STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION
BEFORE THE IOWA UTILITIES BOARD

IN RE: **DAKOTA ACCESS, LLC**	**DOCKET NO. HLP-2014-0001** **EXPEDITED RELIEF REQUESTED** **INTERVENORS' BRIEF IN SUPPORT OF THEIR EMERGENCY MOTION FOR STAY**

TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT 7

II. INTERVENORS ARE LIKELY TO PREVAIL ON THE MERITS 9

A. *The IUB's consideration of the economic impacts of the DAPL was arbitrary and capricious because the IUB is statutorily precluded from considering economic benefits in deciding whether to grant an entity the power of eminent domain.* *9*

B. *The IUB's conclusion that the DAPL will "reduce the overall risk of crude oil spills" in Iowa is arbitrary and capricious, irrational, unsupported by substantial evidence, and the product of a decision-making process in which the IUB did not consider relevant and important facts that a rational decision maker would have considered.* ..*11*

1. Risk Analysis Framework *12*

2. Summary of relevant facts from the contested case proceeding *14*

a. Oil pipelines are safer than transporting oil by rail car, but pipeline are still dangerous. *14*
b. The IUB refused to find that the DAPL would reduce the amount of oil transported through and across Iowa by rail car *14*
c. The IUB's conclusion that the DAPL will measurably reduce the risk Iowans face from the transportation of oil across Iowa is arbitrary and capricious, irrational, and unsupported by substantial evidence because, if anything, the DAPL will increase the risks Iowans face from the transportation of oil. *15*

3. Legal Analysis of the Facts *17*

C. *The IUB's determination that Iowa Code § 6A.21 did not bar Dakota Access from exercising eminent domain over intervenors' "agricultural lands" was arbitrary and capricious because it is contrary to law* *21*

D. *Dakota Access's Proposed Exercises of Eminent Domain Authority - and the IUB's Granting of Eminent Domain Authority to Dakota Access - are Unconstitutional.* *24*

1. Standard of Review and Legal Background *24*

a. The IUB's failure to evaluate the constitutionality of the DAPL *24*
b. The United States and Iowa Constitution's "Public Use" Clauses and relevant statutes…… *25*
c. "Public convenience and necessity" is not equivalent to "public use" as used in the Federal and Iowa Constitutions *25*

2. Intervenors as applied challenges to Iowa Code §§ 479B.9 and 479B.16 26

a. The Court should adopt the reasoning of the Illinois Supreme Court in Southwestern Illinois in finding that the IUB's Order and Dakota Access's exercise of eminent domain pursuant in Iowa Code §§ 479B.9 and 479B.16 are unconstitutional as applied to intervenors…… 27

b. The IUB's Order and Dakota Access's exercise of eminent domain pursuant to Iowa Code §§ 479B.9 and 479B.16 are unconstitutional as applied to intervenors under Kelo v. City of New London, Conn 29

c. The Court should adopt the reasoning of Justice O'Connor's dissent in Kelo, afford Iowans greater constitutional protection in eminent domain cases, and find the IUB's Order unconstitutional soley under Article I, Section 18 of the Iowa Constitution 36

III. INTERVENORS WILL SUFFER IRREPARABLE HARM IF A STAY IS NOT GRANTED…….....39

A. *Intervenors will suffer two irreparable harms if Dakota Access's construction of the DAPL across their farms is not stayed 39*

IV. DAKOTA ACCESS WILL NOT BE SUBSTANTIALLY HARMED IF A STAY IS GRANTED…….....42

A. *The Court should not consider harms to Dakota Access until intervenors have the opportunity to challenge Dakota Access's exercise of eminent domain on the merits.42*

B. *The Court should not consider financial impacts to Dakota Access because it will establish precedent that some private parties' uses of eminent domain are "too big to stay" until a merits challenge can be heard. 43*

V. THE PUBLIC INTEREST RELIED UPON BY THE IUB ARE INSUFFICIENT TO JUSTIFY AGENCY ACTION BECAUSE THEY ARE ARBITRARY AND CAPRICIOUS, UNREASONABLE, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, NO RATIONAL PERSON WOULD ADOPT THEM, AND AUTHORIZE THE UNCONSTITUTIONAL USE OF EMINENT DOMAIN. 45

INTRODUCTION

Intervenors come to the Iowa Utilities Board ("IUB") seeking a stay of enforcement of its March 10, 2016 Final Decision and Order ("Final Order" or "Order"), as it applies to Intervenors' farmlands. Intervenors are constitutionally entitled to a stay so that they may, eventually, have their day in Court challenging the IUB's Final Order. Intervenors have a due process right to challenge the constitutionality of Dakota Access's exercise of eminent domain over their farmland. If intervenors are deprived of that right, they will have suffered an irreparable harm. Because this irreparable harm is of constitutional magnitude, it outweighs all of the other factors the IUB could consider in deciding whether or not to grant intervenors' motion for stay, and the IUB should grant intervenors' motion until such time as they can be heard by the Court on the merits in the ongoing § 17A.19 judicial review proceeding.

If a stay is not granted, Dakota Access, as soon as within days or weeks (depending on where the particular Intervenor's farmland sits), will dig a massive trench across intervenors' farms. Once the pipeline trench is dug, the harm to intervenors will be permanent and irreparable. No order of Court or any amount of damages can repair the damage that Dakota Access proposes to do to intervenors' farmlands or grant intervenors the relief that they seek: to keep the Dakota Access Pipeline ("DAPL") off their farmland in the first instance. If intervenors' due process right to challenge the constitutionality of Dakota Access's exercise of eminent domain is to have meaning, the IUB must grant the stay until it can hear intervenors' challenge.

Accordingly, Intervenors request that the IUB stay execution and enforcement of its Final Order as it applies to intervenors' farmlands.[1] A stay is appropriate: to preserve intervenors' constitutional rights thereby avoiding irreparable harm to intervenors, because the Order is arbitrary and capricious, unsupported by substantial evidence, irrational, and unconstitutional, because Dakota Access will not be substantially harmed by a stay, and because the public interest relied upon by the IUB is insufficient to justify the IUB's Order.

PARTIES AND PROCEDURAL BACKGROUND

Intervenors Richard Lamb (as trustee of the Richard R. Lamb revocable trust), Keith Puntenney, Laverne Johnson, Marian Johnson, by her agent Verdell Johnsonare Iowa landowners. Intervenors Northwest Iowa Landowners Association ("NILA") and the Iowa Farmland Owners Association, Inc. ("IFOA") represent similarly situated landowners. Many of them farm land that has been in the family for generations. They own agricultural lands across Iowa that have been identified in the IUB's Final Order approving Dakota Access, LLC's ("Dakota Access") "petition for a hazardous liquid pipeline permit pursuant to Iowa Code ch. 479B." IUB Ord. 4; *See generally* IUB Ord. 122 - 149, Attachment 1 to the Final Order.[2] The Order, pursuant to Iowa Code §§ 479B.9 and 479B.16, further grants Dakota Access eminent domain authority over the parcels of intervenors' farmland identified in the Order.

Intervenors Lamb, Puntenney, and Laverne Johnson and Marian Johnson, by her agent Verdell Johnson were intervenors in the contested case proceeding before the IUB.

Intervenor NILA is an unincorporated association that represented several Iowa farmers in the contested case proceeding. It has standing under *Iowa-Illinois Gas and Electric Co. v.*

[1] Intervenors are not seeking a statewide stay of Dakota Access's construction activities, just of the Iowa Utilities Board's Final Order as it applies to intervenors farmlands identified within the Order.
[2] Intervenors' motion identifies each parcel of land for which a stay is sought and where that parcel is referenced in the Order.

Iowa State Commerce Com'n, 347 N.W.2d 423, 426 (Iowa 1984) and Iowa Code § 17A.19 to represent the interests of its members before the Board and the Court. Those members are: Hickenbottom Experimental Farms, Inc., William R. and Anne C. Smith, Gary D. and Linda L. Hammen, Gary D. Hammen as Trustee of the Hammen Family Trust, U/W Doris E. Hammen, Grandma's Place, L.C., AIM Acres, L.C., and the Judith Anne Lamb Revocable Trust.

Intervenor IFOA is an incorporated association that represented several Iowa farmers in the contested case proceeding before the IUB. It has standing under *Iowa-Illinois Gas*, 347 N.W.2d at 426 and Iowa Code § 17A.19 to represent the interests of its members in this judicial review action. Those members are: Prendergast Enterprise, Inc., Arlene Bates and Leona O. Larson, Lowman Brothers, Inc., and Walnut Creek Limited Partnership.

LEGAL STANDARD

Intervenors request that the IUB, pursuant to Iowa Code § 17A.19(5)(c), stay the IUB's Final Order's provisions granting Dakota Access eminent domain authority over intervenors' farmland. Because Intervenors have no guarantee that the IUB will decide their request for a stay prior to one or both of: the condemnation hearings for their farmland taking place (almost all hearings have taken place) or Dakota Access digging the pipeline trench across their farmland, intervenors request that the IUB stay its enforcement of the Final Order pending its resolution of this motion for stay.[3] Once Dakota Access alters the farmland, intervenors' only remedy (likely) becomes monetary damages. *See* Iowa Code §§ 6B.23, 6B.25; *Stellingwerf v. Lenihan*, 85 N.W.2d 912 (Iowa 1957); *Nichols v. City of Evansdale*, 687 N.W.2d 562 (Iowa 2004) (refusing to require city to remove sewer lines even though the lines constituted a continuing trespass).

Dakota Access will argue that it has completed the condemnation proceedings over all of intervenors' lands and deposited the award with the sheriff, entitling it to possession under Iowa

[3] Intervenors have or will immediately file a separate motion to this extent.

Code § 6B.25, and that intervenors' request for a stay is now moot. This contention would be without merit because intervenors may still challenge the condemnation until the condemner's "ultimate goal…has…become an accomplished fact." *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005). In *Lewis*, even though Iowa City had deposited the condemnation award and taken possession of the condemned property, the challenge to Iowa City's exercise of eminent domain was not moot, because Iowa City had not sold or transferred the property to a third party. *Id.*

However, if something tangible, like a road, were to be built on the property, the condemnation would become moot. *Id.* (citing *Welton v. Iowa State Highway Commission*, 227 N.W. 332 (1929). Further, the IUB "…has previously ruled that staking, clearing, and grubbing work is not sufficient to establish that a project has commenced 'construction in part.'" (citing *In re: Iowa Electic Light and Power Co.*, IUB Docket No. DRU-93-5, 1993 WL 559861 (Iowa Utils. Bd.), slip op. at 3-4)). All that has been done to intervenors' farmlands, as of the date of this filing, is work insufficient to establish that Dakota Access has commenced "construction in part" on intervenors' farmlands. ***Time is of the utmost essence for intervenors***.

