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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, v. State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota, and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendants/Appellants, and Continental Resources, Inc., Intervenor/Appellant.	**Supreme Ct. No. 20210148** **Civil No. 05-2019-CV-00085** **ORAL ARGUMENT REQUESTED**

APPEAL FROM THE
JUDGMENT OF THE DISTRICT COURT
BOTTINEAU COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE ANTHONY BENSON

BRIEF OF STATE DEFENDANTS/APPELLANTS & ADDENDUM

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TABLE OF CONTENTS

Page

Paragraph

TABLE OF AUTHORITIES

Cases **Paragraph(s)**

Statutes and Rules

Other Authorities

STATEMENT OF THE ISSUES

[¶1] Whether the district court erred when it granted the Northwest Landowners Association's Cross-Motion for Summary Judgment, denied the State's Cross-Motion for Summary Judgment, and determined certain sections of S.B. 2344 violate the federal and state constitutions.

[¶2] Whether S.B. 2344 constitutes an unconstitutional gift.

[¶3] Whether the district court erred in its application of N.D.R.Civ.P. 56 by not considering the evidence submitted by the State.

[¶4] Whether the district court erred by awarding attorneys' fees to the Northwest Landowners Association.

ORAL ARGUMENT IS REQUESTED

[¶5] Oral argument is requested because of the significant issues involved in this case, including: the constitutionality of Senate Bill 2344 passed by the 2019 Legislative Assembly, the State's police powers, the principle of the dominant mineral estate, the application of N.D.R.Civ.P. 56, and the district court's award of attorneys' fees.

STATEMENT OF THE CASE

[¶6] The Northwest Landowners Association ("NWLA") filed a Complaint against the State of North Dakota, North Dakota Industrial Commission ("NDIC"), the Board of University and School Lands (the "Board"),[1] Governor Douglas Burgum, and Attorney General Wayne Stenehjem (collectively the "State" or "State Appellants"), challenging the constitutionality of Senate Bill 2344 ("S.B. 2344" or the "Bill"), which was passed by the 2019 Legislature and enacted into law. A.J.A. at 12-48. NWLA alleged S.B. 2344 is

[1] NWLA voluntarily dismissed the Board pursuant to a stipulation. Index ## 16, 23, 24.

facially unconstitutional in all of its applications, and that the Bill should be invalidated. *Id.*; *see infra* describing facial challenge, at 41-42. The State answered NWLA's Complaint, A.J.A. at 49-64, and Continental Resources, Inc. ("Continental") intervened as a Defendant. A.J.A. at 92-96.

[¶7] The State moved for Judgment on the Pleadings ("MJP") arguing the district court should dismiss NWLA's Complaint based upon an example of a constitutional application of the laws in S.B. 2344 provided by the State. North Dakota mineral owners and their lessees have an implied right to use the surface estate, including pore space, for certain disposal operations, without compensating the surface owner. Index ## 56-58. The implied right is based upon the State's police powers and the principle of the dominant mineral estate. *Id.* NWLA responded to the State's MJP with a Cross-Motion for Summary Judgment ("NWLA Cross-Motion"), supported in part by declarations from a petroleum engineer and NWLA's own counsel JJ England. Index ## 81-91. NWLA argued the district court should invalidate the Bill in its entirety because there is not a single constitutional application of the laws in the Bill. *Id.* NWLA sought a return to pre-S.B.2344 law. Index # 135, ¶ 9.

[¶8] During the parties' briefing, the district court held a status conference so that parties could address the order by which the court might consider the parties' motions. Index # 102; A.J.A. at 113-14. The State argued that the court should first consider the legal arguments in the State's MJP. *See* A.J.A. at 113-14. The State also raised the need to conduct discovery if the court was going to consider NWLA's Cross-Motion with the State's MJP. *Id.*

[¶9] The district court subsequently denied the State's request for staggered

consideration, directed the parties to continue the briefing, and directed the State to file a motion under N.D.R.Civ.P. 56(f) if the State determined it was necessary. *Id.* The State immediately filed a motion for continuance under Rule 56(f), joined by Continental, so the State could pursue discovery before responding to NWLA's Cross-Motion. Index ## 105-108, 111.[2] The district court did not rule on the State's Rule 56(f) motion before the deadline to respond to NWLA's Cross-Motion.

[¶10] The State responded to NWLA's Cross-Motion with its own Cross-Motion for Summary Judgment ("State's Cross-Motion"), supported by an affidavit from Lynn Helms, the Director of the NDIC Department of Mineral Resources. Index ## 113-117; A.J.A. at 118-23. The State argued that every provision of S.B. 2344 is constitutional. *Id.* Continental moved to strike the declaration of NWLA's counsel JJ England, Index ## 122-124, and joined the State's Cross-Motion. Index # 164. The State joined Continental's motion to strike. Index # 131.

[¶11] The district court issued a memorandum opinion and order on January 21, 2021. A.J.A. at 150-61. The court denied the State's Rule 56(f) motion to conduct discovery based upon the reasoning that pore space has value as a matter of law, or inherent value; the court did not rely upon assertions and expert opinions by either party in drawing its conclusion. A.J.A. at 151-52, ¶ 8. Regarding Continental's motion to strike the declaration of NWLA counsel JJ England, Index # 89, the court reasoned it would consider the affidavit stricken unless England chose to withdraw as co-counsel within ten days of the Order. A.J.A. at 152, ¶ 10. The court further stated "matters outside the pleadings were not

[2] The court issued its letter on August 17, 2020, and the State filed its Rule 56(f) motion on August 19. A.J.A. 113-14; Index ## 105-108.

considered . . . ." *Id.* at ¶ 11.

[¶12] Regarding the parties' dispositive motions, the district court denied the State's MJP and Cross-Motion and granted NWLA's Cross-Motion. A.J.A. at 152-61, ¶¶ 11-45. The foundation of the court's holding was that surface owners have a property right to their pore space as a matter of law, i.e. inherent value. A.J.A. at 154-55, ¶ 17. The court concluded that pore space is a vested right for surface owners, predating the Legislature's pore space policy. A.J.A. at 151-55, ¶¶ 8, 16-20. The court reasoned, relying upon this Court's decision in *Mosser v. Denbury Resources, Inc.*, 2017 ND 169, ¶ 24, 898 N.W.2d 406, that a surface owner *may* be entitled to compensation for a mineral developer's use of pore space under N.D.C.C. § 38-11.1-04. A.J.A. at 155, ¶ 19. The district court further held that "surface owners have a clear, inherent right to control and enjoy their pore space . . . ." *Id*.

[¶13] The district court rejected the State's additional multiple examples of how S.B. 2344 could be constitutionally applied. A.J.A. at 156-60, ¶¶ 23- 39. The court reasoned that the police powers of the State are not unlimited and must be reasonably necessary, within the context of disposing of saltwater generated outside of a unit. A.J.A. at 156-57, ¶¶ 25-26. "The same 'reasonably necessary' limitation holds true for implied covenants . . .[,]" the court reasoned. A.J.A. at 157, ¶ 27. The court further concluded S.B. 2344 constitutes a taking because surface owners have had all value of pore space stripped by S.B. 2344, without compensation and for an improper purpose, and surface owners are barred from seeking compensation for use of their pore space estate, whether reasonable or unreasonable. A.J.A. at 158-59, ¶¶ 31-33. The court held the three provisions at issue in the Bill, N.D.C.C. chs. 38-08, 38-11.1, and 47-31 in S.B. 2344, "render the pore space

worthless in every instance of its application, and [the Bill] is unconstitutional on its face." A.J.A. at 159, ¶ 33. The court further held that the Bill unconstitutionally transferred value to the oil and gas industry. A.J.A. at 160, ¶¶ 37-39.

[¶14] The district court struck down the entire Bill based upon the inability to strike only the affected portion of the law, and enjoined enforcement of the law. A.J.A. at 161, ¶¶ 41-45. Mr. England did not withdraw as co-counsel for NWLA, so his declaration was considered stricken.

[¶15] The State filed a Notice of Appeal on May 17, 2021. A.J.A. at 164-68. The case was subsequently remanded to the district court to correct the Judgment, Index # 188, and the court later entered an Amended Judgment. A.J.A. at 176-78. After the briefing restarted, NWLA filed a notice seeking attorneys' fees, Index ## 215-220, and the case was remanded back to the district court. Index # 222. The State opposed NWLA's notice. Index ## 223-230. On September 22, 2021, the district court granted NWLA's request for attorneys' fees and expenses and requested that NWLA submit redacted billing statements for in camera review. A.J.A. at 179-84. The court awarded additional fees after its in camera review. A.J.A. at 185-86. The State filed an Amended Notice of Appeal on October 7, 2021. A.J.A. at 187-91.

