IN THE COURT OF APPEALS OF THE STATE OF OREGON

IDAHO POWER COMPANY, Petitioner-Appellant, v. DOUGLAS BALDWIN BEAN, MALLORY HARDT BEAN, and MADELINE BALDWIN BEAN, Partners doing business as 516 RANCH PARTNERSHIP, an Oregon general partnership; and FOR THE GIRLS LLC, an Oregon limited liability company, Respondents-Respondents.	Union County Circuit Court Case No. 23CV12213 CA No. A182676

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Appeal from the Judgment of the Circuit Court for Union County
Honorable Wes Williams, Judge

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in constitutional rights including private property rights. Founded more than 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases that defend individuals' constitutional rights under the Takings Clause. *See, e.g.*, *Tyler v. Hennepin County*, 598 US 631 (2023); *Cedar Point Nursery v. Hassid*, 594 US 139, 147 (2021); *Knick v. Twp. of Scott*, 588 US 180 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595 (2013); *Palazzolo v. Rhode Island*, 533 US 606 (2001); *Nollan v. Cal. Coastal Comm'n*, 483 US 825 (1987). PLF has also represented clients in state courts around the country to defend property owners' rights. *See, e.g.*, *Shear v. Cal. Coastal Comm'n*, S284378 (Cal June 12, 2024) (review granted); *Rafaeli v. Oakland County*, 952 NW2d 434 (Mich 2020); *Schafer v. Kent Cnty.*, 990 NW2d 876 (Mich 2023).

PLF often participates as amicus curiae to support property owners against uncompensated takings. *See, e.g.*, *Walton v. Neskowin Reg'l Sanitary Auth.*, 372 Or 331, 550 P3d 1 (2024); *State ex rel. Dep't of Transp. v. Alderwoods (Oregon), Inc.*, 358 Or 501, 503, 366 P3d 316, 317 (2015); *Coast Range Conifers, LLC v. State ex*

rel. Oregon State Bd. of Forestry, 339 Or 136, 117 P3d 990 (2005); *Dolan v. City of Tigard*, 319 Or 567, 877 P2d 1201 (Or 1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court recently reconfirmed, property owners have a fundamental constitutional right to say "keep out," and statutes authorizing third parties to enter private property without consent are presumptively takings, requiring both condemnation proceedings and the payment of just compensation. *See Cedar Point*, 594 US 139. In this case, Oregon's "precondemnation entry" statute does just that: it authorizes a condemner to "enter upon, examine, survey, conduct tests upon and take samples" from any property "that is subject to condemnation by the condemner." ORS 35.220.

Idaho Power—a private, for-profit entity which has been delegated the state's power of eminent domain—claimed a right under the statute to enter 516 Ranch's property for numerous purposes: three-toed woodpecker surveys, northern goshawk surveys, rare plant inspection, gray owl surveys, flammulated owl surveys, wetland inspection, terrestrial visual encounter survey, noxious weed surveys, cultural, archaeological, and historic properties management plan inspection, geotechnical drilling or access, land survey, and an appraisal field visit. (ER-5). These entries are presumptively takings requiring compensation, unless Idaho Power can demonstrate

they "are consistent with longstanding background restrictions on property rights." *Cedar Point*, 594 US at 160.

After considering evidence, the circuit court determined that Idaho Power planned to enter 516 Ranch's property as many as thirty-two times over the course of several months, with crews of one to five Idaho Power employees or contractors. These entries went well beyond minor and innocuous entries for examination, survey, and testing that can be allowed by the statute consistent with the U.S. Constitution. The circuit court correctly denied Idaho Power the power to enter 516 Ranch's property except for relatively innocuous boundary surveying and appraisal activities, because the scope, duration, and frequency of the remaining entries it sought equated to an appropriation of 516 Ranch's right to exclude, and would have resulted in the taking of a temporary easement, for which Oregon's ordinary condemnation proceedings are required.

