In the Supreme Court of Iowa

No. 17-0423

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

Petitioners-Appellants,

and

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

Petitioners,

vs.

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

Respondent-Appellee,

and

OFFICE OF CONSUMER ADVOCATE

Intervenor-Appellee,

and

DAKOTA ACCESS, LLC,
Indispensable Party-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE JEFFREY FARRELL, JUDGE

BRIEF OF AMICUS CURIAE NISKANEN CENTER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Niskanen Center ("Niskanen") is a 501(c)(3) libertarian think tank with a strong interest in securing Americans' rights to their property. It is a fundamental matter of justice – and a foundational belief among libertarians – that government should forcibly take private property only as a measure of last resort, when truly for public use, and must compensate the property owners sufficient to render them indifferent to the taking. Justifying the forced sale of property on the basis of greater economic benefits to the state or society as a whole – as was the case here – is an abuse of government power.

Niskanen has made a careful study of the evolution of eminent domain and private property rights following the Takings Clause decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). In accordance with the principles of federalism, Niskanen believes that the sovereign States should (and do) provide greater

[1] Pursuant to Iowa R. App. P. 6.906(4)(d), Niskanen states that its counsel was the sole author of this brief, and that no other party or any other person contributed money to fund its preparation or submission.

protection for their citizens' property than *Kelo* found under the Fifth Amendment. Niskanen has great faith in the power of economically efficient markets, but the state seizing someone's property and turning it over to another person based on the belief that the beneficiary can use it more profitably is a serious threat to American liberty.

Protecting private property from arbitrary government appropriation is a necessary condition for political freedom. Justice Story described the Takings Clause as:

> an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. *Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen.*

Commentaries on the Constitution of the United States § 1790 (Thomas M. Cooley ed., 4th ed. 1873)(emphasis added).

Introduction

This case presents the question of what is a "public use" under Article I, § 18 of the Iowa Constitution: "Private property

shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof . . . "[2]

This Court has not decided what is a "public use" in the twelve years since *Kelo*. Before *Kelo*, in *South East Iowa Co-op Elec. Ass'n v. Iowa Utilities Board*, 633 N.W.2d 814, 822 (Iowa 2001) – the primary authority relied on by both the Iowa Utilities Board and the District Court – this Court endorsed a finding of "public use" based solely on economic benefits: "We conclude the utilities board may base its finding that a proposed electric transmission line is necessary to serve a public use on economic considerations alone." Niskanen believes that after *Kelo*, State Supreme Court interpretations of State Takings Clauses, the wave of State constitutional and legislative reactions (including Iowa's amendment to its Eminent Domain Code), the debates at the 1857 Iowa Constitutional Convention, and lastly an earlier decision of this Court, counsel against extending *South East Iowa* to justify the takings in this case based on "economic benefit".

[2] Niskanen believes that the Board's decision also violates the Fifth Amendment's Takings Clause, but confines its argument solely to issues under Iowa Constitution Article I, § 18.

The Decisions Below

Pursuant to Iowa Code chapter 479B, Respondent Dakota Access LLC applied to the Iowa Utilities Board (the "Board") for a permit to construct and operate a crude oil pipeline. Section 479B.9 states that the Board may only grant such a permit if it determines "that the proposed services will promote the public convenience and necessity." Section 479B.16 then provides that, "A pipeline company granted a pipeline permit shall be vested with the right of eminent domain[.]" Since eminent domain authority automatically comes with a chapter 479B pipeline permit, the Board's determination of "public convenience and necessity" under § 479B.9 is necessarily equivalent to a determination that any takings under that authority are for a "public use" under Article I, § 18.

The Board's Decision

Because the Iowa Legislature did not define the term "public convenience and necessity" in chapter 479B, the Board concluded "that the indefiniteness of the term is intentional and reflects a delegation of authority to the Board of the power to identify for

itself what factors and circumstances should bear on its determination in any specific situation." Utilities Board Docket No. HLP-2014-001, Final Decision and Order ("Order"), p. 14.

