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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

William S. Wilkinson, Ann L. Nevins, and Amy Perkins as Personal Representatives for the Estate of Dorothy A. Wilkinson; Barbara Caryl Materne, Trustee of the Petty Living Trust; Charlie R. Blaine and Vanessa E. Blaine, as Co-Trustees of the Charlie R. Blaine and Vanessa E. Blaine Revocable Trust; Lois Jean Patch, life tenant; and Lana J. Sundahl, Linda Joy Weigel, Deborah J. Goetz, Marva J. Will, Ronald J. Patch, Michael Larry Patch, and Jon Charles Patch, Remaindermen, Plaintiffs and Appellants, vs. The Board of University and School Lands of the State of North Dakota, Brigham Oil & Gas, LLP; Statoil Oil & Gas LP, EOG Resources, Inc.; XTO Energy Inc.; Petrogulf Corporation; North Dakota State Engineer; and all other persons unknown who have or claim an interest in the property described in the Complaint, Defendants and Appellees.	**SUPREME COURT NO. 20220037** Civil No. 53-2012-CV-00038

ON APPEAL FROM ORDER FOR JUDGMENT AND JUDGMENT

APPELLANTS' REPLY BRIEF

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I. Chpt. 61-33.1, N.D.C.C., was not state law until 2017, seven years after the State claimed that it owned the Wilkinsons' property, and no subsequent state legislation moots the Wilkinsons' takings claim.

[¶1] The State concedes that it claimed it owned the Wilkinsons' property beginning in 2010. The State concedes Statoil did not pay the Wilkinsons their royalties for ten years because of the State's actions. Notwithstanding, the State argues that its actions were not an unconstitutional taking because of a state law, Chpt. 61-33.1, that did not even exist until 2017, *seven years after the State first claimed it owned the Wilkinsons' property*.

[¶2] No subsequent government action excuses the State's taking of the Wilkinsons' property that began in 2010. "Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'" *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) (quoting *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 321, [] (1987)). Once the State claimed it had an interest in the Wilkinsons' property and interfered with their ownership, it was a taking. The passage of Chpt. 61-33.1 does not—and *could never*—render the Wilkinsons' takings claim moot.

[¶3] The takings claim was irrevocable once the State claimed an interest in the property.

> In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. See *id*., at 315, 318, 107 S.Ct. 2378 [] In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation." [].

Knick v. Twp. of Scott, Pennsylvania, 139 S.Ct. 2162, 2172, 204 L.Ed.2d 558 (2019). The unconstitutional taking began in 2010 when the State claimed an interest in the Wilkinsons'

property, and did not end until the Wilkinsons received their royalties in November 2020.

> "Because of the self-executing character" of the Takings Clause "with respect to compensation," a property owner has a constitutional claim for just compensation at the time of the taking. [] The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation." [*First English*] 482 U.S. at 321 [].

Id. at 2171. Because of the self-executing character of the Takings Clause, the Wilkinsons had a claim for just compensation, including interest, the very moment the State claimed an interest in their property.

[¶4] Not a single case cited by the State changes that. None of the cases the State relies on respecting its argument that "subsequent legislation" mooted the Wilkinsons' takings claim involved a Fifth Amendment Takings. No matter how hard the State tries, it cannot get around cases like *Knick*, *Arkansas Game & Fish Comm'n*, or *First English*, which hold that no subsequent government action can undo or excuse an unconstitutional taking.

[¶5] The application of the State's argument would lead to dangerous results. Under the State's argument, the government can: (1) claim an interest in private property any time it wants without having a constitutional basis to do so; (2) hold that property for years, depriving owners like the Wilkinsons of the property and benefits of owning the property (in the form of royalties); (3) force property owners to spend hundreds of thousands of dollars in attorney's fees fighting to keep their property; and (4) then pass a statute years later purporting to resolve a "title dispute" that never existed in the first place because the State never had a constitutional basis to claim the property.

[¶6] The State unquestionably interfered and disturbed the Wilkinsons' rights in their property. "A taking under the fifth amendment occurs when the Government acts in a

manner that directly interferes with or disturbs a claimant's rights in his private property." *Stockton v. United States,* 214 Ct. Cl. 506, 514 (1977). Thus, whether viewed as a physical or regulatory taking, the Wilkinsons are entitled to just compensation. The right to exclude others from property, especially the government, has been described as one of the most valued rights that accompanies ownership. "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession – the right to exclude strangers, or for that matter friends, but especially the Government." *Hendler v. United States*, 952 F.2d 1364, 1374–75 (Fed. Cir. 1991).

[¶7] When the State claimed an interest in the property adverse to the Wilkinsons and interfered with their property, including their right to receive royalties, a taking occurred. As *Knick* tells us, "A bank robber might give the loot back, but he still robbed the bank." *Id*. at 2172. *Cf. Res. Invs., Inc. v. United States,* 85 Fed. Cl. 447 (2009) (holding the government's interference with a property owner's ability to enjoy their property resulted in economic harm giving rise to a taking.)

