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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-752

SEVERIN POA GROUP, LLC,

Petitioner

v.

EARL J. NICHOLSON and
JOYCE A. NICHOLSON,

Respondents

BRIEF OF *AMICI CURIAE* COUNTRY ROADS MINERALS, LLC, MORRIS MOUNTAINEER OIL & GAS LLC, LACORE AGRICULTURE, LLC, WV MINERALS, INC., HUNDRED RESOURCES, INC., BOUNTY MINERALS, LLC, AND DAC ENERGY, LLC IN SUPPORT OF PETITIONER

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I. STATEMENT OF INTEREST[1]

Amici Curiae submit this brief in support of Petitioner. *Amici Curiae* are some of the largest holders of fee interests in oil, gas, and minerals in the state of West Virginia. Collectively, they hold fee interests in oil, gas, and minerals underlying tens of thousands of acres and across multiple counties, including, but not limited to: Monongalia, Marion, Marshall, Harrison, Wetzel, Doddridge, Tyler, Ritchie, Pleasants, Lewis, Upshur, and Gilmer Counties. Said fee interests are conservatively valued at hundreds of millions of dollars. *Amici Curiae* are intimately and actively involved in the purchasing, selling, leasing, and/or development of oil, gas, and minerals within the state of West Virginia. The value of these interests will be significantly affected by the issues presented in this appeal. *Amici Curiae* seek to assist this Court in its analysis of the issues presented by this appeal.

II. ARGUMENT

A. Estate Misconception and the Legacy of the 1/8 Royalty

In a deed dated April 1, 1902 ("Severin Deed"), F. W. Severin conveyed approximately 117.55 acres in Doddridge County, expressly reserving "'one-sixteenth of all the oil and gas in and under said land.'" *Nicholson v. Severin POA Grp., LLC*, 249 W. Va. 458, 895 S.E.2d 927, 928 (Ct. App. 2023). In its declaratory judgment order, the circuit court correctly stated that "[c]onstruction of the deed on its date of execution … supports the conclusion that the reservation of 1/16th of the oil and gas operate[d] to reserve 1/2 of the oil and gas estate under West Virginia law in 1902 and the early 1900s." (J.A. 587). However, on review, the Intermediate Appellate Court ("ICA")

[1] Neither counsel for the parties to this instant appeal wrote in whole or in part the forgoing *amici* brief. Neither the parties nor their counsel, or any other third party not identified as a party to this *amici* brief, made a monetary contribution for the preparation or submission of this *amici* brief.

reversed the circuit court and erroneously concluded that "only one-sixteenth of the oil and gas mineral estate was reserved for Severin, not one-half[,]" *Nicholson*, 895 S.E.2d at 931, ignoring the wisdom of the circuit court and disregarding that in the context of oil and gas conveyances and reservations occurring at the time of the Severin Deed, one-sixteenth (1/16) "sometimes equals one-half." *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353, 357 (Tex. 2023).

The issue raised by the one-sixteenth (1/16) reservation in the Severin Deed is the product or result of two interrelated complications prevalent in deeds in oil and gas producing states during the time around the date of the Severin Deed: namely, estate misconception and the legacy of the one-eighth (1/8) royalty. With respect to estate misconception, this "theory reflects the prevalent (but, as it turns out, mistaken) belief that, in entering into an oil-and-gas lease, a lessor retained only a 1/8 interest in the minerals rather than the *entire* mineral estate. . ." *Van Dyke*, 668 S.W.3d at 363 (Tex. 2023) (emphasis in original). Consequently, a landowner "would refer to what they *thought* reflected their entire interest in the 'mineral estate' with a simple term they understood to convey the same message: '1/8'" *Id*. (emphasis in original).[2]

For example, a landowner "'would use the fraction 1/16, <u>*or*</u> a double fraction, 1/2 of 1/8, to convey 1/2 of what he perceived he owned." *Hysaw v. Dawkins*, 483 S.W.3d 1, 10 (Tex. 2016) (emphasis added) (quoting Laura H. Burney, *The Regrettable Rebirth of the Two–Grant Doctrine in Texas Deed Construction*, 34 S. Tex. L. Rev. 73, 89 (1993)).[3] In Texas, this "'widespread and

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[2] See the circuit court's order at footnote 2 discussing *McCoy v. Ash*, 64 W. Va. 655, 63 S.E. 361 (W. Va. 1908): "The reality that the parties in *McCoy* were fighting over a 1/2 interest demonstrates the custom and understanding of one-sixteenth fractional language in the early 1900s within West Virginia jurisprudence/abstracting practices."

[3] *See also*, Walter L. Summers, *Transfers of Oil and Gas Rents and Royalties*, 10 Tex. L. Rev. 1, 13-14 (1931) ("The grantors had in mind that under existing or future leases they would be entitled to receive one-eighth of the oil produced as royalty and a certain gas well rental. They could have granted one-half of the oil and gas rents and royalties, or they could have accomplished the same result by conveying one-half of the one-eighth of the oil produced and one-half of the gas well rentals, but they simplified the fractions by conveying one-sixteenth of the oil and one-half of the gas. This may have simplified the fractions but it complicated the grants.").

mistaken belief ran [so] rampant in instruments of this time involving the reservation or conveyance of a mineral interest ... that [Texas] courts have taken judicial notice of this widespread phenomenon.'" *Johnson v. Clifton*, No. 08-22-00132-CV, 2023 WL 4443016, at *9 (Tex. App. July 10, 2023) (quoting *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353, 363 (Tex. 2023)) (citing *Hysaw v. Dawkins*, 483 S.W.3d 1, 9-10 (Tex. 2016)).

