St. 3d 558, 560, 664 N.E.2d 926, 928 (1996).

As Amici explained in their opening brief, if this Court interprets Chapter 1509 to preempt all local zoning designations and to permit oil and gas activities anywhere in the state irrespective of existing zoning, it would transform the statute into a zoning law that offers preferential treatment in favor of a single industry. *See* Brief of Amici Curiae Health Professionals in Support of Appellants at 30-36 (“Health Professionals’ Br.”).

In effect, Chapter 1509 would single out certain locations (specifically, those where an oil and gas operator seeks to drill a well) “for discriminatory or different treatment from that accorded surrounding land which is similar in character.” *Willott v. Village of Beachwood*, 175 Ohio St. 557, 559, 197 N.E.2d 201, 203 (1964). Such spot zoning is unconstitutional because, under due process principles, the state’s exercise of its police powers must “bear a real and substantial

¹ As in their opening brief, Amici do not address the question of whether Chapter 1509 is a general law and respectfully refer the Court to Appellant’s briefs for argument on this point. Amici argue that in a preemption analysis, even if Chapter 1509 were found to be a general law, the statute does not conflict with, and therefore does not preempt, local zoning designations.

relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public,” and must not be “arbitrary, discriminatory, capricious or unreasonable.” *State v. Thompkins*, 75 Ohio St. 3d at 560, 664 N.E.2d at 928; *see Willott*, 175 Ohio St. at 559. Notably, Beck and its six supporting amici do not mention, much less address, this significant constitutional problem in their briefing.

The industry’s broad interpretation of Chapter 1509 as a preemptive zoning law confronts other constitutional problems beyond spot zoning. The state’s exercise of its police powers in Chapter 1509 to erase local zoning designations would mean the following: First, an oil and gas operator would select a location for a well. As amicus American Petroleum Institute (“API”) candidly notes, this well location would “not conform to local zoning districts.” Brief of the American Petroleum Institute, et al. as *Amici Curiae* in Support of Appellees at 21 (“API Br.”). The operator would then apply for a permit to drill the well. *See* R.C. §§ 1509.05-1509.07. In urbanized areas, this would require the operator to certify that it had provided notice to property owners within 500 feet of the surface location of the well. *See id.* § 1509.06(A)(9).² Neighbors and local communities in areas not classified as “urbanized areas” and all property owners more than 500 feet away from the surface location of the well would receive no notice whatsoever. Even those property owners who receive notice would have no opportunity to participate in a hearing or to engage in the state’s permitting process. At most, they would be informed by the permit applicant that they could send “comments regarding the application” to the Ohio Department of Natural Resources (“ODNR”). The agency is under no obligation to consider or respond to these comments. *Id.* A copy of the drilling permit application would be provided to

² Chapter 1509 defines “urbanized area” as “an area where a well or production facilities of a well are located within a municipal corporation or within a township that has an unincorporated population of more than five thousand in the most recent federal decennial census prior to the issuance of the permit for the well or production facilities.” R.C. § 1509.01.

local officials who, like individual property owners, would have no opportunity for a hearing or to weigh in on ODNR's review of the permit application. *See id.* § 1509.06(B). ODNR's approval of a permit cannot even be appealed by a member of the public (although industry can challenge the denial of a permit). *See id.* § 1509.36 (permitting appeals to the oil and gas commission from orders of the chief of ODNR); *id.* § 1509.06(F) ("The issuance of a permit shall not be considered an order of the chief."); *Chesapeake Exploration, L.L.C. v. Oil & Gas Comm'n*, 135 Ohio St. 3d 204, 985 N.E.2d 480 (2013) (granting a writ of prohibition to prevent the Oil and Gas Commission from exercising jurisdiction over an appeal from ODNR's issuance of a permit to drill an oil and gas well).

