IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-589

JACKLIN ROMEO, *et. al.*,
Individually and on behalf of others similarly situated,

Plaintiffs-Petitioners,

v.

ANTERO RESOURCES CORPORATION,

Defendant-Respondent.

Upon Certified Questions from the
United States District Court for the Northern District of West Virginia
Case No. 1:17-cv-88 (Kleeh, C.J.)

RESPONSE BRIEF OF ANTERO RESOURCES CORPORATION

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CERTIFIED QUESTIONS

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

Question 1: Do the requirements of *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), 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 a lessee to pay royalties on natural gas liquids ("NGLs"), and if it does, do the lessors share in the cost of processing, manufacturing, and transporting the NGLs to sale?

INTRODUCTION

This Court is asked to answer two questions of oil and gas law regarding the scope of the implied duty to market based on factual circumstances that it has not previously confronted. Although the Court has recognized the implied duty to market gas requires lessees to bear the costs associated with rendering gas marketable, the Court has not addressed whether that duty is satisfied prior to the point of sale when gas is sold downstream of local basins (such as down on the Gulf Coast rather than in West Virginia) by delivering marketable gas to a first available market. Nor has the Court addressed the question of whether, after there is a first marketable product for gas, the implied duty to market is extended to the remaining by-products if they are refined into natural gas liquids ("NGLs"). This Court should confirm that under the marketable product rule in West Virginia, absent lease language to the contrary, a lessee has a duty to bear the costs incurred in rendering the gas ***marketable*** and deliver it to the first available market; and that the marketable product rule does not extend beyond marketable gas to any by-products (and thus additional costs related to by-products in paying royalties may be shared proportionally). This is consistent with the marketable product rule applied in other states and with the principles previously announced by the Court and is fair and beneficial to both the lessor and the lessee. To rule otherwise would position West Virginia oil and gas law as an outlier, distort market incentives, and harm lessees in the near term and lessors in the long term.

In considering the certified questions, it is important to retrace the Court's adoption of the marketable product rule. Relying on decisions from Colorado, Kansas, and Oklahoma, in *Wellman v. Energy Resources, Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001), the Court recognized a lessee's implied "duty to market" gas—requiring lessees "to get the . . . gas in marketable condition," and to incur the costs of doing so—when the parties' contract is otherwise silent. 210 W. Va. at 210, 557 S.E.2d at 264. *Wellman* addressed a simple scenario in which the gas was sold locally in the basin where it was produced—meaning the point of sale was a first available market. *Id.* at 204, 557 S.E.2d at 258. The Court affirmed its adoption of the marketable product rule five years later in *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006), which also involved gas sold locally at a first available market. Antero recognizes that the syllabus points of *Wellman* and *Tawney* state that a lessee bears all costs to market gas "to the point of sale." But in considering the certified questions, it is important to understand the location of the gas sales in those cases when interpreting the Court's intent. In both cases, the gas was sold locally, in-basin and therefore the Court evaluated costs that were incurred in rendering gas marketable, not costs incurred thereafter. And most recently in 2022, the Court explained that the holdings in *Wellman* and *Tawney* mean that West Virginia's marketable product rule provides that the lessee "bears all post-production costs incurred until the product is ***first*** rendered marketable, unless otherwise indicated in the subject lease." *SWN Prod. Co., LLC, v. Kellam*, 247 W. Va. 78, 83, 875 S.E.2d 216, 221 (2022) (emphasis added). The questions now before the Court do not challenge the marketable product rule or the duties associated with it, but seek a determination of its scope.

This case (and many modern royalty cases) involves different market realities and circumstances than those considered by the Court in *Wellman* and *Tawney*. Rather than selling all of their gas to local buyers in the basin (e.g., to local utilities like in *Wellman* or at the TCO pool locations like in *Tawney*), many lessees today are able to transport gas to distant markets such as the Gulf Coast, Chicago, or Detroit, to obtain a higher price. Additionally, for gas that is processed, lessees may elect to further manufacture the remaining by-products removed from the gas stream into natural gas liquids. In order to ship gas beyond local markets or to further manufacture by-products that are removed from the gas stream, the lessee is required to incur additional costs and/or enter into long term contracts, neither of which would be necessary if the lessee sold the gas in-basin once it was rendered marketable. These contractual arrangements can benefit both the lessee and the lessor because they allow the lessee to sell gas for a higher price at downstream markets and to also generate a separate product to sell. *Wellman* and *Tawney* did not address the factual scenario presented here, where the lessee sells gas and gas by-products in a place other than the local basin. Nonetheless, the reasoning behind the marketable product rule, precedent in other jurisdictions applying that rule, and the Court's recent explanation of the rule, confirm that a lessee's implied duty to market is fulfilled once gas is rendered marketable.

This Court should reject Petitioners' invitation to convert the marketable product rule into a novel, "final point of sale" rule, under which lessees must bear all costs until the gas is finally sold—even if the gas was rendered marketable (as a matter of fact) at a point upstream from where it is sold (such as, for example, near the wellhead, a local transmission line, or the entrance to a processing plant). Petitioners' position is that they are entitled to the higher prices earned by selling gas at locations like the Gulf Coast, but do not have to share in any of the costs incurred to move the gas beyond the local markets to that location. Petitioners' position contradicts every other jurisdiction to consider the matter, is unfair, and makes no sense. Forcing lessees to bear, as a matter of law, all costs of further enhancing and transporting gas to a more lucrative market (beyond the local, in-basin markets) creates economic disincentives against seeking out such markets in the first place. And precedent does not compel such an anomalous rule. Petitioners' heavy reliance on the "point of sale" language in the syllabus points of *Wellman* and *Tawney* is misplaced. Although different courts have read the Court's precedent differently, *compare W.W. McDonald Land Co. v. EQT Prod. Co.*, 983 F. Supp. 2d 790, 800 (S.D. W. Va. 2013), *with Corder v. Antero Res. Corp.*, 57 F.4th 384, 397 (4th Cir. 2023), the fact is that the Court has not addressed whether the marketable product rule requires lessees to solely bear all costs beyond the point at which the gas is marketable, for example, when gas is sold thousands of miles beyond the local, in-basin market for a higher price.

Final resolution by this Court is, thus, necessary to clarify West Virginia law regarding how far a lessee's implied duty to market, when applicable, extends. ***First***, in answering the first certified question, this Court should hold that the marketable product rule only requires the lessee to incur costs to the first market (as the rule is summarized in *Kellam*), and it does not require the lessee to bear all costs beyond that point (for example, to the final sales point, as sought by Petitioners). Such a holding would only require this Court to confirm what it most recently observed—that the lessee's duty to solely bear all costs only extends until "the product is ***first*** rendered marketable." *Kellam*, 247 W. Va. at 83, 875 S.E.2d at 221 (emphasis added). This would also align West Virginia with other marketable product rule states such as Colorado, Kansas, and Oklahoma.

Second, this Court should hold that the marketable product rule does not extend beyond marketable ***gas***. It makes no sense to say (as Petitioners argue) that lessees must solely bear all costs associated with further refining and manufacturing any by-products separated from the gas stream (e.g., costs to transport and fractionate Y-Grade) and transporting those refined or enhanced by-products to their final point of sale. Implying such an obligation into West Virginia contracts would be doubly wrong. Once gas is marketable (as is undisputed, in this case, with respect to the residue gas), the implied duty to market does not require lessees to solely bear any further costs that may be incurred to refine and enhance the by-products that may be separated from the gas stream at a processing plant (e.g., costs to transport and fractionate Y-Grade into NGL purity products and transport those purity products) as this would disincentivize lessees from choosing to process the gas in the first place. No appellate court has interpreted the marketable product rule to require a lessee to bear all costs after rendering a first marketable gas product, and this Court should not be the first.

In sum, the Court should (1) answer the first certified question by holding that under the marketable product rule in West Virginia, the lessee is only required to bear all costs incurred in rendering the gas marketable (as the rule is summarized in *Kellam*), and it does not require the lessee to solely bear all costs beyond that point; and (2) answer the second certified question by holding that if the implied duty to market and marketable product rule do not extend beyond gas and if the lessee has already rendered gas marketable, any further value-enhancing costs (such as those incurred to fractionate and transport NGLs) must be proportionately shared unless otherwise specified in the lease.

