SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

COOPERSTOWN HOLSTEIN CORPORATION,	:	Case No. 2012-1010
Plaintiff-Appellant,	:	Otsego County Index No. 2011-0930
-against-	:	
TOWN OF MIDDLEFIELD,	:	
Defendant-Respondent.	:	

NOTICE OF MOTION OF THE AMERICAN PETROLEUM INSTITUTE, ET AL. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

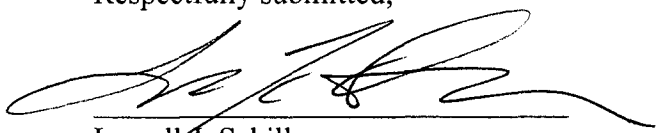
PLEASE TAKE NOTICE, that upon the annexed Affirmation of Lowell J. Schiller, sworn to the 16th day of October, 2012 ("Schiller Affirmation") and the proposed amicus curiae brief attached as an exhibit thereto, a motion will be made at a term of this Court to be held in the City of Albany, New York, on the 29th day of October, 2012, for an order granting the American Petroleum Institute, the Chamber Of Commerce Of The United States Of America, and the Independent Oil and Gas Association of New York leave to file the brief attached as Exhibit A to the Schiller Affirmation as *amici curiae* in support of the Plaintiff-Appellant in the above-captioned action, and for such other and further relief as the court may deem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2(a) answering papers, if any, must be filed before 11 :00 a.m. on Friday, October 26, 2012.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2(a) this motion will be submitted on the papers and that personal appearance in opposition to the motion is neither required nor permitted.

Dated: Washington, D.C.
October 16, 2012

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
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TOWN OF MIDDLEFIELD,	:	
Defendant-Respondent.	:	

AFFIRMATION OF LOWELL J. SCHILLER IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

LOWELL J. SCHILLER, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an associate at the law firm of Sidley Austin LLP, and I submit this affirmation in support of the Motion of the American Petroleum Institute, the Chamber Of Commerce Of The United States Of America, and the Independent Oil and Gas Association of New York (collectively, "Proposed *Amici*") for Leave to File Brief as *Amici Curiae* in Support of Plaintiff-Appellant in the above-captioned action.

2. Attached hereto as Exhibit A is a copy of the brief that Proposed *Amici* wish to submit to the Court (the "brief"). Proposed *Amici* have duly authorized me to submit this brief on their behalf.

3. Proposed *Amici* seek leave to file the brief because this appeal presents questions of law that are of great importance to Proposed *Amici* and their members. Specifically, Proposed *Amici* and their members have an interest in ensuring that New

York's Oil, Gas and Solution Mining Law, ECL § 23-0101 *et seq.* (the "Oil and Gas Law"), is properly interpreted to prohibit local zoning authorities from enacting laws and ordinances that ban oil and gas drilling within their borders and, in particular, that the complete ban enacted in the Town of Middlefield is held invalid. The interests of individual Proposed *Amici* are set forth in greater detail in the attached brief.

4. Each Proposed *Amicus* is a trade association or business federation that engages in advocacy on behalf of the oil and gas industry. Collectively, Proposed *Amici* have significant expertise in both technical and regulatory issues related to oil and gas development.

5. Given Proposed *Amici*'s substantial interest and expertise as described above and in the attached brief, I respectfully submit that the brief will be of special assistance to the Court in determining the proper interpretation of the Oil and Gas Law. The brief presents law or arguments that might otherwise escape the Court's consideration by expanding upon and elaborating the arguments in support of reversing the decision below in the above-captioned action. Accordingly, I respectfully request that the instant motion be granted in all respects and that Proposed *Amici* be given leave to file the attached brief in this appeal.

AFFIRMED: Washington, D.C.
October 16, 2012

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

COOPERSTOWN HOLSTEIN CORPORATION,	:	Case No. 2012-1010
Plaintiff-Appellant,	:	Otsego County Index No. 2011-0930
-against-	:	
TOWN OF MIDDLEFIELD,	:	
Defendant-Respondent.	:	

PROPOSED BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE INDEPENDENT OIL AND GAS ASSOCIATION OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

No. 2012-1010

Supreme Court

State of New York
Appellate Division – Third Department

COOPERSTOWN HOLSTEIN CORPORATION

Plaintiff-Appellant,

-against-

TOWN OF MIDDLEFIELD,

Defendant-Respondent.

Otsego County Index No.: 2011-0930

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE INDEPENDENT OIL AND GAS ASSOCIATION OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF *AMICI*

The American Petroleum Institute ("API") is a national trade association representing more than 500 companies involved in all aspects of the oil and natural gas industry. America's oil and natural gas industry comprises more than 7.7% of the U.S. economy, supports 9.2 million domestic jobs, delivers more than $86 million a day in revenue to the U.S. government, and since 2000 has invested more than $2 trillion in U.S. capital projects to advance all forms of energy, including alternative energy. API's member companies include natural gas producers, processors, suppliers, pipeline operators, and service and supply companies. API's members have made substantial financial investments in New York in order to develop the State's natural gas resources.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, from every region of the country, and in every industry, including the oil and gas industry. An important function of the Chamber is to represent the interests of its members in matters before the political branches and the courts. To that end, the Chamber regularly files amicus curiae briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

The Independent Oil and Gas Association of New York ("IOGA of NY") represents oil and gas professionals to the citizens and lawmakers of New York State. Membership includes producers, operators, engineers, consultants, landowners and allied businesses and individuals. Headquartered in suburban Buffalo, IOGA of NY advocates for industry and educates the public through community outreach.

