In The
Supreme Court of Virginia

RECORD NO. 170620

WILLIAM BARR and MELISSA BARR,
MARY J. HOFFMAN, NANCY HOLSTEIN,
HAZEL M. RHAMES, Trustee and JOSEPH L. RHAMES, Trustee,

Petitioners,

v.

ATLANTIC COAST PIPELINE, LLC,

Respondent.

BRIEF IN OPPOSITION OF RESPONDENT
ATLANTIC COAST PIPELINE

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INTRODUCTION

The Petition for Appeal ("Petition") should be refused. In their two assignments of error, Petitioners challenge the trial court's interpretation of Code § 56-49.01(A) and its determination that the proposed surveying here does not amount to a taking in violation of Article I, Section 11 of the Constitution of Virginia. There was no error in the trial court's rulings. Accordingly, this Petition is meritless.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Respondent Atlantic Coast Pipeline, LLC ("Atlantic") offers this counterstatement to amplify and correct the statement offered by the Petitioners.

Atlantic is a company engaged in the regulatory approval process for a roughly 600-mile interstate natural gas pipeline ("Pipeline") that will extend from West Virginia, through Virginia, and into North Carolina. As an interstate natural gas company, Atlantic is primarily regulated by the Federal Energy Regulatory Commission ("FERC").

Before construction of the Pipeline may start, federal law requires Atlantic to obtain a certificate of public convenience and necessity ("Certificate") from FERC. *See* 15 U.S.C. § 717f(c)(1)(A). To apply for a Certificate, Atlantic must provide "all information necessary to advise [FERC] about the construction and operation of the Pipeline. *See* 18 C.F.R. § 157.5(a). This information includes plans for crossing

wetlands, field surveys, and the location of culturally and environmentally significant sites that might be disturbed. *See id.* § 380.12.

To satisfy these requirements, Atlantic seeks to survey, test, appraise, and examine the properties along the proposed route of the Pipeline to the extent permitted by Virginia law. The statute that permits these activities is Code § 56-49.01(A), which provides in relevant part:

> Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary (i) to satisfy any regulatory requirements and (ii) for the selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities . . . .

Petitioners' properties are located along the Pipeline's proposed route in Nelson County. Thus, Atlantic was required to enter their lands to conduct the surveys and testing. Before doing so, Atlantic sent each Petitioner a request for permission to enter, in accordance with Code § 56-49.01(B). *See Second Amended Petition for Declaratory Judgment* ("*SAP*") (Dec. 7, 2016) at Exhibit A. After Petitioners denied the request, Atlantic sent each of them a notice of intended entry, as required by Code § 56-49.01(C). *See SAP* at Exhibit B.

Code § 56-49.01 does not require Atlantic to obtain a court order to enter Petitioners' properties for surveying purposes. Atlantic, however, brought a

declaratory judgment action in the Circuit Court of Nelson County to avoid any conflict that might otherwise result from entering the properties. Petitioners demurred, arguing that the statute permits an unconstitutional taking. In an Opinion and Order dated May 9, 2016, the trial court overruled the demurrer on that issue, finding that Virginia has long recognized entry-to-survey as an exception to a landowner's right to exclude. Op. at 8-10 (May 9, 2016). Alternatively, the trial court held, even if Petitioners had a right to exclude Atlantic, the surveys here were temporary and so minimal that they did not rise to the level of a taking. *Id.* at 9-10.

Nevertheless, the trial court sustained, in part, the demurrer with respect to a notice issue that is not part of this appeal. With leave to amend, Atlantic filed an Amended Petition, and then a Second Amended Petition, the latter of which is now the operative pleading. Petitioners again demurred, this time arguing that Atlantic failed to plead facts demonstrating that its survey was necessary to satisfy regulatory requirements under Code § 56-49.01. By Order dated January 17, 2017, the trial court overruled that demurrer and scheduled a hearing on the merits of Atlantic's Second Amended Petition to occur on February 6, 2017.