This widespread misconception is derivative of the legacy of the one-eighth (1/8) royalty, which is based on the "historical standardization" that "stems from the 'special meaning that 1/8 acquired in the standard-royalty context.'" *Id*. (internal quotations omitted). More specifically, "oil and gas leases of a 'certain vintage' almost invariably set forth a 1/8th royalty, and the prevalent belief was that a royalty interest would always be 1/8[,]" and thus deeds were drafted accordingly. *Id* (internal quotes omitted). Thus, "'parties would use the term 1/8 as a placeholder … without anyone understanding that reference to set an arithmetical value.'" *Id.* (internal quotes omitted). As a result, courts have recognized that the "use of a 1/8th fraction in" a deed of a certain era "was the result of the parties' erroneous belief about the nature of a royalty interest" always being a one-eighth (1/8). *Id*. *See also Heyen v. Hartnett*, 235 Kan. 117, 124, 679 P.2d 1152, 1158 (1984) ("We believe that the use of the fraction '1/16' in the initial clause of this mineral deed was simply an error commonly made in the early days of oil and gas conveyancing." There was an "early day misconception and misuse of the fraction '1/16th' when '1/2' was really intended.").

As the circuit court correctly concluded, it is clear from numerous West Virginia cases reviewing oil and gas conveyances and reservations that estate misconception and the legacy of the one-eighth (1/8) royalty were prevalent in West Virginia during the turn of the 20th century, when the Severin Deed was made. *See United Carbon Co. v. Presley*, 126 W. Va. 636, 29 S.E.2d 466, 468 (1944) (landowner reserved "one-half of the oil and gas royalty upon and as to" the land

and then stated that he reserved "the undivided one sixteenth of the oil and gas underlaying" the land); *Horner v. Philadelphia Co. of W. Va.*, 71 W. Va. 345, 76 S.E. 662, 663 (1912) (The grant was for "all of the one-half of the royalty, being the one-sixteenth, of all the oil and one-half of all the gas …"); *Kilcoyne v. Southern Oil Co.*, 61 W. Va. 538, 56 S.E. 888, 888-89 (1907) (landowner granted "one-sixteenth of all the oil within and underlying said tract of land, and one-half of all gas royalties that might be paid thereon or arise therefrom[.]"); *Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187, 94 S.E. 472, 474 (1917) (the deed, in the first clause, granted a fee in one-sixteenth (1/16) of the oil and, in the second clause, granted a fee in one-half (1/2) of the oil); *Lockhart v. United Fuel Gas Co.*, 105 W. Va. 69, 141 S.E. 521, 523 (1928) (the deed conveyed a one-sixteenth (1/16) in the oil and gas in place but later stated it conveyed a one-half (1/2) royalty reserved in any lease of land for oil and gas); *McCoy v. Ash*, 64 W. Va. 655, 63 S.E. 361 (W. Va. 1908) ("A dispute arose as to the right to one-half the royalty - that is, one-sixteenth of the oil - coming from the well on the little Gorrell tract.").

It is not a coincidence that all these cases, like the Kansas and Texas cases cited, concerned a fraction which is a multiple of one-eighth (1/8). More specifically, all the West Virginia cases, and almost all the cases cited from other jurisdictions, concerned a fraction of one-sixteenth (1/16). A one-sixteenth (1/16), or 6.25%, interest is an odd interest to be repeatedly the subject of so much litigation. Why are there no cases involving closely related fractions, like one-fifteenth (1/15) or one-seventeenth (1/17)? Moreover, all these cases involved deeds of a certain vintage. The oddity is explained and rationalized by estate misconception and the legacy of the one-eighth (1/8) royalty.

The circuit court understood this and tailored its declaratory judgment order in that light. And, notwithstanding its erroneous reversal of the circuit court's holding, the ICA implicitly acknowledged that this Court first recognized estate misconception and the legacy of the one-eighth (1/8) royalty more than a century ago in *Horner*. *Nicholson v. Severin POA Grp., LLC*, 249 W. Va. 458, 895 S.E.2d 927, 931 n. 2 (Ct. App. 2023). As explained by the ICA, "*Horner* involved a deed which expressly granted 'all of the one-half of the royalty, being the one-sixteenth, of all the oil and one-half of all the gas within [....]' Noteworthy to the Court's analysis in *Horner*, was the existence of a lease upon the land granting the lessors one-eighth of the oil produced and a payment of $300.00 per year for each gas well used." *Id*. The lease is only "noteworthy" if the ICA was acknowledging that parties from that time period operated under an estate misconception that was a product of the legacy of the one-eighth (1/8) royalty.

In 1931, the preeminent oil and gas scholar, Walter L. Summers, reviewed West Virginia cases concerning the conveyance or reservation of fractional oil and gas interests. He relied on the deeds considered in the *Paxton*, *Lockhart*, and *Horner* cases to explain that these West Virginia cases "strongly suggest" that "where grantors conveyed or reserved a one-sixteenth [1/16] of the oil and one-half [1/2] of the gas, they meant one-half [1/2] of the royalties arising under existing or future leases, rather than a fee interest in one-sixteenth [1/16] of the oil and one-half of the gas." Walter L. Summers, *Transfers of Oil and Gas Rents and Royalties*, 10 Tex. L. Rev. 1, 13-14 (1931). Summers noted that grantors used this type of language in their conveyances or reservations because:

> The grantors had in mind that under existing or future leases they would be entitled to receive one-eighth [1/8] of the oil produced as royalty and a certain gas well rental. They could have granted one-half [1/2] of the oil and gas rents and royalties, or they could have accomplished the same result by conveying one-half [1/2] of the one-eighth [1/8] of the oil produced and one-half [1/2] of the gas well rentals, but they simplified the fractions by conveying one-sixteenth [1/16] of the oil and one-half [1/2] of the gas. This may have simplified the fractions but it complicated the grants.