At issue in this case is a property owner's fundamental constitutional right to exclude others. As the Supreme Court has repeatedly recognized, this is an essential right and the hallmark of private property ownership. *Cedar Point*, 594 US at 149–50; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435 (1982); *Kaiser Aetna v. United States*, 444 US 164, 176, 179–80 (1979); *see Dolan v. City of Tigard*, 512 US 374, 384, 393 (1994); *Nollan v. California Coastal Comm'n*, 483 US 825, 831 (1987). 516 Ranch's objections are not merely a legal formality or

process for the sake of process. After years of consenting to Idaho Power's free entry and use of its property, and repeated disruption to 516 Ranch's operations, 516 Ranch merely asks the Court to recognize some limit on Idaho Power's authority claimed under ORS 35.220. This case is an opportunity to reaffirm the fundamental principle that property owners have the right to control who enters their properties, unless the condemnor takes and provides compensation.

The scope, duration, and frequency of the entries permitted under ORS 35.220 should be limited to prevent uncompensated takings and to protect a property owner's right to exclude.

This brief makes three main arguments in support of affirmance:

1. The proposed repeated physical invasions at issue here amount to a taking of private property for a public use, requiring just compensation and condemnation proceedings.

2. *Cedar Point*'s "common law privilege" exception is narrow, and the circuit court correctly concluded that Idaho Power did not meet its burden of showing consistency with any common law privilege. Even if it could, access consistent with a common law privilege may still amount to a taking.

3. ORS 35.220 must be construed narrowly to avoid constitutional problems and to protect common law rights.

ARGUMENT

I. PHYSICAL INVASIONS PRESUMPTIVELY REQUIRE CONDEMNATION PROCEEDINGS AND JUST COMPENSATION

A. Repeated, Temporary Invasions Take Private Property Within the Meaning of the Takings Clause

Cedar Point held that statutes authorizing third parties to access or enter private property without consent are *per se* takings because they prevent the owner from exercising his or her right to exclude, "one of the most essential sticks in the bundle of rights" known as property. *Cedar Point*, 594 US at 150 (quoting *Kaiser Aetna v. United States*, 444 US 164, 176 (1979)). Even minor or temporary intrusions are subject to this rule. *See, e.g.*, *Loretto*, 458 US 419 (city could not require building owner to allow a small cable TV box on an apartment roof without condemnation and compensation); *Arkansas Game & Fish Comm'n v. United States*, 568 US 23 (2012) (temporary physical invasions require just compensation); *Cedar Point*, 594 US at 150–54 (even occasional government-authorized intrusions are takings, regardless of actual damage).

Many courts have reasoned that repeated but temporary invasions cause a taking on the ground that such incursions create a de facto easement. *See, e.g.*, *Arkansas Game & Fish Comm'n v. United States*, 736 F3d 1364, 1369–70 (Fed Cir 2013); *Hendler v. United States*, 952 F2d 1364, 1377–78 (Fed Cir 1991) (per se taking in "a situation in which the Government behaved as if it had acquired an

easement"). One Oregon eminent domain expert has likened the interest sought to be taken by prospective condemnors like Idaho Power here to a "temporary investigative easement." Paul J. Sundermeier, *The Constitutionality of Pre-condemnation "Right" of Entry Laws After* Cedar Point Nursery.

Whether the scope, frequency, and duration of a prospective condemnor's entries pursuant to ORS 35.220 may constitute the taking of a property interest such as a temporary investigative easement is a question of constitutional interpretation that every lower court is facing when it hears a petition for precondemnation entry. The question may be harder to answer in other cases, but the answer is that the access sought is presumably a taking. *Cedar Point*, 594 US at 147–48 (describing "per se" rule); *Arkansas Game & Fish Commission*, 568 US at 31 ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking."); *Walton v. Neskowin Reg'l Sanitary Auth.*, 372 Or 331, 343, 550 P3d 1, 10 (2024) ("There is no unitary test for what constitutes a 'taking' of property under either Article I, section 18, or the Fifth Amendment."). Idaho Power's construction of ORS 35.220, which would authorize numerous, invasive entries, would render its application here unconstitutional.

B. Takings Require Eminent Domain Proceedings and Just Compensation

ORS 35.220 has none of the procedural safeguards inherent in most eminent domain statutes and required by state and federal constitutions. First, ORS 35.220

limits a landowner's recovery to "reasonable compensation" for "physical damage" or "substantial interference" although both the Oregon and the U.S. Constitutions require just compensation when property is taken for public uses. *Oregonian Ry. Co. v. Hill*, 9 Or 377, 379 (1881) ("Not simply compensation, but just compensation . . . .").

