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IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 23-1186
Hardin County No. CVCV101911

KENT KASISCHKE,

Defendant/Appellant,

vs.

SUMMIT CARBON SOLUTIONS, LLC

Plaintiff/Appellee.

Appeal from the Iowa District County for Hardin County
Hon. Amy M. Moore

AMICUS BRIEF
of the LIQUID ENERGY PIPELINE ASSOCIATION and the AMERICAN PETROLEUM INSTITUTE

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IDENTITY & INTEREST OF THE AMICUS CURIAE AND STATEMENT OF AUTHORSHIP

"Liquid Energy Pipeline Association ["LEPA"] promotes responsible policies, safety excellence, and public support for liquids pipelines. [LEPA] represents pipelines transporting 97 percent of all reported hazardous liquids barrel miles reported to the Federal Energy Regulation Commission (FERC). [LEPA's] diverse membership includes large and small pipelines carrying crude oil, refined petroleum products, [natural gas liquids], and other energy liquids." *About LEPA Membership*, Liquid Energy Pipeline Ass'n, https://liquidenergypipelines.org/page/about-aopl (last visited Sept. 1, 2023).

"American Petroleum Institute ["API"] represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. [API's] nearly 600 members produce, process and distribute the majority of the nation's energy, and participate in API Energy Excellence®, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting." *About API*, Am. Petroleum Inst., https://www.api.org/about.

LEPA's and API's members across the United States regularly utilize preliminary survey or examination statutes, including Iowa Code section 479B.15, in the efficient preparation and development of their pipelines. Appellant's novel argument that preliminary survey statutes constitute a taking would detrimentally impact

LEPA's and API's members' efforts to transport much needed energy and other products across the United States.

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned counsel of LEPA, API, and the Lamson, Dugan and Murray, LLP Law Firm authored this brief in whole. No party, party's counsel, or other person outside of LEPA or API contributed money to fund the preparation or submission of this brief.

ARGUMENT

"The energy transportation network of the United States consists of over 2.5 million miles of pipeline." *Pipeline Basics*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://primis.phmsa.dot.gov/comm/PipelineBasics.htm (last visited Sept. 1, 2023). "Natural gas provides for nearly 25% of our country's *total energy consumption*, and petroleum provides for nearly 40%. This requires the transportation of huge volumes of hazardous liquids and gas, and the most feasible, most reliable and safest way to do so is through pipelines." *Id.* (emphasis in original). Pipelines will continue to be critically important in providing reliable energy across all sectors of the American economy as American energy consumption continues to grow. *Pipeline Construction*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://www.phmsa.dot.gov/pipeline/pipeline-construction/pipeline-construction (last visited Sept. 1, 2023) ("In the last few years, the pipeline industry experienced unparalleled growth to satisfy the Nation's energy demand and bring new sources of supply to the market."); *see General Pipeline FAQs*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://www.phmsa.dot.gov/faqs/general-pipeline-faqs (last visited Sept. 1, 2023) ("[O]ur oil and gas pipelines provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system.").

Approximately 43,000 miles of new pipeline are constructed each year to help meet the energy demands of the American public.[1] *New Construction Miles*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://portal.phmsa.dot.gov/analytics/saw.dll?Portalpages&PortalPath=%2Fshared%2FPDM%20Public%20Website%2F_portal%2FPublic%20Reports&Page=New%20Construction (last visited Sept. 1, 2023); *see Pipeline Construction*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://www.phmsa.dot.gov/pipeline/pipeline-construction/pipeline-construction (click "Annual Reports (AR) from pipeline operators to approximate the miles of newly constructed pipelines built each year" to retrieve data set). Construction of these new pipelines "requires a great deal of planning, consultation and preparation." *Pipeline Construction: Route Selection*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://primis.phmsa.dot.gov/comm/construction/index.htm?nocache=9818#RouteSelection (last visited Sept. 1, 2023). "Extensive environmental and land use assessments are completed, and mitigation plans are formulated for various scenarios." *Id.* These assessments, more colloquially known as surveys, are needed to help construct pipeline routes that avoid highly populated areas, minimize environmental impact, and recognize culturally significant sites. *Routing*, PIPELINE 101, https://pipeline101.org/topic/routing/ (last

[1] This calculation is based on an average of data collected from 2006 to 2021.

visited Sept. 1, 2023); *see Pipeline Construction*, Liquid Energy Pipeline Ass'n, https://liquidenergypipelines.org/page/pipeline-construction (last visited Sept. 1, 2023).

