IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SCS Carbon Transport LLC, Petitioner and Appellee, vs. Howard L. Malloy, Trustee of The Harry L. Malloy Trust No. 2, Dated May 25, 2008, Connie Erickson, Larry Hoge, Dean Twardowski, BRH LLLP, 8N2E Properties LLP, Paul E. Kuetemeyer, Hoge Farm Limited Partnership, Timothy J. Hoge, John M. Carrels, Loren E. Staroba and Diane L. Staroba, Trustees of the Staroba Revocable Living Trust dated April 8, 2016, Verdell T. Jordheim and Phyllis J. Jordheim Trustees of the Verdell J. Jordheim and Phyllis J. Jordheim Living Trust dated February 25, 2005, Valera A. Hayen, Shirley Waloch, Randall Waloch and Karla Waloch, SPLJ, LLP, Respondents and Appellants.	)	Consolidated Cases Supreme Court Nos. 20230149 & 20230162-20230176 Morton Co. No. 2022-CV-00665 Burleigh Co. No. 2022-CV-02073 Burleigh Co. No. 2022-CV-02075 Burleigh Co. No. 2022-CV-02076 Burleigh Co. No. 2022-CV-02078 Burleigh Co. No. 2022-CV-02116 Burleigh Co. No. 2022-CV-02161 Burleigh Co. No. 2022-CV-02162 Burleigh Co. No. 2022-CV-02163 Dicky Co. No. 2022-CV-00050 Richland Co. No. 2022-CV-000164 Richland Co. No. 2022-CV-00162 Sargent Co. No. 2022-CV-00052 Sargent Co. No. 2022-CV-00051 Sargent Co. No. 2022-CV-00054 Burleigh Co. No. 2022-CV-02097

Appeal From Case No. 2022-CV-00665
April 26, 2023 Order (Doc. 216) and its May 2, 2023 Final Judgment (Doc. 220).
South Central Judicial District, Morton County
The Honorable Daniel D. Narum

BRIEF OF AMICUS CURIAE NORTHWEST LANDOWNDERS ASSOCIATION IN SUPPORT OF RESPONDENT/APPELLANT AND REVERSAL OF THE ORDER AND FINAL JUDGMENT

/s/ Derrick Braaten
Derrick Braaten (ND #06394)
derrick@braatenlawfirm.com
BRAATEN LAW FIRM
109 North 4th Street, Suite 100
Bismarck, ND 58501
Phone: 701-221-2911
Attorney for Northwest Landowners Association

TABLE OF CONTENTS

Paragraph

TABLE OF AUTHORITIES

Cases **Paragraph**

Other Authorities

Statement of Identity and Interest

[¶1] Pursuant to Rule 29 of the North Dakota Rules of Appellate Procedure, Northwest Landowners Association respectfully submits this brief as amicus curiae. The Association is a nonprofit corporation representing hundreds of farmers, ranchers, and property owners in North Dakota. The Association strives to bring landowners and stewards of North Dakota's resources together to protect, inform and educate.

[¶2] The mission of Northwest Landowners Association is to create a network of information on issues as they pertain to mineral owners, landowners, operators, or occupants; to share and discuss the development of North Dakota's resources; and to become educated, such that its members may help maintain a balance in resource development and property rights of individuals in a responsible manner. The Association strives to provide unbiased education regarding current and past resource development processes, to bring together those with similar issues to solve common problems, to aid in the development of comprehensive legislation to protect the resources of the citizens of North Dakota well into the future, and to ensure a more harmonious coexistence between landowners, residents, and the energy industry.

[¶3] The 2019 N.D. legislative session saw Senate Bill 2344 introduced. SB 2344 sought to limit the rights of pore space owners, giving a company or operator access to pore space over the objection of the landowner and prohibiting compensation. A fight ensued, and Northwest Landowners Association addressed legislators numerous times in opposition to SB 2344. Troy Coons, Chairman, presented testimony and requested repeatedly that the proponents of the legislation sit down and discuss the issues with the Landowners in a constructive manner, and these efforts were rebuffed. SB 2344 was enacted on August 1, 2019. *See Nw. Landowners Ass'n v. State*, 2022 ND 150, 978 N.W.2d 679; *see also See* SB

2344 legislative history at https://ndlegis.gov/files/resource/66-2019/library/sb2344.pdf. Several days before it went into effect, on July 29th, 2019, Northwest Landowners Association filed suit in North Dakota District Court in Bottineau County, seeking a declaration that SB 2344 "...is unconstitutional and void, and of no effect...". *Northwest Landowners Association vs. State of ND, et al.*, No. 05-2019-CV-00085, Doc. 1, ¶ 36 (Bottineau County District Court, North Dakota).

