IN THE IOWA SUPREME COURT

Supreme Court No. 17–0423

District Court Nos. CVCV051990, CVCV051997
CVCV051999, CVCV051987

KEITH D. PUNTENNEY, LAVERNE I. JOHNSON, RICHARD R. LAMB, trustee of the RICHARD R. LAMB REVOCABLE TRUST, MARIAN D. JOHNSON by her Agent VERDELL JOHNSON, NORTHWEST IOWA LANDOWNERS ASSOCIATION IOWA FARMLAND OWNERS ASSOCIATION, INC. and the SIERRA CLUB IOWA CHAPTER,

Petitioners – Appellants,

and

HICKENBOTTOM EXPERIMENTAL FARMS, INC., PRENDERGAST ENTERPRISES, INC,

Appellants,

vs.

IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,

Respondent – Appellee

and

OFFICE OF CONSUMER ADVOCATE

Intervenor – Appellee,

and

DAKOTA ACCESS, LLC,

Indispensable Party – Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. FARRELL

Final Brief of Appellee Dakota Access, LLC

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ROUTING STATEMENT

Dakota Access believes this case can be decided by application of existing precedent and plain language of Iowa statutes, and therefore would be appropriate for determination by the Court of Appeals. Nonetheless, to the extent Appellants have requested the Supreme Court retain the case, and acknowledging it is a matter of public interest, Dakota Access has no objection to the Supreme Court retaining the case.

REQUEST FOR ORAL ARGUMENT

Dakota Access hereby respectfully requests oral argument in this appeal.

STATEMENT OF THE CASE

On March 10, 2016, the Iowa Utilities Board ("IUB" or "Board") – like utilities commissions in North Dakota, South Dakota and Illinois before it – granted a permit for Dakota Access, LLC ("Dakota Access") to construct an interstate pipeline to carry crude oil from the Bakken oil fields in North Dakota to a transfer hub in Patoka, Illinois.[1] The Board found, under the procedures and standards in Iowa Code chapter 479B, that the Dakota Access Pipeline ("DAPL") would "promote the public convenience and necessity." *See* Iowa Code § 479B.9. By operation of Iowa Code § 479B.16, the permit vested in Dakota Access the power of eminent domain to the extent the Board found necessary.

Dakota Access subsequently completed DAPL, a $4 billion investment, which is now in commercial service under a Federal Energy

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[1] *In re Dakota Access, LLC*, Docket No. HLP-2014-0001, Final Decision and Order (Iowa Utils. Bd. Mar. 10, 2016) ("*Final Order*"); *see also* Findings of Fact, Conclusions of Law and Order, Case No. PU-14-842 (N. Dakota Pub. Serv. Comm'n Jan. 20, 2016), *available at* http://www.psc.nd.gov/database/documents/14-0842/134-040.pdf. ("*North Dakota Order*"); Final Decision and Order, Case No. HP14-002 (S. Dakota Pub. Utils. Comm'n Dec. 14, 2015), *available at* https://puc.sd.gov/commission/orders/hydrocarbonpipeline/2015/hp14-002decision.pdf ("*South Dakota Order*"); December 16, 2015 Order, Case No. 14-0754 (Illinois Com. Comm'n Dec. 16, 2015), *available at* https://www.icc.illinois.gov/docket/files.aspx?no=14-0754&docId=237581 ("*Illinois Order*").

Regulatory Commission ("FERC") tariff.[2] Appellants are an environmental group and a handful of landowners who objected to DAPL and sought judicial review of the Board's *Final Order*. On review, the Polk County District Court affirmed the well-reasoned decision of the Board.

On appeal from the district court, this Court should find the appeal is now moot and Sierra Club ("Sierra") lacks standing. Ultimately, however, the Court should affirm the expert Board as substantial evidence in the record shows that DAPL promotes the public convenience and necessity, and because controlling precedent demonstrates the use of eminent domain for DAPL, as contemplated by Iowa Code § 479B.16, was constitutional.

STATEMENT OF THE FACTS

Iowa produces no petroleum products. Its large agricultural sector, many transportation companies, heavy manufacturing industry, range of temperatures, and low population density, however, make Iowa one of the largest per capita *users* of petroleum products and of energy more broadly.[3] As a result, Iowa is entirely dependent on a robust, reliable shipping network

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[2] *See* FERC I.C.A. Oil Tariff of Dakota Access, LLC, *available at* https://etariff.ferc.gov/TariffBrowser.aspx?tid=4641.

[3] *See, e.g.*, Exhibit DRD Direct 13:4 – 14:9 (App. 297 – App. 298) (Iowa ranks fifth in the United States in per capita energy consumption, and eighth in per capita consumption of motor gasoline and diesel fuel); Exhibit JM Reply 4:18 – 5:8 (App. 270 – App. 271) (Iowa consumes approximately 233,000 barrels of petroleum products *daily*).

to power its needs – without interstate transportation facilities like pipelines, Iowa's tractors and trucks would come to a stop. Dakota Access has invested, completed, and put into service a 1,172-mile underground pipeline – DAPL – to transport over 450,000 barrels per day of domestic crude oil from the Bakken, through South Dakota and Iowa, to a hub in Illinois. There, it can be stored or shipped through other pipelines to refineries around the Great Lakes, or to the Gulf Coast. In addition to providing a safer, more efficient means for shipping domestic oil, Dakota Access invested approximately $4 billion total, spurred approximately $1 billion in economic activity in Iowa, and created thousands of construction jobs and a stream of state tax revenue going forward.[4]

But Iowa, and even the four-state area of DAPL, is only part of the picture. The United States continues to import approximately 44 percent of the petroleum it needs.[5] Often, this supply comes from countries that are unstable and occasionally unfriendly.[6] The need to ensure and protect the

[4] Exhibit MAL Direct 2 – 3; 8 – 10 (App. 245 – App. 246 ; App. 251 - App. 253); Exhibit DRD Direct 20 – 22 (App. 304 – App. 306); Exhibit JM Reply 3 – 4 (App. 269 – App. 270).

[5] Exhibit GC Direct at 4 (App. 68).

[6] Exhibit GC Direct 4 – 5 (App.68 – App. 69).

availability of this foreign supply requires significant resources – sometimes including American lives – and impacts America's policy options.[7]

Nonetheless, Appellants represent a small but vocal minority[8] opposing the project – or at least arguing "not in my backyard." While these objectors are persistent, their arguments fail. The sole issues before the Court are whether the Board, as the expert agency charged with permitting crude oil pipelines, acted lawfully in granting Dakota Access's permit application in its March 10, 2016 *Final Order*, and whether the eminent domain authority that comes with that permit by operation of Iowa Code § 479B.16 is a constitutional public use.

The Board's 159-page *Final Order* was the conclusion of a process that began in October 2014 with docket HLP-2014-0001 being opened for public comments, and materials being sent to landowners in advance of required county informational meetings. Such meetings were held in each of the 18 Iowa counties through which DAPL passes.[9] Parties were allowed to

[7] Exhibit GC Direct 4 – 6 (App. 68 – App. 70); Exhibit GC Reply 2 – 3 (App. 80 – App. 81).

[8] Approximately 1,278 of the 1,295 easements required in Iowa were obtained through voluntary agreements with landowners.

[9] *Final Order* at 5 – 6*;* Iowa Code § 479B.4.

intervene by Order until July 27, 2015[10] (and the Board allowed additional interventions through October 2015 – a year after the docket was opened[11]). The Board carefully examined an extraordinary record: written testimony and exhibits from more than 50 witnesses; numerous reviews of the project by the Board's expert technical staff; thousands of filed comments for and against the project; and a hearing that began November 12, 2015 and concluded on December 7, 2015 that generated roughly 3,500 pages of transcripts reflecting cross-examination by opposing parties, neutral parties like the Office of Consumer Advocate, and extensive examination by Board Members.

Based on that massive record and thorough post-hearing briefing, the Board found DAPL would generate at least $787 million in economic benefits in Iowa during construction[12], create new jobs and tax revenues[13], enhance the nation's energy security[14], improve public safety by minimizing the amount of oil transported through Iowa (and elsewhere) on trains and

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[10] *In re Dakota Access, LLC*, Docket No. HLP-2014-0001, Order Setting Procedural Schedule at 2 (Iowa Utils. Bd. Jun. 8, 2015).

[11] *See In re Dakota Access, LLC*, Docket No. HLP-2014-0001, Order Granting Intervention (Iowa Utils. Bd. Nov. 13, 2015).

[12] *Final Order* at 46 – 47; 109 – 110.

[13] *Id*.

[14] *Id*. at 27.

trucks[15], and may reduce pressure on rail shipping that adversely impacts the shipping of grain and other Iowa products[16] – and as a result found the project would "promote the public convenience and necessity." The *Final Order*, as required by the mandate in Iowa Code § 479B.16, granted Dakota Access the right to use eminent domain to obtain the small percentage of properties needed to complete the pipeline.

Even before the Board's hearing, two actions were filed in Cherokee and Boone Counties that raised the eminent domain and constitutional issues in this case; both of those challenges failed.[17] Eminent domain and constitutional issues were raised again in five separate claims brought under Iowa Code § 6A.24 in Cherokee and Calhoun Counties; all five challenges were dismissed.[18] Further, the utilities commissions in three other states –

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[15] *Id*. at 31 – 33; 109.

[16] *Id*. at 35.

[17] *See Lamb v. Iowa Utils. Bd.*, No. CVCV024420, Ruling on Respondent and Intervener's Joint Motion to Dismiss (Cherokee Cty., Iowa Oct. 20, 2015); *Dakota Access, LLC v. LaVerne Johnson*, No. EQCV040450, Order (Boone Cty., Iowa Aug. 7, 2015).

