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

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-Appellants,

vs.

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

Respondent - Appellee,

and

OFFICE OF CONSUMER ADVOCATE
Intervenor - Appellee,

and

DAKOTA ACCESS, LLC,

Indispensable Party - Appellee.

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

APPELLANTS 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 REPLY BRIEF

/s/ William E. Hanigan
William E. Hanigan, AT0003284
Jason R. Lawrence, AT0013301
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309-3993
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: billhanigan@davisbrownlaw.com
jasonlawrence@davisbrownlaw.com

ATTORNEYS FOR PETITIONERS-APPELLANTS 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., and PRENDERGAST ENTERPRISES, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The Landowners' claims are not moot.

Am. Eye Care v. Dep't of Human Serv.,
770 N.W.2d 832 (Iowa 2009)

Americo Energy Res., L.L.C. v. Moore, 2008 WL 3984169
(Tex. App. Aug. 29, 2008)

Berman v. Parker, 348 U.S. 26, 29 (1954)

Clarke Cnty. Reservoir Comm'n v. Robins, 862 N.W.2d 166 (Iowa 2015)

Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002)

Dep't of Transp. v. Ass'n of Am. R.R.s, — U.S. —, 135 S.Ct. 1225 (2015)

Grinnell Coll. v. Osborn, 751 N.W.2d 396 (Iowa 2008)

Kelo v. City of New London, Conn., 545 U.S. 465 (2005)

Martin Trigona v. Baxter, 435 N.W.2d 744 (Iowa 1989)

Mountain Valley Pipeline, LLC v. McCurdy, 793 S.E.2d 850 (W.Va. 2016)

Norwood v. Horney, 853 N.E.3d 1128

Office of Consumer Advocate v. Iowa State Commerce Comm'n,
468 N.W.2d 280 (Iowa 1991)

Pappan Enters., Inc. v. Hardee's Food Sys., Inc., 143 F.3d 800 (3d Cir. 1998)

Thompson v. Heineman, 857 N.W.2d 731 (Neb. 2015)

Welton v. Iowa State Highway Comm'n., 227 N.W. 332 (Iowa 1929)

Iowa Code § 6B.3

Iowa Code § 17A.19

II. The IUB's constitutional arguments write the "Public Use Clause" out of Iowa's constitution by failing to meaningfully distinguish between incidental public benefits resulting from private use and actual public use and, therefore, fail.

Adams v. Greenwich Water Co., 83 A.2d 177 (Conn. 1951)

Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. App. 1967)

Clarke Cnty. Reservoir Comm'n v. Robins, 862 N.W.2d 166 (Iowa 2015)

Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)

Kinley Pipeline Co. v. Iowa Utils. Bd., 999 F.2d 354 (8th Cir. 1993)

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

Simpson v. Low-Rent Housing Agency of Mount Ayr, 224 N.W.2d 624 (Iowa 1974)

Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.,
768 N.E.2d 1 (Ill. 2002)

Square Butte Elec. Co-op v. Hilken, 244 N.W.2d 519 (N.D. 1976)

Vittitoe v. Iowa Southern Util. Co., 123 N.W2d 878 (Iowa 1963)

III. The constitutional arguments made by Dakota Access and the MAIN Coalition are insufficient to establish that Dakota Access exercised eminent domain authority pursuant to Iowa's "Public Use Clause."

Bankhead v. Brown, 25 Iowa 540 (1868)

Browneller v. Nat. Gas Pipeline Co. of Am., 8 N.W.2d 474 (Iowa 1943)

Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P.,
409 S.W.2d 908 (Tex. App. 2013)

Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)

In re J.A., 697 N.W.2d 129 (Table), 2005 WL 724834 (Iowa Ct. App. 2015)

Iowa RCO Ass'n v. Ill. Commerce Comm., 409 N.E.2d 77
(Ill. App. Ct. 1980)

Kelo v. City of New London, Conn., 545 U.S. 465 (2005)

Linder v. Arkansas Midstream Gas. Services Corp., 362 N.W.3d 889,
2009 WL 6496969 (Jul. 31, 2009)

Ohio Oil Co. v. Fowler, 100 So. 2d, 128 (Miss. 1958)

Peck Iron & Metal Co. v. Colonial Pipeline Co., 146 S.E.2d 713 (Va. 1966)

Rindge Co. v. Los Angeles, 202 U.S. 700 (1923)

Robinson Twp. v. Commonwealth, 147 A.3d 536 (Pa. 2016)

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

Sunoco Pipeline L.P. v. Teter, 63 N.E.3d 160 (Ohio Ct. App. 2016)

Thompson v. Heineman, 857 N.W.2d 731 (Neb. 2015)

Iowa R. Civ. P. 1.904(2)

Iowa R. Civ. P. 1.1603(3)

IV. Neither the IUB, Dakota Access, nor the MAIN Coalition show that Dakota Access is a common carrier under Iowa law.

Circle Exp. Co. v. Iowa State Commerce Comm'n, 86 N.W.2d 888 (Iowa 1957)

Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P.,
409 S.W.2d 908 (Tex. App. 2013)

Freedom Fin. Bank v. Estate of Boesen, 805 N.W.2d 802 (Iowa 2011)

Kinder Morgan Cochin L.L.C. v. Simonson, 66 N.E.3d 1176 (Ohio Ct. App. 2016)

Linder v. Ark. Midstream Gas. Serv. Corp.,
362 N.W.3d 889, 2009 WL 6496969 (Jul. 31, 2009)

State v. Beach, 630 N.W.2d 598, 600 (Iowa 2001)

Sunoco Pipeline L.P. v. Teter, 63 N.E.3d 160 (Ohio Ct. App. 2016)

Wright v. Midwest Old Settlers and Threshers Ass'n, 556 N.W.2d 808 (Iowa 1996)

137 FERC ¶ 61126 (2011)

Northern Nat. Gas Co., 108 FERC ¶ 61004 (2004)

REPLY ARGUMENT

I. The Landowners' claims are not moot.

The landowners' claims are not moot because this case presents a justiciable controversy.[1] The issues before the Court are "live" and are not merely "academic." *See Martin-Trigona v. Baxter*, 435 N.W.2d 744, 745 (Iowa 1989). The Court's decision "would be of force or effect in the underlying controversy." *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 398 (Iowa 2008). Alternatively, the Landowners' appeal satisfies the four-factor test for the Court considering moot issues as announced in *Grinnell College*. *Id.* at 399.

