No. 122973
Consolidated With 122985, 122986, 122987, 122988, 122989, 122992, 122993, 122994, 122996, 122997, 122998, 122999, 123000, 123001, 123002, 123003, 123004, 123005, 123006, 123007, 123008, 123009, 123011, 123012, 123013, 123014, 123015, 123016, 123017, 123081, 123019, 123020, 123021

IN THE
SUPREME COURT OF ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)
Plaintiff – Appellant,	)
v.	)
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS,	)
Defendant-Appellees.	)

On Direct Appeal from the Circuit Court for the
Fifth Judicial Circuit, Edgar County, Illinois

Case Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED-16, 2016-ED-17, 2016-ED-18, 2016-ED-19, 2016-ED-20, 2016-ED-21, 2016-ED-22, 2016-ED-23, 2016-ED-24, 2016-ED-25, 2016-ED-27, 2016-ED-28, 2016-ED-29, 2016-ED-30, 2016-ED-38, 2016-ED-40, 2016-ED-42, 2016-ED-43, 2016-ED-44, 2016-ED-45, 2016-ED-47, 2016-ED-48, 2016-ED-49, 2016-ED-50, 2016-ED-51, 2016-ED-52, 2016-ED-53, 2016-ED-54, 2016-ED-55

Honorable Craig H. DeArmond and Honorable James R. Glenn, Judges Presiding

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REPLY BRIEF OF PLAINTIFF-APPELLANT AMEREN TRANSMISSION COMPANY OF ILLINOIS

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Carolyn Taft Grosboll
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Matthew R. Tomc (6295507)
AMEREN SERVICES COMPANY
One Ameren Plaza
1901 Chouteau Avenue
St. Louis, Missouri 63166
(314) 554-4673
mtomc@ameren.com

Albert D. Sturtevant (6278551)
Nikhil Vijaykar (6327738)
WHITT STURTEVANT LLP
180 N. LaSalle Street, Suite 2020
Chicago, Illinois 60601
(312) 251-3017
(312) 251-3098
sturtevant@whitt-sturtevant.com
vijaykar@whitt-sturtevant.com

David A. Rolf (6196030)
Lisa A. Petrilli (6280865)
SORLING NORTHRUP
One North Old State Capitol Plaza, Ste. 200
Post Office Box 5131
Springfield, Illinois 62705
(217) 544-1144
darolf@sorlinglaw.com
lapetrilli@sorlinglaw.com

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

I. Even assuming the issue can be relitigated, Landowners have not shown they had a protected interest before the Illinois Commerce Commission.

Time and again, this Court has confronted the question of whether a certificate proceeding implicates a landowner's protected property interests. Each and every time, this Court has answered in the negative. One hundred years of case law, starting with *Cavanagh*, stand firmly behind a basic principle: Certificate proceedings before the Illinois Commerce Commission ("ICC") do not implicate constitutionally protected property interests, even though they later result in the condemnation of property. *See, e.g.*, *Chicago, Burlington & Quincy R.R. Co. v. Cavanagh*, 278 Ill. 609, 617 (1917); *Zurn v. City of Chicago*, 389 Ill. 114, 132 (1945); *Adams County Property Owners & Tenant Farmers v. Ill. Commerce Comm'n*, 2015 IL App (4th) 130907, ¶ 80 (cert. denied Nov. 25, 2015); *see also* ATXI Br. p. 14. Notwithstanding Landowners' and *amicus* Illinois Agricultural Association's ("Farm Bureau") attempts to minimize, discredit or ignore a century of settled case law, that basic principle remains valid and vital today.

A. The Landowners concede that to avoid reversal, a drastic departure from long-settled rules of law is required; but they have not justified such a departure.

The Landowners' response to Ameren Transmission Company of Illinois' ("ATXI") initial brief is telling: they neither inform the Court that ATXI has misconstrued decades of constitutional case law, nor show that this body of law does not apply on these facts. They do not assert these things, because they cannot. ATXI correctly described the law, and it clearly applies on these facts.

The Landowners instead ask this Court to "adapt the case law" that otherwise compels reversal. They claim that changes to the Eminent Domain Act ("EDA") in 2007

and the Public Utilities Act in 2010 together "present a far more onerous predicament to a landowner" than in 1917 (the year of the *Cavanagh* decision), and so create a protected interest at the ICC certificate stage where none was before. Resp., p. 22. This argument that the *Cavanagh* principle should be unraveled, however, is flawed at every turn. Even assuming for sake of argument that this issue is not precluded, the changes in the EDA and Public Utilities Act provide no basis for revising *Cavanagh's* longstanding principles.

1. The 2007 revisions to the Eminent Domain Act had no impact on this case and provide no basis for revisiting *Cavanagh*.