Remarkably, despite this lack of public process, Appellees characterize Chapter 1509 as a statute that adequately takes local considerations into account in a way that properly exercises the state's police powers. *See, e.g.,* Appellees' Merit Br. at 2, 17 ("Appellees Br."); Merit Brief of Amicus Curiae State of Ohio in Support of Appellees at 9 ("State Br."); API Br. at 13. Requirements to conduct a site review and to consider screening and landscaping measures, *see* R.C. § 1509.06(H)(1), afford scant protection for local interests, however, for two reasons. First, the actual placement of a well is dictated not by the compatibility of neighboring land uses but by the well operator's choice, subject only to setback and spacing requirements. *See id.* §§ 1509.021, 1509.24; Ohio Admin. Code 1501:9-1-04. Second, and more crucially, ODNR has limited discretion to approve or deny a permit. Chapter 1509 provides in relevant part:

The chief shall issue an order denying a permit if the chief finds that there is a substantial risk that the operation will result in violations of this chapter or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment, provided that where the chief finds that terms or conditions to the permit can reasonably be expected to prevent such violations, the chief shall issue the permit subject to those terms or conditions, including, if applicable, terms and conditions regarding subjects identified in rules adopted under section 1509.03 of the Revised Code.

R.C. § 1509.06(F). In other words, the agency is *required* to issue the permit when it finds that permit terms and conditions “can reasonably be expected to” prevent violations of the statute that “will present an *imminent danger*” *Id.* (emphasis added). At the same time, ODNR has no discretion to deny a permit unless “there is a *substantial risk* that the operation will result in violations [of the statutory regime] that will present an imminent danger” *Id.* (emphasis added). The agency cannot consider serious health threats that result from chronic, low-dose exposure to toxic chemicals, devastating harms from predictable but long-term migration of pollutants, or significant diminution in the value of nearby property that cannot be used or enjoyed in close proximity to oil or gas wells.

Chapter 1509 thus leads to a fundamentally different result than would be permitted under a municipality’s zoning designations. Appellees paint a pretty picture of the possible site-specific terms and conditions of well permits that might protect local interests. But in actuality, an applicant presents ODNR with a well location, which has been selected without regard to existing land uses, and the agency is *required* to approve a permit to drill at that location regardless of detrimental impacts on public welfare and the quiet enjoyment of property – so long as the operation does not present an *imminent danger*. An oil and gas well might be drilled within 150 feet of a senior home, for instance, and the well permit’s terms and conditions – including those touted by Appellees, such as noise mitigation and screening – would go only so far as would “reasonably be expected to prevent” an “*imminent danger*” to the members of the public living in that home. R.C. § 1509.06(F) (emphasis added). In sum, Chapter 1509 undoubtedly allows the pig in the parlor, in violation of the Ohio Constitution. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Contrary to Appellees’ claims that the statute adequately protects local interests and considers local conditions, Chapter 1509

guarantees only that the pig will not imminently endanger the parlor and those who use it. If Chapter 1509 is construed to override local zoning designations, therefore, the state’s exercise of police powers would fail to bear the necessary “real and substantial relation” to “health, safety, morals or general welfare of the public,” *State v. Thompkins*, 75 Ohio St. 3d at 560, 664 N.E.2d at 928, rendering the statute unconstitutional.

II. CHAPTER 1509 DOES NOT CONFLICT WITH MUNICIPAL ZONING DESIGNATIONS.

This Court can avoid an interpretation of Chapter 1509 that would make the statute an unconstitutional exercise of the state’s police powers. Indeed, because it is “reasonably possible” to construe the statute constitutionally, this Court is bound to do so. *Coop. Legislative Comm. of Transp. Bhd.*, 177 Ohio St. at 103, 202 N.E.2d at 701. As was explained in Amici’s opening brief, and in the briefs submitted by Appellant and other supporting amici, Chapter 1509 and local zoning regulate wholly different subject areas. *See, e.g.*, *Health Professionals’ Br.* at 13-15. Whereas Chapter 1509 regulates the technical aspects of oil and gas activities, local zoning ensures the separation of incompatible land uses. *See Smith v. Jullierat*, 161 Ohio St. 424, 425, 119 N.E.2d 611, 612 (1954) (“The purpose of a zoning ordinance is to limit the use of land in the interest of the public welfare.”). A foundational principle at the heart of this case – one that is obscured by Appellees’ self-serving arguments – is that the police powers that underlie municipal zoning derive from the Ohio Constitution and can be extinguished *only* by a general law in conflict. *See Ohio Const., Art. XVIII, § 3.* As is set forth below, no such conflict exists. This Court therefore should conclude that Chapter 1509 does not effectuate wholesale preemption of local zoning designations.

A. The Ohio General Assembly Cannot Deprive Localities of Constitutionally Protected Powers Merely by Expressing an Intent to Preempt a Field.