A. A live controversy exists for the Court to decide.

Contrary to Dakota Access's arguments (*See* Dakota Access Br. 32 – 35), a live controversy exists for the Court to decide. Dakota Access first cites *Welton v. Iowa State Highway Comm'n*, a very old case, in which a farmer lost part of his orchard to a completed highway before this Court could hear his challenge. 227 N.W. 332 (Iowa 1929). The *Welton* court held that "No order which we can make can preserve to appellant his orchard." *Id.* at 333. In other words, once mature trees have been felled and killed, they cannot immediately

[1] As Dakota Access notes (Br. p. 26 n.21), Dakota Access moved to dismiss this matter on mootness grounds, and the Landowners resisted. Like Dakota Access, the Landowners invite the Court's attention to their prior resistance, which for reasons of space limitations in this brief, is more expansive.

regrow. *Welton* is inapplicable because, as Dakota Access points out, the Landowners' farms have been "restored in accordance with state land restoration rules." *See* Dakota Access Br. 33. The District Court agreed that such restoration meant that Petitioners would not be irreparably harmed. August 29, 2016 Order at 10.

Accordingly, the facts and law of this case as set forth by both Dakota Access and by the District Court distinguish this case from *Welton*. In *Welton*, there was irreparable harm because the orchard could not be restored. In this case, both the District Court and Dakota Access agree that the Landowners' farms can be restored, as required by state law.

At the District Court, on their motion for a stay, the Landowners took the position that the construction of the pipeline constituted irreparable harm. Dakota Access took the position that they would comply with land restoration rules, adequately repairing the Landowners farmland. The District Court disagreed with the Landowners and agreed with Dakota Access. App. 1423 (holding that the requirement that Dakota Access restore "the soil in the same or similar condition it was in before the work was done" meant that "Petitioners have not met the showing of irreparable harm. . .").

The Landowners accepted the District Court's holding on the question of irreparable harm and did not appeal it. Thus, they have abandoned their prior

position that the construction of the pipeline has so altered or changed the character of their land to make it impossible to put the Landowners and their land back in the position they were in prior to the construction of the pipeline. Nonetheless, Dakota Access now seeks to use the Landowners' rejected and abandoned position against them. The Landowners are not "blithely mak[ing] inconsistent representations to Iowa's courts." Dakota Access Br. 33 – 34. The Landowners are arguing that irreparable harm, like the destruction of mature apple trees at issue in *Welton*, has not occurred, thus distinguishing this case. The Landowners' position is consistent with the facts and law as set forth in the District Court's opinions and as argued by Dakota Access.

Thus, the irreparable harm that rendered *Welton* (or *Lewis* or *Porter*) moot is not present here.[2] The easement could be revoked, and the pipeline could be removed; or, the commodities could cease their trespass, and the Landowners could be restored to their original positions.[3] If Dakota Access argues at oral argument that this outcome would be unfair because it would bear the economic costs of removing the pipeline, or losing its profits by the

[2] Because the two other cases principally relied upon by Dakota Access: *Lewis* and *Porter*, rely on *Welton*, those cases are similarly distinguished by the Landowners' argument.

[3] *See Americo Energy Res., L.L.C. v. Moore*, 2008 WL 3984169, at *7 (Tex. App. Aug. 29, 2008) (Texas pipeline constructed without a valid easement, along with oil transiting through the pipeline, were trespasses).

cessation of the flow of oil throughout the pipeline, then it is ultimately responsible for those costs. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (abrogated on other grounds related to federal court standards for issuing a preliminary injunction) (entities that anticipate a "pro forma result" are responsible for their costs when they ultimately end up having "jumped the gun" and incurred costs or proceeded with actions that are later determined to be unlawful) (citing *Pappan Enters., Inc. v. Hardee's Food Sys., Inc*., 143 F.3d 800, 806 (3d Cir. 1998)). The Court should not entertain any argument by Dakota Access that the pipeline is too big or too important to fail.

Additionally, if the Court were to hold that this controversy is moot, then the Court would render the judicial review process set forth in Iowa Code § 17A.19 irrelevant. Iowa Code § 17A.19 and the judicial review process within provides Iowa's citizens with meaningful judicial oversight and review of agency action. On questions of constitutionality and on (many) statutory interpretation questions, Iowa's courts protect citizens from unlawful agency action by providing a *de novo* review of agency action. *Office of Consumer Advocate v. Iowa State Commerce Com'n*, 465 N.W.2d 280, 281 (Iowa 1991), *Am. Eye Care v. Dep't of Human Serv.*, 770 N.W.2d 832, 835 (Iowa 2009). As this Court is surely aware, it takes time for any case to work its way through Iowa's

overburdened judicial system, despite the best efforts of its diligent judges, clerks, and staff, and the members of the bar.

Dakota Access's pipeline permit was approved in March of 2016, and the pipeline is complete. Dakota Access Br. 21, 22. Dakota Access's position necessarily would require the Landowners, Iowans of normal means, to have extraordinarily found a way to bring this case to this Court within a period of a few months, coincidentally comprising of the April and May, 2016 spring planting season. *See generally* App. 1287 - 88. Dakota Access's position must further be that, since a true merits-based decision could not be reached before the pipeline was constructed and operational, that the Landowners' only recourse was to seek a stay from this Court (if, even then, a request for a stay could have been briefed, heard, and decided before the completion of pipeline construction on the Landowners' farms).

