No. 20-0393

In the Supreme Court of Texas

JAMES FREDRICK MILES,
Petitioner,

v.

TEXAS CENTRAL RAILROAD & INFRASTRUCTURE, INC. AND INTEGRATED TEXAS LOGISTICS, INC.,
Respondents.

On Petition for Review
from the Thirteenth Court of Appeals, Corpus Christi

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

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This brief responds to the Court's letter of October 15, 2021 inviting the Solicitor General to express the views of the State of Texas. No fee has been or will be paid for the preparation of this brief.

To the Honorable Supreme Court of Texas:

The State takes no position on the wisdom or utility of building a high-speed train between Dallas and Houston. But private actors who seek to seize private property using eminent-domain powers must strictly comply with statutory and constitutional conditions governing the use of such powers. Respondents have not.

In the State's view, Respondents failed to demonstrate that they are either "railroad company[ies]" or "interurban electric railway compan[ies]" authorized to exercise eminent domain under the Transportation Code. The first category refers to currently operating railroad companies seeking to expand their routes. But Respondents are not operating anything resembling a railroad. That they might *possibly* do so someday is not enough. The second category refers to small, localized, electric railways that are designed to transport passengers between a city and its surrounding areas. Respondents' proposed multi-billion dollar, cross-state, high-speed train does not fit the bill.

Respondents also cannot satisfy constitutional constraints requiring private actors to demonstrate a "reasonable probability" that they will complete their public-use project. Simply put, the Respondents failed to establish a likelihood that they will ever succeed in raising the substantial capital required to complete their high-speed train, let alone that such a train will one day actually operate and serve the public interest. This Court should accordingly reverse and render judgment for Miles.

Statement of Facts

I. Legal Background

Eminent domain is the inherent sovereign power by which the sovereign takes private property for a public use without the owner's consent. *City of Austin v. Nalle*, 120 S.W. 996, 996 (Tex. 1909); *see also Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 72 (Tex. 1949); *Imperial Irrig. Co. v. Jayne*, 138 S.W. 575, 587 (Tex. 1911). The Texas Constitution limits this inherent sovereign power: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made." Tex. Const. art. I, § 17(a); *Weber*, 219 S.W.2d at 72; *Nalle*, 120 S.W. at 996. This limitation on eminent domain speaks to the intrinsic "conflict between the people's interest in public projects and the principle of indemnity to the landowner." *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 280 (1943).

The Legislature may either exercise the power of eminent domain itself or delegate that power to an agent. *Davis v. City of Lubbock*, 326 S.W.2d 699, 714 (Tex. 1959). When the Legislature delegates this inherent feature of sovereignty, it "can be exercised only by the strictest adherence to the terms of the grant" of authority to do so. *Byrd Irrig. Co. v. Smythe*, 146 S.W. 1064, 1065 (Tex. App.—San Antonio 1912, no writ); *see also City of Houston v. Kunze*, 262 S.W.2d 947, 951 (Tex. 1953).

This Court polices these delegations closely. *Tex. Rice Land Partners, Ltd., v. Denbury Green Pipeline–Tex., LLC*, 363 S.W.3d 192, 197 (Tex. 2012) (*Denbury I*). If there is any "doubt as to the scope of the power, the statute granting such power is

strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith." *Id.* at 198 (cleaned up).

II. Factual Background

A. TCRI

In December 2012, TXHS Railroad, Inc. was formed as a for-profit corporation whose purpose was to construct, operate, and maintain a 240-mile-long high-speed passenger railway connecting the major Texas metropolises of Dallas-Fort Worth and Houston. CR.119; 1stSupp.CR.4 (¶ 3). In January 2015, this entity amended its certificate of formation to change its name to Texas Central Railroad & Infrastructure, Inc. (TCRI), CR.119, and restated that its corporate purpose was primarily "to plan, build, maintain and operate an interurban electric railroad," *Id.* at 120.

According to TCRI, if its plan for a bullet train comes to fruition, the train will transport passengers at over 200 miles an hour, reducing the travel time between Dallas and Houston to under 90 minutes. *Id.* at 550 (¶ 3). TCRI is primarily responsible for the design, acquisition of rights of way, and overall construction for the high-speed-rail project. 1stSupp.CR.4 (¶ 3).

TCRI currently owns no "rolling stock" (*i.e.*, trains) and has never "constructed a depot station or any train track." 1stSupp.CR.7 (¶ 14). Nonetheless, TCRI contends that it is a railroad company and an interurban electric railway as those terms are defined in the Texas Transportation Code because it filed the necessary paperwork with the State *and* performed several preliminary activities in furtherance

of constructing and eventually operating a railroad in the future. CR.118–21, 884; 1stSupp.CR.20–25.

In 2017, the Federal Railroad Administration (FRA), at TCRI's request, released a Draft Environmental Impact Statement (DEIS) suggesting a preferred route for the rail line. 1stSupp.CR.5 (¶ 7). The FRA also indicated that building the rail line along the preferred route would be preferable to building no rail line at all. *Id.* After the DEIS was released, several public hearings were held to elicit comments, *id.*, and the final environmental impact statement was issued in 2020, https://tinyurl.com/3z8mcysm.

Meanwhile, TCRI also engaged several private contractors to assist in constructing and managing the high-speed rail project. 1stSupp.CR.6 (¶ 9). Besides construction contractors, TCRI also "employed law firms, appraisers, surveyors, architects, railroad operations advisors, market research and customer experience consultants, ridership forecasting experts, and financial advisors." *Id.* And TCRI contracted with Amtrak to connect the proposed high-speed rail line to Amtrak's interstate rail network. *Id.* Because of the Amtrak agreement, TCRI petitioned the federal Surface Transportation Board to assert jurisdiction over the project, 1stSupp.CR.6 (¶ 10), and the board agreed to the request, STB Decision No. FD 36025 (July 16, 2020), https://static.texastribune.org/media/documents/Decision.pdf.

Finally, TCRI sent landowners letters notifying them of the proposed high-speed rail line, its potential effects, and TCRI's need to access landowners' property. 1stSupp.CR.6 (¶ 12). If permission was given to enter property, TCRI agents surveyed and examined the land for the project. 1stSupp.CR.7 (¶ 12).

B. Miles

Petitioner James Miles owns approximately 600 acres of land in Leon County. 2dSupp.CR.30. The property has been in Miles's family for nearly 100 years. CR.153 (¶ 6). The proposed rail line, if built, would bisect Miles's property with a 100-foot right-of-way. CR.519, 812.

In November 2015, TCRI representatives attempted to get Miles's permission to survey his property. 2dSupp.CR.30 (¶ 3). Miles refused. 2dSupp.CR.30 (¶ 4).

C. ITL

Integrated Texas Logistics, Inc. (ITL) is a Texas corporation formed in 2017. 1stSupp.CR.4 (¶ 4). Its certificate of formation states that its corporate purpose is to build and operate an interurban electric railroad. *Id.*; *see also id.* at 15.

ITL claims that it "will support and assist TCRI and contractors in the procurement, storage, and timely delivery of the rolling stock and component parts necessary for construction." 1stSupp.CR.4 (¶ 4). Moreover, ITL claims that it "will also procure, own, and operate any short line railroads necessary to facilitate the [high-speed rail line]." *Id.* And after the rail line is built, ITL claims that it "will maintain the rail infrastructure and rolling stock." *Id.* Essentially, ITL's function is to help

TCRI build and eventually operate the proposed Dallas-Houston high-speed rail line.

ITL has neither employees of its own, CR.1678, officers or directors of its own, Cr. 1681-82, nor a website or email address of its own, CR. 1679. It shares office space, mailing addresses, email addresses, and officers with TCRI. *Id*. at 1683; *compare* 1stSupp.CR.20–25, *with id*. at 26–28. TCRI and ITL are collectively referred to as "Respondents."

