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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, vs. 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 Court No. 20210148 Civil No. 05-2019-CV-00085

Appeal from Judgment Entered on April 13, 2021
Case No. 05-2019-CV-00085
County of Bottineau, Northeast Judicial District
The Honorable Anthony S. Benson, Presiding

BRIEF OF APPELLEE NORTHWEST LANDOWNERS ASSOCIATION

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STATEMENT OF THE FACTS

[¶1] The historic and legal context in which Senate Bill 2344 arose is critical to understanding the purpose and meaning of the legislation.

I. The context from which S.B. 2344 arose makes it clear that its purpose and effect is to remove the Landowners' rights to protect their pore space.

[¶2] Pore space is the empty, interstitial space between the soil and rock of the earth, regardless of depth. S.B. 2344 defines pore space as "a cavity or void, naturally or artificially created, in a subsurface sedimentary stratum." S.B. 2344, Section 1, *adding* N.D.C.C. § 38-11.1-03(7). During the 2019 legislative session long-time landowner advocate Dennis Johnson used a sponge to illustrate:

> I hold in my hand a sponge. The formations that lie below the surface that have tiny pockets of space are formations with pore space. This sponge is like one of those formations. It is capable of holding gas or fluids if they are injected, disposed or soaked up by the sponge.[1]

[¶3] Physically, pore space exists in the soil that grows the crops, in the subsoil through which pipelines are run, and in deeper formations used for disposal wells, water supply wells, and mineral production. At lower subsurface depths, pore space is particularly useful for industrial applications because it can be used to store or dispose of hazardous or waste liquids and gases (sometimes for later sale). A produced water disposal well injects produced water—an unwanted waste—into pore space for permanent disposal. Index #84, ¶ 5. Pore space can also be used to store gases such as CO2 or natural gas. *Id.*

[¶4] The surface owner has always owned the pore space. "In North Dakota, it is clear that the surface owner owns the subsurface pore space given that N.D.C.C. § 47–01–12

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[1] Legislative History of SB 2344, p. 94, (2019) (https://www.legis.nd.gov/files/resource/66-2019/library/sb2344.pdf).

(which dates back to at least the 1877 Civil Code for the Dakota Territory) provides…[that the] owner of land in fee has the right to the surface and to *everything* permanently situated beneath or above it." *Mosser v. Denbury Res., Inc.*, 112 F. Supp. 3d 906, 919 (D.N.D. 2015) (emphasis in original). This is the prevailing view in most jurisdictions. *See Burlington Resources Oil & Gas Co., LP v. Lang and Sons Incorporated, a/k/a Lang and Sons, Inc.*, 2011 MT 199, ¶¶ 23–24, 361 Mont. 407, 259 P.3d 766 (holding that compensation for diminution in value from use of pore space is required under Montana surface damage statute modeled after Chapter 38-11.1).[2]

[¶5] Although the surface owner owns the pore space, the mineral owner has certain rights to use the surface estate, including the pore space.

> An oil and gas lease carries with it the right to possession of the surface to the extent reasonably necessary to enable the lessee to perform the obligations imposed upon him by the lease. 'This rule is based upon the principle that when a thing is granted all the means to obtain it and all the fruits and effects of it are also granted.' Accordingly, the right to such use of the surface is implied if it is not granted, whether the form of conveyance is a mineral deed or a lease.

Feland v. Placid Oil Co., 171 N.W.2d 829, 833–34 (N.D. 1969) (citing 4 Summers, Oil & Gas, Sec. 652, page 2) (internal citations omitted in original). These implied surface rights of the mineral estate are often referred to as an "implied easement."

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[2] *See also Ellis v. Arkansas Louisiana Gas Co.,* 450 F. Supp. 412, 420 (E.D.Okla.1978); *Emeny v. United States,* 412 F.2d 1319, 1321–22 (Ct.Cl.1969) (applying Texas law); *Cassinos v. Union Oil Co. of California,* 14 Cal.App.4th 1770, 1782–83, 18 Cal.Rptr.2d 574 (Cal.Ct.App.2d Dist.1993); *Humble Oil & Refining Co. v. West,* 508 S.W.2d 812, 815 (Tex.1974); *cf. Dick Properties, LLC,* 221 P.3d at 620–22; *see generally* 1–2 *Williams & Meyers* at § 218; Owen L. Anderson, Kay Bailey Hutchison, & R. Lee Gresham, *Legal and Commercial Models for Pore-space Access and Use for Geologic Co2 Sequestration,* 2015 NO. 4 RMMLF–INST PAPER NO. 9 at * * 9–7–9–12 & n. 48 (May 2015).

[¶6] When the North Dakota Industrial Commission ("NDIC") force-pools a spacing unit, or unitizes a field/reservoir, the implied easement has an expanded geographic scope, such that the mineral owner can use any part of the surface estates pooled in the spacing unit as reasonably necessary to produce minerals from beneath that unit, or use any surface estates within a unitized field as reasonably necessary to produce the oil from beneath that unitized field. *See* N.D.C.C. § 38-08-08 (pooled spacing units); N.D.C.C. § 38-08-09.8 (unitization). In the absence of force-pooled units or unitized fields, an oil and gas lease or mineral interest and the associated implied easement would only apply on a leasehold-by-leasehold basis, such that the surface of one leasehold could not be used for development of an adjoining leasehold. This creates difficulties where horizontal drilling occurs. North Dakota addressed those difficulties through force-pooling and unitization. *Id*.

[¶7] The decision in *Continental Res., Inc. v. Farrar Oil Co.* cited by the State of North Dakota and its officials ("State") and Continental Resources, Inc. ("Continental") stands for nothing more remarkable than this: force-pooling and unitization result in a limited expansion of the geographic scope of application of the implied easement,[3] and with respect to mineral estates they also create an equitable distribution of the reservoir to its common owners. 1997 ND 31, 559 N.W.2d 841. While the State may rely on the extent of its police powers in effectuating conservation statutes,[4] it may do so *only* to the extent

[3] The State erroneously asserts the implied easement is part of its police power. The implied easement is the *developer's* right to do what is "reasonably necessary" to produce the minerals and is a common law creation. Conservation orders can expand the geographic application of the rights provided by the implied easement, but do not *create* that implied easement. These distinctions are important.

[4] Statutes that allow for creating and force-pooling of spacing units and forced unitization, such as N.D.C.C. §§ 38-08-07, 38-08-08, and 38-08-09.1-09.16, respectively, are often referred to as "conservation" statutes.

necessary to effectuate those conservation statutes. *See, e.g.*, *Mosser v. Denbury Res., Inc.*, 112 F. Supp. 3d 906, 918, n.9 (D.N.D. 2015); *Buchholz v. Burlington Res. Oil & Gas Co. LP*, 2008 ND 173, ¶ 18, 755 N.W.2d 914.

[¶8] Before the overreach of S.B. 2344, this adjustment of rights effectuated by the implied easement was limited to operations reasonably necessary for production of minerals within the spacing unit or unitized field, and a surface owner could bring a trespass action if, for example, his surface estate was being used for the benefit of mineral production from outside the spacing unit or unitized field. *See Mosser v. Denbury Res., Inc.*, 112 F. Supp. 3d 906, 918 (D.N.D. 2015) (*citing Cf., e.g., Hill v. Southwestern Energy Co.*, No. 4:12–cv–500, 2013 WL 5423847, at **3–4 (E.D.Ark. Sept. 26, 2013); *Dick Properties, LLC*, 221 P.3d at 621; *Kysar v. Amoco Production Co.*, 135 N.M. 767, 93 P.3d 1272, 1278, 1283–86 (2004).