In consideration of intervenors' request for a stay of the IUB's Final Order as it applies to their farmlands, statute dictates the four factors that the IUB must weigh in deciding intervenors' request. Those factors are:

(1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.

(2) The extent to which the applicant will suffer irreparable injury if relief is not granted.

(3) The extent to which the grant of relief ot the applicant will substantially harm other parties to the proceedings.

(4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Iowa Code § 17A.19(5)(c)(1)-(4). The IUB must "consider[] and balance[e]…all of the [above] factors." *Id*; *see also Teleconnect*, 366 N.W.2d at 513 (citations omitted). None of the four factors are dispositive; that is, "more of one factor excuses less of another factor." *Grinnell College v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008).

ARGUMENT

I. Summary of Argument

As Argued in Section III *infra*, The IUB should grant intervenors motion for stay because intervenors have a constitutional due process right to be heard on the merits of their claim that Dakota Access's exercise of eminent domain over their farmland is unconstitutional under both the Federal and Iowa Constitutions. That right only has value if it can prevent Dakota Access from digging the DAPL trench across their farmland. Dakota Access is poised to begin that construction imminently. If the trench is dug and the pipeline installed, intervenors will likely have no legal recourse to remove the pipeline should they later prevail on the merits of their constitutional challenge. That amounts to an irreparable harm to intervenors, as their exercise of their constitutional rights will be permanently frustrated. The constitutional dimensions of the irreparable harm intervenors face outweigh any of the other elements cited in § 17A.19 for granting a stay. The IUB should grant intervenors' motion for stay and preserve the *status quo* between the parties until such time as intervenors can be heard on the merits.

If the IUB looks beyond the irreparable harms intervenors face, it will find a decisive merits case, further supporting intervenors' motion for stay. As argued in Section II *infra*, respectfully, the Final Order is arbitrary and capricious, not based on substantial evidence,

irrational, and is the product of a decision-making process in which the IUB did not adequately weigh the risks the DAPL poses to Iowans relative to its purported safety benefits. The Order found that the DAPL would make Iowans safer, a finding that cannot be supported in light of the IUB's refusal to find that the DAPL would reduce the amount of oil shipped by rail cars across Iowa. The Order found that the DAPL still posed a risk to Iowans, but failed to account for the risks the DAPL would introduce in making its safety analysis. The Order further considered economic benefits - job creation and tax revenues - which the IUB is statutorily precluded from considering. Finally, Dakota Access's exercise of eminent domain pursuant to the Order and Iowa Code §§ 479B.9 and 479B.16 is unconstitutional.

Intervenors further argue that Dakota Access will not be substantially harmed by a stay because a stay will not be the legal cause of harm to Dakota Access. Further, if Dakota Access argues financial impacts as "substantial harm," then it is claiming, in essence, that the DAPL is "too big to stay." The Court should not set a precedent where the alleged financial impacts to a party exercising the power of eminent domain take precedence over citizens' Constitutional due process right to be heard in challenging the exercise of eminent domain. Finally, the public interests relied upon by the IUB are insufficient to justify its actions because the agency's actions are unconstitutional, arbitrary and capricious, contrary to statute, irrational, and not supported by substantial evidence.

Intervenors' decisive case on the merits, combined with the irreparable harms they face if they are not allowed the opportunity to make their merits case to this Court, justifies the Court entering a stay in favor of intervenors until it can dispose of the merits of the case.

II. Intervenors are Likely to Prevail on the Merits

A. The IUB's consideration of the economic impacts of the DAPL was arbitrary and capricious because the IUB is statutorily precluded from considering economic benefits in deciding whether to grant an entity the power of eminent domain

With respect, the IUB's consideration of the economic impacts of the DAPL was arbitrary and capricious[4] because the IUB considered the (alleged) economic benefits of the DAPL without consideration of Iowa law that precludes such considerations. *Office of Consumer Advocate v. Iowa State Commerce Com'n*, 432 N.W.2d 148, 154 (Iowa 1988) ("Arbitrary' and 'capricious' are practically synonymous; both mean an agency decision taken *without regard to law* or the facts of the case." (emphasis added)) Iowa Code § 6A.22 imposes "limitations" "in addition to [those] in Section 6A.21." Thus, the IUB and the Court must construe the statutory limitations on the exercise of eminent domain found in Iowa Code §§ 6A.21 and 6A.22 separately.

The IUB acknowledged that it must "consider[]…whether Iowa Code §§ 6A.21 and 6A.22 limit the Board's authority to grant eminent domain to a pipeline company granted a permit to construct a hazardous liquid pipeline pursuant to Iowa Code chapter 479B." IUB Ord. 119. Yet, the IUB did not fully analyze the prohibition on considering economic development under Iowa Code § 6A.22.

Iowa Code § 6A.22(1) limits the "authority of an acquiring agency to condemn any private property through eminent domain" to "a public purpose, public use, or public improvement." The statute then defines "public use', 'public purpose,' or 'public

[4] Respondents will inaccurately frame this question as solely one of substantial evidence. Intervenors do not dispute the existence of substantial evidence that it is safer on an "apples to apples" basis to ship oil by pipeline than by rail car (e.g. on a barrel per mile basis). Intervenors' argument is that once the IUB concluded that it could not determine that the DAPL would reduce the amount of oil transported across Iowa by rail car, it was arbitrary and capricious that Iowans would be safer by introducing a new risk - the DAPL - to add to the existing risk of transporting oil by rail car. With that said, there is no substantial evidence that the DAPL will make Iowans safer given the IUB's clear decision to find that oil shipped in the DAPL will not lessen the amount of oil shipped by rail car.

improvement.'" *See generally* Iowa Code § 6A.22(2). The legislature then determined that "Except as specifically included in the definition in paragraph 'a',[5] '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 commercial or industrial development…." Iowa Code § 6A.22(2)(b).

This section is fatal to the IUB's Order because the IUB found that "There appears to be no real issue that the hazardous liquid pipeline proposed by Dakota Access is an industrial enterprise…" IUB Ord. 119. The IUB found that "the economic benefits associated with the construction, operation, and maintenance of the proposed pipeline are substantial." IUB Ord. 109. The Board credited the proposed construction with the creation of "[t]housands of construction jobs" and the "[l]ong term…generat[ion of] substantial tax revenues and…at least 12 permanent jobs." IUB Ord. 109. However, the IUB is *statutorily precluded* by Iowa Code § 6A.22(2)(b) from considering "increased tax revenues" and "increased employment opportunities" in deciding whether to grant Dakota Access, the "acquiring agency," eminent domain authority. As the IUB agrees, this statute, as one related to the delegation of eminent domain power, "should be strictly construed." IUB Ord. 116 (citing *Hawkeye Land Co. v. IUB*, 847 N.W.2d 199, 208 (Iowa 2014) and *Clarke County Reservoir Commission v. Robins*, 862 N.W.2d 166, 168 (Iowa 2014))[6].

Strict construction of Iowa Code § 6A.22 requires the following determinations:

- Dakota Access is an "acquiring agency" given the "authority…to condemn any private property through eminent domain." Iowa Code § 6A.22(1); *see also* Dakota Access Br.

[5] This exception relates to the condemnation of blighted or slum properties, which designations cannot ever apply to agricultural land. Iowa Code § 6A.22(2)(a)(5)(b)(i - iii).
[6] The IUB mis-cites the case as *Clarke County Reservoir Commission v. Abbott*…

in Supp. of Mot. to Dismiss 3[7] ("Iowa Code § 6A.22(1) provides the general rule that an 'acquiring agency' (a status granted to Dakota Access by the Iowa Utilities Board) may 'condemn any private property through eminent domain….'")

- Dakota Access, as the "acquiring agency" may only use eminent domain to condemn private property for "a public purpose, public use, or public improvement." Iowa Code § 6A.22(1).
- Economic benefits, including job creation, employment opportunities, and increased tax revenues may not be considered -- *because they are statutorily precluded* -- in determining whether an exercise of eminent domain is for a "public use,' 'public purpose' or 'public improvement…'" Iowa Code § 6A.22(b).
- Therefore, the IUB's determination that the (alleged) economic benefits of the DAPL supports a finding of "public convenience and necessity" is arbitrary and capricious because the IUB may not make that determination as a matter of law.

Instead of carrying "significant weight" in the "statutory balancing test for determining whether the proposed pipeline will 'promote the public convenience and necessity,'" (IUB Ord. 109 - 110), this factor must carry no weight as a matter of law. Having shown that IUB's findings of economic benefits are arbitrary and capricious, the IUB must vacate the parts of its Order granting Dakota Access the authority - including eminent domain authority - to build the DAPL.

B. <u>The IUB's conclusion that the DAPL will "reduce the overall risk of crude oil spills" in Iowa is arbitrary and capricious, irrational, unsupported by substantial evidence, and the product of a decision-making process in which the IUB did not consider relevant and important facts that a rational decision maker would have considered</u>

The IUB sought to balance the costs and the benefits of the DAPL in deciding to issue the permit for Dakota Access to construct the pipeline. IUB Ord. 108 (citing *South East Iowa Co-*

[7] Exhibit A.

