

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Northwest Landowners Association, Mike )  
Dresser, Sandra Short, and the Swenson )  
Living Trust, )  
)  
Plaintiffs, Appellants, and Cross- )  
Appellees, )  
)  
and )  
)  
North Dakota Farm Bureau, Inc., )  
)  
Intervenor-Plaintiff, Appellant, and )  
Cross-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 )  
as the Chairman and a member of the )  
North Dakota Industrial Commission, and )  
Hon. Drew Wrigley in his official capacity )  
as Attorney General of North Dakota and )  
as a member of the North Dakota )  
Industrial Commission, and Hon. Doug )  
Goehring in his official capacity as )  
Agriculture Commissioner of North )  
Dakota and as a member of the North )  
Dakota Industrial Commission, )  
)  
Defendants and Appellees, )  
)  
and )  
)  
SCS Carbon Transport, LLC, SCS )  
Permanent Carbon Storage, LLC, and )  
Summit Carbon Solutions, LLC, )  
)  
Intervenor-Defendants, Appellees, )  
and Cross-Appellants, )  
)

Supreme Court Case No. 20240298

Bottineau County Case No.  
05-2023-CV-00065

and )  
 )  
Minnkota Power Cooperative, Basin )  
Electric Power Cooperative and Dakota )  
Gasification Co., )  
 )  
Intervenor-Defendants and )  
Appellees. )  
 )

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Appeal from the Memorandum Opinion and Order Granting Summary Judgment to Defendant and Intervenor-Defendants entered on August 27, 2024 and Judgment entered on August 29, 2024

Bottineau County Case No. 05-2023-CV-00065

District Court of North Dakota

The Honorable Anthony Benson, Presiding

**ORAL ARGUMENT REQUESTED**

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**BRIEF OF PLAINTIFFS, APPELLANTS, AND CROSS-APPELLEES  
NORTHWEST LANDOWNERS ASSOCIATION, MIKE DRESSER, SANDRA  
SHORT, AND THE SWENSON LIVING TRUST**

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Swenson Living Trust*

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### **Statement of the Issues**

[¶1] Whether the District Court erred in holding that a statute of limitations bars the facial constitutional challenges brought in this action.

[¶2] Whether the District Court erred when it held that the challenged statutes are not susceptible to a facial challenge.

[¶3] Whether the District Court erred by failing to recognize that the right to exclude is a fundamental right under North Dakota’s specific constitutional provision categorizing “acquiring, possessing and protecting property” as an inalienable right. N.D. Const. art. I, § 1.

[¶4] Whether the District Court erred by only considering whether the right to exclude was a fundamental right being infringed and not also considering the right of all landowners to protect property safeguarded by North Dakota Constitution Article I, Section 1 as well as through the explicit process rights for protecting property in Article I, Section 16 (jury trial to assess just compensation having been first made to owner) and Chapter 32-15 of the Century Code.

[¶5] Whether the District Court erred in granting and not denying summary judgment to Appellees and in denying and not granting summary judgment to Appellants.

### **Oral Argument Requested**

[¶6] Oral argument is requested due to the gravity of the issues raised in this appeal and the request to strike down legislation as facially unconstitutional.

### **Statement of the Case**

[¶7] N.D.C.C. §§ 38-22-10 and 38-25-08 purport to give the North Dakota Industrial Commission (“NDIC”) power to authorize developers to inject carbon dioxide and natural gas into a nonconsenting landowners’ pore space without first providing just compensation.

See §§ 38-22-10, 38-22-08(14), 38-25-08, 38-25-05(18), 38-25-06(15), and 38-25-07(16). The combined effect of these provisions amalgamating property and requiring only a finding that a landowner will be equitably compensated is unconstitutional. The implementation of these statutes inevitably results in an unconstitutional taking without just compensation under Article 1, Section 16 of the Constitution of North Dakota and of the United States Constitution, Amendment V (as applied to the state of North Dakota through Amendment XIV), and by stripping landowners of the process protections of Art. I, § 16 and Chapter 32-15, are a violation of procedural and substantive due process under Art. 1, § 12 of the Constitution of North Dakota and of the United States Constitution, Amendment V as applied by Amendment XIV. These provisions also specifically and on their face violate the guarantee of a jury trial and the right to just compensation *before* a taking under art. 1, § 16 of the Constitution of North Dakota and are additionally unconstitutional for this textual reason.

[¶8] N.D.C.C. § 38-22-03(7) is an unconstitutional delegation of legislative power under N.D. Const. Art. IV, § 13 and *State v. Riggins*, 2021 ND 87, 959 N.W.2d 855.

[¶9] N.D.C.C. § 32-15-06 and N.D.C.C. § 24-05-09 cannot prohibit entitlement to just compensation under the Constitution. The second clause of the last sentence of N.D.C.C. § 32-15-06 prohibits just compensation. This violates the Constitution of North Dakota, Article I, Section 16 and Amendment V of the United States Constitution as applied to the states through Amendment XIV. The last sentence of Section 24-05-09 provides for damages, but Article I, Section 16 of the ND Constitution requires just compensation for property when it is “taken or damaged.” N.D. Const. art. I, § 16 (emphasis added). Just

compensation is not limited to “damages” or claims for “negligence, wantonness, or malice.”

[¶10] As such, the language “...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” must be struck. N.D.C.C. § 24-05-09 does not suffer from the same infirmity so long as “damages” as used in that section is interpreted to encompass “just compensation and damages” as the North Dakota Constitution has always required.<sup>1</sup>

### **Statement of Facts**

[¶11] In this case:

The Association's complaint [seeks a declaration that numerous statutes are] unconstitutional and should be declared void, therefore making [sic] a facial challenge rather than an as-applied challenge. "A claim that a statute on its face violates the constitution is a claim that the Legislative Assembly exceeded a constitutional limitation in enacting it, and the practical result of a judgment declaring a statute unconstitutional is to treat it 'as if it never were enacted.'" *Sorum v. State*, 2020 ND 175, ¶ 21, 947 N.W.2d 382 (citing *Hoff v. Berg*, 1999 ND 115, ¶ 19, 595 N.W.2d 285).

*Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 12, 978 N.W.2d 679.

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<sup>1</sup> Landowners recognize and explicitly acknowledge that finding the statute unconstitutional as argued by Landowners requires this Court to overrule in part *Cass Cnty. Joint Water Res. Dist. v. Brakke (In re 2015 Application for Permit to Enter Land for Surveys & Examination Associated with a Proposed N.D. Diversion & Associated Structures)*, 2016 ND 165, ¶ 15, 883 N.W.2d 844, 850 (holding, *inter alia*, that “[t]he District's permit for entry ‘constitutes no claim for relief in favor of the owner of the land except for injuries resulting from negligence, wantonness, or malice.’ N.D.C.C. § 32-15-06. The Landowners are not entitled to a jury trial where no such evidence exists.”).

[¶12] As in the prior litigation brought by Northwest Landowners Association, “[t]o resolve the claim, we need only interpret the enacted language of [the challenged statutes] and the relevant constitutional provisions to determine whether there is a conflict. . . . *Sorum* provides the correct framework for this facial challenge.” *Id.* at ¶ 15.

[¶13] This action relates to the prior ruling of this Court in *Nw. Landowners Ass'n v. State*, 2022 ND 150, 978 N.W.2d 679 striking down Senate Bill 2344 (2019). This action also relates to the ruling of the United States Supreme Court quoted therein, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), wherein the Court stated 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.’” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

[¶14] In *Nw. Landowners Ass'n v. State* this Court struck down parts of Senate Bill 2344 (2019), which authorized access to a landowner’s pore space by third parties without just compensation in violation of the state and federal constitutions. Senate Bill 2344 (2019) deprived private landowners of their property and of any remedies for temporary and permanent physical occupations of their property.

[¶15] The Bottineau County District Court enjoined the law enacted by Senate Bill 2344 (2019) on January 21, 2021 in Case Number 05-2019-CV-00085 stating: “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.”

[¶16] On August 4, 2022, this Court affirmed, stating:

Senate Bill 2344 constitutes a per se taking. It allows third-party oil and gas operators to physically invade a landowner’s property by injecting substances into the landowner’s pore space. As demonstrated in *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 34, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), physical invasion by water, even for a limited duration, results in a per se taking. Furthermore, because S.B. 2344 permits oil and gas operators to use pore space to temporarily or permanently store or dispose of gases and wastes, the bill authorizes an occupation of the landowners’ property. Similar to the unconstitutional regulation in *Cedar Point Nursery*, S.B. 2344 grants oil and gas operators a right of access to the landowners’ private property. Further, as in *Loretto*, 458 U.S. at 436, S.B. 2344 restricts landowners from having any control over the ‘timing, extent, or nature of the invasion.’

*Nw. Landowners Ass’n v. State*, 2022 ND 150, ¶ 26, 978 N.W.2d 679 (emphasis added).

[¶17] In *Sorum v. State*, 2020 ND 175, 947 N.W.2d 382, this Court stated:

Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal.

A constitution must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect. A facial challenge is purely a question of law because the violation, if any, occurs at the point of enactment by virtue of the Legislative Assembly enacting a law prohibited by the constitution. *Id.* A violation that occurs at the time of enactment does not depend on any facts or circumstances arising later.

*Sorum*, 2020 ND, at ¶ 19 (internal quotes and cites omitted).

[¶18] “No consideration of circumstances is necessary to resolve a facial challenge because the claim is that upon enactment, the legislation has an immediate unconstitutional legal effect.” *Nw. Landowners Ass’n v. State*, 2022 ND 150, ¶ 14, 978 N.W.2d 679.

[¶19] The District Court appeared to treat enactment dates as factual matters:

At the outset, the Court notes Plaintiffs did not refute the enactment dates laid out in ¶ 44 and footnote 4 of State Defendant's Brief in Support of Summary Judgment. *Index* at 184. The amalgamation for CO2 storage statute, N.D.C.C. § 38-22-10, and the statute giving NDIC authority to grant exceptions, N.D.C.C. § 38-22-03(7), were enacted in 2009.

(R248:2:4, Order Granting Summary Judgment).

[¶20] While the Landowners did not comment on the date of enactment during the briefing, this is not a factual issue and the District Court's conclusion is wrong as a matter of law. While it is true that North Dakota approved N.D.C.C. ch. 38-22 in 2009, that is not the only relevant legal issue with respect to the enactment of a state-approved program under a federal regulatory regime, which is precisely what Chapter 38-22 is. Pursuant to 40 C.F.R. 147.1751, North Dakota approved its program in 2009, but it was not valid, enforceable or actionable until enacted by the United States Environmental Protection Agency on **April 24, 2018**. 40 C.F.R. 147.1751. *See also*, 83 Fed. Reg. 17758 (Vol. 83, No. 079, April 24, 2018). Pursuant to law:

The UIC Program for Class I, III, IV, and V wells in the State of North Dakota, except those located on Indian lands, as defined under 40 CFR 144.3, is the program administered by the North Dakota Department of Environmental Quality, approved by the EPA pursuant to section 1422 of the SDWA. Notification of this approval was published in the Federal Register on April 15, 2019; the program is effective May 15, 2019. The UIC Program for Class VI wells in the State of North Dakota, except those located on Indian lands, is the program administered by the North Dakota Industrial Commission (NDIC), approved by the EPA pursuant to section 1422 of the SDWA. Notification of this approval was published in the Federal Register on April 24, 2018; the effective date of the NDIC UIC Class VI program is April 24, 2018. The State-administered UIC programs for Classes I, III, IV, V, and VI consist of the following elements, as submitted to the EPA in the State's program applications.<sup>2</sup>

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<sup>2</sup> The "following elements" referenced for Class VI wells then refer to N.D.C.C. ch. 38-22, N.D.C.C. §§ 38-08-16 & 38-08-17, and N.D.A.C. §§ 43-05-01-01 through 43-05-01-20.

