

In the Supreme Court of Ohio

THE VILLAGE OF SCIO, OHIO, <i>et al.</i>,)	Case No. 2023-1116
)	
<i>Appellants,</i>)	
)	
v.)	On Appeal from the Harrison County
)	Court of Appeals,
)	Seventh Appellate District
NORTH TOWNSHIP, c/o NORTH)	
TOWNSHIP BOARD OF TRUSTEES,)	
(UTICA EAST OHIO MIDSTREAM,)	Court of Appeals
LLC),)	Case No. HA-2022-0006
)	
<i>Appellees.</i>)	

MEMORANDUM OF APPELLEE UTICA EAST OHIO MIDSTREAM, LLC OPPOSING JURISDICTION

Joseph R. Miller (0068463), *Trial Attorney*
John M. Kuhl (0080966)
Christopher L. Ingram (0086325)
Muna Abdallah (0099824)
Margaret S. Echols (0099471)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400 Telephone
(614) 719-4630 Facsimile
jrmiller@vorys.com
jmkuhl@vorys.com
clingram@vorys.com
mabdallah@vorys.com
msechols@vorys.com

Counsel for Appellee
Utica East Ohio Midstream, LLC

James F. Mathews (0040206),
Brittany A. Bowland (0100126)
BAKER DUBLIKAR
400 South Main Street
North Canton, Ohio 44270
(330) 499-6000 Telephone
(330) 499-6423 Facsimile
mathews@bakerfirm.com
bbowland@bakerfirm.com

Counsel for Appellants
The Village of Scio, Ohio, et al.

TABLE OF CONTENTS

THIS CASE DOES NOT PRESENT ANY CONSTITUTIONAL QUESTION OR ISSUES OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW	6
<u>Response to Proposition of Law No. 1:</u> <i>The Board, the Court of Common Pleas, and the Seventh District all correctly found that Scio's Petition failed to satisfy the "contiguous" requirement for annexation because the two parcels proposed for annexation were separate and unconnected</i>	6
<u>Response to Proposition of Law No. 2:</u> <i>A proposed annexation of non-contiguous territories that would triple the size of the annexing village to the detriment of the township is an unreasonably large territory under R.C. 709.033(A)(4)</i>	8
<u>Response to Proposition of Law No. 3:</u> <i>A facially defective services resolution that does not address all of the territory proposed for annexation does not satisfy R.C. 709.03(D)</i>	10
<u>Response to Proposition of Law No. 4:</u> <i>The Court of Common Pleas acted within its authority under R.C. Chapter 2506 when it reviewed the entire record and sustained Utica East's cross-assignment of error that the proposed annexation did not satisfy the general good inquiry set forth in R.C. 709.033(A)(5)</i>	11
CONCLUSION.....	12
CERTIFICATE OF SERVICE	13

**THIS CASE DOES NOT PRESENT ANY CONSTITUTIONAL QUESTION OR ISSUES
OF PUBLIC OR GREAT GENERAL INTEREST**

This annexation matter does not warrant Supreme Court review. The case does not present any novel argument or issue of first impression. It presents no issues left unresolved by Ohio case law and no issue that has caused problems for lower courts in annexation matters. The Harrison County Board of Commissioners (“Board”), the Harrison County Court of Common Pleas (“Court of Common Pleas”), and the Seventh District Court of Appeals (“Seventh District”) all correctly determined that Appellant Village of Scio’s (“Scio”) annexation petition failed to meet the requirements of R.C. Chapter 709. Among other fatal flaws, Scio’s petition was legally insufficient from the outset because Scio attempted to annex two non-contiguous areas of land through a single annexation proceeding and failed to pass an ordinance establishing the services it would provide to the entire territory proposed for annexation.

Appellant now asks this Court to review its flawed annexation petition for a fourth time in a last-ditch effort to obtain a different result. In doing so, Appellant cannot clearly articulate why the lower courts’ straight-forward application of established annexation law to the facts of this case creates a matter of great public importance to Ohioans. Nor does Appellant explain exactly what needs to be clarified or what further guidance Ohio courts need under the annexation statutes at issue. Instead, Scio is really asking this Court to provide a third level of review and engage in alleged error correction because Scio does not like the result of the lower courts’ application of the law to the facts. This Court’s role, however, is not to correct *alleged errors* and each of Scio’s propositions of law should be rejected.

