

IN THE SUPREME COURT OF OHIO

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Sunoco Pipeline, L.P.)	
)	CASE NO. 2016-1486
Appellee)	
)	On Appeal from the Court of
)	Appeals of Harrison County
)	Seventh Appellate District
Carol A. Teter, Trustee, et al.,)	
)	Court of Appeals
Appellants.)	Case Nos. 16 HA 0002
)	16 HA 0005
)	

**AMICI OHIO FARM BUREAU FEDERATION AND HARRISON COUNTY
FARM BUREAU'S MEMORANDUM IN OPPOSITION TO APPELLEE'S
SUGGESTION OF MOOTNESS AND MOTION TO DISMISS**

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Amici Ohio Farm Bureau Federation and the Harrison County Farm Bureau (hereinafter, “OFBF,” collectively) respectfully submit this Memorandum in Opposition to Appellee’s Suggestion of Mootness and Motion to Dismiss. This case puts before the Court an issue of significant importance to the thousands of farmers and landowners across the state who are approached for pipeline development on their land.

I. STATEMENT OF INTEREST

OFBF is Ohio’s largest general farm organization, representing Ohio farmers and landowners. Members own and rent land throughout the state and use it produce every agricultural commodity found in the Midwest. OFBF began nearly 100 years ago, as a novel idea by groups of farmers trying to address the problems facing their communities. Today, more than 63,000 active farmers across the state are members of the Farm Bureau and participate in discussing public policy, volunteering and holding events for their non-farm neighbors to experience agriculture. Since its beginning, OFBF has focused on developing sound public policy to address the concerns of farmers and the communities in which they live.

A major focus of that Farm Bureau policy has always been private property rights. OFBF has been involved with largely every private property issue that has faced this state since 1919, including the creation of the Current Agricultural Use Valuation program in 1973, eminent domain reform in 2007, repeal of the estate tax in 2013, not to mention the protection of hunting rights, the codification of premises liability obligations, and the farmland preservation act, just to name a few.

II. FACTS AND PROCEDURAL BACKGROUND

Amici accept and herein incorporate Appellant’s Facts and Procedural Background.

III. ARGUMENT

As Appellants describe, a controversy remains between the parties in this case. Even if no controversy existed, the mootness doctrine would not apply to this case, as it clearly meets the two exceptions to the mootness doctrine. Cases will not be deemed moot when they concern an issue of great public interest or raise a substantial constitutional question. The definition of “petroleum” under R.C. Chapter 1723 is a question of great public interest and raises a constitutional question as a logical outgrowth of the holdings in *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115. Cases will also not be deemed moot if the issues are likely to arise again yet evade review. The same issues in this case have arisen before, and have continue to evade final review by this Court, and therefore, should not be deemed moot.

A. Clarification of pipeline eminent domain power is a matter of great importance and interest that stands to affect thousands of farmers across the state.

The first exception to the mootness doctrine is the presence of a substantial constitutional question or a question of great public or general interest. *See Franchise Developers, Inc. v. City of Cincinnati*, 30 Ohio St.3d 28, 505 N.E.2d 966, 30 O.B.R. 33 at syllabus 1 (1987). As OFBF has previously stated in its Memorandum of Jurisdiction, the issues at hand in this case are of a great public interest to the many farmers and landowners across Ohio. Proposal and construction of pipelines of all types are unlikely to slow down, given Ohio’s proximity to population and the resources of the Marcellus and Utica Shale. However, because pipelines that carry finished product natural gas liquids do not undergo permitting or routing approvals prior to their construction, it is hard to definitively state how many landowners stand to be affected by this matter of great importance before the Court. The definition of the word “petroleum” in R.C.

1723.01 is part and parcel of every pipeline easement acquisition discussion that occurs in this state, because invariably someone will ask about or assert the power of eminent domain.

In recent years, OFBF estimates at least 37 counties have been affected by finished product natural gas liquid pipeline activity alone.¹ Using the National Agricultural Statistics Service Quick Stats database, these counties represent approximately 33,000 Ohio farmers. U.S.

¹ Below is a list of recently proposed and/or constructed finished product natural gas liquids pipelines from across the state and the counties they have affected of which OFBF is aware. This does not account for other pipelines that are specifically permitted by the Federal Energy Regulatory Commission or the Public Utilities Commission of Ohio. Note pipelines are listed by their common names, as ownership of pipelines often changes hands throughout proposal, construction and implementation.

