IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 23-589

JACKLIN ROMEO, SUSAN S. RINE, and DEBRA SNYDER MILLER,
on behalf of themselves and the other members of the certified class,

Plaintiffs Below, Petitioners,

v.

ANTERO RESOURCES CORPORATION,

Defendant Below, Respondent

Upon Certified Questions from the United States District Court
for the Northern District of West Virginia
Case No. 1:17-CV-88

***AMICUS CURIAE* BRIEF OF THE WEST VIRGINIA ROYALTY OWNERS' ASSOCIATION AND WEST VIRGINIA FARM BUREAU IN SUPPORT OF PETITIONERS**

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STATEMENT OF IDENTITY OF AMICI CURIAE, THEIR INTERESTS IN THIS CASE, AND SOURCE OF AUTHORITY TO FILE[1]

The West Virginia Royalty Owners' Association ("WVROA") is an association of 1,162 members who collectively own tens of thousands of acres of oil and gas in the State of West Virginia. WVROA is interested in issues affecting the ownership, development and responsible production of oil and gas and real property in West Virginia, including royalty interests in oil and gas estates. WVROA's mission is to inform West Virginia mineral owners about current issues in the oil and gas industry, leasing, and their rights as real property owners, as well as promoting legislation that protects the rights of all property owners, whether fee, surface or mineral owners, to ensure that oil and gas development in West Virginia is done responsibly, fairly and equitably.

Your Amicus West Virginia Farm Bureau ("WVFB") represents approximately 9,000 members who are interested in issues affecting the ownership of oil, gas and mineral interests and real property in West Virginia, including the fair and accurate computation and payment of royalty interests in oil and gas leasehold estates. West Virginia Farm Bureau's mission is to provide leadership, education, information, training and economic services to members and county farm bureaus to enhance the quality of farming in West Virginia through the betterment of conditions of those engaged in agricultural pursuits, the improvement of the grade of their products, and development of a high degree of efficiency in their agricultural pursuits. WVROA and WVFB respectfully request the Court consider this brief submitted on the certified questions presented to the Court.

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[1]Pursuant to W. Va. R. App. P. 30(e)(5), WVROA and WVFB state that no counsel for any party authored this *amicus curiae* brief, in whole or in part, and no party or its counsel made a monetary contribution specifically intended to fund the preparation or submission of this *amicus curiae* brief. No person other than the *amici*, their members, or their counsel made such a monetary contribution.

WVROA and WVFB have provided counsel for all parties with notice of their intent to file this amicus brief at least five (5) days prior to the filing due date for the brief of the Petitioners in accordance with W. Va. R. of App. P. 30(b). Pursuant to Rule 30(a), all parties have consented to the filing of this brief.

QUESTIONS CERTIFIED BY DISTRICT COURT

The United States District Court for the Northern District of West Virginia has certified two questions in this case:

> Question 1: Does *Wellman* and *Tawney's* applicability extend only to the "first available market" as opposed to the "point of sale" when the duty to market is implicated?
>
> Question 2: Does the first marketable product rule extend beyond gas to require the lessee to pay royalties on NGLs, and if it does, do the lessors share in the cost of processing, manufacturing, and transporting the NGLs to sale?

SUMMARY OF ARGUMENT

This Court's holdings in *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W. Va. 2001) ("*Wellman*") and *Estate of Tawney v. Columbia Nat. Res., L.L.C.*, 633 S.E2d 22 (W. Va. 2006) ("*Tawney*") have served as the foundation of how oil and gas leases have been drafted, interpreted, and enforced in West Virginia for over two decades. Since then, royalty-owner lessors and natural gas company lessees alike have responded to this Court's legal rulings and contracted accordingly. This Court should continue to adhere to the rules adopted by *Wellman* and *Tawney* in order to uphold the meeting of minds that has resulted from the public's understanding of West Virginia law based upon these cases. As explained below, the principle of *stare decisis* weighs heavily in

answering the certified questions in the manner as urged below.

The first certified question should be answered in the negative based upon the Court's prior holdings in *Wellman*, *Tawney* and most recently, *SWN Prod. Co., LLC v. Kellam*, 875 S.E.2d 216, 221 (W. Va. 2022) ("*Kellam*"): unless a lease provides otherwise, the lessee is responsible for all post-production costs up to the ***point of sale***. This has been black-letter law in West Virginia since *Wellman*, and thousands of leases have been drafted in this state with that exact principle in mind. To claw-back on *Wellman* and *Tawney*'s holdings now—only a year after reaffirming them in *Kellam*—would effectively re-write the parties' contracts in a way that would only serve the interest of the lessee.