Having decided that it had the authority to determine what "public convenience and necessity" is, the Board turned to *South East Iowa Co-Op. Elec. Ass'n v. Iowa Utilities Board*, 633 N.W.2d 814 (Iowa 2001) as "[p]erhaps the most instructive case for determining and understanding the applicable standard." Order, p. 16. In *South East Iowa,* the Board approved an electric transmission line under Iowa Code chapter 478 as "necessary to serve a public use." While the issue here was § 479B.9's standard of "public convenience and necessity", the Board stated that "the tests are sufficiently similar that the analysis should also be similar". *Id.* p. 16. The Board concluded that:

> In each type of proceeding, the Board must consider and balance concepts relating to public use, public benefits, and public and private costs and detriments. In *South East Iowa Co-Op*, the Court approved of the Board's process, which "balanced all of these factors and determined the substantial benefits outweighed the costs…." (633 N.W.2d at 821.)

Id. And so the Board formulated its test:

> Pursuant to Iowa Code § 479B.9, the Board is applying the "public convenience and necessity" test as a balancing test, weighing the public benefits of the proposed project against the public and private costs or other detriments as established by the evidence in the record.[3]

Id., pp. 16-17.

"Public Convenience and Necessity"

Having decided to apply a cost-benefit balancing test, the Board determined that, "Two factors weigh heavily in favor of granting a permit." Order, p. 109. The first was that a pipeline "represents a significantly safer way to move crude oil from the field to the refinery when compared with the primary alternative, rail transport." *Id.*[4] The second was that the "economic benefits

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[3] After performing this analysis solely because the Legislature did *not* define "public convenience and necessity" the Board repeatedly (and mistakenly) describes this as "the statutory balancing test" (*e.g.*, Order, pp. 109, 112, 113).

[4] Niskanen takes no position on the relative safety of transporting crude oil by rail versus pipeline. However, Niskanen notes that it appears that the Board assumed that if the pipeline were not built, the resulting rail shipments would also go through Iowa. Niskanen is not nearly as familiar with the factual record as the parties, but it may be a relevant consideration for this Court if there is no record evidence that the alternative to the pipeline was rail shipment *through Iowa;* as of 2014, approximately 90% of Bakken crude shipped by rail to Illinois did not go through Iowa. *Wall Street Journal*, "Crude Oil By Rail", December 3, 2014 (available at http://graphics.wsj.com/crude-oil-by-rail/).

associated with the construction, operation, and maintenance of the proposed pipeline are substantial." *Id.* The Board described a third benefit in the form of serving "a market where there is a clear demand for pipeline transportation service", although this factor "merits less weight" in the balancing test than the safety and economic benefits. *Id.*, p. 110.

The Board summarized the economic benefits as follows (*id.*, pp. 109-110):

> [T]he economic benefits associated with the construction, operation, and maintenance of the proposed pipeline are substantial. The construction period benefits are projected to be at least $787,000,000, and may be much more. Thousands of construction jobs will be created, many of them to be filled by Iowans. Long term, the project will generate substantial tax revenues and will directly generate at least 12 permanent jobs. These are real economic benefits to Iowa that have not been seriously challenged on this record. This public benefit also carries significant weight in the statutory balancing test for determining whether the proposed pipeline will "promote the public convenience and necessity." (Iowa Code § 479B.9.)

The Constitutionality of § 479B.9

Petitioners raised several Constitutional issues before the Board, including whether a § 479B.9 permit constituted a "public use" under either the federal or Iowa Constitutions. Order, pp.

115-116. The Board sidestepped these: "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." *Id.*, p. 117.

The Board's "statutory grounds" were first, "In determining whether a taking by eminent domain satisfies the public use requirement, courts will defer to the wisdom of the legislature", (*id.*, p. 118) and second, "In enacting chapter 479B, the Iowa legislature made the determination that those pipelines that meet the statutory requirements for a permit also meet the public use requirement such that eminent domain is proper to the extent determined by the Board." *Id.*, p. 119. In short, if the Legislature says it's a public use, then it's a public use.

