IN THE SUPREME COURT OF IOWA

Supreme Court No. 23-1186
District Court No. CVCV101911

SUMMIT CARBON SOLUTIONS, LLC,

Plaintiff-Appellee,

v.

KENT KASISCHKE,

Defendant-Appellant.

Appeal from the Iowa District Court in and for Hardin County
The Honorable Amy M. Moore

FINAL BRIEF OF PLAINTIFF-APPELLEE SUMMIT CARBON SOLUTIONS, LLC

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1. Whether Iowa Code § 479B.15, which gives pipeline companies the right to undertake land surveys and examinations, is facially constitutional under the Iowa and United States Constitutions.

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- Iowa Code § 479B.15
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2. Whether Appellee Summit Carbon Solutions, LLC was entitled to injunctive relief under Iowa Code § 479B.15.

- Iowa Code § 479B.15
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- *City of Okoboji v. Parks*, 830 N.W.2d 300 (Iowa 2013)
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- *City of Riverside v. Metro Pavers, Inc.*, No. 16-0923, 2017 WL 2875687 (Iowa Ct. App. July 6, 2017)
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- *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330 (Iowa 1976)

ROUTING STATEMENT

In accordance with Iowa Rule of Appellate Procedure 6.1101(2), the Supreme Court of Iowa should retain this case because it involves substantial constitutional questions about a state statute, substantial issues of first impression, and fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by the Supreme Court of Iowa.

STATEMENT OF THE CASE

Appellee Summit Carbon Solutions, LLC is developing an interstate carbon dioxide (CO_2) pipeline that will transport captured CO_2 through a network of more than 2,000 miles of underground pipeline across five states (Iowa, South Dakota, North Dakota, Minnesota, and Nebraska). App. 180 (Trial Tr. 18:17–24); App. 36 (Rorie Decl. ¶ 2); App. 10 (Am. Pet. ¶ 1); Ans. to Countercl. p. 1–2, ¶ 1. In Iowa, Summit's pipeline is expected to traverse more than 700 miles through 30 counties. App. 180–181 (Trial Tr. 18:25–19:2); App. 119 (Pl.'s Trial Ex. 1).

The pipeline project is underway. App. 180 (Trial Tr. 18:17–21); App. 36 (Rorie Decl. ¶ 2); App. 10 (Am. Pet. ¶ 1); Ans. to Countercl. p. 1–2, ¶ 1. On September 13, 2021, Summit held an informational meeting about its proposed pipeline—as Iowa Code Chapter 479B requires—in Hardin County, Iowa, where Appellant Kent Kasischke's property is located. App. 182–183 (Trial Tr. 20:25–21:24); App. 38 (Rorie Decl. ¶¶ 10–12); App. 7 (Rorie Aff. ¶ 5); App. 120–122 (Pl.'s Trial Exs. 2, 3). Then, on January 28, 2022, Summit filed a petition with the Iowa Utilities Board (IUB) for a permit to construct, operate, and maintain the proposed CO_2 pipeline. App. 114–119 (Pl.'s Trial

Ex. 1).[1] Summit is in the process of securing the necessary permits and negotiating with landowners for land access. App. 181–182 (Trial Tr. 19:18–20:16); App. 36 (Rorie Decl. ¶ 3).

The state permitting process is nearly completed: The IUB's hearing on Summit's application (which ran for 25 hearing days) has concluded and, after post-hearing briefing, the IUB will render a decision.[2] In addition to preparing to build the pipeline, Summit and its affiliates have also been engaging with potential customers and executing agreements to transport customers' CO_2 after the pipeline is operational. App. 180–182 (Trial Tr. 18:17–21, 19:18–20:16); App. 36 (Rorie Decl. ¶ 3).

To prepare for construction and to appraise properties, Summit must enter and examine the property along the proposed route to complete preliminary civil, environmental, archaeological, and soil surveys and investigations. By statute, Iowa law permits those surveys and authorizes statutory injunctions to enforce that right:

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[1] *See* Petition, *In re Summit Carbon Sols., LLC*, No. HLP-2021-0001 (Iowa Utils. Bd. Jan. 28, 2022), https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2082361&noSaveAs=1.

[2] *See* Order Establishing Briefing Schedule and Addressing Brief Page Limits, *In re Summit Carbon Sols., LLC*, No. HLP-2021-0001 (Iowa Utils. Bd. Nov. 17, 2023), https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2134615&noSaveAs=1.

> After the informational meeting or after the filing of a petition if no informational meeting is required, a pipeline company may enter upon private land for the purpose of surveying and examining the land to determine direction or depth of pipelines by giving ten days' written notice by restricted certified mail to the landowner… and to any person residing on or in possession of the land. The entry for land surveys shall not be deemed a trespass and may be aided by injunction. The pipeline company shall pay the actual damages caused by the entry, survey, and examination.

Iowa Code § 479B.15.[3]

In accordance with § 479B.15, Summit sent Kasischke ten days' written notice by restricted certified mail *three times*—first on March 12, 2022, then a second time on July 14, 2022, and finally on May 4, 2023—informing him that Summit intended to access his property to conduct surveys and examinations to determine the appropriate depth and direction of the proposed pipeline. App. 192–193, 195–196, 198–199 (Trial Tr. 31:17–32:9, 46:15–47:17, 65:25–66:9); 36–37 (Rorie Decl. ¶¶ 4–8); App. 7–8 (Rorie Aff. ¶¶ 6–9); App. 123–139 (Pl.'s Trial Exs. 4–8, 17–18). Kasischke refused Summit entry. App. 38 (Rorie Decl. ¶ 14–15); App. 8 (Rorie Aff. ¶ 10).

[3] Summit will use the terms "survey" and "survey access" as shorthand for all of the access that Iowa Code § 479B.15 authorizes, whether denominated as "examinations," "surveys," or otherwise.

Because Kasischke persisted in his refusal, Summit petitioned the district court for an injunction permitting access to Kasischke's property under Iowa Code § 479B.15. App. 38 (Rorie Decl. ¶ 15); App. 10–15 (Am. Pet.).[4] In his answer to the petition, Kasischke admitted that Summit is a pipeline company for purposes of Iowa Code § 479B.15; Kasischke also counterclaimed arguing that Iowa Code § 479B.15 is facially unconstitutional. App. 16, 25–34 (Ans. & Countercl. p. 1, ¶ 1, p. 10–19, ¶ 1–34).

On March 17, 2023, Summit moved for summary judgment on the grounds that Iowa Code § 479B.15 is facially constitutional and that Summit had satisfied the statute's requirements for entry. Pl. Mot. for Summ. J. at 1. In opposing Summit's motion, Kasischke claimed—for the first time in the case—to have an unnamed tenant on his property who had not received notice of the surveys and examinations. Resp. Mem. in Opp. to Summ. J. at 13–14. In the interest of judicial economy, Summit withdrew its summary judgment motion as to its affirmative claim for survey access but not as to Iowa Code § 479B.15's constitutionality. Pl. Corrected & Substituted Reply in Supp. of Mot. for Summ. J. at 1. On May 10, the district court granted Summit's

[4] Summit filed its original petition on September 19, 2022 and its amended petition on October 19, 2022. Because the amended petition is the operative pleading, all references to Summit's petition are to the October 19, 2022 amended petition.

motion, holding that Iowa Code § 479B.15 is facially constitutional under both the Iowa and United States Constitutions. App. 85–95 (Order on Pl.'s Mot. for Summ. J.).

