IN THE SUPREME COURT OF IOWA
No. 21-1788

LINDA K. JUCKETTE,

Petitioner - Appellant,

v.

IOWA UTILITIES BOARD,

Respondent – Appellee

and

MIDAMERICAN ENERGY COMPANY and OFFICE OF CONSUMER ADVOCATE,

Intervenors - Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR

POLK COUNTY

THE HONORABLE JEANIE VAUDT

FINAL BRIEF OF AMICUS CURIAE IOWA FARM BUREAU FEDERATION

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AMICUS CURIAE IDENTIFICATION

The Iowa Farm Bureau Federation (Farm Bureau) is an independent, non-governmental, voluntary organization of farm families. With over 150,000 member families, Farm Bureau is dedicated to helping farm families prosper and improve their quality of life. Farm Bureau members include farmers and landowners who own or lease agricultural land in rural areas. Their land is traversed by secondary roads which generally form a one-mile square grid across Iowa. In almost all instances, the rights-of-way for these secondary roads were acquired through a general road easement, and along these road easements are utility easements acquired in the 1930s and 1940s during the electrification of rural Iowa. Farm Bureau, and its one hundred county Farm Bureaus, directly supported these efforts by unifying and coordinating the work for the engineering and construction necessary to distribute electricity through rural areas and by helping to secure easements for this distribution infrastructure. D.B. Groves and K. Thatcher, *The First Fifty: History of Farm Bureau in Iowa* (1968), pp. 171-173. Farm Bureau has

a history of supporting electrification when the companies acquire the appropriate easements.

Farm Bureau members, as the servient landowners, pay property taxes to the middle of the secondary road, and own the land where utility facilities, such as those in the instant case, are to be constructed, operated, repaired, and maintained. In seeking to protect their property interests, Farm Bureau's elected voting delegates have adopted policy positions which support "due process and reasonable compensation for the amount the owner's right has been diminished." Farm Bureau member families will be impacted by the decision in this matter long after the ink is dry on the paper.

This case will determine whether "public utilities," as defined in Iowa Code § 306.46, will place their utility infrastructure in a general road right-of-way without the necessity of acquiring a separate easement from the burdened landowner. These utilities can be government owned or privately owned, for-profit or not-for-profit. These "public utilities" do not have to provide services to the public, such as a private, for-profit electric transmission line company that installs electric transmission infrastructure to carry newly generated electricity from a solar or wind facility to a out-of-state wholesale market. These "public utilities" could be a private, for-profit broadband internet company installing its communication lines in the road right-of-way to

provide its internet services to consumers for lucrative fees. It could also be the local electric service provider who wants to expand their services to include broadband for a monthly fee using the existing power line easement for free. Or, it could even be a regional wastewater company piping the collected sewer and wastewater to a centralized treatment system for a fee. Section 306.46 includes many types of government entities and companies and many types of utility facilities.

New utility infrastructure in rural areas is expected to continue to grow to accommodate the digital economy, environmental regulations, and new energy generation facilities. These numerous situations across rural Iowa add burdens to the private property owned or leased by our member families, and in the event there are benefits to the landowners, it comes with a large monthly fee to be paid to the provider. The treatment of private property owners' rights during this "utility" expansion currently taking place (including a major growth in electric transmission lines across the state) will be greatly influenced by the decision in this case.

DISCLOSURE STATEMENT

No party's counsel authored this brief in whole or in part and no party or their counsel contributed financially to the preparation of this brief.

ARGUMENT

I. MidAmerican's Installation of Electric Transmission Lines and Poles on Ms. Juckette's Property Without Paying Just Compensation Constitutes a Taking.

Property rights are one of the most fundamental rights guaranteed to a person. They are so fundamental that our state and nation's founders explicitly wrote them into our constitutions. The Iowa Constitution provides that "Private property shall not be taken for public use without just compensation …." Iowa Const. art. I, § 18. Similarly, the United States Constitution provides "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. However, this fundamental right guaranteed by the Iowa Constitution and the United States Constitution was disregarded when the Iowa Utilities Board ("IUB") Order granted a franchise to MidAmerican Energy Company ("MidAmerican") that allowed it to install electric transmission lines and poles on Linda Juckette's ("Juckette") property without her permission or just compensation.

