IN THE SUPREME COURT OF OHIO

OHIO POWER COMPANY, *Plaintiff-Appellant*, v. MICHAEL BURNS, *et al.*, *Defendants-Appellees*	Case No. 2021-1168 On Appeal from the Court of Appeals of Ohio, 4th Appellate District Washington County Case Nos. 20CA19, 20CA20, 20CA2, and 20CA22 Court of Common Pleas, Washington County, Ohio Case Nos. 20AP10, 20AP08, 20AP34 and 20AP93

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF DEFENDANTS-APPELLEES

Brian A. Morris (93530)
bmorris@ij.org
(COUNSEL OF RECORD)
Daniel Nelson* (OH PHV 26049**)**
dnelson@ij.org
Dana Berliner (PA Bar 68601)
dberliner@ij.org

INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321

Attorneys for *Amicus Curiae* Institute for Justice
*Pro hac vice *motion filed*

Ryan P. Sherman (75081)
rsherman@porterwright.com
(COUNSEL OF RECORD)
Christopher J. Baronzzi (78109)
cbaronzzi@porterwright.com
Jason T. Gerken (90562)
jgerken@porterwright.com
Syed Ahmadul Huda (98633)
ahuda@porterwright.com

PORTER WRIGHT MORRIS & ARTHUR LLP
41 S. High St., Suite 2900
Columbus, OH 43215
Tel: (614) 227-2000
Fax: (614) 227-2100

Attorneys for Plaintiff-Appellant
Ohio Power Company

Joseph R. Miller (68463)
jrmiller@vorys.com
(COUNSEL OF RECORD)
Thomas H. Fusonie (74201)
thfusonie@vorys.com
John M. Kuhl (80966)
jmkuhl@vorys.com
Daniel E. Shuey (85398)
deshuey@vorys.com

VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay St., P.O. Box 1008
Columbus, OH 43215
Tel: (614) 464-6400
Fax: (614) 464-6350

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Institute for Justice (IJ) represented the prevailing homeowners in Ohio's landmark eminent-domain case *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

Founded in 1991, IJ is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society, including private property rights. As part of that mission, IJ litigates cases challenging the use of eminent domain for a non-public use, *see, e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005), and challenges eminent domain procedures that violate due process, *see, e.g.*, *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir.2005). IJ has litigated necessity in many cases, as it is closely connected to public use and due process.

IJ also has long been at the forefront of eminent-domain research, highlighting the negative impacts stemming from eminent-domain abuse. *See, e.g.*, Dick M. Carpenter II, Ph.D & John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse* (2007); John Ross, Christina Walsh, & Dana Berliner, *50 State Report Card: Tracking Eminent Domain Reform Legislation Since* Kelo (2007).

Today, IJ continues its nationwide work with eminent domain by defending Americans, and their homes, against unconstitutional takings of private property.

INTRODUCTION

Ohio power companies want the unilateral ability to determine whether it is necessary to take land from Ohioans. That is unconstitutional because necessity is a constitutional requirement subject to judicial review. It is the application of the public use requirement to the particular property. As this Court's unanimous, watershed decision in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, reaffirmed, property rights are fundamental in Ohio. When the State or a private entity uses eminent domain to take private property from Ohioans, necessity review ensures that the state takes no more than is needed for the public use. The Court should reject the power companies' position, and instead make clear that necessity review is part of the judicial review of public use, as discussed in *Norwood*. This brief—filed by the nonprofit law firm that represented the prevailing homeowners in *Norwood*—will explain how by advancing three propositions of law.

First, the issue of "necessity" in eminent domain requires meaningful, fact-based review of necessity determinations. This Court's decisions in *Norwood* and *In re Application of Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-3224, 184 N.E.3d 44, provide the correct framework. The key factors are: (1) necessity, like public use, is a judicial question; (2) necessity prohibits takings beyond what is necessary for the public use; (3) necessity requires the condemnor to prove that every piece of land or estate that it wants is necessary for the public use; and (4) property owners can use evidence to

refute assertions of necessity. Applying this framework to necessity, like *Norwood* did for public use, ensures that the judiciary sufficiently guards Ohioans' right to own private property, while at the same time preventing eminent-domain abuse. And here, applying any kind of judicial review shows that the disputed easement conditions are not necessary and are not for public use.

