IN THE SUPREME COURT OF OHIO

Sunoco Pipeline, L.P.	:	
	:	**Case No. 2016-1486**
Plaintiff-Appellee,	:	
	:	**On Appeal from the Harrison County**
vs.	:	**Court of Appeals, Seventh Appellate**
	:	**District**
Carol A. Teter, Trustee, et al.	:	
	:	**Court of Appeals Case Nos.**
Defendants-Appellants.	:	**16 HA 0002 and 16 HA 0005**

APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO LIFT STAY OF EXECUTION OF APPELLATE COURT'S JUDGMENT

Nicholas I. Andersen (0077732)
(COUNSEL OF RECORD)
Eric R. McLoughlin (0082167)
Jessica L. Sohner (0089232)
ARENSTEIN & ANDERSEN CO., LPA
5131 Post Rd., Ste. 350
Dublin, OH 43017
P: (614) 602-6550
F: (866) 309-0892
nick@aacolpa.com
eric@aacolpa.com
jessica@aacolpa.com
Counsel for Defendant-Appellant, Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust

Kathleen M. Trafford (0021753)
(COUNSEL OF RECORD)
Ryan P. Sherman (0075081)
L. Bradfield Hughes (0070997)
Christopher J. Baronzzi (0078109)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 S. High St.
Columbus, OH 43215
P: (614) 227-2000
F: (614) 227-2100
ktrafford@porterwright.com
rsherman@porterwright.com
lhughes@porterwright.com
cbaronzzi@porterwright.com
Counsel for Plaintiff-Appellee, Sunoco Pipeline, L.P.

(Additional counsel appear on following page)

Jordan S. Berman (0093075)
(COUNSEL OF RECORD)
Assistant Attorney General
Constitutional Offices Section
30 E. Broad St., 16th Fl.
Columbus, OH 43215
P: (614) 466-2872
F: (614) 728-7592
jordan.berman@ohioattorneygeneral.gov
Counsel for Ohio Attorney General, Mike DeWine

C. Craig Woods (0010732)
(COUNSEL OF RECORD)
Andrew H. King (0092539)
SQUIRE PATTON BOOGS (US) LLP
2000 Huntington Center
41 S. High St.
Columbus, OH 43215
P: (614) 365-2700
F: (614) 265-2499
craig.woods@squirepb.com
andrew.king@squirepb.com
Counsel for Defendant-Appellee, Enterprise TE Products Pipeline Company, LLC

Chad A. Endsley (0080648)
(COUNSEL OF RECORD)
Leah F. Curtis (0086257)
Amy M. Milam (0082375)
Ohio Farm Bureau Federation, Inc.
280 N. High St., 6th Floor
P.O. Box 182383
Columbus, OH 43218
T: (614) 246-8258
F: (614) 246-8656
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Ohio Farm Bureau Federation, Inc. and Harrison County Farm Bureau, Inc., Amici Curiae in Support of Appellant

James B. Hadden (0059315)
(COUNSEL OF RECORD)
Murray Murphy Moul + Basil LLP
1114 Dublin Rd.
Columbus, OH 43215
T: (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

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State St.
Columbus, OH 43215
P: (614) 340-9817
F: (614) 365-9564
mthompson@ohioconstitution.org
Counsel for 1851 Center for Constitutional Law, Amicus Curiae in Support of Appellant

TABLE OF CONTENTS

APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO LIFT STAY OF EXECUTION OF APPELLATE COURT'S JUDGMENT

I. INTRODUCTION

On November 15, 2016, Sunoco Pipeline, L.P. ("Sunoco") filed a Motion to Lift Stay of Execution of Appellate Court Judgment ("Motion to Lift Stay") with this court. Defendant-Appellant Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust ("Teter"), vigorously opposes the Motion for the reasons set forth below.

Sunoco's proposal in its Motion to Lift Stay that this court allow it to construct the Pipeline across the Teter property during the pendency of this appeal in exchange for it posting a bond is eerily similar to the manner in which Ohio appropriation actions used to proceed before this court found that the prior version of R.C. 163.19 was unconstitutional in *Norwood v. Horney*, 110 Ohio St.3d 253, 2006-Ohio-3799, 852 N.E.2d 1115, paragraph six of syllabus. Prior to *Norwood*, R.C. 163.19 stated in relevant part as follows:

> any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; *but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by appellate courts*. (Emphasis added.)

This court held that the emphasized language above was "an unconstitutional encroachment on the judiciary's contribution and inherent authority in violation of the separation-of-powers doctrine." *Id.* at ¶ 125. In so holding, this court noted that "[b]ut for our orders in [*Norwood*], the appellants' property would likely have been razed. Although we reiterate that is imperative that appellate courts review these cases as expeditiously as possible, we doubt the courts' ability, absent authority to issue a stay, to move more quickly than a bulldozer." (Internal citations omitted.) *Id.* at ¶ 134.

Here, Sunoco's Motion to Lift Stay asks this court to allow it to proceed to bulldoze Teter's property so it can construct its Pipeline on the property while this appeal is pending on the condition that it post a $2.5 million bond to pay for the cost of removing the Pipeline if Teter wins this appeal. (Mot. 2 (should be ii), 1, 9.) Thus, Sunoco is basically asking this court to find that a $2.5 million bond is "adequate security" for it to take and use the property during this appeal. If this court were to grant Sunoco's Motion, the result would be to severely limit its holding in *Norwood*, which, Teter submits, is a decision that should not be made on a procedural motion like the current one. Furthermore, a decision from this court lifting the stay in exchange for a bond would severely limit the ability of any of the over 200 landowners who are currently defendants in appropriation actions to appeal adverse trial court decisions, as the pipeline companies would cite this court's decision as precedent that they should be allowed to proceed with construction during an appeal as long as they post a bond. (Dockets, Appx. # 1 Ex. 17, 127.) This court already rejected this approach when it held the former version of R.C. 163.19 unconstitutional and should reject it again here by denying Sunoco's Motion to Lift Stay.

Additionally, the irony of Sunoco's Motion to Lift Stay is that it illustrates on its face why the appropriation of Teter's property is not a necessity and is not for a public use. Sunoco's offer to post a bond in exchange for a release of the stay completely ignores the reason Teter has defended this case and prosecuted the appeals, namely: to protect its and other Ohioans' fundamental constitutional rights to possess, enjoy and protect its property. Article I, Section 1, Ohio Constitution. If Teter were doing so for profit, it would have settled long ago, once it became clear that its property was the last one that Sunoco needed to complete the Pipeline. In fact, the offer to post a bond is just Sunoco's attempt to place a monetary value on Teter's constitutional rights and an attempt to force a settlement upon Teter.

First, in a footnote, Sunoco admits that it is finally considering other alternatives to the appropriation of the easements from the Teter farm for its Mariner East Phase 2 pipeline ("Pipeline"), including routing the Pipeline around the farm, because of the stay. (Mot. 5, n. 2.) Sunoco has known Teter did not want the Pipeline to cross its property since at least February 2014 when it initially requested a survey. (Aff'd of John Lovejoy, Appx. # 1 Ex. 1, 1.) However, despite being fully aware of Teter's objection for more than two and half years, Sunoco did not so much as even bother to explore the option of purchasing voluntary easements from Teter's neighbors until this late date. (Appx. # 2 Ex. 18, 46 (Tr. 46:16 – 48:25, 53:10 – 54:1).) Sunoco could have easily avoided the monetary harm it alleges it is suffering as a result of the stay simply by developing a backup plan to the appropriation of Teter's property instead of putting itself into this difficult position by obstinately insisting that it has the right to appropriate any property it selects in its sole discretion for the Pipeline.

Sunoco also argues extensively in its Motion to Lift Stay that it is "commit[ted] to relocating the pipeline and remediating the Trust property if the judgment below is reversed * * *." (Mot. 7.) If Sunoco can so easily remove the Pipeline and relocate it as it insists it can, it follows that the appropriation of the easements from the Teter farm is not necessary for the construction of the Pipeline because it could have chosen to negotiate with neighboring landowners to obtain voluntary easements *before* initiating the appropriation action against Teter. Article I, Section 1, Ohio Constitution. This is especially true here because, in contrast to most other pipelines that are subject to Natural Gas Act or similar regulatory laws, the route of the Pipeline has not been fixed or approved by an accountable public agency like the Ohio Power Siting Board ("OPSB") or the Federal Energy Regulatory Commission ("FERC").

As of today, Sunoco has already developed an alternate route to bypass the Teter farm and has already obtained at least one option to purchase an easement from an adjacent landowner. (Memo of Purchase Option, Appx. # 1 Ex. 2, 18.) It has even started to mark the new route of the Pipeline that will go around Teter's property on an adjacent landowner's property. (Aff'd of John Lovejoy, Appx. # 1 Ex. 1, 1, ¶ 11, Pictures 1-13 – 1-15.) Thus, it should be clear that Sunoco will build the Pipeline during the pendency of this appeal even if this court denies its Motion to Lift Stay. The difference is that it will be doing so through the property of willing landowners rather than through Teter's property without its consent. These actions alone tend to prove that the appropriation of Teter's property is not a necessity.

Second, the harm Sunoco alleges that it and other third parties will suffer by the continuance of the stay is purely economic. (Mot. 1 (should be i), 5-7.) Such alleged harm includes: (1) Sunoco's move-around and standby costs, which, as noted above, could have been avoided if it had not painted itself into a corner by not exploring the possibility of alternate routes until this late date; (2) lost revenue for Sunoco; (3) the loss of royalty payments to private landowners; (4) lost profits for the private gas production and drilling companies; (5) lost profits for the private shipping companies; and (6) lost jobs, taxes, business development and revenue. (*Id.*) These alleged harms are the exact same economic benefits that Sunoco argued and the lower courts' found constituted a public use. In *Norwood*, this court expressly held that "the fact that the appropriation would provide an economic benefit to the government and the community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution." *Norwood*, 110 Ohio St.3d 253, paragraph one of syllabus. Accordingly, Sunoco's Motion to Lift Stay shows with certainty that the appropriation of the easements from the Teter

farm for the Pipeline is not for a public use, and that, therefore, Teter does have a substantial likelihood of success in this appeal, contrary to Sunoco's claims otherwise.

