IN THE SUPREME COURT OF OHIO

In the Matter of the Application of **BIRCH SOLAR 1, LLC** for a Certificate of Environmental Compatibility and Public Need for a Solar-Powered Electric Facility Located in Allen and Auglaize Counties, Ohio.	:	CASE NO. 2023-1011 On Appeal from The Ohio Power Siting Board Case No. 20-1605-EL-BGN

BRIEF OF THE OHIO CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT BIRCH SOLAR 1, LLC

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

Pursuant to S. Ct. Prac. R. 16.06, the Ohio Chamber of Commerce ("Ohio Chamber") submits this brief as *amicus curiae* in support of Appellant Birch Solar 1 LLC ("Birch"). Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization, representing businesses ranging from small sole proprietorships to some of the nation's largest companies. The Ohio Chamber works to promote and protect the interests of its nearly 8,000 business members, while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper.

This case is of great importance to the Ohio Chamber. If allowed to stand, the Ohio Power Siting Board's ("OPSB") rationale to deny Birch's application ("Application") to construct a 300 MW solar facility in Allen and Auglaize counties ("Project") injects undue uncertainty into Ohio's historically stable and predictable regulatory framework for building in-state power generation.

II. STATEMENT OF THE CASE AND FACTS

Amicus curiae assumes, for the purpose of this brief, that the factual and procedural background set out by the OPSB in its opinion and order is correct. *See* generally opinion and order filed August 11, 2023 (collectively "Order"). On February 12, 2021, Birch filed its Application for the Project.[1]

[1] Since the initial filing, there were six supplements to the Application and thirteen responses to data requests from Staff filed in the docket.

On June 29, 2021, the Ohio General Assembly passed Substitute Senate Bill 52 ("SB 52"), a significant revision to Ohio's power siting approval process for utility-scale solar projects. The law grants a new upfront veto to the board of county commissioners prior to a developer moving forward with the state siting process. Am. Sub. S. B. No. 52, 135th Gen. Assemb., Sections 4-5 (Ohio 2021); R.C. 303.59-303.62. Importantly, as part of the give-and-take of the legislative process in which the Chamber was heavily involved, SB 52 grandfathered projects where developers had already invested significant time and money so as not to unfairly change the rules in the middle of the game. Birch is one of these.

On October 22, 2022, OPSB entered its Order denying the Application for the Project claiming it did not satisfy R.C. 4906.10(A)(6). *See* generally Order. Specifically, the OPSB incorrectly and unlawfully relied myopically on local officials' opposition in finding the Project did not serve public interest, convenience and necessity—ignoring, as a practical matter, that the project is not subject to SB 52. Rather, OPSB should have applied its longstanding, broad-based analysis for determining public necessity under R.C. 4906.10(A)(6). Accordingly, this Court should reverse the Order and award the Certificate.

III. ARGUMENT

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

In a landmark administrative law decision, this Court recently made explicit that with respect to statutory interpretation, the judicial branch does not simply defer to the executive branch. In *TWISM Enterprises, L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022 WL 17981386, 2022-Ohio-4677, ¶ 1, this Court heard an appeal of a state agency adjudication regarding the requirements that a firm must meet in order to provide engineering services in Ohio. The case turned on the construction of Ohio Rev. Code § 4733.16(D), which sets

forth those requirements. *Id.* The intermediate court of appeals looked to *Chevron* and applied its two-part test. *Id.* at ¶¶ 15-16. The appellate court concluded that the statute was ambiguous, and that the court therefore "must defer" to the agency's interpretation. *Id.* at ¶ 16.

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

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

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

> unconvincing. What a court may not do is outsource the interpretive project to a coordinate branch of government.

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

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

In re Application of Alamo Solar I, L.L.C., Slip Opinion No. 2023-Ohio-3778, ¶¶ 13-14 (internal citations omitted). Therefore, the Ohio Chamber respectfully submits that while this Court can certainly consider the OPSB's rationale set forth in the Order, it need not and must not defer to it.

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

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

the agency's decision is internally inconsistent. *Id.* Here, the OPSB's Order is both unsupported by the evidence and internally inconsistent.

As stated, SB 52 provided that, effective October 11, 2021, certain solar projects subject to its new provisions would need to undergo county-level review before applying to the Board. R.C. 303.59-303.62; Am. Sub. S. B. No. 52, 135th Gen. Assemb., Sections 4-5 (Ohio 2021). For solar project applications exempt from requirements under SB 52—that are effectively "grandfathered" from the new law (such as the instant Application)—there is no county-level review. Am. Sub. S. B. No. 52, 135th Gen. Assemb., Sections 4-5 (Ohio 2021).

Here, the OPSB failed to be consistent and apply the broad lens approach afforded to projects grandfathered by SB 52. *See* Order at ¶ 68 ("As we have indicated in recent decisions, the determination of public interest, convenience, and necessity must be examined through a broad lens and in consideration of impacts, local and otherwise, from the Project."); *In re Application of Duke Energy Ohio, Inc.*, 2021-Ohio-3301, 166 Ohio St. 3d 438, 445, 187 N.E.3d 472, 482 *quoting* Power Siting Bd. No. 16-0253-GA-BTX, Rehearing entry, at ¶ 35 (Feb. 20, 2020) ("interests of the general public are fully considered under the public interest, convenience, and necessity criterion found in R.C. 4906.10(A)(6).").

