IN THE SUPREME COURT OF OHIO

In the Matter of the Application of **Kingwood Solar I LLC** for a Certificate of Environmental Compatibility and Public Need.	: : : : :	CASE NO. 2023-1286 On Appeal from The Ohio Power Siting Board Case No. 21-0117-EL-BGN

BRIEF OF THE OHIO CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT KINGWOOD SOLAR I LLC

N. Trevor Alexander (0080713)
Kari D. Hehmeyer (0096284)
Benesch, Friedlander, Coplan & Aronoff LLP
41 South High Street, Suite 2600
Columbus, Ohio 43215
talexander@beneschlaw.com
khehmeyer@beneschlaw.com
Telephone: (614) 223-9300
Facsimile: (614) 223-9330

Counsel for Amicus Curiae,
The Ohio Chamber of Commerce

Michael J. Settineri (0073369)
Anna Sanyal (0089269)
Emily J. Taft (0098037)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mjsettineri@vorys.com
aasanyal@vorys.com
ejtaft@vorys.com
Telephone: (614) 464-5462
Facsimile: (614) 719-5146

Counsel for Appellant,
Kingwood Solar I LLC

David Yost (0056290)
Attorney General of Ohio

Stephen W. Funk (0058506)
Emily Anglewicz (0083129)
Roetzel & Andress, LPA
222 S. Main Street, Suite 400
Akron, Ohio 44308
Telephone: (330) 849-6602
Facsimile: (330) 376-4577
sfunk@ralaw.com
eanglewicz@ralaw.com

Outside Counsel for Appellee,
Ohio Power Siting Board

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF INTEREST OF AMICUS CURIAE THE OHIO CHAMBER OF COMMERCE

Pursuant to S. Ct. Prac. R. 16.06, the Ohio Chamber of Commerce ("Ohio Chamber") submits this brief as *amicus curiae* in support of Appellant Kingwood Solar I LLC ("Kingwood"). Founded in 1893, the Ohio Chamber is Ohio's largest and most diverse statewide business advocacy organization, representing businesses ranging from small sole proprietorships to some of the nation's largest companies. The Ohio Chamber works to promote and protect the interests of its nearly 8,000 business members, while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper.

This case is of great importance to the Ohio Chamber. If allowed to stand, the Ohio Power Siting Board's ("OPSB") rationale to deny Kingwood's application ("Application") to construct a 175 MW solar facility in Greene County, Ohio ("Project") injects undue uncertainty into Ohio's historically stable and predictable regulatory framework for building in-state power generation.

II. STATEMENT OF THE CASE AND FACTS

Amicus curiae assumes, for the purposes of this brief, that the factual and procedural background set out by the OPSB in its opinion and order is correct. *See* generally opinion and order filed December 15, 2022 ("Order"). On April 16, 2021, Kingwood filed its Application for the Project.

On June 28, 2021, the Ohio General Assembly passed Substitute Senate Bill 52 ("SB 52"), a significant revision to Ohio's power siting approval process for utility-scale solar projects. The law grants a new upfront veto to the board of county commissioners prior to a developer moving

forward with the state siting process. Sub. S. B. No. 52, 134th Gen. Assemb., Section 1 (Ohio 2021); R.C. 303.57–303.62. Importantly, SB 52 grandfathered projects where developers had already invested significant time and money so as not to unfairly change the rules in the middle of the game. Kingwood is one of these.

On December 15, 2022, the OPSB entered its Order denying the Application for the Project claiming it did not satisfy R.C. 4906.10(A)(6). *See* generally Order. Specifically, the OPSB incorrectly and unlawfully relied myopically on local officials' opposition in finding the Project did not serve the public interest, convenience and necessity—ignoring, as a practical matter, that the Project is not subject to SB 52. Rather, the OPSB should have applied its longstanding, broad-based analysis for determining public necessity under R.C. 4906.10(A)(6). Accordingly, this Court should reverse the Order and grant the Application.

III. ARGUMENT

A. This Court's recent finding that Ohio courts are the interpreter of the law, and not Ohio's administrative agencies, has leveled the playing field for Ohio businesses.