An important Constitutional right is at stake in this appeal: the right to not have one's land taken for a private purpose. Adopting Dakota Access's position on mootness effectively denies Iowans the protections of our Constitution by only guaranteeing them an extraordinary[4] hearing in which their Constitutional rights are placed on a scale and potentially outweighed by

[4] The costs to Iowans of modest means of pursuing expedited relief, such as a stay, are extraordinary.

Constitutionally irrelevant factors, like the interests of the opposing party and the public interest. Iowa Code § 17A.19(5)(c)(1)-(4). These include a developer's risk of large economic losses resulting from incurring significant construction and completion costs before judicial review can be completed.

The Landowners urge this Court to hold: when an Iowan properly invokes judicial review of an agency's decision to grant eminent domain to a private entity, the private entity cannot moot the judicial review by condemning and altering the taken property before Iowa's Courts can fully and finally adjudicate the constitutionality of the taking, and any private party who so condemns and alters the taken land does so at its sole risk of an eventual adverse legal outcome. *Davis*, 302 F.3d 1116; *see also* Iowa Code § 6B.3 (Dakota Access alternatively could have sought the District Court's "determination and declaration that [the acquiring agency's] finding of public use, public purpose, or public improvement necessary to support the taking meets the definition of those terms" pursuant to Iowa Code § 6A.24(2). It did not.)

Because Dakota Access chose to ask for forgiveness, rather than ask for or wait for permission, the Court should reach the merits.

B. Even if moot, the Court should still decide this controversy.

The Court should still decide this controversy, even if the Court otherwise finds it moot. This controversy weighs in favor of the Landowners on the four

factors considered in "determining whether or not we should review a moot action." *Grinnell Coll.*, 751 N.W.2d at 398. Those factors are:

> (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review.

Id.

This matter is public in nature and of great importance. Both the Iowa Utilities Board and Iowa's Office of the Consumer Advocate agree that this matter concerns "issues of broad public importance." IUB Br. 12 (Routing Statement), OCA Br. 10 (Routing Statement). The Nebraska Supreme Court found that a taxpayer challenge to the constitutionality of the exercise of eminent domain for the proposed Keystone XL Pipeline was of such public importance that Nebraska's taxpayers generally, and not just "any particular landowner in an approved pipeline route", could challenge Nebraska's regime of granting eminent domain to pipeline companies because "every citizen has an interest" in the matter that "should not hinge upon whether any particular landowner. . . has the resources and ability to resist a condemnation proceeding on constitutional grounds." *Thompson v. Heineman*, 857 N.W.2d 731 (Neb. 2015). The *Thompson* case, along with the IUB's and Iowa OCA's Routing Statements, satisfy the first factor.

Second, it is essential that the Court reach the merits to provide Iowa's agencies with an authoritative adjudication to guide their future conduct. "Liberty requires accountability." *Clarke Cnty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166, 176 (Iowa 2015) (quoting *Dep't of Transp. v. Ass'n of Am. R.R.s*, — U.S. —, — 135 S.Ct. 1225, 1234 (2015)). As argued in the preceding section, if Dakota Access prevails on its mootness argument, its exercise of eminent domain will have been placed beyond judicial review because it could build the pipeline faster than Iowa's judicial system could hear any Landowners' challenge. This also means that the IUB's decision to grant the pipeline permit and eminent domain authority to Dakota Access will also be placed beyond the judicial review of the Court. If Iowa's agencies know that massive private entities with bottomless budgets can evade judicial review of the exercise of eminent domain, then Iowa's agencies will be more likely to grant those private entities eminent domain authority because they know their decisions will be beyond effective review.

The Nebraska Supreme Court also granted review in *Thompson* on similar reasoning: "The exception for matters of great public concern ensures that no law or public official is placed above our constitution." 857 N.W.2d at 823. The Court should not allow the IUB to evade judicial accountability only because Dakota Access is a multi-billion-dollar company with the means of constructing

the pipeline before the Court could hear the Landowners' constitutional challenge. The Court should reach the merits for the purpose of providing substantive legal guidance for the future conduct of state agencies bestowing Iowa's sovereign eminent domain authority on private parties. The Court should reach the merits to promote the accountability necessary for democratic government by making clear that the agencies' decision to grant eminent domain authority is never beyond this Court's review. This second factor also weighs in the Landowners' favor.

Third, this issue is likely to recur in some form. Both parties have cited several cases from across the nation relating to the exercise of eminent domain for private pipeline companies. The cases cited by the Landowners in their opening brief[5] show that the broader constitutional question of when a private party's exercise of eminent domain is for a private—and not a public—use is a live and contested judicial question, especially in the wake of *Kelo* v*. City of New London, Conn.*, 545 U.S. 465 (2005).

Finally, this issue is likely to evade judicial review in the future if the Court agrees with Dakota Access that the Landowners' appeal is moot. Eminent domain authority is an aspect of state sovereignty. *Clarke Cnty.*, 862 N.W.2d at

[5] *See Norwood v. Horney*, 853 N.E.3d 1128 (Ohio 2006), *Mountain Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850 (W.Va. 2016).

171. Thus, for a private party to exercise it, Iowa must confer its eminent domain authority on the private party. If the Court agrees with Dakota Access and declares this controversy moot, then all private developers in the future will have the strongest incentive to race any challenge to their exercise of eminent domain and at least commence, if not complete, their projects before this Court can decide the dispute. If the project can be built quickly enough, a well-funded developer might even commence or complete the project before the District Court can hear the § 17A.19 judicial review.

The Court's ruling in favor of Dakota Access on the mootness question would make constitutional challenges to a private developer's exercise of eminent domain likely to evade review in the future. The third and fourth factors enunciated in *Grinnell College*, therefore, weigh in favor of the Landowners. The Court should reach the merits of the Landowners' arguments.

II. The IUB's constitutional arguments write the "Public Use Clause" out of Iowa's constitution by failing to meaningfully distinguish between incidental public benefits resulting from private use and actual public use and, therefore, fail.

