IN THE SUPREME COURT OF OHIO

OHIO POWER COMPANY,	:	Case No. 2021-1168
	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	
	:	On Appeal from the
MICHAEL BURNS, et al.	:	Fourth Appellate District
	:	Case Nos. 20CA19, 20CA20,
	:	20CA21, 20CA22
Defendants-Appellees.	:	

BRIEF OF AMICUS CURIAE THE BUCKEYE INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES MICHAEL BURNS, et al.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the state and federal levels. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3).

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States and the Ohio Constitution, against government interference. The Buckeye Institute is a leading advocate of protecting private property and promoting policies that utilize fair processes and fair laws to produce just outcomes. The Buckeye Institute has taken the lead in Ohio and across the country in advocating for free-market, pro-growth policies at the local, state, and federal levels of government.

The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals. This case raises issues of significant concern to The Buckeye Institute, namely the potential abuse of eminent domain powers and judicial deference to administrative agencies.

II. STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Case set forth in the Appellees' Merit Brief.

III. ARGUMENT AND LAW

A. Introduction

The Appellee landowners in this case find themselves deluged by the unhappy confluence of two common streams of impermissible government action. The first is the government's abuse of its eminent domain power; the second, unwarranted judicial deference to administrative agencies on issues reserved to the judiciary.

The Appellants suggest that once a governmental entity approves a project that requires taking easements on real property by eminent domain, any appropriation—no matter the scope—is *de facto* necessary and beyond judicial review. This reading threatens to demolish the well-established limitation on eminent domain that the state can take "no more than necessary to promote the public use." *Norwood v. Horney,* 110 Ohio St. 3d 353, 373-73, 2006-Ohio-3799, ¶ 69 (citing *Buckingham v. Smith*, 10 Ohio 288, 297 (1840)); *see also, Platt v. Pennsylvania Co.,* 43 Ohio St. 228, 238, 1 N.E. 420, 426 (1885) (stating that "only so much can be taken as is *necessary* . . .") (emphasis in original). Under the Appellants' theory, the government agency expropriating private property would have unlimited discretion to determine the necessity and the scope of the taking. The fox would thus guard the henhouse.

Second, the Appellants argue that the courts must defer to legislative or administrative determination regarding necessity. In other words, should the chickens be heard to complain, the courts should defer to the fox's management. Although courts historically have given some deference to legislative and administrative determinations regarding the necessity of a taking, such

deference is far from absolute. The judiciary always retains its authority under our constitutional system to protect private property from seizure by another branch of government. *Norwood* at ¶¶s 66-69. Indeed, in *Norwood*, this Court cautioned against granting "artificial judicial deference" to the "public use" determination of other government entities. *Norwood* at ¶ 61. This brief examines the historical origins and use of the necessity limitation in takings law both nationally and in Ohio, and how despite allowing some deference to legislative and administrative bodies, Ohio courts have not abandoned their role in applying judicial review to those determinations of necessity.

B. The History of the Takings Power and the Limit of Necessity

The Fifth Amendment's Takings Clause is categorical and unconditional. Its simple and unadorned language provides, "Nor shall private property be taken for public use, without just compensation." U.S. Const., Fifth Amendment. Those words carry the same meaning today that they carried when they were written with quill and ink and affirm the equitable premise that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Com'n v. United States*, 568 U.S. 23, 31, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). Indeed, the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)).

Courts and commentators have explained that the sovereign's authority to take property is constrained by two equitable limitations: "'the public use requirement' and 'just compensation' rule." *Norwood v. Horney,* 110 Ohio St. 3d 353, 364, 2006-Ohio-3799, 853 N.E. 2d 115, (citing Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: An argument for Banning Economic Development Takings*, 29 Harv. J. L. & Pub. Policy 491, 532 (2006)); William B.

Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 595 (1972). But a significant component of the public use requirement—a limitation recognized throughout Ohio's history and reinvigorated by this Court's decision in *Norwood*—is the government's duty to refrain from taking more property than is necessary for the public purpose. *See Norwood* at ¶ 69.

