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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE 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-CV00085** **Appeal from Judgment, District Court, Northeast Judicial District, County of Bottineau**

APPELLANTS' JOINT PETITION FOR REHEARING AND ADDENDUM

Respectfully submitted,

STATE OF NORTH DAKOTA
DREW H. WRIGLEY
ATTORNEY GENERAL

By: */s/ Matthew A. Sagsveen*
Matthew A. Sagsveen, ND Bar #05613
Solicitor General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone: 701.328.3640
masagsve@nd.gov

Attorneys for State Defendants/Appellants

BAKER & HOSTETLER LLP

By: */s/ L. Poe Leggette*
L. Poe Leggette (*admitted pro hac vice*)
Alexander K. Obrecht, ND Bar #08346
1801 California Street, Suite 4400
Denver, CO 80202-2662
Telephone: 303.861.0600
pleggette@bakerlaw.com
aobrecht@bakerlaw.com

Attorneys for Continental Resources, Inc.

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STATEMENT OF THE ISSUES

[1] **Issue Number One**: Whether the Court should modify the language stricken from N.D.C.C. § 38-08-25(5), Opinion ("Op.") ¶ 34, so that "the constitutional . . . provisions . . . may stand," as required by *Tooz v. State*, 38 N.W.2d 285, 291 (1949).

[2] **Issue Number Two**: Whether this Court should vacate its holding that the definition of "land" under the Oil and Gas Production Damage Compensation Act unconstitutionally excluded "pore space" because the stricken language does not apply to common law remedies and the ruling, as it stands, means this Court, *sub silentio*, is the first in the nation to declare a legislature cannot amend a statutory remedy without compensating the prior beneficiaries of the statute.

[3] **Issue Number Three**: Whether this Court should restore the case to the calendar for reargument on its rejection of *Larimore Public School District No. 44 v. Aamodt*, 2018 ND 71, 908 N.W.2d 442, and its application of *Sorum v. State of North Dakota*, 2020 ND 175, 947 N.W.2d 382, because *Larimore*'s purported inapplicability was not briefed, *see State v. Runck*, 418 N.W.2d 262, 265 n.4 (N.D. 1987) ("We decline to consider this issue without the benefit of an adversarial briefing."), and because applying *Sorum* here places North Dakota nearly alone among its sister states and the United States Supreme Court.

STATEMENT OF THE CASE

[4] On August 4, 2022, this Court affirmed in part and reversed in part the ruling of the district court. *See* Op. ¶ 49. Relevant to this Petition for Rehearing, the Court concluded three provisions of S.B. 2344 were facially unconstitutional, violating the takings clauses of the Constitutions of North Dakota and the United States, but that other provisions were constitutional and severable. Op. ¶¶ 34-41.

ARGUMENT

I. The Court Unnecessarily Struck Language in N.D.C.C. § 38-08-25(5).

[5] This Court read S.B. 2344 to allow an operator to drill a saltwater disposal well anywhere in the state, without any other contract or property right to do so, if it has a permit from the NDIC. Op. ¶ 29. The Court found this to take the rights of the pore space owner without compensation. *Id.* Where the surface and mineral estates have been severed, however, the Court agreed that the mineral owner's right to reasonably develop (the "implied easement") allowed the developer to dispose of—within the lease, unit, or pooled spacing unit—saltwater produced within the lease or unit. *Id.* ¶ 30. The Court found S.B. 2344 unconstitutional where it denied the owner of the pore space all remedies when the disposal was outside the implied easement. Accordingly, the Court declared most of N.D.C.C. § 38-08-25(5) unconstitutional. *Id.* ¶ 34.

