No. 14-657

In The
Supreme Court of the United States

DETROIT INTERNATIONAL BRIDGE COMPANY,

Petitioner,

v.

GREGORY G. NADEAU, ACTING ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR *AMICUS CURIAE* NEBRASKA EASEMENT ACTION TEAM IN SUPPORT OF PETITIONER

DAVID A. DOMINA, ESQ.
(*Counsel for Amicus Curiae*)
DOMINA LAW GROUP PC LLO
2425 S. 144th Street
Omaha, NE 68144
(402) 493-4100
dad@dominalaw.com
Lawyers for Amicus Curiae
Nebraska Easement Action Team

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The *Amicus Curiae* writes concerning one prong of the first question presented by the Detroit Int'l Bridge Company's Petition for Writ of Certiorari. Isolated, the issue of concern to the *Amicus* is:

> Whether agency action and judicial review are flawed where the Record compiled for an APA proceeding under 5 U.S.C. §§ 701-706 discloses that the lead U.S. agency is not a foreign policy-executing agency, but . . . gave deference to a foreign government's perceived view without proof of what constituted that government's position, or of the process used to reach the position.

CORPORATE DISCLOSURE STATEMENT

Nebraska Easement Action Team, Inc. (NEAT) is a Nebraska Non-profit Corporation. It has no members. NEAT has no relationship to the Petitioner.

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Nebraska Easement Action Team, Inc. (NEAT) seeks to advance the rights and interests of farmers, ranchers and other landowners confronted with the adverse exercise of eminent domain. This sovereign power is threatened to be exercised against Nebraska landowners by a for-profit foreign corporation to build a crude oil pipeline, known publicly as the TransCanada Keystone XL pipeline (KXL). KXL requires a Presidential Border Crossing Permit to be built.

The *Amicus* expresses concerns here because the agency and judicial deference given in this case to an unproven, alleged position of a foreign nation in a border crossing case deprives interested parties of judicial review. The decisions below permit NEPA and other agency reviews to be avoided by mere assertion, without proof, of a foreign nation's position.

The *Amicus* was filed with the consent of both the Petitioner and Respondent.

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. No counsel for party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation of submission.

SUMMARY OF ARGUMENT

The case at Bar involves international border crossing issues at the Canadian Border. Issues presented are of interest to the *Amicus Curiae*.

NEAT focuses its attention on an aspect of this case not entirely elevated by the Petition for precise consideration. The case arrives here upon *Administrative Procedures Act* (APA) review of an Agency decision under the *National Environmental Policy Act* (NEPA). Material decision-driving evidence is absent from the Administrative Record. It has escaped judicial review. Yet, the district court and Sixth Circuit gave deference to the unproven, undisclosed position of the Canadian government on the contested proposed new border crossing bridge. They did so on a point of U.S. environmental law, not on one of international law.

The Federal Highway Administration's (FHWA) decision maker gave deference to Canada's perceived position without proof of that position. Canada's alleged position was referenced in documents of FHWA personnel but Canada's proceedings to reach a formal position, and the official expression of that position, are not in the Administrative Record.

The district court and Court of Appeals assumed Canada's position was as generally reported in hearsay statements of federal employees. It lacked evidence of this actual position. A dangerous precedent is set by the district court's decision, 858 F. Supp. 839 (E.D. Mich.) (App. C to Petition for Writ), and its

advancement by Sixth Circuit affirmation, 756 F.3d 447 (E.D. Mich.) (App. B).

NEAT opposes comity for a foreign nation's unproven position where that position is unknown to an administrative record and unavailable for judicial review. Such deference should not rise to a decisional level over matters as significant as an international border crossing that impacts commerce and the environment. To allow such deference would sacrifice U.S. nationalism. It would marginalize the APA for agency review by the judiciary and offend the clear Congressional mandate of the APA.

ARGUMENT

I. Due process is denied when an APA judicial review of a National Environmental Policy Act (NEPA) determination turns on deference to a foreign nation but its proceedings are not in the Administrative Record or available for judicial review.

Landowner citizens in the United States, like the *Amicus Curiae*, have a fundamental right, and basic interest, in assuring that their property cannot be taken for an ostensible public purpose without knowing, in advance, that appropriate protocol has been observed to protect the environment. They are entitled to certainty that the *National Environmental Policy Act*, 42 U.S.C. § 4321 is fulfilled.

The Administrative Record is the source of evidence upon which NEPA decisions must be made in an APA appeal. There is no other source of data from which the decision can be made. An agency's refusal or failure to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of 5 U.S.C. § 706, and denies due process of law. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

In this case, the Administrative Record discloses many studies of commerce between the United States and Canada at Detroit, the available international border crossings available for commerce, the need for an additional crossing, and the placement for that crossing that would be most advantageous, and most compliant with NEPA. But none of this data was decisional. Instead, FHWA approved a plan to build a new, publicly owned bridge across the Detroit River between Michigan and Canada, because Canada seems to want one.