D. Public concern about the proposed high-speed rail line

After the Dallas-Houston high-speed rail project began to be promoted, Texas taxpayers started to express concern to their elected leaders that if the private entities backing the project "fail in their undertaking, Texans would be left with an incomplete or failed high-speed rail project potentially requiring state bailouts for either project completion or damage mitigation." Tex. S. Res. Ctr., Enrolled Bill Analysis, Tex. S.B. 977, 85th Leg., R.S., at 1 (2017) (Author's/Sponsor's Statement of Intent). Furthermore, concern was expressed that the project "encroaches on private property rights." House Comm. on Transp., Bill Analysis, S.B. 977, 85th Leg., R.S. (2017).

Reacting to these concerns, the Texas Legislature enacted Senate Bill 977. Act of May 21, 2017, 85th Leg., R.S., ch. 311, § 1, 2017 Tex. Gen. Laws 590, 590–91 (codified at Tex. Transp. Code § 199.003). The law "amends the Transportation Code to prohibit the legislature from appropriating money to pay for certain costs associated with high-speed rail operated by a private entity and to prohibit a state agency

from accepting or using state money to pay for such a cost." Enrolled Bill Summ., S.B. 977, 85th Leg., R.S. (2017); *see* Tex. Transp. Code § 199.003.

Still, the law does not "categorically prevent high-speed rail from being developed in Texas." House Res. Org., Bill Analysis, S.B. 977, 85th Leg., R.S., at 3 (2017); *see* Tex. Transp. Code § 199.003. "If a future project [is] deemed viable and the use of public funds [is] in the best interests of the public, the Legislature [can] amend the statute to allow state funding." House Research Org., Bill Analysis, *supra*, at 3.

Several Texas legislators also wrote to the U.S. Transportation Secretary to express concern that TCRI "simply does not have the financial resources required or expertise employed to continue with this project." Dug Begley, *Critics Urge Feds To Pull Plug on Texas Bullet Train, Citing Uncertainties Caused by Pandemic*, Hous. Chron. (Apr. 8, 2020), https://tinyurl.com/u252nhh3. And other legislators asked for an AG Opinion concerning whether TCRI has eminent-domain authority to condemn property for the high-speed rail project. CR.219–24; Tex. Att'y Gen., RQ–0113–KP (2016). The Attorney General, however, declined to issue an opinion because the question is "the subject of pending litigation." CR.236.

III. Procedural History

A. The lawsuit

In 2016, Miles sued TCRI, seeking "a declaration concerning the parties' rights, status, and obligations with respect to TCRI's requested right of entry onto [his] [p]roperty including, but not limited to, an order declaring that TCRI's Consent Form exceeds the scope of survey activities granted [by the Transportation Code]."

CR.9 (¶ 17). TCRI filed a plea to the jurisdiction—arguing there was no ripe, justiciable controversy between the parties—and a general denial. CR.16–18.

Miles filed an amended petition. CR.22. He sought a further declaration "negating TCRI's claim that it has eminent domain authority solely by virtue of statutory entitlement." CR.27 (¶ 22). TCRI responded with a counterclaim for injunctive relief. CR.102. It sought an order compelling Miles to allow TCRI onto his land so that TCRI could conduct "lineal surveys and environmental/cultural resources examinations," CR.103 (¶ 3), under the Transportation Code, CR.106–07 (¶¶ 24–25).

B. The abatement

Months later, TCRI non-suited its claims against Miles, including its claim for injunctive relief, CR.140, 183, and notified Miles that it was no longer seeking to survey his land, CR.144, 151. TCRI then filed a motion to dismiss Miles's suit as moot. CR.143–49. Miles responded by filing his Second Amended Petition and Request for Declaratory Relief. CR.152. In it, Miles alleged that, despite the non-suit of TCRI's counterclaim, TCRI was still claiming publicly that it is a railroad and an interurban electric railway with eminent-domain authority to enter onto private property to conduct pre-condemnation surveys and that TCRI is going to construct its high-speed-rail project through Miles's property. CR.156 (¶ 21).

TCRI filed an amended motion to dismiss Miles's suit as unripe and moot. CR.187–97. TCRI asserted that, because it was considering whether to re-align various parts of the rail line, it was uncertain at that time whether the proposed rail line

would travel through Miles's property. CR.192. Because of the "potential realignment of the project," TCRI argued "[i]t [was] possible that TCRI [might] never need to survey . . . Miles's property." *Id.*

A hearing was held on TCRI's motion to dismiss. 2.Supp.RR.1. At that hearing, a TCRI witness testified that it was "uncertain whether [the proposed Dallas-Houston high-speed rail line] [would] be on . . . Miles'[s] property or not." *Id.* at 70.

The trial court granted TCRI's motion in part. CR.471. The court dismissed without prejudice only TCRI's request to survey Miles's property; it otherwise abated the rest of the case. *Id.* The court found that the issue whether the proposed rail line would traverse Miles's property was not moot but was unripe. 2dSupp.CR.67. So it ruled that "[t]he case on the issue of eminent domain is abated (on any action including but not limited to discovery) until a final decision is made as to whether or not the alignment of the proposed rail line impacts [Miles's] property." *Id.*

While the case was abated, the FRA identified a preferred route for the proposed rail line running through Miles's property. 1stSupp.CR.5 (§ 7). The trial court accordingly reinstated the case. CR.472.

C. The parties' cross-motions for summary judgment

Miles then moved for summary judgment, CR.519-865, arguing that he "is entitled to summary judgment declaring that TCRI has no right to enter onto his [p]roperty—to survey, condemn, or for any other purpose—because TCRI does not have

eminent domain authority as a 'railroad company' or 'interurban electric railway,' as those terms are defined in the Texas Transportation Code." CR.520.

ITL then petitioned to intervene in the lawsuit. CR.503–18. ITL's petition in intervention alleged that it is entitled to a declaratory judgment that "it is a railroad company as that term is used in TEX. TRANSP. CODE § 112.051 *et seq.* [and] . . . a declaration that it is an electric railway as that term is used in TEX. TRANSP. CODE § 131.012 *et seq.*" CR.509–10 (¶ 14). ITL also sought to enjoin Miles from "directly or indirectly impeding or interfering in any way with [ITL's] access on and across [Miles's] Property . . . for the purposes of conducting examinations and surveys of the Property in connection with proposed high-speed rail line and the proposed easement and right-of-way across the Property." CR.516 (¶ 3).

Contemporaneous with ITL's intervention, TCRI filed a Third Amended Answer, Verified Counterclaim, and Application for Injunctive Relief and Declaratory Judgment. CR.473–502. Like ITL's petition in intervention, TCRI's amended answer and counterclaim sought a declaration that "it is a railroad company as that term is used in TEX. TRANSP. CODE § 112.051 *et seq.* [and] . . . a declaration that it is an electric railway as that term is used in TEX. TRANSP. CODE § 131.012 *et seq.*" CR.479 (¶ 22). And it requested injunctive relief on the same grounds that ITL asserted. CR.486 (¶ 3).

Shortly after filing their pleadings, Respondents filed a joint motion for partial summary judgment. CR.866–87. The motion argued there is no genuine issue of ma-

terial fact that (1) they "are Texas corporations chartered for the purpose of constructing and operating a high-speed passenger train between Houston and Dallas" and that (2) the "efforts" they have taken "in preparation for constructing the passenger railway[] are sufficient to deem [either of them] a 'railroad company' and an 'interurban electric railway company' under Texas law." CR.866. The joint motion further indicated that, because of the federal DEIS, Respondents were "sufficiently confident that the Project [would] impact [Miles's] [p]roperty" and that they "need[ed] to begin exercising their rights as statutory railroad companies and interurban electric railways to survey the [p]roperty." CR.872.

