

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. JACK MORRISON, JR., LAW DIRECTOR, CITY OF MUNROE FALLS, OHIO,	:	
	:	Case No. 2013-0465
	:	
Plaintiff-Appellant	:	ON APPEAL FROM THE SUMMIT
	:	COUNTY COURT OF APPEALS,
v.	:	NINTH APPELLATE DISTRICT,
	:	CASE NO. 25953
BECK ENERGY CORP., et al.	:	
	:	
Defendant-Appellees	:	

**REPLY OF MUNICIPAL AMICI CURIAE, THE CITIES OF BROADVIEW HEIGHTS,
EUCLID, MANSFIELD, AND NORTH ROYALTON, AND THE VILLAGE OF
AMESVILLE, IN SUPPORT OF APPELLANT**

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INTRODUCTION

Appellee Beck Energy Company and supporting amici advocate an interpretation of Ohio Revised Code Chapter 1509 (“Chapter 1509”) that would usurp Ohio municipalities of their constitutional prerogative over local land use decision making with respect to a heavy industrial activity that has already injured the character and local resources of many communities across the country. In doing so, Appellee and supporting amici ignore these injuries—particularly those to drinking water resources—and attempt to assure the court that critical local interests, protected for nearly a century by municipal zoning laws, will be adequately evaluated by state regulators employed to regulate the technical aspects of well drilling and production. This narrow reading of the law produces the dangerous result of installing the Ohio Department of Natural Resources (“ODNR”) as the state’s supreme land use agency with respect to oil and gas drilling, despite the fact that it has virtually no ability or expertise to act in response to local conditions or to uphold local land use values. As a statute fundamentally geared toward regulating the *methods* of oil and gas extracting, Chapter 1509 and its implementing regulations provide no authority to ODNR to prevent industrial drilling operations in plainly inappropriate community areas—such as in a residential neighborhood or near an elementary school play field. Nor do they provide ODNR with the ability to obtain the local knowledge necessary to protect long term property, development, or economic interests of Ohio’s diverse communities through its permitting decisions. Accordingly, Municipal Amici Curiae file this reply to once again urge this Court to reverse the decision of the Ohio Court of Appeals, and to affirm the important and vital role of municipal zoning authority in Ohio.

ARGUMENT

I. Oil and Natural Gas Development Using Hydrofracking Poses Harm to Ohio's Communities, Including to Local Water Quality.

Amici, the American Petroleum Institute (“API”) et al., focus their discussion of the impacts of oil and gas drilling using hydraulic fracturing (“hydrofracking”) only on the precise moment of high volume, high pressure injection itself in order to claim that hydrofracking is safe and has never resulted in impacts to water quality. Brief of API et al. at 5-6, fn. 3, 27. But water contamination resulting from oil and natural gas drilling operations, including those accompanying hydrofracking, is well documented in Ohio as well as in other states.¹ The most common incidents of such contamination occur at or near the surface, usually as the result of accidental spills of fracturing fluid; leaks from storage pits, tanks, or pipelines; or inappropriate disposal of toxic wastewater. *See, e.g.*, Bruce Finley, *Drilling spills reaching Colorado groundwater; state mulls test rules*, *The Denver Post* (Dec. 9, 2012) (“Oil and gas have contaminated groundwater in 17 percent of the 2,078 spills and slow releases that companies reported to state regulators over the past five years, state data show.”);² Edward McAllister and Chris Reese, *Exxon Mobil unit charged for Pennsylvania fracking waste spill*, *Reuters* (Sep. 11, 2013) (Pennsylvania Attorney General charging Exxon Mobil for spilling 50,000 gallons of

¹ The question of whether hydrofracking *per se* has resulted in contamination of water supplies remains a hotly debated one. Evidence from the U.S. Environmental Protection Agency’s (“EPA”) investigation of water contamination problems in Pavillion, WY—which has now been unfortunately and prematurely abandoned by the agency—suggested that hydrofracking itself may have been responsible for at least some observed groundwater contamination. *See* EPA, *Draft Investigation of Groundwater Contamination near Pavillion, Wyoming* 33-39 (Dec. 2011), http://www2.epa.gov/sites/production/files/documents/EPA_ReportOnPavillion_Dec-8-2011.pdf; Abraham Lustgarten, *EPA’s Abandoned Wyoming Fracking Study One Retreat of Many*, *ProPublica* (Jul. 3, 2013) <http://www.propublica.org/article/epas-abandoned-wyoming-fracking-study-one-retreat-of-many>.

