IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Fountain Point Solar Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Solar-Powered Electric Generation Facility in Logan County, Ohio.	)))))	Supreme Court Case No. 2025-75 On Direct Appeal from the Ohio Power Siting Board, Case No. 21-1231-EL-BGN

BRIEF OF AMICI CURIAE MAREC ACTION AND THE UTILITY SCALE SOLAR ENERGY COALITION OF OHIO IN SUPPORT OF INTERVENOR-APPELLEE FOUNTAIN POINT SOLAR ENERGY LLC

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I. INTRODUCTION

MAREC Action ("MAREC") and the Utility Scale Solar Energy Coalition of Ohio ("USSEC") (collectively "amici curiae") support Fountain Point Solar Energy LLC's ("Fountain Point") 280-megawatt solar-powered electric generation facility ("Project"), which will benefit Ohio's economy, grid resiliency, energy security, and environment. The three propositions of law advanced by Citizens Against Fountain Point LLC, Brent Vermillion, Jim Culp, Jocelyn Kavanaugh, Alyssa Rice, Cliff Cronkelton, Anthony Cogossi, Paul Schaller, Kara Slonecker, and Jeny Hammer's (collectively, "Appellants") are all without merit. Appellants improperly attempt to provide local government officials jurisdiction over this Project, write a rule for the Ohio Power Siting Board (the "Board") while inviting the Court to exceed its authority by reweighing the evidence the Board weighed in making its decision. Amici curiae respectfully request that the Court instead reject Appellants' propositions of law and affirm the Board's Opinion and Order approving the Joint Stipulation and Recommendation on September 19, 2024 ("Order"). (ICN 95, Sept. 19, 2024, Order.)

II. STATEMENT OF INTEREST OF AMICI CURIAE

MAREC is a coalition of over 50 utility-scale solar, wind, and battery storage developers, wind turbine and solar panel manufacturers, and public interest organizations dedicated to promoting the growth and development of renewable energy in Ohio and the broader region where PJM Interconnection, LLC, the regional transmission organization, operates. Many of MAREC Action's members have developed or are developing projects in Ohio.

USSEC is a non-profit organization representing over 30 large-scale solar developers, manufacturers, and industry leaders working to meet the demand for clean energy and drive economic development benefitting Ohio's communities, schools, and rural landowners. USSEC's

mission is to provide transparency to Ohio's communities, education for Ohio's citizens, and advocate for public policy that will further the solar industry in the State of Ohio.

As industry organizations, amici curiae have an interest in supporting and promoting ambitious efforts underway at the federal, state, and local levels to increase energy generation, including work to harness solar energy in Ohio. Such efforts are key to long-term national security, economic prosperity, energy system reliability and capacity, and environmental sustainability. If these efforts are to be realized, siting decisions must be made impartially and founded in fact. Decisions cannot be made because of unscientific local objection, as is the case advocated by the Appellants. In furtherance of the interests of its members, MAREC and USSEC submit this amicus brief to urge the Ohio Supreme Court to affirm the Board's decision, which granted Fountain Point its certificate.

III. STATEMENT OF FACTS

To issue a certificate of environmental compatibility and public need for the construction of a major utility facility, the Board must find and determine eight criteria listed in Ohio Revised Code ("R.C.") 4906.10(A), including that the facility will serve the public interest, convenience, and necessity. R.C. 4906.10(A)(6). Fountain Point provided the Board all necessary and relevant information, and the Board properly issued its Order approving the Project—which it twice reaffirmed—after thorough review and consideration of all the evidence of record. Among the benefits of the Project included in the information reviewed by the Board, the Project will create thousands of construction jobs and dozens of long-term jobs and will support the agricultural industry by providing supplemental income to participating farmers. (ICN 95, Sept. 19, 2024, Order, ¶¶ 161, 170.) The Project will also benefit the community through millions of dollars in annual tax payments, including payments to the Benjamin Logan School District. (*Id.* at ¶ 170.)

IV. ARGUMENT

MAREC and USSEC oppose all three propositions of law, and the Board's decision should be affirmed on all grounds. However, MAREC and USSEC are especially concerned with the potential consequences of Appellants' Proposition of Law No. 3, so this brief will focus on that proposition.