This is not proven in the Administrative Record. The Record describes comments and information gathered in the U.S., not Canada. Nothing in the Administrative Record discloses the process, standards, evidence, or airing of evidence, employed by candidate to reach an official position. Instead, the Record discloses the perception of a federal agency employee about what he thinks Canada wants. It is true that:

> "'(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy*, . . . 416 U.S. [134] at 167-168, 94 S. Ct. [893] at 1650-1651, 47 L. Ed. 2d 18 [(1974] (Powell, J., concurring in part); *Goldberg v. Kelly*, . . . 397 U.S. [254] at 263-266, 90 S. Ct. [893], at 1018-1020. . . .

Matthews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). Due process is denied, however, where evidence is not required at the threshold and there are no facts to support an administrative decision. This is because:

> . . . identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

> safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., *Goldberg v. Kelly*, supra, 397 U.S., at 263-271, 90 S. Ct., at 1018-1022.

Mathews v. Eldridge, 424 U.S. 319, 334-335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

The courts below perceived that Canada concluded there would be no adverse environmental impact from the project on its side of the border. Without evaluation of the evidence, or in overt expression of Canada's position in the Record, this is an impossible judgment to make. The environmental laws in the two nations differ greatly. Canada's *Environmental Assessment Act*, 2012, Ch. 19, § 52 (2012) (Can.) ("CEAA") demands no consideration of either a) the necessity for, or b) alternative placements for, a new bridge. The U.S.'s NEPA commands FHWA to give a "hard look" at the option of building no new bridge – the "no build" option. NEPA also requires a "hard look" at alternative locations. Markedly different legal criteria could produce different official Government positions; and, the Canadian position could be utterly inconsistent with U.S. legal policies. Comity cannot be extended to the foreign nation without evidence that its extension is consistent with U.S. interests.

Detroit Int'l Bridge Company's Petition for Writ of Certiorari describes several studies reaching conclusions supportive of a new bridge, and others to the contrary. The conflicting proposals are controversial. Judging them requires disciplined focus on facts. This is undermined by presuming a foreign government's position, using comity to elevate it, and allowing the elevated position to overwhelm U.S. environmental interests.

This Court is not asked to correct a factual error. Instead, it is asked to establish a standard to govern shared international environmental concerns that arise in projects that impact the United States and a foreign nation. This new standard should require that legal differences between environmental laws in affected nations be harmonized in cases involving construction of international border crossing apparatus by requiring compliance with the most rigorous standard of either affected nation.

The *Amicus* perceives risks that land can be taken from Americans on the strength of such rumors. Unless this is halted, by a writ of certiorari directed to the Sixth Circuit in this case, the judiciary fails in its mission to stand as a check against such abuses.

Real evidence is required in APA cases. And it must be in the record. If it is not found there, the record is flawed, and the proceedings must begin anew so facts can be found, and a decision can be based upon facts.

The Sixth Circuit's decision is an outlier in the law. It is at odds with the holdings of other circuits. For example, *Crickon v. Thomas,* 579 F.3d 978 (9th Cir. 2009), concluded in a rule-making case that evidence is necessary:

> [T]he BOP gave no indication of the basis for its decision. It did not reference pertinent research studies, or case reviews. It did not describe the process employed to craft the exclusion. It did not articulate any precursor findings upon which it relied. It did not reveal the analysis used to reach the conclusion that the categorical exclusion was appropriate. Indeed, the administrative record is devoid of any substantive discussion of the rationale underlying the BOP's exercise of its discretion.

579 F.3d at 985. This Court's decisions command that the administrative "agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfgrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 49 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1804, 173 L. Ed. 2d 738 (2009). The agency decision must be based on U.S. law. Where controlling U.S. law exists, it controls over the expressions of a foreign country based on its foreign law.

Discretionary agency decision making is not permissible where the law defines what must be done and leaves no room for discretion. This Court so held

in Board of Immigration Appeals decisions in deportation cases. *Judulang v. Holder,* 132 S. Ct. 475, 485, 181 L. Ed. 2d 449 (2011). [A]n agency must abide by its own regulations. *Vitarelli v. Seaton,* 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959). Where Congress gives statutory direction, the judiciary requires that "the agency follow that law." *Heckler v. Chaney,* 470 U.S. 821, 835, 105 S. Ct. 1649, 1657, 84 L. Ed. 2d 714 (1985).

These rules were not observed by FHWA or the reviewing courts below. This occurred because the decision makers bowed to Canada's perceived preferences. Acts of Congress do not go on vacation because foreign nations dislike them. They must be followed by U.S. agencies. *F.C.C. v. NextWave Personal Comm., Inc.,* 537 U.S. 293, 299, 123 S. Ct. 832, 838, 154 L. Ed. 2d 863 (2003). The APA itself requires federal courts to set aside agency action that is "not in accordance with law." 5 U.S.C. § 706(2)(A). *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413-414, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

The project at issue, the international implications, and the undeniably predominant role of environmental concerns in international policy, all make this case "cert-worthy." These considerations commend this case for issuance of a writ of certiorari, and encapsulate the concerns that prompted the *Amicus* to offer this support.