Amici's members have a significant interest in developing natural gas across the State. Unless impediments such as Dryden's ordinance are held invalid, as they were long understood by industry to be, then further investments, hiring, and other economic activity cannot be pursued by oil and gas developers in the state. The natural gas industry can play a key role in New York's recovery from the economic downturn by creating jobs.

Amici and their members have a direct interest in the validity of both Middlefield's complete prohibition on oil and gas drilling within its borders and the reasoning of the decision on review, which upheld the prohibition under a rationale that, if left in place, would impede access to resources in a critical area and leave important, highly technical regulatory matters to the judgment of local zoning authorities. This result would significantly impact New York's ability to ensure the effective recovery of underground resources located in geological formations that obviously do not correspond to municipal borders. Indeed, the ability of local zoning authorities to interfere with a state government's management of these cross-jurisdictional resources is a question of national importance that has arisen in numerous states. *See, e.g.*, *Northeast Natural Energy v. City of Morgantown*, No. 11-C-411 (Cir. Ct., Monongalia County W. Va. Aug. 12 2011) (order granting summary judgment), at 8 (holding that although "the City [of Morgantown, West Virginia] has an interest in the control of its land within its municipal borders," it lacks the power to prohibit extraction through the technique of hydraulic fracturing); Complaint for Declaratory Relief, *Colo. Oil & Gas Conservation Commn. v. City of Longmont* (Boulder County Colo. Dist. Ct. July 30, 2012), *available at* http://extras.mnginteractive.com/live/media/site46/2012/0730/20120730_051916_Longmont%20Oil%20&%20Gas%20Complaint%207-30-12.pdf. *Amici* and their members have a vital interest in ensuring that the development of natural resources across the State of New York and the

myriad economic benefits that flow from it is not held hostage by a patchwork of unnecessary and unjustified local bans and regulations.

INTRODUCTION AND SUMMARY

The State of New York contains vast gas reserves that have been developed successfully and safely in New York for decades.[1] Through the proper design elements such as the depth, location, and casing of the well, responsible natural gas drilling minimizes surface impacts and does not pose a threat to drinking water.[2]

The decision below threatens the effectiveness of oil and gas drilling in New York by disturbing the Legislature's allocation of regulatory authority over this activity. Consistent with the principles just described, the Oil, Gas and Solution Mining Law, ECL § 23-0101 *et seq.* (the "Oil and Gas Law"), vests that authority exclusively in the New York State Department of Environmental Conservation ("NYSDEC" or "the Department"), *e.g.*, ECL § 23-0501, and expressly preempts "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries," except those relating to "local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2). Despite this clear language, the Supreme Court upheld a zoning regulation that imposed a town-wide ban on oil and gas drilling. In so ruling, the court reasoned that, under the Oil and Gas Law, "[t]he state maintains control over the 'how' of such procedures while the municipalities maintain control over the 'where' of such exploration." *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d

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[1] *See* N.Y. State Dep't of Envtl. Conservation, *Marcellus Shale*, http://www.dec.ny.gov/energy/46288.html.

[2] *See id.*; *see also* API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Lease* (1st ed. July 2009), http://www.api.org/~/media/Files/Policy/Exploration/API_RP_51R.ashx; § 1 (Scope), § 6 (explaining detailed considerations for the planning and placement of wells), § 7 (explaining detailed considerations for the planning and placement of lease gathering and system lines); *Energy Policy Act of 2005: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 109th Cong. 115-16 (2005) (statement of Hon. Victor Carrillo, Chairman, Railroad Commission of Texas) (citing survey by the Interstate Oil and Gas Compact Commission showing that no instance of harm to drinking water had been found in over one million hydraulic fracturing operations nationwide).

767, 777-78 (Sup. Ct., Otsego County 2012). If upheld, this decision would reassign this regulatory authority to hundreds—if not thousands—of municipal, county, and other local bodies, in contravention of long-standing, duly-enacted state law.

In concluding that municipalities may regulate where exploration occurs, the Supreme Court badly misconstrued—and, indeed, defeated a central purpose of—the Oil and Gas Law. By its plain terms, the Oil and Gas Law draws no distinction between local laws that regulate *where* hydraulic fracturing occurs and local laws that regulate *how* it occurs. Instead, the statute broadly preempts "*all* local laws or ordinances relating to the regulation of the oil, gas and solution mining industries." ECL § 23-0303(2) (emphasis added). The Legislature confirmed the breadth of this provision by narrowly excepting from its scope only two kinds of local laws, those that concern either roads or local property taxes. These discrete, specific exceptions only reinforce that the otherwise broad language of the preemption provision must extend to local land-use ordinances, and preempt any that, like the ordinance at issue here, "relat[e] to the regulation of the . . . gas . . . industr[y]." The NYSDEC has confirmed this plain meaning, by issuing regulations governing the location of natural gas wells, *e.g.*, 6 NYCRR part 553, and proposing new draft regulations that make the scope of its regulatory oversight regarding the location of wells even clearer.

The Supreme Court nevertheless suggested that it was appropriate to construe the Oil and Gas Law's preemption clause narrowly in order to "harmonize[ ]" the State's interest under that law "with the home rule of local municipalities." 35 Misc. 3d at 777. This reasoning, however, fundamentally misconstrues New York's constitutional structure. Under the Constitution, local governments may only enact zoning laws that are "not inconsistent" with "the provisions of this constitution or any general law." NY Const. art. IX, § 2(c). *See Wambat Realty Corp. v. State*,

41 N.Y.2d 490 (1977). Because the Oil and Gas Law expressly and unambiguously prohibits *all* local laws regulating the location of drilling operations, Middlefield's zoning law is inconsistent with a "general law" and thus invalid. That conclusion, moreover, cannot be avoided on the basis of the vague and unsupportable inferences the Supreme Court sought to draw from the Oil and Gas Act's legislative history.