On May 16, 2023, the district court held a bench trial on the sole remaining issue in the case—whether Summit had complied with Iowa Code § 479B.15's requirements for survey access: (1) whether Summit was a pipeline company under the statute, (2) whether it held an informational meeting in Hardin County, and (3) whether it sent ten-days' notice according to the statute's requirements. App. 95 (Order on Pl.'s Mot. for Summ. J.); App. 178 (Trial Tr. at 1); App. 102 (Order on Pl.'s Pet. for Injunctive Relief). Since the case's inception, Kasischke had admitted that Summit was a pipeline company under the statute. App. 16 (Ans. & Countercl. ¶ 1). But during the trial, Kasischke made an oral motion to amend his answer to deny that fact. App. 217 (Trial Tr. 118:9–12). The district court granted the motion to amend and held the record open so that each party could submit additional briefing and affidavits on that narrow issue. App. 227–233 (Trial Tr. 154:17–160:18). Several days after trial, Kasischke filed an untimely motion for reconsideration of the district court's order upholding Iowa Code § 479B.15's constitutionality. Def.'s Mot. For Reconsideration at 1–2.

On July 11, 2023, the district court granted Summit's petition. App. 109 (Order on Pl.'s Pet. For Injunctive Relief). The court issued findings of fact and conclusions of law on each open issue. *Id.* The court also denied Kasischke's motion for reconsideration. App. 111–112 (Order Denying Def.'s Mot. For Reconsideration). Kasischke now appeals the district court's (1) grant of summary judgment in Summit's favor, (2) denial of his motion for reconsideration, and (3) post-trial findings of fact and conclusions of law.

ARGUMENT

I. IOWA CODE § 479B.15 IS FACIALLY CONSTITUTIONAL UNDER BOTH THE IOWA AND UNITED STATES CONSTITUTIONS.

A. Error Preservation.

Kasischke preserved for appeal the issue of whether Iowa Code § 479B.15 is facially constitutional. The district court's May 10, 2023 order granting summary judgment in Summit's favor, combined with its findings of fact and conclusions of law and its July 11, 2023 order denying Kasischke's motion for reconsideration, constitute a final judgment for appellate purposes. *See* Iowa R. App. P. 6.101(1)(d).

B. Standard of Review.

This Court reviews a constitutional challenge de novo. *State v. Mitchell*, 757 N.W.2d 431, 434 (Iowa 2008) (citation omitted). With a facial challenge

to a statute's constitutionality, the challenger must "refute every reasonable basis upon which the statute could be found to be constitutional." *Id.* This Court "presume[s] [statutes] to be constitutional, and a challenger must prove unconstitutionality beyond a reasonable doubt." *Id.* Accordingly, Kasischke must demonstrate, beyond a reasonable doubt, that "no application of the statute could be constitutional under any set of facts." *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 764 (Iowa 2019) (citation and quotation marks omitted). A facial challenge is "the most difficult . . . to mount successfully because the challenger must show the law 'is unconstitutional in all its applications." *League of United Latin Am. Citizens v. Pate*, 950 N.W.2d 204, 209 (Iowa 2020) (citation and quotation marks omitted); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987).

C. Iowa Code § 479B.15 does not authorize a taking.

Kasischke challenges Iowa Code § 479B.15 as authorizing an unconstitutional taking. Appellant's Br. at 31–56. Citing the U.S. Supreme Court's decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), Kasischke contends that Iowa Code § 479B.15 violates the Fifth Amendment to the U.S. Constitution and Article VI, § 18 of the Iowa Constitution because it authorizes survey access that amounts to a taking without requiring just

compensation.[5] But *Cedar Point*, which addressed a challenge to a California union regulation, not a survey statute, makes clear that longstanding restrictions on property rights—like the right to survey access—are not takings.

1. *Cedar Point* reaffirms that longstanding restrictions on property rights are not takings.

Cedar Point was not about survey access. It was about a California regulation requiring all agricultural employers to "allow union organizers onto their property for up to three hours per day, 120 days per year" without compensation for the intrusion. 141 S. Ct. at 2069. The Court held that the regulation constituted a per se physical taking without compensation because it "appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year." *Id.* at

[5] A taking under the Iowa Constitution arises in three ways: "(1) a per se taking arising from a permanent physical invasion of property, (2) a per se taking arising from regulation that denies the owner all economically beneficial ownership, and (3) a regulatory taking based on the balancing of the three *Penn Central* factors." *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 545 (Iowa 2017). Kasischke did not argue at the district court that Iowa Code § 479B.15 constitutes a taking under this framework, so Summit does not address it here. *See Lee v. State*, 844 N.W.2d 668, 688 (Iowa 2014) ("It is a basic rule of appellate law that arguments not raised in the trial court 'cannot be raised for the first time on appeal.'"). In any event, Iowa Code § 479B.15 withstands constitutional scrutiny under either the state or federal framework.

2074. The Court did not suggest, let alone hold, that survey-access statutes suffer from the same constitutional infirmities as the California regulation.

Far from it. Even as the Court invalidated the California regulation, it affirmed that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Id.* at 2079. The Court explained that "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'" *Id.* at 2079 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992)). That principle did not apply in *Cedar Point* because "no traditional background principle of property law requires the growers to admit union organizers onto their premises." *Id.* at 2080. In doing so, the Court rejected the theory that Kasischke peddles here—that every physical invasion of property is a per se taking. *See also id.* at 2078–79 (discussing how not all government-induced flooding is a taking).[6]

[6] Many courts have declined to extend *Cedar Point* beyond its union-regulation context. *E.g.*, *Hardy v. United States*, 156 Fed. Cl. 340, 344–45 (2021); *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1380, 1383 (8th Cir. 2022); *Orlando Bar Grp., LLC v. DeSantis*, 339 So. 3d 487, 491–92 (Fla. Dist. Ct. App. 2022), *review denied*, No. SC22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022), *cert. denied*, 143 S. Ct. 980 (2023); *Gonzales v. Inslee*, 535 P.3d 864, 872–73 (Wash. 2023); *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 551–53 (2d Cir. 2023), *cert. denied*, No. 22-1095, 2023 WL 6379013 (U.S. Oct. 2, 2023);

2. Survey access is a longstanding background restriction on property rights.

Unlike the California union regulation in *Cedar Point*, survey access incidental to the power of eminent domain is a "traditional background principle of property law." *Id.* at 2080. Survey statutes "merely assert[] a 'pre-existing limitation upon the land owners' title.'" *Id.* at 2079 (citation omitted). Iowa Code § 479B.15 reflects a longstanding background restriction on property rights that has existed in this State (and across the Nation) for more than a century. Iowa Code § 479B.15 does not authorize a taking because Kasischke never enjoyed the right to exclude prospective condemnors from surveying his land in the first place. *See Lucas*, 505 U.S. at 1030 ("[I]t was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."); *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E.2d 414, 418 (Va. 2017) ("[T]he common law has long recognized that the right to exclude is not absolute.").

