In the Supreme Court of Ohio

OHIO POWER COMPANY,	:	Case No. 2021-1168
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the Fourth Appellate
v.	:	District, Case Nos. 20CA19, 20CA20,
	:	20CA21 and 20CA22
MICHAEL BURNS, *et al.*,	:	
	:	
Defendants-Appellees.	:	
	:	

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I. INTRODUCTION

In this appeal, Ohio Power Company ("AEP"),[1] a private for-profit utility, asks this Court to change the law and permit AEP to take overbroad easements from landowners without any third party, let alone a court, reviewing the easement terms for necessity. Such a bold request defies the judiciary's role in eminent domain proceedings, as established by this Court's precedent and by statute. AEP is clear that it makes this request because this Court recognized landowners have a right to challenge and then appeal necessity issues, and landowners have hired counsel to protect their constitutional rights. This case exemplifies why Ohio law does not just trust these private for-profit companies to simply do the right thing, and a ruling in AEP's favor would encourage continued eminent domain abuse.

The Fourth District's opinion was unremarkable and followed Ohio law. It remanded and instructed the trial court to "hold a R.C. 163.09(B) hearing to determine whether the specifically contested terms of the easements are necessary." (R. 45, App'x 39, *Fourth Dist. Op.*, ¶ 59.)[2] This Court should affirm the Fourth District Court of Appeals' decision, reaffirm Ohio courts' "critical" role in eminent domain proceedings, and permit the trial court to complete a necessity analysis in this case.

A. Ohio courts have a "critical" role in ensuring that an appropriating agency "takes no more than necessary."

This Court has clearly delineated the constitutional role the judiciary plays in an eminent domain case like this one:

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[1] Ohio Power is a subsidiary of AEP, and, as Appellee's counsel explained at the hearing, the two entity names are referred to interchangeably in the transcript and some of the documents. (R. 50, Supp. 111, Tr. 10:19–21.)

[2] As AEP did, and rather than cite to four records, the Landowners cite to the record in Case No. 20AP08.

> [O]ur role—though limited—is a critical one that **requires vigilance** in reviewing state actions for the necessary restraint, including **review to ensure that the state takes no more than that necessary** to promote the public use, and that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose.

City of Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 69 (internal citations omitted) (emphasis added).[3] And, this Court emphasized that "**a court's independence is critical"** in situations like this, where "**the authority for the taking is delegated to another**" and "in such cases the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner." *Id.* at ¶ 71 (citing *Pontiac Improv. Co. v. Board of Comm'rs*, 104 Ohio St. 447, 453–4, 135 N.E. 635 (1922)) (emphasis added). Accordingly, the Ohio Legislature requires courts to analyze proposed takings and make necessity decisions as "to any or all of the property or other interests sought to be appropriated." *See* R.C. 163.09(B)(2) (App'x 64). And the burden of proof on those matters is on the appropriating agency. R.C. 163.09(B)(1) (App'x 64).

AEP now argues that landowners cannot deny the necessity of the property rights sought through an AEP easement, and a court may not review the rights AEP seeks through its delegated authority to exercise the State's power of eminent domain. This argument does not comport with this Court's precedent or statute. The Fourth District summarized AEP's audacious position: that

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[3] Legal commentators recognized the import of this decision, because it:

> [R]ebalanced the takings scale by withdrawing the judicial thumb, placed there under prior law in the form of judicial deference, and by allowing the property owners' pan to naturally weigh against the legislature's pan . . . [Norwood recognized that] judicial deference cannot bleed into judicial abdication.

Trafford, *City of Norwood v. Horney - Much More Than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce It*, 48 Akr.L.R. 46, 51 (2015).

"[AEP] alone can determine the extent of an appropriation, presumably even taking a fee simple title in the Landowners' properties, constrained only by AEP's financial ability to compensate the Landowners[.]" (*See* R. 45, App'x 38, *Fourth Dist. Op.*, ¶ 56.) The Fourth District correctly responded: "'[w]e think that the power of the state is not so great, nor the plight of the citizen so helpless.'" (*See id.* at App'x 37-38, ¶ 55 (quoting *Jackson v. State*, 213 N.Y. 34, 35, 106 N.E. 758 (1914) (Cardozo, J.)).)

B. AEP and its Amici make clear they seek a change in the law because this Court recognized landowners' right to challenge and appeal necessity, and because landowners have hired counsel to protect their rights.

In *State ex rel. Bohlen v. Halliday*, 164 Ohio St.3d 121, 2021-Ohio-194, 172 N.E.3d 114, which arose from these very same cases, this Court recognized that Ohio landowners have a right to challenge the necessity of easements and a right to appeal necessity determinations. The Court also held – over AEP's objection that its desired takings must be resolved in "expeditious litigation" and with "all possible speed" – that a private utility cannot simply barge ahead to try compensation while the necessity of easement terms are decided, because "the scope of the takings" may be altered on appeal. *Id.* at ¶ 26.

AEP and its amicus rehash the same arguments here in a blatant collateral attack of the *Halliday* prohibition decision. To avoid this legal process that AEP finds inconvenient for its purposes, AEP argues that the Court should simply not recognize a landowner's right to challenge the necessity of takings. (*See, e.g.*, AEP Br. at 9.) AEP also criticizes Landowners for hiring "sophisticated counsel" who are utilizing the statutory process to protect landowners' rights. (*Id.* at 10–12.) AEP laments that "[l]andowner challenges to anything other than compensation were rare in Ohio until recently" and "AEP and Ohio's other public utilities had little experience with such challenges until the past five to ten years." (*Id.* at 8.) *Norwood*, which reestablished long standing principles of Ohio law that now form the basis of landowners' challenges, was only

decided in 2006. And the legislative amendments passed in conformance with Norwood were not enacted until 2007. That landowners were subject to the whims of utility companies prior to *Norwood*, but are now hiring counsel to protect their rights under the law, does not justify AEP's position. This Court should not permit AEP to collaterally attack its previous decisions, and, of course, it should not change the law simply because AEP finds it inconvenient.

C. This case exemplifies why the law requires judicial review and does not simply trust private for-profit utilities to do the right thing.

The Fourth District found that "[t]he need for the trial court to engage in a vigilant review to ensure the appropriation is narrow and that Ohio Power is acting fairly and not taking more than necessary" is important, but was "particularly true" under these circumstances. The Fourth District found that AEP's "cavalier approach" to eminent domain proceedings "reflected a dulled sensitivity to the constitutional import of eminent domain proceedings." (R. 45, App'x 30-31, *Fourth Dist. Op.*, ¶ 40.) AEP admitted: (1) it uses two or three different easement forms with narrower or broader terms based—***not on necessity***—but on whether they are negotiating, anticipating litigation, and who is representing the landowners; (2) until recently it included broad easement terms that did not even limit the kilovoltage transmitted over the easements based on the project; and (3) conceded at the hearing it originally sought distribution and other rights it never needed.

D. Adopting AEP's position will allow for rampant eminent domain abuse to continue.

AEP admits that landowners' recent challenges have forced it to reevaluate its business practices and make some nominal attempt to narrow its easements. Without the ability of landowners to make these challenges, there is nothing preventing AEP from reverting back to seeking broad blanket easements in every case untethered to the needs of an approved project. (AEP Br., at 12.) Other utilities have already begun arguing that, if given a blanket easement, a

utility may change how it uses the easement beyond what was originally needed for a project without any additional compensation to landowners. (*See* Amicus Br. of Columbia Gas, et al., p. 28 (arguing that "[u]nder Ohio law, once an area is encumbered by an easement, utilizing additional (or allegedly unnecessary) rights within the subject area does not further encumber the easement area.") Thus, unless the Fourth District's decision is affirmed and utilities are required to appropriately tailor their easements, a utility may take a broad easement without judicial review based on its own determination that it is "necessary" for a certain project, and then do whatever it (or whoever it assigns or grants rights to) wants with that easement moving forward. Under AEP's desired world, an easement taken – and not reviewed by any court or agency – because it is "necessary" for a 23 kV line could later become a utility superhighway containing a massive 765 kV line, transformers, distribution stations, a natural gas pipeline, and cable lines, all without review or additional compensation to the landowner.

In light of AEP's admitted attempt to take more than necessary, the Fourth District recognized the danger of a utility company's unchecked power and acted to protect private property rights in this case—not by ruling on necessity, but simply mandating that the trial court perform its obligations under Ohio law and "ensure that the state take no more than that necessary to promote the public use." *Norwood*, 2006-Ohio-3799, ¶ 69. This Court should do the same.