The Court should answer the second certified question in the affirmative and confirm that *Wellman* and *Tawney*'s holdings apply to the sale of natural gas liquids ("NGLs"). Again—this Court's holding in *Tawney* already addresses this very question by finding that the marketable *product* rule applies to the *product* produced under a lease, not any specific hydrocarbon.

<u>ARGUMENT</u>

I. THE COURT SHOULD ANSWER CERTIFIED QUESTION NO. 1 IN THE NEGATIVE BY HOLDING THAT UNLESS A LEASE PROVIDES OTHERWISE, THE LESSEE IS RESPONSIBLE FOR ALL POST-PRODUCTION COSTS UP TO THE POINT OF SALE.

The Court should answer the District Court's Certified Question No. 1 in the negative by applying the Court's prior holdings in *Wellman* and *Tawney* to the effect that unless an oil and gas lease provides otherwise, a lessee is responsible for all post-production costs up to the point of sale when the duty to market is implicated. As recently noted in *SWN Prod. Co., LLC v. Kellam*, 875 S.E.2d 216, 221 (W. Va. 2022), *Wellman* and *Tawney* remain controlling authority and West

Virginia follows the marketable-product rule[2] adopted and applied in those cases. Not only are these cases well-reasoned, but the doctrine of *stare decisis* strongly supports the Court adhering to the holdings of these cases because over twenty years have elapsed since the rule concerning point of sale was adopted in West Virginia, during which time thousands of West Virginia royalty owners have relied upon these cases to determine their rights and otherwise conduct their affairs, including when negotiating new lease agreements or amending existing lease agreements to allow for pooling and unitization of horizontal wells. In short, the abandonment of the point-of-sale rule announced in *Wellman* and *Tawney* and very recently reaffirmed in *Kellam* would upset the now-settled expectations of countless thousands of lessors who have entered into leases since those cases were decided.

A. *Wellman and Tawney:* The Duty to Market to the Point of Sale.

It has long been the law in West Virginia that lessors receive royalties on their share of the proceeds received by the lessee on the sale of oil and gas. *Wellman* reaffirmed the duty of a lessee to market the oil or gas produced, noting that,

> there has been an attempt on the part of oil and gas producers in recent years to charge the landowner with a *pro rata* share of various expenses connected with the operation of an oil and gas lease such as the expense of transporting oil and gas ***to a point of sale***, and the expense of treating or altering the oil and gas so as to put it in a marketable condition. To escape the rule that the lessee must pay the cost of discovery and production, these expenses have been referred to as "post production expenses."

Wellman, 577 S.E.2d at 264 (emphasis added). *Wellman* held that a lessee must bear all costs incurred in connection with the exploration, production, marketing, and transportation of the

[2]West Virginia has recognized and followed the "marketable product rule," but, as discussed *infra*, there is no recognized "***first*** marketable product rule" in West Virginia.

product to the point of sale, unless there is clear language to the contrary. *See id.* at 265. In *Wellman*, this Court explained that "[s]uch a conclusion is also consistent with the long-established expectation of lessors in this State, ***that they would receive one-eighth of the sale price received by the lessor***." *Id.* (emphasis added).

Wellman's holding was not limited to any particular type of lease. The lessee's responsibility for all costs up to the point of sale was not explained as only being applicable to certain leases, but rather as a general duty under all oil and gas lessees. The *Wellman* Court explained that its holding was in line with the fact that lessors in West Virginia typically receive royalties based on the sale price received by lessees. *Id.* at 263. This Court recently affirmed that conclusion in *Kellam*, where it characterized *Wellman's* holding as follows: "Over twenty years ago, this Court issued its opinion in *Wellman*, wherein we essentially held that: (1) lessees may not deduct postproduction costs unless the lease agreement explicitly permits such deductions; and (2) where there is such a provision, only reasonable and actually incurred expenses may be deducted." *Kellam*, 875 S.E.2d at 221. Again, this Court did not limit its holding to any particular lease form or royalty provision. Accordingly, *Wellman*'s ruling is applicable to all oil and gas leases in West Virginia.