This case demonstrates a classic physical taking. The IUB Order that granted a franchise to MidAmerican to install electric transmission lines and poles created an easement without providing for compensation through an eminent domain proceeding. By all accounts, Madison County's general road easement did not include explicit language authorizing its use by utilities and

no other written utility easement or dedication exists for the Juckette property. With its interpretation of Iowa Code § 306.46, the IUB also eliminated Juckette's right to exclude other "public utilities" from her property. The IUB and MidAmerican's actions directly violate the Iowa Constitution and the United States Constitution.

To determine whether an unconstitutional taking has occurred, the following framework is used: (1) Is there a constitutional protected private property interest at stake? (2) Has this private property interest been "taken" by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner? *City of Eagle Grove v. Cahalan Investments*, LLC, 904 N.W.2d 552, 560 (Iowa 2017) (citations omitted). Under this framework, if the IUB order authorizes and grants the physical placement of the electric transmission lines and poles in the public road right-of-way and reduces Juckette's right to exclude, the installation of physical transmission lines and poles on Juckette's property is a taking; and, therefore, she is entitled to a remedy.

A. The IUB Order Granted a Property Right to MidAmerican.

The first step in determining whether a property right exists is identifying how the state defines a property right. *Id.* Iowa defines a property right to mean "the group of rights inhering in the citizens' relation to the

physical thing, as the right to possess, use and dispose of it." *Id.* "[P]roperty is not alone the corporeal thing, but consists also in certain rights therein created and sanctioned by law, of which, with respect to land, the principal ones are the rights of use and enjoyment …." *Liddick v. Council Bluffs*, 5 N.W.2d 361, 374 (1942).

The IUB order allowed MidAmerican, to construct, operate, repair, or maintain its facilities within the county's public road right-of-way. This inherently creates an easement for MidAmerican because an easement is a matter "by which the servient owner is obligated to suffer, or not do something on his own land, for the advantage of the dominant owner." *Churchill v. Burlington Water Co.*, 62 N.W. 646, 647 (Iowa 1895); *Hawk v. Rice*, 325 N.W.2d 97, 98 (Iowa 1982)("An easement is a liberty, privilege, or advantage in land without profit, existing distinct from ownership."). MidAmerican has argued that the easement granted by the IUB order fits within the original easement, so no additional compensation is owed to Juckette. An easement's scope is determined by comparing the language of the easement with the proposed use and considers (1) the physical character of past use compared to the proposed use; (2) the purpose of the easement compared to the purpose of the proposed use; and (3) the additional burden imposed on the servient land

by the proposed use. *Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 356 (Iowa 2000).

The physical character of the past use of Madison County's 1970 road easement is drastically different than the proposed use of the easement created by the IUB order. The original 1970 easement created a highway and allows for vehicular traffic. The new easement changes the physical character of Juckette's property as gigantic electrical transmission lines and poles occupy her property like evenly spaced darts on a dartboard. The consequence of the IUB and district court's interpretation is not limited to MidAmerican's easement but would allow any "public utility" to place new infrastructure on private property without a new easement or paying just compensation. Because the IUB Order substantially changed the physical character of Juckette's property without providing a process for just compensation, her substantial constitutional rights have been prejudiced and she is entitled to a remedy. *See id.;* Iowa Code § 17A.19(10) (2021).

The purpose of Madison County's existing easement is significantly different than the easement granted by the IUB order. The road easement over the property, which is now owned by Juckette, was granted to Madison County for use as a public highway. Iowa Code § 321.1(78) defines "highway" as "the entire width between property lines of every way or place

of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic." The road easement for vehicle traffic does not contain language allowing utility infrastructure, such as electric transmission lines and poles, and the IUB Order allowing such infrastructure exceeds the scope of a general road easement. Further, the universal definition of "highway" in the Iowa Code does not include any language relating to utilities being part of a highway. "Once a valid easement has been created and the servient landowner is justly compensated, the continued use of the easement must not place a greater burden on the servient estate than was contemplated at the time of formation." *Id.* at 362. As such, the easement granted by the IUB order is a separate and distinct easement from the original 1970 easement, which entitles Juckette to just compensation.