In its first proposition of law, Scio asks this Court to disregard existing precedent and conclude that R.C. 709.02 permits a municipal corporation to annex multiple non-contiguous areas of land through a single annexation petition. Scio argues that the Board, the Court of

Common Pleas, and the Seventh District all imputed a requirement into R.C. 709.02 that does not exist. First of all, Scio mischaracterizes the law and fails to distinguish the facts of this case from established annexation precedent. Moreover, Scio never explains why this issue presents a substantial constitutional question or an issue of public or great general interest. Indeed, Scio fails to cite to any authorities suggesting that Ohio annexation law has posed obstacles for municipalities who follow the annexation process, nor can it identify any conflicts between lower courts addressing issues similar to those here. Instead, Scio seeks only to correct purported errors below and urges this Court to find that the specific set of facts at issue here “satisf[ied] the minimal threshold for contiguity, as a matter of law.” Jur. Br. at 9. Scio’s first proposition of law does not extend beyond the immediate facts of this case and the Court should accordingly deny jurisdiction.

In its second proposition of law, Scio argues that the proposed annexation territory – a land area more than double the size of Scio’s existing municipal territory – was not unreasonably large. The Court of Common Pleas and the Seventh District both properly found the proposed annexation territory to be “unreasonably large.” Scio does not argue that the lower courts applied the wrong legal analysis in reaching this conclusion; Scio simply contends that the lower courts all got it wrong. Scio, however, cannot state why any alleged error below constitutes a question of great public interest that requires this Court’s review of the very unique facts in this case and its second proposition of law should be rejected.

In its third proposition of law, Scio argues that the services ordinance required by R.C. 709.03(D) need not address the entire area to be annexed. The ordinance passed by Scio in an attempt to satisfy R.C. 709.03(D) is facially defective because it does not state what services Scio will provide to the entire area proposed for annexation. Scio’s position is that the Services Ordinance only had to state the services to be rendered and the approximate date for those services,

and that there was “no requirement” that they be expressly provided to the entire territory. Scio misapplies the law. R.C. 709.033 could not be more clear that the Board could only grant annexation if, “based upon a preponderance of the substantial, reliable, and probative evidence on the whole record,” the annexation requirements were met. The Services Ordinance plainly does not specify that it would provide services to the annexed territory because it does not cover the entire territory to be annexed. Even still, Scio makes no showing of why this is a substantial constitutional question or a matter of public or great general interest. Without more, this Court should deny jurisdiction.

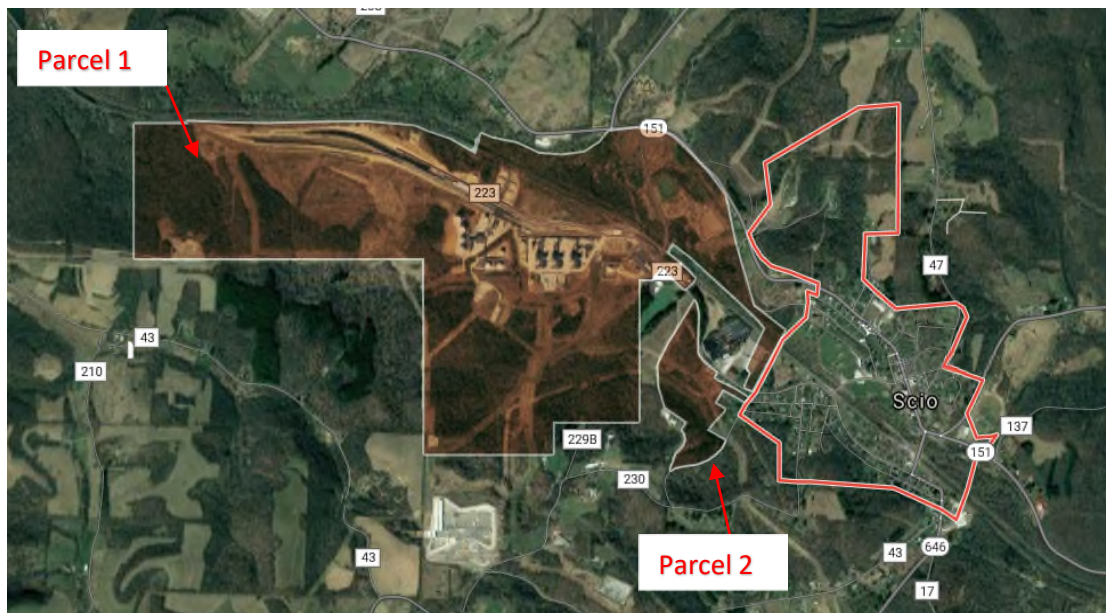
In its final proposition of law, Scio argues that the Court of Common Pleas reached the wrong result in a R.C. Chapter 2506 appeal. This Court has clearly instructed that “the common pleas court considers the whole record and determines whether the administrative order is ‘unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.’” *City of Indep. v. Office of the Cuyahoga Cty. Exec.*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 13. Where the reviewing court finds that the order is not properly supported by the evidence, it may “affirm, reverse, vacate, or modify the order . . . consistent with the findings or opinion of the court.” R.C. 2506.04. The Court of Common Pleas reviewed the full evidentiary record from the annexation hearing and determined that the Board erred in finding that the benefits of annexation to the territories sought to be annexed and the surrounding area outweighed the detriments to the same area resulting from the annexation. The Seventh District affirmed its analysis. Scio’s dissatisfaction with the result does not create a question of great public interest. This Court should therefore deny jurisdiction.