The parties filed amended motions for partial summary judgment. CR.986–1010, 1011–51, 1663–1695. And they jointly stipulated that "[a]s of August 9, 2018, [TCRI] ha[d] spent at least $125,000,000 on its high-speed rail project." CR.1581.

D. The judgment

The trial court granted Miles's amended motion for partial summary judgment and denied the Respondents' motion. CR.1727. The court specifically found that neither of the Respondents was "a railroad company or an interurban railway company." *Id.* Final judgment was rendered for Miles. CR.1772–73.

E. The appeal

The Respondents filed a joint notice of appeal to the Tenth Court of Appeals in Waco, CR.1774-75, but the case was transferred to the Thirteenth Court of Appeals in Corpus Christi as part of a docket equalization, No. 13–19–00297–CV, *Tex. Cent. R.R. & Infrastructure, Inc. v. Miles*, Clerk's Letter 1 (June 14, 2019).

The Respondents raised four issues on appeal. Three issues generally concerned whether the trial court erred in granting summary judgment to Miles. *Tex. Cent. R.R. & Infrastructure, Inc. v. Miles*, No. 13-19-00297-CV, 2020 WL 2213962, at *2 (Tex. App.—Corpus Christi May 7, 2020, pet. granted) (mem. op.). The fourth issue concerned the trial court's award of attorney's fees to Miles. *Id.* at *8.

1. Railroad companies

On the issue whether either of the Respondents is entitled to exercise the power of eminent domain as "a railroad company" under section 81.002 of the Transportation Code, the court of appeals noted that a railroad company is defined as a "legal entity operating a railroad." *Id.* at *2. The issue turned specifically on the meaning of the term "operating." *Id.* at *3.

Miles argued that "operating" in section 81.002 is in the present tense; thus, because the Respondents currently own no trains and have constructed no tracks or train depots, they are not "operating" a railroad and cannot satisfy the statutory definition of a railroad company. *See id.* at *3–4. The Respondents, however, contended that operating a railroad involves more than just presently owning trains that are running on tracks. In their view, it includes engaging in railroad activities that there is a reasonable probability will eventually result in trains running on tracks after construction is complete. *Id.* at *4 (citing *Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd.*, 510 S.W.3d 909 (Tex. 2017) (*Denbury II*)).

Applying the Texas Code Construction Act's guidance that "words in the present tense include the future tense," Tex. Gov't Code § 311.012(a), the court of appeals held that the preliminary actions taken by the Respondents created a reasonable probability that they would operate a railroad in the future, 2020 WL 2213962, at *4. Thus, the court concluded that the Respondents are railroad companies under section 81.002. *Id.*

2. Interurban electric railway companies

On the issue whether either of the Respondents is entitled to exercise the power of eminent domain as an "interurban electric railway company" under section 131.011 of the Transportation Code, the court of appeals noted that such a company is "chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state" and may, under section 131.012, exercise eminent-domain power like a railroad company. *Id.* at *5. Miles argued that the Respondents did not qualify as interurban electric railway companies just because they claimed they were on their certificate-of-formation forms. *See id.*

The court rejected Miles's argument, reasoning that section 131.012 grants eminent-domain power to a corporation based on its intent to construct and operate such a railway. *See* id. at *5–6. The court therefore held that the Respondents are interurban electric railway companies under section 131.011. *Id.* at *7.

* * *

In sum, the court of appeals reversed the trial court's summary judgment for Miles and rendered declaratory judgment for the Respondents. *Id.* at *9. And the

court remanded the case on the issue of attorney's fees and the Respondents' claims for injunctive relief. *Id.*

Summary of the Argument

The Legislature has delegated to "railroad companies" the power of eminent domain, Tex. Transp. Code § 112.053, which includes the power to enter, examine, and survey a person's land that may be used for the company's proposed railway, *id.* § 112.051(a). Interurban electric railway companies may also "exercise the power of eminent domain with all the rights and powers granted by law to a railroad company." *Id.* § 131.012(1). The Respondents may only make preliminary examinations and surveys of private landowners' properties for the purpose of constructing and operating a bullet train if they are either railroad companies or interurban electric railway companies.

In the State's view, the Respondents are neither. They are not railroad companies because they do not operate a railroad. And they are not interurban electric railway companies because the high-speed train they intend to operate is not the small, localized, interurban railway expressly contemplated by statute. The Respondents also cannot satisfy constitutional constraints upon private actors seeking to employ eminent-domain powers because they cannot show a likelihood that they will procure financing to complete the project.

Accordingly, the Respondents have no authority to enter, examine, survey, or condemn Miles's land. The Court should reverse the court of appeals' judgment and render judgment for Miles.

ARGUMENT

I. The Respondents Are Neither Railroad Companies Nor Interurban Electric Railways Under the Transportation Code.

A. Neither of the Respondents is "a railroad company."

Neither of the Respondents qualifies as "a railroad company" under Texas Transportation Code section 81.002. *See* Pet'r's Br. xvi; Resps.' Br. xix. That section provides:

> In this title, a reference to *a railroad company* includes:
>
> (1) a railroad incorporated before September 1, 2007, under former Title 112, Revised Statutes; or
>
> (2) *any other legal entity operating a railroad*, including an entity organized under the Texas Business Corporation Act or the Texas Corporation Law provisions of the Business Organizations Code.

Tex. Transp. Code § 81.002 (emphases added). The parties agree that subsection 1 does not apply to the Respondents. But they disagree as to whether subsection 2 applies. *See* Pet'r's Br. 21–28; Resps.' Br. 40–43. They also disagree as to whether the phrase "operating a railroad" is subject to the guidance in section 311.012(a) of the Code Construction Act that "words in the present tense include the future tense." *See* Pet'r's Br. 29–30; Resps.' Br. 40–41. The Respondents rely on that guidance to argue that "operating a railroad" also includes companies that "*will be* operating a railroad."

The court of appeals construed the phrase "operating a railroad" in section 81.002(2) as the Respondents do. *See* 2020 WL 2213962, at *4. Like the Respondents, the court relied on the Code Construction Act's present-tense, future-tense rule, *id.* at *3, and held that an entity "operating a railroad" includes an entity that *is operating* a railroad as well as an entity that *will be operating* a railroad in the future. *See id.* at *4. Thus, even though the Respondents do not currently own any trains, do not operate any trains, and have not constructed any fixed railroad tracks, the court still concluded that they are railroad companies because they proved that they will "be able to create and operate a railroad in the future." *See id.*

That analysis is incorrect. As explained below, the phrase "operating a railroad" is a reduced adjectival phrase that modifies the noun "entity." The word "operating" is a neutral, non-finite verb that does not serve as the action of the sentence and does not have a tense. Properly understood, then, the Code Construction Act's present-tense, future-tense rule does not apply to the phrase "operating a railroad." Further, nothing in title 5 of the Transportation Code indicates that "operating a railroad" includes the future tense and that it must be construed this way to avoid an absurd result.

1. The common, ordinary meaning of the words in the phrase "operating a railroad" and their relationship to other words in section 81.002(2) demonstrate that "a railroad company" in title 5 includes only legal entities that are presently operating a railroad.

