Supreme Court No. 23-1186
Hardin District Court No. CVCV0101911

IOWA SUPREME COURT

Kent Kasischke
Defendant-Appellant

v.

Summit Carbon Solutions, LLC
Plaintiff-Appellee

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR HARDIN COUNTY
HONORABLE AMY M. MOORE, DISTRICT COURT JUDGE

Final Brief for Defendant-Appellant

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Certificate of Filing

I, Christian T. Williams, certify that I did file the attached Appellant's Proof Brief with the Clerk of the Iowa Supreme Court by EDMS on January 23, 2024.

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Routing Statement

1. This case warrants retention by the Iowa Court of Supreme Court. This appeal, in part, concerns a trial court's ruling that Iowa Code § 479B.15 is unconstitutional. Iowa R. App. P. § 6.1101(2)(a).

Statement of the Case

2. Plaintiff-Appellee Summit Carbon Solutions, LLC seeks to construct a pipeline that will transport its Carbon Dioxide, CO2, throughout Iowa.

3. Part of the proposed pipeline's route is over Defendant-Appellant's land. Appellant's land is in Hardin County, Iowa.

4. On October 19, 2022, Appellee filed an Amended Petition for Injunction in Hardin County District Court seeking an injunction against Appellant. The injunction sought to restrain Appellee from preventing Appellee's efforts conduct land surveys Appellant's land. The purpose of the surveys, Appellee claims, are to determine the depth and direction of the proposed route.

5. Iowa Code § 479B.15 allows the District Court to enter the injunction requested by Appellee. Before an injunction must be granted, Appellee must provide proof that (1) it held an informational meeting on the proposed pipeline project; and (2) that it served Appellant notice of

Appellee's intent to survey Appellant's land. This latter element requires 10 day written notice by restricted certified mail. *Id*.

6. On October 27, 2022, Appellant filed an answer and counterclaim. The pleading denies that Appellant was properly served and also alleges that Iowa Code § 479B.15 is unconstitutional as it allows a taking of Appellant's property rights without just compensation.

7. On April 24, 2023, Summary judgement proceedings occurred. On May 10, 2023, the trial court entered an order finding that Iowa Code § 479B.15 was constitutional.

8. On May 16, 2023 trial commenced on Appellee's Amended Petition. Before the end of trial, the court granted an oral motion to amend Appellee's answer and counterclaim, paragraph 1, switching the answer from "admit" to "deny". An amended answer and counterclaim was filed on May 26, 2023. The effect was to deny that Appellee was a pipeline company within the meaning of Iowa Code Ch. 479B. If Appellee is found to not be a pipeline company, then it cannot utilize the injunction procedure that forms the requested relief in its Amended Petition. Affidavits were permitted to be submitted following the end of trial on May 16.

9. On July 11, 2023, the trial court entered an Order finding that (1) Appellant had been served with notice of the required informational

meeting and Appellee's intent to conduct land surveys on Appellant's land; and (2) that Appellee qualifies as a pipeline company under Chapter 479B.

10. On July 28, 2023, Appellant filed its Notice of Appeal. This appeal asserts that Iowa Code § 479B.15 is unconstitutional, that Appellant was not properly served with notice, and that Appellee is not a pipeline company within the meaning of Chapter 479B.

Statement of Facts

11. On October 19, 2022, Appellee filed an Amended Petition for Injunction in Hardin County District Court seeking an injunction against Appellant. This is the operative Petition. (Appdx. pp. 10-15.).

12. On October 27, 2022, Appellant filed an answer and counterclaim. This pleading denies that Appellant was properly served and also alleges that Iowa Code § 479B.15 is unconstitutional as it allows a taking of Appellant's property rights without just compensation. (Appdx. pp. 16-35).

13. On April 24, 2023, Summary judgement proceedings occurred. On May 10, 2023, the trial court entered an order finding that Iowa Code § 479B.15 was constitutional. (Appdx. pp. 83-96).

14. On May 16, 2023 trial commenced on Appellee's Amended Petition. Before the end of trial, the court granted an oral motion to amend

Appellee's answer and counterclaim, paragraph 1, switching the answer from "admit" to "deny". The effect was to deny that Appellee was a pipeline company within the meaning of Iowa Code Ch. 479B. (Appdx. pp. 227-231; Tr. 154:17-158:9).

15. Because the Court granted the oral motion noted above, the parties were permitted to submit opposing affidavits on the issue of whether Appellee qualifies as a pipeline company.

16. Appellant also filed an amended answer and counterclaim on May 26, 2023. All matters tried on May 16, 2023 were taken under advisement. *Id*.

17. On July 11, 2023, the trial court entered an Order finding that (1) Appellee had complied with Iowa Code § 479B.15 by serving Appellant with notice of the required informational meeting and Appellee's intent to conduct land surveys on Appellant's land; and (2) Appellee qualifies as a pipeline company under Iowa Code Ch. 479B. (Appdx. pp. 97-110).

18. Appellant filed a motion for reconsideration. (Defendant Kent Kasischke's Motion for Reconsideration, May 26, 2023). This was also denied on July 11, 2023. (Appdx. pp. 111-113).

19. The May 10, 2023 and July 11, 2023 Orders constitute a final order for purposes of appeal as all judiciable controversies were decided.

20. On July 28, 2023, Appellant filed its Notice of Appeal, and paid the filing fee. (Appellant's Notice of Appeal, July 28, 2023).

Argument

I. The District Court Erred Finding that Appellee is a Pipeline Company as Defined by Iowa Code § 479B.2

Error Preservation

21. On May 16, 2023 trial commenced on Appellee's Amended Petition. Before the end of trial, the court granted an oral motion to amend Appellee's answer and counterclaim, paragraph 1, switching the answer from "admit" to "deny". The effect was to deny that Appellee was a pipeline company within the meaning of Iowa Code Ch. 479B. (Appdx. pp. 227-231; Tr. 154:17-158:9). Appellant's amended answer and counterclaim which noted the change to paragraph one was filed on May 26, 2023.

22. The parties submitted competing affidavits. An Order was entered on this issue on July 11, 2023. This Order, combined with another order entered on the same date denying a motion for reconsideration, and the Court's May 10, 2023 summary judgment order collectively constituted a final order. *Valles v. Mueting*, 956 N.W.2d 479, 483 (Iowa 2021)(citing Iowa R. App. P. 6.101(1)(b)).

Standard of Review

23. Issues of statutory interpretation are reviewed for correction of errors at law. *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018).