Id. at 14. Thus, although not using the names of the doctrines or theories they are identified by today, Professor Summers, in 1931, essentially recognized that grantors in West Virginia were making conveyances and reservations based on estate misconception and the legacy of the 1/8 royalty at the time of the Severin Deed.

What is also noteworthy about the foregoing West Virginia cases discussed in Professor Summers' law review article, is that the conveyance or reservation at issue was always dealing with a one-sixteenth (1/16) interest, and in each case this Court ultimately found a one-sixteenth (1/16) to be a one-half (1/2) - just through various different means. Thus, it is easy to surmise from these results how the oil and gas industry and oil and gas law practitioners came to treat and continue to treat one-sixteenth (1/16) oil and gas conveyances and reservations from this era to mean one-half (1/2) and how modern business transactions are conducted accordingly.

The only case discussed in the briefing by the present Respondent that is an outlier from the results of the above cases is *Manufacturers' Light & Heat Co. v. Knapp*, 102 W. Va. 308, 135 S.E. 1 (1926), which found a grant of "one–sixteenth in all the oil underlying a tract of land, and an undivided one–half of all the gas therein (subject to lease previously made), including the undivided one–sixteenth of the oil royalty and one–half of the gas well rentals. . . vests in the grantees one–sixteenth of the oil and one–half of the gas in place." *Id.* at Syl. Pt. 1. However, Professor Summers subsequently criticized *Knapp*, explaining:

> The trial court seemed to think that it conveyed one-half of the rents and royalties under the existing lease and one-half of the fee interest, but the supreme court [in *Knapp*] held that it merely conveyed a one-sixteenth fee and royalty interest in the oil, and a one-half fee and royalty interest in the gas**. <u>It seems very possible that the trial court was right, for there is plenty of evidence from decided cases in West Virginia that a reference by a lessor to one-sixteenth of the oil may mean a half interest in the royalty or of the oil in place.</u>**

Summers, *Transfers of Oil and Gas*, 10 Tex. L. Rev. at 27 (emphasis added). It is probably because of *Knapp*'s anomalous nature, its subsequent criticism, and its discord with the above cases that it was not even cited, let alone discussed, in the ICA's *Nicholson* opinion.

Regardless, cases such as *Knapp* must be reexamined through the context of the 1963 decision in *Davis v. Hardman*, 148 W. Va. 82, 133 S.E.2d 77 (1963), which set forth the principles a court should use in examining issues like the one in this instant appeal. The main issue in *Davis* concerned what language in a reservation that refers to royalties in some form or fashion is sufficient to reserve oil and gas in place, rather than a mere non-participating royalty interest.[4] Incidentally, the issue in *Davis* is often intertwined with the current problem at hand: namely, what is the quantum of the interest reserved once the type of interest reserved is determined. In fact, the *Davis* opinion cited to most of the opinions cited above. *Id.* at 87-89. While the ultimate outcome in *Davis* does not bear directly on the issue addressed in this *amici* brief, the basis upon which the *Davis* Court reached its decision does. Specifically, the *Davis* Court found that its prior decisions interpreting the term "royalty," including *Knapp*, were inconsistent and caused "great confusion." *Id.* at 88. To remedy this confusion and to appropriately address the issue, the *Davis* Court relied on the principle that courts should rely on "the meaning of certain terms as they are used and understood in the oil and gas industry" when interpreting oil and gas instruments. *Id.* at 89; *see also* Graham et al., *One Stick in the Bundle*, 117 W. Va. L. Rev. at 531 (2014) ("The *Davis* court

[4] *See* Andrew S. Graham, Allison J. Farrell, Lauren A. Williams, & Amber M. Moore, *One Stick in the Bundle: Characterizing Nonparticipating Royalty Interests Under West Virginia Law,* 117 W. Va. L. Rev. 519, 522 (2014) ("An NPRI [non-participating royalty interest] is a pure royalty interest that is carved out of fee title to a mineral estate by grant or reservation. The only incident of mineral ownership possessed by the NPRI owner is the right to a share in the proceeds from the produced or developed minerals. In contrast, a person with a mineral interest in fee possesses the right to execute leases and to receive bonuses, delay rentals, and royalties under a lease. Thus, an NPRI owner has the right to receive proceeds from the production of oil and gas, but has no right to participate in developing the mineral estate that may lead to such production."); s*ee also Gastar Exploration, Inc. v. Contraguerro*, 239 W. Va. 305, 800 S.E.2d 891 (2017).

acknowledged that inconsistent usage of the term 'royalty' 'has resulted in great confusion' and that 'it is helpful to bear in mind the meaning of certain terms as they are used and understood in the oil and gas industry.'").

An important corollary to this principle is that an oil and gas instrument "be interpreted and construed as of the date of its execution." *Oresta v. Romano Bros.*, 137 W. Va. 633, 633, 73 S.E.2d 622, 623 (1952). S*ee also Cogar v. Sommerville,* 180 W. Va. 714, 719, 379 S.E.2d 764, 769 (W. Va. 1989) ("[A] severance deed is to be construed in light of the conditions and reasonable expectations of the parties at the time it is made."); *Van Dyke*, 668 S.W.3d at 357 ("The rules that courts must apply, however, are not primarily those of arithmetic but of textual construction. The rules of construction, in turn, reflect the principle that legal texts—including private-law documents like contracts, deeds, and wills—still bear the meaning that their words had when they were drafted, even if the use of the same words today might generate a different meaning."). It is for this reason that it is "incumbent" for a court "to place itself in the situation of the parties, as near as may be, to determine the meaning and intent of the language employed in the deed." *Meadows v. Belknap*, 199 W. Va. 243, 246, 483 S.E.2d 826, 829 (1997).