[¶9] This Court explained the meaning of "reasonably necessary" operations as follows:

> …the rights of the owner of the mineral estate are limited to so much of the surface and such use thereof as are Reasonably necessary to explore, develop, and transport the minerals. In addition to, or underlying the question of what constitutes reasonable use of the surface in the development of oil and gas rights, is the concept that the owner of the mineral estate must have Due regard for the rights of the surface owner and is required to exercise that degree of care and use which is a just consideration for the rights of the surface owner. Therefore, the mineral estate owner has no right to use more of, or do more to, the surface estate than is reasonably necessary to explore, develop, and transport the minerals. Nor does the mineral estate owner have the right to negligently or wantonly use the surface owner's estate.

Hunt Oil v. Kerbaugh, 283 N.W.2d 131, 135–36 (N.D. 1979) (internal citations omitted).

[¶10] Landowners could previously sue for trespass or nuisance for operations that were not reasonably necessary for oil production. Before S.B. 2344 amended 38-11.1, they could

also sue for compensation under N.D.C.C. ch. 38-11.1 even when an operation *was* reasonably necessary. *See* N.D.C.C. § 38-11.1-04; *see also* N.D.C.C. § 38-11.1-02.

[¶11] N.D.C.C. ch. 38-11.1, enacted in 1979, vested surface owners with a right to compensation for the reasonable use of their property for mineral extraction, even when an operator relied on the implied easement or severed mineral estate for its access rights. Severed estates are commonplace in North Dakota and the legislature has recognized that surface owners are unable to prevent the lawful use of their property for mineral extraction by developers with an implied easement. *See Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d at 135 ("[T]he surface estate is servient in the sense it is charged with the servitude for those essential rights of the mineral estate."). Landowners have relied on the right codified in N.D.C.C. ch. 38-11.1 for more than forty years to maintain the value of their property and property they purchase. The existence of the remedy of compensation imputes value to real property by its existence and availability to the landowner. Chapter 38-11.1 was challenged immediately after it went into effect and the Eighth Circuit upheld its constitutionality. *Murphy v. Amoco Prod. Co.*, 729 F.2d 552, 560 (8th Cir. 1984).

[¶12] N.D.C.C. ch. 38-11.1 codified and vested a cause of action for damages regardless of the nuanced rights that existed before its enactment, however, so whether the right to compensation pre-existed Chapter 38-11.1 is irrelevant – either way 38-11.1 created a substantive property right to compensation, in particular for situations in which the mineral developer had access rights through the implied easement. *See* N.D.C.C. § 38-11.1-02.

[¶13] More recently, the *Mosser* and *Fisher* cases addressed whether compensation for use of pore space in a unitized field for a disposal well was required under Chapter 38-11.1 after two developers refused to pay the landowners. *See, generally*, *Mosser v. Denbury*

Res., Inc., 112 F. Supp. 3d 906 (D.N.D. 2015); *Mosser v. Denbury Res., Inc.*, 2017 ND 169, 898 N.W.2d 406; *Fisher v. Continental Res., Inc.*, 49 F. Supp. 3d 637 (D.N.D. 2014) ("*Fisher*"). Significantly, in the federal *Mosser* case, the court denied a motion to dismiss by Denbury claiming the case was a collateral attack on an NDIC order and explained that "no language has been located granting the North Dakota Industrial Commission condemnation powers" and that the "permit in question does not appear to contain any language expropriating the Plaintiffs' pore space." *Mosser v. Denbury Res., Inc.*, No. 1:13-CV-148, 2014 WL 11531329, at *3 (D.N.D. Feb. 12, 2014).

[¶14] The federal court in *Mosser* determined that the term "land" in 38-11.1.-04 includes pore space. Denbury argued that N.D.C.C. ch. 38-11.1 does not apply to use of the surface owner's pore space, basing its argument on the use of the word "land" in N.D.C.C. § 38-11.1-04, which requires compensation for lost *land* value and lost use of and access to a surface owner's *land*. *Mosser*, 112 F. Supp. 3d, at 920. Under N.D.C.C. § 47-01-04, "land" is defined as "the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." Denbury argued that this definition of land should be applied to N.D.C.C. ch. 38-11.1, and that, therefore, pore space was not compensable under N.D.C.C. ch. 38-11.1. *Id*. The federal court disagreed and denied Denbury's early motion for summary judgment. *Id.* at 920-21

[¶15] Two years later, following a second motion, Judge Miller certified seven questions to this Court regarding the issues he had addressed in his prior opinion. *Mosser v. Denbury Res., Inc.*, 2017 ND 169, 898 N.W.2d 406. The first question was whether the surface owner owns the pore space in North Dakota, to which this Court stated its agreement with the federal court's prior ruling. *Id*. at ¶¶ 15-17. The second question boiled down to whether

a mineral developer must pay compensation under N.D.C.C. ch. 38-11.1 for use of the subsurface pore space for disposal of produced water generated as a result of drilling operations. *Id*. at ¶ 18.

[¶16] This Court answered: "we agree with the interpretations by the federal magistrate judge and the federal district court that pore space is part of the surface owner's interest in the land for purposes of N.D.C.C. § 38–11.1–04. We conclude 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.

[¶17] Prior to this Court confirming its agreement with two federal judges, the federal court also ruled on similar issues in *Fisher v. Continental Resources, Inc.*, 49 F. Supp. 3d 637 (D.N.D. 2014). In *Fisher*, the dispute related to a produced water disposal well drilled by Continental. 49 F. Supp. 3d 637 (D.N.D. 2014). Rick and Rosella Fisher owned land within a unitized field that is operated by Continental. *Id*. at 638. Continental drilled the Lonesome Dove 42-17 SWD well on the Fishers' land without their consent and over their objection. *Id*. As the unit operator, Continental had also obtained a permit from the NDIC for the well. *Id*. at 640. The federal court ruled that Continental had the right to operate its disposal to dispose of on-unit water, but that Continental must pay damages under Chapter 38-11.1 when it used the well at issue for disposal. *Id.* at 646. These rulings were again consistent with long-established precedent. Following the federal court's ruling in *Fisher*, the parties settled some of the claims, and left open the issue of the amount owed for damages for use of pore space under N.D.C.C. ch. 38-11.1 because at the time of settlement, Continental had not yet started injecting into the Lonesome Dove 42-17 SWD.

See Fisher v. Continental Resources, Inc., Case 1:13-cv-00097-DLH-CSM, Document 88 (Stipulation to Dismiss) (Filed 05/03/16).

[¶18] Years after the decision in *Fisher*, on September 7, 2018, and just months before the 2019 legislative session, Continental began injecting into the disposal and refiled the lawsuit that had originally been filed by the Fishers, and asked for a declaratory judgment that it did *not* have to pay compensation under N.D.C.C. ch. 38-11.1. *Continental Resources, Inc. v. Fisher*, Case 1:18-cv-00181-CSM, Document 1 (Complaint) (Filed 09/07/18). Continental's position that it need not compensate for use of the Fisher's pore space was confusing. The federal court had already ruled "there is no question the Fishers are statutorily entitled to compensation for damage to the Subject Property which is related to the construction and use of the Lonesome Dove 42–17 SWD well in accordance with … N.D.C.C. ch. 38–11.1." *Fisher*, 49 F. Supp. 3d, at 646. This confusion was dispelled shortly after the legislative session commenced, when Senate Bill 2344 was introduced.