[6] The Court has left § 38-08-25(5) with two separated sentence fragments and a final sentence, as shown in Addendum 1, leaving the section without meaning. But the four flaws the Court identified, Op. ¶ 29, can be addressed by striking fewer words, leaving a statute still with meaning. The Court's first, second, and fourth points were that the section applied to all NDIC-authorized operations "regardless of the source of the saltwater relative to the location of the well[,]" therefore authorizing even "disposal of waste generated outside the unit or field." *Id.* The Court's third point was that the section did not limit "the location of the 'subsurface geologic formations[,]'" allowing an operator to use any "'subsurface geological formations *in the state*.'" *Id.* The Court could provide NWLA the relief needed to address these flaws by striking the references to: (1) any "other operation"

conducted "under this chapter," and (2) "in this state."[1] Thus, the block quote in paragraph 34 should be modified so that the language invalidated by the Court is the language stricken through below:

> 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, [or] 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 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 or enhanced recovery of oil, gas, and other minerals, [or] 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.

This modification recognizes that "unit operations" for disposal of water produced within a unit constitutionally fall within the implied easement. Disposal operations for water from outside the unit are outside the easement's scope and are not "unit operations."

II. The Legislature Lawfully Excluded "Pore Space" from the Definition of "Land" under the Oil and Gas Production Damage Compensation Act.

[7] In addition to remedies at common law, the Legislature "provided a statutory remedy for surface owners in enacting the Oil and Gas Production Damage Compensation Act." Op. ¶ 24. As amended in 1983, the Act provided compensation for the surface owner's "lost use of and access to the surface owner's land[.]" N.D.C.C. § 38-11.1-04. The Act did not define "land," but this Court in *Mosser v. Denbury Resources, Inc.*, 2017 ND 169, ¶ 24, 898 N.W.2d 406, interpreted "land" to include "pore space." Key to the

[1] "[T]he constitutional and unconstitutional provisions may be contained in the same section and yet be perfectly distinct and separable so that the first may stand though the last fall." *Tooz v. State*, 38 N.W.2d 285, 291 (1949).

Mosser holding was that "[t]he legislature has not amended the relevant statutes" since the federal courts similarly held. *Id.* In S.B. 2344, however, the Legislature provided the amendment this Court found lacking in *Mosser*, defining "land," solely within the Act, to exclude "pore space." N.D.C.C. § 38-11.1-03 ("'Land' means the solid material of earth, regardless of ingredients, but excludes pore space.").

[8] As Judge Daniel J. Hovland recognized, at common law, the implied easement affords a unit operator the right to drill "a saltwater disposal well drilled on the leased premises *without additional compensation to the lessor*."[2] *Fisher v. Cont'l Res., Inc.*, 49 F. Supp. 3d 637, 643 (D.N.D. 2014) (emphasis added) (internal quotation omitted). By interpreting the Act to allow compensation for use of pore space for disposal operations, *Mosser* recognized only a statutory right. The Court did not address the common law rights of the surface and mineral owners. In S.B. 2344 the Legislature determined the statutory right was no longer the best policy. All case law cited to the Court showed legislatures are free to amend statutory remedies without compensating the prior beneficiaries. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 604-05 (1987); *Tri Cty. Wholesale Distribs., Inc. v. Labatt USA Operating Co.*, 828 F.3d 421, 429-30 (6th Cir. 2016); *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104-05 (7th Cir. 1995). That rule is consistent with this Court's view that the "legislative power is primarily plenary[.]" *Verry v. Trenbeath*, 148 N.W.2d 567, 570 (N.D. 1967) (separation of powers doctrine). Without addressing this rule, the Court held S.B. 2344's definition unconstitutional. The Court should reconsider this

[2] The Court cited Judge Hovland's ruling to hold "the operator must compensate the surface owner for the disposal of waste." Op. ¶ 27. But, consistent with *Continental Resources, Inc. v. Farrar Oil Co.*, 1997 ND 31, ¶ 17, 559 N.W.2d 841 ("[T]he property law of trespass does not affect those authorized operations[.]"), Judge Hovland was referring solely to the statutory remedy, not the common law remedy.

conclusion. Even if the phrase "lost use of land" was intended to apply to pore space, the issue here is the Legislature's authority, unquestioned until now, to amend or repeal what it enacts. The repeal of a statutory "pore space" remedy does not diminish the rights of pore space owners to protect their property rights at common law, for the Court also struck down the provision that would have qualified common law rights. Op. ¶ 35 (partly striking down the second sentence of N.D.C.C. § 47-31-09(1)). The Court should vacate that part of its opinion concerning S.B. 2344's statutory definition of "land."

