No. 19-502

In The
Supreme Court of the United States

RICHARD BAATZ, *et al*.,

Petitioners,

v.

COLUMBIA GAS TRANSMISSION, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners (the "Landowners") sought an award of damages against Respondent Columbia Gas Transmission, LLC ("Columbia") arising from Columbia's allegedly unauthorized use, for natural gas storage, of a rock stratum roughly 3,000 feet beneath the surface. This case proceeded to judgment solely on the Landowners' Ohio common law trespass and unjust enrichment claims. The district court entered summary judgment for Columbia, and the Court of Appeals affirmed, relying on *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996). *Chance* held that a surface owner cannot exclude others from an underlying subsurface stratum unless the alleged subsurface invasion caused actual physical damage or interfered with the Landowners' use of the property. *Id*. at 993.

As a result, the only question properly presented by the Landowners' Petition for Writ of Certiorari is the following:

Did the Court of Appeals correctly apply Ohio common law to hold that Landowners did not have the legal right to exclude Columbia from the subsurface, given that they concededly could not use the subsurface, and absent any evidence of physical damage or actual interference with use of the surface?

CORPORATE DISCLOSURE STATEMENT

Columbia Gas Transmission, LLC is an indirect wholly-owned subsidiary of TC Energy Corporation (formerly known as TransCanada Corporation).

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INTRODUCTION

This case involves the straightforward resolution of common law trespass and unjust enrichment claims in accordance with controlling Ohio Supreme Court precedent, and simply does not present any issues meriting this Court's time and attention.

At the outset, the Landowners have forfeited the federal statutory and constitutional claims that they appear to assert here by failing to advance those arguments previously; those claims are now forfeited. The only claim arising under federal law (an inverse condemnation claim) was dismissed at the outset of the case, without further complaint from the Landowners, and the matter proceeded to judgment solely on state law trespass and unjust enrichment claims. Both the district court and the Court of Appeals rested their decisions solely on principles of Ohio common law on which Ohio courts have spoken uniformly. Indeed, the Landowners successfully argued ***against*** the application of federal law. Under these circumstances, there are no properly-preserved federal statutory or constitutional claims suitable for review here.

Even if federal claims had not been forfeited, however, there is no substance to the Landowners' positions:

- The Landowners' Petition itself argues that the Natural Gas Act, 15 U.S.C. §§ 717–717z ["NGA"], does not govern the pre-condemnation legal relationship between interstate natural gas companies and landowners, and that

those legal relations are matters of state law. Lower courts have agreed. As a result, this case simply does not present any issue under the NGA that this Court should review.

- The Landowners' Due Process and Takings Clause claims also fail because they beg an essential question: do the Landowners have a legally-protectable "property" interest in excluding others from the subsurface? Under this Court's precedent, any such interest arises as a matter of underlying state law, and longstanding Ohio precedent confirms that the Landowners do not have a legally-protected property interest in excluding others from their subsurface, absent any actual physical damage or interference with use. *See Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996) [*Chance*].

- Even if Columbia could be said to have deprived the Landowners of a cognizable "property" right, the record is clear that any interest that the Landowners may legitimately have in the subsurface has already been fully compensated through a related condemnation proceeding (meaning that they have received both "due process" and "just compensation"). If anything, the Landowners have been ***more*** than fully compensated, given that they did not own the subject properties at the time of the alleged deprivation.

- Nor should the Court take up the Landowners' passing suggestion that the entry of summary judgment violated their Seventh

> Amendment right to a jury trial, given that there were – concededly – no genuine issues of material fact relevant to the common law claims at issue.

At bottom, then, the Landowners ask this Court simply to review the Court of Appeals' resolution of a principle of Ohio law, something that this Court has been traditionally and properly reluctant to undertake. This case is a particularly poor candidate for the Court to weigh in on state common law, given that the Court of Appeals' judgment was controlled by Ohio Supreme Court precedent that is squarely on point, and is consistent with an unbroken line of state and federal cases applying that precedent.

For these reasons, the Court should deny the writ.

OPINIONS BELOW

The Court of Appeals' decision was reported at 929 F.3d 767, and affirmed an opinion reported at 295 F. Supp. 3d 776.