At the February 6, 2017 hearing, Petitioners moved to strike after Atlantic's case-in-chief, arguing that Atlantic failed to prove that the surveys were necessary for any regulatory requirement. Hr'g Tr. at 103:12-104:16, 108:4-9 (Feb. 6, 2017). The trial court found the showing unnecessary, given that Atlantic proved the

necessity of the surveys for selecting the most advantageous route. *Id.* at 146:21-147:2. Although the statute uses the word "and" to connect the two purposes, the trial court interpreted that connector disjunctively and rejected Petitioners' argument that the statute requires both purposes to exist. *Id.* at 142:9-146:20. The trial court then entered judgment in Atlantic's favor and granted Atlantic access to Petitioners' lands to conduct survey activities as permitted by Code § 56-49.01.

Petitioners filed this Petition on May 8, 2017, raising two assignments of error. They argue that Code § 56-49.01(A) permits surveying activities only if done for *both* regulatory requirements *and* selection of the pipeline route. Second, they claim that Code § 56-49.01 violates Article I, Section 11 of the Constitution of Virginia.

ARGUMENT

I. Petitioners Misconstrue Code § 56-49.01(A).

Atlantic has taken the position, throughout this case, that the surveying activity here is being conducted both to satisfy regulatory requirements and for the selection of the Pipeline's most advantageous route. Atlantic also takes the view that Code § 56-49.01(A) permits surveying in support of either of those purposes, so long as the other requirements of the statute are met. The "and" that connects the two purposes identified in the statute generally connotes the conjunctive. But this Court has long recognized that "and" must be interpreted in the disjunctive as "or"

when statutory context or history demonstrates that such was the General Assembly's intent.[1] *See S. E. Pub. Svc. Corp. v. Commonwealth*, 165 Va. 116, 122 (1935).

Here, the proper interpretation is that the General Assembly intended "and" to mean "or." The statute begins with the permissive "may," and authorizes surveys of a proposed line or location of works when one of two purposes is satisfied: to meet regulatory requirements, or to select the most advantageous route of a line. If parents tell their teenager that he may use the car to go to the mall, to see a movie, and to attend a sporting event, no one would construe that grant of permission to allow the teenager to use the car only if he does all three activities. So too here, Code § 56-49.01(A) is best understood to authorize surveying when either of the two statutory purposes is present. That interpretation is consistent with the text of the statute and with the General Assembly's intent, as discussed below.

A. **Code § 56-49.01(A) grants authority to survey for either of two purposes.**

Code § 56-49.01(A) states, in pertinent part:

> Any . . . natural gas company as defined in 15 U.S.C. § 717a . . . *may* make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works *as are necessary* (i) to satisfy any

[1] The key here is the General Assembly's intent. For example, the phrase in subsection C that "[n]otice of intent to enter shall . . . be made not less than 15 days prior to the date of mailing of the notice" clearly does not mean Atlantic must draft (or send) the notice 15 days before it is mailed. *See* Code § 56-49.01(C).

> regulatory requirements *and* (ii) for the selection of the most advantageous location or route . . . .

(Emphases added). The statute permits authorized companies to conduct certain enumerated activities. Each of these activities, however, is permissible only to the extent it is for the company's "proposed line or location of its works" and "as are necessary" for one of two purposes. Code § 56-49.01(A).

Each of the two purposes—satisfaction of regulatory requirements and selection of pipeline location or route—is prefaced by a romanette. They are joined by the word "and," which ordinarily has a conjunctive meaning. *See Safeway v. Milk Comm'n*, 197 Va. 69, 74 (1955). In this case, however, the word "and" should not be interpreted literally because it falls into the category of cases in which strict reliance on the literal meaning of the conjunctive word is "misplaced." *See Industrial Dev. Auth. v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 280 (1975).