Iowa Code section 479B.15's authorization for the preliminary survey and examination of property for pipelines does not constitute a taking. Courts throughout the United States, including Iowa courts, have long held that a property owner's right to exclude does not extend to individuals entering land pursuant to law. Preliminary surveys and examinations are historically categorized as excused technical trespasses, or well-established background restrictions, that are necessary to effectuate the public benefits that come from the infrastructure they support. The District Court's holding was consistent with longstanding consensus among courts throughout the United States. An alternative holding would disrupt an industry critical to the national economy. Preliminary surveys and examinations serve to ensure Iowans and Americans receive necessary energy and other products at efficient financial and environmental costs.

I. PRELIMINARY SURVEYS AND EXAMINATIONS ARE NOT TAKINGS.

Article I, section 18 of the Iowa Constitution provides that "Private property shall not be taken for public use without just compensation." Iowa Const. art. I, §

18.[2] "In determining the minimum degree of protection the constitution afforded when adopted, [Iowa courts] generally look at the text of the constitution as illustrated by the lamp of precedent, history, custom, and practice." *State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021). In order to prevail on a takings claim, a party must show that they have a constitutionally protected private property interest at stake, that private property interest must be taken by the government for public use, and just compensation has not been paid. *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 560 (Iowa 2017); *see also Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006) (applying the same analysis to an inverse condemnation claim).

A taking under the Iowa Constitution can arise 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."[3] *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 545 (Iowa 2017); *see*

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[2] The United States Constitution contains a similar provision that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. However, Mr. Kasischke only pled a takings claim under the Iowa Constitution, not the United States Constitution. *See* Landowner Answer & Counterclaim. Regardless of whether Mr. Kasischke properly preserved a federal Constitutional claim, statutes authorizing preliminary surveys or examinations are not unconstitutional under either Constitution.

[3] Mr. Kasischke did not raise a challenge that a preliminary survey statute constitutes a taking that deprives him of all economically beneficial ownership or

also Easter Lakes Estates, Inc. v. Polk Cty., 444 N.W.2d 72, 75 (Iowa 1989) ("[G]overnment action that substantially deprives a person of the use of property, in whole or in part, may be a compensable taking."). "The continuance or permanency of the government action sufficient to support the finding of a creation of a servitude has been the determining factor for a finding of a taking." *Kingsway Cathedral*, 711 N.W.2d at 10.

The United States Supreme Court in *Cedar Point Nursey v. Hassid*, 549 U.S. ___, 141 S. Ct. 2063 (2021), recently clarified what type of government regulation is sufficient to establish a *per se* taking under the United States Constitution.[4] A *per se* taking occurs "[w]hen the government physically acquires private property for a public use." *Id.* at 2071. A physical appropriation occurs when the government takes property "as one's own." *Id.* at 2077 (quoting 1 Oxford English Dictionary

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that such statutes would constitute a taking under the *Penn Central* balancing test. Consequently, amici focus on the first type of taking.

[4] The Iowa Supreme Court may choose to decide whether to incorporate the takings analysis conducted by the United States Supreme Court in *Cedar Point Nursey v. Hassid*, 141 S. Ct. 2063 (2021), into Iowa takings jurisprudence. "[F]ederal cases interpreting the Federal Takings Clause [are solely] 'persuasive in our interpretation of the state provision, but 'not binding.'" *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 844, 848 (Iowa 2019) (quoting *Kingsway Cathedral*,711 N.W.2d at 9) (declining to adopt the United States Supreme Court's majority opinion's definition of "public use" in *Kelo v. City of New London*, 545 U.S. 469 (2005), under the Iowa Constitution). Amici take no position on this issue, as the statute under review in this appeal satisfies the constitutional analysis under either framework.

587 (2d ed. 1989)). A government can take property "as one's own" through physical occupations and regulations that go "too far." *Id.* at 2071–74 (identifying repeated military aircraft flyovers over private property, imposition of a navigational servitude upon private property, compelled dedication of private property, and the removal of a certain percentage of raisins as examples of takings).

Yet, *Cedar Point* identified several limiting principles to this federal takings jurisprudence. First, "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." *Id.* at 2078. Second, government-authorized physical invasions that are "longstanding background restrictions on property rights," such as traditional common law privileges, will not constitute a taking. *Id.* at 2079 (identifying a non-exhaustive list of longstanding background restrictions such as the privilege to enter onto land to effectuate an arrest). Third, a right may be ceded "as a condition for receiving certain benefits." *Id.*

A. Over 200 Years of Jurisprudence Conclusively Establishes that Preliminary Surveys and Examinations Are Not Takings.

"The law has . . . long recognized a right to enter land to survey it for eminent domain or other public purposes." Bethany R. Berger, *Property and the Right to Enter*, 80 Wash. & Lee L. Rev. 71, 101 (2023); *see also id.* n.187 (identifying the earliest statute authorizing a preliminary survey and examination from Pennsylvania in 1782); *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E.2d 414, 418–19 (Va. 2017).