Finally, Sunoco attempts to make Teter out to be a villain for defending its and other Ohioans' constitutional rights by claiming that the stay is the only thing that is preventing the Pipeline from being completed. (*Id.* 1 (should be i), 5.) What Sunoco does not tell that court is that it does not actually know when the Pipeline will be completed, even if this court were to lift the stay, because it still does not have all of the necessary permits. During its recent earnings call on November 10, 2016, Michael Hennigan, the president of Sunoco Pipeline, L.P.'s parent company, Sunoco Logistics Partners LP, told investors that Sunoco does not yet have all of its permits from the Pennsylvania Department of Environmental Protection and that it plans to respond to the deficiencies in the permit application in December. (Tr. from Earnings Call, Appx. # 1, Ex. 5, 70-71.) Mr. Hennigan also told investors that the "updated estimate of permit timing now indicates a third quarter 2017 start-up." (*Id*.) This directly conflicts with the sworn statement contained in Matthew Gordon's affidavit that was offered as support for the Motion to Lift Stay wherein he states that damages from lost revenue will "begin to accrue as early as April 2017, if the Mariner Pipeline is not completed and ready for operation as planned." (Mot. Ex. D, ¶ 4.) Accordingly, the alleged potential economic harm to Sunoco from the continuance of the stay is not nearly as great as Sunoco has attempted to portray it to be.

For these reasons and the other reasons set forth below, Teter respectfully requests this court to deny Sunoco's Motion to Lift Stay and continue the stay to preserve the status quo for the duration of this appeal.

II. LAW & ARGUMENT

A. <u>This court's precedent in Ocasek and its progeny entitle Teter to a stay as a matter of right and the procedural posture of this appeal should not affect Teter's right to the stay</u>.

This court held that "[t]he lone requirement of Civ.R. 62(B) is the giving of an adequate supersedeas bond" in *State ex rel. Ocasek v. Riley*, 54 Ohio St. 488, 490, 377 N.E.2d 792 (1978). In *Ocasek*, the Ohio Senate and the Department of Public Instruction filed a complaint seeking a writ of prohibition to prevent the trial judge from holding an evidentiary hearing on their motion for stay. *Id.* at 489. This court granted the writ and held that the appellants were "entitled to a stay of judgment as a matter of right." *Id.* at 490. Although the appellants in *Ocasek* were state agencies that are exempted from posting bond under Civ.R. 62(C), the holding strongly supports Teter's proposition that a private party is also entitled to a stay as a matter of right upon posting an adequate supersedeas bond.

Ocasek has been reaffirmed by this court numerous times over the past 35 years including in *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 2000-Ohio-248, 722 N.E.2d 73. *See also State Ex. rel Electronic Classroom of Tomorrow v. Cuyahoga Cty. Ct. of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149; *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361. In *Curl*, the trial court denied the Fire Marshal's motion to stay a judgment ordering it to issue a fireworks permit. *Id.* at 569. The Fire Marshal filed a complaint for writs of prohibition and mandamus in this court requesting writs to require the trial court judge to issue the stay and prohibit the trial court from holding a contempt hearing. This court again analyzed Civ.R. 62 and affirmed its prior holding in *Ocasek*. *Id.* at 570-73. Justice Douglas wrote a lengthy dissent in *Curl* wherein he

argued that trial courts have discretion to grant or deny stays. *Id.* at 574-80. This is the same argument Sunoco has made here that has repeatedly been rejected by a majority of this court.

Sunoco's only attempt to distinguish this court's holding in *Ocasek* and its progeny is to argue that those holdings do not apply to this court because they are based on the Ohio Rules of Civil Procedure. (Mot. 9.) While Sunoco is correct that the Civil Rules apply to trial courts, there is no reason that the procedural posture of this appeal should change the result. If Teter would have chosen to file a complaint for a writ of mandamus rather than requesting the stay from the court of appeals, this court would have either had to follow the *Ocasek* precedent and issue the writ ordering the trial judge to grant the stay and set the bond, or would have had to overrule or severely limit *Ocasek*. The fact that Teter chose to file a motion for a stay with the court of appeals after the trial court denied the initial motion and then chose to file a motion for a stay with this court rather than filing a complaint for a writ of mandamus, should not change the result that Teter is entitled to a stay as a matter of right upon the posting of an adequate bond, which both the court of appeals and this court have found to be no bond.

In conclusion, Teter has not had a reason to file a complaint for a writ of mandamus to reverse the trial court's decision denying the stay since both the court of appeals and this court have granted its motions to stay. However, if this court were to lift the stay, Teter would be forced to file a complaint for a writ of mandamus against the trial judge forthwith to obtain the stay. That would put this court in the position of having to issue the writ to reimpose the stay it had just lifted, or to overrule or severely limit *Ocasek* and its progeny, which the court has not done on any of the numerous occasions it has had to reconsider its holding that "the lone requirement of Civ.R. 62(B) is the giving of an adequate supercedeas bond." *Ocasek*, 54 Ohio St. at 490.

Accordingly, this court should deny Sunoco's Motion to Lift Stay and continue the stay for the duration of this appeal.

B. <u>Even if this court applies a balancing test to determine whether the stay should continue, it should still deny Sunoco's Motion to Lift Stay because Teter has a likelihood of success on the merits of this appeal and the harm to Teter's constitutional rights and property if the stay is lifted outweighs the alleged harm to Sunoco and other third parties from the continuation of stay</u>.

1. <u>This court has never adopted the balancing test for the purpose of determining whether a stay should be issued or lifted</u>.

The test Sunoco urged this court to apply in its Memorandum in Opposition to Teter's Motion to Stay, and that it again urges this court to apply in its Motion to Lift Stay, is a modified version of the four part balancing test that is applied by courts when considering requests for injunctions. (Mot. 9.) That test generally requires courts to balance the following factors when ruling on a motion to stay:

> (1) [W]hether the stay applicant has made a strong showing that he is likely to prevail on the merits [of the appeal];
>
> (2) [W]hether the applicant will be irreparably injured absent a stay;
>
> (3) [W]hether the issuance of a stay will substantially injure other parties interested in the proceeding; and
>
> (4) [W]here lies the public interest?

Nken v. Holder, 556 U.S. 418, 426, 173 L.Ed.2d 550 (2009), quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 129 S.Ct. 1749, 95 L.Ed.2d 724 (1987). While Sunoco contends that the test is "universally used by appellate courts," the fact is that this court has never adopted this balancing test for the purpose of determining whether or not a stay should be granted. *MCI Telecommunications Corp. v. Public Utilities Comm. of Ohio*, 31 Ohio St.3d, 604, 606, 510 N.E.2d 805 (1987) (Douglas, J. dissenting) ("Research indicates that this court has never

enunciated criteria detailing the circumstances and conditions upon which a stay will be granted.").

Where, as here, the request for an appeal (or a request for an injunction) concerns an alleged infringement of a party's fundamental constitutional rights, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012), quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009). This is because "[w]hen constitutional rights are threatened or impaired, *irreparable injury is presumed.*" (Emphasis added.) *Id.*, citing *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d. 438, 445 (6th Cir. 2003). Stated slightly differently, "if it is found that a constitutional right is being threatened or impaired, *a finding of irreparable injury is mandated*." (Emphasis added.) *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 809), citing *Elrod v. Burns*, 427 U.S. 247, 373, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). Moreover, "the public interest is [always] promoted by the robust enforcement of constitutional rights * * *." *Am. Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp.*, 698 F.3d 885, 896 (6th Cir. 2012).

Sunoco does not even attempt to argue the determinative "likelihood of success on the merits" factor in its Motion to Lift Stay because this court already rejected its arguments directed towards this factor when it granted Teter's Motion to Stay. (Mot. 2 ("The present motion * * * does [not] ask the Court to consider which party has the likelihood of success in the event the Court does accept the case for discretionary review [because] [t]he parties addressed the merits of the underlying legal issues at length in connection with the Emergency Motion to Stay * * *.").) Accordingly, Sunoco's Motion to Lift Stay is fatally defective in that it does not allege any errors in this court's Entry granting the stay, which, if the same was based on the application of the balancing test, necessarily required a majority of this court of find that Teter does have a

likelihood of success on the merits of this appeal. Even though Teter has already briefed and prevailed on this issue, Sunoco's filing of its Motion to Lift Stay requires it fully rebrief the reasons it has a likelihood of success on the merits and the reasons the balancing of the equities requires this court to deny Sunoco's Motion to Lift Stay and continue the stay for the duration of this appeal to preserve the status quo and protect Teter's fundamental constitutional rights to possess, enjoy and protect its property. Article I, Section 1, Ohio Constitution.

2. <u>Teter has a likelihood of success on the merits of this appeal</u>.

While courts have refrained from establishing a specific test for the determination of whether a party has a likelihood of success on the merits, the Supreme Court of the United States has stated that "[i]t is not enough that the chance of success on the merits be better than negligible" and that "more than a mere possibility of relief is required." (Internal quotations and citations omitted.) *Nken*, 556 U.S. 418, 434.

Teter's chance of success on the merits of this appeal is much "better than negligible" and much more than a "mere possibility" for the simple reason that this is a case of first impression for this court. Indeed, at the full hearing on Sunoco's Petition for Appropriation the trial court stated as follows: "As far as the Court knows this is the first time we'll be hearing the argument at issue in this case and making a decision in [the] state so we want to make sure that we keep a clear record so if there are any appeals or anybody wants a transcript." (Appx. # 2 Ex. 18, 7 (Tr. 7:15-19.).) Accordingly, Teter's chances of success on the merits of this appeal are much better than those for most appellants.

Some of the arguments that Teter will advance in this appeal that have much more than a "mere possibility" of success, and that Teter also briefed in its Memorandum in Support of Jurisdiction, are as follows:

a. <u>R.C. Chap. 1723 does not authorize Sunoco to appropriate property for its Pipeline because the term "petroleum" does not include the finished product natural gas liquids propane and butane</u>.

The statute upon which Sunoco claims eminent domain authority is R.C. 1723.01, which states in relevant part as follows:

> If a company is organized for the purpose of * * * transporting natural or artificial gas, *petroleum*, coal or its derivatives, water, or electricity, through tubing, pipes, or conduits * * *; then such company * * * may appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building of such tubing, conduits, pipes * * *. (Emphasis added.)