A longstanding background restriction is one that is consistent "with the historical compact recorded in the Takings Clause that has become part of

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United States v. Andrews, No. 3:20-cv-1300, 2022 WL 1443998, at *3 n.3 (D. Conn. May 6, 2022); *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 980–81 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 1085 (2023); *Munzel v. Hillsborough County*, No. 8:21-cv-2185, 2022 WL 671578, at *4 (M.D. Fla. Mar. 7, 2022).

our constitutional culture." *Lucas*, 505 U.S. at 1028. In assessing "historical practice," courts look "primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions." *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020). In *Cedar Point*, the Court relied on *Nichols on Eminent Domain* to explain the distinction between trespass and takings. 141 S. Ct. at 2078 (citing 1 *P. Nichols, The Law of Eminent Domain* § 112, p. 311 (1917)). *Nichols* explains that "[e]ntry by a governmental agency for purposes of conducting a survey generally does not constitute a taking, under either the common law or under applicable statutory guidelines." 2A *Nichols on Eminent Domain* § 6.01(16)(b) (2022). "Inspections for the purposes of surveys and examinations have been allowed," *Nichols* continues, "even in the absence of statutory authority." 6 *Nichols* § 26C.01(1).

Cedar Point also relied on the Restatement of Torts for examples of common-law privileges. 141 S. Ct. at 2079 ("These background limitations also encompass traditional common law privileges to access private property." (citing Restatement (Second) of Torts § 196 (1964))); *see also Barker v. Capotosto*, 875 N.W.2d 157, 166 (Iowa 2016) (citing *Rohlin Constr. Co. v. City of Hinton*, 476 N.W.2d 78, 80 (Iowa 1991)) ("We often turn to Restatements of the Law . . . ."); *Estate of Fields v. Shaw*, 954 N.W.2d 451,

458 (Iowa Ct. App. 2020) ("Iowa courts frequently consult the Restatements as guidance on tort questions."). Like *Nichols*, the Restatement of Torts recognizes the common-law survey privilege. Restatement (Second) of Torts § 211 cmt. c ("The privilege of entry for the purpose of performance or exercise of such duty or authority may be specifically given, as where an employee of a public utility is in terms authorized to enter upon privately owned land for the purpose of making surveys preliminary to instituting a proceeding for taking by eminent domain. Such a privilege of entry may also arise by implication."); *see also* T. Cooley, *Law of Torts* 313–14 (1879) ("[T]he statutes which permit lands to be taken for public purposes may provide for preliminary surveys, in order to determine the necessity for any particular appropriation, and in thus providing, they license an entry upon the lands for the purpose.").

The Model Code on Eminent Domain reflects the same background limitations on property rights: "The owner shall not obstruct a condemnor from entering upon his land prior to filing a declaration of taking for the purpose of surveying the land or making a specified inspection of same, provided that, the condemnor shall compensate the owner for any virtual damages that may result from his entrance upon the land . . . ." 10 *Nichols* Appendix D-2 § 308.

Those sources reflect the long-established and (as far as we can tell) unanimous position of appellate courts across the Country. *See Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 690 (W.D. Va. 2015) ("Indeed, it appears that no court has declared a statute expressly giving a utility the right to enter private property for survey purposes before exercising eminent domain authority facially unconstitutional.").[7] American courts have long recognized—even in the absence of statutory authorization—that an entity with eminent-domain power has a right to enter private land to undertake preliminary surveys or similar investigations. *See Fox v. W. Pac. R.R. Co.*, 31 Cal. 538, 543–44 (1867); *Young v. McKenzie*, 3 Ga. 31, 45 (1847); *Chambers v. Cincinnati & Ga. R.R.*, 69 Ga. 320, 322 (1882); *Thomas v. City of Horse Cave*, 61 S.W.2d 601, 604 (Ky. 1933); *Winslow v. Gifford*, 60 Mass. 327, 329–30 (1850); *Brigham v. Edmands*, 73 Mass. 359, 363

[7] One Iowa district court held that Iowa Code § 479B.15 is unconstitutional. *Navigator Heartland Greenway, LLC v. Koenig*, No. EQCV034863 (Iowa Dist. Ct. May 3, 2023), *appeal filed*, No. 23-0739 (Iowa May 8, 2023). That case was on appeal before this Court but was recently voluntarily dismissed. The district court in *Koenig* misapplied both *Cedar Point* and the legal standard for a facial constitutional challenge. And since the *Koenig* decision, Iowa Code § 479B.15's constitutionality has been upheld twice—once in the decision at issue in this appeal and also by another Iowa court. *See also Navigator Heartland Greenway, LLC v. Hulse*, No. EQCV204557, order at 3–12 (Iowa Dist. Ct. May 30, 2023), *appeal filed*, No. 23-1026 (Iowa June 28, 2023). And before *Cedar Point*, another Iowa court also upheld Iowa Code § 479B.15's constitutionality. *See Dakota Access, LLC v. Johnson*, No. EQCV040450, order at 10–20 (Iowa Dist. Ct. Aug. 7, 2015).

(1856); *Orr v. Quimby*, 54 N.H. 590, 596–97 (1874); *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538, 544 (1877); *Kincaid v. United States*, 35 F.2d 235, 247 (W.D. La. 1929)*, aff'd*, 49 F.2d 768 (5th Cir. 1931)*, rev'd on other grounds sub nom.*, *Hurley v. Kincaid*, 285 U.S. 95 (1932); *see also Klemic*, 138 F. Supp. 3d at 690–91 ("[I]t is clear that the common law recognizes, and state and federal courts have consistently upheld, the privilege to enter private property for survey purposes before exercising eminent domain authority . . . . [A] landowner has no constitutionally protected property right to exclude an authorized utility from entering his property for survey purposes.").

Take, for instance, *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887 (Ga. 1984). There, the Georgia Supreme Court—citing *Nichols*—upheld the common-law right to enter property to survey, inspect, and appraise it. *Id.* at 889. The *Oglethorpe* court explained that "it would be illogical to require the prospective condemnor to institute condemnation proceedings and pay compensation" before a preliminary entry. *Id.* at 890. The court held that "a prospective condemnor is not required to adhere to condemnation procedures and constitutional provisions for compensation before making a preliminary entry" and, surveying the legal landscape, observed that "courts in a vast majority of jurisdictions agree." *Id.*

That includes Iowa. Iowa's very first legislature authorized the taking of private property by a company or individual "to construct a canal or a railroad, or a turnpike, graded, macadamized, or plank road, or a bridge, as a work of public utility although for private profit." Iowa Code § 759 (1851). The legislature also provided an accompanying right of preliminary survey access, providing that "[a] company or person . . . entering upon the land of another for the purpose of making the requisite examination and surveys and doing no unnecessary injury, shall be liable only for the actual damage done, and if sued in such case the plaintiff shall recover only as much cost as damage." *Id.* § 778. The legislature expanded condemnation rights and survey access in 1927 when it authorized county officials to condemn land to obtain gravel for road construction. The officials were permitted "after giving written notice to the owner and the person in possession, [to] *enter upon the land and run a survey*" to determine whether there were sufficient deposits to warrant the condemnation. Iowa Code § 4658-a1 (1927) (emphasis added).

