

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOLORES FREDERICK, PATRICIA
HAGAMAN, AND BEVERLY
TAYLOR,

Appellants,

vs.

ALLEGHENY TOWNSHIP ZONING
HEARING BOARD, et al.,

Appellees.

No. 2295 CD 2015

**BRIEF OF CLEAN AIR COUNCIL, DELAWARE RIVERKEEPER
NETWORK AND
CITIZENS FOR PENNSYLVANIA'S FUTURE
AS AMICI CURIAE IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT4

ARGUMENT6

I. Allegheny Township and Act 13’s UNGD-Everywhere Zoning Regimes.6

II. This Court Held in its 2012 *en Banc* Decision in Robinson I that Substantive Due Process Bars a Municipality from Allowing Unconventional Natural Gas Drilling in Zoning Districts with Incompatible Land Uses.9

 A. Allegheny Township’s UNGD-everywhere Zoning Ordinance Violates Substantive Due Process Because It “allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications.” Robinson I at 485.10

 B. Like Act 13, the Ordinance Singles out UNGD for Special Treatment Creating an Unconstitutional Spot Use.....12

 C. UNGD-Everywhere Zoning Affects an Unconstitutional Disturbance of Reasonable, Investment-Backed Expectations15

III. Municipalities Are Not Immune from the Constitutional Requirements Affirmed by This Court in Robinson I.....17

CONCLUSION20

TABLE OF AUTHORITIES

Cases

| | |
|--|-----------|
| <u>Atherton Development Co. v. Twp. of Ferguson</u> , 29 A.3d 1197, 1204 (Pa. Commw. Ct. 2011)..... | 13 |
| <u>Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors</u> , 491 A.2d 86, 90 (Pa. 1985) | 10, 11 |
| <u>City of Edmonds v. Oxford House, Inc.</u> , 514 U.S. 725, 732-33 (1995)..... | 11, 12 |
| <u>In re Realen Valley Forge Greenes Assocs.</u> , 838 A.2d 718, 729 (Pa. 2003)..... | 14 |
| <u>Main Street Development Grp., Inc. v. Tincum Twp. Bd. of Supervisors</u> , 19 A.3d 21, 29 (Pa. Commw. Ct. 2011) | 17 |
| <u>Robinson Twp. v. Commonwealth</u> , 52 A.3d 463 (Pa. Commw. Ct. 2012)..... | passim |
| <u>Robinson Twp. v. Commonwealth</u> , 83 A.3d 901 (Pa. 2013) | 8, 16, 18 |
| <u>Schubach v. Zoning Bd. of Adjustment (Philadelphia)</u> , 270 A.2d 397, 399 (Pa. 1970) | 15 |
| <u>Swade v. Zoning Board of Adj. of Springfield Twp.</u> , 140 A.2d 597, 598 (Pa. 1958) | 13 |
| <u>Twp. of Plymouth v. Cnty. Of Montgomery</u> , 531 A.2d 49, 57 (Pa. Commw. Ct. 1987) | 13 |
| <u>Vill. of Euclid, Ohio v. Ambler Realty Co.</u> , 272 U.S. 365, 388 (1926)..... | 11 |

Statutes

| | |
|----------------------------------|----|
| 53 P.S. § 10303(d)..... | 14 |
| 53 P.S. § 10606 | 14 |
| 58 Pa. C.S.A. § 3304(b)(5) | 7 |

Treatises

8 E. McQuillin, *Municipal Corporations* s 25.83, at 224-25 (3d ed. 1965)15

STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae—Clean Air Council (the Council), Delaware Riverkeeper Network (DRN), and Citizens for Pennsylvania’s Future (PennFuture)—are Pennsylvania-based environmental non-profits with strong ties to local Pennsylvania communities. *Amici* have a long-standing interest in the health and wellbeing of Pennsylvania residents, and are committed to preserving and protecting Pennsylvania’s natural resources. *Amici* have a specific interest in ensuring that municipal-level land use and zoning ordinances regulate oil and gas development in a manner that serves all residents in the community, and do not unduly disturb existing restrictions that secure the preservation of rural spaces and provide for responsible, orderly development. The *amici* all have active cases in which the same—or related—issues are before Pennsylvania courts.