II. STATEMENT OF FACTS

A. AEP approval for a 138kV transmission line project.

In 2017, the Ohio Power Board of Directors gave initial approval to AEP for a project in Marietta, Ohio to enhance the reliability of the electric transmission network. (*See* Supp. 10, 14-15.) The Board of Directors determined that the existing 23kV network should be replaced with a 138kV network. (*Id.*) The project, known as "The Bell Ridge-Devola 138kV Transmission Line Project" (the "Project") included miles of new 138kV transmission lines and required siting, rights

of way, and property purchases. (*See* Supp. 1, 10-11.) In August 2018, the Siting Board issued a certificate of environmental compatibility and public need for the Project. (Supp. 14-42.) The Ohio Power Board of Directors issued a December 2019 resolution approving the Project. (Supp. 9-12.)

B. AEP filed petitions seeking to appropriate broad easement rights over the Landowners' properties. The Landowners challenged the necessity of these overbroad easements.

In 2020, AEP filed petitions seeking to appropriate permanent easement rights of the Landowners through a Proposed Easement, which was attached to the petitions as Exhibit 2. (*See* R. 1, Pet., ¶ 6.) AEP alleged that it currently possessed an easement across each of the Landowners' properties for an existing electric power line, but the replacement line would require a wider easement area.[4] (R. 45, App'x 16, *Fourth Dist. Op*, ¶ 7.) The Landowners filed answers and, as relevant here, raised a specific denial pursuant to R.C. 163.08, alleging that various of the permanent property rights that AEP sought to acquire were not necessary, because the appropriations were overly broad and went beyond what was necessary for the construction and operation of the Project. (*See* R. 6, Verified Answer.)

C. The trial court held a necessity hearing, where the Landowners presented evidence that AEP filed untruthful verifications and sought unnecessary rights.

The trial court held a consolidated evidentiary hearing on the Landowners' specific denials on August 10, 2020. During the hearing, Landowners raised two issues: (1) whether AEP's Petitions against certain Landowners should be dismissed based on AEP's failure to comply with R.C. 163.05; and (2) whether AEP sought to acquire permanent easement rights from the

[4] Ryan and Denay May's property purportedly did not have an existing easement over it; the petition against them did not contain this allegation.

Defendant Landowners in excess of those rights necessary for the construction of its high voltage Project.

AEP presented one witness at the hearing: Kelly Sue Rentschler, a Senior Right of Way Agent for AEP's affiliate. (R. 50,[5] Supp. 125, Tr. 24:3–5.) Landowners presented the testimony of Ms. Rentschler on cross-examination, the cross-examination testimony of Thomas Berkemeyer, AEP's Associate General Counsel and Assistant Secretary, and the testimony of Defendant Landowner Michael Burns. (*Id.* at Supp. 209, 232, Tr. 108, 131.) During the hearing, AEP's witnesses admitted that the verifications to their petitions were false. (*Id.* at Supp. 219, Tr. 118; *id.* at Supp. 220, Tr. 119.) And, through cross-examination of AEP's witnesses, the Landowners also established that none of the statutory presumptions applied in this matter and that AEP was seeking unnecessary and overbroad easement rights.

1. AEP's witnesses admitted that the verifications to its Petitions were not truthful.

At the hearing, Mr. Berkemeyer reviewed the verifications for the Bohlen and Burns petitions. In both cases, the individual verifying AEP's petition swore, under oath, that she had reviewed the petitions and that they were true and accurate. (R. 50, Supp. 218, 220, Tr. 117, 119.) Both verified petitions contained, as an attachment, minutes from a December 11, 2019[6] Ohio Power board meeting. (R. 1, Pet.) Yet, the verifications both pre-dated the documents they purported to verify. (R. 50, Supp. 218, 220, Tr. 117, 119.) AEP's assistant secretary admitted that the individual who verified the petitions "couldn't possibly have truthfully verified this petition."

[5] There was a handwritten reference on the Record Index to the August 10, 2020 transcript, but it was not assigned a record number. Consistent with AEP's designation, the Landowners refer to the transcript as "R. 50."

[6] Ohio Power's board assistant secretary admitted that the certificate he signed regarding the meeting was itself incorrect and contained the wrong date for the meeting. (R. 50, Supp. 210, Tr. 109.)

(*Id.* at Supp. 219, Tr. 118; *id.* at Supp. 220, Tr. 119 (agreeing "there's no possible way [she] could have reviewed and truthfully verified this petition on November of 2019, when the even that she's verifying didn't take place until December 11th of 2019.") Based on these admissions, the Landowners moved for judgment on the pleadings because the flawed verifications did not comply with R.C. 163.05. (*Id.* at Supp. 221, Tr. 120.)

2. AEP admitted that the Power Siting Board did not receive, review or approve the Proposed Easements and did not approve the appropriation of any property.

At the hearing, Ms. Rentschler admitted that the Power Siting Board "was never given the easement documents in these cases." (R. 50, Supp. 179, Tr. 78.) She agreed that the Power Siting Board "did not analyze or make a decision on the easement documents in this case." (*Id.*) She also agreed that the Power Siting Board does not consider, and it's not otherwise involved, in the appropriation of property." (*Id.*) She was unable to identify "where in the OPSB certificate they are approving the appropriation of the property from these specific landowners" or where the Power Siting Board is "approving any appropriation of property." (*Id.*)

3. AEP admitted that the Ohio Power Board did not review the Proposed Easements.

At the hearing, Mr. Berkemeyer also testified regarding the Ohio Power Board's resolution. He admitted that "the Board does not specifically consider the appropriation of individual easements from the landowners." (R. 50, Supp. 211, Tr. 110.) He admitted that the Ohio Power Board "doesn't review the easement terms, or the proposed easement terms." (*Id.*) He admitted that "the Board itself doesn't vote to approve the easement." (*Id.*) The resolution the Ohio Power Board approves does not "list who the property owners are" or "what rights are being sought from those property owners." (*Id.* Supp. 212, Tr. 111.)

4. AEP admitted that it does not seek to appropriate easements based on what is necessary, but instead on whether a landowner will challenge the easement and the identity of landowner's counsel. AEP further admitted that terms in its Proposed Easement were not necessary here.

At the hearing, Ms. Rentschler testified about how AEP has three easements it uses when acquiring property for its projects. AEP has one easement it uses in negotiations with unrepresented landowners. (R. 50, Supp. 142, Tr. 41.) Then, Ohio Power also has a "litigation easement" if the matter is proceeding to litigation and the landowner has counsel. (*Id*.) Finally, Ohio Power has a third easement it uses based on what counsel is representing landowners. (*Id.* at Supp. 166-167, Tr. 65–66 ("during your deposition, you testified that this is a document that is being used because Vorys is counsel for the landowners [in] this case. Isn't that true? A. In part.")[7] The easement AEP uses with unrepresented parties is designed to acquire the broadest rights, and, from there, AEP modifies it appropriations based on landowners' counsel. (*Id.* at Supp. 142, 167, Tr. 41, 66.)

Ms. Rentschler testified broadly that, in her opinion, all of the easement terms that AEP sought to take were "reasonably necessary to safely operate, maintain a high voltage electric transmission line." (R. 45, App'x 19, *Fourth Dist. Op.*, ¶ 13.) Despite this broad and unsupported conclusory statement, and despite AEP using the narrowest form it uses when the landowners are represented by the Vorys firm, AEP's witnesses admitted that the appropriation was still overbroad in this case.[8]

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[7] In other cases, AEP's witnesses have testified that "the Proposed Easements were not prepared to meet Ohio Power's needs for its 69kV Project. Instead, [AEP witness] testified that the Proposed Easements were Ohio Power's 'standard forms' that it seeks to obtain whether it is constructing a 69kV single pole line or a 745kV transmission line with steel towers." *See* Fourth Dist. Reply Brief, Ex. A, Decision and Entry, *Ohio Power Company v. Clifton Bros. Land LLC*, Pickaway Case No. 2019-CI-0194, ¶ N (March 2, 2020) (finding various Ohio Power easement terms to be not necessary).

[8] AEP's witnesses have conceded the same in other cases. *See* Fourth Dist. Reply Br. Ex. A, *Clifton Bros.* (summarizing AEP witness testimony that "the Proposed Easements provided Ohio Power with broad rights beyond those rights necessary for its 69kV single pole transmission line Project.")

a. At the necessity hearing, and only after being challenged, AEP admitted it did not need to acquire the right to construct distribution lines and abandoned that appropriation.