In *La France*, the statute gave municipalities development powers that could be exercised "for the benefit of the inhabitants of the Commonwealth, for the increase of their commerce *and* for the promotion of their safety, health, welfare, convenience, and prosperity." 216 Va. at 279. The defendant argued that plaintiff's laundry facility was impermissible because it did not meet all of the conditions. The trial court agreed, reading "and" in the conjunctive as requiring "*all* of these elements [to] be present." *Id.* at 280. This Court, however, reversed the trial court's

decision, and construed "and" in the disjunctive to effectuate the actual intent of the legislature. *Id.* at 281.

As it did in *La France*, the Court here should read "and" in the disjunctive. Code § 56-49.01(A) does not declare that surveys are permitted *only if* both conditions are present. Contrast, for example, Code § 8.01-216.5(A), which provides that "[t]he action *may* be dismissed *only if* the court *and* the Attorney General give written consent to the dismissal *and* their reasons for consenting." (Emphases added). The plain language of Code § 56-49.01, on the other hand, expresses two separate purposes for surveying, either of which allows Atlantic to survey on Petitioners' properties.[2]

That the General Assembly intended a disjunctive meaning here is confirmed by the realities of surveying leading up to and following receipt of a FERC Certificate. As a preface, Code § 56-49.01(A) is clearly designed to enable surveying in support of FERC certification as it applies only to interstate natural gas

[2] Petitioners incorrectly assert that Atlantic "admitted that it needed to enter the landowners' properties in order to satisfy any regulatory requirements," and that Atlantic acted to the contrary by arguing "it only had to establish that it needed entry for the selection of the most advantageous location or route." *See* Pet. at 5-6. In support, Petitioners cite to Paragraph 10 of Atlantic's Petition for Declaratory Judgment and Paragraph 8 of the Amended and Second Amended pleadings thereto. These paragraphs, however, merely recite the text of Code § 56-49.01(A). Atlantic's position has always been that either of the two purposes set forth in Code § 56-49.01(A) suffices and that Atlantic meets both.

companies, and such companies, like Atlantic, are regulated by FERC. Under that premise, Petitioners' own arguments demonstrate why the General Assembly could not have intended the conjunctive interpretation. According to the Petitioners, a survey is permitted only if both purposes are met. Imagine, however, if a company applying for a Certificate has already submitted to FERC a proposed pipeline route. FERC then issued a Certificate, but required the company to complete environmental, archeological and other surveys as a condition of receiving the Certificate. Under Petitioners' reading, the company could not utilize Code § 56-49.01 at that point because its only purpose would be to satisfy the regulatory requirement, and no longer to select a route as the route has already been determined. Certainly, the General Assembly did not intend for such an absurd result.

The trial court's interpretation of Code § 56-49.01 avoids this incongruous result. By applying a disjunctive meaning to "and," the Court would allow for the realistic approach that the General Assembly intended. That is, Atlantic would be permitted to survey and test the properties either to satisfy regulatory regulations *or* to select the most advantageous route for the Pipeline. In so doing, the interests of both Atlantic and landowners are furthered. Atlantic avoids proposing (and later condemning) areas that surveys disclose are not conducive to the Pipeline. The landowners avoid condemnation proceedings if their land is, in fact, not appropriate for the Pipeline. The information developed from these surveys would then be

submitted to FERC in Atlantic's application. Then, regardless of whether FERC required additional data for either the route, regulatory requirements (e.g., further environmental testing), or both, Atlantic could again utilize Code § 56-49.01 to provide the necessary information to FERC.

Still, Petitioners argue that the use of romanettes in Code § 56-49.01(A) favors a conjunctive reading. That argument, however, is unsupported by case law. Rather, Black's Law defines "romanette" simply as "one of a series." *Romanette*, BLACK'S LAW DICTIONARY (10th ed. 2014). The conjunctive construction could have been just as easily accomplished without romanettes. Indeed, the use of romanettes here actually favors the disjunctive interpretation. When viewed in the context of a permissive statute, the romanettes in Code § 56-49.01(A) mean, as Judge Garrett aptly noted in the proceedings below, "you can do it for this or you can do it for that." Hr'g Tr. at 146:11-12 (Feb. 6, 2017).

