IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-0569

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

Petitioners, Plaintiffs below,

v.

ANTERO RESOURCES CORPORATION,

Respondent, Defendant below.

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 GAS & OIL ASSOCIATION OF WV, INC. IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

OTHER AUTHORITIES

RULES

RULE 30(E) STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY[1]

The Gas and Oil Association of WV, Inc. ("GOWV") is an association of over 600 oil and gas-related companies doing business in nearly every West Virginia county. GOWV's members are engaged in almost every aspect of the natural gas industry, from exploration to sale. Consisting of large corporations and smaller family-run operations, GOWV's members employ thousands of West Virginians and are active in their communities that span the State. So too, members of GOWV have invested billions in West Virginia, making it possible for producers, mineral owners, and their communities alike to benefit from our State's abundant oil and gas resources.

However, answering the certified questions in the way advocated by Petitioners to this action threatens that prosperity. If this Court were to decide, as a matter of law, that *Wellman* and *Tawney* applicability extends beyond the point of "first available market" to the "point of sale," West Virginia's oil and gas businesses (like GOWV's members), as well as the state's royalty owners (such as Petitioners), would suffer.[2] Such a decision would place West Virginia's oil and gas industry in a place of severe economic disadvantage as compared to those of our regional neighbors,

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[1] Pursuant to West Virginia Rule of Appellate Procedure 30(e)(5), GOWV states 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 *amicus*, its members, or its counsel made such a monetary contribution.

[2] The full citations of those two well-known decisions are: *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W. Va. 2001) and *Estate of Tawney v. Columbia Natural Resources*, 633 S.E.2d 22 (W. Va. 2006).

let alone across the country. And the same is true if this Court were to determine that — as a matter of first impression — the first marketable product rule applies beyond natural gas to by-products, like natural gas liquids ("NGLs"), that in some instances, are mixed in the gas stream with traditional natural gas pulled out of the ground. Stated concisely, extending *Wellman* and *Tawney*, as advocated by petitioners, would make West Virginia's oil and gas industry less competitive. It would risk GOWV's members' ability to compete in the national marketplace of oil and gas sales, as well as the likelihood that mineral and royalty owners could benefit from the exploration, production, and sale of their minerals.

Instead, the better path is to answer those certified questions as proposed by Respondent. Respondent's positions — that *Wellman* and *Tawney* do not extend beyond the first available market or beyond marketable residue gas to gas by-products — will foster West Virginia's oil and gas industry. In addition to being more consistent with the rules of other oil and gas producing jurisdictions, those positions would bring clarity and consistency to the development of West Virginia's oil and gas. As such, deciding the questions presented in the manner delineated by Respondent will maintain West Virginia's competitiveness in the oil and gas marketplace and better allow our state to maximize production of West Virginia's minerals and products to everyone's benefit.

Consistent with Rule 30(b) of the Rules of Appellate Procedure, GOWV has provided counsel for all parties with notice of its intent to file this amicus at least five days prior to the filing date. *See* W. Va. R. App. P. 30(b). GOWV is authorized to file this brief as all parties have consented to its filing. *See id.* at 30(a). Likewise, GOWV's brief complies with the other dictates of Rule 30.

CERTIFIED QUESTIONS

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

1. Do the requirements of *Wellman* and *Tawney* extend only to the "first available market" as opposed to the "point of sale" when the duty to market is implicated?

ANSWER: ***Yes***, the requirements of *Wellman* and *Tawney* extend only to the "first available market," not the "point of sale."

2. Does the first marketable product rule extend beyond gas to require a 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?

ANSWER: ***No***, the first marketable product rule does not extend to gas by-products like NGLs.

STATEMENT REGARDING ORAL ARGUMENT

Given the fundamental importance of the issues presented, as well as their novelty concerning the application of *Wellman* and *Tawney*, oral argument by the parties is appropriate pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

I. Extending the *Wellman* and *Tawney* requirements to the "point of sale" ignores the realities of the oil and gas market; and it would put West Virginia at a competitive disadvantage by making West Virginia the *only* state to do so.