In addition, Middlefield's regulation is invalid under well-settled principles of implied preemption. A local law or ordinance is preempted if it (1) regulates in a field of exclusive state authority or (2) conflicts with a state statute because it undermines its purpose, prohibits permissible conduct, or interferes with its operation. *See, e.g.*, *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983). Middlefield's blanket prohibition on a wide swath of oil, gas, and related activities does all these things. If allowed to stand, the Supreme Court's decision below will have far-reaching adverse consequences that extend well beyond Middlefield's own borders.

ARGUMENT

I. THE SUPREME COURT ERRED IN CONCLUDING THAT NEW YORK'S OIL AND GAS LAW DOES NOT EXPRESSLY PREEMPT MIDDLEFIELD'S ZONING REGULATION

A. The Oil and Gas Law Expressly Preempts Middlefield's Zoning Regulation.

Middlefield's zoning regulation is invalid because it is expressly preempted by the Oil and Gas Law. This understanding is compelled by the statute's unambiguous text and structure and by its clear delegation of exclusive regulatory authority on the matter to NYSDEC.

The Oil and Gas Law was first enacted in 1963 to serve several related purposes: (1) to "regulate the development, production and utilization of natural resources of oil and gas"; (2) to "provide for the operation and development of oil and gas properties" so as to promote "a greater ultimate recovery" of those resources; and (3) to protect "the correlative rights of all owners."

ECL § 23-0301. It sets forth a detailed and comprehensive statutory scheme that, *inter alia*, requires permits for oil and gas wells, *id.* § 23-0501, specifies precise depth and spacing limits for different types of wells, *id.* § 23-0503, and provides for integration of properties to protect owners' correlative rights, *id.* §§ 23-0701, 23-0901. It also empowers NYSDEC to issue regulations and orders as necessary to promote the efficient recovery of oil and gas resources, and to prevent or remedy any pollution or other damage relating to the recovery of those resources. *Id.* § 23-0305.

The statute imposes express restrictions on local laws concerning the gas industry. In 1981, due to problems with intrusive and inconsistent local regulations of the oil and gas industry, the Legislature amended the Oil and Gas Law to include a broad provision preempting local laws and ordinances. As noted, that clause declares that the law "shall supersede *all* local laws or ordinances *relating to* the regulation of the oil, gas and solution mining industries," except that the law "shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2) (emphasis added).

The scope of this supersession clause is extraordinarily broad. The term "all" is, by definition, sweeping in scope. So, too, is the phrase "relating to." Indeed, the Court of Appeals has given the phrase an "expansive" meaning synonymous with having a "connection with." *State v. Philip Morris Inc.*, 8 N.Y.3d 574, 580 (2007) (interpreting language in arbitration agreement). Similarly, the Supreme Court of the United States has concluded that use of the phrase "relating to" in a preemption clause reflects a "broad pre-emptive purpose." *Morales v Trans World Airlines Inc.*, 504 U.S. 374, 383 (1992); *see State ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278, 283-84 & n.5 (2012). As used in the Oil and Gas Law, therefore,

this "expansive" language unambiguously preempts local laws that prohibit oil and gas drilling as well as laws that prescribe the manner of drilling operations. In either case, such laws "relat[e] to," or have a "connection with," regulation of the oil and gas industry, and thus are preempted.

The conclusion that this language preempts local zoning regulations is both confirmed and compelled by the fact that the supersession clause includes an express exception for certain local laws and ordinances—those governing local roads and property taxes—but fails to include an express exception for local land-use ordinances. The Legislature's decision to state only certain exceptions must be interpreted using the traditional canon of *expressio unius est exclusio alterius*, which recognizes that "'where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned.'" *Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health*, 84 N.Y.2d 252, 262 (1994) (quoting McKinney's Cons. Laws of NY, Book 1, Statutes § 240, at 412-13). By not including zoning laws within the stated exceptions, the Legislature made clear its intent not to create an exception for such laws.

Thus, as one court explained in a decision affirmed by the Appellate Division for the Fourth Judicial Department, the language and structure of the Oil and Gas Law make clear that it "pre-empts not only inconsistent local legislation, but also *any municipal law* which purports to regulate gas and oil well drilling operations, unless the law relates to local roads or real property taxes." *Application of Envirogas, Inc. v. Town of Kiantone*, 112 Misc. 2d 432, 434 (Sup. Ct., Erie County 1982) (emphasis added), *aff'd*, 89 A.D.2d 1056 (4th Dept. 1982). Middlefield's law, of course, is not an exercise of its "jurisdiction over local roads" or its rights "under the real property tax law." ECL § 23-0303(2). Thus, it is plainly preempted.

The preemption of local zoning regulations is confirmed by other provisions of the Oil and Gas Law that explicitly grant NYSDEC the authority to regulate *where* drilling for gas occurs. *See* ECL § 23-0501 (requiring analysis of well locations as part of permit application). Indeed, the statute specifically provides that local governments are entitled only to prior notice of "the location of the drilling site" *after* a state-level permitting decision has been made. *Id.* § 23-0305(13). This provision would make no sense if municipalities retained authority to prohibit drilling. Under the Supreme Court's interpretation, companies could apply for well permits, and the NYSDEC could exercise its regulatory authority and approve such applications, only to have a town subsequently enact an ordinance barring the location of any wells within its borders. The Legislature could not have intended to allow such a clear waste of private and agency resources. Instead, the provisions that authorize the Department to consider location as part of the permitting process, and that entitle municipalities to notice only after a permit is granted, confirm that the statute preempts local land use ordinances governing the location of drilling activities.