Second, the presumptions in R.C. 163.09(B)(1) cannot save Ohio Power Company's ("AEP")[1] proposed taking. The irrebuttable presumption in R.C. 163.09(B)(1)(c) is flatly unconstitutional for two reasons: (1) it completely forecloses judicial review of necessity, and (2) the state agency that triggers the presumption never reviews the proposed taking.

The rebuttable presumptions in R.C. 163.09(B)(1)(a) and (b) are no better for AEP. To start, these rebuttable presumptions are evidence based. So, to win on the presumption alone, AEP would have to establish the necessity of the taking—and the Landowners would have to fail to present any contrary evidence. But the opposite happened here. That is perhaps why AEP asks the Court to essentially turn the rebuttable presumptions into irrebuttable ones. But that too, would be unconstitutional. And anything else short of meaningful, fact-based review—such as AEP's suggested abuse of discretion standard—contradicts *Norwood* and *Suburban Gas*.

[1] As the Fourth District noted, Ohio Power Company is a subsidiary of AEP. *Ohio Power Co. v. Burns*, 2021-Ohio-2714, 176 N.E.3d 778, ¶ 14, fn.2 (4th Dist.).

Third, necessity review warrants the Court's attention. Eminent domain abuse can be devastating. That includes public utility easements, which affect thousands of Ohioans each year. And when abuses do occur, they disproportionally affect minorities, the impoverished, Ohioans lacking a high school diploma, and renters. Necessity review, however, would ensure all Ohioans' constitutional rights are protected.

ARGUMENT

I. Proposition of Law 1: "Necessity" is a constitutional limitation on the state's power to take private land, and it requires meaningful, evidence-based review.

The state or a private company may take someone's property only if the taking is for a public use and only if the property taken is indeed needed for the public use. *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 69. Necessity, like public use, is a constitutional requirement, and indeed, it is implicit in the public use inquiry itself. Courts must give meaningful, fact-based review to effectuate the Ohio Constitution's promise that property can be taken only for public use.

A. Necessity requires meaningful review, just like public use.

The Court has a starting point for evaluating the review needed for a necessity determination—public use. Sixteen years ago, *Norwood* conducted a thorough, historical analysis of the Ohio Constitution's strong protection of property rights to hold that a general economic benefit cannot justify taking private property under Article I, Section 19. The Court got there by detailing the "doctrinal and conceptual disarray" in eminent-domain caselaw over the decades, *Norwood* at ¶ 44, and refocusing Ohio's

"misunderstanding of the scope of review" for eminent domain, *id.* at ¶¶ 44–61, 63. In doing so, the Court rejected the contrary holding by the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005). And it cemented the new path forward for meaningful review of eminent domain in Ohio.

Norwood did not devise meaningful review for takings out of thin air. Instead, *Norwood* recognized that meaningful review was required by the Ohio Constitution's strong protection for the natural right to property, which is "'an *original* and *fundamental* right, existing anterior to the formation of the government itself.'" *Norwood* at ¶ 36, quoting *Bank of Toledo v. Toledo*, 1 Ohio St. 622, 632 (1853). It is a right that Ohio, since its inception, has declared "inviolate." Ohio Constitution, Article I, Section 19. And it is a right that must be balanced with the State's right to take property needed for a true public use.

Norwood's meaningful review applies to necessity, just as it does to public use. Indeed, *Norwood* treated the two concepts as connected inquiries. As this Court made clear, Article 1, Section 19 requires that the taking be "necessary" for a public use, *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 41, because only a public use can justify a taking, *id.* at ¶ 43, citing *Buckingham v. Smith*, 10 Ohio 288, 297 (1840); *see also Cooper v. Williams*, 5 Ohio 391, 392 (1832) ("Private property can only be taken by the government or its agent, when necessary for the '*public welfare*,' and in such case compensation must be made."). This Court in *Norwood* understood that necessity is

inextricably linked to public use. And both concepts work together "to ensure that the state takes no more than that ***necessary*** to promote the ***public use***." (Emphasis added.) *Norwood* at ¶ 69.

Conversely, to the extent taken property is not necessary for a public use, it has been taken for some reason *other* than a public use, like mere convenience or profit for the condemnor. One could say the particular property is not "necessary," but it is just as true that, because that property is not needed, it is not being taken for public use. Ultimately then, necessity review is public use review.

Under a necessity challenge, the landowner does not always dispute the stated public use for the taking. Instead, she typically argues that the taking is more than what is needed for that public use. Thus, a necessity challenge often contests only a *portion* of the condemnor's taking. That is precisely the case with the Landowners' challenge here.