These principles are the foundation upon which the approaches advocated in this *amici* brief are based, and the ICA's declination to utilize these principles when reviewing the reservation of a one-sixteenth (1/16) in the Severin Deed is why this Court should reverse the ICA's *Nicholson* decision.

B. The ICA's *Nicholson* Decision Opened Pandora's Box.

For the past several decades, the issue regarding what quantum of interest was conveyed or reserved when the stated fractional interest is a multiple of one-eighth (1/8) has essentially laid dormant. During that time, countless oil and gas title transactions have occurred—and payments in the millions of dollars tied to those transactions have been made—based on the industry practice to treat the fractional interest of one-eighth (1/8) in an oil and gas deed as the entire estate, and thus fractional interests such as a one-sixteenth (1/16) as a one-half (1/2) and a one-thirty-second (1/32) as a one-quarter (1/4). This practice is completely understandable and fully supported by West Virginia cases from prior decades that have the end result of treating a fractional interest such as a one-sixteenth (1/16) as a one-half (1/2), like those cases discussed above, save *Knapp*. *See also* 3A *Summers Oil and Gas* § 36:15 (3d ed.). However, this institutional understanding and the transactions predicated upon that understanding were recently turned upside down when the ICA issued its decision in *Nicholson*.

In *Nicholson*, the ICA was called on to review the following reservation: "[T]he parties of the first [Severin] also reserve the one-sixteenth [1/16] of all the oil and gas in and under said land[.]" *Nicholson*, 895 S.E.2d at 929. The ICA had to determine whether this fractional interest was intended to be a one-half (1/2), as the circuit court ruled. *Id*. at 929. The ICA overturned the circuit court and held that the fractional interest set forth in the Severin Deed was intended by the parties to be a one-sixteenth (1/16), not a one-half (1/2), interest. *Id.* at 931-32. In reaching this decision, the ICA first declared that the Severin Deed was unambiguous and basically found that a one-sixteenth (1/16) interest cannot be construed or interpreted as a one-half (1/2) interest. Despite that early holding in the decision, the ICA nonetheless went on to examine several West Virginia cases, most of which are discussed above, on the hypothetical foundation of what would be had it found the Severin Deed ambiguous. *Id.* at 930-931. The ICA stated that in each of those cases, while the end result may have been a finding that a one-sixteenth (1/16) was intended to be treated as a one-half (1/2), the same language examined in those cases was not present in the Severin Deed reservation. *Id*.

More specifically, the ICA focused on the fact that, unlike prior cases interpreting the effect of a one-sixteenth (1/16), "there is no reference to any other fractional interest or any royalty interest, there is simply a reference to a reservation of 'one-sixteenth of the oil and gas'" in the Severin Deed. *Id.* at 930–31. In essence, traveling down the hypothetical path, the ICA did not try to ascertain the intent of the parties to the Severin Deed so much as it mechanically applied arithmetic, without regard to what the parties intended by the reservation of a one-sixteenth (1/16) interest in 1902 and what the reservation of that particular fraction was believed or intended to reserve at that time.[5]

Up until the *Nicholson* opinion, the issue in this case had laid dormant for decades and parties and practitioners to oil and gas transactions had utilized industry usage—such as treating an undivided (1/16) in an oil and gas conveyance or reservation as a one-half (1/2)—in these transactions. The issue is now problematic, however, following the ICA's *Nicholson* opinion. The *Nicholson* opinion introduces title instability that will inevitably lead to numerous subsequent lawsuits. This is diametrically counter to the "goal" of this Court "to eradicate confusion from land titles and prevent uncertainty from arising in the future." *W. Virginia Dep't of Transportation v. Veach*, 239 W. Va. 1, 20, 799 S.E.2d 78, 97 (2017) (Ketchum, J., concurring).[6] The fact that there will inevitably be numerous lawsuits on this issue due to the instability wrought by *Nicholson* is

[5] *See Van Dyke*, 668 S.W.3d at 357 ("The rules that courts must apply, however, are not primarily those of arithmetic but of textual construction. The rules of construction, in turn, reflect the principle that legal texts—including private-law documents like contracts, deeds, and wills—still bear the meaning that their words had when they were drafted, even if the use of the same words today might generate a different meaning.").

[6] *See e.g.*, *Faith United Methodist Church & Cemetery of Terra Alta v. Morgan*, 231 W. Va. 423, 431, 745 S.E.2d 461, 469 (2013) (finding it is of "great significance to the interpretation of many land titles in West Virginia" to "avoid bringing upon the people interminable confusion of land titles;" instead, we must "endeavor to prevent and eradicate uncertainty of such titles") (internal quotations and alterations omitted); *Bailey v. Baker*, 137 W. Va. 85, 104, 70 S.E.2d 645, 648 (1952) (rejecting an argument when "it will increasingly disturb the stability of the title to a veritable multitude of parcels and tracts of land"); *Shaffer v. Mareve Oil Corp.*, 157 W. Va. 816, 828, 204 S.E.2d 404, 411 (1974) ("In the instant case, the public policy is to require every taxpayer to bear his share of the taxes and to obtain certainty in land titles so that the land may be productively used.").

not an overstatement. This Court need only note the fact that by diminishing what a landowner believed to be a one-half (1/2) oil and gas interest to a one-sixteenth (1/16) transfers that difference to someone else, who now can lay claim to a fifteenth-sixteenth interest (15/16) rather than what the parties previously believed to be a one-half (1/2) split. The party who can now point to *Nicholson* to claim it should have received a fifteenth-sixteenth (15/16) interest rather than a one-half (1/2) interest will undoubtedly file suit to quiet the title and recoup the difference. Not only did the ICA resurrect this dormant issue that will lead to numerous lawsuits, but it also then failed to provide any logical or workable approach for trial courts to utilize when confronted with lawsuits pertaining to the issue that are inevitably soon to follow.