In fact, NYSDEC has issued numerous regulations pursuant to this authority. For example, it has issued regulations that prohibit wells from being located within certain distances of private dwellings, certain public buildings, traveled roads, bodies of water, lease boundary lines, oil and gas wells in the same pool, or the Pennsylvania border. 6 NYCRR part 553. It has also issued regulations that authorize it to permit exceptions to any of these prohibitions "[w]here in its opinion there exists good and sufficient reason," *id.* § 553.4, or to issue orders further regulating the location of wells within a lease, taking into account all relevant information, *id.* § 553.3. In addition, NYSDEC is proposing new regulations that relate specifically to operations associated with high-volume hydraulic fracturing. *See* N.Y. State Dep't of Envtl. Conservation, *Proposed Express Terms 6 NYCRR Parts 550 through 556 and 560*, http://www.dec.ny.gov/

regulations/77401.html (proposing new requirements with respect to, *inter alia*, permit applications, *id.* § 560.3; the construction and operation of wells, *id.* § 560.6; and the location of wells with respect to various water supplies, *id.* § 560.4). If the regulation of where gas recovery may occur were left to local authorities, NYSDEC's current and proposed actions would be *ultra vires*.

Regulating the location of wells, moreover, is not merely ancillary or incidental to NYSDEC's function, but is part of its core responsibility. The Oil and Gas Law was enacted to "regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste," ECL § 23-0301, and "waste" is defined to include "locating" or "spacing" any gas well "in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations," *id.* § 23-0101(20)(c). This definition reflects the reality that gas does not exist in formations that follow jurisdictional boundaries, and efficient and economical development that minimizes waste should prioritize full development of a particular shale formation and gas field. If authority over location had been left to the municipalities, rather than the State, NYSDEC would have been powerless to prevent this sort of waste.[3]

B. The Decision Below Is Inconsistent With The Oil and Gas Law.

The decision below is fundamentally at odds with the text, structure, and purpose of the Oil and Gas Law, as well as the authoritative interpretation of the agency charged with

[3] The importance of location to effective regulation of the oil and gas industry is reflected in industry guidance and technical standards, which provide a framework based on proven engineering practices for safe and reliable natural gas production. These documents make clear that proper site selection and layout are essential to the success of operations, and contain detailed recommendations to ensure that the relevant considerations are taken into account. *See, e.g.*, API Recommended Practice 51R §§ 1, 6, 7; API, *Practices for Mitigating Surface Impacts Associated With Hydraulic Fracturing* (1st ed. Jan. 2011), http://www.api.org/~/media/Files/Policy/Exploration/HF3_e7.ashx. (explaining the importance of site selection and layout and discussing relevant considerations).

implementing the law. The Supreme Court's contrary conclusion rests on a series of critical errors that must now be corrected.

Although the Supreme Court largely sidestepped the statutory language, the textual analysis on which it did rely was clearly erroneous. The court stated that its exclusion of zoning laws from the Oil and Gas Law's preemptive scope was consistent with the statutory language because ECL § 23-0302(2) preempts only the "regulation" of the oil, gas, and solution mining industries, and the word "regulation" is defined as "'an authoritative rule dealing with details or procedure.'" 35 Misc. 3d at 777 (quoting Merriam-Webster Dictionary). But the court nowhere explained why the plain meaning of the word "regulation" fails to encompass rules governing both the manner and the location of operations. Nor could it have done so.

The permissible location of natural gas wells is no less a "detail" of the natural gas industry than are the safety standards that govern well operations. A simple illustration highlights the fallacy in the Supreme Court's ruling. Suppose a municipality included, as part of its traffic code, provisions that prohibited 18-wheel trucks from using any of its roads. Under the Supreme Court's flawed reasoning, this provision would not qualify as a motor vehicle "regulation" because it governs only the location of motor vehicle use, not "the *manner and method* to be employed with respect to" such use. The court's crabbed reading of the term "regulation" is simply untenable.

Indeed, the zoning law at issue here is contained within an article of the zoning law entitled "'General *Regulations* Applying to All Districts,'" 35 Misc. 3d at 768 (emphasis added). The Supreme Court itself referred to that zoning law as a "*local regulation*[ ] addressing land use," *id.* at 778 (emphasis added). And of course the NYSDEC's rules governing well siting, or location, are also "regulations." In short, the plain meaning of the term "regulation" provides no

basis for concluding that zoning ordinances that prohibit wells within municipal boundaries fall outside the scope of the Oil and Gas Law's preemption provision.

Moreover, the Supreme Court's textual reading is at odds with the statutory language that the provision "shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2) If the supersession clause were interpreted to apply only to laws that govern how—rather than where—wells are operated, then there would have been no need for the drafters to include the exception for laws governing local roads and property taxes, because neither type of law falls within the narrow scope of that exception. Thus, the Supreme Court's interpretation runs afoul of the fundamental interpretive rule that "meaning and effect should be given to every word of a statute" such that each word has "a distinct and separate meaning." *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001).