In statutory-construction cases, the meaning of particular words or phrases as well as the relationships between those words and phrases are threshold issues. *Tex.*

Health Presbyterian Hosp. of Denton v. D.A., 569 S.W.3d 126, 131 (Tex. 2018). In both situations, the statute is construed by applying the common, ordinary meaning of the words and phrases unless the text supplies a different meaning or the common meaning leads to absurd results. *See id.*

"[G]rammar rules [also] can be crucial to proper construction" of a statute, *id.* at 132 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 141 (2012)), because they convey a sense of the meaning that the Legislature intended. *See also, e.g.*, Tex. Gov't Code § 311.011(a) ("Words and phrases shall be . . . construed according to the rules of grammar and common usage."); *Tex. W. Oaks Hosp., L.P. v. Williams*, 371 S.W.3d 171, 184 (Tex. 2012) ("scrutinizing grammar" in interpreting the Texas Medical Liability Act). Ultimately, the Court "must enforce the statute as written and refrain from rewriting text that lawmakers chose." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (quotation marks omitted).

In addition, although the Court must consider the specific statutory language at issue, it still must do so "while looking to the statute as a whole, rather than as 'isolated provisions.'" *Id.* (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)). The statute should be read "contextually, giving effect to every word, clause, and sentence." *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013) (orig. proceeding). Thus, statutory construction involves discerning the ordinary meaning of a statute's words and phrases and the apparent meaning of those words within their context. *Jaster*, 438 S.W.3d at 562.

a. The ordinary meaning of "operating" and "railroad" is running passenger or freight trains on fixed tracks.

Statutory construction begins with the words of the statute. The words "operating" and "railroad" are not defined in chapter 81 of the Transportation Code. *See* Tex. Transp. Code §§ 81.001–.002. When a statute uses a word that it does not define, the Court's task is to determine and apply the word's common, ordinary meaning. *Jaster*, 438 S.W.3d at 563. The Court usually resorts to dictionaries to determine a word's common, ordinary meaning. *Id.*; *see also TDCJ v. Rangel*, 595 S.W.3d 198, 208 (Tex. 2020) ("We typically look first to dictionary definitions to determine a term's common, ordinary meaning." (cleaned up)).

"Operating" is the "present participle of [the verb] operate." *Operating*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/operating; *see also Operating*, Webster's New Int'l Dictionary (2d ed. 1961) ("*adj.* **1.** That operates; specif., *Colloq. U.S.*, of a company actually engaged in manufacture, transportation, etc. Cf. holding company. **2.** Arising out of the current operations of a concern engaged in transportation or manufacturing, as distinct from its financial transactions and its permanent improvements."). The base form of "operating" is the finite verb "operate." "Operate" means "to work or cause something to work, be in action, or have an effect." *Operate*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/operate; *see also Operate*, Webster's New Int'l Dictionary (2d ed. 1961) (*v.* . . . "*Transitive*: **1.** To produce as an effect; to cause to effect; to bring about; to work. . . . **2.** To put into, or continue in, operation or

activity; to manage, to conduct; to carry out or through; to work; as, to *operate* a machine or motor vehicle.").

A "railroad" is "a system of transportation using special vehicles whose wheels turn on metal bars fixed to the ground, or a particular company using such a system." *Railroad*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/railroad; *see also Railroad*, Webster's New Int'l Dictionary (2d ed. 1961) (*n.* . . . **2.** Specif.: A permanent road or way having a line or lines of rails fixed to ties or sleepers and laid to gauge, usually on a levelled or graded, ballasted road or roadbed, providing a track for freight cars, passenger cars or coaches, and other rolling stock designed to be drawn by locomotives or sometimes propelled by self-contained motors; hence, such a road or line together with all the lands, buildings, rolling stock, franchises, and other assets pertaining thereto and constituting a single property; a railroad company."). Put simply, a railroad is a track or set of tracks along which passenger and freight trains run.

The dictionary definitions of the word "operating," its base form "operates," and the word "railroad" reflect what English speakers intuitively know. An entity "operating a railroad" is one that runs passenger or freight trains on fixed tracks.

Thus, giving the words in the phrase "operating a railroad" their common, ordinary meaning compels the conclusion that the Respondents are not "railroad company[ies]" because they admittedly are not owners and operators of any trains that run on fixed tracks, and they do not have land or buildings pertaining to trains run-

ning on tracks. Because they are not railroad companies under title 5 of the Transportation Code, the Legislature has not delegated eminent-domain power to them, as provided in sections 112.002(5) and 112.053(a) of the Transportation Code. Accordingly, the Respondents cannot conclusively establish that they are railroad companies with the power to enter onto, examine, survey, or condemn private lands for the purpose of constructing a bullet train. The court of appeals erred in holding otherwise.

b. "[O]perating a railroad" is a reduced adjectival phrase that modifies the noun "entity."

i. "Operating" is a present participle and as such does not have a tense.

The rules of grammar confirm that the Respondents are not railroad companies as described in section 81.002(2) and thus do not come within Title 5 of the Transportation Code. The group of words "operating a railroad" in section 81.002(2) form a participle phrase comprised of a present participle ("operating") and a direct object of the participle ("a railroad").* The participle phrase "operating a railroad"

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* A participial phrase is a phrase (i.e., a group of words that does not include the subject-verb pairing necessary to make a clause) that is introduced with a participle. *See D.A. v. Tex. Health Presbyterian Hosp. of Denton*, 514 S.W.3d 431, 435 (Tex. App.—Fort Worth 2017) (citing Webster's New World English Grammar Handbook 86, 213 (2d ed. 2009)), *rev'd on other grounds*, 569 S.W.3d 126 (Tex. 2019). A participle is a word that combines characteristics of a verb with those of an adjective by taking the base form of a verb and adding *-ing*, *-ed*, *-en*, *-d*, *-t*, *-n*, or *-ne* to the end. *See id.* (citing Webster's Grammar Handbook, *supra*, at 32, 213, 368); Purdue Online

describes or modifies the noun "entity" in the sentence "In this title, a reference to a railroad company includes[] . . . any other legal *entity* operating a railroad . . . ." Thus, the phrase functions exactly as an adjective functions. Specifically, it is a reduced adjective clause formed with a present participle ("any other legal entity operating a railroad") instead of a subject-verb pairing ("any other legal entity *that is* operating a railroad"), making it an adjective phrase.

The statute's use of the adjective phrase ("operating a railroad") in lieu of an adjective clause with a subject and a verb ("*that is* operating a railroad") is significant because each conveys a different sense of the statute. One indicates tense; the other does not. "**Tense** is a property that belongs to verbs." Madeline Semmelmeyer & Donald O. Bolander, Instant English Handbook 134 (1990 ed.). Verbs commonly express action or the condition of the subject in some way and tense indicates time. *Id.* at 13–14, 134. Every verb has certain forms that indicate the time of the action or the time of the state of condition. *Id.* at 134. In other words, a verb tense indicates when the action or state of being is taking place—in the past, present, or future. *See* David Racine, *The Difference Between Verb Participle and Verb Tense*, Magoosh Blog–TOEFL® Test (updated Apr. 27, 2016), https://tinyurl.com/ypvzhetx.

Writing Lab (OWL), Purdue Univ., Coll. of Liberal Arts, *Participles*, https://tinyurl.com/vsuajdyr. There are two types of participles: present participles and past participles. Present participles end in *-ing*. Past participles end in *-ed*, *-en*, *-d*, *-t*, *-n*, or *-ne*. Purdue OWL, *Participles*. Participial phrases function exactly as adjectives function—they modify (*e.g.*, describe or limit) a noun or pronoun. *D.A.*, 514 S.W.3d at 435 (citing Webster's Grammar Handbook, *supra*, at 86, 213).

Because the *hypothetical* adjective-clause construction contains a verb ("that *is* operating a railroad"), it indicates tense. But because the *actual* adjective phrase ("*operating* a railroad") does not use a verb but instead uses a present participle, it does not indicate tense. That is because a participle does not indicate the time frame of an action or condition. *Id.* Instead, it describes or limits a noun and characterizes what it does. *Id.* Here, the participle phrase "operating a railroad" refers to "a railroad company." Tex. Transp. Code §81.002(2). In other words, an operator of a railroad is "a railroad company." Neither of the Respondents, by their own admission, is an operator of a railroad.