[18] *See Marian Johnson v. Dakota Access, LLC*, Case No. EQCV024957 and *Zoch v. Dakota Access, LLC*, Dakota Access, LLC, Case No. EQCV024956, Ruling on Petitioners' Application for Supplemental Relief and Respondent's Motion to Dismiss (Cherokee Cty., Iowa June 13, 2016); *Hammen Family Trust v. Dakota Access, LLC,* Case No. EQCV501985, *Hammen v. Dakota Access, LLC*, Case No. EQCV501984, and *Metzger v. Dakota Access, LLC*, Case No. EQCV501986, Order Denying Petitioners' Requests for Stays; Order Dismissing Cases (Calhoun Cty., Iowa June 21,

North Dakota, South Dakota and Illinois[19] – each reached the same result as the Board. Finally, on judicial review, the Polk County District Court correctly affirmed the *Final Order*.

Appellants offer nothing to change the result below. To the contrary, as Appellants conceded would happen in their motion for stay before the district court, this case has become moot. Three other states, five Iowa district court judges, and the Board on reconsideration[20] all reached the same conclusion as the Board's *Final Order*. There is a simple reason these results have been so consistent: the Board's granting of the permit, and the eminent domain authority that by statute accompanies that permit, to Dakota Access was correct under this Court's well-established precedents and the plain language of the Iowa Code. This Court should affirm the thorough and well-reasoned decision of the Board.

2016 and July 11, 2016); *cf. Vos v. Dakota Access, LLC*, Case No. CVCV120056, Ruling on Motion for Stay of Agency Action (Jasper Cty., Iowa July 28, 2016) (denying a challenge brought on other grounds under § 6A.24 and denying a motion for stay of agency action).

[19] *See generally North Dakota Order*; *South Dakota Order*; *Illinois Order*.

[20] *In re Dakota Access, LLC*, Docket No. HLP-2014-0001, Order Denying Applications for Rehearing or Reconsideration (Iowa Utils. Bd. Apr. 28, 2016).

ARGUMENT

I. AS A THRESHOLD MATTER, THIS CASE IS NOT A LIVE CONTROVERSY: SIERRA LACKS STANDING AND THE LANDOWNERS' CLAIMS REGARDING EMINENT DOMAIN ARE MOOT.

Appellants' claims are fatally flawed and cannot go forward.[21] Sierra has failed to plead or establish standing as it cannot show any "specific, personal" manner in which Sierra or its members have been "aggrieved or adversely affected" by the *Final Order*. The claims of the remaining

[21] Dakota Access filed a Motion to Dismiss the appeal on these bases; that motion was denied by Justice Wiggins without prejudice to raise the issue in the merits briefs. Due to space limitations, the issue is given shorter treatment here, but Dakota Access invites the Court's attention to the more extensive analysis of standing and mootness in its previously filed motion briefs. Those briefs also explain why, regardless of the outcome on the merits, there is no relief to provide to Landowners in this case. *See* 75 Am. Jur. 2d Trespass § 3 ("Inverse condemnation, rather than trespass, is the appropriate remedy for granting damages to an injured landowner where the trespasser is cloaked with the power of eminent domain."); *K & W Elec., Inc. v. State*, 712 N.W.2d 107, 118 (Iowa 2006) (noting that "the measure of damages in an inverse condemnation case [is] diminution in market value"); *Jones v. Iowa State Hwy. Comm'n*, 144 N.W.2d 277, 280 (Iowa 1966) (holding that in a condemnation action, "[t]he measure of damages for a partial taking is the difference in the fair market value of the subject property immediately before and immediately after condemnation"); *see also Browneller v. Nat. Gas Pipeline Co. of America*, 8 N.W.2d 474, 481 (Iowa 1943) (where damages can be compensated, "equity will not interfere" by requiring removal of an "improvement which is in operation and supplying a fuel vital to homes and industries").

Appellants – the "Lamb Group,"[22] Laverne Johnson, and Keith Puntenney – are moot, as Appellants conceded to the district court they would be, because issues relating to construction of DAPL on their property are purely academic: DAPL is an "established fact." *See Lewis Investments, Inc. v. City of Iowa City*, 703 N.W. 2d 180, 184 (Iowa 2005) ("[B]ecause the road challenged in *Welton* had become an established fact there was no manner in which we could interfere or grant relief" (internal quotation marks and citation omitted).

A. Sierra Lacks Standing as Neither the Organization Nor its Members Have Shown Any Specific, Personal, and Non-Speculative Harm.

The test for standing for an association is not a toothless one. One of the leading U.S. Supreme Court cases on such standing is one Sierra lost – *Sierra Club v. Morton*, 405 U.S. 727 (1972). While the *basis* for the federal standing test is different than for the state test, the *elements* are similar. *See Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 869 (Iowa 2005). This Court has articulated the test as follows:

> [S]tanding to sue means "a party must have sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." As far as Iowa law is concerned, this means "that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously

[22] The "Lamb Group" is comprised of the Petitioners in Case No. CVCV051997.

> affected." Having a legal interest in the litigation and being injuriously affected are separate requirements for standing.

Id. at 863 – 64 (citations omitted).

In *Alons*, this Court relied on the federal environmental case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) for the minimum elements of standing: "plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 867 – 868 (quoting *Lujan*, 504 U.S. at 560 – 61). *Alons* went on to note the injury must be "trace[able] to the challenged action of the defendant, and not…th[e] result [of] the independent action of some third party." *Id.* at 868 (alteration in original) (quoting *Lujan*, 504 U.S. at 560).

In *Alons*, plaintiffs challenged the district court's dissolution of a same-sex civil union, asserting that the dissolution required it to tacitly accept the premise of same-sex marriage, which would weaken the "vital institution" of marriage over time. *Id.* at 869. The Court faulted those assertions, as "an injury in the abstract, not in fact, which is not enough," adding "the injury the plaintiffs claim is anticipatory, which, as we have said, is not sufficient for standing." *Id*. at 870 (citations omitted).

Sierra's alleged basis for standing here also fails that test. Sierra's scant Petition below was little more than the same description of the

organization that was held insufficient in *Morton,* 405 U.S. at 735, followed by the procedural history of this case and a quotation from Iowa Code § 17A.19(10) with no application to the facts. Sierra did not plead and cannot show that it has a single member who owns property on the DAPL route, and its Petition made no assertion of how the Board's issuance of a permit would harm Sierra or its members.[23] Sierra's attempt to manufacture standing after the fact by attaching two affidavits to its reply brief in the district court only reinforces its lack of any discrete, non-speculative harm.[24] Sierra's affidavits make only broad, general claims – about global climate policy, for example – that fail the requirement of a plaintiff-specific harm.[25]

Where the affidavits do allege harm, that harm is entirely speculative, remote, and in the uncertain future: "a minor spill *would* jeopardize," "[t]hese benefits *would* be gone when there is an oil spill," "*[i]f* there is a pipeline spill."[26] Even the most specific example, at paragraph 5 of the Edwards Affidavit, falls well short, merely averring that Edwards kayaks in

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[23] Sierra Petition (App.1158 – App. 1163).

[24] Raffensperger Affidavit (App. 1429); Edwards Affidavit (App. 1433).

[25] *See, e.g.*, *Godfrey v. State,* 752 N.W.2d 413, 421 (Iowa 2008) (noting that "a general interest in the issue" is not sufficient to confer standing); *Morton*, 405 U.S. at 739 (finding that "mere interest in a problem" is not the same as "adversely affected or aggrieved" (internal quotation marks omitted)).

[26] Edwards Affidavit at 1-3 (App. 1433 – App. 1435) (emphasis added).

rivers under which the pipeline crosses. The allegation is non-specific – Edwards does not say where on the rivers he kayaks relative to DAPL's discrete crossing points – and Edwards' "concern" that there *could be* a "rupture," at some unknown date in the future is pure conjecture, providing no explanation as to how a speculative future spill would impact his recreational use of the river. Additionally, none of the alleged harms are caused by the Board granting a permit – the action being appealed – rather, the alleged harms could come only from Dakota Access's future operation of DAPL which, contrary to the standing requirements in *Lujan*, is an independent action of a third-party. *See Lujan*, 504 U.S. at 560.

In sum, the strongest claim Sierra makes for standing is that at *some unknown date in the future* there *could* be a spill, that the speculative spill *might* occur at precisely the location along a 1,172-mile pipeline where Edwards desires to kayak precisely when he desires to do so, and that oil form the pipeline running under the riverbed *might* reach the surface in a way that *could* impact his enjoyment of kayaking. Only if *all* of those future conditions – each uncertain and unproven alone; extraordinarily unlikely together – were to occur could there ever be any injury. This Court has been absolutely clear that "an injury in the abstract… is not enough" and a plaintiff's claim that "is anticipatory… is not sufficient for standing." *Alons*,

698 N.W.2d at 870. Sierra's wholly abstract, wholly anticipatory claims of potential injury caused by independent third-party action stand far beyond any limits established by this Court and cannot create standing in this appeal.

While Sierra may counter that, because it was a party before the Board, it automatically has standing here, this Court has specifically held otherwise. *Richards v. Iowa Dept. of Revenue & Fin.*, 454 N.W.2d 573, 575 (Iowa 1990) ("We recognize a person may be a proper party to agency proceedings and not have standing to obtain judicial review. This is evident from the language of the statute allowing only a 'party…who is aggrieved or adversely affected' by agency action to obtain review." (alteration in original)). Any other result would also negate the well-established maxim that standing may be raised at any time. *See Northbrook Residents Ass'n v. Iowa State Dept. of Health Off.*, 298 N.W.2d 330, 331 (Iowa 1980) (concluding standing objection was not waived at the agency level and noting, "Since standing is jurisdictional it can be raised at any time."). In sum, this Court's prior holdings provide no basis for Sierra to have standing in this appeal, and its appeal should be dismissed.