Op. Elec. Ass'n. v. Iowa Utilities Board, 633 N.W.2d 814, 821 - 22 (Iowa 2001)). The IUB determined that "two factors weigh heavily in favor of granting a permit." IUB Ord. 109. The first factor was that "the proposed pipeline represents a significantly safer way to move crude oil from the field to the refinery when compared to the primary alternative, rail transport."[8] *Id.* The Board also found that "…if it is built, this pipeline will reduce the overall risk of crude oil spills, both in Iowa and elsewhere." IUB Ord. 32 - 33. However, these conclusions do not follow from any other finding of fact in the IUB's Order. Fatal to its safety determinations, the IUB asserted that "The oil is going to be produced and shipped as long as the market demands it..." *Id.*

1. Risk Analysis Framework

As just discussed, the IUB determined that the DAPL Pipeline should be constructed because it was "safer" than the alternative means of transporting oil through Iowa: by rail car. IUB Ord. 109. The IUB found that the DAPL Pipeline would make Iowans more, not less safe. IUB Ord. 32 - 33. The IUB should re-evaluate its safety findings through the following qualitative risk framework:

- Presently, "approximately 40,000 rail cars of crude oil travel through Iowa each year." IUB Ord. 29 (citation omitted). That is equivalent to 74,000 barrels per week. IUB Ord. 31. This poses an existing baseline risk to Iowans that is convenient to term X.
- If the DAPL is built, it will carry a capacity of somewhere between 320,000[9] and 570,000[10] barrels per day. The DAPL has an anticipated incident rate of one-fourth to

[8] This factor and the economic benefits just discussed are the two principal reasons the IUB granted Dakota Access the pipeline permit.

[9] Dakota Access represented to the Federal Energy Regulatory Commission that the DAPL would carry 320,000 barrels per day. 149 FERC ¶ 61,275 p. 2 ("Intervenors explain that the Bakken Oil Projects will provide transportation up to approximately 320,000 barrels per day (bpd).")

[10] The IUB cites 570,000 barrels per day on page 31 of its Final Order, but then cites 450,000 barrels per day on page 33 of its Final Order. The range of 250,000 barrels per day is significant, as the fewer barrels per day carried by the pipeline, the less likely it is that the quantity carried by the pipeline will be enough to fully or mostly satisfy market demand such that additional shipments by rail are unnecessary or will be significantly reduced.

one-third "the incident rate of railway transport of petroleum products." IUB Ord. 32 (finding that other pipelines have this lesser incident rate relative to rail transport). Thus, the DAPL would introduce a new source of risk to Iowans they do not presently face (the probability of an incident magnified by the volume of oil being shipped). This poses a new risk to Iowans that is convenient to term Y.

- Thus, for Iowans to be safer, the introduction of risk Y would have to offset the present risk X that rail-car transportation of oil poses to Iowans. It could do so by reducing present transportation levels or by slowing the increase of future transportation levels. It would be helpful to term this offset risk "X prime" (X'). If that offset occurs, by reducing existing rail car traffic or by slowing the growth of future rail car traffic, then that offset must still outweigh the risk Y that the DAPL introduces.
- If the DAPL will not have any impact on the amount of oil transported by rail car across Iowa in a year, then the introduction of the DAPL to Iowa would make Iowans less safe, because they would face existing risk X, plus the new DAPL risk Y, for a total risk of X + Y.
- If the DAPL will reduce, or slow the growth of, the amount of oil transported by rail car across Iowa, Iowans will face a new risk equation of X'+Y. If X'+Y is greater than X (X'+Y >X), then Iowans will still be less safe. If X' + Y is less than X (X'+Y < X), then Iowans will be safer.

For the IUB's public safety rationale to hold, its reasoning in the Final Order must allow it, upon further review, to conclude that the DAPL will result in Iowans facing in aggregate, less, not more risk. Intervenors contend, as explained in depth below, that the IUB's findings in its Final Order are insufficient to allow it to reach this conclusion and, if anything, support the

opposite conclusion. Accordingly, the IUB's public safety conclusions are arbitrary and capricious, unsupported by substantial evidence, irrational, and the product of a decision-making process that failed to articulate a clear risk analysis.

2. Summary of relevant facts from the contested case proceeding

a. Oil pipelines are safer than transporting oil by rail car, but pipelines are still dangerous

The IUB found that, according to the United States Department of Transportation ("USDOT"), "pipelines are shown to have between one-third and one-fourth the incident rate of railway transport of petroleum products." IUB Ord. 32. However, according to the same USDOT data, "significantly more oil is shipped more miles by pipeline than by rail." *Id.* Accordingly, "*it is not surprising that the total amount of oil leaked by pipelines is higher*." *Id.* (emphasis added) The only reasonable conclusion to be drawn from the IUB's findings is that the construction of the DAPL will introduce a significant element of risk into the lives of Iowans and especially intervenors, under whose farms the DAPL will run. This magnitude of this risk is significant because of the increased volumes of oil transported by the DAPL: very large amounts of oil risk leaking or spilling, contaminating intervenors' farms and the broader environment. Thus, the risk Y established in the risk framework above indisputably exists.

b. The IUB refused to find that the DAPL would reduce the amount of oil transported through and across Iowa by rail car

Dakota Access argued that the DAPL would reduce the amount of oil transported through and across Iowa by rail car, but the IUB repeatedly refused to make such a finding. IUB Ord. 32 ("The pipeline may or may not reduce rail shipments of crude oil…") Dakota Access argued that the DAPL, by "transport[ing] crude oil that might otherwise be shipped by rail, reliev[es] rail capacity to ship other goods" including "grains produced in Iowa." IUB Ord. 33. However, the IUB found that "Dakota Access's witness acknowledged that there is no guarantee that rail

transportation of crude oil will be reduced if the pipeline is built." IUB Ord. 35. Most fatal to the IUB's safety reasoning, it instead found, based on the testimony of Dakota Access's witness, "It is possible that *Bakken production will increase instead*. If that happens, then *the impact of the proposed pipeline on the availability of rail transport may be non-existent*." *Id.* (internal citation omitted) (emphasis added) Accordingly, there is no factual basis for the IUB to conclude that a decreased risk, X-prime (X') in the above risk-analysis will result from the construction and operation of the DAPL.

c. The IUB's conclusion that the DAPL will measurably reduce the risk Iowans face from the transportation of oil across Iowa is arbitrary and capricious, irrational, and unsupported by substantial evidence because, if anything, the DAPL will increase the risks Iowans face from the transportation of oil

A reasonable person would find that the facts presented in the contested case proceeding support the conclusion that the DAPL will not measurably reduce the risk Iowans face from the transportation of oil across the state. If anything, the DAPL will only increase the risk Iowans face from the transportation of oil across the state as other facts affirmatively found by the IUB would cause a rational person to conclude that oil shipments across Iowa by rail cars will not decrease should the DAPL become operable.

The IUB found that the market will get the maximum amount of Bakken oil as market demand will allow. IUB Ord. 32, 109 (both quoted *supra*). The IUB heard credible testimony, cited in its Final Order, that presently the market is getting "approximately 40,000 rail cars of crude oil travel[ing] through Iowa each year." IUB Ord. 29 (citation omitted). That is equivalent to 74,000 barrels per week. IUB Ord. 31. One of two things is likely the case: either the market only wants 74,000 barrels of Bakken oil per week, or the market wants more, but 74,000 barrels per week is, on average, the maximum capacity railroad operators have for shipping oil by rail across Iowa.

Based on Dakota Access's advocacy to the IUB, and common-sense inference, it cannot be true that the market wants only the 74,000 barrels of oil per week shipped across Iowa. Dakota Access's proposed pipeline will carry a capacity of somewhere between 320,000[11] and 570,000[12] barrels per day. Whatever its capacity, Dakota Access has represented that "[c]rude oil producers have signed 'take or pay' contracts for 90 percent of the capacity of the proposed pipeline, the maximum capacity that FERC will allow Dakota Access to permit." IUB Ord. 110. The remaining 10 percent of the capacity will go to "walk up' or casual shippers." *Id.* Dakota Access anticipates that the demand for this remaining 10 percent of capacity will be so great that it may have "walk-up" supply that exceeds the pipeline's remaining capacity, requiring it to allocate that capacity by lottery.[13] The lottery losers will still need to ship their oil. With the pipeline is full, the shippers who lost the lottery for access to the 10% walk-up capacity will need to utilize the present method of rail shipping The IUB was right to avoid concluding that the DAPL will decrease the amount of oil being shipped by rail car.

Further, the IUB found that Dakota Access could not guarantee that Bakken oil would not "be sold to foreign markets, at least from time to time…[I]t has always been possible that the oil carried by the proposed pipeline will be sold into overseas markets…." IUB Ord. 25. The IUB also found that "[d]uring periods of lower domestic demand the oil will be more likely to be sold to foreign markets." *Id.* Indeed, the recent federal enactment of H.R. 2029, Pub. L. 114-113,

[11] Dakota Access represented to the Federal Energy Regulatory Commission that the DAPL would carry 320,000 barrels per day. 149 FERC ¶ 61,275 p. 2 ("Intervenors explain that the Bakken Oil Projects will provide transportation up to approximately 320,000 barrels per day (bpd).")

[12] The IUB cites 570,000 barrels per day on page 31 of its Final Order, but then cites 450,000 barrels per day on page 33 of its Final Order. The range of 250,000 barrels per day is significant, as the fewer barrels per day carried by the pipeline, the less likely it is that the quantity carried by the pipeline will be enough to fully or mostly satisfy market demand such that additional shipments by rail are unnecessary or will be significantly reduced.

[13] 149 FERC ¶ 61,275 pp. 9 - 10, 13 (¶¶ 27, 38).

Division O, Title I, Sec. 101 (December 18, 2015) allows U.S. crude oil to be exported to foreign countries for the first time since 1975.

A rational person, when reviewing these facts, would reach the following conclusions:

- The 74,000 barrels per week of oil presently transported across Iowa does not represent the market's true demand for Bakken oil.
- Instead, market factors such as a limited capacity of rail cars, whether caused by: a lack of suitable cars, competition with other rail shippers, or inability to add additional rail transportation capacity is presently limiting the ability of oil producers to satisfy the market's demand for Bakken oil.
- Even if oil shipped by the DAPL satisfied domestic demand - itself a dubious proposition that the IUB did not find as fact and that is unsupported by the evidence cited by the IUB in its Final Order - foreign demand would require additional Bakken oil in excess of the DAPL's capacity. In this regard, the market's combined domestic and foreign demand for Bakken oil is inelastic. As such, the volumes shipped by the DAPL, plus present rail shipping methods, will not be able to fully satisfy the market's demand.
- Accordingly, the operation of the DAPL, even at its maximum capacity, will not significantly reduce the amount of Bakken oil transported across Iowa by rail car for a reasonably foreseeable period of time.