The Landowners' central argument in defense of the circuit court is predicated on the 2007 revisions to the EDA, which added a rebuttable presumption of public use when the ICC issues a certificate. *See Enbridge Energy (Ill.), L.L.C. v. Kuerth*, 2016 IL App (4th) 150519 at ¶ 138.

The Landowners' theory is complex. As ATXI understands it, Landowners argue the *Cavanagh* line of cases was sound law until 2007. That year, however, the EDA was revised to create a "strong presumption" that ICC-approved projects are for a public use and purpose. This supposedly "eroded" their property rights. But their remedy, according to them, is *not* to address the "strong presumption" in the EDA that is the source of their concern. Rather, it is to backtrack on a century of case law and hold that certificate proceedings implicate protected property interests.

a. The 2007 EDA revisions are not the dramatic change Landowners' claim.

Landowners' theory assumes that the 2007 EDA revisions represented a dramatic change in the substance of the law. This is not the case. The 2007 revisions merely reflect

pre-2007 deference accorded legislative determinations, such as the ICC's, regarding the exercise of eminent-domain authority. *See, e.g.*, *Zurn*, 389 Ill. at 121 ("This finding and declaration of . . . public use by the legislature is entitled to great weight" although whether individual exercises of the eminent domain power "constitute . . . a public use, is a judicial question which must be determined by the courts"); *Cavanagh*, 278 Ill. at 615 ("it is to be presumed that the [relocation of the tracks requiring the exercise of eminent domain] was a proper and feasible method of securing the public safety"). Although determining "whether a given use is a public use" is ultimately a judicial function, "[g]reat deference should be afforded the legislature and its granting of eminent domain authority." *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl, L.L.C.*, 199 Ill.2d 225, 236 (2002) (internal quotations omitted). The 2007 revisions do nothing more than reflect propositionsand presumptions long recognized by the Court.

The propriety of these particular EDA revisions, moreover, has been consistently recognized and relied upon by Illinois courts. *See, e.g.*, *Kuerth*, 2016 IL App (4th) 150519. Generally speaking, the fact a statute creates a presumption or otherwise shifts burdens based on official state action is nothing new or even controversial. This was settled law well before even *Cavanagh*. *See, e.g.*, *Chicago Terminal Transfer R. Co. v. City of Chicago*, 217 Ill. 343 (1905) (that statutes of this character "giving presumptive or prima facie weight to facts of official certificates, are valid and constitutional, is not an open question in this court"). So again, the recognition of a presumption in the EDA provides no basis for "adapting" *Cavanagh*.

b. The "strong presumption" had no impact on this case because Landowners did not present *any* evidence on the presumption.

Irrespective of whether the 2007 revisions really changed anything, this is not the case to consider them. The "strong presumption" had no impact on this case whatsoever, because, as the circuit court expressly found, Landowners did not present *any* evidence below on either factor to which the presumption applies. R. C954, R. R112; A8, A318. So ATXI would have prevailed on the public-use and public-purpose factors regardless of any presumption, whether strong, weak, or non-existent. The only issue on which the Landowners presented evidence was whether they received notice at the ICC.

ATXI pointed all this out in its initial brief (*see* p. 30), but despite this, and despite relying heavily on the "strong presumption" throughout their brief (*see* Resp., pp. 9, 11, 21–22, & 36), the Landowners never acknowledge the fact that they presented no evidence on the presumptions below. The Landowners were not deprived of any right to present evidence on any topic; they either chose not to do so or had no such evidence to present. Because the 2007 EDA revisions had no impact on this case, it would be inappropriate for this Court to make *any* determination based on them, much less to backtrack and reverse more than a century of case law addressing entirely different issues of constitutional law.

2. Other Public Utilities Act changes cited by Landowners do not affect substantive standards, but purely affected procedural issues.

Although the focus of Landowners' brief is on the 2007 revisions to the EDA, they also claim that two provisions in the 2010 enactment of Section 8-406.1 support revising the *Cavanagh* principles: (*a*) one requiring the ICC to include an order directing construction of the line under Section 8-503 of the Public Utilities Act (220 ILCS 5/8-503); and (*b*) another permitting the ICC to include an order authorizing the exercise of eminent domain under Section 8-509. 220 ILCS 5/8-509. Landowners claim that these

revisions eliminated the opportunity to "separately object" to the pertinent orders. Resp., p. 21–22.

Once again, however, these revisions had no impact on the Landowners in this case. Nor did either provision affect any substantive requirement under the law; they merely changed in the procedural timing of approvals. Since the Landowners either had a "separate" opportunity to object to these issues, or declined to object when they had an opportunity, their alleged harm is non-existent.

a. The revision affecting Section 8-503 was purely procedural and had no impact on Landowners in this case.