B. The Appeals of the Lamb Group, Puntenney, and Johnson are Moot as the Relevant Interests in Land Have Transferred to Dakota Access and the Pipeline is Fully Constructed and in Operation.

The "Landowners" – the Lamb Group, Puntenney and Johnson – seek relief from the use of eminent domain to condemn easements across their properties. Those issues, however, are no longer live – Dakota Access has acquired all requisite easements; the ground was cleared and trenched; the pipeline was installed; the ground was restored; and the pipeline has been fully operational for months. This case has become moot with the passage of time. *See Martin-Trigona v. Baxter*, 435 N.W.2d 744, 745 (Iowa 1989) ("A moot case is one that no longer presents a justiciable controversy because the issues involved have become academic….").

In *Welton v. Iowa State Highway Commission*, property had been condemned for purposes of installing a road, and the road had already been constructed. 227 N.W. 332, 333 (Iowa 1929). The Court held the property owner's challenge to the condemnation moot because the challenged road had already become an established fact. *Id.*; *see also Lewis*, 703 N.W. 2d at 184.

Similarly, in *Porter v. Board of Supervisors*, the plaintiffs sought to enjoin the county from condemning a right-of-way for installing a drainage ditch through their lands. 28 N.W.2d 841, 841 (Iowa 1947). This Court

affirmed the district court's denial of the requested injunction, noting that the appeal had been rendered moot because the ditch had already been dug, and concluding, "Under these circumstances the construction of the ditch became an establishe [sic] fact before the case was submitted to us for decision." *Id*. at 844.

As in *Welton* and *Porter*, the condemnation for and installation of DAPL has "become an established fact." With the completion of DAPL, "substantial improvements have been made to the property that would place it beyond the power of the court to restore the parties to their former positions." *See Lewis*, 703 N.W.2d at 184. The ground has been cleared, graded, trenched, a 30 inch pipeline installed, the trench back-filled, and the property restored in accordance with state land restoration rules.[27]

This result should be no surprise to Appellants. Before the district court, when seeking an (inexcusably belated) stay,[28] Appellants argued it was critical that the stay be issued because the case would become moot within days. While Appellants may suggest myriad reasons why their controversy is allegedly now live, Appellants should not be able to blithely

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[27] *See* Iowa Admin. Code 199—9.1 *et seq.*

[28] The stay was denied and the denial was not appealed. *See* August 21, 2016 Ruling on Petitioners' Motion for Stay and August 29, 2016 Ruling on Petitioners' Motion for Stay, Case No. CVCV051997 (Polk Cty. Aug. 21, 2016; Aug. 29, 2016).

make inconsistent representations to Iowa's courts. In a brief supporting their Motion for Stay to the district court, Appellants argued, "[u]ntil the pipeline trench is actually dug, Appellants' claims are not moot."[29] Similarly, Appellants' Brief in Support of their Motion for Stay alleged, "Once the pipeline trench is dug, the harm to Appellants will be *permanent and irreparable*. No order of this Court *or any amount of damages* can repair the damage…."[30] Perhaps more directly, at the hearing on their motion, Appellants argued that once the pipeline was constructed on their properties, "the entire petition for judicial review is an interesting academic effort but can get them no relief."[31] Appellants' admission matches precisely this Court's test for mootness: that the issue has become academic. Appellants' claims challenging the Board's authorization and Dakota Access's exercise of eminent domain are therefore moot.

[29] Petitioners' Reply Brief in Support of Motion for Stay at 4 (App. 1259).

[30] Petitioners' Brief in Support of Motion for Stay at 1 (App. 1208) (emphasis added).

[31] Excerpt of Transcript of August 19, 2016 Hearing on Motion for Stay, at 5:12 – 16 (App. 1275).

II. THE BOARD PROPERLY CONCLUDED THAT DAPL WOULD PROMOTE THE PUBLIC CONVENIENCE AND NECESSITY AND APPROPRIATELY GRANTED A PERMIT UNDER IOWA CODE CHAPTER 479B.

A. Preservation of Issue and Standard of Review.

Dakota Access agrees that Appellants have preserved this issue for appellate review. While the general standard of review of agency action is for errors at law, *see S.E. Iowa Co-Op. Elec. Ass'n v. Iowa Utils. Bd.*, 633 N.W.2d 814, 818 (Iowa 2001), this issue includes legal interpretation, factual findings, and application of law to facts by the Board. Dakota Access maintains all such determinations by the Board are entitled to deference, as discussed throughout this section. This Court has recognized, because agency determinations are afforded considerable deference, "the majority of disputes are won or lost at the agency level." *Id.* at 818.

B. The Board Properly Interpreted and Applied the Public Convenience and Necessity Standard.

Pursuant to Iowa Code § 479B.9, the Board may grant a permit if the Board determines the project will "promote the public convenience and necessity." The statute does not define "public convenience and necessity," and the Board therefore applied a well-reasoned interpretation requiring a balancing test, based on this Court's existing precedent. In its *Final Order*,

the Board set forth the Court's precedents interpreting the public convenience and necessity standard[32] before explaining,

> Perhaps the most instructive case for determining and understanding the applicable standard is *South East Iowa Co-Op. Elec. Ass'n v. Iowa Utilities Board*, 633 N.W.2d 814 (Iowa 2001). That case reviewed the standards applicable to an electric transmission line franchise proceeding under Iowa Code chapter 478, where the test is whether the proposed line is "necessary to serve a public use" and "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest" (*see* Iowa Code § 478.4), rather than the "promote the public convenience and necessity" test applicable in this case, but the tests are sufficiently similar that the analysis should also be similar. In each type of proceeding, the Board must consider and balance concepts relating to public use, public benefits, and public and private costs and detriments. In *South East Iowa Co-Op*, the Court approved of the Board's process, which "balanced all of these factors and determined the substantial benefits outweighed the costs…." (633 N.W.2d at 821.)
>
> Pursuant to Iowa Code § 479B.9, the Board is applying the "public convenience and necessity" test as a balancing test, weighing the public benefits of the proposed project against the public and private costs or other detriments as established by the evidence in the record.

Final Order at 16.

Despite the Board's reasoned approach based upon controlling precedent, Sierra argues the Board improperly applied the public

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[32] *See Final Order* at 14 – 15 (discussing *Appl. of Nat'l Freight Lines, Inc. v. Iowa State Com. Comm'n*, 40 N.W.2d 612 (Iowa 1950); *Thomson v. Iowa State Com. Comm'n*, 15 N.W.2d 603 (Iowa 1944); *Wabash, C. & W. Ry. v. Com. Comm'n*, 141 N.E. 212 (Ill. 1923); and other precedent).

convenience and necessity standard because the standard requires a project to provide direct services to Iowa residents. Sierra's argument is without merit for a number of reasons: it is contrary to U.S. and Iowa Supreme Court precedent interpreting the public convenience and necessity standard; it is contrary to the very enactment of Iowa Code chapter 479B; and interpreting the standard as Sierra proposes would violate the Commerce Clause.[33]

1. The Board's Interpretation of "Public Convenience and Necessity" is Entitled to Deference.

The standard of review applicable to the Board's interpretation of statutory terms depends upon whether the legislature "clearly vested" the Board with interpretative authority. As this Court has explained,

> When the legislature has clearly vested the interpretation of a law in the discretion of the agency, the court only reverses the agency if its ruling is "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law…." However, when the legislature has not clearly vested the interpretation of a law in the discretion of the agency, the court applies a clearly erroneous standard.

Off. of Consumer Advoc. v. Iowa Utils. Bd., 744 N.W.2d 640, 643 (Iowa 2008) (quoting Iowa Code § 17A.19(10)(*l*)). While this Court has not established bright-line rules dictating when deference must be given to an agency's interpretation of law, it has generally held that a court:

[33] U.S. Const. art. I, § 8, cl. 3 ("Commerce Clause").

> must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

Renda v. Iowa Civ. Rights Comm'n, 784 N.W.2d 8, 11 (Iowa 2010) (quoting Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 63 (1998)).

A review of the language, context, purpose, and practical considerations involved with Iowa Code § 479B.9 indicates the legislature clearly vested the Board with authority to interpret the public convenience and necessity standard. First, the legislature did not itself define the term "public convenience and necessity" in the statute, which weighs in favor of finding interpretive authority exists and distinguishes this case from those cited by Appellants. *See Renda*, 784 N.W.2d at12 (collecting cases); *see also SZ Enterprises, LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441, 450 (Iowa 2014) ("[W]here the general assembly provides an agency with a definition of legal terms in a statutory provision, [that] is a significant factor weighing against an interpretation requiring deference."). That the legislature chose

not to define "public convenience and necessity" yet tasked the Board with applying it indicates the legislature intended the Board to interpret the term.

In fact, the legislature has tasked the Board with applying the public convenience and necessity standard in multiple contexts, while never defining the term – a fact that further indicates it has entrusted that interpretation to the Board. *See* Iowa Code § 479B.9; *id.* § 479.12 (requiring the IUB to find that services promote the public convenience and necessity in issuing permits for operating an intrastate natural gas pipeline); *id.* § 476.29 (now repealed, but from 1992 until its sunset in 2017 requiring the IUB to issue certificates of public convenience and necessity for the operation of landline telephone service).