"[S]tate and federal courts have consistently upheld[] the privilege to enter private property for survey purposes before exercising eminent domain authority . . . ." *Charlottesville Div. v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 690 (W.D. Va. 2015). The wealth of authority cannot be overstated.

1. Nineteenth Century State Courts, including Iowa Courts, and Scholars Regularly Identified Fundamental Differences Between an Entry for a Preliminary Survey and A Compensable Taking.

As early as 1830, state courts recognized that "[a]n entry on private property for the sole purpose of making the necessary explorations for location, is not taking it." *Bonaparte v. Camden & A. R. Co.*, 3 F. Cas. 821, 831, F. Cas. No. 1617 (C.C.D.N.J. 1830) (explaining further that "the right remains in the owner as fully as before; no permanent injury can be sustained, nothing is taken from him, nothing is given to the company."); *Bloodgood v. The Mohawk and Hudson R.R. Co.*, 18 Wend. 9, 34 (N.Y. 1837) ("The entering upon land and making the necessary surveys and examinations thereof for the purpose of determining the most advantageous route . . . is not, in ordinary acceptation or legal contemplation, the taking of land."). A preliminary survey or examination was described as "a brief . . . momentary interference with the absolute right of the owner of real estate . . . [that] is one of every day's occurrence; indeed, so common, as to be acquiesced in without remonstrance, or even a question as to the right to do so." *Winslow v. Gifford*, 60 Mass. (6 Cush.) 327, 330 (1850); *Brigham v. Edmands*, 73 Mass. (7 Gray) 359, 363 (1856) ("[T]he

beneficial possession of the owner is not substantially interfered with . . . in entering on land for the purpose of making surveys for highways or railroads."). Preliminary surveys or examinations were simply described as "technical trespasses." *Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 525 (1872); *State v. Seymour*, 35 N.J.L. 47, 53 (N.J. 1871) ("Surveying and mapping lands by legislative authority is not such taking. It is not even a trespass to go on lands for these purposes, where the right is thus given, much less can it be held to be a taking of property so to do."). Nineteenth century courts also emphasized the necessity of surveys, explaining they ensured subsequent eminent domain proceedings were efficient and proper. *Fox v. Western P. R. Co.*, 31 Cal. 538, 555 (1867) ("If a railroad is to be constructed, a survey must be made before the corporation can determine the precise land to which will be required . . . [u]nder no circumstances, then, can the entry be regarded as the taking."); *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538, 544 (1877) ("It would seem that a railroad company must, of necessity, be permitted to go upon lands for the purpose of surveying and locating the line of its road; for, until the line is located, condemnation is impossible."). Simply put, "[t]o hold that compensation must be paid or tendered, before a survey should be made, or other preparatory steps taken, would be a construction of the constitution not required by its language, or necessary for the protection of private rights." *Steuart v. Baltimore*, 7 Md. 500, 516 (1855).

The Iowa Supreme Court recognized this fundamental bright line distinction in 1860. *See Henry v. The Dubuque & Pac. R.R. Co.*, 10 Iowa 540 (1860). In *Henry*, the Iowa Supreme Court explained the Iowa Constitution and the Right of Way Act required that just compensation must be made before a railroad company could make improvements to private land. *Id.* at 544–45. Yet, the *Henry* Court noted that a landowner's right to just compensation prior to the railroad's entry onto private land did not apply to "**making surveys or the like**." *Id.* at 545 (emphasis added). The *Henry* court explained that *Bloodgood*. "fully sustains the views" expressed in its opinion. *Id*. at 546 (citing *Bloodgood*, 18 Wend. 1); *see Bloodgood*, 18 Wend. at 34 (explaining that a preliminary survey does not constitute a taking).

The legislature's ability and power to authorize preliminary surveys and examinations prior to eminent domain proceedings was described as well-settled in the nineteenth century caselaw. *See, e.g.*, *McClain v. People*, 11 P. 85, 87 (Colo. 1886) ("The legislative power to authorize a temporary occupancy for these purposes ["running surveys, locating lines, and the like"], without requiring a prior ascertainment and deposit of damages, has been generally recognized under stringent constitutional provisions for the protection of land-owners."); *Young v. McKenzie*, 3 Ga. 31, 45 (1847) ("We do not intend to say, that the company could not have entered on the land, made the necessary survey and examination of the premises, under the authority of the Legislature."); *Cushman v. Smith*, 34 Me. 247, 260 (1852) ("It is