The term "petroleum" is not defined in R.C. Chap. 1701. Accordingly, the determination of whether or not the finished product natural gas liquids propane and butane are "petroleum" for purposes of the statute is critical to this case. If the term "petroleum" is not construed to include finished product natural gas liquids, Sunoco has no basis to rely on R.C. 1701.01 for its purported right to appropriate property from Teter for the Pipeline.

This court has long held that courts must strictly construe statutes that delegate the authority of eminent domain to private enterprises in favor of the landowner to protect the constitutional guarantee of the right to private property. *Parkside Cemetery Assn. v. Cleveland, Bedford & Geauga Lake Traction Co.*, 93 Ohio St. 161, 112 N.E. 596, paragraph one of syllabus (1915); *accord Pontiac Improvement Co. v. Bd. of Commrs. of Cleveland Metro. Park Dist.*, 104 Ohio St. 447, 135 N.E. 635, paragraph one of syllabus (1922); *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-2799, 852 N.E.2d 1115, paragraph three of syllabus, ¶ 70. Accordingly, it was improper for the lower courts to, and this court need not, stretch the definition of "petroleum" to include finished product natural gas liquids to allow for the appropriation of private property for pipelines that transport such liquids, because that is a legislative function.

i. <u>The common meaning of the terms "petroleum" and "oils" when the statute was originally enacted included only the naturally occurring liquid substance that is commonly referred to today as crude oil</u>.

As the Supreme Court of Rhode Island perfectly explained, the first step in statutory construction is to determine "whether or not the statute in question has a plain meaning and therefore is unambiguous; in that situation, [courts] simply apply that plain meaning to the case at hand. By contrast, if a statute is ambiguous, [courts] must engage in a more elaborate statutory construction process, in which process [courts] very frequently employ the canons of statutory constructions." (Citations omitted.) *Chambers v. Ormiston*, 935 A.2d 956, 960 (R. I.2007).

"It is a fundamental principle that in the absence of statutory definition or qualification the words of a statute are given their ordinary meaning. What is crucial, however, is to determine the ordinary meaning *as of the time of enactment* [of the statute in question]. Words can have different meanings at different points of historical time, but it is the role of the judiciary to ascertain what meaning a particular word had when the statute containing the word was enacted." (Emphasis in original, internal citations and quotations omitted.) *Id.* at 961; *see also Perrin v. U.S.*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 1999 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning. Therefore, we must look to the ordinary meaning of the term * * * *at the time Congress enacted the statute* * * *." (Emphasis added, citations omitted); *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228, 114 S.Ct. 2223, 129 L.E.2d 182 (1994) ("[T]he most relevant time for determining a statutory term's meaning" is the time the statute was enacted). "In carrying out the process of determining the meaning of words employed by an enacting legislature, reference to contemporaneous dictionaries is appropriate and often helpful. (Citations omitted.) *Id.* at 962; *see also Alexander v.*

Buckeye Pipeline Co., 53 Ohio St.2d 241, 242, 374 N.E.2d 146 (1978) (relying upon contemporaneous dictionaries to determine the common meaning of the terms "oil" and "gas" for the purpose of a 1911 right of way agreement).

The statute that is now codified as R.C. 1723.01 was initially enacted in 1868. 65 Ohio Laws 109-10 (eff. Apr. 25, 1868), included in Appx. # 1 as Ex. 6, 74. The initial version of the statute allowed companies to incorporate for the purpose of "transporting *oils* through tubing and pipes" and to "enter upon any land for the purpose of examining and surveying a line for its tubing and pipes for the transportation of *oil*, and [to] appropriate so much thereof as may be deemed necessary for the laying down of such tubing and piping * * *." (Emphasis added.) *Id.*

In 1875, the General Assembly amended the statute to authorize companies to incorporate "for the transportation of *petroleum* and water through pipes and tubing." The term "oils" was changed to "petroleum" in this amendment. This indicates that the General Assembly understood these two words to be synonymous and used these words interchangeably during this period. The addition of water "was for the purpose of furnishing the same to engineers employed in developing for, or in the production and transportation of *petroleum* * * *." (Emphasis added.) 72 Ohio Laws 151 (eff. Mar. 30, 1875), included in Appx. # 1 Ex. 8, 79. This version of the law was codified for the first time as R.S. 3878, in 1882. R.S. 3878 (1882), included in Appx. # 1 Ex. 8, 81.[1]

In 1888, the General Assembly amended the statute to add "natural gas" to the list of substances for which pipes could be constructed and land could be appropriated. This

[1] The General Assembly also amended the statute in 1872 to clarify that "appropriations [by oil pipeline companies] shall be conducted in accordance with the provisions of the act or acts which may then be in force providing for compensation to the owners of private property appropriated to the use of the corporations * * *." 69 Ohio Laws 194 (eff. April 29, 1872), included in Appx. # 1 as Ex. 7, 77.

amendment also added language for regulatory oversight of pipeline companies by city councils of municipal corporations. The terms "petroleum" and "oils" are both used in this version of the statute, which again shows that that the General Assembly understood these two words to be synonymous and used these words interchangeably during this period. 85 Ohio Laws 114-15 (eff. Mar. 24, 1888), codified in R.S. 3878 (1895), both included in Appx. # 1, Ex. 9, 83.

The common meaning of the words "oil" and "petroleum" as defined in the leading dictionary from around this time were:

> 'Oil' – An unctuous substance expressed or drawn from various animal and vegetable substances. *The distinctive characteristics of oil are* inflammability, *fluidity,* and insolubility in water. Oils are *fixed and greasy*, fixed and essential, and volatile and essential. They have *smooth feel*, and most of them have little taste or smell. Animal oil is found in all animal substances. Vegetable oils are produced by expression, infusion, or distillation.
>
> 'Petroleum' – Rock oil, *a liquid,* inflammable substance or bitumen extruding from the earth and on the surface of the water in wells and fountains, in various parts of the world, or oozing from cavities in rocks. It is essentially composed of carbon and hydrogen.

(Emphasis added.) *An American Dictionary of the English Language*, 770, 820 (Webster, Noah; 1890), relevant pages included in Appx. # 1 Ex. 15, 106.[2]

It is undisputed the propane and butane do not fall within the foregoing definitions because they are gases, not liquids, at standard temperature and pressure. (Appx. # 2 Ex. 18, 113, 154-55, 158-59 (Tr. 113:19:23, 154:12-15, 155:2-21, 158:9-12, 159:6-9).)

[2] Indeed, a decision from this court in 1903 supports the proposition that the common meaning of terms "oil" and "petroleum" around the turn of the 19th century only include the natural occurring liquid substance that is extracted from a well. *Langabaugh v. Anderson*, 68 Ohio St. 131, 67 N.E. 286 (1903). Specifically, in *Langabaugh*, this court uses the terms "oil," "crude oil" and "crude petroleum" interchangeably to refer to the naturally occurring liquid substance that was being extracted from a well. *Id*. at 140 ("oil"), 141 ("crude oil"), 145 ("crude petroleum").

The lower courts completely ignored the foregoing definitions and instead applied definitions of "petroleum" that were not established until 1996 or later.[3] Similarly, the decisions from the *Ohio River Pipe Line* cases that the lowers courts relied upon extensively, and which this court accepted for discretionary review in 2001, but did not decide because the cases settled, relied exclusively on definitions of "petroleum" that post-date the enactment of the statute to reach the erroneous conclusion that the term includes petroleum by-products. *Ohio River Pipe Line, LLC v. Henley*, 144 Ohio App.3d 703, 708, 761 N.E.2d 640 (5th Dist. 2001); *Ohio River Pipe Line, LLC v.* Gutheil, 144 Ohio App.3d 694, 700-01, 761 N.E.2d 633 (4th Dist. 2001) (discretionary review of both cases granted, but dismissed upon settlement) 94 Ohio St.3d 1403, 2001-Ohio-6977.

Accordingly, even under the standard axiom of statutory construction that courts must apply the common meaning of undefined terms at the time of the enactment of the statute, the lower courts' construction of the term "petroleum" to include the finished product natural gas liquids propane and butane based on definitions that were not developed at the time the General

[3] The definitions of "petroleum" the court of appeals relied upon to stretch the definition of the term to include "its pure component parts such as pure propane and pure butane" were the following: (1) the definition from R.C. 3746.01(L), which is a hazardous waste cleanup statute that was not enacted until 1996; (2) the definition from O.A.C. 3745-300-01(93), which is a regulation governing hazardous waste cleanup that was promulgated in 1995; and (3) the current definition that was promulgated by the U.S. Energy Information Association ("EIA") in 2014. *See* EIA definition of "natural gas plant liquids" (noting that some EIA publications still use the definition of natural gas plant liquids in effect prior to January 2014), available at http://www.eia.gov/tools/glossary/index.cfm?id=N (accessed Nov. 22, 2016). The definition of "petroleum" in R.C. 3737.87(J) the court of appeals also relied upon does not even support its holding that propane and butane are petroleum. That statute defines "petroleum" as: "Petroleum, including 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*. 'Petroleum' includes, without limitation, motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils." (Emphasis added.) As noted above, propane and butane are gases, not liquids, at standard temperature and pressure and therefore are excluded from this definition.

Assembly enacted the original versions of the R.C. 1701.23 was improper. This error is even more evident give this court's clear precedent that courts must strictly construe statutes that delegate the authority of eminent domain to private enterprises in favor of the landowner to protect the constitutional guarantee of the right to private property. *Parkside Cemetery Assn.*, 93 Ohio St. 161, paragraph one of syllabus (1915); *accord Pontiac Improvement Co.*, 104 Ohio St. 447, paragraph one of syllabus; *Norwood v. Horney*, 110 Ohio St.3d 353, paragraph three of syllabus, ¶ 70.

Given the above, Teter's position that R.C. 1701.23 does not authorize Sunoco to appropriate its property for the Pipeline because the ordinary, contemporary, common meaning of the statute does not include pipelines that will transport only butane and propane has a substantial likelihood of succeeding on the merits.

ii. <u>Even if the meaning of the word "petroleum" at the time the statute was enacted was ambiguous (which it is not), the rules of statutory construction preclude an interpretation of the statute that includes propane and butane</u>.