STATEMENT OF THE FACTS

[¶16] In 2019 the Legislature passed S.B. 2344, which contained three sections that amended and reenacted three existing statutes: N.D.C.C. §§ 38-08-25, 38-11.1-01, and 38-11.1-03. 2019 N.D. Sess. Laws ch. 300, §§ 1-3; Add. at 46-47. A fourth section of the Bill created and enacted a new section of law codified at N.D.C.C. § 47-31-09. 2019 N.D. Sess. Laws ch. 300, § 4; Add. at 48.

I. Section 47-31-09, N.D.C.C. is a new section of law relating to the Legislature's subsurface pore space policy.

A. Subsection 1 of N.D.C.C. § 47-31-09 recognizes the dominance of the mineral estate over the surface estate and pore space.

[¶17] The first sentence of N.D.C.C. § 47-31-09(1) (hereinafter also referred to as the "dominant mineral estate sentence") provides that the Legislature's policy for pore space ownership, N.D.C.C. ch. 47-31, "may not be construed to limit the rights or dominance of a mineral estate to drill or recomplete a well under [N.D.C.C.] chapter 38-08 [(Control of Gas and Oil Resources)]". Add. at 48. The meanings of the phrases "dominant mineral estate", "pore space ownership", and "use of pore space", are central to this case.

1. Pore space

[¶18] "Pore space" is defined in N.D.C.C. ch. 47-31 as a "cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum." N.D.C.C. § 47-31-02; *see also* N.D.C.C. § 38-08-25(5). Pore space may also be described as a physical rock property that constitutes a condition or capacity of each different layer of rock, sedimentary strata, or subsurface geologic formation. A.J.A. at 120, ¶ 15. Pore space within subsurface geologic formations always contains either waters of the state, defined by N.D.C.C. § 61-01-01(2), or minerals. *Id*. at ¶ 16.

[¶19] "Title to pore space in all strata underlying the surface of lands and waters is vested in the owner of the overlying surface estate[ ]" under N.D.C.C. § 47-31-03, but access to and use of pore space is highly regulated.[3] The NDIC has primary jurisdiction over all operations intended to access pore space for the production and development of mineral

[3] After 2009, title to pore space could not be severed from the surface estate. N.D.C.C. § 47-31-05.

resources, N.D.C.C. § 38-08-04(1)(b), and the NDIC regulates and permits the injection of fluids into pore space under N.D. Admin. Code ch. 43-02-05. The appropriation of water from pore space is separately regulated under N.D.C.C. ch. 61-04.

[¶20] In North Dakota there is not a continuous connection between all pore space from the ground level to the deepest depths of the earth. A.J.A. at 120, ¶ 14. Generally, minerals are produced in a level of strata that is separate from where saltwater or produced water is disposed of, and produced water is disposed of in a level of strata isolated from strata containing water that could be appropriated for domestic use. A.J.A. at 121, ¶ 17.

2. The dominant mineral estate

[¶21] This Court has long recognized that the mineral estate is dominant when the estate is severed from the surface estate. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979). "The mineral estate is dominant in that the law implies, where it is not granted, a legitimate area within which mineral ownership of necessity carries with it inherent surface rights to find and develop the minerals, which rights must and do involve the surface estate. Without such rights the mineral estate would be meaningless and worthless." *Id.* at 135. The Court recently reaffirmed this longstanding principle in *Krenz v. XTO Energy, Inc.*, 2017 ND 19, ¶ 42, 890 N.W.2d 222.

[¶22] In 2009, the Legislature expressly preserved the dominance of the mineral estate over pore space when it enacted its policy for pore space. 2009 N.D. Sess. Laws ch. 401, § 1, (Apr. 9, 2009). Section 47-31-08, N.D.C.C., provides that "[i]n the relationship between a severed mineral owner and a pore space estate," Chapter 47-31 "does not change or alter the common law as of April 9, 2009, as it relates to the rights belonging to, or the dominance of, the mineral estate." N.D.C.C. § 47-31-08. *See* generally *Reese v. Reese-*

Young, 2020 ND 35, ¶ 20, 938 N.W.2d 405 (describing the common law); N.D.C.C. §§ 1-01-03, 05, 06.

B. The second sentence of N.D.C.C. § 47-31-09(1) recognizes that the injection and migration of substances into pore space is lawful.

[¶23] The second sentence of N.D.C.C. § 47-31-09(1) (hereinafter also referred to as the "injection and migration sentence") provides that the "[i]njection or migration of substances into pore space for disposal operations, for secondary or tertiary oil recovery operations, or otherwise to facilitate production of oil, gas, or other minerals is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort." Add. at 48. The operations listed in the injection and migration sentence, and other operations that facilitate production of oil, gas, or other minerals, are approved by the NDIC. *See also* A.J.A. at 122, ¶ 24. The operations expressly referenced in the injection and migration sentence are routinely conducted in North Dakota.

1. Disposal operations

[¶24] Disposal operations are common and required in North Dakota because oil wells drilled in the state frequently produce saltwater held in pore space, which is considered waters of the state and must be disposed of by injection. A.J.A. at 121, ¶ 17; *see also Fisher v. Cont'l Res., Inc.* 49 F. Supp. 3d 637, 639 (D.N.D. 2014) ("As an oil field ages, the ratio of salt water production to oil often increases . . . ."). "All saltwater liquids or brines produced with oil and natural gas shall be processed, stored, and disposed of without pollution of freshwater supplies." N.D. Admin. Code § 43-02-03-53(2). Unless specifically authorized, saltwater cannot be stored in earthen pits or open receptacles, rather it must be injected underground in accordance with N.D. Admin. Code ch. 43-02-05. N.D. Admin. Code § 43-02-03-19.3; *see also* N.D. Admin. Code § 43-02-05-01(2) (defining

underground injection); N.D.C.C. § 38-08-04(1)(b).

[¶25] The disposal of produced fluids is not allowed in all strata, specifically strata composed of glacial till. A.J.A. at 121, ¶ 17. "Disposal wells are only permitted in pore space located within deep subsurface geologic formations which meet the statutory and regulatory requirements for an injection well." *Id.* Disposal or injection into underground drinking water sources is prohibited, N.D. Admin. Code § 43-02-05-02, and may only be done according to a permit. N.D. Admin. Code § 43-02-05-04.

2. Enhanced recovery operations

[¶26] Enhanced oil recovery operations ("ERO"), also commonly referred to as pressure maintenance operations, secondary recovery projects, or tertiary recovery projects, are additional types of operations specifically referenced in the injection and migration sentence. A.J.A. at 121-22, ¶ 21; *see also* N.D. Admin. Code § 43-02-03-01(18) (defining ERO); N.D. Admin. Code § 43-02-03-01(40) (defining "pressure maintenance"), N.D. Admin. Code § 43-02-05-01(2) (defining "underground injection" to include the enhanced recovery of oil or natural gas); *Buchholz v. Burlington Res. Oil & Gas Co. LP*, 2008 ND 173, ¶ 14, 755 N.W.2d 914. ERO is used by operators to increase production in a well because the rate of oil and gas production for wells in North Dakota naturally declines over time. *Id.* ERO primarily involves the use of water to displace oil by increasing pore space pressure. A.J.A. at 121-22, ¶¶ 19-23.

[¶27] Recent studies have concluded that carbon dioxide, instead of water, may be an option for ERO. A.J.A. at 122, ¶ 22. A carbon dioxide ERO project could also be converted to a carbon dioxide storage facility under N.D.C.C. § 38-22-19(2). *See also* N.D.C.C. § 38-22-08.

3. Hydraulic fracturing

[¶28] Hydraulic fracturing operations, or "fracking" as it is commonly known, is not expressly referenced in the injection and migration sentence, but fracking is a routine process regulated by the NDIC that is used to facilitate the production of oil and gas. A.J.A. at 121, ¶ 18. Fracking is recognized as an acceptable process for the recovery of oil, gas, and other minerals under N.D.C.C. § 38-08-25(1). Fracking involves the injection of water and proppants into a well, and pore space, with the intent to cause cracks in the targeted strata, which help stimulate the production of oil. *Id*. Water used for fracking is recovered from the well and disposed of in disposal wells. *Id*.

4. Migration

[¶29] The injection and migration sentence also provides that the migration of substances is not unlawful. The word migration is commonly used in the context of a disposal well. A.J.A. at 121, ¶ 20. When produced water is injected for storage in a disposal well permitted by the NDIC, the water migrates outward from the injection site and in the permitted strata, in a plume. *Id.* The plume of the injected fluid is recognized to occupy a known radius. *Id.*

C. The injection or migration of substances for operations intended to facilitate the production of oil, gas, and other minerals, is not a tort.