[¶19] Continental next announced to the federal court that with respect to "the Damage Compensation Act, on which [the Fishers] based their initial suit, [S.B. 2344] repealed their remedy effective August 1, 2019." *Continental Res., Inc. v. Fisher*, No. 1:18-CV-181, (D.N.D. Feb. 19, 2021), Doc. No. 57, p 2. The federal court agreed "the 2019 Amendments appear to eliminate the right of the surface owner to recover compensation for use of the pore space under § 38-11.1-04—at least as of the effective date of the law." *Continental Res., Inc. v. Fisher*, No. 1:18-CV-181, 2021 WL 665102, at *4 (D.N.D. Feb. 19, 2021). The federal court continued: "Continental requests that this court conclude that it owes nothing for any injections from its SWD well after July 31, 2020, which is the effective date of SB 2344. The court rejects this request given the ruling of the state district court set

forth above [that strikes down the law].” *Id*. at *7. Continental has now claimed that it will cease use of the disposal at issue entirely in 2022 and Judge Miller continued the trial awaiting proof of Continental’s newest claim. *Continental Res., Inc. v. Fisher*, No. 1:18-CV-181, 2021 WL 5567303, at *8 (D.N.D. Nov. 29, 2021).

[¶20] As the *Fisher’s* case illustrates, S.B. 2344 was drafted with surgical precision.

II. **S.B. 2344 eviscerates landowners’ property rights in their pore space to “benefit the state economy.”**

[¶21] S.B. 2344 states that the purpose of this legislation was 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.” S.B. 2344, Section 1, *amending* N.D.C.C. § 38-08-25.

[¶22] S.B. 2344 does the following:

- It allows oil and gas operators to use landowners’ subsurface pore space regardless of whether this use is reasonable, effectively turning landowners’ privately-owned subsurface pore space into communal property that can be freely used by oil and gas operators, and it *explicitly prohibits* the property owner any compensation remedy, whether in tort, inverse condemnation, or otherwise. S.B. 2344 Section 1, *amending* N.D.C.C. § 38-08-25(5) (“**a person conducting … any … operation authorized by the commission … may utilize subsurface geologic formations in the state for such operations…[and] [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**…”).

- It bars landowners from using tort law, such as trespass, to remedy subsurface trespasses. S.B. 2344 Section 4, *enacting* N.D.C.C. § 47-31-09(1) (“Injection or migration of substances into pore space for disposal operations, for secondary or tertiary 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.”).

- It changes the very definition of “land” in the Surface Damage Act so that the definition excludes pore space, thus divesting landowners from the long-vested right to compensation for the use of pore space by oil and gas operators and allowing oil and gas operators to use landowners’ privately-owned pore space

for free. S.B. 2344 Section 3, *amending* N.D.C.C. § 38-11.1-03.

[¶23] The purpose of these provisions, as stated in the Bill itself, was to benefit "the state's coal and power industries, and to benefit the state economy." S.B. 2344, Section 1, *amending* N.D.C.C. § 38-08-25. Lynn Helms, Director of the NDIC's Oil and Gas Division, testified about the purported purpose and benefits of S.B. 2344, using an example related to the economics of gas storage. *See* Legislative History of SB 2344, p. 4, (2019) (https://www.legis.nd.gov/files/resource/66-2019/library/sb2344.pdf). He explained the point of his illustration, stating "I bring that up because you can see this project stores and reproduces the gas at $2.96, which means it can't endure any additional burden from having to compensate for pore space being temporarily used for the storage of natural gas." *Id*. So the solution was to simply take away the additional burden by giving that pore space to the industry to use for free. This was literally the purpose and intent of S.B. 2344.

[¶24] Recent headlines in North Dakota announced: "Carbon capture dominates North Dakota energy developments in 2021."[5] Carbon capture utilizes the landowner's pore space. The article goes on to explain: "The carbon capture projects dovetail with the goal Gov. Doug Burgum unveiled at the Williston Basin Petroleum Conference in May to make North Dakota carbon neutral by the end of the decade. He told the audience that the state has 'hit the geologic jackpot' with rock formations that contain the right characteristics for permanent carbon dioxide storage." *Id*. That "geologic jackpot" is the pore space that the State took away from the Landowners and offered up to mineral developers to use free of charge.

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[5]https://bismarcktribune.com/news/state-and-regional/carbon-capture-dominates-north-dakota-energy-developments-in-2021/article_40748ed8-2173-5a74-ad9b-ae950d528d07.html.

ARGUMENT

[¶25] Despite the catalogue of arguments made by Defendants, the Landowners' argument is fairly simple. S.B. 2344 authorizes a physical invasion and is therefore a *per se* taking, and S.B. 2344 is also an unconstitutional taking because it takes private property and gives it to another private party for its benefit and use, in violation of both the North Dakota and federal constitutions. It is also a taking under the North Dakota constitution because the legislation itself proclaims that it is for the purpose of economic development and benefit to private parties. It is an unconstitutional gift because the State is itself a surface estate owner and therefore the effect of S.B. 2344 on the State's land is not a "taking" but rather is a gift to the industries the law was written to benefit. Finally, S.B. 2344 is a blatant violation of the open courts provision of the North Dakota constitution, since its actual purpose and effect is to bar all access to courts for the Landowners, even inverse condemnation actions. *See* SB 2344, State of ND Addendum, p 46, § 1, ¶5.

[¶26] The State, Continental, and the North Dakota Petroleum Council also make numerous other miscellaneous arguments which will be addressed individually following the Landowners' discussion of why they should prevail on their claims.

[¶27] And fundamentally, it should be recalled that this entire case occurs against a backdrop recently described as follows by the United States Supreme Court:

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).

[¶28] "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Id*. S.B. 2344 imposes a clear and categorical prohibition on the owner receiving *or even asking for* just compensation. It is unconstitutional and as the United States Supreme Court would agree, what the North Dakota Legislative Assembly did here violates the principles upon which the United States of America was founded, as described by the Founders themselves.

I. S.B. 2344 authorizes a physical invasion and is a *per se* taking.

A. Federal and North Dakota law contain similar approaches to analyzing takings such as S.B. 2344.

[¶29] Under the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, private property shall not be taken except for a public use, and never without just compensation. U.S. Const. amend. V ("…nor shall private property be taken for public use, without just compensation."); U.S. Const. amend. XIV; *see also Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 234 (1897). Under the North Dakota Constitution, "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner…" N.D. Const. art. I, § 16.

[¶30] The framework for analyzing federal and North Dakota constitutional takings claims is generally contained in *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, 705 N.W.2d 850. The State of North Dakota states the standard as follows:

> 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)….

Brief of State of North Dakota, ¶ 44. With respect to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court has said that "[t]he complete elimination of a property's value is the determinative factor in this category because the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶ 13, 705 N.W.2d 850.

[¶31] With respect to North Dakota law,

> … our state constitutional provision is broader in some respects than its federal counterpart because the state provision was intended to secure to owners, not only the possession of property, <u>but also those rights which render possession valuable</u>. Nevertheless, this Court has looked to both state and federal precedents in construing takings claims under the state constitution, and our cases on inverse condemnation under the state constitution bear some similarities to the federal analysis.

Id. at ¶ 16 (internal quotes and citations omitted, emphasis added). Access to the courts is one such right that renders possession of real property valuable. The most important, of course, is the right to exclude. Both have been taken.

[¶32] Finally, the United States Supreme Court has recently affirmed that physical appropriations do not require permanent physical invasions. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021). Speaking of a California law requiring landowners to provide access to their property for union organizers (just as S.B. 2344 requires for oil developers), the Supreme Court said it was a *per se* taking under its case precedent:

> [G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those

> cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. Cal. Code Regs., tit. 8, §20900(e)(1)(C). It is therefore a *per se* physical taking under our precedents.

Id.

B. The State of North Dakota misreads *Lucas*.

[¶33] The State of North Dakota misreads language from the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ("*Lucas*"). In two long block quotes in paragraph 46 of its brief, the State excerpts language from *Lucas* which states in part: "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; 'as long recognized, some values are enjoyed under an implied limitation and must yield to the police power.'" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). The next quote states "Where the State seeks to sustain 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." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

[¶34] The full quote is as follows:

> 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. at 426 -- though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare *Scranton v. Wheeler*, 179 U.S. 141, 163, 45 L. Ed. 126, 21 S. Ct. 48 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444

> U.S. at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking).