There is nothing novel in considering the Section 8-503 requirements in the same case as the certificate; this occurred *before* the enactment of Section 8-406.1. *See, e.g. Ill. Power Co.*, ICC Docket 06-0179, Order at 39-40, 2007 WL 1617828 (May 16, 2007); *Cent Ill. Pub. Serv. Co.*, ICC Docket 07-0532, Order at 14-16 (May 9, 2009). *Cavanagh* itself determined that Section 8-503's predecessor did *not* affect protected interests, 278 Ill. at 614, confirming that this change to Section 8-406.1 provides no reason for revisiting the law.

On appeal, moreover, Landowners did *not* challenge any aspect of the ICC Order pertaining to Section 8-503. Having made no objection when the issue was before them, they can hardly complain they were not provided with a later, "separate" opportunity to do so. The change in timing had no significance in this case.

Finally, the underlying substantive requirements for a certificate and a Section 8-503 order remain the same as before Section 8-406.1 was enacted. *Compare* 220 ILCS 5/8-406(b) *with* 220 ILCS 5/8-406.1(f). And the criteria for a Section 8-503 order—that new structures are necessary "to promote the security or convenience of [the utility's]

employees or the public or promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities" are similar to the Section 8-406 and 406.1 requirements and have remained consistent over time. 220 ILCS 5/8-503. The addition of a Section 8-503 order had no impact on the substance of the certificate process that informed *Cavanagh* or any case that followed it.

b. The changes to the Section 8-509 process were also purely procedural, and again had no impact on the Landowners.

Landowners also criticize the 2010 revisions for permitting a certificate order to include an order under Section 8-509, which authorizes the utility to exercise eminent domain authority. Resp., pp. 21-22; Farm Bureau Br., p. 9. *See* 220 ILCS 5/8-509. Again, this revision does not change the substance of the law—a utility must still satisfy the Section 8-509 requirements irrespective of when that authorization is sought or granted.

As the record reflects, ATXI did seek Section 8-509 authority in "separate" dockets, two-and-a-half *years* after the 2013 final certificate order, giving Landowners their desired opportunity to "separately object." Landowners do not dispute they were notified of the Section 8-509 petitions. R. C858; A120. Indeed, a number of landowners intervened in the Section 8-509 proceedings, with most declining to challenge the petitions, and none raising due process claims. R. C449-452, C455.

3. The cases cited by Landowners provide no support for such a drastic revision of such long-standing case law.

In sum, the 2007 and 2010 statutory changes highlighted by Landowners provide no basis for revisiting *Cavanagh*. Landowners also cite two cases in support of their request. As may be inferred from the absence in their brief of any discussion of the specifics of these cases, they are not even analogous, much less on point.

Both cases involved the Court recognizing that prior decisions had been founded on some discrete error. In the case *In re R.L.S.*, 218 Ill.2d 428 (2006), the Court concluded that its prior cases had failed to apply certain statutes "as written." *Id*. at 447 ("This court's cases refusing to apply section 11–7 [of the Probate Act] as written are wrong and should no longer be followed."). In *Cochran*, the Court pointed out that previous cases had relied on an inaccurate interpretation of a 1914 case, by assuming that the earlier case had reached an issue it did not reach and adopted a standard it expressly did not adopt. *Cochran v. Securitas Security Services, USA*, 2017 IL 121200, ¶13.

Both *R.L.S.* and *Cochran* involved situations where the Court recognized that a *past* error had occurred. Here, unlike *R.L.S.*, there is no history of cases that failed to interpret a statute as written. And here, unlike *Cochran*, no one is arguing that *Cavanagh* or any case following it mistook or misinterpreted a prior decision. Indeed, Landowners do not even allege that the *Cavanagh* line of cases is erroneous or founded on a mistake. Their theory is of a different stripe, premised on (allegedly) new developments, not past errors. *R.L.S.* and *Cochran* are inapplicable to this case and provide no support for Landowners' theory of relief.

B. The facts of this case provide no basis for disregarding *Cavanagh*.

Landowners also suggest that the *Cavanagh* line of cases may be ignored because of the purportedly exceptional deprivation of process they claim to have experienced before the ICC. According to the Landowners, "It would be difficult to imagine a more unfair and unequal utility routing process than what happened in this case." Resp., p. 5.

This is an exaggeration. To begin, Landowners repeatedly mischaracterize the record. Over and over, they state that the ICC "failed to send" notice. *See e.g.*, Resp., pp.