Iowa Code § 479B.15, the statute that Kasischke challenges, followed in that unbroken line of statutes authorizing survey access. It was enacted in 1995, but similar versions of the statute (each addressing survey access for pipeline companies) trace back to at least 1979. *See* 1979 Iowa Acts ch. 118, § 2 (codified at Iowa Code § 479.30 (1981)); 1988 Iowa Acts ch. 1074, § 15

(codified at Iowa Code § 479A.15 (1989)); 1995 Iowa Acts ch. 192, § 42 (codified at Iowa Code § 479B.15 (1997)). The language appearing in § 479B.15 today remains nearly identical to that in its predecessor codified in 1981. *Compare* Iowa Code § 479B.15 (2022), *with* Iowa Code § 479.30 (1981). Section 479B.15 and all the other eminent-domain and survey-access statutes in Iowa are in the heartland of the legislature's authority. The Iowa legislature has always had the power to enact them. *See Iowa State Highway Comm'n v. Hipp*, 147 N.W.2d 195, 199 (Iowa 1966) ("If appellant is to be given the right to enter and make preliminary surveys and investigations it is for the legislature to so provide as done regarding other condemnors and as provided in most states.").

For over 170 years, then, Iowa has statutorily authorized the type of survey access that Summit seeks. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (noting that "the regulatory regime in place at the time the claimant acquires the property at issue" shapes the reasonableness of expectations and informs the background principles analysis for takings). Those Iowa authorities—along with authorities like *Klemic*, *Palmer*, *Nichols on Eminent Domain*, the Restatement of Torts, and the Model Code on Eminent Domain—illustrate that survey-access laws are a longstanding part of American law that "merely assert[] a 'pre-existing

limitation upon the land owner's title.'" *Cedar Point*, 141 S. Ct. at 2079 (quoting *Lucas*, 505 U.S. at 1028–29). They "are consistent with longstanding background restrictions on property rights" and do not constitute a taking. *Id.*

Again, Iowa is not an outlier. "Today, every state has codified the common law privilege of a body exercising eminent domain authority to enter private property to conduct preliminary surveys without trespass liability." *Palmer*, 801 S.E.2d at 418 & n.2. In fact, there are more than 490 survey-access statutes currently codified across the 50 States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. *See* Addendum supporting Mot. for Summ. J. at 1–2 (Nationwide Survey-Access Laws). At least 29 States (plus D.C. and Puerto Rico) have had statutes in effect for more than a hundred years. *Id.* That of course says nothing of common-law survey rights that predate codification efforts.

The bottom line: Kasischke took title to the property subject to the background restriction in Iowa authorizing survey access. That makes this case unlike *Cedar Point*.

Kasischke's attempt to distinguish survey access from *Cedar Point*'s three examples of background restrictions likewise falls flat. The *Cedar Point* Court held that "many" longstanding background restrictions on property rights are not takings, explained that those longstanding background

restrictions include (but are not limited to) "traditional common law privileges to access private property," and then provided a few examples of those common-law privileges (which are only a subset of the broader universe of "longstanding background restrictions" that are not takings). 141 S. Ct. at 2079. But the Court did not limit background restrictions to *only* those examples. They were examples, not an exhaustive list. *Id.* at 2079 ("One such privilege allowed . . . ."). In any event, *Cedar Point*'s examples included government-authorized invasions for both public and private interests (*id.* at 2078–79), so a condemnor's survey authority is consistent with those examples.

There is no hint in *Cedar Point* that the U.S. Supreme Court upended centuries of nationwide survey-access laws when it invalidated a one-off California union regulation with no analog elsewhere in the Nation. Kasischke's contrary position would threaten longstanding laws of all 50 States even though *Cedar Point* did not mention, let alone cast doubt on, those laws.

If adopted, Kasischke's position would invalidate more than 490 statutes across the Nation[8] and would force all prospective condemnors

[8] That includes several more Iowa survey statutes. *E.g.*, Iowa Code § 314.9 (authorizing entry onto "private property for the purpose of making surveys, soundings, drillings, appraisals, and examinations as the agency deems

(including the State of Iowa itself) to condemn property before surveying it, causing condemnation proceedings to proliferate and increasing the burden on property owners, condemnors, the public, and the courts. Fortunately, longstanding principles of Iowa property law—reflecting the consensus across the country—defeat Kasischke's theory.[9]

D. Iowa Code § 479B.15 requires payment for actual damages caused by the entry.

Because the surveys and examinations that Summit seeks are not takings, they do not require just compensation. And even if surveys or examinations authorized under § 479B.15 were to cause any damage, the

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appropriate or necessary to determine the advisability or practicability of locating and constructing a highway on the property or for the purpose of determining whether gravel or other material exists on the property of suitable quality and in sufficient quantity to warrant the purchase or condemnation of the property"); *id.* § 455B.426(2) ("In the evaluation of known or suspected hazardous waste or hazardous substance disposal sites, the director may enter private property and perform tests and analyses"); *id.* § 479.30 (authorizing, after prior notice, entry "upon private land for the purpose of surveying and examining the land to determine the direction or depth of a pipeline").

[9] Kasischke cites *Missouri Highway & Transportation Commission v. Eilers* for the proposition that entities should be required to condemn property to conduct a soil survey because the Missouri court determined that a soil sampling is a taking. *See* Appellant's Br. at 57 (citing *Mo. Highway & Transp. Comm'n v. Eilers*, 729 S.W.2d 471, 474 (Mo. Ct. App. 1987)). But *Eilers* does not accurately reflect Missouri law: Another Missouri court later clarified that pre-condemnation survey rights "include[] the right to do what is reasonable under the circumstances to make a pre-condemnation survey," which may include even "clearing a line of sight through a heavily-wooded and brushy acreage." *Pogue v. Kamo Elec. Coop., Inc.*, 795 S.W.2d 566, 569 (Mo. Ct. App. 1990).

statute provides for the payment of damages. *See* Iowa Code § 479B.15 ("The pipeline company shall pay the actual damages caused by the entry, survey, and examination.").

E. Iowa Code § 479B.15 authorizes the surveys and examinations that Summit intends to perform.

Kasischke argues that Iowa Code § 479B.15 allows "limitless surveys as to type or duration." Appellant's Br. at 54. But even as he challenges "the plain language of 479B.15" (*id.*), Kasischke ignores the statute's plain language and courts' interpretation of it. The statute describes what it authorizes: "surveying and examining the land." *See Dakota Access*, order at 10–20.

Summit's proposed surveys involve primarily visual and limited physical inspection to determine the direction and depth of the proposed pipeline. App. 187–188 (Trial Tr. 26:13–27:19); App. 38 (Rorie Decl. ¶ 13); App. 8 (Rorie Aff. ¶ 11). The statute plainly encompasses what Summit proposes. *See, e.g.*, *Examination*, Oxford English Dictionary (3d ed. 2016, updated online Dec. 2022) ("Investigation of the nature or condition of something by means of visual or *physical inspection*" (emphasis added)); *Examine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/examine (last visited Dec. 18, 2023) ("to test the condition of"); *Survey*, Merriam-Webster,

https://www.merriamwebster.com/dictionary/survey (last visited Dec. 18, 2023) (an "examin[ation] as to [a] condition, situation, or value" of something or "to determine and delineate the form, extent, and position of (such as a tract of land)").