In deciding whether localities retain their traditional authority to create distinct zoning districts for distinct uses of property, this Court need not dwell long on the language in R.C. § 1509.02 that gives the State “sole and exclusive” power to permit oil and gas activities, as Appellees insist. *See* Appellees Br. at 5-6, 9-10. This language does not resolve the question before this Court – whether Chapter 1509 preempts local zoning designations – because mere statements of legislative intent to preempt a field are not sufficient to preempt a municipality’s Home Rule powers to enact ordinances not in conflict with general laws. *See Am. Fin. Servs. Ass’n v. Cleveland*, 112 Ohio St. 3d 170, 175, 858 N.E.2d 776, 782 (2006).

As this Court has noted:

A statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent and may be considered to determine whether a matter presents an issue of statewide concern, *but does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws.*

Id. (emphasis added); *see also Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St. 3d 96, 100, 896 N.E.2d 967, 972 (2008) (noting that a statement of legislative intent to preempt “may be considered in a home-rule analysis but does not dispose of the issue”) (citation omitted). In *Fondessy Enterprises, Inc. v. City of Oregon*, this Court made it exceedingly clear that the legislature’s expressed intention is not the applicable test in determining whether a state statute preempts a municipal ordinance. 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986). There, the statute at issue was explicit in its intent to preempt:

No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or regulation that in any way alters, impairs, or limits the authority granted in the permit.

Id. at 215, 492 N.E.2d at 800 (quoting R.C. § 3734.05(D)(3)). Nevertheless, this Court reversed the lower court, which had concluded that the statute preempted an ordinance imposing a permit fee and record-keeping requirements.

The Court's reasoning in *Fondessy* is instructive:

[A]s the power of any Ohio municipality to enact local police regulations is derived directly from Section 3 of Article XVIII of the Ohio Constitution and is no longer dependent upon any legislative grant thereof, *the same police power cannot be extinguished by a legislative provision.* If R.C. 3734.05(D)(3) were elevated to a level of "express preemption" . . . , no police power ordinance in the instant field would survive long enough to face a conflict test against a state statute. Our review of the judgments of the courts below reveals to this court that both courts reasoned and ruled as they did on preemption grounds exclusively rather than applying the conflict test of *Struthers*

Id. at 216-17, 492 N.E.2d at 800-801 (emphasis added). In reversing the lower court, this Court concluded:

We hold that the language of R.C. 3734.05(D)(3) cannot be employed to nullify the police power granted the city of Oregon by the Home Rule Amendment. *R.C. 3734.05(D)(3) may be utilized only to limit the legislative power of municipalities by the precise terms it sets forth.* R.C. 3734.05(D)(3) provides a conflict standard by which to judge ensuing legislation in the instant arena of environmental regulation.

Id. at 217, 492 N.E.2d at 801 (emphasis in original). The Court went on to undertake a conflict analysis and concluded that the statute did not conflict with local permit fee and monitoring requirements. Similarly, in *Ohioans for Concealed Carry*, this Court acknowledged that the statute at issue "embod[ied] the General Assembly's intent to occupy the field of handgun possession in Ohio." 120 Ohio St. 3d at 100, 896 N.E.2d at 972. Citing its own precedent, however, this Court concluded that "that intent does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws." *Id.* (citation omitted). The Court then went

on to apply the preemption analysis to assess whether the local ordinance was an exercise of police powers that conflicted with a general law.

In short, the mere expression of legislative intent to preempt, even to “occupy the field” – as Appellees interpret the “sole and exclusive” language in R.C. 1509.02 – cannot nullify the police power granted to the city of Munroe Falls by the Home Rule Amendment. “The General Assembly cannot withdraw from municipalities powers expressly conferred upon them by the Constitution.” *City of Akron v. Scalera*, 135 Ohio St. 65, 66, 19 N.E.2d 279, 279 (1939). The oil and gas statute can limit the authority of municipalities *only* to the extent the statute’s “*precise terms*” conflict with a municipality’s exercise of police powers. *Fondessy*, 23 Ohio St. 3d at 217, 492 N.E.2d at 801. As was set forth in Amici’s brief and is reiterated in the next section, the precise terms of Chapter 1509 do not conflict as a matter of course with municipal authority to designate certain zoning districts for certain land uses.