Property owners whose property is invaded by virtue of ORS 35.220 must devote resources like their own time and money to shepherding the many crews and visits that are claimed to be allowed under statute. For example, for a large property like the 516 Ranch, wildlife surveyors or plant clippers need to be directed which roads to use to get from A to B, to make sure gates are closed, where to avoid mud bogs, which culverts or bridges can support heavy equipment, etc. (ER-354–55, 175–76). A landowner will often prudently decide to accompany the condemnor and its agents to facilitate their visits while minimizing the disruption to the owner's facilities and land uses. In other instances, the landowner may be bound to closely monitor a condemnor's use of its property to prevent breaches of conservation easements, shared maintenance agreements, and other contracts. Such time and resources may not constitute "substantial interference" or "actual damage" within the meaning of ORS 35.220, but nevertheless be part of the value of the apparent easement taken by the condemnor and worthy of just compensation.

Secondly, a private condemnor like *Idaho Power* must "assess and tender" just compensation prior to taking private property. Or Const art 1, § 18 ("Private property shall not be taken for public use . . . except in the case of the state, without such compensation first assessed and tendered."); *State By & Through State Highway Comm'n v. Stumbo*, 222 Or 62, 71, 352 P2d 478, 482 (1960) ("our constitutional provision exempts the state from the requirement made of other condemnors, that damages shall be assessed and tendered before the taking."). In recognition of this, the legislature has not given private condemnors the power of "quick take," whereby a public condemnor may take *possession* of property before a condemnation action is concluded, *see* ORS 35.352, 35.215(6), and Oregon's early *occupancy* statute for private condemnors "requir[es] the posting of a bond or deposit of funds into court to apply toward whatever damages are eventually shown to result from the taking." *Nw. Nat. Gas Co. v. Georgia-Pac. Corp.*, 53 Or App 89, 96, 630 P2d 1326, 1332 (1981); ORS 35.275.

But Idaho Power's construction of ORS 35.220 would allow the taking of private property without observance of the above-mentioned procedures and without prior payment of just compensation for the value of the interest taken, not just actual damage or interference. The trial court's narrow construction of the statute properly avoided these constitutional problems.

II. BACKGROUND PRINCIPLES OF OREGON PROPERTY LAW DO NOT INCLUDE A PROPSECTIVE CONDEMNOR'S REPEATED ACCESS TO PRIVATE PROPERTY FOR PERVASIVE INFORMATION GATHERING

Idaho Power claims that its 32 entries for counting birds, taking plant clippings, testing soil, etc. would not constitute a taking of private property because it is necessary for Idaho Power to have such information to locate its powerline. Appellant's Brief at 42–47. But *Cedar Point* recognized only one minor exception pertinent here to its categorical rule that just compensation is owed when a statute authorizes other people to use and occupy another's property: when the authorization granted by statute is "consistent with" longstanding background principles of property law such as common law privileges to enter private property. 594 US at 141. A common law privilege to enter is a defense to trespass, *see Collier v. City of Portland*, 57 Or App 341, 344, 644 P2d 1139, 1141 (1982) (citing *Restatement (Second) of Torts* § 158 (1934)).

Exceptions generally, but especially exceptions to constitutional rules, are narrowly construed. *See, e.g.*, *Arkansas v. Sanders*, 442 US 753, 760 (1979) (exceptions to Fourth Amendment warrant requirement narrowly drawn); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 US 622, 641 (1994) (explaining that exceptions to First Amendment's free speech clause are narrow). And of course, the burden is on Idaho Power, as the claimant of the exception, to show that it meets the requirements and justification for the exception. *See* ORS 40.105 (burden of proof is on the party

against whom a finding on the issue would be required in the absence of further evidence); ORS 40.115.

"As a general matter . . . the property rights protected by the Takings Clause are creatures of state law." *Cedar Point*, 594 US at 155. To satisfy its burden that *Cedar Point*'s categorical rule does not apply, Idaho Power must show the existence of some common law privilege in Oregon, and explain how that privilege, narrowly construed, is consistent with a prospective condemnor's 32 entries onto private property to count birds, take plant clippings, and collect other valuable information. Idaho Power has not made that showing.