The General Assembly vested the Board with the authority to evaluate whether a project meets the requirements of R.C. 4906.10 by balancing the need for energy development while also protecting ecological and societal interests. In 2021, the General Assembly passed SB 52, which required review of certain projects at the county level before an applicant could apply to the Board. (2021 Sub. S.B. No. 52.) However, in SB 52, the General Assembly specifically determined that certain solar projects, such as Fountain Point, should continue to be evaluated and approved by the Board in accordance with the standards and procedures historically undertaken by the Board. Thus, the county procedure created under SB 52 does not apply to Fountain Point. The Board has the sole statutory authority to issue the certificate to Fountain Point—not the local government officials.

It is noteworthy that the co-sponsor of SB 52, Ohio House of Representative Majority Floor Leader William Seitz, confirmed this by stating:

> As a co-sponsor of [SB 52], I understand the desire of local governments to govern the scope of development activities and projects that occur in their jurisdictions. When the General Assembly passed SB 52, there was also a desire to grandfather late-stage projects that have followed the proper channels in their development. As described in the Staff Report, the Fountain Point project fits the bill to be grandfathered … and localized opposition to a grandfathered project may not be determinative. (Daniel Vertucci, July 24, 2023, Applicant Ex. 21, DV-2.)

If accepted by the Court, Appellants' Proposition of Law No. 3 would strip the Board of its statutory authority and improperly give the Board's authority to local officials. Such a decision

would defeat the General Assembly's intent in creating the Board and in grandfathering Fountain Point under SB 52. Further, amici curiae's members rely on the Board's expert decision making when deciding to invest in multi-million-dollar projects under the Board's purview. To apply SB 52 through the "back door" would introduce great uncertainty for project developers and make it more difficult for generating facilities, like Fountain Point, to invest in Ohio. The Court should decline Appellants' invitation to create a new rule for the Board and respect the General Assembly's intent by upholding the Board's decision.

In its Order, the Board lawfully and reasonably assessed the evidentiary record. When reviewing the Board's orders, the Court will reverse, modify, or vacate an order only when its review of the record reveals that the order is unlawful or unreasonable. *In re Harvey Solar I, L.L.C.*, 2025-Ohio-1503, ¶ 11, citing *Alamo Solar I, L.L.C.*, 2023-Ohio-3778, ¶ 10; s*ee also Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 2004-Ohio-6767, ¶ 50.

In their Proposition of Law No. 3, Appellants contend:

> [T]he Board failed to follow its own established rules and that the manifest weight of evidence reflects that there was unanimous government opposition, and overwhelmingly one sided public sentiment in opposition to the Project, and according to the Board's own rules, the Project is not in the public interest, convenience and necessity pursuant to R.C. 4906.10(A)(6). (Appellants' Br. at 24.)

However, it is clear that the Board, in its Order, thoroughly considered all of the evidence of record and concluded that, contrary to the Appellants' view, the comments filed in the docket expressed varying viewpoints both for and against the Project such that the Board did not find that the comments were one-sided in opposition to the Project. (ICN 95, Sept. 19, 2024, Order, ¶ 188.) Further, the Board correctly weighed the document filed by Benjamin Logan Public School Superintendent John Scheu supporting the Project and the supportive testimony from Bokescreek Trustee Larry Mouser, the township where the Project will be built, and found that the record

indicated "*that local governmental opposition is not unanimous in this case*." (Emphasis added). (*Id*.)

To issue a Certificate of Environmental Compatibility and Public Need, the Board must find, in part, that the facility will serve the public interest, convenience, and necessity. R.C. 4906.10(A)(6). As acknowledged by Appellants (*see* Appellants' Br. at 11-12), the Board has not defined or clarified what it means to, or what is required to, "serve the public interest, convenience, and necessity." In its 2023 "five-year review" of its rules, the Board declined requests from commenters to add a definition of "public interest, convenience, and necessity" as used in R.C. 4906.10(A)(6) to Ohio Adm.Code 4906-3-06. *In The Matter of the Ohio Power Siting Board's Review of Ohio Adm.Code Chapters 4906-1, et al.*, Case No. 21-902-GE-BRO, Finding and Order (July 20, 2023), ¶ 19. The Board instead stated that the "statute speaks for itself and the Board's orders have explained how each application's unique facts apply to our consideration of R.C. 4906.10(A)(6)." *Id.* Thus, the Board chose to maintain a case-by-case approach that allows for consideration of the unique and complex facts of each case instead of adopting a rule.

