COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2023-SC-0031

(Appeal Case Nos. 2021-CA-1214-ME; 2021-CA-1291-MR)

FLORENCE OWNER 1, LLC, et al. **MOVANTS**

v.

DUKE ENERGY KENTUCKY, INC. **RESPONDENT**

Appeal from Boone County Circuit Court
Hon. James R. Schrand, Judge
Case No. 21-CI-00119

MEMORANDUM OF AMICUS CURIAE THE INSTITUTE FOR JUSTICE IN SUPPORT OF MOVANTS

Respectfully Submitted,

J.B. Lind (KBA# 92594)
VORYS, SATER, SEYMOUR, & PEASE LLP
301 East Fourth Street, Suite 3500
Great American Tower
Cincinnati, Ohio 45202
(513) 842-8119
jblind@vorys.com

Brian A. Morris*
Dana Berliner*
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
bmorris@ij.org
dberliner@ij.org

**Pro Hac Vice Pending*

Counsel for Amicus Curiae Institute of Justice

CERTIFICATE OF SERVICE

I hereby certify on this the 1st day of February, 2023, the original and ten copies of this Memorandum were hand delivered to the Clerk, Kentucky Supreme Court, State Capitol, Room 235, 700 Capital Avenue, Frankfort, Kentucky 40601. I also served this Memorandum by U.S. mail and electronic mail on the following counsel of record and by U.S. mail on the judges whose decisions are under review:

Nick J. Pieczonka
Alex E. Wallin
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45203
(513) 357-9603
npieczonka@taftlaw.com
awallin@taftlaw.com

Counsel for Respondent Duke Energy Kentucky, Inc.

Matthew W. Fellerhoff
Daniel A. Hunt
STRAUSS TROY CO., LPA
50 East RiverCenter Blvd., Suite 1400
Covington, Kentucky 41011
(513) 621-8900
dahunt@strausstroy.com
mwfellerhoff@strausstroy.com

Counsel for Movants Florence Owners and M&T Realty

Clerk, Kentucky Court of Appeals
360 Democrat Drive
Frankfort, Kentucky 40601

Hon. James R. Schrand
Boone County Circuit Court Judge
6025 Rogers Lane
Burlington, Kentucky 41005

J.B. Lind

WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 45 because, excluding the parts exempted by RAP 15(D) and RAP 45, this document contains 1,737 words.

J.B. Lind

STATEMENT OF POINTS & AUTHORITIES

INTERESTS OF AMICUS

This case presents an important constitutional question that only this Court can resolve: Does a condemnor have the unilateral ability to determine whether it is "necessary" to take private land? The court of appeals said yes—giving Duke Energy the unchecked power to take whatever property it wants. Whether that answer is correct affects *thousands* of homeowners, small businesses, and private property owners throughout the Commonwealth. That is a quintessential question of extraordinary importance that this Court should review.

The Institute for Justice (IJ) is dedicated to getting this answer right. IJ is a nonprofit legal center dedicated to defending the foundations of a free society, including private property rights. As part of that mission, IJ is a national leader in eminent domain litigation and research. IJ litigated the landmark case, *Kelo v. City of New London*, 545 U.S. 429 (2005), which sparked a bipartisan backlash against the use of eminent domain for non-public uses. IJ also litigates and files amicus briefs in state high courts about eminent domain. *See, e.g.*, *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (representing party); *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639 (Okla. 2006) (amicus). IJ's efforts have been met with overwhelming success. Since *Kelo*, forty-seven states, including Kentucky, have strengthened their protections against eminent domain abuse, either through legislation or state supreme court decisions. Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 Sup. Ct. Econ. Rev. 183, 256 (2007).

Kentucky counsel for IJ, Vorys, Sater, Seymour, & Pease LLP, brings that same expertise. Vorys regularly represents owners in eminent domain disputes, including the successful landowners in a nearly identical case in Ohio just last year—*Ohio Power Co. v. Burns*, 2022-Ohio-4713 (Ohio Dec. 29, 2022).

