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SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20838

9 PETTIPAUG, LLC, ET AL.
Plaintiff - Appellee

v.

PLANNING AND ZONING COMMISSION OF BOROUGH OF FENWICK
Defendant – Appellant

BRIEF OF *AMICUS CURIAE* CONNECTICUT CONFERENCE OF MUNICIPALITIES

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STATEMENT OF CERTIFIED ISSUES

1. Did the Appellate Court correctly conclude that General Statutes § 8-3 (d), which requires notices of zoning amendments to be published in a "newspaper having a substantial circulation in the municipality," may be satisfied by evidence of the specific number of newspapers physically sold or distributed within that municipality?

2. Did the Appellate Court correctly conclude that the ready availability of a newspaper to residents of a municipality within that newspaper's area of coverage, where the newspaper has a history of being used for the municipality's notices, was insufficient to satisfy the "substantial circulation" requirement of § 8-3 (d)?

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1966, the Connecticut Conference of Municipalities ("CCM") is the largest nonpartisan organization of municipal leaders in the State.[1] Currently, 168 of Connecticut's 169 municipalities are members. One of its many purposes is to provide advocacy for member cities and towns. CCM has a compelling interest in this appeal because it affects the ability of municipalities to amend their zoning regulations and comply with statutes that require the publication of notices in newspapers of municipal actions.

II. INTRODUCTION

At issue in this appeal is General Statutes § 8-3(d), which requires notices of zoning amendments to be published in a "newspaper having a substantial circulation in the municipality." As noted in Fenwick's brief, there are more than 80 Connecticut statutes that require notice by publication in a "newspaper having substantial circulation" and another 100 statutes requiring notice in a "newspaper having a general circulation.[2] *See* Def. Br. at 9-10 n.1. CCM agrees with the arguments presented by Fenwick that the Appellate Court's

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[1] Pursuant to Practice Book § 67-7 the Connecticut Conference of Municipalities (CCM) represents that this brief was written entirely by its counsel. No party to the appeal wrote the brief in whole or in part, nor contributed any costs for the preparation of the brief.

[2] The Office of Legislative Research has assembled a summary of 149 of such statutes. *See* T. Adams, "Municipal Legal Notice Requirements," Office of Legislative Research Report 2016-R-0099 (Sept. 8, 2016).

interpretation of the newspaper circulation requirement is unworkable. *See* Def. Br. at 20-24.

In addition, as discussed below, CCM asks this Court to interpret § 8-3(d) and other municipal notice statutes in a way that brings them in line with the realities of contemporary society and recognize that publication to a municipal website satisfies municipal notice requirements.[3]

III. NATURE OF PROCEEDINGS AND STATEMENT OF FACTS

CCM agrees with and adopts the Nature of Proceedings and Statement of Facts set forth in the Defendant's brief. *See* Def. Br. at 9-14. CCM will offer additional facts where relevant to its argument.

[3] This Court does not ordinarily consider issues raised by an *amicus* party. *See Markley v. Department of Public Utility Control*, 301 Conn. 56, 67 (2011). However, this is not an absolute rule and this Court has considered requests from *amici* parties to shape our jurisprudence. *See Oller v. Oller-Chiang*, 230 Conn. 828, 836 (1994); *Curry v. Burns,* 225 Conn. 782, 789 n. 2 (1993). Moreover, while an *amicus* may not be "at liberty to inject new issues in a proceeding [it] is not confined solely to arguing the parties' theories in support of a particular issue." *Gold v. Rowland*, 296 Conn. 186, 209 n.21 (2010) (internal citations and quotations omitted).

IV. ARGUMENT

A. THIS COURT SHOULD INTERPRET THE STATUTORY NOTICE REQUIREMENT OF NEWSPAPER PUBLICATION TO BE DEEMED SATISFIED BY THE MUNICIPALITY'S PUBLICATION OF NOTICE ON ITS OFFICIAL MUNICIPAL WEBSITE

1. Facts Relevant to This Claim

As this Court explained as far back as 1835, the purpose of the newspaper publication requirement was to provide as much notice as possible to a town's inhabitants of municipal action that would have a direct and important effect on the interests of individuals:

> The power which is given to towns to make by-laws for restraining horses and other animals from going at large, and for regulating such as shall go at large, has, when exercised, a direct and important effect upon the interests of individuals. It not only operates to deprive them of what they deem a benefit, but, if resisted, subjects them to penalties, expenses, and, as the case may be, much inconvenience. It was considered highly reasonable, that some further notice should be given of the existence of these by-laws than would be furnished, by the records of the town, which passed them. The statute, therefore, provided, that they should "not be in force," until they were published: and in directing the mode of publication, the legislature had in view, **the adoption of one which**

> **would be most suitable and best adapted to give notice of the existence of the by-law, to all who might be affected by its provisions.** It was forseseen, that the publication in a newspaper printed in the town where the by-law was made, might not furnish as extensive notice, as a publication in one printed in a town nearest to such town; and that the notice might be more general, by omitting to publish in either of such newspapers, and substituting one which had a general circulation in the town, without reference to the place where it was printed. It was supposed, that the great object of publication-**that of giving the most effectual notice**-would be most fully answered, by vesting a discretionary power somewhere, to adopt that one of the three modes specified in the statute, which would best secure that object: and that discretion was accordingly vested in the town, who make the by-law,-whose inhabitants are to be subject to its provisions,-and who are presumed to be most competent to determine which mode of publication will best subserve the purpose of general information….

(Emphasis added.) *Higley v. Bunce*, 10 Conn. 436, 442–43 (Conn. 1835).

Through the years, that purpose has not changed. In 2013, testifying in support of a proposal to change this publication requirement, CCM explained that the original purpose of General Statutes § 1-2, which governs publication of legal notices in newspapers, was "to ensure the public is provided information on government actions and issues that may impact them." Testimony of R.

Thomas, CCM in support of SB 1112 (March 18, 2013), at 1.[4] However, in modern society, it is the internet, not newspapers, that provide the best vehicle for this communication:

> In the 21st, century, the quickest, most transparent and cost-effective way to get information to the greatest number of residents, is the Internet. It is no secret that the Internet is where people shop, communicate, conduct financial transactions, socialize and share general information. **Municipal and state websites have become a critical lifeline that links living rooms to their governments instantly.** Despite advances, in 2013, Connecticut's hometowns continue to be mandated to post legal notices in printed newspapers with dwindling circulations.

(Emphasis in original.) *Id*. at 2.

That testimony was offered ten years ago, and the legal notice statutes regarding municipalities have still not been updated. Judge Calabresi's recognition of legislative inertia, and the need for courts to be able to take action to modernize now obsolete laws, is on full display with the instant case.

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[4] The legislative history underlying Senate Bill No. 1112 (Session Year 2013), which did not pass, is available here: https://cga.ct.gov/aspx/CGADisplayTestimonies/CGADisplayTestimony.aspx?bill=SB-01112&doc_year=2013

2. Fixing The Problem Of Legislative Inertia

Judge Calabresi has proposed that courts can resolve "the problem of legal obsolescence" or "legislative inertia." The problem occurs when the legislature has failed to amend a statute to continue its rationality into modern times. The doctrine allows a court to fix a statute that has, as written, become obsolete in contemporary society. *See* G. Calabresi, A Common Law for the Age of Statutes (Cambridge: Harvard University Press. 1982), p. 2. Statutes can become obsolete and disconnected from their original purpose because the legislative process is not able to modernize them. *Id*. at 6-7. In these circumstances, the Court can itself modify the statute so that the legislature's original intent is realized, with the assurance that if the Court has misread that purpose, the legislature can respond with clarifying legislation putting the statute back the way it was. *See Bhinder v. Sun Co.,* 263 Conn. 358, 375 (2003) (recognizing legislature's ability to respond to court decisions with clarifying legislation). This approach overcomes the problem of legislative inertia and forces the legislature to review whether the statute is obsolete or continues to represent the will of the majoritarian and representative body. *See* Calabresi, *supra*, at 125-126.

While this theory of judicial review of statutes has not been expressly applied by this Court, it has been applied by other courts. *See, e.g., Phillips v. State*, 226 Md. App. 1, 12, 126 A.3d 739, 745 (2015), *aff'd on other grounds*, 451 Md. 180, 152 A.3d 712 (2017); *Yoshizaki v. Hilo Hospital*, 50 Haw. 150, 155, 433 P.2d 220, 224 (1967). In *Yoshizaki*, the Supreme Court of Hawaii was tasked with construing a statute of limitations. In order to avoid a bizarre result, the Court

addressed the statute with a common sense policy approach to solve the problem of legislative inertia. Specifically, the Court noted:

> Courts too often overestimate the facility with which the legislative process can deal with reform in the area of tort law… . Where reform is necessary in the area of tort law, the court should act wherever possible and leave to the legislature the question whether the reform should be modified or rescinded in whole or in part. **Judicial action is frequently necessary to overcome legislative inertia**…

(Emphasis added; internal citations omitted.) *Yoshizaki*., 50 Haw. at 155.