[¶4] After briefing, the Honorable Judge Anthony Benson issued an Order Granting Summary Judgment to Northwest Landowners Association writing the following:

> The taking of pore space from surface owners is clearly and unambiguously for the constitutionally impermissible purpose of economic development to benefit private parties, i.e. the oil and gas industry. This is a violation of N.D. Const. art. l, § 16, which specifically directs that "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" and "[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., Doc. 171, ¶34.

[¶5] Judge Benson concluded "As a matter of law, the enactments and amendments to N.D.C.C. chs. 38-08, 38-11.1 and 47-37 in SB 2344 are facially unconstitutional." *Id.*, ¶43. Defendants appealed to the North Dakota Supreme Court. In the Opinion of the Court, Justice Tufte explained:

> Government-authorized physical invasions of property constitute the "clearest sort of taking" and therefore are a per se taking. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). "[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Loretto*, 458 U.S. at 436. A physical invasion "is qualitatively more severe than a regulation of the *use* of property . . . since the owner may have no control over the timing, extent, or nature of the invasion." *Id*. Further, regardless of whether the physical occupation is permanent or temporary, just compensation is required. *Cedar Point Nursery*, 141 S. Ct. at 2074. Even if the physical invasion has only minimal economic impact on the owner, compensation is required because when

> there is a physical occupation of property, it effectively destroys the owner's rights to possess, use, and dispose of the property. *Loretto*, 458 U.S. at 435–36; *Cass Co. Joint Water Res. Dist. v. Aaland*, 2021 ND 57, ¶¶ 13–14, 956 N.W.2d 395. Further, because government-authorized physical invasions take away the landowner's right to exclude—"one of the most treasured" rights of property ownership—they are a per se taking.

Nw. Landowners Ass'n, 2022 ND 150, ¶ 25, 978 N.W.2d 679.

[¶6] Northwest Landowners Association has hundreds of members who are owners of surface estates in areas with oil and gas production, several of which have already been directly impacted by the surveying activities of appellees SCS Carbon Transport Solutions LLC. Consequently, Northwest Landowners Association filed suit in North Dakota District Court in Bottineau County on May 31st, 2023 seeking an order declaring "...the last sentence[] of §§ 32-15-06...to be unconstitutional and void, and of no effect" and "[e]njoining the State...from further implementation or enforcement of the last sentence[] of N.D.C.C. §§ 32-15-06...or allowing executive agencies and political subdivisions to utilize these unconstitutional provisions." *Northwest Landowners Association vs. State of North Dakota, et al*., No. 05-2023-CV-00065, Doc. 1, p14, ¶¶1,3 (Bottineau County District Court, North Dakota). The Bottineau County District Court issued a revised Scheduling Order on August 15th, 2023 scheduling the dispositive motions deadline for December 12, 2023, oral argument for February 21, 2024, and trial[1] for September 4-6, 2024. *Id.*, Doc. 59.

[1] The parties agreed that a trial is almost certainly unnecessary and highly unlikely, but scheduled one to ensure a setting should it become necessary. It appears all parties intend to submit dispositive motions and to brief the legal issues, and the complaint is indeed a facial challenge not based on any specific facts.

[¶7] While the Northwest Landowners Association intends to move forward with its facial challenge, it appears likely that this appeal will be decided before its facial challenge is fully presented to the District Court. For that reason, the Landowners request leave to submit this brief as amicus curiae and request leave to present oral argument as well.

[¶8] Northwest Landowners Association has long been engaged in the protection of private property rights in North Dakota and through this experience has gained significant expertise in this area. Northwest Landowners Association also represents the interests of the farmers and ranchers who live and work upon the land of North Dakota. "The husbandman that laboureth must be first partaker of the fruits." 2 Timothy 2:6-23. Similarly, the farmers and ranchers who steward our land and are most impacted by the taking of private property rights must be heard first by those who safeguard our Constitution, *before* takers such as SCS get any access to their land.