B. The Precise Terms of Chapter 1509 Do Not Conflict with Municipal Zoning Designations.

Appellees make sweeping predictions of the “potentially conflicting permitting processes and regulations” that would be enacted “[i]f each locality were permitted to independently regulate oil and gas production,” Br. of Amicus Curiae Ohio Contractors Association In Support of Appellees at 5 (“Contractors Br.”), but that parade of horrors is not the scenario before this Court. Setting aside the specter of uncontrolled municipal “regulation” of the oil and gas industry, the real issue before this Court is whether Chapter 1509 preempts municipal zoning that would limit oil and gas wells to those districts in which such industrial activity is compatible with pre-existing permitted uses. The answer to that question clearly is no.

1. Nothing on the Face of the Statute Creates an Inevitable Conflict with Local Zoning Designations.

The terms of Chapter 1509 do not conflict unavoidably with local zoning designations. The Ohio General Assembly can draft statutes with precise terms that conflict with local zoning designations, but it failed to do so in Chapter 1509. The statute mentions “zoning” only once, and then in the context of *recognizing* the existence of zoning districts. *See* R.C. § 1509.23(A)(2) (authorizing ODNR to promulgate rules establishing minimum distances from certain structures and physical objects, including “zoning districts”). Moreover, nothing in Chapter 1509 leads to a conclusion that the statute inexorably conflicts with local zoning designations. One can imagine a scenario, for instance, in which an oil and gas operator identifies a well site in an appropriate zoning district and complies with all of the procedures and requirements set forth in Chapter 1509. Because Chapter 1509 does not inevitably conflict with local zoning and because a municipality’s authority to create and enforce zoning designations is a constitutionally-delegated power that can be extinguished *only* by a general law *in conflict*, *see Fondessy*, 23 Ohio St. 3d at 215, 492 N.E.2d at 799, this Court should not find that Chapter 1509 preempts local zoning designations as a whole.

This Court’s admonition that a statute “may be utilized only to limit the legislative power of municipalities *by the precise terms it sets forth*,” moreover, makes Appellees’ arguments about what is *not* in the statute less than persuasive. *Fondessy*, 23 Ohio St. 3d at 217, 492 N.E.2d at 801. In its discussion of legislative history, for instance, Amicus API points to the 2004 amendment of the oil and gas statute, which repealed language indicating that the statute and “rules adopted under it shall not be construed to prevent any municipal corporation, county, or township from enacting and enforcing health and safety standards for the drilling and exploration for oil and gas, provided that those standards are not less restrictive than this chapter or the rules adopted under it” R.C. § 1509.39 (repealed by H.B. 278); *see* API Br. at 16, 22-

23 (arguing that the repeal of this language reversed “the statutory default”). The repeal of this language does not spell preemption of local zoning, as Appellees suggest.

First, this repealed statutory language concerned local “health and safety standards,” which are wholly distinct from local *zoning designations*, in which a municipality separates incompatible land uses into different districts. More importantly, though, Appellees conveniently forget first principles: “[T]he power of any Ohio municipality to enact local police regulations is derived directly from Section 3 of Article XVIII of the Ohio Constitution and is no longer dependent upon any legislative grant thereof,” so “the same police power cannot be extinguished by a legislative provision.” *Fondessy*, 23 Ohio St. 3d at 216, 492 N.E.2d at 800 (citations omitted). The statutory language prior to 2004 did not grant municipalities any authority they did not already have under the Home Rule Amendment, and by the same token, the repeal of that language in 2004 did not extinguish any authority that the municipalities hold under the Home Rule Amendment. The fact that Chapter 1509 today does not contain language expressly permitting municipalities to enact health and safety standards, therefore, says nothing about whether Chapter 1509 conflicts with municipal zoning designations.