The Maryland Court of Special Appeals took a different approach to the problem of legislative inertia when confronted with an outdated statute that governed the admissibility of DNA evidence. In *Phillips*, the Court first explained the real problems of legislative inertia and legal obsolescence:

> Statutes may also become *factually* obsolete. Conditions change. Laws drafted for the horse and buggy don't make sense for automobiles; some current automobile laws may not make sense for driverless cars. Unfortunately, unlike code revision, there is no regularized mechanism for eliminating factually obsolete statutes. While a legislature may delete a factually obsolete statute when it is noticed, combing the Code for factually obsolete statutes is generally not a high legislative priority. Judge Guido Calabresi and others have referred to this concept as legislative inertia—the recognition that it is easier to leave obsolete statutes than it is to remove or revise

> them…. The result is that many factually obsolete statutes remain on the book.

(Internal citations omitted; emphasis in original). *Phillips*, 226 Md. App. at 9–10. The Maryland Court's way of addressing the issue was to identify the intent of the legislature in adopting the statute, and then applying the necessary changes to fit the current factual realities and maintain the legislative intent:

> Cognizant of the challenges presented by obsolete statutes, and mindful of the pitfalls of the three approaches courts taken, it is our view that the best way to proceed with an obsolete statute is not to take any of the three, but to rely on the traditional tools of statutory interpretation to effectuate the legislature's intent, as we have previously done when dealing with outdated statutes. *See, e.g., Sieglein v. Schmidt,* 224 Md.App. 222, 242, 120 A.3d 790 (2015) (interpreting "artificial insemination" in parentage statute to encompass in vitro fertilization—a newer reproductive technology that didn't exist at the time of the statute's enactment—because the legislature intended to "acknowledge the role of medically assisted, non-traditional conception of a child in establishing a parent's rights and obligations"). Therefore, we will attempt to discern the legislature's intent in passing the DNA Admissibility Statute. Our principal aim in this undertaking is to determine if and how the legislature would have intended for us to enforce this now-obsolete statute.

> Thus, we hold that the proper way to deal with a statute that is obsolete on its face is to look to the legislature's intent and work to effectuate that intent in the present legal and factual landscape…

Phillips, 226 Md. App. at 11–12.

CCM does not suggest that this Court should routinely change statutes and recognizes that it is usually best left to the legislature to set a particular policy. *See Comm'r of Mental Health & Addiction Servs. v. Freedom of Info. Comm'n*, 347 Conn. 675, 693 (2023) ("it is not the province of this court, under the guise of statutory interpretation, to legislate ... a [particular] policy, even if we were to agree ... that it is a better policy than the one endorsed by the legislature as reflected in its statutory language"). But that cannon of judicial restraint is not absolute and, indeed, cannons such as the mistake cannon and absurdity cannon show that the judiciary does have the power to apply a statute in a way that makes sense. *See* Brett M. Kavanaugh, "Fixing Statutory Interpretation Judging Statutes by Robert A. Katzmann.,"129 Harv. L. Rev. 2118, 2156 (2016).

This Court has made fixes to statutes when it has determined that there has been "legislative error." *See State v. Jenkins*, 198 Conn. 671, 677 (1986). It has performed "arthroscopic surgery" on a statute to preserve its constitutionality. *See State v. Indrisano*, 228 Conn. 795, 801 n.5 (1994). While these cases may be the exception, they demonstrate that this Court does have the power to modify a statute to make it sensible in the modern world. This is such a circumstance where the Court should exercise that authority and bring the municipal notice statutes in harmony with modern day practical realities.