In a landmark administrative law decision, this Court recently made explicit that with respect to statutory interpretation, the judicial branch does not simply defer to the executive branch. In *TWISM Enterprises, L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022 WL 17981386, 2022-Ohio-4677, ¶ 1, this Court heard an appeal of a state agency adjudication regarding the requirements that a firm must meet to provide engineering services in Ohio. The case turned on the construction of Ohio Rev. Code § 4733.16(D), which sets forth those requirements. *Id.* The intermediate court of appeals looked to *Chevron* and applied its two-part test. *Id.* at ¶¶ 15–16. The appellate court concluded that the statute was ambiguous, and that the court therefore "must defer" to the agency's interpretation. *Id.* at ¶ 16.

With this backdrop, this Court determined to answer the "predicate question" of "[w]hat deference, if any, should a court give to an administrative agency's interpretation of a statute?" *Id.* at ¶ 2. The Court discussed *Chevron* and related state court precedents at length. *See Id.* at ¶¶ 18–28. It also took a "step back" to "examine the matter in light of first principles." *Id.* at ¶ 29. These included the separation of powers and, more specifically, protecting the courts' authority to render definitive interpretations of the law. *Id.* at ¶ 33.

This Court's analysis ultimately led it to reject all forms of mandatory deference:

> First, it is never mandatory for a court to defer to the judgment of an administrative agency. Under our system of separation of powers, it is not appropriate for a court to turn over its interpretative authority to an administrative agency. But that is exactly what happens when deference is mandatory. When we say that we will defer to an administrative agency's reasonable interpretation of a statute, or its reasonable interpretation of an ambiguous statute, we assign to the agency a range of choices about statutory meaning. We police the outer boundaries of those choices, but within the range (e.g., reasonableness), the agency renders the interpretive judgment.
>
> In our constitutional system, it is exclusively the "the province and duty of the judicial department to say what the law is." Thus, we reject the position advanced by the Board in prior stages of the litigation that the courts are required to defer to its reasonable interpretation of a statute . . .
>
> * * *
>
> Now assume that a court does find ambiguity and determines to consider an administrative interpretation along with other tools of interpretation. The weight, if any, the court assigns to the administrative interpretation should depend on the persuasive power of the agency's interpretation and not on the mere fact that it is being offered by an administrative agency. A court may find agency input informative; or the court may find the agency position unconvincing. What a court may not do is outsource the interpretive project to a coordinate branch of government.

Id. at ¶¶ 42–43, 45 (internal citations omitted). This Court recently reinforced this principle with respect to deference to an agency's interpretation of its own regulations:

> This case also presents a related issue: whether a court must give deference to an agency's interpretation of its own regulations. The citizens repeatedly argue that the

> board incorrectly interpreted its own regulations. Under federal doctrine, a federal court must defer to an agency's interpretation of an ambiguous regulation that the agency has promulgated. But the same separation-of-powers principles that led us to reject *Chevron*-style deference in *TWISM* also apply to deference of the *Auer* variety.
>
> When a court defers to an agency's interpretation of its own regulation, it allows the agency to assume the legislative power (the rule drafter), the judicial power (the rule interpreter), and the executive power (the rule enforcer). Doing so violates the fundamental precept that the power of lawmaking and law exposition should not be concentrated in the same hands. Thus, we will independently interpret the regulations at issue in these cases.

In re Application of Alamo Solar I, L.L.C., 2023 WL 6851474, 2023-Ohio-3778, ¶¶ 13–14 (internal citations omitted). Therefore, the Ohio Chamber respectfully submits that while this Court can certainly consider the OPSB's rationale set forth in the Order, it need not and must not defer to it.

B. The Order eviscerates SB 52's grandfather clause, injecting uncertainty for Ohio businesses in future dealings with Ohio administrative agencies.

This Court can properly reverse, modify, or vacate an order of the OPSB when its review of the record reveals that the order is "unlawful or unreasonable." *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7; *see* R.C. 4906.12 (incorporating the standard of review from R.C. 4903.13). At issue in this case is the OPSB's exercise of its implementation authority granted by the legislature, which requires application of the reasonableness standard. *Alamo Solar* at ¶ 16. This Court examines the reasonableness of an agency's decision by looking to see whether the evidence clearly does not support it, or whether the agency's decision is internally inconsistent. *Id.* Here, the OPSB's Order is both unsupported by the evidence and internally inconsistent.

