IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0423

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, IOWA FARMLAND OWNERS ASSOCIATION, INC.,

Petitioners-Appellants,

and

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

Petitioners,

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

APPELLANTS 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, IOWA FARMLAND OWNERS ASSOCIATION, INC., HICKENBOTTOM EXPERIMENTAL FARMS, INC., PRENDERGAST ENTERPRISES, INC., FINAL BRIEF

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ROUTING STATEMENT

The Supreme Court should retain this appeal for review. This appeal presents several questions of first impression. First, Appellants' constitutional arguments raise the question of whether the Iowa Utilities Board's consideration of "public uses" beyond Iowa's borders as justification for its delegation of Iowa's sovereign power of eminent domain to a privately owned interstate crude oil pipeline satisfies the Public Use Clauses under the Iowa and United States Constitutions. Second, Appellants' statutory arguments present the question of whether an interstate crude oil pipeline that does not serve or hold itself out to Iowans is a "common carrier" for purposes of Iowa's common law and/or for the purposes of Iowa Code § 6A.22. IOWA R. APP. P. 6.1101(2)(c).

Additionally, this appeal would determine whether the respective takings clauses of the Iowa Constitution and the Federal Constitution impose any meaningful restrictions on Iowa Code §§ 479B.9 and 479B.16's grant of the power of eminent domain to private entities. IOWA R. APP. P. 6.1101(2)(a).

This appeal also presents substantial questions of enunciating or changing legal principles. IOWA R. APP. P. 6.1101(2)(d). For the first time since the United States Supreme Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), this Court can determine whether Iowa finds federal eminent domain law so persuasive that it effectively controls the Court's interpretation of Article I, Section 18 of the Iowa Constitution or whether Iowa's Constitution provides additional protections to Iowa's landowners than those provided by the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE ON APPEAL

The Iowa Utilities Board ("IUB" or "Board") approved Dakota Access, LLC's ("Dakota Access") application for a hazardous liquid pipeline permit on March 10, 2016, issuing a "Final Decision and Order." District Court Order 5. The IUB previously held a contested-case proceeding in 2015. *Id.* After the IUB granted the pipeline permit, the Landowner-Appellants ("Landowners")

filed a Petition for Judicial Review with the Iowa District Court for Polk County or joined in that petition. *Id.* at 6. The District Court, sitting in an appellate capacity under Iowa Code § 17A.19, heard argument on the petition for judicial review on December 15, 2016 and issued its Order denying the petition on February 15, 2017. The Landowners timely appealed.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

I. The Landowners and their Petition for Judicial Review

The Landowners are four individuals and two associations, the Northwest Iowa Landowners Association and Iowa Farmland Owners Association, Inc., who represent their members' interests. The individual landowners and members of the associations own farmland identified as subject to Dakota Access' power of eminent domain granted by the IUB in its March 10, 2016 Final Decision and Order. *See* App. 1091 – 1120, App. 1285 (identifying the Landowners' parcels). Pursuant to Iowa Code § 17A.19(10)(a), the Landowners challenged the constitutionality of Dakota Access' exercise of the power of eminent domain over their farmlands. App. 1193 - 94 ¶ 13. The Landowners also challenged the IUB's determination that the provisions restricting the power of eminent domain found in Iowa Code § 6A did not bar Dakota Access' exercise of such power over the Landowners' farms. App. 1194 - 95 ¶¶ 14, 15.

II. The Iowa Utilities Board's March 10 Final Decision and Order

On January 20, 2015, Dakota Access filed with the IUB its petition for a hazardous liquid pipeline permit. App. 973. Dakota Access' pipeline was proposed to run from the "Bakken area near Stanley, North Dakota, to an oil transfer station, or hub, near Patoka, Illinois" spanning some 1,168 miles. *Id.* From the hub in Illinois, the crude oil can be shipped to refineries around the United States and exported to foreign nations. App. 974, 1006. The nine shippers with whom Dakota Access has contracted have signed "take or pay" contracts "committing to use 90 percent of the planned volume of the pipeline . . . requir[ing] the shippers to pay for that capacity even if it is not used. . . ." App. 981. The pipeline would cost Dakota Access $4 billion to construct. App. 1028. Dakota Access expects to make $83.3 million per month from operating the pipeline. App. 1372:5–8.

On March 10, 2016 the IUB issued a Final Decision and Order granting Dakota Access a hazardous liquid pipeline permit. In its 153 page order, the IUB determined the scope of "benefits" it could consider and considered "global issues," "national issues," "state issues," and "route issues" and appropriate "terms and conditions applicable to overall route" in concluding that Dakota Access' (then) proposed pipeline served the "public convenience and necessity." *See generally* App. 979 – 1082 (Sections I - VII). The IUB also

considered arguments that Dakota Access' exercise of the power of eminent domain was unconstitutional. The IUB did not reach the merits of those arguments; instead, it considered statutory arguments challenging its ability to delegate the power of eminent domain to Dakota Access. It determined that the eminent domain issue could be decided solely on statutory grounds. *See generally* App. 1083 – 1090.

The IUB determined that it could consider the accrual of benefits to "those living outside Iowa" in determining if the pipeline promoted the public convenience and necessity. App. 986 – 991. Of the numerous "global," "national," and "state" factors considered in the IUB's factual analysis, only the safety advantages of the pipeline (App. 1000 – 1003), the "economic benefits" to Iowa (*id.* 1010 – 1016), "environmental concerns," (*id.* 1017 – 1023), safety risks in operating the pipeline (*id.* 1023 – 1027), and "oil spill remediation" (*id.* 1027 – 1032) merited "significant weight" in the Board's analysis. Of these factors, only the safety advantages and economic benefits represent affirmative benefits to Iowans. The other factors were risks of harm to Iowans that the Board determined Dakota Access minimized. Consequently, economic and safety benefits are the only factors factually relevant to the Landowners' argument.

With respect to the economic benefits to Iowans, the IUB did not find any economic benefit to Iowans in the form of indirect consumption of refined oil (*e.g.* gasoline) or lower gas prices as a result of the pipeline. *See* the "Board analysis" at App. 1015 – 1016. Though the MAIN coalition invited the IUB to make such a finding (App. 1011), the IUB did not consider this claim in its written "Board Analysis" of the issue. The IUB found that during the "construction phase," Iowa would receive an economic benefit of at least $800 million. App. 1015. The IUB further found that Dakota Access would pay $27 million in property taxes each year and that about twenty-five (25) long-term jobs would be directly and indirectly created. *Id.*

With respect to the safety advantages, the Board compared shipping crude oil through the pipeline with shipping crude oil by rail car. The Board found that "[t]he pipeline may or may not reduce rail shipments of crude oil, but oil that is shipped by pipeline is significantly less likely to be spilled than oil shipped by rail." App. 1001. Contrary to its uncertainty about whether rail shipments of crude oil would decrease after construction of the pipeline, the IUB found that ". . . if it is built, this pipeline will reduce the overall risk of crude oil spills in Iowa and elsewhere." App. 1001 – 1002. But, in the next sentence, the IUB returned to its equivocation of the safety benefits stating: "The project's *potential* impact on safe shipping of crude oil is a factor that

merits significant weight in the Board's balancing test." App. 1003 at 33. The IUB gave significant weight to an unquantified chance that the pipeline would make Iowans safer.

Finally, the Court should note that the phrase "common carrier" does not appear anywhere in the entirety of the IUB's Final Decision and Order.

III. Summary of relevant testimony

Mr. Damon Rahbar-Daniels, Vice President of Commercial Development for Energy Transfer Partners, testified that Iowans receive no measurable direct benefit from the pipeline, that crude oil has no intrinsic value unless refined, and that 100% of the crude oil to be transported through the pipeline is destined to a refinery. App. 430:25 – 431:1–10. He further testified that Iowa has no oil wells or oil refineries. App. 422:15–17. Mr. Rahbar-Daniels further testified that he is not aware of any technology in the marketplace that would even allow the tracing of crude oil transported through the Dakota Access pipeline through a refinery and then back to Iowa in the form of refined gasoline. App. 426:9–15.

Mr. Rahbar-Daniels also testified that that Dakota Access has only nine shipper-customers. App. 426:16–19. Finally, Mr. Rahbar-Daniels testified that crude oil shipped in the pipeline could be exported to foreign countries. App. 335:19–20 ("It's the shippers who control what they do with their oil, sir.").

SUMMARY OF THE ARGUMENT

The District Court committed reversible error in determining that neither the Iowa nor Federal Constitution's "Public Use Clause" prohibited Dakota Access' taking of the Landowners' farmlands. The District Court also committed reversible error in applying the decision in *Kelo* as persuasive in interpreting Iowa's Public Use Clause. The District Court further erred in determining that the Iowa Utilities Board could consider out-of-state entities as members of the "public" for determining both whether the pipeline permit served the "public convenience and necessity" and whether Dakota Access' taking of the Landowners' farmlands satisfied Iowa's Public Use Clause. The District Court further erred in determining that economic and safety benefits incidental to Dakota Access' private construction and for-profit operation of a $4 billion pipeline constituted public uses satisfying Iowa's Public Use Clause.

