IN THE SUPREME COURT OF OHIO

Sunoco Pipeline, L.P.	)	
	)	CASE NO. 2016-1486
Appellee	)	
	)	On Appeal from the Court of
v.	)	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
	)	

BRIEF OF AMICI CURIAE OHIO FARM BUREAU FEDERATION AND HARRISON COUNTY FARM BUREAU IN SUPPORT OF APPELLANT

Chad A. Endsley (0080648)
(Counsel of Record)
Leah F. Curtis (0086257)
Amy Milam (0082375)
Ohio Farm Bureau Federation, Inc.
280 N. High Street
P.O. Box 182383
Columbus, OH 43218-2383
Phone: (614) 246-8256
Fax: (614) 246-8656
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Amici Curiae,
Ohio Farm Bureau Federation, Inc. and
Harrison County Farm Bureau

Nicholas I. Andersen (0077732)
(Counsel of Record)
Eric McLoughlin (0082167)
Jessica L. Samuel (0089232)
Arenstein & Andersen, Co., LPA
6740 Avery Muirfield Dr., Ste B
Dublin, OH 43017
Telephone: (614) 602-6550
Fax: (866) 309-0892
Email: nick@aacolpa.com
eric@aacolpa.com
jessica@aacolpa.com
Counsel for Appellant, Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust

Jordan S. Berman (0093075)
(Counsel of Record)
Assistant Attorney General
Constitutional Offices Section
30 E. Broad St., 16 Fl.
Columbus, OH 43215
Telephone: (614) 466-2872
Fax: (614) 728-7592
Jordan.berman@ohioattorneygeneral.gov
Counsel for Ohio Attorney General, Mike DeWine

Kathleen M. Trafford (0021753)
(Counsel of Record)
Ryan P. Sherman (0075081)
L. Bradfield Hughes (0070997)
Christopher J. Baronzzi (0078109)
Porter Wright Morris & Arthur
41 S. High St.
Columbus, OH 43215
Telephone: (614) 227-2000
Fax: (614) 227-2100
Email: ktrafford@porterwright.com
rsherman@porterwright.com
lhughes@porterwright.com
cbaronzzi@porterwright.com
Counsel for Appellee, Sunoco Pipeline, L.P.

C. Craig Woods (00107032)
(Counsel of Record)
Andrew H. King (0092539)
Squire Patton Boggs (US) LLP
2000 Huntington Center
41 South High Street
Columbus, OH 43215
Telephone: (614) 365-2700
Fax: (614) 365-2499
Email: craig.woods@squirepb.com
Andrew.king@squirepb.com
Counsel for Defendant-Appellee Enterprise TE Products Pipeline Company, LLC

James B. Hadden (0059315)
(Counsel of Record)
Murray Murphy Moul + Basil LLP
1114 Dublin Rd.
Columbus, OH 43215
Telephone: (614) 488-0400
hadden@mmmb.com
Counsel for Association of Oil Pipe Lines, American Petroleum Institute, and Ohio Chemistry Technology Council
Amici Curiae in Support of Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Federal Statutes

State Statutes

Federal Regulations

State Regulations

Administrative Materials

Other Authorities

I. STATEMENT OF THE CASE AND FACTS

The Ohio Farm Bureau and Harrison County Farm Bureau (hereinafter, "Farm Bureau") hereby incorporate and accept the Appellant's statement of the case and facts.

II. INTEREST OF THE AMICI CURIAE

A. The Farm Bureau represents landowners across the state with an interest in private property rights.

The Farm Bureau is Ohio's largest general farm organization, with a core purpose of working together for Ohio's farmers to advance agriculture and strengthen our communities. Ohio Farm Bureau is a federation of county farm bureau organizations, representing all 88 counties. This includes the Harrison County Farm Bureau, which works in the local community to provide an agricultural voice and a connection to agriculture for Harrison County residents.

Farm Bureau members own and rent land throughout the state and use it to produce virtually every kind of agricultural commodity found in this area of the country. Ohio's number one industry remains food and agriculture, and Farm Bureau supports the farmers of all types and sizes that annually contribute more than $105 billion to Ohio's economy. The Cleveland Plain Dealer PolitiFact Ohio, *John Kasich says agriculture is the "strongest industry in Ohio"* (2013) http://www.politifact.com/ohio/statements/2012/dec/12/john-kasich/john-kasich-says-agriculture-strongest-industry-oh/ (last accessed August 18, 2017.).

Farm Bureau is a truly grassroots organization. All of the policy positions taken by the Farm Bureau began as an idea from an individual member. In the same way, Farm Bureau's involvement as an amicus typically begins at the suggestions of an individual Farm Bureau member or county farm bureau. The Farm Bureau then reviews the case for its potential to impact members statewide,

its alignment with Farm Bureau member-developed policies, and the potential for statewide precedent. This case has met all three of these criteria.