Argument

24. Before the end of trial, the trial court granted an oral motion to amend Appellee's answer and counterclaim, paragraph 1, switching the answer from "admit" to "deny". The effect was to deny that Appellee was a pipeline company within the meaning of Iowa Code Ch. 479B.2. (Appdx. pp. 227-231; Tr. 154:17-158:9).

25. Because the Court granted the oral motion noted above, the parties were permitted to submit opposing affidavits on the issue of whether Appellee qualifies as a pipeline company. All matters tried on May 16, 2023 were taken under advisement. *Id*.

26. Iowa Code § 479B deals with Hazardous Liquid Pipelines and Storage Facilities. Appellee is not claiming to be a storage facility. (Appdx. 200-201; Tr. 72:21-73:2). Unless Appellee's project qualifies as a hazardous liquid pipeline, all the relief requested in its Amended Petition cannot proceed to judgment. Iowa Code § 479B only allows pipeline permit applications to be received by the Iowa Utilities Board by those entities who qualify under the definition of a pipeline company. Iowa Code § 479B.4.

27. Appellee is not a pipeline company for the purposes of Iowa Code chapter 479B. §479B.2(4) defines "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." (emphasis added)

28. § 479.2(2) defines "hazardous liquid" as crude oil, refined petroleum products, liquefied petroleum gases, anhydrous ammonia, liquid fertilizers, **liquefied carbon dioxide**, alcohols, and coal slurries interstate pipelines for the transportation or transmission of natural gas or hazardous liquids." (emphasis added). So, for Appellee to be granted any relief at all under Code § 479B, what it intends to transport must be liquified carbon dioxide – and no other phase of carbon dioxide.

29. At trial, no witness for Appellee established the carbon dioxide it intends to transport is liquefied carbon dioxide. (Appdx. pp. 200-202; Tr. 72:21-74:23). Instead, we were informed of supercritical CO2 was utilized to describe the substance being transferred across the pipeline. (Defendant-Appellant Trial Exhibit M, Trial Exhibit N).

30. The parties following presentation at trial were allowed to submit competing affidavits.

31. As detailed in the Affidavit evidence included here from Chemical Engineer experts, supercritical carbon dioxide describes a separate and distinct phase of carbon dioxide from liquified carbon dioxide. Scientifically these describe different phases and are not synonymous. (Appdx. pp. 45-82; 140-177).

32. Appellee's response was contained in the affidavit of James Powell. Mr. Powell does not address the scientific facts. Mr. Powell's affidavit argues that simply because Appellee filled out of form and declared itself a liquid pipeline company and because the IUB docketed Appellee's Application that those simple acts trump basic scientific evidence – they do not. (Appdx. pp 40-44). Filing of an Application does not prove anything, and it certainly doesn't destroy years of scientific facts in the fields of physics and chemistry. Appellee's requested relief fails because they are not a person engaged in the type of activity that falls within the confines of § 479B.

33. As detailed in Appellant's Rebuttal Affidavit evidence, as was in his opening Affidavit evidence, Chemical Engineer experts confirm that supercritical carbon dioxide describes a separate and distinct phase of carbon dioxide from liquified carbon dioxide. Scientifically these describe different phases and are not synonymous. (Appdx. pp. 45-82; 140-177).

34. The trial court errantly found that:

34.1 Neither of Appellant's expert witnesses identifies their education, training, background and experience. (Appdx. p. 99). This is not true as both affidavits include this exact information in the form specific sections on education and background and/or include Curriculum Vitaes. (Appdx. p. 45, ¶ 4; Appdx. p 76, ¶ 4).

34.2 Supercritical CO2 must have been intended to be included by the legislature because it would be nonsensical to hold that companies transporting carbon dioxide through pipelines at higher temperatures and higher pressures than carbon dioxide in its liquid phase are exempt from its requirements." (Appdx. p. 104).

35. Ascertaining legislative intent requires examination of the statute's subject matter, the object to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." *State v. Lindell*, 828 N.W.2d 1, 5 (Iowa 2013). The Court cannot speculate or make assumptions on what the legislature intended.

36. Here, speculation is what the trial court did. To be synonymous and presume physical phase that can be described as fluid is therefore the

same as liquid – it is not. (Appdx. pp. 145-146, ¶¶ 18-20; Appdx. pp. 175-176, ¶¶ 14-19).

37. The trial court also erroneously relies on case law asserting that collectively, the cases referenced address the supercritical question. None of them do. The word supercritical is not mentioned anywhere. The trial court also relies on federal regulations referencing the Federal Pipeline Safety Act, and regulations put forward by the Pipeline and Hazardous Materials Safety Act. (Appdx. p. 104). As to regulations relied on by the court, 87 FR 33576, 33578 (June 2, 2022), is the only one that discusses supercritical CO2. It makes an all-inclusive statement that makes clear to the reader that the regulation is attempting to group together different types of pipelines in the rules that follow instead of trying to put forth a definition:

> *Advisory:* All owners and operators of gas and hazardous liquid pipelines, including supercritical carbon dioxide pipelines, are reminded that earth movement, particularly in variable, steep, and rugged terrain and terrain with varied or changing subsurface geological conditions, can pose a threat to the integrity of a pipeline if those threats are not identified and mitigated.

38. As pointed out by Appellant's affidavits on this issue, but not discussed or recognized by the trial court, the transportation of CO2 will be at temperatures above liquid state threshold, i.e. supercritical phase. (Appdx. p. Defendant-Appellant Trial Ex M, ¶¶ 17-20; Trial Exhibit N ¶¶ 15-20). Trial Exhibit N also indicates that PHMSA, OSHA and other agencies recognize that supercritical CO2 is a distinct and separate phase from other phases. (Appdx. p. 177, ¶ 21).

39. The analysis by the trial court appears to be surface level, and relies on authority that does not address the subject matter at hand. Appellant's Exhibits M & N are the main evidence left standing on this issue.

40. Reversing the trial court's order on this issue is proper and means that Appellee cannot proceed on its injunction.

II. The District Court Erred Finding Appellee was Entitled to Injunctive Relief through Iowa Code § 479B.15

Error Preservation

41. On May 16, 2023 trial commenced on Appellee's Amended Petition and request for injunctive relief.

42. An Order was entered on this issue on July 11, 2023. This Order, combined with another order entered on the same date denying a motion for reconsideration, and another order entered on May 10, 2023 addressing a summary judgment motion filed by Appellee, collectively constituted a final order. *Valles v. Mueting*, 956 N.W.2d 479, 483 (Iowa 2021)(citing Iowa R. App. P. 6.101(1)(b)).