6, 25. This is not consistent with the stipulated facts. The stipulated fact, adopting Landowners' affidavits, is that they did not "*receive*" notice. R. C856; A. 118-19. The stipulated facts make clear that the Landowners were listed on the January 31, 2013 service list compiled by the ICC Clerk and filed accompanying a notice regarding proposed alternate routes on Landowners' properties. R. C856; A. 118. No evidence corroborates the Landowner's inference that the ICC Clerk *did not send* the notice, and in the absence of evidence to the contrary, the Clerk must be presumed to have mailed it. *See Cty. of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 481 (2005) (holding that it "is presumed that a public official performs the functions of his office according to law and that he does his duty").

The affected parties in the *Cavanagh* line of cases faced far more difficult circumstances than the Landowners even claim to have faced here. In *Cavanagh*, for instance, landowners received no notice of the underlying proceeding that authorized eminent domain, nor did they receive a copy of the order such that they might have appealed it. *Cavanagh*, 278 Ill. at 616. Similarly, in *Zurn*, the affected landowners received no notice of the certificate proceeding and had do not appear to have had any chance to appeal. *Zurn*, 389 Ill. at 129.

In contrast, the Landowners here concede that ATXI complied with all statutory and ICC notice requirements, and that they had notice of the ICC proceeding from the outset. R. C855-56, C69, C80; A117-18, 54, 65. They knew about the Illinois Rivers Project, and they knew about the proceeding. The problem is they *chose* not to become (or remain) involved in the proceeding when they saw that the initially proposed routes did not cross their property. R. C69, C80; A54, A65. Even then, when a proposed route

eventually did affect their property, the Landowners appeared on an ICC service list providing notice of that route. This is a stipulated fact. R. C856; A118. They claim that they did not "receive" this notice, but regardless, they eventually did intervene and were permitted to appeal the alleged denial of notice. ATXI Br., pp. 5-6. Their due-process claim was fully and completely considered but lacked merit and was rejected.

These Landowners in fact enjoyed far more process than their counterparts in the *Cavanagh* line of cases. They had a chance to litigate their notice claim on direct appeal, while condemnation proceedings were still months, if not years, away. The facts of this case provide no basis for breaking with precedent and holding that a protected interest existed in the certificate proceedings below.

C. The Landowners' equal protection claim lacks merit.

Briefly and belatedly, Landowners attempt to shoehorn their notice claim into an equal protection theory, claiming that either the statute or the ICC should have required "equal notice" to landowners affected by initial routes and those affected by routes later proposed. Resp., p. 27. There are two fundamental problems with this argument.

1. The equal protection claim should not be considered on the merits.

First, the equal protection claim should not be considered on the merits, as it is subject either to preclusion or forfeiture. The Landowners have been litigating the ICC proceeding since 2013, but this is the first time an equal protection argument has appeared. Although a new theory, the equal protection claim arises out of the same cause of action that was considered and resolved on appeal, and thus (for the same reasons explained in ATXI's initial brief) is barred by claim preclusion—which applies both to

theories that were raised and those that could have been raised. *See LaSalle Bank Nat. Ass'n v. Bull Valley*, 355 Ill. App. 3d 629, 635 (2d Dist. 2005).

In addition, even if the claim were not precluded, it is forfeited. The claim focuses *solely* on the conduct of the ICC proceeding and has no bearing on any element of the eminent domain action. The Landowners could have raised this issue on direct appeal; nothing prevented them from doing so, and they provide no explanation for presenting this issue for the first time nearly three years after their appeal of the ICC proceeding. *Cf People v. Enis*, 194 Ill.2d 361, 375 (2000) (issues decided on direct appeal are barred by res judicata, issues that could have been raised on direct appeal, but were not, are deemed waived).

2. On the merits, the Landowners fail to demonstrate either state action or that the ICC acted with a discriminatory purpose.

Second, the Landowners cannot show that the allegedly "differential" treatment reflected either state action or a discriminatory purpose. "State action is a prerequisite to invoking the equal protection clause." *People v. Lander*, 215 Ill.2d 577, 589 (2005). So, too, is a discriminatory purpose: "Equal protection is denied when state officers enforce a statute in a discriminatory manner but only if the discrimination is intentional and purposeful." *ESG Watts, Inc. v. Pollution Control Bd.*, 286 Ill. App. 3d 325, 333, (3d Dist. 1997).

Section 8-406.1, as it existed during the ICC proceeding, required numerous prefiling notices (such as by publication and to county officials), but made no distinction between landowners affected by initial routes, and those affected by later proposed routes. It did not address this issue at all, but imposed a general requirement that the certificate be issued only "after notice and a hearing." 220 ILCS 5/8-406.1(f). So, the

statute did not make the complained-of distinction and does not even provide the most basic element of differential treatment. [1]

The Landowners also complain about how the ICC applied this law. But it is a matter of record that the ICC tried to do *exactly* what Landowners say "would have protected the rights of defendants": mail notice to each landowner affected by any route proposed at any point in the proceeding. Resp., p. 16. The Landowners stipulated to the fact that they were *included* on the service list of the notice that identified the now-challenged route. Although the Landowners claim not to have "received" this notice, there is no evidence tying this to an action of the ICC, and even they do not allege that such lack of receipt was intended and purposeful.