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992). The Court then explains: "We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id*. at 1029.

[¶35] From here, the State now argues that the implied easement and existing limitations on trespass rights were a pre-existing servitude such as the United States government's navigational servitudes referenced in *Lucas*. The State quotes the *Lucas* case and argues that existing limitations on rights associated with pore space vis-à-vis the implied easement somehow authorize the taking in S.B. 2344 because Landowners should have been aware that the State could authorize operations such as those in Chapter 38-08 on their land, so they took title subject to that understanding and it is therefore not a taking if the State takes away those rights. This is the crux of the State's argument in Section I(A)(1) of its argument. *See* State Brief ¶¶ 18-20. Section 1(A)(2) then asserts that in circumstances in which the landowners would not be entitled to compensation as a result of the implied easement allowing use of the surface for mineral development, landowners again should have been aware that their title to the surface estate did not include the right to exclude because there are numerous situations in which the owner of the surface estate did not have the right to exclude due to the implied easement. *See* State Brief, ¶¶ 64-70.

[¶36] These are the primary arguments from the State of North Dakota, and they are specious. That the State of North Dakota has police powers and regularly authorizes oil

development operations is nothing new. That the surface estate is burdened with an implied easement allowing the mineral estate owner to do what is "reasonably necessary" to produce the minerals is also nothing new. That the surface estate owner will not obtain compensation from the mineral owners at common law for non-tortious conduct is nothing new.[6] But that does not mean that what S.B. 2344 authorized was not new or that it simply sanctioned this existing law. The Landowners recognize there are limitations on their rights and they understood those in 2019 when S.B. 2344 was introduced. It was not those existing limitations to which they were, or are, objecting.

[¶37] What *is new* is that when the State of North Dakota exercises its police powers and authorizes oil development, where landowners previously were paid for use of their pore space, now they are not because that was the purpose and effect of S.B. 2344. What *is new* is that even when an operator acts in excess of the implied easement allowing a mineral estate owner to do what is "reasonably necessary" to produce minerals, where landowners previously were paid for and entitled to bring tort claims for this excess use, now they are not because that was the purpose and effect of S.B. 2344. What *is new* is that the landowners who could obtain compensation for non-tortious conduct under N.D.C.C. ch. 38-11.1 now cannot obtain that compensation because that was the purpose and effect of S.B. 2344.

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[6] This should not be viewed a concession that compensation is not owed to the surface estate for rights exercised under the "implied easement" but in excess of any explicitly-granted contractual rights. At some point the implied easement itself amounts to a judicial taking and the rights granted in excess of those conveyed explicitly by owners have a value that is owed by the government or the private party receiving those rights. If the landowner lost them through a judicially-created implication it was not with due process or just compensation. This is not an issue before this Court today, however.

[¶38] This entire argument from the State is a red herring based on a misunderstanding of the discussion in *Lucas* about existing servitudes (referring to the United States Government's navigational servitude). But even if the State's police power itself and the implied easement were considered pre-existing servitudes such as were referenced in *Lucas*, the Landowners have explained repeatedly that S.B. 2344 deprives them of rights to compensation and the right to exclude that were previously *consistent* with both the police power and implied easement, but now have been taken by the Legislative Assembly wholesale and given to other private parties for free.

[¶39] Ultimately, it would not even matter if the rights removed by S.B. 2344 actually were pre-existing servitudes (they were not, clearly, else why all this effort?). It does not matter because this concept, that existing servitudes belie a claim to a taking if the servitude existed on the title at the time of purchase, only applies to the analysis in the *Lucas* case and its categorical exception to the *Penn Central* analysis for regulations that remove all value of property. The Landowners' case can and should be decided under *Loretto* because S.B. 2344 authorizes a physical invasion. *See Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982).[7] This analysis of pre-existing servitudes under *Lucas* is irrelevant to a physical invasion case.

[7] The same is true of the arguments Appellants make regarding the "inherent value" of pore space or valuing it using the "parcel as a whole" rule. That is only pertinent to an analysis under *Lucas* related to whether all economic value has been lost because of the regulation at issue.

C. The Unites States Supreme Court decisions in *Loretto* and *Cedar Point Nursery* control and dictate that S.B. 2344 is unconstitutional.

1. *Loretto v. Teleprompter Manhattan CATV Corp.* controls this case.

[¶40] Although this was not the focus of the State's briefing before the District Court and thus also not a focus of the District Court's opinion, the State's focus on appeal is on federal caselaw and specifically various aspects of the *Lucas* decision. To the extent the State has decided to abandon its *Larimore* arguments and turn to federal caselaw, however, it turned to the wrong case.

[¶41] The seminal case on permanent physical invasions as a taking is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*"). In *Loretto*,

> A New York statute provides that a landlord must permit a cable television (CATV) company to install its CATV facilities upon his property and may not demand payment from the company in excess of the amount determined by a State Commission to be reasonable. Pursuant to the statute, the Commission ruled that a one-time $1 payment was a reasonable fee. After purchasing a five-story apartment building in New York City, appellant landlord discovered that appellee CATV companies had installed cables on the building, both "crossovers" for serving other buildings and "noncrossovers" for serving appellant's tenants. Appellant then brought a class action for damages and injunctive relief in a New York state court, alleging, *inter alia*, that installation of the cables insofar as appellee companies relied on the New York statute constituted a taking without just compensation.

Id. at 419. The lower court analyzed the case as a regulatory taking and found none. *Id*.

[¶42] The United States Supreme Court reversed and disagreed, holding that a physical invasion is a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id*. at 434-35. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." *Id.* at 435 (internal citations omitted) (emphasis in original).

[¶43] Further, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Id.* at 436 (emphasis added). "[S]uch an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Id.* In order to avoid "difficult line-drawing problems," the court stated that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.*

[¶44] "Later cases … clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id*. at 430 (citing *Lovett v. West Va. Central Gas Co.*, 65 W.Va. 739, 65 S.E. 196 (1909).

[¶45] "Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id*. at 436. "Compensation is required for physical takings, 'however minimal the economic costs [they] entail[ ],' because they "eviscerate[ ] the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶ 13, 705 N.W.2d 850 (citations omitted).

[¶46] S.B. 2344 authorizes the physical invasion of the pore space owned by North Dakota landowners, authorizes such an invasion by *other private parties*, and forbids the landowner any compensation at all. This is a *per se* taking without just compensation.

[¶47] In *Loretto*, the legislature had at least recognized that compensation is required but had allowed an appointed commission to set it as a nominal value of $1. Here, the North Dakota Legislative Assembly *prohibited* landowners from *even asking* for compensation. For these reasons, the laws enacted by S.B. 2344 must be struck down.[8]

2. *Cedar Point Nursery* affirms that the United States Supreme Court will view any physical invasions as takings.

[¶48] The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435, (1982). The right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U. S. 164, 176, 179-180, (1979); *Dolan v. City of Tigard*, 512 U. S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 831, (1987). The Court has often described the property interest taken as a servitude or an easement. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072-73 (2021). In *Cedar Point Nursery*, the U.S. Supreme Court reaffirmed that it considers any physical invasion a *per se* taking, even if the invasion is not permanent. "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). The law at issue expropriated a farmers' property to allow access to union organizers for union organizing. Here, the law expropriates a farmer's property to allow access for oil developers to inject their waste into

[8] The Petroleum Council now argues, having successfully lobbied for S.B. 2344, that if it is unconstitutional, it is the *State* who should pay for all of the property taken by S.B. 2344, by some estimates worth billions of dollars. This would subject the State to massive financial liability. But S.B. 2344 is not like the statute in *Loretto* which set up a process for compensation but then arbitrarily set it at $1.00. S.B. 2344 literally says that compensation is illegal. To say the remedy is to pay compensation is nonsensical.

the farmer's property. It is not different. S.B. 2344 is more egregious and more a physical invasion. S.B. 2344 does make the empty gesture of allowing the Landowners to retain their title to their pore space, but that title is as empty as the State's gesture, because the State took away the right to exclude.