Although Petitioners advocate for the "point of sale" extension of the *Wellman* and *Tawney* requirements, they fail to acknowledge that no other state has done what they seek. Imposing the *Wellman* and *Tawney* requirements to the "point of sale" for West Virginia natural gas would place our state on an island — the only one to judicially extend the marketable product rule that far — and hinder West Virginia's ability to reap the benefits of its plentiful natural gas.

Likewise, Petitioners ignore the realities of the oil and gas industry and the harmful effects that extension would have on all participants in that market (including themselves). As a practical matter, extending the marketable product rule to the "point of sale" will increase the costs borne by West Virginia's natural gas. And it will harm smaller and local producers who will be unable seek out higher prices in other markets without sharing the costs to reach those markets. Indeed, the distance between a "first available market" and an ultimate "point of sale" may be hundreds (or even thousands) of miles apart, with the litany of accompanying costs incurred along the way. Without the ability to share a portion of those costs, production of West Virginia's natural gas, becomes more expensive, less desirable, and less likely to be developed.[3]

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[3] *See* Congressional Research Service, *Natural Gas Markets Going Global: Changes in Consumption* (2022).

That disincentive will not only hurt West Virginia's oil and gas producers (as well as their tens of thousands of employees in the Mountain State), but it will also hurt royalty owners like Petitioners, whose natural gas would make less economic sense to develop and market downstream of the wellhead. That is, it will hinder everyone's ability — both lessors and lessees — to obtain higher prices for West Virginia's oil and gas.

a. **If this Court adopted Petitioners' proposed extension of *Wellman* and *Tawney* to the "point of sale," West Virginia would be the *only* state to do so.**

As this Court has previously acknowledged, West Virginia is already amongst a minority of states in adopting the marketable product rule. *See Leggett v. EQT Prod. Co.*, 800 S.E.2d 850, 863 (W. Va. 2017) (observing that West Virginia does not "align with other states"). The majority of states have adopted the "at the well" approach, which allows producers to calculate the value of the gas at the wellhead by deducting post-production costs from the final price obtained for the gas. But even amongst those states that have adopted the marketable product rule, West Virginia would stand *alone* in judicially extending that rule beyond the point of marketability to the "point of sale."

As explained in Chief Justice Hutchison's concurrence in *SWN Production Company, LLC v. Kellam*, four other states have adopted the marketable product rule by way of judicial decision (Colorado, Oklahoma, Kansas, and Arkansas); and three have adopted the rule by statute (Nevada, Wyoming, and Michigan). *See* 875 S.E.2d

216, at 232-33 (W. Va. 2022) (Hutchison, C.J.). But *none* of those jurisdictions have judicially extended that rule to the "point of sale."

Colorado — one of the earliest states to adopt the marketable product rule — clarified at the outset that the rule only extends to the point at which the natural gas is "fit to be offered for sale in a market." *Garman v. Conoco*, 886 P.2d 652, 660 & n.26 (Colo. 1994). Colorado's Supreme Court went so far as to explain that the costs that "enhance the value of *marketable gas*," as well as those that "*transform*" the gas, may be deducted from royalties. *See id.* at 660 n.26, 661 (emphasis original, but internal quotations and citations omitted). Additionally, that court has clarified that once gas is marketable, any "additional costs incurred to either improve the product, or transport the product," may be shared between the lessor and lessee. *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 906 (Colo. 2001).

So too, Kansas and Oklahoma have reached the conclusion that the *marketable product* rule only extends to the point at which *a marketable product* exists, not to the final point of sale. Kansas permits "costs incurred to transport or enhance the value of marketable gas [to] be charged against [royalties]." *Sternberger v. Marathon Oil Co.*, 894 P.2d 788, 800 (Kan. 1995); *see also Coulter v. Anadarko Petroleum Corp.*, 292 P.3d 289, 362 (Kan. 2013) (providing that "once the gas is in marketable condition, regardless of whether a market actually exists at that point," the royalty owners can be charged a proportionate share of cost). Indeed, in *Sternberger*, the Supreme Court of Kansas determined that the gas in that case was "marketable at the well" and that the royalty owner must "bear a proportionate share of the reasonable cost of transporting the marketable gas to its *point of sale*." *Id.* (emphasis added).