Nothing in the record so much as hints that the ICC acted with a discriminatory purpose against the Landowners. The equal protection claim should not be considered, but if it is, it clearly lacks merit.

D. As the *Cavanagh* line of cases explains, the decision *where* to locate a transmission line is a legislative, not judicial, determination.

As explained in greater detail in the Brief *Amicus Curiae* of Commonwealth Edison Company, the Landowners (and Farm Bureau) ask this Court to disregard an important distinction between certificate proceedings and eminent domain proceedings.

[1] This also continues to confirm that the circuit court's finding of facial unconstitutionality must be rejected. The Landowners' only defense of that finding is to assert it was supported in the Order below. It was not, and ATXI explained why in its initial brief (see ATXI Br., p. 15-16). Landowners concede as much when they say, "The procedure proposed by the Administrative Law Judges handling this matter, if followed, would have protected the rights of defendants." Resp., p. 16.

A certificate proceeding concerns the decision *whether* to take, and *where* — fundamentally a legislative determination. Approval of the Illinois Rivers Project and the route were decisions delegated to the ICC, but they could have been made by the General Assembly directly. The law is clear that, when considering certificate applications, the ICC exercises legislative authority as "an extension of the legislative branch." *Illinois Power Company v. Lynn*, 50 Ill. App. 3d 77, 81 (4th Dist. 1977).[2] And because that question is "essentially political in its nature, and not judicial," it is not subject to judicial review. *Zurn*, 389 Ill. at 127.

Landowners still have constitutional protections. But those protections do not include contesting the taking decision, in and of itself. By its very nature, eminent domain is the power to take property "without the owner's consent." *Cavanagh*, 278 Ill. at 615. The constitutional protections are to contest just compensation and public use. These determinations, unlike the taking decision itself, are judicially reviewable.

The Landowners here have introduced no evidence pertinent to the judicial determination of whether the Illinois Rivers Project is necessary for a public use. They are instead attempting to gain a new constitutional right—to determine whose property should be taken. That decision is reserved to the General Assembly. Reversal of the principle recognized in *Cavanagh* and its progeny would eviscerate the eminent domain

[2] Although the ICC may exercise quasi-judicial authority in *how* it conducts a given proceeding, this does not affect the character of the proceeding's subject matter. The Farm Bureau collapses this distinction when it asserts that "hearings pursuant to either Section 406 or 406.1 . . . are not legislative matters" but "exercises of judicial power." (Amic. Br. at 4.) The case cited in support of this assertion, *People ex rel. Ill. Commerce Comm'n v. Operator Commc'n, Inc.*, 281 Ill. App. 3d 297 (1st Dist. 1996), concerns the ICC's use of its investigative power under Section 10-101 of the PUA, and bears no relation to Sections 406 or 406.1.

power and have far reaching consequences on one of the core applications of eminent domain: the siting of critical utility infrastructure.

II. Res judicata and collateral estoppel both prevent Landowners from evading the decision in *Adams County* and preclude relitigating Landowners' claims and issues previously considered and decided by the Fourth District.

In addition to asking the Court to disregard one hundred years of its constitutional case law, Landowners also seek to evade the outcome of *Adams County*, which resolved the very same claims Landowners raise here. To do so, they claim an exception to issue and claim preclusion: to prevent the circuit court from considering the matter again would be unfair. But the purported unfairness is entirely predicated on the existence of a protected property interest at the ICC certificate stage. This is the very claim that has already been settled, and while Landowners assert the ICC proceedings were not fair, they do not and cannot claim that unfairness afflicted the appellate court proceedings. Moreover, since *Adams County* correctly found, based on the same facts and circumstances at the ICC as now presented to the circuit court, that there was no protected interest, there is no equitable basis to carve out an exception to the issue and claim preclusion doctrines.

A. Landowners' claims in the Fourth District and the Landowners' claims in the eminent domain proceedings are based on the same set of facts and occurrences in the ICC proceedings.

There is no dispute that the Landowners' claims in the Fourth District and the Landowners' claims in the eminent domain proceedings are based on the same set of facts and occurrences in the ICC proceedings. Landowners in *Adams County* claimed that (1) their due process rights were violated because they failed to receive notice in the ICC proceedings, and (2) that the lack of a clear notice requirement renders Section 8-406.1

unconstitutional. *Adams County* 2015 IL App (4th) 130901, ¶ 69. In this matter, Landowners again claim that (1) they were deprived of due process when they did not receive notice and opportunity to be heard in the ICC proceeding, and (2) that Section 8-406.1 is unconstitutional.