Accordingly, the parties to this *amici* brief offer two workable solutions to the problem at hand. The first approach, which the parties respectfully contend is the most efficient and desirable, is derived from Texas, which itself has confronted the issue presented in this appeal on multiple occasions. The second, alternative approach, is predicated on a practical approach that relies on usage of trade as it applies to fractional interests which are a multiple of one-eighth (1/8) and is not dissimilar to the approach this Court has adopted with respect to other difficult oil and gas issues, namely the treatment of conveyances or reservations of coal bed methane. These two proposed approaches are taken in turn hereinbelow.

C. Two Approaches to Solve the Multiple of One-Eighth (1/8) Dilemma and the Problems Caused by the ICA's *Nicholson* Decision.

1. Texas Approach

In prior years Texas has grappled with oil and gas conveyances and reservations drafted around the turn of the 20th century that provided for fractions which are a multiple of one-eighth (1/8), or a double fraction that yielded a fraction which is a multiple of one-eighth (1/8), just like West Virginia. The Supreme Court of Texas in *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016), expressly recognized that this issue was caused by estate misconception and stemmed from the legacy of the one-eighth (1/8) royalty. *Id.* 9-12. The *Hysaw* Court recognized that "the reality is that use of 1/8 (or a multiple of 1/8) in some instruments undoubtedly embodies the parties' expectation that a future lease will provide the typical 1/8th landowners' royalty with no intent to convey a fixed fraction of gross production." *Id.* 10. The *Hysaw* Court further observed that the state of the law on the subject in Texas was less than desirable, explaining prior cases did "little to pour oil on turbulent waters" as those prior decisions "yielded mixed results, with no discernible unifying principle except to the extent the outcome derives from the conveying instrument's specific language." *Id*. at 11. This is not dissimilar to the problematic state of affairs in West Virginia caused by West Virginia case law reviewing severance deeds from the turn of the 20th century, which the ICA's *Nicholson* decision only exacerbated.

While recognizing the problems associated with estate misconception and the historical use of the one-eighth (1/8) royalty, the *Hysaw* Court refused to adopt any bright line rule or a separate approach to the issue other than the one previously adopted by Texas courts, even though those cases did not actually offer a solution to the problem. However, in 2023, the Supreme Court of Texas revisited the problem. This time, it offered a workable solution to the issue presented when there is a double fraction the product of which is a multiple of one-eighth (1/8). In *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353 (Tex. 2023), the Texas Court walked through the estate misconception theory, the legacy of the one-eighth (1/8) royalty, and a discussion on the prior Texas caselaw that resulted in "mixed results." *Id*. at 363-64. Critically, the *Van Dyke* Court "clarif[ied]" the holding of *Hysaw*, and expressly held that "when courts confront a double fraction involving 1/8 in an instrument, the logic of our analysis in *Hysaw* requires that we *begin* with a presumption that the mere use of such a double fraction was purposeful and that 1/8 reflects the *entire* mineral estate, not just 1/8 of it." *Id*. at 364 (emphasis in original). The *Van Dyke* Court went on clarify that the "rebuttal must come from the document itself[.]" *Id*. at 364.

In explaining this holding, the *Van Dyke* Court noted that "it would be odd to say, 'one-half of one-eighth' rather than simply 'one-sixteenth' if all that was intended by 'one-half of one-eighth' was 1/16." *Id. See also* Summers, *Transfers of Oil and Gas*, 10 Tex. L. Rev. at 14 ("They could have granted one-half [1/2] of the oil and gas rents and royalties, or they could have accomplished the same result by conveying one-half [1/2] of the one-eighth [1/8] of the oil produced and one-half [1/2] of the gas well rentals, but they simplified the fractions by conveying one-sixteenth [1/16] of the oil and one-half [1/2] of the gas. This may have simplified the fractions but it complicated the grants."). It is because of this "oddity" that the *Van Dyke Court* set forth a "rebuttable presumption that the term 1/8 in a double fraction in mineral instruments of this era refers to the entire mineral estate. Because there is 'little explanation' for using a double fraction for any other purpose this presumption reflects historical usage and common sense." *Id*. (internal quotes and alterations omitted). This explanation in *Van Dyke* is noteworthy in the context of the ICA's *Nicholson* decision, as the ICA failed to see—or, rather, ignored—this "oddity" when it found the reservation in the Severin Deed was of a mathematical one-sixteenth (1/16) rather than a one-half (1/2) because there was a lack of a "reference to any other fractional interest or any royalty interest[.]" *See Nicholson*, 895 S.E.2d at 930-31.

