BEFORE THE IOWA SUPREME COURT

No. 17-0423

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

Petitioners-Appellants,

v.

IOWA UTILITIES BOARD,

Respondent-Appellee,

DAKOTA ACCESS, LLC,

Indispensable Party-Appellee,

OFFICE OF CONSUMER ADVOCATE and THE MAIN COALITION,

Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
OF POLK COUNTY
HON. JEFFREY D. FARRELL

INTERVENOR-APPELLEE THE MAIN COALITION'S BRIEF

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ROUTING STATEMENT

This case involves application of existing legal principles. The case is appropriate for transfer to the court of appeals. See Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This is a judicial review proceeding pursuant to Iowa Code § 17A.19 concerning the permit granted by the Iowa Utilities Board (the "Board") to Dakota Access, LLC for the construction, operation, and maintenance of a hazardous liquid pipeline. Iowa Code Chapter 479B provides the Board authority to implement controls over such pipelines to protect landowners and tenants from environmental or economic damages, to approve the location and route of pipelines, and to grant rights of eminent domain where necessary.

On October 29, 2014, Dakota Access filed documents with the Board to hold informational meetings as required by Iowa Code § 479B.4 and 199 IAC 13.3. The proposed notices expressed Dakota Access's intent to construct a pipeline to transport crude oil from the Bakken region of North Dakota to a hub in Patoka, Illinois. (Final Decision & Order, March 10, 2016, pp. 4-5) (App. 973-74).

On January 20, 2015, Dakota Access filed a petition with the Board for a hazardous liquid pipeline permit. On June 8, 2015, the Board issued an order establishing a procedural schedule for its proceedings. The order informed the parties of the Board's intent to take evidence through pre-filed testimony and submission of exhibits. Thirty-eight parties filed timely motions to intervene, and five more parties were granted the right to intervene even though their motions were untimely.

On November 16, 2015, the Board began an evidentiary hearing that lasted eleven days and involved testimony from sixty-nine witnesses through cross-examination. The Board received extensive briefs from the parties following the hearing.

On March 10, 2016, the Board issued a 159-page final decision and order granting Dakota Access's petition for a permit pending the Board's receipt of certain compliance documents. Applications for rehearing were thereafter filed, which the Board denied on April 28, 2016.

On May 26, 2016, the Petitioners filed petitions for judicial review in the Iowa District Court, which were ultimately consolidated into one action. On February 15, 2017, the district court denied the petitions for judicial review.

The MAIN Coalition is an unincorporated association of entities and individuals from the agricultural, business, labor, and national security sectors advocating for improved economic development and energy security projects in the Midwest. When Dakota Access filed its permit application to construct a pipeline in Iowa, the MAIN Coalition intervened in the Board proceeding in support of the application.

The MAIN Coalition participated in the Board's eleven-day hearing in Boone County. It pre-filed direct and reply testimony from witnesses, who were then subject to cross-examination by adverse parties and the Board, and filed initial and responsive briefs with Board. The MAIN Coalition was likewise a party to and participant in the judicial review process before the district court.

ARGUMENT

Standard of Review

Judicial review of agency decisions is governed by Iowa Code section 17A.19. *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 222 (Iowa 2014). The Iowa Supreme Court applies the standards of § 17A.19(10) to determine if it reaches the same results as the district court. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010).

The district court may properly grant relief if the agency action prejudiced the Petitioners' substantial rights and if the agency action falls within one of the criteria listed in Iowa Code § 17A.19(10)(a) - (n). *Id.*

On judicial review from action of an administrative agency, the correct standard of review depends on whether the Legislature has clearly vested the agency with authority to interpret the statute at issue. *NextEra Energy Resource LLC v. Iowa Utilities Board*, 815 N.W.2d 30, 36 (Iowa 2012). If the Legislature has vested the agency with such authority, the Court must defer to the agency's statutory interpretation, and the Court may reverse the agency only if the Court finds the agency's interpretation to be irrational, illogical, or wholly unjustifiable. *Id.* at 37. Conversely, if the Legislature did not clearly vest the agency with authority of statutory interpretation, then the Court does not defer to the agency's interpretation and will reverse the agency if the interpretation is based on an erroneous interpretation of law. *Id.*

Petitioners have the burden of proving that one or more of the grounds for reversal is applicable, but they have failed to do so. The Legislature vested the Board with authority to interpret the statutes at

issue in this matter, and the Court should defer to the Board's interpretation and reverse only if the Court finds the agency's interpretation to be irrational, illogical, or wholly unjustifiable. To the contrary, the Board's Order was well-reasoned and based on the compelling factual record of the administrative hearing.