The Proposed Easement that AEP attached to its petition expressly sought to acquire permanent easement rights to construct not only transmission lines, but also electric distribution lines on the Property. (R. 1, Pet., Ex. 2.) After the hearing began, and after Landowners' had challenged AEP's need to acquire such rights, AEP stated that it was no longer seeking to acquire the right to construct distribution lines as part of the Proposed Easement. (R. 25, Order, p. 1.) At the hearing, AEP's witness acknowledged that "distribution is not necessary for this project." (R. 50, Supp. 201, Tr. 100.) Another AEP witness acknowledged that AEP only removed this right "after the landowners challenged the necessity of the easement" and was "willing to abandon that portion of the easement." (*Id.* at Supp. 181, Tr. 80.)

b. AEP sought rights for speculative future concerns or to simply save itself some money.

Ms. Rentschler testified generally about the Project and AEP's plans for the Project, and testified that AEP was seeking to condemn various permanent rights not necessary for the Project based upon speculative and dubious future concerns not currently in AEP's Plans. (*See* R. 45, App'x 19, *Fourth District Op.*, ¶ 12.) (noting that AEP determined "that distribution is not immediately planned for this line and therefore, we are not seeking that right").) This was done just to save AEP's money, even though these rights might never be needed in the 100 plus years that the easement would be in effect.

c. AEP could not identify why it needed an anti-abandonment term for this Project and admitted it could "negotiate" that term.

The Proposed Easement contains an anti-abandonment provision. When asked why this provision was necessary, Ms. Rentschler was unable to explain why "when the easement is no longer in use by AEP, why is it necessary that it maintain the easement?" She could only say

"sometimes, we may need to come back and build the line again. I can't - - I can't speak to that more than – than that." (R. 50, Supp. 170, Tr. at 69.) She further testified that AEP could "negotiate" on including the anti-abandonment terms or not. (*Id.* at Supp. 169, Tr. 68.)

D. The trial court applied an irrebuttable presumption of necessity and refused to review the necessity of each of the easement rights that AEP sought to take.

On September 2, 2020, the trial court issued an Order on all Pending Motions ("Order"). (R. 25.) First, the court denied Landowners' Motion for Judgment on the Pleadings. (*Id.*, ¶ 6.) Then, it ruled against the Landowners on their necessity challenge by improperly applying, in the first instance, an irrebuttable presumption, and then purportedly in the alternative other presumptions in favor of AEP. (*Id.* ¶¶ 7-8.) The trial court expressly refused to review each of the various easement rights that AEP seeks to take. (*Id.* ¶ 10 ("Any argument concerning the extent of the take will be heard as part of Defendants' alleged damages and just compensation at the compensation trials.").) It also ruled that AEP's mid-hearing withdrawal of its attempt to take permanent rights related to distribution lines, in the face of the Landowners' challenge, did not constitute abandonment under R.C. 163.21 and denied Landowners' request for attorneys' fees. (*See* R. 25, Order.) Landowners filed a timely appeal to the Fourth District.

E. The Fourth District reversed the trial court's decision.

The Fourth District reversed the trial court, finding that the irrebuttable and rebuttable presumptions in R.C. 163.09(B)(1)(a)–(c) did not apply under these facts. (R. 45, App'x 49, *Fourth Dist. Op.*, ¶ 77.) As to the irrebuttable presumption, the Fourth District held that "[t]he irrefutable evidence is that the Siting Board and the Ohio Power Board did not review or approve the easements sought from the Landowners. Thus the trial court erred in applying the irrebuttable presumption for the necessity for the proposed easements." (*Id.* at App'x 35, ¶ 51.) Likewise, the Fourth District noted that "the Ohio Power Board did not review or approve the appropriations

sought from the Landowners," and thus AEP was not entitled to a rebuttable presumption. (*Id.* at App'x 36, ¶ 52.)

With this in mind, the Fourth District rejected AEP's position "that it alone can determine the extent of an appropriation, presumably even taking a fee simple title in the Landowners' properties, constrained only by [AEP]'s financial ability to compensate the Landowners accordingly." (*Id.* at App'x 37, ¶ 54.) The Fourth District remanded to the trial court to conduct a necessity review of the easement terms. (*Id.* at App'x 49, ¶ 77.) Finally, it found that the Landowners were entitled to fees and costs after being forced to a hearing on AEP's pursuit of the right to construct distribution lines. (*Id.*)

III. STANDARD OF REVIEW

Whether a taking is necessary and for a public use are questions of law. *Norwood*, 2006-Ohio-3799, ¶ 67. The decision in this case also turns on the interpretation of Chapter 163 of the Ohio Revised Code. Because the interpretation of a statue is a question of law, it is reviewed de novo. *E.g., State v. Vanzandt*, 142 Ohio St. 3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 6. "A court's main objective in applying a statute is to determine and give effect to the legislative intent." *Stewart v. Vivian*, 151 Ohio St. 3d 574, 2017-Ohio-7526, 91 N.E.3d 716, ¶ 23.

IV. ARGUMENT

Courts play a fundamental role in appropriation cases. "[I]t is for the courts to ensure that the legislature's exercise of power is not beyond the scope of its authority, and that the power is not abused by irregular or oppressive use, or use in bad faith. And when the authority is delegated to another, the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner. *Norwood*, 2006-Ohio-3799, ¶ 70 (cleaned up).

But AEP ignores this principle, as well as other fundamental principles of property rights under Ohio law:

- **Landowners' property rights are fundamental and protected as inviolate in the Ohio Constitution.** For 150 years, this Court has provided that "[t]he right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself." *Id.* at ¶ 36 (citing *Bank of Toledo v. Toledo*, 1 Ohio St. 622, 664 (1853)).
- **The grant of the governmental power of eminent domain to a private corporation like AEP must be strictly construed and all doubts resolved in favor of landowners.** *Norwood*, 2016-Ohio-3799, ¶ 71; *Pontiac Improv. Co.*, 104 Ohio St. at 454 (1922).
- **An appropriating agency has the burden to show that a take is necessary.** R.C. 163.021. Courts play a critical constitutional role in the eminent domain process by ensuring that a condemning authority "**takes no more than that necessary to promote the public use.**" 2006-Ohio-3799, ¶ 69 (emphasis added).

Norwood reestablished long-standing principles of Ohio law that in the Court's view, had been reduced improperly to "hortatory fluff." *Id.* at ¶ 66; *see, e.g.*, *Cooper v. Williams*, 5 Ohio 391, 392 (1832) (appropriating agency may take only that "which is necessary" and may not take a "surplus" of rights); *Buckingham v. Smith*, 10 Ohio 288, 297 (1840) (dismissing petition and recognizing power of eminent domain is limited to the rights necessary to accomplish the public project); *State ex rel. Sun Oil Co. v. Euclid*, 164 Ohio St. 265 (1955), paragraph 4 of the syllabus (holding that necessity cannot include acquiring property rights "for some contemplated but undermined future use").

When a court performs its critical necessity review, it must distinguish between the question of whether the utility project is necessary, which is not in dispute here, and the question of whether the to-be-appropriated easement rights, i.e. the appropriation, is necessary for the utility project based on the project plans and specifications. The Fourth District did not make a determination on necessity of the to-be-appropriated easement rights; it simply directed the trial court to perform its role and review the necessity question with more than "artificial judicial deference." (R. 45, App'x 37, *Fourth Dist. Op.*, ¶ 55 (citing *Norwood*, 2006-Ohio-3799, ¶ 61).)

For the reasons below, this Court should affirm the Fourth District's opinion and reject AEP's three propositions of law.

Appellant's Proposition of Law No. 1: A trial court determines the necessity of an appropriation of an easement by a preponderance of the evidence, subject to the presumptions set forth in R.C. 163.09(B). If a landowner specifically denies that the easement is necessary, the rebuttable presumptions set forth in R.C. 163.09(B)(1)(a) and R.C. 163.09(B)(1)(b) may be rebutted only upon the landowner's presentation of evidence of bad faith, abuse of discretion, or improper purpose by the agency.

> **Response: The Court should not issue an advisory opinion regarding how a landowner can rebut certain presumptions when the lower court determined that the presumptions did not apply and AEP did not challenge those determinations. Moreover, a landowner can rebut a presumption of necessity by presenting evidence that the appropriation is not necessary; a showing of bad faith, abuse of discretion, or improper purpose is not required.**

AEP's first proposition of law is limited. On its face, AEP's first proposition of law is limited – indeed, AEP devoted only two paragraphs to this proposition in its memorandum in support of jurisdiction. It relates only to how the rebuttable presumptions set forth in R.C. 163.09(B)(1) may be rebutted, if applicable.