1. The right to private property receives the utmost respect and protection under the Ohio Constitution.

Farm Bureau has been strongly committed to protecting the private property rights preserved by the Ohio and U.S. Constitutions since its inception nearly 100 years ago. Ohio Farm Bureau state policy staunchly opposes the use of eminent domain for private development purposes. Ohio Farm Bureau Federation, 2017 State Policies, Policy #411: Eminent Domain, at 58, line 36 (2016) *available at* https://ofbf.org/app/uploads/2012/03/2017-OFBF-Policy-Book.pdf. Farm Bureau led the way on eminent domain reform in 2007, pushing the legislature to honor the Court's decision in *Norwood v. Horney,* 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, and to further ensure that private property rights received the utmost protections under Ohio law. *See* Jane Houn, Farm World, *Ohio House continues eminent domain debate* (June 27, 2007) *available at* http://www.farmworldonline.com/news/ArchiveArticle.asp?newsid=4406 (last accessed August 18, 2017). The right of eminent domain has long been a part of the American experience, affording the sovereign the power to appropriate property where necessary to achieve a public good. However, important parameters have been placed upon that power to ensure that property rights retain the utmost respect and protection from abuse throughout any such appropriation. Among those protections are the fundamental requirement that the proposed project must meet the requirements of both necessity and public use. In the unique case that the sovereign has transferred its power, that entity still must comply with those requirements as well as any statutory guidelines set out by the sovereign to qualify for the use of eminent domain power. Private pipeline companies, like any other entity that asserts the power of eminent domain, must be held to the

highest standard to ensure private property rights receive the ultimate protection required by the Ohio Constitution. Ohio Constitution, Article 1, Section 19 ("Private property shall be held forever inviolate.").

2. The threat of eminent domain imperils fair negotiations and limits the ability for landowners to negotiate for fair compensation.

Pipelines are not uncommon across Ohio's landscape today, whether existing or proposed. Nearly every rural community across this state is aware of pipeline construction, and the possibility of this infrastructure crossing their land. Our staff often hear from members who have been told by some representative that if a landowner doesn't agree to allow a pipeline easement, eminent domain actions will be filed. Even if this is the case and no harm is intended, landowners are often afraid of the prospect of court action, and the expense they would incur in a "David and Goliath" fight against a large company. This does not just affect the compensation the landowner receives, but also lowers their resolve to negotiate other important aspects of the easement, including the conservation of soil and water resources, repair and remediation of drainage systems, fencing and other features integral to continuing a farm business on the property.

B. The lack of regulation and oversight of this type of pipeline necessitates close and careful judicial review to uphold the protections of the Ohio Constitution for private property owners.

It should not be lost upon the Court that for landowners, the taking of property is not just of the physical rock, dirt and grass. As recognized in *Norwood*, property is much more to those who have lived on it and built their home and family in that location. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶4. For farmers, land is their livelihood as well as their

home. Farmland is typically worked for generations, and holds the same significance and legacy to a farm family as their own last name. Because of the importance of this land, farmers look to the regulatory process and their government officials to ensure takings are just and necessary whenever their property must be taken.

1. **In most cases where Ohio law grants eminent domain status to private entities, those entities are directly and closely regulated or permitted by other governmental authorities.**

In many of the other situations where companies are granted eminent domain power due to their status as utilities or common carriers, significant process, regulation and permitting requirements must be fulfilled before such power is used. For example, in the case of electric companies looking to site power lines, another common use of eminent domain power, the company must file a case with the Ohio Power Siting Board. O.A.C. 4906-3-02. The company must hold local public hearings where the community as a whole—the "public" whose "good" will be served—is given the opportunity to express their opinions and concerns. O.A.C 4906-03-03(B). A formal administrative hearing is held, where any affected landowners or interested parties can intervene to provide their own unique view of the project and ensure important viewpoints are heard by the administrative law judge. R.C. 4906.07(A).

This additional due process that is afforded to the public at large occurs largely before any eminent domain proceedings would be utilized to construct the project. This ensures that the project truly is serving the public good and allows administrative officials with subject matter expertise to review all aspects of the project. This process is what affords piece of mind to citizens, like the members of the Farm Bureau, to ensure the eminent domain process is not abused. No such review has occurred in this situation. The public at large has received no process in this

project, supposedly for its greater benefit. Because no such regulatory oversight is available for this pipeline, Ohio law does not contemplate it would be able to utilize the power of eminent domain.

2. The Ohio Power Siting Board and the Ohio Public Utilities Commission hold no oversight over the proposed pipeline.

Ohio law places under the regulatory authority of the Ohio Power Siting Board any major utility facilities. R.C. 4906.02. A "major utility facility" includes any "gas pipeline that is greater than 500 feet in length, and its associated facilities, is more than nine inches in outside diameter and is designed for transporting gas at a maximum allowable operating pressure in excess of one hundred twenty-five pounds per square inch." R.C. 4906.01(B)(1)(c). "Gas" is defined simply as "natural gas, flammable gas, or gas that is toxic or corrosive." R.C. 4906.01 (E).

However, Ohio law specifically excludes from the definition of "major utility facility" any pipelines transporting "natural gas liquids finished products." R.C. 4906.01(B)(2)(g). "Finished product natural gas liquids" include ethane, propane, iso-butane, normal butane, and natural gasoline. R.C. 4906.01 (J). Therefore, the Ohio Power Siting Board has no regulatory authority to require adequate due process before the use of eminent domain to the public at large regarding this project.