III. The Court Should Restore the Case to the Calendar for Reargument of Its Decision Not to Follow *Larimore*.

[9] *Larimore* remains the general rule for facial challenges. This Court has not expressly overruled it, and *Sorum* only distinguished it in light of North Dakota's "longstanding standard for taxpayer challenges to statutes under the gift clause." *Sorum*, 2020 ND 175, ¶ 23, 947 N.W.2d 382. Because this case was not a taxpayer challenge under the gift clause, *Sorum*'s applicability was unbriefed.

[10] The issue is not whether the Court may determine the correct law when the parties are mute; it is whether the Court should expand a precedent without the benefit of adversarial briefing. Generally, this Court does not. *Runck*, 418 N.W.2d at 265 n.4 ("We decline to consider this issue without the benefit of an adversarial briefing."). Adversarial briefing would have disclosed that twenty-nine states and the Virgin Islands follow the *Salerno* principle adopted in *Larimore*.[3] Nor has the United States Supreme Court

[3] The page limitations governing this Petition prevent a full listing of citations. *See, e.g., Overstock.com, Inc. v. New York State Dept. of Taxation and Finance*, 987 N.E.2d 621, 624 (N.Y. 2013); *Texas Workers' Comp. Com'n v. Garcia*, 893 S.W.2d 504, 518 (Texas 1995); *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013); *Espinoza v. Montana Dep't. of Rev.*, 435 P.3d 603, 611-12 (Mont. 2018), rev'd and remanded on other grounds, 140 S.Ct. 2246 (2020).

abandoned it.[4] Seven more states have followed a modified version of *Salerno*, holding that the test is not satisfied by merely hypothetical constitutional applications of the challenged statute.[5] Here, of course, Continental provided the Court several concrete constitutional applications, including one (under the implied easement) with which the Court agrees. So this variant of *Salerno* does not support extending *Sorum* beyond taxpayer challenges. In sum, the customary reasons for not following *Larimore* as precedent do not apply, and the new extension of *Sorum* is contrary to the current trend of judicial decisions in other states. Bryan A. Garner, *The Law of Judicial Precedent* 396 & 702 (2016).

[11] North Dakota and Utah stand alone. With respect to the Utah takings precedents the Court cites, in both cases the courts upheld the challenged laws,[6] and in contexts where, unlike here, there was no equal and opposite private property right impacted by the Court's

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[4] The Court states the U.S. Supreme Court "has also declined to apply *Salerno* in subsequent decisions[.]" Op. ¶ 14 (citing *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)). But the Court cites a part of the opinion with which only three Justices agreed. Later decisions continue to follow *Salerno*. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008); *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (the court does not consider hypothetical constitutional applications, only applications which the statute "actually authorizes or prohibits conduct"). Here the statute actually and constitutionally authorized unit operations to proceed without paying a surface owner. In sum, the Supreme Court still thinks a "facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications[,]" not just some applications. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1127 (2019).

[5] *See , e.g.*, *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1222 (Pa. 2009) (citing *Salerno* and "no hypothetical" application tests); *Conoco, Inc. v. Taxation & Revenue Dept. of State of N.M.*, 931 P.2d 730, 737-38 (N.M. 1996) (pre-dating *Washington State Grange* and holding taxpayers need not show law "would discriminate against every conceivable taxpayer").