The Court should not provide an advisory opinion. AEP's first proposition of law does not fit the posture of this case. AEP's proposition of law states that "[a] trial court determines the necessity of an appropriation of an easement by a preponderance of the evidence, subject to the

presumptions set forth in R.C. 163.09(B)." The Fourth District's decision does not deviate from that process, it simply found that the rebuttable presumptions did not apply under these facts. (R. 45, App'x 37, 39-40, *Fourth Dist. Op.* ¶¶ 53, 59.) Unlike the irrebuttable presumption challenged in Proposition of Law No. 2, AEP never sought this Court's review to determine whether the rebuttable presumptions apply under these facts. AEP's proposition of law then continues that "the rebuttable presumptions set forth in R.C. 163.09(B)(1)(a) and R.C. 163.09(B)(1)(b) may be rebutted only upon the landowner's presentation of evidence of bad faith, abuse of discretion, or improper purpose by the agency." Although the parties disagree as to the rebuttal standard, a decision on how to rebut those presumptions would be advisory, because the Fourth District found the presumptions to be inapplicable.

Any advisory opinion from this Court should reject AEP's flawed proposed standard. If the Court does provide an advisory opinion on this proposition of law, it should provide that a landowner may rebut the statutory presumptions, if applicable, by providing evidence that the proposed easement terms are not actually necessary for the relevant project. AEP's proposed standard, that a presumption may only be rebutted through a showing of bad faith, abuse of discretion, or improper purpose, is based on a misinterpretation of *Norwood*.

AEP improperly seeks to expand this proposition of law. AEP attempts a sleight of hand by addressing its first two propositions of law together in order to hide its attempts to expand the proposition of law this Court accepted. Indeed, in addition to addressing how presumptions may be rebutted, AEP now argues that this limited proposition of law requires the Court to address:

- Whether the term appropriation, as used in Chapter 163 of the Ohio Revised Code, includes individual easement terms;

- Whether a court may review individual easement terms for necessity purposes, or whether a private utility taking unnecessary and overbroad easements is only an issue of compensation;
- Whether the Fourth District correctly applied a strict construction of the eminent domain statute in this case involving a private utility company appropriating property;
- How Ohio courts should define necessity;
- Whether *Norwood* applies outside of blight cases;
- Whether the rebuttable presumption in R.C. 163.09(B)(1)(a) should have been applied under these facts by the Fourth District; and
- Whether the rebuttable presumption in R.C. 163.09(B)(1)(b) should have been applied under these facts by the Fourth District.

On the face of the matter, none of these issues are included in AEP's First Proposition of Law. This Court should reject the invitation to address AEP's new and expanded arguments at this stage.

AEP's additional arguments are flawed. If this Court chooses to address these expanded issues, it must reject AEP's attempt to effectively eliminate the judiciary's role in eminent domain proceedings. Indeed, AEP's expanded arguments seek to prohibit judicial review of its easements.

A. AEP's Proposition of Law No. 1 is moot and would require an advisory opinion. The Court should find that Proposition of Law No. 1 was improvidently accepted.

R.C. 163.09(B)(1)(a) and (b) set out rebuttable presumptions relevant to necessity determinations. AEP's first proposition of law involves how the presumptions set forth in R.C. 163.09(B)(1) *may be rebutted*; not whether the presumptions *should apply to this case*.

The Fourth District determined that the trial court erred, in part, because the rebuttable presumptions did not apply based on these facts. (*See* R. 45, App'x 34, 37, 49, *Fourth Dist. Op.*,

¶¶ 47, 54, 77.) Unlike AEP's challenge to the Fourth District's decision on the irrebuttable presumption in the Second Assignment of Error, AEP does not actually challenge the Fourth District's determination that the rebuttable presumptions in (1)(a) and (1)(b) do not apply. Instead, it challenges how a landowner ***could rebut*** those presumptions ***if*** they did apply.

It would be an advisory opinion for this Court to address how a landowner can rebut presumptions that have been determined to be inapplicable. This Court should not render an advisory opinion and should instead find this proposition of law as improvidently accepted. *See, e.g., State ex rel. White v. Kilbane Koch*, 96 Ohio St. 3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18 (stating Court's "well-settled precedent that we will not indulge in advisory opinions"); *Barclay Petroleum, Inc. v. Bailey*, 156 Ohio St.3d 77, 2018-Ohio-5136, 123 N.E.3d 947, ¶ 1 (dismissing appeal as "improvidently accepted" after oral argument).

B. If the Court issues an advisory opinion, it should provide that a landowner may rebut the rebuttable presumptions in R.C. 163.09 by presenting evidence that the easement terms are not necessary for the Project.

AEP proposes an incorrect standard for rebutting the statutory presumptions. R.C. 163.09(B)(1) places the burden of proving necessity on the utility by a preponderance of the evidence. As the Fourth District correctly held, the presumptions in R.C. 163.09(B)(1), if applicable, "shift the evidentiary burden of providing evidence" but "it does not [a]ffect the burden of proof" and "a rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact." (R. 45, App'x 33, *Fourth Dist. Op.*, ¶ 46 (quoting *Horsley v. Essman*, 145 Ohio App.3d 438, 444, 2001-Ohio-2557, 763 N.E.2d 245(4th Dist. 2001)).) If the rebutting party provides evidence that "'counterbalances the presumption or * * * leave[s] the case in equipoise,' then the presumption disappears and the case must be disposed of on the evidence presented, without reference to the presumption." *Cincinnati Ins. Co. v. DTJ Ents. (In re Hoyle)*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 24 (quoting *In re Guardianship of Breece*,

173 Ohio St. 542, 555, 184 N.E.2d 386 (1962)). Thus, even if AEP had been entitled to a rebuttable presumption, Landowners would simply have to present evidence demonstrating that the terms of the appropriation were not actually necessary for the Project. Here, testimony from AEP's own employees on cross-examination provided sufficient evidence to do so.

Contrary to AEP's arguments, *Norwood* does not require the Landowners to prove bad faith, abuse of discretion, or other impropriety by the condemning agency to rebut the presumptions. Under *Norwood*, Ohio courts must review eminent domain proceedings to ensure an acquiring agency complies with two distinct requirements: "[1] that the state takes no more than necessary to promote the public use * * * **and** [2] that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose." 2006-Ohio-3799, ¶ 69 (emphasis added). These are two distinct criteria supported by different case citations, and a landowner need not prove one to disprove the other. A landowner that provides evidence that a taking is not necessary has sufficiently rebutted the presumption, if applicable, and need not also prove that the state proceeded in bad faith,[9] etc.

AEP's First Assignment of Error seeks an advisory opinion and should be rejected. But even if AEP had challenged the determination that the R.C. 163.09(B) presumptions did not apply, that challenge would fail. And, even if Landowners would have been required to rebut a presumption in this case, AEP advocates for the wrong standard for that rebuttal.

[9] In this case, although it was unnecessary to raise and decide below, the Landowners could have demonstrated bad faith or an abuse of discretion based on AEP's flawed and untruthful verifications, by AEP seeking easements based not on necessity but on whether the landowners were represented and who was representing landowners, on AEP seeking unnecessary distribution rights but only dropping that term after a challenge and at the hearing, and on AEP seeking to appropriate an anti-abandonment terms it has no rationale for seeking.

C. AEP cannot expand its appeal to issues not included in its proposition of law.

As explained above, the only legal dispute presented in AEP's first proposition of law is the standard for rebutting statutory presumptions, and resolving that issue requires an advisory opinion because the Fourth District found that the rebuttable presumptions do not apply under these facts. Any other issues are outside the scope of the proposition of law accepted. But, as set forth above, AEP tries to expand this proposition of law. The Court should not address issues not included in the propositions of law. *See State v. Abrams*, 39 Ohio St. 2d 53, 55, 313 N.E.2d 823 (1974) ("[T]his court will consider only that proposition of law which presents an issue assigned as error and considered by the Court of Appeals"); *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, ¶ 18 (declining to address issue that was not "set forth [in a] proposition of law * * * in its memorandum in support of jurisdiction").

D. AEP's new and expanded arguments are flawed and should be rejected if considered.

1. The appropriation in this case is set forth in the terms of the easement. Therefore, Ohio courts must review the terms of AEP's easement for necessity.