The Council is a tax-exempt non-profit organization was established in 1967 under the laws of Pennsylvania, with a mission to protect everyone’s right to breathe clean air. The Council has members and supporters throughout the Commonwealth. The Council fights to improve air quality across Pennsylvania through public education, community organizing, and litigation.

The Council is a founding member of Protect Our Children, a coalition of parents, concerned citizens, and advocacy organizations, dedicated to protecting

school children from the health risks of shale gas drilling and infrastructure.

The Council and DRN currently have a case before this Court in which they challenge a local zoning ordinance on similar grounds.

DRN is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. DRN also works in communities outside the Delaware River watershed to support organization members with shared interests in protecting water quality, quality of life, public trust resources, and the constitutionally-protected environmental rights in members' communities.

DRN was an integral party to the Pennsylvania Supreme Court's decision in Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth, 83 A.3d 901 (Pa. 2013) (plurality), which recognized the significant rights protected under Article I, Section 27 of the Pennsylvania Constitution and reaffirmed that all citizens have an inalienable right to a clean and healthy environment.

DRN established a new initiative, For the Generations, to: 1) ensure that the Pennsylvania Environmental Rights Amendment is further strengthened in the wake of the Robinson Township, Delaware Riverkeeper Network decision; 2) pursue and secure constitutional protection of environmental rights in states across the nation; 3) pursue and secure recognition of environmental rights at the federal

level through constitutional amendment; and 4) ensure governments at the local level, state level, and federal level honor the rights of all people to pure water, clean air and healthy environments in the laws they enact, the decisions they make, and the actions they pursue.

As a result, DRN works with and supports groups around the Commonwealth who are fighting to protect their communities and their constitutional rights to a clean and healthy place in which to live.

PennFuture is a non-profit membership organization that works to create a just future where nature, communities, and the economy thrive. PennFuture conducts strategic campaigns and enforces Pennsylvania's environmental laws in order to protect our natural environment and improve public health and safety.

PennFuture currently represents individuals and citizens groups in six different townships across the Marcellus shale gas play that are actively attempting to shape local land use decisions to ensure that shale gas development occurs in a manner that protects public health, safety, and the environment, and is consistent with the constitutional guarantees found in Article I, Sections 1 and 27 of the Pennsylvania Constitution, with a particular interest in the impact of shale gas development on the most at risk populations.

SUMMARY OF ARGUMENT

This Court, in Robinson Twp. v. Commonwealth, declared that it is unconstitutional to zone for unconventional natural gas development (UNGD) in the precise manner that is at issue here in Allegheny Township. 52 A.3d 463 (Pa. Commw. Ct. 2012) (referred to hereinafter as Robinson I). At issue in Robinson I was the constitutionality of Act 13, legislation that mandated—in relevant part—that UNGD be allowed throughout Pennsylvania, in all zoning districts. 52 A.3d at 468-69. This Court reasoned that it would be unconstitutional for a local municipality to zone in such a manner, and thus, the state legislature cannot mandate municipalities to do so. Robinson I, 54 A.3d at 485 (“**If a municipality cannot constitutionally include allowing oil and gas operations**, it is no more constitutional just because the Commonwealth requires that it be done.”) (emphasis added).

What follows is a discussion of how the substantive due process clause of the Pennsylvania and Federal constitutions, as explained principally by this Court in Robinson I, controls the outcome of the present challenge and requires that the subject ordinance be struck down. First, *amici* review the applicable substantive due process protections against the insertion of incompatible uses, the creation of spot uses, and the disturbance of reasonable, investment-backed expectations.

Then, *amici* clarify that this Court in Robinson I articulated constitutional principles that apply to the state legislature and local municipalities equally. Because Allegheny Township's UNGD-everywhere zoning ordinance is in direct conflict with the substantive due process rights articulated by this Court in Robinson I, *amici* respectfully urge the Court to find that the ordinance is unconstitutional.