Similarly, the overall scheme of Iowa Code chapter 479B provides extensive authority to the Board. The relevant enabling statute, § 479B.1, provides,

> It is the purpose of the general assembly in enacting this law ***to grant the utilities board the authority to implement certain controls*** over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline or underground storage facility within the state, ***to approve the location and route of hazardous liquid pipelines***, and ***to grant rights of eminent domain where necessary***.

Iowa Code § 479B.1 (emphasis added). Moreover, § 479B.9 provides that the Board "may grant a permit in whole or in part upon terms, conditions, and restrictions as to location and route as it determines to be just and proper" where "the board determines that the proposed services will promote the public convenience and necessity." And § 474.9 provides that "[t]he utilities board has general supervision of all pipelines…pursuant to chapter[]…479B." Thus, the enabling statute and statutory scheme evince intent to provide the Board with extensive authority to interpret and apply the statutes governing pipeline permitting.

In addition, the Board cannot carry out its duties without interpreting the term. The Board is required to grant a pipeline permit under § 479B.9 where "the board determines that the proposed services will promote the public convenience and necessity." In *Renda*, this Court reviewed several similar cases and summarized its prior holding in *City of Marion v. Iowa Department of Revenue & Finance,* 643 N.W.2d 205 (Iowa 2002), explaining,

> In that case, we confronted the question of whether the department had correctly interpreted the term "athletic sport" to include swimming. We noted that "athletic sport" was not defined in the statute and that the department had been given the authority to create rules "necessary and advisable for its detailed administration." We concluded that because the term was not defined in the statute and because the department must necessarily interpret the term in order to carry out its duties, the

> power to interpret the term was clearly vested in the department and deference was therefore given.

Renda, 784 N.W.2d at 12 (citations omitted) (quoting *City of Marion*, 643 N.W.2d at 206 – 07).

The same is true here. The legislature has tasked the Board with considering permit applications and issuing permits where doing so will "promote the public convenience and necessity" without defining the term in the statute. As in *City of Marion*, "because the term [is] not defined in the statute and because the [Board] must necessarily interpret the term in order to carry out its duties, the power to interpret the term was clearly vested in the [Board]." *Renda*, 784 N.W.2d at 12.

That the legislature tasked the Board with determining whether a project meets the public convenience and necessity standard without defining that term indicates the legislature vested the Board with the power to interpret its meaning when applying it. *See S.E. Iowa Co-Op.*, 633 N.W.2d at 819 (deferring to Board's interpretation of the "necessary to serve a public use" and "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest" tests governing electric transmission franchising). This Court has "frequently relied upon the Board's expertise in interpreting Iowa Code chapter 478." *Id*. There is

nothing to indicate a different result would be warranted under the very similar chapter 479B.

Because the Board's interpretation is entitled to deference, and the interpretation, based upon this Court's precedent, cannot be said to be "irrational, illogical, or wholly unjustifiable," the Board's determination should be upheld on this basis alone.[34]

2. The Dakota Access Pipeline Provides Service to the Public; Direct Service to Iowa Residents Is Not a Requirement of the Public Convenience and Necessity Standard; and The Board's Interpretation of that Standard was Proper.

Sierra attempts to argue that the Board misinterpreted the public convenience and necessity standard because, they assert, the project must literally provide services to the public. To be clear, Sierra does not deny that DAPL will serve members of the general public; that DAPL will transport oil from producers in North Dakota to refiners in Illinois and beyond; or that DAPL is a common carrier under the Interstate Commerce Act and FERC regulations. Sierra also does not deny that DAPL will serve nine third-party shippers who have already signed contracts to utilize a portion of DAPL, as

[34] Notably, even if interpretive authority is not vested in the Board as Sierra suggests, the Board's interpretation of the statute would still be reviewed for clear error. *Off. of Consumer Advoc.,* 744 N.W.2d at 643. As the Board followed this Court's precedent, most particularly *South East Iowa Co-Op,* the Board's interpretation is not clearly erroneous.

well as "walk-up" shippers for whom FERC requires that Dakota Access reserve 10% of DAPL's capacity. Rather, Sierra argues DAPL does not provide service to the public because there must be a direct service to residents of Iowa. Sierra's arguments are mistaken, as they ignore the holdings of this Court, the very enactment of Iowa Code chapter 479B, and the Commerce Clause of the U.S. Constitution.

Sierra attempts to distinguish the cases relied upon by the Board, suggesting that merely because a fact was present in a prior case, it was the basis of the Court's holding in that case. Sierra is mistaken. In *Thomson v. Iowa State Commerce Commission*, this Court explained that the public convenience and necessity standard is a flexible one:

> The word 'convenience' is much broader and more inclusive than the word 'necessity.' Most things that are necessities are also conveniences, but not all conveniences are necessities. The word 'necessity' has been used in a variety of statutes. It has been generally held to mean something more nearly akin to convenience than the definition found in standard dictionaries would indicate. So it is said the word will be construed to mean not absolute, but reasonable, necessity.

15 N.W.2d 603, 606 (Iowa 1944); *see also In re MidAmerican Energy Co.*, Docket No. RMU-2009-0003, "Final Decision and Order" (Iowa Utils. Bd., Dec. 14, 2009), at 17 – 18 (finding "need" to be flexible, looking to "individual circumstances," and considering "public policy factors" including fuel diversity, lower-cost energy, and economic development),

aff'd sub nom NextEra Energy Res., LLC v. Iowa Utils Bd., 815 N.W.2d 30 (Iowa 2012); *Federal Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 23 (1961) ("[T]he term 'public convenience and necessity' connotes a flexible balancing process….").

In an attempt to ignore what *Thomson* actually says about the law – that "public convenience and necessity" is not absolute – Sierra argues that because *Thomson* involved an application by a motor freight carrier for a permit to carry freight within Iowa, direct service to residents must be a requirement of the public convenience and necessity standard. Sierra's argument misses the point. While the case involved a motor carrier in Iowa, nothing in *Thomson* indicates that the provision of services directly to Iowa residents is a requirement of the public convenience and necessity standard. *See generally* 15 N.W.2d 603.

Likewise, the fact that *South East Iowa Co-Op.* happened to involve electric transmission within Iowa does not dictate that direct service to Iowans is a requirement of the "necessary to serve a public use" and "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest" standards governing electric transmission franchises. The actual import of *South East Iowa Co-Op* – its legal holding – makes clear that "economic considerations alone" are sufficient (DAPL

produced evidence of an economic benefit to Iowa estimated at $1 billion), and that this Court approved of the Board using a balancing test to interpret a standard similar to that applicable in this case. 633 N.W. 2d at 823.

Sierra's argument that only service directly to Iowans qualifies under the public convenience and necessity standard is mistaken for additional reasons as well. As an initial matter, Dakota Access disagrees with the premise that DAPL does not directly serve Iowans. The economic benefits of DAPL are absolutely direct – expenditures and taxes paid in Iowa, and jobs for Iowans. But given Iowa's high use of petroleum products and production of none, a robust shipping network for those products and the oil they are made from certainly does benefit Iowans, and does so directly. To see this is true, one need only imagine Iowa if other states rejected the infrastructure needed to carry crude oil – Iowa would have no gasoline, no diesel fuel, and no anhydrous ammonia. Iowa benefits from the regional and national network for shipping raw fuel stock and subsequently refined products. Interstate crude oil pipelines must be viewed on a regional and national basis.[35] *See Pliura Investors v. Illinois Com. Comm'n*, 942 N.E.2d

[35] This is particularly evident for pipelines like DAPL, which are considered critical national infrastructure by the U.S. Department of Homeland Security. *See* https://www.dhs.gov/transportation-systems-sector ("Pipeline Systems consist of more than 2.5 million miles of pipelines spanning the

576, 584 (Ill. App. Ct. 2010) (rejecting pipeline opponents' argument that the utility commission lacked authority to consider "regional, national, or global benefits" in determining public convenience and necessity).

Even accepting Sierra's premise that Iowans only benefit indirectly from DAPL, Sierra's argument still fails for several reasons. First, Sierra's reading of the standard would render the enactment of chapter 479B meaningless. Iowa has neither crude oil production nor refineries. When chapter 479B was enacted, the legislature was presumably aware of those facts. Nonetheless, the legislature enacted chapter 479B, which expressly applies to crude oil pipelines, and only to ***inter***state pipelines. Iowa Code § 479B.2 If Sierra's argument were correct and the public convenience and necessity standard required a pipeline to serve producers or refineries in Iowa, chapter 479B would be meaningless.

Further, as the Board noted in its *Final Order*, consideration of only direct benefits to Iowans would violate the Commerce Clause. *See Final Order* at 21 (*citing In re Appl. of Nebraska Public Power Dist.*, 354 N.W.2d 713, 718 (S.D. 1984)). The Board, while correct in its result, understates the magnitude of the constitutional problem in trying to look solely to in-state

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country and carrying nearly all of the nation's natural gas and about 65 percent of hazardous liquids, as well as various chemicals.").

benefits and costs when granting a permit or condemnation authority for an interstate project. A federal court in South Dakota reached a similar result, striking down a state law limiting eminent domain to railroads that provided in-state shipping solely for products that were produced, mined, grown or consumed in the state. *Dakota & Minnesota E. R.R. Corp. v. S. Dakota*, 236 F. Supp. 2d 989, 1015 – 16 (D.S.D. 2002).[36] That court concluded the law "overtly discriminate[d] against interstate commerce," holding that "[s]uch an economic protectionist stance is precisely what is forbidden by the dormant Commerce Clause." *Id*. at 1016. This is not surprising: providing state-granted advantages like permits or eminent domain in a way that favors in-state rather than out-of-state or interstate economic interests, burdens interstate commerce, or would create economic Balkanization if numerous states had the same approach, is routinely rejected. *See, e.g.*, *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F. 3d 1151 (7th Cir. 1999).[37] As the

[36] *Aff'd in part, vacated in part on other grounds, remanded*, 362 F.3d 512 (8th Cir. 2004).