PROCEDURAL HISTORY

In their operative class action complaint, Petitioners allege that *Wellman* and *Tawney* obligate Antero to pay royalties on proceeds received for gas and NGLs at the final point of sale. Petitioners allege that Antero failed to pay them a full 1/8th royalty due to the deduction of post-production costs from their royalties. A.R. at 43–47. The District Court certified a class of those entitled to royalties under one of two lease forms executed by Petitioners' predecessors-in-interest prior to 1990: the 1984 Mutschelknaus and 1979 Matthey Leases (the "Class Leases"). *Id.* at 270, 275.

The parties filed cross motions for summary judgment. *See id.* at 3243, 3383, 5869. The District Court stayed the proceedings until an appeal in *Corder v. Antero Resources Corporation*, 57 F.4th 384 (4th Cir. 2023) was resolved. *Id.* at 7199–200. After the *Corder* decision, the District Court lifted the stay and directed supplemental briefing on *Corder*'s impact to the pending summary judgment motions. *Id.* at 7259–60.

In the parties' supplemental summary judgment briefing, Petitioners' claim that *Wellman* and *Tawney* require Antero to pay royalties on proceeds received for both gas and NGL purity products at the ultimate point of sale, rather than the first available market. *Id.* at 7262–65. By contrast, Antero's position is that *Wellman* and *Tawney* both only require Antero to bear costs incurred in rendering gas marketable, and costs after that point can be proportionally shared with lessors when paying royalties. *Id.* at 7275–76. For processed gas, Petitioners go a step further and argue Antero is also required to pay royalties on any NGL purity products at the final point of sale without deductions. *Id.* at 7265–67. Said differently, Petitioners contend that the marketable product rule also requires Antero to incur any costs to extract, process, and refine the Y-Grade (the by-products that are separated from the gas stream) into separate, enhanced fractionated purity products and transport those additional products to the ultimate point of sale, and then pay royalties based on the sales price, free of the costs to lessor, including when such costs result in higher royalties. *Id.* Antero's position is that the implied duty to market does not extend beyond gas to create a second duty with respect to by-products (such as Y-Grade) that may be separated from the gas stream, and therefore costs from sales of by-products (if any) in paying royalties can be proportionally shared. Because the Court has not previously addressed these issues, Antero moved to certify these questions. *Id.* at 7283–85; 7276–81. The District Court granted Antero's motion. *Id.* at 7299–315.

STATEMENT OF FACTS

Antero markets gas from the class wells in different ways depending upon the gas quality, location, and available marketing outlets. *Id.* at 5921–24. For example, some class wells produce high BTU gas that contains a greater percentage of entrained liquefiable hydrocarbons (referred to as "rich" or "wet" gas); and other class wells produce lower BTU gas containing fewer entrained liquefiable hydrocarbons. *Compare id.* at 5917, *with id.* at 5922. In an effort to move the gas to distant markets to achieve higher prices, Antero has different marketing arrangements. *Id.* at 5922. Antero sells some gas without processing; processes some gas and then sells it; and has gas that is sometimes processed but other times is not. *Id.* at 5922–24; *see also id.* at 2655 (A. Schopp Dep. Tr. at 17:21–18:9). Accordingly, there are different final "points of sale," as well as available markets where gas is in a condition in which it could be sold prior to those points of sale. *Id.* at 5922–24.

For class wells in which Antero does not process the gas, it may sell gas at or near the wellhead at a contract price, or at local locations farther from the wellhead, including distant markets. *Id.* at 5922. For example, gas may flow into a gathering system and can be sold upon entry into the Columbia Interstate Transmission Line 1983 (also called "TCO"), a local sales location. *Id.* at 5922; *see also id.* at 2677 (A. Schopp Dep. Tr. 149:15–150:8); *id.* at 5963.

For class wells in which Antero processes the gas, it moves the gas to other markets to command higher prices. *Id.* at 5926–28. The gas from these wells is commingled with gas from other wells, gathered, and delivered to a processing plant. *Id.* at 5913–14. At the processing plant, the heavier hydrocarbon by-products are separated from the gas stream. The processed gas stream is then referred to as "residue gas" and is transported on interstate pipelines to downstream markets for sale. Both parties' experts here agree that residue gas constitutes gas that is in a marketable condition. *See id.* at 5924, 2684.[1]

For the residue gas, Antero has a variety of available points of sale, including: the tailgate (i.e., exit) of the processing plant; local sales locations; and distant out-of-basin locations, like markets in Chicago, Detroit, and the Gulf Coast. *Id.* at 2657 (A. Schopp Dep. Tr. at 24:11–26:21), 2655 (19:1–8), 2656 (20:13–21); 2655 (16:8–17:5), 2656 (16:8–5, 22:12–21); *see also id.* at 5968–69; Figure 1, *id.* at 5969. The residue gas can be sold for different prices in these various locations, but the sales result in different transportation costs. *Id.* at 5914–15.

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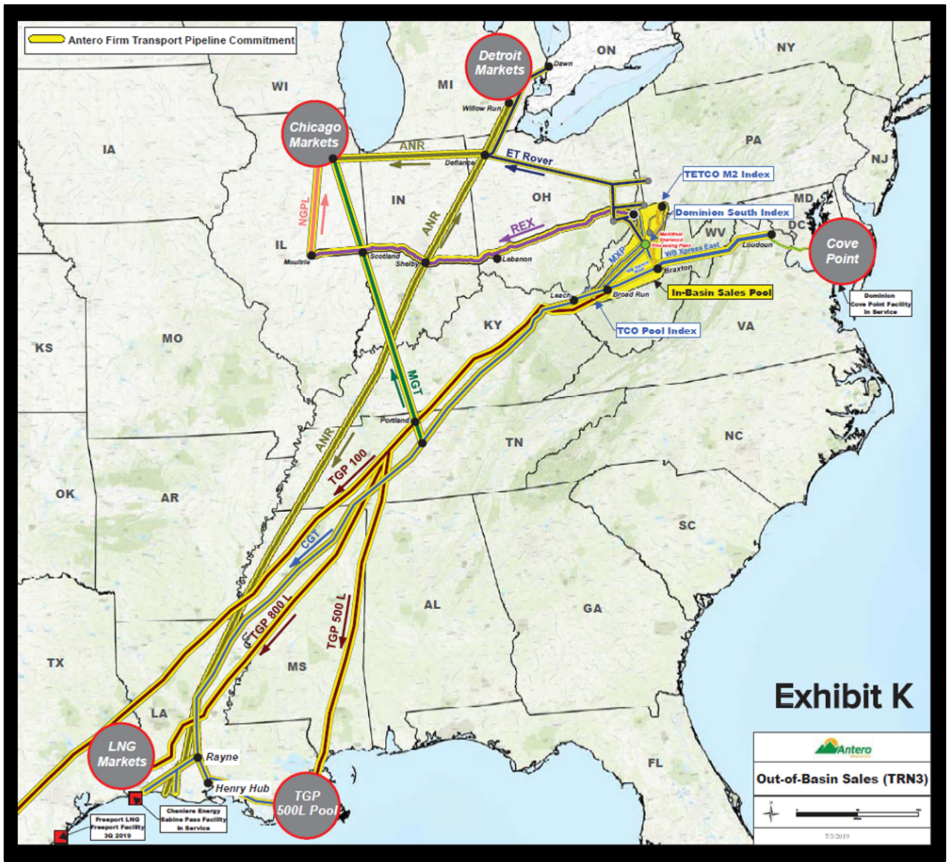
[1] Antero does not concede that this is the first location in which the gas is marketable, as Antero's expert opines that the gas is marketable prior to processing. *See* A.R. at 5914.

Figure 1, Example Out-of-Basin Gas Sales Locations.



The by-products separated from the gas stream at the processing plant are referred to as "Y-Grade" or "raw make." *Id.* at 5926–27. In this case, the Y-Grade mixture is transported from Doddridge County, West Virginia to distant locations, such as Houston, Pennsylvania, where it is fractionated into NGL "purity products" (e.g., propane, isobutane, normal butane, pentane). *Id.* at 5913–14, 5921. These NGL purity products are either sold at the tailgate of the fractionation plant or transported to distant markets, such as Sarnia, Ontario, Canada; Mont Belvieu, Texas; or Marcus Hook, Pennsylvania. *Id.* at 2659 (A. Schopp Dep. Tr. 42:13–43:13); 5967.