Atex Pipeline: Jefferson, Harrison, Tuscarawas, Coshocton, Licking, Fairfield, Pickaway, Fayette, Clinton, Warren, Butler. *See* Downing, *ATEX Express ethane pipeline under construction across Ohio from Utica shale well fields*, (July 7, 2013) available at <http://www.ohio.com/news/local/atex-express-ethane-pipeline-under-construction-across-ohio-from-utica-shale-well-fields-1.411499> (last accessed August 3, 2017).

Bluegrass Pipeline: Jefferson, Carroll, Harrison, Tuscarawas, Coshocton, Muskingum, Licking, Fairfield, Pickaway, Fayette, Clinton, Brown. Note that while Bluegrass pipeline easements were obtained, the project was scrapped for lack of interest. In addition, a Kentucky appellate court ruled that the Bluegrass Pipeline did not have the power of eminent domain. *Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386 (Ky.App.2015) (discretionary review denied by Kentucky Supreme Court, February 10, 2016). Rudell, *Bluegrass pipeline project through Ohio and beyond is cancelled* (Apr.29, 2014) available at <http://wksu.org/news/story/39022> (last accessed August 3, 2017)

Blue Racer Network: Trumbull, Portage, Stark, Columbiana, Mahoning, Tuscarawas, Carroll, Harrison, Jefferson, Guernsey, Belmont, Monroe, Noble, Morgan, Washington. Blue Racer Midstream, *Where we work*, available at <http://www.blueracermidstream.com/where-we-work> (last accessed August 3, 2017).

Falcon Ethane: Harrison, Carroll, Jefferson. Junkins, *Falcon Pipeline to Send Ethane to Royal Dutch Shell Through Ohio Valley*, (Oct. 22, 2016) available at <http://www.theintelligencer.net/news/top-headlines/2016/10/falcon-pipeline-to-send-ethane-to-royal-dutch-shell-through-ohio-valley/> (last accessed August 3, 2017.)

Mariner East I/Mariner East II/Mariner West: Harrison, Jefferson, Mahoning, Portage, Summit, Medina, Lorain, Huron, Wood, Seneca, Lucas. Energy Transfer, *Natural Gas Liquids (NGLs) Segment Map*, available at <http://www.sunocologistics.com/Customers/Business-Lines/Natural-Gas-Liquids-NGLs/Natural-Gas-Liquids-NGLs-Segment-Map/267/> (last accessed August 3, 2017).

Kinder Morgan Utopia: Harrison, Carroll, Tuscarawas, Stark, Wayne, Ashland, Richland, Huron, Seneca, Sandusky, Wood, Lucas, Fulton. Utopia Pipeline Project, *Utopia Pipeline Project Route*, available at <https://utopiapipeline.com/overview/> (last accessed August 3, 2017).

Department of Agriculture, National Agriculture Statistics Service, Quick Stats Database, Query: Census, Economics, Farms&Land&Assets, Farm Operations, Operations, Farm Operations-Number of Operations, Total, County, Ohio, Listed Counties, 2012, Annual, Year, *available at* <https://quickstats.nass.usda.gov/results/ED15AE8E-06B0-3028-BC7C-9AE834E54668> (last accessed Aug. 2, 2017). With each new pipeline, OFBF holds informational meetings to help members understand the process of pipeline construction and the general legal framework that applies. Without clarification regarding the definition of “petroleum” and thereby the use of eminent domain, pipeline companies are able to shape landowner negotiations with the specter of eminent domain.

The state of Ohio has more than 75,000 farm operations total that at any moment could be chosen as the route for the next Sunoco Pipeline, just as the Teter Farm was in this case. U.S. Department of Agriculture National Agricultural Statistics Service, “2016 State Agricultural Overview: Ohio,” https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=OHIO (last accessed Aug. 8, 2017). As Appellants aptly explain, even the Teter’s farm remains at risk for the next proposed pipeline project given the existing easements appropriated by the lower court’s decision. Every farm operation in Ohio has land that is being used for crops, hay, orchards and pastures—working and productive land that to the developer eye looks like prime open real estate for construction.