Idaho Power relies on General Laws of Oregon, Title 1, § 22 (1862), *see* Appellant's Brief Appx-92, stating that a road, railroad, canal, or bridge builder may enter upon any land for "the purpose of examining, locating, and surveying the line of such road or canal," but this statute does not support its argument that the common law recognized a privilege of entering property up to 32 times to conduct numerous environmental and other surveys. The right of access created by this law—which Idaho Power would have had no rights under as they are not the builder of a bridge, road, railroad, or canal—is clearly statutory. It is the result of legislative enactment and not any body of judicial decisions. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 77 (2nd, Oxford Univ Press rev ed 2001) (Common law "denot[es] the body of judge-made law based on that developed in England" and "is contrasted with

statutory law."). A statute may codify common law, but it also may be completely new and unsupported by the common law. *See Naber v. Thompson*, 274 Or 309, 546 P2d 467, 468 (Or 1976) (the derogation cannon acknowledges that some statutes may contravene the common law). A statute does not necessarily evince a common law privilege any more than a common law privilege suggests the existence of a statute.

Although *Gen Laws of Or*, Title 1, § 22, dates back to 1862, Oregon's Takings Clause and just compensation requirement date to 1857 and the Fifth Amendment even earlier. The passage of a later statute like Title 1, § 22, does not demonstrate that 32 entries onto private property to conduct environmental and related surveys were a "common law privilege" in Oregon that can be regarded as a pre-existing "longstanding background restriction on property rights." *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 US 702, 715 (2010) ("A state, by ipse dixit, may not transform private property into public property without compensation.").

The early cases cited by Idaho Power don't establish a common law privilege for such uncompensated entries either, since owners could still obtain relief through trespass actions and other claims. Instead, the holdings of these cases merely establish that such entries did not entitle the owners to monetary relief under the understanding of state takings clauses at that time. *See, e.g.*, *Cushman v. Smith*, 34

Me 247, 258–59 (1852) (holding that although damages are available against condemnors who trespass, such remedy is not guaranteed by the state constitution); *Oregonian Ry. Co.*, 9 Or at 379 (holding that an owner has an action in trespass for a taking not previously compensated); *cf. Knick*, 588 US at 199 (explaining that prior to 1870, takings plaintiffs could often only obtain monetary relief through trespass actions, and injunctive relief for a taking). But subsequent takings decisions recognized that temporary interference or possession of property may cause a taking that requires just compensation (not just injunctive relief), so the reasoning of many of these early cases has been abrogated. *See id.* at 200 (monetary relief rather than injunctive relief became the norm for takings); *United States v. Causby*, 328 US 256, 258 (1946) (recognizing taking from temporary invasions caused by overflights by military planes); *Arkansas Game & Fish Comm'n*, 568 US 23 (temporary flooding causing taking).

Indeed, courts often recognize an action as a trespass, even if that trespass doesn't rise to the level of a taking. In other words, a court's holding that a precondemnation entry did not violate the Takings Clause cannot, by itself, stand for the proposition that the entry was privileged at common law. For example, in *Boise Cascade Corp. v. United States*, 296 F3d 1339, 1341 (Fed Cir 2002), a logging company argued that the repeated entries by owl surveyors authorized by a lower court's injunction constituted a taking of its property. On appeal, the Federal Circuit

concluded that the nature and purposes of the entry by owl surveyors "preclude a finding that a taking occurred as a matter of law," 296 F3d at 1357, even though it determined that "the government's incursion into Boise's property is more in the nature of a temporary trespass . . . ." *Id*. at 1355. The judgment that an entry is not a taking does not establish that the entry was privileged at common law. *See id*.