Landowners admit that the Fourth District held that Landowners lacked a protectable interest in at the ICC proceedings, as the ICC proceedings "had not deprived [L]andowners of their protected property interests." Resp., pp. 19, 29, 37. Landowners further admit that the Fourth District held that because Landowners lacked a protected interest, they were not entitled to due process in the ICC proceedings. Resp., p. 29. Yet despite such admissions, Landowners again claim they were deprived of due process, not because they lacked notice and opportunity to be heard in the eminent domain proceeding, but because they lacked notice and opportunity to be heard in the ICC proceedings. This is the very issue decided by the Fourth District in *Adams County*.

The cause of action or claim need not be identical in order for *res judicata* to apply. *Hayashi v. Illinois Department of Financial and Professional Regulation* 2014 IL 116023, ¶46. *Res judicata* is applicable even where the previous decision was not based in eminent domain, but based on the exact same set of operative facts as the decision in the eminent domain proceeding. *See River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 309 (1998). The circuit court and the Fourth District considered the exact same set of operative facts, those being the facts and occurrences in the ICC proceeding.

B. Landowners' attempt to carve out an equitable exception to issue and claim preclusion is baseless.

Landowners nevertheless attempt to carve out an equitable exception to issue and claim preclusion. Landowners claim that the Fourth District's failure to recognize due

process rights in the ICC proceeding "should not serve to preclude this Court's consideration of those due process rights when they are asserted here in the context of these eminent domain proceedings." Resp., p. 32. There are three problems with Landowners claimed exception.

First, Landowners are conflating two separate issues. The Landowners' position is that the ICC's decision, establishing the Illinois Rivers Project's route, was "unfair." But that is not the decision that precludes them from relitigating the due process arguments: the preclusive decision is the appellate court decision in *Adams County.* Landowners assert no unfairness or irregularity in the appellate court proceedings, and they cannot do so.

The question pertinent to the "exception" is "whether a party has had a full and fair opportunity to litigate an issue in a prior action." *Talarico v. Dunlap*, 177 Ill. 2d 185, 192. (1997); *see also, e.g., Darrow v. Phillips*, 2015 IL App (2d) 140763-U, ¶ 35 ("there is no indication that the application of collateral estoppel will be unfair, as plaintiffs had ample opportunity in the 2010 case to challenge the ruling regarding their false-light claim"). The issue subject to preclusion is whether Landowners had a protected interest during the ICC proceeding. The Landowners were able to and did fully and fairly litigate that issue before the appellate court, which considered and rejected the issue on the merits. Although Landowners' assert that the *outcome* of the appellate court decision was incorrect and unfair, that is an entirely different matter than whether the appellate *process* that led to that decision was unfair and inequitable. If the so-called "exception" applied anytime a later court believed the *result* of a prior decision were incorrect or could be deemed unfair, then collateral estoppel would be virtually meaningless.

Second, as Landowners admit, the Fourth District declined to extend due process rights to Landowners in the ICC proceedings. Resp., pp. 19, 29. While Landowners claim that equity warrants a "new determination" as to whether there is a protectable interest in the ICC proceeding because of an "intervening change" in the law, the applicable law cited in Landowners' Response has not changed. Resp., p. 33. The 2010 version of Section 8-406.1 applicable to the ICC proceeding was the version considered by the Fourth District in *Adams County,* and the relevant portion of the EDA has not changed since it was enacted in 2007. The implication of Landowners' argument is that the Fourth District must not have fully considered the existing law prior to issuing its decision in *Adams County*. In reality, the Fourth District made it clear that it specifically contemplated Section 8-406.1 and recognized that an eminent domain proceeding would follow, yet still found that the ICC proceeding does not "implicate Landowners' property rights in a significant way." *Adams County*, 2015 IL App (4th) 130901, ¶ 50, ¶ 80.

Finally, Landowners admit that the deprivation of rights which would trigger due process occurs not in the ICC proceeding, but in the eminent domain proceeding. Resp., p. 34. While Landowners claim they should not be precluded from asserting due process rights in the context of an eminent domain proceeding, Landowners ignore the fact that they are not actually claiming deprivation of due process "in the context of an eminent domain proceeding." Resp., p. 32. They are claiming a deprivation of due process rights in the context of the ICC's certificate proceeding. The lack of Landowners' due process rights in the ICC proceedings, regardless of the change in forum, is the very issue considered and decided by the Fourth District.