Had the District Court properly applied the law, it would have determined that Dakota Access' use of the power of eminent domain over the Landowners' farmlands was a taking for a private party, barred by both the Iowa and Federal Constitutions. Had the District Court properly viewed use of the power of eminent domain as an exercise of Iowa's sovereignty, it would have concluded that Iowa's sovereignty cannot extend beyond its borders, concluding that the IUB's consideration of out-of-state "publics" as supporting

findings of "public convenience and necessity" and "public use" was contrary to law. Had the District Court given due weight to recent, highly persuasive decisions from three states (West Virginia, Pennsylvania, and Kentucky), the District Court would have concluded that takings to build crude oil pipelines that do not serve or that are not used by Iowans are unconstitutional.

The District Court further erred in finding that neither of Iowa Code §§ 6A.21 nor 6A.22 barred Dakota Access' taking. Had the District Court analyzed § 6A.21 with the appropriate statutory construction, it would have determined that it barred Dakota Access from taking the Landowners' "agricultural lands." Had the District Court analyzed § 6A.22 with the appropriate statutory construction, it would have determined that Dakota Access is not a "common carrier" as that term is used in the statute and that none of the statute's exceptions to the prohibition on considering economic development as a basis for exercising eminent domain applied to Dakota Access.

ARGUMENT

I. The Court should analyze whether Dakota Access' takings independently violate the Iowa Constitution without regard to whether the takings violate the United States Constitution and determine that the Iowa Constitution affords additional protections to landowners whose property is being taken by a private entity.

A. Statement of error preservation and standard of review.

In considering the Landowners' constitutional arguments, the Court "is obliged to make an independent evaluation of the totality of the evidence; our review becomes *de novo*." *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991). Error was preserved at the agency level because constitutional claims were raised to the IUB but not decided. App. 1085. The matter was presented and decided on judicial review. *See* App. 1193 – 94 ¶ 13; *see generally* App. 1461:18 - 1466:12 (argument of counsel for Landowners regarding constitutional issues); *see also* App. 1550 – 1555 (rejecting Petitioners' constitutional arguments).

B. The relevant Iowa and Federal Constitutional Provisions.

The Iowa Constitution's restriction on the exercise of the power of eminent domain relevantly reads: "Private property shall not be taken for public use without just compensation first being made. . ." Iowa Code Ann. Const. Art. 1, § 18 (West 2017). The Fifth Amendment to the United States Constitution relevantly provides: ". . . nor shall private property be taken for public use, without just compensation." U.S. Code Ann. Const. Amend. V. (West 2017). Each Constitution's requirement that private property only be taken for a "public use" will be referred to throughout this brief as the "Public Use Clause."

C. In light of the United States Supreme Court's majority decision in *Kelo* this Court should develop an eminent domain jurisprudence specific to Iowa for takings by private entities.

The Court should determine that the Iowa Constitution affords greater protections to Iowa's landowners whose property is being taken by a private entity than are provided by the United States Constitution. The United States Supreme Court in *Kelo v. City of New London* effectively read the "Public Use Clause" out of the Federal Constitution by holding that showing of a mere "public purpose" was all that was necessary to effect a taking benefitting a private party. 545 U.S. 465, 480 (2005). Still, the *Kelo* majority recognized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law. . ." *Id.* at 489.

It has long been the case that in Iowa ". . .we consider federal cases interpreting the federal [eminent domain] provision persuasive in our interpretation of the state provision. . . . Such cases however are not binding on us regarding our interpretation of the state position." *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 9. (Iowa 2006) (internal citation omitted). Unlike the *Kingsway* Appellants who "had not asserted a basis to

distinguish the protections afforded by the Iowa Constitution. . .” (*id.*), the Landowners maintain this Court should break with federal precedent so as to preserve Iowa’s Public Use Clause and give Iowa’s landowners adequate protections against a private party’s takings for a private purpose.

In *Kelo*, petitioners in New London, Connecticut opposed the New London Development Corporation’s exercise of eminent domain over their homes. *See generally* 545 U.S. at 474 – 75. One petitioner, Wilhelmina Dery, was born in her home in 1918 and had lived there her entire life. *Id.* at 475. Their homes were taken so that Pfizer, who planned on building a $300 million research facility adjacent to the neighborhood where the *Kelo* petitioners resided, could have amenities like hotels, restaurants, and shopping nearby. *See generally id.* at 473 – 74.

The five-Justice *Kelo* majority held that the phrase “public use” in the Fifth Amendment to the United States Constitution really means “public purpose.” *Id.* at 484 (“Because the [NLDC] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”) In effect, the *Kelo* majority, using rhetorical alchemy, transmuted the phrase “public use” in the Fifth Amendment into “public purpose.” This Court should not read out the phrase “public use” from Iowa’s constitution.

This Court has taken the first steps toward distancing Iowa from the *Kelo* majority. In *Star Equip., Ltd. v. State, Iowa Dep't of Transp.*, 843 N.W.2d 446 (Iowa 2014), the Court considered a question related to Iowa's state constitutional prohibition[1] of giving, loaning, or aiding "any individual, association, or corporation" with the credit of the state. *Id.* at 458 – 59. The Court specifically noted that, unlike other states, a valid public purpose was not a reason to make an exception to this constitutional provision. *Id.* at 459.

In support of its reasoning, the *Star Equipment* Court quoted Justice O'Connor's dissenting opinion in *Kelo*: "Four [*Kelo*] dissenters noted in the context of the Federal Takings Clause: 'We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff.'") *Id.* at 459 n.11 (quoting *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting)). The Court should apply reasoning in this case similar to its reasoning in *Star Equipment* and refuse to dilute Iowa's Public Use Clause by transforming it into a "Public Purpose Clause."

[1] Iowa Code Ann. Const. Art. 7, § 1 (West, 2017).

This Court also quoted *Kelo* in *Clarke Cnty. Reservoir Comm'n v. Robins*, again favorably quoting Justice O'Connor's dissent. 862 N.W.2d 166, 171 – 72 (Iowa 2015). The *Clarke County* Court wrote:

> Justice O'Connor underscored the constitutional necessity that any taking be for a "public use" with "just compensation":
>
> "These two limitations serve to protect the security of Property, which Alexander Hamilton described to the Philadelphia Convention as one of the great obj[ects] of Gov[ernment]. Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."

Id. at 171 – 72 (quoting *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting) (quotation marks around the second paragraph added)).

The Court's disposition to maintain a clear and principled distinction between the "public" and "private" is sound. It is the role of the Court to use judicial review to distinguish between public and private takings. *Reter v. Davenport, R.I. & N.W. Ry. Co.*, 54 N.W.2d 863, 867 (Iowa 1952) ("It is in this constitutional sense only that the question of public use may said to be judicial. It is ultimately for the courts only where constitutionality of the legislative declaration is questioned."), *Southwestern Ill. Dev. Auth. v. Nat'l City Env., L.L.C.*, 768 N.E.2d 1, 8 (Ill. 2002) ("…[I]t is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated

by the framers of the constitutions. . . . 'Courts all agree that the determination of whether a given use is a public use is a judicial function.'") (internal and quoted citation omitted) (hereinafter "*SWIDA*").

The Court should further look to Justice O'Connor's warning about the consequences of transforming the phrase "public use" into "public purpose":

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.

Kelo, 545 U.S. 469, 505 (O'Connor, J., dissenting). The Court should protect Iowans of relatively few means, like the Landowners, by reading Iowa's Public Use Clause more narrowly than the Federal Public Use Clause.

This Court also cited *Kelo* in *State v. Baldon*, addressing the question of whether Iowa's constitution could afford greater rights and liberties to its citizens than the Federal Constitution.[2] 829 N.W.2d 785, 817 (Iowa 2013). The *Baldon* Court found that ". . . state constitutional law involves recognition of the independent nature of state constitutions and the obligation of state courts in our federal system." *Id.* It continued: "And, in the wake of the United

[2] These three cases are the only cases the Landowners could find in which this Court cites to *Kelo*.

States Supreme Court decision in [*Kelo*], the Ohio Supreme Court, on independent state grounds, provided greater protection to property rights under the Ohio Constitution than were provided by the United States Supreme Court." *Id.* (citing *Norwood v. Horney*, 853 N.E.2d 1123, 1128 – 42 (Ohio 2006))[3].

The Court has recognized that its eminent domain jurisprudence may diverge from federal eminent domain law. Because *Kelo* transmuted the Federal Public Use Clause into a "Public Purpose Clause," the Court should determine that Iowa's Constitution affords Iowa's citizens greater protections with respect to takings than the United States Constitution affords them.

II. Dakota Access' taking of the Landowners' farmlands violated the Iowa Constitution because it was a private taking for a private purpose.

A. Statement of error preservation and standard of review.

In considering the Landowners' constitutional arguments, the Court "is obliged to make an independent evaluation of the totality of the evidence; our review becomes *de novo*." *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991). Error was preserved at the agency level because constitutional claims were raised to the IUB but not

[3] The opinion in *Norwood* is thorough, well written, and persuasive. The Landowners ask the Court to give careful consideration to the reasoning and holding in *Norwood*.

decided. App. 1085. The matter was presented and decided on judicial review. *See* App. 1193 – 94 ¶ 13; *see generally* App. 1461:18 – 1466:12 (argument of counsel for Landowners regarding constitutional issues); *see also* App. 1550 – 1555 (rejecting Petitioners' constitutional arguments).