The statute that is now codified as R.C. 1723.01 was initially enacted in 1868 and was amended several times during the late 18th century. Of particular significance, as discussed in more detail below, is the amendment to the statute in 1888 to add "natural gas" to the list of substances for which pipes could be constructed and land could be appropriated which corresponds in time with advances in technology that allowed "natural gas" to be transported by pipelines. 85 Ohio Laws 114-15 (eff. Mar. 24, 1888), codified in R.S. 3878 (1895), both included

in Appx. # 1 Ex. 9, 83.[4]

In 1904, the statute was amended again to authorize appropriations for the purpose of generating and distributing electricity. 97 Ohio Laws 300-01 (eff. Apr. 23, 1904), codified in G.C. 10128 (1910), both included in Appx. # 1 Ex. 11, 91. This amendment corresponds in time with advances with technology as well.

In 1927, the statute was amended to add "artificial gas" to the list of substances that could be transported through pipes and for which land for pipes could be appropriated. 112 Ohio Laws 143-44 (eff. April 25, 1927), codified in G.C. 10128, both included in Appx. # 1 Ex. 12, 97. This version of the statute also removed the authority of counties, townships and municipal corporations to regulate the pipelines, presumably due to the establishment of the Public Utilities Commission of Ohio in 1911. *Id. See* 102 Ohio Laws 550.

Finally, in 1951, the statute was amended to add "coal or its derivatives" to the list of substances that could be transported through pipes and for which land for pipes could be appropriated. 124 Ohio Laws 170 (eff. 1951), codified in G.C. 10128, both included in Appx. # 1 Ex. 13, 100. This final version of the statute was codified in 1953 as R.C. 1723.01 and has remained unchanged for the last 63 years. R.C. 1723.01 (1964) (eff. Oct. 1, 1953), included in Appx. # 1, Ex. 14, 103.

As explained above, there is no need to resort to canons of statutory construction to determining the meaning of "petroleum" because the term had an unambiguous ordinary meaning at the time the statute was enacted. However, to the extent there is any doubt, the

[4] The statute was also amended in 1900 to authorize municipal corporations to build natural gas, petroleum, and water pipelines and reservoirs, and to give "county commissioners as to county and state roads, the township trustees as to township roads and the council of municipal corporations as to streets and alleys" the ability to regulate the pipelines. 94 Ohio Laws 382-83 (eff. Apr. 16, 1900), included in Appx. # 1 Ex. 10, 88.

following canons of statutory construction conclusively establish that the legislature did not intend for the word "petroleum" to include all of its "pure component parts such as pure propane and pure butane" as the court of appeals held it did. (7th Dist. Judg. Entry, Appx. # 1 Ex. 3, 39, ¶ 46.)

First, under the canon of *noscitur a sociis*, "the intended meaning of an ambiguous word depends on the context in which it is used." *Black's Free Online Legal Dictionary* (2nd Ed.), available at www.thelawdictionary,org/noscitur-a-sociis/ (accessed Nov. 23, 2016). Stated slightly differently, "[s]tatutory language must be read in context and a phrase gathers meaning from words around it." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596, 124 S.Ct. 1236, 157 L.E.2d 1094 (2004).

Here, the phrase in question is "transporting natural or artificial gas, *petroleum*, coal or its derivatives, water, or electricity." (Emphasis added.) R.C. 1723.01. The definitions of "petroleum" from R.C. 3746.01(L) and O.A.C. 3745-300-01(93) – utilized by the court of appeals to hold that the term "petroleum" includes its pure component parts – both include "natural gas" and "synthetic gas" within their definitions of "petroleum." (7th Dist. Judg. Entry, Appx. # 1 Ex. 3, 24-35, ¶¶ 31, 33.) Under then canon of *noscitur a sociis*, when the foregoing phrase is read as a whole, it necessarily follows that the General Assembly did not intend to include "natural gas" or "artificial gas" within the definition of "petroleum" because otherwise there would have been no reason for it to include these words in the statute.

Second, a very similar cardinal rule of statutory construction is that statutes "should be construed so that effect is given to all its provisions, so no part will be inoperative or superfluous, void or insignificant * * *." (Citations omitted.) *Hibbs v. Winn*, 542 U.S. 88, 101, 1224 S.Ct. 2276 (2004). Thus, courts "assume that [a legislative body] used two terms because it

intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146, 116 S.Ct. 501 (1995). A related principal applies to statutory amendments: "[w]hen [a legislative body] acts to amend a statute, [courts] presume [the legislature] intends its amendment to have real and substantial effect." *Stone v. Immigration and Naturalization Servs.*, 514 U.S. 386, 387, 115 S.Ct. 1537 (1995). Here again, the use of the definitions of "petroleum" found in R.C. 3746.01(L) and O.A.C. 3745-300-01(93) renders the words "natural gas" and "artificial gas" that appear in the R.C. 1723.01 superfluous. These are terms which the General Assembly specifically added to the statute by amendments in 1888 and 1927 and therefore cannot simply be ignored by defining "petroleum" in a way that includes them. 85 Ohio Laws 114-15 (eff. Mar. 24, 1888), codified in R.S. 3878 (1895), both included in Appx. # 1 Ex. 9, 83; 112 Ohio Laws 143-44 (eff. April 25, 1927), codified in G.C. 10128, both included in Appx. # 1 Ex. 12, 97.

Third, the canon of statutory construct *expressio unius est exclusio alterius* is helpful in determining the General Assembly's intended meaning of the term "petroleum." That principle provides that the expression of one thing is to the exclusion of another. The General Assembly's choice to include "coal *or its derivatives*" when it amended the statute in 1951, but to include only "petroleum" and to leave out "petroleum or its derivatives," "petroleum products," or any similar phrase at the time it originally enacted the statute and at each time it subsequently amended it is yet another indication that it did not intend the term "petroleum" to include all of its pure component parts. 124 Ohio Laws 170 (eff. 1951), codified in G.C. 10128, both included in Appx. # 1 Ex. 13, 100; *see also Smith v. Erie R. Co.*, 134 Ohio St. 135, 147-48, 16 N.E.2d 310 (1938) (applying *expressio unius est exclusio alterius* to interpret a provision in a former eminent domain statute).

Finally, there is no doubt the General Assembly is aware of the advances in fracking technology that has allowed for the extraction of natural gas liquids from the Utica and Marcellus share formations in Eastern Ohio and the fractionation of those liquids into finished product natural gas liquids, including the propane and butane Sunoco intends to transport through the Pipeline. Indeed, in response to these developments the General Assembly enacted 2012 SB 315, which specifically excludes natural gas liquids finished product pipelines from regulation by PUCO. R.C. 4905.02(F) (excluding "[a] pipe-line company * * * engaged in the business of the transport associated with gathering lines, raw natural gas liquids, or finished product natural gas liquids" from the definition of "public utility."). Had the General Assembly believed that the newly developed natural gas liquid finished product pipelines provided a sufficient public use to warrant the use of eminent domain, it would have amended the statute to authorize the appropriation of land for such pipelines as it did in 1888 for natural gas, in 1904 for electricity, in 1927 for artificial gas, and, finally, in 1951 for coal or its derivatives.

Accordingly, if there is any doubt as to the meaning of the word "petroleum" the General Assembly intended when it enacted and subsequently amended the statute numerous times, the foregoing canons of construction require a construction that excludes the finished product natural gas liquid products propane and butane that Sunoco intends to ship through the Pipeline. Therefore, again, Teter has a substantial likelihood of success on the merits of this appeal.

b. <u>The court of appeals impermissibly relied upon speculation and potential economic benefits to hold that appropriation of the easements from the Teter farm satisfies the public use requirement of Article I, Section 19, of the Ohio Constitution</u>.

In its Motion to Stay, Sunoco places great emphasis on the alleged economic harm it claims it and others will suffer if this court does not grant the Motion to Lift Stay. (Mot. 1 (should be i), 5-7.) Specifically, the harms Sunoco alleges will result from the continuance of the

stay are: (1) Sunoco's move-around and standby costs, which, as discussed in the necessity section below, it could have avoided if it had not voluntarily put itself in this position by not exploring the possibility of alternate routes until this late date; (2) lost revenue for Sunoco; (3) lost royalties for private landowners; (4) lost profits for private drillers, producers and shippers; and (5) lost jobs and economic growth for private companies such as hotels, restaurants, and retail establishments. (*Id*.) These alleged economic harms are the flip side of the exact same speculative economic benefits to the community that this has court specifically held do not, standing alone, "satisfy the public-use requirement of Section 19, Article 1 of the Ohio Constitution." *Norwood*, 100 Ohio St.3d 353, paragraph one of syllabus. Thus, Sunoco's Motion to Lift Stay supports, rather than rebuts, Teter's position that the appropriation of its property for the Pipeline does not satisfy the public use requirement.

In *Norwood*, in addition to holding that economic benefits to the government and the community do not satisfy the public use requirement, this court affirmed the following principles that are directly applicable here:

> (1) A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.
>
> (2) To justify the use of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitation on the government's power of eminent domain.
>
> (3) Any taking based solely on financial gain is void as a matter of law and courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to the community.

(Citations omitted.) *Id.* at ¶66, 77, 80. Furthermore, this court has stated, "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 * * *the power of eminent domain clearly could not

lawfully be exercised." *O'Neil v. Bd. of Cty. Com'rs.*, 3 Ohio St.2d 53, 58, (1965), quoting *Kessler v. Indianapolis*, 199 Ind. 420, 430, 157 N.E. 547 (1927).

This case involves Sunoco's plan to build a 350 mile long pipeline from Scio, Ohio in Harrison County to its own storage and distribution facility in Marcus Hook, Pennsylvania (a small portion of the facility spans into Delaware). To be clear, the Pipeline will transport Ohio resources out of Ohio to Pennsylvania and Delaware to a facility owned by Sunoco. (Appx. # 2, Ex. 18, 21(Tr. 21:2 –22:19).) The private use and benefit to Sunoco is actual and present and the public use is speculative at best.