A condemnor's taking may be excessive for one of two main reasons. Either the condemnor seeks too large an amount of property; or it seeks too great of an estate or interest in the property. To illustrate, suppose a taking is for a power line, which everyone admits is a public use. Yet the power company seeks 50 feet for the power line and 50 feet for parking for a friend of one of the power company's employees. The power company has statutory authorization to condemn for a power line but no statutory authorization to condemn for parking for friends. When the power company seeks 100 feet of property, the inquiry is just as much an issue of "public use" as it is of "necessity." *See, e.g.*, *Eighth*

& Walnut Corp. v. Pub. Library of Cincinnati, 57 Ohio App.2d 137, 139, 385 N.E.2d 1324 (1st Dist.1977).

Or imagine that the power company seeks 100 feet. It really only needs 85 feet, but it rounded up for convenience. Unfortunately, those final 15 feet will destroy the owner's home. In that case, it is appropriate to ask whether those 15 feet are truly for the power line or not. That could be called a necessity inquiry or a public use inquiry. Either way, it is a taking of private property, and the Ohio Constitution requires that the actual property being taken is taken only for public use.

Both sorts of disputes often arise in utility condemnations. One utility may have statutory authorization to condemn for a particular purpose, but it wants both extra land and for the easement to include the right to lease that land to other parties. *See, e.g.*, *McDonald v. Miss. Power Co.*, 732 So.2d 893, 897 (Miss. 1999) (explaining that an electric company was not permitted to sublease space on its easement "to third parties for uses other than providing electricity"). Or, a utility seeks to condemn extra land or access rights for mere convenience, even though that will have a devastating effect on the owner. *See, e.g.*, *State ex rel. Sun Oil Co. v. City of Euclid*, 164 Ohio St. 265, 272, 130 N.E.2d 336 (1955). In these situations, the condemnor is taking some property for public use, and some property that either (a) truly isn't for public use, or (b) isn't the public use that the utility has statutory authorization to condemn. In both situations, courts must

meaningfully evaluate whether the contested portion of land is actually necessary for the public use.

These examples also highlight why judicial review of necessity is immensely important. Most eminent domain cases are for established public uses—like power lines. Yet these takings occur probably thousands of times per year across Ohio. And the only constitutional protection against those takings is necessity. Thus, to have any protection at all against these common takings, necessity review must be meaningful.

B. The Court should apply meaningful necessity review with a fact-specific inquiry that looks for a real, evidence-based connection to the stated public use, like what this Court did in *Norwood* and *Suburban Gas*.

Necessity is a fact-specific inquiry. Courts must evaluate the contested portion of the proposed taking with real evidence. And the inquiry must assess both "the amount of property [needed] and the estate or interest in such property." *Henry v. Columbus Depot Co.*, 135 Ohio St. 311, 316, 20 N.E.2d 921 (1939); *see also Krauter v. Lower Big Blue Natural Resources Dist.*, 259 N.W.2d 472, 476 (Neb.1977) (citation omitted) (same). This inquiry safeguards property rights in Ohio, while also ensuring that the actual public use is not frustrated. This Court's decisions in *Norwood* and *Suburban Gas* show how to conduct this review.

In *Norwood*, this Court held that the City of Norwood's ("the City") plan to take neighborhood property did not have a real, factual connection to a public use. *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 105. To reach that holding, the

Court thoroughly looked at the alleged facts justifying the planned taking—concluding that the facts gave little justification for the taking.

For example, the City argued it could take neighborhood property because it was "deteriorating," and thus a risk to public health and safety. *Id.* at ¶ 91. But the City's factual bases for justifying the neighborhood's so-called "deteriorating" state—like diversity of ownership, lack of adequate parking, and obsolete platting—were vague, speculative, or aspects common to all neighborhoods. *Id.* at ¶¶ 92–99. The facts also showed that the neighborhood was overall in good condition. *Id.* at ¶ 92. Further, the City simply wanted to hand the property to a private developer for general economic development. *Id.* at ¶ 105. Thus, based on the facts, the taking was not for any public use, so the City could not take the property. *Id.* at ¶¶ 97–98, 105.