As stated, above, the statutes governing utilities and the Ohio Power Siting Board make a distinction between natural gas and the products planned to be distributed through this pipeline. This distinction creates a regulatory vacuum without day-to-day oversight of the project, unlike nearly all other utilities which can utilize the eminent domain power under R.C. Chapter 163 and R.C. 1723.01.

3. The pipeline is also not regulated through traditional oversight by the Federal Energy Regulatory Commission.

Within R.C. 4906.01, the law is also clear that the Ohio Power Siting Board will not have regulatory authority over any "gas transmission lines over which an agency of the United States has exclusive jurisdiction." R.C. 4906.01 (2)(a). This traditionally only applies to those gas pipelines, as defined above transporting natural gas, flammable gas, or gas that is toxic or corrosive, which travel interstate, rather than intrastate. In their trial testimony, Sunoco Pipeline, L.P.'s witness Harry (Hank) Alexander stated that the pipeline is an "interstate common carrier pipeline company regulated by FERC, the Federal Energy Regulatory Commission, [...]" Trial Transcript at 34. The witness described that the company had gone through an "open season" procedure and had its rates approved by the Federal Energy Regulatory Commission (FERC). *Id.*

What was not discussed, however, was the traditional permitting and oversight process which is required by FERC for pipelines carrying natural gas under the Natural Gas Act, to which this pipeline is not subject. The Natural Gas Act grants exclusive jurisdiction to FERC over pipelines carrying natural gas in interstate commerce. 15 U.S.C. 717. By the definitions within R.C. 4906.01(B)(2)(a), these are the pipelines which are exempt from the definition of "major utility facility" within Ohio law. (i.e. those not subject to Ohio Power Siting Board jurisdiction due to exclusive federal jurisdiction). Section 7 of the Natural Gas Act requires FERC to review applications for construction and operation of natural gas pipelines. 15 U.S.C 717f, *see also* Federal Energy Regulatory Commission, *Gas Pipelines*, (December 29, 2015) http://www.ferc.gov/industries/gas/indus-act/pipelines.asp (last accessed August 18, 2017). With such applications, the company must go through extensive filings, local hearings, and the administrative judicial process. *See generally* 18 C.F.R Part 157. Furthermore FERC issues

certificates of public convenience and necessity, has siting authority, reviews environmental impacts, and approves rates for interstate natural gas pipelines. *See id.,* 18 CFR Part 154, 18 C.F.R Part 380. A number of pipelines which transect Ohio have gone through or are currently experiencing this elaborate and collaborative process, including the ET Rover pipeline proposed to go through Harrison County. *See generally* FERC Docket No. CP15-93-000. In fact, as this case was being heard in the Appellate Court, local public input meetings, facilitated by FERC, were held across the state, with one scheduled near the Teter farm in Cadiz, Ohio on Tuesday, April 5, 2016. 81 Fed.Reg. 12895 (Mar. 11, 2016).

The Sunoco pipeline has not gone through the hoops of the Natural Gas Act regulatory requirements because it is not transporting "natural gas" as defined by the Natural Gas Act. While the pipeline is regulated by FERC, it is regulated under the Interstate Commerce Act, under non-exclusive jurisdiction to set rates and tariffs. 49 USC 60502, s*ee generally Sunoco Pipeline, L.P.,* FERC Docket No. OR14-40-000, 149 FERC 61,191, 2014 WL 6751517 (December 1, 2014)(approving Sunoco Pipline, LP rates for Mariner East 2), 18 C.F.R Part 341. The scope of oversight under the Interstate Commerce Act is vastly different than that of a natural gas pipeline. Mark K. Lewis and D. Kirk Morgan II, Oil and Gas Financial Journal, *An Uneven Playing Field Exists in Oil vs Gas Pipeline development*, (October 1, 2011) *available at* http://www.ogfj.com/articles/print/volume-8/issue-10/features/an-uneven-playing-field-exists.html (last accessed August 18, 2017). Interstate Commerce Act jurisdiction does not include federal pre-emption of conflicting state and local statutes, meaning the pipeline is not exclusively regulated by the federal government. *Id*. Additionally, FERC does not have jurisdiction to provide project authorization such as permitting or siting approval. *Id*. Day-to-day regulatory oversight by FERC does not exist for a pipeline carrying materials such as propane. *Id*., *see also* Nils Nichols,

Testimony of Nils Nichols, Director, Division of Pipeline Regulation, Federal Energy Regulatory Commission to the U.S. Senate Committee on Energy and Natural Resources (May 1, 2014) at 2, *available at* https://www.ferc.gov/CalendarFiles/20140501143300-Testimony-Nils-Nichols-05-01-2014.pdf (last accessed August 18, 2017). FERC also does not issue certificates of public convenience and necessity under its Interstate Commerce Act jurisdiction. 18 C.F.R Part 340 *et seq*. Jurisdiction under the Interstate Commerce Act over oil pipelines is limited to rates and tariffs only. *See* Code of Federal Regulations, Title 18, Part 340.