generally admitted in them, that examinations and surveys may be authorized by legislative enactments without a violation of the constitutional provision and without provision for previous compensation."); *Walther v. Warner*, 25 Mo. 277, 289 (1857) ("We are not to be understood, however, as denying to the legislature the power of authorizing an entry upon private property without compensation for the purpose of making the preliminary examinations and surveys before the location of the road."); *Orr v. Quimby,* 54 N.H. 590, 597 (1874) ("The application of the [takings] doctrine . . . to preliminary surveys, seems to be settled by the authorities."); *Polly v. Saratoga & Wash. R.R. Co.*, 9 Barb. 449, 450 (N.Y. Sup. Ct. 1850) ("The constitution does not prohibit the legislature from permitting an entry to be made upon the property of an individual for the purpose of a preliminary examination."); *Ward v. Toledo, Norwalk & Cleveland R.R. Co.*, 10 Ohio Dec. Reprint 365, 367 (Dist. Ct. Huron Cty. 1853) ("This court hold[s] that the legislature may properly and constitutionally confer this right [to survey and make examinations for its line of road], and that the company may exercise it, doing no unnecessary damage."); *Oregonian R. Co. v. Hill*, 9 Ore. 377, 381 (1881) ("Of course, this has no refence to the power of the legislature to authorize an entry upon private property without compensation, for the purpose of making the preliminary examination and survey before the location of the road.").

Numerous prominent nineteenth century legal scholars also recognized the fundamental principle that a preliminary survey or examination was not considered a taking. *See Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 830–31 (6th Cir. 2023) (reviewing works of nineteenth century scholars, such as Judge Thomas Cooley and Henry Mills, to determine whether a "background takings principle" exists). For example, Judge Cooley in his well-recognized treatise[5] on constitutional law identified that "[n]o constitutional principle . . . is violated by a statute which allows private property to be entered upon and temporarily occupied for the purpose of survey." *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 560 (2d ed. 1871). Similarly, Henry Mills and Augustus L. Abbott explained that "[a]n entry may be made on land, to ascertain boundaries for public purposes without compensation, provided the entry was reasonably necessary, not too long continued, and accompanied with no unnecessary damage." Henry Mills & Augustus L. Abbott, *Mills on the Law of Eminent Domain* 126 (2d ed. 1888). Judge Cooley's and Henry E. Mills conclusions were consistent with several other treatises. *See, e.g.*, Theodore

[5] Judge Cooley's treatise has been credited by the United States Supreme Court and the Iowa Supreme Court. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 616 (2008) ("The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations."); *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 662 (Iowa 2021) (Appel, J., dissenting) (noting Judge Cooley's "reputation for independence and integrity").

Segwick & John Norton Pomeroy, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* 467 (2d ed. 1874) ("In the construction of works of public improvement, as railroads or canals, for instance, before it is known what lands will be wanted, preliminary steps, such for instance as surveys, are indispensably necessary. These preliminary steps are, in themselves, a trespass."); Isaac Redfield, *Law of Railways* 258 (5th ed. 1873) ("[W]here the statute authorizes the entry upon the land, the company are not to be treated as trespassers and even where the statute provides for no compensation, it is not regarded as taking private property for public use, within the provisions of the American state and United States constitutions."); John Cassan Wait, *The Law of Operations Preliminary to Construction in Engineering and Architecture* 235 (1900) ("Preliminary surveys and explorations for determining the route of a canal or railroad may be authorized by the state without compensation being previously paid or secured to an owner. This is so even though the Constitution requires the payment of compensation to precede a taking, on the ground that no estate is thereby taken, the owner not being deprived of the use and enjoyment of his property.").

2. Twentieth Century State Courts Continued to Recognize the Fundamental Difference Between an Entry for a Preliminary Survey and A Compensable Taking.

This overwhelming line of precedent continues straight through the twentieth century. Courts continued to emphasize that the preliminary survey was simply a

temporary entry that did not amount to a substantial interference with the owner's property rights. *State v. Simons*, 40 So. 662, 662 (Ala. 1906) ("The entering upon the premises for the purposes of examinations and surveys . . . is purely of a temporary nature, and in no proper sense a taking of the property."); *Jacobsen v. Superior Ct. of Cty. of Sonoma*, 219 P. 986, 991 (Cal. 1923) ("[I]t is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of this property."); *Lafontaine's Heirs v. Lafontaine's Heirs*, 107 A.2d 653, 656 (Md. 1954) ("Authorized temporary occupancy or momentary entry for the purposes of survey or inspection is not a taking and may be done without compensation."). Many twentieth century courts concluded that this was the overwhelming majority approach. *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890 (Ga. 1984) ("These courts have recognized a basic conceptual difference between a preliminary entry and a constitutionally compensable taking or damaging of property and have held that . . . the former is not a variety of the latter."); *Cty. of Kane v. Elmhurst Nat'l Bank*, 443 N.E.2d 1149, 1153 n.2 (Ill. App. Ct. 1982) ("Most other jurisdictions have also held that a preliminary entry for survey purposes is not an exercise of the power of eminent domain, but rather a mere temporary intrusion not substantially