The Supreme Court also reasoned that the Oil and Gas Law restricted the NYSDEC's authority over the natural gas industry to "the *manner and method* to be employed with respect to. . . gas . . . drilling or mining" and did not give the agency control over the "where" of such exploration. 35 Misc. 3d at 777-78 (emphasis added). But, as explained, the statute expressly grants the NYSDEC authority to regulate "where" drilling may occur, and NYSDEC has repeatedly exercised that authority. *See supra* § I.A. If the Supreme Court were correct that NYSDEC's authority were limited to "control over the 'how' of such procedures," 35 Misc. 3d at 777, many of NYSDEC's regulations would in fact be void as exceeding its authority. The Supreme Court did not explain how its interpretation could be reconciled with these provisions; indeed, it did not even cite them in its opinion.

The Supreme Court also erred in concluding that its interpretation of the Oil and Gas Law was justified because "[t]here is no language contained within the legislative history which serves to support plaintiff's claim that the supersession clause enacted was intended to impact, let alone diminish or eliminate, a local municipality's right to enact legislation pertaining to land use." *Id.* The court's reliance on legislative history was deeply flawed.

As an initial matter, it was error for the Supreme Court to rely on legislative history at all—let alone to make it the centerpiece of its analysis, *see id.* at 771-77—because the statutory text is unambiguous. *See Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 286 (2009) (legislative history may be examined "[i]f the [statutory] language is ambiguous"); *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998) ("[I]f [a statute has] a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning.") (internal quotation marks omitted). Indeed, it is particularly improper to look beyond the plain text of a statute and rely on *silence* in the legislative history to override the plain meaning of that text. Contrary to the Supreme Court's view, the text of the preemption provision must be given its plain and ordinary meaning even if "[t]here is no language contained within the legislative history which serves to support" that plain meaning. 35 Misc. 3d at 777.

The Supreme Court's contrary ruling rests on the implicit assumption that the Legislature cannot override "the home rule of local municipalities" unless it makes its intent to do so unmistakably clear; indeed, this assumption appears to underlie the court's effort to "harmonize[]" the preemption provision with the town's home rule powers. *Id.* This assumption, however, is plainly mistaken. There is no need to harmonize the preemption provision with municipal zoning powers—and no reason to require a "clear statement" to find

preemption of local zoning laws—because New York's Constitution prohibits municipalities from enacting zoning laws that are inconsistent with any general law.

Middlefield's power to enact laws and ordinances, like that of other local governments in New York, is defined by the State's Constitution and Home Rule Law, as interpreted by New York courts. Article IX of the New York Constitution grants local governments the authority to enact laws and ordinances "relating to its property, affairs, or government," but expressly limits that authority to laws and ordinances that are "not inconsistent" with "the provisions of this constitution or any general law." NY Const. art. IX, § 2(c); *see* Municipal Home Rule Law § 10(1)(ii). The Town of Middlefield, therefore, "may not exercise its police power when the Legislature has restricted such an exercise by preempting the area of regulation." *N.Y. State Club Ass'n v City of N.Y.*, 69 N.Y.2d 211, 217 (1987), *aff'd*, 487 U.S. 1 (1988). *See People v. De Jesus*, 54 N.Y.2d 465, 468 (1981) ("[S]ince the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority."). To the extent that a state law expressly provides that it supersedes all local ordinances, a local government may not legislate on that subject matter unless the State has given it "clear and explicit" authority to the contrary. *Robin v. Inc. Vil. of Hempstead*, 30 N.Y.2d 347, 350-51 (1972).

It is well-established that zoning laws, like other local laws and ordinances, are subject to these principles. *Wambat Realty*, 41 N.Y.2d 490. Local governments "have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant," as with their other powers. *Kamhi v. Town of Yorktown*, 59 N.Y.2d 385, 389 (1983). Thus, because the zoning law at issue here is preempted by the express language in a state statute, it is void as outside the scope of the local governmental authority.

In all events, the legislative history of the Oil and Gas Law actually cuts against the interpretation below by confirming that regulating location at the statewide level was part of the statutory design. For example, a Memorandum in Support of the original 1963 legislation stated, in language that the Supreme Court quoted but did not explain, that NYSDEC "'is empowered to make an early determination as to all the lands believed underlaid by a pool and shall fix ... *well locations* [to ensure the] uniform distribution of wells.'" 35 Misc. 3d at 773 (emphasis added). Leaving the regulation of "where" drilling occurs to local governments would have made this determination impossible to achieve. Likewise, when the Legislature added the express preemption clause in 1981, the Memorandum in Support explained that this amendment was intended to preclude "[l]ocal government's diverse attempts to regulate the oil, gas and solution mining activities," which "threaten[ed] the efficient development of these resources." R.995. *See also id.* ("The comprehensive scheme envisioned by the law and the technical expertise required to administer and enforce it necessitates that this authority be reserved to the State."). Given that well location is chief among the technical issues that must be addressed to ensure efficiency and reduce waste, it is implausible that a legislature concerned with ensuring comprehensive control by the State would have intended, without saying so, to exclude regulations governing location from the statute's preemptive scope.

Finally, the Supreme Court erred in relying on two decisions by the Court of Appeals that interpreted different language in a different statute, New York's Mined Land Reclamation Law, ECL § 23-2701, *et seq.* ("Mined Land Law"). *See* 35 Misc. 3d at 778-79. In *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987), and *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996), the Court of Appeals upheld two local zoning ordinances as consistent with the Mined Land Law. The language of the preemption provision in that law,

however, differed markedly from the language used in the Oil and Gas Law's supersession clause.