The physical installation of electric transmission lines and poles on Juckette's property creates an additional servitude. In *Keokuk Junction*, the city of Keokuk allowed IES Industries to build electric power lines within the city's right-of-way on Keokuk Junction Railway Company's land. *Id.* at 354. IES Industries unsuccessfully argued that the utility lines do not create an additional servitude. *Id.* at 362-363. The Iowa Supreme Court stated, "The increased risk of harm to KJRY's land also creates an additional burden because overhead power lines create a danger to KJRY's railroad tracks below

and its operations in that area in general that was not contemplated at the time of the original easement." *Id.* at 360. Further, the high voltage from the electrical transmission lines creates a dangerous hazard. *Id.* (citing *Karcher v. Wheeling Elec. Co.*, 118 S.E. 154, 155 (W.Va. 1923). Plus, the installation of physical transmission lines and poles on Juckette's land minimizes the use that Juckette could have for her property. *See id.* at 362. Juckette's situation is identical to that of Keokuk Junction Railway Company. The installation of physical transmission lines and poles create an additional burden on Juckette's property because they were not contemplated to be included in the road easement granted in 1970. As the IUB Order exceeds the scope of road easement and did not provide compensation, the Order prejudiced Juckette's substantial rights found in the U.S. and Iowa Constitutions' takings clauses.

B. The IUB Order Results in a Per Se Taking.

An easement is a property interest that is subject to compensation under the Iowa Constitution's Takings Clause. *Simkins v. City of Davenport*, 232 N.W.2d 561, 566 (Iowa 1975). A taking can arise in any one of three different ways: a (1) a permanent physical invasion of property; (2) when an owner is denied all economic benefits of ownership; or, (3) the balancing factors identified in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104

(1978) are met. In this brief, only a permanent physical invasion will be analyzed.

"In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In this matter, it is without question that a permanent physical invasion occurred on Juckette's property. The installation of transmission lines and poles, by MidAmerican, on Juckette's property are obvious and will occupy her property indefinitely. These facts are identical to *Loretto v. Teleprompter Manhattan CATV Corp.* In *Loretto*, New York passed a statute that required a landlord to permit a cable television company to install cable facilities on its property and a landlord argued that the law amounted to a taking when a cable company installed cable facilities on a residential apartment building. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). The Supreme Court concluded, "that a permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve." *Id.* at 426. When there is a taking "the property owner entertains a historically rooted expectation of compensation…." *Id.* at 441.

In *Kaiser Aetna v. U.S.*, the Supreme Court reviewed whether a taking occurred when a private pond was converted into a marina with public access. *Kaiser Aetna v. U.S.*, 444 U.S. 164, 165-66 (1979). The Supreme Court focused on a property owner's right to exclude as a key property right at issue and stated "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interest that the Government cannot take without compensation." *Id.* at 179-180. The Supreme Court further noted that "Even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. *Id.* at 180. These are critical holdings to this case because Juckette is being denied her fundamental right to exclude anyone she pleases from her property. Normally, she could exclude MidAmerican, but the IUB Order allows them to access Juckette's property in a manner that was nonexistent prior to the Order. Because she was denied her right to exclude without compensation, the IUB Order is unconstitutional and Juckette is entitled to relief. Iowa Code § 17A.19(10)(a) (2021).

Further, the holdings in *Kaiser Aetna* laid the foundation that infringing on the right to exclude is a per se taking and not subject to the *Penn Central* analysis. In *Cedar Point Nursery v. Hassid*, the Supreme Court upheld the longstanding legal precedent that a per se taking requires compensation. 141

S. Ct. 2063 (2021). At issue was a California statute which allowed labor organizations to occupy an agriculture employers' property at certain times. *Id.* at 2069. The Supreme Court held the physical occupation on the property amounted to a per se taking. *Id.* at 2080. In reaching its holding, the Supreme Court explained that the right to exclude "is a 'fundamental element of the property right,' that cannot be balanced away." *Id.* at 2077 (citing *Kaiser Aetna*, 444 U.S. at 179-180). The Supreme Court explained that "Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central* …." *Id*. Therefore, this Court does not need to review the *Penn Central* balancing test to determine that a taking has occurred. Because the IUB Order interpreted Iowa Code § 306.46 to grant MidAmerican access to construct and operate physical transmission lines and poles, as well as destroy Juckette's right to exclude others from her property without compensation, the Order resulted in an unconstitutional taking.

C. Juckette is Entitled to Just Compensation.

It is undisputed that Juckette did not receive just compensation from MidAmerican. Juckette is entitled to just compensation because "From every unlawful entry, or every direct invasion of the person or property of another, the law infers some damage." *Nichols v. City of* Evansdale, 687 N.W.2d 562, 573 (Iowa 2004)(quoting 75 Am. Jur. 2d *Trespass* § 117). For the reasons

discussed above, the IUB order that interpreted Iowa Code § 306.46 in a manner that allowed MidAmerican to construct and operate electric transmission line infrastructure, and also reduced Juckette's right to exclude others from her property without just compensation, is an unconstitutional taking of private property.