[37] *See also, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (the practical effect of a statute is "evaluated not only by considering the consequences of the statute itself, but also by considering…what effect would arise if not one, but many or every, State adopted similar legislation"); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (states may not "discriminate against an article of commerce by reason of its origin or destination out of State"); *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) ("'discrimination' simply means differential treatment of in-state and

Seventh Circuit has emphasized, "it is essential to ask whether the interaction of many extraterritorial laws similar to [the law in question] would serve as a clog on interstate commerce." *Id*. at 1153. There can be no question that if every state looked only to its own risks without consideration of whether any other state would benefit, beneficial regional and national infrastructure projects – oil pipelines, gas pipelines, anhydrous ammonia pipelines, electric transmission lines – would rarely if ever get completed. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (holding "the states are not separable economic units" and quoting *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935) for the proposition that "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation"). The discrimination in favor of wholly in-state projects – and the burden on interstate projects – that would result from looking solely at an in-state cost-benefit analysis to justify a permit or eminent domain would create a constitutional violation.

In sum, the public convenience and necessity standard does not require that a project provide direct services to Iowa residents. Such an interpretation would be contrary to U.S. and Iowa Supreme Court precedent,

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out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid.")

the enactment of Chapter 479B, and the Commerce Clause. Moreover, it would simply be bad policy: Iowa is entirely dependent on fuels carried across state lines through shipping infrastructure. Iowa inarguably benefits from pipelines, and specifically from DAPL. The Board properly applied the public convenience and necessity standard. Sierra's arguments to the contrary should be rejected.

C. The Remainder of Sierra's Arguments – However they are Described – are Pure Substantial Evidence Claims That Cannot Succeed.

The great majority of Sierra's brief merely re-litigates the facts that were before the Board. Sierra argues over the relative risk of rail versus pipeline transport, or the long-term likelihood of various levels of productivity of Bakken's oil fields. Sierra's argument, however, is never that the Board's position lacked evidence – of course the Board's 159-page opinion based on a 10-day hearing and a 3,500 page transcript is factually well-supported. On every issue required by statute or rule, Dakota Access presented testimony of extraordinarily credible witnesses: Guy Caruso, former director of the U.S. Energy Information Agency and international energy economist[38]; Stacey Gerard, former director of the U.S. Pipeline and

[38] Exhibit GC Direct (App. 63 – App. 75); Exhibit GC Reply (App. 78 – App. 86) (discussing the need for DAPL, energy security, and pipeline safety).

Hazardous Materials Safety Administration[39]; and numerous additional experts with extensive experience in the engineering, development, and economics of pipelines[40].

Sierra's argument is that the Board failed by finding the evidence in favor of DAPL more compelling than that presented by DAPL's opponents. This argument has no merit. The Board's factual determinations are clearly entitled to deference and its determinations as to the weight and credibility of evidence are not subject to review. *See, e.g., Arndt v. City of Le Claire*, 728 N.W.2d 389, 394 (Iowa 2007) (relying on *Tim O'Neill Chevrolet, Inc. v. Forristall,* 551 N.W.2d 611, 614 (Iowa 1996) for the proposition that "it is not the task of the reviewing court 'to weigh the evidence or the credibility of the witnesses'"); *S.E. Iowa Co-Op.*, 633 N.W.2d at 818 (explaining that because of the deference due to agency determinations "the majority of disputes are won or lost at the agency level" (quoting *Northwestern Bell Tel. Co. v. Iowa Utils. Bd.*, 477 N.W.2d 678, 682 (Iowa 1991)).

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[39] Exhibit SG Direct (App. 155 – App. 173); Exhibit SG Reply (App. 174 – App. 189) (discussing pipeline safety).

[40] *See, e.g.*, Exhibit DRD Direct (App. 283 – App. 309) (discussing energy economics and project need); Exhibit CAF Direct (App. 108 – App. 132); Exhibit CAF Supplemental (App. 133 – App. 139); Exhibit CAF Reply (App. 140 – App. 149) (discussing project engineering and construction); Exhibit MH Direct (App. 190 – App. 201); Exhibit MH Reply (App. 202 – App. 233) (discussing routing, intergovernmental consultation, and environmental issues).

The only legal argument Sierra makes pertains to the definition of "public convenience and necessity," and the Board's interpretation is legally sound. As the rest of Sierra's brief simply re-argues the evidentiary case, the Court can and should make quick work of Sierra's factual challenges to the *Final Order*.

III. ONCE A PERMIT WAS PROPERLY ISSUED, THE IOWA LEGISLATURE GRANTED DAKOTA ACCESS THE RIGHT OF EMINENT DOMAIN. SUCH A GRANT IS CONSTITUTIONAL UNDER THE PUBLIC USE REQUIREMENT.

The Landowners spend several pages imploring the Court to ignore federal constitutional law and instead announce its own definition of "public use" for purposes of a constitutional taking. Specifically, Landowners ask the Court to elevate the unsuccessful dissenting position in *Kelo*[41] – more accurately, Landowners' inaccurate gloss on that opinion – to the general constitutional law of takings in Iowa. This extended argument is a strawman: no one suggests that Iowa cannot reach its own standard for public use under the Iowa Constitution. In the end, however, whether under this Court's precedents or those of the U.S. Supreme Court, looking at relevant cases, Iowa statutes, good policy, and even the *Kelo* dissent, the takings conducted for DAPL are easily constitutional.

[41] *Kelo v. City of New London*, 545 U.S. 469 (2005).

A. Preservation of Issue and Standard of Review.

Dakota Access agrees that certain of the Landowners preserved this constitutional issue for appellate review. Constitutional issues are reviewed de novo by an appellate court. *Off. of Consumer Advoc. v. Iowa State Com. Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991). "Statutes are presumed constitutional, imposing on the challenger the heavy burden of rebutting that presumption." *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001). This includes statutes authorizing the use of eminent domain. *CMC Real Estate Corp. v. Iowa Dept. of Transp.*, 475 N.W.2d 166, 169 (Iowa 1991) ("It is initially for the legislature to determine whether private property is being taken for a public use.").

B. The Scope of the Allowable Use of the Eminent Domain Power is for the Legislature to Determine, and in This Case the Legislature has Spoken Unambiguously in Iowa Code § 479B.16.

While this case may have garnered more publicity than other eminent domain cases, that does not mean it is novel or complicated. To the contrary, the use of eminent domain by Dakota Access is entirely consistent with both Iowa statutes and constitutional precedent. To reach any other conclusion would require ignoring long-established maxims for addressing challenges to statutes, and overturning not one but many prior lines of cases

by this Court, as well as breaking with well-reasoned positions of state and federal courts nationwide.

Appellants raise a challenge to whether DAPL is a "public use" as required under the Iowa and federal constitutions[42] for a taking to be lawful. Following proper legal analysis, there is little question that a pipeline carrying commodity fuels for shippers other than the pipeline owner is a public use for eminent domain purposes.

The important starting point is that "it is initially for the legislature to determine whether private property is being taken for a public use. Courts should not substitute their judgment as to what constitutes a public use unless the use is palpably without reasonable foundation." *CMC Real Estate*, 475 N.W.2d at 169 (*citations omitted*); *Bankhead v. Brown*, 25 Iowa 540, 545 – 47 (Iowa 1868) ("When the public exigencies demand the exercise of the power of taking private property for the public use, is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.…Mineral wealth is not to be locked up forever, beyond the

[42] There is little substantive difference in the protections under the two constitutions, and this Court has previously held that it finds federal law persuasive on eminent domain issues. *Kingsway Cathedral v. Iowa Dept. Of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006) ("Because of this similarity regarding takings, we consider federal cases interpreting the federal provision persuasive in our interpretation of the state provision.").

power of the legislature to force a public passage to the mines…." (citations omitted)); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239 (1984); *see also Milligan v. City of Red Oak*, 230 F.3d 355, 359 (8th Cir. 2000). These legislative determinations are entitled to a strong presumption of validity. *See Milligan*, 230 F.3d at 359 ("Legislation calling for condemnation enjoys the same presumption in its favor as when the constitutionality of [any other] statute is challenged").

In the present case, the legislature has spoken explicitly, determining that crude oil pipelines are entitled to eminent domain authority. Iowa Code chapter 479B expressly applies to interstate crude oil pipelines, *see* § 479B.2(2), and where the Board has found it proper to grant a permit under that chapter, the legislature mandated that the applicant "***shall*** be vested with the right of eminent domain." Iowa Code § 479B.16 (emphasis added). While this is the most specific and relevant statute to the facts in this case, the legislature has made similar provision in Iowa Code § 6A.22, the general eminent domain statute, where "public use" is defined as including "[t]he acquisition of any interest in property necessary to the function of a public or private utility, ***common carrier***, or airport…." Iowa Code § 6A.22(2) (emphasis added).

The specific legislative grant in Iowa Code § 479B.16 is, under Iowa and federal law, binding and not to be overturned by a court unless the legislature's judgment is "palpably without reasonable foundation." *See CMC Real Estate*, 475 N.W.2d at 169. Appellants cannot come close to clearing that high bar: the legislative decision (and its application in this case) was not only reasonable, but consistent with the mainstream of cases both in Iowa and across the country. As early as 1943, this Court upheld language nearly identical to that in the current § 479B.16 against many of the same challenges Appellants now bring. *See Browneller*, 8 N.W.2d at 479 ("The power of eminent domain granted to pipe line companies by chapter 383.3 [a predecessor to chapter 479B] is broad and general in its terms. It is not for this court to say that the legislature did not have the power to provide for the right of condemnation as provided for in said chapter."). Even earlier, however, the U.S. Supreme Court had similarly deferred to a state legislature, providing a glimpse at the practical and economic reasons why provisions like Iowa Code § 479B.16 are necessary:

> In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.

Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906).

Over time, in case after case, across a wide variety of jurisdictions, courts have found pipelines for the shipping of fuels are public uses, routinely rejecting the kinds of arguments raised by Appellants. In 1958, for example, the Mississippi Supreme Court held that a "company organized to transport condensate or oil by pipeline is organized for a public use for which private property may be condemned," even though (as with DAPL) the pipeline would not directly serve any retail customers – it was purely for shipping from production to a refinery. *See Ohio Oil Co. v. Fowler*, 100 So.2d 128, 130 – 31 (Miss. 1958). This basic premise, that if a legislative body allows the use of eminent domain for pipelines then the court should not interfere, has since been repeatedly reaffirmed over many decades. *See, e.g.*, *Peck Iron & Metal Co. v. Colonial Pipeline Co.*, 146 S.E.2d 169, 172 (Va. 1966) (holding the "economical and efficient transportation" of "highly used commodities. . . is obviously in the public interest" and noting that "[o]bviously,… a pipeline company must have rights of way from the source of supply to the places of consumption"); *Crawford Family Farm P'ship v. TransCanada Keystone Pipeline L.P.*, 409 S.W.3d 908,922 – 24 (Tex. App. 2013) (holding a pipeline satisfied public use requirements where there was a "reasonable probability" it would carry product for unaffiliated entities

because there would be an "open season" for interested shippers to subscribe, various third-party shippers had made commitments to utilize it, and a standard tariff had been filed with FERC)[43]; *Thompson v. Heineman*, 857 N.W.2d 731, 764 – 65 (Neb. 2015) (finding a public use where the pipeline would "offer[] to transport the commodities of others who could use its service, even if they [were] limited in number")[44]; *Sunoco Pipeline L.P. v. Teter*, 63 N.E. 3d 160, 172 – 76 (Ohio Ct. App. 2016) (finding a pipeline with no "off-ramps" in Ohio met the public use test because hydrocarbon fuel "provides some of the necessities of life" and because "it seems certain" that refined and manufactured products whether fuels or additives and plastics would return to Ohio).[45] It has in fact become "black letter law" that private property may be condemned for oil pipelines. *See* 2A NICHOLS ON EMINENT DOMAIN § 7.05[5][c].[46] As a result, neither the legislature's grant

[43] All of these are also true for DAPL.

[44] While a four-justice majority of the seven-justice Court joined the public use finding, Nebraska law requires a five-justice supermajority to invalidate the statute giving authority for pipeline routing to the governor. As a result, the decision was not conclusive, but remains persuasive.

[45] *Appeal on other grounds granted,* 76 N.E.3d 1207 (Ohio, Jun. 21, 2017) (table decision).

[46] Landowners' reliance on cases where other states have ruled based on their own state's statutes is misplaced, and is not indicative of some new wave of authority regarding pipeline infrastructure. Those cases are specific to the state statutes they interpret, relate to other activities, or simply decide issues of state law that are already settled in Iowa. For example, in

in Iowa Code § 479B.16 nor the IUB's application of it in this case can be said to be "palpably without reasonable foundation" as to the scope of appropriate public use.

Nonetheless, even as Appellants argue the need for strict construction of eminent domain statutes, they also argue this Court should apply restrictions that are found nowhere in the Iowa Code. For example, they argue DAPL is not a public use because it does not directly "serve any Iowa citizen or business" and any benefits to Iowans are not "measurable." Lamb Br. 33, 35. They also argue the IUB was incorrect to consider benefits that would accrue outside of Iowa. Lamb Br. 38 *et seq.* Despite their repeated references to benefits that are direct and measurable or limited to Iowans, the

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Robinson Township v. Pennsylvania., 147 A.3d 536 (Pa. 2016), the court determined whether the state's natural gas storage statute, which allowed the exercise of eminent domain *with**out*** a certificate of public convenience and necessity from the regulatory agency, was constitutional. Obviously, the applicable Iowa statute (Iowa Code § 479B.9) requires a finding of public convenience and necessity from the Board, a requirement that has been in place for decades in Iowa. Similarly, in *Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850 (W. Va. 2016), the West Virginia legislature had not defined whether the natural gas pipeline involved was a public use, whereas the Iowa legislature has determined that crude oil pipelines, *see* Iowa Code § 479B.16. In that case, the West Virginia Supreme Court determined whether a pipeline that was *not* a common carrier and transported *only its own products* could be a public use – a question that this Court settled more than 50 years ago. *See Mid-America Pipeline Co. Iowa State Com. Comm'n*, 114 N.W.2d 622, 624 (Iowa 1962) (ruling against a finding of public use because, "Northern intends to handle only its own products by pipeline and is not a common carrier of such products").

Lamb Appellants do not provide a single citation to support their argument that such requirements actually exist.[47] None of these limitations appear in the statutory language, nor are they required by any constitutional decisions of this Court or the U.S. Supreme Court. To the contrary, Appellants' argument – that to be a "public use" the property condemned or the use of the condemned property must benefit the general public – has been flatly rejected by the U.S. Supreme Court:

> The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion,…directly enjoy or participate in any improvement in order [for it] to constitute a public use."

Midkiff, 467 U.S. at 244 (alteration in original) (quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923). The "public use" test is simply not as stringent as Appellants suggest. Appellants' unsupported arguments cannot overcome the presumption that § 479B.16 is constitutional – or its plain

[47] Noteworthy in this regard is that pipeline opponents recently sought legislation that would have further restricted the use of eminent domain for oil pipelines; the legislature did not pass those proposed policy changes. *See* Iowa S.F. 506 (2015); Iowa H.S.B. 249 (2015). Even if Appellants' suggested changes to the law had merit, the absence of such language in the existing statute is fatal to the appeal; the policy change would have to come from the legislature. *See also Brakke v. Iowa Dept. of Nat. Res*, 897 N.W.2d 522, 533 – 34 (Iowa 2017) ("[A] court may not ignore the clear language of a statute and impose its own ideas through the guise of construction, even if it is the best way to promote public welfare and achieve a desirable result.").

language providing eminent domain authority to interstate oil pipelines that meet the test of public convenience and necessity.

C. Alternatively, DAPL is a Common Carrier Which is also Expressly Defined as a Public Use in Iowa Code § 6A.22.

Dakota Access believes the proper way to resolve the eminent domain challenge in this case is to look to the plain language of the statute most directly on point – Iowa Code § 479B.16 – which provides that interstate crude oil pipelines granted a permit by the Board shall be vested with the power of eminent domain. There is an alternative and equally expeditious way to resolve this challenge, however, and that is for the Court to confirm that DAPL is a common carrier under Iowa Code § 6A.22. Iowa Code chapters 6A and 6B are the general statutes on eminent domain, substantive and procedural, respectively. Section 6A.22 provides, in relevant part,

> 1. …[T]he authority of an acquiring agency to condemn any private property through eminent domain may only be exercised for a public purpose, public use, or public improvement….
>
> 2. a. "Public use", "public purpose", or "public improvement" means one or more of the following: . . .
>
> > (2) The acquisition of any interest in property necessary to the function of a public or private utility, common carrier, or airport or airport system.

Appellants do not contest that if DAPL is a common carrier, the use of eminent domain was constitutional. Appellants incorrectly argue, however,

that DAPL is not a common carrier. This argument reflects, at best, that Appellants do not properly understand the term "common carrier," particularly in the context of utilities; at worst, Appellants are misstating the test to the Court – Appellants repeatedly have omitted key, relevant language in quotes in their briefs from controlling Iowa cases.

This Court has explained the distinctive characteristic of a common carrier is that it holds itself out as ready to engage in the transportation of goods or persons for hire; it need not serve all the public all the time:

> Iowa law has defined a common carrier as "one who undertakes to transport, indiscriminately, persons and property for hire." ***We have ruled that the distinctive characteristic of a common carrier is that it holds itself out as ready to engage in the transportation of goods or persons for hire, as public employment, and not as a casual occupation***. A common carrier holds itself out to the public as a carrier of all goods and persons for hire. ***We, however, have also recognized that a common carrier need not serve all the public all the time***.

Wright v. Midwest Old Settlers & Threshers Ass'n, 556 N.W.2d 808, 810 –11 (Iowa 1996) (emphasis added) (citations omitted) (quoting *Employers Mut. Cas. Co. v. Chicago & North Western Transp. Co.*, 521 N.W.2d 692, 693 (Iowa 1994)) (citing *Kvalheim v. Horace Mann Life Ins. Co.*, 219 N.W.2d 533, 535 (Iowa 1974)); *see also Circle Exp. Co. v. Iowa State Com. Comm'n*, 86 N.W.2d 888, 893 (Iowa 1957) ("[T]he distinctive characteristic of a common carrier is that he holds himself out as ready to

engage in the transportation of goods for hire, as a public employment, and not as a casual occupation, and that he undertakes to carry for all persons indifferently, ***within limits of his capacity and the sphere of the business required of him***.") (emphasis added).