All parties agree that pursuant to R.C. 163.09, the Landowners may file an answer challenging the "necessity for the appropriation." R.C. 163.09(B)(1) (App'x 64). AEP now argues that appropriation is synonymous with project, and thus the Landowners can challenge the necessity of the project only—not individual easement terms. (AEP Br. 23-25.) In other words, AEP wants to define the term appropriation to ensure that no court can ever review whether AEP's easement terms are actually necessary.

The definition of "appropriation" in the context of a necessity review should start with this Court's constitutional parameters on necessity: a court must perform a "review to ensure that **the state takes no more than that necessary** to promote the public use." *Norwood*, 2006-Ohio-3799,

¶ 69 (emphasis added). In other words, the necessity review is focused on the scope of what the state takes from private landowners. Here, the easement terms establish what the state is taking, and therefore a court must review the easement terms for necessity.

In the prohibition action arising from this matter, this Court similarly recognized that "**the scope of the property rights** that must be valued" was squarely on appeal after a necessity hearing, and that the Fourth District's decision would determine "**the scope of the takings**." *State ex rel. Bohlen*, 2021-Ohio-194, at ¶ 26 (emphasis added). As an Ohio trial court recently elaborated, "R.C. Chapter 163 clearly contemplates that Courts are to review the necessity of 'the appropriation' and 'other interests at issue,' not the necessity of the project itself." (*See* R. Fourth Dist. Reply Br. Ex. A, Decision and Entry, *Ohio Power Company v. Clifton Bros. Land LLC*, Pickaway Case No. 2019-CI-0194, ¶ 3 (March 2, 2020) (finding various Ohio Power easement terms to be not necessary). AEP's proposed interpretation of the word "appropriation" would render this Court's prohibition decision meaningless, as AEP does not believe courts have any right to determine the necessity of the scope of rights taken, only whether the overall project is necessary.

In order to argue that the term "appropriation" is synonymous with the term "project" in Chapter 163 of the Ohio Revised Code, AEP highlights a few examples where the word swap isn't facially absurd. But attempting to use the terms interchangeably elsewhere in the same chapter does lead to absurd results. *See, e.g., Brooks Capital Servs., LLC v. 5151 Trabue Ltd.*, 10th Dist. Franklin, No. 12AP-30, 2012 Ohio App. LEXIS 3901, at *11 (noting that "when interpreting a statute, courts must avoid an illogical or absurd result" and instead "must seek to construe the statute to operate sensibly" (citing *State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 2009 Ohio 2522, 909 N.E.2d 610, ¶ 34 (Pfeifer, J., dissenting))).

Under Chapter 163.08, a landowner would have the right to challenge "the agency's right to make [the project.]." Chapter 163.02(A) would read "all [projects] of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code. . ." Chapter 163.02(E) would find that voluntary conveyances would be deemed a "sale under the threat of [project] for a public use." Appropriation and project are not used interchangeably in Chapter 163 of the Revised Code.

Finally, R.C. 163.041 does not define appropriation and does not purport to do so. This statute provides general guidance on a form that an appropriation agency should use to explain a taking to landowners in non-legalese, but it is not written in stone; it only requires the notice to "be substantially in the" form provided. The form should be amended as appropriate to each case, whether the taking is in fee, for an easement, etc. And, while the suggested form contains a blank for the "general description of the property or easement to be acquired" it also later requires the provision of a "legal description of your property that [the agency] needs." Nothing in this statute prohibits a court from engaging in its constitutional review of easement terms "to ensure that the state takes no more than that necessary." *Norwood*, 2006-Ohio-3799, ¶ 69.

2. The lower courts did not attempt to define necessity below, and this Court should not do so in the first instance. If the Court does so, it should hold that easement terms must be reasonably necessary for the project selected and that courts may not simply defer to private entities using the governmental power of eminent domain.

a. The lower courts did not attempt to provide a definition of necessity. This Court should not do so in the first instance.

The definition of necessity was not decided by the courts below. The Fourth District's decision was focused instead on the procedural mechanisms of determining necessity. In the end, the Fourth District remanded the case to the trial court to "hold a R.C. 163.09(B) hearing to determine whether the specifically contested terms of the easements are necessary" and the Court expressly stated that "because the trial court did not review and determine the necessity of the

easement terms individually, we will not engage in a review of them for the first time on appeal." (R. 45, App'x 40, *Fourth Dist. Op.*, ¶ 59.) Nevertheless, AEP asks this Court to supply a definition of necessity in the first instance within a proposition of law that does not call for such a definition. The proper course of action would be for the lower courts to decide the necessity issue, and for the parties to appeal the definition actually applied, if necessary, rather than appealing on speculation.

b. AEP incorrectly argues that the Court should adopt a definition of necessity that reverts back to the type of deference rejected in Norwood.

If the Court should decide to define necessity in the first instance, it should not adopt AEP's proposed definition. AEP asks this Court to defer to private for-profit utilities on what is necessary, with "necessary" meaning whatever is "reasonably convenient" for AEP. This argument flies in the face of *Norwood*, and ignores the strict scrutiny applied when private entities are granted the governmental power of eminent domain.

AEP largely cites to lower court decisions released before *Norwood* "withdr[ew] the judicial thumb" placed in favor of appropriating agencies "under prior law in the form of judicial deference." Trafford, 48 Akr.L.R. at 51. Indeed, this Court recognized in *Norwood* that while some deference may be appropriate in some circumstances, where, like here, "**a court's independence is critical, particularly when the authority for the taking is delegated to another . . . courts must ensure that the grant of authority is construct strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner.**" *Norwood*, 2006-Ohio-3799, ¶ 71 (citing *Pontiac Improvement Co.*, 104 Ohio St. at 453-454) (emphasis added). Indeed, the General Assembly has provided that the taking agency must "show by a preponderance of the evidence that the taking is necessary" and the agency must be held to that burden, especially when it is a private for-profit enterprise. R.C. 163.021(A) (App'x 54); R.C. 163.09(B)(1) (App'x 64).

c. No one is calling for an "absolute" necessity standard. Instead, if the Court adopts a standard, it should adopt a reasonably necessary standard based on the actual plans and specifications for a given project.

Although the Fourth District held AEP to its burden and did not simply defer to AEP's say-so, it never provided a definition of necessity that the trial court should apply. AEP's warnings against an "absolute" necessity standard is a strawman, as no one is advocating for that standard.

AEP's proposed standard—which calls for complete deference to a utility and permits it to take anything it deems convenient for any current or potential future use—cannot be squared with a court's role to ensure an agency takes no more than that necessary, the strict construction of eminent domain statutes against private agencies, and the ordinary meaning of the word necessary.

On the other hand, Landowners acknowledge that a court may not strip a utility of all discretion by adopting a strict physical necessity test. The appropriate standard sits in the middle. To determine whether appropriation terms are necessary, a court should look at the plans and specifications for a project to determine if there is a reasonable current and actual project need for the right taken. *See Columbus City v. Lockbourne*, C.P. No. 10-CV-01-362, 2011 Ohio Misc. LEXIS 14701, at *14 (Apr. 20, 2011) ("plans and specifications are important in intelligently determining the necessity of the appropriation of real property"); Fourth Dist. Reply Br. Ex. A, *Clifton Bros.* Order, ¶ 5 ("Ohio Power seeks to acquire easement rights from the Defendant Landowners **in excess of those rights reasonably necessary to complete Ohio Power's Project.**" (emphasis added)). This standard recognizes an agency's discretion in deciding what projects will serve a public use and the design and implementation of those projects. But, after the agency designs its plans for a project, this standard also prevents an agency from taking speculative easement rights that it has no current intent or need to use. *See Euclid*, 164 Ohio St. 265, ¶ 4 of the syllabus (agency may not acquire property rights "for some contemplated but undermined future use.") Applying a reasonableness standard also prevents a private utility from taking a

significantly intrusive right (like spraying herbicides across a burdened property) simply to save itself a few dollars when other less intrusive methods are available (like targeted physical brush clearing when necessary).[10]

3. The holding and reasoning of Norwood apply here.

AEP argues that the Fourth District erred in applying *Norwood* to this case. (AEP Br. 32–34.) This Court, however, did not limit its analysis of the judiciary's role in eminent domain proceedings to Norwood's specific facts and this Court often relies on *Norwood* in a variety of contexts. *See Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187, ¶ 12 (citing *Norwood* in case involving state taking of interest earned on unclaimed funds); *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 52 (citing to *Norwood* in flooding case).[11] The Fourth District therefore did not err in relying on *Norwood* to define a court's duty to review easement terms for necessity and to ensure judicial independence in cases where the state grants the power of eminent domain to private for-profit corporations like AEP.