ARGUMENT

I. Allegheny Township and Act 13's UNGD-Everywhere Zoning Regimes

Allegheny Township, on December 13, 2010, passed Ordinance No. 01-2010 (the Ordinance), which amended its zoning to allow for unconventional gas development (UNGD) in all of its zoning districts. The Ordinance's stated purpose is "to declare the Development of Oil and Gas a permitted use by right in all parts of the Township." (R. 203a). The Ordinance inserts UNGD as a permitted use by right in Allegheny Township's R-1 Residential District and the R-2 Residential-Agricultural District, which makes up 85% of the Township. (R. 389a). The R-2 District's purpose is to:

Provide for agricultural uses and low-density residential development in rural areas where public sewer and /or water facilities may not be available and to provide for compatible public, semipublic and accessory uses and conditional uses by special exception.

(R. 39a). The Ordinance defines UNGD—using the term "Oil and Gas Development"—to include all phases of development, such as site preparation, drilling, and hydraulic fracturing; impoundments; pipelines; and other associated equipment. (R. 204a). However, excluded from the definition are compressor stations and natural gas processing plants. Id.

Later, in February 2012, the Commonwealth likewise sought to facilitate the broad expansion of UNGD and passed Act 13, P.L. 87 (Act 13). Act 13 repealed and replaced Pennsylvania’s Oil and Gas Act, adding—among its many changes—Section 3304 which required that all municipal zoning ordinances in the Commonwealth allow UNGD without any restriction.¹ The Section reads: “In order to allow the [sic] for the reasonable development of oil and gas resources, a local ordinance ... [s]hall authorize oil and gas operations ... compressor stations and processing plants, **as a permitted use in all zoning districts.**” 58 Pa. C.S.A. § 3304(b)(5) (emphasis added). So long as the UNGD operator complied with applicable state law and state regulatory requirements, unconventional gas wells were to be allowed in all zoning districts, including agricultural and residential districts.

Multiple municipalities, individuals, and amicus Delaware Riverkeeper Network challenged Act 13 in this Court, claiming—in part—that the Act violated Article 1, Section 1 of the Pennsylvania Constitution by depriving residents of their substantive due process protections.² The Commonwealth Court issued an *en banc* decision in favor of the appellants, concluding that portions of Act 13 would

¹ Please note that as used here, UNGD refers only to unconventional wellsite-related activities. In Act 13, the legislature also provided for the expansion of compressor stations and natural gas processing plants.

² Challengers also alleged that the Act violated Pennsylvania’s Environmental Rights Amendment and a Pennsylvania Supreme Court plurality agreed, however that aspect of the case is not the subject of this brief.

deprive residents of their fundamental due process rights. Robinson I, 52 A.3d at 485.

The case was then appealed to the Supreme Court (referred to here as Robinson II) wherein a majority of the justices affirmed that provisions of Act 13 violated constitutional protections. Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013).³ In Robinson II, a plurality of the justices ruled that Section 3304 of the Act was unconstitutional because it failed to comply with the Environmental Rights Amendment of the Pennsylvania Constitution. Justice Baer concurred, grounding his opinion in substantive due process, rather than the Environmental Rights Amendment. Id. at 1000-09. As the Pennsylvania Supreme Court upheld this Court's finding that Section 3304 is unconstitutional, Robinson I remains good law.

Given the deep similarities between the Ordinance and Section 3304, a review of Robinson I shows that the Ordinance fails many of the same core constitutional tests that rendered Act 13 invalid.

³ The Pennsylvania Supreme Court affirmed in part and reversed in part.

II. This Court Held in Its 2012 *En Banc* Decision in Robinson I that Substantive Due Process Bars a Municipality from Allowing Unconventional Natural Gas Drilling in Zoning Districts with Incompatible Land Uses

The substantive due process protections guaranteed to all Pennsylvanians by Article 1, Section 1 of this state’s constitution, as well as by the Fifth and Fourteenth Amendments to the United States Constitution, forbid the blanket industrialization of a municipality, like what has been attempted in Allegheny Township. This constitutional principle was clearly articulated in Robinson I, when an *en banc* panel of this Court found that UNGD cannot be permitted by right throughout the Commonwealth.