Although the certified questions do not specifically concern Antero's royalty payment practices, Petitioners' characterization of Antero's payment methods for class members is wrong.[2] For all gas sales, Antero's starting price is its weighted average sales price for gas sold from the same field ("WASP"). Antero pays royalties on the MMBtu content of the gas produced, which is measured at a meter at or near the wellhead, at Antero's monthly WASP. A.R. at 5897–99. Every month, Antero compares its monthly gas WASP to the monthly local, in-basin index price to determine if Antero's WASP exceeded the local index price. *Id.* Where Antero's WASP exceeds the local index price, Antero allocates the lessors their proportionate share of the costs Antero incurred to transport the gas to the distant markets where it was able to obtain a higher price. *Id.* Said differently, at a minimum, class members receive an amount equal to the full MMBtu content of the gas that is produced, as measured at the wellhead, multiplied by the local index price for gas for the given month (after accounting for their proportionate share of transportation costs), *id.* at 7303. Additionally, for gas that is processed, Antero conducts a monthly analysis that compares (a) the value of selling all of the wellhead MMBtu content at its

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[2] Petitioners' footnote 2 should be disregarded as it is factually inaccurate. First, Petitioners wrongly characterize how royalties are calculated for class members who own an interest in a pooled unit—pooling the interests in a unit does not reduce the unit owner's royalty rate. Royalties are calculated based on the actual ownership share of the unit, e.g. mineral ownership, at the royalty rate provided for in the lease, which is, at a minimum, 12.5% for all class members. Furthermore, Petitioners' statements regarding revenues Antero received from the sale of NGLs is inaccurate and not supported by the record. Antero did not begin processing gas in West Virginia until October 2012. Petitioners state that they are entitled to nearly $4 million dollars for underpayment of gas and NGL royalties through February 2020. The record shows that through February 2020, Antero had already paid the class members a net total of $25,432,849.57 in royalties and the class members only shared in $2,512,939.38 of the nearly $2 billion in post-production costs Antero incurred for the class wells during that time. Likewise, with respect to revenues Antero received from the sale of NGLs, the record shows that through February 2020, Antero paid over $600 million dollars to further refine and fractionate Y-Grade into NGL purity products and Petitioners shared in only $1.6 million of those costs, which is less than 1% of the total.

WASP to (b) the value of the residue gas sold at its WASP plus the gross value of the NGL purity products sold, less the costs to process the gas, and fractionate, transport, and sell the NGL purity products downstream. Antero pays royalties on whichever amount is higher. *Id.* at 5924–26, 2676, 2702–04. Said differently, when Antero receives a higher net value for the sale of NGL purity products, class members share in the upside and their proportionate share of the costs. To the extent Antero deducts post-production costs from a class member's royalties, Antero only deducts a proportionate share of the actual costs of third-party post-production activities (not overhead or administrative costs). *Id.* at 7261–62. But in all circumstances, the class members receive as much as or more than they would have if Antero had sold the gas locally—the kinds of sales envisioned in both *Wellman* and *Tawney*.[3]

SUMMARY OF ARGUMENT

The Court should hold that *Wellman*'s and *Tawney*'s requirements extend only to the "first available market" when the implied duty to market is implicated, and that the lessee may share with the lessor its proportionate share of all value-enhancing costs after that point. The *Wellman* Court recognized that the duty to market requires the lessee to bear all costs to render gas marketable—relying on Colorado, Kansas, and Oklahoma law. In each of those jurisdictions, this presumption extends only to the first available market—just as the implied duty's name suggests—and not an ultimate sales point. No jurisdiction extends an implied duty to market to require the lessee to continue enhancing, processing, or transporting gas, even ***after*** it has reached the first available market. Nor does any jurisdiction require lessees to pay all the costs of doing so. That

[3] The payments practices described in this paragraph relate to the class members and not all of Antero's lessors.

would convert the marketable product rule into a novel final point of sale rule no other jurisdiction has adopted.

Petitioners' argument that the Court has recognized the "point of sale" as the point to which lessees must bear all costs is misplaced. *Wellman*'s use of the phrase "point of sale" in its syllabus points, when read in line with the facts, holding, and the authorities on which the Court relied makes clear that it was not requiring lessees to cover all costs necessary to bring gas to the final point of sale in a distant market (let alone all value-enhancing costs), but rather to the first point at which the gas is in a condition to be sold. The Court did not consider the difference between the two points because, in that case, the first available market ***was*** the actual point of sale. *See W.W. McDonald Land Co.*, 983 F. Supp. 2d at 802. *Tawney* merely accepted the syllabus points in *Wellman* without any consideration of the issues now presented. The Court should clarify syllabus points 4 and 5 in *Wellman* and syllabus points 10 and 11 in *Tawney* to refer to the first available "point of sale"—i.e., a first market—and not to a final, ultimate "point of sale." Alternatively, to the extent the Court believes that it cannot do so without formally overruling those syllabus points and corresponding portions of *Wellman*'s and *Tawney*'s holdings, it should do so to align West Virginia's marketable product rule with the implied duty to market and with other first marketable product rule states, which requires lessors to share in value-enhancing costs once gas is rendered marketable. Petitioners' extreme position potentially disincentivizes development in West Virginia and eviscerates the marketable product rule, which contemplates that the lessor and lessee will share in the costs of enhancement after gas is rendered marketable.

Once this Court decides that *Wellman*'s and *Tawney*'s presumption extends only to the first point of marketability, as opposed to an ultimate point of actual sale, this Court should then hold that the duty to market ends once marketable ***gas*** has been produced. The marketable product rule contemplates that once gas is rendered marketable, the lessee has no further obligation under the implied duty to market. The rationale makes sense for an implied term in gas leases: the implicit duty was to get gas to market in marketable form. But once the gas is marketable, the implied duty is fulfilled. As such, lessors should share in the costs to enhance any remaining by-products and transport them to market. No state appellate court in a marketable product rule jurisdiction has extended the rule to apply to a derivative by-product, much less has ruled as such as a matter of law.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, oral argument is appropriate in this case because this case involves complex issues of first impression.

STANDARD OF DECISION

West Virginia Code Section 51-1A-3 provides that the Court "may answer a question of law certified to it by any court of the United States . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state." Both requirements are satisfied here. ***First***, as the certification order provides, the answers to the certified questions "determine the viability of the sole cause of action alleged in Petitioners' Second Amended Class Complaint, in which Petitioners allege Antero took improper deductions from their royalties under the Class Leases." A.R. at 7309. ***Second***, as the certification order further provides, the Court has neither addressed whether the implied duty to market extends only to the "first available market" as opposed to the ultimate, final "point of sale" nor whether the lessors share in any costs thereafter. *Id*. at 7310–14. Thus, there is no controlling appellate decision, constitutional provision, or West Virginia statute addressing these questions.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT WEST VIRGINIA'S MARKETABLE PRODUCT RULE EXTENDS ONLY TO THE "FIRST AVAILABLE MARKET" FOR GAS.

This Court should rule that *Wellman* and *Tawney* committed West Virginia to the same first marketable product rule recognized by the other marketable product rule jurisdictions. ***First***, the facts in *Wellman* and the sources it cited demonstrate that the Court adopted a first marketable product rule like that in Colorado, Kansas, and Oklahoma—not a novel, extreme ultimate "point of sale" approach that was not contemplated because the first available market was the actual point of sale in both cases. ***Second***, *Wellman*'s and *Tawney*'s references to a "point of sale" in their syllabus points do not resolve the question presented here because, in those cases, the points of sale were both in-basin within the state, and the Court had no occasion to make a distinction between the first available market versus a downstream point of sale. The Court's explanation of the marketable product rule in *Kellam* is aligned with other jurisdictions upon which the Court has relied upon. ***Third***, if this Court declines to clarify *Wellman*'s and *Tawney*'s syllabus points, this Court should overrule those syllabus points and corresponding portions of the opinions and explicitly adopt the prevailing, accepted understanding of the marketable product rule.

A. Lessees in West Virginia Have an Implied Duty to Render Gas Marketable.

1. *Wellman* and *Tawney* Adopted a First Marketable Product Rule Like That in Colorado, Kansas, and Oklahoma.