² http://www.denverpost.com/environment/ci_22154751/drilling-spills-reaching-colorado-groundwater-state-mulls-test#ixzz2EihHU2fg.

"chemical-laced wastewater from a storage tank and into a local waterway.");³ U.S. Geological Survey, *Hydraulic Fracturing Fluids Likely Harmed Threatened Kentucky Fish Species* (Aug. 28, 2013) (spill of fracturing fluid believed to have caused "widespread death" of fish in Kentucky's Acorn Fork River).⁴ Appellee Beck Energy, for example, was cited in 2010 by ODNR for failing to prevent the release of approximately 1.6 million gallons of "brine, frac water and other oil field waste fluids"—two-thirds the content of a 2.5 million gallon pit—into a nearby stream. ODNR, *Compliance Notice* (Jun. 21, 2010); ODNR, *Order by John Husted, Chief of ODNR Division of Mineral Resources Management to Beck Energy, Order No. 2010-25* (Jul. 15, 2010).⁵ While spills are possible at any well site, hydrofracking wells pose unique risks due to the flowback and produced waters they generate in large volumes. See N.Y. State Dep't of Env'tl. Conservation ("DEC"), *Revised Draft Supplemental Generic Environmental Impact Statement*, 5-99 (2011) (the expected volume of fluid return for Marcellus hydrofracking wells is between 216,000 and 2.7 million gallons per well); 6-15 to 6-39 (discussing the risks of surface spills at hydrofracking well sites "causing significant adverse impacts to water resources," and concluding that such risks to "Primary and Principal Aquifers" were "not fully mitigated" by precautionary measures identified in the impact statement).⁶

A second known source of water contamination associated with hydrofracking-related oil and gas production is poorly drilled and/or completed wells. As the Ohio Environmental Protection Agency ("OEPA") notes, "[g]as and oil can [also] migrate from a production well into

³ <http://www.reuters.com/article/2013/09/11/us-exxon-spill-charges-idUSBRE98A0RJ20130911>.

⁴ <http://www.usgs.gov/newsroom/article.asp?ID=3677#.UnzxWfmTgtk>.

⁵ <http://ohiogasdrilling.files.wordpress.com/2013/09/2010beck-energy-odnr-violations-and-permit-denial-copy.pdf>.

⁶ <http://www.dec.ny.gov/energy/75370.html>.

an aquifer" at subsurface levels "if a well casing is damaged, leaking or poorly constructed." OEPA, *Drilling for Natural Gas in the Marcellus and Utica Shales: Environmental Regulatory Basics* (Nov. 2012).⁷ This type of contamination occurred in Ohio most notably in Bainbridge Township, where gas drilling activities contaminated the water supplies of several dozen residences with methane gas, resulting in an explosion that destroyed one home. See Diane Ryder, *Bainbridge drilling case has national consequences*, *The News-Herald* (May 26, 2009).⁸ ODNR later determined that the gas migration occurred, in part, due to "inadequate cementing of the production casing" and "the decision to proceed with stimulating, or hydraulic fracturing, the well without addressing the issue of the minimal cement behind the production casing." ODNR, *Report on the Investigation of the Natural Gas Invasion of Aquifers in Bainbridge Township of Geauga County, Ohio* 3, 4 (Sep. 1, 2008) [hereinafter "ODNR Bainbridge Report"].⁹

Gas migration incidents similar to that in Bainbridge are far from isolated. See, e.g., Open Letter from John Hanger, Secretary of Pennsylvania Department of Environmental Protection (Oct. 19, 2010) (noting the "overwhelming evidence" that hydrofracking wells caused contamination of water supplies in Dimock, PA); Laura Legere, *Sunday Times review of DEP drilling records reveals water damage, murky testing methods*, *thetimes-tribune.com* (May 19, 2013) (revealing at least 161 cases of water contamination from fracking between 2008 and the fall of 2012).¹⁰ Oil and gas operators are well aware that "well integrity" issues are simply a part

⁷ <http://www.epa.ohio.gov/portals/0/general%20pdfs/generalshale711.pdf>.