Amici's interest lies in ensuring the eminent domain process is used properly and fairly for the use of necessary public projects. The regulatory processes and government oversight typically present in most other eminent domain projects, whether put forth by the government or a private actor, provides assurance to landowners that these projects have gone through significant consideration and review before sale offers are made or lawsuits filed.

III. LAW AND ARGUMENT

A. The Ohio Constitution's protection of private property rights requires utmost scrutiny in review of eminent domain statutes.

This Court, in the seminal eminent domain case of recent history, ruled that heightened scrutiny must be applied in reviewing any statutes which regulate the use of eminent domain powers. *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at syllabus. "Judicial review is even more imperative in cases in which the taking involves an ensuing transfer of the property to a private entity [...]." *Norwood*, at ¶28. As eminent domain is a constitutional power, and private property receives significant constitutional protection, it is imperative that the highest scrutiny is applied in interpreting any statutes which may grant such a power.

In addition, where the eminent domain power is transferred, it must be ensured that the grant of authority is strictly construed and "that any doubt over the propriety of the taking is resolved in favor of the property owner." *Norwood* at 375-6, ¶71. In this case, the ambiguity, if any, of the words "natural gas" and "petroleum," must be considered in the context of a statute which transfers the eminent domain power from the sovereign to a private company. That ambiguity within the statute must be resolved in favor of the property owner.

If an ensuing transfer from a governmental appropriator to a private company must receive scrutiny, surely a direct transfer by a private company as the appropriator must also receive that heightened review. If the transfer of eminent domain power must be strictly construed in favor of the private property owner, the statute at hand—which transfers the power directly to private companies—must be resolved in favor of the private property owner. In the statute at issue, R.C. 1723.01 has created a direct right of appropriation for a private company. That private company must be subject to the same standards and scrutiny that the government would be under should it be the one acting as the direct appropriating authority.

B. The literal text of the eminent domain statute must be reviewed and each word given its meaning.

The general rules of statutory construction state that words and phrases should be read in context and construed according to the rules of grammar and common usage. R.C. 1.42. In reviewing the statute, the trial court posited that the words "natural gas" and "petroleum" must include propane and butane because other areas of the code had related terms defined to include those products. In doing so, the court relied upon *Cablevision of the Midwest, Inc. v. Gross,* 70 Ohio St. 3d 541 (1994). However, the *Cablevision* case did not stand for the proposition that other unrelated definitions should be utilized to define terms in a statute, and certainly not as the first

resort. In *Cablevision*, the Court was reviewing whether a cable television business held the power of eminent domain under R.C. 4931.11(repealed). The statute under review stated eminent domain power was granted to a "communications business," for the purpose of operating systems for the transmission of voices, sounds, signals, pictures, visions, or other forms of intelligence by means of cable. *Id*. at 544. The court found that the "clear and unambiguous language used by the General Assembly" within the statute itself produced a conclusion that a cable television company was exactly what was meant by the term "communications business" in R.C. 4931.11. *Id*. It is only after the Court made this finding based on the language of the appropriation statute itself, that the court refers to another statutory definition. While other statutory definitions can lend support, the statute under review must be the source of interpretation.

When the language of the statute is unambiguous, no construction is necessary or proper. *Cablevision* at 544. In this case, the statutory language itself is also clear that only transport of petroleum or natural gas can utilize the eminent domain power. Unlike in the *Cablevision* case, the statute does not contemplate generally any type of business transporting any material or resource through a pipeline but only natural gas and petroleum. As the statutory language is clear in its meaning, the lower court should be overturned.

1. The statute's inclusion of "derivatives" of coal only must be read as a choice to limit petroleum and natural gas to their whole product state.

Appellees argued in the lower courts that the pure butane and pure propane planned to be transported through the Sunoco pipeline were individual parts that could be derived from the whole that is petroleum. However, the plain language of the statute makes clear that only "natural gas or artificial gas, petroleum, coal or its derivatives, water, or electricity" are products the transport of which are afforded eminent domain status. R.C. 1732.01.

The statute specifically states that the transport of products which are the derivatives of coal are specifically provided the eminent domain power. R.C. 1723.01., "coal and **its derivatives**" (emphasis added.). The same treatment was not afforded to derivatives of water, derivatives of natural gas, derivatives of petroleum, or derivatives of the other resources immediately listed in R.C. 1723.01. While pure propane, pure butane, ethane and other products may be derivatives of natural gas or petroleum, they are not, in and of themselves, considered to be the whole products. The General Assembly made a conscious choice to limit expansion of the eminent domain power beyond the whole resource to coal only, by stating "its derivatives" are included, but not "their derivatives." Instead, under the common usage of grammar, the statute creates subjects in a series. Each comma delineates separate subjects, each individual subject between the preceding and following commas. If the General Assembly had, in fact, intended to create such an expansion of the eminent domain power to the transport of all types of gases and liquids, it would have used the statutory language to express it, as it did with coal.