Oklahoma has done the same thing. It extends the marketable product rule only to the first available market not the point of sale. *See Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203, 1209-10 (Okla. 1998) (explaining that costs incurred to an "already marketable product are to be allocated proportionally to the royalty interest"). In fact, under Oklahoma's rule, as with Kansas's, gas can be "marketable" at the well. *Whisenant v. Strat Land Exploration Co.*, 429 P.3d 703, 708-09 & n.10 (Okla. Civ. App. 2018). And when it is, "the royalty owner may be charged a proportionate expense of transporting that gas to the point of purchase." *Id.* (quotation marks and citation omitted).

And, although Arkansas's marketable product rule is not as well defined as those of the three other states — with the few decisions being largely driven by specific lease language and the conduct of the parties — transportation expenses prior to the point of sale are deductible. *See Dorchester Minerals, LP v. Chesapeake Exploration, LLC*, 215 F.Supp.3d 746 (E.D. Ark. 2016) (explaining that "gross proceeds" leases permit transportation charges to be deducted).

Even in states that have adopted a statutory marketable product rule, those statutes do not extend the rule to the "point of sale." Nevada, for example, has adopted statutory language that prohibits deduction of certain post-production costs. But the Nevada legislature expressly *permits* producers to deduct from royalties "costs associated with transporting . . . gas from the point of entry into the pipeline to the market or the processing of gas in a processing plant." *See* Nev. Rev. Stat. § 522.115(3). In other words, Nevada's statutory scheme would also allow the deduction of costs beyond the "first available market" and long before the "point of sale."

Indeed, Wyoming's statute is substantially similar to that of Nevada. That is, under Wyoming's law, a producer *may deduct* from lessors' royalties "costs associated with transporting . . . the gas from the point of entry into the market pipeline or the processing of gas in a processing plant." Wyo. Stat. § 30-5-304(a)(vi).

Same too with Michigan. After the Michigan high court refused to adopt the marketable product rule, *Schroeder v. Terra Energy, Ltd.*, 565 N.W.2d 887, 892 (Mich. 1997), the legislature adopted the rule by statute, *see* M.C.L. § 324.61503b. In *Schroeder*, the Michigan court concluded that under leases contemplating royalties based on the value of gas "at the wellhead," production companies could deduct all post-production costs. 565 N.W. at 893-94. In 2000, three years after *Schroeder*, the Michigan legislature adopted a first marketable product rule for leases entered into *after* March 28, 2000. M.C.L. § 324.61503b. Under that statute, if a lease provides for the deduction of unspecified post-production costs, it may only deduct costs associated with enhancing the value of the gas and transporting the gas beyond the first available market. M.C.L. § 324.61503b(1)(a)-(b).

And even the Federal Government does not extend that rule to the point of sale. In adopting the marketable product rule by regulation, the Federal Government, as the lessee, does not share in costs to place gas "in marketable condition acceptable to buyers." *Am. Petroleum Inst. v. United States Dep't of Interior,* 81 F.4th 1048, 1059 (10th Cir. 2023) (explaining 30 C.F.R. § 1206.101). A "marketable condition" is defined as a product which is "sufficiently free from impurities and otherwise in a condition that [it] will be accepted by a purchaser under a sales contract typical for the field or area." 30 C.F.R. § 1206.20. In general, however, the lessee may deduct costs incurred to transform and transport the gas after it has become marketable. *API*, 81 F. 4th at 1059 (describing deductions allowed under the federal rule).

None of the other marketable product rule states (or the Federal Government) have judicially extended the marketable product rule to the "point of sale." But that across-the-board refusal to do so is not due to happenstance. Instead, that refusal to so extend the rule acknowledges the realities of the oil and gas industry, as well as the negative competitive impact such a decision would have on a jurisdiction's oil and gas stakeholders. West Virginia cannot afford to break from those other states in its application of the marketable product rule, and thereby ignore the industry's realties and harm our state's economic prospects.

b. **To expand *Wellman* and *Tawney* to the "point of sale" would ignore the realities of the oil and gas industry and the deregulation of the industry.**

i. *The realities of the field: a brief look at the flow of natural gas from the well.*

It will come as no surprise that the process to extract natural gas from deep below the ground is no easy (or inexpensive) task. Prior to drilling a gas well, the production company conducts extensive geological surveys and significant testing —

all of which are borne by the producers.[4] After drilling a well, the production company extracts raw materials, which are then separated into oil, raw gas, and/or water, and a meter measures the amount collected of each — again, costs that are borne by the producer. *Id.*

Raw gas produced at the wellhead frequently contains other by-products and impurities, including, among others, oxygen, nitrogen, hydrogen sulfide, and helium.[5] It also falls into one of two categories: "wet" gas or "dry" gas. Wet gas consists of what we traditionally think of as natural gas, which is called methane, as well as associated by-products that are mixed in with the methane. Some of those by-products can be refined into natural gas liquids (NGLs), a collection of certain hydrocarbons with names like ethane, butane, and propane.