interfering with the owner's property rights or beneficial enjoyment of the land."); *State by Waste Mgmt. Bd. v. Bruesehoff*, 343 N.W.2d 292, 296 (Minn. Ct. App. 1984) ("[Other states have] reasoned that surveys are temporary intrusions which do not substantially interfere with the owner's property rights or enjoyment of the land, and therefore, are not a taking in the constitutional sense."); *Cleveland Bakers Union Local No. 19 Pension Fund v. State, Dep't of Admin. Servs-Pub. Works*, 443 N.E.2d 999, 1002 (Ohio Ct. App. 1981) ("The overwhelming majority of courts which have considered the issue have held that entry onto private property by a body with the power of eminent domain, for the purpose of conducting preliminary surveys and appraisals, does not amount to a 'taking' for which compensation must be awarded.").

3. Fundamental Differences Between a Preliminary Survey and A Compensable Taking are Applied to Preliminary Surveys for Pipelines.

As pipelines began to emerge as critical infrastructure in the United States, several states, including Iowa, began granting pipelines a statutory right of entry for surveying. *See, e.g.*, Ark. Code Ann. § 18-15-1302(*a*)(1) ("Whenever a corporation desires to construct a pipeline . . . the corporation, by its agents, shall have the right to enter peacefully upon the lands or rights-of-way and survey, locate, and lay out its pipeline."); Iowa Code § 479.30 ("[A] pipeline company may enter upon private land for the purpose of surveying and examining the land. . ."); Or. Rev. Stat. §

772.510(1) ("Any pipeline company . . . may enter in the manner provided by ORS 35.220 upon lands within this state outside the boundaries of incorporated cities."); Va. Code Ann. § 56-49.01(A) ("Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works."). To this day, courts continue to apply these basic takings principles to preliminary surveys or examinations for the construction of pipelines. *See Charlottesville Div.*, 138 F. Supp. 3d at 690; *Midwestern Gas Transmission Co. v. Baker*, No. M2005-00802-COA-R3-CV, 2006 Tenn. App. LEXIS 113, at *5–6, *53–54 (Tenn. Ct. App. Feb. 24, 2006); *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 361 (Tex. Ct. App. 2011); *Palmer*, 801 S.E.2d at 418. Indeed, two other Iowa District Courts recently applied these principles to hold a preliminary examination or survey does not constitute a taking. *See, e.g.*, Ruling and Order, *Navigator Heartland Greenway, LLC, v. Hulse*, EQCV204557 (Iowa Dist. Ct. May 30, 2023); Order, *Dakota Access, LLC, v. Johnson*, EQ40450 Pg. 14 (Iowa Dist. Ct. Aug. 7, 2015).

II. THE SUPREME COURT'S DECISION IN *CEDAR POINT* DOES NOT DISTURB THE HISTORICAL PRECEDENT.

The cases and secondary sources cited above illustrate how a preliminary survey or examination is quite different from the right to access regulation for union

organizers at issue in *Cedar Point*. 141 S. Ct. at 2069–70. The right to access regulation in *Cedar Point* allowed for labor union organizers to come onto agricultural employers' property for three hours a day for one hundred and twenty days a year to solicit support for unionization. 141 S. Ct. at 2069–70.

The right to access continuously encumbered the property, year after year, establishing a "degree of continuance or permanency." *Kingsway Cathedral*, 711 N.W.2d at 12; *see Cedar Point*, 141 S. Ct. at 2069–70. The Supreme Court held such a right of access essentially created a servitude on the land. *Cedar Point*, 141 S. Ct. at 2073 (explaining that government-authorized physical appropriations, such as the right of access, create a servitude on the land); *see also Kingsway Cathedral*, 711 N.W.2d at 11 ("A servitude has been defined as 'a right to the limited use of a piece of land or other immovable property without the possession of it.'") (quoting *Black's Law Dictionary* 1400 (8th ed. 2004)).