STATEMENT OF THE CASE AND FACTS

Scio’s existing municipal territory is approximately 358 acres with a population of 673

residents.¹ In June of 2021, Scio sought to annex two separate and non-contiguous parcels of land totaling 730.746 acres located in North Township. If accepted, the annexation would have more than tripled Scio's size. Utica East owns nearly 600 of the 730 acres at issue and operates a large industrial facility known as the Harrison Hub Fractionation Facility (the "Plant") on its property. Utica East opposed the annexation of its property.

The two areas of land (referred to as Parcel 1 and Parcel 2) Scio sought to annex are not connected at any point. Parcel 1 consists of 693.831 acres owned by six different owners, including Utica East. Parcel 2 consists of 36.915 acres and two different owners. An image reflecting the size of proposed territories for annexation (outlined in white) compared to Scio (outlined in red) is depicted below:



Three owners signed the Petition on behalf of Parcel 1 and only one owner signed the Petition on behalf of Parcel 2. Utica East, Scio Pottery Company, AEP Transmission Company,

¹ See U.S. Census Bureau (2021), <https://data.census.gov/cedsci/profile?g=1600000US3970814>. The Court may take judicial notice of Scio's population. Evid. R. 201(B); *State v. Adams*, 4th Dist. Pickaway No. 94CA21, 1995 Ohio App. LEXIS 1024, at *8 (Mar. 9, 1995) ("Ohio courts have taken judicial notice of U.S. Census Reports.").

Inc. (“AEP”), and Ohio Power Company did not sign the Petition. The parties disputed whether AEP and Ohio Power Company are statutory owners such that their signatures would be needed for a majority.

In an effort to satisfy the requirements of R.C. 709.03(D), Scio passed Ordinance No. 2021-004 (the “Services Ordinance”), which outlined the municipal services the village would provide to the proposed annexation territories. However, the Services Ordinance failed to address the entirety of the territory proposed for annexation.

The Board held a hearing on the Petition pursuant to R.C. 709.03 on August 20, 2021. On September 15, 2021, the Board issued its Resolution unanimously denying Scio’s Petition on three grounds. The Board found that Scio’s Petition failed to satisfy the contiguity requirement, that Scio failed to approve a Services Ordinance that would obligate the village to provide municipal services to the entirety of the territories to be annexed in violation of R.C. 709.03(D) (requiring municipal services for the annexed territory), and failed to account for segmented roads in violation of 709.033(A)(6).

Scio appealed to the Harrison County Court of Common Pleas under R.C. Chapter 2506, and Utica East cross-appealed. The Court of Common Pleas overruled Scio’s four assignments of error and sustained Utica East’s three cross-assignments of error. The Court of Common Pleas found that the Board had properly rejected Scio’s petition because the territories to be annexed were not contiguous, the Services Ordinance failed to meet the requirements of R.C. 709.03(D), and the Services Ordinance failed to meet the requirements of R.C. 709.033(A)(6). Upon considering the full record below, the Court of Common Pleas found three additional defects with Scio’s Petition: (1) the Petition did not have signatures of a majority of the owners in the territories proposed for annexation; (2) the territories to be annexed were “unreasonably large”; and (3) the

annexation would not serve the general good.

Scio appealed again. The Seventh District affirmed the decisions of the Board and the Court of Common Pleas on all grounds with the exception of whether Scio had obtained necessary signatures. *See generally* App. Op. Scio now asks this Court to review its defective Petition for a fourth time.