Statement Per N.D.R.App.P. 29(a)(4)(D)

[¶9] This Brief was authored solely by Northwest Landowners Association's legal counsel. No party, party's counsel, or other person contributed money intended to fund preparing or submitting this Brief other than Northwest Landowners Association.

Introduction

[¶10] "From farming to original homesteads, it is in the blood of North Dakota landowners to be protective of their real estate. From family ties to the need for farmers to grow crops, property ownership is near and dear to those who maintain it." *WBI Energy Transmission, Inc. v. Easement & Right-Of-Way*, No. 1:18-cv-078, Doc. ID 131, at *12 (D.N.D. Nov. 1, 2022). These words from the United States District Court for the District of North Dakota are equally applicable to this case. Our North Dakota Constitution begins with the declaration: "All individuals are by nature equally free and independent and have

certain inalienable rights, among which are those of … acquiring, possessing and protecting property." N.D. Const. art. I, § 1.

[¶11] The United States Supreme Court agrees: "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them. *Murr v. Wisconsin*, 582 U.S. 383, 394, 137 S. Ct. 1933, 1943 (2017).

Argument

[¶12] This case appears to have been decided in a vacuum of relevant facts, and Amicus Curiae Northwest Landowners Association had no involvement with the proceedings below. As such, Northwest Landowners Association will limit its argument to issues of law, recognizing however that as a matter of law, summary judgment should never be granted when there is an issue of disputed fact as there appears to have been here. N.D.R.Civ.P. 56.

[¶13] More importantly, SCS Carbon Transport LLC ("SCS") misrepresented the law to the District Court. SCS *falsely* proclaimed:

> Survey access incidental to the power of eminent domain has a long pedigree in American history. Every State authorizes entry onto private property for the purpose of surveying land; many have done so for centuries. In North Dakota, there has been a statute in place since 1895 authorizing survey access. The nearly-130- year-old statute codified an even longer-standing common-law restriction on property owners' right to exclude surveyors. To our knowledge, no court (state or federal) has ever held that temporary survey access qualifies as a taking requiring compensation, and every State, including North Dakota, has authorized survey access as a restriction on property rights.

R102:2:¶3.

I. The exact language of N.D.C.C. § 32-15-06 has been struck down as unconstitutional based on the same language found in Art. 1, § 16 of North Dakota's constitution.

[¶14] Such sweeping assertions of law are shamefully naked without a *single citation*, particularly when SCS is making claims about *common law*. While one of these statements is true, that N.D.C.C. § 32-15-06 has been on the books (in some form) since 1895, SCS left out that North Dakota has also had a Constitution with a takings clause on the books since 1889. *See* N.D. Const. art. I, § 16.[2]

[¶15] Most alarming, however, is the assertion by SCS's lawyers that: "To our knowledge, no court (state or federal) has ever held that temporary survey access qualifies as a taking requiring compensation, and every State, including North Dakota, has authorized survey access as a restriction on property rights." (R102:2:¶3). While SCS's lawyers may make such a representation to a court "to the best of [their] knowledge, information, and belief," this can only be done "after an inquiry reasonable under the circumstances" lest such a bald representation run afoul of the restrictions of Rule 11 of the North Dakota Rules of Civil Procedure. And indeed, this assertion by SCS's lawyers could not have been formed after a reasonable inquiry because if they had even read the *Aaland* case to which they cited they would know that California's Supreme Court ruled

[2] The takings clause has been amended numerous times since its adoption: Const. 1889, Art. I, § 14, as amended by art. amd. 66, approved June 26, 1956 (S.L. 1957, ch. 397); Amendment approved November 2, 1982 (S.L. 1981, ch. 670, § 1; 1983, ch. 721); Amendment by initiated measure #2 on general election ballot approved November 7, 2006.

that the precise language found in N.D.C.C. § 32-15-06 was unconstitutional and significantly, it was unconstitutional based on language in California's constitution which is found almost *verbatim* in North Dakota's constitution. This Court explained:

> Before 1963, California had a statute nearly identical to N.D.C.C. § 32-15-06, authorizing state agents to enter private land required for public use to "make examinations, surveys and maps thereof." *See Prop. Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151, 204 Cal. Rptr. 3d 770, 375 P.3d 887, 901 (Cal. 2016) (quoting Cal. Civ. Proc. Code § 1242 (amended 1963 and 1970; repealed 1975)). Section 32-15-06, N.D.C.C., is derived from Cal. Civ. Proc. Code § 1242. *See City of Grafton v. St. Paul M. & M. Ry.*, 16 N.D. 313, 113 N.W. 598, 599 (N.D. 1907) (stating our eminent domain statute, chapter 36 of the Code of Civil Procedure (Rev. Codes 1905), "was, no doubt, borrowed from" California); N.D.R.C. § 7579 (1905) (identifying the former N.D.C.C. § 32-15-06 as a part of the eminent domain statute in the Code of Civil Procedure). In construing Cal. Civ. Proc. Code § 1242, the Supreme Court of California concluded that it permitted only "such innocuous entry and superficial examination as would suffice for the making [**399] of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property." *Jacobsen v. Superior Court of Sonoma County*, 192 Cal. 319, 219 P. 986, 991 (Cal. 1923), *superseded by statute*, Cal. Civ. Proc. Code §§ 1245.010-1245.060, as recognized in *Prop. Reserve*, 375 P.3d at 905.1 Because N.D.C.C. § 32-15-06 is derived from, and nearly identical to, California's prior statute, Cal. Civ. Proc. Code § 1242, the Supreme Court of California's construction of Cal. Civ. Proc. Code § 1242 in *Jacobsen* is particularly persuasive to this Court. *Estate of Zins v. Zins*, 420 N.W.2d 729, 731 (N.D. 1988) ("While we are not compelled to interpret our statute in the same way as the State from which our law is derived, such decisions are highly persuasive.").

Cass Cnty. Joint Water Res. Dist. v. Aaland, 2021 ND 57, ¶ 9, 956 N.W.2d 395.

[¶16] In *Aaland*, this Court recognized the interpretation of the exact same language in the California statute, but did not delve deeply into the actual decision made by an historic California Supreme Court in 1923. That California Court did precisely what SCS now claims that "no court (state or federal) has ever" done. In *Jacobsen v. Superior Court of Sonoma*, 192 Cal. 319, 320, 219 P. 986, 987 (1923), the California Supreme Court considered the precise language at issue here, and also specific language that had been

added to the California constitution which rendered the statute unconstitutional in most regards:

> At the time the present constitution was adopted (in 1879), the law as declared by the supreme court was as follows: The possession and use in terms authorized by the statute, before compensation had been made and while the proceeding was pending, is a taking within the meaning of the constitution, but the requirement of the former constitution, which only provided that private property should not be taken for public use without just compensation, was satisfied by a provision which insured the payment on reasonable terms as to delay and difficulty in the enforcement of the right. Viewed in the light of these facts, the change made in the language by the new constitution becomes significant. The following italicized words were added, and no other change was made in the general provision: '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*.

Id., 192 Cal. at 327 (emphasis in original).

[¶17] This language is significant because it also appears verbatim in the North Dakota constitution's takings clause. This Court recognized as much recently when it wrote: "The North Dakota Constitution provides overlapping and broader protection against government interference with property rights [than the federal 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*." *Northwest Landowners Ass'n v. State*, 2022 ND 150, ¶ 16 (quoting N.D. Const. art. I, § 16) (emphasis added).

[¶18] Additionally, the North Dakota constitution requires that just compensation be determined by a jury unless waived by the landowner. *Id*. (emphasis added). The only exception to this is for the State itself and its political subdivisions, who could utilize quick take procedures in order to effectuate immediate possession subject to appeal on all grounds, and potential reconveyance along with just compensation for the temporary taking if the taking was found to be unconstitutional or unjustified. *Id*. The California Supreme Court agreed with this. *Jacobsen*, 192 Cal. At 331, 219 P. 986 ("The only means by which

[the government] can acquire such property without the owner's consent is through the exercise of the right of eminent domain."). And as in California, if the State itself or its political subdivisions seek to acquire survey access in an expedited manner, it can be done through the quick take procedures allowed by the Constitution and other state law, but not through N.D.C.C. § 32-15-06.