The District Court's Decision

On appeal, the District Court for Polk County affirmed the Board's decision. Ruling on Judicial Review, February 15, 2017 ("Ruling"). The District Court held that the Board's interpretation of "public convenience and necessity" was entitled to deference (Ruling, p. 14), and that *South East Iowa* had resolved the

question as to whether economic considerations were properly part of "public use" under Iowa law: "There is no question that economic impact may be considered as a factor." *Id.*, p. 17. It then concluded that *Kelo v. City of New London*, 545 U.S. 469 (2005) held that economic benefits are a permissible consideration as part of "public use", and that the takings involved here were "much less intrusive" than those approved of in *Kelo*. *Id.*, pp. 34-35. This appeal followed.

Much has happened in the sixteen years since *South East Iowa*. To the extent that *South East Iowa* can be read – as the Board and the District Court read it – as carte blanche to seize private property when someone else shows that doing so will yield greater economic benefits, the judicial and legislative reactions to *Kelo* - including the 2006 amendments to Iowa's Eminent Domain Code - the debates of the Iowa 1857 Constitutional Convention, and this Court's decision in *Mid-America Pipeline Co. v. Iowa State Commerce Commission*, 114 N.W.2d 622 (Iowa 1962), all weigh in favor of not extending *South East Iowa* to chapter 479B.

ARGUMENT

I. MANY OTHER STATES HAVE JUDICIALLY OR LEGISLATIVELY REJECTED KELO'S ECONOMIC BENEFIT HOLDING.

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments . . . . Hence, a double security arises to the rights of the people.

James Madison, *The Federalist No. 51.*

> Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977).

A. Other State Supreme Courts Have Refused to Equate "Economic Benefit" With "Public Use".

Perhaps *Kelo's* most quoted passage is its penultimate paragraph: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." 545 U.S. at 489.

Appellants' brief discussed three State Supreme Court cases declining to equate "public use" with "economic benefits under their state constitution Takings Clauses. Two – *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), and *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002) – pre-dated *Kelo*, and one – *City of Norwood v. Horney*, 853 N.E.2d 1123 (Ohio 2006) – came after.[5] Niskanen will not repeat arguments concerning those decisions but notes that many other State Supreme Courts have reached the same conclusion, both before and after *Kelo*.

For example, in *Hogue v. Port of Seattle*, 341 P.2d 171, 187 (Washington 1959) the Washington Supreme Court refused to accept as a valid "public use" an attempted land grab under a statute that authorized appropriation of "marginal" lands for industrial development. That was not a "public use" because "the basis for acquiring this property by eminent domain really rests upon the theory that the Port can condemn this fully developed

[5] In *State v. Baldon,* 829 N.W.2d 785, 817 (2013) this Court cited *Norwood* approvingly as an example of a State extending its constitutional protections beyond the federal constitutional floor.

agricultural and residential land because the Port can devote it to what it considers a higher and better economic use (to sell it as industrial sites)".

Similarly, in *Phillips v. Foster*, 211 S.E.2d 93, 96 (Virginia 1975), the Virginia Supreme Court was faced with a forced sale justified by the greater benefits that would flow from the property's use by the purchaser (internal quotations omitted; emphases added):

> It is of no importance that the public would receive incidental benefits, *such as usually spring from the improvement of lands or the establishment of prosperous private enterprises:* the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another *on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it*.

In *Opinion of the Justices*, 126 N.E.2d 795, 803 (Mass. 1955)(emphasis added), the Supreme Judicial Court examined whether a proposed condemnation of a railyard in part "to support the economic well-being of the city" by increasing the taxable value of the property was a public use under the Massachusetts Constitution:

> It seems plain that the primary design of the bill is to provide for . . . the devoting of some portions of the area to truly public uses, and the return of the remainder to private ownership to be rented or sold for private profit, *with the expectation that adjacent areas and the city as a whole will benefit through the increase of taxable property and of values*. But this kind of indirect public benefit has never been deemed to render a project one for a public purpose.

Just as these courts had rejected the "economic benefit" theory of public use before *Kelo*, others did so afterwards. In *Board of County Commissioners v. Lowery*, 136 P.3d 639 (Oklahoma 2006), the issue was whether easements for a proposed power plant's water pipelines were a "public purpose" (which under Oklahoma law is the same as "public use"[6]):

> The County's primary argument is that the general eminent domain statute, 27 O.S. § 5, authorizes its exercise of eminent domain for the sole purpose of economic development (i.e., increased taxes, jobs and public and private investment in the community) because economic development constitutes a "public purpose" within the meaning of the statute as well as the state constitutional eminent domain provisions found in Art. 2, §§ 23 & 24 of the Oklahoma Constitution.