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW

Response to Proposition of Law No. 1: *The Board, the Court of Common Pleas, and the Seventh District all correctly found that Scio's Petition failed to satisfy the "contiguous" requirement for annexation because the two parcels proposed for annexation were separate and unconnected.*

There is no factual dispute that Scio sought to annex two non-contiguous territories (Parcel 1 and Parcel 2) through a single annexation petition. As the Court of Common Pleas noted, "Parcel 1 and Parcel 2, however, are not contiguous. They are separate territories that are not adjacent at any point." The Board determined (and the Court of Common Pleas and Seventh District each affirmed) that Scio's Petition failed because it did not satisfy the contiguous requirement. There was nothing remarkable about this result as Ohio law is clear that "[w]hen separate and unconnected territories are to be annexed, separate petitions are required to ensure that in each territory, a majority of the landowners in that territory has signed the petition as required by R.C. 709.02.'" *In re Annexation of 561.590 Acres of Land*, 105 Ohio App.3d 771, 777, 664 N.E.2d 1368 (5th Dist.1995); *see also Vill. of East Canton v. Stark Cty. Bd. of Cty. Comm'rs*, 5th Dist. Stark, 2009-Ohio-2555, ¶ 26 (attempted annexation of noncontiguous parcels was "fatal flaw").)

Scio attempts to sidestep this law by arguing that because each of the two territories are separately connected to Scio's existing corporation limits, the contiguity requirement of R.C. 709.02 is somehow met. But this Court has cautioned against "shoestring, subterfuge, corridor, and gerrymander annexations...." *City of Middletown v. McGee*, 39 Ohio St.3d 284, 287, 530

N.E.2d 902 (1988) (citations omitted). Gerrymandered annexation territories undermine the public policy of creating a town or city that, from a territorial extent, is unified, compact, and not arbitrarily segregated. *See id.* Further, irregular boundaries create the potential for confusion of safety forces over the jurisdictional territories, which is yet another factor that weighs against approving gerrymandered annexations. *See, e.g., In re Appeal of Williams*, 5th Dist. Stark No. 95-CA-00144, 1996 Ohio App. LEXIS 739 (Jan. 16, 1996); *In re Petition for Annexation of 131.983 Acres*, 2d. Dist. Miami No. 94-CA-0015, 1995 Ohio App. LEXIS 2984 (July 7, 1995).

Scio's annexation plat, on its face, violates these clear principles. The two separate, unconnected territories are comprised of random, gerrymandered boundaries assembled only to garner additional signatures in an attempt to meet the majority of owners requirement to annex Utica East's property into Scio for tax purposes. The gerrymandered nature of Scio's proposed annexation is evident when simply viewing the territories proposed for annexation. As the Seventh District aptly explained, Scio not only used disfavored connector strips in an effort to reach Utica East's property, but its proposed annexation would leave pockets of township land that would be left between the two territories proposed for annexation. App. Op. at ¶ 41.

Additionally, just as in *Village of East Canton*, Scio's attempted annexation of two non-contiguous territories through a single petition is a "fatal flaw" that compels denial of the Petition. *See Vill. of East Canton v. Stark Cty.*, 2009-Ohio-2555, ¶ 26. Scio's inclusion of both Parcel 1 and Parcel 2 within the same petition is an improper attempt to manufacture majority owner support for the proposed annexation. Such attempts to "annex property in contravention to the desires of the majority of landowners by 'bootstrapping' a section of land not contiguous to the rest of the land but with sufficient owners to bring the whole up to a majority violates the spirit and purpose of the annexation code." *In re Annexation of 561.590 Acres of Land*, 105 Ohio App.3d

at 777. Accordingly, the Board, the Court of Common Pleas, and Seventh District all correctly concluded that the Petition's two gerrymandered territories failed to satisfy the contiguity requirement in R.C. 709.02.

Response to Proposition of Law No. 2: *A proposed annexation of non-contiguous territories that would triple the size of the annexing village to the detriment of the township is an unreasonably large territory under R.C. 709.033(A)(4).*

There is no dispute as to the legal analysis applicable to the determination of whether a proposed annexation territory is unreasonably large. A board of county commissioners cannot grant an annexation unless the preponderance of the substantial, reliable, and probative evidence demonstrates the territory proposed to be annexed is “not unreasonably large.” R.C. 709.033(A)(4). It is well-settled that Courts apply a three-pronged test to determine whether the property sought to be annexed is “unreasonably large”:

- (1) The geographic character, shape and size of the territory to be annexed in relation to the territory to which it will be annexed, and in relation to the territory remaining after the annexation is completed;
- (2) The ability of the annexing city to provide the necessary municipal services to the added territory; and
- (3) The effect on remaining township territory if annexation is permitted.