C. Landowners are in privity with parties to *Adams County*.

Landowners also claim that certain landowners should not be precluded from asserting claims and issues because they were not parties to the *Adams County* appeal. Landowners ignore the stipulation and principles of privity. The Landowners in this matter were either identical to or in privity with the landowners who participated in the *Adams County* appeal. The segment of the line challenged by the Landowners has not changed since it was approved by the ICC in 2013 and upheld in *Adams County*. Thus, the landowners who stand to be affected by this line segment have not changed. A majority of the Landowners were also parties to the *Adams County* appeal. ATXI concedes that some of the landowners below were not named parties in the appeal; nevertheless, all parties agreed in the stipulation to be treated as if they were part of the ECCDP group that appeared in *Adams County*. R. C856; A. 118.

Given that the stipulation was a negotiated instrument, involving give and take by both sides, ATXI was surprised to see the Landowners contradict stipulated facts on appeal. The Court would be more than justified in disregarding their contradictory assertions. It is ultimately a moot point, however, because regardless of whether the two groups were identical, they are in privity, which is all that is required.

Privity will apply where the nonparty's interests "'are so closely aligned to those of a party' in the prior suit that the party was essentially, a virtual representative of the nonparty." *Agolf, LLC v. Vill. of Arlington Heights*, 409 Ill. App. 3d 211, 220 (1st Dist. 2011) (quoting *Purmal v. Robert N. Wadigton & Assocs.*, 354 Ill. App. 3d 715, 723 (1st Dist. 2004)). "It is the identity of interest that controls in determining privity, and not the nominal identity of the parties." *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296 (1992).

The interests of all Landowners, whether or not they appeared in the *Adams County* appeal, are identical. All landowners, appealing or non-appealing, own property named in by ATXI in eminent domain actions related to a project deemed necessary under a certificate issued in ICC Docket 12-0598. All landowners are represented by the same counsel in the condemnation proceeding, and this same counsel also represented landowner interests in the ICC proceeding and the *Adams County* appeal—indeed, the non-appealing landowners not only had a "virtual representative" on appeal, *see Agolf*, but the very same one. All have presented the same arguments before the circuit court, without any distinction or difference: all filed the same motion to dismiss and traverse, all of which raised the same grounds for dismissal. All allege they were denied due process in ICC Docket 12-0598, based on the alleged failure of the ICC Clerk to mail a notice published on January 31, 2013. All received the same relief when the circuit court granted their motion to dismiss and all consented to the consolidation of these cases on appeal.

The Landowners have defended this case on a united basis, with no distinction between those who appealed and those who did not, and there is no reason for this Court to treat them otherwise. With respect to the issue in dispute—was due process denied during the ICC proceeding—there is no way to distinguish these landowners, other than by name. Their interests are identical; they are privies bound by the decision in *Adams County*.

D. The *Adams County* decision was not dicta.

Landowners also claim that the determinations of the *Adams County* court were dicta and so do not have a preclusive effect. However, the decision in *Adams County* was

not dicta. Landowners acknowledge the *Adams County* "holding" and admit that the Fourth District "decided" there were no protectible rights in the ICC proceedings. Resp. pp. 19, 37. The Fourth District determined that because the Administrative Law Judge permitted Landowners to participate in the ICC proceeding, it was "appropriate to address the merits of [Landowners'] appeal." *Adams County* 2015 IL App (4th) 130901, ¶ 76. The Fourth District considered the merits of Landowners' claims, as acknowledged by Landowners in their Response, and ultimately held that "the due process rights of [Landowners] were not violated." *Adams County* 2015 IL App (4th) 130901, ¶ 80. Both *res judicata* and collateral estoppel preclude Landowners from again arguing these same claims that were decided in *Adams County*.

III. The circuit court's consideration of the ICC process and orders was not within its general subject matter jurisdiction, as such matters are exclusively reserved in the appellate court.

Landowners do not dispute that the circuit court lacked jurisdiction to review and invalidate the ICC certificate and render an opinion as to the constitutionality of ICC procedures under Section 8-406.1. The circuit court only has authority to review ICC proceedings and orders as provided by law. *People ex rel. Hartigan v. Illinois Commerce Commission*, 148 Ill. 2d 348, 366 (1992). The circuit court possessed no authority to review ICC process and decisions where such authority rests within the exclusive jurisdiction of the appellate court. 220 ILCS 5/10-201(a) (West 2014). Furthermore, general subject matter jurisdiction will not confer jurisdiction in the circuit court where such jurisdiction is exclusively reserved for the appellate court. *See Commonwealth Edison Co. v. IBEW, Local Union No. 15*, 961 F. Supp. 1154, 1168 (N.D. Ill. 1996).