Moreover, a survey of the Code reflects that when the General Assembly employs the terminology "may . . . as necessary," followed by a list connected with "and," it intends a disjunctive meaning. Notably, Code § 56-49.01(A) also employs "and" in permitting Atlantic to "make such examinations, tests, hand auger borings, appraisals, *and* surveys." (Emphasis added). Under Petitioners' interpretation, Atlantic could not enter properties to survey only. The company would have to conduct all activities listed therein to enter. Further, Code § 62.1-132.11:1 provides

that the Port Authority "*may* take such steps *as necessary* . . . to prevent and suppress fires on the waters of Hampton Roads, its tributaries and other waters in the vicinity of Hampton Roads, *and* on property adjacent to such waters." (Emphases added). Presumably, the General Assembly intended to authorize the Port Authority to prevent or suppress a fire in any of those three areas—not only when a fire is present in all three. *See also, e.g.*, Code § 15.2-2109(A) (locality "may . . . acquire . . . so much land as may be necessary to make, erect, construct, operate and maintain any of the works or plants mentioned"); Code § 54.1-3435(E) ("The Board may promulgate such regulations . . . as it deems necessary to implement this section, to prevent diversion of prescription drugs, and to protect the public.").

Petitioners, however, contend that construing "and" in the disjunctive would give Atlantic more rights because intrastate natural gas companies must also obtain a Certificate prior to surveying. *See* Pet. at 14. Code § 56-49.01 does not make eminent domain authority a condition precedent to survey authority. In fact, the statute contemplates the ability to survey during a company's pre-Certificate stages of operation. Rather than limiting application of the statute to companies actually engaged in the transportation of natural gas, the General Assembly included companies, such as Atlantic, that are merely "organized *for the bona fide purpose of* operating as a natural gas company." Code § 56-49.01(A) (emphasis added). It is unlikely that such companies would have already acquired a Certificate and the

attendant eminent domain power. Moreover, the statute authorizes surveying for a "*proposed* line or location of its works." *Id.* (emphasis added). Use of the modifier "proposed" contemplates that a company can survey at the pre-Certificate stage.

Likewise, survey authority is provided generally to intrastate public service entities in Code § 56-49(1) without reference to eminent domain power. Code § 56-49(2) requires certain companies to obtain a Certificate prior to *the exercise of eminent domain power*, not surveying. No such requirement, however, exists for surveys under Code § 56-49(1). To read either Code § 56-49 or Code § 56-49.01 as requiring a natural gas company to first obtain a Certificate before exercising its right to survey would defeat the whole purpose of entry-for-survey statutes. *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 694 (W.D. Va. 2015), *appeal docketed*, No. 15-2338 (4th Cir. Oct. 30, 2015).

B. **Atlantic's proposed survey is necessary to satisfy regulatory requirements associated with the application for a FERC Certificate.**

Petitioners raise various provisions of Title 18 of the Code of Federal Regulations and several cases involving FERC certification to show that surveying is not necessary to satisfy regulatory requirements prior to receiving a Certificate. *See* Pet. at 19-29. This argument is meritless, and is merely an unpersuasive attempt to divert the Court's attention from the language and context of Code § 56-49.01.

Petitioners cite *Mt. Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850 (W. Va. 2016), for the proposition that "surveys are not necessary to satisfy any regulatory requirements unless FERC issues a Certificate." Pet. at 28. In *McCurdy*, however, the issue was whether Mountain Valley Pipeline was in public service of West Virginia as the statute at issue gave only companies "invested with the power of eminent domain" the ability to survey. 793 S.E.2d at 855. Companies with eminent domain authority in West Virginia were limited by the court to those in public service of West Virginians. *Id.* at 862. The issue was not whether surveys are necessary to satisfy regulatory requirements prior to FERC certification. Accordingly, *McCurdy* is inapposite.