Just a few months after *Van Dyke* was issued by the Supreme Court of Texas, the Court of Appeals of Texas (El Paso) in *Johnson v. Clifton*, No. 08-22-00132-CV, 2023 WL 4443016, at *10 (Tex. App. July 10, 2023), applied *Van Dyke's* rebuttable presumption that the term one-eighth (1/8) in a double fraction in mineral instruments of this era refers to the entire mineral estate to situations where there is a single fraction which is a multiple of one-eighth (1/8). The *Johnson*

Court held that the estate misconception theory underpinning the rebuttable presumption set forth in *Van Dyke* "is applicable not only when a deed contains a double fraction but also when it uses a fraction that is a multiple of 1/8." *Id.* at *9. "In other words, the estate-misconception doctrine may apply in situations in which the granting clause contains a double fraction, such as 1/2 of 1/8th, as well as when it contains a multiple of a 1/8th fraction, such as 1/16th." *Id*. Indeed, the *Johnson* Court noted that in *Hysaw*, the Supreme Court of Texas observed that a landowner "would use the fraction 1/16, *or* a double fraction, 1/2 of 1/8, to convey 1/2 of what he perceived he owned." *Id*. (internal quotations omitted). Thus, the *Johnson* Court found no reason to treat the two situations differently. *See id*.

This Court should adopt the rebuttable presumption set forth in *Van Dyke* and *Johnson*. The reason for adopting such a paradigm is that it "avoids the arbitrary, unfair, and inaccurate results that would necessarily follow from adopting either extreme," i.e., that is always interpreting a conveyance or reservation of a fraction which is a multiple of one-eighth (1/8) based on the assumption the estate misconception theory is at play, versus never doing so. *Van Dyke*, 668 S.W.3d at 365. At the same time, "it also avoids reinventing the wheel in every individual case." *Id*. Moreover, such a rule would be "flexible even as it advances stability and predictability from case to case." *Id*. Finally, it will help avoid "[w]asteful litigation" involving fractional interests in oil and gas conveyances or reservations which are a multiple of one-eighth (1/8), which will undoubtedly "proliferate absent clear guidance for the courts and the public" in light of the ICA's *Nicholson* decision. *Id.* It is for these practical, fair, and efficient reasons the parties to this *amici* brief respectfully request this Court to adopt the approach followed by Texas.

It should finally be noted that this Court has often looked to Texas caselaw when addressing difficult issues concerning oil and gas law, and the parties to this *amici* brief respectfully submit this Court should do so again when addressing the issues raised in this appeal. *See e.g.*, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 502, 128 S.E.2d 626, 638 (1962) (stating "it is our judgment that the fairest and most equitable rule is the one suggested by the Texas case previously referred to herein" when addressing damages sustained in conjunction with violations of a contractual obligation to develop and market gas); *Wellman v. Energy Res., Inc.*, 210 W. Va. 200, 205, 557 S.E.2d 254, 259 (2001) (relying in part on a "seminal" case from Texas when determining how to treat "right to cure" clauses in oil and gas leases); *W. Virginia Dep't of Highways v. Farmer*, 159 W. Va. 823, 828, 226 S.E.2d 717, 720 (1976) (relying in part on Texas case law for the proposition that "where the surface of land conveyed by deed is sand and gravel, a straight mineral reservation does not include the sand and gravel").

2. Latent Ambiguity/Usage of Trade Approach

Even if this Court decides not to adopt the Texas approach to estate misconception and the legacy of the one-eighth (1/8) royalty, it should still take an approach grounded upon the legal principles that extrinsic evidence can be considered to determine whether there is a latent ambiguity with respect to a certain term in the context of the oil and gas industry and whether there is a particular meaning or understanding of that term within the oil and gas industry. As noted in the last section, a review of the decisions of this Court in the first half of the 20th century shows that oil and gas instruments regularly used the one-sixteenth (1/16) fraction to refer to a conveyance or reservation of one-half (1/2) of the oil and gas in place or one-half (1/2) of the royalty interest. In addition, the Respondent below offered extrinsic evidence to show that a reservation of one-sixteenth (1/16) of the oil and gas was meant and understood in 1902 as reserving one-half (1/2) of the oil and gas in place. *See* (J.A. 186-189); (J.A. 501-522). Moreover, the circuit court knew this and entered judgment accordingly. (J.A. 586-590).

This Court has consistently held that the "the polar star that should guide us in the construction of deeds as of all other contracts is, what was the intention of the party or parties making the instrument, and when this is determined, to give effect thereto, unless to do so would violate some rule of property." *Gastar Exploration Inc. v. Rine*, 239 W. Va. 792, 798, 806 S.E.2d. 448, 454 (2017) (internal quotations and alterations omitted). As more fully set forth *supra*, a deed will be interpreted and construed as of the date of its execution and construed in light of the conditions and reasonable expectations of the parties at the time it is made. Thus, in order to ensure that effect is being given to the parties' intent, West Virginia courts must consider whether certain words in a deed were employed as a term of art at the time it was executed, intended to have a meaning different from that which they ordinarily had then or have at present.

Furthermore, "[a]ll rules of construction must yield to the expressed intention of the parties if that can be ascertained." *Davis v. Hardman*, 148 W. Va. 82, 89, 133 S.E.2d 77, 81 (1963). This point of law is critical because many West Virginia cases, like those noted above, addressing whether a conveyance or reservation of a one-sixteenth (1/16) is a one-half (1/2) often default to construing the deed against the grantor. Such an approach, however, is not correct. West Virginia views this rule of construction as a "rule simply tipping the balance" when all else fails. *Bruen v. Thaxton*, 126 W. Va. 330, 347, 28 S.E.2d 59, 70 (1943) (Kenna, J., concurring). As explained by Judge Richard Posner, the "venerable principle . . . that ambiguities . . . are to be resolved against the draftsman does not bar the use of oral testimony to disambiguate a written contract," but "is a tie-breaker, used to resolve cases in which the written contract remains ambiguous even after oral evidence has been admitted." *Residential Mktg. Grp., Inc. v. Granite Inv. Grp.*, 933 F.2d 546, 549 (7th Cir. 1991). *See also Norfolk S. Ry. Co. v. Zayo Grp., LLC*, 87 F.4th 585, 592 (4th Cir. 2023) (applying Virginia law) (finding the rule of construction that construes against the grantor "applies only as a tool of last resort to resolve persistent ambiguities") (quoting 11 *Williston on Contracts* § 32:12 (4th ed. May 2023 update)) ("The rule of *contra proferentem* is generally said to be a rule of last resort and is applied only when other secondary rules of interpretation have failed to elucidate the contract's meaning.").