As stated, SB 52 provided that, effective October 11, 2021, certain solar projects subject to its new provisions would need to undergo county-level review before applying to the OPSB. R.C. 303.57–303.62; Sub. S. B. No. 52, 134th Gen. Assemb., Section 1 (Ohio 2021). For solar project

applications exempt from requirements under SB 52—that are effectively "grandfathered" from the new law (such as the instant Application)—there is no county-level review. Sub. S. B. No. 52, 134th Gen. Assemb., Section 4–5 (Ohio 2021).

Here, the OPSB failed to be consistent and apply the broad lens approach afforded to projects grandfathered by SB 52. *See* Order at ¶ 142 ("As we have reinforced in recent decisions, the determination of public interest, convenience, and necessity must be examined through a broad lens and in consideration of impacts, local and otherwise, from the Project."); *In re Application of Duke Energy Ohio, Inc.*, 166 Ohio St.3d 438, 2021-Ohio-3301, 187 N.E.3d 472, ¶ 30 *quoting In re Application of Duke Energy Ohio, Inc.*, Power Siting Bd. No. 16-0253-GA-BTX, 2020 WL 12813330, at *6 (Feb. 20, 2020) ("interests of the general public are fully considered under the public interest, convenience, and necessity criterion found in R.C. 4906.10(A)(6).").

Instead, the OPSB effectively subjected the Application to SB 52's narrow county-level review requirements by using local officials' opposition as its determinative evidence in denying the Application. *See* Order at ¶ 145 ("As in *Birch Solar*, we conclude that the unanimous opposition of every local government entity that borders the Project is controlling as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)."). The OPSB gave undue weight to local officials' opposition, despite acknowledging the "numerous public benefits" of solar facilities, including:

> (1) the public's interest in energy generation that ensures continued utility services and the prosperity of the state of Ohio, (2) economic benefits relative to increased employment, tax revenues, and PILOT [payments in lieu of taxes], (3) air quality and climate impact improvements relative to transitioning from fossil fuels to renewable energy resources, (4) protecting landowner rights, and (5) preserving agricultural land use.

Order at ¶ 142. Several witnesses, including local landowners, expressed support for the Project and asserted many of these same public benefits. *See* Order at ¶¶ 38–39. Further, the OPSB failed

to give due weight to the generally supportive Staff Report, which explained that the Project would aid regional development by increasing local tax revenues, create over 450 jobs, protect agricultural land from permanent development, effect no negative impacts to surrounding property values, and would not likely pose any significant adverse impact to existing land use, cultural resources, recreational resources, or wildlife. *See* Order at ¶¶ 47, 52–53, 61.

The Order is another example of the OPSB's recent trend of denying certification of "grandfathered" solar generation facilities—not subject to SB 52—based solely on local opposition. *See In re Application of Birch Solar 1, LLC*, Power Siting Bd. No. 20-1605-EL-BGN, 2022 WL 15476256 (Oct. 20, 2022); *see also In re Application of Cepheus Energy Project, LLC*, Power Siting Bd. No. 21-293-EL-BGN, 2023 WL 370719 (Jan. 19, 2023). By denying certification to "grandfathered" facilities based solely on local opposition, the OPSB is essentially outsourcing the public interest determination to local officials in clear contravention of the General Assembly's purpose in drafting the grandfather clause of SB 52. Majority Floor Leader William J. Seitz and Representative Jim Hoops made this purpose clear in their respective statements supporting a different solar project. Majority Floor Leader Seitz stated:

> As a co-sponsor of Senate Bill 52, I understand the desire of local municipalities to govern the scope of projects that occur in their jurisdictions. However, when the General Assembly passed SB 52, there was also a desire to grandfather in late-stage projects that have followed the proper channels in their development…Thus, while localized opposition to a grandfathered project may be of some relevance, it is by no means determinative as it would otherwise be if the project had not been protected by the grandfathering clauses of SB 52.

Representative Hoops stated:

> I served as the Chair of the House Public Utilities Committee during the Senate Bill 52 debate. The goal of this legislation was to allow more local input into the siting process while ensuring that late-stage projects were grandfathered and protected…
>
> * * *

> Thus, while reasonable local input into a project is important and warranted, it is by no means determinative.