Wellman and *Tawney* are based on the marketable product rule, which recognizes lessees are implicitly required to both bring the gas to the first available market, and bear the costs for doing so, rather than bringing gas to the final, actual point of sale (and bearing all such costs)—barring express contractual language addressing the issues. The Court recently confirmed this understanding of the marketable product rule in *Kellam*. The conclusion that *Wellman* and *Tawney* adopted only a first marketable product rule—and cannot be read as adopting a final point of sale rule—is supported by (1) the rule in states that those cases relied on (that is, Colorado, Kansas, and Oklahoma), (2) the legal sources relied on in *Wellman* and *Tawney*, and (3) the facts of *Wellman* and *Tawney*.

First, the marketable product rule states upon which *Wellman* relied in adopting its rule hold that lessees are required to bear all "post-production" costs incurred to render the gas marketable, but costs beyond the point of marketability may be shared between the lessor and lessee. *See Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265 ("This Court believes that the rationale employed by Colorado, Kansas, and Oklahoma in resolving the question of whether the lessor or the lessee should bear 'post-production' costs is persuasive."). Most cases in those jurisdictions arose in the 1990s, when courts throughout the country were grappling with how to deal with post-production costs in a deregulated environment where sales no longer took place at or near the wellhead. *See* Rachel M. Kirk, *Variations in the Marketable-Product Rule from State to State*, 60 Okla. L. Rev. 769, 772–73 (2007).

Wellman particularly leaned on and adopted the Colorado Supreme Court's reasoning for the marketable product rule in *Garman v. Conoco*, 886 P.2d 652 (Colo. 1994), which described the rule as a guide in applying the implied duty to market. *See Wellman*, 210 W. Va. at 210–11, 557 S.E.2d at 264–65. In *Garman*, the plaintiffs alleged that costs for gathering, compression, and dehydration could not be deducted from their royalties because they were necessary to make the gas marketable in the first place. 886 P.2d at 655 n.8. Because of the implied duty to market, the *Garman* Court held that there is a presumption that lessees bear all post-production costs until it has "made the gas marketable in the first place." *Id.* at 658, 662. That is the marketable product rule. Under that rule, the presumption ends "[u]pon obtaining a marketable product, [and] any additional costs incurred to enhance the value of the marketable gas, such as [transportation costs and costs to process gas into components], may be charged against nonworking interest owners." *Id.* at 661 & n.8. Thus, in applying the rule, Colorado presumes that lessees bear the burden of post-production costs until the first available market—i.e., when gas is in a marketable condition, and in a place where it can be sold—not the ultimate or final point of sale. *See Rogers v. Westerman Farm Co.*, 29 P.3d 887, 904 (Colo. 2001) (reaffirming the "first marketable-product" rule). Kansas and Oklahoma, on which *Wellman* also relied, hold the same. *See Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265; *see also Sternberger v. Marathon Oil Co.*, 894 P.2d 788, 800 (Kan. 1995) (holding that "[i]n [*Garman*], the Colorado Supreme Court held as we believe the law in Kansas to be"); *Mittelstaedt v. Santa Fe Mins., Inc.*, 954 P.2d 1203, 1207 (Okla. 1998) ("[W]e agree with both *Sternberger* and *Garman*.").

No jurisdiction applies a final point of sale rule. Every marketable product state has repudiated Petitioners' final point of sale approach. For example, in *Garman*, the Colorado Supreme Court held that "costs incurred after the gas is made marketable, which actually enhance the value of the gas, should be borne proportionately by all parties benefitted by the operations." 886 P.2d at 655. *Garman* thus makes the point that if marketable gas is transported farther downstream, past an initial market "to the point of sale," to achieve higher prices in a way that benefits lessors and lessees, the costs are presumptively shared pro rata. *Id.* at 661 & n.8. Moreover, the jurisdictions *Wellman* relied on have explicitly held that the implied duty to market ends when the "first-marketable product has in fact been obtained." *Rogers*, 29 P.3d at 904. And those jurisdictions held (or have since even further clarified), that "[o]nce a marketable product is obtained, reasonable costs incurred to transport or enhance the value of the marketable gas may be charged against nonworking interest owners." *Mittelstaedt*, 954 P.2d at 1207; *Fawcett v. Oil*

Producers Inc. of Kansas, 352 P.3d 1032, 1041 (Kan. 2015); *see also Wood v. TXO Prod. Corp.*, 854 P.2d 880, 881 (Okla. 1992) ("When the lessee has made the gas available for market then his sole financial obligation ceases, and any further expenses beyond the lease property must be borne proportionately by the lessor and the lessee."); *Lindauer v. Williams Prod. RMT Co.*, 381 P.3d 378, 386 (Colo. App. 2016) ("We have concluded that *Garman* and *Rogers* do not require transportation costs to meet the enhancement test and that imposing such a requirement is inconsistent with marketplace realities. Thus, transportation costs beyond the first commercial market need not enhance the value of the gas, such that actual royalty revenues increase in proportion to those costs, to be deductible from royalty payments."). And although these States have also further made clear that when and where gas is first marketable is a factual question (after the Court's decision in *Wellman* and *Tawney*), they have not altered their commitment to the marketable product rule and its focus on marketability—rather than a final point of sale.[4]

In sum, the reasoning and limitations on the marketable product rule by the Colorado, Kansas, and Oklahoma courts informs how West Virginia's marketable product rule should be understood. After analyzing those cases, the Court in *Wellman* expressly adopted the same first marketable product rule of Colorado, Kansas, and Oklahoma, holding that:

> [T]he rationale employed by Colorado, Kansas, and Oklahoma in resolving the question of whether the lessor or the lessee should bear 'post-production' costs is persuasive. Like those states, West Virginia holds that a lessee impliedly covenants that he will market oil or gas produced. Like the courts of Colorado, Kansas, and Oklahoma, the Court also believes that historically the lessee has had to bear the cost of complying with his covenants under the lease.

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4 *See Whisenant v. Strat Land Expl. Co.*, 429 P.3d 703, 707 (Okla. Ct. App. 2018) ("[T]he determination in Oklahoma of the moment in time when oil or gas extracted from any particular well becomes a 'marketable product' and, thus, reaches its royalty-valuation point, requires a fact-intensive inquiry."); *Antero Res. Corp. v. Airport Land Partners, Ltd*, 526 P.3d 204, 212 (Colo. 2023) (same); *L. Ruth Fawcett Tr. v. Oil Producers Inc. of Kansas*, 507 P.3d 1124, 1131 (Kan. 2022) (same).

Wellman, 210 W. Va. at 211, 557 S.E.2d at 265 (internal citation omitted); *see also* Owen L. Anderson, *Rogers, Wellman, and the New Implied Marketplace Covenant*, 2003–1 Rocky Mtn. Min. L. Inst. 13A (2003) ("*Wellman* take[s] the view that royalty is owed on the value added by transportation incurred to move gas to a ***first market*** unless the lease expressly provides otherwise." (emphasis added)). All three states relied on by *Wellman* presume that lessees bear the burden of "post-production" costs only until the first available market and that any further costs to the point of sale are shared between lessees and lessors—expressly rejecting a final point of sale approach. *Wellman* and *Tawney*, thus, cannot be read to hold that lessees have a duty to market gas beyond the first available market to a later point of sale or to incur all costs associated with moving the gas from a first market to a final market, particularly when that issue was not even presented in those cases.

Second, no other legal source cited in *Wellman* supports adopting a final point of sale approach. Besides Colorado, Kansas, and Oklahoma case law, *Wellman* also relied on Professor Robert Donley's treatise and the West Virginia case *Davis v. Hardman*, 148 W. Va. 82, 133 S.E.2d 77 (1963). Neither *Davis* nor Professor Donley's treatise stands for an extreme view that lessees bear all post-production costs (including transportation) through the final point of sale. *Davis* does not discuss the implied duty to market, but instead distinguishes a nonparticipating royalty interest from a property interest in gas in a dispute involving which entity had the right to lease the land to an operator to drill gas wells. *Davis*, 148 W. Va. at 81, 133 S.E.2d at 90. Professor Donley simply states that "[i]n the absence of an express covenant to market either oil or gas, the court implies one in order to effectuate the basic purpose of the lease, which, after all, is to enable to lessor to convert his minerals into cash," without further explaining what the implied covenant to market entails. Robert Donley, The Law of Coal, Oil and Gas in West Virginia and Virginia § 104 (1951). Moreover, as Justice Walker noted in *Kellam*:

> *Wellman* based its interpretation of the implied covenant to market on a section from a 1951 treatise that says
>
>> From the very beginning of the oil and gas industry it has been the practice to compensate the landowner by selling the oil by running it to a common carrier and paying to [the landowner] one-eighth of the sale price received. This practice has, in recent years, been extended to situations where gas is found. . . .
>
> But *Wellman* overlooked another section of the treatise that acknowledges that the implied covenant to market does not extend to minerals sold off-site and that lessees should pay royalties
>
>> equal to one-eighth (1/8) of the proceeds received by the [l]essee from the sale of gas if measured and sold at the well, but if not sold at the well but after transmission or commingling with gas from other properties, then equal to one-eighth (1/8) of the average prevailing price currently paid at the well in the same field by public utility companies.