But a preliminary survey or examination has an effective end date: when enough information about the land has been gathered to attempt commercial resolution, commence eminent domain proceedings on the specific land or to change or abandon the route. *See Winslow*, 60 Mass. (6 Cush.) at 330; *Cf. Kingsway Cathedral*, 711 N.W.2d at 12 ("We agree with the defendants that the only reasonable inference from this allegation is that the damage was because of vibrations were of a temporary nature. Obviously, the construction projects have a beginning and an end."). Unlike

the right of access regulation in *Cedar Point*, "the real estate is not 'permanently subjected to a servitude'" by a preliminary survey or examination. *Eaton*, 51 N.H. at 525; *see also Fox*, 31 Cal. at 555 ("Nor, indeed, can [a survey] be said in any legal sense that the land has been taken until the act has transpired which divests the title or subjects the land to the servitude."). Nor do preliminary surveys rise to the level of a substantial interference with an owner's property rights needed to establish a taking. *Winslow*, 60 Mass. (6 Cush.) at 330; *Eaton*, 51 N.H. at 525; *see Elmhurst Nat'l Bank*, 443 N.E.2d at 1153 n.2.

"Absence of such continuance or permanency leaves the property owner with nothing but an action in tort." *Kingsway Cathedral*, 711 N.W.2d at 11; *see also Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) ("If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential."). That action in tort is trespass. *Cedar Point*, 141 S. Ct. at 2078; *Hendler*, 952 F.2d at 1377. Not surprisingly, the cases and secondary sources refer to these preliminary surveys as "technical trespasses" that were excused by the common law or state statutes to further the goal of efficient eminent domain proceedings. *See Bloodgood*, 18 Wend. at 34; *Seymour*, 35 N.J.L. at 53; Segwick & Pomeroy at 467; *see also Cedar Point*, 141 S. Ct. at 2078 ("[O]ur holding does nothing to efface the distinction between trespass and takings.").

Historically, courts and commentators analogize the necessity and temporary nature of preliminary surveys or examinations for eminent domain to the well-established background restriction of police officers entering onto land to effectuate an arrest. *See e.g.*, *Winslow*, 60 Mass. (6 Cush.) at 330; *Walther*, 25 Mo. at 289; *Eaton*, 51 N.H. at 525; Mills & Abbott at 126; *see also Cedar Point*, 141 S. Ct. at 2078 (recognizing the common law arrest privilege as an example of a well-established background restriction); *White v. Harkrider*, 990 N.W.2d 647, 655 (Iowa 2023) (same). The Supreme Court long ago recognized this parallel in the context of a takings challenge in *Montana Company v. St. Louis Mining and Milling Company*:

> In the latter case [*Winslow*], it appeared that certain commissioners, under authority of a statute entered upon the lands of the plaintiff and made certain surveys . . . . It was held that the act authorizing such entry without compensation was not unconstitutional. **Other instances of like temporary occupancy were referred to by the court in its opinion, such as the acts of the sheriff, with criminal process against an individual, going to arrest him on the land of a third party; entering upon the lands of an individual for the purpose of surveying for a highway**, when, as a result of such survey, the purpose of establishing the highway is abandoned. It was conceded that such entry and occupancy created a slight trespass upon the absolute right of the owner to an undisturbed and exclusive use of his real estate, but it was held that if the occupancy was reasonably necessary for some public purpose, was temporary, and with no unnecessary damage, it carried no right to compensation. . . . **All these cases involve some invasion of the rights to the possession and use of his property, yet the necessities of justice seem to compel it**.

152 U.S. 160, 167–68 (1894) (emphasis added); *accord Charlottesville Div.*, 138 F. Supp. 3d at 689 ("The Supreme Court of the United States cited *Winslow* and its

discussion of the common law privilege with approval in *Montana Co. v. St. Louis Mining & Milling Co.*, in upholding a Montana statute that authorized a court to order a physical inspection of a mine to determine conflicting claims.").

One would be hard pressed to believe *Cedar Point* was written with the *sub rosa* intention of overruling two centuries of well-developed caselaw and secondary treatises explaining that preliminary survey statutes, such as Iowa Code section 479B.15, do not constitute a taking. *See Cedar Point*, 141 S. Ct. at 2078 (explaining that its holding was not intended to "endanger a host of state and federal government activities involving entry onto private property."). Preliminary surveys are *de minimis* non-invasive intrusions or "technical trespasses" that are excused by common law or state statute in order to further the public benefit derived from eminent domain proceedings much like the well-established background restriction of entering land to effectuate an arrest for the public benefit. Iowa Code section 479B.15's authorization of preliminary survey and examination fits well within the constitutional bounds identified in *Cedar Point* and Iowa takings jurisprudence.

