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.	)
	)

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

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

ORAL ARGUMENT REQUESTED

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I. The doctrine of correlative rights does not apply to the amalgamation statutes, and regardless its application in this context proves that the challenged laws are unconstitutional takings.

[¶1] "The rule of capture ownership regime creates two major problems: overdrilling, and premature dissipation of natural reservoir energy. Conservation regulation arose as a response to these two problems. Eventually the concept of correlative rights, giving each owner over a common source of supply a fair opportunity to produce, without waste, its just and equitable share of the reservoir was developed." *1 The Law of Pooling and Unitization*, 3rd Edition, ch. 2 (emphasis added).

[¶2] An opinion from the Supreme Court of the United States, *Ohio Oil Co. v. State of Indiana*, explains the nature of correlative rights as they relate to state regulation and exercise of the police power. 177 U.S. 190 (1900). While the opinion and issues in that case related to venting of natural gas while producing oil from a common source, the discussion nonetheless illustrates well the competing interests that justify use of the police power through conservation statutes that allow force-pooling and force-unitization. It is also significant for its commentary on what the police power does not allow. While defendants also cite to this case, they miss the important points:

> [A]s to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a co-equal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others….

Id. at 209–10 (emphasis added). Pooling ensures an equitable *allocation* of a common resource.

[¶3] North Dakota's law regarding force-pooling interests contains the requirement that "[e]ach such pooling order must be made after notice and hearing, and must be upon terms and conditions that are just and reasonable, and that afford to the owner of each tract or interest in the spacing unit the opportunity to recover or receive, without unnecessary expense, that owner's just and equitable share." N.D.C.C. § 38-08-08 (emphasis added). It is the ownership interest in the reservoir which determines that equitable share.

[¶4] It is only through equitably allocating the resource that correlative rights are protected and the police power can justify adjusting the rights of co-owners in a common source of supply. Indeed, the North Dakota Supreme Court has gone a step further in oil and gas law and ruled that the mineral interest itself includes the inherent right to a cost-free interest and therefore that also is required when force pooling occurs or it will be an unconstitutional taking. In *Slawson v. North Dakota Indus. Comm'n*, this Court noted that part of the mineral estate includes the landowner's royalty. 339 N.W.2d 772, 777 (N.D. 1983). Correlative rights requires that the landowner must receive not only their working interest, but a cost-free royalty as well. *Id.* at 773.

[¶5] Correlative rights is "a right of the land owner to be protected against damage to a common source of supply and a right to a fair and equitable **share** of the source of supply." *Id.* at 774, n.1 (emphasis added). The language of N.D.C.C. § 38-22-08(14) requiring "equitable compensation" sounds similar but misses the mark. The State concedes that the nonconsenting owners must receive "their equitable *portion* of the revenues" and "their equitable *portion* of the proceeds" from the Class VI well but the State has failed to understand the import of this requirement. If the Courts agrees to its proposal to treat pore space owners as mineral owners, then it must do so as the law has always required – the

nonconsent landowners have correlative rights too and must be treated just as working interest owners are treated in the oil and gas context. And those rights would entitle them to their proportionate share of all revenue derived from the Class VI well injecting the CO2 just as they share in all revenue from an oil well.

[¶6] This Court explained it would be a taking otherwise: "We agree with the … rationale that unless the Commission can issue pooling orders retroactive to the date of first operations, an adjoining landowner may not receive his just and equitable share in a pool, thereby confiscating his property without due process." *Texaco, Inc. v. Indus. Comm'n*, 448 N.W.2d 621, 624 (N.D. 1989) (emphasis added). The nonconsenting property owner receives her "just and equitable share of that property," meaning the proportionate ownership percentage times all revenue generated from development of the common resource. That is also what Professor Righetti meant when she said correlative rights ensure each owner receives "his or her just and equitable share of that property."

[¶7] The point of the conservation programs is that "more oil and gas would ultimately be recovered." *Syverson v. N.D. State Indus. Comm'n*, 111 N.W.2d 128, 133 (N.D. 1961). In the *Syverson* case "the appellants themselves [agreed that the conservation program] will substantially increase the amount of oil and gas recovered from the field." *Id*. This is the entire reason that the conservation programs are not obvious takings of private property. It is not a *taking* because the overall effect of the conservation program is to produce *more oil* – so it cannot be a *taking*, it is quite literally a *giving*. The landowner must wait longer to get his equitable share of the oil, but the doctrine of correlative rights ensures that he receives his *full share* of the oil in the reservoir, or in the context of CCUS, it would simply be the revenue for injection of the CO2 such as the 45Q credits that are the revenue stream

for some commercial CCUS projects. *See* (R185:17:54) (Dr. Harju Report). But the key is that this is *why* the conservation laws allow force pooling as an exercise of the State's police power – these things *must be true*. The State continues to argue for an expansive scope to its police power while continuing to forget that even the police power is always subject to Constitutional limits.

[¶8] Just a couple hundred miles west of Bismarck near the border of North Dakota and Montana, there is a natural gas storage facility operated by WBI Energy in Fallon County, Montana. *WBI Energy Transmission, Inc. v. Subsurface Easements for the Storage of Nat'l. Gas*, No. CV 18-88-BLG-SPW-TJC, 2020 U.S. Dist. LEXIS 144001, at *1 (D. Mont. July 6, 2020). WBI used eminent domain law to condemn the rights necessary for that facility. The State's argument that providing due process and just compensation before taking private property is "killing the implementation of CCS" is unsupported. And importing oil and gas law does not get the defendants around paying the landowners anyway.