Kellam, 247 W. Va. at 98, 875 S.E.2d at 236 (Walker, J., dissenting) (citing *Wellman*, 210 W. Va. at 209, 557 S.E.2d at 263; quoting Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* § 104 (footnotes omitted)). This unquoted portion of Professor Donley's treatise supports the view that royalties for gas sold downstream should be paid based not on the final downstream sales price but on the prevailing price paid at the wellhead—the opposite of what Petitioners want—and recognizes that lessors cannot benefit from higher downstream prices unless they will share in the costs of getting gas downstream.

Third, the facts of *Wellman* and *Tawney* demonstrate that the Court could not have adopted a final point of sale rule. In *Tawney*, the lessee gathered the gas to transport it to a processing plant before ultimately delivering it to the Columbia Gas Transmission line (TCO) where it was sold.

Tawney, 219 W. Va. at 269, 633 S.E.2d at 25.[5] In *Wellman*, the lessee sold gas that was "not used for the manufacture of gasoline or any other product" to Mountaineer Gas Company in-basin. *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258. In both cases, the point of sale just happened to be in-basin at local markets. *See Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30; *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258; *see also* A.R. at 2667, 2677–78, 5917, 5968 (A. Schopp Dep. Tr. 108:9–16, 151:3–152:22). Accordingly, the Court found that the lessees could not deduct costs incurred prior to the gas being rendered marketable at the local sales point. *See Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30; *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258.[6] The Court's focus remained, however, on when the gas first reached a market, not the final point where it was sold, and it had no occasion to consider the difference between those two points. *See Tawney*, 219 W. Va. at 271, 644 S.E.2d at 27. In fact, for this reason, a federal court held that "when *Tawney* and *Wellman* are read in their entirety, it becomes clear that lessees must bear the costs of bringing gas to the market, ***not to a point of sale***." *W.W. McDonald Land Co.*, 983 F. Supp. 2d at 800 (emphasis added).

In *Kellam*, the Court confirmed that *Wellman* adopted the same first marketable product rule recognized by other states. It acknowledged the "point of sale" language in *Wellman*'s

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5 Although the gas in *Tawney* was processed, the lessee did not sell NGL purity products. Instead, the third-party processor provided the lessee with replacement residue gas, which the lessee sold locally. Br. Def. Columbia Nat. Res., LLC, on Certified Questions, at *7–8, *Tawney v. Columbia Nat. Res., L.L.C.*, 219 W. Va. 266, 633 S.E.2d 22 (2006). A jury determined that the lessors were not entitled to additional royalties on the sale of NGL purity products. Pet. for a Writ of Certiorari, at *11, *NiSource, Inc. v. Tawney*, 555 U.S. 1041 (2008).

6 Notably, the costs at issue in *Wellman* and *Tawney* were not limited to the lessee's third-party post-production costs, but included overhead and administrative costs. *See* Resp. of Appellees James T. Wellman & Grace Wellman at 26, *Wellman v. Energy Res., Inc.*, 210 W. Va. 200, 557 S.E.2d 254 (2001); Pls.' Br. in Support of Affirming Trial Court's Rulings on Certified Questions at 1–3, *Tawney v. Columbia Nat. Res.*, 219 W. Va. 266, 633 S.E.2d 22 (2006).

syllabus points and then characterized that language as meaning that "the lessee bears all post-production costs incurred until the product is ***first rendered marketable***." *Kellam*, 247 W. Va. at 83, 875 S.E.2d at 221 (emphasis added); *see also id.* (characterizing this "point of sale" language as "firmly cement[ing] West Virginia as a 'marketable product rule' state"). Justice Hutchison specifically observed in his concurrence that the Court had adopted the first marketable product rule. *Kellam*, 247 W. Va. at 93, 875 S.E.2d at 231 (Hutchison, C.J., concurring) ("[A]bsent an express lease provision to the contrary, lessees should not have to pay royalty on any value added to production by reason of incurred 'post-production' activities. However, 'production' should not be regarded as having been completed until a ***first-marketable product*** has been obtained." (quoting Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically? Part 2*, 37 Nat. Resources J. 611 (1997))) (emphasis added); *see also* Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically? Part 2*, 37 Nat. Resources J. 611, 642 (1997) ("'[P]roduction' would end at the point where a first marketable product has in fact been obtained."). There may be factual questions over the location of the "first market," *see Kellam*, 247 W. Va. at 93, 875 S.E.2d at 231 (Hutchison, C.J., concurring), but that inquiry itself demonstrates that the relevant "market" is not necessarily the actual point of sale.

Taken together, West Virginia precedent and persuasive case law demonstrates that the Court intended an approach whereby the lessee would bear post-production costs until the gas is first rendered marketable at a point where it is in a condition in which it could be sold—not to the actual, final point of sale. Now that this distinction is squarely presented, this Court should clarify that marketability, not the final point of sale, is the endpoint for the implied duty to market, and with it the sole burden of carrying costs.

2. Petitioners' Arguments in Favor of Adopting a Final Point of Sale Rule Are Unsupported and Unpersuasive.

Petitioners offer unpersuasive arguments in favor of adopting a final "point of sale" approach. ***First***, citing Professor Donley's treatise, Petitioners claim that extending the duty to market to the ultimate point of sale adheres to the "traditional rule" that lessors receive royalty on the sale of the price of gas. Pet. Br. at 18–19. But Professor Donley did not set forth such a rule. Instead, Professor Donley recognized that it was "uncommon" for early leases to provide for gas royalties instead of a flat well rental, and that "modern" leases typically provide for royalty "equal to one-eighth (1/8) of the proceeds received by the Lessee from the sale of the gas if measured and sold at the well" but "if not sold at the well but after transmission or commingling with gas from other properties, then equal to one-eighth (1/8) of the average prevailing price currently paid at the well in the same field." Donley, The Law of Coal, Oil and Gas in West Virginia and Virginia § 159.

Second, Petitioners claim that *Wellman*, *Tawney*, and *Kellam* already held that lessees bear all costs from the first available market through the ultimate point of sale, and that the District Court therefore erred in certifying the question. Pet. Br. at 19–21. Not so. *Kellam* explained that *Wellman* and *Tawney* "firmly cemented West Virginia as a 'marketable product rule' state," and it did not further examine the duty to market because "that covenant is not implicated" when "there is a contractual provision addressing the allocation of post-production costs." *See Kellam*, 247 W. Va. at 88, 875 S.E.2d at 221, 226.

In outlining the marketable product rule, Chief Justice Hutchison's concurrence referred to production ending with "a first-marketable product," citing for support the treatises of Professors Merrill and Kuntz, who explained that "transportation to the distant point [of sale] is no part of the legitimate operating expense of the lease" and that if "the lessee carries the product to a distant point for sale[, lessee] must account for the price received, less the reasonable cost of transportation from the lease to the market." Merrill, *The Law Relating to Covenants Implied in Oil and Gas Leases* § 86; *see Kellam*, 247 W. Va. at 93, 875 S.E.2d at 231 (Hutchison, C.J., concurring). Moreover, Professor Kuntz explained that "[a]fter a marketable product has been obtained, then further costs in improving or transporting such product should be shared by the lessor and lessee if royalty gas is delivered in kind, or such costs should be taken into account in determining market value if royalty is paid in money." Eugene Kuntz, A Treatise on the Law of Oil and Gas § 40.5 (1962); *see Kellam*, 247 W. Va. at 93, 875 S.E.2d at 231 (Hutchison, C.J., concurring). *Wellman* and *Tawney* likewise did not (and could not) hold that lessees bear all costs to a distant, final point of sale, because those cases concerned only gas sales that occurred in-basin at a first available market. *Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30; *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258.