But not all gas wells produce natural gas with by-products like NGLs. In contrast to that so-called "wet" gas, some wells produce just "dry" gas (that is, just methane), which does not have (or has substantially fewer) by-products like NGLs.[6] In fact, since to the relatively recent technological availability of horizontal drilling and hydraulic fracturing in the mid-2000's, producers in the Appalachian region have been able to extract more NGLs.[7]

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[4] U.S. Energy Information Administration, *Natural Gas Explained*, available at https://www.eia.gov/energyexplained/natural-gas/.

[5] Congressional Research Service, *Natural Gas Liquids: The Unknown Hydrocarbons*, at 7 (2018).

[6] Congressional Research Service, *U.S. Energy in the 21st Century: A Primer*, at 12 & n.42 (2021)

[7] *See* United States Department of Energy, *Natural Gas Liquids Primer: With a Focus on the Appalachian Region*, at 1 (2018).

Both "dry" and raw "wet" gas can be sold at the well and sent to a larger pipeline. *See* A.R. 5914 (explaining that gas can be sold at well); *see also* Owen L. Anderson, *Marketable Product: What Did Kuntz Say? What Did Merrill Say?*, 1 Oil & Gas, Nat. Res. & Energy J. 43, 54 (2015) (providing that wet gas is marketable and is sold). "Wet" gas has a higher heat content, or BTU, while "dry" gas has a lower heat content. *Compare* A.R. at 5917, *with* A.R. at 5922. Because of this difference in heat content, wet gas will command a higher price.

Raw "wet" gas may also be processed to separate the natural gas (methane) from by-products and impurities.[8] Pulled from that raw gas are: residue gas (methane); a mix of NGL hydrocarbons called "Y-Grade"; and the other substances, if any, like oxygen, nitrogen, hydrogen sulfide, and helium.[9] *See* A.R. 595. Following that processing, the residue gas is transported to a larger, interstate pipeline for sale.[10] *See* A.R. 2684, 5914. So too, the Y-Grade may be sold or sent to a fractionation facility where those individual hydrocarbons can be isolated from each other into sellable products like ethane, propane, and butane.[11] And, in certain cases, those individual hydrocarbons can be further processed into alkene molecules (which can be sold even further downstream) by breaking their carbon bonds in a process known as "cracking."[12]

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[8] Congressional Research Service, *Natural Gas Liquids: The Unknown Hydrocarbons*, at 7 (2018).
[9] *Id.*
[10] *Id.* at 8.
[11] *Id.* at 8-9.
[12] *Id.* at 9

ii. *The realities of regulation: how the industry's regulatory environment has changed markets and practices.*

Over the course of the last century, the manner in which natural gas is produced, marketed, and sold has undergone significant change due to deregulation (in addition to technology). That is, in recent years, due to the changing regulatory environment, the possible points at which that gas can actually be "sold" has spread from the wellhead to many points downstream.

Prior to 1992, large pipeline companies bought gas at the wellhead. Those companies transported the gas to local distribution companies. *NorAm Gas Transmission Co. v. F.E.R.C.*, 148 F.3d 1158, 1160 (1998). Royalties, therefore, (as a matter of regulatory requirement) were calculated based on the price the pipeline companies paid the producers at the wellhead. That meant that few, if any, post-production costs existed for the production companies paying the royalties. David E. Pierce, *Royalty Jurisprudence: A Tale of Two States*, 49 Washburn L.J. 347, 368 (2010). Indeed, the price of gas at the wellhead reflected purchasers' expectation that they would incur significant costs in transforming the gas for the end user, but neither the benefits nor the costs of transforming the gas was allocated to the lessor. *Id.* That is because the pipeline companies, as the purchasers, were responsible for marketing the gas.