Id. at 647-648 (footnotes omitted). Acknowledging *Kelo's* invitation to state courts to read their constitutions more broadly,

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[6] "[W]e . . . view these terms as synonymous." *Lowery*, 136 P.3d at 646.

the Court held that mere economic development was not enough (*id.* at 650-651):

> Accordingly, we hold that economic development alone does not constitute a public purpose and therefore, does not constitutionally justify the County's exercise of eminent domain. Pursuant to our own narrow requirements in our constitutional eminent domain provisions found at Art. 2, §§ 23 & 24 of the Oklahoma Constitution, we view the transfer of property from one private party to another in furtherance of potential economic development or enhancement of a community in the absence of blight as a purpose, which must yield to our greater constitutional obligation to protect and preserve the individual fundamental interest of private property ownership.

Similarly, in *Rhode Island Economic Development Corporation v. The Parking Company,* 892 A.2d 87, 105-106 (Rhode Island 2006), a state agency exercised its eminent domain authority over an airport parking garage, claiming that this would "promote a healthy and growing economy, [and] encourage the expansion of * * * commercial industry in Rhode Island". That was not enough under the State Constitution; the Rhode Island Supreme Court concluded that "We are satisfied that the condemnation of a temporary easement in Garage B was inappropriate, motivated by a desire for increased revenue and was not undertaken for a legitimate public purpose." *Id.* at 104.

These cases (and others)[7] show states recognizing that their state constitutions do not allow the government to seize private property on the grounds that someone else can put it to a "more profitable use".

This Court has not addressed the issue of "public use" since *Kelo*; indeed, it has only cited it three times, and each instance was to Justice O'Connor's dissent. Only one of those cases – *Clarke County Reservoir Commission v. Abbott*, 862 N.W.2d 166 (Iowa 2015) – involved the Takings Clause.[8] In *Clarke County*, this Court noted that "Justice O'Connor underscored the constitutional necessity that any taking be for a 'public use' with 'just compensation'", and then quoted her opinion:

> These two limitations serve to protect the security of Property, which Alexander Hamilton described to the Philadelphia Convention as one of the great obj[ects] of Gov[ernment]. Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for

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[7] *E.g.*, *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006), recognizing that the South Dakota Constitution provided greater "public use" protection than afforded under *Kelo*.

[8] The other two cases were *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013)(*supra*, n. 5) and *Star Equipment Ltd. v. State*, 843 N.W.2d 446, 459 n. 11 (Iowa 2014).

> whatever reasons, may be unable to protect themselves in the political process against the majority's will.

862 N.W.2d at 171-172, quoting *Kelo*, 545 U.S. at 496.

B. Iowa's Legislative Reaction to *Kelo*

Following *Kelo*, state legislatures scrambled to impose restrictions on using economic benefit to justify eminent domain. Dozens of states did so[9]; of particular relevance is Iowa's 2006 amendments to both chapters 6A (Eminent Domain Code), and 6B (Procedure Under Eminent Domain). 2006 Ia. Legis. Serv. 1st Ex. Sess. Ch. 1001 (H.F. 2351) (West 2017). Because Appellants discuss the specific restrictions added to §§ 6A.21 and 6A.22, Niskanen does not do so. But there is far more to the 2006 amendments than those changes, both substantively and procedurally, all of which illustrate the Legislature's goal of restricting economic benefit takings.

[9] *E.g.*, Alabama Code 11-47-170; Alaska Statutes 09.55.240; Arizona Revised Statutes Title 12, Ch. 8, Art. 2.1; Colorado Revised Statutes 38-1-101(1)-(3); Florida Constitution Art. X, Sec. 6; Louisiana Constitution Art. I, Sec. 4(B); Michigan Constitution Art. X, Sec. 2; North Dakota Constitution Art. I, Sec. 16; 12 Vermont Statutes Annotated Sec. 1040.