Yet, despite acknowledging that the Board has not adopted a rule to further define "public interest, convenience, and necessity," Appellants assert that "the Board is required to follow its own rules" and attempt to create a rule by relying on out-of-context quotations from select Board orders. (*See* Appellants' Br. at 12.) Appellants ultimately assert that "[Appellants] relied upon *the Board's own rule* that states that universal public and local government opposition to the Project is proof that the Project is not in the public interest, convenience and necessity." (Emphasis added.) (*Id.* at 32.) This claimed "rule" is not accompanied by a citation because no such rule exists.

Chapter 119 of the Revised Code outlines the procedure that state agencies and boards must follow to adopt administrative rules. This process involves an agency proposing a rule and a notice

and comment period. The chapter does not authorize agencies to informally adopt rules through their decisions. For the Board, R.C. 4906.03 gives them the authority to adopt rules, but it does not provide for an alternate process to do so outside of Chapter 119.

The Board has not undergone the procedure prescribed by R.C. 119.03 to adopt a rule defining or clarifying the meaning of "public interest, convenience, and necessity." As discussed above, the Board instead chose to maintain a case-by-case approach that allows for consideration of the unique and complex facts of each case. The complexity of the Board's decisions in weighing the eight factors in R.C. 4906.10(A), and the considerations within each of those factors, should not be reduced to a pass or fail test such as whether there was "unanimous government opposition." No such rule has been "promulgated by the Board" as claimed by Appellants (Appellants' Br. at 32) because even when unanimous local government opposition exists in a project—which did not exist for this Project—that local opposition is only one of many considerations the Board must evaluate in weighing the statewide public interest.

Further, while the Board must follow its own rules, the fact-dependent, case-by-case nature of the Board's decisions cannot allow for an oversimplified approach. The Board is not required to indiscriminately apply its precedential rationale to future decisions that are factually distinct. Rather, the Board may exercise its discretion as long as in doing so its rationale is lawful and reasonable. *See Harvey Solar*, 2025-Ohio-1503, at ¶ 11 (stating that the Court reviews whether Board decisions are lawful and reasonable); *see generally Kindred Nursing Centers E., LLC v. N.L.R.B.,* 727 F.3d 552, 560 (6th Cir. 2013) (explaining that "an agency may depart from its precedents" and a court's review of such a departure is limited to whether such a departure was reasonable). Accordingly, Appellants have no grounds to claim the Board acted unlawfully because Appellants cannot identify the existence of a rule prohibiting the issuance of a certificate

when there is local government opposition, and the Board has the discretion to rely upon various precedent when coming to a decision.

Further, in reviewing the Board's determinations, the Court does not "reweigh the evidence or second-guess [the board] on questions of fact." *Harvey Solar* at ¶ 15, quoting *Lycourt-Donovan v. Columbia Gas of Ohio, Inc.*, 2017-Ohio-7566, ¶ 35. In acknowledging that local government opposition actually may not be "controlling," Appellants state that such evidence "certainly qualifies as 'good evidence' that the Project is not in the public interest, convenience and necessity." (*See* Appellants' Br. at 25.) In other words, without a rule to cite to assert that the Board's Order is unlawful, Appellants devote most of their brief attempting to highlight evidence to demonstrate that the Board's determination was unreasonable. Yet, the record is replete with evidence to support a finding that the Project is in the public interest, convenience, and necessity, including the economic, energy security, and environmental benefits discussed before. Accordingly, the Board reasonably exercised its statutorily vested discretion when it weighed the evidence and found the Project to be in the public interest, convenience, and necessity.

Because the Court does not "reweigh the evidence" and the Board reasonably exercised its statutory authority to determine the Project's compliance with the statutory criteria, the Board's decision was neither unlawful nor unreasonable. Consequently, amici curiae respectfully request the Court conclude that Appellants' arguments in Proposition of Law No. 3 are without merit and should be denied, thereby affirming the Board's issuance of the Certificate to Fountain Point.

V. CONCLUSION

Appellants ask the Court to exceed its authority and re-weigh the evidence to reverse the Board's determinations regarding the public interest, convenience, and necessity of the Project. As supported by the law and the record, amici curiae instead request that the Court conclude that the Board's decision was lawful and reasonable and affirm the Board's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Court's electronic filing system on May 15, 2025 and was served upon the Chairperson of the Ohio Power Siting Board, Jenifer French, by leaving a copy at her office at 180 East Broad Street, Columbus, Ohio 43215, and upon the following counsel via email:

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