But in 1992, the Federal Energy Regulatory Commission ("FERC") issued Order 636, which, among other things, required pipeline companies to "unbundle" their services. *NorAm Gas*, 148 F.3d at 1160. In other words, pipeline companies had to sell their transportation services separately from the gas — a requirement that relegated them primarily to a transportation role. *Id.* The goal, according to FERC was to ensure that "all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible." Order No. 636, ¶30,393 at 30,393.

Deregulation has thus moved the possible points of sale beyond the wellhead, to the point where the gas enters the interstate pipeline, and beyond. Any processing that occurs to enhance the value of the gas prior to its placement in the interstate pipeline is paid for by the gas producer, rather than the pipeline company. In essence, as a result of deregulation, gas producers have taken on significantly more costs. What is more, as technology advances, producers can enhance natural gas by-products that had previously been considered waste and disposed of. Yet the costs are significant, and the value of enhanced by-products depends entirely on the market.

Also prior to deregulation, FERC strictly regulated the cost of the gas at the wellhead since the interstate pipeline companies enjoyed monopolistic control of the natural gas market. As the deregulation movement gathered momentum, the price of gas at the wellhead was capped, but not fixed. But the wellhead price of gas remained generally known and stable.

With Order 636, however, FERC removed the control over the price of natural gas at the wellhead. As explained in Order 636, FERC intended that its deregulatory efforts would allow competitive markets to develop geographically, "where the pipelines intersect to create a market for gas purchasers from different market areas." Order No. 636 at ¶ 30,939. The idea of Order 636 was to "aid competition" by facilitating access to gas from different regions. Order No. 636-A, ¶ 30,950.

Since deregulation, gas markets have expanded, as intended. Production companies actively market their products beyond the wellhead, and even beyond local markets. Consistent with the goal of Order 636, gas markets exist at multiple major pipeline intersections hundreds of miles from any specific region. Production companies can, therefore, seek out the best price available for their product outside of the local West Virginia Markets (known in the industry as the "in-basin" markets). But the processing costs, which had been borne by the pipeline companies who were protected by their monopoly power, are now shouldered by the production companies. And because pipelines now provide only transportation services — and no longer purchase natural gas from producers — the "point of sale" can be anywhere from the wellhead to any number of points, both domestically and internationally.

Indeed, producers can typically obtain higher prices hundreds or even thousands of miles from the wellheads in West Virginia. Ports like those in Chicago, Detroit, or those in the Gulf Coast, typically offer better prices for natural gas than what can be garnered locally within the basin. *See* A.R. at 2657; *see also id.* at 5968; Figure 2.

c. **Extending the marketable product rule to the "point of sale" would make West Virginia less competitive in the global marketplace, hurting West Virginia's producers, the tens of thousands of industry employees, and royalty owners.**

The effect of adopting the "point of sale" extension would reach well into the fields and boardrooms of the industry. Extending *Wellman* and *Tawney* beyond the first available market would cause West Virginia producers to bear costs that no other producer in the country is required to bear. As a result, West Virginia gas will be less competitive with gas from other states. And ultimately, that lack of competitiveness will stifle West Virginia's oil and gas industry, to the detriment of producers and royalty owners alike. Instead of fostering the ability of West Virginia and its people to benefit from its bountiful natural gas resources, that extension would impair the vitality of West Virginia's oil and gas industries.

i. Forcing West Virginia producers to bear the cost of bringing their marketable products beyond the first available market will render West Virginia gas less competitive.

Although West Virginia has an abundance of high quality natural gas, it is not alone. Various states, including our abutting neighbors, also enjoy ample natural gas resources.[13] But, with the increased globalization of that market — due in part to the increased number of export facilities in the United States — competition is no longer localized within certain states or regions.[14] Instead, the market for natural gas reaches far and wide, and West Virginia's ability to be a viable producer of natural gas relies on its ability to compete in the market of globally-set prices. Stated differently, if the post-production costs are higher for West Virginia producers than for producers in other areas, West Virginia's reserves of natural gas are less likely to be explored and produced. *See* John Bratland, *Economic Exchange as the Requisite*

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[13] *See* U.S. Energy Information Administration, *Proved Resources of Crude Oil and Natural Gas in the United States, Year-End 2021* (2022).
[14] *See* Congressional Research Service, *Natural Gas Markets Going Global: Changes in Consumption* (2022).