Nonetheless, the court of appeals ignored all of the foregoing precedent from this court and instead relied solely upon speculation and potential economic benefits to hold that Sunoco's appropriation of Teter's property satisfies the public use requirement. Specifically, the court of appeals identified the following "public uses," which are, in reality, only private economic benefits:

- "[W]ithout the pipeline 'you have to pay to pay a dollar to get a product you can sell for 50 cents to market and that's just not efficient and will stifle production and that will stifle drilling and that will stifle royalties[.]'" (7th Dist. Judg. Entry, Appx. # 1 Ex. 3, ¶ 71.)
- A cracker plant planned for Pennsylvania is "likely to send economic reverberations through the entire region." (*Id.* ¶ 72.)
- "The pipeline actually services Ohio in that it takes products to market. This benefits Ohioans by maintaining a supply for the demand; wells are drilled and Ohioans are receiving royalties." (*Id.* ¶ 79.)

Higher royalties, economic reverberations, production by and for private interests, and maintaining supply for demand are all purely economic benefits, and are not a public use.

Moreover, the other purported "public uses" the court of appeals relied upon are purely speculative. At the necessity hearing, Sunoco's representative, Hank Alexander, consistently maintained that Sunoco does not "have any control over where the shippers take their products *

* * [or] ultimately where these products go." (Appx. # 2, Ex. 18, 64, 66 (Tr. 64:20-25; 66:23).) Nonetheless, Mr. Alexander proceeded to offer self-serving hypotheticals about what the propane and butane *could* be used for. Specifically, Mr. Alexander testified that "propane *could* be used to heat homes[,]" "*could* be broken down into other products like propylene[,]" "*could* be used for every day products like [water bottles,]" and that "butane *can* be used as lighter fluid [and] it also has a role in terms of the automotive industry." (Emphasis added.) (*Id.* at 30:24 – 31:15.) The court of appeals impermissibly relied upon this speculative testimony to find that the Pipeline serves a public use, which is clearly seen in the following statements in its decision:

- "[T]he Mariner East 2 Pipeline has no off ramps in Ohio. Once the product reaches any off ramp, including the last off ramp at Marcus Hook, Pennsylvania, where the product will go is *speculative*. There was testimony it *could* be shipped overseas and sold. Testimony indicated it *could* also be transported all over the northeast, including Ohio, for use in heating homes and as an additive to gasoline so that automobiles can start in colder temperatures. Testimony indicated [Sunoco] owns a plant in Marcus Hook that *might* have the potential to be converted into a cracker plant."
- "Given propane and butane use, it *seems certain* that some products containing Ohio propane and butane will return to Ohio; it *may* be through additives to gasoline or plastics made from cracker plants."
- "Although there is no off ramp in Ohio's plan as of now there *may come a time* when an off ramp is added because a cracker plant is built in this area." (Emphasis added.) (7th Dist. Judg. Entry, Appx. # 1 Ex. 3, 46, ¶¶ 70-72.)

The legislative history of R.C. 1723.01 shows that the General Assembly intended the statute to authorize the use of eminent domain for the construction of energy infrastructure that directly benefits the general public by providing it with resources that are needed to meet the public's daily living needs, not to facilitate economic growth and commercial enterprise. Although the court of appeals attempted to justify its holding that the Pipeline serves a public use by stating that "it provides some of the necessities of life," in reality, finished product natural gas liquids pipelines like the one at issue here are materially different than public utility pipelines and powerlines. (*Id.* ¶ 73.) Whereas the purpose of public utility pipelines and powerlines is to

actually provide resources directly to the public, the purpose of a finished product natural gas liquids pipeline is commercial because the molecules they transport are primarily used as feedstocks in commercial manufacturing to make plastics. (Appx. # 2, Ex. 18, 163 (Tr. 163:8-25).) Moreover, it is undisputed that the Pipeline does not have any off ramps in Ohio and thus cannot provide the products that will be shipped through it to the Ohio general public. (*Id.* 110:1-7.)

Sunoco's pretext that the propane that is shipped *could* be used to heat homes is nothing more than legal gerrymandering to obtain eminent domain authority in Pennsylvania (and now Ohio). *See In re Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1025-29 (Penn. App. Jul. 14, 2016) (Brobson, J. dissenting and McCullough, J. dissenting) (explaining that after a Pennsylvania trial court held that Sunoco did not have eminent domain authority for the Pipeline because it was not providing public utility services, it added on and off ramps within Pennsylvania and obtained public utility permits from the Pennsylvania Public Utilities Commission so that it could appropriate property for the Pipeline).

The fact that the purpose of the Pipeline is not actually to provide propane to consumers as Sunoco claims is also supported by the testimony of Teter's expert, Dr. Paul Matter. He testified that "99 percent [pure] propane would not be customarily manufactured for the intention of selling to consumers." (Appx. # 2 Ex. 18, 163 (Tr. 163:8-10).) Dr. Matter went on to explain that "the highest grade of propane that's sold to consumers is called HD5 and the spec for that is 90 percent propane. It wouldn't make sense to purify propane beyond 99 percent, or even much further beyond 90 percent propane unless you were intending to use it for something else because it cost[s] additional money and energy to purify it more." (*Id.* 163:12-18.) Finally, he explained that 99 percent pure propane would be more likely to be used in a PDH plant to

convert the propane into propylene to make plastics because "if you want to use that propylene to produce plastics it needs to have a very high purity." (*Id.* 163:19-25). Dr. Matter's opinion is consistent with the EIA's definition of consumer grade propane (the source of the definitions Sunoco has painstakingly argued the courts should follow here), which lends credibility to it. Specifically, the EIA defines "propane, consumer grade" as:

> A normally gaseous paraffinic compound (C_3H_8), which includes all products covered by Natural Gas Policy Act Specifications for commercial and HD-5 propane and ASTM Specification D 1835. *Excludes: feedstock propanes, which are propanes not classified as consumer grade propanes, including the propane portion of any natural gas liquid mixes, i.e., butane-propane mix.*

Available at http://www.eia.gov/tools/glossary/index.cfm?id=P (accessed Nov. 23, 2016) (emphasis added). Accordingly, Sunoco's claim that the Pipeline will serve a public use by providing propane to non-Ohio consumers to heat their homes was purely pretextual and thus does not establish that the appropriation of Teter's property serves a public use. When this pretext is stripped away, all that is left to attempt to justify the use of eminent domain to build the Pipeline are speculative economic benefits.

Similarly, Sunoco's claim that the pure butane that will be shipped through the Pipeline to allegedly be used as a pressurizing agent to make gasoline will serve a public use because the gasoline might make its way back to Ohio via a pipeline is speculative and pretextual. (Appx. # 2, Ex. 18, 30 (Tr. 30:17-23).) Even if this were true, this "public use is contingent and prospective" and thus does not satisfy the public use requirement. *O'Neil*, 3 Ohio St.2d at 58. Indeed, as noted above, as the court of appeals even acknowledged that "[o]nce the product reaches any off ramp, including the last off ramp at Marcus Hook, Pennsylvania, *where the product will go is speculative*." (Emphasis added.)

In conclusion, the court of appeals holding that Sunoco's appropriation of Teter's property satisfies the public use requirement of Article I, Section 19 of the Ohio Constitution

stands on a nonexistent foundation. Therefore, Teter does have a likelihood of success on the merits of this appeal.

c. <u>The appropriation of Teter's property for the Pipeline is not a public necessity solely because Sunoco determined that the property and the Pipeline are "reasonably convenient and useful</u>."

i. <u>The "reasonably convenient and useful" standard for determining the necessity of an appropriation provides far too much deference to private entities who seek to appropriate property for their own private benefit without any oversight from an accountable public agency</u>.

In *Norwood*, this court clearly stated that courts "owe no deference to a legislative finding that the proposed taking will provide a financial benefit to the community." 110 Ohio St.3d 353, ¶ 80. This court has also recognized:

> that due to the mutuality of public and private interests in [cases where the government takes property and transfers it to a private entity], a danger exists that the state's decision to take may be influenced by the financial gain that would flow to it or to the private entity because of the taking * * *. (Citations omitted.) *Norwood*, 110 Ohio St. 353, ¶ 73.

It should be obvious that this danger is ever more present where, as here, it is the private enterprise itself that determines the alleged necessity of the taking without public oversight.

In this case, the test the lower courts applied to find that the Pipeline is "necessary" was whether it is "reasonably convenient and useful to the public." (7th Dist. Judg. Entry, Appx. # 1 Ex. 3, 51, ¶ 86; C.P. Judg. Entry, Appx. # 1 Ex. 4, 64.) This standard has never been adopted by this court and has a very questionable origin.

Specifically, the "reasonably convenient and useful to the public" standard's origin appears to be a misreading of *Solether v. Turnpike Comm.*, 99 Ohio App. 228, 133 N.E.2d 148 (6th Dist. 1954), by the Montgomery County Court of Common Pleas in *Dayton v. Keys*, 21 Ohio Misc. 105, 252 N.E.2d 655 (1969). In *Keys*, the court defined necessity as follows:

> Necessity means that which is indispensable or requisite especially toward the attainment of some end. *Dayton v. Borchers*, 13 Ohio Misc. 273, 232 N.E.2d 437 (C.P.1967). In statutory eminent domain cases it cannot mean limited to physical necessity. It means reasonably convenient and useful to the public. *Solether v. Turnpike Comm*., 99 Ohio App. 228, 133 N.E.2d 148 (6th Dist. 1954). Reasonably means conformable to reason; sensible; rational; governed by reason in acting or thinking.

(*Id.* at 112.) However, the "reasonably convenient or useful to the public" standard appears nowhere in the *Solether* decision. In fact, the only place the term "convenient" appears in *Solether* is within the text of R.C. 5537.37, which is referenced twice, and is identified as a statute that "empowers the [Turnpike Commission] to acquire *by purchase (not condemnation)* such property rights as it deems necessary or convenient for the construction and operation of the turnpike." (Emphasis added.) *Solether*, 99 Ohio App. at 231, 238.