Rather, surveying for the most advantageous route necessarily satisfies a regulatory requirement here. In order to obtain a FERC Certificate, Atlantic must submit an application that "shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested." 18 C.F.R. § 157.5(a). That same provision further states that "every applicant shall file all pertinent date and information necessary for a full and complete understanding of the proposed project." *Id.* And "[e]very requirement of this part shall be considered as a forthright obligation of the applicant." *Id.* § 157.5(b).

More specifically, such information must include a map indicating "the proposed pipeline route and location of major aboveground facilities." *Id.* § 380.12(c)(3)(ii). In addition, the applicant must survey and submit an environmental report on, among other things, wetland, fish, wildlife, vegetation, and cultural resources. *See id.* §§ 380.12(d)-(f). Therefore, Atlantic's survey here is necessary to satisfy regulatory requirements. The fact that FERC may issue a Certificate allowing information not yet gathered to be submitted at a later time does not render surveying at the proposal stage unnecessary. *See McCulloch v. Maryland*, 17 U.S. 316, 413-14 (1819) (emphasizing that the word "necessary" does not mean "absolutely necessary"); *Harter v. Quade*, 10 Va. Cir. 9, 12 (Winchester 1985) (recognizing that "necessary," as used in jurisprudence, often means "convenient," "useful," or "essential").

Petitioners make an equally unpersuasive argument that Code § 56-49.01 should not apply to proposed projects because it would permit "forced surveying on private property that [would] not need to be surveyed [if] the Certificate [is] denied." Pet. at 17. That argument ignores the plain language of Code §§ 56-49(A) and 56-49.01(A), which both expressly permit surveying for a company's "*proposed* line or location of its works." (Emphasis added). This language necessarily contemplates circumstances in which surveying could occur, but actual construction might not subsequently be approved or otherwise happen.

II. Code § 56-49.01 Does Not Violate the Takings Clause.

Petitioners next argue that, as applied, Code § 56-49.01 is unconstitutional under Article I, Section 11 of the Constitution of Virginia "because it allows activities constituting a taking without just compensation."[3] Pet. at 30. Constitutional arguments are reviewed de novo. *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005).

"[A]ll acts of the General Assembly are presumed to be constitutional." *In re Phillips*, 265 Va. 81, 85 (2003). "[T]here is no stronger presumption known to the law." *FFW Enters. v. Fairfax Cty.*, 280 Va. 583, 590 (2010). Courts are "required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity." *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 336 (2010) (quotation marks omitted). Unless the statute "clearly violates a provision of the . . . Virginia Constitution[]," it must be upheld. *FFW Enters.*, 280 Va. at 590.

[3] Petitioners do not contend, as an assignment of error, that Code § 56-49.01 is facially unconstitutional. Thus, the arguments raised must be viewed only in the as-applied context. *See* Rule 5:17(c)(i); *Wash v. Holland*, 166 Va. 45, 54 (1936) ("[This Court] can consider only such errors as are properly saved in the record and presented to us by appropriate assignments of error."). Further, Atlantic has already addressed whether entry to survey constitutes a taking in another case pending before this Court. *See* Br. of Appellee at 38-41, *Palmer v. Atlantic Coast Pipeline, LLC*, Record No. 160630. The *Palmer* appeal has been fully briefed, and this Court heard oral argument on April 19, 2017.

Code § 56-49.01 does not implicate Article I, Section 11, because Petitioners do not possess a property right to exclude legislatively authorized surveying. Even if there is a right to exclude surveyors, Code § 56-49.01 does not effect a constitutional taking of that right. Accordingly, Petitioners' as-applied constitutional challenge fails.

A. Under Virginia law–and the law of other states–a private landowner has no property right to exclude surveyors authorized by law.