III. PRELIMINARY SURVEYS AND EXAMINATIONS ARE NECESSARY TO REALIZE THE PUBLIC USE PROVIDED BY PIPELINES.

Pipelines, including hazardous liquids pipelines, constitute a "public use" under the article I section 18 of the Iowa Constitution.[6] The Iowa Supreme Court

[6] Pipelines easily constitute a "public use" under the United States Constitution as described in *Kelo v. City of New London*. *See Kelo*, 545 U.S. at 484

recently adopted Justice O'Conner's dissent in *Kelo* to define what constitutes a "public use" under article I section 18 of the Iowa Constitution. *Puntenney*, 928 N.W.2d at 848; *see generally Kelo*, 545 U.S. at 494–505 (O'Conner, J., dissenting). Justice O'Conner's dissent in *Kelo* identifies three categories of legitimate public use: 1) a transfer of private property for public ownership; 2) a transfer of private property to private entities, such as common carriers, who make the private property available to the public; 3) a transfer of private property to a private entity to meet certain exigencies. *Id.* at 845 (citing *Kelo*, 545 U.S. at 497–98 (O'Conner, J., dissenting)). Of relevance is the common carrier category.

A common carrier is "one who undertakes to transport, indiscriminately, person and property for hire." *Employers Mut. Cas. Co. v. Chi. & N.W. Transp. Co.*, 521 N.W.2d 692, 695 (Iowa 1994). Yet, "a common carrier need not serve all the public all the time." *Wright v. Midwest Old Settlers & Threshers, Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996) (per curiam). The common carrier also need not serve just Iowans. *Puntenney*, 928 N.W.2d at 851.

(explaining that "economic development [as] a traditional and long-accepted function of government" is a public use); *see also Enbridge Energy, L.L.C. v. Kuerth*, 99 N.E.3d 210, 218 (Ill. App. Ct. 2018) ("[T]he public will often benefit from a pipeline. Oil, natural gas, and other energy sources are essential to modern American life and must be transported from production facilities to refineries and ultimately to consumers.").

In *Puntenney*, the Iowa Supreme Court found that an underground crude oil pipeline, the Dakota Access pipeline, was a "common carrier" analogous to a railroad or public utility. *Id.* at 848. The Iowa Supreme Court identified that the Dakota Access pipeline would provide "cheaper and safer transportation of oil which in a competitive marketplace results in lower prices for petroleum products." *Id.*; *see also id.* at 849 (explaining that the public use is served when a service may be obtained at a lower cost). Thus, the Dakota Access pipeline was a "public use" under the Iowa Constitution. *Id.* ("[T]he pipeline is a common carrier with the potential to benefit all consumers of petroleum products, including three million Iowans."). Carbon capture pipelines are "common carriers" similar to railroads and oil pipelines. *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909, 917 (Tex. 2017) (explaining that the "Green Line" carbon capture pipeline was a common carrier because it transported non-pipeline-owned gas for one or more third-party users).

A carbon capture pipeline can similarly serve the public by supporting ethanol production. Decision Innovation Solutions, *Comparative Economics of Carbon Sequestration for Iowa Ethanol Plants* 3 (Feb. 2023). This impact is notable because "Iowa has some of the most advanced and productive farming in the world." *Puntenney*, 928 N.W.2d at 849. Ethanol plants in Iowa contribute to the farming industry by purchasing 57% of the state's corn. John M. Urbanchuk, *Contribution of the*

Renewable Fuels Industry to the Economy of Iowa, ABF Economics: Agriculture and BioFuels Consulting, LLP (Jan. 28, 2021), https://iowarfa.org/wp-content/uploads/2021/02/2020-Iowa-Biofuels-Impact-Final.pdf. Iowa remains the nation's leading ethanol producer providing approximately 27% of U.S. Capacity. *Id.*

In addition, carbon capture pipelines enable significant industrial greenhouse gas reductions, benefiting Iowa, the United States, and the World. Sixty-six percent (66%) of Iowa's greenhouse gas emissions come from carbon dioxide. *Greenhouse Gas Emissions*, Iowa Department of Natural Resources https://www.iowadnr.gov/environmental-protection/air-quality/greenhouse-gas-emissions (last visited Sept. 1, 2023). Carbon capture pipelines aim to reduce Iowa's carbon footprint. *See CO2 Pipelines: Part of Our Clean Energy Future*, Liquid Energy Pipeline Ass'n, https://liquidenergypipelines.org/documents/en-us/328589cc-7d03-481f-92d7-156d32392466/1 (recognizing the benefit of carbon capture in reducing greenhouse gas emissions); *see also* American Petroleum Institute, *Compendium of Greenhouse Gas Emissions Methodologies: For the Natural Gas and Oil Industry* 373–75 (Nov. 2021), https://www.api.org/-/media/files/policy/esg/ghg/api-ghg-compendium-110921.pdf (recognizing the benefit of carbon capture in reducing greenhouse gas emissions); *cf. Puntenney*, 928 N.W.2d at 851 (recognizing "serious and warranted concern about climate change"). Several federal agencies recognize the benefit of carbon capture pipelines in addressing the national goal of combating