Furthermore, absurd results would come about if the eminent domain power were to be extended to all petroleum derivatives, products or chemicals that might be transported through tubing. Pipelines to transport products like detergents, adhesives, fertilizers, paints, lubricants, and plastics all made from petroleum could be given the right of eminent domain if that standard were to apply.

The Appellate Court posited that it read many definitions throughout the code, and decided that an "expansive definition" of petroleum was intended. Expansive definitions might be "intended" in other areas of the code, but eminent domain statutes must be narrowly interpreted and in such a way as to favor private property rights. Such an expansive view cannot stand with

the holdings of *Norwood* and is wholly inconsistent with the heightened scrutiny required by *Norwood*. *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at ¶10.

The General Assembly intended for the terms "natural gas" and "petroleum" to have limits upon them, and did not intend for processed derivatives of those commonly understood products to be included within their meaning. For this reason, the Court should overturn the lower court's ruling and properly limit the meaning of "petroleum" as used in R.C. 1723.01.

2. The lack of day to day oversight and public participation supports the textual limitations of the statute to limit the eminent domain power to pipelines transporting natural gas or petroleum only.

The pipeline at issue in this case will have no significant oversight, no public participation, and no day-to-day regulation. As explained in II.B, *infra*, a regulatory vacuum has been created, because FERC does not hold actual jurisdiction to permit and have direct day-to-day authority over this project, but neither does the Ohio Power Siting Board, the state counterpart. As discussed above, other companies included within the R.C. 1732.01 grant of eminent domain power are projects that would traditionally go through a regulatory agency or other governmental body for review and approval prior to the use of eminent domain. If the definition of natural gas and petroleum are limited in their meaning, eminent domain power remains only with those pipelines that are under strict day-to-day regulation, including permitting, siting and extensive public participation, by either FERC or the Ohio Power Siting Board. If, instead, the definition is not limited to the actual statutory text present in R.C. 1723.01, the door is opened to private use of eminent domain with little or no regulatory oversight.

C. Eminent domain statutes cannot be expanded by the use of unrelated and inapplicable statutory definitions.

While other statutory definitions can be considered when a Court faces the need to define an ambiguous term, such definitions must also be considered in the full context of the statutes from which they are pulled. The statutes referred to by the lower courts cannot be relied upon as evidentiary of the eminent domain statute's intent, as they do not deal with the issue of eminent domain or even similar subject matter of pipeline transport.

The first statute which the court looks to, R.C. 3746.01(L) defines "petroleum" for purposes of property contamination and remediation. The definition does not mention propane or butane, but instead uses a general term of "natural gas liquids" to which the court points. The court also made reference to O.A.C. 1301-7-7-38 within the State Fire Code, which defines propane and butane as "liquified petroleum gases" for purposes of storage requirements. Again, this is not the term used in the eminent domain statute and also does not relate to the terms in the other definition referenced. In the first reference, the definition used does not include the two products at issue in this case. In the second reference, the definition is for an entirely different term. In both cases, the definitions are not applicable to a subject-matter with as much constitutional importance as that of the taking of private property rights or even the subject of pipelines generally.

The general rules of statutory construction state that words and phrases should be read in context and construed according to the rules of grammar and common usage. R.C. 1.42. Statutes that are unrelated to the subject matter at hand should not be considered relevant as "common usage." Though not supported by this reasoning, in that vein the court did look to R.C. 4906.01, which actually covers the subject matter of pipelines. In this section, "gas" is defined as natural gas, flammable gas, or gas that is toxic or corrosive. R.C. 4906.01 (E). By contrast, propane and

butane (including iso-butane and normal butane) are defined as "finished product natural gas liquids," a product transported via pipeline which the Ohio Power Siting Board does not have jurisdiction over. R.C. 4906.01 (J). The Appellate Court did consider this statute, but not these definitions. Instead, the court used this statute's definition of "raw natural gas liquids," to inform what was contained in an unrelated administrative code section that used similar language. O.A.C 3745-300-01, R.C. 4906.01 (I).

The court could have also referenced O.A.C. 4901:5-29-01, which discusses heating oil and propane emergencies, a topic of discussion at trial. *See* Trial Transcript at 28-29, 207. In K(9) and (10) of this rule, it is clearly delineated that pipelines carrying propane are different from those carrying "petroleum." O.A.C. 4901:5-29-01(K)(9)&(10). "Propane" itself is defined in this rule, as a product extracted from natural gas. *See* O.A.C. 4901:5-29-01 (L).

The Appellate Court referred to the definition of "petroleum" in statutes governing underground storage tanks as "crude oil or any fraction thereof, that is a liquid at the temperature of sixty degrees Fahrenheit and the pressure of fourteen and seven-tenths pounds per square inch absolute." R.C. 3737.87(J). This statute also specifically lists motor fuels, jet fuels, distillate oils, residual oils, lubricants, petroleum solvents, and used oils as "petroleum." This statute is cited, along with *Ohio River Pipeline, LLC v. Gutheil,* 144 Ohio App.3d 694, 700, 761 N.E.2d 633 (4th App. Dist.2011). It is true that the products at issue in the *Guthiel* case—gasoline, jet fuel and diesel fuel—are listed in this definition. *Ohio River Pipeline, LLC v. Gutheil*, 144 Ohio App.3d 694, 700, 761 N.E.2d 633 (4th App. Dist.2011). However, the Sunoco pipeline differs from the Ohio River Pipeline as it will not be transporting any of the products listed in the definition, nor can the products actually being transported fit within the general description contained in that definition. R.C. 3737.87 (J).