Third, Petitioners argue that the Fourth Circuit in *Corder* already held that lessees bear all costs beyond the first available market to the point of sale. Pet. Br. at 20. Of course, a federal court like *Corder* cannot issue determinative rulings on West Virginia law. *See Shears v. Ethicon, Inc.*, 64 F.4th 556, 566 (4th Cir. 2023) ("[A] ruling by [the Fourth Circuit] cannot and does not propound new principles of state law . . . if the Supreme Court of Appeals arrived at a conclusion contrary to [a prior Fourth Circuit opinion], that determination would control."). This Court should give no weight to *Corder*'s holding, as it is neither persuasive nor correct. *Corder* did not even examine the sources *Wellman* relied on in adopting the first marketable product rule—it failed to mention Colorado, Kansas, and Oklahoma law or any of the legal treatises explaining the rule. Instead, the Fourth Circuit was unsure what the Court's precedent required. *Corder*, 57 F.4th at 397 ("[T]he West Virginia Supreme Court has cast some doubt on whether the lessee actually is responsible for costs through the point of sale. . . . [and] the *Kellam* court did not assess the 'point of sale' approach in any depth."). The Court's deep history of resolving West Virginia oil and gas issues puts it in a far better position to assess its own prior decisions; the Fourth Circuit's admittedly uncertain decision warrants no weight, but its confusion does demonstrate the need for this Court to clarify West Virginia law.

The arguments presented by amici West Virginia Royalty Owners' Association and West Virginia Farm Bureau fare no better, as they merely repeat Petitioners' arguments. Tellingly, however, amici's position now takes the opposite position from prior briefing they submitted to the Court, in which they argued that the duty to market applies only to the first available market—the argument Antero, not Petitioners, advances here. In 2022, shortly after *Kellam*, amici argued 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." Amicus Curiae Brief on Behalf of West Virginia Royalty Owners' Association, et al. as Amici Curiae Supporting Respondents, *State ex rel. TH Exploration II, LLC v. Venable Royalty, LTD.*, 2022 WL 12524993 (W. Va. Oct. 21, 2022) (No. 21-1004), 2022 WL 4372063, *8–9 (emphasis added). Where the implied duty to market is implicated, this Court should credit the amici's prior positions to the Court rather than its more extreme approach asserted here.

Finally, to find that a lessee has an obligation to bear all costs through the final point of sale, as opposed to the first available market, creates distorted incentives in West Virginia and would discourage lessees from making the decision to enter into contracts that allow the lessee to enhance the value of the gas produced. A final point of sale rule encourages lessees to sell gas at or near the wellhead or at local markets (where prices are generally lower) as opposed to obtaining additional value for the gas by processing and transporting to distant markets (where prices are generally higher). *See* Byron C. Keeling & Karolyn King Gillespie, *The First Marketable Product Doctrine: Just What Is the "Product"?*, 37 St. Mary's L.J. 1, 98–99 (2005). Under a final point of sale rule, when a lessee takes gas all the way downstream and incurs all the costs of doing so, the lessors do not share any of the costs but receive the benefit of all upside profit realized as a result. *See id.* The lessee is incentivized to just sell the gas farther upstream (closer to the wellhead) at a lower price, which in turn reduces the lessors' chance to share in the upside farther downstream. *See id.* An economically rational lessee saddled solely with the downstream costs would take a lower, local, sales price to avoid those costs; if costs are shared proportionally, both can ultimately make more at a higher, distant sales location.

B. ***Wellman*'s and *Tawney*'s Reference to "Point of Sale" In Their Syllabus Points Does Not Adopt a "Final Point of Sale" Rule as Argued by the Petitioners.**

1. **The "Point of Sale" in *Wellman* Was Also the First Available Market.**

Petitioners' reliance on *Wellman*'s and *Tawney*'s syllabus points as announcing a final point of sale rule is misplaced because syllabus points must be read in line with the case's opinion and facts. Under the West Virginia Constitution, an opinion's syllabus announces important new points of law, but the opinion furnishes the breadth of the rule: "the syllabus is not intended to be an exhaustive recitation of every item decided in the case, and must be read in light of the opinion as a whole." *State v. McKinley*, 234 W. Va. 143, 149, 764 S.E.2d 303, 309 (2014). Indeed, the Court has indicated that the opinion provides the ultimate law of the case. *Id.* (quoting *Koonce v. Doolittle*, 48 W. Va. 592, 592, 37 S.E. 644, 645 (1900)). And the facts of *Wellman* and *Tawney* provide critical context limiting the "point of sale" language in their syllabus points to the first point at which gas could be sold, not the actual final point of sale, as further supported by the opinions themselves.[7]

To start, in those cases, the "points of sale" were in-basin, at local markets at a first available market. *Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30; *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258. And the Court held that the lessees must bear the costs to get the gas to this market, which also happened to be where the lessees sold their gas. *See Tawney*, 219 W.Va. at 269, 633 S.E.2d at 25; *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258. The Court, thus, had no occasion to distinguish between the first available market and the ultimate point of sale. As such, the Court's reference to "the point of sale" in both *Wellman* and *Tawney* is best understood as meaning the point at which gas has reached a condition and location it could be sold. *See, e.g.*, *W.W. McDonald Land Co.*, 983 F. Supp. 2d at 800 ("The only way to reconcile *Tawney*'s facts—only the costs of bringing the gas to market were at issue—with the 'point of sale' language in *Tawney*'s syllabus points is to assume that *Tawney* applies to the costs incurred in bringing the gas to market, not to a point of sale.").

In addition, reading the phrase "point of sale" in the context of the *Wellman* and *Tawney* opinions, it is clear the Court was simply adopting the first marketable product rule found in numerous other jurisdictions, which requires rendering gas marketable at the first available market. When the Court set forth the holding that became syllabus point 4 in *Wellman*, it said, "In view of all this, this Court concludes that if an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale." *Wellman*,

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[7] The Court in *Wellman* also limited its holding to proceeds leases. *Wellman*, 210 W. Va. at 210 n.3, 557 S.E.2d at 264 n.3. Antero does not concede that the Class Leases are proceeds leases.

210 W. Va. at 211, 557 S.E.2d at 265. The "[i]n view of all this" referred to in the opinion gives context to the syllabus points, as it includes the facts of the case, the cases *Wellman* cited from Colorado, Kansas, and Oklahoma, as well as Professor Donley's treatise on oil and gas law. *See Wellman*, 210 W. Va. at 209–11, 557 S.E.2d at 263–65. And "all of this" authority explained that the lessee bears post-production costs until the first available market—not beyond. *See, e.g.*, *Garman*, 886 P.2d at 661. Thus, by plucking the phrase "point of sale" from the syllabus, casting aside the rest of the *Wellman* opinion, and ignoring that in context it should be properly viewed as referring to a ***first*** point at which gas could be sold rather than the ultimate, actual point of sale, Petitioners' attempt to commit West Virginia to an unprecedented final point of sale rule inconsistent with all other jurisdictions—jurisdictions that *Wellman* explicitly relied on (and joined) when adopting its rule.

2. If this Court Believes It Cannot Clarify the Syllabus Points in *Wellman* and *Tawney* Because It Reads the Syllabus Points as Requiring the Lessee to Bear Post-Production Costs to a Point of Final Sale, Then this Court Should Overrule These Holdings.

If this Court concludes that *Wellman*'s and *Tawney*'s syllabus points actually do require the lessee to solely bear post-production costs to a point of final, ultimate sale, and this Court cannot clarify those syllabus points to reflect that they only refer to the point at which gas is first marketable, this Court should overrule them and explicitly adopt the prevailing, accepted understanding of the first marketable product rule. Unlike in *Kellam*, Antero does not ask this Court to hold that *Wellman* and *Tawney* are no longer good law, but—if necessary—limit those holdings to the circumstances where the final point of sale was the first available market (of course, as the first available market was the sales point in those cases, such a modification, would not change the results in those cases).

The principle of stare decisis should not hinder this Court from overruling a final point of sale rule derived from *Wellman* and *Tawney*. Unlike *Wellman*'s and *Tawney*'s adoption of the implied duty of marketability addressed in *Kellam* (and not challenged here), any final point of sale rule would not satisfy the principles of stare decisis because: (1) *Wellman* and *Tawney* did not engage in extrinsic analysis for adoption of a final point of sale rule—indeed the distinction between a first and final point of sale was irrelevant to, and unaddressed in, both cases, (2) the Court has not addressed a serious change in conditions in how lessees market gas since the Court adopted the rule, (3) the rule relies on a serious judicial error, and (4) the rule is unaligned with other jurisdictions.