40 C.F.R. § 147.1751 (emphasis added).

[¶21] This action was served on the State of North Dakota on May 31, 2023. (R1-7 - Complaint, Summons, and Affidavits of Service).

### Argument

**I. Landowners' claims are properly brought as a facial challenge because the laws cannot be validly applied under any set of circumstances, and summary judgment should have been granted in Landowners' favor.**

[¶22] The challenged amalgamation legislation has an unconstitutional legal effect because in no circumstances is the explicit due process required by Article I, § 16 of the ND Constitution provided by the amalgamation statutes, and the inevitable authorizations of physical invasions without just compensation through the amalgamation statutes are similarly unconstitutional in every possible legal application.

[¶23] The “no set of circumstances” test referenced in *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 2018 ND 71, ¶ 37, 908 N.W.2d 442 and *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) has been given negative treatment in recent years. *See Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 14, 978 N.W.2d 679. But the issue is with treating the “under no set of circumstances” standard as a threshold for a facial challenge in all instances. It is not.

[¶24] But it is instructive in some instances as a matter of logic. The courts abandoned the standard because it is not a *necessary condition* for there to be no set of circumstances under which a law can be constitutionally applied in order for it to be facially unconstitutional. This Court said as much in *Nw. Landowners Ass'n. Id.* But, it is a *sufficient condition* to prevail on a facial challenge if it can be shown that there is no set of circumstances under which the law can be constitutionally applied. And that is the case here with the amalgamation laws, both because the challenged laws inevitably and only

result in takings without just compensation on their face, and also because they violate procedural and substantive due process on their face. *See* art. I, § 16, Constitution of North Dakota and art. I, §§ 1&12. Additionally, Section 32-15-06 prohibits just compensation without proof of negligence, wantonness, or malice and this conflicts with the guarantee of just compensation in the Constitution that pre-existed that survey statute.

**A. N.D.C.C. ch. 38-22 authorizes an unconstitutional taking on its face and can have no other effect when applied.**

[¶25] North Dakota Century Code Chapter 38-22 provides authority and procedures for the North Dakota Industrial Commission to authorize the geologic sequestration of carbon dioxide. N.D.C.C. § 38-22-10 is unconstitutional on its face.

[¶26] N.D.C.C. § 38-22-10 provides: “... the commission may require that the pore space owned by nonconsenting owners be included in a storage facility and subject to geologic storage.”

[¶27] N.D.C.C. § 38-22-02 defines “storage facility” as “...the reservoir, underground equipment, and surface facilities and equipment used or proposed to be used in a geologic storage operation...” N.D.C.C. § 38-22-02 defines “geologic storage” as “...the permanent or short-term underground storage of carbon dioxide in a storage reservoir.” N.D.C.C. § 38-22-02(6) defines “reservoir” to mean “a subsurface sedimentary stratum, formation, aquifer, cavity, or void, whether natural or artificially created, including oil and gas reservoirs, saline formations, and coal seams suitable for or capable of being made suitable for injecting and storing carbon dioxide.”

[¶28] N.D.C.C. § 38-22-08(14) provides that “[b]efore issuing a permit, the commission shall find... [t]hat all nonconsenting pore space owners are or will be equitably compensated.”

[¶29] The Constitution of North Dakota, Article I, Section 16 states: “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... . Compensation shall be ascertained by a jury, unless a jury be waived.”

[¶30] N.D.C.C. § 38-22-10 authorizes the North Dakota Industrial Commission to “allow[] third-party ... operators to physically invade a landowner’s property by injecting substances into the landowner’s pore space” which is precisely what the Supreme Court of North Dakota ruled is a *per se* taking because it constitutes a physical invasion of the landowners’ property. *Nw. Landowners Ass’n v. State*, 2022 ND 150, ¶ 26, 978 N.W.2d 679. “As demonstrated in *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 34, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), physical invasion by water, even for a limited duration, results in a *per se* taking.” *Id.* So does invasion by carbon dioxide.

[¶31] Although N.D.C.C. § 38-22-08(14) requires the commission to find that all nonconsenting pore space owners are or will be equitably compensated, this finding is not a suitable replacement for just compensation and the safeguards guaranteed by the Constitution of North Dakota and Chapter 32-15.

[¶32] The Constitution requires that just compensation be paid before any taking of private property, and a determination and payment of just compensation, not equitable compensation, is constitutionally required before this taking can occur. N.D. Const. art. I, § 16 (“...without just compensation having been first made to, or paid into court for the owner...”). A landowner must also be given a jury trial for this determination unless it is waived. *Id.* (“Compensation shall be ascertained by a jury, unless a jury be waived.”).

[¶33] In addition to authorizing an unconstitutional taking of private property, N.D.C.C. § 38-22-10 allows the North Dakota Industrial Commission to take private property by fiat without any of the constitutional or statutory safeguards in Article I, Section 16 of the ND Constitution or Chapter 32-15 of the Century Code. This blatant attempt to bypass constitutional and other safeguards for protection of private property is arbitrary and violates both substantive and procedural due process requirements because there is simply no justification under any due process analysis for removing explicit rights such as the right to just compensation before a taking and for a jury to assess just compensation.

[¶34] Intentionally bypassing the safeguards of the North Dakota Constitution and Chapter 32-15 and allowing the NDIC to take private property by fiat through administrative proceedings without payment of just compensation determined by a jury violates notions of fundamental fairness and is arbitrary and unreasonable and violative of both substantive and procedural due process under the North Dakota and United States Constitutions. The Legislative Assembly cannot bypass the due process afforded by Article I, Section 16 of the North Dakota Constitution by authorizing an administrative process that skirts its explicit procedural safeguards. “[I]t is settled law that the government cannot do indirectly what it is barred from doing directly when constitutional rights are implicated.” *Patrolmens Benevolent Assn of the City of N.Y., Inc. v. City of N.Y.*, 2004 U.S. Dist. LEXIS 18172, at \*40-41 (S.D.N.Y. Aug. 19, 2004) (citing *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990)).