I. THE BOARD PROPERLY FOUND THAT THE PIPELINE WILL PROMOTE THE PUBLIC CONVENIENCE AND NECESSITY

The central issue before the Board in its consideration whether to grant a pipeline permit was whether the pipeline would promote the public convenience and necessity. Iowa Code § 479B.9 provides:

> 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. A permit shall not be granted to a pipeline company unless the board determines that the proposed services will promote the public convenience and necessity.

The term "public convenience and necessity" is not defined in the statute. The Board concluded that, in the absence of statutory definition, the Board is authorized "to identify for itself what factors and circumstances should bear on its determination in any specific situation." Board Order p. 13-14 (App. 982-83) (citing *Application of National Freight Lines*, 40 N.W.2d 612, 616 (Iowa 1950).)

More recently, the Iowa Supreme Court considered under what circumstances a court should defer to the judgment of an administrative agency, such as the Board, in its interpretation of a statute. Iowa Code Chapter 17A defines when the court should give deference to an agency's interpretation of law. In *Renda v. Civil Rights Commission*, 784 N.W.2d 8 (Iowa 2010), the Court referred to a treatise by Professor Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998), stating:

> Normally, the interpretation of a statute is a pure question of law over which agencies are not delegated any special powers by the General Assembly, so a court is free to, and usually does, substitute its judgment *de novo* for that of the agency and determine if the agency interpretation of the statute is correct. . . . But, where the General Assembly clearly delegates *discretionary* authority to an agency to interpret or elaborate a statutory term based on the agency's own special expertise, the court may not simply substitute its view as to the meaning or elaboration of the term for that of the agency but, instead, may reverse the agency interpretation or elaboration only if it is arbitrary, capricious, unreasonable, or an abuse of discretion a deferential standard of review.
>
> This means that the reviewing court, using its own independent judgment and without any required deference to the agency's view, 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.

Id. at 11.

In *Renda*, the Court held that if statutory provisions to be interpreted are not in a statute the agency enforces, the Court will generally find the "interpretative power was not vested in the agency." *Id.* at 14. Further, if "a term has an independent legal definition not uniquely within the subject matter expertise of the agency, [the court] generally conclude[s] the agency has not been vested with interpretative authority." *Id.*

Conversely, the *Renda* Court stated that "when the statutory provision being interpreted is a substantive term within the special expertise of the agency, we have concluded that the agency has been vested with the authority to interpret the provisions." *Id.*

In *City of Marion v. Iowa Department of Revenue & Finance,* 643 N.W.2d 205 (Iowa 2002), the Court first examined whether the legislature granted an agency the authority to interpret a statute under the amended Chapter 17A. The specific issue was whether the Department of Revenue correctly interpreted the term "athletic sport" to

include swimming. *Id.* at 206. The term "athletic sport" was not defined in the statute, but the department was given authority to create rules "necessary and advisable for its detailed administration." *Id.* at 207. The Court concluded that because the term was not defined in the statute and because the department must necessarily interpret the term to carry out its duties, the power to interpret the term was clearly vested in the department and deference was therefore given. *Id.*

The Court followed the same analysis in *NextEra,* stating: "If the legislature clearly vested the agency with the authority to interpret specific terms of a statute, then we defer to the agency's interpretation of the statute and may only reverse if the interpretation is 'irrational, illogical, or wholly unjustifiable.' If, however, the legislature did not clearly vest the agency with the authority to interpret the statute, then our review is for correction of errors at law." *Nextera,* 815 N.W.2d at 37 (internal citations omitted).

The Court has thus adopted a three-prong test, applicable to this case, to determine whether the legislature has vested an administrative agency with the authority to construe a statutory provision: (1) Are the statutory provisions to be interpreted in a statute the agency enforces?

(2) Does the term have an independent legal definition uniquely within the subject matter expertise of the agency? (3) Is the statutory provision being interpreted a substantive term within the special expertise of the agency?

Concerning the first prong, in this case, § 479B.9 makes clear that the Board has authority to enforce the statute providing that "[a] permit shall not be granted to a pipeline company unless the board determines that the proposed services will promote the public convenience and necessity." The statutory provisions with respect to "public convenience and necessity" are part of § 479B.9; they are enforced by the Board; and the Board has promulgated rules regarding the procedures for consideration of a pipeline permit application, including a requirement that the applicant state how the pipeline will promote the public convenience and necessity. IAC §199-13.2(1)(f)(1). It is the Board, and no other agency, that determines whether the pipeline permit should be issued based on whether the pipeline will promote the public convenience and necessity.