Furthermore, the fact that one or two entries may have been privileged at common law—such as for surveying and appraisal—does not mean that repeated entries for those purposes are not a taking. *Cedar Point* did not hold that common law privileges to trespass are categorically not takings. *See Cedar Point*, 594 US at 160 (noting that "many [not all] government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights"). If a prospective condemnor shows that its precondemnation entries are consistent with a common law privilege to enter, the condemnor has shown that the categorical rule that physical invasions cause a taking *might* not apply. The condemnor may have a defense to trespass, but it has not shown *ipso facto* that no taking has occurred. That is because a taking may occur even when the actor's entry is privileged and does not constitute a trespass. *See Mitchell v. Harmony*, 54 US 115, 134 (1851) (explaining that a person may act pursuant to official duty, and not be a trespasser, yet be obligated to pay just compensation for property taken); *Thornburg v. Port of Portland*, 233 Or 178, 376 P2d 100, 102

(1962) (holding that property may be taken whether or not a trespass occurred and criticizing contrary holdings).

So even if this Court were to determine that the 32 entries requested by Idaho Power to take plant clippings, listen for birds, and collect other environmental, cultural, and historical data are consistent with a common law privilege to enter without trespassing, the scope, frequency, and duration of the invasions sought under ORS 35.220 will still amount to a taking of private property. After all, interests like what *Idaho Power* proposed to take here are routinely the object of condemnation proceedings initiated by condemnors. For example, in temporary construction easements, a condemnor needs to access private property in order to effectuate its eminent domain power, i.e., the construction of some public work on a nearby property permanently taken for that purpose. The condemnor's possession and use of the condemned property is temporary; nevertheless, a taking is effected within the meaning of the Fifth Amendment and compensation is due. *See, e.g.*, *Alderwoods*, 358 Or 501 (upholding award of just compensation after taking of temporary construction easement).

The broad scope of Idaho Power's information gathering needs and the rule that exceptions to constitutional rules are interpreted narrowly further suggests that there was no common law privilege to enter private property 32 times to count birds, take plant clippings, and perform cultural or historical analyses. Nearly all the

environmental regulations giving rise to such information gathering needs were passed in the last 25 to 50 years. And as Idaho Power recognizes, only "land surveys and appraisals . . . would have been historically commonplace back at the adoption of the state and federal constitutions." Appellant's Brief at 41. Prospective condemners at common law did not have the privilege to enter private property over the course of several months (or as here, 15 years) to count birds, take plant clippings, etc. to determine the suitability of a property for a railroad or powerline. (ER-354). And of course, it is Idaho Power's burden to show that such a degree of access was allowed. *See* ORS 40.105.

In an attempt to expand whatever limited common law privilege may exist, *Idaho Power* argues that "rather than being frozen in time to historical contexts, the relevant underlying principles of a constitutional right inform the application of the constitutional text to modern circumstances." Appellant's Brief at 42. But *Cedar Point* was decided less than three years ago, and the Supreme Court applied the constitutional text to the modern circumstances of a regulation passed pursuant to a law passed around the same time as ORS 35.220, and determined that statutory rights of access are categorically takings, with few exceptions. *See Cedar Point*, 594 US at 144 (1975 labor relations law found to cause taking). There is no need, as Idaho Power urges, for this Court to further reexamine the "principles of the Constitution" in light of such a recent decision.

Idaho Power makes the related argument that the common law may change, which is true so long as courts continue to issue decisions and those decisions are regarded as precedent. But the common law privileges which form "longstanding background restrictions" on property rights protected by the Constitution do not change. *See, e.g.*, *Tyler*, 598 US at 638 (looking to "traditional property law principles," historical practice, and Supreme Court precedent). The relevant time period for identifying a common law privilege is the time of the framing of Or Const art 1, § 18, and the Fifth Amendment. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 597 US 1, 34 (2022) ("Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.") (quoting *D.C. v. Heller*, 554 US 570, 634–35 (2008)). Idaho Power has not shown that its access is consistent with any common law privilege, and much less that its access, if privileged at common law, does not constitute a taking for which ordinary condemnation proceedings are required.

III. STATUTES AUTHORIZING PHYSICAL ENTRY ON PRIVATE PROPERTY AND DEROGATING CONSTITUTIONAL RIGHTS ARE NARROWLY CONSTRUED

Because ORS 35.220 authorizes entry to private property without first instituting eminent domain proceedings and providing just compensation, the statute must be narrowly construed and applied in a way to avoid unconstitutionality. *See, e.g.*, *Bernstein Bros. v. Dep't of Revenue*, 294 Or 614, 621, 661 P2d 537, 541 (1983)

("It is axiomatic that we should construe and interpret statutes 'in such a manner as to avoid any serious constitutional problems.'") (quoting *Easton v. Hurita*, 290 Or 689, 694, 625 P2d 1290, 1292 (1981)). ORS 35.220 should be narrowly construed to allow only one or two innocuous and superficial entries, because a broad interpretation would render the statute in a manner that authorizes uncompensated takings of property.