[10] In a different matter, a court of common pleas found that although AEP prefers to have the right to spray herbicides, they have struck that provision from other easements in the past, demonstrating that it isn't actually necessary. (*See* Fourth Dist. Reply Br. Ex. B, Decision and Entry, *Ohio Power Company v. Hartig*, Pickaway Case No. 2020-CI-0097, ¶ 7 (December 2, 2020).).

[11] *See also Boice v. Village of Ottawa Hills*, 137 Ohio St.3d 412, 2013-Ohio-4769, 999 N.E.2d 649, ¶ 17 (citing *Norwood* generally for the "constitutional protections that people must be afforded with respect to their private property" in zoning variance case); *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 40 (citing to *Norwood* to explain that "[c]ourts honor the people and their Constitution by giving careful consideration to property owners' challenges to the propriety of government actions that affect their property"); *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 60 (citing *Norwood* as "reiterat[ing] [the Supreme Court's] adherence to the principles that protect property rights" in littoral rights case).

4. The rebuttable presumptions do not apply under these facts.

The Fourth District correctly determined that the rebuttable presumptions in R.C. 163.09(B)(1) did not apply here. First, the rebuttable presumption in R.C. 163.09B(1)(a) was not applicable because the AEP Board "did not consider appropriation of specific easements * * * did not review the easement terms, did not know who the landowners are, and did not know what rights are being sought from the Landowners." (R. 45, *Fourth Dist. Op.*, ¶ 48.) Thus, "the Ohio Power Board resolution did not approve the appropriations sought from the Landowners." (*Id.* at ¶ 52.) This is not an outlier case. In a Pickaway County case, the court summarized AEP testimony that Ohio Power's "Board did not discuss or authorize the appropriation of property from specific landowners and did not discuss or authorize the easements attached to Ohio Power's Petitions" and it was AEP's position that "it would **be overly burdensome** for Ohio Power's Board **to spend twenty-minutes to consider those issues.**" (Fourth Dist. Reply Br. Ex. A *Clifton Bros. Land LLC*, ¶ J (emphasis added).) As explained in greater detail related to the irrebuttable presumption addressed in AEP's second proposition of law, AEP cannot claim the benefit of a presumption that its easement terms are necessary based on actions of an entity that never saw, reviewed, or approved the specific appropriation.

Second, the rebuttable presumption in (B)(1)(b) did not apply because that requires the utility to present evidence "of the necessity for the appropriation." The trial court did not require AEP to present evidence of necessity, but instead abdicated any role and completely deferred to what AEP wanted, ruling that the jury would determine the scope of the easement. (R. 45, App'x 39, *Fourth Dist. Op.*, ¶ 57.) The Fourth District correctly rejected the trial court's rote deference, explaining that it is a court's role to vigilantly examine the scope of the taking – not a jury – and that even "'deferential review is not satisfied by superficial scrutiny.'" (*Id.* at App'x 38-39, ¶¶ 56–58 (quoting *Norwood*, 2006-Ohio-3799, at ¶ 66).) Here, while Ms. Rentschler testified broadly

that, in her opinion, all of the easement terms that AEP sought to take were "reasonably necessary to safely operate, maintain a high voltage electric transmission line," these conclusory statements were not evidence and were belied by her own testimony regarding the lack of necessity under cross-examination. Thus, even if the rebuttable presumption somehow applied based on AEP's broad conclusory statements, the cross-examination of Ms. Rentschler would have successfully rebutted it.

Appellant's Proposition of Law No. 2: A certificate from the Ohio Power Siting Board declaring that a utility project will "serve the public interest, convenience, and necessity" raises an irrebuttable presumption under R.C. 163.09(B)(1)(c) that the appropriation sought by the public utility for that project is necessary.

Response: A private for-profit utility is not entitled to an irrebuttable presumption that its easement terms are necessary when the Power Siting Board never even saw, let alone approved, the easements in question.

A. AEP is attempting to remove the required role of the judiciary to perform an independent review based on the actions of a state agency that did not receive, review or approve the easements in question.

As set forth above, *Norwood* requires a judge to determine necessity. 2006-Ohio-3799, ¶ 69. "In any appropriation, the taking agency shall show by a preponderance of the evidence that the taking is necessary and for a public use." R.C. 163.021(A) (App'x 54) (emphasis added). AEP asks this Court to take away that determination and excuse all for-profit utility companies from *ever* having to show the necessity of easement terms by applying the irrebuttable presumption in R.C. 163.09(B)(1)(c):

> Approval by a state or federal regulatory authority ***of an appropriation*** by a public utility or common carrier creates an irrebuttable presumption of the necessity for the appropriation.

(emphasis added). Under the statute's plain language, the Fourth District correctly held that this presumption does not apply here and any doubt about its application must be made in favor of the Landowners. (R. 45, App'x 40, *Fourth Dist. Op.*, ¶ 59.) While the OPSB approved the necessity

of AEP's ***Project***, it never approved ***the appropriation of the overbroad easement rights*** that AEP now seeks to appropriate from the Landowners. The testimony from the necessity hearing further underscores that OPSB never even saw the Proposed Easement, did not make a decision on the Proposed Easement, and was not involved in the appropriation of property:

> Q. The OPSB was never given the easement documents in these cases, were they?
>
> A. As they've never requested them, no, they were not.
>
> Q. So the OPSB did not analyze or make a decision on the easement documents in this case; correct?
>
> A. They did not.
>
> Q. And the OPSB does not consider, and it's not otherwise involved, in the appropriation of property; correct?
>
> A. Not to my understanding, no.
>
> Q. And can you show me where in the OPSB certificate they are approving the appropriation of the property from these specific landowners?
>
> A. I cannot.
>
> Q. Can you show me anywhere in the document where they are approving any appropriation of property?
>
> A. I cannot.

(R. 50, Supp. 179, Tr. at 78:7–24.) Consequently, OPSB did not review and approve the easements setting forth the appropriation. The Fourth District summarized the lack of review:

> **Ohio Power concedes that** neither **the Siting Board** nor the Ohio Power Board **reviewed or approved the specific appropriations** involved in this case (i.e., the proposed easements or their terms). Ms. Rentschler testified that the Siting Board did not have the easement documents, did not analyze or make any decisions about the easements, and did not approve the appropriation of easements from the landowners.

(R. 45, App'x 34, *Fourth Dist. Op.*, ¶ 48 (emphasis added)).

Nevertheless, AEP argues that because the OPSB found that the ***Project*** was necessary, it creates an irrebuttable presumption of the necessity for any appropriation of any right that AEP chooses to take against any individual landowner without any judicial review. But this outcome cannot be what the legislature intended. AEP cannot try to claim the benefit of this presumption when it did not even attempt to submit the easements to the Siting Board for review and approval. While the Landowners did not dispute the Siting Board's approval of the Project or even its route, they were permitted to challenge, AEP was required to prove, and the Court was required to review, the necessity of the appropriations that were never seen or reviewed.

If the plain language of the statute left any doubt on this point, the Court must strictly construe the presumption to find it inapplicable. First, eminent domain statutes must be strictly construed in favor of landowners and against private companies like AEP. *Norwood*, 2006-Ohio-3799, ¶ 70. Second, the Supreme Court of Ohio has determined that "defining the parameters of the power of eminent domain is a judicial function," that vigilant judicial review of necessity remains "critical," and it has expressed grave concerns "about the validity of the presumptions in favor of the state" in R.C. 163.09(B). *Id.* at ¶¶ 67, 69, 136 n. 16.[12] Applying the presumption and taking the necessity review out of the hands of the courts would place the constitutionality of the presumption front and center in this case – the Court therefore should construe the presumption as inapplicable here to avoid that constitutional question. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237-238, 118 S. Ct. 1219 (1998) (quoting *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401, 60 L. Ed. 1061, 36 S. Ct. 658 (1916)) ("A statute must be construed, if fairly possible,

[12] These concerns are only amplified under the Due Process clause when the presumption is irrebuttable and infringes upon the fundamental right of private property. *See, e.g., Vlandis v. Kline*, 412 U.S. 441, 446, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) ("Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments").

so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.")