The Court also stressed the need for a fact-based inquiry: When evaluating public use, the taking of private property cannot be "based on mere belief, supposition, or speculation" about the property. *Norwood* at ¶ 103. Rather, the government must establish the factual connection to public use. *See id.* As this Court put it, any approach not rooted in facts "would permit the derogation of a cherished and venerable individual right based on nothing more than 'a plank of hypothesis flung across an abyss of uncertainty.'" *Id.* (citation omitted). The same is true for necessity review. Therefore, like it did in *Norwood*, this Court should review the facts of AEP's planned taking to look for a real, evidence-

based connection to the stated public use of providing new power lines.[2] The only difference is that, here, the Court needs to review only a *portion* of AEP's planned taking—not the entire taking itself.

Just last year, the Court engaged in that type of analysis. *See In re Application of Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-3224, 184 N.E.3d 44. In *Suburban Gas*, a public utility sought to increase its rate on homeowners to pay for a newly-constructed 4.9-mile pipeline extension. *Id.* at ¶¶ 5–6. By statute, the public utility could only increase its rates if the new pipeline was "useful" to current homeowners. *Id.* at ¶ 15. The homeowners challenged the 4.9-mile pipeline extension. They were not, however, denying the usefulness of the pipeline as a whole—a growing population and recently cold winters made some extension necessary. *Id.* at ¶¶ 3–5. Instead, the homeowners

[2] Necessity review also requires courts to look at the burden of the taking on the owner. For example, if losing the disputed portion or interest in property would have a major effect on the property owner, courts should consider that when evaluating whether the taking is necessary. Similarly, courts can also evaluate the burden of the taking by considering apparent alternatives that would intrude less on the landowners' property rights. *See State v. 2.072 Acres*, 652 P.2d 465 (Alaska 1982) (preventing a state agency—after a long factual review—from taking land to build a road because the state ignored two less-intrusive alternatives); *State Hwy. Comm. v. Danielsen*, 146 Mont. 539, 544, 409 P.2d 443 (1965) (holding that a condemnor cannot take a landowners' property for a highway without explaining why it did not use two, potentially equal alternatives that would have taken less private property). Apparent alternatives could also include less intrusive means, such as not spraying herbicide on a farm (like the Proposed Easements do here).

argued that the evidence showed that the pipeline did not need the *entire* 4.9-mile extension but only a *portion* of it. *Id.* at ¶ 8.

This Court agreed. In doing so, it conducted a fact-specific review of the disputed portion of property. And looking at the facts, the Court found that the "evidence showed only that the existing pipeline would soon be inadequate and that some extension was necessary; it didn't address the [homeowners'] contention that [the public utility] built far more than necessary." *Id.* at ¶ 27. That meant there was no connection between the facts and the current usefulness of the 2.9 miles in dispute. *Id.* Instead, when it came to "the 'precise length' of the extension," the evidence went to the public utility's "potential to save time and money in the future"—reasons *other* than current usefulness. *Id.* at ¶ 28. But that 2.0 miles of the pipeline were useful could not justify the remaining 2.9 miles; otherwise, "virtually any size extension (10 miles, 15 miles, and beyond) would pass muster." *Id.* at ¶ 38.

To be sure, *Suburban Gas* was not about a public utility seeking too much land from a private person—it was about a public utility seeking too much money from a private person. That said, the analysis is the same. Suburban Natural Gas Co. had to show that it did not build more pipeline than what was "useful" to the public. To do so, this Court had to conduct a fact-specific inquiry to ensure the disputed portion of a public utility's pipeline was, in fact, useful. Likewise, the Court needs to conduct a fact-

specific inquiry to ensure the disputed portion of a public utility's condemnation is, in fact, necessary.[3]

In sum, *Norwood* and *Suburban Gas* show the path forward.[4] Necessity asks if the exact property being taken is connected to the public use—and courts must look at real facts and evidence to make that determination. After all, eminent domain applies only to land that is needed for public use—anything extra stays with the landowner. And to make that determination, facts matter.

C. AEP cannot show that the disputed conditions of the easement are necessary.

Applying any kind of judicial review here shows that the disputed easement conditions are not necessary and are not for public use. The record shows why: AEP provided no factual connection between its project of 138 kV power lines and the disputed conditions in the Proposed Easements.

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[3] Even further, "necessity" is a statutory requirement for any public utility taking, R.C. 163.021, just like "usefulness" is a statutory requirement for public utility ratemaking, R.C. 4909.15(A)(1).