[¶19] But the California Court did not stop there. And it must be recalled that this is the same state that passed the law giving unions access to farms over their objection, and which was struck down by the United States Supreme Court in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074-75 (2021) ("*Cedar Point*"), which will be discussed *infra*. The California Court said a court allowing access without payment of just compensation ascertained by jury *first* commits a grave transgression of fundamental rights.

> It was error certainly but was more than that; it was a transgression of a **fundamental right guaranteed to every citizen** … whose property is sought to be taken, of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure which has the effect to deprive one of a constitutional right is as much an excess of jurisdiction as where there exists an inceptive lack of power. The substance and not the shadow determines the validity of the exercise of the power.

Id. at 332.

[¶20] SCS's legal assertions cast long shadows, but lack substance, and offend the very foundations of our Constitutional Democracy.

[¶21] The reality is that the language in N.D.C.C. § 32-15-06 was identical to that stuck down in *California* as far back as *1923*, and SCS's claim that "no court (state or federal)" has done this is either an outright lie, or at least a sanctionable violation of Rule 11 as a baseless and unfounded legal assertion easily contradicted by this Court's own caselaw. Winning at any cost is *intolerable*, particularly when what is at stake is the *Constitution*.

[¶22] The California Supreme Court again took up the matter of pre-condemnation surveys in 2016, but with respect to a very different set of laws. *See Prop. Rsrv., Inc. v. Superior Court*, 1 Cal. 5th 151, 151, 204 Cal. Rptr. 3d 770, 775, 375 P.3d 887, 892 (2016) (discussing Title 7 (eminent domain), Chapter 4 (precondemnation activities), Article 1 (preliminary location, survey, and tests)). Indeed, the California legislature had responded to the unconstitutional nature of its prior law and as the California Court recognized:

> In 1975, as the culmination of a multiyear effort to update and reorganize California's eminent domain statutes into a comprehensive statutory scheme, the Legislature enacted a new, lengthy, and detailed Eminent Domain Law. (Stats. 1975, ch. 1275, §§ 1–5, pp. 3409–3466.) The new Eminent Domain Law moved and revised the then-existing precondemnation entry and testing provisions of former sections 1242 and 1242.5 into a new, separate article of the Eminent Domain Law (Code Civ. Proc., tit. 7, ch. 4, art. 1), containing the current precondemnation entry and testing statutes—sections 1245.010 to 1245.060—that we have set forth above. (See ante, pp. 174–177.)

Id. at 183. While the California Supreme Court later approved of such access, it was only because the new laws in California required at least the minimum that North Dakota would require for a State condemnor effectuating its quick-take authority, and indeed, it is difficult to understand how anything less could even be considered due process. *See Prop. Res., Inc.,* 1 Cal. 5th 151, 187-89, 204 Cal. Rptr. 3d 770, 794-95, 375 P.3d 887, 907-08 (2016). It should also be noted that this all happened *before* the United States Supreme Court decided *Cedar Point*, which also controls and does not provide for any "exceptions" such as SCS appears to have convinced the District Court.

II. The District Court misunderstood and misapplied *Cedar Point* based on the misleading arguments made by SCS.

[¶23] "[B]ecause government-authorized physical invasions take away the landowner's right to exclude— 'one of the most treasured' rights of property ownership—they are a per se taking." *Nw. Landowners Ass'n*, 2022 ND 150, ¶ 13, 978 N.W.2d 679 (citing *Cedar*

Point Nursery v. Hassid, 141 S. Ct. 2063, 2072, 2074 (2021); *Wild Rice River*, 2005 ND 193, ¶ 13, 705 N.W.2d 850).

[¶24] The District Court discussed the United States Supreme Court's decision in *Cedar Point Nursery*, 141 S. Ct. 2063, but its characterization of the holding is alarming: "While the U.S. Supreme Court agreed the regulation constituted a per se physical taking, that regulation granted an ongoing right of access to property, as opposed to the limited right of access sought in the case at hand." (R216:6:¶13) (emphasis in original). This is simply a blatant misstatement of law that grossly obscures the ruling from *Cedar Point*. The U.S. Supreme Court directly refuted this very conclusion in its opinion:

> To be sure, Loretto emphasized the heightened concerns associated with "[t]he permanence and absolute exclusivity of a physical occupation" in contrast to "temporary limitations on the right to exclude," and stated that "[n]ot every physical invasion is a taking." The latter point is well taken, as we will explain. But Nollan clarified that appropriation of a right to physically invade property may constitute a taking "even though no particular individual is permitted to station himself permanently upon the premises."
>
> Next, we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous.