In analyzing the second prong, because the term "public convenience and necessity" is not defined in the statute, in the absence

of a statutory definition, the legal definition is uniquely within the subject matter expertise of the agency. "Public convenience and necessity" is a term of art used almost exclusively by the Board to determine whether to issue permits to telephone utilities (§ 476.29), to public utilities crossing railroads (§ 476.27(2)), to gas pipeline companies (§ 479.12), and operators of hazardous liquid pipelines and storage facilities in Iowa (§ 479B.9). The Executive Council is the only other state body authorized to employ the term "public convenience and necessity," and then only when considering applications for hydroelectric plants. *See* Iowa Code Chapter 469A. The Board has a long history of determining when and how "public convenience and necessity" is served and promoted. No governmental body has greater subject matter expertise with respect to serving and promoting "the public convenience and necessity" served by a liquid pipeline.

Concerning the third prong, "public convenience and necessity" is a substantive term within the special expertise of the agency. As noted, the Board is the only administrative agency in Iowa to employ the term. Over a period of many years the Board has acquired special expertise in determining when it is appropriate to find that an entity promotes the

public convenience and necessity. Thus, the Court should defer to the Board's expertise in determining that the pipeline promotes the public interest and necessity in connection with, among other specific things, hazardous liquid pipelines. The Court should reverse only if the Board's interpretation is irrational, illogical, or wholly unjustifiable.

In this case, the Board considered and balanced "concepts relating to public use, public benefits, and public and private costs and detriments" and referred to *South East Iowa Co-Op, v. Iowa Utilities Board*, 633 N.W.2d 814, 821 (Iowa 2001), in which the Iowa Supreme Court approved the Board's process, which "balanced all of these factors and determined the substantial benefits outweighed the costs." Board Order p. 16 (App. 985).

In its Order, the Board applied 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. Board Order p. 16 (App. 985). Further, the Board found that the term "necessity" is not absolute, but instead relative. The Board cited to *Wabash, C & W Ry. Co. v. Commerce Comm'n*, 141 N.E. 212, 214 (Ill.1923), for the proposition that the

meaning of the term "must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found." Board Order p. 15 (App. 984). Similarly the Board found that the term "convenience" denotes "not absolute, but reasonable, necessity." *Id.* (*citing Thompson v. ISCC*, 15 N.W.2d 603, 606 (Iowa 1944)).

As discussed below, the Board thoroughly evaluated a multitude of global, national, and state issues, including economic, environmental, safety, and cultural issues. The Board's extensive discussion in its Order in which it balanced the benefits and detriments of the pipeline shows the Board carefully considered all aspects of its decision.

The Iowa Supreme Court's decision in *NextEra* holds that when the legislature has clearly vested interpretive authority in the Board, the court will not reverse if the Board's decision is supported by substantial evidence as required by § 17A.19(10)(f). *Nextera*, 815 N.W.2d at 37. "The agency's decision does not lack substantial evidence merely because the interpretation of the evidence is open to a fair difference of opinion." *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004). Based on the record evidence, there are sound bases for the Board's Order.

If, however, the Court determines (and it should not) that the legislature did not confer authority on the Board to interpret the meaning of "public convenience and necessity" as provided in § 479B.9, then the Court should analyze whether the Board's interpretation is an error at law requiring correction. *See* Iowa Code §17A.19(10)(c).

In *Renda*, the Court held the Iowa Civil Rights Commission did not have authority to interpret the terms "employee" and "dwelling," finding instead those terms have meanings beyond the context of civil rights and are more appropriately interpreted by the courts. *Id.* at 14. The Court nevertheless agreed with the Commission's interpretation of "dwelling," but did not agree with its interpretation of "employee," and remanded for further proceedings. The terms "dwelling" and "employee" are commonly used throughout the Iowa Code and in common law in many contexts and are not subject to any unique legal definition within the expertise of the Iowa Civil Rights Commission.

Similarly, in *Gartner v. Iowa Department of Public Health*, 830 N.W.2d 335 (Iowa 2013), the Court considered whether the nonbirthing spouse in a lesbian marriage was entitled to have her name on a child's birth certificate. The Department of Health refused to include the name

without the spouse first adopting the child, noting that the applicable statute spoke only of gendered roles of "mother" and "father." The Court declined to defer to the Department of Health's interpretation of the terms "paternity," "father," and "husband," noting that "these terms are not exclusively within the expertise of the Department. Instead, the legislature utilized these terms throughout the Iowa Code." *Id.* at 344.

The terms analyzed in *Renda* and *Gartner* are much different than the term "public convenience and necessity," which has its own unique usage as a term of art with a very specialized definition in the context of the limited places it appears in Iowa law.

Petitioners argue that, for the pipeline to promote the public convenience and necessity, it must serve the "public." Petitioner then takes a very parochial view of the "public," however, contending that the "public" is confined to people in the state of Iowa. Petitioners choose not to acknowledge that we live in a regional, national, and even global economy, particularly with respect to a commodity like crude oil. Although there is no oil production or refining in Iowa, consumption of refined oil occurs all across the nation, including in Iowa.