Here, simply resorting to a tie breaker with respect to the issue at hand is inappropriate. Extrinsic evidence is admissible to demonstrate there is a latent ambiguity as to whether a one-sixteenth (1/16) meant a one-half (1/2) during the time period of the Severin Deed. Then, once one considers how the oil and gas industry used the term one-sixteenth (1/16) in oil and gas conveyances and reservations during this time, the true intent of the parties can be ascertained, namely a conveyance or reservation of a one-sixteenth (1/16) was meant to mean one-half (1/2). This analytical approach is in accord with West Virginia law and other leading legal authorities.

More specifically, this Court has held that "[i]n deeds, contracts, and other instruments, both ***technical and nontechnical, words are sometimes given meanings variant from the significations they ordinarily have***, and, when it is manifest that the parties intended them to have a restricted or peculiar signification, such intention will be respected and enforced by the courts." Syl. Pt. 1, *Bank v. Catzen*, 63 W. Va. 535, 60 S.E. 499 (1908) (emphasis added). Other state courts have recognized that "[a]pplying the literal meaning to words and phrases found in oil and gas documents is fraught with the opportunity for injustice." *Szymanowski v. Brace*, 987 A.2d 717, 720 (Pa. Sup. Ct. 2009) ("The legal effect of words clearly understood when used in other contexts, therefore, becomes murky when considered in the context of oil and gas instruments."). Moreover, in *Van Dyke*, the Supreme Court of Texas ruled that the employment of one-eighth (1/8) in "[a]ntiquated" oil and gas instruments is presumptively "a term of art that references the entire mineral estate." *Van Dyke v. Navigator Grp.*, 668 S.W.3d at 359. Similarly, as noted previously, this

Court in interpreting oil and gas instruments has stated that it is "helpful to bear in mind the meaning of certain terms as they are used and understood in the oil and gas industry." *Davis*, 133 S.E.2d at 81.

Additionally, modern authorities on contract law recognize that terms can have both an ordinary and a special trade meaning. *See* 12 *Williston on Contracts*, § 34:1 (4th ed.) (May 2023 update) ("[O]ften terms that are unambiguous on their face may be ambiguous or have a different meaning as a matter of fact, as when the terms have both an ordinary and a special trade meaning. In these circumstances, evidence of usage is admissible to show that the words, though they are unambiguous according to their well-known ordinary meaning, have acquired by usage of trade a peculiar and different meaning in the particular trade or profession, and that they were used in that manner in the contract in question."); *id.* at § 34:5 ("[T]he correct rule with reference to the admissibility of evidence as to trade usage under the circumstances presented here is that while words in a contract are ordinarily to be construed according to their plain, ordinary, popular, or legal meaning, as the case may be, if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are considered to have used them according to their different and peculiar sense as shown by the trade usage.").

The *Restatement (Second) of Contracts* recognizes that "usage of trade" evidence can be admitted to interpret a contract. *See Restatement (Second) of Contracts*, § 222 (1981). In this regard, the *Restatement* notes that "[a] usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement." *Id.* at § 222(1). The comment to Section 222 notes in pertinent part that "[t]here is no requirement that an agreement be ambiguous before evidence of a usage of trade can be shown, nor is it required that the usage of trade be consistent with the meaning the agreement would have apart from the usage." *Id.* at comment b.

Moreover, this Court has recognized on several occasions that a contract seemingly clear on its face can actually be ambiguous because of a latent ambiguity. *Energy Development Corp. v. Moss*, 214 W. Va. 577, 586, 591 S.E.2d 135, 143 (W. Va. 2003) ("We also agree with the lower court that a document that may appear on its face to be free from ambiguity, may be deemed latently ambiguous.").[7] In such an instance, this Court has permitted the circuit court to consider the "custom and usage of the gas industry" at the time the documents were entered into to determine the parties' intent. *Moss*, 591 S.E.2d at 145; *see also* Syl. Pt. 2, *Bell v. Wayne United Gas Co.*, 116 W. Va. 280, 181 S.E. 609 (1935) ("Oral testimony of the general usages of the gas business, which must have been in the minds of the parties at the time of entering into the contract, is admissible to explain an ambiguity in a written contract for the purchase of gas, whether the ambiguity is latent or patent.").

One example of this Court permitting the introduction of extrinsic evidence relating to a latent ambiguity concerns whether the term "gas" in mineral instruments includes coalbed methane. In finding that "gas" is ambiguous in this context, this Court has noted that "[o]ther states have grappled with conflicts between various owners as to who has the right to develop coalbed methane" and the "best indicator that this is a complex and elusive issue . . . is the fact that the decisions in this area are all over the map." *Moss*, 591 S.E.2d at 146; *see also Poulos v. LBR*

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[7] *See also Kopf v. Lacey*, 208 W. Va. 302, 307, 540 S.E.2d 170, 175 (2000) (per curiam) ("A latent ambiguity, which does not appear upon the face of the document, however, may be created by intrinsic facts and extraneous evidence."); *Collins v. Trent*, 108 W. Va. 443, 446, 152 S.E. 205, 206 (1930)("'A latent ambiguity arises when the instrument upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain.'") (quoting 22 *Corpus Juris*, 1192).