A prior decision dismissing the case was not reported, but is available at 2015 WL 1011403 (N.D. Ohio Mar. 5, 2015), and was reversed in an opinion reported at 814 F.3d 785 (6th Cir. 2016) ["*Baatz I*"].

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions relevant to the questions presented in this matter, in that this case proceeded and was decided and affirmed solely as a matter of Ohio common law.

COUNTERSTATEMENT

A. Factual Background

1. The Medina Storage Field

Columbia operates and maintains an extensive interstate natural gas transportation system and one of North America's largest underground natural gas storage systems. App. 29. These storage fields are an "integral part" of Columbia's operations, and Columbia "could not produce adequate supplies of natural gas for its wholesale customers and through them to the gas consuming public without the use of underground storage facilities." *Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement*, 578 F. Supp. 930, 932 (N.D. Ohio 1983) [*Parrott*], *aff'd*, 776 F.2d 125 (6th Cir. 1985). Columbia stores its customers' gas by injecting it into the pore spaces of naturally occurring rock

formations during periods of low demand. Columbia then returns the natural gas to its customers during the winter, so they can provide gas to consumers when it is needed to heat homes and supply power to businesses. App. 29–30; *see Parrott*, 578 F. Supp. at 932.

One such storage field is the Medina Storage Field. The Medina Storage Field is located roughly 3,000 feet beneath the surface in a formation known as the Clinton sandstone, extending across 15,016 acres of Medina County, Ohio. App. 29; *Columbia Gas Transmission Corp.*, 41 FERC ¶ 62,118 (Nov. 2, 1987). The field was once a producing natural gas field, but existing "native gas" was depleted by production. *See* App. 30.

Columbia operates the Medina Storage field pursuant to certificates of public convenience and necessity issued by FERC and its predecessor. *See The Ohio Fuel Gas Co.*, 20 F.P.C. 63 (July 21, 1958); *Columbia Gas Transmission Corp.*, 41 FERC ¶ 62,118 (Nov. 2, 1987).

2. The Landowners' Claims

The Landowners own residential lots – 5.2647 acres in total – on the western edge of the City of Medina County, Ohio. These lots are located just inside the FERC-certificated boundary of the Medina Storage Field. App. 3, 36. Although Columbia has acquired storage rights for more than 99% of the field's reservoir area, the Landowners' properties were not subject to a

storage lease or easement at the commencement of this case.[1]

The Landowners allege that Columbia's operation of the Medina Storage Field has caused storage gas to be located beneath their properties. App. 36.[2] There has never been any allegation that Columbia entered onto the surface of the Landowners' properties, and any storage gas that might be located beneath the Landowners' properties necessarily arrived there

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[1] There is no evidence to suggest that Columbia intentionally decided not to acquire storage rights for the subsurface beneath the Landowners' properties.

[2] Columbia asserted that the Landowners could not make this showing, but the issue did not need to be resolved in light of the district court's disposition of the case. In any event, the presence of storage gas beneath unacquired properties is often unavoidable given the scientific constraints storage operators confront:

> Each storage field presents unique, often difficult problems. Since it is impossible to burrow down to the storage formation for direct observations, all knowledge of the field must come from remote observations of characteristics like pressure and volume. Learning about an underground gas storage field is like trying to define a tire when only the valve stem is visible and the only available measurements are volume and pressure. . . .
>
> It frequently takes decades to establish the boundaries and operating characteristics of a gas storage field.

David D. Noble, *Ten Years of Federal Underground Gas Storage Condemnations*, ENERGY & MIN. L. FOUND.: PROC. OF THE 14TH ANN. INST., § 26:03 (1993), http://www.emlf.org/clientuploads/directory/whitepaper/ Noble_93.pdf.

through subsurface migration within the native Clinton sandstone formation. App. 36.

The Landowners uniformly admitted that they did not use or intend to use the subsurface for oil and gas production or in any other way. App. 11, 39, 47. Further, not a single Landowner identified any physical damage to their properties, and the Landowners conceded that Columbia's operation of the Medina Storage Field has not interfered with their use of the properties at issue. App. 46, 48. Instead, the Landowners offered only "speculations regarding possible stigma." App. 44; *see also* App. 44–46. Nevertheless, the Landowners sought more than $5.3 million in damages – more than $1 million per acre, plus punitive damages and attorney's fees.