Standard of Review

43. The standard of review for injunctions is de novo. *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 180 (Iowa 2001).

Argument

A. *Buss v. Guis* Provides the Proper Legal Framework.

44. Even if Appellee qualifies as a pipeline company under §479B, which they do not, they still failed to follow all of its requirements. Under Iowa Code § 479B.15, a pipeline company cannot enter private land until it provides ten (10) days written notice by **restricted certified mail** to the "**landowner**" and "**any person** residing on or **in possession of the land**." § 479B.15 (emphasis added).

45. This case is identical in fact and outcome to *Buss v. Gruis*, 320 N.W.2d 549 (Iowa 1982). In *Buss*, the Iowa Supreme Court held that the requirements of restricted certified mail are "mandatory," and that courts

must adhere to the General Assembly's "precise ways in which notice must be given." *Id*. at 552. Anything short of full compliance would "undo the efforts of the General Assembly to make those notices definite and certain[.]" *Id*.

46. Before a pipeline company can enter private property, the General Assembly requires notice via "restricted certified mail." Iowa Code § 479B.15. This means that the Pipeline company must place its notice in an envelope containing the endorsement "Deliver to Addressee Only." Iowa Code § 618.15. If the envelope does not contain the words "Deliver to Address Only," service is not valid. *Buss*, 320 N.W.2d at 550 (service invalid because "the envelope was not marked 'Deliver to addressee only'").

47. At trial, Appellee claimed it did not have to follow the law in this regard, but then presented what it claimed to be envelopes containing this exact phrase it claims to have recently prepared for mailing to Appellant. (Appdx. pp. 214-215, Tr. 112:4-113:11). This is an admission that prior Appellee attempts at service using mailings that did not explicitly contain this phrase on the face of the envelope were in fact not incompliance with the law. Therefore, if the court believes Appellee did later correctly include such required language in subsequent attempt on Appellant then Trial Exhibit 17 would be the only possible exhibit that possibly could have

satisfied part of § 479B.15. (Appdx. pp. 134-136). However, there is no return slip, which is required as discussed below, and the Court is then left with Trial Exhibit 18 which proves nothing. (Appdx. pp. 137-139).

48. While Appellee's counsel offered explanation of what Exhibit 18 is and where it came from and how it was created, Appellee's witness Michah Rorie did not. (Appx. P. 216, Tr. 117:8-15). Even if he had, there is no evidence of what "Refused" means and no person with foundational knowledge to discuss the contents and meaning of Exhibit 18 testified. But even if the word "Refused" could only mean the attempted mailing was refused it still doesn't prove Appellant refused it – and Appellant testified he did not. (Tr. 106:9-109:16; Appdx. pp. 224, 151:2-6; Appdx. pp. 227, 154:4-8). Appellee's case fails for lack of evidence on these points. "[R]estricted certified mail . . . seems to demand service upon the defendant himself. Such mail must be delivered to the addressee only." *Esterdahl v. Wilson*, 252 Iowa 1199, 1205, (1961).

B. Appellee Failed to Prove Appellant Actually Received Lawful Notice.

49. Restricted certified mail also requires that the intended recipient – here, Appellant – actually receive the notice. If the landowners do not actually receive the notice, then service is not perfected, and notice is not

effectuated. The Iowa Supreme Court confirmed this requirement in *Buss*, invalidating a piece of restricted certified mail that "was not in fact delivered to the addressee." *Id*. The corollary here is if Appellee himself must actually receive the notice – not his wife or his child or any person at his residence – they Appellee must present convincing evidence that Appellant himself refused Exhibit 18, assuming Exhibit 17 was in fact inside. However, Appellee has no such evidence.

50. Finally, restricted certified mail is effectuated if—and only if—the sender provides proof of delivery through a return slip. The return slip must contain "the date of delivery, the place of delivery, and the person to whom delivered." Iowa Code § 618.15. The failure to provide a fully executed return slip is a separate and independent basis for invalidating notice via restricted certified mail. *See Buss*, 320 N.W.2d at 550 (restricted certified mail, to be valid, must include a return receipt to the mailer). For trial purposes, competent evidence is required to prove each of these steps and Appellee cannot overcome Appellant's foundational and hearsay objections to its evidence.

C. Appellee has not Complied with the Notice Requirement of § 479B.15 as to any Person in Possession of the Land in Question.

51. Appellee admitted it did not provide evidence that the required notice was provided to Appellant's tenant and Appellant confirmed the same. (Appdx. p. 203, Tr. 76:3-14; Appdx. p. 221, Tr. 146:3-25). Therefore, it is uncontroverted that Appellee failed to follow each element of § 479B.15. This alone is basis for denying Appellee injunction.

D. Tenants per Iowa Code § 479B.15 are Indispensable Parties. Appellee failed to Name Them as a Party or Serve Them.

52. Appellee failed to name Appellant's tenant at any time., and it is too late to do so. Appellant's tenant holds a lawful property right interest co-equal to Appellant's in terms of Appellee's survey injunction request upon land with a valid leasehold interest.

53. Due to the failure in Appellee's pleading, the trial court cannot issue an injunction against Appellant's tenant and even if the trial court issued an injunction against Appellant, the injunction would have no bearing on the tenant's separate and distinct property interests. Legal rights, and independent ability to deny survey entry. Appellant's tenant was an indispensable party that Appellee failed to name or add. *Tod v. Crisman*, 99 N.W. 686 (Iowa 1904) (Generally indicates that a judgment can be effective against the named parties while making clear that judgment is restricted to those who are parties). Iowa Code § 479B.15 makes clear that an injunction

can only be effective if an injunction also reaches any tenant. Otherwise, even if Appellee can secure injunctive relief against Appellant, the nonparty tenant can still reject Appellee's ability to enter onto the land.

54. On the issue of the tenant, the trial court, without evidence to support its conclusion, appeared to disregard Appellant's unrebutted evidence on the existence of a tenant. (Appdx. p. 108). When there is no opposition, Appellant's oral testimony, (Appdx. pp. 221-222, Tr. 146:21-147:22), should have sufficed to create an undisputed issue to deny injunctive relief.