In any event, Kasischke's argument that Iowa Code § 479B.15 is unconstitutional because it "allows limitless surveys as to type and duration" is not proof that Iowa Code § 479B.15 is facially unconstitutional in all its applications. *See* Appellant's Br. at 54 ("Appellant's challenge . . . to the plain language of 479B.15 . . . is a facial one."). To succeed on his facial challenge, Kasischke must demonstrate that Iowa Code § 479B.15 "is unconstitutional in *all* its applications"—not just possibly unconstitutional in *some* applications. *Pate*, 950 N.W.2d at 209. A facial challenge to a statute—which does not turn on evidence because it is a question of law—is therefore "the most difficult . . . to mount successfully." *Id.* Kasischke cannot meet that high bar because—as explained above—Iowa Code § 479B.15 authorizes surveys and examinations that pass constitutional muster under the statute's plain language.

II. SUMMIT HAS MET IOWA CODE § 479B.15'S REQUIREMENTS AND IS ENTITLED TO INJUNCTIVE RELIEF.

A. Error Preservation.

Kasischke preserved the issue of whether Summit complied with Iowa Code § 479B.15's requirements for appeal. The district court held trial on Summit's amended petition and request for injunctive relief on May 16, 2023. The district court's findings of fact and conclusions of law in its July 11, 2023 order granting Summit's petition, combined with its July 11, 2023 order denying Kasischke's motion for reconsideration, constitute a final judgment on this issue for appellate purposes. *See* Iowa R. App. P. 6.101(1)(b).

B. Standard of Review.

This Court reviews de novo the district court's order issuing an injunction. *City of Okoboji v. Parks*, 830 N.W.2d 300, 304 (Iowa 2013). "Although the trial court's factual findings are not binding in an action seeking an injunction, [the reviewing court] give[s] weight to the [district] court's assessment of the credibility of the witnesses." *Id.* The Court reviews evidentiary rulings for an abuse of discretion. *Holmes v. Pomeroy*, 959 N.W.2d 387, 389 (Iowa 2021). "'An abuse of discretion exists when the court exercise[s] its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Mohammed v. Otoadese*, 738 N.W.2d 628, 632 (Iowa 2007) (citation omitted). Finally, Summit agrees that issues of statutory

interpretation are reviewed for errors at law. *See* Iowa R. Civ. P. 6.907. "'The primary rule of statutory interpretation is to give effect to the intention of the legislature.'" *Albrecht v. GMC*, 648 N.W.2d 87, 89 (Iowa 2002) (citation omitted).

C. Summit complied with § 479B.15's requirements.

Under Iowa Code § 479B.15, Summit is entitled to injunctive relief if it (1) is a pipeline company under Iowa Code § 479B.2(4), (2) held a public informational meeting in Hardin County regarding its proposed pipeline project, and (3) provided ten days' written notice by restricted certified mail to Kasischke and to persons it could reasonably determine to be in possession of or residing on the property. On appeal, Kasischke does not challenge the district court's determination that Summit held an informational meeting in Hardin County. *See Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1983) ("A proposition advanced at trial but not argued on appeal is deemed waived."). And at trial and through post-trial briefing, Summit demonstrated that it met the remaining two requirements—it is a pipeline company under Iowa Code § 479B.2(4) and it provided proper notice of its intent to survey and examine Kasischke's property.

1. Summit is a pipeline company.

Iowa Code § 479B.2(4) defines a "pipeline company" as "a person engaged in or organized for the purpose of owning, operating, or controlling pipelines for the transportation or transmission of any hazardous liquid or underground storage facilities for the underground storage of any hazardous liquid." The statute defines a "pipeline" as "an interstate pipe or pipeline and necessary appurtenances used for the transportation or transmission of hazardous liquids." *Id.* § 479B.2(3). And it defines "hazardous liquid" as "crude oil, refined petroleum products, liquefied petroleum gases, anhydrous ammonia, liquid fertilizers, liquefied carbon dioxide, alcohols, and coal slurries."[10] *Id.* § 479B.2(2). The statute does not define "liquefied carbon dioxide."

Summit is a "pipeline company" because it is developing an interstate pipeline to transport CO_2. App. 180 (Trial Tr. 18:17–24; App. 36 (Rorie Decl. ¶ 2). The CO_2 that Summit will transport through its pipeline will be in a supercritical state, meaning that the CO_2 will be pressurized above its critical point, converting the CO_2 to a fluid state. App. 40–41 (Powell Aff. ¶¶ 4–7). Supercritical CO_2 is at higher temperatures and higher pressures than CO_2 in its liquid phase. App. 40–41 (Powell Aff. ¶¶ 5–7). As it stands, there are more

[10] A slurry is a mixture of solids and liquids.

than 5,000 miles of CO_2 pipelines in the United States, and the most common method for transporting CO_2 involves compressing it into a supercritical state. App. 161 (Def.'s Post-Trial Br., Ex. M).

Throughout the case—and nearly through the end of trial—Kasischke admitted that Summit is a pipeline company under the statute. App. 16 (Ans. & Countercl. ¶ 1). Then, just before the trial ended, Kasischke changed his tune in a last-ditch effort to manufacture a factual issue where there was none. App. 217 (Trial Tr. 118:9–12). The crux of Kasischke's argument is that the statutory definition of "hazardous liquid" does not include supercritical CO_2. Kasischke relied on affidavits from two purported experts—Jasper Hardesty and Richard Kuprewicz—for the proposition that "supercritical phase" CO_2 is separate and distinct from "liquid" or "liquified" CO_2 such that Summit's pipeline falls outside Iowa Code Chapter 479B. Def.'s Post-Trial Rebuttal Br. at 2–3 & Attachments 1, 2.

As a threshold matter, the purported expert reports were untimely. Expert disclosures must be made "[n]o later than 90 days before the date set for trial" or, in the case of rebuttal, "[w]ithin 30 days after the other party's [expert] disclosures . . . ." Iowa R. Civ. Proc. 1.500(2)(d). Kasischke waited until *after trial* to disclose his experts. *See City of Riverside v. Metro Pavers, Inc.*, No. 16-0923, 2017 WL 2875687, at *1–3 (Iowa Ct. App. July 6, 2017)

(affirming refusal to consider expert witness affidavit filed after discovery deadline and one day before hearing and granting summary judgment); *Cox v. Jones*, 470 N.W.2d 23, 25–26 (Iowa 1991) (affirming motion to strike expert testimony in medical malpractice case when plaintiffs filed expert certification 13 months past the statutory deadline and failed to show good cause). And as the district court observed, the affidavits are nearly identical to each other. App. 100 (Order on Pl.'s Pet. for Injunctive Relief). Given those facts, the district court was well within its discretion to afford the affidavits little weight. *Mohammed*, 738 N.W.2d at 632 ("An abuse of discretion exists when the court exercise[s] its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.").[11]