B. Iowa's Constitution bars the taking of private property for private use.

Dakota Access' taking of Appellants' farmlands violated the Iowa Constitution because Dakota Access is a private company that took the land for a private purpose. "[A] private corporation intending to operate the proposed pipeline for private purposes. . . . may not be done; and any statute giving such a right is beyond the pale of constitutional authority. The power of eminent domain may be granted and exercised only where a public use is involved." *Mid-Am. Pipeline Co. v. Iowa State Commerce Comm'n*, 114 N.W.2d 622, 624 (Iowa 1962). The *Mid-Am.* Court further observed:

> . . . [T]he grant of power of eminent domain for a strictly private purpose and use. . . is beyond legislative authority and when the commission attempts to follow the [authorizing] statute in granting such right it is acting illegally and beyond its jurisdiction. It has no right to put into effect unconstitutional provisions of a statute.

Id.; *accord Vittetoe v. Iowa Southern Utils. Co.*, 123 N.W.2d 878, 882 (Iowa 1963) ("Of course private property may not be taken for private use.") (citing *Mid-Am.*).

C. The Iowa Utilities Board unconstitutionally authorized Dakota Access to exercise eminent domain authority solely on the grounds that the pipeline promotes "the public convenience and necessity" even though the pipeline is not a "public use" as required by Iowa's Constitution.

Iowa Code § 479B.9 delegates to the IUB the authority to issue a hazardous liquid pipeline permit, as it did in its Final Order (IUB Final Ord. 153 – 54); the statute 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*.

Iowa Code Ann. § 479B.9 (West, 2017) (emphasis added). Iowa Code § 479B.16 grants Dakota Access with the power of eminent domain, relevantly stating: "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 Ann. § 479B.16 (West, 2017).

The statutory grant of eminent domain authority to Dakota Access, and Dakota Access' exercise of that authority, is unconstitutional if it violates the Public Use Clause of Iowa's Constitution. In many instances, there is overlap between a "public use" and promoting "public convenience and necessity." Takings that serve a "public use" also necessarily serve the "public

convenience and necessity," because it would be illogical for the public to use something that was neither convenient nor necessary.

However, not all things that promote the public convenience and necessity satisfy the Public Use Clause. *See, e.g. SWIDA.*, 768 N.E.2d at 8 – 11 (discussing importance of judiciary in determining "whether a given use is a public use" and finding that a taking that would improve public safety and have a positive economic impact was nonetheless a private taking and not for a "public use"), *Norwood*, 853 N.E.2d at 1142 (financial benefits alone insufficient to constitute a "public use"); *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786-87 (Mich. 2004) (a private, for-profit corporation's economic contributions to the economic health of communities or the state do not satisfy the Public Use Clause). Thus, it would be possible for the IUB to issue a permit under the "public convenience and necessity" standard for a project or purpose that is nonetheless a "private use," rendering the grant of eminent domain authority pursuant to § 479B.16 unconstitutional. The IUB did just that by considering the pipeline's incidental economic and safety benefits to Iowans as the principal reason for issuing the pipeline permit.

D. <u>Dakota Access' for-profit operation of a private crude oil pipeline is a private use as it does not serve any Iowa citizen or business, thus its exercise of eminent domain over the Landowners' farmlands is an unconstitutional private taking under Iowa's Constitution</u>.

Dakota Access' for-profit operation of a private crude oil pipeline that does not serve any Iowan is a private use. First, the IUB has acknowledged that the pipeline is a "private development purpose." Second, the IUB did not credit testimony from Dakota Access that was offered in support of the proposition that Iowans would directly or indirectly make meaningful use of the crude oil shipped in the pipeline. Third, the appellate courts of other states have determined that hazardous liquid pipelines that are mere conduits through a state are not public uses for the purpose of allowing energy companies to validly exercise eminent domain authority.

1. *The IUB acknowledge that the pipeline is a "private development purpose" as defined by Iowa law.*

The Iowa Utilities Board acknowledged the unmistakably private character of Dakota Access' pipeline. It found "There appears to be no real issue that the hazardous liquid pipeline proposed by Dakota Access is an industrial enterprise development for purposes of Iowa Code § 6A.21(1)(c)." App. 1088. The IUB misidentified the relevant statutory provision; it is Iowa Code § 6A.21(1)(b), which defines "Private development purposes" to mean: "the construction of . . . commercial or industrial development." By finding that Dakota Access' pipeline was an "industrial enterprise development," the IUB

acknowledged the quintessentially private, for-profit, character of the pipeline.

2. *Iowans will neither directly nor indirectly use the crude oil transported in the pipeline; therefore the IUB only considered incidental benefits to Iowans in granting Dakota Access the pipeline permit.*

Iowans will neither directly nor indirectly use the crude oil transported in the pipeline, meaning all benefits accruing to Iowans from the pipeline must be incidental[4]. None of the crude oil transported on the pipeline will originate in Iowa or be consumed as crude oil in Iowa, because Iowa has no oil wells or refineries. There is no way to trace whether the crude oil transported in the pipeline ever finds its way back to Iowa as a refined product. Accordingly, the Iowa public has no measurable direct or indirect use of the pipeline.

Additionally, the crude oil could be exported to foreign nations.[5] The IUB found that ". . .[I]t has always been true that any oil carried by the proposed pipeline could be exported in some form. The lifting of the [crude oil export] ban only means that the oil can be exported in crude form as well as refined." App. 1006. The IUB refused to accept Dakota Access' testimony

[4] Merriam-Webster's *Ninth New Collegiate Dictionary* 310 (1986) defines "incidental" as: "occurring merely by chance or without intention or calculation."

[5] *See* PL 114-113, Dec. 18, 2015, Consolidated Appropriations Act, 2016, Division O, Title I, Section 101 (repealing 42 U.S.C. § 6212) (West 2017).

that the crude oil carried in the pipeline was "highly unlikely. . . [to] be exported." *Id.*

The IUB did not find any economic benefit to Iowans in the form of indirect consumption of refined oil (*e.g.* gasoline) or lower gas prices. The MAIN Coalition invited the IUB to make such a finding, but the IUB did not consider this argument in its "board analysis." With regard to economic benefits to Iowans, the Board found no direct benefits.

Accordingly, the IUB only considered incidental benefits to Iowans in deciding to grant Dakota Access the pipeline permit, rather than the direct benefits that would follow from actual public use. First, the IUB justified granting the pipeline permit to Dakota Access because the construction and operation of the pipeline would result in economic benefits to Iowa. *See generally* App. 1010 – 1016. However, those economic benefits are not "intended" by Dakota Access. Dakota Access built the pipeline to make money, not to make work for Iowans. Incidental economic benefits to Iowa and Iowans are insufficient to satisfy the "public use" requirement for a taking. Iowa Code § 6A.22; *see also Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting), *Norwood*, 853 N.E.2d at 1141, *Hathcock*, 684 N.W.2d 482-83.

The Board also found an incidental safety benefit to Iowans related to the relative safety of shipping oil by rail cars compared to by pipeline. *See*

generally App. 997 – 1001. The benefit the IUB found was truly incidental, *i.e.* one that possibly occurs, in light of the IUB's determination that the pipeline would only have a "potential impact" to the "safe shipping of crude oil." *Id.* at 32 – 33. The Board found that there is a potential, but not by any means a certainty, that Iowans will be safer because some oil shipped by the pipeline may not be placed onto rail cars.[6] Such incidental, chance, benefits cannot constitute a public use. *See, e.g. Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting), *Norwood*, 853 N.E.2d at 1141, *Hathcock*, 684 N.W.2d 482 – 83.

3. *The Court should look to recent eminent domain jurisprudence from other states and other eminent domain decisions to determine that a crude oil pipeline that is not directly or indirectly used by Iowans is not a public use.*

Courts in other states across the country have recently been confronted with similar questions of whether private lands may be taken for the construction of hazardous liquid pipelines that carry contents to more distant locations in other states and that are not used by the citizens of the state in which the land is being taken. As explained in this section, the facts and legal

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[6] Neither the Board nor the District Court considered the fact that the written studies presented by Dakota Access upon which the IUB and District Court relied were based upon old, lesser, railcar safety standards and operational procedures that have since been superseded by regulations imposing more stringent standards. *See* App. 1466:20 – 1468:22 (argument of Landowners' counsel citing 49 C.F.R. § 171 et seq. discussing new DOT-117 tank car standards).

issues presented in these cases are closely analogous to Dakota Access' exercise of eminent domain authority so as to be highly persuasive to the Court.

a. The IUB's delegation of Iowa's sovereign eminent domain authority to Dakota Access was impermissible because the only direct "public use(s)" the IUB considered were not by Iowan consumers or producers, but by foreign entities.