Crude oil has no ready use until it is refined. For crude oil to reach the market, it must be transported from its point of production to facilities where it is refined for sale to consumers. That there is no off-loading point in Iowa for the crude oil does not diminish its importance to the public in Iowa by transporting oil to refineries. Because oil is a fungible commodity, the oil that will be carried on the pipeline cannot be traced to Iowa after it is refined, but unquestionably the increased supply of crude oil in the market increases the supply of refined oil, which reduces the cost of refined oil products, including gasoline and the plethora of oil-based products Iowa consumers enjoy.

Moreover, consideration of benefits to the public from the safety of oil transportation should not be limited to Iowans. As described more fully below, the overwhelming evidence concerning the safety of oil transportation—whether measured by numbers of incidents, injuries, fatalities, or spilled fluids recovered—shows pipelines are the safest and most effective form of energy transportation. The safety benefits of transporting oil by pipeline as opposed to trains or trucks can reasonably only be realized by people in states bordering Iowa if such a pipeline can run through Iowa. Petitioners' suggestion that the Board must be

indifferent to the safety of human beings in other states when considering and balancing "public use, public benefits, and public and private costs and detriments" is both callous and legally inaccurate.

"Public" should not be so narrowly defined as to exclude neighboring states or our country. The Board accordingly did not commit error in its interpretation of "public convenience and necessity."

II. THE BOARD'S GRANT OF THE POWER OF EMINENT DOMAIN IS CONSTITUTIONAL UNDER BOTH THE UNITED STATES AND IOWA CONSTITUTIONS.

American jurisprudence has long recognized that private property may be acquired through eminent domain for a public use or purpose. *See, e.g., Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923) (property condemned for construction of a public highway along the Pacific coastline in Malibu). The exercise of eminent domain need not benefit every citizen, or every citizen equally. *Id.* at 707 ("[I]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use.") Important to the question of who makes the determination whether a proposed use is a "public use," the Court stated: "[T]he necessity for appropriating private property for public use is not a judicial question.

This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers." *Id.* at 709.

Similarly, in *Berman v. Parker*, 348 U.S. 26 (1954), the Supreme Court considered a constitutional challenge to the District of Columbia's urban renewal plan and upheld the plan. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved." *Id.* at 32 (citations omitted). Once the question of the public purpose has been decided, "the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Id.* at 35-36.

In *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), the Supreme Court considered a Hawaii statute designed to break up the oligopolies owning vast tracts of land in Hawaii. The state legislature

found the concentration of land ownership skewed the residential fee simple real estate market, "inflating land prices, and injuring the public tranquility and welfare." *Id.* at 232. The legislature enacted legislation to break up the oligopolies. Landowners strongly objected to the expressed legislative intent and filed suit in federal court seeking a declaration the statute was unconstitutional and an injunction preventing its enforcement. The district court upheld the constitutionality of the statute, finding that the goals of the legislation were permitted by the State's police powers, and the means chosen were not "arbitrary, capricious, or selected in bad faith." *Id.* at 235. The Ninth Circuit reversed, but on appeal, the Supreme Court reversed the Ninth Circuit, holding "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts." *Id.* at 242-43. "Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Id.* at 244.

The *Midkiff* court noted some cases in which the right of eminent domain was not upheld. One such case, *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896), involved a private entity seeking to require a private railroad to sell land to the private entity for construction of a private grain elevator adjacent to the railroad's tracks. The Court found such a taking did not have a justifying public purpose and was a violation of the 14th Amendment to the U.S. Constitution inasmuch as it was "a taking of private property of the railroad corporation for the private use of the petitioners." *Id.* at 411. However, the *Midkiff* court went on to state, "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Midkiff*, 467 U.S. at 241.

Petitioners correctly observe that *Midkiff* is factually distinguished from this case, but the fundamental legal principle underlying the *Midkiff* decision, as well as *Berman* and *Rindge*, is the same: courts should defer to legislative determinations of what constitutes a "public use."

More recently, in *Kelo v. City of New London*, 545 U.S. 469 (2005), Justice Stevens writing for the Court noted the development of the law since the late 19th century shows what constitutes "use by the public" has eroded over time because the prior test was "difficult to administer and impractical given the diverse and always evolving needs of society." *Id.* at 479-80. Consequently, at the close of the 19th century, the court "embraced the broader and more natural interpretation of public use as 'public purpose.'" *Id.* 480. The court has "repeatedly and consistently rejected that narrow test [of public use] ever since." *Id.*

In determining what a public purpose is, the court has paid "great respect" to state legislatures and state courts in discerning local public needs. *Id.* at 482. "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 483.