Other courts have conducted similar grammatical analyses in statutory-construction and contract-interpretation cases and reached similar conclusions to those proffered by the State here. *See Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 961–65 (11th Cir. 2016) (on reh'g); *Boeing Co. v. United States*, 75 Fed. Cl. 34, 43–45 (2007); *In re Waag*, 418 B.R. 373, 375 & n.3, 378–79 (B.A.P. 9th Cir. 2009); *Graev v. Comm'r of Internal Revenue*, 147 T.C. 460, 461-62, 479 (2016), *vacated on other grounds*, No. 30638-08, 2017 WL 11048256 (T.C. Mar. 30, 2017); *Celebrate Va. S. Holding Co. v. CVAS Prop. Mgmt., LLC*, No. 3:21cv261 (DJN), 2021 WL 5015732, at **1–2, 7–11 (E.D. Va. Oct. 27, 2021) (mem. op.).

ii. The court of appeals improperly resorted to the Code Construction Act.

The court of appeals misconstrued the grammatical structure of section 81.002(2) in concluding that the Respondents are railroad companies under section

81.002(2) and that Title 5 of the Transportation Code applies to them. The court's misconstruction was due to its failure to understand that the phrase "operating a railroad" in section 81.002(2) does not have a verb and thus does not have a tense; instead, the adjectival phrase describes what an "entity" is (*i.e.*, an operator of a railroad). The court compounded this fundamental mistake by then resorting to an extrinsic statutory-construction aid to deduce the meaning of and legislative intent behind the phrase "operating a railroad." Specifically, the court of appeals turned to the present-tense, future-tense guidance in section 311.012(a) the Code Construction Act. *See* 2020 WL 2213962, at *3–4. That was error.

The Code Construction Act provides "extrinsic" aids of statutory construction. *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 84 (Tex. 2017). But courts should not resort to them "when statutory language is clear." *Id.* Although the Code Constructive Act can provide "helpful" "guidance" through its "buffet of interpretative options," the Court is usually a "picky eater[]" and instead follows the maxim: "Clear text equals controlling text." *Id.* In sum, if statutory language is clear, reliance on the extrinsic statutory-construction aids in the Code Construction Act is "improper" and "inappropriate." *Id.* & nn.49–50 (quoting *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010), and *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008), respectively)).

The language in section 81.002(2) is clear. Hence the court of appeals should not have resorted to the extrinsic "tense" construction aid in the Code Construction Act. Using section 311.012(a) to contrive a meaning that is plainly not indicated in

the unambiguous words of section 81.002(2) does not "*clarify* meaning"—it "*cloak*[s] meaning." *Id.* The present-participle phrase "operating a railroad" manifestly tells the reader which entities are considered railroad companies for purposes of Title 5 of the Transportation Code, *i.e.*, operators of a railroad. By resorting to the Code Construction Act's present-tense, future-tense guidance, the court of appeals improperly altered the clear meaning of the statutory language in section 81.002(2).

2. "[O]perating a railroad" in section 81.002(2) should be given its ordinary and common meaning because a different meaning is not apparent from the statutory context.

The Court need not look any further than the plain language of section 81.002(2) to resolve the issue of what type of entity is considered "a railroad company" for purposes of Title 5. "The plain language of a statute is the surest guide to the Legislature's intent." *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012). The plain and ordinary meaning of the words used in a statute control unless a different meaning is apparent from the context of the statute. *Cadena Comercial USA Corp. v. TABC*, 518 S.W.3d 318, 326 (Tex. 2017). In the context of section 81.002 as well as the overall statutory scheme, no different meaning is apparent.

a. The State's plain-text interpretation of section 81.002(2) is not contraindicated by the statutory context.

Construing the words and phrase "operating a railroad" in section 81.002(2) to mean an entity that is presently an operator of a railroad is not contradicted by the statutory context. Section 81.002 contains two subsections identifying the entities included as "a railroad company" in Title 5 of the Transportation Code.

Subsection 1 includes "a railroad incorporated before September 1, 2007, under former Title 112, Revised Statutes." Tex. Transp. Code § 82.002(1). Under former Title 112, a railroad company is "[a]ny number of persons, not less than ten, being subscribers to the stock of *any contemplated railroad*, may be formed into a corporation for the purpose of constructing, owning, maintaining and operating such railroad by complying with the requirements of this chapter." Tex. Rev. Civ. Stat. art. 6259(a) (emphasis added), *repealed by* Act of May 25, 2007, 80th Leg., R.S., ch. 1115, § 5(1), 2007 Tex. Gen. Laws 3771, 3772. To comply with the chapter, a company can elect to be incorporated under article 6259(a), in former Title 112, for purposes of "constructing, owning, maintaining and operating" a "contemplated railroad" if it "(1) operates a railroad passenger service by contracting with a railroad corporation or other company; *and* (2) does not construct, own, or maintain a railroad track." *Id.* art. 6259(b) (emphasis added). Thus, before September 1, 2007, under former Title 112, a company operating "a railroad passenger service" that did not "construct, own, or maintain a railroad track" could be "incorporated" as a "railroad" "by contracting with a railroad corporation or other company" that did "construct, own, or maintain a railroad track." In short, a pre-September 1, 2007, railroad passenger service company without trains and tracks can be incorporated as a railroad with eminent-domain power under Title 5 of the current Transportation Code if it was contractually linked with a railroad corporation or other company that has trains and tracks.

Subsection 2 of section 81.002, which follows subsection 1 and is preceded by the disjunctive "or," refers to any other legal entity that will qualify as "a railroad company" with eminent-domain authority under Title 5, regardless of a date of incorporation. This subsection includes "any other legal entity." And such an entity does not have to be a passenger railroad service and does not have to contract with an existing railroad company. Rather, under subsection 2, the other legal entity is included as "a railroad company" for purposes of Title 5 with the authority to condemn land but only if that entity is already an operator of a railroad.

Thus, read in context, there are two ways for a legal entity to be "a railroad company" with eminent-domain authority under Title 5—operate an existing railroad with trains and tracks, or, before September 1, 2007, be a passenger railroad service and contractually combine with an existing railroad company that has trains and tracks. Under either scenario, the statute reflects the intent that eminent-domain authority may be exercised only by existing railroad companies or in conjunction with existing railroad companies. The statute's plain text and context does not suggest any different meaning.

b. The State's plain-text interpretation of section 81.002(2) is not contraindicated by other statutes in the overall statutory scheme of Title 5 of the Transportation Code.

Outside of section 81.002, the term "railroad company" appears numerous times in Title 5 of the Transportation Code. Tex. Transp. Code §§ 111.051–.054, 111.103; 112.002, 112.051–.055, 112.057–.062, 112.101–.103; 191.001, 191.005-.006; 192.001; 193.002; 199.001. None contradicts section 81.002's plain text, provides a

definitive clue as to whether "a railroad company" is a present or future concern, or suggests that section 81.002 has a different meaning in the context of the larger statutory scheme.

There is, however, a provision that does suggest another definition of "a railroad company"—section 199.002. The section concerns when "a municipality or other public agency" plans, acquires, establishes, develops, constructs, enlarges, improves, maintains, equips, operates, regulates, protects, polices, leases, and alienates a railroad or railroad facility. Tex. Transp. Code § 199.002(b). It declares that these activities "(1) are . . . public and governmental functions that are exercised for a public purpose and matters of public necessity; and (2) in the case of a municipality, are declared to be municipal functions and purposes as well as public and governmental." *Id.*

"Railroad" in subsection (b) is defined as "an enterprise created and operated to carry passengers, freight, or both on a fixed track" and "includes all real estate and interests in real estate, equipment, machinery, materials, structures, buildings, stations, facilities, and other improvements that are necessary to, or for the benefit of, the enterprise." *Id.* § 199.002(a)(1).