Holdings, LLC, 238 W. Va. 89, 792 S.E.2d 588, 594 (2016) ("There is no uniformity amongst courts and scholars regarding whether the term 'gas' as used in a deed or lease includes CBM.").

Thus, in resolving the question of whether coalbed methane was intended to be covered as "gas" in a mineral instrument, this Court has recognized the need to consider "the custom and usage of the gas industry at the time the leases were executed in its search for the parties' intent." *Moss*, 591 S.E.2d at 145; *id.* at 144 ("'Exploring the intent of the contracting parties often, but not always, involves marshalling facts extrinsic to the language of the contract document.'") (quoting *Fraternal Order of Police Lodge, Number 69 v. City of Fairmont*, 196 W. Va. 97, 101 n.7, 468 S.E.2d 712, 716 n. 7 (1996)). Ultimately, this Court has held that "[i]n order for a usage or custom to affect the meaning of a contract in writing because [it was] within the contemplation of the parties thereto, it must be shown that the usage or custom was one generally followed at the time and place of the contract's execution." *Moss*, 592 S.E.2d at Syl. Pt. 7 (quoting Syl. Pt. 1, *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947)).

Just like relying on the simple dictionary definitions of "gas" "afforded this Court no comfort in determining ownership of coalbed gas," *Polous*, 792 S.E.2d at 596, simply relying on arithmetic when confronted with an oil and gas reservation or conveyance using fractions which are a multiple of one-eighth (1/8), like one-sixteenth (1/16), from a certain era should also afford no comfort to this Court. Unfortunately, the ICA did just that, despite the fact that, as noted above, courts and scholars have accepted the premise that rote arithmetic cannot always answer the question. *See e,g., Heyen*, 235 Kan. at 124 ("We believe that the use of the fraction '1/16' in the initial clause of this mineral deed was simply an error commonly made in the early days of oil and gas conveyancing." There was an "early day misconception and misuse of the fraction '1/16th' when '1/2' was really intended."); *Hysaw v. Dawkins*, 483 S.W.3d 1, 10 (Tex. 2016) (stating a landowner "would use the fraction 1/16, <u>or</u> a double fraction, 1/2 of 1/8, to convey 1/2 of what he perceived he owned."); Summers, *Transfers of Oil and Gas*, 10 Tex. L. Rev. at 9-14 (1931) (discussing, albeit not by name, the concept of estate misconception in reviewing the West Virginia cases *Knapp* and *Horner* discussed above); *The Regrettable Rebirth of the Two–Grant Doctrine in Texas Deed Construction*, 34 S. Tex. L. Rev. 73, 89 (1993).

Indeed, the ICA went so far as to label the argument that the language in the Severin Deed was actually a reservation of one-half (1/2), as opposed to reservation of one-sixteenth (1/16), as "nonsensical." *Nicholson*, 895 S.E.2d at 929. This is not true. The term "one-sixteenth" was actually a "term of art" in the oil and gas industry during the time of the Severin Deed's execution, and Petitioner to the appeal to this Court presented evidence and caselaw to support that proposition.

In sum, relying on the ordinary, mathematical meaning of the term one-sixteenth (1/16) in a 1902 oil and gas deed like the ICA did in the *Nicholson* opinion did nothing to address or answer the interpretive question of whether custom and usage evidence establishes that the term had a special trade meaning different than its ordinary meaning, namely whether it was intended to be a one-half (1/2). Accordingly, to the extent this Court is not inclined to adopt the Texas approach to the issue raised in this appeal, the parties to this *amici* brief respectfully request that this Court find that extrinsic evidence should be permitted to establish whether there was a latent ambiguity as to what quantum of interest was intended to be encompassed by a conveyance or reservation of a one-sixteenth (1/16) or other fraction which is a multiple of one-eighth (1/8) in an antiquated oil and gas deed, and then permit trial courts to consider custom and usage of the oil and gas industry.

III. CONCLUSION

Based on the forgoing, the parties to this *amici* brief respectfully request that this Court reverse the ICA *Nicholson* decision. In so doing, the parties request that this Court adopt the same approach adopted by Texas when resolving the issue presented in this appeal, namely: when courts confront a fraction which is a multiple of one-eighth (1/8) in an oil and gas conveyance or reservation around the turn of the last century there is a rebuttable presumption that 1/8 reflects the entire mineral estate. Thus, a one-sixteenth (1/16) reservation, like the reservation in the Severin Deed, absent overcoming the presumption, would be treated as a one-half (1/2). Alternatively, this Court should reverse the ICA's *Nicholson* decision with instruction that courts are to allow extrinsic evidence to determine whether there is a latent ambiguity in oil and gas conveyances or reservations around the turn of the last century which contain a fraction which is a multiple of one-eighth (1/8), and then permit the consideration of the oil and gas industry's usage of the term at issue at the time of the conveyance or reservation.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-752

SEVERIN POA GROUP, LLC,

Petitioner

v.

EARL J. NICHOLSON and
JOYCE A. NICHOLSON,

Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2024, the foregoing **BRIEF OF *AMICI CURIAE* OF COUNTRY ROADS MINERALS, LLC, MORRIS MOUNTAINEER OIL & GAS LLC, LACORE AGRICULTURE, LLC, WV MINERALS, INC., HUNDRED RESOURCES, INC., BOUNTY MINERALS, LLC, AND DAC ENERGY, LLC IN SUPPORT OF PETITIONERS** was filed and served using the File and ServeXpress system which will send notification of such filing to all counsel of record.

/s/ Dale H. Harrison
Dale H. Harrison (WVSB #11784)