The necessity limitation enjoys a long pedigree in the historical development of takings jurisprudence. This principle of necessity, like the just compensation requirement, finds its roots in Magna Carta. Historians noted that before Magna Carta, seizure of property to fulfill debts to the Crown was a common practice: "The sheriff and bailiffs of the district, where [the] deceased's estates lay, were in the habit of seizing everything" to secure the interests of the King" and "sold chattels out of all proportion to the sum actually due" and often refused to disgorge the surplus. Johnson, *The Ancient Magna Carta & the Modern Rule of Law: 1215 to 2015*, 47 St. Mary's L.J. 1, 47 (2015). Clause 26 of Magna Carta remedied that situation by requiring that when good were seized to satisfy a debt, "the value of the goods seized had to approximate the value of the debt." *Id*. English law thus recognized "equity" in a person's real and personal property. Indeed, Blackstone, a name familiar to the Founders, summarized the well-understood limitation on tax seizures, stating that "whenever the government seized property for delinquent taxes, it did so subject to an "implied contract in law to . . . render back the overplus" if the property was sold to satisfy the delinquency. 2 Blackstone, *Commentaries on the Laws of England*, Page 452 (1893). The King was due what he was owed, but nothing more.

Expounding on this principle, renowned jurist Thomas Cooley noted in his 1871 *Treatise on Constitutional Limits*—which surveyed the common law of the day—that appropriations (takings) beyond necessity are illegitimate:

> The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the

> proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain.

Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union,* Page 1147 (2d. Ed.1871).

1. Property Rights and Ohio's Founding

Ohio's settlers inherited these traditional English rights along with rest of the new nation. But Ohio's origin as a state carved from the Northwest Territory guaranteed the primacy of property rights in its early jurisprudence. While the protection from government takings in the original thirteen states relied on a patchwork of purveyance statutes and general reliance on the common law, the Congress of the Confederation of the United States provided what was to be the first national statement on the matter when it enacted the Northwest Ordinance of 1787. The Northwest Ordinance provided a national "pre-constitutional codification of the eminent domain power." Joseph J. Lazzarotti, *Pub. Use Or Pub. Abuse*, 68 UMKC L. Rev. 49. 54 (1999). More importantly, it guaranteed broad protection of property rights for those who would settle in Ohio. In language more expansive than what the Fifth Amendment would later contain, the Northwest Ordinance stated:

> No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.

An Ordinance for the government of the Territory of the United States northwest of the River Ohio, art. 2. U.S.C.A., NORTHWEST ORDINANCE art. 2 (1787) (emphasis added).

Consequently, scholars have observed that "the language used might support a more robust interpretation of the takings principle: the Ordinance stated that when public exigencies required a taking, compensation was due." Festa, *Property & Republicanism in the Northwest Ordinance*, 45 Ariz. St. L.J. 409, 455–56 (2013). More importantly for this case, the term "'[e]xigencies' can be interpreted as setting a higher bar for what sort of things can be taken in the first place—that the government should only take property *when truly required for emergencies or strict necessity*." *Id.* (emphasis added).

The importance of property to the drafters cannot be understated. Steeped in the republican philosophy of their time, the Northwest Ordinance's authors saw real property as more than an economic asset. To them, the protection of property from government seizure was naturally and inexorably tied to the protection of other civil rights and the development of civic virtue. Indeed, the historical record reveals "a strong regard in the founding era with protection of property as one of the key requirements for encouraging a virtuous, self-sufficient citizenry." Festa, *supra* at 434.

This connection between property as both a guarantor of other liberties and an incubator of civic virtue was well-established in the ideology of the early republic and the men and women who settled Ohio. The republican theory was that citizens who were self-sufficient and secure in their own property was a backstop against tyranny and as well as a solid middle class which could "prosper so that they in turn could give back to the common good as political participants and guarantors of the collective social order and security." *Id*., at 427; *see also*, Maxwell M. Garnaat, *The Republic of Virtue: The Republican Ideal in British and American Property Law*, 51 Cornell Int.'l L.J. 731, 741-742 (2018) (discussing the importance of available land as a means of promoting republican virtue.)