For example, the 2006 amendments added a new section, 6A.24, which created two forms of action: Property owners received the right to challenge "the exercise of eminent domain authority" in district court (§ 6A.24(1)) and, even more importantly, agencies could seek a pre-condemnation declaratory judgment "that its finding of public use, public purpose, or public improvement necessary to support the taking meets the definition of those terms." § 6A.24(2). Nothing better shows the Legislature's concern over agency "public use" overreach than creating a mechanism to resolve that question *before* property was taken.

The 2006 amendments also made more than a dozen changes to chapter 6B, including adding several new sections, each designed to increase the rights and protections of landowners, *e.g.*, increasing the baseline for agency acquisition offers (§ 6B.2B); additional notice to property owners, purchasers, and tenants (§§ 6B.2D, 6B.3); requiring that offers not be based solely on appraised tax value (§ 6B.45).

When the Legislature first passed the 2006 amendments, they were vetoed by Governor Vilsack. The Governor was explicit that the Legislature was taking up *Kelo's* invitation to states to curtail the use of "economic benefit" as justification for eminent domain; he used the phrase "economic development" to describe what the amendments would limit no fewer than four times in his veto message:

> I am particularly troubled with the provisions that restrict the use of eminent domain for redevelopment purposes to areas defined as slum or blighted. *These new standards threaten anticipated economic development projects that will result in job creation throughout the state.* The most obvious example is the planned expansion of a plastics plant in the city of Clinton. *This $280 million project, which expects to create over one hundred high paying jobs, would be at risk if HF 2351 was current law.* It is widely known that the General Assembly delayed the effective date of portions of this bill several months so that this project could continue. Delaying the effective date is an admission by the General Assembly of the bill's potential damage.
>
> A rail spur for an ethanol plant in Dyersville, redevelopment of commercial property in Burlington, and a new municipal airport near Pella are further examples of proposed projects that would be in jeopardy if HF 2351 were to be signed. With those projects in mind, and the many others to come, we must recognize that protecting private property can be achieved without sacrificing *economic development and job growth* so vital to Iowa.

> The United States Supreme Court's decision in Kelo affirmed that a government may not take private property solely for the private benefit of a particular person. *Since the Kelo decision several states have purported to restrict the use of eminent domain for economic development purposes, but have made numerous exceptions because they recognize that restrictions that are too harsh will have a chilling impact on economic development and job creation.*

Iowa Journal of the House, May 3, 2006, pp. 1764-65 (emphases added).

The Legislature's response was swift and emphatic: In a special one-day session called for the sole purpose of overriding the veto, the Iowa House voted 90-5 to do so, and the Senate followed hours later, 41-8. Journal of the House, July 14, 2006, pp. 1781-82; Journal of the Senate, July 14, 2006, p. 1110.

II. THIS COURT SHOULD NOT EQUATE "ECONOMIC BENEFIT" WITH "PUBLIC USE" UNDER ARTICLE I, § 18.

A. The Iowa Constitution Provides Greater Protection for Individual Rights than the Federal Constitution.

"Our Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection, especially considering the latter applied only to

actions by the federal government for most of our country's history."[10]

This Court has noted "that *state* constitutions and not the Federal Constitution were the original sources of written constitutional rights. . . . At the federal constitutional convention, whenever the issue of individual rights arose, the founders repeatedly expressed the view that they looked to *the states* for the preservation of individual rights." *State v. Short*, 851 N.W.2d 474, 481-482 (Iowa 2014)(emphases in original).

This Court has repeatedly found that the Iowa Constitution provides more extensive protection for individual rights than does the federal Constitution:

> The bill of rights in the Iowa Constitution was not considered by Iowa constitutional writers as some kind of appendage controlled by federal court interpretations. Unlike the Federal Constitution, the bill of rights was part of the first articles of the Iowa Constitutions of 1846 and 1857.
>
> According to George Ells, Chair of the Committee on the Preamble and Bill of Rights, "the Bill of Rights is of more importance than all the other clauses in the Constitution put

[10] Cady, Mark: *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition In Recognizing Civil Rights And Civil Liberties*, 60 Drake L. Rev. 1133, 1145 (2012).

> together, because it is the foundation and written security upon which the people rest their rights."