II. **SB 2344 is prohibited by Section 16 of the North Dakota Constitution and as a private transfer to a private party under the federal constitution.**

[¶49] Any taking of private property by the government must be for a public use, and this is true for both the state and federal constitutions. *See*, *City of Medora v. Golberg*, 1997 ND 190, ¶ 6, 569 N.W.2d 257 (citing N.D.C.C. § 32-15-01(1)); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477–78 (2005) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void … Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.") (internal quotations omitted).

[¶50] The North Dakota Constitution is more restrictive than the United States Constitution because in North Dakota, "a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health." N.D. Const. art. I, § 16. Additionally, "[p]rivate property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business." *Id.*

[¶51] Senate Bill 2344 runs directly afoul of both these constitutional prohibitions. The legislation itself inexplicably announces its unconstitutional purpose "to help ensure the viability of the state's coal and power industries, and to benefit the state economy." S.B. 2344, Section 1, *amending* N.D.C.C. § 38-08-25. While the State of North Dakota is free

to do many things to "help ensure the viability of the state's coal and power industries," the North Dakota Constitution forbids taking the pore space estate from landowners for the use by and benefit of these private entities and to benefit the state economy. N.D. Const. art. I, § 16. Indeed, S.B. 2344 explicitly authorizes operators who conduct operations under Chapter 38-08 to use private landowners' pore space estates and prohibits those landowners from so much as asking for payment. S.B. 2344 Section 1, amending N.D.C.C. § 38-08-25(5). In its order, the District Court found S.B. 2344 to violate not only the post-*Kelo* amendments to the Constitution of North Dakota, but the federal constitution even under the standards allowed by the *Kelo* decision. *See* Index No. 171, ¶ 39.

[¶52] It is simply and explicitly impermissible under the North Dakota and U.S. Constitutions to take private property for private entities such as is done by S.B. 2344. Moreover, S.B. 2344 explicitly states that its purpose is to "benefit the state economy." Again, the ND Constitution is clear that benefit to the state economy is not an acceptable "public use" for which private property may be taken in North Dakota. This is precisely the purpose, as the Legislative Assembly itself declared, of S.B. 2344.

III. <u>SB 2344 is an unconstitutional gift and violates the open courts provisions.</u>

A. S.B. 2344 conveys an unconstitutional gift to of the State's land to private parties.

[¶53] The North Dakota Constitution also prohibits the State from taking land *from itself* and gifting it to private entities. This is articulated in the Anti-Gift clause of the Constitution, which states that "neither the state nor any political subdivision thereof shall … give its credit or make donations to or in aid of any individual, association or corporation." N.D. Const. art. X, §18.

[¶54] The State of North Dakota is itself obviously a very large landowner, and a significant portion of its land holdings are controlled by the Board of University and School Lands. *See* North Dakota Enabling Act, 25 Stat. 676, § 10 (February 22, 1889); N.D.C.C. § 15-01-02. Regardless, S.B. 2344 acts on *all* surface estate owners, including the State itself. S.B. 2344 Section 1, *amending* N.D.C.C. § 38-08-25(5) ("a person conducting … any … operation authorized by the commission … may utilize subsurface geologic formations in the state for such operations…[and] [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…"). Some of the "subsurface geologic formations" at issue are owned by the State, and many of them are utilized by the State for income-producing activities, such as leasing the pore space for produced water disposal. Despite this, the Legislative Assembly has authorized "any person conducting … any … operation authorized by the commission" to use its pore space, free of charge. This is a gift to those persons conducting such operations.

[¶55] S.B. 2344 "has the effect of transferring to certain designated classes or individuals property of the state, held in trust for all the people thereof, as a gift. In other words, by the terms thereof the state '[makes] donations to or in aid of' an 'individual', in violation of the provisions of [Article 10, § 18 of the Constitution of North Dakota]." *See Solberg v. State Treasurer*, 78 N.D. 806, 814, 53 N.W.2d 49, 53–54 (1952).

B. S.B. 2344 violates the "open courts" provision of the North Dakota Constitution.

[¶56] Article I, Section 9 of the North Dakota Constitution states in part: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation

shall have remedy by due process of law, and right and justice administered without sale, denial or delay."

[¶57] The District Court quoted language from this Court's decision in *Larimore*:

> The damage cap for tort claims against political subdivisions is not an absolute bar to a money damages remedy. Nor does it set a limit so arbitrarily low as to be the functional equivalent of an absolute bar. Therefore, it does not violate N.D. Const. art. I, § 9.

Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 2018 ND 71, ¶ 23, 908 N.W.2d 442. If the law is not an absolute bar to a monetary damages remedy, or is not the functional equivalent of an absolute bar, then it does not violate the open courts provision. Consequently, an absolute bar or its functional equivalent does violate the open courts provision. S.B. 2344 is an absolute bar. That is the entire point of it.

[¶58] The District Court agreed that

> SB 2344 is an absolute bar to not just money damages, but all other remedies generally available to landowners; that it is an absolute bar or the functional equivalent of an absolute bar…. The provisions of SB 2344, both individually and taken together, prohibit landowners from obtaining any compensation for any oil and gas operators' use of their pore space estate, whether reasonable or unreasonable, whether at large or small volumes, whether at a large financial detriment or small financial detriment. These provisions act as an absolute bar to not just money damages, but to all other meaningful remedies, including trespass, nuisance or other torts. The three provisions at issue here, enacted or amended within SB 2344, render pore space worthless in every instance of its application, and it is unconstitutional on its face.

[¶59] Indeed, Continental took full advantage of its successful efforts at the Legislative Assembly and argued in its lawsuit against Rick and Rosella Fisher, NWLA members, that S.B. 2344 took away their rights and therefore Continental should win the lawsuit. *Cont'l Res., Inc. v. Fisher*, No. 1:18-cv-181, Doc. No. 57 (Continental argued that "…S.B. 2344 … repealed [the landowners'] remedy effective August 1, 2019.").

IV. <u>Responses to specific arguments from the State and Continental</u>

A. Appellees' *Larimore* arguments re: "constitutional applications" are all instances where 2344 does not apply.

[¶60] A facial challenge to a statute requires the challenger to establish that no set of circumstances exists under which the statute would be valid. *Larimore*, at ¶ 38 (citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1984)). In its brief, the State merely repeats this rule and avoids any argument that a circumstance exists under which S.B. 2344 would be valid. The district court's analysis is unassailable. S.B. 2344 quite simply goes too far. Its overreach means there is no circumstance where it could ever be constitutionally applied. The State understandably and honorably abandons its *Larimore* argument on appeal. Continental less honorably continues pushing the *Larimore* argument. But to do so, it must again use tactics the U.S. District earlier found "shameful" and, ultimately, unpersuasive.