First, the policy of stare decisis would have a limited effect on a final point of sale rule because, to the extent they announce such a rule, *Wellman* and *Tawney* did so without extrinsic analysis in cases where the issue was not actually presented. "[A] precedent-creating opinion that contains no extrinsic analysis of an important issue is more vulnerable to being overruled." *State v. Guthrie*, 194 W. Va. 657, 679 n.28, 461 S.E.2d 163, 185 n.28 (1995). *Wellman* spilled much ink on its decision to adopt the marketable product rule. But to the extent that *Wellman* was modifying the rule announced in other jurisdictions by adopting a final point of sale rule, it did so without any analysis. *See Wellman*, 210 W. Va. at 210, 557 S.E.2d at 264. Moreover, Petitioners would have this Court presume that *Wellman* ruled on an issue that was not presented—the parties had no occasion to brief a distinction between the first point of marketability and final point of sale because they were the same, *see id.* at 204, 557 S.E.2d at 258. But that is not how the Court renders precedential holdings. *See Guthrie*, 194 W. Va. at 679 n.28, 461 S.E.2d at 185 n.28.

Second, any putative final point of sale rule should be overturned because a serious change in conditions undermines its validity. *See Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d

169 (1974). Starting in the late 1990s and taking off in the late-2000s, federal deregulation combined with the existence of hydraulic fracturing and horizontal drilling incentivized lessees to sell gas at distant markets downstream of the well, and some—like Antero—entered into long-term contracts to aggregate and move large volumes of liquids-rich gas to processing facilities to capture higher sales prices for gas at downstream locations like the Gulf Coast. And in fact, Antero was required to commit to long-term processing contracts in order for the counterparty to agree to build the capital-intensive facilities needed to provide those services. Since *Wellman* and *Tawney* were decided, the Court has not faced this new factual scenario of how to allocate properly the costs when gas is sold at a distant market. Even in *Kellam*, the Court was not asked to consider a case where gas is sold beyond a local sales point—i.e., the first available market—to command a higher price. *See* 247 W. Va. at 97, 875 S.E.2d at 235 (Walker, J. dissenting) (focusing on *Wellman*'s failure to acknowledge the effects of deregulation in the 1990s that allowed lessees to transport gas to "an off-site location" for "more value than the market value" at the well). Instead, the Court has considered a post-deregulation world where the ultimate point of sale and the first available market for gas were often coextensive at a local sales location. *See, e.g.*, *Tawney*, 219 W. Va. at 269, 633 S.E.2d at 25; *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258. Because this is often no longer the case, *Wellman*'s final point of sale rule is out of step with changed conditions.

Third, if read as imposing a final point of sale rule, *Wellman* presents a serious judicial error. To the extent that *Wellman* was attempting to follow other marketable product jurisdictions by adopting such a rule, it failed to realize a critical distinction that these other jurisdictions employ. As explained above, those other jurisdictions all understand the marketable product rule to require lessees to bear the costs to render gas marketable (i.e., the first marketable product rule). *See supra* Section I.A. Despite having relied on the reasoning from these other jurisdictions, to the extent *Wellman* is viewed as adopting a final point of sale rule, it broke with the ultimate conclusion of those jurisdictions, and it did so without acknowledging that critical distinction. A failure to appreciate the distinction between the first marketable product rule and a (putative) final point of sale rule would be a serious judicial error that counsels in favor of overturning the syllabus points in *Wellman* and *Tawney* to the extent they are read as adopting the latter. *See State v. Varlas*, 243 W. Va. 447, 454, 844 S.E.2d 688, 695 (2020) (holding that a previous case should be overturned for serious judicial error because it failed to appreciate a critical distinction made within the existing case law).

Finally, for related reasons, a final point of sale rule should be overruled because it is not aligned with all jurisdictions. While acknowledging the importance of stare decisis, the Court has consistently overturned precedent that has committed West Virginia to a minority approach or an approach that is unaligned with an analogous Supreme Court or federal rule. *See State v. Sutherland*, 231 W. Va. 410, 418, 745 S.E.2d 448, 456 (2013) (overruling a prior syllabus point where the "better and more legally sound approach" is a rule adopted "by the overwhelming majority of states"); *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 479–81, 745 S.E.2d 508, 517–19 (2013) (same); *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 178, 786 S.E.2d 188, 197 (2016) (overruling prior syllabus point to align with the U.S. Supreme Court's "better and more legally sound approach"); *Meadows v. Meadows*, 196 W. Va. 56, 64, 468 S.E.2d 309, 317 (1996) (overruling prior syllabus points to bring rule in line with "[m]ost surrounding jurisdictions"). A final point of sale rule would make West Virginia the ultimate minority jurisdiction—a minority of one.

For all of these reasons, to the extent this Court believes precedent adopted a final point of sale rule, this Court should now overturn it.

II. THIS COURT SHOULD HOLD THAT ONCE THERE IS MARKETABLE GAS, THE IMPLIED DUTY TO MARKET IS SATISFIED AND FURTHER COSTS WITH RESPECT TO GAS BY-PRODUCTS ARE SHARED.

This Court should hold that the first marketable product rule contemplates that once ***gas*** is rendered marketable, the lessee and lessor share in any costs incurred to further process or market any gas by-products—as they are enhancements. There is no dispute that if the lessee sells the by-products at a profit, it must share royalties with the lessor. To be clear, for class wells in which Antero processes gas and therefore manufactures NGL purity products, Antero pays class members for the value of those products, either at the sales price (less certain actually incurred third-party post-production costs) or for an amount equal to the wellhead volume of gas at local index (TCO pool) price (as if Antero sold the products as residue gas)—whichever results in a higher royalty. *See* A.R. at 5924–26, 2676, 2702–04. The question of whether Antero pays royalties at the appropriate amount in such circumstances is not presented in the certified questions before this Court, but rather, the question is whether Antero must pay royalties on gas by-products at the final point of sale without any cost sharing for such enhancements at all.

In accordance with the first marketable product rule, this Court should thus hold that (1) the implied duty to market is satisfied when a lessee renders gas marketable; and (2) any costs incurred thereafter, such as fractionation and transportation of the by-product, should be shared proportionally by lessor and lessee, unless otherwise specified in the lease. This Court should reject Petitioners' suggestion that West Virginia's marketable product rule always extends to NGLs (as a matter of law), because "whether gas is marketable is a question of fact." *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 273 n.13, 800 S.E.2d 850, 859 n.13 (2017); *see also Rogers*, 29 P.3d at 907 ("[T]he question of marketability is one of fact, not law.").

A. The Implied Duty to Market Should Not Be Extended to Gas By-Products.

The issue presented by the second certified question is when the implied duty to market ends. When that duty ends, so does the marketable product rule—meaning the lessee no longer presumptively bears all costs. (That is not to say that provisions in leases or other common law duties may be implicated, but the implied duty to market ends). As case law confirms, the duty to market ends once the lessee "place[s] ***gas*** in a condition acceptable for market." *Garman*, 886 P.2d at 659; *id.* at 658, 662 (duty to market ends once lessee has "made the ***gas*** marketable in the first place"); *Sternberger*, 894 P.2d at 800 (holding that "[i]n [*Garman*], the Colorado Supreme Court held as we believe the law in Kansas to be"); *Mittelstaedt*, 954 P.2d at 1207 ("[W]e agree with both *Sternberger* and *Garman*."). Once that duty is satisfied, the lessee has no further obligations under the implied duty to market. This means that in a situation where gas is processed and residue gas is separated from by-products, a lessee satisfies its duty to market once the residue gas is rendered marketable and delivered to a market.