The IUB's constitutional arguments write Iowa's Public Use Clause out of its constitution. The IUB fails to meaningfully distinguish between incidental public benefits resulting from private use and benefits resulting from actual public use. The IUB fails to acknowledge the judiciary's role as the final arbiter

of what constitutes a "public use," and its conception of "public use" leaves no room for meaningful judicial oversight. As set forth in its brief, the IUB's position is that a "public use" is whatever the IUB determines makes Iowa or Iowans richer or marginally safer. IUB Br. 51 ("... the Board granted the power of eminent domain based on public *benefits*[6] in Iowa, including economic *benefits* specific to Iowa and safety *benefits* to Iowans and to others." (emphasis added)).

The IUB offers no substantive response to the Landowners' argument that the IUB's position is incompatible with a stable and ordered regime of private property, where the "Public Use Clause" functions as a meaningful safeguard against the taking of private property for private purposes, because it cannot. *See* Landowners Opening Br. 27 – 29. Perhaps realizing that specific words matter in this context the IUB, in its brief, represents that it applied a "public *use* and convenience" test. IUB Br. 45 (emphasis added). This representation is inaccurate. In its Final Decision and Order, the IUB specifically stated that it applied a "promote the public *convenience* and necessity' test applicable in this case." App. 985 (emphasis added). The IUB even distinguished "public convenience and necessity" from a "necessary to

[6] Tellingly, the IUB did not find "public use" but only "public benefits."

serve a public use" test as set forth in Iowa Code § 478.4 (but argued that the two tests were similar). *Id.*

Further, the Iowa cases cited by the IUB in support of its position can be distinguished and pose no barrier to the Court's ruling in favor of the Landowners. In *Vittitoe v. Iowa Southern Util. Co.*, the Court sided with the landowner and affirmed the trial court's dismissal of condemnation proceedings because the Iowa Commerce Commission refused to determine whether it was necessary to take a specific landowner's farmland to build electrical lines. 123 N.W.2d 878, 879-80 (Iowa 1963). In so ruling, the Court reaffirmed the foundational principle providing that, "Of course private property may not be taken for private use." *Id.* at 882. The dispute in *Vittitoe* did not concern "the question of whether distribution of electricity to the public is a public use." *Id.* at 880-81. The Landowners do not dispute that providing Iowans with electricity is a "public use" because Iowans are directly using the electricity. Thus, the language that the IUB quotes from *Vittitoe* is only applicable if the pipeline itself constitutes a "public use." It does not.

The most important statement of this Court in *Vittitoe* is: "It is true…the *initial* determination of what is a public use is ordinarily for the legislature and courts will not interfere with its determination that a use is public unless it is clear, plain and palpable it is private in character." *Id.* at 880 (emphasis added).

First, the legislature, and the IUB as the delegee of the legislature's authority, only makes an initial determination of what constitutes a public use. Though unstated, the *Vittitoe* Court's use of "initial" means that the Court, not the IUB, makes the final and dispositive determination of whether something is a public use. Second, the Landowners maintain that an oil pipeline built by a private company to generate annual revenues of $1 billion is "plain[ly] and palpabl[y] private in character." App. 1372: 5-8. The Landowners maintain that the "benefits"—not "use(s)"—identified by the IUB are incidental to the plainly and palpably private character of the pipeline.

The other two Iowa cases relied upon by the IUB provide no additional authority for their position. *Simpson v. Low-Rent Hous. Agency of Mount Ayr* concerned the construction of low-rent dwellings. *See generally* 224 N.W.2d 624 (Iowa 1974). Of course, Iowans would rent and occupy such dwellings as homes, and thereby *use* them.

Similarly, in *Reter v. Davenport, R.I. & N.W. Ry. Co.*, the "spur" railroad at issue still served an Iowa business and was open to the local public for use, which meant that any future (Iowa) businesses built along the spur would have had a right to use the rail spur. *See generally* 54 N.W.2d 863 (Iowa 1952). Central to the *Reter* court's analysis were two facts: (1) the rail spur at issue connected to the larger network of public railways, and (2) the public has a

right to use the rail spur. *Id*. at 1120. Though unstated, the *Reter* court conducted its analysis in the context of use by Iowa businesses, *i.e.* an Iowa public. Nothing in *Reter* suggests the same outcome should be reached when only an out-of-state-public uses the taking, whether it be a pipeline, rail spur, or otherwise, and Iowans only incidentally benefit.

Neither *Reter*, nor the IUB answer the question of whether Iowa's sovereign eminent domain power can be granted to a private entity for the sole and exclusive use of out-of-state individuals or entities. The IUB conceded that the public using the pipeline is at best an out-of-state public. *See* App. 990. *Reter* is not relevant to the Court's decision in this matter.

Further, the IUB misunderstands authority cited by the Landowners in their opening brief. The IUB tries to construe the *Southwestern Illinois* case[7] ("SWIDA") as a case supporting its elastic conflation of "public use" with "public purpose." IUB Br. 49 – 50. Instead, *SWIDA* affirms the judiciary's role in confirming that no agency finds that a development serves a "public purpose" without also finding a "public use" as required by the state or federal constitution. 768 N.E.2d at 8 – 11. *Reter* confirms this role for Iowa's Courts. 54 N.W.2d at 867.

[7] *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.C.C.*, 768 N.E.2d 1 (Ill. 2002).

The IUB further tries to spin *Cnty. of Wayne v. Hathcock*[8] as favorable to its position. IUB Br. 50 – 51. *Hathcock* recognizes that private property can be condemned, even by a private entity, for a "public *use*," because that is the law in Michigan the same as it is in Iowa. IUB Br. 50. The Landowners cite *Hathcock* in support of the proposition that an interstate crude oil transportation pipeline is not a public use. The IUB argues that because central coordination and planning is required to build the pipeline, it is like railroads or highways or gas lines, which are the examples *Hathcock* gives under this analysis. IUB Br. 50; *Hathcock*, 648 N.W.2d 781 – 82. These are examples of "vital instrumentalities of commerce" used by the public within the state as local modes of transportation or for transporting goods to local consumers. *Hathcock*, 648 N.W.2d at 781 – 82. Instead, the Dakota Access pipeline is closely analogous of building a private highway or railroad across Iowa that cannot be used or accessed by Iowans, but can only be accessed by citizens of other states. The pipeline at issue in this case is not a "vital" instrumentality of commerce for Iowans; it is instead a "vital" instrumentality of revenue for Dakota Access.