The Court should first look to the very recent and closely analogous case of *Mountain Valley Pipeline, LLC v. McCurdy* for persuasive guidance in determining if the Dakota Access pipeline is a "public use" for purposes of Iowa law. 793 S.E.2d 850 (W.Va. Nov. 15, 2016) (hereinafter "*Mountain Valley*"). In *Mountain Valley*, the natural gas pipeline at issue originated in West Virginia, instantly giving it a closer nexus to being a "public use" in West Virginia than the Dakota Access pipeline has to Iowa. *Id.* at 853. The pipeline would run to delivery points in Virginia and Columbia, South Carolina. *Id.* Just as no Iowa businesses or consumers would use the crude oil shipped in the Dakota Access pipeline, the *Mountain Valley* court observed: "*there currently is no definitive evidence that any West Virginia consumers* or non-MVP affiliated natural gas producers *would benefit from MVP's pipeline*." *Id.* (emphasis added)

Like Iowa, West Virginia strictly construes statutes granting eminent domain authority. *Compare Clarke Cnty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 171 (Iowa 2015) *with Mountain Valley*, 793 S.E.2d at 855. While West Virginia's statutory regime authorizing the purposes for which eminent domain may be exercised appears to vary from Iowa's[7], any differences between the statutes at issue in *Mountain Valley* and the instant case are superfluous. The *Mountain Valley* court found that "MVP has been unable to identify even a single West Virginia consumer, or a West Virginia natural gas producer who is not affiliated with MVP, who will derive a benefit from MVP's pipeline." 793 S.E.2d at 860. Similarly, neither Dakota Access nor the IUB identified a single Iowa consumer or business that will use or derive a direct benefit from the pipeline.

[7] West Virginia's statutory regime appears to codify all activities that constitute a "public use" authorizing the exercise of eminent domain with a catch-all provision (*see* W.Va. Code § 54-1-2 and (11) for the catch-all). Iowa's regime offers a more brief list of activities that constitute a "public use" authorizing the exercise of eminent domain (*see* Iowa Code § 6A.22), while also authorizing the exercise of eminent domain throughout the Iowa Code, sometimes for a clearly defined "public use" and sometimes for different and lower standards like "public convenience and necessity" as it does in Iowa Code §§ 479B.9 and 479B.16.

For the *Mountain Valley* court, the pipeline's failure to provide direct benefits to a West Virginia consumer or business not affiliated[8] with Mountain Valley Pipeline, LLC was fatal. The *Mountain Valley* court held:

> While there is evidence that consumers outside of West Virginia will benefit from receiving natural gas via MVP's pipeline, the circuit court correctly found that the State of West Virginia may exercise the right of eminent domain or authorize the exercise of that right *only for the use and benefit of West Virginians*:
>
> "The sovereign's power of eminent domain, whether exercised by it or delegated to another, is limited to the sphere of its control and within the jurisdiction of the sovereign. A state's power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property in one state cannot be condemned for the sole purpose of serving a public use in another state."

Id. at 862 (quoting *Clark v. Gulf Power Co.*, 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967) (internal quotation marks added) (emphasis in original) (additional citations omitted).

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[8] The question of "affiliation" is irrelevant to the instant case. If the Mountain Valley pipeline were open to unaffiliated West Virginia producers, then presumably the *Mountain Valley* court's analysis changes dramatically, as West Virginia companies would benefit from being able to ship their natural gas. While the Mountain Valley court never explicitly spells out its reasoning for why it is a problem that 95% of the Mountain Valley pipeline shippers are affiliated with Mountain Valley, LLC, it is presumably problematic for the same reason that the Iowa Supreme Court found that Mid-America's private pipeline shipping its own product, not open to the public, was a private use, not a "public use," and could not justify exercise of the power of eminent domain. *Mid-Am. Pipeline Co.*, 114 N.W.2d 622.

The IUB reached the opposite—and incorrect—conclusion: ". . . the Board will consider all benefits of a proposed hazardous liquid pipeline, regardless of whether they are Iowa-specific benefits." App. 987. The IUB relied on a sole prior Board decision[9], in which the IUB found that a crude oil pipeline running from Illinois to Minnesota which primarily supplied "over 50 percent of Minnesota's refined petroleum requirements, but only about 6 percent of Iowa's. . . would promote the public convenience and necessity and issued a permit." App. 988.

The Dakota Access pipeline is easily distinguishable because six percent is greater than zero percent. In this instance, the IUB made no finding that the crude oil carried in the Dakota Access pipeline would provide any of Iowa's refined petroleum requirements. In the administrative case cited by the IUB, though Iowa's direct use of the crude oil shipped in the pipeline was comparatively less than other states, it did not mean that Iowans did not obtain a direct, measurable, public use from the pipeline. Iowa's consumers and Iowa's economy would have surely noticed the loss of six percent of Iowa's supply of refined petroleum. In this instance, like in *Mountain Valley*,

[9] *Re: The Petition of Northern Pipeline Co, etc.*, "Order Granting Pipeline Permit, etc." issued May 31, 1979, Dkt. No. P-749.

there is no definitive direct or indirect use by Iowans of the crude oil shipped in the pipeline.

Second, the IUB's consideration of out-of-state public use(s) to authorize Dakota Access to exercise eminent domain within Iowa must fail because it exceeds the scope of the IUB's and the legislature's sovereign authority. This is a question of first impression for this Court. The Court has recognized that the right to exercise eminent domain is an inherent part of state sovereignty. *Clarke Cnty.*, 862 N.W.2d at 171 (quoting *Hardy v. Grant Twp. Trs.*, 357 N.W.2d 623, 625 (Iowa 1984)). The Court has not determined whether the legislature or an agency vested with Iowa's sovereign eminent domain authority may look beyond Iowa's borders to find a permissible "public use" to satisfy the Public Use Clause or make a finding of public convenience and necessity.

One of the first rights explicitly granted to Iowans as inalienable is the right to "acquire[], possess[] and protect[] property." Iowa Code Ann. Const. Art. 1, § 1 (West, 2017). Consistent with an inalienable right to private property, Iowa's Constitution explicitly limits the sovereign's authority to exercise eminent domain to take private property only for public uses. Iowa Code Ann. Const. Art. I, § 18; *see also Norwood*, 853 N.E.2d at 1128 – 1130 (discussing the pre-societal origins and importance of Ohio's constitutionally

enshrined inalienable right to property and how it is in tension with and limits the state's sovereign power of eminent domain) and 1140 (inalienable state constitutional right to property makes judicial review "imperative in cases in which the taking involves an ensuring transfer of the property to a private entity [or] where a novel theory of public use is asserted. . .").

The primary reason statutes delegating the sovereign's authority to exercise eminent domain must be strictly construed is because the exercise of eminent domain is fundamentally at odds with Iowans' right to acquire, possess, and protect their private property. *Cf. Norwood*, 853 N.E.2d at 1129 – 30, 1140. The inalienable right to property has given, and should give way to the state's sovereign authority in instances like roads, schools, hospitals, and public utilities. This is the first time Iowa's citizens have been asked to compromise an inalienable right for a "public use" beyond Iowa's borders.

Dakota Access and the IUB have asked of the Landowners more than Iowa's sovereignty allows. Accordingly, the Court should find the IUB's delegation of eminent domain authority to Dakota Access unlawful and unconstitutional. *Mountain Valley*, 793 S.E.2d at 862, *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.2d 386, 392 (Ky. Ct. App. 2015) (holding that pipeline running through Kentucky solely to ship natural gas liquids to the Gulf of Mexico and where the natural

gas does not reach Kentucky consumers is not a "public service" and eminent domain cannot be used to acquire land for its construction); *see also Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951) ("It is true that no state is permitted to exercise or authorize the exercise of power of eminent domain except for a public use within its own borders.") (citations omitted), *Square Butte Elec. Co-op v. Hilken*, 244 N.W.2d 519, 524 – 25 (N.D. 1976) ("A state's power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property within one state cannot be condemned for the sole purpose of serving a public use in another state.").

b. Once out-of-state "public use(s)" are removed from consideration, the indirect and incidental benefits to Iowans do not satisfy Iowa's Public Use Clause.

If the IUB cannot consider out-of-state "public use(s)" in delegating Dakota Access eminent domain authority, then the IUB's only remaining ways to satisfy Iowa's Public Use Clause are the economic benefits and safety benefits identified in its Final Order. These speculative, indirect, and incidental benefits are insufficient to constitute a "public use" as a matter of law. First, the question of whether economic benefits alone satisfies the "public use" clause of the Iowa Constitution is a matter of first impression for the Court, rendering the authority from other jurisdictions discussed herein relevant and persuasive. Second, Iowa Code § 6A.22 2.b broadly excludes

"economic development activities resulting in increased tax revenues, increased employment opportunities. . .privately owned or privately funded commercial or industrial development" from constituting a "public use" justifying the exercise of eminent domain.

The Court should adopt the reasoning of the Pennsylvania Supreme Court from its very recent decision in *Robinson Twp. v. Commonwealth*: "[i]n order to satisfy the public purpose requirement[10], 'the public must be the primary and paramount beneficiary of the taking.'" 147 A.3d 536, 586 (Pa. Sept. 28, 2016). "A mere incidental benefit to the public from the taking is insufficient to render it lawful. . . ." *Id. Cf. Kelo*, 545 U.S. at 490 ("transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.") (Kennedy, J., concurring), *SWIDA*, 768 N.E.2d 1, 8-11 (incidental safety benefits of improved traffic flow and of economic growth from a taking that would allow a private party to build a pay-to-park parking garage to generate additional profits do not satisfy the public use requirement for takings), *Norwood*, 853 N.E.2d at 1140 – 41, *Hathcock*, 684 N.W.2d 482 – 83.