Instead, OPSB effectively subjected the Application to SB 52's narrow county-level review requirements by using local officials' opposition as its determinative evidence in denying the Application. *See* Order, at ¶¶ 64-65, 72 ("Based on the unanimous and consistent opposition to the Project by the government entities whose constituents are impacted by the Project, the Board finds that the Project fails to serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6)"). All while summarily dismissing admissible evidence demonstrating the local officials' opposition against the Project was waning. *Id.* at ¶ 71 (internal citations omitted)

("Further, the Board disagrees with Stipulating Parties regarding the claim that local government opposition to the Project has waned. In support of this claim, Stipulating Parties point to the fact that Auglaize County and Logan Township partially joined in the Stipulation. We reject the conclusion that Partial Stipulating Parties have waivered in their opposition to the Project…Obviously, each of those communities could have clearly delivered notice of their changed opposition to the Project by fully executing the Stipulation. By refusing to do so and only joining in the Stipulation as to including the protections provided by the 40 conditions should the Board certificate the Project, the two governmental Partial Stipulating Parties have expressed, at least, their continued lack of support for the Project.")

OPSB's essential outsourcing of the public interest determination to local officials is in clear contravention of the General Assembly's purpose in drafting the grandfather clause of SB 52. Majority Floor Leader William J. Seitz and Representative Jim Hoops made this purpose clear in their respective statements supporting a different solar project:

> As a co-sponsor of Senate Bill 52, I understand the desire of local municipalities to govern the scope of projects that occur in their jurisdictions. However, when the General Assembly passed SB 52, there was also a desire to grandfather in late-stage projects that have followed the proper channels in their development…Thus, while localized opposition to a grandfathered project may be of some relevance, it is by no means determinative as it would otherwise be if the project had not been protected by the grandfathering clauses of SB 52.
>
> I served as the Chair of the House Public Utilities Committee during the Senate Bill 52 debate. The goal of this legislation was to allow more local input into the sitting process while ensuring that late-stage projects were grandfathered and protected…
>
> …
>
> Thus, while reasonable local input into a project is important and warranted, it is by no means determinative.

See Power Siting Bd. No. 22-0549-EL-BGN, Public Comments filed March 7, 2023 and March 17, 2023. The OPSB, through its Order, eviscerated the intent of the General Assembly, which, it cannot do as a creature of statute. *In re Application of Icebreaker Windpower, Inc.*, 169 Ohio St.3d 617, 2022-Ohio-2742, 207 N.E.3d 651 ("The board, as a creature of statute, may exercise only those powers that the General Assembly confers on it."). And by doing so, made a determination manifestly against the weight of the evidence that in turn creates uncertainty for Ohio businesses.

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

As stated, determining public interest, convenience and necessity requires a broad approach that evaluates the pros and cons of the Project to the general public. *See* Order at ¶ 68. Here, the Order is not supported by the weight of the evidence because the evidence overwhelmingly demonstrates the Project promotes public interest, convenience and necessity. While the Applicant and other *amici* expound certain project benefits, the Ohio Chamber points out two.

First, at a macro level, the Order is problematic for Ohio consumers. Greater energy supply (regardless of fuel source) reduces wholesale electric rates across the board for every Ohio energy consumer. As a matter of basic economics, increased competition lowers prices. Growing and diversifying our in-state generation, therefore, places downward pressure on the commodity price of electricity—and this delivers real energy savings vital to keeping our state economically competitive. These savings are particularly beneficial in an inflationary environment such as the state is experiencing now. The Ohio Chamber is concerned that the Order devalues the public's interest in new power generation and the benefits of increased supply. Perversely, the Order lays out a roadmap to block all manner of new energy infrastructure from coming online in Ohio. Over the long term, this is a dangerous precedent for higher energy prices (especially where energy demand is projected to increase).

In addition, the Project helps fulfill robust corporate demand for solar in the Buckeye State. Some of the country's largest employers with a renewable energy appetite are Chamber members, including manufacturers like Proctor & Gamble and tech companies Amazon, Meta, Google, and Microsoft. *See* Johnathan Lopez, General Motors to Reach 100 Percent Renewable Energy in the U.S. by 2025, GM Authority (Sept. 30, 2021), https://bit.ly/3Nn1zo1; Press Release, Proctor & Gamble, P&G Purchases 100% Renewable Electricity in U.S., Canada, and Western Europe (Oct. 24, 2019), https://bit.ly/3x9juIa. The Ohio Chamber believes these benefits—and the continued ability to attract these employers to our state—should be given greater weight than appears in the Order below.

IV. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2023, a copy of the foregoing Amicus Brief was served upon the following counsel of record by electronic mail:

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