Here, for Antero's processed gas, the implied duty to market is fulfilled (at the latest) when gas is processed to remove by-products, rendering marketable residue gas (at a market where it can be sold). At that point, the marketable methane (residue gas) has been freed from the remaining by-products (Y-Grade; a raw mix of NGLs). *See* A.R. at 2684, 5913–14. The parties' experts agree that gas is capable of being sold (and is in fact often sold) once it is processed into residue gas that is fit for transmission into an interstate pipeline. *See id.* at 5914–15 (Antero's Expert Kris Terry: "Gas may also be sold as residue gas at the tailgate of a gas processing plant"); *id.* at 2684 (Petitioners' expert Dan Reineke: "The residue gas is transported and consistently sold by Antero at a point of sale which is at an interconnect to a long distance pipeline"). By processing residue gas, Antero has produced a marketable product at the tailgate of the processing plant and satisfied its implied duty to market gas. To be sure, this question does not apply to the situation where Antero sells gas from the class wells at any point prior to processing, as there, Antero satisfies the duty to market (under either the point of sale approach or the approach Antero advocates for here, *see supra* Section I) as a sale is a sufficient, but not necessary, condition to establishing that gas is marketable.[8]

An implied duty to market ***by-products*** of gas finds no support in the case law. *Wellman* and *Tawney* did not hold that the implied duty to market applies to by-products of gas. Rather, those cases dealt solely with a lessee's duty to market ***gas*** itself—as the gas was not processed "for the manufacture of gasoline or any other product" in *Wellman* and the lessee did not sell gas by-products in *Tawney*—and the Court did not suggest or hold the duty extended to by-products of gas. *Tawney*, 219 W.Va. at 269, 633 S.E.2d at 25; *Wellman*, 210 W. Va. at 204, 557 S.E.2d at 258; *see also* supra n.5. Moreover, no state appellate court in a marketable product rule jurisdiction has held that an implied duty to market extends beyond the first marketable product (gas) to by-products of gas. *See* Anderson, *Marketable Product: What Did Kuntz Say? What Did Merrill Say?*, 1 Oil & Gas, Nat. Res. & Energy J. at 56.

This Court should not be the first to extend an implied duty to market to by-products of gas. As the Court acknowledged over 100 years ago, "courts hesitate to read into contracts anything by way of implication, and never do it except upon grounds of obvious necessity" and that "[a]ll authority opposes construction, or the reading in of matter not expressed by way of implication, when it is not rendered necessary in some way or for some reason." *Id.*; *Grass v. Big*

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8 *See Fawcett*, 352 P.3d at 1042 ("OPIK satisfied its duty to market the gas when the gas was sold at the wellhead."); Owen L. Anderson, *Marketable Product: What Did Kuntz Say? What Did Merrill Say?*, 1 Oil & Gas, Nat. Res. & Energy J. 43, 54 (2015) ("[I]n today's (and yesterday's) marketplace, wet gas—gas saturated with NGLs—is marketable."); A.R. at 5914 (K. Terry) (opining that rich gas is marketable as native gas prior to processing).

Creek Development Co., 75 W. Va. 719, 84 S. E. 750, 756 (1915) (quoting *White v. Bailey*, 65 W. Va. 573, 576, 64 S. E. 1019, 1023 (1909)). Nor may courts "impose new terms upon parties to contracts without their consent." *City of New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79, 91 (1891); *see Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 444, 745 S.E.2d 461, 482 (2013) ("It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.").

It is not necessary for the operation of a gas lease to imply a duty on the lessee to market gas by-products. After all, the whole purpose of a gas lease—i.e., the kind of lease at issue here—is to produce and market gas—not by-products. A.R. at 270 (leasing lands to lessee "for the ***purpose*** of mining and operating for oil, ***gas*** and casinghead gas" (emphasis added)); *id.* at 275 (leasing lands to lessee "for the ***purpose*** and with the rights of drilling, producing, and otherwise operating for oil and ***gas***" (emphasis added)). Concerning the implied duty to market, Professor Merrill explained nearly a century ago that "the lease is said to imply that, if ***oil or gas*** is found, the wells will be operated and the product sold." Maurice H. Merrill, *The Law Relating to Covenants Implied in Oil and Gas Leases* at 151–52 (1st ed. 1926) (emphasis added). In other words, it is not enough for a lessee to simply pay delay rentals and leave valuable gas in the ground—instead the lessee must produce and market the gas. Once the lessee has marketed the gas, however, this implied duty ends, and further costs incurred to market by-products are shared by lessor and lessee.

Because the implied duty to market does not extend beyond the marketing of gas itself to gas by-products, it follows that to the extent lessees incur costs to fractionate or otherwise improve the value of the by-product removed from the gas and are able to sell by-products at a profit (and share profits with the lessor), lessees may share such reasonable costs that led to the enhanced price with lessors—unless their lease specifies otherwise.

In sum, the implied duty is fulfilled in rendering gas marketable and does not extend to by-products. Thus, in sharing royalties from by-product sales (if any), lessees are permitted to share the costs associated with enhancing, improving, and transporting the by-product that remains after removal from methane gas.

Petitioners' arguments to the contrary are not persuasive. ***First***, they largely require this Court to hold that the marketable product rule extends to the "point of sale"—and as explained above, that is not correct. *See supra* Section I. Petitioners, for example, assert that royalties should be "based on the selling price of . . . natural gas liquid products at the point of sale." Pet. Br. at 4–5. Similarly, they rely heavily on *Corder*, which extended the marketable product rule to NGLs only because the lessee sold NGLs at the "point of sale." *Id.* at 22–23. If this Court agrees that the marketable product rule does not extend to the "point of sale," then Petitioners' derivative arguments necessarily fail.

Second, Petitioners erroneously assert that *Wellman* and *Tawney* already extended the marketable product rule to NGLs (as a matter of law) by requiring lessees to market "the product" or "products." Pet. Br. at 21–22. Not so. Read in context, *Wellman* and *Tawney* equated "product" or "products" with the oil or gas taken from the well—not whatever sub-products are ***derived*** from that oil or gas. *See, e.g.*, *Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265 ("Like those states, West Virginia holds that a lessee impliedly covenants that he will market ***oil or gas*** produced.") (emphasis added); *Tawney*, 219 W. Va. at 271, 633 S.E.2d at 27 ("In *Wellman*, we expressly recognized the general duty of a lessee to market the ***oil or gas*** produced." (emphasis added)); *id.* ("[T]he duty to market embraces the responsibility to get the ***oil or gas*** in marketable condition and actually transport it to market." (emphasis added)). Accordingly, these references to "products" support Antero, not Petitioners.

B. If the Court Holds That an Implied Duty to Market Applies to By-Products of Gas, Then Whether and When Those By-Products Are Marketable Is a Question of Fact for the Factfinder.

If the Court were to disagree with Antero and hold that lessees have an implied duty to also market by-products of gas, the question of whether and when those by-products are marketable is not presented here and should not be for a court to decide as a legal question. Instead, marketability is a question of fact—not law—and it would be up to the factfinder to determine whether (and when) the gas by-products are marketable (to the extent there are disputed facts). *See Leggett*, 239 W. Va. at 273 n.13, 800 S.E.2d at 859 n.13 ("The determination of whether gas is marketable is a question of fact, to be resolved by a fact finder."); *Rogers*, 29 P.3d at 907 ("[T]he question of marketability is one of fact, not law."); *Whisenant*, 429 P.3d at 707 ("[W]hen oil or gas extracted from any particular well becomes a "marketable product" and, thus, reaches its royalty-valuation point, requires a fact-intensive inquiry."). Importantly, for example, a lessee could show that the Y-Grade by-product is itself marketable and that therefore, costs incurred to fractionate it and transport subsequent NGL purity products for sale enhances the value of the product, in which case those costs can be shared with the lessor. *See, e.g.*, *Garman*, 886 P.2d at 661 ("[A]dditional costs incurred to enhance the value of the marketable gas . . . may be charged against nonworking interest owners."); *Mittelstaedt*, 954 P.2d at 1210 (same); *Sternberger*, 894 P.2d at 800 (same). But that is an issue for a factfinder in the first instance, not a legal question for a court. Accordingly, at a minimum, this Court should reject Petitioners' suggestion that the first marketable product rule always extends to NGLs, as a matter of law. *See Rogers*, 29 P.3d at 908 ("[W]e disagree . . . that certain costs are deductible [or not] as a matter of law.").

CONCLUSION

For the reasons stated above, Antero respectfully requests that this Court (1) answer the first certified question by holding that under the marketable product rule in West Virginia, the lessee is only required to bear all costs incurred in rendering the gas marketable (as the rule is summarized in *Kellam*), and it does not require the lessee to solely bear all costs beyond that point, and (2) answer the second certified question by holding that if the implied duty to market and marketable product rule do not extend beyond gas and if the lessee has already rendered gas marketable, any further value-enhancing costs (such as those incurred to fractionate and transport NGLs) must be proportionately shared unless otherwise specified in the lease.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January 2024, I electronically filed the foregoing "Response Brief of Antero Resources Corporation" with the Clerk of the Court using File&ServeXpress, which will send notification of such filing to counsel of record as follows:

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