Beyond that, the hyper-technical interpretation that Kasischke proposes ignores the Iowa legislature's intent, not to mention industry practice and common sense. The Iowa Legislature enacted Chapter 479B in part "to protect

[11] Kasischke also argues that the trial court "errantly found that . . . [n]either of [Kasischke's] expert witnesses identifies their education, training, background, and experience." Appellant's Br. at 19. He claims that "[t]his is not true as both affidavits include this exact information in the form specific sections on education and background and/or include Curriculum Vitaes." *Id.* The affiants identified their education and background in one version of their filed affidavits, but not in another. *Compare* App. 140–177 (Def.'s Post-Trial Br., Exs. M, N), *with* Def.'s Post-Trial Rebuttal Br., Attachments 1 and 2. If anything, that inconsistency validates the trial court's exercise of discretion in discounting their value.

landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline[.]" Iowa Code § 479B.1. In light of Chapter 479B's purpose, it would make no sense for the State to regulate pipelines transporting CO_2 at *sub*critical temperatures and pressures but not *super*critical temperatures and pressures. *See Ames 2304, LLC v. City of Ames*, 924 N.W.2d 863, 871 (Iowa 2019) (refusing to adopt an interpretation of a statutory provision that would lead to absurd results). As the district court observed, it is "clear that Summit's proposed pipeline is the exact type of hazardous liquid pipeline that the Iowa Legislature intended to be governed by Chapter 479B, regardless of the fact that the carbon dioxide being transported may not always meet a scientifically precise definition of 'liquefied' at every moment in the transportation process." App. 104 (Order on Pl.'s Pet. for Injunctive Relief).

Kasischke accuses the district court of speculation in reaching that conclusion. Appellant's Br. at 20. But examining a statute's purpose to determine legislative intent is not speculation. Quite the contrary: "The goal of statutory construction is to determine legislative intent. . . . Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used." *State v. Dohlman*, 725 N.W.2d 428, 431 (Iowa

2006); *see also Albrecht*, 648 N.W.2d at 89 ("The primary rule of statutory interpretation is to give effect to the intention of the legislature."). And as this Court has noted, "legislative intent is derived not only from the language used but also from the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." *Dohlman*, 725 N.W.2d at 431. The district court properly ascertained the legislature's intent.

The IUB, tasked with issuing permits under Iowa Code Chapter 479B, agrees with the district court's interpretation. In June 2023, an intervenor in Summit's IUB permitting proceeding (who shares Kasischke's counsel) moved to dismiss Summit's permit petition, making the same arguments about the definition of "pipeline company" that Kasischke raises here. *See* Cummins' Mot. to Dismiss, *In re Summit Carbon Sols., LLC*, No. HLP-2021-0001 (Iowa Utils. Bd. June 21, 2023).[12] The IUB rejected that argument and expressly agreed with the district court's conclusion in this case:

> While the Board is not bound by the Hardin County decision, the Board agrees with the conclusion reached by the court. The Iowa Legislature enacted Iowa Code chapter 479B "to protect landowners and tenants from environmental or economic damages which may result from the construction,

[12] Available at https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2122973&noSaveAs=1.

> operation, or maintenance of a hazardous liquid pipeline . . . ." Iowa Code § 479B.1. For the legislators to enact a law not covering the most common method of transporting carbon dioxide by pipe creates an absurd result. *See Ames 2304, LLC*, 924 N.W.2d at 871. This cannot be what the Iowa Legislature intended.

Order Denying Motion to Dismiss at 9, *In re Summit Carbon Sols., LLC*, No. HLP-2021-0001 (Iowa Utils. Bd July 28, 2023).[13] That ruling is correct, even under a *de novo* standard of review, but because the phrase "liquified carbon dioxide" is a highly specialized "term of art within the expertise of the IUB," the IUB's interpretation—even though it occurred outside of this case—is granted deference. *Puntenney v. Iowa Utilities Bd*., 928 N.W.2d 829, 836 (Iowa 2019).

The specialized nature of the phrase is highlighted by the fact that the federal Pipeline and Hazardous Materials Safety Administration (PHMSA)—the agency charged with regulating hazardous liquid pipeline safety—defines "carbon dioxide" as "a fluid consisting of more than 90 percent CO2 molecules *compressed to a supercritical state*." 49 CFR § 195.2 (emphasis added). And PHMSA treats supercritical CO_2 pipelines as "hazardous liquid pipelines" for purposes of federal regulations implementing the federal

[13] Available at https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2125732&noSaveAs=1.

Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq*. *E.g.*, 87 Fed. Reg. 33576, 33578 (June 2, 2022) ("All owners and operators of gas and hazardous liquid pipelines, *including supercritical carbon dioxide pipelines* . . ." (emphasis added)). Indeed, a U.S. Government Accountability Office report on the 2019 amendments to PHMSA regulations notes that the report "includes pipelines that carry *liquefied carbon dioxide*," referring to supercritical CO_2 pipelines using the same phrase found in the Iowa statute.[14]

The bottom line: Iowa Code Chapter 479B governs pipelines transporting supercritical CO_2. Summit is a "pipeline company" under Iowa Code Chapter 479B.

2. Summit complied with Iowa Code § 479B.15's notice requirements.

Iowa Code § 479B.15 requires pipeline companies to give "ten days' written notice by restricted certified mail to the landowner . . . and to any person residing on or in possession of the land." At trial, Summit offered evidence proving that it sent Kasischke *three notice letters*—on March 12, 2022, July 14, 2022, and May 4, 2023—by U.S. Postal Service (USPS) restricted certified mail informing Kasischke of Summit's intent to access his

[14] U.S. Gov't Accountability Office, *Report to Congressional Committees on Pipeline Safety* 1 n.1 (June 22, 2021), https://www.gao.gov/assets/gao-21-493.pdf.

property to complete surveys under Iowa Code § 479B.15. *See* App. 123–124, 129–130, 134–136 (Pl.'s Trial Exs. 4, 7, 17). USPS tracking results corroborate its mailings. *See* App. (125–127, 131–133, 137–139 (Pl.'s Trial Exs. 5, 8, 18). Those records show that the first letter was delivered, but Kasischke refused the second and third letters.[15] *See* App. 125, 132, 137 (Pl.'s Trial Ex's. 5, 8, 18). The USPS return receipt for the first letter bears Kasischke's signature. App. 128 (Pl.'s Trial Ex. 6); App. 223 (Trial Tr. 150:14–22).