Petitioners' constitutional challenge first hinges on the existence of a property right to exclude legislatively authorized surveyors. Without an underlying property right, there can be no constitutional violation. *See Commonwealth v. Swann*, 290 Va. 194, 196 (2015) (recognizing that cases should be decided on the "narrowest grounds available" and that "unnecessary adjudication of a constitutional issue should be avoided" (internal quotation marks omitted)).

All property rights, including the right to exclude, are creatures of common law. *See Munn v. Illinois*, 94 U.S. 113, 134 (1876); *Tvardek v. Powhatan Village Homeowners Ass'n*, 291 Va. 269, 274 (2016) ("'The common law of England was brought to Virginia by our ancestors' in large part 'to settle the rights of property.'"). Importantly, "[t]he common law has long recognized exceptions to the right [to exclude]." *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 688 (W.D. Va. 2015). For instance, the original Restatement of Torts catalogued

numerous instances in which third parties were privileged to enter private property without liability for trespass. *See* Restatement of Torts §§ 191-211 (1934). Among others, these privileges included but were not limited to:

- the right to enter property to avert a public disaster (§ 196);
- reasonable use of property to protect a person from death or serious bodily harm or chattels from destruction or serious harm (§ 197);
- entry at reasonable times and in a reasonable manner to abate a public nuisance (§ 201);
- entry at reasonable times and in a reasonable manner by a public officer who is authorized to abate a public nuisance (§202); and
- entry "pursuant to legislative duty or authority" (§ 211).[4]

Surveying pursuant to legislative authorization has long been held to fall within the exceptions to the right to exclude. In 1830, Justice Baldwin, riding circuit, ruled that a state legislature may give a private corporation authority to plant stakes on private property to determine the most appropriate route for an interstate public railway:

> An entry on private property for the sole purpose of making the necessary explorations for location, is not taking it, the right remains in the owner as fully as before; no permanent injury can be sustained, nothing is taken from him, nothing is given to the company. When nothing further is done, it is competent for the legislature to give

[4] These privileges were carried into the Second Restatement of Torts. *See* Restatement (Second) of Torts §§ 191-211 (1965).

> this authority, without any obligation to compensate for a damage which must be trivial[.]

Bonaparte v. Camden & Amboy R.R. Co., 3 F. Cas. 821, 831 (C.C.N.J. 1830) (No. 1,617). Constitutional challenges to similar statutes have been "consistently rejected." *See Klemic*, 138 F. Supp. 3d at 690. The complete absence of contrary authority is critical because every state has a similar entry-for-survey law. *See id.*

Virginia law has adopted the common law approach by similarly permitting numerous exceptions to the right to exclude. In fact, Virginia's statutes allowing this conduct are almost as old as the Commonwealth itself. They include the following:

- a 1782 law permitted authorized surveyors to enter upon private land to survey the location of public roads, making it unlawful for anyone to "stop, oppose, or hinder" them;[5]

- the Code of 1819 gave any turnpike company the power "to enter upon all lands and tenements through which they may judge it necessary to make the said road; and to lay out the same according to their pleasure," provided "neither the dwelling-house, yard, garden nor curtilage of any person be invaded without his consent";[6]

- the Code of 1860 gave "internal improvement" companies the power to "enter upon any lands for the purpose of examining the same and surveying and laying out such as may seem fit to any officer or agent authorized by it, provided no injury be done to the owner or possessor of the land";[7]

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[5] 11 William Walter Hening, *Statutes at Large* 27-28 (1823) (ch. 11).

[6] 2 Va. Rev. Code ch. 234, § 7 (1819).

[7] Va. Code, tit. 17, ch. 56, § 4 (1860).

- the Code of 1904 gave the same power to "[a]ny company" on which the legislature had granted eminent domain power,[8] and that same power was restated in § 3866 of the Code of 1930,[9] and in § 3866a of the Code of 1946;[10] and

- a 1944 Act of the General Assembly granted railroad companies the right to conduct preliminary surveys and examinations, which is now codified in Code § 56-49, the immediate predecessor in the Code to the statute at issue.[11]

Likewise, this Court has recognized entry for pre-condemnation surveys as an exception to the right to exclude. In 1905, this Court held that a railroad company could not obtain an injunction to stop another railroad company from entering upon its land for purposes of inspecting and surveying portions for possible condemnation. *See S. & W. Ry. Co. v. Va. & Se. Ry. Co.*, 104 Va. 323 (1905).