Petitioners attempt to divert the Court's attention away from the majority holding in *Kelo*, and instead to focus on Justice Kennedy's concurring opinion and Justice O'Connor's dissent to afford "greater protections to Iowa's landowners . . . than are provided by the United

States Constitution." Landowner Petitioners' Brief p. 25. Petitioners urge this Court to adopt as the law of Iowa the position of the minority dissents in *Kelo*. Petitioners cite no other occasion in which the Iowa Court has adopted the minority position of the U.S. Supreme Court.

Petitioners fail to discuss a key portion of Justice Thomas's dissent in which he referred to states' historical uses of the power of eminent domain "to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks," and even grist mills operated by water power that flooded upstream properties with the payment of compensation to upstream landowners. Those grist mills were used by the public and were "common carriers – quasi public entities. These were 'public uses' in the fullest sense of the word, because the public could legally use and benefit from them equally." *Id.* at 512. Even in dissent, Justice Thomas recognized that common carriers serve a public use. Because Dakota Access is a common carrier, it is able to exercise the power of eminent domain under Iowa law and Petitioner's claims must therefore fail. *See* Iowa Code § 6A.22(2)(a)(2).

The question of what constitutes a common carrier is a question of law. *Wright v. Midwest Old Settlers and Threshers Ass'n,* 556 N.W.2d

808, 810 (Iowa 1996). It is a question of fact, however, "whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity." *State ex rel. Bd. of R.R. Com'rs v. Rosenstein*, 252 N.W. 251, 253 (Iowa 1934).

While § 6A.22 fails to define the term "common carrier," Iowa courts have held the term to mean, "one who undertakes to transport, indiscriminately, persons and property from one place to another." *Employers Mut. Cas. Co. v. Chi. & N. W. Transp. Co.*, 521 N.W.2d 692, 695 (Iowa 1994); *see Kvalheim v. Horace Mann Life Ins. Co.*, 219 N.W.2d 533, 536 (Iowa 1974) ("One who holds himself out to the public as engaged in the business of transporting for hire to the extent of his facilities is a common carrier."); *Circle Exp. Co. v. Iowa State Commerce Comm'n*, 86 N.W.2d 888, 893 (Iowa 1957) ("There have been various definitions of a common carrier...but it will suffice to say that the 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 business required of him.").

An entity need not "serve all the public all the time" to be a common carrier. *Wright*, 556 N.W.2d at 810 ("A common carrier may combine its transportation function with other vocations and still be considered a common carrier."); *see Kvalheim*, 219 N.W.2d at 537 ("While a common carrier must serve the public, no common carrier can cater to all the public. This has frequently been recognized by the courts."); *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1916) ("The public does not mean everybody all the time."). An entity's status as a common carrier will therefore not be changed merely because it is not exclusively in the business transportation of the public and renders "other, and more substantial, services as well." *Kvalheim*, 219 N.W.2d at 538. Additionally, the Court has made clear "an occasional rejection of shipments, the restrictions of the type and kind of goods carried, or their size and weight, the fact that written contracts are required before accepting goods for shipment, or that no regular advertising was done, is not conclusive." *Circle Exp. Co.*, 86 N.W.2d at 890.

The district court correctly found Dakota Access is a common carrier. District Court Order p. 29 (App. 1546) (citing *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 639 (1978) (referring to pipelines as common carriers under the Interstate Commerce Act); *W. Ref. Sw., Inc. v. F.E.R.C.*, 636 F.3d 719, 724 (5th Cir. 2011) (same)). Dakota Access's status as a common carrier is also consistent with the holdings of other state courts. *See, e.g., Thompson v. Heineman*, 857 N.W.2d 731, 759 (Neb. 2015) (holding an oil pipeline is a common carrier "if it holds itself out as willing to transport oil products for a consideration to all oil producers in the area where it offers its transportation services"); *Kinder Morgan Cochlin, LLC v. Simonson*, 66 N.E.3d 1176, 1182 (Ohio Ct. App. 2016) (finding petroleum products pipeline to be a common carrier under similar definition as Iowa's).

Dakota Access clearly holds itself out as engaged in the business of transporting for hire the oil of third-party shippers, whether by contract or walk-up service. *See Kinder Morgan Cochlin*, 66 N.E.3d at 1182 (finding evidence supported a finding pipeline was common carrier where pipeline held "open season" where "anyone who wanted to reserve capacity . . . to transport petroleum was able to sign a transportation

agreement"); *see also Employers Mut. Cas. Co.*, 521 N.W.2d at 695; *Kvalheim*, 219 N.W.2d at 536.

At the hearing before the Board, Dakota Access witness Damon Rahbar-Daniels testified that Dakota Access is a common carrier, subject to regulation by the Federal Energy Regulatory Commission. (Testimony of Damon Rahbar-Daniels, Tr. 42, 83, 85, 101, 148, 176.) Dakota Access has contracts with nine different companies that will ship oil on the pipeline; will leave 10% of the pipeline's capacity available to walk-up shippers. It will publish tariffs in accordance with FERC rules, and will recover its costs of transporting oil from revenues derived from payment for services. (Tr. 84-85.) Dakota Access does not own the oil that it ships, but "provides transportation service for shippers." (Tr. 102.)