The IUB also misreads *Hathcock's* analysis of accountability. Accountability, according to the *Hathcock* court, is the state's ability "to ensure

[8] 684 N.W.2d 765 (Mich. 2004).

that the property continues to be used for the commonwealth after being sold to private entities." 684 N.W.2d at 784. In this case, neither the IUB nor Dakota Access can ensure that the pipeline is being used for Iowa at all—it may be that the oil the pipeline transports is refined by private entities and sold to foreign nations for the profit of those private entities.[9] Like the developers in *Hathcock*, Dakota Access "intends . . . to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise." 684 N.W.2d at 784. Whatever continuing regulatory powers the IUB has over Dakota Access and its pipeline, [10] the IUB cannot require Dakota Access or the end refiners of the oil transported in the pipeline to allow Iowans the use of the oil. The Landowners urge the Court to make this crucial distinction between utility pipelines designed to be used by consumers within Iowa and the Dakota Access pipeline, which cannot be used by Iowans.

Finally, the IUB mis-analyzes the *Square Butte*[11] and *Adams*[12] cases cited by the Landowners. IUB Br. 51 – 52. The IUB ignores *Square Butte*'s holding that the public benefit must be "substantial and direct . . . something greater

---

[9] App. 335:19-20.
[10] Because it has constructed an interstate pipeline, Dakota Access will be subject to preemptive federal jurisdiction. *See Kinley Pipeline Co. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993) and App. 1024.
[11] *Square Butte Elec. Co-op v. Hilken*, 244 N.W.2d 519 (N.D. 1976).
[12] *Adams v. Greenwich Water Co.*, 83 A.2d 177 (Conn. 1951).

than an indirect advantage" and "inextricably attached to the territorial limits of the state because the state's sovereignty is also so constrained." 244 N.W.2d at 525. The *Adams* court requires the same showing of a "substantial and direct" benefit.[13] 83 A.2d at 182.

First, if the IUB's reasoning is accepted, then indirect benefits like increased revenues whether from taxes, job creation, or otherwise would always justify a private entity's taking of private property. The Landowners ask this Court to draw the distinction between "direct" and "indirect" or "incidental" benefits that the IUB will not make and hold that the tax revenues, jobs created, and specious safety benefits identified by the IUB are indirect or incidental[14] and not an appropriate basis for supporting a finding of a "public use". Our constitution requires a brightline distinction between direct "use(s)" and indirect "benefit(s)" to prevent large, wealthy, corporate interests from showering pliant state regulators with promises of increased tax revenues and platitudes about increased public welfare as pretext for using the power of eminent domain to take Iowans' real estate at a discounted price from that

[13] The Landowners would ask the Court to go further and find a "substantial and direct use" as opposed to benefit, so as to respect the language and purpose of Iowa's Public Use Clause.

[14] *See* Landowners' Opening Br. 35 - 36.

which it could negotiate in a free and fair marketplace. *Clarke Cnty.*, 862 N.W.2d at 171–172.

Second, the IUB fails to address the issue of state sovereignty raised in *Square Butte* and the Landowners' opening brief. The pipeline is equivalent to the "one way transmission line" whereby power flowed out of Florida and into Georgia. *Square Butte*, 244 N.W.2d at 524 – 25 (discussing *Clark v. Gulf Power Co.*, 198 So. 2d 368, 371 (Fla. App. 1967)). A state's sovereignty does not extend beyond its borders. Consequently, eminent domain cannot be exercised in Iowa under Iowa law to confer a benefit on businesses or individuals in either North Dakota or Illinois or Texas. The IUB exceeded the Iowa legislature's sovereign authority (as delegated by the legislature), rendering its grant of the power of eminent domain legally void.

III. The constitutional arguments made by Dakota Access and the MAIN Coalition are insufficient to establish that Dakota Access exercised eminent domain authority pursuant to Iowa's "Public Use Clause."

The constitutional arguments made by Dakota Access and the MAIN Coalition fail to establish that the pipeline is a "public use" satisfying Iowa's "Public Use Clause." First, Dakota Access overstates the deference this Court is required to give the Iowa legislature in determining what constitutes a "public use." The portion of *Bankhead v. Brown* quoted by Dakota Access is inconsistent with *Reter's* holding that the judiciary is the final arbiter of what constitutes a

public use and should be considered overruled by the Court. *See* Dakota Access Br. 53 (quoting 25 Iowa 540, 545-47 (1868) (especially the phrase "the courts cannot sit in judgment")).

The *Browneller*[15] case cited by Dakota Access does not support its position. *Browneller* involved the construction of a distributor's second interstate natural gas pipeline across Iowa (the first was built with the company having acquired all easements without resorting to eminent domain). 8 N.W.2d at 688. The second pipeline was designed to be connected to the first pipeline by "loops" allowing the two pipelines to operate as "one complete line." *See id.* at 478 (describing loops), 479 (pipelines to operate as one). Importantly, 6.5%, or 15 million cubic feet, of the gas transported in the pipeline was sold to Iowa consumers. *Id.* at 691. The *Browneller* pipeline had an "off ramp" in Iowa and was used by Iowans. The pipeline at issue in this case has no "off ramp" in Iowa and is not used by Iowans. The Court can—and should—distinguish *Browneller*.[16]

Other cases cited by Dakota Access are similarly distinguished. *Strickley v. Highland Boy Gold Mining Co.* allowed land to be condemned to transport ore