3. Legal Analysis of the Facts

The IUB's Final Order is "arbitrary and capricious" if "it is taken without regard to the law or facts of the case." *Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688 - 89 (Iowa 1994) (citing *Office of Consumer Advocate*, 432 N.W.2d at 154). The United States Supreme Court offers further guidance:

> Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment…Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park v. Volpe*, 410 U.S. 402, 416 (1971)); *Accord: Central South Dakota Co-op. Grazing Dist. v. Secretary of U.S. Dept. of Agriculture*, 266 F.3d 889, 894 (8th Cir. 2001)[14], *Office of Consumer Advocate*, 432 N.W. at 154 (Iowa 1988) ("Arbitrary' and 'capricious' are practically synonymous; both mean an agency decision taken without regard to the law or the facts of the case.") "The agency must articulate a 'rational connection between the facts found and the choice made.'" *Bowman*, 419 U.S. at 285 (quoted citation omitted).

Here, the IUB acted arbitrarily and capriciously, because there is no rational connection between the facts that the IUB found and its public safety conclusions. The IUB determined that the DAPL would make Iowans safer but expressly refused to find that the DAPL would decrease or otherwise limit the amount of oil transported by rail across Iowa. Most on point is the case of *Alaska Dept. of Environmental Conservation v. E.P.A.*; in this case, the EPA considered Alaska's Department of Environmental Conservation's ("ADEC") determinations as to what constituted "best available control technology" ("BACT") for a zinc mine whose electric generators discharged significant amounts of air pollution. *See generally* 540 U.S. 461, 468 - 82 (2004) (summarizing the background facts and ADEC's administrative process).

The Alaskan agency, ADEC, initially determined that a technology known as "selective catalytic reduction" ("SCR") was the BACT and economically feasible. *Id.* at 476. The zinc

[14] "A decision is arbitrary and capricious if: 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' (quoted citation omitted)."

mine ("Cominco") resisted and claimed that a technology "Low NOx" was the BACT. *Id.* at 475. ADEC eventually changed its determination as to the BACT and agreed with the mine that Low NOx was the BACT, even though "it had made 'no judgement…as to the impact of…[SCR] on the operation, profitability and competitiveness of the Red Dog Mine.'" *Id.* at 479 (quoted citation omitted). Yet ADEC also concluded that "SCR imposed a 'disproportionate cost' on the mine…[and] on a 'cursory review,'…requiring SCR for a rural Alaska utility would lead to a 20% price increase, and that…SCR came at a 'significantly higher cost.'" *Id.*

The EPA found several flaws with the Alaskan agency's action. The EPA found that the Alaskan agency acted arbitrarily, capriciously and unreasonably and blocked the Alaskan agency's action. *Id.* at 482 ("ADEC failed to provide a reasoned justification for its elimination of SCR as a control option"), 490 - 91 ("Only when a state agency's BACT determination is 'not based on a reasoned analysis,'…may EPA step in….EPA adhered to that limited role here, explaining why ADEC's BACT determination was 'arbitrary' and contrary to ADEC's own findings."), 497 ("…so read, the [EPA's] comments and orders adequately ground the determination that [the Alaskan agency's] acceptance…was unreasonable given the facts [the Alaskan Agency] found.") The Supreme Court affirmed the EPA's findings.

The facts found by the IUB cannot support a finding that construction of the DAPL will reduce the risk Iowans face from the transportation of oil across the state. Accordingly, the Court should find the IUB's public safety determinations to be arbitrary, capricious, unreasonable, and unsupported by substantial evidence for the same reasons the EPA and the Supreme Court found ADEC's BACT determinations to be arbitrary and unreasonable.

The IUB made no finding that the operation of the DAPL would reduce rail shipments of crude oil. IUB Ord. 32 ("The pipeline may or may not reduce rail shipments of crude oil…")

This finding is analogous to ADEC's acknowledgement that "no judgment [could then] be made as to the impact of [SCR's] cost on the operation, profitability and competitiveness of the Red Dog Mine." *Alaska Dept. of Environmental Conservation*, 540 U.S. at 498. Despite this finding, ADEC made the fatally unfounded, arbitrary, and unreasonable determination that "SCR would threaten both the…Mine's 'unique and continuing impact on the economic diversity' of northwest Alaska and the mine's 'world competitiveness.'" *Id.*

Similarly, the IUB made what it should now view as a fatally arbitrary and unreasonable determination that the DAPL will make Iowans safer instead of less safe, as it was made without regard to the facts it found and without regard to substantial evidence. IUB Ord. 32. If the IUB cannot determine that the DAPL will reduce rail shipments of crude oil across Iowa, then it cannot reasonably determine that introducing the DAPL and its associated risks will constitute a "safety advantage" to the people of Iowa. *Id.* Even though shipping of oil by rail may be less safe than shipping oil by pipeline on a barrel-per-mile basis, the IUB failed to make any finding that the DAPL would reduce the number of barrels shipped by rail car across Iowa either by slowing or stopping increases in oil shipments by rail over present levels or by reducing present levels of oil shipments by rail. Without such a finding, the IUB's conclusion that the DAPL will improve the safety of Iowans is arbitrary, irrational, and not based on substantial evidence. The only conclusion the IUB can reach, based on facts as it found them, is that the existing risk X from rail car transportation of oil will continue unabated, while a new risk Y from the DAPL pipeline will be introduced, leaving Iowans, and especially intervenors, vulnerable to the greater risk of X + Y.

The IUB should determine that the first prong of the its finding of "public convenience and necessity" is arbitrary and capricious, unreasonable, and not supported by substantial

evidence. The IUB should invalidate its Order and Dakota Access's petition for this reason. Alternatively, the IUB should stay its Order as applied to intervenors' farmlands until it can conduct a quantitative risk analysis of the impact that the DAPL will have. This quantitative risk analysis should consider the impact the DAPL will have on the quantity of oil shipped across Iowa by rail, quantify both any decrease in risk resulting from less oil being shipped across Iowa by rail and the affirmative risk of a pipeline incident, considering that though the probability of such an incident is less, the volume of oil it ships is significantly greater, making the magnitude of probable harms significantly greater. The IUB should then exercise its unique expertise and competence to actually weigh the quantified risks so that it can make a reasoned and factual determination grounded in substantial evidence about the DAPL's impact on the safety of Iowans. The IUB should rescind the DAPL permit if a quantitative risk assessment finds that DAPL ultimately makes Iowans less safe and not safer.

C. The IUB's determination that Iowa Code § 6A.21 did not bar Dakota Access from exercising eminent domain over intervenors' "agricultural lands" was arbitrary and capricious because it is contrary to law

The IUB's determination that Iowa Code § 6A.21 did not bar Dakota Access from exercising eminent domain over intervenors' "agricultural lands" was arbitrary and capricious because it is contrary to law. *Office of Consumer Advocate* 432 N.W.2d at 154. Iowa Code § 6A.21(1)(b) defines "Private development purposes" to "mean[] the construction of, or improvement related to, recreational trails, recreational development paid for primarily with private funds, housing and residential development, or commercial or industrial development." The IUB agrees that the DAPL is "industrial enterprise development." IUB Ord. 119. 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. Intervenors' farms are all "agricultural lands" for the purposes of the statute. Iowa Code § 6A.21(1)(a) (defining "Agricultural land"). Intervenors have not given their consent to the condemnation of their "agricultural lands."

The IUB determined that the above prohibition did not apply because Iowa Code § 6A.21(2) contains an exception to the language quoted above, under which Dakota Access fits. The statute says "The limitation on the definition of public use, public purpose, or public improvement does not apply to…utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce…." The IUB determined that Dakota Access was under its jurisdiction, and accordingly, Iowa Code § 6A.21 did not bar Dakota Access's exercise of eminent domain. IUB Ord. 121 ("The Board considers that the use of the term 'jurisdiction' in Iowa Code § 6A.21(2) includes the jurisdiction granted the Board under Iowa Code chapter 479B to 'implement certain controls over hazardous liquid pipelines…'")

The IUB's determination that Dakota Access was under its jurisdiction is arbitrary and capricious because it is contrary to law. Again, Iowa courts strictly construe eminent domain statutes. *Clarke County Reservoir Comm'n*, 862 N.W.2d at 168. Again, the IUB agrees. IUB Ord. 116. The board does not have its full legislatively prescribed jurisdiction over Dakota Access. The Board's jurisdiction over hazardous liquid pipelines is prescribed by § 479B.1. It provides:

> It is the purpose of the general assembly in enacting this law to grant the utilities board the authority to implement certain controls over hazardous liquid pipelines *to protect landowners and tenants from environmental or economic damages which may result from*

> *the* [1] *construction*, [2] *operation, or* [3] *maintenance of a hazardous liquid pipeline* or underground storage facility within the state, to [4] approve the location and route of hazardous liquid pipelines, and to grant rights of eminent domain where necessary

(emphasis added).

However, having issued an order approving the location and route of an interstate crude oil pipeline, the Board has no continuing construction, operational or maintenance control over it given the holding in *Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354 (8th Cir. 1993) (Iowa Utilities Board has no jurisdiction over jet fuel pipeline because Hazardous Liquid Pipeline Safety Act preempted Iowa Code Chapter 479 under the Supremacy Clause of the United States Constitution); *see also* 49 U.S.C. § 60104(c) ("a state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."), 49 U.S.C. § 60101 (defining "pipeline facility" to include "hazardous liquid pipeline facilit[ies]," which includes oil pipelines).

Strict construction of Iowa Code § 6A.21 requires that the IUB have sole and exclusive jurisdiction over Dakota Access and the DAPL, which would necessarily include jurisdiction related to every factor listed in Iowa Code § 479B.1. Partial or shared jurisdiction is insufficient. For example, the Board lacks any jurisdiction or even influence over the continued safe construction, operation, or maintenance of interstate crude oil pipelines such as the DAPL. It cannot protect landowners and tenants from any resulting environmental or economic damages, much less personal injury or death in association with a hazardous liquid pipeline. Because the Board does not have all of its required authorities and cannot perform all of its required duties under § 479B.1, it is without the relevant jurisdiction required by § 6A.21(2). *Cf. ANR Pipeline Co. v. Iowa State Commerce Comm'n*., 828 F.2d 465, 468 (8th Cir. 1987) ("[section 601, et seq.]

leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards.").