As the exhibits and trial testimony proved, Summit (1) listed the correct address on the mailings, (2) designated the mailings for "Restricted Delivery" (which, under the USPS procedures explained below, must be delivered only to the addressee or to the addressee's authorized agent), (3) used proper postage, and (4) deposited the letters in the mail. *See* App. 123–139 (Pl.'s Trial Exs. 4–8, 17–18). Testimony also confirmed that it is Summit's routine custom and practice to send those notices by restricted certified mail. App. 194 (Trial Tr. 33:23–25). That is all that is needed to show compliance with

[15] Despite the USPS tracking records, Kasischke testified that he did not refuse any mailing from Summit. App. 223–224 (Trial Tr. 150:23–151:9). And although he denied receiving Summit's first letter, Kasischke admitted that his signature was on the return receipt. App. 223 (Trial Tr. 150:14–22). The district court found Kasischke's testimony "not credible," "disingenuous," and "at best evasive." App. 100–101 (Order on Pl.'s Pet. for Injunctive Relief).

the mailing requirements. *See Jordan v. Second Inj. Fund of Iowa*, No. 8-346, 759 N.W.2d 4 (Table), 2008 WL 4570309, at *3 (Iowa Ct. App. Oct. 15, 2008); *State v. Williams*, 445 N.W.2d 408, 411 (Iowa Ct. App. 1989). Kasischke offered no credible evidence to contradict the records. Absent contrary evidence, Iowa courts presume that postal workers perform their duties in delivering and returning mail. *See Roshek Realty Co. v. Roshek Bros. Co.*, 87 N.W.2d 8, 13 (Iowa 1957) (explaining that absent evidence to the contrary, "there is the same inference or presumption postal employees will do their duty in returning to the sender a letter not delivered to the addressee as that they will perform their duty in delivering it").[16]

Lacking any evidence to dispute the postal records, Kasischke instead offers attorney argument attempting to cast doubt on Summit's compliance with Iowa Code § 479B.15's notice requirements. *First*, Kasischke asserts that

[16] Kasischke argues that Summit's witness lacked the foundational knowledge to testify regarding the notice letters and mailing labels evidencing Summit's compliance with § 479B.15. *See* Appellant's Br. at 24. That is incorrect. Summit offered evidence establishing that each letter and mailing label "is what [Summit] claims it is." Iowa R. Evid. 5.901(a). Summit's witness testified that he supervised contact with landowners when survey access may be needed, is familiar with Summit's record-keeping practices regarding landowner communication, and reviewed its records. App. 190–192, 194 (Trial Tr. 29:10–31:16, 33:7–22). Furthermore, it is Summit's routine custom and practice to send the statutory notices by restricted certified mail. App. 194 (Trial Tr. 33:23–25). That evidence creates a presumption that the notice letters were mailed. *See Jordan*, No. 8-346683, 759 N.W.2d 4 (Table), 2008 WL 4570309, at *3; *Williams*, 445 N.W.2d at 411.

Summit's earlier letters did not contain the endorsement "Deliver to Addressee Only" or a return receipt, rendering the notice—in Kasischke's opinion—ineffective. Appellant's Br. at 22–23. He bases that argument on Iowa Code § 618.15(2), which defines "restricted certified mail" as meaning—"unless such meanings are repugnant to the context"—"any form of certified mail" that carries a "conspicuous" instruction to "'Deliver to addressee only'" and that provides the mailer with a return receipt showing the date, place, and recipient of the delivery. According to Kasischke, if the envelopes containing the notice letters were marked with words other than "Deliver to addressee only" and if Summit did not receive physical return receipts, then the notice is legally defective.

The district court properly rejected that argument. The USPS has uniform rules and standards for the entire country. Those standards and rules, as laid out in the Domestic Mail Manual, have been incorporated by reference into the Code of Federal Regulations. *See* 39 C.F.R. § 111.1 ("Domestic Mail Manual (DMM) is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. [§] 552(a) and 1 CFR part 51.").

The DMM provides clear guidelines about restricted certified delivery:

> 1.1.8 Additional Delivery Standards for Restricted Delivery. In addition to following standards

> specified under 1.1.7, **postal employees must deliver mail marked "Restricted Delivery" only to the addressee or person authorized in writing as the addressee's agent** and under the following conditions: (Note: USPS may require an acceptable primary form of identification as specified under 608.10.3 from the addressee or agent receiving the mail.) . . .
>
> 3.2.2 Additional Standards for Certified Mail Restricted Delivery. **Certified Mail Restricted Delivery permits a mailer to direct delivery only to the addressee (or addressee's authorized agent).** The addressee must be an individual (natural person) specified by name.

DMM §§ 508.1.1.8, 503.3.2.2 (emphasis added). In other words, mailings marked "Restricted Delivery" or sent by certified mail restricted delivery must be delivered only to the addressee or the addressee's authorized agent. *See id.*

Summit mailed its notice letters by restricted certified mail as evidenced by the envelopes marked "USPS CERTIFIED MAIL" and "RESTRICTED DELIVERY" and by the corresponding tracking results. *See* App. 123–127, 129–139 (Pl.'s Trial Exs. 4–5, 7–8, 17–18). According to the DMM, that means that the letters had to be delivered only to the addressee or the addressee's agent. *See* DMM § 508.1.1.8. That is the functional

equivalent of Iowa Code § 618.15(2)'s requirement to mark the mailing "Deliver to Addressee Only."[17]

Similarly, a return receipt is unnecessary to demonstrate compliance. The USPS tracking report shows exactly what a return receipt would show. In *Woods v. Charles Gabus Ford, Inc.*, the Iowa Court of Appeals found substantial compliance with a statute that required a notice mailing be sent "return receipt requested" without a return receipt: "It is the fact that the notice was sent by certified mail that gave the notice the requisite cachet of importance. . . . A return receipt request would add nothing more." No. 19-0002, 942 N.W.2d 9, 2020 WL 109590, at *8 (Iowa Ct. App. 2020), *aff'd*, 962 N.W.2d 1 (Iowa 2021). Accordingly, Summit's mailings satisfy the statute's requirements.

Second, Kasischke contends that the statute requires actual notice and maintains that he did not receive actual notice. That argument is meritless; it's also a moot point. Kasischke signed for one of the notice letters (*see* App. 128

[17] In any event, Summit's third notice letter to Kasischke contained the words "Deliver to Addressee" on the envelope. *See* Pl.'s Trial Ex. 17. Kasischke argues that "[t]his is an admission that prior [Summit] attempts at service . . . were in fact not in compliance with the law." Appellant's Br. at 24. Kasischke cites no authority for that absurd proposition. Summit's decision to include Kasischke's magic words on its third round of notice (which the law does not require) does not cast any doubt on the earlier mailings' effectiveness.

(Pl.'s Trial Ex. 6); App. 223 (Trial Tr. 150:14–22), so he received actual notice. In any event, Iowa Code § 479B.15 does not require actual receipt of any notice; it requires only that Summit *give* ten days' written notice. *See* Iowa Code § 479B.15 (a pipeline company may enter land for the purpose of surveying "by giving ten days' written notice by restricted certified mail to the landowner"). Summit complied with the statute's plain language by sending the notice letters.

In *L.F. Noll Inc. v. Eviglo*, this Court addressed statutory notice. 816 N.W.2d 391, 393–97 (Iowa 2012). Synthesizing decades of case law, the Court distilled an overarching, general principle: Notice sent by the method required is generally effective when sent to a "valid address" where the party to be noticed may be effectively served. *Id.* at 393–97. The Court held that so long as notice is sent to a valid address, "actual receipt is not required and . . . refusal to accept or to claim registered or certified mail . . . will not defeat service." *Id.* at 397. The IUB confirmed that this same reasoning applies to § 479B.15 when it rejected this same argument made by Kasischke's counsel on behalf of other clients in Summit's IUB permitting proceeding. *See* Order Addressing Stay and Clarification, *In re Summit Carbon Sols., LLC*, No. HLP-2021-0001, at 8, 2022 WL 2651791 (Iowa Utils. Bd. July 5, 2022) ("[G]iving notice and having it either accepted, rejected, or

failed to be claimed satisfies the requirements under [§ 479B.15] and Iowa law." (citing *Eviglo*, 816 N.W.2d at 397)).