[15] *Browneller v. Nat. Gas Pipeline Co. of Am.*, 8 N.W.2d 474 (Iowa 1943).
[16] Of course, having neither oil wells nor oil refineries, Iowans cannot "use" a crude oil pipeline.

extracted in Utah by a bucket line to a nearby rail station in Utah. *See* 200 U.S. 527 (1906). Both ends of the bucket line were used in Utah. In *Ohio Oil Co. v. Fowler*, oil was extracted from a Mississippi oil field and transported a mere twenty-five miles to a Mississippi refinery. *See* 100 So. 2d, 128, 129-30 (Miss. 1958). The Mississippi public used the pipeline. Similarly, the interstate pipeline at issue in *Peck Iron & Metal Co. v. Colonial Pipeline Co.* served "eleven locations in Virginia, including the city of Chesapeake." 146 S.E.2d 713 (Va. 1966). Virginians used the pipeline. *Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P.* can be distinguished because the condemnation was of Texas land for an oil pipeline that terminated in Port Arthur Texas; the pipeline was "used" by Texans. *See* 409 S.W.3d 908 at 911 (Tex. App. 2013).

Dakota Access argues that no caselaw authority or statute expressly precludes the IUB from considering that only a public outside of Iowa will use the pipeline. Dakota Access Br. 58. But no caselaw authority cited by Dakota Access expressly says that Iowa's legislature or its agencies may grant eminent domain authority for the exclusive use of an out-of-state public. This is the question before the Court, and it is a matter of first impression.

Dakota Access's assertion that the Landowners provided no authority for their position is inaccurate. Dakota Access Br. 58. The Landowners provided

authority from Iowa that eminent domain is a feature of Iowa's sovereignty[17], coupled with persuasive authority from other states.[18] All but one case Dakota Access cites on this point are unavailing, as none of them address whether a state can authorize the use of eminent domain for the sole and express use of a public beyond its borders.[19]

The MAIN coalition's discussion of federal law does not provide this Court with useful precedent or analysis. *See* MAIN Br. 26 – 31. *Rindge Co. v. Los Angeles*[20] is unremarkable; none of the parties dispute the public nature of a highway. *Berman v. Parker* is easily distinguished because the takings involved a comprehensive "area redevelopment plan" whereupon the taken land would be "devoted to such public purposes as streets, utilities, recreational facilities and schools" or sold to purchasers' who "will carry out the redevelopment plan." 348 U.S. 26, 29 (1954). Similarly, the taking in *Kelo* survived because it was part of a similar "comprehensive redevelopment plan." 545 U.S. at 488.

---

[17] Landowners Opening Br. 42.
[18] *Id.* at 44.
[19] Dakota Access, in response to the Sierra Club, argues the Federal Commerce Clause. Dakota Access Br. 46 - 48. Though Dakota Access raised this argument to the District Court, it was not decided. *See Generally* Dakota Access Oct. 31, 2016 Br. 60; App. 1518 - 1556 (Ruling on Judicial Review). Dakota Access waived the argument by failing to move the District Court to amend or enlarge its Order. *See* Iowa Rs. Civ. P. 1.904(2), 1.1603(3), *In re J.A.*, 697 N.W.2d 129 (Table), 2005 WL 724834 at *3 (Iowa Ct. App. 2005).
[20] 262 U.S. 700 (1923).

The Hawaii legislature, in *Haw. Hous. Auth.y v. Midkiff*, broke up a land oligopoly "traceable to their monarchs" in which "only 72 private landowners" owned 47% of the land. 467 U.S. 229, 232 (1984) (percentage of land ownership), 241 – 42 (traceable to monarchs). This taking was initiated by Hawaii's legislature so that Hawaiians could have a fair shot at owning land or a home; in other words, so the Hawaiian public could use the land.

None of these cases—or any of the other federal cases cited by the MAIN Coalition or Dakota Access—decide the constitutionality of a taking where land is taken in one state for out-of-state public's sole and exclusive use of the object of the taking (*i.e.* highway, airport, pipeline, etc.). The Landowners cannot imagine this Court allowing eminent domain to be used by a private developer to build a highway across Iowa, with North Dakotans being the only individuals allowed to travel on it.

Dakota Access cites only one state court case in which a pipeline company was granted eminent domain authority without the pipeline having either an "on ramp" or "off ramp" in the state: *Thompson.* 857 N.W.2d 731.[21] *Thompson*

[21] In *Sunoco Pipeline L.P. v. Teter*, the pipeline did not have an "off ramp" in Ohio; it originated at a plant in Eastern Ohio, and the intermediate appeals court adopted the trial court's finding that "The pipeline creates a means to deliver Eastern Ohio resources to market" an Ohio "use." 63 N.E.3d 160, 163 (Ohio Ct. App. 2016). In *Linder v. Ark. Midstream Gas Serv. Corp*., 362 S.W.3d 889, the pipeline at issue was for "the development of [Arkansas's] natural resources,"

is not of persuasive value to this Court because a majority of Nebraska's Supreme Court would have overruled the grant of eminent domain authority for construction of the pass-through, interstate pipeline at issue (the Keystone XL pipeline). Nebraska's constitution contains an unusual requirement that a supermajority of its Supreme Court (at least five of seven justices) agree to find a statute unconstitutional prevented the 4-3 majority decision from taking effect. *Id.* at 847.

Dakota Access fails to distinguish other persuasive authority cited by the Landowners. Dakota Access argues that the taking in *Robinson Twp. v. Commonwealth* would have been allowed if Pennsylvania's equivalent of a certificate of public convenience and necessity were issued. Dakota Access Br. 57 – 58 n.46. That is inaccurate. The *Robinson* Court said in dicta that a taking by a public utility would be constitutional. *See generally* 147 A.3d 536, 584 – 85 (Pa. 2016). But a public utility in Pennsylvania must distribute the commodity "directly to the public for compensation." Thus, *Robinson* supports the Landowners' position that, unless the public can use the commodity (oil, natural gas, etc.) transported in the pipeline, the taking is unconstitutional.

