

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20120184

Patricia R. Capps, *f/k/a* Patricia Anderson,  
Tara A. Anderson, *a/k/a* Tara Anderson,  
Gerald C. Woods, Penny Brink, Michael Lea,  
Gwen Hassan, Melissa Kellor, and the Estate  
of Ruth A. Nelson, Deceased,

Appellees,

v.

Colleen L. Weiten, *a/k/a* Colleen Weiten, a  
single woman, Marleen Weiten, *f/k/a*  
Marleen W. Trett, Sharon Kruse, *a/k/a*  
Sharon C. Kruse *f/k/a* Sharon Weiten, a  
married woman dealing in her sole and  
separate property, Catherine Harris,  
a single woman, Norris Weiten, *a/k/a*  
Norris L. Weiten, a single man,  
Winsor Bakken, LLC, a Delaware Limited  
Liability Company, Gulfport Energy  
Corporation, EOG Resources, Inc.,

Appellants.

Colleen L. Weiten, *a/k/a* Colleen Weiten, a  
single woman, Marleen Weiten, *f/k/a*  
Marleen W. Trett, Sharon Kruse *a/k/a*  
Sharon C. Kruse *f/k/a* Sharon Weiten, a  
married woman dealing in her sole and  
separate property, Catherine Harris *f/k/a*  
Catherine Gunderson, a single woman, Norris  
Weiten, *a/k/a* Norris L. Weiten, a single man,  
Winsor Bakken, LLC, a Delaware Limited  
Liability Company, Gulfport Energy  
Corporation, EOG Resources, Inc.,

Appellants.

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STATE OF NORTH DAKOTA

Supreme Ct. No. 20120184  
District Ct. No. 31-10-C-00009

Appeal from Summary Judgment  
Entered on February 8, 2012

Northwest Judicial District  
Honorable David W. Nelson, Presiding

BRIEF OF AMICUS CURIAE  
STATE OF NORTH DAKOTA

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Patricia R. Capps, f/k/a Patricia Anderson, )  
Terrel A. Anderson, a/k/a Terral Anderson, )  
Gerald C. Wools, Penny Brinks, Michael Lee, )  
Gwen Hassan, Melissa Kellor, and the Estate )  
of Ruth A. Nelson, Deceased, )

Appellees, )

v. )

Colleen L. Weflen, a/k/a Colleen Weflen, a )  
single woman, Marleen Weflen, f/k/a )  
Marleen W. Tiedt, Sharon Kruse, a/k/a )  
Sharon O. Kruse f/k/a Sharon Weflen, a )  
married woman dealing in her sole and )  
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**BRIEF OF AMICUS CURIAE  
STATE OF NORTH DAKOTA**

State of North Dakota  
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## ISSUE

North Dakota Century Code § 38-18.1-06 (2004), is constitutional.

## STATEMENT OF IDENTITY AND INTEREST

The North Dakota League of Cities has an interest in this appeal as an amicus curiae. On October 18, 2012, Amicus Curiae (the State) received notice of Capps Appellees' constitutional challenge. The State, through undersigned counsel, submits this brief under N.D.C.C § 32-23-11 and N.D.R.Civ.P. 24(c), which provide that the Attorney General is entitled to participate if a party questions the constitutionality of a legislative act.

## ARGUMENT

The Capps Appellees argue, in the alternative, that if the Supreme Court overturns the district court's decision in their favor, the Court should determine N.D.C.C. § 38-18.1-06 (2004) is unconstitutional. Capps Appellees' Brief, at 17. Appellees specifically argue that section 38-18.1-06 should be deemed unconstitutional if the Court determines a deceased person can be subjected to notice. Id. at 18. Capps Appellees are not arguing that the law is facially unconstitutional, rather that the Court should determine its application is unconstitutional.

"All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution." Simons v. State, 2011 ND 190, ¶ 23, 803 N.W.2d 587 (citations omitted). Any doubt about a statute's constitutionality must, when possible, be resolved in favor

of its validity. Id. “The power to declare a legislative act unconstitutional is one of the highest functions of the courts, and that power must be exercised with great restraint.” Id. “The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt.” Id.