In the version of the Mined Land Law at issue in *Frew Run*, the preemption clause stated that "nothing in this title shall be construed to prevent any local government *from enacting local zoning ordinances* or other local laws which impose stricter mined land reclamation standards or requirements." 71 N.Y.2d at 129 (emphasis added). The version of the law at issue in *Gernatt* was even more explicit in preserving local zoning authority, stating that "nothing in this title shall be construed to prevent any local government from . . . *enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts*." 87 N.Y.2d at 682 (quoting ECL § 23-2703(2)) (emphasis added). Thus, even though the supersession language contained the same phrase—"relating to"—that appears in the Oil and Gas Law,[4] the Legislature *expressly* provided that this language was to be "construed" as permitting local zoning laws. *See id.* at 683 ("the Legislature expressly excluded that authority from its preemptive reach"). In contrast, the Oil and Gas Law expressly exempts only local road and real property tax ordinances from preemption, but does *not* exempt local zoning ordinances.

Indeed, if anything, these cases affirmatively undermine the Supreme Court's conclusion in this case. First, *Frew Run* and *Gernatt* demonstrate that the phrase "relating to" is so broad that, when read in accordance with its plain meaning, it encompasses local land-use zoning laws. It is precisely because the language is ordinarily understood to have such breadth and meaning that the Legislature deemed it necessary to expressly enact a rule of construction to avoid that result. *See* ECL § 23-2703(2) (providing that supersession clause must be "construed" to permit local zoning laws). Second, the preemption provisions at issue in *Frew Run* and *Gernatt* confirm

[4] *See* ECL § 23-2703(2) ("this title shall supersede all other state and local laws relating to the extractive mining industry.").

that the Legislature knows how to exempt local land-use zoning laws from the reach of an otherwise broad preemption provision, and does so expressly when that is its intent. The fact that Legislature chose, in the Oil and Gas Law, to preserve local authority only with respect to roads and property taxes confirms that it intended to preempt all other local authority relating to regulation of the natural gas industry, including the authority to enact local land-use zoning laws that prohibit drilling operations within municipal borders. *See Jewish Home*, 84 N.Y.2d at 262 (applying canon of *expressio unius est exclusio alterius*).

Moreover, unlike the Oil and Gas Law, the Mined Land Law clearly contemplated that there *would* be local restrictions on the location of mining activities. As the court in *Frew Run* emphasized, upon an "examination of the entire statute," there was "nothing" to suggest that the Mined Land Law was intended to preempt zoning ordinances that restrict the location of mining activities. 71 N.Y.2d at 132-33. In contrast, the Oil and Gas Law expressly regulates the location as well as the operation of mines, *see supra* § 1.A, demonstrating an intent to preempt conflicting local ordinances that prohibit oil and gas drilling in certain locations.[5]

II. THE SUPREME COURT ERRED BY FAILING TO INVALIDATE MIDDLEFIELD'S ZONING REGULATION UNDER PRINCIPLES OF IMPLIED PREEMPTION.

Even if this Court were to conclude that ECL § 23-0303(2) is silent as to whether local zoning ordinances are included in the Oil and Gas Law's preemptive scope, Middlefield's zoning regulation still would be invalid under principles of implied preemption. The constitutional requirement that local laws must be "not inconsistent" with "any general law," NY Const. art.

[5] In addition, in neither *Frew Run* nor *Gernatt* did the ordinances completely prohibit mining everywhere in the municipality. Specifically, in *Frew Run*, the ordinance prohibited mining only in particular non-industrial districts, 71 N.Y.2d at 130; in *Gernatt*, even with statutory language that expressly saved zoning ordinances from preemption, the court found it "important" that the zoning ordinance allowed existing mines to continue as nonconforming uses, 87 N.Y.2d at 675-76. Here, by contrast, the Town is "singl[ing] out oil and gas drillers," *Envirogas*, 112 Misc. 2d at 434, and attempting to ban drilling entirely, in all districts.

IX, § 2(c), applies without regard to whether the statute in question contains language expressly preempting the local law at issue. *See, e.g.*, *Red Hook*, 60 N.Y.2d at 108 ("Inconsistency is not limited to cases of express conflict between State and local laws."); *N.Y. State Club Assn.*, 69 N.Y.2d at 217 (a local government "may not exercise its police power by adopting a local law inconsistent with constitutional or general law"). Thus, even if a statute's supersession clause is not on point, a local enactment will be impliedly preempted if (1) "it imposes an additional layer of regulation in an area where the Legislature has evidenced its intent to pre-empt the field of regulation," or (2) "it is inconsistent with ... a general law." *Red Hook*, 60 N.Y.2d at 104-05. Middlefield's regulation is preempted under both doctrines.

A. Middlefield's Regulation Is Invalid Under The Doctrine of Field Preemption.

In addition to stating expressly in ECL § 23-0303(2) that *all* local regulation of the oil and gas industries is preempted, the Legislature made clear in other provisions of the Oil and Gas Law that it intended to occupy the entire field of regulation over where drilling occurs. A local enactment is invalid under the doctrine of field preemption if the Legislature has demonstrated an intent to "occupy the entire field so as to prohibit additional regulation by local authorities in the same area." *Robin*, 30 N.Y.2d at 350. Such intent can be inferred from either (1) "a declaration of State policy by the Legislature" or from (2) "the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." *Red Hook*, 60 N.Y.2d at 105; *accord Vil. of Nyack v. Daytop Vil., Inc.*, 78 N.Y.2d 500, 505 (1991). Here, intent may be inferred on either basis.