The legislature did not intend to allow an interstate hazardous liquid pipeline company to use the power of the State to force its way under agricultural land and then not be subject to the Board's safety and maintenance oversight intended to protect the landowners living in their homes and operating their farms on the surface. *See Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W. 3d 386, 392 (Ky. Ct. App. 2015) *discretionary review denied* (Feb. 10, 2016) ("We believe that the legislature only intended to delegate the state's power of eminent domain to those pipeline companies that are, or will be, regulated by the [Public Service Commission]"). Because the IUB erroneously equated partial jurisdiction with full jurisdiction, as required by a strict construction of Iowa Code § 6A.21, it acted arbitrarily, capriciously and contrary to law in deciding that Iowa Code § 6A.21 did not bar Dakota Access's exercise of eminent domain over intervenors' agricultural lands.

D. Dakota Access's Proposed Exercises of Eminent Domain Authority - and the IUB's Granting of Eminent Domain Authority to Dakota Access - are Unconstitutional

1. Standard of Review and Legal Background

a. The IUB's failure to evaluate the constitutionality of the DAPL

The IUB failed to reach or decide any constitutional issues - either federal or state - in its Order. IUB Ord. 117 ("The Board has determined that it can resolve the issues raised by the parties on statutory grounds and need not reach the constitutional issues raised by those opposing the pipeline.") This position was mistaken, because the exercise of eminent domain authority always implicates the Fifth Amendment of the United States Constitution and Article I, Section 18 of the Iowa Constitution. Either the IUB's granting - and Dakota Access's exercise - of

eminent domain authority is constitutional, or it is not. The Constitutional issue must always be reached.

b. The United States and Iowa Constitution's "Public Use" Clauses and relevant statutes

The Fifth Amendment to the United States Constitution states "…[N]or shall private property be taken for *public use*, without just compensation" (emphasis added). Article I, Section 18 of the Iowa Constitution states: "Private property shall not be taken for *public use* without just compensation first being made…." (emphasis added); *see also Bormann v. Board of Sup'rs In and For Kossuth County*, 584 N.W.2d 309, 313 (Iowa 1998) (quoting the relevant provisions and noting the Fifth Amendment's applicability to the states through the Fourteenth Amendment).

Iowa Code § 479B.9 states "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 § 479B.16 further states that "A pipeline company granted a pipeline permit shall be vested with the right of eminent domain, to the extent necessary and as prescribed and approved by the board…." Thus, it follows that the IUB's finding of "public convenience and necessity" is necessary for granting Dakota Access eminent domain authority, but it is not sufficient, because it is not the "public use" that the Federal and Iowa Constitutions demand.

c. "Public convenience and necessity" is not equivalent to "public use" as used in the Federal and Iowa Constitutions

"Public convenience and necessity" is both a different and lesser standard than "public use" for purposes of the exercise of eminent domain. Just as all squares are rectangles, but not all rectangles are squares, all exercises of eminent domain that are for the public use must also be for public convenience and necessity, but not all things that are of a public convenience and necessity are for a public use. The Illinois Supreme Court grasped the difference between

"public use" and "public purpose[15]" in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*:

> SWIDA contends that any distinction between 'public purpose' and 'public use' has long since evaporated and that the proper test is simply to ask whether a 'public purpose' is served by the taking. While the difference between a public purpose and a public use may appear to be purely semantic, a distinction still exists….We agree that these terms are necessarily somewhat loosely defined. However, that does not mean they are indistinguishable. The term "'[p]ublic purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution." [quoted citation omitted]. However, this flexibility does not equate to unfettered ability to exercise takings beyond constitutional boundaries.

768 N.E.2d 1, 8 - 9 (Ill. 2002), *cert denied* 537 U.S. 880 (2002) (hereinafter "*Southwestern Illinois*"); *see also Kelo v. City of New London, Conn.*, 545 U.S. 469, 505 - 506 (2005)

> ...Blackstone wrote that the 'law of the land…postpone[s] even public necessity to the sacred and inviolable rights of private property...' The Framers embodied that principle in the Constitution, allowing the government to take property *not for 'public necessity,' but instead for 'public use*…' Defying this understanding, the Court replaces the Public Use clause with a "'[P]ublic [P]urpose'" Clause.

(Thomas, J. dissenting) (internal citations omitted) (emphasis added).

2. Intervenors as applied challenges to Iowa Code §§ 479B.9 and 479B.16

Intervenors challenge the constitutionality of Iowa Code §§ 479B.9 and 479B.16 under both the Federal and Iowa Constitutions as the statutes are being applied to allow Dakota Access to exercise eminent domain over intervenors' farmland. Although intervenors have rebutted the safety and economic development rationale's in support of the IUB's determination of "public convenience and necessity," even if those arguments fail, the IUB's Final Order and Dakota Access's exercise of eminent domain authority under Iowa Code §§ 479B.9 and 479B.16 are unconstitutional. The IUB's authorization and Dakota Access's exercise of eminent domain is

[15] "Public purpose" is a standard very similar, if not identical, to "public convenience and necessity."

unconstitutional because it fails to satisfy the "Public Use" Clauses of the Federal and Iowa Constitutions.

a. The Court should adopt the reasoning of the Illinois Supreme Court in Southwestern Illinois in finding that the IUB's Order and Dakota Access's exercise of eminent domain pursuant to Iowa Code §§ 479B.9 and 479B.16 are unconstitutional as applied to intervenors

The IUB should adopt the reasoning in *Southwestern Illinois* in finding that Iowa Code §§ 479B.9 and 479B.16 is unconstitutional as applied to intervenors because the facts of the case are closely analogous and its reasoning is persuasive. In *Southwestern Illinois*, the Southwestern Illinois Development Authority ("SWIDA") exercised its "quick take" eminent domain authority, granted by statute, to condemn National City Environmental, L.L.C.'s ("National City") recycling plant next door to a racetrack. *See generally* 768 N.E.2d at 4 - 6. The racetrack wanted National City's property so that it could build "additional parking facilities to adequately serve patrons." *Id.* at 4. The SWIDA found that additional parking facilities would relieve traffic burdens on the nearby Interstate 55-70 and state highways, promote pedestrian safety, create economic development, and increase tax revenues. *See generally id.* at 4 - 6. The SWIDA's reasoning, rejected by the Illinois Supreme Court, closely mirrors the IUB's reasoning (*e.g.* emphasis on public safety, economic development, and tax revenues). *See id.* at 8.

Though the concept of "public use" is admittedly elusive (*see, e.g. id.* at 8), the Illinois Supreme Court held that "public use" requires that "[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, *but by right*." *Id.* at 9 (quoting *Gaylord v. Sanitary District*, 68 N.E. 522 (1903) (emphasis added)). The IUB claims that the pipeline is open to shippers, and that they are part of the public too (IUB Ord. 110), but the racetrack at issue in *Southwestern Illinois* was open to the public too, though <u>not by right</u>. *Southwestern Illinois*, 768 N.E.2d at 9. Instead, the *Southwestern Illinois* court found that

the casino "…is a private venture designed to result not in a public use, but in private profits." *Id.* The IUB similarly found that the DAPL is a private "industrial enterprise development" (IUB Ord. 119), and there can be no mistake that its sole and exclusive purpose is to make Dakota Access and its partners and investors billions of dollars.

The *Southwestern Illinois* court further found that though "economic development is an important public purpose," it was insufficient to show a public use because "incidentally every lawful business does this [grow and prosper and contribute to economic growth in the region]." 768 N.E.2d at 9. The *Southwestern Illinois* court relied on *Limits Industrial R.R. Co. v. American Spiral Pipe Works*, 151 N.E. 567 (1926), a case in which a railroad company was denied the power of eminent domain to expand its facilities despite having a "certificate of convenience and necessity issued by the Illinois Commerce Commission." 768 N.E.2d at 9. Because the railroad's expansion "provided minimal public benefit and principally benefitted the railroad itself and a few other business entities," its expansion was not a public use, even though it was found to promote "convenience and necessity." 768 N.E. 2d at 9 - 10. In light of the *Limits Industrial R.R. Co.* case, the *Southwestern Illinois* court concluded: "Similarly, it is incumbent on us to question SWIDA's findings as to the parking situation at Gateway and determine whether the true beneficiaries of this taking are private businesses and not the public." *Id.* at 10.

Here the IUB should follow its determination that Dakota Access is a private industrial enterprise to its only logical conclusion and determine that the only actual beneficiaries of the DAPL are Dakota Access and its partners and investors. To the extent Iowans or the "public" benefit, such benefits are incidental in the same way that every other viable private industrial enterprise benefits the public.

b. *The IUB's Order and Dakota Access's exercise of eminent domain pursuant to Iowa Code §§ 479B.9 and 479B.16 are unconstitutional as applied to intervenors under Kelo v. City of New London, Conn.*

i. The IUB should not consider the majority opinion of *Kelo v. City of New London, Conn.* - or the prior eminent domain jurisprudence on which it relies - in deciding this matter because it is distinguishable and statutorily pre-empted

In *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), a 5-4 majority of the Supreme Court allowed a highly controversial exercise of eminent domain by the City of New London Connecticut's "New London Development Corporation" whereby it condemned the homes of Susette Kelo and Wilhelmina and Charles Dery.[16] *Id.* at 475. The Derys had occupied their home together for 60 years, and Wilhelmina was born in the home in 1918. *Id.* The intervenors' property was to be transferred to a developer who would then lease the property to Pfizer Inc. or other private entities like a conference hotel, restaurants, or shopping pursuant to an "integrated development plan." *Id.* at 474. The development plan also included a public riverwalk, a Coast Guard museum, a public marina, a state park, residences, and the necessary public infrastructure. *Id.* Further, the condemned properties were not outright transferred in fee simple to private parties, but rather, they were leased to a developer, who would then lease them to the private entities. *Id.* at 476 n.4, 478 n.6.

Like in *Kelo*, the IUB and Dakota Access are on the verge of taking large swaths of intervenors' farmland for the construction and operation of the DAPL. Unlike the City of New London in *Kelo*, Iowa is not a distressed economy[17], and the DAPL is not part of an "integrated economic development plan." *See id.* at 487. *Kelo* is immediately distinguishable on its face.