Five years after *Wellman*, this Court reaffirmed and expanded upon *Wellman*'s holding in *Tawney*.[3] The key holding in *Tawney* is as follows:

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[3]*Tawney* also involved a certified question, which this Court answered as follows:

> In light of the fact that West Virginia recognizes that a ***lessee to an oil and gas lease must bear all costs incurred in marketing and transporting the product to the point of sale*** unless the oil and gas lease provides otherwise, is lease language that provides that the lessor's 1/8 royalty is to be calculated "at the well," "at the wellhead" or similar language, or that the royalty is an amount equal to 1/8 of the price, net all costs beyond the "wellhead," or "less all taxes, assessments, and adjustments" sufficient to indicate that the lessee may deduct post-production expenses from the lessor's 1/8 royalty, presuming that

> "Language in an oil and gas lease that is intended to allocate between the lessor and lessee the ***costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale***, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs."

Syl. Pt. 10, *id.* (emphasis added). *Tawney's* holding was recently confirmed in *Kellam*, where this Court characterized *Tawney*'s holding as follows:

> "this holding sets forth three basic requirements for determining whether a lease enforceably permits the sharing of post-production costs: (1) language explicitly stating the lessor will bear some portion of those costs; (2) identification of the deductions the lessee intends to make; and (3) the method of calculating the amount to be deducted."

Kellam, 875 S.E.2d at 223. *Wellman's* central holding stated that the lessee must bear the costs of transporting oil and gas ***to the point of sale***. *Tawney* expanded upon *Wellman* to include not only gas and oil, but also related products, and stated that absent language to the contrary, the lessee must bear the post-production costs "incurred between the wellhead and the point of sale." Syl. Pts. 10 and 11, *Tawney*, 633 S.E.2d at 30.

Neither *Tawney* nor *Wellman* limited their application to any particular type of lease or royalty provision. In fact, this Court has clearly signaled that a lessee's obligation to bear all costs in transporting the product to the point of sale applies to any lease that does not clearly provide otherwise. Thus, the implied duty to market is implicated for oil, gas, and related products in all leases unless the lease expressly and explicitly states otherwise.

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such expenses are reasonable and actually incurred?

Answer: No.

Tawney, 633 S.E.2d at 30 (emphasis added).

The *Tawney* Court clearly and unambiguously stated that the point to which the lessee must bear all costs incurred in marketing and transporting the product is to "the point of sale," and did not limit its holding to the first available market. Rather, it expressly stated that its holding applied to the point of sale for all products from a well that are marketed, transported, and sold.

Therefore, as to the first question in this matter—"Does *Wellman* and *Tawney's* applicability extend only to the 'first available market' as opposed to the 'point of sale' when the duty to market is implicated?"—this Court should resoundingly answer it in the negative.

B. The Doctrine of *Stare Decisis* Strongly Favors applying *Wellman* and *Tawney* to the point of sale of gas, oil and products.

The doctrine of *stare decisis* strongly favors the Court continuing to adhere to the holdings in *Wellman* and *Tawney*. Over twenty years have elapsed since the marketable-product rule and related guidelines were formally adopted by these cases, during which time thousands of West Virginia landowners have relied upon them to understand and determine their rights under new and amended lease agreements. Importantly, the increased exploration and production of West Virginia's Marcellus and Utica shale formations over the past two decades has resulted in thousands of West Virginia landowners entering into new and amended mineral leases with producers.[4] To suddenly change the well-established rules regarding what lease language is

[4]The use of horizontal drilling techniques to reach these deep oil and gas formations often involves producing gas from several properties, thus implicating multiple existing lease agreements. The related need to obtain consent to pooling from the holders of royalty interests caused many producers to renegotiate and modify the royalty provisions of existing leases. Consequently, even where pre-*Wellman* oil and gas leases are involved, in many cases landowners have made decisions regarding the express terms of such lease agreements based upon this Court's decisions in *Wellman* and *Tawney*. And this Court's recent decision in *Gastar Expl., Inc. v. Contraguerro*, 239 W. Va. 305, 800 S.E.2d 891 (2017) (holding that the validity of pooling provisions in oil and gas leases and designated pooling units are not dependent upon the consent and ratification of nonparticipating royalty holders), did not change that fact, since there is the still the need to obtain pooling agreements from those landowners with executory rights in properties under leases that do not contemplate pooling.

necessary to impose responsibility for post-production costs would be highly detrimental to these land and mineral owners and would otherwise disrupt the contractual expectations that have developed since *Wellman* and *Tawney* were decided.