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10 While the Landowners disagree with eminent domain being linked to a "public purpose" rather than a "public use" requirement, the legal principle articulated here is equally applicable to a "public use" requirement.

The Court should determine that the IUB's consideration of "public use(s)" outside of Iowa are insufficient as a matter of law to satisfy the "public use" requirement of Article I, § 18 of Iowa's Constitution. Thus the public uses beyond Iowa's borders that the IUB relied upon in granting Dakota Access the pipeline permit and corresponding eminent domain authority are invalid as a matter of law, rendering Dakota Access' exercise of the power of eminent domain pursuant to Iowa Code §§ 479B.9 and 479B.16, as applied to the Landowners, unconstitutional.

Further, the considerations of economic growth and safety of Iowans are incidental, speculative, and not the primary purpose of Dakota Access' construction of the pipeline. They cannot be a "public use" for purpose of exercising the power of eminent domain pursuant to the Iowa Constitution. Accordingly, the IUB could not constitutionally delegate the power of eminent domain to Dakota Access, and Dakota Access' exercise of the power of eminent domain pursuant to Iowa Code §§ 479B.9 and 479B.16, as applied to the Landowners, is unconstitutional.

E. Additionally, the Court should adopt Justice Thomas's analysis of the "Public Use Clause" from his *Kelo* dissent and interpret the Iowa Constitution's Public Use Clause in a similar manner and hold that Dakota Access' taking of the Landowners' farmland was unconstitutional.

The Court should adopt Justice Thomas's analysis of the Federal Constitution's "Public Use Clause" from his *Kelo* dissent. It should then interpret the Iowa Constitution's "Public Use Clause" in a similar manner and hold that Dakota Access' taking of the Landowners' farmland was unconstitutional. Justice Thomas found that the *Kelo* majority:

> . . . replaces the Public Use Clause with a "'[P]ublic [P]urpose'" Clause…(or perhaps the "Diverse and Always Evolving Needs of Society" Clause). . .a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational.'"

Kelo, 545 U.S. at 505-06 (Thomas, J., dissenting). The *Kelo* majority transformed the Fifth Amendment's Public Use Clause into a "Public Purpose Clause." Given this effective transformation of Constitutional text, the rights of Iowa's landowners depend on this Court interpreting Iowa's Public Use Clause more narrowly than the Federal Public Use Clause by requiring a taking to serve an actual public use, not a mere public purpose or public convenience and necessity.

The Court should not reduce Iowa's Public Use Clause to mere surplusage. *Cf. Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012). "If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage." *Kelo*, 545 U.S. at 507

(Thomas, J., dissenting). Instead, the Court should use "[t]he most natural reading of the Clause. . .that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." *Id.* at 508 (Thomas, J., dissenting).

That the government own, or the public have some access to and means of using the property by right, should be the *sine qua non* of the Iowa Constitution's Public Use Clause. If the state, or a private entity that has had the state's eminent domain authority delegated to it, takes private property and then uses it in a manner or a purpose in which Iowans cannot use it, then such a taking should always violate Iowa's Public Use Clause and be unconstitutional. *Accord id.* at 508 – 09 (Thomas, J., dissenting); *See also id.* at 509 – 511 (Thomas, J., dissenting) (analyzing the Public Use Clause in context of our language, the law and circumstances at the time the Fifth Amendment was adopted.). Accordingly, for the Public Use Clause to have an independent meaning, it must impose a requirement that the public, even if not all the public, as a matter of right, must be able to use the condemned property.

Justice Thomas's illuminating analysis of the history of the Supreme Court's eminent domain jurisprudence continues through his opinion. In analyzing these cases, Justice Thomas criticizes them for their "almost

insurmountable deference to legislative conclusions that a use serves a 'public use.'" *Id.* at 517 (Thomas, J., dissenting). As Justice Thomas observes, "We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable. . .or when a convicted double-murderer may be shackled during a sentencing proceeding. . .or when state law creates a property interest protected by the Due Process Clause." *Id.* at 518 (Thomas, J., dissenting); *accord Norwood*, 1139 – 40 (articulating importance of judicial review of takings).

Yet, under both modern Iowa and Federal eminent domain jurisprudence, the judiciary gives the legislature significant deference in defining what constitutes a "public use." *See, e.g. U.S. v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 679 – 80 (1896) (Peckham, J.) *and Sisson v. Bd. of Sup'rs of Buena Vista Cnty.,* 104 N.W. 454, 458 – 59 (1905); *see also* Iowa Code § 6A.22. *Sisson*, like the historical cases analyzed by Justice Thomas, was a drainage and irrigation case. *See generally* 104 N.W. 454. The Landowners, like Justice Thomas, have no problem with the outcome of these cases[11], because the relevant "public," the residents of Iowa with farms and communities irrigated or served by the drainage ditches, would "result in a common benefit and be

[11] *See Kelo* 545 U.S. at 515 ("Thus, the 'public' did have the right to use the irrigation ditch because all similarly situated members. . .had a right to use it.")

of community use." *Sisson*, 104 N.W. at 461. Importantly, this Court in *Sisson* left itself room to act because "We can conceive that there may be cases where the drainage. . .would result in so slight a public benefit to be scarcely appreciable." *Id.*

The Court should make use of the room it left itself to act in *Sisson* to adopt a narrow reading of the Iowa Constitution's Public Purpose Clause consistent with Justice Thomas's reading of the Fifth Amendment's Public Purpose Clause. This Court has previously policed the improper use of eminent domain for private purposes or purposes unauthorized by statute. *See, e.g. Mid-Am.*, 114 N.W.2d 622, *Stellingwerf v. Lenihan*, 85 N.W.2d 912, 914 – 916 (Iowa 1957) (ordering temporary injunction against a taking of land by the Le Mars Board of Park Commissioners on evidence that the land was not being taken by the Park Board for a park, but for the city to turn over the land at no cost to the federal government for the construction of an armory), *Clarke Cnty.*, 862 N.W.2d 166. The Landowners are not asking this Court to rewrite Iowa law or shed longstanding precedent. They simply ask this Court to hold that the "Public Use Clause" in Iowa's Constitution means that "the government may take property only if it actually uses or gives the public a legal right to use the property." *Kelo*, 545 U.S. at 520 (Thomas, J. dissenting).

Iowans are not able to use the pipeline constructed by Dakota Access. To uphold its taking of the Landowners farmlands as constitutional would leave "no coherent principle" limiting "what could constitute a valid public use" going forward. *Id.* (Thomas, J., dissenting). It would functionally "[o]bliterat[e] a provision of [Iowa's] Constitution." *Id.* (Thomas, J., dissenting). It would turn the shield of Iowa's Public Use Clause into the fearsome sword of a "Public Purpose Clause" that private, out-of-state, entities with vast resources may lawfully wield to forcibly take the property of Iowans of few or modest means. Iowans would lose a crucial check in preventing "large corporations and development firms. . .[from] victimiz[ing] the weak." *Id.* at 522 (Thomas, J., dissenting). The Court should find Dakota Access' taking of the Landowners' farmlands to be in violation of the Public Use Clause of Iowa's Constitution.

III. Dakota Access' exercise of eminent domain also violates the United States Constitution.

Even the *Kelo* majority agrees that a party "would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." 545 U.S. at 477 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)). From this starting point, Dakota Access' exercise of the power of eminent domain runs afoul of the United States

Constitution for the reasons that follow, as well as the reasons previously given for it violating Iowa's Constitution.

A. Statement of error preservation and standard of review.

In considering the Landowners' constitutional arguments, the Court "is obliged to make an independent evaluation of the totality of the evidence; our review becomes *de novo*." *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991). Error was preserved at the agency level because constitutional claims were raised to the IUB but not decided. App. 1085. The matter was presented and decided on judicial review. *See* App. 1193 – 94 ¶ 13; *see generally* App. 1461:18 – 1466:12 (argument of counsel for Landowners regarding constitutional issues); *see also* App. 1550 – 1555 (rejecting Petitioners' constitutional arguments).

B. Dakota Access' exercise of eminent domain is inconsistent with *Kelo*'s holding, as limited by Kelo's majority.

Dakota Access' taking of the Landowners' farmland is inconsistent with *Kelo* and prior Supreme Court precedent. They agree with the *Kelo* petitioners that a "bright-line rule" prohibiting takings where the public purpose justifying the taking is economic development or growth should be adopted; but, the *Kelo* majority rejected such a bright-line rule. *Id.* at 486 – 87.

However, the *Kelo* majority limited its rejection to instances in which the taking was part of "an integrated development plan."

> Such a one-to-one transfer of property, *executed outside the confines of an integrated development plan*, is not present in this case. While *such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoo*t, the hypothetical cases posited by petitioners can be confronted if and when they arise.

Id. (emphasis added). Dakota Access' taking of the Landowners' farmland is the hypothetical case that the Court must now address.