More recently, the United States District Court for the Western District of Virginia rejected challenges to the constitutionality of Code § 56-49.01. *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673 (W.D. Va. 2015). In *Klemic*, Judge Dillon dismissed any notion of a property right to exclude authorized surveyors. *Id.* at 688-91. Based on numerous and uncontroverted authorities, Judge Dillon determined that "it is clear that the common law recognizes, and state and

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[8] Va. Code § 1105f(3) (1904).

[9] Va. Code § 3866(a) (1930).

[10] Va. Code § 3866a (1946 Cum. Supp.)

[11] *See* Act of Mar. 31, 1944, ch. 367, 1944 Va. Acts 523-41, at 539.

federal courts have consistently upheld, the privilege to enter private property for survey purposes . . . and that Virginia law is fully in accord with the common law." *Id.* at 690. Similarly, Judge Turk of Giles County concluded that, under Code § 56-49.01, "there is no transfer of ownership of the property from the owners to the natural gas company, nor does it really deprive the owners of any [property right]." *Williams v. Mountain Valley Pipeline, LLC*, No. CL15000314 (Giles County Aug. 24, 2015), *petition refused*, Record No. 151891 (Mar. 7, 2016). Simply put, entry to survey does not implicate, let alone violate, Article I, § 11.

B. **As applied, the limited and minimally invasive entry here does not rise to a constitutional taking.**

Petitioners do not claim a permanent taking, but argue that the temporary entry to survey here warrants just compensation. As Atlantic does not seek to exceed the surveying and examination powers authorized by Code § 56-49.01, and because Petitioners have no right to exclude for such purposes, the as-applied challenge fails. Even if Petitioners had a right to exclude, Atlantic's proposed survey does not amount to a constitutional taking.

"[I]t is well established that 'not every destruction or injury to property by governmental action has been held to be a taking in the constitutional sense.'" *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982) ("Not every physical invasion is a taking."). Rather, "temporary limitations are subject to a more complex

balancing process to determine whether they are a taking." *Loretto*, 458 U.S. at 436 n. 12. This process "entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard*, 447 U.S. at 83.

With respect to the character of the action, the surveying here is minimally invasive. As evidence of an as-applied taking, Petitioners raise only two activities—potential digging and the possible removal of cultural/historical artifacts. *See* Pet. at 6, 32. If digging occurs, Atlantic has already committed to refilling the areas and restoring any vegetation. *See SAP* at Exhibit A. Further, Atlantic will not remove any cultural/historical artifacts from the properties, but will immediately deliver any found to Petitioners. *See SAP* at Exhibit B. Moreover, Atlantic's surveying activities are temporary and statutorily limited in scope to conduct that is "necessary" to determine the most advantageous location of its pipeline. *See* Code § 56-49.01(A). The minimally intrusive entry here does not trump "the interest the Commonwealth has in facilitating the supply of natural gas." *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 697 (W.D. Va. 2015); *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939) ("[I]f governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner.").

Petitioners cite no evidence of economic impact nor claim any interference with reasonable investment-backed expectations caused by Atlantic's proposed surveying. Further, any actual damages suffered by Petitioners as the result of Atlantic's survey will be reimbursed. *See* Code § 56-49.01(D); *SAP* at Exhibit B ("In the unlikely event of actual damages to your Property, you will be reimbursed consistent with the requirements of Va. Code § 56-49.01."). Accordingly, Petitioners have failed to show an economic impact.