B. Procedural History

1. Preliminary and Related Proceedings

This dispute originated in a functionally-identical putative class action suit brought in late 2012, *Wilson v. Columbia Gas Transmission LLC*, No. 2:12-cv-01203 (S.D. Ohio Dec. 21, 2012). *Wilson*'s putative class encompassed all landowners in Ohio beneath whose properties Columbia allegedly stored natural gas without authorization, including the Landowners. The claims in *Wilson* were nearly identical to those brought here. *See generally Baatz I*.

To further its defense of the *Wilson* case, Columbia sought to confirm its rights to use putative class

members' properties by way of condemnation counterclaims. In connection with this condemnation strategy, as contemplated by the NGA,[3] Columbia sent "pre-condemnation" letters to the Landowners, seeking easements confirming Columbia's exclusive right to use the Clinton formation for natural gas storage, and offering $250 per parcel. The Landowners did not accept Columbia's offers. App. 4.

Before Columbia could amend its counterclaim to include the Landowners' properties, the Landowners brought this lawsuit. In response, Columbia amended its condemnation counterclaim to include the Landowners, and moved to dismiss this action, contending that the claims should be resolved in the first-filed *Wilson* suit. The district court agreed. *See Baatz I*, 814 F.3d at 788–89; App. 4, 27.

On appeal, the Court of Appeals held that the district court appropriately directed the Landowners to litigate their claims in *Wilson*, but held that the district court abused its discretion by dismissing, rather than staying, this action. *See Baatz I*, 814 F.3d at 789–95. Although the Court of Appeals suggested a stay on remand, *id.* at 795, the district court disagreed, App. 27.

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[3] *See generally* 15 U.S.C. §717f(h) (allowing condemnation where the operator "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid").

2. The *Booth* Condemnation and Ensuing Payment of "Just Compensation" to the Landowners

At that point, the parties jointly moved to sever Columbia's condemnation claims against the Landowners from the broader *Wilson* lawsuit and transfer them to the Northern District. After severance and transfer, these *in rem* condemnation claims against the Landowners' properties were captioned *Columbia Gas Transmission, LLC v. Booth*, No. 1:16-cv-01418-TMP (N.D. Ohio) [*Booth*]. App. 5, 28.

Thereafter, the court granted partial summary judgment, holding that Columbia had the exclusive right to use the Clinton formation beneath the Landowners' properties, and appointed a panel of commissioners to assess just compensation, as permitted by Federal Rule of Civil Procedure 71.1(h). App. 5.

The commission in *Booth* held an evidentiary hearing on the question of just compensation in December 2017. Based on the evidence, the commission awarded $250 per lot or $450 per double lot for permanent storage easements for use of the Clinton formation beneath the Landowners' properties, and $1 for diminution in value of the surface estate. App. 28 n.2, 57.[4] The Landowners did not object to the commissioners' report, and judgment was entered. There was no

[4] The Landowners' contention that the commission "declined to award the [Landowners] for diminution in value, and awarded nominal damages to the Landowners," Petition at 13, is not correct.

appeal, and the award of $13,811.40 (with interest) was paid in full. *See* App. 5.

3. Summary Judgment for Columbia

The Landowners' amended complaints asserted claims for trespass, unjust enrichment, declaratory judgment, permanent injunction and mandamus/inverse condemnation. The last of these claims by its terms alleged a "taking" in violation of the Fifth Amendment, and was the only claim to allege a violation of the Constitution or federal law.

After remand, Columbia renewed its motion to dismiss. Because the Landowners admitted that the *Booth* condemnation "moots their claims for mandamus/inverse condemnation, declaratory judgment, and injunctive relief," the district court dismissed those claims, and the matter proceeded only on the Landowners' state law trespass and unjust enrichment claims. App. 5, 28.[5] The district court specifically declined Columbia's invitation to rule that the NGA preempted those state common law claims in favor of a federal claim for relief. *See* App. 61.