[¶30] The last half of the injection and migration sentence provides that the injection and migration of substances into pore space for the operations described above, *by itself*, cannot be a tort. Stated differently, the injection and migration of substances is not *per se*, a tort. This provision leaves open the possibility of raising a tort claim based upon damage to pore space.

D. Subsections 2 and 3 of N.D.C.C. § 47-31-09 limit the application of the section and N.D.C.C. ch. 38-08 and N.D.C.C. § 47-31-09(4) preserves tort remedies for surface owners.

[¶31] Subsections 2 and 3 of N.D.C.C. § 47-31-09 (collectively referred to as the "contract construction subsections"), place limitations on the application and construction of N.D.C.C. § 47-31-09 and N.D.C.C. ch. 38-08, for the purposes of contractual disputes relating to saltwater disposal. Add. at 48. Subsection 4 of N.D.C.C. § 47-31-09, preserves tort claims for the owner of a surface estate if the operator of a disposal well commences or continues operations of a disposal well in violation of N.D.C.C. §§ 47-31-09(2) or (3). *Id*.

II. Amendments to N.D.C.C. § 38-08-25.

[¶32] The Legislature amended N.D.C.C. § 38-08-25(1) by adding the use of carbon dioxide for enhanced recovery of oil, gas, and other minerals as an additional acceptable recovery process. Add. at 46.[1] The Legislature also added three new public interest statements to N.D.C.C. § 38-08-25 relating to the use and availability of carbon dioxide. N.D.C.C. §§ 38-08-25(2)-(4); *Id*. Subsections 2 through 4 of N.D.C.C. § 38-08-25 provide that it is in the public interest to promote the use of carbon dioxide, to use carbon dioxide for ERO and other recovery operations, and to use as much of a subsurface geologic formation as reasonably necessary for various operations. *Id.*

[¶33] The Legislature added a fifth subsection to N.D.C.C. § 38-08-25 that serves two functions. Add. at 46. The first sentence of N.D.C.C. § 38-08-25(5) (hereinafter the "NDIC approved use of pore space sentence") provides that operations approved by the NDIC under N.D.C.C. ch. 38-08, including unit operations for ERO, utilization of carbon dioxide for ERO, and disposal operations, may utilize pore space for such operations or

any other permissible purpose under N.D.C.C. ch. 38-08. *Id.* All of the listed operations are used, or intended to be used, to develop and produce the State's natural resources of oil and gas in such a manner as will prevent waste, to protect correlative rights, and provide for the greatest possible economic recovery of oil and gas. A.J.A. at 122, ¶ 24.

[¶34] The second sentence of N.D.C.C. § 38-08-25(5) (hereinafter referred to as the "prohibit or demand payment sentence") provides that "[a]ny other provision of law may not be construed to entitle the owner of a subsurface geologic formation to prohibit or demand payment for the use of the subsurface geologic formation[,]" for the NDIC approved operations conducted under N.D.C.C. ch. 38-08. Add. at 46. The most reasonable construction of this sentence is that a surface owner cannot prohibit use of pore space, or demand payment for use of pore space.

[¶35] The new subsection 6 of 38-08-25 authorizes the NDIC to adopt and enforce administrative rules to effectuate the purposes of the section. Add. at 46. The NDIC has not yet adopted any new administrative rules.

III. Amendments to the Oil and Gas Production Damage Compensation Act.

[¶36] The Legislature amended and reenacted the Oil and Gas Production Damage Compensation Act (hereinafter referred to as the "Damage Compensation Act") in S.B. 2344. Add. at 47. The Damage Compensation Act is intended to protect surface owners and other persons from the undesirable effects of mineral development and provide a statutory right to compensation for the owner of a surface estate when a mineral developer damages the surface estate for mineral development. N.D.C.C. § 38-11.1-04.

[¶37] The amendment to N.D.C.C. § 38-11.1-01(1) added language that recognizes a balance between agriculture and mineral development through the approved use of pore

space. Add. at 47. A fourth legislative finding, N.D.C.C. § 38-11.1-01(4), was added to expressly state that N.D.C.C. ch. 38-11.1 cannot be construed to alter, amend, repeal, or modify the law concerning title to pore space in N.D.C.C. § 47-31-03. *Id*.

[¶38] The Legislature also amended the definitions section of the Damage Compensation Act. Add. at 47. The Legislature added a definition for the word "land" that excludes pore space, a definition of "pore space", and amended the definition of "surface owner". *Id*.; N.D.C.C. §§ 38-11.1-03(3), (7), (8).

STANDARD OF REVIEW

[¶39] The constitutionality of a statute is fully reviewable on appeal. *Sorum v. State*, 2020 ND 175, ¶ 19, 947 N.W.2d 382. "In determining whether summary judgment was appropriately granted, [a court] must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record." *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, ¶ 10, 903 N.W.2d 51 (citations omitted). The district court's award of attorneys' fees is reviewed for abuse of discretion. *Sagebrush Res., LLC v. Peterson*, 2014 ND 3, ¶ 15, 841 N.W.2d 705. "A district court 'abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when the court misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination.'" *Id.* (citation omitted).

LAW AND ARGUMENT

[¶40] NWLA's facial constitutional challenge to S.B. 2344 carries an extremely heavy burden. The laws within the Bill must be upheld unless NWLA clearly demonstrates the laws are unconstitutional. *See State v. Burr*, 1999 ND 143, ¶ 9, 598 N.W.2d 147. "All

regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates it contravenes the state or federal constitution[, beyond a reasonable doubt]." *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 45, 855 N.W.2d 31 (citation omitted). "Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity[,]" and a declaration that a law is unconstitutional "must be exercised with great restraint." *Id.* (citations omitted). The burden of proving a statute's constitutional infirmity lies solely with the challenger. *Simons v. State, Dep't of Human Servs.*, 2011 ND 190, ¶ 23, 803 N.W.2d 587. Upholding the constitutionality of a statute is so compelling that four Supreme Court Justices must find a statute is unconstitutional. N.D. Const. art. VI, § 4.

[¶41] NWLA's facial challenge presents a higher bar than an as-applied challenge. *Sorum*, 2020 ND 175, ¶ 21, 947 N.W.2d 382. Even if NWLA can show the laws enacted and reenacted by S.B. 2344 are or could be unconstitutional, NWLA must "establish that no set of circumstances exists under which the statute would be valid." *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 2018 ND 71, ¶ 38, 908 N.W.2d 442 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). NWLA's facial challenge must be rejected if there is *any* circumstance whereby the laws are valid.

[¶42] A facial challenge is the most difficult challenge to mount successfully. *Salerno*, 481 U.S. at 745. Such a challenge is disfavored because such claims often rest on speculation. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2007). Facial challenges "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records[,]'" and "run contrary to the fundamental principle of judicial restraint." *Id.* (citation omitted). Facial challenges also threaten to short circuit

the democratic process. *Id.*; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-95 (1987).

I. The district court erred when it granted NWLA's Cross-Motion for Summary Judgment, denied the State's Cross-Motion, and determined certain sections of S.B. 2344 constitute an unconstitutional taking under the federal constitution.

[¶43] The district court concluded portions of S.B. 2344 are facially unconstitutional because surface owners have a constitutional property right to control and enjoy their pore space, and pore space has *inherent* value. A.J.A. at 155-56, ¶¶ 20, 24. The court further concluded S.B. 2344 strips all value from pore space, without compensation and for an improper purpose, and renders pore space worthless in every instance of its application. A.J.A. at 158-59, ¶¶ 31-33. The court ultimately held certain provisions of S.B. 2344 take pore space for the constitutionally impermissible purpose of economic development in violation of N.D. Const. art. I, § 16. A.J.A. at 159, ¶ 34. The district court's determination that S.B. 2344 constitutes a taking under the federal constitution, and the issuance of an injunction against the State Defendants, is erroneous.

A. None of the laws within S.B. 2344 constitute a taking under the federal constitution.

[¶44] In *Wild Rice River Estates, Inc., v. City of Fargo*, 2005 ND 193, ¶ 13, 705 N.W.2d 850, this Court explained that there are two categories of regulatory action that are generally deemed *per se* takings under the federal constitution. The first categorical rule applies where a government requires a property owner to suffer a permanent physical invasion of their property. *Id.* The second rule applies to regulations that completely deprive a landowner of all economically beneficial use of her property. *Id.* Takings challenges that are outside these narrow categories are governed by the standards set forth

in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which examined the economic impact of the regulation on the claimant. *Wild Rice River* at ¶ 13.