Section 199.002(a)(1)'s definition of "Railroad" does not contradict or alter the meaning of the phrase "operating a railroad" in section 81.002, because section 199.002(a)(1) begins with the introductory prepositional phrase "*In this section*," clarifying and limiting the reach of its definition of "Railroad." *Id.* (emphasis added).

Accordingly, section 199.002 has no bearing on section 81.002(2) and does not suggest that anything other than section 81.002(2)'s plain text controls in other parts of Title 5 of the Transportation Code.

3. Adopting a plain-text construction of section 81.002 would not establish an unconstitutional monopoly.

The Respondents argue that adopting Miles' interpretation of section 81.002 "would result in the Transportation Code granting an unconstitutional monopoly to companies that already have trains on tracks." Resps.' Br. 38; *cf. Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998) ("In analyzing the constitutionality of a statute, we should, if possible, interpret the statute in a manner that avoids constitutional infirmity."). But applying a plain-text interpretation of "operating a railroad" poses no such constitutional threat.

Article I, section 26 of the Texas Constitution provides that "monopolies are contrary to the genius of a free government, and shall never be allowed." Tex. Const. art. I, § 26. As the Court explained, the monopoly clause restricts the State from granting to "*one or an association of persons* an exclusive right to buy, sell, make, or use a given thing or commodity" because such exclusive rights "prevent[] competition . . . and tend[] to high prices." *City of Brenham v. Brenham Water Co.*, 4 S.W. 143, 153 (Tex. 1887) (emphasis added).

To establish an illegal monopoly, a challenger therefore must show that a single company or association possesses (or would possess) monopoly power in a relevant market. *Caller-Times Publ'g Co. v. Triad Commc'ns, Inc.*, 826 S.W.2d 576, 580 (Tex.

1992). Monopoly power means "the power to control prices" resulting from a dearth of competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

There is no factual support for the Respondents' claim that adopting an "already-having-trains-on-tracks" interpretation of section 81.002 would result in an unconstitutional monopoly. Resps.' Br. 37. Indeed, the Respondents acknowledge that any company operating a train "anywhere in the world" could satisfy the definition of "railroad company" under this plain-text construction of the statute. *Id.* at 37-38. On this record, it cannot be concluded that a trains-on-tracks requirement would result in an unconstitutional grant of exclusive rights to a single company or association.

Contrary to the Respondents' claim, the *set* of "compan*ies* that already have trains on tracks somewhere in the world," Resps.' Br. 38 (emphasis added), cannot constitute a monopoly without evidence that these companies are acting in concert to control prices, *cf. Ark. Fuel Oil Co. v. State*, 280 S.W.2d 723, 727 (Tex. 1955) ("The word *monopoly* loses much of its meaning when applied to a market in which there are ten or more competitors."); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 70 (Tex. App.—Austin 1995, no writ) ("The existence of so many [competitors] suggests that, absent a price-fixing conspiracy, competition will prevent them from charging outrageous sums[.]").

The Respondents nevertheless contend that interpreting section 81.002 to "prevent[] new competitors from entering an existing market" would also violate the monopoly clause. Resps.' Br. 39; *see also State Banking Bd. v. Airline Nat'l Bank*, 398 S.W.2d 805, 817 (Tex. App.—Austin 1966, writ ref'd n.r.e.) (suggesting that a provision restricting new banks from organizing in communities that already receive banking services "would conflict" with the monopoly clause).

But this Court has never construed the monopoly clause to bar the State from establishing reasonable conditions upon market entry—particularly where there are many competitors in the existing market. *Cf. Brenham Water Co.*, 4 S.W. at 153 (stating that "certain classes of exclusive privileges [exist] which do not amount to monopolies" under the Texas Constitution); *see also Lens Express*, 907 S.W.2d at 70–71 (observing that a statute "confer[ring] rights on some and not others" satisfies the Monopoly Clause "as long as the distinction is justified"). Under the Respondents' contrary view, Texas's many professional licensing requirements would violate the monopoly clause.

Regardless, adopting a plain-text interpretation of section 81.002 would not prevent new competitors from entering the market to operate railroads in Texas. Such companies could acquire land to build and operate a railroad in the ordinary course of business. The statute merely restricts nascent companies from exercising the extraordinary power of eminent domain. *See* Tex. Transp. Code § 81.002.

B. The Respondents are not operating an "interurban electric railway company."

1. An interurban is a small, localized, electric railway.

The Transportation Code defines an "interurban electric railway company" (hereinafter, "interurban") as "a corporation chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state." Tex. Transp. Code § 131.011. Section 131.012(1) makes clear, however, that an interurban is distinct from a "railroad company," insofar as the statute empowers a qualifying interurban with "all the rights and powers granted by law *to a railroad company*." *Id.* § 131.012(1) (emphasis added); *see also N. Tex. Transfer & Warehouse Co. v. State*, 191 S.W.550, 551 (Tex. 1917) (distinguishing an "interurban railway" from a generic "railroad" for purposes of taxation).

Accordingly, neither Corporation can be both a railroad company and an interurban—each is one, the other, or neither. And, like a railroad company that must be operating trains on tracks to exercise eminent-domain powers, an interurban's eminent-domain powers are "strictly construed in favor of the landowner" and "against" private companies seeking to seize private property, *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).

While section 131.012 suggests that a corporation need only "charter[]" to operate an "electric railway between municipalities" to exercise eminent-domain powers, Tex. Transp. Code § 131.012, the Court has clarified that a private company cannot acquire the right to condemn private property simply "by checking the right boxes on a one-page form," *Denbury I*, 363 S.W. 3d at 195. The Respondents must

instead prove that the Legislature intended to provide them with eminent-domain powers.

The Respondents have not carried that burden. Various provisions in chapter 131 (entitled "Miscellaneous Railways") demonstrate that the Respondents cannot squeeze their multi-billion dollar, cross-state, high-speed railroad project into the Legislature's conception of an interurban. *Cf. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Chapter 131—and its grant of eminent-domain powers—instead applies to smaller, localized, electric railways.

To illustrate, section 131.014(d) authorizes an interurban to "construct[] . . . an electric railway on or across a street, alley, square, or property of a municipality" with the consent of the municipality. Section 131.015(a) then empowers an interurban to use eminent domain to obtain a right-of-way to "operate interurban cars along and on the track of an electric street railway company owning, controlling, or operating track on any public street or alley in a municipality." And under section 131.016, the interurban must complete construction of any road from one municipality to another "within 12 months of the date of the final judgment awarding the company an easement or right-of-way" under section 131.015.

These provisions are incompatible with the Respondents' plans for a multi-billion-dollar high-speed train line expected to reach speeds of 200 miles per hour. Indeed, the FRA has confirmed that the Respondents' high-speed railroad project is

not "interoperable"—meaning that it needs its own set of tracks to operate. 2dSupp.CR.349, 354. But the court of appeals did not even address these sections of chapter 131 when it concluded that the Respondents qualify as interurbans. *See* 2020 WL 2213962, at *5-7.

The Respondents respond by arguing that chapter 131 merely permits—but does not require—interurbans to operate the types of smaller, localized rail projects that could traverse municipal alleys, streets, or squares. *See* Resps.' Br. 58–59. But the Court must construe these provisions "in context rather than in isolation" to effectuate legislative intent. *Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796, 802 (Tex. 2019). Nothing within chapter 131 suggests that the Legislature intended to treat a cross-state, high-speed rail project as an interurban with eminent-domain powers.