In Robinson I, this Court held that Act 13 violated substantive due process in ways that apply equally to the Ordinance at issue here. First, this Court found that forcing UNGD—an industrial use—into incompatible zoning districts—such as residential and agricultural districts—created incompatibilities that rendered the zoning framework irrational. Robinson I, 54 A.3d at 484-85. The instant Ordinance creates the same core incompatibilities. Second, this Court held that singling out UNGD for special treatment—providing it with advantages not enjoyed by any other similar use—represented an unconstitutional “spot use.” Id. at 485 n.23. Likewise, Allegheny Township’s Ordinance treats UNGD unlike any other land use. And third, this Court recognized that the imposition of ubiquitous

UNGD is an unconstitutional disturbance of residents' reasonable, investment-backed expectations. Id. at 484. Here too, the Ordinance permits UNGD within communities in which residents had reasonable expectations of enjoying a quiet, rural life, expectations that are completely at odds with expansive UNGD.

- A. ***Allegheny Township's UNGD-everywhere zoning ordinance violates Substantive due process because it "allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications." Robinson I at 485***

Zoning is an exercise of the police power that historically grew out of attempts to prevent nuisances by regulating the use of land and designating where particular uses could occur. Robinson I, 52 A.3d at 481. However, the municipality's exercise of its police power is carefully cabined, where its improper use constitutes a violation of substantive due process. In Robinson I, this Court found that:

Because the changes required by 58 Pa. C.S. § 3304 do not serve the police power purpose of the local zoning ordinances, relating to consistent and compatible uses in the enumerated districts of a comprehensive zoning plan, any action by the local municipality required by the provisions of Act 13 would violate substantive due process as not in furtherance of its zoning police power.

Robinson I, 52 A.3d at 485; Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors, 491 A.2d 86, 90 (Pa. 1985) ("A zoning ordinance is a valid exercise

of the police power when it promotes public health, safety or welfare and its regulations are substantially related to the purpose the ordinance purports to serve.”).

This Court further explained how a zoning scheme violates substantive due process:

Because 58 Pa.C.S. § 3304 requires all oil and gas operations in all zoning districts, **including residential districts**, as a matter of law, we hold that 58 Pa.C.S. § 3304 violates substantive due process because **it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications.**

Robinson I, 52 A.3d at 485 (emphasis added). The concept that zoning, at its very core, is about the separation of incompatible uses is not new. The United States Supreme Court recognized that, “Land use restrictions aim to prevent problems caused by the ‘pig in the parlor instead of the barnyard.’” City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732-33 (1995) (quoting Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926)); see also Boundary Drive Assocs., 491 A.2d at 90.

As with Act 13, the instant Ordinance flouts the mandate to separate incompatible uses. This Court observed that Section 3304 “is a requirement that zoning ordinances be amended in violation of the basic precept that [l]and-use

restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded.” Robinson I, 52 A.3d at 484-85 (quoting City of Edmonds, 514 U.S. at 732 (internal quotation marks omitted)). The Ordinance at issue here is simply a flavor of the type of zoning ordinance amendment that this Court deemed unconstitutional. Its express purpose is to accomplish the same result: namely, to allow UNGD everywhere without any sensitivity to the compatibility of the activity with neighboring land uses. The Ordinance states, “It is hereby declared to be the purpose of this chapter to declare the development of Oil and Gas a permitted use by right in all parts of the Township.” (R. 203a).

As it was unconstitutional for state legislators to mandate invalid zoning, it is no more constitutional for local municipalities to adopt that same violative zoning scheme. Robinson I, 52 A.3d at 485.

B. Like Act 13, the Ordinance singles out UNGD for special treatment creating an unconstitutional spot use

Section 3304 of Act 13’s treatment of UNGD was recognized as an unconstitutional “spot use” because it inserted industrial uses—such as unconventional gas well sites, processing plants, compressor stations, and wastewater impoundments—in non-industrial zones, including residential areas, contrary to the purposes and established expectations of those districts.

This Court explained:

While in spot zoning the land is classified in a way that is incompatible with the classification of the surrounding land, **the same unconstitutional infirmity exists here.** What we have under Act 13 is a “spot use” **where oil and gas uses are singled out for different treatment that is incompatible with other surrounding permitted uses.** What the dissent ignores is that the sanctioning of “bad planning” renders the affected local zoning ordinances unconstitutionally irrational.