II. Iowa Code § 306.46 did not Abrogate *Keokuk Junction's* Holding that Landowners are Entitled to Compensation for the Additional Servitude of Electric Transmission Lines.

The IUB should not receive deference in its interpretation of § 306.46. IUB's authority over electric transmission lines is found in Iowa Code chapter 478, not in chapter 306 which addresses the establishment, transfer, and closure of roads. Chapter 306 does not give the IUB any rulemaking or interpretative authority over § 306.46 and thus its decision is to be reviewed for "erroneous interpretations of law." *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 207 (Iowa 2014); Iowa Code § 17A.19(10)(c) (2021). As this Court said in the *Auen* case, "If the legislature has not clearly vested the interpretation of the statute at issue with the agency, we are free to substitute our judgment de novo for the agency's interpretation and determine if the interpretation is erroneous." *Auen v. Alcoholic Beverages Div., Iowa Dep't of Com.,* 679 N.W.2d 586, 589–90 (Iowa 2004).

Approval of an electric transmission franchise by the IUB includes both the acquisition of land rights and the installation of transmission line infrastructure. Iowa Code § 478.1(1) and (4) (2021). The required petition is for the approval of both the installation of the poles, wires, towers, and other transmission infrastructure at the location and the approval "to acquire necessary interests in real estate for such purposes." Iowa Code § 478.2(1) (2021). MidAmerican did not acquire or request acquisition of an easement using eminent domain before the IUB issued its final decision. (D.Ct. Order, p. 12.; App. p.69.). Instead, MidAmerican asserted that no separate easement was required pursuant to Iowa Code § 306.46. (IUB Order, pp. 26-27, App. p.1006-1007.). The IUB and the district court erred in finding that Iowa Code § 306.46 abrogates this Court's finding in *Keokuk Junction* that "power lines and utility poles are not included within the scope of the general public highway easement." *Keokuk Junction,* 618 N.W.2d at 362; (D.Ct. Order, p. 18, App. p.75; IUB Order, pp. 27-32, App. pp.1007-1012.).

A. The Plain Language of § 306.46 Does Not Grant an Easement or Establish there is No Additional Servitude from the Placement of Electric Transmission Line Infrastructure.

"In any question of statutory interpretation, we begin with the words of the statute." *Blue Grass Sav. Bank v. Cmty. Bank & Tr. Co.,* 941 N.W.2d 20, 24 (Iowa 2020) (citation omitted). "In determining the fair and ordinary

meaning of the statutory language at issue, we consider the language's relationship to other provisions of the same statute and other provisions of related statutes." *Com. Bank v. McGowen*, 956 N.W.2d 128, 133 (Iowa 2021) (citations omitted). "Legislative intent is determined from the words chosen by the legislature, not what it should or might have said." *State v. Tarbox*, 739 N.W.2d 850, 853 (Iowa 2007) (citation omitted). "Under the guise of construction, we may not extend, enlarge, or otherwise change the meaning of a statute." *Auen,* 679 N.W.2d at 590.

The original Iowa Code § 306.46 was adopted four years after the *Keokuk Junction* decision and says in part "A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way." Iowa Code § 306.46(1) (2021). Chapter 306 generally discusses the establishment, transfer, and closure of public roads. A more consistent interpretation with other related statutes is that § 306.46 tells road authorities that utility facilities may be placed in the public road right-of-way rather than an interpretation that transfers the property rights of landowners on potentially ninety thousand miles of easements along secondary roads (times two) to thousands of "public utilities." Iowa Code § 306.3(9) (2021); Iowa Dep't of Transp., *Iowa Miles of Rural Secondary Roads as of January 1, 2021*

(February 9, 2022), https://iowadot.gov/analytics/pdf/Secondary-Road-Report-2021.Pdf

First, provisions of the same statute should be examined when interpreting Iowa Code § 306.46. In the provision immediately prior, the legislature demonstrates that it knows how to grant an easement on a road right-of-way. The department of transportation may "grant easements across land under its jurisdiction." Iowa Code § 306.45 (2021). In contrast to § 306.45, § 306.46 does not mention either that an easement is granted or that placement of "utility facilities" is not an additional servitude on the landowner. Therefore, changing the property rights of the servient landowner should not be read into the statute.