What's more, the Respondents have no convincing answer for section 131.103, which *requires* interurbans that join with street railway companies to sell half-price tickets "in lots of 20" to students "younger than 18 years of age who attend . . . school in a grade not higher than the highest grade of the public high schools located in or adjacent to the municipality in which the railway is located." Tex. Transp. Code § 131.103(a)-(b). This grade-school student-commuter provision is inconsistent with the cross-state high-speed rail project the Respondents intend to operate.

2. The Legislature treats "high-speed rail" differently from interurbans.

The Transportation Code is not silent, however, regarding high-speed trains. "High-speed rail" is defined in different chapters of the code as a "passenger rail service that is reasonably expected to reach speeds of at least 110 miles per hour." *Id.* §§ 112.201, 199.003(a); *see also id.* § 111.103(a) (defining "high-speed rail" as "passenger rail service capable of operating at speeds greater than 185 miles per hour"). Section 111.103 also authorizes TxDOT to adopt safety standards governing "high-speed rail systems," *id.* § 111.103(b), while sections 112.204–.205 impose security duties upon private "high-speed rail operator[s]," *id.* §§ 112.204–.205. There is no mention of "high-speed rail" anywhere in chapter 133, however, where the Legislature set forth provisions governing interurbans and provided them with eminent-domain powers. That absence is telling. *See Cadena*, 518 S.W.3d at 329 ("When the Legislature uses a word or phrase in one part of a statute but excludes it from another, the term should not be implied where it has been excluded.").

Neither did the Legislature specifically provide any "high-speed rail" companies with eminent-domain powers anywhere else within the Transportation Code. Indeed, the last time private actors sought to build and operate a high-speed rail system in Texas, the Legislature enacted a special statute to govern the project, which created a new state agency to exercise eminent-domain powers on behalf of the private partner. *See* Act of May 27, 1989, 71st Leg., R.S., ch. 1104, § 1, sec. 3, 1989 Tex. Gen. Laws 4564, 4565 (repealed by Act of May 22, 1995, 74th Leg., R.S., ch. 401, § 1(a), 1995 Tex. Gen. Laws 2957, 2957); Tex. Civ. Stat. art. 6674v.2, §§ 2(b),

6(b)(3) (repealed 1995). These actions would have been wholly unnecessary if the private actors could have exercised eminent-domain authority simply by chartering as an interurban, as the Respondents seek to do here.

In short, the Respondents cannot fit their high-speed rail project into the narrow provisions in chapter 133 governing interurbans. Accordingly, the court of appeals erred in concluding that the Respondents are authorized to exercise eminent-domain power under section 133.012.

II. The Respondents Cannot Satisfy Constitutional Requirements for Exercising Eminent-Domain Authority.

A. *Denbury*'s "reasonable probability" test applies to a private entity claiming to be a railroad or interurban with the power of eminent domain.

As shown in the preceding section, the court of appeals erred by rejecting the strictly textual interpretation of the phrase "operating a railroad" under section 81.002(2) of the Transportation Code. *See* 2020 WL 2213962, at *4. Instead, the court held that the Respondents satisfied that statutory requirement because they "*will have* running trains on the tracks after construction is complete." *Id.* (emphasis added) (citing *Denbury II*, 510 S.W.3d at 915–16).

The court arrived at this atextual formulation of the statutory requirement because the Respondents' urged the court to apply this Court's decision in *Denbury II*. *See id.* The court stated:

> While it is undisputed that appellants have not yet physically laid tracks or began to carry passengers or freight onboard a train, appellants have taken

> many of the necessary steps in order to be able to create and operate a railroad in the future. . . . Although Miles contends that [the Respondents] have only spent approximately 1% of their overall budget, [the Respondents] produced summary judgment evidence showing that they have coordinated with regulatory agencies concerning the Project, begun design, construction, and management operations, conducted land surveys, and entered into purchase agreements.
>
> Accordingly, considering the [L]egislature's instruction to view present tense as including future tense in the statute and the actions taken by appellants to begin to operate a railroad, we conclude that [the Respondents] are railroad companies pursuant to § 81.002(2).

Id. The court's analysis (and by extension, the Respondents' argument on which that analysis is based) is flawed in two respects.

1. To begin, as discussed above, the court should not have resorted to the extrinsic aid of the Code Construction Act. The present-tense, future-tense rule has no application here because the statutory language is unambiguous and clearly indicates only a present operator, and not a future operator, of a railroad.

2. The court of appeals' misinterpretation of the statutory text also violates the constitutional rules governing the exercise of eminent-domain power by private actors, as articulated by this Court in *Denbury*, a case that involved the analogous situation of a gas-pipeline common carrier. *Denbury* reaffirmed the constitutional rule that a private entity seeking to exercise eminent-domain power may do so only if it can show *strict compliance* with the statutory grant of such authority. *Denbury I*, 363 S.W.3d at 201. Thus, like a common carrier, a private entity that intends to exercise eminent-domain power as a railroad or interurban—*see* Tex. Transp. Code

§§ 112.002(b)(5), 112.051, 112.053, and 131.012—must strictly comply with the requirement that it be "a railroad company" under section 81.002(2) or an "interurban electric railway" under section 131.011 of the Transportation Code.

3. Merely filing paperwork with the State describing oneself as a railroad or interurban will not do. *See Denbury I*, 363 S.W.3d at 202 ("Denbury Green is not entitled to common-carrier status simply because it obtained a common-carrier permit, filed a tariff, and agreed to make the pipeline available to any third party wishing to transport its gas in the pipeline and willing to pay the tariff."). More is required: "[A] *reasonable probability* must exist that the [proposed railroad] will at some point after construction" actually operate a railroad or an electric railway, in accordance with the statutory requirements. *Id.* (emphasis added) (footnote omitted). "[A] reasonable probability is one that is more likely than not." *Id.* at 202 n.29.

Thus, a private entity seeking to exercise eminent-domain power as a railroad or an interurban has the burden "to establish its [railroad/railway operator] bona fides if it wishes to exercise the power of eminent domain." *See id.* at 202. To carry that burden, the entity must "adduce[] evidence . . . to support its assertion of [railroad operator] status." *See Denbury II*, 510 S.W.3d at 912. Evidence that establishes "only a possibility, and not a reasonable probability," is insufficient. *Id.* at 914.

The reviewing court must determine whether the putative condemnor's evidence "established as a matter of law a reasonable probability that, at some point after construction," it will be an operator of a railroad or interurban, as required by

law. *See id.* If any doubt exists, the enabling statutes must be strictly construed in the landowner's favor against the would-be condemnor. *Denbury I*, 363 S.W.3d at 198.

4. *Denbury*'s reasonable-probability rule for meeting statutory requirements "safeguards" a core concern of Texas Constitution article I, section 17: there can be no taking of private property by private corporations unless the taking will serve a public purpose. *Id.* at 194–95; *see* Tex. Const. art. I, § 17 (stating "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made"). "It is fundamental that a person's property cannot be taken for the benefit of another without a justifying public purpose." *Coastal States*, 309 S.W.2d at 833 (citing *Marrs v. R.R. Comm'n*, 177 S.W.2d 941, 949 (Tex. 1944)). The public is protected if the private entity seeking to condemn land to build a railroad line first demonstrates that it is reasonably probable the entity will ultimately become an operator of a railroad or interurban that will serve the public after the railroad or electric-railway line is constructed.

Otherwise, a private entity that condemns land for use in constructing a railroad line but that does not ultimately become an operator of a railroad or electric railway after completing the project ill-serves the public interest, in violation of the Texas Constitution. That is because the private entity will escape accountability to the public, not to mention private landowners whose property is condemned, if the private entity is not the operator of the proposed railroad or electric railway.