The IUB's finding was not made pursuant to a larger "integrated development plan." Because the pipeline was not built pursuant to a comprehensive "integrated development plan" crafted by a legislative body, Iowans lack the check of subsequent accountability at the ballot box. This Court has previously recognized accountability to the electorate as essential to checking the use of the power of eminent domain. *Clarke Cnty.*, 862 N.W.2d at 176 ("Private entities are not accountable to voters. 'Liberty requires accountability.'") (quoting *Dep't of Transp. v. Ass'n of Am. R.R.s*, — U.S. —, 135 S.Ct. 1225, 1234 (2015) (Alito, J. concurring)).

Dakota Access' takings fail to provide for any "public use" and are not part of an integrated development plan because the pipeline does not include public control of the land taken or truly public amenities like sidewalks, roads,

parks and museums, which the public may use by right. The "integrated development plan" in *Kelo* allowed the non-profit, city-controlled NLDC to retain a fee interest in some of the condemned property. 545 U.S. at 476 n.4. Dakota Access, a purely private entity, has permanent easements obtained through condemnation that now encumber the Landowners' farmlands. The integrated development plan in *Kelo* provided for truly public amenities that the public, by right, had access to like a "pedestrian 'riverwalk'" providing access to the Fort Trumbull state park and a "new U.S. Coast Guard museum." *Id.* at 474. Dakota Access' takings provide nothing of the sort, distinguishing Dakota Access' takings from the takings in *Kelo*, and rendering Dakota Access' exercise of eminent domain authority unconstitutional for failing to satisfy the Fifth Amendment's Public Purpose Clause.

C. Dakota Access' taking of Appellants' farmland is inconsistent with other Supreme Court jurisprudence on eminent domain.

Additionally, Dakota Access' taking of the Landowners' farmland is inconsistent with Supreme Court precedent on eminent domain, rendering this case easily distinguishable from those prior cases. Dakota Access' taking of the Landowners' farmland can be distinguished from the Supreme Court's more recent eminent domain jurisprudence. Before *Kelo*, the Supreme Court's most significant prior eminent domain jurisprudence came in *Midkiff* and

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). Both decided in 1984, *Midkiff* and *Ruckelshaus* are best understood as addressing unique and important economic issues not implicated in this case. Underlying both of these cases is an unstated, but easily observed, public policy against monopolies and in favor of economic competition and free and fair markets.

Midkiff dealt with a circumstance unique to the state of Hawaii: that there was almost no real estate available, and what little there was, was owned by an incredibly small number of people. 467 U.S. 229 (1984). The Hawaii legislature's taking of private real estate to redistribute it so that many more people could own it had the "purpose of eliminating the 'social and economic evils of a land oligopoly.'" *Kelo*, 545 U.S. at 482 (quoting *Midkiff*, 467 U.S. at 241 – 42);[12] *see also Kelo* 545 U.S. at 499 (O'Connor, J. dissenting) (observing that in *Midkiff* just "22 landowners owned 72.5% of the fee simple titles" on Hawaii's most populated island, Oahu.)

In *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court allowed the Environmental Protection Agency to consider data about the

[12] The case of *Berman v. Parker*, 348 U.S. 26 (1954) is also easily distinguished because it related to takings of a "blighted area of Washington, D.C., in which most of the housing for the area's 5,000 inhabitants was beyond repair." *Kelo*, 545 U.S. at 480. Since the Iowa legislature has distinguished between the taking of "blighted" properties in Iowa Code § 6A.22 and the taking of agricultural lands in § 6A.21, *Berman* is entirely inapposite. *See also Kelo*, 545 U.S. at 498 – 99 (O'Connor, J. dissenting) (distinguishing *Berman*).

environmental impacts of a pesticide submitted by one pesticide manufacturer in support of a different pesticide manufacturer's application for approval of a chemically similar pesticide. *Id.* at 992 – 93. At issue was a statutory provision that "instituted a mandatory data-licensing scheme." *Id.* at 992. The *Ruckleshaus* Court allowed the taking of a company's prior research data on the grounds that it eliminated costly and duplicative research barriers to enter the pesticide market and that it allowed a truly competitive market. *Id.* at 1015. Antitrust and monopoly concerns, which are not present here, lay at the root of the *Ruckleshaus* Court's "public use" determination.

Nothing in these instances of the Supreme Court's eminent domain jurisprudence requires this Court to find in favor of Dakota Access.

IV. Dakota Access' takings of the Landowners' farmlands violates Iowa Code §§ 6A.21 and 6A.22.

The appropriate standard of review of the IUB's and District Court's analysis of Iowa Code §§ 6A.21 and 6A.22 is for errors at law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982) (noting that district court sits in appellate capacity to correct the agency decision for errors at law and thus, the Supreme Court corrects the district court for errors at law) (distinguished on other grounds by *Goodpaster v. Schwan's Home Serv., Inc.*, 841 N.W.2d 1 (Iowa 2014)); *accord Am. Eye Care v. Dep't of Human Servs.*,

770 N.W.2d 832, 835 (Iowa 2009). "When an agency has not clearly been vested with the discretion to interpret the pertinent statute, the court gives no deference to the agency's interpretation of the statute." *Id*. (citing *Iowa Ass'n of Sch. Bds. v. Iowa Dep't of Educ.*, 739 N.W.2d 303, 306 (Iowa 2007)). Error was preserved at the IUB where these statutes were raised and considered by the IUB. *See* App. 1086 - 1090. The Landowners preserved error on judicial review. *See* App. 1194 ¶ 14; App. 1458:25 – 1461:17 (counsel for Landowners arguing both § 6A.22 and § 6A.21 to the District Court on judicial review).

A. Dakota Access' taking is barred by Iowa Code § 6A.22.

In the aftermath of *Kelo*, the Iowa legislature amended Iowa Code § 6A (Eminent Domain Law (Condemnation)) to include § 6A.22 providing for "Additional limitations on exercise of power" of eminent domain. 2006 Ia. Legis. Serv. 1st Ex. Sess. Ch. 1001 (H.F. 2351) (West 2017); *accord* Degen, *The Legislative Aftershocks of Kelo: State Legislative Response to the New Use of Eminent Domain*, 12 Drake J. Agric. L. 325, 344-345 (2007). Section 6A.22 places additional limits on "the 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."[13] Iowa Code Ann. § 6A.22

[13] Appellants contend that the statute mistakenly goes beyond a constitutionally permissible scope by expanding eminent domain authority

(West 2017). Dakota Access is an "acquiring agency" pursuant to Iowa Code § 6B.1 (2). Iowa Code Ann. § 6B.1 (West 2017). Therefore, the limits contained in § 6A.22 apply to Dakota Access.

The limit is set forth in § 6A.22 2.b.:

> Except as specifically included in the definition in paragraph "a", "public use" or "public purpose" or "public improvement" does not mean economic development activities resulting in increased tax revenues, increased employment opportunities, privately owned or privately funded housing and residential development, privately owned or privately funded commercial or industrial development, or the lease of publicly owned property to a private party.

The IUB found $800 million in short-term economic impact resulting from construction activities, including employment, and additional long-term taxes and employment as meriting "significant weight in the Board's balancing test." IUB Final Ord. 46 – 47. In doing so, the IUB violated this express provision of § 6A.22.

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from takings for a "public use," which is all that is allowed by Iowa's Constitution, to takings that are for a "public purpose" or "public improvement." However, the legislature effectively mooted any facial challenge by defining all three phrases in the same way. Appellants do not technically challenge the Constitutionality of this statute as applied to them, because the statutes authorizing the exercise of eminent domain over their farmlands were Iowa Code §§ 479B.9 and 479B.16, which Petitioners challenge.

Dakota Access' taking is not a "public use" as defined by § 6A.22, thus the exception in § 6A.22 2.b. does not apply. The statute defines "Public use," "public purpose," or "public improvement" as "one or more of the following":

> (1) The possession, occupation, and enjoyment of property by the general public or governmental entities.
>
> (2) The acquisition of any interest in property necessary to the function of a public or private utility to the extent such purpose does not include construction of aboveground merchant lines, common carrier, or airport or airport system.
>
> (3) Private use that is incidental to the public use of the property, provided that no property shall be condemned solely for the purpose of facilitating such incidental private use.
>
> (4) The acquisition of property pursuant to chapter 455H.
>
> (5) [lengthy, irrelevant provisions related to blighted or slum properties]

Iowa Code Ann. § 6A.22 2.a. (West 2017). The definitions in (1), (4), and (5) can be instantly excluded.

With respect to § 6A.22 2.a.(3), the Landowners contend that Dakota Access' "private use" of the pipeline is not "incidental" to the "public use" of the pipeline. As Appellants have argued, there is no constitutional "public use" in the first instance, and without that, this section cannot apply. Additionally, Dakota Access did not construct a four-billion-dollar ($4,000,000,000) pipeline principally for public use and benefit and then to

only incidentally make $1 billion in annual profits. The private use and private profits are the primary reason Dakota Access constructed the pipeline. Any public benefit or use is, at best, incidental. Dakota Access condemned the Landowners' farmlands so it could make a billion dollars annually.