The California Supreme Court, in *Jacobsen v. Superior Ct. of Sonoma Cnty., Dep't No. 2*, 219 P 986, 991 (Cal 1923), adopted a similar position over a hundred years ago with respect to the scope of surveys allowed under California's precondemnation entry statute, writing that it would "render the section void" as violating the Takings Clause if it was interpreted as authorizing anything more than entry for the "superficial examination" for "making of surveys or maps." *Id*. (superseded by statute as stated in *Property Reserve, Inc. v. Superior Ct.*, 375 P3d 887, 914 (Cal 2016)). For any entry more intrusive than that, it would be "idle to attempt to argue" that it would not "amount to a taking . . . to the extent and during the period of such entry." *Id*. at 902.

Furthermore, "it is a cardinal rule of statutory construction that statutes in derogation of a common law right must be strictly construed." *Naber*, 274 Or at 311; *see also* ORS 174.030 ("[W]here a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to

prevail."). The common law and natural right derogated by ORS 35.220 is the right to exclusive possession of one's property. The statute should be strictly construed to allow one or two innocuous and superficial inspections. This will protect a person's right of exclusive possession and give the prospective condemnor the basic information required to begin condemnation of an interest, such as a temporary investigative easement, even if acquisition of a more permanent interest, such as a utility easement, may be planned.

This narrow and constitutional construction of ORS 35.220 does not frustrate the use of eminent domain power by condemnors. Besides the fact that prospective condemnors are rarely met by opposition in their requests for consent to enter property, Appellant's Brief at 16 (stating that 95 percent of landowners give consent), condemnors can get in one or two innocuous and superficial entries the basic information needed to make sure that acquisition of a temporary investigative easement would not be "purchasing a pig in a poke."

Rather than purchasing a pig in a poke, the condemnor of a temporary investigative easement proposes to get exactly what Idaho Power sought here: the right to access private property to conduct whatever necessary information gathering its private use of the eminent domain power is conditioned upon. Here, by allowing an entry for appraisal and boundary surveying, the trial court allowed one or two superficial and innocuous entries while acknowledging a condemnor's need to know

basic information about the property to be condemned. *Cf. State ex rel. Rhodes v. Crouch*, 621 SW2d 47, 48 (Mo 1981) (holding that pre-condemnation surveying is necessary to the exercise of the right of eminent domain so that a condemnor can describe the property sought to be condemned).

Under Idaho Power's rule, the scope, frequency, and duration of the access allowed under ORS 35.220 could expand without limit as long as permitting requirements and a condemnor's consequent information gathering needs grow. Surely the scope of the Takings Clause's protection does not wax or wane with the promulgation of state, federal, or local permitting requirements. The scope, frequency, and duration of access allowed under ORS 35.220 must find some limit under the Fifth Amendment, and a narrow construction of the access permitted under ORS 35.220 provides that limit: the entries allowed should be one or two, innocuous and superficial, and if supported by a common law privilege, strictly consistent with that privilege.

Other jurisdictions construe their precondemnation entry statutes narrowly. The approach of the Kansas Supreme Court is illustrative of such jurisdictions. In *National Compressed Steel Corp. v. Unified Gov't of Wyandotte Cnty./Kansas City*, 38 P3d 723, 730 (Kan 2002), that court concluded that the Kansas entry statute, Kan Stat Ann 26-512, which allows a prospective condemnor to "enter upon the land and make examinations, surveys and maps," did not permit a physical invasion. The list

of environmental and geological activities which the government sought to undertake in that case was long, but not as extensive as those which Idaho Power sought here, and included drilling soil borings, creating temporary monitoring wells, installing pipes, inserting sand, collecting soil and water samples, purging wells, and filling of drilled holes. 38 P3d at 727.