[¶45] This Court in *Wild Rice* additionally recognized the United States Supreme Court's parcel-as-a-whole rule as part of its analysis of whether a restriction on property constitutes a taking under the federal constitution, and adopted the test for its analysis of the state constitution. *Wild Rice River*, 2005 ND 193, ¶ 17, 705 N.W.2d 850. The rule requires that "courts look to the effect of [the law] on a parcel of land as-a-whole, rather than to the effect on individual interests in the land." *Id.* (citations omitted).

[¶46] The United States Supreme Court has also recognized exceptions to its tests for determining whether a government regulation constitutes a taking under the fifth amendment of the federal constitution. A court must consider and evaluate state law to determine whether property owners have an expectation that their title is limited by state law, in addition to evaluating a government regulation's impact on property. In *Lucas v. South Carolina Coastal Council*, the Supreme Court explained:

> Where the State seeks to sustain a regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. [393, 413 (1922).]

Lucas, 505 U.S. 1003, 1027 (1992) (footnote omitted). The Court further reasoned:

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation),

> no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. [419, 426 (1982)]—*though we assuredly* would *permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title*.

Id. at 1028-29 (emphasis added). In addition, the Court in *Lucas* reasoned, within the context of confiscatory regulations, that the explicit use of background principles of property law that were always applicable to property do not constitute a taking. *Id.* at 1030. The United States Supreme Court has traditionally resorted to existing rules or understandings stemming from sources such as state law to define the range of interests that qualify for protection as property under the fifth amendment to the federal constitution. *Id.*

[¶47] There are four sentences within S.B. 2344 that may be construed as authorizing access to or use of pore space: the dominant mineral estate and injection and migration sentences in N.D.C.C. § 47-31-09(1); and, the NDIC approved use of pore space and the prohibit or demand payment sentences in N.D.C.C. § 38-08-25(5). These provisions of law, however, do not violate the federal constitution because they fall squarely within the exceptions contemplated by the Supreme Court in *Lucas*. The surface estate, including pore space, is subject to the State's legitimate exercise of its police powers and the principle of the dominant mineral estate. Furthermore, the district court misconstrued certain provisions of the Bill. In addition, although N.D.C.C. § 38-11.1-03 does not authorize access to or restrict property, this provision of law is also constitutional based upon the principle of the dominant mineral estate.

[¶48] The remaining provisions of S.B. 2344 do not directly authorize access to or use of pore space, and the court erroneously concluded the laws constitute an unconstitutional taking because the laws are intertwined. These sections of law are constitutional based

upon the exceptions recognized in *Lucas*, to the extent they are unseverable. The Bill, in its entirety, is not a taking under the federal constitution.

1. This Court has recognized that property in North Dakota is subject to the State's police powers.

[¶49] In *State v. Riggin* this Court recently recognized that "property rights . . . are subject to the police power of the state" "'to impose such restrictions upon private rights as are practically necessary for the general welfare of all.'" 2021 ND 87, ¶¶ 14, 18, 959 N.W.2d (first quotation citing *Cont'l Res., Inc. v. Farrar Oil Co.*, 1997 ND 31, ¶ 15, 559 N.W.2d 841) (second quotation quoting *State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 914 (1943)); *see also Wild Rice River,* 2005 ND 193, ¶ 17, 705 N.W.2d 850. "[P]roperty rights are not absolute." *Cont'l Res., Inc.*, 1997 ND 31, ¶ 15, 559 N.W.2d 841 (citing N.D. Const. art. XII, § 5). The State, in the exercise of its police powers, "is not confined to matters relating strictly to the public health, morals, and peace, but … there may be interference whenever the public interests demand it." *Cromwell*, 72 N.D. 565, 9 N.W.2d at 919. These decisions accord with the Supreme Court's reasoning in *Lucas*. 505 U.S. at 1027. "[T]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Id.*

[¶50] This Court has recognized that the Legislature has provided the NDIC with comprehensive police powers to regulate oil and gas development. *Cont'l Res., Inc.*, 1997 ND 31, ¶¶ 13-17, 559 N.W.2d 841. The NDIC has authority over all persons and property, public and private, necessary to effectively enforce the provisions of the Act for the Control of Gas and Oil Resources. *Id.* at ¶ 13. The NDIC also has authority to determine when waste exists, to prevent waste, the authority to adopt rules and orders to effectuate the

purposes of the Act, fix spacing units, and issue orders compelling pooling. *Id.* at ¶¶ 13-16 (citing N.D.C.C. §§ 38-08-04, 38-08-04(5), 38-08-07(1), & 38-08-07(3)). Significantly, the NDIC has jurisdiction over all efforts to access or use pore space, and the means by which this is done. N.D.C.C. § 38-08-04(1)(b). The property law of trespass does not affect NDIC authorized operations. *See Cont'l Res., Inc.*, 1997 ND 31, ¶ 17, 559 N.W.2d 841. The NDIC's orders, which implement the laws to facilitate the production of oil and gas in North Dakota, are a proper exercise of the State's police powers. *Id.* at ¶ 16.

[¶51] The district court's analysis of the State's police powers, as exercised by the NDIC, was flawed at its base level. The district court cited this Court's decision in *Continental Resources, Inc.*, but only for the principle that property rights are protected by the North Dakota Constitution. A.J.A. at 153-54, ¶ 16; *see Cont'l Res., Inc.*, 1997 ND 31, ¶ 16, 559 N.W.2d 841. The district court failed to acknowledge this Court's police powers analysis and precedent. *Id.* The district court further, but erroneously, reasoned that surface owners have a clear an inherent right to control and enjoy their pore space, based upon the North Dakota federal district court's decision in *Mosser v. Denbury Resources, Inc.*, 112 F. Supp. 3d 906 (D.N.D. 2015), N.D.C.C. § 47-01-12, and this Court's decision in *Mosser*, 2017 ND 169, ¶¶ 17-20, 31, 898 N.W.2d 406.

[¶52] The district court's analysis seems to rest upon the belief that North Dakota has codified the *ad coelum* doctrine through N.D.C.C. § 47-01-12 for pore space, or that a surface owner can bar all access to pore space. *Ad coelum* is the "ancient doctrine that at common law ownership of the land extended to the periphery of the universe." *U.S. v. Causby*, 328 U.S. 256, 260-61 (1946). The Court in *Causby*, in the context of air travel, held the doctrine has no place in the modern world. *Id.* at 261. Even if the *ad coelum*

doctrine was recognized by the modern world, it would not prevent the State from lawfully exercising its police powers. Regardless, North Dakota's regulation and management of oil and gas development through spacing and pooling orders intended to protect correlative rights, which this Court has recognized and upheld in a slew of cases, *Continental Resources, Inc.,* 1997 ND 31, ¶ 16, 559 N.W.2d 841, does not follow the *ad coelum* doctrine.

[¶53] Courts in other jurisdictions have similarly concluded a state properly exercises its police powers for mineral development, and property owners do not have the right to exclude deep subsurface migration of fluids. *See Nunez v. Wainoco Oil & Gas Co.*, 488 So.2d 955 (La. 1986); *Gawenis v. Ark. Oil & Gas Comm'n,* 464 S.W.3d 453 (Ark. 2015); *O'Brien Oil, L.L.C. v. Norman*, 233 P.3d 413, 417 (Okla. Civ. App. 2010); *See also R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 568-69 (Tex. 1962); *Raymond v. Union Tex. Petroleum Corp.*, 697 F. Supp. 270, 274-75 (E.D.La.1988); *Chance v. BP Chems., Inc.*, 670 N.E.2d 985, 991-92 (Ohio 1996); *Baatz v. Columbia Gas Transmission, LLC,* 295 F. Supp. 3d 776 (N.D. Ohio 2018), aff'd, 929 F.3d 767, 777 (6th Cir. 2019).

[¶54] A surface owner may own above and below the surface pursuant to N.D.C.C. § 47-01-12, but a surface owner has neither a constitutional right to trump the State's police powers nor exclusive possession or the right to exclude others from pore space where mineral development is concerned. Similarly, the value of pore space, whether inherent or otherwise, does not eliminate or counteract the application of the State's police powers as exercised through the NDIC. Any inference or conclusion to the contrary is inconsistent with this Court's established precedent and conflicts with this Court's deference to NDIC decision-making. *See e.g. Hanson v. Indus. Comm'n of N.D.*, 466 N.W.2d 587, 591

(N.D. 1991).

a. The injection and migration of substances into pore space to facilitate the production of oil, gas, and other minerals is a proper exercise of the State's police powers.