E. Appellee did not Prove Irreparable Harm or Substantial Injury

55. Iowa Code § 479B.15 is silent on the relevant standard of review for an injunction. The "injunctive relief is to be granted or denied within the discretion of the court under the applicable equitable principles." *Max 100 L.C. v. Iowa Realty Co.*, 621 NW2d 178, 181 (Iowa 2001). This is another way of saying that the moving party must show (1) irreparable harm, (2) maintenance of the status quo, and (3) the lack of an adequate remedy at law. *Id*. at 180. The trial court committed error when it stated that the statute provided the standard for an injunction. (Appdx. p. 101). Compliance with the notice requirements discussed above is not a basis alone to comply with injunctive relief.

56. The trial court was incorrect in its determination that the statute speaks for itself on the standard for granting injunctive relief, and equitable principles do not apply. (Appdx. pp. 97-110).

57. The language of § 479B.15 states that entry for a land survey "…may be aided by injunction." This alone indicates a grant of discretionary authority. Injunctions need not be utilized in every situation. There must be a demonstrated legislative intent to supplant traditional equitable principles for granting or denying an injunction. *Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004) (additional citations omitted). "There must be some showing that the statute was designed to provide for an injunction based on the violation of some act prohibited by the statute independent of the equitable principles. *Id.* 233. The trial court's order did not demonstrate legislative intent supportive of its position.

58. Second, the statute does not authorize temporary injunctions. The word temporary is absent. Appellee turned to artful pleading to remove any reference in its original Petition to a request for Temporary Injunction. (Appellee's Petition for Injunctive Relief, September 19, 2022, p. 6; Appdx. p. 14). The amendment removing the request for temporary injunction was filed because Appellee recognized that the statute itself does not authorize

temporary injunctions, and for a court to grant one, it would need to rely on equitable considerations.

59. However, the injunction sought is temporary in nature. Trial testimony on this point makes clear that there are distinct surveys to be performed by Appellee on Appellant's land for the purpose of submitting this information to the Iowa Utilities Board in compliance with Iowa Code § 479B.15, which indicates that the survey is to determine the direction and depth of a pipeline. Iowa Code § 479B.5 requires a petition for a permit to condemn property to include several criteria, including descriptions of the land, waters and streams present, location of the route, alternative routes, and the inconvenience and injury to the landowner from the route. (Appdx. pp. 187-189, 219-220, Tr. 26:4-28:5; 131:3-132:17).

60. When asked at trial what kind of injunction Appellee was requesting in the Court enter, Appellee's witness did not know. (Appdx, p. 218, Tr. 128:3-6). As stated previously, the nature of their Amended Petition suggests they are seeking a permanent injunction, and this is supported by the fact Appellee amended their original Petition to remove their temporary injunction request. At trial, Appellee put on no evidence of irreparable harm or substantial injury.

61. Irreparable harm, not a low bar, is a key element of proving worthiness of injunctive relief. Irreparable harm "must be a substantial injury, not just a slight monetary loss or an inconvenient delay." *Walterman v. Iowa Dep't of Revenue & Fin.*, No. 55-191, 1987 WL 267689, at *2 (Iowa Dist. Aug. 17, 1987). Appellee put on no evidence of substantial injury. Appellant established Appellee does not have a single federal or state permit it needs to commence construction activities anywhere and that Appellee needs hundreds of surveys and hundreds of permits and/or approvals before it could advance this project. (Tr: 133:1-134:2). Appellee is in the infancy of multiple state actions, all challenged by thousands of landowners across the Midwest. *Id.*

62. No trial evidence exists to prove the irreparable harm or substantial injury Appellee would suffer if they could not enter Appellant's property for the surveys they desire – and the test is as to the Appellant's surveys specifically. No person for Appellee testified as to the specific economic harms, no expert quantified economic loss, no Appellee witness or document established the irreparable effects of any delay of survey should the Appellant specific surveys not move forward. So, even if the Court is convinced Appellee met all § 479B.15 burdens of proof, which it did not,

Appellee has failed to prove it is entitled to an injunction as to Appellant's land.

III. The District Court Erred in Finding that Iowa Code § 479B.15 was Constitutional

Error Preservation

63. On May 10, 2023, the trial court entered an order dismissing Appellant's counterclaim. The counterclaim alleged that Iowa Code 479B.15 was unconstitutional. The dismissal of this claim was not a final order.

64. On May 16, 2023 trial commenced on Appellee's Amended Petition and request for injunctive relief.

65. An Order was entered on this issue on July 11, 2023. This Order, combined with another order entered on the same date denying a motion for reconsideration. Collectively the three orders constituted a final order. *Valles v. Mueting*, 956 N.W.2d 479, 483 (Iowa 2021)(citing Iowa R. App. P. 6.101(1)(b)).

Standard of Review

66. Constitutional challenges to a statute are reviewed de novo. *City of Coralville v. Iowa Utilities Bd.*, 750 N.W.2d 523, 527 (Iowa 2008).

Argument

67. This case is a matter of first impression nationally in that it asked the trial court to consider the constitutionality of so-called pre-

condemnation survey statues following the United States Supreme Court's ruling in Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021). The constitutionality of Iowa Code § 479B.15 was considered by the trial court in summary judgment proceedings. On May 10, 2023, the trial court entered an order finding that Iowa Code § 479B.15 was constitutional. This is erroneous for the following reasons.

A. Iowa Code § 479B.15 Constitutes a Taking

68. Despite Appellee's efforts during summary judgment to minimize the significance of *Cedar Point*, it was in fact a landmark decision affirming that a government authorization of the right to invade private property for any duration is a taking. As the U.S. Supreme Court stated, "[w]e cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right,' *Kaiser Aetna v. U.S.*, 444 US 164, at 179–180, that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings…" *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2077. *Cedar Point* has far reaching implications for landowners and governments who seek to compromise the fundamental right to exclude through legislation.

69. The Fifth Amendment to the United States Constitution ends with the Takings Clause: "nor shall private property be taken for public use without just compensation." Iowa has its own Takings Clause found in Iowa Const. art. 6, § 18: "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury…."

70. The Takings Clause is obviously applied when a government exercises its eminent domain powers and condemns the property of a citizen. However, the clause has also been interpreted to require just compensation when a government action, other than an explicit exercise of eminent domain, burdens private property to such a degree that just compensation is owed. These types of takings were previously coined "regulatory takings", but a more proper label now used is "implicit takings."