Further, the majority opinion in *Kelo* has been statutorily pre-empted by the Iowa legislature. The crux of the *Kelo* majority opinion was its consideration of intervenors' request

[16] And other similarly situated intervenors.
[17] Iowa's unemployment rate of 4.0% as of June, 2016 is tied for fourteenth-best in the nation, according to the Bureau of Labor Statistics. See http://www.bls.gov/web/laus/laumstrk.htm (last accessed August 1, 2016).

that the Court "adopt a new bright-line rule that economic development does not qualify as a public use." *Id.* at 484. The *Kelo* majority rejected that argument, noting that "promoting economic development is a traditional and long-accepted function of government." *Id.* The *Kelo* majority further held that "There is, moreover, no principled way of distinguishing economic development from other public purposes that we have recognized." *Id.*

The Iowa legislature strongly disagreed. In response, the Iowa legislature adopted Iowa Code § 6A.22 in 2006, which statutorily excludes the sort of economic development arguments used in *Kelo* (*i.e.* job creation, tax revenues) from ever being a "public use" or "public purpose" except in narrow exceptions. The Iowa legislature drew a principled distinction between the taking of private property that were "blighted" or "slum" properties and the taking of agricultural land, which is statutorily prohibited from being "blighted" or "slum" property.[18] When it comes to taking "blighted" or "slum" properties, economic development can be considered a "public use" or "public purpose." Iowa Code § 6A.22. But "economic development" may never be considered a "public purpose" or "public use" when agricultural lands are being condemned. Because Dakota Access has condemned agricultural lands, the Iowa legislature has statutorily excluded *Kelo*'s holding from having an impact on the outcome of this matter.

Further, the cases that the *Kelo* majority relies upon are easily distinguished. The case of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) dealt with a circumstance unique to the state of Hawaii: that there was almost no real estate, and what little there was, was owned by an incredibly small number of people. The Hawaii legislature's taking of private real estate to redistribute it so that many more people would 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

[18] As discussed *supra* in this brief.

241 - 42);[19] *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 on the 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, provided compensation was made to the manufacturer for use of its data. *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 provided for 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.

In sum, the majority opinion in *Kelo* is irrelevant for the purposes of resolving this case.[20] The prior cases on which *Kelo* relies are also easily distinguished and similarly irrelevant. Accordingly, the Court should look beyond the *Kelo* majority opinion to *Southwestern Illinois*, discussed *supra*, and Justice Kennedy's concurrence and the *Kelo* dissent, discussed *infra*, in deciding that Iowa Code §§ 479B.9 and 479B.16, as applied to intervenors, are unconstitutional.

ii. Iowa Code §§ 479B.9 and 479B.16 Are Unconstitutional as Applied to Intervenors Because They Are Inconsistent With Justice Kennedy's narrow concurrence in *Kelo*

[19] 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 and the taking of agricultural lands, *Berman* is entirely inapposite. *See also Kelo*, 545 U.S. at 498 - 99 (O'Connor, J. dissenting) (distinguishing *Berman*).

[20] Justice Kennedy's concurrence and the dissent still remain relevant, though.

The IUB should further hold Iowa Code §§ 479B.9 and 479B.16 Unconstitutional As Applied to Intervenors because they are inconsistent with Justice Kennedy's narrow concurrence in *Kelo*. Justice Kennedy's concurrence should be highly persuasive to the IUB, because although he joined the majority opinion, his concurrence places sharp limits on the majority opinion.[21]

a. The legal standard(s) set forth in Justice Kennedy's concurrence: searching rational-basis review or a presumption of impermissible favoritism

Justice Kennedy acknowledges that rational-basis review is the appropriate Constitutional standard in determining intervenors' challenge under the Federal Constitution. *Kelo*, 545 U.S. at 490 (Kennedy, J. concurring) ("This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses.") However, Justice Kennedy's rational-basis review is not as deferential as one might expect. Instead, Justice Kennedy makes clear that "…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." *Id.* Justice Kennedy goes on to make clear that "A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits…." *Id.* at 491 (Kennedy, J. concurring).

Already, it should be clear that Justice Kennedy's rational-basis review of takings is one with teeth. Those teeth get even sharper as he adds "*A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one* and review the record to see if it has merit, though with the presumption that the

[21] Though different than the situation in which the Court's majority is split, such that there is no true majority opinion, leaving the narrowest opinion in favor of the outcome as the controlling opinion, that Kennedy's concurrence narrows a five-justice majority opinion gives his concurrence a greater value than a typical concurrence.

government's actions were reasonable and intended to serve a public purpose." *Id.* at 491 (emphasis added). The Court should note that it, and not the IUB, is to conduct this analysis. Justice Kennedy credited the trial court with "conduct[ing] a careful and extensive inquiry into 'whether, in fact, the development plan is of primary benefit to … the developer, and private businesses…and in that regard, only of incidental benefit to the city." *Id.* Here, the IUB should conduct a similarly careful inquiry as to whether the DAPL is of primary benefit to Dakota Access and its partners and investors and only of a possible, although not measurable, incidental benefit to the people of Iowa, such as in the form of marginally cheaper gas prices. The Court should stay Dakota Access's proposed exercises of eminent domain until it has time to conduct this constitutionally crucial inquiry.

Justice Kennedy further argues: "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.* at 493. But, Justice Kennedy agreed "…with the Court that a presumption of invalidity is not warranted for economic development takings in general…" *Id.* Here, where economic development is a statutorily barred purpose for the proposed taking of intervenors' land, Justice Kennedy's proposed presumption of invalidity of Dakota Access's takings has merit.

b. Dakota Access's proposed exercise of eminent domain under Iowa Code §§ 479B.9 and 479B.16, as applied to intervenors, is unconstitutional under Justice Kennedy's concurrence in Kelo

Dakota Access's proposed exercise of eminent domain under Iowa Code §§ 479B.9 and 479B.16, as applied to intervenors, is unconstitutional when viewed through the framework of Justice Kennedy's concurrence in *Kelo*. Justice Kennedy's analysis of the prior proceedings in

Kelo suggests that he would find Dakota Access's proposed exercise of eminent domain as applied to intervenors to be unconstitutional. The key findings for Justice Kennedy were:

- The state of Connecticut made a "substantial commitment of public funds…to the development project before most of the private beneficiaries were known" (*id.* at 491 - 92);
- The developer was chosen "from a group of applicants" instead of being handpicked "beforehand" (*id.* at 492); and
- "[O]ther private beneficiaries of the project are still unknown (*id.*)

Based on these findings, Justice Kennedy felt confident in concluding "that benefitting Pfizer was not the 'primary motivation or effect of this development plan'; instead, 'the primary motivation…was to take advantage of Pfizer's presence." *Id.* (quoted citations omitted).

Here, the primary purpose of the DAPL is to benefit Dakota Access, a private enterprise, and accordingly, its shareholders and partners, as the IUB has acknowledged. The state government of Iowa has practically no skin in the game, unlike Connecticut in *Kelo*. Dakota Access is the only developer, equivalent to one hand-selected beforehand; as a consequence, neither Iowa nor intervenors could benefit from competition, as in *Kelo*. Further, the beneficiaries of the pipeline are known: Daktoa Access and its investors and partners, the nine companies who have agreed to shipping contracts, and a few "walk-up" shippers. This is contrary to the taking in *Kelo* where the additional unknown private parties who could benefit could be community-based businesses and entrepreneurs, instead of foreign oil producers, and where the development included public goods like a riverwalk, museum, and infrastructure.[22]

[22] The lands the New London Development Company acquired through the exercise of eminent domain were only leased to the developer and then to the different entities by long-term leases. Thus, the city, through its development company, ultimately retained the fee simple to the lands. Here, Dakota Access is acquiring a permanent easement, and the IUB has no continuing regulatory authority over Dakota Access.

When the DAPL is viewed through the factors important in Justice Kennedy's concurrence, it is clear that the purpose of the DAPL is not to revitalize Iowa's economy, promote sustainable long-term economic growth in Iowa, or measurably benefit Iowans. Instead, the benefits identified by the IUB are an obvious pretext to facilitate the transfer of private property from farmers to an oil transportation company. The first pretextual justification offered by the IUB is that the DAPL will make Iowans safer. The pretext here is plain. For this claim to have any chance of being true, the DAPL would have to limit the amount of oil shipped by rail car across Iowa. The IUB explicitly refused to find that would occur. Instead, the likely outcome is that oil companies will ship as much oil as they can by pipeline in addition to as much oil as they can by rail to satisfy the market's insatiable demand for oil that not even the DAPL will satisfy.[23] As a result, adding the risks of the DAPL to the existing risks of oil shipments by rail will only make Iowans less safe, not safer. That the IUB looked past this apparent analysis to make assertions about safety that it cannot factually support shows that its Order is not just arbitrary and capricious, but pretext to justify the transfer of private property to a private entity, in violation of the Federal and Iowa Constitutions.

Respectfully, the IUB's pretext is further rendered apparent by its touting of purported economic benefits to Iowans that it statutorily cannot consider in deciding whether to grant Dakota Access eminent domain authority to condemn farmland. That the IUB ignores the legislature's enactments reveals how it searched to find a justification for transferring intervenors' privately owned farmland to a private company in Dakota Access. Its arbitrary and capricious avoidance of the law again lays bare that Dakota Access is a "favored private entit[y]" of the IUB. *Kelo*, 545 U.S. at 490 (Kennedy, J. concurring). The IUB's Final Decision and

[23] If the market's demand for oil weren't so great as to be functionally inelastic for the foreseeable future, it's highly unlikely that the nine committed shippers Dakota Access boasts of would have made such commitments.

Order granting Dakota Access eminent domain authority over intervenors' farmland is nothing more than pretextual cover to facilitate the naked transfer of private property from Iowa's politically disfavored farmers to favored big oil companies. The Final Decision and Order fails the searching rational-basis review of Justice Kennedy's concurrence in *Kelo* and is thus unconstitutional under the Fifth and Fourteenth Amendments to the Federal Constitution.

c. The IUB should adopt the reasoning of Justice O'Connor's dissent in Kelo, afford Iowans greater constitutional protection in eminent domain cases, and find its Order unconstitutional solely under Article I, Section 18 of the Iowa Constitution

The IUB, upon further review, should adopt the reasoning of Justice O'Connor's dissent in *Kelo* and afford Iowans greater state constitutional protections in eminent domain cases. Because of the similarity between the federal and state takings clauses, "federal cases interpreting the federal provision are persuasive in our interpretation of the state provision." *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005). "However, such cases are not binding on this court regarding our interpretation of the state provision." *Id.* (citing *State v. Carter*, 696 N.W.2d 31, 37 (Iowa 2005)).[24] Here, the IUB should first look to the Iowa legislature's swift and explicit rejection of *Kelo*'s holding - especially as it applies to intervenors' farms. In light of the legislature's rejection of *Kelo*, the Court should adopt the reasoning of Justice O'Connor's dissent[25] in *Kelo* and find that Dakota Access's proposed exercise of eminent domain under Iowa Code §§ 479B.9 and 479B.16 is unconstitutional as applied to intervenors.