**B. N.D.C.C. ch. 38-25 authorizes an unconstitutional taking on its face and can have no other effect when applied.**

[¶35] North Dakota Century Code Chapter 38-25 provides authority and procedures for the North Dakota Industrial Commission to authorize the geologic storage of oil and gas. N.D.C.C. § 38-25-08 is unconstitutional on its face.

[¶36] N.D.C.C. § 38-25-08 provides in part: "... the commission may require the interest owned by the nonconsenting owners be included in an approved storage facility and subject to geologic ...."

[¶37] N.D.C.C. § 38-25-01 defines "storage facility" as "the reservoir, salt cavern, underground equipment, and surface facilities and equipment used or proposed to be used in an underground storage operation." N.D.C.C. § 38-25-01 defines "geologic storage" as "the underground storage of oil or gas in a storage reservoir or salt cavern." N.D.C.C. § 38-25-01(8) defines "reservoir" as "a subsurface sedimentary stratum, formation, aquifer, or void, whether natural or artificially created, including oil and gas reservoirs and saline formations suitable for or capable of being made suitable for injecting, storing, and withdrawing oil or gas...."

[¶38] N.D.C.C. §§ 38-25-05(18), 38-25-06(15), and 38-25-07(16) all generally state that the commission must find that all nonconsenting owners are or will be equitably compensated before issuing a permit.

[¶39] N.D.C.C. § 38-25-08 authorizes the North Dakota Industrial Commission to "allow[] third-party ... operators to physically invade a landowner's property by injecting substances into the landowner's pore space" which is precisely what the Supreme Court of North Dakota ruled is a *per se* taking because it constitutes a physical invasion of the landowners' property. *Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 26, 978 N.W.2d

679. “As demonstrated in *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), physical invasion by water, even for a limited duration, results in a per se taking.” *Id.* So does invasion by natural gas.

[¶40] The Constitution requires that just compensation be paid before any taking of private property, and a determination and payment of just compensation, not equitable compensation, is constitutionally required before this taking can occur. N.D. Const. art. I, § 16 (“...without just compensation having been first made to, or paid into court for the owner...”). A landowner must also be given a jury trial for this determination unless it is waived. *Id.* (“Compensation shall be ascertained by a jury, unless a jury be waived.”).

[¶41] The amalgamation statutes are unconstitutional and must be struck.

**C. The amalgamation statutes under N.D.C.C. § 38-22-10 and § 38-25-08 violate substantive and procedural due process.**

[¶42] The North Dakota Constitution requires payment of just compensation before a taking occurs, and it also requires that just compensation be decided by a jury. Constitution of ND, art. I, § 16. The failure of the amalgamation statutes at §§38-22-10 and 38-25-08 to provide for these rights is not part of a takings claims here – the statutes are unconstitutional on their face because their only possible legal effect is to authorize an illegal taking.

[¶43] There is also a separate due process claim for failure to provide the process required explicitly by the North Dakota Constitution. Article I, § 16 (“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...” and “Compensation shall be ascertained by a jury, unless a jury be waived.”) (emphasis added). These are fundamental rights that landowners in North Dakota have to protect their property. Article I, Section 1.

[¶44] “History may be examined to decide whether a right is fundamental under our Constitution. However, that is not our starting point. We need not resort to the historical record when the Constitution's language is clear.” *Access Indep. Health Servs. v. Wrigley*, 2025 ND 26, ¶ 31 (internal citations and quotation omitted).

[¶45] “Where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly tailored to express only the legitimate state interests at stake. Therefore, state limitations on a fundamental right ... are permissible only if they survive strict constitutional scrutiny.” *Hoff v. Berg*, 1999 ND 115, ¶ 13, 595 N.W.2d 285, 290. “Although not established by our precedent, other state courts have concluded that statutes subject to strict scrutiny are presumed *unconstitutional*.” *Access Indep. Health Servs. v. Wrigley*, 2025 ND 26, ¶ 35. The rights at issue here are unquestionably fundamental, and explicitly inalienable under our Constitution. N.D. Const. art. I, § 1 (“All individuals are by nature equally free and independent and have certain **inalienable rights**, among which are those of ... **acquiring, possessing and protecting property**....”).

[¶46] As to procedural due process, the standard is usually a flexible one, but here the standard is unnecessary given that the procedural due process of which the Appellants are being deprived is explicitly prescribed in the North Dakota Constitution Article I, Section 16. “Due process [also] requires that administrative proceedings conform with ‘[b]asic notions of fundamental fairness.’ *Morrell v. N.D. Dep't of Transp.*, 1999 ND 140, ¶ 9, 598 N.W.2d 111. ‘[D]ue process is flexible and must be analyzed on a case-by-case basis, balancing the competing interests and assessing whether the basic due process requirement

of fairness has been satisfied.” *Black Hills Trucking Inc. v. N.D. Indus. Comm'n*, 2017 ND 284, ¶ 30, 904 N.W.2d 326, 335.

[¶47] The North Dakota Court in *Bigelow v. Draper*, 6 N.D. 152, 166, 69 N.W. 570, 574 (1896) discussed the clear constitutional requirement for a jury to assess just compensation: “As the issues in such proceedings were not wont to be tried by a jury, as, with the exception of the matter of compensation, there is no constitutional right to such a mode of trial...” *Id.* (emphasis added).

[¶48] The Court explained, however, that “[t]he constitution requires this question of compensation to be left to a jury. Const. § 14. Section 5955 of the Rev. Codes, declares, in the language of the constitution, that ‘compensation shall in all cases be ascertained by a jury unless a jury is waived.’ In the absence of the provision contained in § 14, a jury trial in such cases could not be demanded as a constitutional right.” *Bigelow*, 6 N.D. 152, 164-65, 69 N.W. 570, 573 (1896) (emphasis added). “A jury decides the amount of compensation due for the taking, unless a jury is waived.” *Sauvageau v. Bailey*, 2022 ND 86, ¶ 9, 973 N.W.2d 207. “The determination of what constitutes just compensation is a question for the jury to resolve, unless the right to a jury is waived.” *Hultberg v. Hjelle*, 286 N.W.2d 448, 451 (N.D. 1979) (emphasis added).