State v. Short, 851 N.W.2d at 482. This is especially true when, as here, a parallel federal constitutional provision is binding on the states via the 14th Amendment: "Incorporation of the provisions of the Bill of Rights of the United States Constitution against the states through the Due Process Clause of the Fourteenth Amendment established a *federal floor* related to civil liberties." *State v. Baldon*, 829 N.W.2d 785, 812 (Iowa 2013)(Appel, J., concurring)(emphasis added). Thus this Court has interpreted the Iowa Constitution as giving greater protections to individual rights and liberties than the federal Constitution in areas such as due process, self-incrimination, search and seizure, and cruel and unusual punishment. *Id.*[11]

In light of this Court's jurisprudence in one of these areas – search and seizure – it is worth noting a particular passage in

[11] For a detailed discussion of the history, theory and importance of state constitutional protections for individual rights, see *Baldon*, 829 N.W.2d at 803-835 (Appel, J. concurring); *State v. Short*, 851 N.W.2d at 481-493.

Justice O'Connor's *Kelo* dissent (545 U.S. at 518; parallel citations omitted):

> The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton*, *supra*, at 601, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," *ante*, at 488, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.

A disconnect between protections to one's home extended under the Fourth Amendment but withheld under the Fifth Amendment is especially germane to discussing the Takings Clause in a state that has expansively interpreted its Constitution's search and seizure protections. It is no exaggeration to say that this Court prides itself on just that approach:

> In addition, many years ago, we stated that the protections in search and seizure law were to be given "a broad and liberal interpretation for the purpose of preserving . . . liberty." *State v. Height*, 661, 91 N.W. 935, 938 (1902). A broad and liberal interpretation to search and seizure was reflected in *Sheridan*, where this court was one of the first courts in the nation to embrace the exclusionary

> rule in connection with search and seizure violations. See 96 N.W. at 731-32; see also *State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000) ("An example of this court's attempts to preserve the spirit of Iowa's constitutional guarantee is reflected in the fact that Iowa was one of the first states to embrace the exclusionary rule as an integral part of its state constitution's protection against unreasonable searches and seizures, and, in fact, did so several years before the United States Supreme Court's decision in *Weeks*. [*v. United States*, 232 U.S. 383 (1914)].

State v. Short, 851 N.W.2d at 493 (parallel citations omitted). It would be odd for a Court which has done so much to protect the liberty of its citizens in their homes to make it easier to tear those homes down, just because someone else has a "better" use for the property. In Justice O'Connor's words, something would have gone "seriously awry with this Court's interpretation of the [Iowa] Constitution."

B. The Drafters of the Iowa Constitution Had a Narrow View of "Public Use"

The authors of the Iowa Constitution expressed extremely strong opinions about the Takings Clause during the Constitutional Convention of 1857 that are relevant to the issues raised here. They not only rejected several explicit attempts to allow private corporations to take private property, they also

recognized and emphasized the unique harm suffered when people's land was taken, as opposed to having the state take their property in the form of taxation: Taking land that was worth $10 was qualitatively – *and constitutionally* – different than taking $10 in the form of taxes on that very same land.

Iowa's first two Constitutions provided that, "Private property shall not be taken for public use, without just compensation". Iowa Constitution of 1844, Article II, § 17*; see also* Iowa Constitution of 1846, Article II, § 18.

However, Iowa's Takings Clause underwent material change in the 1857 Iowa Constitution:

> Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

Iowa Constitution, Article I, § 18.[12]

[12] The final clause was inspired by concerns that when land was taken for a public road, the "just compensation" may be reduced by "the benefit [the landowner] will receive from said road." *The Debates of the Constitutional Convention of the State of Iowa* (W. Blair Lord rep., 1857)("*Debates*"), p. 202.

Several other changes to the Takings Clause were also proposed and debated; of particular relevance were two separate proposals that would have extended to *private parties* the right to exercise eminent domain.