Indeed, in cross examination, at least one of the pipeline opponents referred to Dakota Access being a common carrier. (Tr. 561.) Mr. Daniels in confidential session testified generally about the price regulations to which Dakota Access, as a common carrier, will be subject under the Interstate Commerce Act. (Tr. 898-910.) Dakota Access witness Joey Mahmoud later testified that Dakota Access is a common carrier and, as such, is subject to certain FERC regulations. (Tr. 3294-95.) Testimony

from both supporters and opponents of the pipeline that Dakota Access is a common carrier went unchallenged until this judicial review proceeding. Based on testimony in the record, there is no basis for the Court to conclude that Dakota Access is not a common carrier.

Petitioners' citation to *Wright* to support their position that under Iowa law Dakota Access is not a common carrier lacks merit. 556 N.W.2d 808. In *Wright*, the plaintiff was injured on a "train" consisting of a small tractor pulling two open cars, each of which had three six-foot-long seats, around the grounds of the Midwest Old Thresher's reunion. The plaintiff urged the court to give a jury instruction that the "train" was a common carrier in order to impose a higher standard of care on the operator. The district court declined to find the "train" to be a common carrier, and the Iowa Supreme Court affirmed, stating:

> In the present case, the association's event is limited in scope and duration to only a few days each year. Its main business is not to transport all people from one are area to another, but rather to entertain those who have paid a fee to attend. Patrons are ferried around the area by a train for which they have paid an additional fee. The purpose of this train is not only to provide transportation around the grounds, but also to entertain the public. Only those who have paid the additional fee may use the train. The association does not hold itself out to the public as being in the business of carrying passengers for hire.

Id. at 811.

The Iowa legislature clearly and unmistakably declared in § 6A.22(2)(a)(2) that, by definition, common carriers serve a public use and public purpose and are a public improvement:

> 6A.22(2)(a). *"Public use," "public purpose,"* or *"public improvement"* means one of 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.

(Emphasis added.)

The long line of U.S. Supreme Court cases makes clear that the determination of "public use" and "public purpose" is to be made by the legislature, not by the courts, and this Court should not interfere with the Iowa Legislature's determination that common carriers serve a public use and public purpose and that the pipeline will be a public improvement.

Section 6A.22 was enacted and added to Chapter 6A in 2006, after the *Kelo* decision, in a special session of the legislature. While applicants are correct that § 6A.22 imposed limitations on the exercise of eminent domain, the legislature clearly and unmistakably expressed its intent

that common carriers serve a public use and public purpose. There is no question that Dakota Access is a common carrier, and the pipeline has been found by the Iowa legislature to serve a public use and purpose. In the face of this legislation, Petitioners' contention that eminent domain only serves the interest of a private company, and that eminent domain is unconstitutional, lacks merit.

Petitioners and amicus contend the 2006 amendments to chapter 6A and 6B constituted a legislative reaction illustrating the Iowa Legislature's goal of restricting the use of eminent domain as occurred here. *E.g.,* Niskanen Brief p. 24. Petitioners ignore, however, that the Legislature *did not touch* the Board's long-standing eminent domain authority set forth in Iowa Code § 479B.16. *See* Iowa Code § 479B.16 (showing no changes to the statute since its enactment). The Legislature shows its intentions both in what it amends and what it chooses not to amend. To the extent parties wish to divine the intentions of our Legislature, the Legislature's inaction with respect to amendment of the Board's eminent domain powers in chapter 479B illustrates not an intention to move away from established precedent, but to support the law as it stands—and has stood for decades.

The U.S. Constitution and the Iowa Constitution have essentially identical provisions regarding the use of eminent domain.[1] Iowa courts have long recognized that the state, acting through the legislature, has an inherent sovereign right of eminent domain.

> The right of eminent domain being an attribute of sovereignty the legislature has the initial duty of determining what constitutes a public use. It is for that body (the legislature) to determine in the first instance . . . what are the public uses, to subserve which a grant of power (to condemn) may properly be made. That this may not be done arbitrarily, and having no proper regard for the character of the conditions to which application is to be made, or the results to follow the use, may readily be conceded. . . . It is to be said, however, that the doctrine common to statutory construction from the viewpoint of the Constitution, is applicable here . . . that interference on the part of the courts will not be warranted, except there be presented a clear, plain, and palpable case of transgression. But if a public use be declared by the legislature the courts will hold the use public unless it manifestly appears by the provisions of the act, that they can have no tendency to advance and promote such public use.