Other related statutory provisions should also be examined when interpreting Iowa Code § 306.46. The Iowa Utilities Board has authority under chapter 478 to regulate electric transmission lines outside of city limits and along public highways in the public right-of-way. Iowa Code § 478.1 (2021). Chapter 478 requires transmission lines to "be constructed near and parallel to roads, to the right-of-way of railways of the state, or along the division lines of the lands" wherever it is "practicable and reasonable." Iowa Code § 478.18(2) (2021). The road authority does not have regulatory authority unless it is an interstate or a road within city limits. *State v. Iowa Pub. Serv.*

Co., 454 N.W.2d 585, 588-589 (Iowa 1990); Iowa Code §§ 306.46(3) and 478.1(1) (2021). Interpreting § 306.46 as granting a property interest and authorizing transmission lines without having IUB approval is inconsistent with Chapter 478. In fact, Iowa Code § 478.1(4) provides for eminent domain when the company "cannot secure the necessary voluntary easements" as was the situation with the Juckette land. *Id.* Therefore, the appropriate reading of the related statutory provisions is that chapter 478 addresses the property interests of servient landowners and § 306.46 informs road authorities that utilities may be placed in the right-of-way.

B. Iowa Code § 306.46 did not Disturb this Court's Findings in *Keokuk Junction* Regarding the Scope of Easements.

As an initial matter, the interpretation of § 306.46 by the Polk County District Court in *NDA Farms* precludes the IUB's arguments in this case. *NDA Farms, LLC v. Iowa Utilities Bd., Dept. of Commerce*, No. CV009448, 2013 WL 11239755 (Iowa Dist. June 24, 2013). After the adoption of § 306.46, the IUB was sued by NDA Farms, LLC alleging the IUB's action approving the construction of transmission lines in the road right-of-way on their land as an unconstitutional taking. *Id. at *1* The Polk County District Court found that "the IUB erred in concluding that § 306.46 abrogated the holding in *Keokuk Junction*, and likewise erred when it determined that Ames did not need a

second easement to construct the transmission line at issue." *Id. at *3* Issue preclusion or collateral estoppel should apply here to preclude the IUB from arguing *Keokuk Junction* was overruled by the enactment of § 306.46 because it is the same issue and the IUB did not appeal the decision. *See generally, Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981). A judgment against the government, in the absence of fraud or collusion, is "binding and conclusive on all residents, citizens, and taxpayers, for matters adjudicated that are of general and public interest." *Riley v. Maloney*, 499 N.W.2d 18, 20-21 (Iowa 1993). At a minimum, failure to apply the *NDA Farms* case results in an erroneous interpretation of a provision of law. Iowa Code § 17A.19(10)(c) (2021).

The plain language of § 306.46 does not mention the *Keokuk Junction* decision, use words from the case, or even mention the word "easement". If the legislature intended to abrogate *Keokuk Junction,* it could have expressly done so or at least included language that directly addressed the holding in the case. The legislature has demonstrated that it knows how to abrogate a ruling of the Iowa Supreme Court by explicitly stating it. *See* Iowa Code § 522B.11(7) (2021). The legislature also knows how to immediately reverse a court ruling by addressing the case holding in the language of the statute. *See* Iowa Code § 461C.2; 2013 Iowa Acts ch. 128 (abrogating *Sallee v. Stewart*,

827 N.W.2d 128 (Iowa 2013).). The adoption of § 306.46 did neither. Section 306.46 was not adopted in the year or two immediately following the ruling, but four legislative sessions later. Section 306.46 neither mentions *Keokuk Junction* nor uses language to reverse the holding of the case that "power lines and utility poles are *not included* within the scope of the general public highway easement." *Keokuk Junction,* 618 N.W.2d at 362.

In *Keokuk Junction*, the Iowa Supreme Court took notice of the lack of uniform treatment across the country and identified five different conclusions among the state courts. It described each approach, why the first four were flawed, and concluded that the approach of Arkansas, New York, Louisiana, North Carolina, and Illinois was the correct approach and "the installation of the power lines creates an actual burden on the land." *Id.* at 360. This Court identified persuasive authority that "the owners in fee of the street or highway are entitled to be compensated for the additional servitude to which their property is subjected by the erection of electric power lines." *Id.* at 361.