[¶49] And just compensation must be paid to the owner or into the court before a taking can occur. “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).

[¶50] The North Dakota Constitution also provides a fundamental right of protecting property. ND Constitution, art. I, § 1. In a society of laws, protecting property is done through the legal process, and there is legal process explicitly required to take private property set forth in Article I, Section 16 of the North Dakota Constitution and Chapter 32-15 of the Century Code. As a federal judge in North Dakota said recently, “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 v. Hoffmann et al.*, No. 1:18-cv-078, 2022 U.S. Dist. LEXIS 250348, at \*17 (D.N.D. Nov. 1, 2022). Protecting their private property is in the blood of North Dakota landowners, and the Constitution preserved that right of protection in the procedural safeguards in Article I, Section 16.

[¶51] The amalgamation statutes attempt to substitute a finding that landowners “are or will be” “equitably” compensated, and this is a violation of both the substantive and procedural due process rights; specifically the Landowners’ fundamental right to own and protect their property as enshrined in Article I, Section 1 of the Constitution of North Dakota. The Landowners are also entitled to have just compensation (not “equitable compensation”), and they are entitled to have a jury determine just compensation before their property is taken. Because the amalgamation statutes strip landowners of their fundamental right to protect their property by taking away the safeguards of Article I, Section 16 they violate procedural and substantive due process, and they should be struck

down. There is no compelling state interest in removing the constitutionally protected fundamental rights of landowners to protect their property.

**D. N.D.C.C. § 38-22-03(7) is an unconstitutional delegation of legislative authority to the North Dakota Industrial Commission that violates the principle of separation of powers.**

[¶52] N.D.C.C. § 38-22-03(7) states that the NDIC has authority to “grant, for good cause, exceptions to this chapter’s requirements and implementing rules.” The reference to “this chapter’s requirements” is to the entirety of Chapter 38-22.

[¶53] This is an unconstitutional delegation of legislative power to the NDIC by the Legislative Assembly. Pursuant to Article IV, Section 13 of the Constitution of North Dakota, “[n]o law may be enacted except by a bill passed by both houses....”

[¶54] Granting the NDIC the authority to suspend the operation of any provision of Chapter 38-22 allows the commission to essentially rewrite, ignore, or selectively apply the law in any situation based on its own determination of whether “good cause” exists. This is a delegation of a non-delegable legislative power and even if it was a delegable power, it contains no reasonable guidelines for implementation. Delegating the legislative authority to an executive agency to suspend the entirety of a “chapter’s requirements” is unconstitutional on its face.

Except as otherwise provided in the constitution, the Legislature may not delegate legislative powers to others . . . ." *Kelsh v. Jaeger*, 2002 ND 53, ¶ 21, 641 N.W.2d 100. However, the Legislature may delegate powers which are not exclusively legislative and which the Legislature cannot conveniently do because of the detailed nature. *Stutsman Cty. v. State Historical Soc’y of N.D.*, 371 N.W.2d 321, 327 (N.D. 1985).

When determining whether there has been a proper delegation of power from the legislature to the executive branch, this Court has recognized that the ‘distinction between a delegable and non-delegable power was whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the

Legislature.’ *Stutsman Cty.*, 371 N.W.2d at 327 (citing *Ralston Purina Co. v. Hagemeister*, 188 N.W.2d 405 (N.D. 1971)).

*State v. Riggan*, 2021 ND 87, ¶¶ 28-29, 959 N.W.2d 855 (emphasis added).

[¶55] The Court has upheld delegations only when there are “reasonable guidelines for how the delegated power is to be implemented.” *Id.* at ¶ 30.

[¶56] The delegation of the power in N.D.C.C. § 38-22-03(7) to grant exceptions to any provisions of an entire chapter of the Century Code does not comply with the requirements set forth in *State v. Riggan*, 2021 ND 87, 959 N.W.2d 855. For that reason it violates the principle of separation of powers and is unconstitutional. It should be struck down.

**E. Pre-condemnation survey authorizations cannot limit entitlement to just compensation.**

[¶57] A landowner must be entitled to damages and just compensation under art. 1, § 16 of the North Dakota Constitution if there is evidence of damages arising from a precondemnation survey, or evidence that a survey conducted pursuant to N.D.C.C. § 32-15-06 exceeds the scope of permissible access (which is governed by what was understood to be a non-invasive precondemnation survey at the time that law was adopted in 1895 and, loosely speaking, would have been a surveyor with a chain and a mule).

[¶58] Sections 32-15-06 and 24-05-09 authorize entities who may have authority<sup>3</sup> to condemn to physically access private property to conduct surveys, take soil samples, and conduct other activities on the property. *See generally Cass Cnty. Joint Water Res. Dist. v. Brakke*, 2016 ND 165, 883 N.W.2d 844. Landowners’ claim that these are unconstitutional

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<sup>3</sup> N.D.C.C. § 32-15-06 provides authority to any entity merely in the “category of persons entitled to seek eminent domain.” *Square Butte Elec. Coop. v. Dohn*, 219 N.W.2d 877, 883 (N.D. 1974).

authorizations of physical invasions without just compensation in violation of art. 1, § 16 of the Constitution of North Dakota and of the United States Constitution, Amendment V (as applied through Amendment XIV). In *SCS Carbon Transp. LLC v. Malloy*, 2024 ND 109, ¶ 23, 7 N.W.3d 268, this Court held that the precondemnation survey laws are background principles of property law, but the Court did not directly address one important and salient issue. The Court explained:

Despite the significant textual differences between the state and federal constitutional provisions, in this case the constitutional question under each turns on essentially the same legal-historical question: did the people of North Dakota in 1889 understand the eminent domain power to take [] private property for public use to encompass a right of entry for pre-condemnation examinations and surveys? If yes, then the original public meaning of the 1889 constitution, continued in effect through today in relevant part, does not conflict with the entry statute. Under the Fifth Amendment, answering the same question in the affirmative would establish a longstanding background principle that property rights under state law do not include the right to bar entry to pre-condemnation surveyors.