The *Kelo* dissent starts with the bedrock proposition that to satisfy the Fifth Amendment, a taking must both "be for a 'public use' and 'just compensation' must be paid to the owner." 545 U.S. at 496 (O'Connor, J. dissenting). In contrast to the "just compensation" component of

[24] *Harms* was decided on August 12, 2005, less than two months after the decision in *Kelo*, which was decided on June 23, 2005. Had parties wished to argue the reasoning of the dissents in *Kelo* as a basis for affording greater state constitutional protections, they would not have had the opportunity. Further, *Harms* was a case about a zoning ordinance, so *Kelo*'s reasoning on economic development takings would not have been applicable.

[25] Joined by the late Chief Justice Rehnquist and Associate Justice Scalia, as well as Justice Thomas.

the Takings Clause, the *Kelo* dissent observes: "The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, *but not for the benefit of another private person*. This requirement promotes fairness as well as security." *Id.* at 497 (emphasis added).

The *Kelo* dissent notes that there are three traditional takings which the Court has supported as legitimate public uses. The first is when land is taken for public ownership, "such as for a road, a hospital, or a military base." *Id.* at 497 - 98. The second are transfers to private parties "often common carriers *who make the property available for the public's use*--such as with a railroad, a public utility, or a stadium." *Id.* at 498. Here, it will do Dakota Access no good to point out that they are a common carrier under federal law, because the DAPL is not available for the public's use; no Iowan is going to use the DAPL. The nine oil shippers, plus the walk-up shippers lucky enough to win a lottery granting them access to the last 10% of the pipeline's capacity, hardly constitute "the public" in any meaningful understanding of "public."[26] The third sort of cases are where "in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use." *Kelo*, 545 U.S. at 498 (O'Connor, J. dissenting) (citing *Berman*, 348 U.S. 26 and *Midkiff*, 467 U.S. 229). Having previously distinguished those cases, this case cannot be said to fall within this third and final category of cases in which eminent domain has been allowed by the United States Supreme Court.[27]

---

[26] Merrian-Webster relevantly defines "public" as "of, relating to, or affecting all or most of the people of a country, state, etc." (http://www.merriam-webster.com/dictionary/public) (last accessed August 1, 2016). Other definitions like "devoted to the general or national welfare" and "accessible to or shared by all members of the community" are equally unavailing. *See id.*

[27] As the dissent notes in these cases "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society." *Kelo*, 545 U.S. 499. Here, the farmers' use of their agricultural lands poses no unique harm or threat to society.

But the true force of the *Kelo* dissent lies in this observation:

> For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory…If legislative prognostications[28] about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Id. at 503 - 504. The IUB has a chance to distinguish the eminent domain protections afforded Iowans under its state Constitution by holding that those protections are greater than the protections afforded Iowans by the Federal Constitution. By adopting the rationale of the *Kelo* dissenters, the IUB can reaffirm under the Iowa Constitution the fundamental principle that Iowa's citizens are entitled to the quiet and peaceful enjoyment of their property. In doing so it can stand as the protector of the equal rights of all Iowans where the *Kelo* dissenters failed for want of a single additional vote.

Echoing these crucial themes, the *Kelo* dissent concludes:

> It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory.
>
> 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*.

545 U.S. 469, 504 - 505 (O'Connor, J. dissenting) (emphasis added).

[28] Or administrative prognostications made pursuant to a delegation of legislative authority…

III. Intervenors will suffer irreparable harm if a stay is not granted

A. Intervenors will suffer two irreparable harms if Dakota Access's construction of the DAPL across their farms is not stayed

Intervenors will suffer two irreparable harms if Dakota Access's proposed condemnations proceed. First, intervenors will suffer the irreparable harm of losing their constitutional right guaranteed under the Federal and Iowa Constitution's equal protection clauses to be heard to challenge Dakota Access's proposed condemnation of their land. Second, intervenors will suffer the irreparable harm of losing a unique interest in their real property, which cannot be adequately compensated with money damages. Any one irreparable harm is one too many.

First, intervenors have a constitutional right to challenge Dakota Access's proposed taking under the Fourteenth Amendment to the United States Constitution. *Brody v. Village of Port Chester*, 434 F.3d 121, 129 (2d Cir. 2005) ("The role of the judiciary, however narrow, in setting the outer boundaries of public use is an important constitutional limitation. *To say that no right to notice or a hearing attaches to the public use requirement would be to render meaningless the court's role as an arbiter of a constitutional limitation on the sovereign's power to seize private property*." (emphasis added)). The IUB should further find that intervenors have the same due process right to challenge the taking under the Iowa Constitution. *Harrison Redevelopment Agency v. DeRose*, 942 A.2d 59, 84 (N.J. Super. App. Div. 2008) ("At its core, due *process requires* adequate notice and *an opportunity to be heard*, whether analyzed under the Federal Constitution or under the New Jersey Constitution." (the case then goes on to discuss the notice DeRose was due so that he could have the opportunity to be heard, *see generally id.* 84 - 87 and holds that "…takings jurisprudence…offers a substantial rationale for allowing a condemnee a fair and final opportunity to test the sovereign's exercise of authority when it is invoked in [eminent domain proceedings]" *id.* at 89.) (emphasis added)) Here, the IUB should,

at a minimum, grant intervenors' request for a stay under Iowa Code §§ 17A.19 until such time as intervenors can exercise their constitutional right to be fully heard in challenging Dakota Access's proposed condemnation of their land in the pending judicial review proceeding.

This irreparable harm is compounded because intervenors lack an adequate remedy at law if Dakota Access then begins construction on intervenors' property prior to the Court hearing intervenors claims. Intervenors cannot attack Dakota Access's exercise of eminent domain in the condemnation proceedings or intervenors' statutory right to appeal those proceedings. *Stellingwerf v. Lenihan*, 85 N.W.2d 912, 915 (Iowa 1957) ("Appellant cannot raise the legal question [challenging the condemnation] on appeal in a condemnation action. The only question involved in eminent domain procedure is the value of the property taken."). Indeed, Iowa Code § 6B.25 allows the condemning party to "take possession of the land condemned and proceed with the improvement" as soon as it deposits "with the sheriff the amount assessed in favor of a claimant." Further, if Dakota Access is allowed to proceed with construction prior to intervenors being heard in this Court, intervenors will lose their only remedy at law. *Nichols* 687 N.W.2d 562; *Lewis Investments, Inc.*, 703 N.W.2d at 184. The IUB should grant intervenors' requested stay because "If an illegal act is threatened and remedy at law is inadequate, the trial court has the authority to grant a temporary injunction to maintain the status quo until the case is tried on its merits." *Stellingwerf*, 85 N.W.2d at 914 (citations omitted).

Second, Intervenors will suffer irreparable harm if Dakota Access is allowed to condemn their land before they can fully and finally litigate their several challenges to Dakota Access's eminent domain authority. Intervenors' interest in their farmland is "unique." *Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 907 (Iowa 1977) ("We review this case in light of our rule that specific performance is available when the contract involves property which is unique or

possesses special value…Real estate is assumed to possess this necessary quality…The record in this case discloses *this neighborhood farm had a unique value to the Moser father-son farm operation*." (emphasis added)) The status of intervenors' farmland as "unique" is important because "monetary relief fails to provide adequate compensation for an interest in real property, which by its very nature is considered unique." *O'Hagan v. U.S.*, 86 F.3d 776, 783 (8th Cir. 1996). Consequently, a property owner "suffer[s] irreparable injury by the proposed force sale of [the owner's] possessory interest in the…property." *Id.*; *Accord Carpenter Technology Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) ("Because real property is at issue and *because Carpenter cannot raise its claim for injunctive relief to prevent the taking of its property in the valuation proceeding, Carpenter has shown a threat of irreparable injury*." (emphasis added))

In sum, intervenors' interest in their family farms is a unique property interest, the loss of which without receiving full and complete due process, is an irreparable harm. Intervenors have a due process right under the Federal and Iowa constitutions to be heard in challenging Dakota Access's proposed condemnation of their land. Intervenors' due process right is unique and will be lost if Dakota Access is allowed to proceed with construction because Intervenors were procedurally barred from raising their challenges in the imminent condemnation proceedings against their land. Should Dakota Access begin construction prior to this Court adjudicating intervenors' challenges to Dakota Access's eminent domain authority, intervenors will suffer twin irreparable harms: the loss of their due process right to be heard and irreparable damage to their unique property without any legal remedy. Because intervenors face two irreparable harms the IUB should, at a minimum, grant intervenors' request for a stay until such time as the Court

in the pending judicial review proceeding may hear intervenors' arguments as set forth in this brief.

IV. Dakota Access will not be substantially harmed if a stay is granted

A. The IUB should not consider harms to Dakota Access until intervenors have the opportunity to challenge Dakota Access's exercise of eminent domain on the merits

The IUB should not consider any harms that Dakota Access Dakota will allegedly face until intervenors can be heard on the merits, because any harms to Dakota Access cannot outweigh the permanent deprivation of intervenors' constitutional rights. Dakota Access will likely make several arguments related to the financial costs they will face if they are not immediately allowed to begin construction activities on intervenors' lands. Dakota Access will further try to cast the immediacy of intervenors' remedy as a problem caused by intervenors when it set a construction schedule so aggressive that it left no flexibility for reasonably anticipable legal challenges and so unprecedented to be unlike any exercise of eminent domain authority in Iowa's history. Dakota Access's proceed at all costs mentality is the principal reason plaintiffs need such extraordinary relief. Had Dakota Access pursued a still aggressive, but more reasonable construction schedule (i.e. beginning after this coming winter and utilizing the entirety of 2017's calendar of non-winter construction days), these proceedings - and the condemnation of intervenors' lands - could have proceeded at a reasonable pace that was fair to intervenors and that did not unfairly privilege Dakota Access, its billions in operating revenues, and its practically infinite legal budget.