Finally, the Court should also recognize the actual and absurd result of applying the irrebuttable presumption any time a project is approved. If applied, the Landowners' private property will be taken without **any** third party even looking at the easement in question to make sure the rights acquired are necessary—the Siting Board has not seen it and a court would be unable to review it. AEP—and other multi-million dollar utility companies—would have carte blanche to appropriate any property right it wishes without review any time the Siting Board approves a project. Giving these companies' free rein would eliminate the role of the court in reviewing necessity and provide such companies with unlimited and unchecked authority. As the Fourth District put it, AEP "argues that it can take whatever property rights it wants and could even appropriate fee simple titles from the Landowners, restrained only by how much the jury decides it must compensate for the taking." (R. 45, App'x 34-35, *Fourth Dist. Op.*, at ¶ 49.) This is an unconstitutional result and private companies cannot be given such unbridled and unchecked governmental power.

B. AEP's own words and actions demonstrate the folly of applying an irrebuttable presumption to prevent the review of easements.

"The need for the trial court to engage in a vigilant review to ensure that the appropriation is narrow and that [AEP] is acting fairly and not taking more than necessary is particular true here," where AEP acknowledges that it uses multiple easement documents depending on the situation, with each easement narrowing depending on whether there will be litigation and whether it thinks the easement will get challenged. (R. 45, App'x 39, *Fourth Dist. Op.*, ¶ 58.) If an irrebuttable presumption applied, and no litigation or challenge is permitted, AEP would have no motivation to appropriately tailor its easement and would continue to take excess rights. Even here, AEP

admitted at the hearing that its litigation easements still included terms it did not need, including the right to construct distribution lines. If an irrebuttable presumption applied, AEP would have simply taken rights away from these Landowners that everyone now agrees were unnecessary.

AEP concedes as much when it attempts to argue that its easement form is narrow enough, and then proceeded to reminisce on the good ole' days in which it had unchecked discretion to appropriate any and all land regardless of necessity. (AEP Br. 12; *see also id.* at 10 (complaining that landowners' have retained counsel and "begun launching challenges to individual easement terms in every case, often despite the fact that the challenged easement terms are ordinary, ubiquitous, and have been used without controversy by public utilities throughout the nation for generations"). Without meaningful judicial review, utility companies will take more than is necessary, all while criticizing landowners who have finally managed to obtain counsel.

C. AEP's argument that the Fourth District's interpretation renders the irrebuttable presumption meaningless is unripe and flawed.

AEP argues that the irrebuttable presumption will be rendered meaningless as applied by the Fourth District, because "the OPSB lacks judicial power to review individual easement terms." (AEP Br. at 40.) AEP has apparently changed its position since it sought jurisdiction and rehearing, where it claimed it did not provide the easements to the Ohio Power Siting Board ("OPSB") because "**it is not clear"** whether the OPSB possesses the jurisdiction to review and approve easement language. (Motion for Reconsideration at 8; *id.* at 9 (AEP speculating that the OPSB "**may not** have jurisdiction to review and approve easement terms") (emphasis added).) No one knows whether the Power Siting Board can review and approve easements for a project, because no one has tried. This issue is therefore not ripe for this Court to decide, and it should be decided after a utility submits its easements to the Siting Board, the Siting Board issues a decision, and that decision is then appealed to this Court.

Moreover, assume for a moment that AEP is correct in resolving the hypothetical case not before this Court, and the Siting Board is not permitted to review and approve easement terms setting forth the rights AEP seeks to take from landowners. As AEP now argues, the Siting Board "is not a court" and does not hold "judicial power." This argument makes AEP's reading of the irrebuttable presumption even more absurd, and makes it even more necessary for a court to conduct a necessity review. AEP wants the Power Siting Board to take the role of the judiciary in determining the necessity of an appropriation, while arguing it has no judicial power and no authority to review the appropriation. What AEP wants flies in the face of this Court's holding that **courts** have the constitutional role to review takings "to ensure that the state takes no more than that necessary to promote the public use." *Norwood*, 2006-Ohio-3799, ¶ 69.

Finally, even assuming that the Power Siting Board may not approve easement terms, such a conclusion does not prove the irrebuttable presumption is meaningless. The statute is not written specifically to the Power Siting Board, but instead focuses on the "[a]pproval by a state or federal regulatory authority of an appropriation." Other regulatory bodies, such as Federal Energy Regulatory Commission or the Federal Railroad Administration, may be able to approve easements for other projects. Again, these arguments are all hypothetical, as none of these facts or issues are squarely before the Court on appeal, and they should not form the basis of this Court's decision.

Appellant's Proposition of Law No. 3: Modification of easement terms in an appropriation proceeding, whether done voluntarily or by court order, does not trigger the provisions of R.C. 163.09(G), R.C. 163.21(A), or R.C. 163.21(B) unless the modification fundamentally changes the appropriation and prejudices the landowner.

> **Response: Chapter 163 of the Ohio Revised Code requires a court to award costs and fees to a landowner when a utility: (1) files a petition to appropriate permanent property rights that it does not need; (2) forces landowners to litigate that issue to a necessity hearing; and (3) admits the right is not necessary at the hearing because of the challenge.**

As this Court has explained, private property is viewed as a "'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property." *State ex rel. New Wen, Inc. v. Marchbanks*, 159 Ohio St.3d 15, 2020-Ohio-63, 146 N.E.3d 545, ¶ 24. When AEP filed the appropriation petition in this case, its easement detailed what "sticks" it sought to take from the Landowners' bundle in the proceeding. Specifically, AEP's petition sought to appropriate an easement that, among other things, permitted AEP to take the right **to construct distribution lines** on the Landowners' Property. (*See* R. 1, Pet., Ex. 2; R. 50, Supp. 180, Tr. 79:13–15.) Then, at the commencement of the hearing, AEP announced that it intended to put the distribution-line "stick" back in the Landowners' bundle of rights. But doing so at that stage of the process does not absolve AEP of its requirement to pay the Landowners' fees.

As the Fourth District recognized, "*any* attempted change to the underlying appropriation action automatically triggers R.C. 163.21 considerations and must be dealt with first." (R. 45, App'x 44, *Fourth Dist. Op.* ¶ 68 (quoting *City of Dublin v. Wirchanski*, 3d Dist. Union No. 14-10-22, 2011-Ohio-2461, ¶ 17) (emphasis in original)).) AEP argues, though, that because it "voluntarily" withdrew the overbroad and unnecessary easement term—the right to construct distribution lines—it should not have to pay the Landowners' fees. (AEP Br. 43.) But this withdrawal due to the lack of necessity is a perfect example of a large utility abusing the eminent domain process and playing games to force landowners to incur unnecessary costs, which is what the fee-shifting provisions in Chapter 163 of the Ohio Revised Code were intended to discourage. If AEP is correct, then anytime a for-profit utility believed a court might rule against them on an easement term after a landowners' challenge, it would "voluntarily" withdraw certain terms at the eleventh-hour with no consequences. These tactics impose de minimis financial implications to for-profit, multi-billion dollar utilities like AEP and its amici, but for landowners fighting to

protect their most significant asset, such gamesmanship means something different. (*See* R. 45, App'x 31, *Fourth Dist. Op.*, ¶ 40, n. 4 (As Amicus Curiae Ohio Farm Bureau Federation explains, "For a farmer, losing his land, even a part of it, can be the equivalent of losing his home, his job, his family's history, and his children's future – all in one fell swoop.").)

For the reasons more fully explained below, the Landowners are entitled to fees under R.C. 163.21. The Fourth District noted that in response to the Landowners' challenge, AEP ultimately conceded that the distribution rights originally sought in the petition were unnecessary, "and agreed to the removal of the distribution rights from the easement, which the trial court subsequently ordered [AEP] to do." (R. 45, App'x 45, *Fourth Dist. Op.*, at ¶ 69.) As such, the Fourth District concluded that "this case does not fit within the procedural context of R.C. 163.21(A), where a voluntary abandonment (either via a notice or via an amended petition) occurs," and analyzed the issue under R.C. 163.21(B). (*Id.* (citing *Ohio Edison Co. v. Franklin Paper Co.*, 18 Ohio St.3d 15, 18, 479 N.E.2d 843 (1985) ("An agency cannot abandon a cause that it has already lost.")).) Under either subsection—163.21(A) or 163.21(B)—the Landowners should be awarded their fees.