What the Appellate Court failed to fully discuss was that this statutory definition also aligns with the testimony of expert witness Dr. Paul Matter, brought forth by the Carol Teter Revocable Trust. Trial Transcript at 154. Dr. Matter's testimony stated that neither propane nor butane are liquids at standard temperature or pressure. Therefore, neither propane nor butane can meet the definition of petroleum as stated in R.C. 3737.87(J). The Appellate Court failed to distinguish why this definition, which testimony showed does not apply to the products planned to be transported, could support their "expansive definition." *See Sunoco Pipeline, L.P. v. Carol A. Teter Trustee, et al.*, 2016-Ohio-7073, 63 N.E.3d 160, ¶39 (7th Dist.). *See* Energy Information Administration, "Glossary: Propane," at https://www.eia.gov/tools/glossary/index.php?id=propane ("Propane(C3H8): a straight-chain saturated (paraffinic) hydrocarbon extracted from natural gas or refinery gas streams, **which is gaseous at standard temperate and pressure**. It is a colorless gas that boils at a temperature of -44 degrees Fahrenheit." (emphasis added)), Energy Information Administration, "Glossary: Butane," at https://www.eia.gov/tools/glossary/index.php?id=butane, ("Butane (C4H10): A straight-chain or branch-chain hydrocarbon extracted from natural gas or refinery gas streams, **which is gaseous at standard temperature and pressure**." (emphasis added)).

The Appellate Court, after viewing a number of various definitions it felt could be applicable, cited that many of those definitions used the words "without limitation." *See Sunoco Pipeline L.P. v. Carol A. Teter Trustee, et al.*, 2016-Ohio-7073 at ¶39. But those definitions, statutes and rules are not part of the statutory scheme that addresses eminent domain. The words "without limitation" do not appear in R.C. 1723.01. Nor do they appear further in the chapter. There is no indication that the General Assembly intended such an expansive view to be used when turning over their appropriation authority. In fact, just the opposite should be inferred. If definitional statutes

throughout the code use the clause "without limitation," and a statute which by all accounts must be interpreted narrowly does not include such a clause or other expansive language, no such expansion should be inferred or applied.

The use of such an expansive definition, and inserting words of expansion into an eminent domain statute, cannot reconcile with the holdings of *Norwood*—that an eminent domain statute must be read narrowly. Instead, the Appellate Court used a strained amalgamation of statutory and regulatory definitions to come to a conclusion that "petroleum" should be viewed expansively, with no mention of the narrow construction and heightened scrutiny required by this Court's holdings. For this reason, the Court should overturn the Appellate Court and rule that "petroleum" has the narrow meaning intended by the General Assembly.

D. The constitutional constraints upon eminent domain power must be considered in defining the terms within an eminent domain statute.

This Court has made clear that the transfer of land from Party A to Party B, for the reason of increasing the commercial gain of Party B, is not a valid public use for the purposes of eminent domain law. *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at ¶43. In this case, the pipeline at issue will not benefit the public at large by transporting petroleum, but instead provides commercial enrichment to the private company building the pipeline and the companies purchasing the right to use it by transporting finished product natural gas liquids. The constitutional limitations of eminent domain power, and the facts at hand involving the pipeline which has brought the interpretative issue to the Court's attention, must be considered as the word "petroleum" is interpreted for purposes of eminent domain.

While Ohio law has determined that a taking is not immediately suspect for transfer to a private entity such as a public utility or common carrier, that does not insulate such a transfer from judicial

review for a qualifying public use. Instead, the judicial review becomes paramount when the transfer of land is to another individual—even one given certain special status under Ohio law. "A primordial purpose of the public-use clause is to prevent the legislature from permitting the state to take private property from one individual simply to give it to another. Such a law would be a flagrant abuse of legislative power […] and to give deference to it would be a wholesale abdication of judicial review. *Norwood* at ¶72 (citations omitted). If eminent domain powers are granted and a public use exists, the private entity should have use of the power, "but must not, for their own gain and profit, be permitted to take private property for private use." *Norwood* at ¶49 citing *Pittsburg, Wheeling & Kentucky RR. Co. v. Benwood Iron-Works* (1888), 31 W.Va. 710, 735, 8 S.E. 453, 467.