Appellants suggest DAPL is not a common carrier because not everyone can use the pipeline at any given time due to capacity limitations, and because different types of users are subject to different terms and conditions (i.e., committed shippers versus walk-up shippers).[48] Appellants fundamentally misunderstand what makes a carrier a "common carrier." The capacity argument is plainly incorrect under *Circle Express*, 86 N.W.2d

[48] Notably, some Appellants in this case have conceded that Dakota Access is a common carrier in related proceedings. *See Marian Johnson v. Dakota Access, LLC*, Cherokee Cty. Case No. EQCV024957, Petitioners' Brief Supporting its Resistance to Respondent's Motion to Dismiss at 24 ("Although it is not a utility, Dakota Access is a pipeline company under § 479B.2(4), ***and a "common carrier"*** under the federal Interstate Commerce Act.") (emphasis added). Appellants may argue they have conceded DAPL is a common carrier only under federal law; that suggestion is disingenuous. Appellants set forth no reason why an Iowa court should not apply the same definition federal courts apply – this Court often looks to federal law in construing state law, including constitutional law. *See, e.g.*, *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 340 (Iowa 2015) ("[W]e often look to federal cases when interpreting the state due process clause."); *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 767 n.2 (Iowa 2004) ("[W]e look to federal decisions for guidance in interpreting our state statute."); *Pub. Fin. Co. v. Van Blaricome*, 324 N.W.2d 716, 725 (Iowa 1982) (when construing the Iowa Consumer Credit Code this Court "look[s] to federal courts' interpretations of the analogous Federal Fair Debt Collection Practices Act").

at 893. But Appellants also miss what constitutes the indiscriminate opportunity for any and all persons to use the pipeline: the FERC-approved open seasons. Dakota Access held two open seasons for DAPL where anyone needing to ship crude oil could subscribe to capacity in the pipeline under the same terms and conditions.[49] Similarly, pursuant to FERC regulations, Dakota Access is required to reserve 10 percent of DAPL's capacity for walk-up shippers to utilize on an indiscriminate basis.[50] This equal opportunity to access the pipeline, and the subsequent operation pursuant to a tariff filed with the federal regulator, establish common carriage. *See Sunoco Pipeline*, 63 N.E.3d at 170 – 71; *Ohio Oil*, 100 So.2d at 130 – 31.

In addition, as set forth above, courts around the country have long held that what makes a pipeline a public use is that it provides open access to its relevant users –shippers – not that it must serve every member of the public directly. *See, e.g.*, *Mid-Am. Pipe Line Co. v. Missouri Pac. R. Co.*, 298 F. Supp. 1112, 1123 (D. Kan. 1969) (holding that a pipeline satisfied the

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[49] Exhibit DRD Direct at 5 – 6 (App. 289 – App. 290); IUB Hearing Tr. 175:1 – 176:12 (App. 464 – App. 465); Declaratory Order (FERC, Dec. 24, 2014), *available at* http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14285145.

[50] Exhibit DRD Direct at 4 – 5 (App. 288 – App. 289); IUB Hearing Tr. 1714:20 – 1715:17 (App. Vol. II (Confidential Appendix) 21 –22).

public use test because its owner would "own neither the products transported nor the terminals on the line," the line would have "room to grow in the number of shippers serviced," and its owner had "filed tariffs with the [Interstate Commerce Commission], thereby holding itself ready to transport anhydrous ammonia for all shippers under the terms of that instrument"); *Iowa RCO Ass'n v. Illinois Com. Comm'n*, 409 N.E.2d 77, 80 (Ill. App. Ct. 1980) (holding the public use test was satisfied with respect to an interstate crude oil pipeline from Illinois through Iowa to Minnesota, where evidence showed that "several nonaffiliated companies wished to use the pipeline and that Northern would furnish service to them" and that Northern "would be operating in interstate commerce and would be required …to furnish nondiscriminatory service to its nonaffiliated users and others wishing to do so"); *Linder v. Arkansas Midstream Gas Servs. Corp.*, 362 S.W.3d 889, 897 (Ark. 2010) (rejecting landowners' argument that a natural gas pipeline was not a public use because "it makes no difference that only 'a collection of a few individuals' may have occasion to use the pipeline after its completion," as "the character of a taking, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised" and concluding that "[i]f all the people have the right to use it, it is a public way, although the number who have occasion

to exercise the right is very small") (internal quotation marks and citation omitted).[51]

This Court has indicated the same rule applies here: where the pipeline provides access to shippers other than the pipeline owner, the pipeline is a common carrier and a public use. In *Mid-America Pipeline Co. Iowa State Commerce Commission.*, this Court ruled against a finding of public use, but did so because the pipeline company intended "to handle only its own products by pipeline and is not a common carrier of such products." 114 N.W.2d 622, 624 (Iowa 1962). In the present case, the Board found DAPL has nine shippers, those shippers have signed take-or-pay contracts for ninety percent of the capacity of the pipeline, and ten percent of the capacity would be reserved for walk-up shippers. With respect to the shippers the Board found that "clearly, they represent a portion

[51] *See also, e.g., Crawford Family Farm*, 409 S.W.3d at 922 (finding that to meet the public use test "a pipeline company must demonstrate a reasonable probability that third-party customers will use the pipeline" and holding a crude oil pipeline met that test where the evidence demonstrated the pipeline company would "ship crude petroleum for one or more customers who [would] retain ownership of the oil"); *Peck Iron*, 146 S.E.2d at 172 (concluding a crude oil pipeline met the public use test where "all persons desiring to ship petroleum products by [the owner's] facilities and meeting its requirements and the regulations of the Interstate Commerce Commission [would] be permitted to do so" and reasoning that "'[i]f it is a public way in fact, it is not material that but few persons will enjoy it'") (*quoting Dismal Swamp R. Co. v. John L. Roper Lumber Co.*, 77 S.E. 598, 601 (Va. 1913)).

of the public that demands the services to be provided by this pipeline." *Final Order* at 110. Based upon those facts found by the Board, this Court is entitled to apply law to fact to confirm that DAPL is a common carrier. Such a conclusion is dispositive of the eminent domain issue on appeal: under Iowa law, a common carrier is a constitutional public use for purposes of eminent domain authority.

D. Affirming DAPL's Use of Eminent Domain Would Not be an Expansion or Change in the Law, and Contrary to Appellants' Arguments Nothing in the *Kelo* Dissent or the Post-*Kelo* Amendments to the Iowa Code is to the Contrary.

The Landowners have consistently used a strategy of trying to make this project seem novel or portraying it as a radical change in takings law. As Dakota Access demonstrates above, that is not the case: pipelines for oil and related products have long utilized eminent domain, and networks for shipping such fuels have long stretched across the country. Nonetheless, Appellants seem to argue everything changed with the U.S. Supreme Court's decision in *Kelo*. It is telling, however, that Appellants argue not from the majority opinion that established controlling federal constitutional law, but rather from the dissenting opinion.

To the extent this Court has cited to the *Kelo* dissent for general statements concerning takings law[52], however, it is noteworthy that even under the *Kelo* dissent DAPL's use of eminent domain would be permitted:

> Our cases have generally identified three categories of takings that comply with the public use requirement.… *Two are relatively straightforward and uncontroversial*.… Second, the sovereign may transfer private property to private parties, *often common carriers*, who make the property available for the public's use – such as with a railroad, a public utility, or a stadium…."

Kelo, 545 U.S. at 497 – 98 (O'Connor, J. dissenting) (emphasis added).[53] The passage goes on to note that even this list of permissible uses of eminent domain is "sometimes too constricting and impractical," *see id.*, allowing that the scope of allowable "public use" for the Takings Clause goes well beyond common carriers and other utility and similar uses which fit safely inside any constitutional limits.

Alternatively, Appellants argument that the "majority opinion in *Kelo* has been statutorily pre-empted by the Iowa legislature" is also inapplicable. To be clear, Appellants *are* correct that the 2006 amendments were intended

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[52] *See Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 172 (Iowa 2015).

[53] Appellants' arguments appear to concede eminent domain could lawfully be used for a less safe, less efficient rail line in lieu of DAPL on the exact same route, even were its sole use to carry the same oil for the same shippers. Appellants offer no rationale to justify their elevation of the form of transportation over its function in determining whether a public use exists.

to place limitations on when economic development and efforts *to eliminate slum or blighted conditions* may constitute a public use. Unfortunately for Appellants, at the same time the legislature enacted the 2006 amendments, it made sure to provide that projects like DAPL are exempted from those limitations. When the legislature limited the use of eminent domain to eliminate blighted conditions by enacting Iowa Code § 6A.22, it also amended § 6A.21(1)(*a*) to broaden the exception applicable to projects like DAPL. In addition, in enacting § 6A.22 itself, the legislature chose to expressly define public use to include takings by common carriers like DAPL. Iowa Code § 6A.22(2)(*a*) ("'Public use' [or] 'public purpose'… means one or more of the following: …The acquisition of any interest in property necessary to the function of a public or private utility***, common carrier***, or airport….") (emphasis added). Finally, the legislature clearly intended § 6A.21 as a whole to harmonize with § 479B.16 and other similar provisions for infrastructure under the Board's supervision. That section, while limiting the use of eminent domain over agricultural lands, explicitly provides,

> This limitation also does not apply to utilities, persons, companies, or corporations ***under the jurisdiction of the Iowa utilities board*** in the department of commerce or to any other utility conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain.

Iowa Code § 6A.21(2)(emphasis added). [54]

The Board found that DAPL would serve numerous shippers, and provide economic, energy, safety, and security benefits to Iowa and the public more generally. In that regard, the taking for DAPL is nothing like the more boundary-pushing taking that was approved in *Kelo*. The Court should have no concern that affirming the use of eminent domain for DAPL, a traditional, interstate infrastructure project, expands the scope of allowable takings or in any way limits the state's ability to address concerns about the breadth of takings post-*Kelo*. Even the *Kelo* dissent on which Appellants rely acknowledges that takings for common carriers and similar entities providing use to the public are consistent with the constitution, and would find DAPL's use of eminent domain constitutional. Accordingly, Appellants have no valid argument against the Board's grant of eminent domain to DAPL. The Court should affirm the Board's *Final Order*.