See In re Annexation of 9.62 Acres of Land in Jackson Twp., 5th Dist. Stark Case No. 1999CA250, 2000 Ohio App. LEXIS 687, at *7 (Feb. 22, 2000).

The Court of Common Pleas applied these factors and found that the territory proposed for annexation was unreasonably large. The Seventh District agreed. Scio takes issue with the application of established law to the facts of this case arguing that “the existing jurisprudence as to what constitutes an ‘unreasonably large’ territory was not satisfied.” Jur. Br. at 9-10. Scio is mistaken.

First, while Scio makes much of the fact that the size of North Township would only decrease by approximately five percent, it ignores the increase to the village – a “one-time 200% increase in size.” App. Op. at ¶ 91 (quoting Court of Common Pleas.) As the Seventh District found, “the increase proposed here was massive, making this consideration a weighty one in the context of evaluating whether the proposed annexation was unreasonably large.” App. Opp at ¶ 91. Ohio courts reject such disproportionate increases in land area as unreasonably large annexation attempts. See *In re Appeal of Annexation of 65.48 Acres*, 6th Dist. Lucas, No. L-96-301, 1997 Ohio App. LEXIS 2631, at *9 (June 20, 1997) (affirming rejection of annexation as unreasonably large where annexation would increase the size of a village **by 12-14%**). Such a sudden expansion will significantly “alter the geographic character, shape, and size” of Scio. See *Tuscarawas Twp. Bd. of Trustees v. City of Massillon*, 2009-Ohio-3267, ¶ 55.

Second, the evidence established that Scio is already struggling to provide necessary municipal services to its current footprint of 358 acres. Indeed, there are incorporated areas within Scio that have yet to receive sewer services, despite sewer lines being installed nearly 50 years ago. See App. Op. at ¶¶ 94-95. As such, Scio cannot credibly provide municipal services to new territories that are the equivalent of two new Scios. Based on this evidence, the Court of Common Pleas found that the Scio’s ability to provide services to this new area was questionable at best. App. Op at ¶ 95.

Finally, the annexation territory is so large that the loss of that territory to North Township would render the remainder of the Township unable to support itself. Representatives for North Township testified that the loss of Utica East’s property to Scio will substantially decrease the Township’s financial resources, and “deprive the township of its largest property taxpayer.” App. Op at ¶ 96. In sum, the territories to be annexed are unreasonably large. Appellants have not and

cannot satisfy their burden to establish otherwise and certainly cannot establish that the Court of Common Pleas committed legal error or abused its discretion in reaching this additional finding against annexation. Therefore, Appellants' second assignment of error should be denied.

Response to Proposition of Law No. 3: *A facially defective services resolution that does not address all of the territory proposed for annexation does not satisfy R.C. 709.03(D).*

A municipal corporation is required to set forth via ordinance or resolution the services it will provide to a territory upon annexation. R.C. 709.03(D). The ordinance or resolution must be filed with the board of county commissioners at least twenty days before the hearing. *Id.* As a condition of annexation, the municipal corporation must also agree that it will assume the maintenance of any street or highway that will be segmented by the boundary line between the township and the municipal corporation as a result of the annexation. R.C. 709.033(A)(6). A board of county commissioners cannot grant annexation unless it finds, "based upon a preponderance of the substantial, reliable, and probative evidence on the whole record," that these conditions have been met. R.C. 709.033(A). The Board, the Court of Common Pleas, and the Seventh District each reviewed Scio's Services Ordinance and correctly found that it did not comply with R.C. 709.03(D).

First, Scio failed to comply with the services requirement of R.C. 709.03(D) with respect to the entirety of the territory proposed to be annexed in the Petition. While Scio passed a Services Ordinance outlining the municipal services it would provide, by its plain language, the Services Ordinance does not address the territory the Petition seeks to annex because it pertains to only 693.831 acres out of the approximately 730 acres to be annexed. This error appears three times in the Services Ordinance – in the caption, in the first clause, and in Section 1, which states: "[T]he Village of Scio will provide the following municipal services for the 693.831 +/- acres in North Township upon annexation of said area to the Village of Scio."