*SCS Carbon Transp. LLC v. Malloy*, 2024 ND 109, ¶ 23, 7 N.W.3d 268.

[¶59] The language of N.D.C.C. § 32-15-06 includes the following language: “...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.” This verbiage in the statute does not align with what this Court said about background principles – specifically, that they are based on how the people of North Dakota would have understood the eminent domain power in 1889 and whether it encompasses such surveys. Although this Court has ruled that such surveys do not inhere in the right to exclude, this does not answer a second question. If the surveys cause damage to the land, or impact the value of the property, or cause lost rent, or result in any number of potential damages or losses to the owner, there is no reason to believe that the people of North Dakota in 1889 would not have also

assumed that their Constitutional provision requiring just compensation for any property taken or damaged also still applied. The State and this Court have referred to the Thomas Cooley treatise, but that authority contains no support for the archaic limitation on just compensation in N.D.C.C. § 32-15-06. See Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* at 694 (5th ed. 1883) (“Cooley treatise”); See also *SCS Carbon Transp. LLC v. Malloy*, 2024 ND 109, ¶27, 7 N.W.3d 268.

[¶60] The section of the treatise cited in *Malloy* is from the chapter on eminent domain, which contains headings such as “What Property is Subject to the Right” and “The Necessity for the Taking” and “What Constitutes a Taking of Property” and “Compensation for Property Taken”. It is in the last section, “Compensation for Property Taken,” where the quoted language can be found. That chapter begins with the command: “It is a primary requisite, in the appropriation of lands for public purposes, that compensation shall be made therefor.” Cooley treatise, p.693. The language just preceding and following the quoted language is critical to contextualize the verbiage quoted by this Court and the State, because it shows that Cooley was discussing the *timing* of an assessment and payment of just compensation, far from agreeing with any principle that just compensation is never *required*. He said, placing his own emphasis:

The *time* when the compensation must be made may depend upon the peculiar constitutional provisions of the State. In some of the States, by express constitutional direction, compensation must be made before the property is taken. No constitutional principle, however, is violated by a statute which allows private property to be entered upon and temporarily occupied for the purpose of a survey and other incipient proceedings, with a view to judging and determining whether or not the public needs require the appropriation, and, if they do, what the proper location shall be; and the party acting under this statutory authority would neither be bound to make compensation for the temporary possession, nor be liable to action of

trespass.<sup>2</sup> When, however, the land has been viewed, and a determination arrived at to appropriate it, the question of compensation is to be considered....

Cooley Treatise, p.694. Significantly, footnote 2 contained within this quote collects a number of old cases on the issue. In *Bloodgood v. Mohawk & Hudson R.R. Co.*, 14 Wend. 51, 1835 N.Y. LEXIS 120 (N.Y. 1835), the Court explained that with a precondemnation survey statute, the damages and just compensation, if any, must of course be determined and assessed *after* the survey else it is as yet unknown what damages or just compensation (if any) is owed. The Court said “

The entry and possession and use are to precede the purchase and appraisal, and the Commissioners are to ‘determine the damages which the owner or owners of the land so entered upon by the said Corporation has or have sustained by the occupation thereof.’ The damages are to be the result of the occupation or taking of the land. The occupation must, of course, precede the assessment of the damages.

*Id.* 14 Wend. 55 (emphasis added).

[¶61] In *Fox v. W. P. R. Co.*, 31 Cal. 538, 556 (1867), the court explained:

Under this view the only objection which can be urged against the statute is that it may by possibility be made to justify a trespass in the event the corporation should finally conclude not to take the land. But the answer to this is that the possibility does not exist, for the moment the time has passed for making the compensation, or the moment the corporation elects not to take the land, the shield interposed between it and the individual pending the proceedings on the score of trespass, is withdrawn, and the latter has his remedy by action against the former for the recovery of his land and any damages he may have sustained by reason of the trespass.

[¶62] This passage illustrates the problem with N.D.C.C. § 32-15-06. The cases relied upon by Cooley presume that subsequent to the surveys the land is actually taken, but as in *Fox*, it is recognized this may not always occur. When it does not, even if the entry was initially shielded, that shield is withdrawn and opens the entrant to an action for trespass – but under N.D.C.C. § 32-15-06, it would only be a trespass if the landowner could prove

the elements of trespass and *then also* prove: “negligence, wantonness, or malice.” That standard is exceedingly difficult; cryptic; potentially self-contradictory in its application; archaic; and *unconstitutional*. To the extent the “damages” referenced under N.D.C.C. § 24-05-09 are anything but just compensation and damages as defined by art. 1, § 16 of the North Dakota Constitution that statute is similarly infirm.

[¶63] As such, the language “...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” must be struck. N.D.C.C. § 24-05-09 does not suffer from the same infirmity so long as “damages” as used in that Section is interpreted to encompass “just compensation and damages” as the North Dakota Constitution has always required.

[¶64] Thus, even if such surveys are considered part of the “background principles” of North Dakota property law, it is inarguable that at the same time these “background principles” existed so did the Constitution’s explicit guarantee of just compensation and damages for takings of private property. And this guarantee cannot constitutionally be limited to instances of negligence, wantonness, or malice.

## **II. No statute of limitations acts as a time bar to claims that statutes are facially unconstitutional.**

### **A. There is not a statute of limitations that applies here.**

[¶65] The District Court’s holding that a statute of limitations applies to this action is incorrect. It cites to *Hager v. City of Devils Lake*, 2009 ND 180, ¶ 34, 773 N.W.2d 420, which involved a claim for compensation for a taking in an inverse condemnation case and based on a theory of implied contract for the promise to pay for the taking, and is therefore inapposite. Application of a statute of limitation to a claim for just compensation has always been allowed because such claims are waivable, as was even discussed by Cooley:

“But if the remedy is adequate, and the party is allowed to pursue it, it is not unconstitutional to limit the period in which he shall resort to it, and to provide that, unless he shall take proceedings for the assessment of damages within a specified time, all right thereto shall be barred.[] The right to compensation, when property is appropriated by the public, may [] always be waived....” Cooley Treatise, pp.695-96 (emphasis added). This is inapposite to a claim in a North Dakota court that a North Dakota law violates the North Dakota Constitution on its face.