climate change. *See, e.g.*, *DOE Announces $45 Million for Carbon Capture, Transport, and Storage to Reduce Carbon Pollution*, Office of Fossil Energy and Carbon Management (May 22, 2023), https://www.energy.gov/fecm/articles/doe-announces-45-million-carbon-capture-transport-and-storage-reduce-carbon-pollution; United States Env'l Protection Agency & U.S. Dep't of Energy, *Carbon Capture and Storage*, https://www.epa.gov/system/files/documents/2022-09/August%202022%20CCS%20Information%20Session.pdf.; *see also* Keegan Cassady, Note, *Better Late Than Never? Combating Climate Change Through Carbon Capture Utilization and Storage*, 27 Drake J. Agric. L. 273, 291 (2022) ("Carbon pipelines for geological sequestration ultimately benefit the environment by removing [greenhouse gases] from the atmosphere, thus making them more beneficial than previously approved oil pipelines.").

But these public benefits can only be provided if the pipeline company can establish a just and reasonable route. Iowa Code § 479B.9. The demands of Iowa Code section 479B.9 are established "if the pipeline company demonstrates that the pipeline requires the exercise of eminent domain and demonstrates why the particular route is superior." *Puntenny*, 928 N.W.2d at 852. A just and reasonable pipeline route must, among other things, "account for environmental features (such as critical habitat, fault lines, state parks, national forests, and historic sites), engineering considerations (such as existing pipelines and power lines), and land use considerations

(such as homes, other buildings, dams, airports, cemeteries, and schools)." *Id.*; *see also Green v. Wilderness Ridge, L.L.C.*, 777 N.W.2d 699, 703–04 (Iowa 2010) (explaining that the "nearest feasible route" under Iowa Code section 6A.4(2) requires a case-by-case analysis).

Many of the considerations for a just and reasonable pipeline route described in *Puntenny* cannot be accomplished without a preliminary survey or examination authorized under Iowa Code section 479B.15. *Charlottesville Div.*, 138 F. Supp. 3d at 693 (explaining that a survey for a pipeline facilitates a public use). "It is logical and essential that public authorities possess such rights of entry prior to the purchase of property or the commencement of condemnation proceedings, for before they can negotiate or appropriate they must first know that site is suitable for their public purposes." *New York State Envtl. Facilities Corp. v. Young*, 320 N.Y.S.2d 821, 824 (N.Y. Sup. Ct. 1971). After the completion of a preliminary survey or examination, "[t]he landowner will have only so much of [their] land condemned as is needed for the particular utility purpose involved; and, the utility will not be forced to engage in the wasteful expenditure of the ratepayer's money by blindly purchasing a 'pig in a poke.'" *Indiana & Michigan Elec. Co. v. Stevenson*, 363 N.E.2d 1254, 1259 (Ind. Ct. App. 1977); *see also Goss*, 322 S.E.2d at 890. These preliminary surveys or examinations can help identify environmental features, engineering considerations,

and land use considerations that go into building a pipeline route that sufficiently meets the standard required by the Iowa Code. *See Puntenny*, 928 N.W.2d at 852.

Without these surveys, pipelines cannot efficiently provide the significant public benefits to Iowans and United States citizens. *See Stevenson,* 363 N.E.2d at 1259. The development of tens of thousands of miles of new pipeline could be stalled every year if preliminary surveys were considered a taking. *See New Construction Miles*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://portal.phmsa.dot.gov/analytics/saw.dll?Portalpages&PortalPath=2Fshared%2FPDM%20Public%20Website%2F_portal%2FPublic%20Reports&Page=New%20Construction. Such delays can only harm Americans in receiving much needed energy and carbon emissions mitigation. *General Pipeline FAQs*, U.S. Dep't of Transp.: Pipeline & Hazardous Materials Safety Admin., https://www.phmsa.dot.gov/faqs/general-pipeline-faqs.

CONCLUSION

A statute that authorizes preliminary surveys or examinations does not constitute a taking. Preliminary surveys are temporary *de minimis* interference with land that are necessary to effectuate an important public purpose. The longstanding caselaw confirms that such statutes are part of traditional background limitations upon landowners' right to exclude. This Court should affirm to ensure that Iowans

and Americans receive the benefits of this pipeline and other pipelines across the Nation.

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Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this motion and accompanying brief were electronically filed and served this 20th day of December, 2023, using the Electronic Document Management System, which will send notification of electronic filing (constituting service) to the parties.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type and contains 6,486 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Jason W. Grams — December 20, 2023
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I hereby certify the cost of printing the foregoing Amicus Brief was the sum of $0.00.

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