[4] Other courts apply the same fact-based analysis, as this Court did in *Norwood* and *Suburban Gas*, to necessity cases themselves. *See, e.g.*, *People ex rel. Dir. of Fin. v. Young Women's Christian Ass'n of Springfield*, 86 Ill.2d 219, 239–240 (1981) (explaining that a state agency could not take an entire city block to build a courthouse when the evidence showed it only needed half of the block); *Mitton v. Wis. Dept. of Transp.*, 184 Wis.2d 738, 739–741, 748 (1994) (finding a proposed taking of 6.26 acres to build a highway unnecessary because the evidence showed that "only 1.26 acres of the land [was] needed for a highway right-of-way").

Take the no-abandonment clause. An abandonment clause kicks in only if the property is not being used for the public use for which it was condemned. It then reverts to the landowner. So property subject to an abandonment clause is, by definition, not being used for public use. By insisting on a no-abandonment clause, the Power Companies are insisting that they be able to condemn—and then keep—property that is, by definition, not for public use. AEP's sole witness failed to explain why AEP needed a no-abandonment clause. Supp. to Appellant's Merit Brief, 3, 169–170.

Another dispute is over the right to use herbicide. *See* Supp. to Appellant's Merit Brief, 2, 176–78. This easement crosses a farm. Not surprisingly, the Landowners are concerned about the effect of herbicide on the crops. The question, then, is whether it is necessary to use herbicide, which will severely affect the farms' crops. A factual inquiry would allow the owner to show that it would not be necessary to destroy vegetation, and the Power Companies could present contrary evidence if they had any (they didn't here). For example, a landowner could put on evidence that the Power Company appears to vary the terms of these easements based on how much power the landowner has and whether the attorneys are experienced. If true, that would show that the varied terms are unnecessary. In a proper necessity inquiry, the owner could present evidence of those facts, and the court would consider the evidence.

The Landowners also dispute the scope of the Proposed Easement. There are no limits on AEP's air rights within the easement area. AEP gave no reason for needing

unlimited air space. Supp. to Appellant's Merit Brief, 182. The Proposed Easements also gives AEP unrestricted access to the Landowner's property. Under the challenged conditions, AEP can enter the Landowner's property whenever it wants. And if AEP deems the access road unsuitable (whatever that means), it can access the property wherever it wants. Supp. to Appellant's Merit Brief, 2. AEP offered no evidence why having the right to come and go as they please was necessary for 138 kV power lines.

In the end, none of the disputed easement conditions are necessary for new, 138 kV power lines, and AEP did not provide evidence showing otherwise. As a result, the challenged terms in the Proposed Easements are unnecessary because they take more than what AEP needs, and because they cause unnecessary harm to the Landowners.

II. Proposition of Law 2: Neither the irrebuttable presumption nor the rebuttable presumption, both in R.C. 163.09(B)(1), can save the disputed conditions of the Proposed Easements.

AEP, however, wants the Court to ignore the facts in this case. In its Second Proposition of Law, AEP argues that "[a] certificate from the Ohio Power Siting Board declaring that a utility project will 'serve the public interest, convenience, and necessity' raises an irrebuttable presumption under R.C. 163.09(B)(1)(c) that the appropriation sought by the public utility for that project is necessary." Appellant's Merit Brief 22. In other words, if the Ohio Power Siting Board (the "Board") thinks the overall project is necessary (*i.e.*, that it is necessary to update the power lines), AEP wants to prevent *any* landowner from challenging the need for *any* taking of land to complete that project. But

that type of irrebuttable presumption is unconstitutional. AEP also says the two rebuttable presumptions in R.C. 163.09(B)(1)(a) and (b) entitle it to the same presumption of necessity. But neither do. The Court should reject AEP's request for carte blanche authority to use eminent domain for its easements.

A. R.C. 163.09(B)(1)(c)'s irrebuttable presumption is unconstitutional.

This irrebuttable presumption is unconstitutional for two reasons. *First*, it violates Ohio's system of separation of powers because it forecloses *any* judicial review of the constitutional requirement of necessity. *Second*, the irrebuttable presumption cannot be constitutionally applied because the Board never reviewed the proposed taking.

i. The irrebuttable presumption is unconstitutional because it forecloses judicial review of necessity in violation of Ohio's system of separation of powers.

This irrebuttable presumption in R.C. 163.09(B)(1)(c) is flatly unconstitutional. A statute cannot create an irrebuttable presumption when it comes to a constitutional requirement. Certainly, a statute could not create an irrebuttable presumption of public use. Or for just compensation. The same is true for necessity. *See Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶¶ 41, 43. But that is exactly what R.C. 163.09(B)(1)(c) does. It states:

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

(Emphasis added.) R.C. 163.09(B)(1)(c).