[¶55] In North Dakota, the NDIC routinely approves the injection of substances into pore space to facilitate the production of oil, gas, and other minerals. *See supra,* ¶¶ 23-29. Substances are injected for fracking, EOR, and saltwater disposal. *Id*. Migration is also contemplated with NDIC approved operations for disposal, fracking, and EOR. *Id.* at ¶ 29. The injection and migration of substances into pore space, as recognized by the injection and migration sentence in N.D.C.C. § 47-31-09(1), is undisputedly lawful and constitutional because the authorizing laws are grounded in the State's police powers. *See also supra,* ¶¶ 49-54. As-applied disputes regarding certain types of injection or migration issues, or disposal operations, do not make the injection or migration sentence or S.B. 2344 unconstitutional.

[¶56] The district court acknowledged the State *could* exercise police powers through S.B. 2344 but reasoned "the police powers of the State are not unlimited and must be reasonably necessary." A.J.A. at 157, ¶ 26. The court concluded the disposal of saltwater generated outside a unit was a potential example of an unreasonable application. *Id.* The district court's narrow analysis of the State's police powers, as exercised and applied by the NDIC, was flawed and inconsistent with the *Salerno* test.

[¶57] The district court's analysis obviously leaves an open question regarding all of the other operations that rely upon injection and migration. It should be undisputed based upon the evidence submitted by the State, and this Court's recognition of common oil and gas industry practice in North Dakota, that all other operations approved by the NDIC are a

proper exercise of the State's police powers. At a minimum, the State was entitled to the inference that all other operations are reasonable and a proper exercise of the State police powers.[4] Even if such saltwater disposal is *per se* unreasonable, which it is not, the court's analysis is inconsistent with the *Salerno* test. NWLA had the burden to show that all NDIC approved operations constitute a taking, which it failed to satisfy. The court erred by concluding otherwise.

b. The injection and migration sentence in N.D.C.C. § 47-31-09(1) preserves a tort remedy for surface owners.

[¶58] The district court erred by concluding S.B. 2344 constitutes an absolute bar to money damages and remedies. *See* A.J.A. at 159, ¶ 32. The last half of the injection and migration sentence in N.D.C.C. § 47-31-09(1), which includes the words "by itself", is a significant component of the law that the court misconstrued. Add. at 48. The proper construction of this sentence, especially when construed pursuant to this Court's standards discussed above, is that the provision bars tort claims for injection and migration standing alone, but it also preserves a surface owner's tort remedies. There is no liability for entry or use, without evidence of injury.

[¶59] Although the law does not specifically state when tort remedies are available for injection and migration, such an explanation is unnecessary. The availability of a tort remedy is dependent upon whether the elements of the tort are satisfied. The law does not presume that use of pore space results in damage. The codification and preservation of a remedy for use of pore space in the injection and migration sentence in N.D.C.C. § 47-31-09(1) is consistent with and does not violate the fifth amendment to the federal constitution.

[4] Whether a particular operation is in fact reasonable, is a question of fact, and outside the scope of a facial challenge. *See Fisher,* 49 F. Supp. 3d at 646.

[¶60] For example, in *FPL Farming, LTD, v. Texas Natural Resources Conservation Commission*, the Texas Court of Appeals considered whether the mere injection of saltwater on neighboring property impaired *FPL Farming's* property rights without evidence of harm, and whether the permitted well was an unconstitutional taking under *Loretto*. No. 03-02-00477-CV, 2003 WL 247183, at * 2-5. (Tex. Ct. App. Feb. 6, 2003). The court rejected *FPL Farming's* takings claims for multiple reasons. The court determined *FPL Farming* had not demonstrated that it was denied the opportunity to apply for an injection well permit itself, and it failed to address any impairment on the right to sell its land. *Id.* at * 5. The court also held that *FPL Farming* failed to prove that the granting of the injection permit was a taking. *Id.* Texas law provided that the granting of a permit did not authorize a person to injure or invade property. *Id.* In addition, Texas law provided *FPL Farming* with a remedy; the opportunity to argue the injection permit impaired existing rights, and *FPL Farming* could pursue damages under state law. *Id. See supra*, ¶¶ 52-54; *see also Causby*, 328 U.S. at 266-67.

[¶61] In summary, although a surface owner cannot claim that either injection and migration are unlawful or constitute a tort, standing alone, the injection and migration sentence preserves a tort remedy for a surface owner if s/he can show actual damage to the use (if any) of the property. This is consistent with what other jurisdictions have determined regarding the use of pore space, i.e., that a mere physical invasion without proof of actual damages is not actionable. *See supra*, ¶ 53; *see also* Joseph A. Schremmer, *Getting Past Possession: Subsurface Property Disputes as Nuisances*, 95 Wash. L. Rev. 315, 344 (2020) ("As will be seen in the following review of cases, an owner generally does not have a right to recovery on a true trespass theory for the unauthorized invasion

and use of the space under her surface property. Although courts label such claims as 'trespasses,' they tend to eschew applying any of the rules or remedies traditionally associated with trespass. Instead, they require a showing of actual harm in addition to the fact of the unauthorized invasion and deny ejectment and nominal damages as remedies."). The injection and migration sentence in N.D.C.C. § 47-31-09(1) is consistent with the State's police powers, this Court's precedent, precedent from other jurisdictions, and does not run afoul of the federal constitution. Even if the sentence is open to divergent constructions, or there is an interpretation of the provision that raises a constitutional conflict, the Court should interpret the provision to avoid such a conflict. *Gregory v. N.D. Workers Comp. Bureau*, 1998 ND 94, ¶ 28, 578 N.W.2d 101.

c. The NDIC approved use of pore space sentence in N.D.C.C. § 38-08-25(5) is a proper exercise of the State's police powers.

[¶62] The first sentence of N.D.C.C. § 38-08-25(5), the NDIC approved use of pore space sentence, provides that notwithstanding any other provision of law, pore space may be utilized for operations approved by the NDIC under N.D.C.C. ch. 38-08. Add. at 46; *see also supra,* ¶ 33. The major difference between N.D.C.C. §§ 38-08-25(5) and 47-31-09(1) is that the former provision does not include the words "injection" and "migration", but expressly incorporates NDIC approval. The omission of the words "injection" and "migration" should not be construed as making this sentence in N.D.C.C. § 38-08-25(5) unconstitutional, or mean that NDIC approved use of pore space is not grounded in the State's police powers. Like the injection and migration sentence in N.D.C.C. § 47-31-09(1), the substance of the NDIC approved use of pore space sentence is clearly based upon the NDIC's police powers.

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[¶63] In summary, the injection and migration sentence in N.D.C.C. § 47-31-09(1) and the NDIC approved use of pore space sentence in § 38-08-25(5) are both based upon a lawful and constitutional exercise of the State's police powers through the NDIC. NWLA's members have an expectation, as a matter of law, that the NDIC may authorize access to and use their pore space to facilitate the production of oil, gas, and other minerals. The laws clearly fall within the exception recognized by the United States Supreme Court in *Lucas.*

2. The well-settled and undisputed principle of the dominant mineral estate is an additional source of authority for applying the exceptions recognized by the United States Supreme Court in *Lucas* to S.B. 2344.

[¶64] This Court's longstanding precedent recognizes the well-settled rule that where the mineral estate is severed from the surface estate, the mineral estate is dominant. *Hunt*, 283 N.W.2d 131, 135; *see also Krenz*, 2017 ND 19, ¶ 42, 890 N.W.2d 222. Significantly, NWLA is not challenging this longstanding principle. Index # 135, ¶ 9.

[¶65] The first sentence of N.D.C.C. § 47-31-09(1), the dominant mineral estate sentence, prohibits a construction of N.D.C.C. ch. 47-31 that would limit the dominant mineral estate's right to drill or complete a well. *Id.* This sentence complements existing law, N.D.C.C. § 47-31-08, which expressly preserved the common law in relation to the dominant mineral estate and recognizes this Court's precedent regarding the dominant mineral estate over the surface estate. *See supra*, ¶¶ 21-22. This *undisputed* principle of law, which falls squarely within the exception recognized in *Lucas*, overlays the State's police powers and provides an additional layer of authority for access to and use of pore space.

[¶66] The surface estate, under the principle of the dominant mineral estate, is charged with a servitude for the implied right of a mineral lessee to develop the minerals. *Krenz*, 2017 ND 19, ¶ 42, 890 N.W.2d 222. This means that a mineral lessee "has an implied right to use as much of the lease surface [and pore space] as reasonably necessary to develop and produce minerals." *Id.* (citations omitted). Significantly, this also means that a mineral lessee is lawfully and reasonably allowed to use techniques such as those contemplated in N.D.C.C. §§ 47-31-09(1) and 38-08-25(1) & (5) to access and use pore space to facilitate the development of minerals.