The *Solether* case involved an appeal of an order dismissing an equitable petition, which appears to have been similar to a declaratory judgment action by the landowner. The landowner asked the court to declare that the appropriation of the landowner's right to erect a billboard on his property that adjoined the turnpike "is not a necessary part of the construction, maintenance and operation of said Ohio Turnpike * * *; [and that the appropriation] violates Section 19, Article 1 of the Constitution * * *." *Id.* at 229. The Sixth District Court of Appeals held that "an owner whose property rights are sought to be appropriated by the Ohio Turnpike Commission has the right to institute an action for a judicial determination upon the evidence adduced at the trial thereof-(1) whether the taking of such rights is *reasonably necessary* to the operation of the turnpike, and (2) whether such rights are to be taken for a public purpose." (Emphasis added.) *Id.* at 235. Accordingly, the Sixth District reversed and remanded the case to the trial court for further proceedings. *Id.* at 236.

While the *Solether* case was still pending in the Sixth District, it was also before this court on a motion to certify a conflict. *Ellis v. Turnpike Comm.*, 162 Ohio St. 86, 120 N.E.2d 719 (1954). This court held that the Turnpike Commission did not have legislative authority to "acquire by appropriation proceedings the right to prohibit the erection of billboards * * * on the remaining lands of an owner whose property is taken for turnpike construction projects." *Id.* at paragraph two of syllabus. Accordingly, this court affirmed the Sixth District "so far as [its decision] reversed the judgment of the trial court in sustaining the demurrer to the petition, but is reversed, so far as it remands the cause to the trial court for further proceedings, and the cause is remanded to the Court of Common Pleas, with instructions to enter judgment for [the landowner]." *Id.* at 95. Therefore, even if the Montgomery County Court of Common Pleas had read the *Solether* case correctly, it still has very little precedential value because this court reversed the portion of the Sixth District's decision that remanded it for further proceedings.

The "reasonably convenient and useful to the public" standard that the Montgomery County Court of Common Pleas developed based on its misreading of *Solether* has subsequently been followed and applied by other Ohio courts, including the lower courts in this case. *Pepper Pike v. Hirschauer*, Cuyahoga App. Nos. 56963, 56964, 56965 and 57667, 1990 WL 6876, *3 (8th Dist. Feb. 1, 1990), quoting *Keys*; *Huron v. Hanson*, Erie Cty. App. No. E-99-060, 2000 WL 1033034, *7 (6th Dist. July 28, 2000), quoting *Keys*; *Toledo v. Kim's Auto & Truck Service, Inc.*, Lucas App. No. L-02-1318, 2003-Ohio-5604, 2003 WL 22390102, ¶ 27 (6th Dist. Oct. 17, 2003), quoting Hanson, quoting *Keys*; *Bd. of Trs. of Sinclair Cmty. College Dist. v. Farra*, 2nd Dist. No. 22886, 2010-Ohio-568, ¶ 37 (2nd Dist. Feb. 19, 2010), quoting *Keys*.

Additionally, the "reasonably convenient and useful to the public" standard provides broad deference to a private entity and renders the necessity requirement a nullity because a

private enterprise would never conclude that its own project is not "reasonably convenient and useful." Accordingly, this standard conflicts with this court's precedent that "no deference [should be given to a] finding that the proposed taking will provide a financial benefit to the community." *Norwood*, 110 Ohio St.3d 353, ¶ 80.

This issue is exacerbated by the preponderance of the evidence standard and the rebuttable and irrebuttable evidentiary presumptions contained in current version of R.C. 163.09(B). In *Norwood*, this court stated as follows:

> Recognizing that the General Assembly is currently reviewing legislation in this area of law, we have limited our decision to those points of law that we feel must be decided at this juncture. We note, however, that given our reaffirmation that the Ohio Constitution confers on the individual fundamental rights to property that may be violated only when a greater public need requires it, there are significant questions about the validity of the presumption in favor of the state that is set forth in R.C. 163.09(B), which provides that a resolution or ordinance of an agency declaring the necessity of an appropriation shall be prima facie evidence of necessity in the absence of a showing by the property owner of an abuse of discretion. See *Grace v. Koch* (1998), 81 Ohio St.3d 577, 692 N.E.2d 1009, syllabus (holding that elements of adverse possession must be proved by clear and convincing evidence); *Addington v. Texas* (1979), 441 U.S. 418, 424, 99 S.Ct. 1804, 60 L.Ed.2d 323 (noting that the clear and convincing standard of proof is often used in cases in which the 'interests at stake * * * are deemed to be more substantial than mere loss of money' and 'to protect particularly important individual interests in various civil cases'). 110 Ohio St.3d 353, fn. 16.

The General Assembly did amend R.C. 163.09(B), effective May 6, 2005, which now provides:

> (1) * * * the burden of proof [on the issue of the necessity of the appropriation] is upon the agency by a preponderance of the evidence except as follows:
>
> (a) A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum.
>
> (b) The presentation by a public utility or common carrier of evidence of the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation.

> (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.

The amended statute falls far short of requiring an appropriating agency to prove necessity by clear and convincing evidence and therefore gives the appropriating agency too much deference, where, as here, the agency is a private enterprise with a profit motive.

Accordingly, Teter has a likelihood of success on the merits of this appeal because the lower courts' determination that Sunoco's appropriation of Teter's property was necessary based on an erroneous standard which conflicts with this court's precedent.

ii. <u>A standard that requires a private company to prove the actual necessity of a taking by clear and convincing evidence should be adopted to prevent the abuse of eminent domain by private companies</u>.

Throughout this proceeding, Sunoco has argued that its corporate resolution declaring the Pipeline to be a necessity and the speculative testimony from its own employees, all with an extreme self-interest and no accountability to the public, was sufficient to establish the necessity of the Pipeline. It has also argued that Teter has failed to prove that the taking is not "convenient or useful." (Memo in Opp. 26-27.) Further, Sunoco has contended that there should be *no* analysis of whether it is necessary to go across these particular properties or whether there are possible alternate routes. Sunoco also claims it is "speculative" to presume that Teter's neighbors or others may voluntarily permit the Pipeline. (Mot. 5, n. 2.)

R.C. 163.021(A) provides that "the taking agency shall show by a preponderance of the evidence that the taking is necessary and for a public use." The term "necessary" is not defined; however it must be defined to have meaning – its *plain* meaning. The most relevant dictionary definition of necessary is a thing "*that cannot be done without*" or is "*absolutely required*."

Webster's Third New International Dictionary 1151 (1986). The plain meaning of the term necessity is thus different than, and far narrower than "convenient" or "useful."

Ohio courts have confirmed this when applying necessity requirements to private actors seeking to take land. In *Tiller v. Hinton*, this court explained that "to justify the implication of an easement by necessity, *strict necessity is required. An easement will not be implied where there is an alternative outlet to a public way, even though it is less convenient or more expensive*." 19 Ohio St.3d 66, 69, 482 N.E.2d 946 (1985), citing *Tratter v. Rausch*, 154 Ohio St. 286, 95 N.E. 2d 685, paragraph two of syllabus (1950); *Meredith v. Frank*, 56 Ohio St. 479, 47 N.E. 656 (1897) ("it must be one of strict necessity * * *. It is not merely a matter of convenience"). This clear definition of "necessity" is consistent with the plain language of the term. Pursuant thereto, "other outlets" are sufficient to disprove necessity, "even though such other outlets are less convenient and would necessitate the expenditure of a considerable sum of money to render them serviceable." *Trattar*, at 295; *see also* 15 Ohio Jurisprudence 62, Section 44.

This narrower construction of "necessity" is dictated not just by the plain meaning of the term, but further, by the same means of statutory construction chronicled above.

First, in resolving questions of statutory interpretation, "[i]t is a cardinal rule that a court must first look to the language of the statute itself to determine legislative intent." *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). Statutes "should be construed so that effect is given to all its provisions, so no part will be inoperative or superfluous, void or insignificant * * *." (Citations omitted.) *Hibbs*, 542 U.S. at 101. Thus, "necessary" means something different than "for a public use." "Necessary" also means something different than "convenient." (*See* FERC and OPSB regulations, requiring agencies to *separately* consider "public necessity" and "public convenience"). Had the General Assembly intended for eminent

domain to be used as a *first* resort rather than a *last* resort, it could have simply indicated as much. However, the General Assembly deliberately used the term "necessary" rather than "convenient" or "useful," which indicates that it intended for eminent domain to be a last resort. Further, the General Assembly, through R.C. 163.09(B)(1), would not mandate a "necessity hearing" if (1) the necessity requirement were not an enforceable limit of the appropriator's power; and (2) this court's duty is to merely serve as a rubber stamp on the appropriator's claims.

Second, this stricter construction of the necessity requirement is consistent with the canon of construction requiring that "in determining the legislative intent of a statute it is the duty of this court to give effect to the words used in a statute, not to delete words used, or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Public Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). R.C. 163.021(A) must be construed to recognize that the General Assembly deliberately chose the term "necessary" over a more flexible or deferential term, such as "convenient" or "useful."

Third, this stricter construction of the statute is consistent with the court's duty to, again, strictly construe all doubts in favor of the property owner, "[c]ourts 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,* 110 Ohio St. 3d 353, ¶ 71. And, as noted above, this duty of strict construction is heightened even further "when the contemplated public use is dependent on a private entity," or when the use of eminent domain is attempted "for transfer to another individual or to a private entity rather than for use by the state itself." *Norwood* at ¶ 72. To give deference to [a taking by or for a private entity] would be a wholesale abdication of judicial review." *Id.* Thus, rather than *deference* to Sunoco's *self-serving claim* that taking

Teter's property land is a necessity, Sunoco is owed *no deference,* and any doubts regarding necessity must be construed in favor of the Teter.

All of the precedent Sunoco cited and the lower courts' relied upon to hold that the appropriation of Teter's property was a necessity is: (1) pre-*Norwood*; and (2) where *governments,* and not *private entities,* were accorded some deference. While Sunoco claims entitlement to the *same* level of deference that has been given to *governments* pre-*Norwood,* a private entity like Sunoco, pursuant to the foregoing binding precedent, must be subjected to the strictest scrutiny rather than lax deference.