71. A *per se* taking is a form of implicit taking in which a government action burdens or invades property to such a degree that a Court must automatically consider it a taking. "These sorts of physical appropriations constitute the 'clearest sort of taking,' *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), and we assess them using a simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d

369 (2021), quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321, 122 S.Ct. 1465 (2002).

72. Prior to *Cedar Point*, the Supreme Court had enumerated two *per se* rules. First, the permanent physical occupation rule established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982), where the Court held that the permanent placement of cable wires and boxes on the outside of apartment buildings constituted a *per se* taking. The Court focused on the permanence of the physical occupation rather than the size, which it deemed relevant only to the amount of compensation owed. The second *per se* rule was established in *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), is the "total takings" rule which automatically categorizes a government act as a taking if the act deprives an owner of all beneficial use of their property.

73. Government impositions on private property which do not fall within the rules of *Loretto* and *Lucas* were previously assessed under the three-factor test of *Penn Central Transp. v. New York,* 438 U.S. 104, 98 S.Ct. 2646 (1978). Under *Penn Central*, in determining whether a government regulation had gone "too far" and thus constituted a taking of private property, a court was to weigh (1) the economic impact on the

landowner; (2) the degree of interference with distinct investment backed expectations; and (3) the character of the invasion. The Court also provided that a taking may be more readily found when the interference with property can be characterized as a physical invasion by government. *Penn Central Transp. Co. v. New York City*, 98 S.Ct. at 2659.

74. Prior to *Cedar Point*, the U.S. Supreme Court had wrestled with when an invasion of private property by the government was sufficiently intrusive to be held a taking for which just compensation was owed. Factors the Court considered included whether the invasion was permanent or temporary and whether access was continuous or intermittent. *U.S. v. Causby*, 328 U.S. 256, 267 (1947)*; Nollan* v. *Cal. Costal Commn*, 438 U.S., 825, 832 (1987) The Cedar Point decision contains a detailed analysis of the Court's progression of physical taking decisions, but that examination need not be restated here.

75. Critically, *Cedar Point* established a new *per se* rule – when the government, by regulation or otherwise, appropriates a right to physically invade private property, it has exercised a physical taking for which just compensation is owed. The frequency and duration of the invasion are no longer relevant. *Cedar Point*, 141 S. Ct. 2063, 2074.

76. The Court explained the importance of an owner's right to exclude and the need for courts to defend that right against governments who seek to diminish it.

> Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude. The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is 'universally held to be a fundamental element of the property right' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2072. *Emphasis added.*
>
> …
>
> We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a "fundamental element of the property right," *Kaiser Aetna*, 444 U.S. at 179–180, 100 S.Ct. 383, that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*. *Emphasis Added. Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2077.

77. Arguments relating to the permanence, frequency, and scope of the invasion were considered by the Court and deemed inconsequential to

the taking question. Invasions which are temporary or intermittent are invasions nonetheless and constitute *per se* takings. "Physical invasions constitute takings even if they are intermittent as opposed to continuous." *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2075. "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Id.* "The duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U.S. at 436–437, 102 S.Ct. 3164—bears only on the amount of compensation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2074, citing *U.S. v. Dow*, 357 U.S. 17, 26, 78 S.Ct. 1039 (1958).

78. *Cedar Point* is not a one-off decision simply striking down California's union farm access law. The decision delineates a new bright line rule – when the government seeks to invade private property against the will of the landowner, the landowner is protected by the Fifth Amendment. Survey access laws, including Iowa Code §479B.15, are no longer justifiable under the constructs of *Cedar Point.*

79. It is well settled that the right to exclude is a fundamental right attached to property ownership. *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2072. "In 'ordinary English' "appropriation" means "*taking* as one's own," *Cedar Point*, 141 S.Ct. at 2072, citing 1 Oxford English Dictionary 587 (2d ed. 1989) (emphasis added).

B. Iowa Code § 479B.15 Does Not Satisfy Any Exception to *Cedar Point's* Bright Line Rule.

80. *Cedar Point Nursery v. Hassid* affirms the fundamental right of an owner to exclude by extending Fifth Amendment protection to those whose properties are invaded by statutory authorization. In doing so, the Supreme Court recognized three narrow exceptions by which a government could avoid takings liability for an invasion.

81. First, the U.S. Supreme Court differentiates between authorized actions, such as a statute authorizing an invasion, and unauthorized actions, such as a trespass. *Cedar Point Nursery v. Hassid,* 141 S. Ct. at 2078. An occasional invasion absent any authority is considered a trespass, not a taking. *Id.* Second, entry pursuant to longstanding background principles upon property including pre-existing limitations upon the owner's title would not be considered takings. *Id.* And finally, the Court conceded that reasonable entry for purposes of a health and safety inspection as a condition to a permit, license, or registration would not constitute a taking. *Id.*

82. At issue in the present matter is the second exception, background principles. Appellee and the trial court, by claiming that survey statutes like the one in this case are part of the background principle exception, is in essence arguing that Appellant took title to their property

subject to an encumbrance in favor of Appellee to conduct various surveys. The logical conclusion of this position is that all private property in the United States is encumbered with such a servitude in favor of prospective condemnors. If that sounds far-fetched that's because it is. The trial court's determination that Iowa Code § 4798B.15 falls into a background exception violates the fundamental understanding of property ownership and is not supported by law.

C. The Right to Exclude is a Fundamental Property Right.

83. The background principles exception delineated in *Cedar Point* is narrow and must be read considering the opinion's earlier affirmation that the right to exclude is "fundamental." *Cedar Point*, 141 S. Ct. at 2072. Preceding the few exceptions noted in the opinion, the Court states the "right to exclude is 'universally held to be a fundamental element of the property right' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2072. "According to Blackstone, the very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.' " *Id. citing* 2 W. Blackstone, Commentaries on the Laws of England 2 (1766).

84. Given the Court's fervent confirmation of the right to exclude as a fundamental right that is not "an empty formality, subject to modification at the government's pleasure," any claimed exemption from takings liability arising from a physical invasion of property must be carefully scrutinized. *Cedar Point,* 141 S. Ct. at 2077.

85. The Court expressly delineated three examples of background principles which would avoid takings liability. They were public abatement of a nuisance, public necessity to avert an imminent public disaster including entry to avert serious harm to a person, land, or chattels, and a common law privilege to enter property to effect an arrest or enforce a criminal law under certain circumstances. *Cedar Point.* 141 S. Ct. at 2079. These background principles all sound in public necessity.