B. This case represents a substantial constitutional question that must be reviewed.

The Court’s seminal and well-reasoned opinion in *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, provided important clarifications on the bedrock principles of eminent domain, including the use for private development. It further held that

eminent domain statutes must be read with strict scrutiny, in order to uphold the tenet of the Ohio Constitution that private property be held inviolate. *Id.* at syllabus 3.

But in this case, we have a hundred-year old statute—granting eminent domain status to a private company—that has not been reviewed or considered in light of the Court’s *Norwood* opinion. Instead, companies have attempted to assert that they have carte blanche to use eminent domain whenever and wherever their private board decides to put a pipeline. OFBF and others instead read the *Norwood* opinion as clearly requiring a strict reading of the statute and adherence to the public need and necessity requirements in order to honor the Ohio Constitution’s enshrinement of private property rights—even when the legislature has specifically gifted the eminent domain power to a private interest. This issue must be reviewed and settled so that landowners across Ohio can exercise the essential right of private property enshrined in our Ohio Constitution.

C. The issue has risen before and will rise again, yet evades review with settlement.

The second exception to the mootness doctrine is found when a case has the likelihood of repeating yet evades review by the courts. *See State ex. Rel. Cincinnati Enquirer v. Ohio Dept. of Public Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶29. The Court has further interpreted this exception to mean that (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Id.* citing *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000).

In 2001, the Court accepted, but was never able to hear, a very similar appeal with essentially the same issue at hand in the cases of *Ohio River Pipe Line, LLC v. Gutheil, et al*, 144 Ohio App. 3d 694, 76 N.E.2d 633 (4th Dist. 2001), *appeal allowed* 93 Ohio St.3d 1463, *joint*

application for dismissal granted 94 Ohio St.3d 1403, and its companion *Ohio River Pipe Line, LLC v. Henley*, 144 Ohio App.3d 703, 761 N.E.2d 640 (4th Dist. 2001), *appeal allowed* 92 Ohio St.3d 1416, *joint application for dismissal granted* 94 Ohio St.3d 1403. That issue was dismissed on joint application of the parties. Similar cases which were moving through the court system in Wood County regarding the Kinder Morgan Utopia Pipeline, where the trial court had found the pipeline did not have the power of eminent domain, were similarly dismissed during the appeal once the company rerouted its private pipeline to avoid the complaining landowners. *Kinder Morgan Utopia, LLC v. PDB Farms of Wood County, LLC, et al.*, Wood C.P. No. 2016CV0220 (Oct. 12, 2016).

These cases show that the time it takes to mount a legal challenge to a threat of eminent domain and bring it to finality, often means that the court does not get to hear the case. Landowners may finally get the compensation they deserve and the terms they need to continue utilizing their land, or the pipeline company sees the writing on the wall and moves to another parcel of land where a landowner will grant them an easement voluntarily. Either way, the question goes unaddressed and leaves in place the uncertainty and ambiguity for another landowner to fund a challenge over.

Without reviewing this issue of great importance, farmers will continue to be approached by “landmen” looking to purchase easements with the caveat that eminent domain might be used if an offer is refused. Because of the confusion of which types of pipelines do and do not have the power, it is easy for the rumor mill and party line to create a fear out in the countryside. Fighting an eminent domain case is not a cheap undertaking, and surely thousands of dollars have been spent in the pursuit of this clarification already, only to have companies settle or move on once there is a chance of a final review

IV. CONCLUSION

As stated in our memorandum of jurisdiction, the power of eminent domain is to be exercised with restraint, and not abandon. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-37992006-Ohio-3799, at ¶68. In the limited circumstances where the almighty power of eminent domain has been afforded to and entirely controlled by a private interest, the courts must ensure that power is strictly construed and doubts over the propriety of a takings have been resolved in favor of the property owner. If this case is not heard, these issues of great importance will go unanswered and the constitutional ambiguity will remain unsolved. If this case is not heard, the circumstances and issues will likely rise again, but whether the court will have a chance to hear them, whether the landowner will have the legal prowess and the funds to see this case through to finality—or whether the company will move on to avoid clarity on the issue—is anyone’s guess.



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CERTIFICATE OF SERVICE

I certify that on this day, August 3, 2017, a copy of this brief was served by electronic mail upon the following counsel of record:

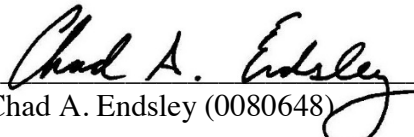
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