In any event, the pre-*Norwood* justifications for deference to government simply do not apply to Sunoco. Those justifications are founded upon a comprehensive public plan by elected governmental officials effectuated only after thorough public deliberation and input, consistently emphasizing factors such as reliance on "the confines of an integrated development plan" and *"*orderly implementation of a comprehensive redevelopment plan" leading courts to reason that "we also decline to second-guess the [government's] determinations as to what lands it needs to acquire in order to effectuate the project." *Kelo v. New London*, 545 U.S. 469, 487-89, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005); *Kim's Auto*, 2003-Ohio-5604, ¶¶ 3, 20 (necessity *only* after a "land use study" of the urban renewal area, approval of the plan by a commission, and city council proceedings; and even then *only* because "judicial review of a municipality's determination to appropriate land is limited."); *Mentor v. Osborne*, Lake Cty. App. No. 98-L-227, 2001 WL 567624, *3 (11th Dist. May 25, 2001) (necessity *only* because "[t]he decision of a legislative body to appropriate a particular piece of property is afforded great deference by courts because it is presumed that the legislative body is familiar with local conditions and best knows community needs," and "it is well-established that the determination of what constitutes a public

purpose is primarily the function of [the appropriating] municipality's legislative body."). Here, by contrast, there was no determination by a legislative or administrative body as to the specific parcels to which to accord deference.

The foregoing further displays that these pre-*Norwood* precedents addressing *governmental* takings are *not inconsistent* with a strict necessity requirement. The taking of a specific tract of land may meet the necessity requirement when (1) a government ordinance mandates the taking of a particular parcel; or (2) a government agency has dictated that a private actor utilize a particular route across specified parcels; but not when (3) a private entity has the freedom to accomplish its ends through the acquisition of numerous alternative parcels, but has failed to research or disprove the availability of such alternatives. Meanwhile, affording deference to a private entity's unexplained and un-researched self-serving proclamation of necessity is quite literally *unprecedented* in Ohio. Thus, converting "necessary" to mean "convenient and useful" or whatever Sunoco claims to be "necessary" is entirely unwarranted.

Fourth, this stricter construction of necessity is consistent with this court's duty to presume "compliance with the constitutions of the state and of the United States is intended," and "avoid rather than * * * raise serious questions as to its constitutionality." R.C. 1.47(A); *See also Akron v. Rowland*, 67 Ohio St.3d 374, 380, 618 N.E.2d 138 (1993), quoting *Co-operative Legislative Commt. of the Transp. Bhds. & Bhd. of Maintenance of Way Emp. v. Pub. Util. Comm.*, 177 Ohio St. 101, 202 N.E.2d 699, paragraph two of syllabus (1964). It cannot be incumbent upon the aggrieved property owner, in response to an attack on his or her "individual fundamental right," to "*rebut"* an appropriation of his or her land, especially in response to nothing more than *the bald assertion* of necessity by an *extremely self-interested private actor*,

rather than any neutral and disinterested public authority. Again, this court has *already* made this clear:

> [G]iven our reaffirmation that the Ohio Constitution confers on the individual fundamental rights to property that may be violated only when a greater public need requires it, there are significant questions about the validity of the presumption in favor of the state that is set forth in R.C. 163.09(B), which provides that a resolution or ordinance of an agency declaring the necessity of an appropriation shall be prima facie evidence of necessity in the absence of a showing by the property owner.

Norwood, 110 Ohio St. 3d 353, at n. 16. This court added "[w]e hold that when a court reviews an eminent-domain statute or regulation under the [Due Process Clause], the court shall use the heightened standard of review employed for a statute or regulation that implicates a First Amendment or other fundamental constitutional right." *Id.* at ¶ 88.

Finally, "[t]he General Assembly will not be presumed to enact a law that produces an unreasonable or absurd result," and courts must construe the statute to avoid such an unreasonable or absurd result if the language of the statute fairly permits. *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 92 N.E.2d 390, paragraph one of the syllabus (1950). Here, it would be absurd for "necessity" to mean anything other than "absolutely required" or "without other alternatives." It would also be absurd to deem "necessary" to mean "convenient." Similarly, it would be absurd for the Ohio Revised Code to mandate a necessity hearing if that hearing was simply to rubber-stamp the taking. It would further be absurd to require a property owner, as a pre-condition to keeping his or her property, to somehow prove with exactness and specificity that another route exists when the very information necessary to prove such a thing was never assembled by the appropriator in the first place. Finally, it would be absurd to deem a route across an objecting property owner's land "necessary" when the appropriator admits that it has failed to even genuinely explore alternative routes across the property of owners who may well

consent especially when the route is flexible, rather than set in stone by any government agency like OPSB or FERC. (Appx. # 2 Ex. 18, 46-48, 53-54 (Tr: 46:16 – 48:25, 53:10 – 54:1).)

Consequently, for all of the foregoing reasons, Teter has a likelihood on the merits of this appeal because the narrower *stricter plain* meaning of "necessity" is much more consistent with this court's precedent than the "reasonably convenient and useful" standard.

iii. <u>The alternate route proves that the appropriation of Teter's property is not necessary</u>.

As noted above, the route of the Pipeline has not been approved, much less set in stone, by OPSB, FERC, or any other governmental authority. Instead, Sunoco alone is attempting to proclaim the necessity of its own route in this case. This distinction matters a great deal. When FERC and OPSB adjudicate routes, they declare a particular route "necessary," both providing a reasoned administrative finding of "necessity" to which a court can defer, and requiring the private entity to abide by this "necessary" route when building the infrastructure project. No agency here has found any route necessary, meaning no government agency has fixed the route of the Pipeline. Accordingly, Sunoco maintains an atypical level of freedom to build the route over any land it would like. That freedom yields the ability and the responsibility to construct the Pipeline around the land of objecting property owners.

In fact, the evidence demonstrates that Sunoco has finally done just that. As noted above, Sunoco has finally developed an alternate route around the Teter property and has already recorded one agreement with a willing landowner granting it the right to purchase an easement along the new route. (Memo of Purchase Option, Appx. # 1 Ex. 2, 18.) It has also started to stake out the new route on the land of Teter's neighbors. (Aff'd of John Lovejoy, Appx. # 1 Ex. 1, 2, ¶ 11, Pictures 1-13 – 1-15.)

Thus, without government oversight over the route of the Pipeline, eminent domain is not necessary to assemble the land to build the Pipeline. Were the route fixed by government, the use of eminent domain across objecting owners would be absolutely essential because otherwise objecting owners could simply hold out for unreasonable sums of money. This is not the case here as Sunoco has attempted to claim: with the absolute freedom to choose where the route goes, comes the absolute inability to cry "necessity" when the most profit-maximizing route fails to pan out.

Consequently, because the use of eminent domain to cross Teter's property is not necessary, Teter has a likelihood of success on the merits of this appeal.

3. Teter will suffer irreparable harm to its constitutional rights and to its property if this court lifts the stay and allows Sunoco to construct the Pipeline across its property.

a. The harm to Teter's constitutional property rights that would result from this court lifting the stay mandates a finding of irreparable harm.

To state the obvious, the overarching issue in this case is whether Sunoco can use eminent domain to take Teter's private property. In *Norwood*, this court reiterated that the inalienable right to possess and enjoy one's property guaranteed by Article I, Section 1 of the Ohio Constitution is a "fundamental right" and stated, "[t]here can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." (Citations omitted.) 110 Ohio St.3d 353, ¶ 38.

Harm is irreparable "if it is not fully compensable by monetary damage." *Obama*, 697 F.3d at 436, quoting *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535,550 (6th Cir.2007). "When constitutional rights are threatened or impaired, *irreparable injury is presumed*." (Emphasis added.) *Id.*, citing *ACLU of Ky.*, 354 F.3d at 445. Stated slightly

differently, "if it is found that a constitutional right is being threatened or impaired, *a finding of irreparable injury is mandated*." (Emphasis added.) *Bonnell*, 241 F.3d at 809, citing *Elrod*, 427 U.S. at 373.

Sunoco's Motion to Lift Stay is asking this court to allow it to "trod" upon Teter's constitutional right to exclude Sunoco from Teter's property during the pendency of this appeal in exchange for it posting a $2.5 million bond. (Mot. at 2 (should be ii), 2, 9.) However, it completely ignores the fact that money cannot compensate Teter for the violation of its constitutional rights. Accordingly, Sunoco's claim that Teter will not suffer irreparable harm from the lifting of the stay and the construction of the Pipeline across its property is baseless and must be rejected by this court.

b. <u>The construction of the Pipeline will cause irreparable harm to Teter's property even if the Pipeline is later removed</u>.

Sunoco's claim that the construction of the Pipeline across Teter's property is just an inconvenience that can be fully remedied by removing the Pipeline is disingenuous. (Memo in Opp., 28; Mot. 4-5.) As John Lovejoy testified at the hearing on Teter's initial Motion to Stay filed with the trial court that that he previously experienced the construction of a pipeline and found it to be a lengthy and invasive process. (Appx. # 1 Ex. 17, 128-31 (Tr. from Stay Hearing 27:13 – 30:8).) Sunoco itself estimates that the construction will take eight months. (*Id.* at 132 (Tr: 81:21).) As the court can see from the attached pictures of Sunoco's construction of the Pipeline on Teter's neighbors' properties, the process involves heavy equipment, the removal of trees and clearing of land, the digging of a large trench. (Aff'd of John Lovejoy, Appx. # 1 Ex. 1, 2, ¶¶ 8, 9, Pictures 1-2 – 1-9.) As can also be seen from the pictures, the proposed route over the Teter property goes through a wooded area and will require the removal of a significant number of trees. (*Id.* at ¶ 10, Pictures 1-10 – 1-12.) Thus, Sunoco's claim that it can fully restore the

property simply by removing the Pipeline is false. There would be damage to the property for years to come, not to mention further infringement on Teter's property rights during the time Sunoco's construction crews were on the property to remove the Pipeline. Therefore, there will be irreparable harm to Teter's property even if the Pipeline is later removed.

c. <u>Neither the settlement nor the bond will compensate Teter for the infringement of its constitutional rights or the damage to its property</u>.

Sunoco argues in its Motion to Lift Stay that the trial court's Judgment Entry that adopted the parties' settlement of the compensation for the appropriation to allow Teter to go forward with this appeal fully compensates it for "any economic or property damage or inconvenience it will incur as a result of the easement or the construction of the pipeline on its property." (Mot. 3.) This fails to recognize that the settlement is for the value of the easement and damage to the property *if* Sunoco is ultimately found to have the right to appropriate the property. If Teter prevails on this appeal, it will never receive the settlement payment because Sunoco will not get the easements. It also fails to recognize that the settlement is only intended to compensate Teter for the value of easements and the damage to the residual of its property, not for the violation of its constitutional rights that will occur if Sunoco is permitted to construct the Pipeline during the pendency of this appeal and Teter later wins.