In rejecting the government's argument that these activities fell within the statute's permitted uses, the court concluded that "subsoil testing is beyond the scope of the examination authorized." *Id*. at 735. The court also held that the power of eminent domain must be strictly construed, and surveyed how the courts of other jurisdictions analyzed the issue, noting that courts in Indiana, Illinois, Missouri, and Nebraska also viewed their entry statutes similarly. *See Indiana State Highway Comm'n v. Ziliak*, 428 NE2d 275, 297 (Ind Ct App 1981) (the term "survey" did not allow digging a 50-foot long and 6-foot wide trench on the property); *Cnty. of Kane v. Elmhurst Nat'l Bank*, 443 NE2d 1149, 1154 (Ill App Ct 1982) ("Rather than hold that such drilling and surveying is authorized under a statute which we would then have to invalidate, we decline to read the power to make the contemplated soil and geologic survey into Section 5-803's grant of power to 'mak[e] surveys.'"); *Missouri Highway & Transp. Comm'n v. Eilers*, 729 SW2d 471, 474 (Mo Ct App 1987) (soil survey was a taking, and condemnor could not conduct the study until either the owner consented, or the condemnor initiated eminent domain proceedings to take an

easement); *Burlington Northern and Santa Fe Ry. Co. v. Chaulk*, 631 NW2d 131, 139 (Neb 2001) (preliminary tests resulted in a taking).

Although the pre-condemnation entry statutes at issue in those cases are not phrased in precisely the same way as Oregon's, the courts in these cases made clear their rulings were not based only on interpreting the statutes, but were compelled as a matter of constitutional law. *See, e.g.*, *National Compressed Steel Corp.*, 38 P3d at 732 ("Finally, statutes should be construed to avoid constitutional problems. As discussed in the next portion of this opinion, if [Kansas' entry statutes] are read to authorize soil surveys, they will violate constitutional restrictions on the taking and damaging of private property without just compensation.") (citing *First National Bank of St. Joseph v. Buchanan Cnty.*, 205 SW2d 726, 730 (Mo 1947)). Thus, the courts recognized that the environmental and geological surveys and testing sought in those cases would be takings regardless of whether the statutes expressly authorized the activities or not.

Applying a similar approach, the entry statutes of other states place similar restrictions on a condemnor's entry, limiting those activities to insubstantial uses. *See, e.g.*, Virginia Code Ann 25.1-203(A) (limiting precondemnation entry to "inspect the property"); Virginia Code Ann 33.1-94 (highway department may enter land for certain enumerated activities "photographing, testing, including but not limited to soil borings or testing for contamination, making appraisals, and taking

such actions as may be necessary or desirable to determine its suitability for highway and other transportation purposes"); Md Code 12-111 (condemnor may enter "to make surveys, run lines or levels, or obtain information relating to the acquisition or future public use of the property . . . [s]et stakes, markers, monuments, or other suitable landmarks or reference points where necessary; and . . . [e]nter on any private land and perform any function necessary to appraise the property"); Haw Rev Stat 101-8 (authority to "enter upon the land and make examinations and surveys"); NJ Stat Ann 20:3-16 ("purpose of making studies, surveys, tests, soundings, borings and appraisals").

Lastly, under Idaho Power's formulation that ORS 35.220 may authorize any entry so long as it is necessary to the condemnor, there is no incentive for a condemnor to consolidate its visits or take any steps to minimize its interference with a property owner's operations. A narrow construction would not only protect constitutional rights, it would encourage prospective condemnors to respect private property owners' time, energy, privacy, and uses of their own property. If ORS 35.220 is narrowly construed, most condemnors will likely gain precondemnation access voluntarily like they do now. But if they don't, condemnors will negotiate with landowners about the scope, frequency, and duration of their access and, if still necessary, pay a commensurate fee for the right to enter. (ER-133) (Idaho Power representative explaining no offer to pay for access has ever been made in connection

with the B2H project). As a consequence, most entries by condemnors will be consensual and have the mutual respect attendant to consensual relationships. This is contrasted with a broad construction of ORS 35.220, where such access is coercive, worth nothing, and places an unfair and uncompensated burden on owners like 516 Ranch.

CONCLUSION

This Court should affirm.

DATED: August 19, 2024.

Respectfully submitted,

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