II. The *United States v. Causby* case and theory was already argued to this Court and the argument was rejected.

[¶9] Summit argues that "...given the consequences of deciding that Loretto applies to non-surface property, it is extremely unlikely that the Court considered and decided the issue" and "[i]t is doubtful that this Court intended to make air travel and forced-pooling unconstitutional in North Dakota. The only logical conclusion is that the Court never considered or decided the issue." Brief of SCS Carbon Transport LLC, et al., at ¶ 52. These statements are unsupported.

[¶10] This Court said: "Furthermore, although the use of pore space may not seriously interfere with a landowner's use of the rest of his land because the pore space is deep beneath the surface, *Loretto* held that compensation is required for physical invasions even

if the owner suffers only a 'minimal economic impact.'" Given the billions of dollars in government subsidies private CCS companies can obtain for such injections, no one can even credibly claim any of this will have a minimal economic impact. Appellees are simply trying to get around the obligation to pay the owners of the land hosting their projects. *See* (R185:15-17) (Dr. Harju Report).

III. SCS Carbon Transport is wrong that the Court lacks jurisdiction because 42 U.S.C. § 300j-7(a)(2) vests exclusive jurisdiction over Plaintiffs' claims in the United States Court of Appeals for the Eight Circuit.

[¶11] SCS Carbon Transport asserts in its brief that "Plaintiffs now explain on appeal that their challenge to Section 38-22-10 is, at least in part, a challenge to the EPA's approval of North Dakota's UIC program and its incorporation of that program into federal law." But this is not what Plaintiffs said and SCS Carbon Transport's entire argument is premised on a mistaken understanding of the argument. This action is a facial challenge claiming that the North Dakota Constitution voids statutes passed by the North Dakota Legislative Assembly that conflict with the constitutions. The presumption that 42 U.S.C. § 300j-7 would apply is premised on a plaintiff having challenged an action of the EPA Administrator. It is not the EPA's action that is being challenged, however – it is the laws passed by the North Dakota Legislative Assembly. NWLA's argument is simply that North Dakota's laws were dead letters until the EPA adopted them, making them enforceable by North Dakota. The statute of limitations could not begin to run until North Dakota was capable of enforcing the laws it passed because this is an action to enjoin the enforcement of those laws. But it is not that EPA approval that is being challenged. It is the law itself, passed by the North Dakota Legislative Assembly. And this lawsuit seeks to strike that law down and enjoin its continued enforceability and enforcement in North Dakota. That is not the type of action anticipated by 42 U.S.C. § 300j-7. The idea that the Eighth Circuit federal

court of appeals is the proper jurisdictional venue for this state constitutional challenge is so grotesquely anathema to the principles of federalism on which this country was founded it should be rejected out of hand for that reason alone.

IV. This is a facial challenge to strike down an unconstitutional law but not a takings claim and statutes of limitations cannot apply.

[¶12] The constitutional infirmity in the amalgamation statutes occurs at the time they are applied. While this would normally require a challenge to brought at the time of application, this is unnecessary when the laws cannot be applied constitutionally in any circumstance. *Cf. Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 2018 ND 71, 908 N.W.2d 442. The NDIC cannot provide a jury to determine just compensation. It may choose to issue a finding that equitable compensation is or *will be* paid, or it may choose not to issue that finding. The amalgamation statutes give it only that charge. It authorizes injections before payment of just compensation, because it can do no other thing when it applies the offending statutes. For this reason, these laws are repugnant to the Constitutions on their face. A statute of limitations has no power over the Constitution. The cases cited by the State are inapposite as they deal with claims for just compensation or facial takings, and the argument here is not a facial takings argument as was made in those cases. *See* Brief of State of ND, ¶ 48 (citing *Levald,* 998 F.2d at 688; *Hillcrest Prop., LLC v. Pasco Cnty.,* 754 F.3d 1279, 1282 (11th Cir. 2014) (citing *Levald* for this point); and *Kuhnle Brothers, Inc. v. Cnty. of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997) (same)). The claim here is that the laws challenged are repugnant to the Constitutions on their face. The applicable case here is a pillar of constitutional law. Because the State gives it short shrift, it is worth repeating Justice Marshall's remarkably applicable words from *Marbury v. Madison*.

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited,

and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury v. Madison, 5 U.S. 137, 176-78 (1803). Statutes of limitations are *ordinary acts*.

[¶13] North Dakota's Constitution also recognizes the supremacy of the Constitution of the United States: "the Constitution of the United States is the supreme law of the land." N.D. Const. art. I, § 23. A law that is repugnant to these Constitutions is void. The Legislative Assembly cannot protect its unconstitutional laws with the ordinary act of a statute of limitations. "[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 Ass'n 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)).

[¶14] Our Constitutions forbid what the North Dakota Legislative Assembly did when it passed the challenged laws. Those laws must be struck down because their entire and exclusive purpose and effect upon application is, by power of the government, to allow private industry to get around constitutional obligations to fully compensate private landowners for taking and using their private property.

[¶15] That is not how government works in America.

Dated: March 21, 2025.

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Certificate of Compliance

[¶16] The undersigned, as attorney for the 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 12 pages, inclusive.

Dated: March 21, 2025.

/s/ Derrick Braaten
Derrick Braaten