The Polk County District Court erroneously relied on the first approach when deciding that the adoption of § 306.46 reversed the foundational holding in *Keokuk Junction* regarding the nature of easements. (D.Ct. Order, p. 18, App. p.75.). The district court and the IUB hang their hat on one sentence in the discussion of the Alaska case in *Keokuk Junction*: "Without the aid of such

legislation in Iowa, we are clearly not prompted to make a similar decision." The IUB, the district court, and perhaps the amici supporting the Appellees, mistakenly read this as the key to overturning *Keokuk Junction* rather than examining the language describing the nature of the easement throughout the opinion.

A direct comparison of the Alaska statute and the Iowa statute leaves no other possible conclusion other than the two are **not** "remarkably similar" except with regards to the general topic. First, the Alaska statute only governs **state** rights-of-way, not county rights-of-way such as in the instant case. The Alaska statute allows "utility facilities" which are a much broader set of infrastructure than contemplated by the Iowa legislature with the use of the term "public utility." Alaska Stat. Ann. § 19.59.001 (2021)(The Alaska statute includes such infrastructure as petroleum pipelines, railroads, tramways, and tunnels.). And finally, the Iowa statute is silent about whether any permissions or property interests must be obtained whereas the Alaska statute authorizes access to a **state** right-of-way only with permission of the state agency. The Alaska statute is more analogous to Iowa Code §§ 306A.3(2) and § 318.9(2) which allow utility structures on state property with state permission than anything resembling § 306.46. Therefore, the enactment of § 306.46 should

not have been interpreted as reversing decades of property law regarding the scope of easements.

The IUB and the district court erroneously relied on the first approach of other states discounted in *Keokuk Junction* that would allow the scope of easements to change and adapt over time. The rationale of this Court for rejecting this approach holds true today.

> There is no reason to assume silence in the easement works as permission to install utility lines. The better conclusion is the easement language is controlling, and a failure to indicate the right to place utility poles within it is conclusive that this right does not exist.

Keokuk Junction, 618 N.W.2d at 357; *See also, Hamner v. City of Bettendorf*, No. 15-2154, 2016 WL 5930997 (Iowa Ct. App. 2016) (Under Iowa law governing easements, the dominant estate acquires no greater use than the parties intended when an easement was created. (Citing *Schwob v. Green,* 215 N.W.2d 240, 243 (Iowa 1974).). The IUB and the district court missed the foundational rationale for the Court's decision on the easement and instead opined that it was because Iowa had not adopted a statute. They both forgot that the taking of private property, including an easement, without just compensation, is prohibited by both the U.S. and Iowa Constitutions, and this right cannot be abrogated just by the adoption of a statute.

Section 306.46 must be construed constitutionally. "[I]t is 'our mandate to construe statutes in a fashion to avoid a constitutional infirmity where

possible.'" *Hawkeye Land,* 847 N.W.2d at 218–19. Statutes should be interpreted to avoid unconstitutionality. "If the law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the court must adopt the interpretation that upholds the law's constitutionality." *State v. Abrahamson,* 696 N.W.2d 589, 592–93 (Iowa 2005)(citations omitted). As argued in part I of this brief, the IUB and district court's erroneous interpretation of § 306.46 results in the unconstitutional taking of a property interest in Juckette's land.

The interpretation of § 306.46 that is most consistent with related statutes, applicable court rulings, and the U.S. and Iowa Constitutions is not that it authorizes the physical placement of utility facilities without acquiring a separate easement or paying compensation, but that it puts road authorities on notice that public utilities may install utility facilities in the public road right-of-way, nothing more. As the Iowa Supreme Court so eloquently said:

> Allowing a utility company that operates for a profit to place its poles on the servient land without having to pay for this right is manifestly unfair to the servient landowner whose easement did not include utilities within its purview. To hold otherwise would allow the utility company to get something for nothing. The sole existence of a public easement should not enable a company for profit to obtain free use.

Keokuk Junction 618 N.W.2d at 362.

III. Iowa Code § 306.46 Should Not be Interpreted in a Manner that Results in a Retroactive Application of the Statute.

A. The District Court's Interpretation of § 306.46 is a Retroactive Application.

The District Court's Order improperly disguises a retroactive application of § 306.46 with the mask of prospective application—but the costume is unavailing. If a statute is interpreted to operate "on transactions that have occurred or rights and obligations that existed before passage of the act," it operates retrospectively. *Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575, 578-79 (Iowa 2009). The issue of retroactivity does not turn on when a law is applied, but whether the application of the law affects rights that existed before the effective date. *Frideres v. Schiltz*, 540 N.W.2d 261, 264 (Iowa 1995) (internal citations omitted) ("A law is retroactive if it affects acts or facts which occurred, or rights which accrued, before the law came into force."). The district court's purportedly "prospective" application of the statute in this case abrogates an existing contract right–the scope of the road easement bargained for at the time of the grant between the landowner and the county. *Keokuk Junction,* 618 N.W.2d at 362. Expanding the scope of servitudes that existed before passage of the statute clearly affects rights that existed before the statute and is thus a retroactive application.