Additionally, the line of cases cited by Petitioners to support their takings argument is factually distinguishable. Those cases involved either a complete, albeit temporary, takeover of the property at issue or significant damages resulting in costly reclamation measures. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (flooding caused "destruction of timber" and a "substantial change in character of terrain, necessitating costly reclamation measures"); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (taking possession of a coal mine and operating it under government purview to avert national strike of miners); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949) (condemnation proceeding to take over a laundry company's plant for Army use); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (taking where flooding was permanent and landowner reclaimed most of the flooded land but at considerable expense); *United States v.*

Gen. Motors Corp., 323 U.S. 373 (1945) (taking of entire warehouse for military purpose). None of these cases relate to the minimally invasive entry here.

C. **Petitioners are not entitled to just compensation for damages incident to a survey.**

Petitioners lastly argue that "[p]roperty may not be removed, even temporarily, without payment of just compensation." Pet. at 34. Atlantic does not intend to remove any property from Petitioners' lands, and thus, this particular issue is moot. *See SAP* at Exhibit B ("Any artifacts discovered will be immediately catalogued onsite and delivered to you. . . . No items will be removed from your land without your permission.").

Petitioners seem to also suggest that the statutory requirement of the reimbursement for any actual damages resulting from surveying activities falls "far short" of just compensation. *See* Pet. at 34; Code § 56-49.01(D) (requiring "reimbursement for any actual damages"). The assignment of error here, however, pertains only to a "taking" of, and not "damaged," property. *See* Pet. at 4. Thus, such an argument should not be considered on appeal. *See* Rule 5:17(c)(i); *Wash v. Holland*, 166 Va. 45, 54 (1936) ("[This Court] can consider only such errors as are properly saved in the record and presented to us by appropriate assignments of error.").

Further, despite raising an as-applied challenge, none of the Petitioners have alleged any instance of actual damage to their respective property. In addition,

Atlantic has no intent on damaging the properties. *See SAP* at Exhibit B ("In the unlikely event of actual damages . . . ."). Therefore, to the extent this Court does consider the as-applied challenge as to the sufficiency of the damages provided under Code § 56-49.01, it is not ripe. *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 685 (W.D. Va. 2015) (finding the as-applied challenges not ripe as they "rest[ed] on 'contingent future events that may not occur at all.'").

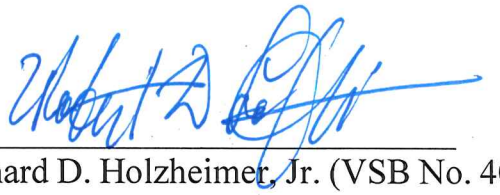
Even if it was ripe, Petitioners' argument is meritless. The General Assembly is well within its authority to limit the types of damages available to a landowner where the underlying entry does not result in a constitutional taking. *See Miller v. State Entomologist*, 146 Va. 175, 194-96 (1926) (refusing to apply just compensation standard in a case involving government destruction of trees because the invasion did not rise to a taking and the statute expressly limited recovery to actual damages). As entry to survey does not rise to a taking, Article I, Section 11 does not require that Code § 56-49.01 provide just compensation over actual damages. To the extent it does, the phrase "reimbursement for any actual damages" under Code § 56-49.01(D) must be interpreted in favor of its validity. *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 336 (2010) (requiring "any reasonable doubt concerning the constitutionality of a law [to be resolved] in favor of its validity").

CONCLUSION

For the foregoing reasons, this Court should refuse the Petition for Appeal.

Dated: May 30, 2017

Respectfully submitted,



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CERTIFICATE

The undersigned hereby certifies that the foregoing Brief in Opposition to the Petition for Appeal complies with Rule 5:18, and further certifies as follows:

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5. On this 30th day of May 2017, seven copies of the foregoing Brief in Opposition to Petition for Appeal were hand delivered to the Clerk of the Supreme Court of Virginia.

6. On this 30th day of May 2017, one copy of the foregoing Brief was served, via Fedex Priority Overnight and via email, upon counsel for the Petitioners.

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