Put simply, R.C. 163.09(B)(1)(c) allows the State to declare its own taking "necessary" just because it says so. That edict, however, directly contradicts Ohio's system of separation of powers. Under Ohio's tripartite government, the power to determine constitutional issues rests "exclusively in the judiciary." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 467, 1999-Ohio-123, 715 N.E.2d 1062. And where, as here, a constitutional question is at issue, "the General Assembly may not enter upon the judicial business of settling the constitutionality of its own laws * * * or in any other way exercise, direct, control, or encroach upon the judicial power." *Id.*; *see also Norwood* at ¶ 114. The judiciary's independent, exclusive role over guarding Ohioan's fundamental right to property becomes even more important when the General Assembly has delegated the power of eminent domain to private corporations, as it has here. *Norwood* at ¶ 71.

R.C. 163.09(B)(1)(c), however, flips the structure of constitutional review on its head. Once a state agency gives the thumbs up for a new utility project, R.C. 163.09 forecloses any judicial review of the necessity for the land. Thus, the irrebuttable presumption takes review of a key, constitutional requirement (that exists for all takings) out of the hands of the courts and puts it squarely into the hands of a state agency, the Board and private power companies. Depriving courts of judicial review in this way violates Ohio's system of separation of powers.

This is not the first time the Court has encountered overreach from the General Assembly. In fact, the Court has struck down a similar judicial-review restraint in eminent-domain statutes. *Norwood*, again, is a perfect example.

In *Norwood*, the provision at issue was former R.C. 163.19, which prohibited courts from issuing injunctions against an appropriation once an appropriating agency deposited adequate compensation for the taking. *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 113. The obvious goal of this provision was to expedite eminent-domain proceedings before the courts. *Id.* But its effect was to preclude appellate courts from issuing injunctions. That preclusion "'directly lock[ed] horns with the constitutionally inherent injunction power of the courts,'" and as such, was "'a classic example of the very type of legislative encroachment onto the power of the judicial branch of our government which is constitutionally impermissible.'" *Norwood* at ¶ 123 (citation omitted).

R.C. 163.09's irrebuttable presumption is no better. It categorically shuts the judiciary out of its inherent and independent authority to review a constitutional requirement of any taking of land through eminent domain. A statute that predetermines the constitutionality of a legislative act is unconstitutional—plain and simple.

ii. The irrebuttable presumption is also unconstitutional because the Board does not actually review the "necessity" of proposed takings.

R.C. 163.09(B)(1)(c) suffers from another fatal problem: It creates an irrebuttable presumption of the need to take the Landowners' property, even though the relevant

state agency, the Board, *never reviewed* the taking. The Power Companies affirm that Board never reviewed the taking, much less the need for it. But they say all is well, because the Board affirmed the general need for new power lines. *See* Supp. to Appellant's Merit Brief, 18–19, 27–28.

The Power Companies, however, are conflating two, distinct necessity determinations under two, completely separate statutory frameworks. *Compare* R.C. 4906.10, *with* R.C. 163. The necessity review the Board made was under R.C. 4906.10—a statute that has nothing to do with eminent domain. Instead, it sets out unrelated findings the Board must make before issuing a certificate approving a "major utility facility," like AEP's 138 kV power lines. R.C. 4906.01(B)(1)(b). One required finding the Board made for the power lines was that the "facility will serve the public interest, convenience, and necessity." R.C. 4906.10(A)(6). But that finding goes to the necessity of the power lines themselves, *not* to the necessity of taking the Landowners' property for those power lines.

By contrast, R.C. 163.09's irrebuttable presumption relates to the constitutional requirement of necessity for an eminent domain taking. To approve the Landowners' property for power lines, then, the Board would have to make this distinct constitutional determination. But here, the Board never reviewed the necessity of the Landowners' property—it only reviewed the necessity of the 138 kV power lines, in accordance with R.C. 4906.10. So in the end, the Board cannot create an irrebuttable presumption of the

necessity of the Landowners' property because it never even looks at that issue. For this other reason, the Court should find the irrebuttable presumption unconstitutional.

B. The Power Companies' reading of the rebuttable presumptions in R.C. 163.09(B)(1) both creates an *irrebuttable* presumption for the disputed portions of the Proposed Easements and illicitly limits the standard of review.