[¶61] Continental argues that this Court's use of the words "absent a severance" in *Mosser*, 2017 ND 169, ¶17, 898 N.W.2d 406, makes it "impossible to deny" that S.B. 2344 can be constitutionally applied where the mineral and surface estates were severed before April 9, 2009. Continental Brief, ¶ 41. This is a recycled argument from Continental's briefing in *Continental Resources, Inc. v. Fisher.* Magistrate Charles Miller, in *Fisher*, did not mince words in rejecting Continental's attempt to intentionally misconstrue quotes out of context:

> Continental contends the pore space at issue is owned by the dominant mineral interests and not Fishers because there had been a severance of the mineral estate prior to April 9, 2009, and with that severance so went ownership of the pore space. Continental claims this result flows from what this court decided in Fisher I and the North Dakota Supreme Court in *Mosser*. More specifically, Continental states:
>
> > But the Fishers say nothing about Judge Hovland's ruling in the prior Fisher case or the North Dakota Supreme Court's affirmation of it in *Mosser v. Denbury Resources, Inc.*, 2017 ND 169, 898 N.W.2d 406. Both held the Act's [i.e., ch. 38-11.1's] remedies apply "in the absence" of a severance of

> the mineral estate before April 9, 2009. Id. ¶ 23 ("in the absence of a severance of the mineral estate, or the severance of the pore space estate made prior to April 9, 2009, . . . a fee simple owner of land owns . . . the pore space" (emphasis added)); see also *Fisher v. Continental Res., Inc.*, No. 1:13-cv-00097, 2015 WL 14400124, at *4 (D.N.D. Oct. 8, 2015) (surface owner owns pore space "in the absence of a severance of the mineral estate, or the severance of the pore space estate made prior to April 9, 2009").[2]

(Doc. No. 59, p. 11). Then, in a footnote 2, Continental adds:

> Judge Hovland reasoned "in the absence of a severance of the mineral estate, . . . [i]t would be illogical to conclude that the pore space is not a component of the land as that term is commonly understood and as it is used in Section 38-11.1-04." *Fisher*, 2105 WL 14400124, at *4. Stated the other way around, in the presence of a severance of the mineral estate, it would be illogical to conclude that the pore space is a component of the land as that term is used in section 38-11.1-04.

In advancing this argument, Continental shamelessly takes out-of-context Judge Hovland's use of the words "in the absence of a severance of the mineral estate" in *Fisher*. The same applies for the North Dakota Supreme Court's decision in Mosser since the passage from that opinion cited by Continental was the court quoting Judge Hovland. What Judge Hovland stated in its entirety was [very different].

Here, it is patently obvious that, when Judge Hovland used the words "in the absence of a severance of the mineral estate" in the italicized passage, it was nothing more than a qualifier upon his general point that the fee owner owns both the surface and the mineral estate (i.e., the fee owner does not own the mineral estate if the mineral estate has been severed). And, he was not saying the fee owner does not own the pore space if the mineral estate has been severed. In fact, Judge Hovland went on to state that the pore space is an estate different from the mineral estate.[9]

Continental v. Fisher, Case 1:18-cv-00181-CSM, Document 61, pp 8-10 (emphasis added).

[¶62] Continental deploys similarly shameless tactics with its other *Larimore* arguments.

It asserts that units are a circumstance where S.B. 2344 is constitutionally applied because

[9] Judge Hovland and this Court have referred to the "pore space estate." This concept and the courts' use of it belie the appellants' arguments that the District Court failed to adhere to the "parcel as a whole rule." That analysis under *Lucas* is largely irrelevant though.

the district court "acknowledged that SB2344 constitutionally applied to operations under NDIC-approved oil and gas units." Continental Brief, ¶ 25, (citing Order at ¶ 24.); ¶ 29 (citing Order at ¶ 24). But Continental again takes the quoted language out of context. Yes, the district court said in ¶ 24 of its order that NDCC § 38-08-25(5) "plainly applies within units." No, the district court did not say that the statute *validly* applies within units. Its ruling in this case is exactly the opposite. Continental's sleight of hand is transparent, its argument utterly meritless.

[¶63] Continental argues that S.B. 2344 could be validly applied outside units and supports its argument by citing to cases from other states that ostensibly stand for the idea that a developer's use need not be tied to a lease or a unit that includes a lease. In short, Continental believes a developer in North Dakota can use any landowner's surface anyplace in North Dakota so long as the developer needs the surface for minerals recovery activities. Continental Brief, ¶¶ 30-31. A cursory reading of the cited cases shows they do not say what Continental asserts.

[¶64] Finally, Continental argues S.B. 2344 could be constitutionally applied if a contract articulated allowable usage. Continental Brief, ¶¶ 38-40. But if a contract articulated a developer's use, there would be no reason for the developer to invoke S.B. 2344 to authorize the use. Continental's hypothetical circumstance simply would never exist and does not constitute a valid application under *Larimore*.

B. The District Court did not misconstrue N.D.C.C. § 47-31-09(1).

[¶65] The State argues that the language 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." State Brief, ¶ 58. The State continues the argument:

> The proper construction of this sentence … 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. 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.

[¶66] State Brief, ¶¶ 58-59. This language is imprecise when the argument demands otherwise. The State says there is no liability for "entry or use" without evidence of "injury." Presuming the entry or use is unauthorized by law or beyond what a reasonable person should endure on their land, that "entry or use" would be either a trespass or a nuisance. If a trespass, proof of damages or injury is <u>not</u> necessary, although a failure to award nominal damages is also not reversible error. *See Kuntz v. Leiss*, 2020 ND 253, ¶ 7, 952 N.W.2d 35. So the State appears to argue that the language "by itself" merely restates existing law. But that is not true because this Court just said that a "person who commits a trespass 'is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests.'" *Id*. at ¶5. The State is now arguing that the language "by itself" in S.B. 2344 impliedly changed trespass law in North Dakota such that now this Court's recent statement on trespass law is now overturned by implication. And that, at most, it merely restates existing law. This is simply not tenable.

C. The "no right to a remedy" cases re: 38-11.1 are inapposite and do not stand for what the State claims.

[¶67] The State makes a specious argument that there are no vested rights to a remedy so it can remove the right to compensation for use of pore space in Chapter 38-11.1. State Brief, ¶72. It cites to *Man. Pub. Ins. Corp. v. Dakota Fire Ins. Co.*, 2007 ND 206, 743 N.W.2d 788 (N.D. 2007). In this case an insurance company attempted to force another into binding arbitration via a statute which had been repealed. *Id*. The statute providing for

this remedy had been repealed nearly a year before Manitoba Insurance sued Dakota Fire to force arbitration. *Id*. at ¶ 9. Manitoba Insurance did not even satisfy the statutory conditions to demand arbitration. *Id*. It sought to enforce a repealed procedural remedy. Put simply, there is a difference between a procedural remedy and a substantive right. Chapter 38-11.1 is not a mere procedural remedy like an arbitration clause – it contains a substantive right, and one which runs with the surface estate.

D. The offensive provisions cannot be severed because they are the active provisions which effectuate the purpose of S.B. 2344.

[¶68] The Landowners have narrowly targeted the offending provisions in Section 1 of S.B. 2344, which enacts N.D.C.C. §§ 38-08-25(2) and (5); Section 3 of S.B. 2344, which enacts N.D.C.C. §§ 38-11.1-03(3) and (7); and Section 4 of S.B. 2344, which enacts N.D.C.C. § 47-31-09.

[¶69] These provisions are the heart of S.B. 2344. Without this language included in S.B. 2344, the Legislative Assembly would not have passed this legislation because it would not have accomplished anything without them. "If the objectionable parts are severable from the rest of the law in such a way that it would be presumed that the Legislature would have enacted such portions without the invalid parts, the failure of the invalid portions would not necessarily render the entire statute invalid." *Montana-Dakota Utilities Co. v. Johanneson*, 153 N.W.2d 414, 424 (N.D. 1967). If the valid portion of the law is so dependent on the invalid provisions so as to warrant the belief that the Legislature intended them to take effect in their entirety or not at all, it is presumed that the Legislature would not have passed the valid portions independently. *Id.*; *see also City of Carrington v. Foster County*, 166 N.W.2d 377 (N.D. 1969); *State v. Fischer*, 349 N.W.2d 16 (N.D. 1984).

E. The District Court correctly determined that NWLA, as a prevailing plaintiff in a meritorious civil rights claim, can recover attorney fees under § 1988(b) without specifically pleading § 1983.