[¶66] Equally inapposite is the other case relied upon by the District Court, *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez*, 659 F.3d 42, 50 (1st Cir. 2011) (“*Juarbe-Jiménez*”). The consideration of statutes of limitation in federal courts for 42 U.S.C. § 1983 claims such as in *Juarbe-Jiménez* is circular. “In determining the proper statute of limitations for actions brought under 42 U.S.C. § 1983, we look to the statute of limitations for personal injury actions in the forum state.” *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004). The District Court noted this, but it failed to ask why a federal court would use the state’s *personal injury* statute of limitations if indeed there is a statute of limitations applicable to facial constitutional challenges here and the answer of course is that there is not. Application of state statutes of limitations by federal courts for § 1983 actions has little bearing on whether a *state* statute of limitations bars a *state* court from considering a claim that a *state* statute violates the *state* constitution. The Legislative Assembly cannot violate the Constitution by mere artifice of passing a law saying that if it is not challenged in a certain time its unconstitutional laws stand.

[¶67] It is also worth noting that in *Maldonado*, the Ninth Circuit said “We join the Fourth Circuit in expressing serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations, see *Nat’l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991). . . .” *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004).

[¶68] The Ninth Circuit noted in a footnote that “We note that a significant number of district courts have held that facial challenges under the First Amendment are not subject to the statutes of limitation applicable to § 1983 actions.” *Id.* at 955, n.6. It continued:

We also note that facial challenges under the First Amendment are fundamentally different from those brought under the Takings Clause. In the latter context, we have held that a statute of limitations can bar facial challenges. See *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687-88 (9th Cir. 1993).

However, as we explained in *Levald*, in the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

*Maldonado v. Harris*, 370 F.3d 945, 955, n.6. (emphasis added).

[¶69] While this might appear at first glance to mean a statute of limitations *can* be applied here because this action asserts violations of the takings clause, that misunderstands the nature of the claims. Unlike the claims in *Northwest Landowners Ass’n v. State*, 2022 ND 150, 978 N.W.2d 679, Appellants do not claim that the challenged statutes effectuated a taking of their property upon enactment as SB2344 took their pore space. Rather the claims are that the challenged statutes violate the provisions of the North Dakota Constitution on their face and can serve no purpose in their implementation *other than* to effectuate such an illegal taking. The amalgamation laws do result in a taking every time they are applied, but they are also independently unconstitutional on their face because by

their very language it is *necessarily the case* that *any application* of the amalgamation law will violate the Constitution (specifically Article I, Section 16).

[¶70] The amalgamation laws violate substantive and procedural due process because Article I, § 16 actually provides mandatory due process requirements, most importantly in the form of a jury trial and provision of just compensation before the taking, not a finding that landowners “are or will be” “equitably” compensated at some point as in N.D.C.C. § 38-22-08(14). Because the amalgamation provisions require a violation of the due process requirements enshrined in Article I, § 16, they can only have the effect of violating the North Dakota Constitution. They are therefore violative of the N.D. Constitution on their face. That can always be challenged for the same reasons as the First Amendment challenges referenced by the Ninth and Fourth Circuits cited above.

[¶71] And this Court has explained why. “The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it.” *State ex rel. Linde v. Taylor*, 33 N.D. 76, 84-85, 156 N.W. 561, 563-64 (1916) (emphasis added).

[¶72] This action and the claims asserted are based on “the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). The judicial branch of our government has both the ever-present jurisdiction and duty to interpret the law and enforce the Constitution.

[¶73] A statute of limitations cannot bar the judiciary from declaring a law void that is repugnant to the Constitution on its face. *Id.* A legislative body cannot declare that it may act in contravention of a Constitution; not for any reason, including a passage of time without the People challenging its unconstitutional act – for its act was void to begin with and the Courts merely declare this to be so as the interpreters of our laws. This Court discussed the North Dakota corollary of the principles first espoused in *Marbury v. Madison* in *State v. First State Bank* and its discussion provides a helpful reminder of the important principles guiding the Court in this action:

Before entering into a discussion of the questions raised by the appellant, we deem it proper and desirable to consider some of the fundamental rules which must guide us in determining them. We are asked to declare a legislative enactment void. The judicial power thus invoked is one of the highest which the people by the Constitution have conferred upon this court, and imposes upon the judges responsibility and duty as grave and solemn as the power is high. The duty imposed is the very source of the power granted. For in establishing government, both in state and nation, the people adopted written constitutions, which it was agreed should constitute the supreme law....

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The Constitution emanates from the people, and is the supreme law. It creates all the departments of government, and is the charter of their authority. This applies as well to the legislative as to the judicial department. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution was written.' *Ibid.* The legislature was created by the Constitution and vested with power to enact laws conformable to the provisions of the Constitution... .

*State v. First State Bank*, 52 N.D. 231, 242-44, 202 N.W. 391 (1924) (emphasis added).

[¶74] When a challenge is leveled that the Legislative Assembly violated the Constitution in enacting laws, and when a Court is convinced this is the case, it has its own Constitutional obligation to defend the Constitution. *See Bd. of Trs. v. N.D. Legislative Assembly*, 2023 ND 185, ¶¶ 89-91, 996 N.W.2d 873 (explaining that granting a stay is not

possible if the effect would be to allow a constitutional law to remain enforceable because the law requires it be treated as *void ab initio*).

[¶75] This principle is recognized in other contexts – for example – when a governmental body acts beyond its own jurisdiction. While in some circumstances governmental action must be appealed and such remedies exhausted, when governmental bodies act in violation of the constitution and clearly beyond their authority their actions can be attacked collaterally. *See Olson v. Cass Cty.*, 253 N.W.2d 179, 182 (N.D. 1977) (“...the policy of ensuring the finality of board decisions must give way to the policy of holding a body accountable when it acts without jurisdiction. We agree with the plaintiffs that an action taken by a person or persons entirely lacking jurisdiction over the substance of the action may be challenged collaterally.”).