[6] *Utah Public Employees Ass'n v. State*, 131 P.3d 208 (Utah 2006) (accrued government sick leave); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245 (Utah App. 1998) (zoning ordinance). The non-Utah precedents—California and Florida—cited in *Utah Public Employees* have subsequently been contradicted. *See Martin v. State*, 259 So.3d 733, 740-41 (Fla. 2018) (acknowledging *Salerno* but agreeing it did not control void-for-vagueness cases); *People v. Grant*, 195 Cal. App.4th 107, 113 n.2 (Cal. App. 2011) (following *Salerno*).

ruling. Here the Court's ruling overrides the Legislature's judgment on statutory remedies and gives a statutory advantage to the severed surface owner at the expense of the dominant mineral estate. Given the "broader protection" of property rights afforded by the North Dakota Constitution, Op. ¶ 16, following *Larimore* would allow the Court to more finely and fairly resolve the conflicting rights of the private parties. To illustrate the point, extending *Sorum* here has caused the Court to strike down, *see* Argument I, so much language in § 38-08-25(5) that the section is effectively void. *Larimore* fosters more concrete disputes, and concrete disputes are the bedrock of the American judicial tradition. Like the Utah Supreme Court did in *Utah Public Employees Ass'n*, 131 P.3d at 213, the Court should request additional briefing.

CONCLUSION

[12] The Court should restore the case to the calendar for reargument of the application of *Larimore*. It should vacate its position on the unconstitutionality of N.D.C.C. § 38-11.1-03's definition of "Land." At a minimum, it should revise its striking of statutory language as requested in Argument I.

Dated this 18th day of August 2022.

Respectfully submitted,

STATE OF NORTH DAKOTA
DREW H. WRIGLEY
ATTORNEY GENERAL

By: */s/ Matthew A. Sagsveen*
Matthew A. Sagsveen, ND Bar #05613
Solicitor General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone: 701.328.3640
masagsve@nd.gov

Attorneys for State Defendants/Appellants

BAKER & HOSTETLER LLP

By: */s/ L. Poe Leggette*
L. Poe Leggette (*admitted pro hac vice*)
Alexander K. Obrecht, ND Bar #08346
1801 California Street, Suite 4400
Denver, CO 80202-2662
Telephone: 303.861.0600
pleggette@bakerlaw.com
aobrecht@bakerlaw.com

Attorneys for Continental Resources, Inc.

ADDENDUM

1. N.D.C.C. § 38-08-25(5) After the Court's Opinion.

~~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 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 or 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.

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[13] [¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A) and 40(b), that this Joint Petition for Rehearing contains 10 pages, excluding the Addendum.

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

Dated this 18th day of August, 2022.

By: */s/ L. Poe Leggette*

L. Poe Leggette (*admitted pro hac vice*)
Alexander K. Obrecht, ND Bar #08346
1801 California Street, Suite 4400
Denver, CO 80202-2662
Telephone: 303.861.0600
pleggette@bakerlaw.com
aobrecht@bakerlaw.com

Attorneys for Continental Resources, Inc.

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[¶1] I hereby certify that on August 18, 2022, the following document: APPELLANTS' JOINT PETITION FOR REHEARING was filed electronically with the Clerk of Supreme Court and served upon Plaintiff/Appellee Northwest Landowners Association, by and through its attorneys, Derrick Braaten at derrick@braatenlawfirm.com and Todd Sattler at todd@braatenlawfirm.com; State Defendants/Appellants, by and through their attorneys, Matthew A. Sagsveen at masagsve@nd.gov and Steven B. Nelson at stnelson@nd.gov; and North Dakota Petroleum Council by and through its attorneys, Lawrence Bender at lbender@fredlaw.com and Tanner Pearson at tpearson@fredlaw.com.

By: */s/ L. Poe Leggette*

L. Poe Leggette (*admitted pro hac vice*)
Alexander K. Obrecht, ND Bar #08346
1801 California Street, Suite 4400
Denver, CO 80202-2662
Telephone: 303.861.0600
pleggette@bakerlaw.com
aobrecht@bakerlaw.com

Attorneys for Continental Resources, Inc.