[¶8] The Court must categorically reject this attempt by the State to eviscerate the protections afforded to our citizens' private property rights by virtue of the Fifth Amendment and Art. I, §16.

> 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). The State's attempts in recent years to interfere and run roughshod over private property rights must be put to an end by the Court. In addition to this case, in *Sauvageau v. Bailey*, the government–via the Cass

County Joint Water Resource District–brazenly tried to take a fee simple interest by arguing it was a right of way and thus the quick take procedures in N.D.C.C. § 61-16.1-09 applied. The Court rejected the District's attempt to "[e]vade the requirements and property owner protections of N.D.C.C. § 61-16.1-09(2)(a)." *Sauvageau*, 2022 ND 86, ¶ 27, 2022 WL 1260311. *Cf. Northwest Landowners Ass'n. v. State, et al.*, Docket No. 20210148 (the State argued it can pass legislation allowing companies to use a property owner's pore space without providing compensation for that use).

[¶9] Enough is enough. The Court must give due meaning to its words in *Sauvageau* that, "Property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Id*. at ¶ 24. The Wilkinsons expectations were destroyed by the State's actions for ten years without there being any outcome possible where the State could constitutionally own the minerals. And even if Chpt. 61-33.1 somehow changed that– which it does not –the State claimed it owned the Wilkinsons' property for *seven years before the statute was passed*, and *continued claiming* their minerals until the decision in *Wilkinson II* in August 2020. If the United States Constitution and North Dakota Constitution do not apply to protect property owners like the Wilkinsons here, then where do they apply, and whom do they protect? This Court must be the bulwark to protect property owners from a government that has felt increasingly at ease and comfortable in North Dakota ignoring their constitutionally-guaranteed rights enshrined in the Fifth Amendment and Art. I, §16.

II. The State failed to preserve its waiver argument by failing to appeal the issue; and even had the State properly appealed, the Wilkinsons did not waive their takings claim.

[¶10] The State argues the Wilkinsons waived their takings claim. The waiver issue is not

before the Court. The district court rejected the State's argument that the Wilkinsons waived their takings claim. The State did not appeal any part of the Order for Judgment. The Court lacks jurisdiction to reverse on waiver because the State did not appeal that part of the decision. *See e.g., Mosbrucker v. Mosbrucker*, 1997 ND 72, ¶ 4 n. 1, 562 N.W.2d 390 (holding, "Debra did not appeal the issue of Ronald's alleged promise to pay for Amanda's college education. Thus, we do not consider it."); and *State v. Gefroh*, 2011 ND 153, ¶ 6, 801 N.W.2d 429 (refusing to address the State's argument on a pat-down search because the State did not appeal the issue). *Cf. Minto Grain, LLC v. Tibert*, 2009 ND 213, ¶¶ 47-48, 776 N.W.2d 549 (holding the Tiberts failed to properly raise the issue on appeal).

[¶11] Even if the State had appealed the Order for Judgment as to waiver, the Wilkinsons did not waive their takings claim, which has been omnipresent throughout this case. Their takings claim was part of the reason the Court remanded for trial in *Wilkinson II*.

> Under the status of this case, the question of plaintiffs' damages remains unresolved. Even if we were to fully affirm the district court's decision and conclude the court correctly applied N.D.C.C. ch. 61-33.1 and did not err in quieting title, plaintiffs claim recovery of damages by taking or otherwise for when the State claimed ownership of the property.

Wilkinson v. Bd. of Univ., 2020 ND 179, ¶ 16, 947 N.W.2d 910. A trial was held where the Wilkinsons presented evidence with respect to their takings claim. The State does not point to any evidence from trial showing the Wilkinsons voluntarily and intentionally relinquished a known right or privilege so as to waive their takings claim.

III. The State failed to preserve any challenge to the Wilkinsons' conversion claim under Chpt. 32-12.2 by failing to appeal the issue.

[¶12] Like its waiver argument, the State failed to preserve its argument that Chpt. 32-12.2, N.D.C.C., operates as a bar to the Wilkinsons' conversion claim. The Order for Judgment does not mention Chpt. 32-12.2, and the State did not appeal the district court's

previous decision from November 2015 that Chpt. 32-12.2 did not require the Wilkinsons to present notice of their conversion claim to the Office of Management and Budget. *See* R160 (Order on State's Partial Motion to Dismiss Counts IV and VI of the Complaint), holding that Chpt. 32-12.2 did not apply to the Wilkinsons' conversion claim.