---

an intrastate pipeline. *See* 2009 WL 6496969 (Jul. 31, 2009) (Br. of Appellant). In *Iowa RCO Ass'n v. Ill. Commerce Comm'n*, the pipeline originated in Illinois and had an "on ramp" in Illinois. 409 N.E.2d 77, 79 (Ill. App. Ct. 1980).

Both Iowa authority and persuasive authority from other courts support the Landowners' constitutional arguments.

IV. Neither the IUB, Dakota Access, nor the MAIN Coalition show that Dakota Access is a common carrier under Iowa law.

Neither the IUB, Dakota Access, nor the MAIN Coalition show that Dakota Access is a "common carrier" under Iowa law. All three parties observe that oil pipeline companies are considered a common carrier under the federal Interstate Commerce Act. IUB Br. 59[22], Dakota Access Br. 62 n.48, MAIN Br. 34. Those parties cite various cases in which other state courts have found pipeline companies to be common carriers pursuant to specific legislative enactments by the respective states' legislatures. *See, e.g. Linder*, 362 S.W.3d 896 – 97 (citing Ark. Code § 23-15-101), C*rawford Family Farm P'ship*, 409 S.W.3d at 915 (citing Tex. Nat. Res. Code Ann. § 111.002(1)), *Sunoco Pipeline*, 63 N.E.3d 170-71 and *Kinder Morgan Cochin L.L.C. v. Simonson*, 66 N.E.3d 1176, 1182 (Ohio Ct. App. 2016) (both quoting Ohio R.C. § 1723.08).

". . . [L]egislative intent is expressed by what the legislature has said, not what it could or might have said . . . Intent may be expressed by the omission,

[22] The IUB did not use the phrase "common carrier" once in its Final Order, and in its briefing, relies on the definition in the federal Interstate Commerce Act to support its position. IUB Br. 59. The IUB's obeisance to federal law and lack of argument about or regard for Iowa law is of concern on federalism grounds.

as well as the inclusion, of statutory terms." *State v. Beach*, 630 N.W.2d 598, 600 (Iowa 2001); *accord Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 812 (Iowa 2011) (citing *Beach*). Unlike Congress or these other state legislatures, Iowa's legislature has failed to define a hazardous liquid pipeline company as a "common carrier." The Iowa legislature's failure or omission to enact such legislation, coupled with the apparent need for Congress and other states to enact such legislation, raises a strong (and accurate) presumption that Dakota Access is not a "common carrier" under the common law and that intervening legislation would be necessary for a Chapter 479B pipeline company to be classified as a common carrier.

The Landowners wholly disagree with Dakota Access's insinuation that they have misrepresented Iowa's law on common carriers to this Court. The Landowners agree that a common carrier is "one who undertakes to transport, indiscriminately, persons and property for hire." *Wright v. Midwest Old Settlers and Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996). It is black letter law that common carriers "need not serve all the public all the time"; after all, semis hauling freight reach a capacity and airline flights get sold to capacity. But until the semi is filled to capacity, or the flight sells all of its seats, those carriers are generally required to sell any available ticket to any paying customer without

discrimination. The Landowners agree that *Wright*, along with other law cited herein, is binding precedent.

The most important case on this question is *Circle Exp. Co. v. Iowa State Commerce Comm'n*, which decided a close question of whether a freight shipper was a contract/private carrier, or a common carrier. 86 N.W.2d 888 (Iowa 1957). *Circle Exp. Co.* is more relevant than *Wright*, because it involved the carriage of freight, rather than people. In that case, the Court stated: "If there was in truth and in fact a holding out to serve all indifferently, then the carrier must perform the law-imposed duty to serve all by contracting with them on demand." *Id.* at 895. Dakota Access and the MAIN Coalition argue that because Dakota Access has complied with Federal Energy Regulatory Commission ("FERC") rules and procedures, it is undertaking service indiscriminately and is a common carrier. Dakota Access Br. 65, MAIN Br. 34 – 36. Although this may be true under federal law, their claim is inconsistent with *Circle Exp. Co.*

FERC rules and procedures allow for Dakota Access to engage in price discrimination, even amongst "open season" shippers. FERC's "policy . . . is to allocate available interstate pipeline capacity to the shipper that values it the

most, up to the maximum rate." 137 FERC ¶ 61126 (2011) at ¶ 2.[23] This means that during an "open season," bidding wars can break out between potential shippers. *See Northern Nat. Gas Co.*, 108 FERC ¶ 61044 (2004) (approving a tariff that allows new shippers, during an open season, to outbid prior shippers, subject to a right of first refusal).

Common carriers of freight or of people in Iowa may not sell space or a seat by conducting an auction to sell the seat. For instance, when a passenger buys a seat on a Delta flight, Delta must contract with him or her, on demand, for the price offered. The Landowners read *Circle Exp. Co.* to preclude Delta from saying to potential customers: "we have sixty seats available for this flight, and the sixty highest bidders at the end of our 'open season' on selling this flight will get the seats." The Landowners argue that Delta could not sell airplane seats to the public by auction and remain a common carrier under Iowa law. Such commercial conduct would violate *Circle Exp. Co.'s* requirement to serve the public indiscriminately (Delta would be engaging in price discrimination) and on demand (the potential customer would not get a seat on demand, but conditionally and at a later time, only if his or her bid was successful).

[23] Because of FERC's citation format, the first paragraph symbol is part of the citation; the second symbol identifies the specific paragraph number in the document.

Dakota Access twice engages in discrimination that precludes it from being a common carrier under Iowa law. First, Dakota Access engages in price discrimination during the "open season" pursuant to FERC rules and regulations. It also does not provide a shipping service "on demand" during open season, but only contingently based on the sufficiency of the shipper's bid. Second, Dakota Access engages in discrimination because it treats "walk-up" shippers seeking shipment on demand differently than its committed shippers. Walk-up shippers are entitled to no more than 10% of the pipeline's capacity. Dakota Access Br. 42 – 43. This is analogous to Delta starting every flight with 90% of its seats sold by private contract and offering only 10% of its seats to the public, or a freight shipper entering into a private shipping contract that fills up 90% of his or her truck and then offering the last 10% to the public.