See In re Application of Oak Run Solar Project, LLC, Power Siting Bd. No. 22-549-EL-BGN, Public Comments filed March 7, 2023, and March 17, 2023.

The OPSB, through its Order, eviscerated the intent of the General Assembly which, as a creature of statute, it cannot do. *In re Application of Icebreaker Windpower, Inc.*, 169 Ohio St.3d 617, 2022-Ohio-2742, 207 N.E.3d 651, ¶ 56 ("The board, as a creature of statute, may exercise only those powers that the General Assembly confers on it."). And by doing so, the OPSB made a determination manifestly against the weight of the evidence that in turn creates uncertainty for Ohio businesses.

As described *infra,* continued denial of renewable project applications may jeopardize Ohio's future economic growth and energy stability, and is contrary to the OPSB's stated mission to "support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens, promoting the state's economic interests, and protecting the environment and land use." Ohio Power Siting Board, Home Page, "Our Mission," https://bit.ly/3TuZnRg.

C. The Project promotes public interest, convenience and necessity as it provides economic benefits to Ohio residents both statewide and locally.

As stated, determining public interest, convenience and necessity requires a broad approach that evaluates the pros and cons of the Project to the general public. *See* Order at ¶ 142.

First, at a macro level, the Order is problematic for Ohio consumers. As a leading advocate of economic growth for all of Ohio, the Ohio Chamber believes increased in-state electric generation will lower electric rates for all Ohioans. Lower electric rates will in turn add to Ohio's economic growth and stability. Growing and diversifying our in-state generation places downward

pressure on the commodity price of electricity—and this delivers real energy savings vital to keeping our state economically competitive. The Ohio Chamber is concerned that the Order devalues the public's interest in new, renewable power generation and the benefits of increased supply.

Second, increased electric generation is necessary to combat the increasing risk of electric grid reliability issues. The grid is currently facing increased electricity demand and simultaneously traditional "baseload" thermal generation resources like coal plants are closing faster than new baseload generation is constructed. PJM, *Energy Transition in PJM: Resource Retirements, Replacements & Risks*, (Feb. 24, 2023), at 1, https://bit.ly/471DITT. The gap between these factors is being addressed in PJM Interconnection LLC's ("PJM") interconnection queue through construction of limited-duration resources like wind and solar. *Id*. As PJM has noted "PJM's interconnection queue is composed primarily of intermittent and limited-duration resources. Given the operating characteristics of these resources, we need multiple megawatts of these resources to replace 1 MW of thermal generation." *Id*. To explain the problem PJM must address, a 50 MW thermal generation unit will produce 1,200 MWh in a typical day (50MW x 24 hours) when it is operating, while a 50 MW solar facility operating at a 20% capacity factor would only produce 240 MWh in that same day as it is unable to operate at full nameplate capacity during large portions of the day. Therefore, it is critical that increased demand and retirements in PJM be addressed with more MW of limited duration resources than the MW of thermal resources which are retired.

Given the rate of electric generation retirements and the projected increased electricity demand, "PJM could face decreasing reserve margins" should trends continue. *Id.* at 3. PJM projections show that, "despite eroding reserve margins, resource adequacy would be maintained if the influx of renewables materializes at a rapid rate." *Id.* at 2. As more projects similar to

Kingwood's are denied, the reserve margin—particularly on a local basis—will continue to decrease creating the risk of local blackouts. In a December 2023 call to action, North American Electric Reliability Corporation warned that rolling blackouts are a rising threat to consumers due to solar and wind projects not being built fast enough to replace retiring fossil fuel generation. *See* Peter Behr, *Grid monitor warns of blackout risks as coal plants retire*, E&E News (Dec. 14, 2023), https://bitly.ws/364nm. Approving renewable generation projects like Kingwood is necessary for a resilient, reliable network and serves the public interest, convenience and necessity for every Ohioan.