Basis for Royalty Ownership of Value Added in Natural Gas Sales, 41 Nat. Resources J. 685, 705-08 (2001).

Importantly, none of West Virginia's fellow top-five producing natural gas states — Texas, Pennsylvania, Louisiana, and Oklahoma — extend the marketable product rule to the "point of sale."[15] Neither Texas nor Louisiana has the marketable product rule; they follow the "at the well" approach to deductions, which allows producers to deduct post-production costs from royalties. *See* Brian S. Wheeler, *Deducting Post-Production Costs When Calculating Royalty: What Does the Lease Provide?*, 8 Appalachian J.L. 1, 13-15 (2008). As explained, Oklahoma extends its marketable product rule only to the first available market. *See supra p.* 7. And Pennsylvania has not definitively chosen whether to follow the at-the-well or marketable product rule. Although not in the top-five natural gas producing states, our neighbors in Ohio produce a substantial amount of natural gas and have expressly declined to adopt the marketable product rule. *See Zehentbauer Family Land LP v. Chesapeake Exploration, LLC*, 450 F.Supp.3d 790, 805 (N.D. Ohio 2020) (citing *Lutz v. Chesapeake Appalachia, L.L.C.*, 71 N.E.3d 1010, 1011 (Ohio 2017)).

Therefore, if this Court adopted the "point of sale" extension, producers of West Virginia oil and gas can expect to have higher costs. Under leases requiring the implication of the marketable product rule, that would include the litany of costs accumulated from the hundreds of miles to further possible points of sale to achieve

[15] *See* U.S. Energy Information Administration, Natural Gas Gross Withdrawals and Production, Dry Production Data Series for 2017-2022 (https://www.eia.gov/dnav/ng/ng_prod_sum_a_EPG0_FPD_mmcf_a.htm).

a higher price. But the sale price for gas is set by a market in which producers from other states have not had to solely bear those same costs. As a result, despite having incurred significant processing and transportation costs, West Virginia producers can only expect to sell their gas for the same price as those producers who can share the increased costs. *See* Bratland, 41 Nat. Resources J. at 705-08.

Essentially, Petitioners seek to have producers bear all the costs of seeking a better market for gas, without allowing them to proportionally share in the benefits from it. *See Leggett*, 800 S.E.2d at 862-63 (2017) (citing Wheeler, 8 Appalachian J.L. 1, 27-28). Due to the burdens associated with bearing all of these post-production costs and of seeking higher prices at downstream ports (e.g., Chicago, Detroit, and the Gulf Coast), West Virginia natural gas will likely be sold locally within the basin. *See* A.R. at 2657; *see also id.* at 5968; Figure 2. And because those local prices are generally lower, the sale of West Virginia natural gas will, in the short term, result in less money for the state's producers *and royalty owners*. But the long term effect is much more harmful and will affect a broader group. Such an extension would result in less revenue being generated by West Virginia natural gas.

ii. Less competitive gas prices will have a long term chilling effect on the West Virginia oil and gas industry.

Long term, the increased costs due to a "point of sale" extension would harm West Virginia's oil and gas, as well as their tens of thousands of employees in the Mountain State. The impact would be especially severe for the state's numerous smaller and family producers. Smaller producers, operating fewer wells, do not have the resources, infrastructure, or ability to transition their business into another state as larger operators. Instead, these smaller, local producers may be forced to close in light the increased burdens and decreased competitiveness.

Ironically, extending *Wellman* and *Tawney* would likely also hurt West Virginia's mineral and royalty owners, *like Petitioners themselves*, as much or more than producers. As explained, if the marketable product rule is extended to the "point of sale," producers of West Virginia natural gas would incur greater costs without the ability to share or recover any portion of those costs incurred to achieve higher prices. *See* Bratland, 41 Nat. Resources J. at 706-08. As such, natural gas owned by West Virginia's mineral and royalty owners would be less valuable to produce (because it costs more) than that of natural gas found in other states. *See id.* That means it would make less economic sense for producers to develop and market the natural gas owned by the Mountain State's mineral and royalty owners. *See id.* With a less economical resource, those mineral and royalty owners could expect less development of the gas and any by-products. *See id.*

In short, the extension of the marketable product rule to the "point of sale" will likely decrease the attractiveness of oil and gas development in West Virginia and harm thousands (family operators, oil and gas employees, and mineral/royalty owners) in the process.