IJ continues its efforts to keep eminent domain within its constitutional and statutory limits. Those limits come up in "public use" cases, of course, but also in "necessity" cases. Necessity is really just another aspect of public use. After all, if the condemnor does not truly need the property for the public use, then it is taking the property for something *other* than the stated public use. IJ seeks to protect individuals against that type of eminent domain abuse by requiring condemnors to prove, with evidence, that they actually need everything they are taking. Kentuckians deserve that same protection.

To achieve that, the Court should take this case for four reasons: (1) the Court hasn't decided a true public use or necessity case in decades; (2) Ohio just decided a near-identical case; (3) the Court hasn't interpreted Kentucky's necessity statute or the General Assembly's 2006 reforms; and (4) all of the appellate necessity cases in Kentucky predate the Eminent Domain Act. It's time this Court weighed in on this important issue.

ARGUMENT

I. The Court Has Not Decided a True Public Use or Necessity Case in Decades.

Individual property rights are fundamental rights that predate the Founding Era. They are also protected by both the Kentucky Constitution and the Eminent Domain Act of Kentucky. Ky. Const. §§ 1, 13. In 1976 (and again in 2006), the General Assembly reinforced property rights by limiting a condemnor's ability to take private property to only what is "needed" for a public use. KRS 416.550. This Court has also recognized the importance of preventing a condemnor, like Duke, from taking more "land than is necessary" for a public use. *Lexington-Fayette Urb. Cnty. Gov't v. Moore*, 559 S.W.3d 374, 380 (Ky. 2018). That protection is important because, as this Court explained, the power to condemn is an "opportunity for tyranny." *Bernard v. Russell Cnty. Air Bd.*, 718 S.W.2d 123, 126 (Ky. 1986) (citation omitted). As a result, the Commonwealth 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.

This Court, however, has not squarely addressed a public use or necessity case in decades. *Commonwealth v. Knieriem*, 707 S.W.2d 340, 341 (Ky. 1986); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 7 (Ky. 1979). The Court should take this case and, for the first time, evaluate *how* courts should make necessity determinations in public utility cases.

II. Ohio Just Decided a Near-Identical Case on Discretionary Review.

It is a particularly good time for this Court to consider necessity. The Ohio Supreme Court just decided a strikingly similar case. In December 2022, it explained that courts must make specific, fact-based necessity determinations for "each easement term that is challenged." *Ohio Power Co. v. Burns*, 2022-Ohio-4713, ¶¶ 33–35 (Ohio Dec. 29, 2022). So now, lower courts in Ohio know that they must make their own factual findings, without deferring to the condemnor or agency, about whether each easement term is truly necessary for the intended public use. *Id.* ¶¶ 22, 24, 31–35.

III. This Court Has Not Interpreted Kentucky's Necessity Statute or the General Assembly's 2006 Reforms.

Unlike Ohio, this Court has not given guidance on how courts should determine whether a taking is "needed" under KRS 416.550. It has never interpreted the eminent domain reform passed in 2006 or how that might affect the consideration of necessity. Without that guidance, lower courts are left confused—with some rubber-stamping necessity determinations and others engaging in meaningful review. *Compare City of Bowling Green v. Cooksey*, 858 S.W.2d 190, 192 (Ky. App. 1992) (rejecting condemnation due to "credible, competent and substantial evidence that the . . . land [was] not necessary for an intended public use"), *with* Op. at 10 (deferring to Duke). But when courts just defer to condemnors, they eviscerate the right of necessity, which in turn, prevents *any* challenge to a taking for a public utility project.

Think of it this way. Everyone agrees that power lines serve the public. So whenever Duke installs power lines, landowners would struggle to challenge that taking. But just because the taking is for a public use doesn't mean that Duke gets to take more property than it needs. Nor should it mean that Duke gets to determine whether its own taking is necessary. For example, suppose Duke needed an access easement just to maintain power lines, but instead, it took an easement that gave the needed access *and* also took an easement that destroyed vegetation, limited signage, and harmed neighboring uses. Are courts required to defer to Duke just because it's the condemnor?