Not surprisingly, the Framers of Ohio's constitution echoed the Northwest Ordinance's language:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Constitution. Article I, Section 19. The men who drafted Ohio's constitution were well aware of the Fifth Amendment ratified fourteen years earlier, which of course at that time applied only to the federal government, just as they were aware of the constitutional protections of property in other state constitutions. With that knowledge, they ensured that Ohio's property protections were broader than those provided by the federal government. *See Norwood,* 110 Ohio St. 3d 353, 373-73, 2006-Ohio-3799, at ¶76; *see also*, *McCarthy v. City of Cleveland,* 626 F.3d 280, 287 (6th Cir. 2010) (citing *Norwood* and recognizing "that Article 1, §19 of the Ohio Constitution affords greater protection than the federal Takings Clause."). Writing fifty years after the state's founding, Chief Justice Bartley emphasized the importance of property rights in Ohio's constitutional system:

> The fundamental principles set forth in the bill of rights in [Ohio's] constitution, declaring the inviolability of private property, * * * were evidently designed to protect the right of private property as one of the primary and original objects of civil society * * *.

Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 632 (1853).

2. Ohio's Judicial Recognition of the Necessity Principle

The rule that appropriations must be limited to only what is necessary was first observed a mere 30 years after statehood in *Cooper v. Williams*, 5 Ohio 391 (1832). The issue arose in the context of state appropriations for canals. Building canals required not only acquiring the land in

which the canal would occupy but acquiring the water that would fill it. Because canals operate by diverting water from a nearby stream or river, building a canal required the government entity to acquire riparian rights from private landowners. In *Cooper*, riparian right owners sued for compensation for the loss of the water. The Court held that the riparian right owners had the right to compensation for any loss of the use of the water that would have flowed across their land but for the diversion. The Court did not end its analysis there, however. It expressly recognized the necessity limitation, noting its authority to enjoin a taking that diverted more water than was necessary for canal navigation:

> But as the *public welfare* does not require that any more should be withdrawn from the river than is necessary for the navigation of the canal, no more can be taken; and should an attempt be made to take more, this court might prevent it by injunction.

Id. at 393 (emphasis in original).

Eight years later, in another canal case, the Ohio Supreme Court reiterated the rule:

> [T]he state, notwithstanding the sovereignty of her character, can take only sufficient water, from *private streams*, for the purposes of the canal. So far [as] the law authorizes the commissioners to invade private right, as to take what may be necessary for canal navigation, and to this extent, authority is conferred by the constitution, provided a compensation be paid in money to the owner.

Buckingham v. Smith, 10 Ohio 288, 297 (1840) (emphasis in original).

As transportation shifted from canal to train, the Ohio Supreme Court applied the necessity limitation to appropriations for rail lines. Thus, in *Giesy v. Cincinnati, W. & Z R. Co*., 4 Ohio St. 308 (1854), the Court held that while a statute might leave "[t]he quantity of land that may be appropriated . . . indefinite," it was nevertheless clear "that only so much can be taken as is necessary . . . ." *Id* at 327. Similarly, thirty years later, in another railroad appropriation case, the Court applied the same rule to hold that any land taken "beyond the amount required by the public, is not properly taken, not being needed for the public use, and the owners are entitled to such

surplus." *Platt v. Pennsylvania Co*., 43 Ohio St. 228, 238, 1 N.E. 420, 426 (1885)(internal citations omitted).

In 2006, this Court recounted Ohio's historical commitment to protection of property in detail and drew upon this history in deciding *Norwood*. The *Norwood* Court reaffirmed that regardless of the compensation paid to the landowner, the state can take "no more than necessary to promote the public use." *Norwood,* 110 Ohio St. 3d 353, 373-73, 2006-Ohio-3799, at ¶69. And as set forth below, the Norwood Court stated that "[t]here can be no doubt" that ensuring that the state takes no more than is necessary is a role for the judiciary. *Id*.