Third, Kasischke claims that Summit's failure to give notice to his previously undisclosed tenant dooms Summit's request for injunctive relief. Appellant's Br. at 26. As an initial matter, Kasischke's trial testimony about his alleged tenant was dubious at best. *See* App. 221–222 (Trial Tr. 146:2–5, 147:6–20). The district court observed:

> At [the] hearing, Mr. Kasischke testified regarding a purported farm tenant on his property and Summit's mailings. The court found him to be unconvincing and, at several points, not credible. He maintains that he has had a cash rent farm lease with Luke Mannetter for the past nine years. He argues that Mr. Mannetter is therefore entitled to notice under Iowa Code section 479B.15; it is uncontested that Mr. Mannetter did not receive notice. However, other than his own testimony, Mr. Kasischke did not offer any additional evidence in support of this contention. There was also no evidence presented to identify what land is subject to Mr. Mannetter's claimed leasehold interest.

App. 100 (Order on Pl.'s Pet. for Injunctive Relief). Elsewhere, the district court wrote:

> The court finds it highly improbable that [Mr. Kasischke] could not have produced at least a modicum of written evidence, whether in the form of a lease agreement, payment record, or other documentation, to support his assertion that a leasehold exists. Further, there was no evidence presented that Mr. Mannetter's supposed lease is for

> property that is the subject of this action. Based upon the lack of any additional evidence, coupled with Mr. Kasischke's clearly evasive and implausible testimony regarding Summit's mailings, the court is unable to find that Mr. Mannetter is a "person residing on or in possession of the land" who is entitled to notice.

App. 108 (*Id.*). "Determinations of credibility are in most instances left for the trier of fact, who is in a better position to evaluate it." *State v. Weaver*, 608 N.W.2d 797, 804 (Iowa 2000). "In matters of witness credibility, [this Court is] particularly inclined to give weight to the district court's findings." *Schaffer v. Frank Moyer Constr.*, 628 N.W.2d 11, 20 (Iowa 2001).[18]

Nevertheless, Summit submitted evidence that it endeavored to "giv[e] ten days' written notice . . . to any person residing on or in possession of the land." Iowa Code § 479B.15. Summit's witness testified at trial that Summit identifies people who need to be sent notice letters by reviewing publicly available records like deed, tax, and online records relating to the property. App. 190–191 (Trial Tr. 29:24–30:9). And after Kasischke claimed in his

[18] The credibility determination about Kasischke's alleged tenant also disposes of Kasischke's argument that his tenant is an indispensable party who should have been named in the petition. *See* Appellant's Br. at 26–27. In any case, the district court correctly determined that "the omission of [the alleged tenant] as a named defendant does not preclude the entry of judgment in this matter." App. 101 (Order on Pl.'s Pet. for Injunctive Relief).

summary judgment resistance that an unnamed tenant on his property had not received notice, Summit performed additional due diligence to try to confirm the existence and identity of that tenant or any others. App. 179, 197 (Trial Tr. 8:4–14, 55:6–13). Finding no recorded leasehold or named tenant, Summit acted reasonably in sending the required notice, for a third time, to Kasischke—the person listed on the property's public records. App. 225–226 (Trial Tr. 152:13–15, 153:10–15); App. 134–136 (Pl.'s Trial Ex. 17).

Summit first learned the identity of Kasischke's alleged tenant at trial. App. 221, 225 (Trial Tr. 146:2–5, 152:16–18). As Kasischke testified, his purported tenant has an unrecorded, year-to-year, cash lease to farm the land. App. 222, 225–226 (Trial Tr. 147:6–15, 152:13–15, 153:10–15). Under those circumstances, there was no practical way for Summit to have known about the tenant.

Summit's efforts are sufficient to comply with the statute's notice requirement. That is the conclusion that the IUB reached when it considered the issue. *See* Order Addressing Stay and Clarification at 9, *In re Summit Carbon Sols., LLC*, 2022 WL 2651791. Because Iowa law does not require farmland leases of less than five years to be recorded, pipeline companies are given a "more difficult task" when "the landowner refuses to cooperate" to identify farm tenants. *Id.* So "a good faith effort" to identify people to be

noticed is sufficient. *Id.* at 10. Any other reading of the statute would lead to absurd results because Summit cannot provide notice to parties that it does not know exist or whose identity other parties willfully keep hidden.

D. Summit is entitled to injunctive relief under Iowa Code § 479B.15.

Summit demonstrated that it satisfied each requirement of Iowa Code § 479B.15. Thus, it was entitled to injunctive relief. *See* Iowa Code § 479B.15 ("The entry for land surveys . . . may be aided by injunction."). Kasischke's argument that the district court erred in determining that Summit need not demonstrate irreparable harm and substantial injury (Appellant's Br. at 28) flies in the face of black-letter Iowa law.

There is a difference between an injunction authorized by statute versus an injunction warranted in equity. When a statute specially authorizes an injunction, the usual equitable requirements for an injunction do not apply; an applicant need only meet the statutory conditions. *See, e.g.*, *Worthington v. Kenkel*, 684 N.W.2d 228, 233–34 (Iowa 2004) ("[T]he requirement for the issuance of a statutory injunction may rest solely on proof of a violation of the statute, and the normal rules of equity requiring a showing of irreparable injury and lack of an adequate remedy at law may not apply."); *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 334 (Iowa 1976) ("[W]here a right for injunction arises from statute the usual grounds for injunctive relief need not

be established. It is sufficient to show the conditions specified in the statute."), *overruled on other grounds by State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617 (Iowa 1989).

In enacting Iowa Code § 479B.15, the Iowa legislature established three conditions for the issuance of an injunction to aid entry for land surveys and examinations. Summit was required only to meet those three requirements, not to satisfy the traditional conditions for an equitable injunction. "When the legislature has specifically authorized an injunction . . . it may have already decided these matters [of equitable principles], and the primary role of the court is to enforce the legislative determination." *Kenkel*, 684 N.W.2d at 233. Thus, this Court should affirm the grant of injunctive relief.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

REQUEST FOR ORAL ARGUMENT

In accordance with Iowa Rules of Appellate Procedure 6.903(2)(i) and 6.903(3), Summit Carbon Solutions, LLC respectfully requests oral argument in this matter.

Respectfully submitted this 22 day of January, 2024.

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CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating paper copies of this brief was $0.00.

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This brief complies with the typeface and type-style requirements and type-volume limitations of Iowa Rules of Appellate Procedure 6.903(1)(d), 6.903(1)(e), 6.903(1)(f), and 6.903(1)(g)(1) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font in Microsoft Word for Microsoft 365 MSO (Version 2302 Build 16.0.16130.20754) and contains 11,202 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

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The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on January 22, 2024, which will serve a notice of electronic filing to all registered counsel of record.

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