Robinson I, 52 A.3d at 485 n.23 (emphasis added); id. at 484 n.21 (“Whether you classify oil and gas operations as a ‘pig in the parlor’ or a ‘rose bush in a wheat field,’ it nonetheless constitutes an unconstitutional ‘spot use.’”); Atherton Development Co. v. Twp. of Ferguson, 29 A.3d 1197, 1204 (Pa. Commw. Ct. 2011) (quoting Twp. of Plymouth v. Cnty. Of Montgomery, 531 A.2d 49, 57 (Pa. Commw. Ct. 1987)) (stating that zoning must be “in accordance with a rational and well considered approach to promoting safety, health and morals and a coordinated development of the whole municipality,” and that lawful zoning “necessarily requires that the picture of the whole community be kept in mind while dividing it into compatibly related zones by ordinance enactments.”).

Inserting industrial uses in non-industrial areas is constitutionally suspect because “[t]he very essence of Zoning is the designation of certain areas for different use purposes.” Swade v. Zoning Board of Adj. of Springfield Twp., 140 A.2d 597, 598 (Pa. 1958). By inserting UNGD into non-industrial areas, the Act

required the inclusion of a use that is incompatible or inconsistent with the purpose and character of host districts. See Robinson I, 52 A.3d at 485 n.23.

This Court in Robinson I recognized that “spot uses” have the same problem as traditionally-recognized spot zoning. That is, “spot uses,” like spot zoning, disrupt the rationality of the zoning scheme as a whole, as reflected in the comprehensive plan and in the zoning ordinance itself, and do so for the benefit of only some landowners, and without a community wide-focus on balancing of costs and benefits. Robinson I, 52 A.3d at 484 n.21 & 485 n.23; see also In re Realen Valley Forge Greenes Assocs., 838 A.2d 718, 729 (Pa. 2003). As further explained by this Court:

[F]or zoning to be constitutional, it “must be directed toward the community as a whole, concerned with the public interest generally, and justified by a **balancing** of community costs and benefits. These considerations have been summarized as requiring that **zoning be in conformance with a comprehensive plan** for growth and development of the community.”

Robinson I, 52 A.3d at 483 (emphasis added). The Municipalities Planning Code requires that a zoning ordinance be generally consistent with the comprehensive plan. 53 P.S. § 10303(d). A municipality’s zoning ordinance should also reflect the statement of community development objectives. 53 P.S. § 10606.

Creating a UNGD spot use further upsets the community-wide balancing of costs and benefits in the same way that spot zoning does—it benefits gas

companies and those who own mineral rights at the expense of neighbors who may not own their minerals or choose not to exploit them. See also Schubach v. Zoning Bd. of Adjustment (Philadelphia), 270 A.2d 397, 399 (Pa. 1970) (quoting 8 E. McQuillin, Municipal Corporations s 25.83, at 224-25 (3d ed. 1965)) (“Thus, singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment, is invalid ‘spot zoning.’”) (rezoning from R-4 to C-2 to allow a nursing home was illegal spot zoning).

The Ordinance establishes the very same UNGD spot use at the local municipality level as Act 13 attempted to create for the entire Commonwealth. The Ordinance singles out UNGD, permitting it by right in areas in which it is incompatible with surrounding established uses.

C. UNGD-everywhere zoning affects an unconstitutional disturbance of reasonable, investment-backed expectations

This Court has affirmed on multiple occasions that residents have a constitutionally protected set of expectations which, if upended by drastic changes to zoning, can render the subject government action unconstitutional. In Robinson I, this Court struck down provisions of Act 13 of 2012 that required municipalities to allow gas development in non-industrial districts and, in analyzing those

provisions, determined that Section 3304 did not promote the public interest

because,

[t]he public interest in zoning is in the development and use of land in a manner **consistent with local demographic and environmental concerns**. 58 Pa.C.S. § 3304 requires zoning amendments that must be normally justified on the basis that they are in accord with the comprehensive plan, **not to promote oil and gas operations that are incompatible with the uses by people who have made investment decisions** regarding businesses and homes on the assurance that the zoning district would be developed in accordance with comprehensive plan and would only allow compatible uses.