Moreover, the bond Sunoco has offered to post in exchange for being permitted to construct the Pipeline across Teter's property during the pendency of this appeal will not provide Teter with any compensation for the damage to its property or the infringement of its constitutional property rights during the construction and subsequent removal of the Pipeline. Instead, as proposed by Sunoco, its sole purpose is to ensure that the "portion of the pipeline that crosses the Teter Trust property will be promptly removed and the property [allegedly] restored to its prior state." (*Id.* at 2 (should be ii).)

Accordingly, Sunoco's "alternative [to the stay] that [allegedly] more fairly balances the equities and protects the interests of all parties[,]" actually provides no protection to Teter at all. Accordingly, this court should reject the proposal and deny Sunoco's Motion to Lift Stay.

4. <u>The harm to Teter's constitutional rights and property outweighs the alleged economic harm to Sunoco and others</u>.

Sunoco claims that it will suffer economic damages from the continuance of the stay because it is required to pay its construction crews move-around and standby costs to go around the Teter farm. (Mot. 5.) It also claims it will begin to incur damages from lost revenue if the Pipeline is not completed by its alleged scheduled completion date of April 2017. (*Id*.) Even if these alleged economic damages were certain, which they are not, they do not outweigh the irreparable harm to Teter's constitutional rights and property that would result from the lifting of the stay.

First, Sunoco could have avoided all of the damages it claims it will sustain from the continuance of the stay by simply negotiating with other landowners when Teter initially informed Sunoco that it did not want the Pipeline to cross its property. The fact that Sunoco elected to pursue eminent domain prior to exploring options and failed to pursue an alternate plan for its $3 billion Pipeline until now is not Teter's fault or this court's concern. Furthermore, Sunoco admits in its Motion to Lift Stay that it is finally pursing an alternate route for which it has already obtained at least one option to purchase an easement and has begun the process of marking the new route. (*Id.* 5, n. 2; Memo of Option Purchase, Appx. # 1 Ex. 2, 18; Aff'd of John Lovejoy, Appx. # 1 Ex. 1, 2, ¶¶ 6, 11, Pictures 1-1, 1-13 – 1-15.) Sunoco also insists that it can easily remove and relocate the Pipeline if Teter wins this appeal. (Mot. 7-8.) Accordingly, it stands to reason that Sunoco could have developed an alternative route around Teter's property just as easily *before* it chose to attempt to take Teter's property. Thus, it cannot now claim that it

will suffer irreparable harm as a result of the stay because the true cause of any harm it will suffer is its own negligence. Moreover, the fact that it will complete the Pipeline during the pendency of this appeal regardless of whether this court grants its Motion to Lift Stay negates any irreparable harm it claims it will suffer. (Motion 5, n. 2.)

Second, despite Sunoco's claim that the anticipated completion date for the Pipeline is April 2017, the truth is that Sunoco does not know when the Pipeline would be completed even if this court were to remove the stay. This is because it still does not have the necessary permits for the Pipeline in parts of Pennsylvania. (Tr. from Earning Call; Appx. # 1 Ex. 5, 68.) In fact, Sunoco's President recently told investors that he now does not expect the Pipeline to be operational until third quarter 2017 because of the issue with the permits. (*Id.*). Interestingly, Sunoco's President makes no mention of this pending appeal or the stay before this court. Accordingly, any lost revenue Sunoco claims it will suffer from the stay is speculative, and, more importantly, is not a matter of public concern. As such, the alleged economic harm to Sunoco from the continuance of the stay does not outweigh the irreparable harm to Teter's constitutional rights and property that will result from the construction of the Pipeline on its property during the pendency of the this appeal.

Similarly, the alleged harm that Sunoco claims third parties will suffer in the form of decreased royalties; lost profits for drillers, producers and shippers; and slowed economic growth is speculative and does not outweigh the harm to Teter's constitutional rights and property. (Mot. 1 (should be i), 6.) This "harm" stems from the claimed economic benefits of the Pipeline, which do not even satisfy the public use requirement, much less outweigh the harm to Teter's constitutional rights and property. *Norwood*, 110 Ohio St. 353, paragraph one of syllabus.

Finally, as this court stressed in *Norwood*, appropriation proceedings must "be advanced as a matter of immediate public interest and shall be heard by the court at the earliest practical moment." *Id.* at ¶ 110, quoting R.C. 163.22. Accordingly, this case will proceed much more quickly than a typical case, thereby reducing any damages Sunoco and others may sustain from the stay.

5. <u>The continuation of the stay to preserve the status quo during the pendency of this appeal is in the public interest because it protects constitutional rights</u>.

"[T]he public interest is promoted by the robust enforcement of constitutional rights." *Am. Freedom Defense Initiative*, 698 F.3d at 896. As Teter explained in its Motion to Stay, *there are over two hundred eminent domain cases pending* in several counties in Ohio due to the lack of guidance on many of the core issues presented by this appeal. (Dockets, Appx. # 1 Ex. 16, 111.) While these ambiguities persist, Ohio landowners, especially those currently involved in eminent domain proceedings, are forced to agonize over whether the pipeline companies even have the right to appropriate their properties. Of course, continuing the stay here will not put a "moratorium" on those pending cases or on pipeline companies instigating litigation for their natural gas liquids finished product pipelines, but it will send a clear message to the public and the pipeline companies alike, namely that this court will settle this issue once and for all here, and until then, Ohio landowners should not so easily give up their constitutionally protected property rights based on the specter of authority claimed by the pipeline companies. Due to this high public interest in the outcome of this case, this factor should be deemed to weigh heavily in favor of Teter and the continuance of the stay.

Therefore, this Court should deny Sunoco's Motion to Lift Stay and should continue the stay for the duration of this appeal to enable this court to resolve the numerous unsettled issues that are presented.

III. CONCLUSION

Sunoco admits in its Motion to Lift Stay that it is finally pursuing an alternative route for its Pipeline through the property of willing landowners. (Mot. 5, n 2.) It has already designed the alternate route, purchased at least one option for an easement, and started to stake the route. (Memo of Purchase Option, Appx # 1 Ex. 2, 68; Aff'd of John Lovejoy, Appx. # 1 Ex. 1, 2, ¶¶ 6, 11, Pictures 1-1, 1-13 – 1-15.) Therefore, it will complete the Pipeline during the pendency of this appeal regardless of whether this court denies its Motion to Lift Stay. The difference will just be that Sunoco will utilize voluntary easements if the court denies the Motion and continues the stay rather than forcing the Pipeline across Teter's property – an option it should have pursued *before* it claimed the appropriation of the Teter property was necessary and pursued a taking via eminent domain.

Meanwhile, Sunoco's offer to post a $2.5 million bond for the costs of removing the Pipeline does nothing to protect Teter from the infringement of its constitutional property rights. Despite Sunoco's claim to the contrary, if Sunoco constructs and then removes the Pipeline, Teter's property will not be the same for many years afterward, if ever.

For these and the other reasons set forth above, Teter respectfully requests this court to deny Sunoco's Motion to Lift Stay and to continue the stay for the duration of this appeal to preserve the status quo until this court can accept jurisdiction and decide the issues on the merits.

Respectfully submitted,

ARENSTEIN & ANDERSEN CO. LPA

/s/ Nicholas I. Andersen
Nicholas I. Andersen (0077732)
(COUNSEL OF RECORD)
Eric R. McLoughlin (0082167)
Jessica L. Sohner (0089232)
5131 Post Rd., Ste. 350
Dublin, OH 43017
P: 614-602-6550
F: 866-309-0892
nick@aacolpa.com
eric@aacolpa.com
Jessica@aacolpa.com
Counsel for Defendant-Appellant, Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing document was served upon the following by email on November 28, 2016.

Kathleen M. Trafford
(COUNSEL OF RECORD)
Ryan P. Sherman
L. Bradfield Hughes
Christopher J. Baronzzi
PORTER WRIGHT MORRIS & ARTHUR LLP
41 S. High St.
Columbus, OH 43215
ktrafford@porterwright.com
rsherman@porterwright.com
lhughes@porterwright.com
cbaronzzi@porterwright.com
Counsel for Plaintiff-Appellee, Sunoco Pipeline, L.P.

Maurice A. Thompson
1851 Center for Constitutional Law
208 E. State St.
Columbus, OH 43215
mthompson@ohioconstitution.org
Counsel for 1851 Center for Constitutional Law, Amicus Curiae in Support of Appellant

Jordan S. Berman
(COUNSEL OF RECORD)
Assistant Attorney General
Constitutional Offices Section
30 E. Broad St., 16th Fl.
Columbus, OH 43215
jordan.berman@ohioattorneygeneral.gov
Counsel for Ohio Attorney General, Mike DeWine

C. Craig Woods
(COUNSEL OF RECORD)
Andrew H. King
SQUIRE PATTON BOOGS (US) LLP
2000 Huntington Center
41 S. High St.
Columbus, OH 43215
craig.woods@squirepb.com
andrew.king@squirepb.com
Counsel for Defendant-Appellee, Enterprise TE Products Pipeline Company, LLC

Chad A. Endsley
(COUNSEL OF RECORD)
Leah F. Curtis
Amy M. Milam
Ohio Farm Bureau Federation, Inc.
280 N. High St., 6th Floor
P.O. Box 182383
Columbus, OH 43218
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Ohio Farm Bureau Federation, Inc. and Harrison County Farm Bureau, Inc., Amici Curiae in Support of Appellant

James B. Hadden
(COUNSEL OF RECORD)
Murray Murphy Moul + Basil LLP
1114 Dublin Rd.
Columbus, OH 43215
hadden@mmmb.com
Counsel for Association of Oil Pipe Lines, American Petroleum Institute, and Ohio Chemistry Technology Council, Amici Curiae in Support of Appellee

/s/ Nicholas I. Andersen
Nicholas I. Andersen (0077732)
(COUNSEL OF RECORD)
Eric R. McLoughlin (0082167)
Jessica L. Sohner (0089232)