Reter v. Davenport, R.I. & N.W. Ry. Co., 54 N.W.2d 863, 867 (Iowa 1952)

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[1] The 5th Amendment to the U.S. Constitution, applicable to the states by virtue of the 14th Amendment, provides in part: "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Article 1, Section 18 of the Iowa Constitution provides in part: "Private property shall not be taken for public use without just compensation."

(citations omitted).

In *Kingsway Cathedral v. Iowa Dept. of Transportation*, 711 N.W.2d 6, 9 (Iowa 2006), and *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005), the Iowa Supreme Court considered federal cases interpreting federal eminent domain to be persuasive, but not binding, when considering the application of eminent domain under Iowa law. In both cases the Iowa Supreme Court found no basis to distinguish the protections provided by the U.S. Constitution from those provided by the Iowa Constitution, and analyzed the cases accordingly. *Id.*

The doctrine of judicial deference to legislative determinations of public use is well established in both federal and state law. In *Milligan v. City of Red Oak, Iowa*, 230 F.3d 355 (8th Cir. 2000), the Eighth Circuit applied Iowa law to a condemnation of land by the City of Red Oak for a municipal airport and adopted a two-step analysis to determine: (1) whether the purpose of the condemnation is for a public use, and (2) the connection between the purpose and the means of accomplishing the purpose. *Id.* at 359. Similar to the federal cases, the *Milligan* court held it "within the legislative province to determine in the first instance whether a use is public in nature, which determination should not be

disturbed by the courts unless it is clear, plain and palpable it is private in character." *Id.* (*citing Vittetoe v. Iowa S. Utils. Co.*, 123 N.W.2d 878 (Iowa 1963)).

Likewise, in *CMC Real Estate v. Department of Transportation*, 475 N.W.2d 166 (Iowa 1991), the Iowa Supreme Court stated courts "should not substitute their judgment for the legislature's judgments as to what constitutes a public use unless the use is palpably without reasonable foundation." *Id.* at 169 (*citing Midkiff*, 467 U.S. at 241). The *Milligan* court found a public interest in the city's clear authority and legitimate interest in regulating airport safety. The same can be said of the Iowa legislature declaring in § 6A.22(2)(a)(2) that a common carrier by definition constitutes a public use, public purpose, and public improvement.

The *Milligan* court further held that Iowa law requires a taking by eminent domain must be "necessary" to accomplish the public purpose. 230 F.3d at 358 (*citing* Iowa Code § 6A.4). In the case of a pipeline, it obviously is necessary for the pipeline to be connected from end to end. While the vast majority of land owners have signed voluntary easements, to make the Dakota Access pipeline complete and functional it was

necessary to have the right of eminent domain to avoid gaps in the pipeline and to assure its completion.

Section 479B.16 provides a clear statement that "[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.*" The statute even delves into specifics, prescribing the pipeline company's right of eminent domain for the width of the pipeline right-of-way to be 75 feet, and for pumps and other equipment to be one acre in any one location. *Id.* Further, the legislature gave the Board authority to expand the area subject to eminent domain if the pipeline company shows a "greater area is required for the proper construction, operation, and maintenance of the pipeline to the extent necessary and *as prescribed and approved by the board . . .*" *Id.* (emphasis added). There is no question that the legislature granted the Board the authority to determine that a pipeline has the right of eminent domain.

III. THE BOARD PROPERLY CONSIDERED THE FACT THAT TRANSPORTING OIL BY PIPELINE IS DEMONSTRABLY SAFER THAN ANY ALTERNATIVES.

Petitioners' claim that the Board's determination the pipeline will improve the safety of Iowans is arbitrary and capricious does not survive

scrutiny. Petitioners contend shipping oil by pipeline will make Iowans less safe than transporting oil by rail, and rely on a finding by the Board that if the pipeline permit is issued there is no guarantee less oil will be shipped across Iowa by rail. Petitioners engage in a fallacious risk analysis in which they claim that transporting oil across Iowa by pipeline, in addition to the oil that is already being shipped by rail, will increase the overall volume of oil shipped across Iowa and, thus, increase the risk of a spill. There is no factual basis for the Petitioners' hypothesis that rail shipments of oil will continue unabated after the pipeline is built. Petitioners contend, nevertheless, because Dakota Access cannot guarantee that less oil will be shipped by rail, that must mean it will stay the same or increase, leading to an increased risk of a spill.

Of course, Dakota Access cannot guarantee what the amount of oil shipped by rail across Iowa will be in the future, as there are many variables involved in such a forecast (e.g., the market demand for oil in the future, the amount of production from the Bakken oil fields in the future, where oil will need to be shipped in the future, the capacity of railroads to carry oil in the future). These variables make uncertain how much oil will be shipped by rail across Iowa in the future, irrespective of

whether the pipeline is built.