Along those same lines, it goes without saying that the new and amended oil and gas leases executed by landowners are, at the very least, initially drafted by operators like Respondent Antero Resources Corporation ("Antero"). During the past fifteen years, the mandates and requirements of *Wellman* and *Tawney* were no secret. To the extent that a company like Antero wanted landowners to share in some or all post-production costs, it could have said so. If it wanted landowners to share in post-production costs from the "first available market" rather than the point of sale, it could have said so.[5] Simply stated, the rules of *Wellman* and *Tawney* were well-settled and the parties to oil and gas leases each had to play by them. Thus, in addition to unfairly disrupting the contractual expectations of landowners, changing the simple-to-follow rules of *Wellman* and *Tawney* also only serves to reward a sophisticated party who knew, or at least should have known, the consequences of the language in its oil and gas leases with West Virginia landowners or the language in oil and gas leases it inherited for its operations.

As this Court has long recognized, the doctrine of *stare decisis* counsels that "[v]ery weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Meadows v. Meadows*, 196 W. Va. 56, 64, 468 S.E.2d 309, 317 (1996) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970)). *Stare decisis* "is the preferred

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[5]WVROA and WVFB point out that the "first available market" position championed by Antero in this matter is undeniably ambiguous. A determination of where on the production stream that subjective point lies is likely to be the source of robust debate. In other words, it likely would be a heavily litigated point in almost every royalty dispute between landowners and operators, thereby spawning significant numbers of lawsuits to add to the dockets of West Virginia state and federal courts. On the contrary, the point of sale rule of *Tawney* and *Wellman* is a finite and obvious point and one that is not susceptible to debate.

course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Three factors must be weighed in the *stare decisis* analysis prior to rejection of a longstanding rule:

> "[1] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."

Meadows, 468 S.E.2d at 317 (quoting *Moragne*, 398 U.S. at 403). "While the principle of *stare decisis* admits of exception, deviation from its application should not occur absent some urgent and compelling reason." *Dailey v. Bechtel Corp*., 157 W. Va. 1023, 1029, 207 S.E.2d 169, 173 (1974); *see also Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991) ("For all of the[] [reasons] supporting the application of *stare decisis*, we will not depart from the doctrine of stare decisis without some compelling justification."). Thus, the proponent of overruling the prior case must articulate a strong reason to have a court overrule prior cases.

All three of the *Meadows* factors weigh heavily in favor of not disturbing the core holdings of either *Wellman* or *Tawney*, as recently affirmed as the law of the land in *Kellam*. Importantly, the "clear guide" provided by *Wellman* and *Tawney* as to what lease language is required to shift responsibility for post-production costs for gas, oil and products to the point of sale has no doubt informed the conduct of individual royalty owners in West Virginia, who have relied upon such decisions to inform their choices as to form and content of the express terms of mineral leases entered into with oil and gas producers in the more than twenty years since the marketable-product rule was first adopted in this state.

Moreover, oil and gas producers have, or should have, adjusted to the requirements imposed by *Wellman* and *Tawney* by, in most instances, reviewing their existing lease agreements and paying royalties in accord with the requirements imposed by those cases. If this Court were to backtrack at this juncture and remove the protections against post-production costs to the point of sale afforded by *Wellman* and *Tawney*, there is little doubt that producers will proceed to reevaluate their leases and attempt to impose unilateral offsets against current royalties to recoup deductions that were not previously taken as to past production—offsets that could reach back years if not decades. It is therefore entirely conceivable that the limitation of *Wellman* and *Tawney* to the first available market would result in many thousands of West Virginia royalty owners seeing their mineral-related incomes slashed to nothing for the foreseeable future. The untold hardships that would be imposed upon West Virginias—many of moderate means—by such a result is impossible to imagine.