[¶67] Similarly, a mineral lessee should expect, based upon the principle of the dominant mineral estate, that the owner of the surface estate may not rely upon the construction of any provision of law to interfere with use of pore space, or payments associated with a mineral lease, or tax a mineral lessee for accessing and using pore space to facilitate the production of minerals. The second sentence of N.D.C.C. § 38-08-25(5), the prohibit or demand payment sentence, incorporates this principle. If a provision of law *could* be construed to allow the surface estate to prohibit the use of or demand payment for use of pore space, it would mean that the particular law is inconsistent with the principal of the dominant mineral estate.

[¶68] Neither the plain meaning of the prohibit or demand payment sentence, nor the State's construction of the law are inconsistent with this Court's decision in *Mosser*, 2017 ND 169, 898 N.W.2d 406. In that case, this Court concluded "a surface owner *may* be entitled to compensation under N.D.C.C. § 38-11.1-04 for a mineral developer's use of the surface owner's subsurface pore space for disposal of saltwater generated as a result of drilling operations." *Id.* at ¶ 24. Since the Legislature has removed pore space from the

application of the Chapter through S.B. 2344, there is no longer a statutory damages remedy for damages related to use of pore space, but this does not mean that a surface owner may not have a common law tort remedy if s/he can show actual damages arising from interference with the use or enjoyment of the surface estate.

[¶69] Even if this Court construes its decision in *Mosser* to mean that a surface owner may be entitled to damages for use of pore space, notwithstanding the new amendments to the definition of "land" in N.D.C.C. § 38-11.1-03(3), the Court's holding should not be construed as mandating compensation for all uses of pore space. The Court's use of the word *may,* in conjunction with the citation to N.D.C.C. § 38-11.1-04, is not a mandate for payment of damages, or a reflection that damages are presumed without proof. *Mosser*, 2017 ND 169, ¶ 24, 898 N.W.2d 406. Such a conclusion is consistent with the Court's decision in *Hunt*, where the Court reasoned, albeit in a footnote, that it did not doubt the mineral estate owner's right to use the surface estate to explore, develop and transport minerals, but specifically did not decide if reasonable use also implied the right to damage and destroy without compensation. 283 N.W.2d at 135 n.4. Furthermore, *Mosser* is limited to saltwater disposal operations. 2017 ND 169, ¶ 24, 898 N.W.2d 406.

[¶70] In conclusion, both the dominant mineral estate sentence in N.D.C.C. § 47-31-09(1) and the prohibit or demand payment sentence in N.D.C.C. § 38-08-25(5) are constitutional as surface owners have an expectation that the dominant mineral estate may use and access pore space without threat of the surface owner barring or demanding payment for use. The district court's invalidation of these laws is erroneous.

3. The Legislature's amendments to N.D.C.C. § 38-11.1-03 and the definition of the word "land" do not constitute a taking under the federal constitution.

[¶71] As explained above, the Legislature amended the definition of "land" in N.D.C.C. § 38-11.1-03(3) to exclude pore space. *See supra*, ¶ 38. As a result, N.D.C.C. § 38-11.1-04 cannot be construed as authorizing damages for use of pore space for saltwater disposal. The Legislature's amendments to N.D.C.C. § 38-11.1-03 are constitutional, because "the legislature has the power to amend and repeal its own acts when in its judgement it sees fit...." *State ex rel. Strutz v. Baker*, 71 N.D. 153, 299 N.W. 574, 576 (1941). The law applicable to a cause of action is the law in effect at that time; a surface owner can no longer rely upon N.D.C.C. §§ 38-11.1-03 or 04 for damage to pore space. *Wilkinson v. Bd. of Univ.& Sch. Lands*, 2017 ND 231, ¶ 17, 903 N.W.2d 51. Furthermore, the 1979 enactment of the Damage Compensation Act did not create a vested property right in a remedy that could never be modified by the Legislature.

[¶72] The Legislature's amendment to the definition of the word "land" in N.D.C.C. § 38-11.1-03 did not take away a vested property right, because "[a] vested right is an immediate or fixed right to present or future enjoyment that does not depend upon an uncertain event. There is no vested right to a specific remedy." *Man. Pub. Ins. Corp. v. Dakota Fire Ins. Co.*, 2007 ND 206, ¶ 8, 743 N.W.2d 788 (citations omitted); *see, e.g. Zipperer v. County of Santa Clara,* 35 Cal. Rptr. 3d 487, 494, (Cal. Ct. App. 2005) (a statutory remedy is merely an inchoate, incomplete, and unperfected right until it is enforced). As explained above, use of pore space is clearly dependent upon NDIC authorization, which is not a certain event. *See supra*, ¶¶ 23-29. And, damage to pore space should not be presumed based upon mere use. *Mosser*, 2017 ND 169, ¶ 24, 898 N.W.2d 406.

[¶73] Even if the Court determines the Legislature's enactment of N.D.C.C. ch. 38-11.1 in 1979 vested pore space owners with a statutory remedy for damage to pore space, it

should interpret the Legislature's actions to avoid a constitutional conflict. *Gregory*, 1998 ND 94, ¶ 28, 578 N.W.2d 101. Under N.D.C.C. § 1-02-30, "[n]o provision contained in this code may be so construed as to impair any vested right or valid obligation existing when it takes effect." *See also Gregory*, 1998 ND 94, ¶ 29, 578 N.W.2d 101 (applying this rule). The amendments would also be constitutional because a common law tort remedy is preserved by the injection and migration sentence in N.D.C.C. § 47-31-09(1).

4. The district court's invalidation of S.B. 2344 is erroneous because it does not consider the parcel-as-a-whole rule.

[¶74] Even if this Court concludes the district court did not err in its determination that S.B. 2344 and its component laws constitute a taking, the Court should nonetheless determine the district court erred by not expressly analyzing or contemplating the parcel-as-a-whole rule. The district court only focused its federal takings analysis on pore space as if it was severed from the surface estate. Since 2009, the Legislature has barred the severance of pore space from the title of surface of real property overlying the pore space. N.D.C.C. § 47-31-05. Pore space in North Dakota is part of the surface estate. The district court's erroneous analysis would allow a person to divide property into discrete segments and claim that rights in certain segments were abrogated. This is contrary to this Court's precedent and United States Supreme Court precedent. *Keystone*, 480 U.S. at 497.

5. The remaining provisions of S.B. 2344 fall within the exception recognized by *Lucas.*

[¶75] The remainder of S.B. 2344 does not directly authorize access to or use of the surface estate, but the district court concluded these provisions could not be severed from the alleged unconstitutional portions of S.B. 2344. A.J.A. at 160-61, ¶ 40. These provisions of law are constitutional.

[¶76] As explained above, N.D.C.C. § 38-08-25(1) adds the use of carbon dioxide for enhanced recovery of oil, gas, and other minerals to the list of acceptable recovery processes. Standing alone, there is nothing about this process that is unconstitutional, and it should be construed as a proper exercise of the State's police powers. If the process raises as-applied questions or issues related to compensation, the Legislature provided a process for resolving these questions in N.D.C.C. ch. 38-22. Regardless, such questions are outside the scope of NWLA's facial challenge.

[¶77] In addition, the public interest statements regarding carbon dioxide (N.D.C.C. §§ 38-08-25(2-4)), either standing alone or collectively, are also constitutional. General legislative enactments that include findings and public interest statements related to industry are common throughout North Dakota law. *See e.g.* N.D.C.C. § 17-05-01; N.D.C.C. § 57-02.2-01; N.D.C.C. § 54-17-35; N.D.C.C. § 61-01-26.1; N.D.C.C. § 61-16.2-01; N.D.C.C. § 53-04.1-02; N.D.C.C. § 40-57-20; N.D.C.C. § 40-57.1-01; N.D.C.C. § 61-04.1-02; N.D.C.C. § 61-01-01.2; N.D.C.C. § 38-18-02. A legislative declaration that projects are devoted to public purpose is entitled to great weight and courts will not interfere with such findings unless they are clearly erroneous or without reasonable foundation. *In re Garrison Diversion Conservancy Dist.*, 144 N.W.2d 82, 90 (N.D. 1966). If the Legislature's public interest statements in N.D.C.C. §§ 38-08-25(2)-(4) are unconstitutional, one could also infer the Legislature's recognition of the agricultural industry through N.D.C.C. ch. 38-11.1 is similarly unconstitutional. Regardless, these public interest statements certainly do not rise to the level of a taking nor do they support the district court's erroneous conclusion that the Bill supports the improper purpose of economic development.