⁸ <http://www.news-herald.com/general-news/20090526/bainbridge-drilling-case-has-national-consequences>.

⁹ <http://www.dnr.state.oh.us/Portals/11/bainbridge/report.pdf>.

¹⁰ <http://thetimes-tribune.com/news/sunday-times-review-of-dep-drilling-records-reveals-water-damage-murky-testing-methods-1.1491547>.

of the drilling business. See Claudio Brufatto et al., *From Mud to Cement—Building Gas Wells*, 15 *Oilfield Review* 62, 63 (Sep. 1, 2003) (industry report noting that “many of today’s wells are at risk” because “[f]ailure to isolate sources of hydrocarbon either early in the well-construction process or long after production begins has resulted in abnormally pressured casing strings and leaks of gas into zones that would otherwise not be gas-bearing”).¹¹ And a recent study of operator-wide statistics in Pennsylvania shows that, even where drillers attempt to follow regulatory standards, 6-7% of new wells drilled over the past three years suffer from compromised structural integrity or outright well-casing failures, which could result in ground water contamination. Anthony Ingraffea, PhD., P.E., *Fluid Migration Mechanisms Due to Faulty Well Design and/or Construction: An Overview and Recent Experiences in the Pennsylvania Marcellus Play*, in *Physicians Scientists & Engineers for Healthy Energy* 8 (Jan. 2013).¹² When faced with the possibility of hydrofracking taking place in the George Washington National Forest—which makes up an important part of the Washington, D.C., watershed—legitimate concerns regarding water contamination prompted the U.S. Army Corps of Engineers and the District of Columbia Water and Sewer Authority to request a complete prohibition on horizontal hydrofracking within the forest. Letter from Thomas P. Jacobus, Gen. Manager of Washington Aqueduct, U.S. Army Corps of Eng’rs, to Kenneth Landgraf, Acting Forest Supervisor, U.S. Dept. of Agric. (Oct. 17, 2011) (“[E]nough study on the technique has been done and information has been published to give us great cause for concern about the

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http://www.slb.com/resources/publications/industry_articles/oilfield_review/2003/or2003aut06_building_gas_wells.aspx.

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http://www.psehealthyenergy.org/data/PSE_Cement_Failure_Causes_and_Rate_Analysis_Jan_2013_Ingraffea1.pdf.

potential for degradation of the quality of our raw water supply as well as impact to the quantity of the supply”);¹³ Letter from George Hawkins, Gen. Manager, D.C. Water and Sewer Auth., to Thomas Vilsack, Sec’y, U.S. Dept. of Agric. (Sep. 10, 2013).¹⁴

Claims that hydrofracking has never contaminated a water supply, like those offered by amici in support of Appellees, *See* Brief of API et al. at 5-6, fn. 3, 27, can only be supported by a narrow construct that looks only at the three to five day period of hydraulic stimulation, but omits the months or years long process of actually developing a hydrofracking well. This process includes the drilling, casing, and cementing of the well; the production and transportation of the oil or gas; the disposal of drill cuttings, muds, and noxious wastewater; and ultimately, the abandonment and closure of the well. Brief of Municipal Amici at 5-8. Such linguistic nuances are helpful in explaining seemingly inconsistent statements from regulatory agencies, but are of no solace to a homeowner whose drinking water has been contaminated. *Compare* ODNR Bainbridge Report, *supra*, at 3, with ODNR, *The Facts About Hydraulic Fracturing* (accessed Nov. 15, 2013) (stating no ODNR investigations have revealed problems due to hydraulic fracturing).¹⁵

In any event, the possibility of water contamination is only one of the concerns facing a community considering hydrofracking. Like any heavy industrial activity, oil and natural gas drilling using hydrofracking can disrupt the quiet enjoyment of community life and cause injury to local residents if located improperly. Oil and natural gas drilling using hydrofracking brings with it a host of impacts uncommon to many Ohio communities: glaring nighttime illumination;

¹³ <http://www.documentcloud.org/documents/782137-gwforestwashingtonaqueductletter.html#document/p1>.