Cedar Point Nursery, 141 S. Ct. 2063, 2074-75 (internal citations omitted, emphasis added). Indeed, the District Court's conclusions merely parrot the arguments made by the 9th Circuit and Justice Breyer's dissent in *Cedar Point*. To these, the majority responded:

> The Ninth Circuit saw matters differently, as do the Board and the dissent. In the decision below, the Ninth Circuit took the view that the access regulation did not qualify as a *per se* taking because, although it grants a right to physically invade the growers' property, it does not allow for permanent and continuous access "24 hours a day, 365 days a year." 923 F. 3d, at 532 (citing *Nollan*, 483 U. S., at 832, 107 S. Ct. 3141, 97 L. Ed. 2d 677). The dissent likewise concludes that the regulation cannot amount to a *per se* taking because it allows "access short of 365 days a year." *Post*, at ___, 210 L. Ed. 2d, at ___ (opinion of Breyer, J.). **That position is insupportable as a matter of precedent and common sense.** There is no reason the law should analyze an abrogation of the right to exclude in one

> manner if it extends for 365 days, but in an entirely different manner if it lasts for 364
>
> To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary. Our cases establish that "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary." *Tahoe-Sierra*, 535 U. S., at 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (citing *General Motors Corp.*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946)). The duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U. S., at 436-437, 102 S. Ct. 3164, 73 L. Ed. 2d 868—bears only on the amount of compensation.

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (internal pagination removed, emphasis added). "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Id*. at 2075.

[¶25] Further, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." *Nw. Landowners Ass'n*, 2022 ND 150, ¶ 25, 978 N.W.2d 679. "The North Dakota Constitution provides overlapping and broader protection against government interference with property rights: '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. It 'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.'" *Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 16, 978 N.W.2d 679 (emphasis added).

[¶26] As the California Supreme Court put it, allowing such a taking without due process and without actual condemnation proceedings as were demanded by the landowners here is "a transgression of a fundamental right guaranteed to every citizen … whose property is sought to be taken, of being heard before he is condemned to suffer injury." *Jacobsen*, 192 Cal. 319, 332, 219 P. 986, 992 (emphasis added).

[¶27] The reason we require the landowner to be heard *before he is condemned to suffer*

injury is perhaps no more apparent than in this very case, where the District Court authorized an unconstitutional taking of private property rights *before* the North Dakota Public Service Commission *denied SCS's application for a siting permit* to locate its pipeline in North Dakota. *See PSC Denies Siting Permit for Summit Carbon Pipeline Project* (Press Release issued by ND Public Service Commission).[3] This is salt in the wound to these landowners and makes it apparent why eminent domain proceedings should *precede* a taking of private property. And again, before SCS responds with its *Chicken Little* argument, it should be recalled that private for-profit companies with investors potentially from foreign adversaries of the United States of America[4] also do not enjoy the authority under the North Dakota Constitution to effectuate immediate possession through quick-take procedures, but the State and its political subdivisions do. N.D. Constitution, Art. 1, § 16. The story of this case shows us why.

[¶28] The District Court also misunderstands the United States Supreme Court's discussion of background limitations on a landowner's title. (R216:6-7:¶14). The U.S. Supreme Court was not "carving out exceptions" to allow unconstitutional takings, as presumed by the District Court and the court in *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673 (W.D. Va. 2015) and *Charlottesville Div. v. Dominion Transmission,*

---

[3]https://www.psc.nd.gov/public/newsroom/2023/8-4-23SummitCarbonPipelineOrderNR.pdf.

[4] *See, e.g.*, "[North Dakota] Lawmakers seek AG investigation into Summit Carbon Solutions ownership and investors", https://www.agweek.com/news/lawmakers-seek-ag-investigation-into-summit-carbon-solutions-ownership-and-investors.