While the circuit court is not divested of the authority to hear eminent domain cases, the decision to dismiss these eminent domain cases was not based on a deficiency in the eminent domain complaint and proceedings, but instead upon a perceived deficiency in the ICC proceedings, as evident from the circuit court's exclusive reliance on the facts of the ICC proceeding in the issuance of its order. Such decision effectively invalidated the ICC order previously upheld in *Adams County*, which is not within the general subject matter jurisdiction of the circuit court.

IV. Landowners do not dispute the fact that a hearing was held on their traverse claims, but Landowners declined to put on any evidence in support of those claims. As such, Landowners' traverse claims must be denied.

Landowners raised no argument on their traverse other than that a decision on the traverse claims was unnecessary because the eminent domain cases were dismissed. Landowners implicitly acknowledge that hearing was held on the traverse claims, and Landowners declined to offer any evidence in support of those claims. Should this Court reverse the circuit court's dismissal of the eminent domain complaints, remand with direction to deny Landowners' traverse claims is necessary where Landowners undeniably offered no evidence to support their traverse claims.

CONCLUSION AND RELIEF REQUESTED

For these reasons, ATXI respectfully requests this Court reverse the order granting the Landowners' Motion to Dismiss, and remand with direction to the circuit court to deny the Traverse and proceed to a determination of just compensation.

Dated: April 30, 2018

Respectfully submitted,
Ameren Transmission Company of Illinois,

/s/ Lisa A. Petrilli
One of its Attorneys

Matthew R. Tomc (6295507)
AMEREN SERVICES COMPANY
One Ameren Plaza
1901 Chouteau Avenue
St. Louis, Missouri 63166
(314) 554-4673
mtomc@ameren.com

Albert D. Sturtevant (6278551)
Nikhil Vijaykar (6327738)
WHITT STURTEVANT LLP
180 N. LaSalle Street, Suite 2020
Chicago, Illinois 60601
(312) 251-3017
(312) 251-3098
sturtevant@whitt-sturtevant.com
vijaykar@whitt-sturtevant.com

David A. Rolf (6196030)
Lisa A. Petrilli (6280865)
SORLING NORTHRUP
One North Old State Capitol Plaza, Ste. 200
Post Office Box 5131
Springfield, Illinois 62705
(217) 544-1144
darolf@sorlinglaw.com
lapetrilli@sorlinglaw.com

CERTIFICATE OF COMPLIANCE

I, Lisa A. Petrilli, Attorney for the Plaintiff-Appellant, certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of the reply brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the reply under Rule 342(a) is 20 pages.

Dated: April 30, 2018

/s/ Lisa A. Petrilli

Attorney for Plaintiff/Appellant
Lisa A. Petrilli (6280865)
SORLING NORTHRUP
One North Old State Capitol Plaza, Suite 200
Post Office Box 5131
Springfield, IL 62705-5131
(217) 544-1144
lapetrilli@sorlinglaw.com

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I electronically filed the foregoing with the Clerk of the Court using the Odyssey eFile IL System which will send notification of such filing to the following:

S. Craig Smith
Asher & Smith
1119 North Main Street
Post Office Box 340
Paris, IL 61944
craig@ashersmithlaw.com

Michael T. Reagan
LAW OFFICES OF MICHAEL T. REAGAN
633 LaSalle Street, Suite 409
Ottawa, IL 61350
mreagan@reagan-law.com

Illinois Attorney General
Attn: Civil Division
100 West Randolph Street, 12th Floor
Chicago, IL 60601
civilappeals@atg.state.il.us

Albert D. Sturtevant
Nikhil Vijaykar
WHITT STURTEVANT LLP
180 N. LaSalle Street, Suite 2020
Chicago, Illinois 60601
(312) 251-3017
(312) 251-3098
sturtevant@whitt-sturtevant.com
vijaykar@whitt-sturtevant.com

Matthew R. Tomc
AMEREN SERVICES COMPANY
One Ameren Plaza
1901 Chouteau Avenue
St. Louis, Missouri 63166
(314) 554-4673
mtomc@ameren.com

Anastasia M. O'Brien
Richard G. Bernet
Exelon Business Services Company
10 S. Dearborn Street, 49th Floor
Chicago, IL 60603
richard.bernet@exceloncorp.com

Matthew E. Price
Jenner & Block LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
mprice@jenner.com

Laura A. Harmon
Garrett W. Thalgott
Office of General Counsel
Illinois Agricultural Association
1701 Towanda Avenue
Bloomington, IL 61701
(309) 557-2470
lharmon@ilfb.org

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/ Lisa A. Petrilli

Attorney for Plaintiff/Appellant
Lisa A. Petrilli (6280865)
SORLING NORTHRUP
One North Old State Capitol Plaza, Suite 200
Post Office Box 5131
Springfield, IL 62705-5131
(217) 544-1144
lapetrilli@sorlinglaw.com