The district court incorrectly applied the holding of *Hrbek v. State*, 958 N.W.2d 779, 782 (Iowa 2021), to find that its application of § 306.46 was prospective. In *Hrbek*, the statute at issue prohibited post-conviction relief applicants represented by counsel from filing pro-se briefs in their application for relief. *Id.* at 781. Importantly, the statute did not eliminate an applicant's right to post-conviction relief, rather it just limited the procedural manner in which an applicant could apply for relief. *Id.* at 783. ("Hrbek's position—that he has a vested right to forever avail himself of the filing and briefing rules in place when he filed his postconviction-relief application in 1987—is untenable . . . [n]o serious person could contend the ***procedures*** governing each and every case become fixed at the time the petition is filed in the case.") (emphasis added). The distinction is critical because the effect of applying the law to pending post-conviction relief cases did not deprive applicants of an existing substantive right. *Id.* at 783. Since application of the law did not deprive post-conviction relief applicants of a substantive right that existed before the law, and the conduct regulated by the law was procedural, the Iowa Supreme Court found application of the law to conduct occurring after the effective date was prospective. *Id.* at 782.

Here, § 306.46 deals with substantive rights instead of procedural rules. This section grants a public utility a right—to construct, operate, and maintain

a utility facility in a road right-of-way—and is therefore, substantive. *Baldwin v. City of Waterloo,* 372 N.W.2d 486, 491 (Iowa 1985)("Substantive law creates, defines and regulates rights."). Although the district court correctly noted that the conduct regulated by the statute is the construction, operation, repair, or maintenance of a utility facility in the public road right-of-way, it erred in solely relying on this as the "determinative event" when deciding whether the statute applied prospectively. The district court was also required to consider whether application of the law would affect rights—even those incidental to the specific regulated conduct—that existed before the effective date. *Frideres*, 540 N.W.2d at 264. *Hrbek* did not eliminate or change this requirement. Instead, it was not an issue in *Hrbek*, as the statute in question dealt solely with procedural rules. *Hrbek*, 958 N.W.2d at 783. If application of the statute in *Hrbek* would have affected substantive rights or obligations existing before the effective date, the court would have been required to reach a different result. *Frideres*, 540 N.W.2d at 264.

In sum, the district court erred in narrowly construing *Hrbek*'s holding to mean that only the specific conduct regulated in the statute and the timing of the statute's regulation, is relevant to the determination of retrospective application. Additionally, the court was required to consider whether application of the statute impacted transactions and rights that existed before

the statute's creation. Here, under the IUB's and the district court's interpretation of § 306.46, the statute clearly would.

B. Iowa Code § 306.46 Does Not Apply Retroactively.

Settled principles of statutory construction mandate that Iowa Code § 306.46 cannot apply retroactively. Unless there is a *clear legislative intent to the contrary*, statutes are presumed to be prospective only. *Id.* Nothing in the plain language of § 306.46 nor its legislative history provides clear intent to overcome the presumption of prospective application. The language of § 306.46 does not mandate an interpretation that results in the loss of substantive rights without just compensation—a taking; therefore, the statute should be interpreted correctly to apply prospectively in a manner that does not result in a retroactive taking.

Iowa Code § 4.5 provides that "[a] statute is presumed to be prospective in its operations unless ***expressly*** made retrospective." (emphasis added). This presumption is further recognized in Iowa Code § 3.7(6), which states that "[u]nless retroactive effectiveness is specifically provided for in an Act or resolution, an Act or resolution which is enacted after an effective date provided in the Act or resolution shall take effect upon the date of enactment." *First National Bank v. Diers,* 430 N.W.2d 412, 414 (Iowa 1988) (holding that the plain language of the statute lacks an express directive to be applied

retrospectively, and therefore required that the statute be applied prospectively).