5. The Respondents—despite claiming in the court of appeals that *Denbury* supports their position, *see* Br. of Appellants 35–40; *see also* 2020 WL 2213962, at

*4—now argue that the reasonable-probability test is not applicable in this case because, they claim, "*Denbury* was grounded in the *Texas Constitution's* 'public use' requirement," Resps.' Br. 19 (emphasis added), and their proposed bullet train "is undisputedly for public use, *i.e.*, moving the public between Dallas and Houston," *id.* at 18.

But their argument's main premise founders: *Denbury* was grounded not on the private entity showing that it met the Texas Constitution's public-use element, but rather on the private entity meeting all the *statutory* requirements for a pipeline to condemn private lands, including section 111.002(6) of the Natural Resources Code, which states that the pipeline be for public hire. Of course, as stated above, *Denbury* recognized that the Texas Constitution permits private land to be condemned only if it is for public use and adequate compensation is paid. But *Denbury* focused on whether the pipeline company satisfied the *statutory provision* that the constructed pipeline be for public hire.

In *Denbury I*, the Court stated that "strict compliance with all statutory requirements is required to exercise eminent domain," 363 S.W.3d at 201, and the issue was whether the pipeline company there was a common carrier that owned or operated a gas pipeline "to or for the public for hire" under Natural Resources Code section 111.002(6), *id.* at 202. The Court in *Denbury* did not apply the reasonable-probability test to the public-use aspect of article I, section 17 of the Texas Constitution. Rather, it stated that to exercise eminent-domain power, it must be reasonably probable that, after construction of the project, *all statutory requirements will have been met*. *See id.*;

see also Denbury II, 510 S.W.3d at 915–16. The Respondents cannot avoid complying with *Denbury*'s reasonable-probability test for meeting statutory requirements.

Furthermore, the Respondents' conclusion that, if their project comes to fruition as planned, they will operate a high-speed rail line benefitting the public, begs the question whether the public interest will ultimately be served by allowing the Respondents to begin surveying and condemning land for their high-speed rail project right now. The whole point of the reasonable-probability test is that, before the awesome power of eminent domain can be exercised in the railroad context, there must be a reasonable probability that the private entity, and would-be condemnor, is a railroad or interurban serving the public interest.

6. The Respondents also argue that if a reasonable-probability test for satisfying statutory requirements applies to private entities like them, it also applies to public entities like TxDOT—something which, they claim, would have dire consequences for public infrastructure projects contemplated by state agencies. *See* Resps.' Br. 24. Again, not true. In *Denbury*, the Court held that the reasonable-probability test applied to a non-governmental entity that intended to build a CO_2 pipeline and transport gas via the pipeline as a common carrier under section 111.002(6) of the Natural Resources Code. *Denbury I*, 363 S.W.3d at 202. But the Court's holding was limited to a private entity. *See id.*; *see also Denbury II*, 510 S.W.3d at 915–16. It cannot and should not be read to broadly apply to state agencies. (Similarly, this brief addresses only private entities' efforts to exercise eminent domain; it does not address the State's exercise of that power.)

There is another reason why the reasonable-probability test does not broadly apply to governmental entities: governmental entities' accountability to the public. "Delegations to private entities raise more troubling constitutional issues than delegations to public entities because private delegates are not elected by the people, appointed by a public official or entity, or employed by the government, and such delegations may allow one with a personal or pecuniary interest to adversely affect the public interest." *Sansom v. R.R. Comm'n*, No. 03-19-00469-CV, 2021 WL 2006312, at *6 (Tex. App.—Austin May 20, 2021, no pet.) (citing *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 874 (Tex. 2000); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997)). Government agencies and elected officials are accountable to the public through the ballot box, whereas private entities have no such accountability. So unlike private entities, it can be reasonably presumed that governmental actors will build public infrastructure requiring the condemnation of private lands in accordance with statutory grants of eminent domain. "[T]he [legislative] determination of public necessity is presumptively correct, absent proof by the landowner of the [condemning authority's] fraud or proof that the condemning authority acted arbitrarily or capriciously." *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Hous. Sys.*, 255 S.W.3d 619, 629 (Tex. 2008).

B. The court of appeals misapplied *Denbury*'s reasonable-probability test.

Although the court of appeals' opinion did not use the words "reasonable-probability test" in stating its conclusion that the Respondents "*will have* running trains

on the tracks after construction is complete," the court made that statement in the context of recounting *Denbury*'s reasonable-probability test. *See* 2020 WL 2213962, at *4 (emphasis added). In other words, despite not *expressly* holding that the Respondents passed *Denbury*'s reasonable-probability test, the court's opinion *implies* that they did—just as the Respondents asked the court to do. *See* Br. of Appellants 35–40.

The court of appeals erred in implicitly holding that the Respondents satisfied *Denbury*'s reasonable-probability test. *See* 2020 WL 2213962, at *4–5, *8, *9. The court reasoned that the Respondents had shown that they had taken enough "necessary steps" towards "creat[ing] and operat[ing] a railroad in the future" through "summary judgment evidence showing that they have coordinated with regulatory agencies concerning the Project, begun design, construction, and management operations, conducted land surveys, and entered into purchase agreements." *Id*. at *4. The court's analysis is flawed because it ignored the single most important piece of evidence—that the project is currently pitifully short of the enormous capital investment needed to accomplish the project of building and operating a high-speed rail line between Dallas and Houston. And the court ignored the complete absence of any evidence proving that it is reasonably probable that the Respondents will ever be able to do so.

It is stipulated that $125 million has been spent on the project thus far. CR.1581. But this amount accounts for less than 0.69% of the project's estimated $18 billion

construction costs. CR.1701 n.18 ("[TCRI] estimates capital costs for the HSR system between $15 billion and $18 billion[.]") (citing DEIS, at ES.9.15, in Ex. A-6 to Def.'s & Intervenor's Mot. for Summ. J.). And at last estimate, those costs reportedly have now climbed to $30 billion. *See* Petr.'s Br. 7 & n.4 (citing Evan Hoopfer, *Texas Central's high-speed rail project 'could require some stimulus money,' CEO says*, Dall. Bus. J. (June 5, 2020), https://www.bizjournals.com/dallas/news/2020/06/05/texas-central--stimulus-money.html). The Respondents proffered no competent summary-judgment evidence conclusively proving that they will ever succeed in raising the sums needed to realize their vision of one day operating a bullet train between Dallas and Houston.

Despite this glaring deficiency, the court of appeals concluded that the Respondents had engaged in sufficient preparatory activities indicating they would likely operate a high-speed railway in the future. *See* 2020 WL22133962, at *4. The Respondents echo the court's conclusion, touting the things that they have accomplished and the amounts they have spent so far. *See* Resps.' Br. 25–27.

But regardless of any preparatory steps or accomplishments that the Respondents have made to date, none *conclusively proves* that there is a *reasonable probability*—as opposed to a *mere possibility*—that they will be operators of a railroad or electric railway in the future. *See* ; *Denbury II*, 510 S.W.3d at 915–16; *Denbury I*, 363 S.W.3d at 202. Preparatory steps that the Respondents have taken so far do not, *as a matter of law*, make it more likely than not that they will obtain the undisputedly tens of billions of dollars needed to construct, maintain, and operate a bullet train between

Dallas and Houston. To the contrary, there is no evidence of where the money will come from. Indeed, on this record, one can only speculate that the money will ever materialize.

Given this, the Respondents were not entitled to summary judgment that they are railroad companies or interurbans entitled to exercise the power of eminent domain under the Transportation Code. The court of appeals erred in holding otherwise. *See* 2020 WL 2213962, at *9. Based on the summary-judgment evidence, the State agrees with the trial court that Miles conclusively negated this element of the Respondents' claim and therefore is entitled to judgment as a matter of law.

Conclusion

The Court should reverse the court of appeals' judgment and render judgment for Miles.

Respectfully submitted.

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