That's exactly what's happening in Kentucky. The trial court deferred to Duke, saying it gets to determine "the amount of land" to be taken *and* whether that "amount of land [is] necessary." (Tr. Ct. Op. at 4.) The court of appeals agreed—allowing Duke to establish necessity not with evidence, but just by saying so. (Op. at 10.) As a result, Duke now has a blank check to condemn. And every Kentuckian who owns private property is left defenseless.

IV. All of the Appellate Necessity Cases in Kentucky Rely on Cases That Predate the Eminent Domain Act.

To create absolute deference for Duke, both courts relied on the same line of cases. But these cases actually show why the Court should accept jurisdiction. Start with *God's Center Foundation, Inc. v. Lexington-Fayette Urban County Government*, 125 S.W.3d 295 (Ky. App. 2002). The courts below cited *God's Center* for the rule that "the condemning body has broad discretion." (Op. at 10 n.4; Tr.

Ct. Op. at 4.) But there are two problems with that cherry-picked quote. First, it ignores the meaningful review that occurred in *God's Center*, when the court walked through the "necessity" evidence. 125 S.W.3d at 302–03. And it ultimately found that "substantial evidence" supported that finding. *Id.* at 306; *see also Cooksey*, 858 S.W.2d at 192 (providing meaningful review). But here, both courts did the opposite. That confusion calls out for this Court's correction.

Second, *God's Center* got its rule from cases dating back to the early 1900s. 125 S.W.3d at 299 n.12, 303 n.29 (citing *Louisville & N.R. Co. v. City of Louisville*, 114 S.W. 743 (Ky. 1908), and *Spahn v. Stewart*, 103 S.W.2d 651 (Ky. 1937)). The courts below did the same thing. (Tr. Ct. Op. at 4 (citing *Kroger Co. v. Louisville & Jefferson Cnty. Air Bd.*, 308 S.W.2d 435 (Ky. 1957).) So the only authority for the rule that condemnors get complete discretion predates the creation of this Court (in 1975) *and* Kentucky's Eminent Domain Act (in 1976). And even if those old cases were persuasive, eminent domain law has transformed over the last 100 years.

IJ knows this better than anyone. One of the changes revolves around necessity. While necessity disputes used to be about simple quantitative questions, *see, e.g.*, *Baxter v. City of Louisville*, 6 S.W.2d 1074, 1077–78 (Ky. 1928) (disputing "[t]he amount or width of land which may be taken"), now, they often focus on specific easement conditions. For example, in both this case and the recent Ohio case, there are disputes about easement access and the need to destroy vegetation. *Ohio Power*, 2022-Ohio-4713, ¶ 10. The owners also dispute easement conditions that impose a shorter statute of limitations and remove the apartment

complex's sign. (Movants' Br. at 4–5.) IJ sees these disagreements over easement conditions regularly in utility condemnations. And to resolve them, the Court should give guidance on *how* lower courts should determine whether an easement term is indeed "needed."

The Court's decision in *Moore* doesn't alleviate the need for the Court's involvement. In *Moore*, the Court relied on the same old cases about deference to condemnors without analyzing whether that deference is consistent with the Kentucky Constitution or the Eminent Domain Act. This case presents the perfect opportunity for the Court to finally grapple with that question.

Moore also emphasized that a condemnor must take "the least possible interest" that is necessary for the public use. *Id.* at 381. The Court, however, did not give guidance on how to make that determination. That created the problem here. Duke admits (as it must) that it "cannot take an estate greater than that needed to achieve its legal purpose," (Resp. in Opp. at 2), but it wants the unilateral ability to decide what is needed. That rule can't be right—it puts the fox in charge of guarding the henhouse. And it strips Kentuckians of their fundamental rights under their Constitution and Eminent Domain Act.

CONCLUSION

The Court should grant the motion for discretionary review.

DATED: February 1, 2023.

Respectfully submitted,

J.B. Lind (KBA# 92594)
VORYS, SATER, SEYMOUR, & PEASE LLP
301 East Fourth Street, Suite 3500
Great American Tower
Cincinnati, Ohio 45202
(513) 842-8119
jblind@vorys.com

Brian A. Morris*
Dana Berliner*
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
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