¹⁴ <http://www.documentcloud.org/documents/798238-gwforestdewaterletter.html#document/p1>.

¹⁵ <http://www.dnr.state.oh.us/Portals/11/pdf/fracking-fact-sheet.pdf>.

twenty four hour noise from drilling, fracking, and gas compression; and thousands of heavy truck trips. Brief of Municipal Amici at 6-8. Additionally, when well sites are located near to where people live, air pollution may cause or contribute to acute and chronic health problems for local residents. Lisa M. McKenzie et al., Colo. Sch. of Pub. Health, *Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources* (2012) (discussing neurological and respiratory effects and cancer). Indeed, many residents who live near hydrofracking well sites complain of symptoms suggestive of illnesses related to air pollution. See, e.g., N. Steinzor et al., *Investigating Links Between Shale Gas Impacts and Health through a Community Survey Project in Pennsylvania*, 23(1) *New Solutions* 55 (2013) (study of more than 100 state residents living near gas facilities found that reported health symptoms closely matched the scientifically established effects of chemicals detected through air and water testing at those nearby sites, and occurred at significantly higher rates at households closer to the facilities than those further away).¹⁶

II. Chapter 1509 Does Not Replace the Vital Role of Local Control in Protecting the Character and Vitality of Ohio's Communities.

Contrary to the assertions of Amici in support of Appellee, see Brief of API et al. at 18-19; Brief of Ohio Oil and Gas O&G Ass'n at 6; Brief of State of Ohio at 23; Brief of Ohio Contractors Assn. at 6-7; Brief of Appellee at 17-18, Chapter 1509 and its implementing regulations do not protect local interests in community character and the compatible and beneficial development of local land. As Municipal Amici have previously detailed, the unique character of each of Ohio's many diverse communities is tremendously important to the health, identity and well-being of residents, as well as the desirability and economic vitality of the

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<http://www.earthworksaction.org/files/publications/SteinzorSubraSumiShaleGasHealthImpacts2013.pdf>.

community as a whole. Brief of Municipal Amici at 2-15. *See also Vill. of Hudson v. Albrecht, Inc.*, 9 Ohio St.3d 69, 73, 458 N.E.2d 852, 856 (1984) (“[T]he appearance of a community relates closely to its citizens' happiness, comfort and general well-being.”). Zoning is the “heart” of municipal home rule authority delegated by Article XVIII, Section 3 of the Ohio Constitution because it empowers local residents, who have investment and expertise in their communities, to control the land use decisions that shape those communities. *See Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 38 (2002). Chapter 1509 does not replace the vital and protective role of local zoning because it does not provide ODNR with the authority or the means by which to obtain site-specific knowledge necessary to substitute for that of local land use decision makers.

The limited range of ODNR’s authority to address concerns regarding the permitting and locating of wells reflects the limited grant of constitutional authority under which Chapter 1509 was enacted. Chapter 1509 is an enactment of Article II, Section 36 of the Ohio Constitution, relating to the conservation of natural resources and allowing the state “to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals.” Brief of Health Professional Amici at 13-14; Ohio Const. art. II, § 36. Accordingly, Chapter 1509 provides for location-based restrictions on the placement of wells, but only to the extent necessary to regulate technical issues relating to the extraction of oil and gas, such as unitization, operational safety, and well spacing. *See* R.C. 1509.021 (setting minimum well distances from, inter alia, railroad tracks or public roads; occupied or public buildings; watercourses; and the property lines of land “not in the drilling unit”). Chapter 1509 also grants authority to ODNR to promulgate rules regarding minimum distances to wells, which is in turn narrowly limited to the conservation of oil and gas reserves, R.C. 1509.24; Ohio Admin.Code

1501:9-1-04, or immediate safety or natural resource protection concerns such as setbacks from inhabited buildings or streams. R.C. 1509.23 (entitled "rules and regulations *as to safety practices* and electronic databases" (emphasis added));¹⁷ *see also* Ohio Admin.Code 1501:9-1-05 (entitled "Safety"); 1501:9-9-05(A)-(D).