The first such proposal was one that would have allowed private property to be taken for the purpose of constructing *private* roads. This was offered "for the reason that there can be at present no private roads established in this State. . . . Under our present constitution, nothing in the shape of roads but public highways can be established against the will of the owner of the soil through which they are to pass." *Debates*, p. 207. There was little discussion about this proposal, which was quickly and overwhelmingly voted down. *Id.*

That attempt was followed by another, even bolder attempt to allow eminent domain for private purposes: "Private property shall not be taken by corporations, for their use or benefit, without compensating the owner for the actual damage to him or her of the taking, and the manner thereof." *Id.*, pp. 412-413. Although this proposal met the same fate, the idea of giving private corporations

the right to eminent domain purely for their own uses created quite a stir. In the words of one delegate:

> There can be no doubt that under the eighteenth section of the bill of rights private property can always be taken for public uses by compensating the owner thereof. That question has arisen over and over again, and it has been decided in several states that turnpike roads and railroads may come within the provisions of that section; that they are so far public in their nature that private property may be taken under the constitution for their construction. If that is all that gentlemen desire, then there is no need of this nineteenth section. But if it is intended to secure to banking corporations, or associations for another purpose of a private nature, the right to take private property for their use, even by compensating the owner for it, then I shall be opposed to it.

Debates, p. 413.

> Now if this nineteenth section is adopted, if any private corporation desires my property for its exclusive benefit, it has the right to compel me to sell it for whatever disinterested men may say it is worth. I do not think this provision is right or should be retained in the constitution.

Id., p. 414. This amendment was promptly struck. *Id.*

The issue of taking private property was also discussed in connection with what would become Article VIII, § 4: "No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly." As originally proposed, that provision read (emphasis added), "No political or

municipal corporation shall become a stockholder in any banking corporation, directly or indirectly; *nor in any other corporation or corporations* to an amount exceeding, at one time, two hundred thousand dollars." *Debates*, p. 290.

The issue (as it was so often in the 19th century), was railroads. Municipalities had been buying stock in railroads in order to help finance their construction. *Id.* p. 316. An analogy was made between the use of eminent domain to take private property for the physical construction of railroads, and taking the same (in the form of taxes) to invest in their construction, *e.g.*:

> Mr. EMERSON. I want to understand if the gentleman claims, that because there is a principle recognised [*sic*] in this State that, for the purpose of building roads, highways, &c., private property may be taken . . . it follows from this that it is right for the majority of the county, in which you may reside, to tax you to any amount they may see fit, for the purpose of aiding particular corporations? *Id.*, p. 318.
>
> Mr. PETERS. I understand it to be a general principle of common law . . . that private property can only be taken for public uses. . . . But the use must be a public use, common to all under the government, and in which all are to have equal rights. I apprehend that it does not give authority for the taking of private property in any case for private corporations. I believe that if you establish the principle, that private property may be taken for any other than public uses, you establish a principle that will, in the end, subvert

> the government, which was intended to protect individual rights.

Id., p. 319. This argument lost; the authors of the Iowa Constitution understood the inherent difference between land and all other forms of property. The government could only take land if it identified a specific use which all citizens could take advantage of, but could take taxes raised on that same land and use it for whatever purpose that it chose, regardless of who benefitted. And the owner must be paid for land taken, as opposed to taxes raised on that same property, for which the landowner received no specific compensation but only whatever benefits accrued collectively to everyone.[13]

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[13] Interestingly, in *Star Equipment, supra,* n. 8, this Court declined to read a "public purpose" exception into Article VII, § 1 of the Iowa Constitution, which prevents the state from extending credit to, or assuming the liabilities of "any individual, association, or corporation". The purpose of this provision was to avoid "the costly state government bailouts of investors in privately owned canals and railroads". 843 N.W.2d at 463. Thus the authors of the 1857 Constitution intentionally kept the state out of the same railroad mania that they allowed local governments to get into under Article VIII, § 4.

III. IF ECONOMIC BENEFIT IS NOT EQUATED WITH "PUBLIC USE", UNDER THIS COURT'S PRECEDENT A PIPELINE MAY STILL SERVE A PUBLIC USE IF IT IS A COMMON CARRIER.

"We strictly construe statutes delegating the power of eminent domain". *Clarke County Reservoir Commission v. Abbott*, 862 N.W.2d 166, 168 (Iowa 2015). Section 479B.6 should not only be strictly construed, but construed so as to not run afoul of *Mid-America Pipeline Co. v. Iowa State Commerce Commission*, 114 N.W.2d 622 (Iowa 1962).