After discovery, Columbia moved for summary judgment on the remaining trespass and unjust

[5] The Landowners have never suggested that the court abused its discretion in retaining supplemental jurisdiction over these claims after disposing of the federal claim upon which jurisdiction was initially predicated.

enrichment claims, and the district court granted the motion:

First, the court, applying *Chance*, held that "the Landowners are required to prove," to recover on their trespass claim, "that their properties suffered actual physical damage or that Columbia interfered with the Landowners' actual or reasonably foreseeable uses of their properties." App. 44. However, the court held that the Landowners "offered no evidence that any of them has suffered actual physical damages to their properties or any evidence that Columbia actually interfered with their use of their properties," an "evidentiary void" that was "fatal to their trespass claims." App. 46.

Second, the court held that the Landowners arguably could recover the fees that Columbia would have paid for the right to store gas prior to obtaining storage rights via condemnation, although it limited that right to the six-year period prior to the filing of the lawsuit, applying Ohio's statute of limitations for unjust enrichment claims. App. 56–57. At the same time, the district court observed that the award in the *Booth* condemnation "necessarily encompasses all rental fee obligations Columbia arguably could have owed the Landowners on an unjust enrichment basis," meaning that the only potential loss was "the time value of these funds dating back to March 5, 2008, the date six years prior to the filing of the instant action." App. 58. Thereafter, the parties agreed upon an award of interest in *Booth*.

The court therefore ruled that the Landowners would be "fully compensate[d] . . . for any unjust enrichment they may have conferred upon Columbia," and "there would be no further damages to be awarded on the Landowners' unjust enrichment claim in this action," meriting judgment in Columbia's favor on the unjust enrichment claim as well. App. 21–22.

4. The Court of Appeals' Affirmance

The Court of Appeals unanimously affirmed the district court's judgment.

First, the Court held that the district court properly applied *Chance*, which held that there are "'limitations on property owners' subsurface rights,'" and that property owners' "'subsurface rights in their properties include the right to exclude invasions of the subsurface property' only if the property owners prove that the invasion 'actually interfere[d] with [their] reasonable and foreseeable use of the subsurface.'" Because the Landowners "admitted that they have not used and do not intend to use the subsurface," App. 11, the Court affirmed the summary judgment against the Landowners' trespass claim.

Second, the Court of Appeals affirmed the summary judgment on the Landowners' unjust enrichment claims, but on a different ground than the district court. The Court of Appeals held, pursuant to *Chance*, that "the Landowners do not have a present possessory interest in their subsurface and by extension, lack the present ability to exclude" Columbia, and "[t]hus . . . were not able to transfer that interest" to Columbia. As

a result, the Landowners "could not show, as they must, that they conferred a benefit upon the defendant." App. 18–19.

REASONS FOR DENYING THE WRIT

A. This Case Presents No Issue of Federal Law for This Court to Review.

Despite the fact that the decisions below both relied exclusively on principles of Ohio common law, the Landowners nonetheless urge this Court to address the matter by contending that the Court of Appeals somehow articulated a ruling on the scope of the NGA and thereby offended constitutional norms. That is not the case. The Landowners' Petition cannot sidestep the simple fact that there is no question of federal law properly before the Court.

1. The Landowners Have Forfeited Any Federal Statutory or Constitutional Claims by Failing to Raise Them Below.

Initially, this Court should deny the writ because it would be deciding in the first instance the statutory and constitutional questions presented in the Landowners' Petition – questions never asserted below.

For example, neither the Landowners' briefs in the Court of Appeals nor their opposition to Columbia's summary judgment motion ever suggested that this case turned on the construction of the NGA, or

involved questions under the NGA. In fact, the Landowners strenuously advanced the diametrically-opposite proposition below, in response to Columbia's argument that the NGA preempted state law claims. *See* App. 61.

In the same fashion, the Landowners' submissions in the Court of Appeals and district court never once suggested that Columbia's operation of the Medina Storage Field violated their Fifth Amendment rights, by acting as a taking or a deprivation of property without due process. While the Landowners had pled a taking without just compensation as part of their mandamus claim, they conceded that their claim was moot, in light of the pending *Booth* condemnation, and the district court dismissed the claim – a ruling about which the Landowners were silent in the Court of Appeals.[6]

In consequence, neither the district court nor the Court of Appeals had occasion to pass upon the questions the Landowners proffer here.