86. Iowa Code § 479B.15 does not serve a public necessity, but rather extends a convenience for permit applicants seeking to conduct a survey prior to condemnation. These applicants are not required by law to conduct a survey prior to permitting or condemnation. Iowa Code § 479B.15 is far more similar to the invasion rights bestowed upon union organizers in California than it is to the background principles enumerated in *Cedar Point.*

87. Additionally, if a corporation is vested with eminent domain power, then they are within their rights to condemn a temporary easement

for survey and examination purposes. While this may create a burden upon a prospective condemnor, it is not a sufficient reason to infringe upon an owner's right to exclude. Appellant urges the adoption of the dissent's logic in *Cedar Point*- that latitude toward temporary invasions of private property is a practical necessity for governing our complex modern world. *Cedar Point,* 141 S. Ct. at 2077. The majority rejects this argument unequivocally and affirms the right to exclude is "fundamental." *Id.* at 2078. The Court should do the same here.

D. Pre-condemnation Survey is Not a Background Restriction Upon Private Property

88. The trial court asserts that pre-condemnation surveys are a background principle. (Order of Plaintiff's Motion for Summary Judgment p. 12). Pre-condemnation survey is not a background principle that saves Iowa Code § 479B.15 from being a taking. For a background principle to suffice as a defense to takings liability, it must be consistent with a landowner's reasonable expectation of the government's ability to regulate or enter his or her property. The *Cedar Point* Court provides examples of background restrictions which may immunize the government from takings liability. Again, these explicit examples include nuisance abatement, public necessity to avert an imminent public disaster, and criminal law enforcement

under certain circumstances. *Cedar Point,* 141 S. Ct. at 2079. Notably absent from the stated exceptions to the *per se* rule is the right of a prospective condemnor to enter and perform exploratory measures on private property simply because they have an idea of how to profit off said property.

89. The privileged entries exempted from takings liability contained in *Cedar Point* are entries which any reasonable landowner would expect under the attending circumstances. That is not by mistake. The concept of background principles being exempt from *per se* takings liability originated in *Lucas v. Carolina Coastal Council.* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In *Lucas,* the Court held that the South Carolina Legislature's passage of a zoning ordinance prohibiting construction on Lucas's beach front lots deprived him of all "economically viable use" and thus constituted a *per se* taking. *Lucas,* 112 S. Ct. at 2087-2088.

90. The government argued that Lucas's property was subject to the background principle of nuisance prevention which allowed regulation of the property for protection of the coastal ecosystem. The *Lucas* Court weighed the background principle of nuisance prevention against Lucas's reasonable expectation of limitations upon his property rights. *Id.* Within its holding, the Court reasoned that "the question must turn, in accord with this Court's

"takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property." *Id. Emphasis Added.* The Court recognized that although it is reasonable for a landowner to expect their property may be regulated pursuant to the police power, the background principle of nuisance prevention which eliminates all economically viable use of land is insufficient to avoid takings liability because it "is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas,* 112 S.Ct. at 2900.

91. For background principles to serve as a valid defense to takings liability, they must comport with the understanding of citizens regarding the State's power over the bundle of rights. *Lucas,* 112 S.Ct. at 2899. A reasonable landowner can expect that the government, or a designee thereof, may enter the landowner's property without express permission for the purpose of nuisance abatement, public necessity, or criminal law enforcement. *Cedar Point,* 141 S. Ct. at 2079. No landowner, including Appellee, understands that they took their property subservient to a condemnor's right, upon 30 days' notice, to enter their property and conduct various surveys. (Tr. 80:7-81:6). Appellant's proposed intrusion is a gross violation of Appellee's right to exclude that does not fall within the

understandings of citizens regarding the content of, and the State's police power over, the bundle of rights.

92. The Supreme Court has not fully defined a background principle or when a property law concept can be deemed a background principle such that it absolves the government of takings liability. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 629, 121 S. Ct. 2448, 2464, 150 L. Ed. 2d 592 (2001), the Court further explored the background principle concept introduced in *Lucas,* and declined to make affirmative judgment on when a statute affecting property interests qualifies as a background principle. ("We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law").

93. However, the *Palazzolo* Court did instruct that the passage of a statute alone is not sufficient. "A law does not become a background principle for subsequent owners by enactment itself." *Id.* The Court rejected the government's argument that a landowner deemed to have notice of an earlier statutory enactment would be barred from claiming that it effects a taking. *Palazzolo*, 121 S.Ct. at 2453. Given the Court's declaration in *Palazzolo*, the fact that Iowa has enacted earlier survey statutes and that all

states have adopted some form of pre-condemnation survey statutes does not establish that pre-condemnation survey is a background principle.

E. No Common Law Right to Pre-Condemnation Survey Exists.

94. The U.S. Supreme Court in *Cedar Point* cites the Restatement (Second) of Torts (1965) in support of the expressly stated traditional common law privileges to access private property (privilege to enter property in the event of public or private necessity, § 196 and § 197; privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances, §§ 204-205). *Cedar Point,* 141 S. Ct. at 2079. To draw comparison between the expressly enumerated background principles in *Cedar Point*, Appellant relied the Restatement (Second) of Torts § 211 (1965) comment C. Section 211, Comment C states that an employee of a public utility entering upon privately owned land for the purpose of making surveys preliminary to instituting a proceeding for taking by eminent domain is an exception to trespass.

95. Comment B to § 211 states: "The principles which determine the constitutionality of particular legislation imposing a duty or conferring an authority to enter land in the possession of another, are not with the scope of the Restatement of this Subject. **This Section assumes that the particular statute or other legislative provision is constitutional**."

Emphasis added. Section 211 cannot be relied upon to support an argument for constitutionality of a legislative authorization to enter private property because constitutionality is assumed and the principles determining constitutionality are outside the scope of the section. This comment reflects the careful consideration which must be given when the legislature attempts to implicitly take an owner's right to exclude though legislation. No such comment exists for the Restatement (Second) of Torts §§ 196, 197, 204, or 205 (the sections the Supreme Court specifically cites as background principles).

96. *Cedar Point's* maxim, "that appropriations of a right to invade are *per se* physical takings" is both "intuitive" (141 S. Ct. at 2076) and rests on "common sense." (141 S. Ct. at 2074). The government, or its third-party designees, have no place on the private property of United States citizens absent permission, warrant, or background principle that is consistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture. Appellee offers none of these in support of its demand to enter Appellant's property.