The doctrine of *stare decisis* has its greatest force in circumstances where, like here, overturning established precedent will unquestionably disturb settled expectations: "Predictability is at the heart of the doctrine of *stare decisis*, and regardless of what we think of the merits of [a particular] case, we must be true to a reasonable interpretation of prior law in the area of property where certainty above all else is the preeminent compelling public policy to be served." *Hock v. Morgantown*, 162 W. Va. 853, 856, 253 S.E.2d 386, 388 (1979). As the United States Supreme Court has recognized:

> *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

Hilton, 502 U.S. at 202; *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("*stare decisis* concerns are at their acme in cases involving property and contract rights") (citing *Payne*, 501 U.S.

at 828); *United States v. Mason*, 412 U.S. 391, 399-400 (1973) ("[l]f the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance.").

The current state of the law regarding post-production expenses has provided clarity to all parties involved in contracting for the right to produce a landowner's oil and gas. Royalty owner lessors, gas producer lessees, and the Legislature have responded in an orderly fashion to the law established by *Wellman* and *Tawney*, to the point where an equilibrium now exists. If anything, the specificity now required before post-production expenses can be allocated to lessors will ultimately reduce the number of disputes concerning what deductions can and cannot be taken. To now limit or retroactively carve out exceptions to what has been established law for over two decades would create chaos—turmoil that would have a severe negative impact upon individual landowners and spawn an entirely new generation of litigation. As this Court noted in *Kellam*, "it is far more likely in our opinion that overruling *Tawney* and *Wellman* would result in instability and uncertainty, particularly for the thousands of leases that have been executed in the years since those opinions were published." *SWN Prod. Co., LLC v. Kellam*, 247 W. Va. 78, 89, 875 S.E.2d 216, 227 (2022). As in *Kellam*, if this Court were to now abandon the calculation of royalties at the point of sale as established by *Tawney* and *Wellman*, it would likewise result in instability and uncertainty for the thousands of royalty owners who executed leases in the nearly two decades since those cases were decided (or even in the past year and a half since *Kellam* reaffirmed the holdings of *Tawney* and *Wellman*).

In sum, limiting the holdings in *Wellman* and *Tawney* to the first market for oil, gas and products instead of the point of sale would undoubtedly undermine the long-settled expectations of West Virginia royalty owners and reward the disregard of those holdings by operators, and in

so doing would also weaken public faith in the judiciary as a source of reasoned judgments capable of guiding West Virginians in their daily affairs. Consequently, even if there is fault with the holdings in either *Wellman* or *Tawney*, the Court should nevertheless retain the core principles enunciated in these cases, including adherence to the marketable-product rule at the first point of sale.

II. THE COURT SHOULD ANSWER CERTIFIED QUESTION NO. 2 BY CONCLUDING THAT THE MARKETABLE PRODUCT RULE APPLIES TO NATURAL GAS LIQUIDS (NGLs) IN THE SAME WAY THAT IT APPLIES TO RESIDUE GAS.

The fact that the subject rule is known as "the marketable product rule" and not the "marketable gas rule" should, in and of itself, be conclusive that the rule applies to all products contained in the raw natural gas stream, including NGLs. Likewise, Syllabus Point 10 of *Tawney*, which clearly and unambiguously requires lessees to bear the "costs of marketing the ***product*** and transporting it to the point of sale" unless the lease defines with particularity the specific deductions to be allocated to the lessor, should apply with no less force when NGLs (or any other products taken from a natural gas stream) are involved. The Court of Appeals for the Fourth Circuit recently came to the same conclusion.[6]

Antero's raw natural gas is processed into natural gas liquids ("NGLs") and then fractionated to produce the individual hydrocarbons that are then sold. The raw gas, which contains NGLs, is brought to the surface at the wells. (Joint App. ("JA") 3390). After the raw gas emerges from the well, it then flows through a gathering system where it comingles with other raw gas from other wells and is typically transported to a processing plant. (*Id.*). Unprocessed "wet"

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[6]In *Corder v. Antero Res. Corp.*, 57 F.4th 384 (4th Cir. 2023), the Fourth Circuit recently explained how Antero's raw natural gas is processed into NGLs and applied the *Tawney* requirements through the point of sale.

gas is transported to the Processing Plant and is then processed into NGLs which are known as "Y-Grade." (JA 6213).

The natural gas that remains after the Y-Grade NGLs are extracted is known as "residue gas." (JA 3390). The residue gas is transported from the processing plant to a natural gas transmission pipeline where it can be sold to third parties. (JA 3391). The Y-Grade NGLs are transported to a fractionation facility where the Y-Grade NGLs are fractionated into identifiable natural gas liquid products, including ethane, propane, normal butane, iso-butane and natural gasoline. (*Id*.). Antero then sells these individual products to Antero's third-party purchasers at points of sale at or near the tailgate of the fractionation facility. (*Id*.).