II. Extending the first marketable product rule beyond gas to its by-products (NGLs) would impose heightened costs to producers that were never contemplated, harming the industry, and especially endangering small and family operations.

As with the first certified question, the adoption of Petitioners' stance as to the second certified question would create tumult for the industry. Petitioners ask this

Court to apply the marketable product rule to by-products of gas production, *separate* from the gas itself. That position ignores the complexities and realties of gas production. Worse yet, if adopted, it would insert extreme uncertainty into the production of natural gas.

Extending the implied duty under the marketable product rule separately to gas by-products would create an untenable situation for producers. In essence, Petitioners seek to *require* producers to cover all of the costs associated with refining by-products. Under that regime, producers would be required to do so despite the fact that, by that point, the producers have already achieved the undisputed marketability of the residue gas (methane), which is the *very point of* natural gas leases. *See* A.R. at 270, 275. That is, if Petitioners' position is adopted, producers would be forced to assume all of the costs to produce and process by-products of gas. Worse yet, that heightened duty would, under Petitioners' view, be read into thousands of leases that never contemplated such duties.

Indeed, that is likely why *no other* appellate court has extended the rule in that manner. As with the first certified question presented, Petitioners' position would leave West Virginia on an isolated legal island, rendering its plentiful natural gas resources less valuable and less likely to be economically developed. *See* Bratland, 41 Nat. Resources J. at 705-08. As explained at length, *supra* section I.a., costs associated with enhancing or transforming already-marketable gas products are deductible in every state that has adopted the marketable product rule. What is more, the cost of "wet" gas, which has a higher heat content, reflects the fact that the gas can yield marketable by-products. That is, royalty owners are paid a higher price for gas that can yield marketable products than for gas that cannot.

Expanding the marketable product rule beyond natural gas (methane) to by-products risks forcing West Virginia's producers to bear all the costs to collect and process already marketable products and substances beyond their core focus and beyond the primary focus of the natural gas lease. *See* Keeling & Gillespie*, The First Marketable Product Doctrine: Just What is the Product?*, 37 St. Mary's L.J. 1, 115-16 (2015) (explaining there is "no duty" to market by-products in marketable product states). Requiring those West Virginia producers who choose to enhance already marketable gas products to bear all the costs of doing so would create "absurd and inequitable results." *Id.* at 115 n. 423. Even Professor Maurice Merrill, who is commonly credited with first articulating the marketable product rule, explained that "there is no duty [for lessees] to go into a completely different business." *See* Owen L. Anderson, *Marketable Product: What Did Kuntz Say? What Did Merrill Say?*, 1 Oil & Gas, Nat. Res. & Energy J. 43, 54 (2015) (quoting Maurice H. Merrill, *The Law Relating to Covenants Implied in Oil and Gas Leases* § 87, at 221-22 (Thomas 1940)). In other words, forcing producers to bear all the costs of by-products like NGLs would require them to assume costs of processing and other necessary services regardless of whether they have the capacity or expertise to perform such processing and services.

As a final note, although the imposition of the marketable product rule to NGLs will harm the entirety of West Virginia's oil and gas industry, it will prove especially difficult for a particular group: West Virginia's countless smaller and family-operated lessees. Those lessees, which have fewer resources and less production volume, will incur increased hardship in attempting to bear the additional and unanticipated costs if they choose to market by-products.

CONCLUSION

As explained, adopting Petitioners' positions on the two questions certified to this Court will likely have long-term and dire consequences for all stakeholders in West Virginia's oil and gas industry, including member of GOWV and Petitioners themselves. Accordingly, this Court should answer the first certified question in the affirmative, and the second in the negative.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2024, ***Amicus Curiae Brief Of The Gas & Oil Association Of Wv, Inc. In Support of Respondent*** was filed and served via File&ServeXpress on all counsel of record.

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