A. The Fourth District correctly concluded that the Landowners were entitled to fees under R.C. 163.21(B).

Pursuant to R.C. 163.21(B), "if the Court determines that an agency is not entitled to appropriate particular property, the court shall enter both of the following:"

> (a) A judgment against the agency for costs, including jury fees;
>
> (b) A judgment in favor of each affected owner, in amounts that the court considers to be just, for the owner's reasonable disbursements and expenses, to include witness fees, expert witness fees, attorney's fees, appraisal and engineering fees, and for other actual expenses that the owner incurred in connection with the proceedings.

As the Fourth District explained, "R.C. 163.21(B) recognizes that different properties and property rights will be contested and provides that if the trial court 'determines that an agency is not entitled to appropriate *particular property'*—such as distribution lines rights in an easement—" then reasonable costs should be awarded. (R. 45, App'x 47-48, *Fourth Dist. Op.*, ¶ 74 (emphasis in original).) Put differently, the Fourth Circuit recognized that R.C. 163.21 permits "property owners who successfully defend against the appropriation of one of the 'sticks' in the bundle of constitutionally protected property rights . . . to recover their expenses associated with defending that right." (*Id.*)

And that is exactly what happened here. The facts are undisputed: (1) AEP initiated litigation seeking to appropriate the permanent property right **to construct distribution lines** on the Landowners' properties; (2) AEP knew that it did not need that permanent property right for the Project; (3) AEP forced the Landowners to prepare for a hearing to prove that right was not necessary; (4) AEP admitted at the necessity hearing that the right to build distribution lines was not necessary and that it would stop seeking that unnecessary right because the Landowners brought their necessity challenge; and (5) the trial court ordered AEP to remove the distribution line language from its easement. (*See* R. 45, App'x 45, *Fourth Dist. Op.*, ¶ 69.) Thus, the Fourth District found that R.C. 163.21(B)(1)[13] required the court to award costs and fees to the landowners. (*See id.* at App'x 48-49, ¶¶ 75–76.)

AEP sets forth various unsupported arguments as to why this result is unjust and must be rejected, none of which are persuasive. (AEP Br. 42-47.)

[13] The court could have also awarded the Landowners fees under R.C. 163.09(G), because the trial court determined the matter in the favor of the owner as to the necessity of the appropriation related to distribution lines.

First, AEP argues that it voluntarily agreed to not appropriate the right to construct distribution lines on the Landowners' properties before the hearing and thus an award of fees is not appropriate. (*Id.* at 42-43.) The Fourth District properly rejected this argument because AEP never filed any prehearing motion to amend its petition, did not file a notice of abandonment, and instead the change was made in a court order after the hearing. (R. 45, App'x 45, *Fourth Dist. Op.*, at ¶ 69.) Similarly, AEP's argument that it should not have to pay fees because the removal of the right benefitted the Landowners is unavailing. AEP did not make this change out of the goodness of its heart, but in the face of a legal challenge. Also, any order forcing a utility to follow the law and not take overbroad rights will benefit Landowners.

Second, AEP argues that the Court should ignore the plain language of the statute, and instead infer that the General Assembly wished to provide an award of fees and costs "only where the agency unnecessarily or without authority forced the landowner to litigate, or where the landowner otherwise suffers prejudice as a result of the agency's actions." (AEP Br. 43.) But that language does not exist in R.C. 163.21.

Third, AEP argues that only one word was removed from its easement, but that one word had a major impact on the rights taken. Here, it changed what permanent property rights AEP was taking and what it would have the right to construct on Landowners' property moving forward. AEP protests that this would mean that every minor mistake or change—such as a court's miscellaneous edit to an easement form or correction of a scrivener's error—would result in fees and costs being imposed on utilities. (AEP BR. 45.) There was no argument, however, that AEP made a mistake or clerical error. Instead, the evidence revealed that AEP willingly sought a right it did not need, argued in support of taking that right up to the necessity hearing, and only admitted it was not necessary at the last minute because of the Landowners' challenge.

Finally, AEP makes repeated references throughout its briefing to it passing the unnecessary costs resulting from its litigation tactics to its customers. (*E.g.*, AEP Br. 2, 9-11.) The solution, however, is not for innocent Landowners to be forced to bear the cost of AEP's tactics. Instead, the solution is for AEP to stop passing on to its customers the statutory costs and fees that result from AEP not following Ohio law and engaging in unwarranted and aggressive litigation tactics.

B. Alternatively, AEP's actions constitute abandonment under R.C. 163.21(A).

If the Court finds that AEP's decision to remove distribution rights from the easement was in fact voluntary, the Landowners are still entitled to their fees based on AEP's abandonment. R.C. 163.21(A). At the hearing, AEP admitted that it was abandoning the distribution rights. (R. 50, Supp. 181, Tr. 80:8–10).

AEP's concession constitutes an abandonment and triggers the landowner protections in R.C. 163.21(A):

> (1) If it has not taken possession of property that is appropriated, an agency may abandon appropriation proceedings under sections 163.01 to 163.22 of the Revised Code at any time after the proceedings are commenced but not later than ninety days after the final determination of the cause.
>
> (2) **In all cases of abandonment as described in division (A)(1) of this section, the court shall enter a judgment against the agency for costs**, including jury fees, and shall enter a judgment in favor of each affected owner, in amounts that the court considers to be just."

AEP argues that "no plain reading of the statute [] could reasonably equate the voluntary withdrawal of a solitary easement term to an 'abandonment' of the 'proceedings.'" (AEP Br. at 46.) AEP then argues because it has not abandoned the proceedings in this case, there can be no abandonment as was meant in R.C. 163.21 (*Id.* at 46-47 ("Finding otherwise would be akin to concluding that a homeowner 'abandoned' a home-construction project merely by changing the

color of the kitchen tiles mid-way through the project."). This is a non-sequitur. Nowhere in R.C. 163.21 is it required that a utility abandon ***the entire proceedings*** for abandonment to occur. Nor has AEP cited to any case law supporting that view.

To the contrary, Ohio law provides that amendments to pleadings that change the property rights to be taken constitute an abandonment under R.C. 163.21. *See City of Dublin v. Wirchanski*, 3d Dist. Union No. 14-10-22, 2011-Ohio-2461, ¶ 18 (listing cases where amendment of complaint was equivalent to abandonment and finding that amendment of petition to no longer seek certain portions of take area constituted abandonment); *Madison Cty. Bd. of Comm'rs v. Bell*, 12th Dist. Madison No. CA2005-09-036, 2007-Ohio-1373, ¶ 7 (affirming amendment of petition to abandon fee simple taking and changing to taking an easement); *Montgomery Cty. v. McQuary*, 26 Ohio Misc. 239, 241, 265 N.E.2d 812 (C.P. 1971) (finding abandonment when agency amended easement to follow a different course through same property); *see also Cty. of Kern v. Galatas*, 200 Cal.App.2d 353, 356 (1962) (finding that when agency originally sought to acquire oil, gas, and mineral rights as part of a take, it constituted abandonment when agency decided to no longer seek those rights).

A finding of abandonment makes sense, logically, as the abandonment provisions in R.C. 163.21 are intended to protect landowners, who are pulled against their wishes into eminent domain proceedings. An appropriating agency, who initiates proceedings for property rights it doesn't actually need or later decides it does not want, must pay for the landowners' fees after they are forced to defend against it. Such a requirement is especially necessary in cases like this one where AEP only abandoned its attempts to acquire distribution rights the day of the hearing and intended to decide whether the acquisition of that right was necessary. Had the landowners not challenged necessity, AEP would have condemned a property right it does not need. (R. 50, Supp.

147, 181 Tr. 46:21–24; 80:4–7.) Apparently, AEP routinely acquires this unnecessary right under the threat of eminent domain even though it does not need it. (*Id.* at Supp. 143, Tr. 42:8–18.) If nothing else, AEP's cavalier attempt to condemn such unnecessary rights until challenged affirms the need to find that the R.C. 163.21 abandonment provision is triggered.

At base, AEP initiated a petition to acquire certain "sticks" from the Landowners' bundle of rights, including the right to build distribution lines, and then decided at the last minute to put the distribution line stick back in the bundle. This triggers R.C. 163.21 and Landowners were entitled to a judgment in their favor for costs and fees incurred. *See* R.C. 163.21(A), 163.21(B).

V. CONCLUSION

Ohio law is clear that the judiciary's role in appropriation proceedings is to "ensure that the state take no more than that necessary to promote the public use." The trial court failed to perform this role, and the Fourth District correctly remanded this case to the trial court to perform its duty. The Fourth District also awarded fees to the Landowners based on AEP's admitted attempt to take more than necessary. This Court should affirm.

Respectfully submitted,

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