[¶13] Even if the State had appealed its argument that Chpt. 32-12.2 required the Wilkinsons to present their conversion claim to OMB, the Wilkinsons were not required to do so because N.D.C.C. § 32-12.2-04 is limited to claims against the State involving "injury, death, or property damage." N.D.C.C. § 32-12.2-01(2). The Wilkinsons' conversion claim does not fall under the statutory definition of injury, death, or property damage. Conversion occurred here because the State wrongfully exercised "control over the property inconsistent with or in defiance of the rights of the owner." *Buri v. Ramsey*, 2005 ND 65, ¶ 14, 693 N.W.2d 619. It was the State's control over the property that gives rise to the conversion, not a property damage claim.

[¶14] The State misstates the evidence before the district court with respect to their control over, and possession of, the Wilkinsons' royalties. The State possessed and controlled the Wilkinsons' royalties before they were released in November 2020. The State's own witnesses, Otteson and Smith, testified the Wilkinsons' royalties were held at the State's behest at the State-owned Bank of North Dakota. While Equinor may have issued the checks to the Wilkinsons, the evidence established the royalties were paid to and held by the State prior to November 2020. *See Appellants' Brief* at ¶¶ 55 – 56, and 63.

IV. The Court should remand the amount of the Wilkinsons' attorney's fees, which must be awarded, to a different judge.

[¶15] The district court erred as a matter of law in holding that 42 U.S.C. §§ 1983 and 1988 did not apply as to the Wilkinsons' claim for attorney's fees based on the Fifth

Amendment Taking. The district court erred as a matter of law in holding that the Wilkinsons' claim for attorney's fees was not timely, ignoring the Court's holding in *Wilkinson II* that the September 2019 Judgment was not a final, appealable order.

[¶16] The State argues the Court must defer to the district court's findings regarding the specific hours and dollar amounts of the Wilkinsons' attorneys' fees, and their costs. The district court erred in adopting the State's position word-for-word in its Order for Judgment with respect to the hours, dollar amounts, and costs incurred by the Wilkinsons. In *City of Medora v. Golberg*, the Court reversed and remanded the district court's holding as to attorney's fees, finding the district court misapplied the law.

> We conclude the trial court misapplied the law in reducing the requested attorneys fees on the basis of proportionality without weighing all of the Thom factors together to decide reasonable attorneys fees. We therefore reverse the award of attorneys fees and remand for redetermination of reasonable attorneys fees.

City of Medora v. Golberg, 1997 ND 190, ¶ 22, 569 N.W.2d 257. Similarly, in *Duchscherer v. W.W. Wallwork, Inc.*, the Court held the trial court misapplied the law and abused its discretion by failing to determine reasonable attorney's fees. The Court remanded, holding that, "A redetermination of fees under the lodestar approach is necessary." *Duchscherer*, 534 N.W.2d 13, 20 (N.D. 1995).

[¶17] The district court misapplied the law in failing to award the Wilkinsons attorney's fees under 42 U.S.C. §§ 1983 and 1988, and Chpt. 32-15, N.D.C.C. The Wilkinsons provided hundreds of pages of records that evidenced their attorney's fees and costs. Jon Patch, Michael Patch, and William "Bill" Wilkinson testified as to the attorney's fees and costs their family incurred because of the State's actions and unconstitutional taking.

[¶18] Despite two prior remands, the district court did not conduct any of its own analysis, instead adopting word-for-word the State's proposed 63-page order as its own ruling in its

entirety. Based on the prior remands, and the misapplication of the law and misstating the record again here, the Court should remand with instructions to award attorney's fees based on the lodestar factors described in *Cass Cnty. Joint Water Res. Dist. v. Erickson*, 2018 ND 228, 918 N.W.2d 371, to a different judge. On several occasions, the Court has determined that assigning a case to a new judge on remand was appropriate. *See State v. Vandehoven*, 2009 ND 165, 772 N.W.2d 603; *State ex rel. Heitkamp v. Fam. Life Servs., Inc*., 2000 ND 166, 616 N.W.2d 826; *Sargent Cnty. Bank v. Wentworth*, 500 N.W.2d 862 (N.D. 1993); and *Bloomquist v. Clague*, 290 N.W.2d 235 (N.D. 1980). Alternatively, the Court should remand with instructions to award the Wilkinsons their full attorney's fees and costs as required by law, including the costs associated with this appeal, by applying the required lodestar factors. *See T.F. James Co. v. Vakoch*, 2001 ND 112, ¶¶ 21 – 24, 628 N.W.2d 298 (remanding for an award of attorney's fees consistent with the Court's opinion).

Respectfully submitted this 9th of May, 2022.

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CERTIFICATE OF COMPLIANCE

[¶1] Pursuant to Rule 32 of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 12 pages.

Dated this 9th day of May, 2022.

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[¶1] I hereby certify that on May 9, 2022, I served the following documents:

Plaintiffs/Appellants' Reply Brief

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