II. Comity does not demand or allow judicial affirmation of an Agency NEPA determination based on deference to a foreign nation where its proceedings and statements are not in the Administrative Record or available for judicial review.

The *Amicus* perceives considerable risk in the Sixth Circuit's willingness to allow the FHWA to give unchecked deference to Canada's perceived position about what is environmentally good for it. This was done despite the absence of evidence in the Administrative Record of Canada's law, its standards, or its process of testing the application of those legal standards to the facts concerning this project.

Comity for foreign nations is important to international cooperation and progress. Comity should be freely given where possible – but never at the expense of the laws of the United States. As this Court said in 2014:

> Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983).

Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2255-6, 189 L. Ed. 2d 234 (2014) (7-1 decision). Limitations have always been recognized where comity is raised. Comity does not permit those who violate U.S. laws to escape the consequences:

> "[I]f crimes are committed on board [a foreign-flag vessel] of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws." [*Wildenhus's Case,* 120 U.S. 1, 12, 7 S. Ct. 385, 30 L. Ed. 565 (1887).]

Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 130-131, 125 S. Ct. 2169, 2177-78, 162 L. Ed. 2d 97 (2005).

The *Amicus* is concerned that, if comity or deference are given to the perceived Canadian position, there may be no opportunity for judicial review of the NEPA determination. Canada has enacted a statute called the *Bridge to Strengthen Trade Act,* S.C. 2012, c. 31. S.179. Its purpose is to close Canadian courts to review of environmental issues related to the construction of a new bridge between Detroit and Windsor.

This Court recognized the problem for foreign litigants summoned into litigation in the United States when laws here concerning disclosure of items in discovery, and laws in their home jurisdictions are inconsistent. This court held that objections by foreign litigants to discovery should receive "most careful consideration" by U.S. courts to accord "due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Societe*

Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 546, 107 S. Ct. 2542, 2557, 96 L. Ed. 2d 461 (1987).

But, in the environmental context, litigants can be confronted with the precise opposite problem. The foreign courts can be closed to them, or the foreign process inadequate. If the United States fails to engage in judicial inquiry, the litigant can be denied any semblance of due process. This problem appears to be one of first impression. It has drawn the attention of the few scholars. Gaspard Curioni, *Interest Balancing and International Abstention*, 93 B.U. L. Rev. 621 (March 2013), Brian Pearce, *The Comity Doctrine As A Barrier To Judicial Jurisdiction: A US-EU Comparison*, 30 Stan. J. Intl. L. 525 (Summer 1994). The issue is one of increasing importance, particularly in the environmental context. It makes the case at Bar "cert-worthy."

This Court employed the Act of State doctrine where a decision by a federal court in the United States might embarrass a foreign government or otherwise interfere with U.S. foreign relations. But the Act of State doctrine "has no application . . . [to a case where] no foreign sovereign act is at issue." *W.S. Kirkpatrick & Co. v. Environmental Tektronix Corp. Int'l,* 493 U.S. 400, 409-410, 110 S. Ct. 701, 707, 107 L. Ed. 2d 816 (1990). In this case, the NEPA question under APA review concerns the laws of the United States, applied within the United States. The question concerns NEPA review and environmental impact in the United States, not Canada. U.S. interests

are at issue, not Canadian ones. NEPA does not apply to Canada; it is the law in the U.S. There is no foreign sovereign act at issue here.

The Act of State doctrine is not a factor in this case. Instead, the question is can NEPA's standards be overridden by an imperfect expression of Canadian governmental preference about the bridge project. The *Amicus* urges this Court to grant *certiorari* and squarely hold on the merits that comity for a foreign nation's preferences has no role in federal judicial decision making where extending comity is inconsistent with U.S. law.

This Court is urged to adopt this standard from earlier dicta:

> Again, Mr. Justice Story says: "It has been thought by some jurists that the term 'comity' is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. . . . Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." And, after further discussion of the matter, be concludes: "There is, then, not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." Story, Confl. Laws, §§ 33-38.

Hilton v. Guyot, 159 U.S. 113, 165, 16 S. Ct. 139, 144, 40 L. Ed. 95 (1895).

Simply, FHWA and the Courts below misapplied comity doctrine and created space for an arguable new rule of comity elevating foreign law over U.S. environmental laws. A new governing precedent from this Court is needed. The new ruling should eradicate any thought that U.S. environmental laws can be overridden by the will of a foreign country.

CONCLUSION

The *Amicus* respectfully urges the Court to grant *certiorari* to the Sixth Circuit and hear Detroit Int'l Bridge Company's First Issue on the merits.

Respectfully submitted,

DAVID A. DOMINA, ESQ.
(*Counsel for Amicus Curiae*)
DOMINA LAW GROUP PC LLO
2425 S. 144th Street
Omaha, NE 68144
(402) 493-4100
dad@dominalaw.com
Lawyers for Amicus Curiae
Nebraska Easement Action Team