In contrast, Ohio law recognizes that the purpose of municipal zoning extends well beyond prevention of imminent threats to health and safety. Municipalities are empowered to enact zoning ordinances for the preservation of neighborhood character and property values, as well as the long term promotion of the public "convenience, comfort, prosperity, or general welfare." R.C. 713.06-713.08.¹⁸ *See also Vill. of Hudson* at 856-857 (upholding local zoning law creating design standards to protect community character and achieve aesthetic harmony); *Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St.3d 28, 505 N.E.2d 966 (1987) (upholding zoning scheme creating environmental quality districts "to preserve and protect the character" of important city neighborhoods). Zoning advances these goals by dividing local land into zones that group compatible and mutually beneficial uses together, and, more importantly, by separating the most noxious uses (generally, industrial uses) from the community areas where they would cause the most harm, broadly defined. Brief of Municipal Amici at 15-17. Whole-scale separation of residential and rural neighborhoods from industry is one of the original animating purposes of zoning, protecting not only immediate resident health and safety, but also

¹⁷ The only mention of zoning in Chapter 1509 is found in R.C. 1509.23, enabling ODNR to promulgate regulations for minimum distances from "zoning districts" for immediate health and safety purposes. *Id.* To date, ODNR has not issued regulations that limit the location of wells or associated processes based upon distance to local zoning districts.

¹⁸ Municipal Amici note that although the legislature has provided zoning enabling legislation in addition to Article XVIII, Section 3 of the Constitution, that section "is self-executing, and * * * the power of local self-government is inherent in all municipalities regardless of enabling legislation," including the power to "enact ordinances relating to the subject of zoning." *Morris v. Roseman*, 162 Ohio St. 447, 449-450, 123 N.E.2d 419, 421 (1954).

longer-term interests in health, local identity, property values, and existing local economies such as tourism or food production. Brief of Municipal Amici at 10-16.

Chapter 1509 cannot protect these local interests tied to the orderly planning of their communities because it does not provide ODNR with the authority to exclude industrial oil and gas drilling activities from incompatible community areas on the basis of community character or local development goals. As an initial matter, ODNR only has authority to deny a permit application where it finds “a substantial risk” that the proposed operations would either violate a provision of or rule enacted pursuant to Chapter 1509, or “present an *imminent* danger to public health or safety or damage to the environment.” R.C. 1509.06(C), (F) (emphasis added).¹⁹ Accordingly, except for the most egregious proposals, ODNR has no authority to deny a well site application even where a large-scale hydrofracking operation (or several) would, for example, destroy the integrity of a country neighborhood or threaten the viability of agricultural production. In these circumstances, limited setbacks related to operational safety and resource maximization do not protect communities or their long-term development goals from the harms of industrialization.

ODNR's narrow authority regarding well-site aesthetics and noise mitigation likewise provides little, if any, protection of local interests. Amici in support of Appellee identify ODNR authority over screening, fencing, and noise control, but neglect to point out that this regulatory authority extends only to permit conditions for wells located in “urbanized areas”—defined as those municipalities with a population of more than 5,000 people. R.C. 1509.01(Y); R.C. 1509.03(A)(3), (A)(6) (requiring promulgation of rules relating to fencing, screening, and noise mitigation *in urbanized areas*); R.C. 1509.06(H) (site specific review *in urbanized areas* for

¹⁹ Even then, ODNR must issue a permit if it “finds that terms or conditions to the permit can reasonably be expected to prevent” a violation of Chapter 1509. *Id.*

purpose of identifying fencing, screening, or landscaping conditions that “may be attached to the permit”); Ohio Admin. Code 1501:9-9-03(H), (I) (temporary fencing and noise mitigation *in urbanized areas*); Ohio Admin. Code 1501:9-9-05(E) (noise, fencing, landscaping and operational restrictions *in urbanized areas*). This authority has no application to wells located in 688 of Ohio's smaller cities and villages—more than two thirds of the states' total number of municipalities. Together We Teach, *Populations of Ohio Cities* (accessed Nov. 15, 2013).²⁰ Indeed, it is worth noting that Appellant City of Munroe Falls would earn that non-urbanized designation, and lose whatever protections are provide for urbanized areas, if it lost even 12 people in the next census, a good possibility given the U.S. Census has predicted its population will decline. U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2012: Munroe Falls City* (2010) (population of Munroe Falls was 5,012 on April 1, 2010 and predicted to be at 4,994 on July 1, 2012).²¹