As the Fourth Circuit aptly noted in *Corder*, "[b]oth *Wellman* and *Tawney* plainly state that the presumption [that the lessee bears the post-production costs] applies through the "point of sale." *Tawney*, 633 S.E.2d at 23; *Wellman*, 557 S.E.2d at 256. Further, the *Tawney* Court repeatedly used "point of sale" language when it set out the three heightened specificity requirements. *See* 633 S.E.2d at 24, 28, 30." *Id.* at 396. However, there is language from *Kellam* where this Court addressed *Tawney* and *Wellman*, saying that "[t]hese holdings [*Wellman* and *Tawney*] firmly cemented West Virginia as a "marketable product rule" state, meaning that the lessee bears all post-production costs incurred until the product is first rendered marketable, unless otherwise indicated in the subject lease. *Kellam*, 247 W. Va. at 83, 875 S.E.2d at 221. The term "first rendered marketable" is not necessarily the same as "point of sale" as specifically contained in the holdings of *Tawney* and *Wellman*.

In *Corder*, the Fourth Circuit addressed this *Kellam* language as follows:

> "And while the *Kellam* opinion suggests we should take the *Leggett* court's criticism of the "point of sale" approach with a grain of salt, it did not definitively resolve this question. Despite repeating the same "point of sale" language from *Wellman* and *Tawney*, 875 S.E.2d at 218, the *Kellam* court

> did not assess the "point of sale" approach in any depth. Rather, it declined to reexamine "our interpretation of the implied covenant of marketability" because the covenant was "not implicated" by the lease at issue, which addressed how post-production costs were allocated. *Id.* at 226. And at one point, the *Kellam* court characterized the marketable product rule as narrower than the "point of sale" approach. It observed that *Wellman* and *Tawney* "firmly cemented West Virginia as a 'marketable product rule' state, meaning that the lessee bears all post-production costs incurred until the product *is first rendered marketable*, unless otherwise indicated in the subject lease." *Id.* at 221 (emphasis added).
>
> Ultimately, though, we cannot ignore the express "point of sale" language in the syllabus points in *Wellman, Tawney*, and *Kellam.* Because the West Virginia Supreme Court has not adopted a contrary rule, we conclude that the *Tawney* requirements apply through the point of sale."

Corder v. Antero Res. Corp., 57 F.4th 384, 397 (4th Cir. 2023).

The Fourth Circuit's analysis of this statement in *Kellam* was correct. Well established law has for decades required the lessee to bear post-productions costs through the point of sale. To hold otherwise would undermine the long-settled expectations of West Virginia royalty owners. Moreover, it would result in instability and uncertainty for the thousands of West Virginia royalty owners who have executed leases in the nearly two decades since *Tawney* and *Wellman* were decided, and again, only reward operators who chose not to follow the clear rules established in those cases.

Thus, regarding Question 2—Does the first marketable product rule extend beyond gas to require the lessee to pay royalties on NGLs, and if it does, do the lessors share in the cost of processing, manufacturing, and transporting the NGLs to sale?—the answer to the first part of the question should be, "Yes, the marketable product rule extends beyond gas to require the lessee to pay royalties on NGLs." As to the second part of Question 2, the answer should essentially be restatement of Syllabus Point 10 of *Tawney*: "Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product [NGLs] and transporting

it [them] to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty, and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs." Given the clear and unequivocal statements of law adopted in *Tawney*, which have stood for nearly two decades, there is simply no rational reason why NGLs should be treated differently from the other constituents of raw natural gas.

CONCLUSION

For all the reasons set forth above, WVROA and WVFB respectfully request that this Court, to the extent it has jurisdiction to do so, answer Certified Question No. 1 in the negative, and otherwise answer Certified Questions No. 2 consistent with the foregoing arguments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2023, I electronically filed a true and exact copy of the forgoing Amicus Curiae *Brief of the West Virginia Royalty Owners' Association and West Virginia Farm Bureau in Support of Petitioners* with the Clerk of this Court using the File & Serve Xpress system, which will send notification of such filing to the following:

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