First, the zoning regulation undermines a "declar[ed] ... State policy," *Red Hook*, 60 N.Y.2d at 105, by prohibiting drilling within its borders without regard to the effect this prohibition will have on waste. Preventing waste is one of the statute's primary policy objectives, ECL § 23-0301, and minimizing waste of the Marcellus Shale's resources through

proper well positioning is a technical issue entrusted to the expertise of NYSDEC, *id.* §§ 23-0101(20)(c), 23-0501. If Middlefield can prohibit drilling within its borders, then so too can municipalities throughout the State. The cumulative impact of such restrictions would predictably increase waste of the Marcellus Shale's resources, in direct contravention of the goals underlying the Oil and Gas Law. *See also infra* pp. 20-21. Because the Legislature "made a studied decision" that these goals "would be more effectively met not at the local community level but by State action alone," *De Jesus*, 54 N.Y.2d at 470, municipalities may not legislate in the field by regulating where drilling occurs.

Second, the Legislature's intent to occupy the field is clear from the "comprehensive and detailed" regulatory scheme that it enacted, under which both the "how" and "where" of drilling are addressed at the statewide level. *Id.* at 469. The Oil and Gas Law expressly regulates the location of wells and authorizes NYSDEC to promulgate detailed regulations, which it has done. *See supra* § 1.A. NYSDEC's regulations are not restricted to technical details but establish detailed and comprehensive rules regarding traditional land use concerns. For example, these regulations specify precisely how far away a well must be situated from private homes, schools, places of lodging, and other structures. 6 NYCRR § 553.2. They also authorize NYSDEC to grant "exceptions" to these specifications upon application and a public hearing. *Id.* § 553.4. Moreover, the legislature has made clear that there is no place in this scheme for the concurrent regulation of well locations by local governments, which are entitled only to *subsequent* notice of "the location of the drilling site," ECL § 23-0305(13)—a division of authority that would make no sense if local governments could make such decisions on their own. *See supra* p. 8.

B. Middlefield's Regulation Is Invalid Under The Doctrine of Conflict Preemption.

Middlefield's regulation is separately invalid under the doctrine of conflict preemption, under which local governments may not enact laws or ordinances that actually conflict with the State's general laws. For example, where a "municipality seeks to administer a zoning ordinance in a manner that is in conflict with the policy objectives of [a state law] . . . . the zoning ordinance is superceded." *Inter-Lakes Health, Inc. v. Town of Ticonderoga*, 13 A.D.3d 846, 847 (3d Dept. 2004). Likewise, a local law is invalid if it "prohibit[s] what would be permissible under State law," or if it "impose[s] prerequisite additional restrictions on rights under State law" that "inhibit the operation of the State's general laws." *Red Hook*, 60 N.Y.2d at 108 (internal quotation marks omitted). Under these principles, Middlefield's zoning regulation is preempted because it conflicts with the Oil and Gas Law in a variety of ways.

First, the zoning regulation conflicts with the Oil and Gas Law's policy objective of preventing waste. This conflict not only demonstrates that the Legislature intended to occupy the field of regulation, *see supra* § II.A, but is in and of a basis for finding preemption, *see Inter-Lakes Health*, 13 A.D.3d at 847.

Second, Middlefield's blanket prohibition on exploration and drilling prohibits conduct that is permissible under State law. *Red Hook*, 60 N.Y.2d at 108. Middlefield makes no exception for activities conducted pursuant to a state-issued permit, which means that a party that seeks and obtains express permission from NYSDEC to drill on its property nonetheless will be prohibited under local law from exercising that right. Under Middlefield's law, a party could follow all applicable state laws and obtain a permit from NYSDEC, only to be told by local zoning officials that its state-issued permit is a worthless document. Moreover, Middlefield's prohibition effectively nullifies NYSDEC's authority to permit exceptions to its own geographic

restrictions within the Town's borders, 6 NYCRR § 553.4, because any exception granted by NYSDEC would be useless in the face of a blanket local prohibition.

Third, by imposing land use restrictions over and above those imposed pursuant to the Oil and Gas Law, it "inhibit[s] the operation of the State's general laws," *Red Hook*, 60 N.Y.2d at 108, by impeding comprehensive decisionmaking by NYSDEC regarding the location of wells and by discouraging applicants from seeking permits that might otherwise be granted. Indeed, under the decision below, it would make little commercial sense for *amici*'s members to make requisite financial investments and acquire lawful state permits from the NYSDEC that could be immediately invalidated on a whim by a capricious local body of government anywhere in the State.

III. THE CONTINUED OPERATION OF MIDDLEFIELD'S ZONING REGULATION THREATENS THE EFFECTIVENESS OF OIL AND GAS RECOVERY OUTSIDE OF MIDDLEFIELD.

Allowing Middlefield's zoning regulation to stand as written would have significant practical consequences that would undermine the effectiveness of oil and gas drilling and related activities in areas well beyond Middlefield's borders. First, interpreting the Oil and Gas Law to grant municipalities—not the NYSDEC—the authority to regulate where drilling occurs would call into question the validity of numerous state-level regulations that it has issued on that topic, including those governing subjects including well siting, *see* 6 NYCRR part 553. *See supra* pp. 8-9.

Second, and more fundamentally, such an interpretation would effectively write the State's expert agency out of a technical area squarely within its expertise, and would do great damage to the State's effort to develop and implement uniform technical standards for oil and gas drilling and hydraulic fracturing. The location of wells is not an ancillary issue that only "'incidentally' impact[s] upon" the recovery of natural resources. 35 Misc. 3d at 778. Rather,

determining where to drill requires significant technical expertise and has important implications for the effectiveness of the well that is constructed. *See supra* n.2 (describing API guidance regarding the need to properly locate leases, wells, and system lines to ensure effective operations). Local governments do not have the expertise necessary to undertake the required analysis. The NYSDEC plainly does.