[¶70] NWLA, in its Complaint, pled legal counts against the State and state officials in their official capacity, based upon the 5th and 14th Amendments to the United States Constitution (due process and taking clause claims) and Article I – Sections 9,12,16, 18, 21, and 22 of the North Dakota State Constitution. A.J.A. at 12-48. NWLA sought only prospective relief in its Complaint, requesting an injunction against enforcement of S.B. 2344. A.J.A. at 47.

[¶71] The district court granted summary judgment for NWLA and found S.B. 2344 unconstitutional on its face under both the federal and state constitutions. A.J.A. at 150-161. The district court granted the prospective relief sought by NWLA: An injunction preventing enforcement of S.B. 2344. A.J.A. at 161.

[¶72] Following summary judgment, the district court awarded NWLA its attorney's fees under 42 U.S.C. §§ 1983 and 1988. The district court ruled that, as the prevailing plaintiff in a meritorious civil rights claim, NWLA is entitled to attorney's fees under §1988 without specifically pleading § 1983. A.J.A. at 170-184. The State seeks reversal of the attorney's fees award, arguing that NWLA was required to expressly plead § 1983 in its complaint and, in any event, did not have standing to bring a claim under § 1983. State App. Br., pp. 41-42.

[¶73] Attorney's fees may be awarded under §§ 1983 and 1988 even if the complaint does not expressly rely on § 1983. *Goss v. City of Little Rock*, 151 F.3d 861 8th Cir. 1998, cert denied, 526 U.S. 1050 (1999); *Americans United for Separation of Church & State v. School District of City of Grand Rapids*, 835 F.2d 627 (6th Cir. 1987); *Solomon v. City of Gainesville*, 796 F.2d 1464 (11th Cir. 1986). The rule that § 1983 need not be specifically

pled is supported by the legislative history of § 1988 which "makes it perfectly clear that the Act was intended to apply to any action for which § 1983 provides a remedy." *Maher v. Gagne*, 448 U.S. 122, 199 n. 11 (1980).

[¶74] Regarding standing to assert § 1983 claims, organizations like NWLA may have either direct standing on their own behalf or associational standing on behalf of their members. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). Direct organizational standing is typically cognizable in two ways: (1) A diversion of organizational resources to identify or counteract the alleged unlawful action or; (2) Frustration of the organization's mission. *Havens v. Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In the absence of injury to itself, an organization may have associational standing if the organization alleges that any of its members are suffering threatened injury due to the challenged action and if the nature of the claim and the relief sought does not make individual participation indispensable to proper resolution of the cause. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

1. The State's argument that NWLA needed to expressly plead § 1983 is not supported by the law.

[¶75] This Court has not before decided the question whether a plaintiff that pleads the constitution itself as the basis for a civil rights claim -- rather than expressly pleading § 1983 -- can be awarded its attorney's fees under § 1988. The district court appropriately relied on the sound reasoning and decision-making of the 8th Circuit Court of Appeals in *Goss*, 151 F.3d at 864-866 to determine that NWLA need not have pled § 1983. Supportive decisions based on similar reasoning have been issued also from the 2nd Circuit in *Americans United*, 835 F.2d 627 and from the 11th Circuit in *Solomon*, 796 F.2d 1464.

[¶76] The State does not cite to authority contrary to the *Goss*, *Americans United*, and *Solomon* cases and none exists. To support its argument, the State awkwardly avoids any discussion of the law related to attorney's fees awards under §§ 1983 and 1988 and shifts to two unrelated questions: (1) Whether state officials are "persons" under § 1983 and; (2) Whether organizations have standing to bring § 1983 claims.

2. The State's argument that state officials sued in their official capacity can never be persons under § 1983 is irrelevant and, in any event, not supported by the law.

[¶77] The State argues that state officials sued in their official capacity are not "persons" under § 1983 and therefore any such § 1983 claim by NWLA would have been dismissed. State Brief, ¶ 90. As a preliminary matter, in reaching its decision on attorney's fees, the district court was not required to determine whether the State or state officials would be "persons" under § 1983. What is required for an award of attorney's fees under § 1988 is that a constitutional civil rights claim was pled in the complaint. It is undisputed that NWLA pled federal constitutional claims in this case and that the district court found S.B. 2344 unconstitutional on its face. Nothing more was required for the district court to award NWLA its attorney's fees. This Court need not consider the "officials as persons" issue raised by the State. *Ceartin v. Ochs,* 516 N.W.2d 651, 656 (N.D.1994) ("Questions, the answers to which are not necessary to the determination of a case, need not be considered.") (citing *Hospital Services, Inc. v. Brooks,* 229 N.W.2d 69, 71 (N.D.1975)). Ultimately, the State's argument is erroneously rooted in sovereign immunity principles from the Eleventh Amendment of the U.S. Constitution that do not apply to an award of attorney's fees under § 1988. *Huto v. Finney*, 437 U.S. 678, 695 ("[§ 1988] imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh

Amendment immunity. . . the Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.")

[¶78] The State nevertheless attempts to rely on *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989), which did not involve an award of attorney's fees. The State posits support from the holding in *Will* that "neither a state nor its officials acting in their official capacities are persons under § 1983." *Id*. at 71. Even if the State had raised a relevant issue, its reliance on *Will* for the argument that the state officials sued by NWLA in this case are not "persons" under § 1983 is simply wrong. NWLA's claim against the State and state officials in this case is for prospective injunctive relief. This undisputed fact distinguishes *Will* from the case at bar. *Will*, 491 U.S., at 71, n. 10, quoting *Kentucky v. Graham,* 473 U.S., at 167, n. 14, 105 S.Ct., at 3106, n. 14. ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'")

[¶79] The State erroneously ignores the plain language from *Will* and the well-recognized distinction where the plaintiff sues for injunctive relief. Its argument, even if relevant, is not supported by the law.

3. The State's argument that NWLA does not have standing to bring a § 1983 claim is irrelevant and, in any event, not supported by the law.

[¶80] At the end of its brief, the State asserts that NWLA would not have standing to bring a § 1983 claim. App. Br. at ¶ 94. The State's argument is irrelevant because the district court was not required to determine whether NWLA would have standing to bring the § 1983 claims. What is required for an award of attorney's fees under § 1988 is that a constitutional civil rights claim was pled in the complaint. It is undisputed that NWLA pled federal constitutional claims in this case and that the district court found S.B. 2344

unconstitutional on its face. "Questions, the answers to which are not necessary to the determination of a case, need not be considered." *Ceartin,* 516 N.W.2d at 656

[¶81] Even if the State had raised a relevant issue, its position regarding standing is not supported by the law. The State asks this Court to adopt a holding from a case from the Second Circuit which the State alleges does not recognize associational standing. Binding authority is available, however, from the United States Supreme Court and this Court, both of which recognize associational standing where, as in the case at bar, the plaintiff organization is seeking injunctive relief. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977); *First Intern. Bank v. Peterson*, 797 N.W.2d 316, 2011 ND 87.

[¶82] An organization may have associational standing and may sue on its members' behalf, where: "(a) [at least some of] its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Nodak Mut. Ins.,* 2004 ND 60, ¶ 14, 676 N.W.2d 752; *see also Hunt,* 432 U.S. at 343.

[¶83] NWLA meets the requirements for associational standing. NWLA's members are landowners in the oil patch who own pore space impacted by S.B. 2344. A.J.A. pp. 28-39, ¶¶ 78-143. The interests that NWLA seeks to protect are germane to its purpose of protecting landowners and maintaining a balance in resource development and property rights of individuals. A.J.A. p. 28, ¶ 78. The constitutional claims asserted by NWLA and the injunctive relief requested by NWLA do not require individualized proof from its members and their participation in the lawsuit is not otherwise required.