Inc., 138 F. Supp. 3d 673 (W.D. Va. 2015). It merely recognized, as even Justice Breyer in his dissent recognized, that the Court was merely reasserting the principle recognized in *Lucas* that "the government can, without paying compensation, impose a limitation on land that 'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2088 (2021) (emphasis added). Justice Breyer asks a couple of rhetorical questions in his dissent: "Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? *Id*. at 2089. The obvious answer based on any reasonable reading of the majority opinion is YES and YES.

[¶29] A District Court in Virginia ruled on a case prior to the *Cedar Point* decision and got it wrong. For example, the Virginia court states that there are "common-law privileges to enter private property without trespass liability" found in statutes, and proceeds to euqote this with an exception to liability for an unconstitutional taking. *Charlottesville Div.*, 138 F. Supp. 3d 673, 688 (W.D. Va. 2015). This statement fundamentally conflates trespass law and takings law and betrays a shallow understanding of both. Of course a statute may relieve trespass liability when it provides an "authorization" because the tort of trespass is an "unauthorized" entry. But whether that is true is irrelevant to whether it is an unconstitutional taking of a private property right, and is also irrelevant to whether such a statute is a limitation that ***inheres*** in the landowner's *title*. If it does, then it cannot be "taken" by a physical invasion because it was never a consequent of the right to exclude in the first place. This is very different than the sweeping "exceptions" to takings law that the District Court attempted to create in its summary judgment order here. The language of

N.D.C.C. § 32-15-06 that limits just compensation ("…and such entry constitutes no claim for relief in favor of the owner of the land except for injuries resulting from negligence, wantonness, or malice), cannot reasonably be said to *inhere* in any title – it is simply a misstatement of law that violates the state and federal constitutions and must be struck down as unconstitutional on its face.

[¶30] Perhaps most surprising is that the District Court felt the need to resort to a far-flung case from a federal court in Virginia rather than this Court's recent precedent that is directly on point:

> Government-authorized physical invasions of property constitute the "clearest sort of taking" and therefore are a per se taking. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021). "[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Loretto*, 458 U.S. at 436. A physical invasion "is qualitatively more severe than a regulation of the *use* of property . . . since the owner may have no control over the timing, extent, or nature of the invasion." *Id.* Further, regardless of whether the physical occupation is permanent or temporary, just compensation is required. *Cedar Point Nursery*, 141 S. Ct. at 2074. Even if the physical invasion has only minimal economic impact on the owner, compensation is required because when there is a physical occupation of property, it effectively destroys the owner's rights to possess, use, and dispose of the property. *Loretto*, 458 U.S. at 435-36; *Cass Co. Joint Water Res. Dist. v. Aaland*, 2021 ND 57, ¶¶ 13-14, 956 N.W.2d 395. Further, because government-authorized physical invasions take away the landowner's right to exclude—"one of the most treasured" rights of property ownership—they are a per se taking.

Nw. Landowners Ass'n, 2022 ND 150, ¶ 25, 978 N.W.2d 679, 691 (emphasis added).

Conclusion

[¶31] The bottom line is that the District Court misapplied the law, and to be fair, this followed the frivolous, false, and alarmingly misleading assertions of law made by SCS in its briefing to the District Court. SCS's playing fast and loose with the constitutional rights of the citizens of North Dakota should not be tolerated.

[¶32] "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr*, 582 U.S. 383, 394, 137 S. Ct. 1933, 1943 (2017). "From farming to original homesteads, it is in the blood of North Dakota landowners [to stand up and protect the land]." *WBI Energy Transmission, Inc. v. Easement & Right-Of-Way*, No. 1:18-cv-078, Doc. ID 131, at *12 (D.N.D. Nov. 1, 2022).

[¶33] Northwest Landowners Association stands with the landowners who have come before this Court to protect their land. Behind them stand the inviolable Constitutions of North Dakota and the United States of America.

Dated: August 29, 2023

Respectfully submitted,

/s/ Derrick Braaten

Derrick Braaten (ND #06394)
derrick@braatenlawfirm.com
BRAATEN LAW FIRM
109 North 4th Street, Suite 100
Bismarck, ND 58501
Phone: 701-221-2911

Attorneys for Northwest Landowners Association