[54] Prior to 2006, the exception in § 6A.21(2) applied only to "utilities or persons under the jurisdiction of the Iowa utilities board." The 2006 amendment broadened the exception, making it applicable to "utilities, persons, **companies, or corporations** under the jurisdiction of the Iowa utilities board." *Id.* (emphasis added).

IV. JOHNSON AND PUNTENNEY'S INDIVIDUAL CHALLENGES TO DAPL'S PERMIT ARE WITHOUT MERIT BECAUSE THE BOARD RELIED ON SUBSTANTIAL EVIDENCE AND PROPERLY FOLLOWED ITS STATUTORY MANDATE TO AUTHORIZE THE USE OF THE EMINENT DOMAIN ACROSS THEIR PROPERTIES.

A. Preservation of Issue and Standard of Review.

Dakota Access agrees that Puntenney and Johnson have preserved this issue for appellate review and that the general standard of review of agency action is for correction of errors at law. The Board's determinations, however, are entitled to deference as set forth more fully above.

B. The Board Relied on Substantial Evidence Regarding Routing and Drain Tile and Properly Followed its Statutory Mandate to Authorize the Use of Eminent Domain.

Puntenney and Johnson's arguments – that the Board lacked substantial evidence regarding routing or drain tile or acted arbitrarily in authorizing the use of eminent domain – distort the law, ignore ample evidence presented to the Board, and impermissibly ask this Court to re-weigh that evidence.

First, Puntenney and Johnson's argument that it was not necessary for the Board to authorize eminent domain across their properties because the Board could have re-routed the pipeline on to someone else's property is without merit. The Board is required to authorize the use of eminent domain upon granting a permit: "A pipeline company granted a pipeline permit shall

be vested with the right of eminent domain, to the extent necessary and as prescribed and approved by the board…." Iowa Code § 479B.16.

The term "necessary" in § 479B.16 does not mean absolute necessity to the exclusion of all other possible lands on which the pipeline could be routed; rather, its meaning in context is clear – once a route is approved, eminent domain is "necessary" on properties where an easement is not already in place for the project. *See, e.g., Race v. Iowa Elec. Light & Power Co.*, 134 N.W.2d 335, 337 – 38 (Iowa 1965) (concluding under nearly identical language in an electric franchise statute that "a finding by the commission [that] it is proper to grant a franchise over a particular route includes a finding… the specified real estate is necessary for such purpose"). If a landowner could avoid the use of eminent domain to route linear infrastructure across his property simply by arguing the route could be moved to his neighbor's property, his neighbor could make the same argument, and so on, rendering the grant of eminent domain authority in chapter 479B an endlessly moving target.

Further, Dakota Access submitted ample evidence establishing the need for DAPL's route, including testimony regarding the use of a sophisticated computer routing tool that evaluated a "vast multitude of data sets" in determining a baseline route, as well as hundreds of additional

revisions following surveys, consultations with government agencies, and similar due diligence to account for items such as federally declared "high-consequence areas", environmental features, cultural resources, and co-location with existing utilities, among other factors.[55] In fact, while not necessary, the record also included specific evidence regarding the necessity of the route across the Puntenney and Johnson properties.[56]

Puntenney's claim is similarly flawed when he argues the Board could have rerouted the pipeline off of his property to account for his plan to someday "approach MidAmerican" in hopes that MidAmerican would install a wind turbine on his property. Such a speculative interest does not rise to the level of substantial evidence; the Board correctly gave it little weight. *See Telecorp Realty, L.L.C. v. Bd. of Adjustment*, Docket No. 4:01-cv-10369, 2001 WL 1678736 (S.D. Iowa, Nov. 20, 2001) (speculation regarding a potential future residential development was not substantial

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[55] *See, e.g.*, Exhibit MH Direct 3 – 6 (App. 193 – App. 196); Exhibit MH Reply 22 – 23 (App. 225 – App. 226); IUB Hearing Tr. 513:8 – 520:18; 1349:8 – 22; 3252:19 – 3253:6; 3477:24 – 3478:13 (App. 490 – App. 497; App. 516; App. 618 – App. 619; App. 728 – App. 729).

[56] *See* IUB Hearing Tr. 3487:2 – 14 (App. 738) (Puntenney testifying that moving the route to a "straight line" to avoid his property could impact a neighbor's house); IUB Hearing Tr. 3354:5 – 3355:8 (App. 680 – App. 681) (Mahmoud testifying that moving the route off of Johnson's property would impact a neighboring property, a county drain tile, a waterway, and a forested area).

evidence to deny a cell tower permit). In addition, two other landowners Puntenney references, Smith and Lenhart, were not simply pipeline opponents requesting the pipeline be moved somewhere "not in my backyard"; they each provided detailed testimony supporting minor re-routes they requested *on their own properties* to account for *specific* future plans.[57] That the Board found the testimony offered by Lenhart or Smith more credible or certain than Puntenney's testimony is a determination by the Board which is entitled to deference. *See Clark v. Iowa Dept. of Revenue & Fin.*, 644 N.W.2d 310, 315 (Iowa 2002) ("[W]e accord deference to the agency's decision on witness credibility.").

Finally, Puntenney and Johnson's arguments that their testimony to the Board about potential impacts to drain tile was "ignored" or "unchallenged" is without merit. Drain tile was mentioned more than ***900*** times in the hearing transcript; professional drain tile installers submitted pre-filed testimony and testified live at hearing; the provisions of Chapter 9 of the Board's Rules[58], which dictate how temporary and permanent tile repairs are made, establish a system for county inspectors to inspect such

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[57] *See* IUB Hearing Tr. 3165:20 – 3176:1; 3189:20 – 3192:3; 3118:21 – 3119:25; 3122:12 – 3125:20 (App. 587 – App. 598; App. 611 – App. 614; App. 578 – App. 579; App. 580 – App. 583).

[58] Iowa Admin. Code 199—9.1 *et seq.*

repairs, and address multiple other tile repair topics, were the subject of hours of testimony. The Board received substantial evidence that Dakota Access's contractors had experience executing thousands of tile repairs and that all drain tile could and would be repaired to its pre-construction or better condition.[59] With respect to Johnson's specific claim that it would be too difficult to bore under his main because of the consistency of soil at a depth of 14 feet, Johnson's own witness testified he was present when a 31-inch drain tile pipe was installed in that same soil and Dakota Access witnesses testified the pipeline would be installed much deeper than that in many places, including 72 feet under of the Mississippi River.[60]

Ignoring for the moment that the Board as fact-finder need not rely on testimony it does not find credible, in the end the Board determined that the pipeline could be built and all drain tile impacts could be repaired or otherwise remedied. Quite the opposite of "ignoring" Johnson's testimony, the Board made special exception in its *Final Order* requiring DAPL to be

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[59] *See, e.g.*, Exhibit JB Reply 3:6 – 14 (App. 56); IUB Hearing Tr. 3010:20 – 25; 3014:3 – 23; 3310:10 – 3311:3 (App. 551; App. 552; App. 636 – App. 637); Exhibit AJD Reply 13:3 – 5 (App. 101); IUB Hearing Tr. 1311:10 – 20; 1312:6 – 17; 2089:22 – 2090:6 (App. 512; App. 513; App. 532 – App. 533).

[60] IUB Hearing Tr. 3010:7 – 15; 3018:16 – 3020:11 (App. 551; App. 553 – App. 555); Tr. 1725:18 – 1726:3 (App. 519 – App. 520).

bored under Johnson's main tile. *Final Order* at 126 – 127[61]. Simply stated, Puntenney and Johnson's arguments ask this Court to re-weigh the evidence presented to the Board – an action this Court does not perform in reviewing agency action. *See, e.g.*, *S. E. Iowa Co-op.,* 633 N.W.2d at 818.

In sum, the Board had substantial evidence of the need for the route and impacts to drain tile. The Board credited that substantial evidence in granting the permit and establishing the route, which, as a matter of law, appropriately vested Dakota Access with eminent domain authority. Johnson and Puntenney's invitations to this Court to distort the law, ignore ample evidence presented to the Board, or re-weigh the evidence presented to the Board and find facts anew must be disregarded.

CONCLUSION

The expert Iowa Utilities Board correctly found that DAPL, with its nearly $1 billion in economic impact in Iowa, its contribution to domestic energy security, and its improved safety over moving oil out of the Bakken by rail, promotes the public convenience and necessity. On that finding, the

[61] Puntenney's claim that "he was not allowed to testify about the impact on his drainage tile at the IUB hearing" (Sierra Brief at 43) is just false. Puntenney filed an objection with the Board, was permitted to file an unlimited amount of pre-filed testimony, testified extensively at hearing, and was directly asked by the Board, "Can you tell the Board exactly what you're looking for in terms of relief beyond moving the pipeline off of your property?" IUB Hearing Tr. 3487:22 – 24 (App. 738).

express terms of Iowa Code § 479B.16 allowing Dakota Access to use eminent domain were constitutionally applied, and eminent domain was properly implemented as to the Johnson and Puntenney properties. Appellants cannot reach the high bars for overturning agency action, or for a constitutional challenge to Iowa Code § 479B.16. Accordingly, the Board's *Final Order* granting Dakota Access's application for a pipeline permit including the right of eminent domain must be affirmed.

Respectfully submitted this 13th day of November, 2017.

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CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating necessary copies of this Appellee Final Brief was $0.00.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

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I further certify that on the 13th day of November, 2017, I filed this document with the Clerk of the Supreme Court, 1111 Court Avenue, Des Moines, IA 50319, by electronically filing it through EDMS.

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