With respect to § 6A.22 2.a.(2), Dakota Access is clearly not an "airport or airport system." The Landowners argue that Dakota Access is neither a "public or private utility" or a "common carrier" as those undefined terms are used in § 6A.22.

1. *Dakota Access is neither a public nor private utility.*

As a hazardous liquid pipeline company under Chapter 479B, Dakota Access' permit petition does not assert that Dakota Access is a public utility. *See* Petition for Hazardous Liquid Pipeline Permit, Docket No. HLP 2014-0001. Iowa Code § 476.1 defines public utilities to be those providing electricity, natural gas, water, and telecommunications services to the public. Dakota Access does not propose to provide any of these services. It "proposes to construct approximately 346 miles of 30 inch diameter pipeline for the transportation of crude oil". Petition for Hazardous Liquid Pipeline Permit, Docket No. HLP 2014-0001.

In light of these basic facts, the Court's prior analysis in *SZ Ent., LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441 (Iowa 2014) requires the conclusion that

Dakota Access is not a public or private utility. In *SZ Enterprises*, the Court found that the eight factors enumerated in *Nat. Gas Serv. Co. v. Serv-Yu Coop., Inc.*, 219 P.2d 324, 325 – 26 (Ariz. 1950) "provide a reasoned approach" when considering whether an entity should be considered a public utility. *See* 850 N.W.2d at 465 – 66. The Court further found that the IUB's efforts to characterize the utility at issue as an "electric utility" but not a public utility failed. *See* 850 N.W.2d at 470 ("The argument presented by IUB seems to be an effort to evade application of the *Serv-Yu* factors. We decline to adopt such an interpretation."). Thus, the *Serv-Yu* factors control whether Dakota Access is a public or private utility for the purposes of § 6A.22.

Appellants contend that five of those eight factors are relevant here. They are: (1) "a dedication to public use", (2) "[d]ealing with the service of a commodity in which the public has been generally held to have an interest", (3) "[m]onopolizing or intending to monopolize the territory with a public service commodity", (4) "[a]ctual or potential competition with other corporations whose business is clothed with public interest" and (5) "[w]hat the corporation actually does."[14] Based on the testimony of Dakota Access'

[14] The remaining three factors of *SZ Enterprises*, although less applicable here, are, ""[a]rticles of incorporation, authorization, and purposes," "[a]cceptance of substantially all requests for service," and "[s]ervice under contracts and reserving the right to discriminate is not always controlling." Regarding these

witness Damon Rahbar-Daniels, who confirmed that Dakota Access is not providing any services within Iowa or competing with Iowa businesses, Dakota Access cannot be a public utility.

2. *Dakota Access is not a common carrier because it does not provide services to Iowans or hold itself out to the Iowa public as a carrier for hire.*

Dakota Access is not a "common carrier" as that term is used in § 6A.22 2.b. because it does not provide services to Iowans or hold itself out to the Iowa public as a carrier for hire. Nowhere in § 6A is the term "common carrier" defined. When a term is not defined, the Court looks to the "ordinary and common meaning of the term." *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 685 (Iowa 2001) (citations omitted). "Furthermore, we construe statutory language consistent with our case law and the common law." *Id.* Additionally, "All parts of the statute will be considered together, and we will not give undue importance to any single portion." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 15 (Iowa 2010). Accordingly, the Court should look to Iowa's common law to determine if Dakota Access is a common carrier for the

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additional factors, the petitioners note that no governing or other documents filed in this case suggest that Dakota Access seeks public utility status. Dakota Access cannot accept substantially all requests for service because of its volume capacity limitations. Finally, unlike a public utility, Dakota Access uses detailed written contracts for every shipper. Although this factor is not controlling, it certainly supports the determination that Dakota Access is not a utility.

purposes of § 6A.22. *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808 (Iowa 1996) ("Iowa law adheres to a common law test for determining whether a particular conveyance is a common carrier or a private carrier.").

The Court should conclude that Dakota Access is not a common carrier. "Iowa law has defined a common carrier as 'one who undertakes to transport, *indiscriminately*, persons and property for hire.'" *Wright*, 556 N.W.2d at 810 (emphasis added). This broad definition is further clarified:

> 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*.

Id. (internal citation omitted) (emphasis added). In contrast, *Black's Law Dictionary* defines a "private carrier" as: "Any carrier that is not a common carrier by law. A private carrier is not bound to accept business from the general public. — Also termed *contract carrier*." *Black's Law Dictionary*, 10th ed. 2014, (definition of "carrier") (emphasis in original).

Dakota Access does not fall within the Iowa definition of common carrier. Dakota Access has nine pre-contracted shippers which will use at least ninety percent of the pipeline's capacity. Dakota Access saves only up to

ten percent of its capacity for other potential shippers, if they materialize. These are called "walk-up" shippers. Dakota Access discriminates against walk-up shippers because they only get up to ten-percent of capacity regardless of their needs and do not enjoy the preferred contract payment rates that the contract shippers receive. But any walk-up shipper is otherwise in the same class as the nine preferred shippers that get at least ninety-percent of capacity. Because it discriminates, Dakota Access is not a common carrier under the definition this Court supplied in *Wright*.

The District Court compared Dakota Access to an airline that cannot accommodate passengers on sold-out flights. App. 1546. The Court's analogy is flawed. If an airline like United sold only ten percent of its seats to the public at large and reserved ninety percent of its seats for customers based on exclusive contracts, it could hardly be said to be a *common* carrier as compared to Delta or Southwest, which hold all of their seats out to the public at large on a first-come, first-serve basis. Because Dakota Access' pre-existing contracts reserve almost all of the pipeline's capacity at preferred rates for contract shippers, the Court should consider Dakota Access to be a "contract" or "private" carrier.

3. *Even if the Court concludes that Dakota Access is a otherwise common carrier, Dakota Access is not a common carrier as that term is used in § 6A.22 because it does not serve or hold itself out to the Iowa public.*

Even if the Court concludes that Dakota Access is otherwise a common carrier, it should still conclude that Dakota Access is not a common carrier as that term is used in § 6A.22 because it does not serve or hold itself out to the Iowa public. Because the phrase "common carrier" is undefined by the statute and because its ordinary, common-law definition is broad and not specific to hazardous liquid pipelines, the Court should utilize tools of statutory construction to interpret the statute. *Iowa-Ill. Gas & Elec. Co. v. City of Bettendorf*, 41 N.W.2d 1, 3 (Iowa 1950) ("Statutory construction may be properly invoked only when the legislative acts contain such ambiguities or obscurities that reasonable minds may disagree or be uncertain as to their meaning.") (citations omitted).

The Court should consider the surrounding words in determining whether Dakota Access is a common carrier. *See, e.g. Den Hartog v. City of Waterloo*, 847 N.W.2d 459, 462 (Iowa 2014) ("We have often explained we construe statutory phrases not by assessing solely words and phrases in isolation, but instead by incorporating considerations of the structure and purpose of the statute in its entirety."), *In re Estate of Melby*, 841 N.W.2d 867, 870 (Iowa 2014) ("we give words their ordinary and common meaning by

considering the context in which they are used") (quoting *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 260 (Iowa 2009)).

Here, the term "common carrier" is used alongside "public or private utility" and "airport or airport system" as the class of entities whose acquisition of property is considered a "public use." Public or private utilities, as discussed immediately above, have to provide services to the Iowa public. Similarly, Iowa's airports and airport systems facilitate Iowans' ability to exercise their fundamental right to interstate travel.[15] In this context, the phrase "common carrier" should be read to mean one "holding itself out to the *Iowa public* as a carrier of all goods and persons for hire."[16] This would be consistent with the Court's prior common carrier jurisprudence. *See, e.g. Wright*, 556 N.W.2d 808 (patrons of the Old Threshers festival in Mt. Pleasant, Iowa), *Emp'rs Mut. Cas. Co. v. Chicago and North Western Transp. Co.*, 521 N.W.2d 692, 693 (Iowa 1994) (question of whether railroad company, who contracted with the "Iowa Limestone plant in Alden Iowa" was a common

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[15] *See, e.g. City of Panora v. Simmons*, 445 N.W.2d 363, 367 (Iowa 1989) (recognizing interstate travel as a "fundamental right' for substantive due process and equal protection purposes").

[16] The Landowners are not suggesting these common carriers cannot hold themselves out to others beyond Iowa's borders. They are only arguing that, to exercise the power of eminent domain, a common carrier must hold itself out to Iowans, in addition to any out-of-state businesses or persons it holds itself out to.

carrier), *Kvalheim v. Horace Mann Life Ins. Co.*, 291 N.W.2d 533 (Iowa 1974) (question of whether tour guide transporting Iowan citizens by car to tourist cites was a common carrier under a life insurance contract governed by Iowa law), *Circle Exp. Co. v. Iowa State Commerce Comm'n*, 86 N.W.2d 888 (Iowa 1957) (question of whether agency was correct to classify Iowa freight shipper serving Northeast Iowa service as common, rather than private, carrier).