Under those circumstances, this Court properly denies review. *See*, *e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) ("We ordinarily do not decide in the first instance issues not decided below." (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S.

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[6] The Landowners did make the same passing suggestion that they make here about their purported Seventh Amendment right to jury trial, *see* Petition at 7, 21, but they did not develop the argument or suggest that the Seventh Amendment precluded a summary judgment on the record here.

103, 109 (2001))); *accord Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007); *Nat. Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *United States v. Bestfoods, Inc.*, 524 U.S. 51, 72 (1998).

2. The Courts Below Did Not Misconstrue the NGA.

Even if the Landowners had properly preserved their claims, they lack merit. Initially, the Landowners seize on a passing remark in the Court of Appeals' decision to suggest that the Court was construing, and wrongly expanding, the NGA. *See* Petition at 1 (characterizing the Court's judgment as "rul[ing] . . . that permission to enter land was optional" and that "the NGA granted certificate holders the right to use land without seeking permission to do so").

The Court of Appeals, of course, did nothing of the sort. Its ruling does not even apply the NGA, and certainly does not effect a novel expansion of the NGA. In fact, the Court's treatment of the Landowners' claims is wholly consistent with precedents on the issue. These cases agree that a holder of a FERC certificate can obtain "the necessary right-of-way" by agreement, or barring that "***may*** acquire the same by the exercise of the right of eminent domain," 15 U.S.C. § 717f(h) (emphasis added). The certificate holder is not compelled to do so, however: the statute by its plain terms makes it clear that condemnation is permissive, by its use of the term "may." *See*, *e.g.*, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005)

("The word 'may' customarily connotes discretion."). These decisions also agree, however, that absent such an acquisition, the certificate holder bears the risk that a landowner will seek damages for the otherwise unauthorized use of the property.

The Landowners admit as much: They argue that "[a]n objecting land holder has a viable state law claim" for the occupation of land "prior to the issuance of an order for condemnation," and that a "condemnation award . . . does not bar an action for the prior trespass." Petition at 5.

Indeed, in assessing Columbia's liability, as a FERC certificate holder, for entries into real property prior to condemnation, the courts below joined other courts in determining the question as a matter of state common law, and not with recourse to any provision of the NGA. The cases cited by the Landowners necessarily make this point, by allowing a landowner to assert common law claims for pre-condemnation entries. *See*, *e.g.*, *Beck v. N. Nat. Gas. Co.*, 170 F.3d 1018 (10th Cir. 1999) (cited in Petition at 7, 9); *Columbia Gas Transmission, LLC v. Crawford*, 267 F.R.D. 227 (N.D. Ohio. 2010) (cited in Petition at 6); *Humphries v. Williams Nat. Gas Co.*, 48 F. Supp. 2d 1276 (D. Kan. 1999) (cited in Petition at 5, 6, 18); *5655 Acres of Land & Coal v. Tex. E. Transmission Corp.*, 190 F. Supp. 175 (W.D. Pa. 1960) (cited in Petition at 6, 19). The Landowners do not identify any conflict or discord in the case law on this point that this Court should step in and resolve.

At bottom, the Landowners are not complaining about how the NGA operates, but rather are dissatisfied with how Ohio common law resolves their claims. For example, although the Landowners profess that "[u]nder the NGA, a gas company is now authorized to avoid eminent domain proceedings, and avoid state common law damages," Petition at 14, any ability a certificate holder has to "avoid state common law damages" is in fact a consequence of the rights, remedies and limitations provided in state common law, and not anything about the NGA.

In short, the Court of Appeals' discussion of the NGA was correct, was consistent with other authorities on the subject, is not in conflict and does not merit a place on this Court's docket.

3. Columbia's Use of the Subsurface Does Not Create Any Cognizable Constitutional Issues.

The Landowners' effort to suggest that Columbia's use of the Medina Storage Field worked a deprivation of Fourth or Fifth Amendment rights is equally lacking.[7]

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[7] As a threshold matter, although the Landowners do not raise the question, we assume that Columbia is acting as an instrumentality of the federal government, and is thus subject to constitutional strictures that ordinarily would not apply to a private entity, because of the "close nexus" between the United States "and the challenged action" created by Columbia's FERC certificate, "so that the action of the latter may be fairly treated as that of the [government] itself." *Jackson v. Metropolitan Edison Co.*,

a. The Landowners lack a "property" interest in the subsurface. The Landowners' takings and due process arguments beg the essential question: in contending that Columbia has wrongly deprived them of property without "due process" or "just compensation," the Landowners necessarily presuppose that they had a "property" interest in excluding Columbia from the Clinton sandstone formation.