Robinson I, 52 A.3d at 484 (emphasis added). To adjudge the constitutionality of ordinances—in addition to the spot zoning/spot use analysis discussed above—“a substantive due process inquiry must take place. When making that inquiry, we take into consideration the rights of **all** property owners subject to the zoning and the public interests sought to be protected.” Id. at 482 (emphasis added).

This concept—that a certain level of disruption to expectations can be unconstitutional—was addressed in both Robinson I and Robinson II. Robinson I, 52 A.3d at 484 (discussing reliance on zoning scheme and investment decisions); Robinson II, 83 A.3d 901 at 974 (“The displacement of prior planning, and derivative expectations, regarding land use, zoning, and enjoyment of property is unprecedented.”); 978 (“The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the

environment.”); 979-80 (plurality). Likewise, in Main Street, this Court determined that an overlay district designed to protect agricultural soils “effectively create[d] agricultural districts out of districts with non-agricultural stated purposes . . . completely changing the expectations created by the Ordinance in the non-agricultural districts.” Main Street Development Grp., Inc. v. Tinicum Twp. Bd. of Supervisors, 19 A.3d 21, 29 (Pa. Commw. Ct. 2011). The overlay “unreasonably disturb[ed] expectations created by the existing zoning ordinance” and as a result, this Court struck it down as invalid. Id. at 28-29.

The Ordinance, by injecting UNGD into residential and residential-agricultural districts, disturbs the expectations of residents living in those districts who purchased homes and planned their lives around living in a rural, non-industrial community.

III. Municipalities Are Not Immune from the Constitutional Requirements Affirmed by This Court in Robinson I

That municipalities cannot permit UNGD in all zoning districts is the foundation upon which the holding in Robinson I was built. The court below misread Robinson I as being principally concerned with *who* was instituting the zoning, rather than the substance of the zoning scheme at issue. The court wrote that Robinson I “did not address the constitutionality of a local ordinance, but addressed the constitutionality of a statewide statute (Act 13), which was found to

be unconstitutional because it interfered with a municipality's right to make local zoning determinations." (Appellant's Br. App. B at 3). But such a reading is belied by the plain language of this Court's opinion. Key to this Court's finding was the understanding that Section 3304 required municipalities to exercise their police power in a manner that would violate substantive due process protections.

Robinson I, 52 A.3d at 485 ("[A]ny action by the local municipality required by the provisions of Act 13 would violate substantive due process as not in furtherance of its zoning police power."). In reaching its ultimate conclusion in Robinson I, this Court stated, "If a municipality cannot constitutionally include allowing oil and gas operations, it is no more constitutional just because the Commonwealth requires that it be done." Id.; see also id. at n.23 ("While there is no disagreement with the dissent's statement that a local ordinance may not frustrate the purposes and objectives of the legislature, the claim here is that the Pennsylvania Constitution stands in the way."); Robinson II, 83 A.3d at 1008 (Baer, J., concurring) ("Accordingly, because these statutes force municipalities to enact zoning ordinances, which violate the substantive due process rights of their citizenries, they cannot survive constitutional scrutiny.").

An unconstitutional zoning scheme becomes no less unlawful just because it is passed by a municipality, rather than a state legislature. The Ordinance at issue

falls squarely within the four corners of the Robinson I holding, requiring a clear directive from this Court that the Ordinance is unconstitutional.

CONCLUSION

For the foregoing reasons, *amici curiae* Clean Air Council, Delaware Riverkeeper Network, and Citizens for Pennsylvania's Future respectfully request that this Honorable Court reverse the decision of the Court of Common Pleas of Westmoreland County and invalidate the Allegheny Township Ordinance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Aaron Jacobs-Smith, hereby certify that on March 24, 2016, the foregoing Brief of Clean Air Council, Delaware Riverkeeper Network, and Citizens for Pennsylvania's Future as *amici curiae* in Support of Appellants was served upon the following by PACFile:

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