3. Avoiding Possible Constitutional Infirmity

Another reason that this Court should interpret the municipal notice statutes in accord with the legislature's original intent and permit municipalities to satisfy its notice requirements by posting to official websites is to avoid potential constitutional problems. Specifically, the state constitution's home rule amendment is implicated because General Statutes § 8-3(f)'s unfunded mandate infringes on both the municipality's local budgetary policy and local zoning control.

a. Additional relevant facts

Recently, CCM testified before the legislature that "local governments spend millions of dollars every year publishing lengthy documents, in their entirety, in local publications." Testimony of D. Hamzy Carrocia, CCM in support of HB 6656 (March 3, 2023), at 2.[5] Newspapers "have taken advantage of this mandate by often charging their highest advertising rate for postings." *Id*.

Harwintown's First Selectman testified that "[a] single legal notice can cost a municipality a few hundred dollars to publish in a newspaper. Our town budgets $3,400.00 per year for publishing legal notices, funds which could be put to much better use in our community." Testimony of M. Criss in support of HB 6656 (March 3, 2023), at 1. Coventry's Town Manager stated that the town "budget[s]

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[5] The legislative history underlying House Bill No. 6656 (Session Year 2023), which did not pass, is available here: https://cga.ct.gov/aspx/CGADisplayTestimonies/CGADisplayTestimony.aspx?bill=HB-06556&doc_year=2023

$10,000 every year to publish required legal notices in print newspaper publications." Testimony of J. Elesser in support of HB 6656 (March 3, 2023), at 1. The mandate required the town to cut funding for a seasonal employee. *Id*. The Connecticut Council of Small Towns explained that "[s]mall towns are budgeting $5,000 to $45,000 a year to publish required legal notices, funds which can be put to better use to meet other obligations." Testimony of B. Gara in support of HB 6656 (March 3, 2023), at 1. Voluntown's First Selectman noted that the local newspaper in which they publish was outsourced to a national company, and now a notice that once cost $275, costs $800: "We have no choice but to pay the increases. We have no other newspapers that service the town." Testimony of T. Hanson in support of HB 6656 (March 3, 2023), at 1.

The value to the public of publishing notice in newspapers versus posting notices online was also discussed. The Connecticut Chapter of the American Planning Association showed how ineffective newspaper legal notices are in today's society:

> CCAPA has long advocated for the online option to provide municipalities with more flexibility to provide legal notice. As our internal surveys among municipal planners have demonstrated, municipalities frequently pay many thousands of dollars for newspaper notifications annually, with little demonstrated value. In a 2018 survey of seven communities across nine public hearings, **only five (5) of over 140 public hearing participants received notification of the public hearing via newspaper**. The vast majority were directly notified as abutters, and larger numbers learned of the meeting on the municipal websites.

(Emphasis added.) Testimony of J. Guskowski and E. Harrigan in support of HB 6656 (March 3, 2023), at 1. Yet, "[t]he fundamental purpose served by notice requirements is to inform the public of important local matters." Testimony of J. Klein, Chair of the Connecticut Bar Association's Planning & Zoning Section, in support of HB 6656 (March 3, 2023), at 2. Municipal websites are better mediums to accomplish that purpose than print newspapers. *Id.*

b. The Home Rule Amendment

Article Tenth, § 1 of the Connecticut Constitution, entitled "of Home Rule," provides:

> The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs relative to the powers, organization and form of government of such political subdivisions. The general assembly shall from time to time by general law determine the maximum terms of office of the various town, city and borough elective offices. After July 1, 1969, the general assembly shall enact no special legislation relative to the powers, organization, terms of elective offices or form of government of any single town, city or borough, except as to (a) borrowing power, (b) validating acts and (c) formation, consolidation or dissolution of any town, city or borough, unless in the delegation of legislative authority by general law the general assembly shall have failed to prescribe the powers necessary to effect the purpose of such special legislation.

Conn. Const. art. Tenth, § 1.

This Court has explained that "our constitutional home rule provision… prohibits the legislature from encroaching on the local authority to regulate **matters of purely local concern**, such as the organization of local government or **local budgetary policy**." (Emphasis added.) *Board of Education of Town and Borough of Naugatuck v. Town of Borough of Naugatuck*, 268 Conn. 295, 310 (2004). In *Windham Taxpayers Ass'n v. Bd. of Selectmen of Town of Windham*, 234 Conn. 513 (1995), the Court explained the scope of its home rule jurisprudence:

> In *Caulfield v. Noble,* [178 Conn. 81, 91 (1979)] we held that decisions regarding the appropriation of surplus revenues are matters of local concern. In *Shelton v. Commissioner of Environmental Protection,* 193 Conn. 506, 521, 479 A.2d 208 (1984), we held that the organization of local government or local budgetary policy is a matter of local concern. Furthermore, the enactment of ordinances by initiative and referendum has been recognized as a matter of local interest. …
>
> In contrast, matters that concern public health and safety, and other areas within the purview of a state's police power, have traditionally been viewed as matters of statewide concern. … For example, in *Dwyer v. Farrell,* 193 Conn. 7, 475 A.2d 257 (1984), we held that a local ordinance placing restrictions on the sale of handguns more substantial than those in the state statutes was preempted by the state statutes. The purpose of the state statutes at issue in *Dwyer* was to protect the public. *Id.,* at 12, 475 A.2d 257. The statutes "clearly indicate a legislative intent 'to protect the safety of the general public from individuals whose conduct has shown them to

> be lacking the essential character or temperament necessary to be entrusted with a weapon.' … *Id.,* at 12–13, 475 A.2d 257.

(Internal citations omitted.) *Windham Taxpayers,* 234 Conn. at 535–36.

Applying these principles, the Court reaffirmed that when a matter is "of purely local interest," the municipality has the right to govern without undue interference from the General Assembly:

> At issue in this case is whether Windham's primary legislative body—the board of selectmen—can be compelled to hold a referendum on the petition of the town's voters despite the fact that the charter explicitly lists the situations in which a town meeting is required. We conclude that this matter is of purely local interest. It is similar to the enactment of an ordinance by referendum or petition, which has been held to be a local issue. …. It is also similar to the appropriation of a town's budget, which is also a local matter, in that it relates to concerns that are of particular importance to the town itself. It is of no import to the rest of Connecticut whether the town of Windham holds a second referendum to reconsider an issue on which its voters have already voted. Indeed, unlike the sale of handguns, the regulation of which may clearly impact the " 'safety of the *general public*' "; (emphasis added) *Dwyer v. Farrell,* supra, 193 Conn. at 12, 475 A.2d 257; the use of the town meeting form of government impacts only the municipality itself and does not affect the interests of the rest of the state.

(Internal citations omitted.) *Windham Taxpayers*, 234 Conn. at 536–37.

Requiring a municipality to publish notice of zoning amendments in a newspaper impacts matters of local, not general, concern. First, the requirement that a municipality pay a newspaper before it can amend its own local zoning ordinances is not a matter of general concern. It affects *local* budget policy. As the testimony from municipal leaders above demonstrates, it affects the ability of the municipality to set its own budget and provide for other needed local resources. Second, the requirement impacts the process through which the municipality may amend its own zoning regulations in a way that does not implicate statewide interest. This is clear given that the statutes do not require notice to be provided in a particular statewide newspaper of general interest. Rather, the requirement is localized to each municipality, calling for the newspaper to have a particular (but undefined) circulation within the municipality. This demonstrates that the goal of the legislation is to provide notice to the local inhabitants, not general statewide notice.

Because a municipality is in the best position to determine how to most effectively reach its residents, the newspaper publishing requirement may run afoul of home rule's entrustment of matters of local concern to the municipality. *Accord Higley v. Bunce*, 10 Conn. at 442–43 (town is in best position to determine most effective method to provide notice to residents). As municipal leaders consistently testified, the most effective way to provide notice to residents is through municipal websites. This Court should deem a municipality's legal notice obligation to be satisfied by such publication on its website rather than requiring publication in a newspaper with a guess at whether the circulation requirement has been met.

V. CONCLUSION

This Court should take this opportunity to effectuate the legislature's purpose in the municipal legal notice statutes by

concluding that publication to an official municipal website satisfies that notice obligation.

Respectfully submitted,

Amicus Curiae

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VI. CERTIFICATION OF COMPLIANCE AND SERVICE

The undersigned counsel of record hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that:

1. The electronically submitted brief and the filed paper brief have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or caselaw; and

2. The electronically submitted brief has been delivered electronically to each counsel of record in compliance with Practice Book § 62-7A and a paper copy provided to any counsel of record exempt from electronic filing:

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3. The briefs being filed with the Clerk are true copies of the brief that were submitted electronically; and

4. The brief complies with all provisions of Practice Book § 67-2A; and

5. This brief complies with the word count limitations because the brief contains 3,965 words; and

6. No deviations from the rules were requested; and

7. This electronic brief was filed in compliance with the guidelines.

BY: /s/ *Proloy K. Das*
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