The Landowners ignore the fact that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (due process). *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (takings; quoting *Roth*). More simply put, "[p]roperty rights are created by the State." *Palazzolo v. R.I.*, 533 U.S. 606, 626 (2001) (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163 (1998)).

Here, as the courts below properly held, subsisting Ohio law rejects the proposition that the Landowners have the right to exclude Columbia from the Clinton sandstone formation. Ohio Supreme Court precedent for nearly a half-century has categorically rejected the traditional notion that "'[h]e who owns a piece of

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419 U.S. 345, 351 (1974). *Cf. id.* at 350–53 (utility customer has no due process right to notice and hearing before termination of service, because utility is not a state actor bound by constitutional due process guarantees, even though utilities are "heavily regulated" through an "extensive and detailed" regime); *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

land . . . is the owner of everything underneath in a direct line to the center of the earth and everything above to the heavens.'" *Chance v. B.P. Chemicals*, 670 N.E.2d at 991 (quoting *Winton v. Cornish*, 5 Ohio 477, 478 (1832)). Such a notion, the Ohio high court has held, "has no place in the modern world." *Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658, 664 (Ohio 1972). Rather, a landowner only owns so much of the space above or below the ground "as we can occupy or make use of, in connection with the enjoyment of our land." *Chance*, 670 N.E.2d at 991–92 (quoting *Willoughby Hills*).

In this case, of course, the Landowners conceded that they did not use, did not intend to use, and had no reasonable ability to use the Clinton formation beneath their properties. Those admissions are not only dispositive of their common law claims; they also are fatal to their efforts to suggest the unconstitutional deprivation of a property right.[8]

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[8] States concededly "do not have the unfettered right to 'shape and define property rights,'" *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944–45 (2017) (quoting *Palazzolo*, 533 U.S. at 626), but they may nonetheless "'adjus[t] rights for the public good,'" *id.* at 1943 (alteration in original) (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)), unless "a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation," *Palazzolo*, 533 U.S. at 627.

The principles of Ohio property law applied here do not offend these principles – they merely limit the Landowners' ability to exclude Columbia from a subsurface rock layer that the Landowners cannot otherwise use, in a manner that leaves the Landowners' use and enjoyment of the surface unimpaired. In such a case, "where an owner possesses a full 'bundle' of property rights," and

b. The Landowners received due process and were justly compensated. Proceedings in the related *Booth* condemnation further negate the Landowners' newly-minted effort to summon a constitutional deprivation. By definition, the Landowners' constitutional claims turn on the deprivation of property without "due process" and the taking of their property without "just compensation." Here, however, Columbia pursued a condemnation to secure its rights to the subsurface interests at issue once the matter was brought to its attention; in connection with that proceeding, the Landowners participated in a multi-day evidentiary hearing to assess just compensation, and they were awarded what the commission determined to be "fair market value," together with an interest award to redress any delay in providing compensation. What the Landowners seek is not "just compensation"; rather, they seek a windfall that the Constitution does not entitle them to receive.

Indeed, the Landowners arguably received more than they were justly entitled to obtain; as the district court noted, Columbia's "taking" of the Clinton formation "gave rise to an obligation to pay just compensation in 1959," and "'[t]he owner at the time the Government takes possession rather than the owner at

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only "one 'strand'" is affected, that "is not a taking, because the aggregate must be viewed in its entirety." *Andrus*, 444 U.S. at 65–66 (1979). *See also Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, 130 (1978) (explaining that the Court's "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

an earlier or later date, is the one who has the claim and is to receive payment,'" App. 51 (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)) (internal quotation omitted). *Accord Palazzolo*, 533 U.S. at 628 ("'[I]t is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser.'" (citing *Danforth v. U.S.*, 308 U.S. 271, 284 (1939))). Of course, none of the Landowners were the owner at the time Columbia began operation of the Medina Storage Field, and so none of them – technically speaking – were entitled to any condemnation award.