[¶84] Even if the issue of standing was relevant to the award of attorney's fees in this case, and even if the State could show NWLA would not have associational standing, NWLA would have direct standing to bring a § 1983 claim. One way for an organization to show direct organizational standing is to show that it has devoted significant resources to identify and counteract the deprivation of civil rights. *Havens,* 455 U.S. at 379. In this case, NWLA devoted significant resources during the 2019 legislative sessions participating in committee and subcommittee hearings regarding S.B. 2344. A.J.A. p. 29, ¶ 79. Following the legislative session, NWLA expended significant time and money to challenge S.B. 2344 in this lawsuit. Index ## 216, 217, 218, 219, 220, 233, 234. In general, NWLA exists as an organization to defend landowners' property rights. When the government takes those property rights away, there is nothing for an organization like NWLA left to protect.

F. The State grossly mischaracterizes the *FPL Farming* cases.

[¶85] The State mischaracterizes the *FPL Farming* decisions from Texas, citing to one decision from the Texas Court of Appeals out of the larger legal dispute. This dispute from Texas was the culmination of a dispute involving many similar legal issues (and also addressing cases cited by Appellants, such as *Manziel*).[10] The editors of the *Williams and*

[10] Defendants cite to cases like *Manziel* and *Garza* and make the same mistake the Texas Court of Appeals made by failing to distinguish between permit challenges and collateral attacks on permits, trespass actions, and by whom those actions are brought, and other procedural postures and contexts that require a close reading of the caselaw. The Texas Supreme Court explained:

> [T]he court of appeals based its ruling on two of this Court's opinions, *Manziel* and *Garza*.
> ***
> The court of appeals misinterpreted this Court's holding in *Manziel*. We stated there that we were "not confronted with the tort aspects" of subsurface injected

Meyers treatise explain: "After *Corzelius, Manziel*, and *Garza* it was an open question as to how a [Texas] Railroad Commission permit or order would impact common law causes of action. In *FPL Farming Ltd. v. Environmental Processing Systems, L.C.*, the Texas Supreme Court resolved the long simmering issue of how agency permits impact, if at all, common law causes of action. 2 The Law of Pooling and Unitization, 3rd Edition § 22.05 (2021). "In all of these cross-boundary fluid migration cases there is one constant, a physical invasion of the receiving owner's property interest without its consent. In *Garza*, due to the rule of capture and deference to agency expertise, there is no trespass, while in *FPL*, the agency permit does not insulate the injecting party from potential trespass liability. Since the *FPL* court never reached the ultimate issue of whether the injection of waste fluids that crossed a boundary line is a trespass, the issue is remanded to determine whether the injector will be liable." 2 The Law of Pooling and Unitization, 3rd Edition §

> water migration, nor did we decide "whether the [Railroad] Commission's authorization of such operations throws a protective cloak around the injecting operator who might otherwise be subjected to the risks of liability . . .." *Manziel*, 361 S.W.2d at 566.***
> *Manziel* and *Garza* considered the justification for the rule of capture — greater oil and gas recovery — in their analyses. However, the rule of capture is not applicable to wastewater injection. *Id*. at 17; *see also Manziel*, 361 S.W.2d at 568. Mineral owners can protect their interests from drainage through means such as pooling or drilling their own wells. *Garza*, 268 S.W.3d at 14. That is not necessarily the case when a landowner is trying to protect his or her subsurface from migrating wastewater. *Manziel* and *Garza* did not decide the issues in this case, and because of the oil and gas interests at issue in *Manziel* and *Garza*, their reasoning does not dictate our analysis in this wastewater injection trespass case.

FPL Farming, Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 313 (Tex. 2011). For additional discussion of this developing area of law and views of commentators who disagree with those cited by appellants, *see* Righetti, Tara K., *Correlative Rights and Limited Common Property in the Pore Space: A Response to the Challenge of Subsurface Trespass in Carbon Capture and Sequestration*, 47 ELR 10420.

22.05 (2021). It should be noted that the Texas Supreme Court also recognized the wisdom of allowing principles of trespass law to be developed *in trespass cases*.

[¶86] Regardless, the commentary on the *FPL Farming* saga in the above-quoted treatise by the same editors of the well-known *Williams and Meyers* treatise is instructive on many of these issues. They also agree with the Texas Supreme Court: "The authors believe that the *FPL Farming* decision is appropriate…" 1 *Williams & Meyers*, Oil and Gas Law § 204 (2021). This is significant because the ultimate conclusions in the *FPL Farming* cases lead to the conclusion that S.B. 2344 is an unconstitutional taking. Those cases began with the question of whether a permit can insulate a developer from trespass liability, which is far less objectionable from a constitutional standpoint than the wholesale removal of rights encompassed by S.B. 2344.

[¶87] "The issue of whether a state conservation agency order can somehow insulate an operator from trespass liability in private litigation has almost always been resolved against the concept of immunity from liability." 1 The Law of Pooling and Unitization, 3rd Edition § 22.05 (Bruce M. Kramer and Patrick H. Martin) (2021). "As a general rule, a permit granted by an agency does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit." *FPL Farming, Ltd. v. Envtl. Processing Sys., L.C.*, 351 S.W.3d 306, 310 (Tex. 2011).

[¶88] The Texas Supreme Court explained the reason that permits provide no property rights "is because a permit is a 'negative pronouncement' that 'grants no affirmative rights to the permittee.'" *Id.*

> A permit removes the government imposed barrier to the particular activity requiring a permit. … [O]btaining a permit simply means that the government's concerns and interests, at the time, have been addressed; so,

> it, as a regulatory body, will not stop the applicant from proceeding under the conditions imposed, if any.

FPL Farming, Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 310-11 (Tex. 2011). "[P]ermits do not provide immunizations from common law standards." *Teel v. Chesapeake Appalachia, LLC*, 906 F. Supp. 2d 519, 525 (N.D.W. Va. 2012); *see also*, *Moundsville Water Co v. Moundsville Sand Co.*, 124 W. Va. 118, 19 S.E.2d 217, 220 (W.Va.Ct.App. 1942); *Kartch v. EOG Res., Inc.*, 845 F. Supp. 2d 995, 1004 (D.N.D. 2012).

[¶89] FPL argued that "should a government permit immunize a permit holder from trespass liability, the Injection Well Act would become a condemnation statute and the subsurface migration would be a government taking." 351 S.W.3d at 315. The Texas Supreme Court avoided that question "[b]ecause we determine that a permit holder is not shielded from liability because he or she holds a permit." *FPL Farming, Ltd. v. Envtl. Processing Sys., L.C.*, 351 S.W.3d 306, 315 (Tex. 2011).

[¶90] Here, the State of North Dakota goes well beyond arguing that a mere permit shields trespass liability, and it has literally overtly stripped landowners of any right to make trespass claims for operations authorized by the NDIC.

CONCLUSION

[¶91] There is nothing wrong with the Legislative Assembly passing laws that benefit our energy industries. But there are right ways and wrong ways. S.B. 2344 is the wrong way.

> We as landowners are not opposed to the storage of gas or to CO2 injection. Almost all of the saltwater disposals in this state are operated through voluntary contracts *with* landowners. As an organization we have always tried to work *with* industry and regulators to address our concerns … We remain committed to working cooperatively with industry, and our invitation to sit down and address the concerns raised by this bill is an open offer. But this bill remains offensive to what we stand for.

S.B. 2344 Legislative History, p. 138, Testimony of Troy Coons for NWLA.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association, Plaintiff/Appellee, vs. 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 Court No. 20210148 Civil No. 05-2019-CV-0085 **CERTIFICATE OF COMPLIANCE**

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

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

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Northwest Landowners Association, Plaintiff/Appellee, vs. 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 Court No. 20210148 Civil No. 05-2019-CV-0085 **CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

[¶1] I hereby certify that on January 21, 2022, the following document:

- **BRIEF OF PLAINTIFF/APPELLEE NORTHWEST LANDOWNERS ASSOCIATION**

was electronically filed with the Clerk of Supreme Court through the E-filing Portal which served copies by e-mail on the following:

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