F. Appellant has No Common Law Right to Enter for Examination Purposes

97. There is no common law right to entry in this case's circumstance. ("Permissible entry 'cannot amount to other than such

innocuous entry and ... examination as would suffice for the making of surveys or maps." *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 646, 322 S.E.2d 887, 890 (1984).

98. According to *Nichols on Eminent Domain*:

> "Courts have typically defined a survey as the measurement of land. Invasive activity activities do not fall within the definition of a survey. However, if invasive acts are to be performed while on the land, the agency entering on the land should exercise its powers of eminent domain to seek a temporary easement. A statutory right to enter on land for the purpose of making an examination or survey does not include the right to engage in a course of destruction. For example, the right to make an examination or survey does not include the right to conduct archaeological digs. Nor does the right to make examinations, surveys, and maps permit installation of permanent survey monuments. Consequently, entry on land to drill holes and remove soil samples often will require the taking of a temporary easement to conduct such testing." *Nichols,* § G32.06 (2021).

99. Neither the common law nor Iowa Code § 479B.15 support the type of exploratory work proposed by Appellant or Appellant's argument regarding this topic. In *Cass Cnty. Joint Water Res. Dist. v. Aaland*, 2021 N.D. 57, 956 N.W.2d 395, the District Court in North Dakota considered whether Petitioner's proposal to install permanent survey markers were outside the scope of NDCC 32-15-02 (North Dakota's survey statute) and rose to a constitutional taking. The Supreme Court applied the permanent

physical invasion test from *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36, 102 S.Ct. 3164 (1982), and held that the installation of survey markers was in fact a taking. Even if Appellee does not intend to place permanent survey markers on Appellant's property, the proposed activities are certainly not appropriate under *Cedar Point.* If Appellee wishes to conduct such activities, then it should follow the instruction of *Nichols* and condemn a temporary easement to do so.

G. Appellant has a Protected Property Interest that Will be Taken if Appellee is Allowed to Enter onto Appellee's Land

100. Iowa courts analyze takings cases under the following framework: by determining (1) whether there is a constitutionally protected private property interest at stake, (2) whether this interest has been "taken" by the government for public use, and (3) if the interest has been taken, whether just compensation has been paid to the owner. *Kingsway Cathedral v. Iowa Dep't. of Transp.*, 711 N.W.2d 6 (Iowa 2006). If – as in this case – all three elements are satisfied, the statute is unconstitutional and unenforceable as a matter of law.

101. The first step in the framework is easily answered here because the right to exclude is "one of the most treasured" rights of property ownership. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). Stated another way, when a person owns private land, they have a legal right to

exclude others from it. *State v. Paye*, 865 N.W.2d 1, 6 (Iowa 2015). Section 479B.15 implicates and impedes this right by appropriating the landowner's right to exclude others from their property. It does so by requiring landowners to permit pipeline companies onto their property for the purpose of conducting invasive land surveys. It is irrelevant under § 479B.15 whether the landowner wishes to exclude the pipeline company from their property—so long as the company complies with the specific requirements of the law, its right of entry supersedes the landowners' right to exclude. There is no question that Iowa's right-of-entry statute implicates landowners' right to exclude others from their land. Simply put, the statute strips landowners of this fundamental right by allowing pipeline companies onto private land against a landowner's wishes. The first step of the takings analysis is satisfied.

H. Appellant's Right to Exclude is Taken by Iowa Code § 479B.15

102. The second step in a takings analysis is determining whether the private property right at issue – here, the right to exclude – has been taken.

103. The land entry for surveys authorized in § 479B.15 constitutes a per se taking. A per se taking occurs when a government regulation authorizes a physical appropriation of property, even intermittently. *Cedar*

Point Nursery, 141 S. Ct. at 2075. A physical appropriation of property occurs when a government regulation allows third parties to physically enter and invade private property. *Outdoor Graphics, Inc. v. City of Burlington*, Iowa, 103 F.3d 690, 693 (8th Cir. 1996); *Cedar Point Nursery*, 141 S. Ct. at 2072.

104. Section 479B.15 authorizes pipeline companies to enter private land to survey the land—an action that but-for the right of access granted to pipeline companies in § 479B.15 would be a trespass. *Cedar Point Nursery*, 141 S. Ct. at 2076. A trespass is a physical invasion of another's land undertaken without authority; cases of trespass are assessed as individual torts not concerning appropriations of property rights. *Id.*, at 2078. When a physical invasion onto another's land is undertaken pursuant to a granted right of access, the entry is assessed as appropriations of property rights, not as a trespass.

105. Appellee's physical invasion, or attempted invasion, of Appellant's land is undertaken pursuant to § 479B.15's granted right of access. Appellant must be compensated for these physical invasions. "[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasion]." *Kingsway Cathedral v. Iowa Dep't. of Transp.*, 711 N.W.2d 6, 10 (Iowa

2006); *Fitzgerald v. City of Iowa City*, 492 N.W.2d 659, 664 (Iowa 1992). For these reasons, § 479B.15 authorizes a taking of a private property interest requiring just compensation.

106. *Cedar Point Nursery* confirms this result. The question presented in that case was whether a California statute constituted a per se physical taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. The challenged statute gave "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs., tit. 8, § 20900(e). *Cedar Point*, 141 S. Ct. at 2069.

107. In evaluating the statute, the Court addressed whether the California regulation physically took (appropriated) property for someone else or, alternatively, whether it restricted a property owner's ability to use his own property. The Court determined that the statute was a physical appropriation because, without the right of access granted to union organizers by the local regulation, the physical entry would otherwise be a trespass. *Id*. at 2076. In other words, the California statute created a formal entitlement for the union organizers to physically invade the growers' land, constituting a *per se* physical taking. *Id*. at 2072—74.

108. Similarly, here, § 479B.15 conveys a right of access to pipeline companies and appropriates a landowner's right to exclude others from their property. By definition, this regulatory scheme amounts to a per se physical taking of land. Accordingly, the second prong of the takings analysis is satisfied.

I. Just Compensation is Owed to Appellant for Physical Invasion.

109. The final consideration in the analysis – whether compensation has been paid to Appellant – is also satisfied on the facts and circumstances presented. "[W]hen the government physically takes an interest in property, it must pay for the right to do so." *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2075.

110. Compensation for the physical invasion is not required by the plain language of Iowa Code Ann. § 479B.15. As written, § 479B.15 only requires pipeline companies to pay for actual damages caused by the land survey—not the physical invasion itself.