In *Mid-America*, Northern Gas Products ("Northern") sought a permit under Chapter 490 of the 1958 Iowa Code for a pipeline to transport "liquid hydrocarbon" (a/k/a petroleum) products. Chapter 490 authorized the commerce commission to issue pipeline permits for "gas, gasoline, oils or motor fuels and/or inflammable fluid" (§ 490.1, 1958 Code), and Northern's permit was duly issued. And, just as the permit issued to Dakota Access entitled it to use eminent domain, Northern's permit did likewise: "Any pipe-line company having secured a permit for pipe lines as in this chapter provided shall thereupon be vested with the right

of eminent domain to such extent as may be necessary . . ." Section 490.25 (1958).

This Court, however, pointed out that "Northern intends to handle only its own products by pipeline and is not a common carrier of such products" (*Mid-America*, 114 N.W.2d at 624) and as such it was not entitled to exercise eminent domain: "Northern is a private corporation intending to operate the proposed pipeline for private purposes. . . . The power of eminent domain may be granted and exercised only where a public use is involved." *Id.*

Northern tried to argue that the pipeline was for the public convenience and necessity and thus would be entitled to use eminent domain under § 490.25 (1958), but the Court declined to address that question on the grounds that public convenience and necessity "was not an issue in the hearing". *Id.* (Presumably, a finding of public convenience and necessity was not required because the application was for an *interstate* pipeline (*id.* at 623), and § 490.12 (1958) required only that "before any permit shall be granted to any pipe-line company proposing to engage in *intrastate commerce*, the commission shall . . . determine whether

the services proposed to be rendered will promote the public convenience and necessity . . . .")

But what if Northern applied for that same pipeline today under chapter 479B, when interstate, as well as intrastate, oil pipelines must demonstrate public convenience and necessity? Like Dakota Access, no doubt Northern's pipeline would produce sizable economic benefits for the state, and presumably would also be safer than transporting that oil by rail. If economic benefits are properly considered a "public use", then the Board would be perfectly justified in finding public convenience and necessity based on the *exact same factors* as it used for Dakota Access. And with that finding, *and that finding alone*, Northern would be entitled to exercise eminent domain under § 479B.16.

The problem with that result is that *Mid-America* held that Northern would *not* be entitled to a finding of public convenience and necessity (and the right to exercise eminent domain) because it would be operating the pipeline for "private purposes". If *Mid-America* is still good law, a finding of "public convenience and necessity" based solely on the economic benefit and safety factors

that the Board relied on below *cannot* equal a finding of "public use". There *has to be something more* to "public use" beyond the economic benefit and safety considerations that the Board held were sufficient here for a finding of "public convenience and necessity".

That something else is, presumably, what *Mid-America* suggests: that a *sine qua non* for a pipeline to be considered a public use is that the permittee is a common carrier.

Is Dakota Access a Common Carrier?

This Court has not addressed what makes a pipeline a "common carrier" under Iowa law. Unfamiliar with Iowa common carrier jurisprudence, Niskanen has not taken a position as to whether Dakota Access would so qualify, but notes four things for this Court's consideration:

1. The Board made no finding as to whether Dakota Access is a common carrier; indeed, those words are not to be found anywhere in the Decision.

2. On appeal, the Board asserted only that Dakota Access was a common carrier under *federal* law (Brief of the Respondent

Iowa Utilities Board, p. 30), and was silent as to common carrier status under *Iowa* law.

3. In *Mid-America*, 114 N.W.2d at 625, this Court found that a pipeline's common carrier status under federal law was irrelevant in determining whether it was a common carrier "engaged in serving a public use or otherwise".

4. In discussing statutory restrictions on eminent domain, the District Court stated that "the court can still find that eminent domain is allowed under section 6A.22 if it finds Dakota is a 'common carrier,' *as the board so found*." Ruling, p. 28 (emphasis added). In light of this fundamental misapprehension of the Board's decision, any conclusions the District Court made as to Dakota Access' common carrier status under Iowa law are suspect.

CONCLUSION

For the reasons given herein, the Court should reverse the decision of the District Court.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the 12th day of July, 2017, one copy of the brief of amicus Niskanen Center was served upon all parties to the above cause through the Court's EDMS system to the parties of record herein as follows:

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