The important point—which was carefully considered by the Board and admitted by Petitioners—is that when considering the volume of oil and number of miles shipped, transporting oil by pipeline is *demonstrably safer* than shipping oil by rail or any other means. Energy expert Guy Caruso, a former administrator of the U.S. Energy Information Administration with over four decades of experience in energy policy and security, testified that taking into account all factors related to the relative safety of shipping oil by pipeline as opposed to rail, "[b]y any measure – numbers of incidents, injuries, fatalities and fluids recovered – pipelines are the safest and most effective form of energy transportation." Ex. GC Direct p. 8 (App. __) (quoting Vern Grimshaw & Dr. John Rafuse, *Assessing America's Pipeline Infrastructure: Delivering on Energy Opportunities*).

The factual findings of the agency must be accepted by substantial evidence. *Burton v. Hiltop Care Center,* 813 N.W.2d 250, 256 (Iowa 2012); Iowa Code § 17A.19(10)(f). The evidence clearly showed that if the same volume of oil carried by the pipeline were transported the same number of miles across Iowa by rail, Iowans would be placed at greater risk. The

pipeline significantly increases the likelihood of safer transportation of oil across the Midwest. The Board's determination to that effect is neither arbitrary nor capricious.

IV. THE BOARD PROPERLY CONSIDERED THE POSITIVE ECONOMIC IMPACTS OF THE PIPELINE.

Petitioners contend the economic impacts of the pipeline are irrelevant to consideration of public convenience and necessity, and claim the Board was not authorized to consider the economic benefits of the pipeline in its determination of public convenience and necessity. Once again, Petitioners take a very narrow view of public convenience and necessity and provides no firm rationale why the Board should not consider the significant economic benefits of the pipeline—such as construction and permanent jobs, construction activity, payments to landowners, and increased income and property tax revenue to state and local governments—that the Board found material.

While Sierra Club argues that economic impacts should not be considered, its brief raises issues about the "externalized costs of the pipeline," which it says the Board should have considered. Sierra Club Brief p. 39. According to Sierra Club, the "externalities" include environmental and economic costs of the pipeline, but Sierra Club never

explained the cost of those "externalities" or the weight the Board should give them, or why economic benefits should be ignored when also analyzing externalized costs.

The Landowner Petitioners claim § 6A.22(2)(b) prohibits the Board's consideration of economic benefits that will accrue to Iowa and Iowans resulting from the pipeline. Section 6A.22, while limiting the state's eminent domain authority, at the same time expressly permits eminent domain for a public use, public purpose, and public improvement, such as the acquisition of an interest in property necessary for the function of a common carrier. Iowa Code § 6A.22(2)(a)(2). There is nothing in § 6A.22 that prevents the Board from considering the significant economic benefits to Iowa and Iowans in the way of jobs, tax revenues, and payments to landowners resulting from construction of the pipeline. In fact, the statutory provision on which applicants rely says just the opposite—it provides that economic development activities that result in increased tax revenues and job opportunities will not be considered to be a public use, public purpose, or public improvement unless specifically included in the definition in paragraph "a." Iowa Code § 6A.22(2)(b).

As previously noted, paragraph "a" specifically includes a common carrier within the definition of public use, public purpose, and public improvement. Thus, contrary to Petitioners' claims, the Board was not at all statutorily precluded from consideration of economic benefits resulting from the pipeline. The Board appropriately found, as part of its consideration of the public convenience and necessity, that the pipeline will provide significant economic benefits to Iowa and Iowans.

The Niskanen Center's amicus brief contends the Board improperly considered economic benefits to *Dakota Access* in granting the permit. The Board did no such thing. The amicus creates a straw man, and then attempts to attack that straw man with citation to cases inapposite to this matter involving attempts to use eminent domain almost exclusively for a private entity's economic benefit. The amicus does not, because it cannot, cite any reliance by the Board on Dakota Access's profits. Setting aside the straw man argument, the amicus nevertheless concedes that the pipeline may still constitute a public use if Dakota Access is deemed a common carrier. Niskanen Brief p. 37. The evidence concerning Dakota Access's use of the pipeline establishes it as a common carrier. There is,

for multiple reasons, no basis to reverse the district court based on the amicus's argument.

CONCLUSION

Petitioners invite the Court to overturn both long-standing statutes and this Court's own precedent in restricting eminent domain powers for pipelines. The Court should not accept Petitioners' invitation. The law is well-settled and well-founded, and there exists substantial evidence supporting the Board's Order. Petitioners' arguments attempting to overturn the well-reasoned decisions of the Board and district court should be rejected.

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PROOF OF SERVICE

I hereby certify that on the 9th day of November, 2017, I electronically filed the foregoing Appellee's Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System, which will send notification to all parties of record. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

Dated: November 9, 2017.

Lori McKimpson

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 7,790 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: November 9, 2017.

Lori McKimpson

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