The pipeline at issue will not generally serve Ohio consumers. The products transported through the pipeline will not heat Ohio homes, they will not fuel Ohio energy, they will not flow into Ohio factories, nor will they impact the everyday consuming Ohioan. Instead, the pipeline will benefit a small number of companies that have transacted with Sunoco Pipeline for a fee to transport finished product natural gas liquids. Sunoco made much of the 10% capacity available on-demand, and the pipeline's contribution in a "polar vortex" situation. Trial Transcript at 28-29. Even the court pointed to the spectre of "polar vortex," in support of public necessity. *Sunoco Pipeline L.P. v. Carol A. Teter Trustee, et al.*, 2016-Ohio-7073, 63 N.E.3d 160 (7th Dist.) ¶87. But, the facts show that 90% of the pipeline—the overwhelming majority of its capacity—is unavailable in any such emergency situation. Any "public benefit" is speculative at best, and non-existent at worst and vastly secondary to the private benefit that will transfer to Sunoco and their contracting partners. "If the public use is contingent and prospective and the private use or benefit is actual and present, the public use would be incidental to the private use, and in such a case the

power of eminent domain clearly could not lawfully be exercised.' *O'Neil v. Bd. of Cty. Comm'rs of Summit Cty.*,(1965) 3 Ohio St. 2d 53, 58, 209 N.E.2d 393, 398 citing *Kessler v. City of Indianapolis* (1927), 199 Ind. 420, 430, 157 N.E. 547, 550.

In this case, any public benefit is only incidental to the private use and private benefit that the pipeline will serve in transporting finished product natural gas liquids to private users. A sine qua non of eminent domain in Ohio is the understanding that the sovereign may use its appropriation powers only upon necessity for the common good. *Norwood,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at ¶43 citing *Buckingham v. Smith* (1840), 10 Ohio 288, 297. A common benefit to all people alike is what allows for and justifies a seizure of private property. *Norwood* at ¶43. The products in the pipeline at issue will not be providing a common good to Ohioans. It is clear that these products will be shipped to Marcus Hook, PA and Claymont, DE—not transmitted to Ohioans. The Appellate Court fixated on the economic and market benefits that could accrue due to a pipeline such as this one, and used the slight possibility that at some point, some product that contained Ohio propane or butane could make its way back to Ohio. *See Sunoco Pipeline, L.P. v. Carol A. Teter Trustee, et al.*, 2016-Ohio-7073, 63 N.E.3d 160 (7th Dist.) ¶71-72. While there is no doubt this pipeline, and other oil and gas infrastructure can provide economic benefits to the region, Ohio has never recognized economic benefits alone to be a sufficient public use for a valid taking. *Norwood* at ¶75.

A recent case in Kentucky faced a similar challenge of a pipeline attempting to assert eminent domain. The appellate court in Kentucky faced a similar situation when reviewing a similar eminent domain power and the Bluegrass Pipeline. This pipeline would have transported natural gas liquids through Ohio, West Virginia, and Kentucky and on to the Gulf of Mexico. The Kentucky court found that the Bluegrass Pipeline, because it did not service Kentucky consumers

and was not regulated by the Kentucky Public Service Commission, could not hold 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).

Because the pipeline's use is vastly supportive of private economic gain, and because any potential public benefit is strictly limited to the downstream economic effect, the court should find this pipeline serves no public use, and therefore cannot utilize the power of eminent domain.

1. Common carriers are private interests and must still comply with the underlying requirements of "public use" and "necessity."

The Appellate Court also discussed that as a "common carrier" Sunoco is seemingly entitled to eminent domain power, regardless of their use of property, so long as they themselves deem it reasonably convenient to their company. *Sunoco Pipeline L.P. v. Carol A. Teter Trustee, et al.*, 2016-Ohio-7073, 63 N.E.3d 160 (7th Dist.), ¶87. The court cites the Fourth District holding that if a private company asserts the project is necessary based upon its own corporate resolution, then a rebuttable presumption of necessity is created. While it correctly stated the statutory text of R.C. 163.09(B)(1)(b) which provides that a common carrier's assertion of necessity is a rebuttable presumption, the court failed to note that such a presumption still must be reviewed for compliance with the constitutional constraints of public use and necessity. As cited in *Norwood*, "[T]he mere recitation of a benign…purpose is not an automatic shield which protects against any inquiry into the actual purpose underlying a statutory scheme." *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at ¶73 citing *Weinberger v. Wiesenfeld* (1975), 420 U.S. 636, 648, 95 S.Ct. 1225, 43 L.Ed.2d 514.

The court's limited review of need and necessity practically created an irrebuttable presumption in favor of the common carrier. Even if a common carrier is recognized or presumed to be operating in the public interest generally, there is no default eminent domain authority for all projects sought to be constructed by one who asserts common carrier status. When the Ohio Constitution affords the utmost protection for private property rights, it is incongruous to think a private company can privately declare, without any government oversight or review, that a project is "necessary" and "for a public use" so as to satisfy the requirements for a lawful taking and such declaration will not be scrutinized sufficiently by the courts.