The first step in determining whether a statute applies retrospectively is to consult the plain language of the statute itself for express legislative intent. *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, Univ. of Iowa*, 763 N.W.2d 250, 266 (Iowa 2009). The entirety of Iowa Code § 306.46(1) reads:

> A public utility may construct, operate, repair, or maintain its utility facilities within a public road right-of-way. The location of new utility facilities shall comply with section 318.9. A utility facility shall not be constructed or installed in a manner that causes interference with public use of the road.

Nothing in the language of the statute suggests the legislature intended it to apply retroactively so the presumption is that it applies prospectively. Iowa Code § 4.5 (2021).

In the absence of clear legislative intent, the courts must determine whether a statute is procedural, remedial, or substantive. *Iowa Beta Chapter of Phi Delta Theta Fraternity*, 763 N.W.2d at 266. "A substantive statute 'creates, defines and regulates rights' whereas a procedural law 'is the practice, method, procedure, or legal machinery by which the substantive law is enforce or made.'" *Id.* (citing *Baldwin*, 372 N.W.2d at 491.). "[T]he preference for retroactive application of statutes pertaining to remedies and procedures does not extend to statutes creating new rights or imposing new

obligations." *Hiskey v. Maloney*, 580 N.W.2d 797, 799 (Iowa 1998). A substantive statute is presumed to operate prospectively only "unless 'by necessary and unavoidable implication,' a legislative intent that it applied retrospectively appears." *Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575, 579 (Iowa 2009). Iowa courts have allowed procedural statutes to apply retrospectively "when the statute provides an additional remedy to an already existing remedy or provides a remedy for an already existing loss." *Iowa Beta Chapter of Delta Theta Fraternity*, 763 N.W.2d at 267. However, the courts have consistently refused to apply a statute retrospectively when the statute eliminates or limits a remedy, finding the statute to be substantive rather than procedural. *Id.*

As set forth above, § 306.46(1) is substantive because it grants a public utility a right. *Baldwin*, 372 N.W.2d at 491. Because the statute is substantive, it is presumed to apply prospectively only unless there is a clear legislative intent for it to apply retrospectively by "necessary and avoidable implication." *Id.*; *see also Manilla Cmty. Sch. Dist. v. Halverson*, 101 N.W.2d 706, 708 (Iowa 1960) (stating a retrospective operation is particularly disfavored when the statute affects substantive rights).

Returning to the statutory language, § 306.46(1) states "A public utility may construct, operate, repair, or maintain its utility facilities within a public

road right-of-way." The language does not unavoidably imply the public utility may do so without compensating a landowner who holds the servitude for the road right-of-way. Assuming for this argument that § 306.46 does address easements, the language would only suggest the statute applies to easements entered after the effective date of the statute. A prospective-only application of § 306.46 is more consistent with due process. Grantors of easements before the enactment of § 306.46 would not have been aware that by granting a public right-of-way easement they were potentially allowing for the future enlargement of that easement through the erection of utility facilities. Starting on the effective date of § 306.46, grantors might have become aware of that potential and could obtain more appropriate compensation. Grantors of easements before the enactment of § 306.46 would have had no such notice. *See also, Ginsberg v. Lindel*, 107 F.2d 721, 726 (8th Cir. 1939) ("It is the general rule that a retrospective operation will not be given to a statute which interferes with antecedent rights, unless such be the unequivocal and inflexible import of its terms and the manifest intention of the legislature.").

While a public utility is still free to construct and maintain a utility on a public road right-away, it still must pay a landowner for the right to do so if the road right-of-way is on the landowner's property. This interpretation is

consistent with the plain language of the statute, which lacks express legislative intent for the retrospective application, and the principle that statutory interpretations that introduce serious constitutional questions should be avoided. *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 877 (Iowa 1969); *Zadvydas v. Davis*, 533 U.S. 678, 689-690 (2001).

Conclusion

The IUB and the district court erroneously interpreted Iowa Code § 306.46 to permit an unconstitutional taking of private property under the U.S. and Iowa Constitutions. The IUB's Order expands Madison County's road easement to include utility facilities and allows MidAmerican, a for-profit company, to construct, operate, repair and maintain electric transmission line infrastructure without landowner permission or an eminent domain proceeding to determine just compensation. Juckette's substantial constitutional rights were prejudiced by this agency action; and therefore, she is entitled to relief.

CERTIFICATE OF COMPLIANCE

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/s/ Christina L. Gruenhagen_____ _May 2, 2022____
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I hereby certify that on May 2, 2022, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court by using the Iowa Judicial Branch electronic filing system, which will send notice of electronic filing to all parties and attorneys of record.

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