C. *Norwood* and the Separation of Powers Requires Court Review of Necessity Determinations

The Appellants argue that courts should defer to agencies like the Ohio Power Siting Board in determining whether a taking—and the scope of that taking—is necessary. While there is some limited authority suggesting that such deference is appropriate when the necessity determination is made by elected officials, *see, e.g., Pepper Pike v. Hirschauer,* 8th Dist. Cuyahoga No. 56963, 1990 WL 6976 (Feb. 1, 1990) ("The decision of a legislative body to appropriate a particular piece of property is afforded great deference by courts because it is presumed that the legislative body is familiar with local conditions and best knows community needs."), the weight of the authority from this Court casts doubt on deference doctrines in general, and in the context of takings emphasize that the courts must independently scrutinize the necessity question.

While deference to administrative bodies, whether by statute or court doctrine, promises the salutary effect of bringing technical expertise to public policy questions, it also carries with it the danger of blurred constitutional responsibilities and improper delegation of constitutional power. This Court has recently expressed skepticism regarding the propriety of deferring to other branches of government in stating "what the law is." *See State ex rel. McCann v. Delaware County*

Bd. of Elections, 155 Ohio St. 3d 14, 21, 2018-Ohio3342, 118 N.E.3d 224, 230 ("Judicial deference to an agency's interpretation of a statute is at odds with the separation-of-powers principle that is central to our state and federal Constitutions. It has long been understood that part of the judicial power is to 'say what the law is.'" (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)).

In the eminent domain context, however, this Court has unambiguously held that its deference to legislative determinations—or in this case legislative determinations to defer to an administrative agency—is never absolute:

> Although there is merit in the notion that deference must be paid to a government's determination that there is sufficient evidence to support a taking in a case in which the taking is for a use that has previously been determined to be a public use, that deferential review is not satisfied by superficial scrutiny.

Norwood, 110 Ohio St. 3d 353, 373-73, 2006-Ohio-3799, at ¶ 66 (internal citations omitted).

The *Norwood* Court explained that "[t]he scrutiny by the courts in appropriation cases is limited in scope, but it clearly remains a critical constitutional component." *Norwood* at ¶ 70. Thus "it is for the courts to ensure that the legislature's exercise of power is not beyond the scope of its authority, and that the power is not abused by irregular or oppressive use, or use in bad faith." *Id.* (citing *Pontiac Improvement Co.,* 104 Ohio St. at 458, 135 N.E. 635 (1922), citing *Giesy v. Cincinnati, W. & Z. R. Co.,* 4 Ohio St. at 326 (1854)). This rule is consistent with the constitutional separation of powers. As Madison wrote in Federalist No. 10, anticipating the risk of allowing agencies to interpret their own statutes and rules to the exclusion of the judiciary:

> No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time.

James Madison, *The Federalist No. 10*, at 59 (Jacob Cooke Ed. 1961). Or as the *Norwood* Court put it:

> A court's independence is critical, particularly when the authority for the taking is delegated to another or the contemplated public use is dependent on a private entity. In such cases, the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner.

Id. at ¶ 71. In other words, our constitutional separation of powers provides for judicial review to ensure that "[t]he power of eminent domain is [ ] exercised with restraint, not abandon." *Id.* at ¶68 (quoting *Southwestern Illinois Dev. Auth. v. Natl. City Environmental, L.L.C.*, 199 Ill.2d 225, 242, 263, 768 N.E.2d 1 (2002)). Unmitigated deference to agency determinations of necessity would fail to meet *Norwood's* requirement of independent judicial review, which ensures that grants of authority of construed strictly. Accordingly, this Court should affirm the Court of Appeals decision and protect Ohio courts' prerogative to say what the law is.

IV. CONCLUSION

The issues presented by this case speak to the fundamental protection of property enshrined in our founding documents, and the system of separation of powers that makes those protections manifest. The Court of Appeals correctly applied the long-recognized necessity limitation and correctly held that it is the judiciary's duty to enforce it. The Court should therefore affirm the Court of Appeals' decision.

Respectfully submitted,

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June 23, 2022

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief In Support of Merits was served on all counsel of record via the Court's electronic filing system this 23rd day of June 2022.

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