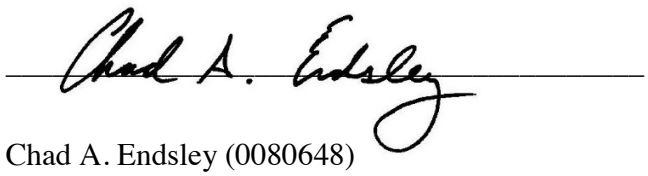
This Court directly questioned these very presumptions in *Norwood*, though the issue was not squarely before them for decision. In a footnote, the Court states that because the individual fundamental rights to property may only be violated by a greater public need, there are questions about the validity of the presumption in favor of the state set forth in R.C. 163.09(B). *Norwood* at fn16. This is the very statute which provides the same such presumption for the use of eminent domain to a common carrier. Furthermore, at its core, *Norwood* deals with the situation of transferring property from one private property owner to another private property owner, the very situation occurring in this case, and in particular doing so for economic benefit, again the keystone of this case. "[W]hen the state takes an individual's private property for transfer to another individual or to a private entity rather than for use by the state itself, the judicial review of the taking is paramount." *Id*.at 72. The public-use requirement's basic purpose is to prevent a flagrant abuse of legislative power in taking private property from one individual simply to give it to another. *Id*. Sunoco's status as a common carrier does not give them a pass to avoid fulfillment of the public use and necessity requirements. If the statute is not narrowly construed and interpreted, it further supports the idea that a common carrier may use the eminent domain power without

compliance with the public need and necessity requirements. Because the statute's limited language ensures that only projects serving a public use and necessity should go forward, the Court should find in favor of Appellant.

IV. CONCLUSION

"Petroleum" as used in R.C. 1723.01 must be read in the narrowest sense to uphold the constitutional protections of private property rights. The General Assembly did not include expansive language in the statute, and the holdings of this Court require a narrow construction and heightened scrutiny in review of the eminent domain statute. In order to honor the constitutional limitations upon the eminent domain power and the holdings of *Norwood*, the Appellate Court should have found that the term "petroleum" did not include the pure butane and pure propane planned to be transported by the Sunoco pipeline. Instead, the ambiguity should have been resolved in favor of the private landowner and the statute interpreted by the language on its face—that "petroleum" is a whole product and not its derivative parts. For these reasons, we respectfully ask the Court to overturn the lower court's decision and find in favor of Ohio property owners in limiting this use of eminent domain power by a private company.

Respectfully submitted,



Chad A. Endsley (0080648)
(Counsel of Record)
Leah F. Curtis (0086257)
Amy Milam (0082375)
Ohio Farm Bureau Federation, Inc.
280 N. High Street
P.O. Box 182383
Columbus, OH 43218-2383
Phone: (614) 246-8256
Fax: (614) 246-8656
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Amici Curiae,
Ohio Farm Bureau Federation, Inc. and
Harrison County Farm Bureau

CERTIFICATE OF SERVICE

I certify that, on August 21, 2017, a copy of this brief was served by regular electronic mail upon the following counsel of record:

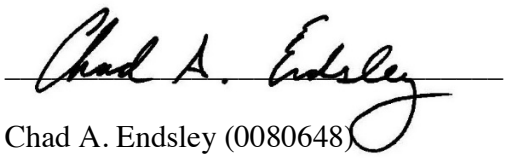
Nicholas I. Andersen (0077732)
(Counsel of Record)
Eric McLoughlin (0082167)
Jessica L. Samuel (0089232)
Arenstein & Andersen, Co., LPA
6740 Avery Muirfield Dr., Ste B
Dublin, OH 43017
Telephone: (614) 602-6550
Fax: (866) 309-0892
Email: nick@aacolpa.com
eric@aacolpa.com
jessica@aacolpa.com
Counsel for Appellant, Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust

Jordan S. Berman (0093075)
(Counsel of Record)
Assistant Attorney General
Constitutional Offices Section
30 E. Broad St., 16 Fl.
Columbus, OH 43215
Telephone: (614) 466-2872
Fax: (614) 728-7592
Jordan.berman@ohioattorneygeneral.gov
Counsel for Ohio Attorney General, Mike DeWine

James B. Hadden (0059315)
(Counsel of Record)
Murray Murphy Moul + Basil LLP
1114 Dublin Rd.
Columbus, OH 43215
Telephone: (614) 488-0400
hadden@mmmb.com
Counsel for Association of Oil Pipe Lines, American Petroleum Institute, and Ohio Chemistry Technology Council
Amici Curiae in Support of Appellee

Kathleen M. Trafford (0021753)
(Counsel of Record)
Ryan P. Sherman (0075081)
L. Bradfield Hughes (0070997)
Christopher J. Baronzzi (0078109)
Porter Wright Morris & Arthur
41 S. High St.
Columbus, OH 43215
Telephone: (614) 227-2000
Fax: (614) 227-2100
Email: ktrafford@porterwright.com
rsherman@porterwright.com
lhughes@porterwright.com
cbaronzzi@porterwright.com
Counsel for Appellee, Sunoco Pipeline, L.P.

C. Craig Woods (00107032)
(Counsel of Record)
Andrew H. King (0092539)
Squire Patton Boggs (US) LLP
2000 Huntington Center
41 South High Street
Columbus, OH 43215
Telephone: (614) 365-2700
Fax: (614) 365-2499
Email: craig.woods@squirepb.com
Andrew.king@squirepb.com
Counsel for Defendant-Appellee Enterprise TE Products Pipeline Company, LLC



Chad A. Endsley (0080648)