Under such circumstances, the Landowners contend that neither Delta, nor the freight shipper, would be considered a common carrier under Iowa law.[24] Accordingly, Dakota Access is not a common carrier. It is not entitled to the presumption that its pipeline constitutes a "public use" as discussed in *Kelo*, and the IUB is statutorily barred from considering the pipeline's (alleged) economic impact or indirect benefits to Iowans in granting Dakota Access

[24] Perhaps this is why other states have statutorily defined common carriers to include pipeline companies.

eminent domain authority under § 6A.22. Without the alleged, indirect, economic benefits to rely upon, the IUB's decision to grant Dakota Access eminent domain authority is decidedly without constitutional or statutory merit.[25]

CONCLUSION

Dakota Access asserts that its taking "is nothing like the more boundary-pushing taking that was approved in *Kelo*." Respectfully, it is wrong. The IUB's approval of Dakota Access's takings impermissibly extends Iowa's sovereign eminent domain authority beyond Iowa's borders, allowing Iowans' land to be taken so that North Dakota's and Illinois' public may solely and exclusively use the pipeline. The Court can and should conclude that Dakota Access's unbelievably swift construction of a $4 billion pipeline was an effort to realize profits, overcome local resistance as soon as possible, and done with the intent to evade this Court's judicial oversight of Dakota Access's exercise of eminent domain. Dakota Access's mootness argument is evidence of what Justices O'Connor and Thomas warned of in *Kelo*: subsequent abuse of eminent domain authority by wealthy and politically powerful private corporations, who take

[25] The Landowners are not implying that the IUB's grant of eminent domain authority has merit if the alleged, incidental, economic benefits are considered.

ordinary citizens' property for the primary purpose of obtaining private profits, in this case, profits in the billions. The Court should reach the merits of this case.

Upon reaching the merits of this case, the Court should conclude that Dakota Access is not a common carrier, because Iowa's legislature has failed to define it as such, and because Dakota Access engages in impermissible price discrimination and does not allocate its pipeline capacity "on demand" to the public as required of a common carrier under Iowa law. Accordingly, Dakota Access' pipeline cannot be considered a "public use" under relevant constitutional law or under Iowa Code § 6A.22. Accordingly, the Court should reverse the District Court and grant the Landowners the relief they requested in their opening brief.

Respectfully Submitted

s/ William E. Hanigan
William E. Hanigan, AT0003284
Jason R. Lawrence, AT0013301
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309-3993
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: billhanigan@davisbrownlaw.com
jasonlawrence@davisbrownlaw.com

ATTORNEYS FOR PETITIONERS-APPELLANTS

CERTIFICATE OF FILING

The undersigned herby certifies that on the 10th day of November, 2017, the Appellant's Final Reply 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.

s/ William E. Hanigan
William E. Hanigan, AT0003284
Jason R. Lawrence, AT0013301
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309-3993
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: billhanigan@davisbrownlaw.com
jasonlawrence@davisbrownlaw.com

ATTORNEY FOR PETITIONERS-APPELLANTS

CERTIFICATE OF SERVICE

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

Matthew C. McDermott
Espnola F. Cartmill
Belin McCormick, P.C.
666 Walnut Street, Suite 2000
Des Moines, Iowa 50309-3989
E-mail:
efcartmill@belinmccormick.com
mmcdermottr@belinmccormick.com
ATTORNEYS FOR INTERVENOR
THE MAIN COALITION

Mark Schuling
John Stewart Long
1375 East Court Avenue, Rm 63
Des Moines, Iowa 50319-0063
Email:mark.schuling@oca.iowa.gov
john.long@oca.iowa.gov
ATTORNEYS FOR INTERVENOR
OFFICE OF CONSUMER
ADVOCATE

Scott Long
5907 Grand Avenue
Des Moines, IA 50312
SLong@1922ingersoll.com
ATTORNEYS FOR AMICUS
CURIAE NISKANEN CENTER

Wallace L. Taylor
118 3rd Ave. S.E., Suite 326
Cedar Rapids, Iowa 52401
E-mail: wtaylorlaw@aol.com
ATTORNEY FOR PETITIONERS
SIERRA CLUB IOWA CHAPTER,
KEITH PUNTENNEY AND
LAVERNE JOHNSON

Benjamin John Flickinger
David Jay Lynch
1375 East Court Avenue, Room 69
Des Moines, Iowa 50319-0069
Email: ben.flickinger@iub.iowa.gov
david.lynch@iub.iowa.gov
ATTORNEYS FOR RESPONDENT
IOWA UTILITIES BOARD

Bret Alan Dublinske
Brant M. Leonard
Fredrickson & Byron, P.A.
505 East Grand Avenue, Suite 200
Des Moines, Iowa 50309
Email: bdublinske@fredlaw.com
bleonard@fredlaw.com
ATTORNEYS FOR
INDISPENSABLE PARTY DAKOTA
ACCESS, LLC

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:

David Bookbinder
Niskanen Center
820 First Street NE
Washington, DC 20002
Email: dbookbinder@niskanencenter.org

s/ William E. Hanigan
William E. Hanigan, AT0003284
Jason R. Lawrence, AT0013301
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309-3993
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: billhanigan@davisbrownlaw.com
jasonlawrence@davisbrownlaw.com

ATTORNEY FOR PETITIONERS/APPELLANTS

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:

[x] this brief has been prepared in a proportionally spaced typeface using Cambria in 14 point and contains 6,981 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

s/ William E. Hanigan
William E. Hanigan, AT0003284
Jason R. Lawrence, AT0013301
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309-3993
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: billhanigan@davisbrownlaw.com
jasonlawrence@davisbrownlaw.com

ATTORNEY FOR PETITIONERS/APPELLANTS