Appellees make other specious legal arguments in support of their preemption claim. Amicus State of Ohio insists, for instance, that “municipal permitting schemes *always conflict* with comprehensive, statewide permitting schemes.” State Br. at 20 (emphasis added). But zoning designations do not create competing municipal oil and gas drilling permit requirements, and Appellees never explain why *zoning designations* invariably must conflict with the state permitting scheme. *See id.* at 20-22 (citing only cases involving “municipal permitting schemes”). In any event, the cases the State cites in support do not sustain an interpretation of invariable conflict. In *State ex rel. McElroy v. City of Akron*, 173 Ohio St. 189, 181 N.E.2d 26

(1962), and *Ohio Assoc. of Private Detective Agencies, Inc. v. City of North Olmsted*, 65 Ohio St. 3d 242, 602 N.E.2d 1147 (1992), cited by the State, the ordinances at issue conflicted with the explicit terms of state statutes. In *McElroy*, the relevant statute stated that “[n]o political subdivision . . . shall charge any license fee or other charge against the owner of any watercraft . . . and no license . . . in addition to those provided [under the statute] shall be required by any . . . political subdivision of this state.” 173 Ohio St. at 191, 181 N.E.2d at 28 (quoting R.C. § 1547.61). In conflict with the precise terms of the statute, the contested ordinance required an additional city license for the operation of watercraft. *Id.* Similarly, in *Assoc. of Private Detective Agencies*, the relevant statute indicated that “[n]o license or registration fees shall be charged by the state or any of its subdivisions for conducting the business of private investigation” 65 Ohio St. 3d at 243, 602 N.E.2d at 1148. The contested ordinance exacted a registration fee for private investigators. *Id.*

Plainly, these cases do not stand for the proposition that “municipal permitting schemes *always conflict* with comprehensive, statewide permitting schemes.” State Br. at 20 (emphasis added). They represent uncontroversial examples of ordinances that conflict directly with the precise terms of a statute. These cases might hold lessons for the present case if Chapter 1509 stated that no municipality may enforce zoning designations against oil and gas operators, but the General Assembly did not include such a provision in the statute.

2. The Allegedly Unique Nature of Oil and Gas Activities Does Not Alter the Home Rule Analysis.

Notwithstanding Appellees’ implied argument that the oil and gas industry deserves special treatment because it is uniquely location-specific, *see, e.g.*, API Br. at 19, the industry

does not enjoy a carve-out from the Home Rule Amendment and this Court's Home Rule analysis. The horizontal drilling technology in use today means that oil and gas activities are not nearly as location-specific as Appellees describe. *See* Appellant City of Munroe Falls' Reply Brief at 8 (explaining why the argument that wellheads must be directly above the point where the oil and gas is found, regardless of zoning districts, is specious). But even if it were true that oil and gas drilling is strictly location-specific, this characteristic does not exempt these activities from the strictures of the law.

As Amici outlined in their opening brief, state regulation regularly co-exists with municipal zoning of the state-regulated activity, and states and localities have concurrently exercised their respective regulatory and zoning authorities over a number of industries, including location-specific industries such as coal mining and sand and gravel mining. *See* Health Professionals' Br. at 15-19 (citing *Smith v. Juillerat*, 161 Ohio St. at 429, 119 N.E.2d at 614; *Kane v. Kreiter*, 93 Ohio Law. Ab. 17, 195 N.E.2d 829, 831 (C.P. 1963); *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St. 3d 260, 265, 510 N.E.2d 373, 378 (1987)). In this respect, this Court's understanding of the dual regime of state regulation of industry operations and local zoning of land, as set forth in *Set Products*, is worth repeating. In this case involving sand and gravel mining – an activity that is bound to a certain location – this Court noted:

The purpose of adopting a comprehensive township zoning plan is to promote the public health, safety, and morals. R.C. 519.02. The purpose of R.C. Chapter 1514 is to ameliorate the effects of surface mining on the natural beauty and environment of Ohio, to the ultimate benefit of public health and safety. The legislative purposes are distinct, and the statutes together present dual conditions to the operation of a mineral quarry. R.C. Chapter 519 empowers a township to regulate surface mining, either by provision in the zoning ordinance, R.C. 519.02, or through the variance procedure, R.C. 519.14(B). R.C. 1514.02 provides that no operator may engage in surface mining without a permit issued by the Chief of the

Division of Reclamation. The final and complete approval of the operation stems from the endorsement by both the state and local authorities.

Set Products, 31 Ohio St. 3d 260, 265, 510 N.E.2d 373, 378 (1987) (citations omitted).³ State regulation of an activity does not conflict with local zoning, in short.