The Power Companies make two main arguments about the two rebuttable presumptions in R.C. 163.09(B)(1)(a) (triggered by a power company's board of directors) and (b) (triggered by evidence put forward by the power company). *First*, the Power Companies claim that once AEP triggers either rebuttable presumption for the taking as a whole, review of the takings "individual easement terms" are foreclosed. *See, e.g.*, Appellant's Merit Brief, 3, 25; Columbia Gas Amicus, 27–28. From there, they say the Landowners can only challenge the necessity of the entire Proposed Easements. But that just means the "rebuttable" presumptions turns into an unconstitutional, *irrebuttable* presumptions for the disputed terms.

Second, the Power Companies claim the rebuttable presumptions, once triggered, narrow the standard of review for necessity to just review for abuse of discretion or bad faith. *See, e.g.*, Appellant's Merit Brief, 22; Columbia Gas Amicus, 29. But the Power Companies are wrong about how the rebuttable presumptions work. The rebuttable presumptions simply require the Landowners to produce outweighing evidence; they do not shift or alter the scope of judicial review.

i. The Power Companies read the rebuttable presumptions as unconstitutionally *irrebuttable* presumptions.

The Power Companies say the two rebuttable presumptions in R.C. 163.09(B)(1)(a) and (b) effectively entitle it to an *irrebuttable* finding of necessity for all the Proposed Easements' disputed terms. *See, e.g.*, Appellant's Merit Brief, 3, 25; Columbia Gas Amicus, 27–28. Under such a reading—and just like the irrebuttable presumption in R.C. 163.09(B)(1)(c)—both rebuttable presumptions are unconstitutional. If a rebuttable presumption of a taking as a whole foreclosed review of its individual terms, a public utility could impose whatever terms it wanted, shielding it from judicial review.

The only way to read R.C. 163.09(B)'s two, rebuttable presumptions as constitutional is if they permit a landowner to challenge the presumed necessity of specific terms. They simply cannot be all-or-nothing presumptions capable of creating de facto irrebuttable presumptions for every term regardless of their need. As explained above, the Landowners rebutted the specific terms in dispute here.

ii. The rebuttable presumptions simply compel the Landowners to provide rebutting evidence, yet the Power Companies incorrectly claim that the rebuttable presumptions narrow the scope of necessity review.

AEP also argues that "[i]f a landowner specifically denies that the easement is necessary, the rebuttable presumptions set forth in R.C. 163.09(B)(1)(a) and R.C. 163.09(B)(1)(b) may be rebutted only upon the landowner's presentation of evidence of bad faith, abuse of discretion, or improper purpose by the agency." Appellant's Merit Brief, 22. The Power Companies contend the same. *See, e.g.*, Columbia Gas Amicus, 29.

AEP misunderstands what a rebuttable presumption does. It does not alter the ordinary scope of review[5] once triggered; it simply requires the opposing party to provide evidence rebutting the presumption, or else lose. In other words, the rebuttable presumption does not shift or change the burden of persuasion; it only changes the burden of production. *See Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, 837 N.E.2d 1169, ¶ 12 ("If the plaintiff establishes a prima facie case, then the burden of production shifts to the employer to present evidence."); *Horsley v. Essman*, 145 Ohio App.3d 438, 444, 2001-Ohio-2557, 763 N.E.2d 245 (4th Dist.) ("[A] presumption shifts the evidentiary burden of producing evidence, *i.e.*, the burden of going forward, to the party against whom the presumption is directed; it does not affect the burden of proof, which remains the same throughout the case."). AEP conflates the two.

The Power Companies may be getting their idea from former R.C. 163.09(B), which *did* expressly limit rebutting the presumption to showing an abuse of discretion. But in *Norwood*, this Court pointed out the suspect nature of that presumption, because it presumed necessity once a power company's board of directors declares necessity—and because it limited any rebuttal to abuse of discretion review. *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 136, fn.16. After *Norwood*, the General Assembly

[5] Typically, of course, the ordinary scope of review in civil cases is preponderance of the evidence.

replaced former R.C. 163.09(B) with present R.C. 163.09(B)(1)(a)—a presumption identical in every respect except for the fact that the present version does not limit review to showing abuse of discretion.

III. Proposition of Law 3: Necessity review warrants the Court's attention.

Necessity review is often portrayed by condemnors as mere quibbling. It is not. As this Court recognized in *Norwood*, the judiciary "must be vigilant in ensuring that so great a power as eminent domain, which historically has been used in areas where the most marginalized groups live, is not abused." *Norwood* at ¶ 98; *see also id.* at ¶¶ 73, 125.