But, intervenors, as just explained in their section on irreparable harm, face the prospect of losing their constitutionally guaranteed right to be heard on the substance of the propriety of Dakota Access's condemnation of their land. Until the Court in the pending judicial review proceeding hears intervenors on the merits of their argument, no injury to Dakota Access can

remotely match the loss of intervenors' constitutional due process rights. Further, Dakota Access previously agreed to proceed with construction at its own risk while the Army Corps of Engineers had yet to approve construction across portions of the route under its jurisdiction. Dakota Access is uninjured by any delay resulting from intervenors' exercise of their constitutional right to be heard, just as it was uninjured by the administrative procedure of the Army Corps of Engineers. Accordingly, the Court should deem this factor to be of no weight until intervenors are heard on the merits.

B. The Court should not consider financial impacts to Dakota Access because it will establish precedent that some private parties' uses of eminent domain are "too big to stay" until a merits challenge can be heard

The Court should not consider the financial impacts a stay would have on Dakota Access because the Court would establish precedent that some private parties' exercises of eminent domain are "too big to stay" until a merits challenge can be heard. Again, Dakota Access is likely to regale the IUB with affidavits, asserting without foundation or backup, millions of dollars that it will lose if it cannot commence construction on intervenors' farms this year. The IUB, above all, should consider that Dakota Access set its own construction schedules knowing that intervenors' challenges were foreseeable, and is responsible for the consequences of delay. In addition, the IUB should consider several other things as it reads Dakota Access's arguments.

First, the IUB should read Dakota Access's argument to be that its bottom line matters more than the merits of intervenors' arguments or the irreparable harms intervenors face. Such a contention is ethically dubious. It asks the IUB to consider the DAPL project as "too big to stay" and to privilege a multi-billion dollar company simply because it is capable of building such a massive project. Such arguments lend the credibility of absolute truth to Justice O'Connor's conclusion in her *Kelo* dissent (quoted at length *supra*), that the legacy of *Kelo* would be

society's wealthiest and most connected using their position of strength to dispossess "those with fewer resources." 545 U.S. at 505.

Second, though Dakota Access is a private company, it is exercising a power (eminent domain) traditionally reserved to the state and granted to it only through the operation of statute. Accordingly, Dakota Access is standing in the shoes of the state, an actor that is not driven by a profit motive. The costs to Dakota Access's bottom-line should be irrelevant to the Court. Yet, to the extent Dakota Access resists this premise, it lays bare to the IUB the inescapable truth of the DAPL: it is being constructed by a private party, Dakota Access, for the sole and exclusive private purpose of making Dakota Access, and its partners and investors, significant amounts of money.

Finally, the IUB should resist Dakota Access's (anticipated) claims of financial harm on causation grounds. In order for the Court to consider any of Dakota Access's claims of financial harm, Dakota Access must prove "but-for" causation. *Gerst v. Marshall*, 549 N.W.2d 810, 818 (Iowa 1996) ("We agree with the Missouri Supreme Court when it stated: '[b]ut for' is an absolute minimum for causation because it is merely causation in fact.") (quoted citation omitted). As the Court is surely aware, the DAPL is a massive undertaking spanning four states. It is not as if the pipeline is now fully constructed, but for intervenors' farms. So long as Dakota Access is not able to operate the pipeline for reasons other than its failure to complete construction on intervenors' farms, its claims of financial harm must be rejected by the Court.[29]

Finally, to the extent that Dakota Access argues that it will suffer costs from "going around" intervenors' farmlands, the IUB should have no sympathy for Dakota Access's claims.

[29] Intervenors do not imply or concede that if, somehow, a stay would be granted and their farms would be the only places where the pipeline's construction was incomplete, that the Court's analysis should change. Intervenors maintain that their due process right to have their claims decided on the merits outweighs any harm to Dakota Access because the legitimate exercise of one's constitutional rights is priceless and a corresponding deprivation of one's constitutional rights is a harm that exceeds any dollar figure.

Dakota Access knew that there were intervenors, like the ones here, who would strongly resist Dakota Access's condemnation of their farmlands. Accordingly, if Dakota Access developed a construction schedule that did not account for such holdouts, they are responsible for those damages, as Dakota Access has already made the decision to accept such risks in pursuit of such a swift construction of other areas of the pipeline. Dakota Access chose how to build the project, and no exercise of intervenors' legal rights afforded by Iowa statute and the Federal and State Constitutions should ever be considered a cause of harm to Dakota Access.

V. The public interests relied upon by the IUB are insufficient to justify agency action because they are arbitrary and capricious, unreasonable, not supported by substantial evidence, no rational person would adopt them, and authorize the unconstitutional use of eminent domain

Finally, the public interests relied upon by the IUB are insufficient to justify the IUB's action under the circumstances. Intervenors have, previously in this brief, laid out a strong case as to why the IUB's "public safety" reasons for approving Dakota Access's pipeline permit are arbitrary, capricious, irrational and unsupported by substantial evidence. No reasonable person would conclude that the DAPL will make Iowans safer if the DAPL cannot be said to decrease the amount of oil shipped across Iowa on rail cars. Instead, just as many barrels of oil will likely be shipped across Iowa on rail cars, while millions more barrels of oil, *per week*, flow through the DAPL. As a result, Iowans will be less safe with the DAPL than they presently are without the DAPL. The "public safety" rationale the IUB relies upon actually supports granting intervenors' stay.

Further, the IUB is statutorily barred from considering the economic benefits that comprise the other major reason it granted Dakota Access its permit. The Iowa legislature's response to the Supreme Court's decision in *Kelo* was crystal clear: no amount of jobs created or taxes generated are sufficient reasons for a private party to exercise eminent domain authority to

dispossess Iowa's farmers of their land. Finally, no public interest can justify a taking that does not satisfy the federal and state constitution's "public use" requirement; that is, no public interest can save an unconstitutional action. The Court should assign no weight in favor of Dakota Access on this prong. If anything, it should assign weight against Dakota Access because the IUB's public safety reasoning is undermined by the dangers inherent in operating the pipeline.

CONCLUSION

Intervenors have a due process right to be heard in the Court above on their petition for judicial review. For that hearing to matter, the parties must remain in the *status quo* that they are in now. The only way to preserve that status quo is for the IUB to stay enforcement of its Final Order granting Dakota Access eminent domain authority over intervenors' farmlands, as identified in the Final Order. If the IUB fails to issue a stay, intervenors' farmlands will irreparably altered by the digging of a massive trench across their entire farm so that the DAPL may run in that trench. Once operational, the DAPL will pose an omnipresent risk of human, environmental, and economic catastrophe to intervenors, as an explosion could end their lives, and an oil spill could end their farming operations. Before intervenors are forced to bear these irreparable harms, they deserve their day in Court.

If intervenors are granted their day in this Court, they will prevail on the merits. Intervenors will show that the IUB's "public safety" rationale for approving Dakota Access's pipeline permit is fatally flawed. The IUB acted arbitrarily and capriciously and without regard for substantial evidence in finding that the DAPL will make Iowans safer. The DAPL will not significantly reduce the amount of oil being carried by rail car across the state of Iowa. The IUB had the opportunity to make such a finding, and it explicitly refused to make this finding. As a result, the IUB should have concluded that the DAPL will only make Iowans less safe. Without

the guarantee of a significant reduction in the existing risk of transportation of oil by rail cars, the IUB can only conclude that the introduction of a new risk, the DAPL, will only make Iowans less safe, and it should remedy this error in its original Final Order.

Similarly, the IUB's decision to rely upon the alleged economic benefits, job creation and tax revenues, as a justification for awarding Dakota Access the pipeline permit was arbitrary and caprcious because it is plainly in violation of statute. The Iowa legislature clearly and explicitly precluded the IUB from considering economic benefits in deciding whether to grant Dakota Access eminent domain authority, which comes with granting Dakota Access its pipeline permit. No Iowan farmers (or otherwise) should be forced to surrender their land to a corporation that says it can put it to more productive use. The IUB should join the legislature in siding with the *Kelo* dissent and grant Iowans' greater protections against the exercise of eminent domain under the state Constitution than they enjoy under the Federal Constitution.

Yet, even under the federal constitution, Dakota Access's proposed taking would not pass muster. Notwithstanding the majority decision in *Kelo,* Justice Kennedy clarified why he joined the majority in his concurring opinion. A careful reading of Justice Kennedy's concurrence reveals none of the factors that caused him to join the majority in *Kelo* are present here. As the swing vote, Justice Kennedy likely would have sided with the dissent against Dakota Access had this case, and not *Kelo,* been before the Court. Accordingly, the IUB should ignore *Kelo* and the cases it cites as predecessors, and decide that Dakota Access's proposed takings constitute nothing more than a naked transfer of intervenors' private property to another private entity, which is still explicitly barred by the Fifth Amendment.

The dire circumstances that Justice O'Connor warned us of in her *Kelo* dissent are at hand: a multi-billion dollar corporation is using the full weight of its wealth and influence to

capture the regulatory agencies of several state governments, so that the state will transfer intervenors' privately owned farms to a private corporation, so that the private corporation can make billions more in profits. As Justice O'Connor's *Kelo* dissent elaborately argued, it is an affront to our cherished tradition of representative government where, the richest gets theirs, so long as the taxman also gets his. Yet, that is the version of government to which Dakota Access has subscribed in this matter.

Intervenors, who are of much fewer resources than the multi-billion-dollar Dakota Access, respectfully ask the IUB to join the *Kelo* dissent and affirm the bedrock principle that has undergirded the United States' regime of private property since the founding: that the state may not take a private citizen's property and transfer it to another private entity for that entity's private benefit. Intervenors, seeking to exercise their due process right to eventually be heard in Court as part of the judicial review proceedings they have filed, ask the IUB to keep them and Dakota Access in the *status quo* that presently exists, until such time as the Court above may finally decide intervenors' arguments on the merits.

Dated this 22nd day of August, 2016.

Respectfully Submitted,

/s/ William E. Hanigan

William E. Hanigan, AT0003284
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

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Iowa Utilities Board using the EFS system which will send notification of such filing (electronically) to the appropriate persons.

/s/ William E. Hanigan