Furthermore, before the Court analyzes the Capps Appellees' constitutional argument, the Court must first inquire as to whether alternative grounds exist for a decision. If the Court can resolve the matter on other appropriate grounds, then the constitutionality need not, and should not, be addressed. Minot Daily News v. Holum, 380 N.W.2d 347, 350 (N.D.1986); Bismarck Public Schools v. Walker, 370 N.W.2d 565, 566 (N.D.1985); Little v. Graff, 507 N.W.2d 55, 59 (N.D. 1993). A party who attacks the constitutionality of a statute must show, among other things, that a decision on the constitutional question is necessary in order to protect him in the enjoyment of the rights guaranteed to him by the Constitution. Olson v. Ross, 39 N.D. 372, 167 N.W. 385, 386 (N.D.1918). Until a property owner meets reasonable conditions placed upon his ownership, the owner has no complaint against the constitutionality of the statute. N. Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925).

There are alternative grounds upon which the case at bar could be decided and, accordingly, the Court should not consider the constitutional arguments. For instance, all of the Appellants argue the Court has grounds to overturn the district court's decision without determining the law unconstitutional. In addition, the Court has addressed and applied this chapter on three separate

occasions since 2010, without addressing constitutional questions. Johnson v. Taliaferro, 2011 ND 34, 793 N.W.2d 804; Sorenson v. Felton, 2011 ND 33, 793 N.W.2d 799; Sorenson v. Alinder, 2011 ND 36, 793 N.W.2d 797. An alternative decision is appropriate in this case.

Finally, as stated above, Capps Appellees do not appear to be challenging a legislative act or arguing the district court's decision is unconstitutional. Appellees alternative argument seems to rest on a hypothetical Supreme Court interpretation: "N.D.C.C. section 38-18.1-06 (2004) should be deemed unconstitutional if the Court determines a deceased person can be subjected to notice." The Court has stated that it does not render advisory opinions. State v. Hansen, 2006 ND 139, ¶7, 717 N.W.2d 541, 543; Sorenson v. Felton, 2011 ND 33, ¶14, 793 N.W.2d 799.<sup>1</sup> If the Court, however, addresses the constitutionality of the law in question, the state adopts the Appellants' arguments that section 38-18.1-06 (2004) is constitutional.

### CONCLUSION

If the Court chooses to address the constitutional issue, the State of North Dakota respectfully requests that this Court find that N.D.C.C. § 38-18.1-06 (2004) is constitutional.

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<sup>1</sup> As presented, the scenario Capps Appellees offer the Court is a fiction because we will never know where the Notice of Lapse would have been mailed had the Capps Appellees complied with the statutory condition of use and updated the record even once in the twenty years prior to the Notice of Lapse being sent.

Dated this 21<sup>st</sup> day of November, 2012.

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Attorney General

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**AFFIDAVIT OF SERVICE  
BY MAIL**

STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF BURLEIGH )

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made  
in this affidavit are true and correct.

2. I am of legal age and on the 21<sup>st</sup> day of November, 2012, I served the attached Brief of Amicus Curiae State of North Dakota, upon Zachary E. Pelham, Richard P. Olson, Lawrence Bender, Monte Rogneby, James Mowry, and Sheldon A. Smith, by placing a true and correct copy thereof in an envelope addressed as follows:

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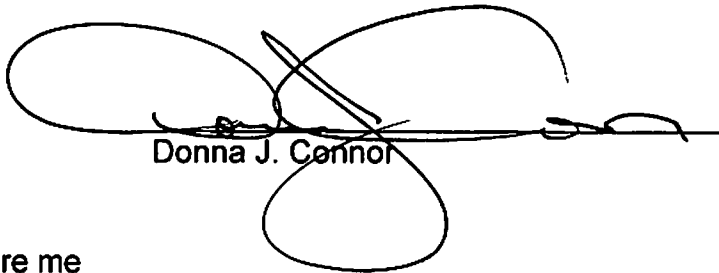
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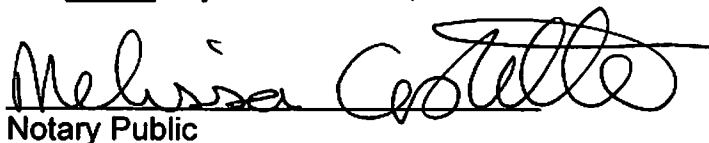
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and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me  
this 21<sup>st</sup> day of November, 2012.



Notary Public