[¶78] Finally, subsections 2 through 4 of N.D.C.C. § 47-31-09, are rules of construction for contractual disputes and the preservation of remedies for surface owners.[5] NWLA did not argue, and the district court did not hold, that these subsections constituted a taking under the federal constitution.

[¶79] In summary, the district court erred where it concluded the remaining provisions are not severable and constitute a taking under the federal constitution.

II. The district court erred when it granted NWLA's Cross-Motion, denied the State's Cross-Motion, and determined certain sections of S.B. 2344 constitute an unconstitutional taking under the state constitution.

[¶80] The North Dakota Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation . . . ." N.D. Const. art. I, § 16. "Governmental regulation constitutes a taking for public use only when it deprives the owner of all or substantially all reasonable uses of the property." *Wild Rice River*, 2005 ND 193, ¶ 17, 705 N.W.2d 850 (quoting *Braunagel v. City of Devils Lake*, 2001 ND 118, ¶ 16, 629 N.W.2d 567). None of the laws challenged by NWLA deprive a surface owner of all or substantially all reasonable uses of property. All of the laws in S.B. 2344 are oriented towards preserving the authorized development of minerals in North Dakota or establishing guidelines for the resolution of disputes. None of the provisions expressly place any restrictions on a surface owner's use of the surface estate, including pore space. S.B. 2344 does not violate this Court's test for determining whether a law or laws constitutes a taking under the state constitution.

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[5] NWLA does not have standing to separately challenge these laws under a void for vagueness argument. "In North Dakota, '[t]o have standing to raise a vagueness challenge, a litigant must almost always demonstrate that the statute in question is vague as applied to his own conduct, without regard to its potentially vague application in other circumstances.'" *In re. D.D.*, 2018 ND 201, ¶ 13, 916 N.W.2d 765 (citations omitted).

[¶81] Even if this Court determines S.B. 2344 could constitute a taking under the state constitution, the Court should apply the exceptions recognized by the United States Supreme Court in *Lucas* to NWLA's state constitutional challenge. The Court should also determine the district court erroneously failed to apply the parcel-as-a-whole test. *Wild Rice River*, 2005 ND 193, ¶ 17, 705 N.W.2d 850.

III. S.B. 2344 does not constitute an unconstitutional gift.

[¶82] NWLA may argue that S.B. 2344 constitutes an unconstitutional gift of pore space owned by the State, although this argument was not expressly addressed by the district court. The Court should reject this argument. As explained above, landowners have an expectation that pore space is burdened by the State's police powers and the dominant mineral estate. Use of pore space, without compensation, cannot be a gift if the law recognizes pore space may be properly used by the dominant mineral estate.

IV. The district court erred in its application of N.D.R.Civ.P. 56 and this Court's standard of review for summary judgment motions, by not considering the evidence submitted by the State.

[¶83] In its memorandum opinion, the district court stated that matters outside the pleadings were not considered by the Court, and apparently excluded Helms' affidavit. A.J.A. at 152, ¶ 11. This was error.

[¶84] The State submitted the Affidavit of Lynn Helms in support of its Cross-Motion, which was also a response to NWLA's Cross-Motion. A.J.A. at 118-23. In his affidavit, Helms provided relevant explanations of the different operations approved by the NDIC and referenced in S.B. 2344, and the lawful purpose those operations serve. A.J.A. at 119-23, ¶¶ 5-28. Helms also explained how the NDIC routinely permits the use of pore space. A.J.A at 119-23, ¶¶ 13-28. NWLA did not oppose or respond to Helms' affidavit with any

declarations or affidavits in its response to the State's Cross-Motion. Helms' affidavit is admissible and undisputed.

[¶85] The district court erred in its application of N.D.R.Civ.P. 56 and this Court's standard for considering summary judgment motions, because it did not view the evidence in the light most favorable to the State, or give the State the benefit of all favorable inferences which can reasonably be drawn from the record. The district court additionally erred by excluding the State's evidence.

[¶86] If this Court determines the district court erred by granting NWLA's Cross-Motion, and that the State is not entitled to summary judgment based upon the record before it, including Helms' affidavit, the State respectfully requests that the Court remand the case back to the district court with directions to consider Helms' affidavit.

V. The district court abused its discretion by awarding attorneys' fees to NWLA based upon a federal statute that was not pled by NWLA and would have been subject to dismissal.

[¶87] North Dakota follows the American Rule for awarding attorneys' fees. *Sorum*, 2020 ND 175, ¶ 58, 947 N.W.2d 382. "Successful litigants are not allowed to recover attorney fees unless authorized by contract or by statute." *Sorum*, at ¶ 58 (citation omitted). If the Court affirms the district court's granting of NWLA's Cross-Motion, the Court should nonetheless determine that district court abused its discretion by misapplying the law and erroneously concluding that an award of attorneys' fees was authorized based upon the application of federal law, 42 U.S.C. §§ 1983 & 1988.

[¶88] The district court erred by granting NWLA's request because it did not expressly plead 42 U.S.C. §§ 1983 & 1988 in its Complaint. The State was not on notice of these purported claims. Had NWLA actually pled these statutes, or even included them within

its briefing, the State would have moved to dismiss the claims because the federal laws are not applicable to the State or State officials in their official capacities. The district court also erred because NWLA does not have standing to raise a claim under 42 U.S.C. § 1983.

A. NWLA does not have a valid claim under 42 U.S.C. § 1983 that triggers a right to attorneys' fees.

[¶89] The United States Supreme Court has held that an action under 42 U.S.C. § 1983 does not lie against a state, its agencies, or its officials in their official capacities because a state is not a "person" within the meaning of the Civil Rights Act. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). In *Will*, the plaintiff sued the Michigan Department of State Police and the Director of State Police in his official capacity claiming a violation of the plaintiff's constitutional rights. *Id.* at 60, 70. The Supreme Court held that the plaintiff failed to state a claim under section 1983: "We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Id.****Error! Bookmark not defined.*** at 71.[6]

[¶90] Clearly, any purported claim pled by NWLA against the State and state officials in their official capacity, based upon 42 U.S.C. § 1983, would have been subject to dismissal. Regarding NWLA's claims against individual State Appellants, "[a] claim under § 1983 must allege that conduct of a defendant acting under color of state law deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or by the laws of the United States." *Kuntz v. State*, 2019 ND 46, ¶ 38, 923 N.W.2d 513 (alteration in original) (citations omitted). NWLA made no allegation that any of the individual State Appellants acted, or threatened to act, in a way that deprived NWLA of a right, privilege, or immunity secured

[6] The North Dakota Supreme Court recognized this precedent in *Perry Center, Inc. v. Heitkamp*, 1998 ND 78, ¶ 37, 576 N.W.2d 505.

by the Constitution or the laws of the United States. The district court confirmed this. A.J.A. at 182-83, ¶ 15. "[T]his case involved state actors in their official capacity . . . ." *Id*. The district court abused its discretion by construing NWLA's complaint as properly alleging a claim against the State Appellants under 42 U.S.C. § 1983.

[¶91] NWLA did seek prospective injunctive relief to prevent the Governor and the Attorney General from enforcing S.B. 2344 and adopting rules, and presumably would argue relief is available under section 1983 under the doctrine of *Ex Parte Young*. *See Ex Parte Young*, 209 U.S. 123 (1908); *Kristensen v. Strinden*, 343 N.W.2d 67, 72-73 (N.D. 1983) (describing circumstances where state officials may be sued in their individual capacities for deprivations of federal rights). The district court, however, only generally enjoined enforcement of the law after determining it was facially unconstitutional. NWLA did not plead or argue, and the district court did not hold, that either the Attorney General or the Governor individually enforce S.B. 2344. As a consequence, there is no basis to conclude that either the Attorney General or the Governor could individually deprive NWLA of its civil rights.

[¶92] In addition, the district court erroneously relied upon *Goss v. City of Little Rock, Arkansas*, 151 F.3d 861 (8th Cir. 1998) to support its analysis. This case is neither controlling nor persuasive precedent. *Goss* considers constitutional claims against a political subdivision, the City of Little Rock, as opposed to a state. *Id.* Section 1983 claims may lie against political subdivisions, but not states or state officials acting in their official capacities.

[¶93] The district court abused its discretion by construing NWLA's Complaint as properly alleging a claim against the State Appellants under 42 U.S.C. § 1983.

B. The district court abused its discretion by concluding associations have standing to bring claims under 42 U.S.C. §§ 1983 & 1988 on behalf of their members.