Under these circumstances, this Court should give no heed to the Landowners' Fourth and Fifth Amendment claims.

4. The Entry of Summary Judgment Does Not Violate the Landowners' Seventh Amendment Right to Trial by Jury.

The Landowners' conclusory suggestion that entry of summary judgment deprived them of their Seventh Amendment right to a jury trial need is even less meritorious, and need not detain the Court long. It has been well-established, for more than 100 years, that the entry of summary judgment in the absence of any issues of fact does not contravene the Seventh Amendment.

> If it were true that the [summary judgment] rule deprived the Plaintiff in error of the *right*

> of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues.

Fid. & Deposit Co. of Md. v. U.S., 187 U.S. 315, 320 (1902). *Accord Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979); *In re Peterson*, 253 U.S. 300, 310 (1920) ("No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined.").

Here, there concededly are no disputed factual issues that require a jury to resolve, as the courts below concluded. Indeed, the Landowners admitted the only salient facts – that they do not use, cannot use, and do not intend to use the Clinton formation beneath their properties, and have not suffered any physical damage or loss of use. App. 11, 39, 44–46. The Landowners tellingly do not identify in their Petition any material facts that require resolution at trial.[9]

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[9] The Landowners merely contend that they intended to adduce "expert valuation of the past storage activities" to show "millions of dollars of storage and transmission value" to Columbia "at the scheduled jury trial." Petition at 13. That is necessarily immaterial, given that the Landowners could not establish the factual predicate needed to support a finding that Columbia is liable under controlling law. The fact that the Landowners could not put on the damages case they hoped to present does not have constitutional significance.

In brief, there are no issues of federal law – let alone conflicts among the federal courts or issues of first impression – that are appropriate for this Court's review.

B. This Court Should Not Review the Lower Courts' Correct Application of Ohio Common Law.

To reiterate, the only issues that the Landowners pressed below, and that the district court and Court of Appeals were called upon to address, are matters of Ohio common law. The manner in which those courts resolved those questions is not something that should trouble this Court.

This Court "do[es] not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). *See also Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (declining to construe Colorado's statute of frauds: "we ordinarily will not consider such a state-law issue, and we decline to do so here").[10]

Rather, it is this Court's "practice to accept a reasonable construction of state law by the Court of

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[10] The Court does so only in extraordinary circumstances, such as when a federal court's application of state law would effectively "allow[ ] blatant federal-court nullification of state law." *Leavitt*, 518 U.S. at 144–45. Indeed, it appears that the Court has only reviewed a pure question of state law once since 1947. *See id.* at 144 n.5.

Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.'" *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (quoting *Bishop v. Wood*, 426 U.S. 341, 346 (1976)). *See also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019); *Propper v. Clark*, 337 U.S. 472, 486–87 (1949) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.").

In this case, the Court should be especially hesitant to step in. The district court and Court of Appeals here did not break new ground, or venture a prediction as to how the courts of Ohio would decide the case. Rather, they applied *Chance*, a recent, controlling Ohio Supreme Court precedent, and did so in a straightforward manner.

Nor are the decisions below outliers. Other courts applying Ohio law to similar situations have reached similar results. *See*, *e.g.*, *Baker v. Chevron U.S.A., Inc.*, 533 F. App'x 509, 523 (6th Cir. 2013) (applying *Chance* to claim of trespass by alleged soil contaminants, to hold that "plaintiffs must produce evidence showing that (1) the plume or its soil vapors have invaded their property, and (2) that invasion has caused either substantial physical damage to the land or substantial interference with their reasonable and foreseeable use of the land."); *Lueke v. Union Oil Co.*, No. OT-00-008, 2000 WL 1545077, at *7 (Ohio App. 6th Dist. Oct. 20, 2000) (construing *Chance*, in the context of an underground

gasoline tank leak, to hold that "actual damages in the form of 'physical damages or interference with use' must be shown before the person suing for trespass can prevail" (citation omitted)).

To put it simply, the Court of Appeals decision, affirming the district court, was the uncomplicated application of a controlling Ohio Supreme Court precedent, in line with an unbroken line of precedents in similar cases, a decision that this Court should not disturb.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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