[¶76] A statute of limitations is impotent to shield an unconstitutional law from the supreme power of the Constitution and the judiciary’s mandate to enforce that Constitution as the Supreme Law of the Land.

**B. N.D.C.C. chapter 38-22 was not approved until 2018.**

[¶77] Even if it were not the case that no statute of limitations applies here, the action related to Chapter 38-22 would not be untimely anyway. Pursuant to 40 C.F.R. 147.1751, North Dakota approved its program in 2009, but it was not enacted by the United States Environmental Protection Agency until **April 24, 2018**. 40 C.F.R. 147.1751. *See also*, 83 Fed. Reg. 17758 (Vol. 83, No. 079, April 24, 2018). And this is true as a matter of law. *Id.* The state implementation of the UIC programs become effective when incorporated into federal law by the EPA as part of its enforcement authority under the SDWA. *See generally United States v. Wright*, 988 F.2d 1036, 1038-39 (10th Cir. 1993) (noting that a “grant of

primary authority [to states] is not a grant of exclusive authority [and that under the SDWA] EPA is actively involved in assuring state compliance with national safe water standards.”).

[¶78] Pursuant to law:

The UIC Program for Class I, III, IV, and V wells in the State of North Dakota, except those located on Indian lands, as defined under 40 CFR 144.3, is the program administered by the North Dakota Department of Environmental Quality, approved by the EPA pursuant to section 1422 of the SDWA. Notification of this approval was published in the Federal Register on April 15, 2019; the program is effective May 15, 2019. The UIC Program for Class VI wells in the State of North Dakota, except those located on Indian lands, is the program administered by the North Dakota Industrial Commission (NDIC), approved by the EPA pursuant to section 1422 of the SDWA. Notification of this approval was published in the Federal Register on April 24, 2018; the effective date of the NDIC UIC Class VI program is April 24, 2018. The State-administered UIC programs for Classes I, III, IV, V, and VI consist of the following elements, as submitted to the EPA in the State’s program applications.<sup>4</sup>

40 C.F.R. § 147.1751 (emphasis added).

[¶79] This action was served on the State of North Dakota on May 31, 2023. (R1-7 - Complaint, Summons, and Affidavits of Service). The District Court applied a six or a ten-year statute of limitations, but even applying a six-year statute of limitations only actions served after April 24, 2024 would be barred. The claims regarding Chapter 38-22 are not.

### **Conclusion**

[¶80] When landowners are treated fairly it is possible to reach agreements with almost all of them for use of their pore space, and if there is that 1% that do not agree, there is a process for taking private property through eminent domain that does not run afoul of the myriad constitutional violations that the so-called “amalgamation” statutes create. *See WBI*

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<sup>4</sup> The “elements” referenced for Class VI wells then refer to N.D.C.C. ch. 38-22, N.D.C.C. §§ 38-08-16 & 38-08-17, and N.D.A.C. §§ 43-05-01-01 through 43-05-01-20.

*Energy Transmission, Inc. v. Subsurface Easements for the Storage of Nat. Gas*, No. CV 18-88-BLG-SPW-TJC, 2020 U.S. Dist. LEXIS 144001, at \*1 (D. Mont. July 6, 2020).

Whatever sky-is-falling arguments the Appellees might make in response, Landowners ask this Court to recall that just over the border eminent domain works just fine for gas storage rights. Practicalities aside, the Constitution is clear and the violations inherent in the challenged statutes are clear as well.

[¶81] “No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.” Alexander Hamilton, Federalist No. 78, (The Judiciary Department, McLEAN'S Edition, New York).<sup>5</sup>

[¶82] “‘The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution was written.’ The legislature was created by the Constitution and vested with power to enact laws conformable to the provisions of the Constitution... .” *State v. First State Bank*, 52 N.D. 231, 242-44, 202 N.W. 391 (ND 1924).

[¶83] As a North Dakota federal judge just said in striking down rules that have been on the books for decades: “Presidents rely on the Constitution and the laws of the United States, then leave it to the courts to decide which ones give them power. The Constitution separated the powers of government for very good reasons. The separation of powers doctrine is not an esoteric point of procedure that academics make a fuss about to get tenure. After centuries, we as Americans do not understand what it was like to live under

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<sup>5</sup> <https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470>.

a monarchy without checks and balances. People fought to separate these powers in a new form of government. People died for this new government because they saw what happened when all the power was held in one hand. Power can be taken by force, given, or lost inch by inch. It is the job of Congress to enact the law. It is the job of the President to enforce the law. It is the job of the Judiciary to determine the boundaries of the law.” *Iowa et al. v. Council on Env't Quality*, No. 1:24-cv-089, Doc. No. 145, pp.45-46 (D.N.D. February 3, 2025).

[¶84] It is not the prerogative of the Legislative Assembly to tell the Judiciary when it may or may not determine the boundaries of the law. That obligation was directed to the Judiciary when our Constitution separated out the powers of government, and the Legislature is powerless to tell the Judiciary it may not determine the boundaries of the law; and therefore equally powerless to tell the Judiciary it cannot strike a facially unconstitutional law from the books regardless of how long it has been on the books. The passage of time cannot protect a law that violates the Constitution on its face. That was the entire point of adopting a Constitution as the Supreme Law. Landowners respectfully request that this Court strike down the challenged laws as unconstitutional and prohibit their implementation and enforcement by the executive branch.

Dated: February 5, 2025.

Respectfully submitted,

*/s/ Derrick Braaten*

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**Certificate of Compliance**

The undersigned, as attorney for Plaintiffs, Appellants, and Cross-Appellees in the above matter, hereby certifies, in compliance with North Dakota Rule of Appellate Procedure 32, that the above brief was prepared with proportionally spaced, 12-point font typeface, and the total number of pages of the above Brief totals 37 pages.

Dated: February 5, 2025.

*/s/ Derrick Braaten*

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Derrick Braaten