Lastly, the Project helps fulfill the increasingly robust corporate demand for renewable energy in the Buckeye State. Some of the country's largest employers with a renewable energy appetite are Ohio Chamber members, including manufacturers like Proctor & Gamble and tech companies Amazon, Meta, Google, and Microsoft. *See* Johnathan Lopez, *General Motors to Reach 100 Percent Renewable Energy in the U.S. by 2025*, GM Authority (Sept. 30, 2021), https://bit.ly/3Nn1zo1; Press Release, Proctor & Gamble, *P&G Purchases 100% Renewable Electricity in U.S., Canada, and Western Europe* (Oct. 24, 2019), https://bit.ly/3x9juIa.

Increasingly, businesses will only locate corporate infrastructure to the state of Ohio if renewable energy is available. In 2017, Meta announced that it would build a $750 million, 22-acre data center in New Albany, Ohio, citing the availability of renewable energy sources, including wind, solar, and hydro, as being critical to choosing the location. Emily Holbrook, *Facebook to Open Renewables-Powered Data Center in Ohio* (Aug. 16, 2017), https://bit.ly/48e0mth. Meta has since announced plans to expand its data center operations in New Albany due to "the infrastructure available at the site, the community partnerships and access to

renewable energy." Mark Williams, *Facebook parent Meta to expand New Albany data center by 1 million square feet*, Columbus Dispatch (Apr. 21, 2022), https://bit.ly/3uQurke.

Meta is not the only company making substantial infrastructure decisions based on the availability of renewable energy resources. In November 2019, Google broke ground on a $600 million data center in New Albany, Ohio, citing New Albany as a fit for Google's "quest to operate on 24/7 carbon-free energy, everywhere, by 2030." *See* Google, *Supporting local renewable energy growth*, https://bit.ly/3GGcDuQ. The continued ability to attract large employers to our state should be given greater weight than appears in the Order.

IV. CONCLUSION

The OPSB's Order denying the Application was not supported by ample evidence that the Project would not serve the public interest, convenience, and necessity. The Order was clearly "manifestly against the weight of evidence" by relying solely on local officials' opposition. The evidence clearly shows that the Project will support local livelihoods, generate tax revenue, and facilitate greenhouse gas emission reductions, which will benefit the public both statewide and locally. Therefore, the Court should reverse the Order and grant the Application.

Respectfully submitted,

/s/ N. Trevor Alexander
N. Trevor Alexander (0080713)
Kari D. Hehmeyer (0096284)
Benesch, Friedlander, Coplan & Aronoff LLP
41 South High Street, Suite 2600
Columbus, Ohio 43215
talexander@beneschlaw.com
khehmeyer@beneschlaw.com
Telephone: (614) 223-9300
Facsimile: (614) 223-9330
Counsel for Amicus Curiae,
The Ohio Chamber of Commerce

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2023, a copy of the foregoing Amicus Brief was served upon the following counsel of record by electronic mail:

Michael J. Settineri mjsettineri@vorys.com
Anna Sanyal aasanyal@vorys.com
Emily J. Taft ejtaft@vorys.com
Counsel for Appellant, Kingwood Solar I LLC

Stephen W. Funk sfunk@ralaw.com
Emily Anglewicz eanglewicz@ralaw.com
Outside Counsel for Appellee, Ohio Power Siting Board

Daniel A. Brown dbrown@browndayton.com
Counsel for Appellees/Cross-Appellants, Board of Trustees of Cedarville Township

David Watkins dw@planklaw.com
Kevin Dunn kdd@planklaw.com
Counsel for Appellees/Cross-Appellants, Board of Trustees of Xenia Township

Lee A. Slone lslone@mdllp.net
Counsel for Appellees/Cross-Appellants, Board of Trustees of Miami Township

Thaddeus M. Boggs tboggs@fbtlaw.com
Jesse Shamp jshamp@fbtlaw.com
Counsel for Appellees/Cross-Appellants, Greene County Board of Commissioners

Jack A. Van Kley jvankley@vankleywalker.com
Counsel for Appellees/Cross-Appellants, Citizens for Greene Acres, et al.

John E. Hart jehartlaw@gmail.com
Counsel for In Progress, LLC

Charles D. Swaney cswaney@woh.rr.com
Counsel for Tecumseh Land Preservation Association

Chad A. Endsley cendsley@ofbf.org
Leah F. Curtis lcurtis@ofbf.org
Counsel for Ohio Farm Bureau Federation

/s/ N. Trevor Alexander
N. Trevor Alexander (0080713)