Third, the unilateral decision by one municipality to prohibit recovery within its borders has the potential to affect recovery outside its jurisdiction. Because gas formations do not conform to local jurisdictional borders, one municipality's prohibition will reduce the recovery from a single gas formation or field that is shared by multiple jurisdictions. *See supra* p. 9. Superimposing a patchwork of restrictions on a single formation will result in sub-optimal and wasteful recovery, with the potential to affect the feasibility of development in neighboring municipalities that *do* wish to permit it. The decision below, however, allows for multiple municipalities to control development of a shared resource outside their territorial and jurisdictional boundaries. In contrast, when decisions are made by a single statewide authority, as the Legislature intended, such conflicts can be addressed by a statewide authority with both the expertise and the jurisdiction to balance competing interests.

Fourth, Middlefield is not the only municipality that has endeavored to prohibit hydraulic fracturing or other or other oil and gas recovery, and the fate of its regulation will have a very real impact on the laws of other local governments in New York. Over two dozen municipalities at least have enacted laws that prohibit or regulate oil and gas drilling and hydraulic fracturing within their borders, *see* Joseph De Avila, *"Fracking" Goes Local*, Wall St. J., Aug. 29, 2012, at A17, with mixed results before the courts. *Compare Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450 (Sup. Ct., Tompkins County 2012) (upholding total ban), *with Jeffrey v.*

Ryan, 2012 N.Y. Misc. LEXIS 4684 (Sup. Ct., Broome County Oct. 2, 2012, No. CA2012-001254) (striking down temporary moratorium as exceeding local police power). This Court's interpretation of the Oil and Gas Law will therefore have consequences that bear on more than just the permissibility of oil and gas activities within a single municipality.

Finally, if local governments are able to close large portions of New York's lands to oil and gas activities, the effects on New York's energy production and economic activity will be significant, especially as new development of the Marcellus Shale formation is expected to continue in New York's Southern Tier under the regulatory authority of the NYSDEC. The use of hydraulic fracturing and directional drilling enables the recovery of oil and natural gas that otherwise could not be commercially developed and thereby spurs both energy production and economic growth. To put the importance of these technologies in perspective, it is estimated that, without them, the nation would lose 45 percent of domestic natural gas production within 5 years.[6] Shale gas development alone supported 600,000 jobs in 2010, *id.* at 4, and one study indicates that that a 25 percent increase in the supply of ethane (a liquid derived from shale gas) could add even more jobs, provide billions in federal, state, and local tax revenue, and spur billions in capital investment.[7] Indeed, it has been estimated that developing the Marcellus could generate $1.2 billion in economic activity in New York *every year*.[8] Local prohibitions that place large portions of New York's gas resources out of reach of development would lead to

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[6] *See* API, *Shale Answers* at 3 (June 2012), *available at* http://www.api.org/~/media/Files/Policy/Hydraulic_Fracturing/Hydraulic_Fracturing_Brochure_June2012.ashx.

[7] *Id.* at 4; Am. Chem. Council, *Shale Gas and New Petrochemicals Investment: Benefits for the Economy, Jobs, and U.S. Manufacturing* at 1 (March 2011), *available at* http://www.americanchemistry.com/ACC-Shale-Report

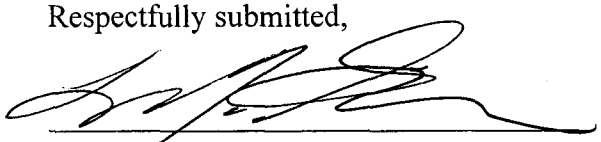
[8] *See* N.Y. State Dep't of Envtl. Conservation, *Revised Draft Supplemental Generic Environmental Impact Statement On The Oil, Gas and Solution Mining Regulatory Program*, Executive Summary 17 (Sept. 2011), *available at* http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf.

precisely the sort of "waste" that the Oil and Gas Law was designed to prevent through comprehensive statewide regulation.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court should be reversed.

Respectfully submitted,



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October 16, 2012

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—THIRD DEPARTMENT

COOPERSTOWN HOLSTEIN CORPORATION,	:	Case No. 2012-1010
Plaintiff-Appellant,	:	Otsego County Index No. 2011-0930
-against-	:	
TOWN OF MIDDLEFIELD,	:	
Defendant-Respondent.	:	

AFFIRMATION OF SERVICE

I, Lowell J. Schiller, an attorney duly admitted to practice law before the Courts of the State of New York, affirm under penalty of perjury:

That I am not a party to this action and am over 18 years of age, and am employed by Sidley Austin LLP, 1501 K Street NW, Washington, D.C., 20005.

That on October 16, 2012, the foregoing NOTICE OF MOTION, AFFIRMATION, and PROPOSED BRIEF were served on the following by overnight mail:

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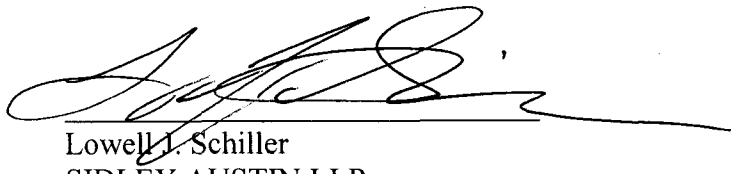
AFFIRMED: Washington, D.C.
October 16, 2012



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