For the same reasons, the Petition also fails to meet the requirement pertaining to segmented roadways set forth in R.C. 709.033(A)(6). While the Services Ordinance states that Scio is willing to assume responsibility for unspecified roads divided or segmented upon annexation, the Services Ordinance is facially defective because it does not cover the total territory to be annexed. In short, because the Services Ordinance does not cover the entirety of the territories to be annexed, upon annexation, Scio may later shirk maintenance of any road divided or segmented by the boundary line between North Township and Scio by claiming that the particular road was not included within the portion of the territory the Services Ordinance covers.

The Board, the Court of Common Pleas, and the Seventh District all correctly concluded that Scio's Services Ordinance failed to satisfy the requirements of R.C. 709.03(D) and their analysis need not be addressed by this Court for a fourth time.

Response to Proposition of Law No. 4: *The Court of Common Pleas acted within its authority under R.C. Chapter 2506 when it reviewed the entire record and sustained Utica East's cross-assignment of error that the proposed annexation did not satisfy the general good inquiry set forth in R.C. 709.033(A)(5).*

Scio argues the Board's decision concerning the general good inquiry was entitled to more deference than the Court of Common Pleas provided. But Scio ignores that "the Court of Common Pleas had the discretionary authority to weigh the various pertinent considerations in determining whether the Board's decision (on the general good and benefits outweighing the detriments) was supported by the preponderance of the evidence." App. Op. at ¶ 108.

In evaluating an annexation petition, a board of county commissioners cannot approve the annexation unless it finds "on balance, the general good of the territory proposed to be annexed will be served, and the benefits to the territory proposed to be annexed and the surrounding area will outweigh the detriments to the territory proposed to be annexed and the surrounding area, if the annexation petition is granted." R.C. 709.033(A)(5). The Court of Common Pleas reviewed

the record and properly determined that the general good requirement was not satisfied. Based on the record, the Court of Common Pleas questioned Scio's ability to provide any new benefits to the proposed annexation territory, noted the lack of zoning in the village, and considered the rights and preferences of the owners of the land subject to annexation, including Utica East who owned 80% of the property at issue. App. Op. at ¶¶ 103-109 (citing *Hottle v. Barney*, 1995 Ohio App. LEXIS 5134 (desires of non-signing owners were entitled to great weight when they owned the majority of territory to be annexed).)

A court of common pleas' role under R.C. Chapter 2506 is well-established. As this Court has instructed, "the common pleas court considers the whole record and determines whether the administrative order is 'unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.'" *City of Indep.*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, at ¶ 13. If the reviewing court finds as much, it may "affirm, reverse, vacate, or modify the order . . . consistent with the findings or opinion of the court." R.C. 2506.04. The Court of Common Pleas did just that, and the appellate court correctly concluded that "there was no legal error or abuse of discretion by the Court of Common Pleas in adding this finding against annexation." App. Op. at ¶ 109.

Because the Court of Common Pleas acted within its discretion, the determination that the Petition failed to satisfy the general good standard was correct. Yet another review by this Court – especially only for alleged error correction – is not warranted.

CONCLUSION

The Board, the Court of Common Pleas, and the Seventh District all correctly decided that Scio's annexation petition failed to satisfy the clear standards set forth in Chapter 709 of the

Revised Code. This case was correctly decided and does not present any constitutional question or issues of public or great general interest. Jurisdiction should be denied.

Respectfully submitted,

/s/ Joseph R. Miller

Joseph R. Miller (0068463), *Trial Attorney*

John M. Kuhl (0080966)

Christopher L. Ingram (0086325)

Muna Abdallah (0099824)

Margaret S. Echols (0099471)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 E. Gay Street, P.O. Box 1008

Columbus, Ohio 43216-1008

(614) 464-6400 Telephone

(614) 719-4630 Facsimile

jrmiller@vorys.com

jmkuhl@vorys.com

clingram@vorys.com

mabdallah@vorys.com

msechols@vorys.com

Counsel for Defendant-Appellee

Utica East Midstream LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 2, 2023, a true and accurate copy of the foregoing was served by email on the following:

James F. Matthews
Brittany Bowland
400 South Main Street
North Canton, Ohio 44720
Mathews@Bakerfirm.com
bbowland@bakerfirm.com
*Counsel for Plaintiff-Appellants
Village of Scio, Ohio, et al.*

/s/ Christopher L. Ingram
Christopher L. Ingram (0086325)