111. Section 479B.15 is unconstitutional and void because it violates Iowa's requirement that just compensation be paid to Appellant when a per se taking occurs. *Outdoor Graphics, Inc.*, at 693. The physical invasion authorized by the government amounts to a per se taking, yet the statute states the land entry "is not a trespass." Compensation is not owed to

Appellant for the invasion that, absent this statue, would be the tort of trespass. This per se taking requires landowners to be compensated. Absent compensation for the entry, the statute is unconstitutional. Further the unilateral mechanism of damages determination and possible compensation is unconstitutional to be wholly in the hands of the taker and damager.

112. Because § 479B.15 requires compensation be paid to Appellant only for actual damages—and not the entry itself—it is unconstitutional. Further, Appellee admitted at trial that it alone is the judge and the jury and it alone has the exclusive power to evaluate a damages claim, determine what "evidence" moves it or doesn't to award landowner compensation, if any, and solely holds the power as to what amount of compensation, if any, be paid to landowner. (Tr: 99:21-103:24). The survey authorized under Iowa Code Ann. § 479B.15 is a per se taking under Iowa law, and it is unenforceable as a matter of law. For this reason, and all the reasons discussed above, the trial court's summary judgment order should be reversed.

J. §479B.15 Allows Limitless Surveys as to Type and Duration.

113. Compounding the problem and confirming the unconstitutionality of 479B.15 is the fact that 479B.15 has no limit on the number of entries, number of surveys, number of examinations that could be

performed anywhere upon Appellant's land. There are also no limitations whatsoever as to the invasive and destructive nature of survey and examination. Lastly, there is no limit as to the duration or each entry, survey, and examination and no time limit upon when this roving property right interference expires. While Appellee may claim it is likely to not have, in its belief, invasive surveys or examinations, Appellant's challenge is a facial one to the plain language of 479B.15 so while we describe Appellee's likely activities below, according to Appellee – that is irrelevant as to our constitutional challenge.

114. The trial transcript in this case is replete with descriptions of the types of surveys that may occur. (Appdx. pp. 187-189, 206-212, 219-220; Tr. 26:4-28:5; 84:25-90:23; 131:3-132:17). Examinations and surveys must be limited to "such innocuous entry…and examination as would suffice for the making of surveys or maps" *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 646, 322 S.E.2d 887, 890 (1984).

115. According to *Nichols on Eminent Domain*:

> "Courts have typically defined a survey as the measurement of land. Invasive activity activities do not fall within the definition of a survey. However, if invasive acts are to be performed while on the land, the agency entering on the land should exercise its powers of eminent domain to seek a temporary easement. A statutory right to enter on land for the purpose of making an

> examination or survey does not include the right to engage in a course of destruction. For example, the right to make an examination or survey does not include the right to conduct archaeological digs. Nor does the right to make examinations, surveys, and maps permit installation of permanent survey monuments. Consequently, entry on land to drill holes and remove soil samples often will require the taking of a temporary easement to conduct such testing." *Nichols,* § G32.06 (2021).

116. Appellee intends to do far more than examinations related to an innocuous entry. Multiple surveys are being conducted. (Appdx. pp. 187-189, 206-212, 219-220; Tr. 26:4-28:5; 84:25-90:23; 131:3-132:17). Appellee's witness at trial, Michah Rorie, stated that for geotechnical and cultural surveys which Appellee seeks to conduct upon Appellant's property, that may entail digging up Appellant's property to unknown depths and without restrictions or limitations on how invasive the disturbance may be. *Id*.

117. Any subsurface activity is prohibited. And that is for good reason. By virtue of Iowa Code § 479B.15, Appellee is under no obligation to build their project on Appellant's property. In that situation, a private landowner would be subjected to drilling, digging, boring, and backfilling with a bentonite/concrete mixture on their property without any guarantee of compensation. This type or intrusions and invasion simply cannot be what was contemplated when the Legislature adopted Iowa Code § 479B.

118. If Appellee wants to perform that kind of work on private property, it should follow the directions of the case law and *Nichols* and condemn a temporary easement to conduct such testing. Appellee is threatening to act outside the scope of Iowa Code § 479B.15.

K. The Sky Will Not Fall if the Court Invalidates Iowa Code §479B.15

119. If the Court adopts Appellant's position, Appellee will not be precluded from completing its project or even from conducting the survey and exploratory measures it demands. Rather, Appellee will simply be required to condemn a temporary easement for those purposes and pay for what it takes. "[W]hen the government physically takes an interest in property, it must pay for the right to do so." *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2075.

120. This idea was succinctly put by the Missouri Court of Appeals in 1987 when it found that pre-condemnation soil sampling was a taking. "While it may be burdensome for the Commission to condemn a temporary easement for a soil survey and then later condemn the entire tract for the highway, the constitutional mandate that property not be taken or disturbed without prior compensation, and the landowner's right to freely use his land

supersede any efficiency concerns." *Missouri Highway & Transp. Comm'n v. Eilers*, 729 S.W.2d 471, 474 (Mo. Ct. App. 1987)

121. The state and federal constitutions exist to protect the people and their property, not to make things more convenient for the government. Certainly, it's a burden on a police officer to secure a warrant before entering a home when they believe there is a crime being committed therein. But the Fourth Amendment requires that. In the same way, the Fifth Amendment protects the citizen from seizure of their property without just compensation. To permit Appellee to enter, survey, and disturb Appellant's property without just compensation would be placing the convenience of the corporation ahead of the constitutional rights of the citizen.

122. Finally, the drastic result likely to be predicted by Appellee seems unlikely. It is more likely that condemnors will offer people in Appellant's position compensation for the right to enter, as they should have all along, and presumably many will acquiesce. Those who don't will rest assured that the Constitution is protecting them and their property as it was intended to do.

Conclusion

123. The trial court's orders incorrectly conclude correctly conclude that Iowa Code § 479B.15 is constitutional, that notices required by this

statute were properly served The trial court's May 10, 2023 and July 11, 2023 orders are respectfully requested to be reversed.

Request for Oral Argument

124. Appellant requests to be heard in oral argument before the court in this matter.

Cost Certificate

125. Appellant certifies that the cost of printing this brief was $0.00 and that amount has been paid in full by the undersigned.

Certificate of Compliance

126. This brief complies with typeface requirements and type-volume limitations of Iowa R. App P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because.

127. This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font, and contains 10,221 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

January 23, 2024

Kent Kasischke, Appellant

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