Research shows this Court was correct. Census data from 2000, for example, showed that those afflicted by eminent domain project areas were more likely minorities (58% versus 45% in the surrounding community), impoverished (25% versus 16%), lacking a high school diploma (34% versus 24%), and renters (58% versus 45%). Dick M. Carpenter II, Ph.D & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urban Studies 2447, 2455 (2009). At its height, urban renewal displaced hundreds of thousands from their homes and small businesses—at least 78% of whom were non-white. *Id.* at 2450. And thousands more houses were destroyed than built—with most new housing being built for more affluent populations. *Id.*

The Power Companies, however, want to downplay the nature of the proposed taking here because AEP merely seeks an easement—rather than razing homes.

Appellant's Merit Brief, 32. But public utility easements acquired through eminent domain carry the same risks of eminent-domain abuse. Even worse, in easement cases, landowners often choose not to seek attorneys because the amount of land or money at issue is too small. This allows the state and companies to strongarm landowners. The facts here demonstrate this abuse. AEP admits that it tailors proposed easements according to whether a landowner lacks an attorney, has an attorney, or has *specific* attorneys. Supp. to Appellant's Merit Brief, 165–168; *see also Ohio Power Co. v. Burns*, 2021-Ohio-2714, 176 N.E.3d 778, ¶ 58 (4th Dist.).

Further, this case is about takings by private corporations, which as this Court noted, makes judicial review "even more imperative." *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 74. But under the Power Companies' conception of necessity review, no one—not even courts—can review the details of the takings. That position is especially troubling when, as here, a private company is exercising the eminent domain power. In this situation, the temptation to act solely for private economic advantage is overwhelming, especially when the company can serve its private interest by taking bigger bites of Ohioans' property and hoping no one notices. As a result, the Court should be especially suspicious of the Power Companies' argument that there is no judicial or statutory supervision over their personal determinations of necessity.

CONCLUSION

Necessity is a constitutional limitation on any taking of private land that demands the meaningful, independent judicial review this Court established in *Norwood* and *Suburban Gas*. This Court should hold that R.C. 163.09(B)(1)(c)'s irrebuttable presumption in unconstitutional and does not apply. This Court should also hold that the Landowners rebutted the presumptions in R.C. 163.09(B)(1)(a) and (b) by showing a lack of necessity—or, alternatively, affirm the court of appeals decision to remand this case to the lower courts for necessity review with instructions that the rebuttable presumptions in R.C. 163.09(B)(1)(a) and (b) cannot substitute for meaningful review.

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Respectfully submitted,

INSTITUTE FOR JUSTICE

/s/ Brian A. Morris
Brian A. Morris (93530)
bmorris@ij.org
(COUNSEL OF RECORD)
Daniel Nelson* (OH PHV 26049**)**
dnelson@ij.org
Dana Berliner (PA Bar 68601)
dberliner@ij.org

901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321

Attorneys for *Amicus Curiae* Institute for Justice

*Pro hac vice *motion filed*.

CERTIFICATE OF SERVICE

I certify that this **Brief of *Amicus Curiae* Institute for Justice in Support of Defendants-Appellees** was served via electronic mail on June 23, 2022, on the following:

Daniel Nelson*
(OH PHV 26049**)**
dnelson@ij.org
Dana Berliner
(PA Bar 68601)
dberliner@ij.org

INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321

Attorney for Amicus Curiae *Institute for Justice*

Ryan P. Sherman (75081)
rsherman@porterwright.com
(COUNSEL OF RECORD)
Christopher J. Baronzzi (78109)
cbaronzzi@porterwright.com
Jason T. Gerken (90562)
jgerken@porterwright.com
Syed Ahmadul Huda (98633)
ahuda@porterwright.com

PORTER WRIGHT MORRIS & ARTHUR LLP
41 S. High St., Suite 2900
Columbus, OH 43215
Tel: (614) 227-2000
Fax: (614) 227-2100

Attorneys for Plaintiff-Appellant Ohio Power Company

Joseph R. Miller (68463)
jrmiller@vorys.com
(COUNSEL OF RECORD)
Thomas H. Fusonie (74201)
thfusonie@vorys.com
John M. Kuhl (80966)
jmkuhl@vorys.com
Daniel E. Shuey (85398)
deshuey@vorys.com

VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay St., P.O. Box 1008
Columbus, OH 43215
Tel: (614) 464-6400
Fax: (614) 464-6350

*Pro hac vice *motion filed*.

/s/ Brian A. Morris
Brian A. Morris (93530)