Finally, the Landowners believe that if this pipeline were constructed above ground, the IUB would not have issued the permit, their farms would not have been taken, and they would not be before this Court. The Landowners believe that the psychology of "out of sight, out of mind" made it easier for the IUB and District Court to grant Dakota Access the pipeline permit and the power of eminent domain over the Landowners' farms. The District Court impermissibly based its decision on the fact that Dakota Access took a permanent easement to a subterranean portion of the Landowners' farms. It observed "In this case, the landowners keep their land." App. 1552. Neither Article I, § 18 nor the Fifth Amendment permit private takings based on the degree of harm or loss to the landowner; they prohibit them.

To counteract the facts that the pipeline is out of sight and that a permanent easement (rather than a fee interest) was taken from the

Landowners, the Landowners ask the Court to consider this hypothetical. A group of freight shippers, all located outside of Iowa and not serving any Iowans or Iowa businesses, transport a lot of goods from Chicago to Denver along Interstate 80. They determine that it would be profitable to have their own privately constructed and maintained interstate highway paralleling Interstate 80 across Iowa. A private company determines that it could profitably build and maintain such a highway by leasing or otherwise selling access to the highway to out-of-state long-haul shippers at a preferred rate and then charging one-time users tolls at a higher rate.

The highway would have some rest stops with gas stations, restaurants, etc. for the shippers, which would employ Iowans and generate a non-trivial amount of economic activity. Interstate 80 would be safer with fewer semis on it. But the highway would have no actual entrances and exits whereby the Iowa public could use it.[17] Like Dakota Access' pipeline, the highway would be a mere conduit for the freight of others originating outside of Iowa on its way to a destination outside of Iowa.

[17] Points whereupon rest-stop employees, emergency responders, maintenance, etc. could access the private highway would be the equivalent of the valves, monitoring stations, etc. that Dakota Access uses to access or control the pipe in Iowa.

The company seeking to build and lease the highway seeks to use the power of eminent domain to condemn farmlands from landowners who will not sell their land so as to maintain a continuous, straight highway. No one would imagine that the highway developer would be entitled to use the State's power of eminent domain to construct a purely private for-profit highway across Iowa that is inaccessible to Iowans. The Landowners contend that the psychology of the highway being visible and above ground helps make the conclusion in the hypothetical obvious, while the pipeline being hidden underground hinders reaching the same conclusion. The Court should give no weight to the nature or "severity" of the taking and determine that the District Court committed reversible error in doing so.

If this Court determines that Dakota Access is a common carrier for the purposes of § 6A.22 it would, necessarily, legitimize this type of taking. Section 6A.22 was passed in response to *Kelo* to prevent exactly this sort of profit-driven private taking, that is a taking justified solely or primarily by its anticipated economic benefits. Adopting a reading of "common carrier" to include out-of-state entities like Dakota Access that do not hold themselves out to or serve Iowans allows the statutory exception to swallow the protections the statute affords to Iowans. It allows foreign, out-of-state entities to take Iowans' private property to realize private profits, without

ever serving or holding themselves out to serve Iowans, so long as Iowa and its economy could be anticipated to make enough money as determined and measured by unelected regulators. It would read the Public Use Clause out of Iowa's Constitution. The Court should determine that Dakota Access is not a "common carrier" for the purpose of § 6A.22.

B. Dakota Access' taking is barred by Iowa Code § 6A.21.

Dakota Access' taking is also barred by Iowa Code § 6A.21. Iowa Code § 6A.21 1.c. states; "Public use' or 'public purpose' or 'public improvement does not include the authority to condemn agricultural land for private development purposes unless the owner of the agricultural land consents to the condemnation." Iowa Code Ann. § 6A.21 (West 2017).

"Private development purposes' means the construction of, or improvement related to. . .commercial or industrial enterprise development." *Id.* The IUB has determined that Dakota Access is a private development.

Finally, the Landowners' farms are "agricultural lands" in that they are "real property owned by a person in tracts of ten acres or more. . .that has been used for the production of agricultural commodities for three out of the past five years" or property that "includes land on which is located farm residences or outbuildings used for agricultural purposes and land on which is located facilities, structures, or equipment for agricultural purposes." *Id.*

Just like with § 6A.22, § 6A.21 facially bars Dakota Access' taking. However, the prohibition in § 6A.21 has an exception just like the prohibition in § 6A.22. The relevant exception in § 6A.21(2) states: "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. . . ." The Board found that Dakota Access was under its jurisdiction, and accordingly, § 6A.21 did not bar Dakota Access' exercise of eminent domain. IUB Ord. 121 ("The Board considers that the use of the term 'jurisdiction' in § 6A.21(2) includes the jurisdiction granted the Board under Iowa Code chapter 479B to 'implement certain controls over hazardous liquid pipelines. . .'").

Appellants contend that the Board and District Court were mistaken as a matter of law.[18] Appellants have already argued that Dakota Access is not a utility. Appellants argue that Dakota Access is also not a "person[], company[y], or corporation[] under the jurisdiction of the [IUB]."

As appellants have argued above, statutory construction requires the Court to read the terms "utilities," "persons," "companies," and "corporations"

[18] The Board's mistaken interpretation is not entitled to any deference from the Court because there is not an explicit grant of authority to the IUB to interpret § 6A.21. *Am. Eye Care v. Dep't of Human Servs.*, 770 N.W.2d 832, 835 (Iowa 2009); *Iowa Ass'n of Sch. Bds. v. Iowa Dep't of Educ.*, 739 N.W.2d 303, 306 (Iowa 2007).

together and not to be independent or unrelated. *Den Hartog*, 847 N.W.2d at 462. The Board should apply the canon of interpretation of *ejusdem generis* and interpret the generic words: "persons, companies, or corporations" to be related to the specific word of "utilities" that immediately precedes it. *See Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 715 (Iowa 2005). The legislature, in this "exception" in § 6A.21 1.c. created a list that begins with a specific legal term, "utilities" and then includes more generic terms, "persons," "companies," and "corporations." The Court should interpret the generic words "to embrace only objects similar to those objects of the specific words." *Id.*

It is significant that in § 6A.21(2) the specific words "utilities" and "any other utility" functionally sandwich the generic words "persons," "companies," and "corporations." Corporations, including utilities, utilize various subsidiaries. *See* Iowa Code Ann. § 476.1(3) ("As used in this chapter, "public utility" shall include any *person, partnership, business association, or corporation*, domestic or foreign, owning or operating any facilities. . .") (West 2017). Here, the natural reading of this exception within § 6A.21 1.c. would be: "This limitation also does not apply to utilities, [*and related*] persons, companies, or corporations under the jurisdiction of the Iowa utilities board. . ." Iowa Code Ann. § 6A.21 (West 2017) (added text in brackets and italics).

For example, an important purpose of the IUB's rate regulations is to ensure that the economic benefit of the state's power of eminent domain accrues to the public, and not the developer. This includes utilities governed by Chapter 476. However, it does not include interstate hazardous liquid pipelines under the jurisdiction of the Federal Energy Regulatory Commission. *See Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993) (IUB has no jurisdiction over interstate jet fuel pipeline because federal law preempts Chapter 479 under the Supremacy Clause of the United States Constitution). The Court should construe Section 6A.21's prohibition on using eminent domain to take agricultural lands to extend to hazardous liquid pipeline companies like Dakota Access that are not utilities or otherwise related to utilities.

STATEMENT OF REQUESTED RELIEF

The Landowners request that this Court determine and declare that Dakota Access' taking of a permanent easement to construct the pipeline under their farmlands violated one or both of Article I, § 18 of the Iowa Constitution and the Fifth Amendment to the United States Constitution. Additionally, or alternatively, the Landowners request that this Court determine that the District Court and Iowa Utilities Board committed errors of law and improperly considered the economic benefits to Iowa in violation of

Iowa Code § 6A.22 2.b. and declare Dakota Access' taking invalid on those grounds or otherwise remand this matter to the Iowa Utilities Board for further determination of whether granting Dakota Access' pipeline permit serves the public convenience and necessity when economic benefits are no longer considered. Additionally or alternatively, the Landowners request that this Court determine that the Iowa Utilities Board and the District Court committed errors of law in determining that Iowa Code § 6A.21 did not bar Dakota Access' taking of a permanent easement to construct the pipeline under their farmlands and declare the takings to be contrary to law.

If the Court grants any or all of the relief requested above, the Landowners further request that the Court direct the District Court to invalidate any easement creating a servitude on the Landowners' farmlands and held by Dakota Access upon proof that the Landowners have returned to Dakota Access the "just compensation" they previously received from Dakota Access pursuant to Iowa Code § 6B, so as to avoid the inequity of Dakota Access retaining an interest in an unlawfully obtained easement.

REQUEST FOR ORAL ARGUMENT

The Landowners request oral argument.

Respectfully Submitted

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CERTIFICATE OF FILING

The undersigned herby certifies that on the 10th day of November, 2017, the Appellant's Final Brief was filed with the Clerk of the Iowa Supreme Court, 1111 E. Court Ave., Des Moines, Iowa 50319 by electronically filing the brief through the EDMS system.

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The undersigned hereby certifies that on the 10th day of November, 2017, one copy of the Appellant's Final Brief was served upon all parties to the above cause through the Court's EDMS system to the parties of record herein as follows:

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I further certify that on the 10th day of November, 2017, one copy of the Appellant's Final Reply Brief was served via email to the following:

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

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