[¶94] Associational standing to assert members' rights in a case brought under 42 U.S.C. § 1983 is not uniformly recognized by courts in this country. In *Nnebe v. Daus,* the Second Circuit Court of Appeals held that the Circuit generally does not recognize the standing of an association to assert rights under 42 U.S.C. § 1983. 644 F.3d 147, 156 (2d Cir. 2011); *see also Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) ("An organization's expenditure of resources on a lawsuit does not constitute an injury in fact sufficient to establish standing." (citation omitted)). This Court should adopt the precedent from the Second Circuit and conclude the district court abused its discretion by determining NWLA had standing to seek attorneys' fees under 42 U.S.C. §§ 1983 & 1988.

CONCLUSION

[¶95] The State respectfully requests that the Court reverse the district court's decision holding that S.B. 2344 is unconstitutional, determine that the Bill is constitutional as a matter of law, and reverse the district court's award of attorneys' fees.

Dated this 8th day of November, 2021.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, v. State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota, and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendants/Appellants, and Continental Resources, Inc., Intervenor/Appellant.	**Supreme Ct. No. 20210148** **Civil No. 05-2019-CV-00085**

APPEAL FROM THE
JUDGMENT OF THE DISTRICT COURT
BOTTINEAU COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE ANTHONY BENSON

ADDENDUM

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Sixty-sixth Legislative Assembly of North Dakota
In Regular Session Commencing Thursday, January 3, 2019

SENATE BILL NO. 2344
(Senators Unruh, Cook, Schaible)
(Representatives Kempenich, Porter)

AN ACT to create and enact section 47-31-09 of the North Dakota Century Code, relating to injection or migration of substances into pore space; and to amend and reenact sections 38-08-25, 38-11.1-01, and 38-11.1-03 of the North Dakota Century Code, relating to pore space and oil and gas production.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 38-08-25 of the North Dakota Century Code is amended and reenacted as follows:

38-08-25. Hydraulic fracturing - Use of carbon dioxide - Designated as acceptable recovery ~~process~~processes.

1. Notwithstanding any other provision of law, the legislative assembly designates hydraulic fracturing, a mechanical method of increasing the permeability of rock to increase the amount of oil and gas produced from the rock~~, an~~; and the use of carbon dioxide for enhanced recovery of oil, gas, and other minerals acceptable recovery ~~process~~processes in this state.

2. It is in the public interest to promote the use of carbon dioxide to benefit the state, to help ensure the viability of the state's coal and power industries, and to benefit the state economy. Carbon dioxide is a potentially valuable commodity, and increasing its availability is important for commercial, industrial, or other uses, including enhanced recovery of oil, gas, and other minerals.

3. It is in the public interest to encourage and authorize cycling, recycling, pressure maintenance, secondary recovery operations, and enhanced recovery operations utilizing carbon dioxide for the greatest possible economic recovery of oil and gas.

4. It is in the public interest for a person conducting operations authorized by the commission under this chapter to use as much of a subsurface geologic formation as reasonably necessary to allow for unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation authorized by this chapter.

5. Notwithstanding any other provision of law, a person conducting unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation authorized by the commission under this chapter may utilize subsurface geologic formations in the state for such operations or any other permissible purpose under this chapter. Any other provision of law may not be construed to entitle the owner of a subsurface geologic formation to prohibit or demand payment for the use of the subsurface geologic formation for unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation conducted under this chapter. As used in this section, "subsurface geologic formation" means any cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum.

6. The commission may adopt and enforce rules and orders to effectuate the purposes of this section.

SECTION 2. AMENDMENT. Section 38-11.1-01 of the North Dakota Century Code is amended and reenacted as follows:

38-11.1-01. Legislative findings.

The legislative assembly finds the following:

1. It is ~~necessary to exercise the police power of~~incumbent on the state to protect the public welfare of North Dakota which is largely dependent on agriculture and to protect the economic well-being of individuals engaged in agricultural production, while at the same time preserving and facilitating exploration through the utilization of subsurface pore space in accordance with an approved unitization or similar agreement, an oil and gas lease, or as otherwise permitted by law.

2. Exploration for and development of oil and gas reserves in this state interferes with the use, agricultural or otherwise, of the surface of certain land.

3. Owners of the surface estate and other persons should be justly compensated for injury to their persons or property and interference with the use of their property occasioned by oil and gas development.

4. This chapter may not be construed to alter, amend, repeal, or modify the law concerning title to pore space under section 47-31-03.

SECTION 3. AMENDMENT. Section 38-11.1-03 of the North Dakota Century Code is amended and reenacted as follows:

38-11.1-03. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Agricultural production" means the production of any growing grass or crop attached to the surface of the land, whether or not the grass or crop is to be sold commercially, and the production of any farm animals, including farmed elk, whether or not the animals are to be sold commercially.

2. "Drilling operations" means the drilling of an oil and gas well and the production and completion operations ensuing from the drilling which require entry upon the surface estate and which were commenced after June 30, 1979, and oil and gas geophysical and seismograph exploration activities commenced after June 30, 1983.

3. "Land" means the solid material of earth, regardless of ingredients, but excludes pore space.

4. "Mineral developer" means the person who acquires the mineral estate or lease for the purpose of extracting or using the minerals for nonagricultural purposes.

~~4.~~5. "Mineral estate" means an estate in or ownership of all or part of the minerals underlying a specified tract of land.

~~5.~~6. "Minerals" means oil and gas.

7. "Pore space" means a cavity or void, naturally or artificially created, in a subsurface sedimentary stratum.

~~6.~~8. "Surface estate" means an estate in or ownership of the surface of a particular tract of land.

~~7.~~9. "Surface owner" means any person who holds record title to the surface ~~of the land as an owner~~estate on which a drilling operation occurs or is conducted.

SECTION 4. Section 47-31-09 of the North Dakota Century Code is created and enacted as follows:

47-31-09. Injection of substances to facilitate production of oil, gas, or other minerals.

1. This chapter may not be construed to limit the rights or dominance of a mineral estate to drill or recomplete a well under chapter 38-08. Injection or migration of substances into pore space for disposal operations, for secondary or tertiary oil recovery operations, or otherwise to facilitate production of oil, gas, or other minerals is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort.

2. This section and chapter 38-08 may not be construed to impair the obligations of any contract for use of the surface estate for disposal operations, provided the contract was entered before the effective date of the unit approved by the commission pursuant to sections 38-08-09 through 38-08-09.17, and provided the disposal well is located within the unit area of the approved unit.

3. This section and chapter 38-08 may not be construed to allow the operator of a disposal well where the contract has expired after the effective date of the unit approved by the commission pursuant to sections 38-08-09 through 38-08-09.17 to claim the surface owner should not be compensated as if the new contract for the disposal well on which the contract has expired had been entered after the effective date of the approved unit.

4. The owner of the surface estate upon which the surface location of a disposal well is located does not lose, and may not be deemed to have lost, a claim for trespass, nuisance, or other tort if the operator of the disposal well commences or continues operations of the disposal well in violation of subsections 2 or 3.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-sixth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2344.

Senate Vote:	Yeas 34	Nays 12	Absent 1
House Vote:	Yeas 66	Nays 24	Absent 4

Secretary of the Senate

Received by the Governor at 11:25 AM. on April 18, 2019.

Approved at 5:29 PM. on April 18, 2019.

Governor

Filed in this office this 19th day of April, 2019,

at 8:42 o'clock A. M.

Secretary of State

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, v. State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota, and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendants/Appellants, and Continental Resources, Inc., Intervenor/Appellant.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20210148** **Civil No. 05-2019-CV-00085**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Defendants/Appellants Brief contains 44 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Times New Roman 12 point font.

Dated this 8th day of November, 2021.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, v. State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota, and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendants/Appellants, and Continental Resources, Inc., Intervenor/Appellant.	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20210148** **Civil No. 05-2019-CV-00085**

[¶1] I hereby certify that on October 8, 2021, the following document: **BRIEF OF STATE DEFENDANTS/APPELLANTS and APPELLANTS' JOINT APPENDIX** was filed electronically with the Clerk of Supreme Court and served upon Plaintiff/Appellee Northwest Landowners Association, by and through its attorneys:

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, v. State of North Dakota, North Dakota Industrial Commission, Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota, and Hon. Wayne Stenehjem in his official capacity as Attorney General of North Dakota, Defendants/Appellants, and Continental Resources, Inc., Intervenor/Appellant.	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20210148** **Civil No. 05-2019-CV-00085**

[¶1] I hereby certify that on November 9, 2021, the following document: **BRIEF OF STATE DEFENDANTS/APPELLANTS (with non-substantive corrections)** was filed electronically with the Clerk of Supreme Court and served upon Plaintiff/Appellee Northwest Landowners Association, by and through its attorneys:

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