Even for wells located in "urbanized areas," review of drilling applications by removed agency staff is not a substitute for thoughtful land use planning by community members. ODNR has only 30 days to consider a drilling application before making a final decision, during which time Chapter 1509 and its implementing regulations provide no opportunity for community input. R.C. 1509.06(C), (F) (ODNR “shall issue” permit within 30 days for proposed wells in urbanized areas, or 21 days for other areas, unless ODNR issues an order denying the permit for on the grounds that it will likely violate Chapter 1509 or cause imminent harm).²² Site specific

²⁰ <http://www.togetherweteach.com/TWTIC/uscityinfo/35oh/ohpopr/35ohpr2.htm>.

²¹ Information available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

²² In contrast, before final approval of a permit for solution mining operations, ODNR is required to post a draft permit for public comment and respond to all comments received. Ohio Admin.Code 1501:9-7-07(H).

considerations are informed predominantly by technical and geological information submitted as part of the drilling application and a one-time site review (required only in urbanized areas), after which ODNR *may* choose to add certain aesthetic or noise related conditions to the permit.²³ See Ohio Admin. Code 1501:9-1-02(A); R.C. 1509.06(H)(1). Furthermore, the recent lack of state attention to well-site inspections inspires little confidence that even where permit conditions are attached, they would be enforced. U.S. Energy Info. Admin., *Ohio Natural Gas Number of Gas and Gas Condensate Wells* (accessed Nov. 15, 2013) (number of gas wells increased from ~33,800 wells in 2004 to ~46,700 in 2011);²⁴ Earthworks, *Enforcement Report: OH DOGRM* (Sep. 2012) (number of inspections decreased approximately 45% from 2004 to 2011 from just under 12,000 to ~6,000, leaving 91% of Ohio's wells uninspected every year).²⁵

In sum, Chapter 1509 is not able to address local concerns regarding the location of industrial well-sites because it is designed to regulate a wholly different subject matter, namely, the *methods* by which oil and gas is extracted in the state. Contrary to the assertions of Amici in support of Appellees, Brief of API et al. 25-27, traditional land use decision making—such as the identification of areas within a municipality where the most noxious uses are clearly inappropriate²⁶—does not interfere with ODNR's expertise or authority with respect to the

²³ Municipal Amici note that ODNR's responsibilities regarding site-specific review in urbanized areas are somewhat unclear. See *id.* (“the division shall * * * evaluate any site-specific terms and conditions that *may be attached* to the permit. * * * The terms and conditions that are attached to the permit *shall include* the establishment of fencing, screening, and landscaping” (emphasis added)).

²⁴ http://www.eia.gov/dnav/ng/hist/na1170_soh_8a.htm.

²⁵ <http://www.earthworksaction.org/files/publications/FINAL-OH-enforcement-sm.pdf>.

²⁶ Municipal Amici pray that this Court acknowledge the constitutional prerogative of Ohio municipalities to regulate local land use—including the ability to limit oil and gas operations to appropriate zoning districts. Whether state regulations governing extractive methods conflict with the particular provisions of the zoning ordinance that Appellant City of Munroe Falls

technical aspects of well permitting and enforcement. By contrast, Appellees' interpretation of Chapter 1509 as requiring ODNR to act as the local zoning authority for every municipality in the state of Ohio, without effective tools to obtain an understanding of local character or the authority to act on that information, would require ODNR to infringe on the local expertise and authority of municipal decision makers. Such an interpretation would have disastrous consequences for the character and economic vitality of Ohio's diverse municipalities,

CONCLUSION

For the foregoing reasons, Municipal Amici once again pray that this Court reverse the decision of the Ohio Court of Appeals, Ninth Appellate District.

Dated: November 15, 2013

Respectfully Submitted,



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wishes to enforce in this case should be resolved in the first instance by the trial court on a complete evidentiary record.



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I hereby certify that a copy of the foregoing was served upon the following persons by email on this 18th day of November, 2013.

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