Appellees ignore this long history of dual jurisdiction and attempt to distinguish oil and gas activities as singularly different from those types of activities for which dual jurisdiction works. In *Village of Sheffield*, this Court found that an ordinance that entirely prohibited construction and demolition debris facilities was preempted by a statute governing the regulation of such facilities, but notably, the Court clarified that “[n]othing in this decision should be construed to suggest that Sheffield cannot restrict state-authorized facilities *to certain districts with appropriate zoning.*” *Village of Sheffield v. Rowland*, 87 Ohio St. 3d 9, 12, 716 N.E.2d 1121, 1124 (1999) (emphasis added). Amicus API reasoned that this Court’s conclusion in *Village of Sheffield* does not apply to the oil and gas industry because “[u]nlike waste facilities, oil and gas wells can be drilled only where oil or gas deposits are found, and those deposits do not conform to local zoning districts.” API Br. at 21.

This argument fails for two reasons. First, as a matter of fact, API fails to mention that the “oil or gas deposits” in the Utica Shale underlies the entire eastern half of Ohio. See Brief of Amicus Curiae Ohio Oil and Gas Association in Support of Appellees at 9. Because horizontal

³ API attempts to distinguish this case by claiming that its outcome “was mandated” by “the specific requirement that the state permit applicant insure in his application that future land uses within the site will not conflict with local zoning plans.” See API Br. at 21 (quoting *Set Products*, 31 Ohio St. 3d at 265, 510 N.E.2d 373). In fact, though this Court mentions this permit requirement, its description of the dual jurisdiction of state regulation and local zoning stands independently of this requirement. See 31 Ohio St. 3d at 265, 510 N.E.2d at 378 (rejecting the argument that the local ordinance caused unnecessary hardship because “[t]his argument ignores the dual jurisdiction described above, *as well as* the specific requirement that the state permit applicant insure in his application that future land uses . . . not conflict with local zoning plans”) (emphasis added).

drilling allows underground access to resources thousands of feet away from the surface location of the well, it is undoubtedly possible for the gas in the shale formation to be accessed from appropriate zoning districts. Second, as a matter of law, the particularities of oil and gas activities cannot nullify the constitutionally-delegated power of municipalities to designate zoning districts. The question that matters in a preemption analysis is whether Chapter 1509 “limit[s] the legislative power of municipalities by the precise terms it sets forth.” *Fondessy*, 23 Ohio St. 3d at 217, 492 N.E.2d at 801. As already explained, *supra*, it does not. Zoning designations for oil and gas activities can co-exist with state regulation under Chapter 1509. Accordingly, however location-specific oil and gas activities may be, Chapter 1509 does not preempt local zoning designations as a whole.

C. The Law and Experience in Other States Cast Doubt on the Specter of Unsafe and Wasteful Oil and Gas Operations Raised by Appellees.

Appellees go to great lengths to discredit the law of other oil- and gas-producing states, such as Colorado, Pennsylvania, Texas, and Oklahoma, which recognize that state oil and gas statutes can operate without conflicting with local zoning ordinances. *See, e.g.*, API Br. at 23, Brief of Amicus Curiae Ohio Aggregates Association, et al. Clearly, Amici do not argue that the law of other states serves as precedent for this Court. Rather, the experience in other states is telling because it demonstrates that the litany of concerns raised by Appellees is unfounded. *See, e.g.*, API Br. at 24-28 (claiming that allowing municipalities to enforce local zoning would threaten the safety and effectiveness of oil and gas operations).

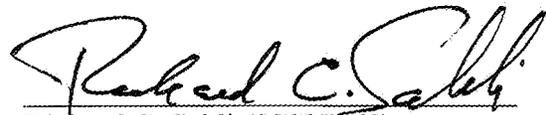
As Amici explained in their opening brief, state oil and gas laws co-exist harmoniously with local zoning throughout the country. *See* Health Professionals’ Br. at 23-30. Indeed, in four of the top gas-producing states in the nation – Texas, Colorado, Oklahoma, and Wyoming – local land use control exists concurrently with state regulation of the gas industry. *See id.* at 29-

30. There is no reason to believe that a regime of concurrent state regulation and local zoning under which the industry thrives in other states would handicap and debilitate the same industry in Ohio.

CONCLUSION

For all the reasons set forth above, this Court should hold that Chapter 1509 does not divest municipalities of their power to enact and enforce zoning designations.

Respectfully submitted this 18th day of November, 2013.



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Certificate of Service

I hereby certify that I served the foregoing Reply Brief of Amici Curiae Health

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