IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association, Mike Dresser, Sandra Short, and Swenson Living Trust, Plaintiffs, Appellants, and Cross-Appellees, and North Dakota Farm Bureau, Inc. Intervenor-Plaintiff, Appellant, and Cross-Appellee v. State of North Dakota, North Dakota Industrial Commission., Hon. Douglas Burgum in his official capacity as Governor of the State of North Dakota and as the Chairman and a member of the North Dakota Industrial Commission, 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, and	Supreme Court No. 20240298

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

Appeal from a Judgment, Entered August 29, 2024,
Case No. 05-2023-CV-00065
County of Bottineau, Northeast Judicial District
The Honorable Anthony Benson, District Judge, Presiding

REPLY BRIEF OF INTERVENOR-DEFENDANTS, APPELLEES, AND CROSS-APPELLANTS SCS CARBON TRANSPORT LLC, SCS PERMANENT CARBON STORAGE LLC, AND SUMMIT CARBON SOLUTION, LLC

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[¶ 1] The Northwest Landowners Association ("NWLA") and the North Dakota Farm Bureau ("NDFB") are requesting this Court to determine whether N.D.C.C. § 38-22-10 violates the Takings Clauses of the United States and North Dakota Constitutions. However, "it is well-settled that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary …" *Espeland v. Police Magistrate's Court of City of Grand Forks*, 78 N.D. 349, 359, 49 N.W.2d 394, 399 (1951).

[¶ 2] It is not "absolutely necessary" for this Court to determine the constitutionality of Section 38-22-10. The Court can resolve the dispute in this case on at least two other bases. First, the Court can and should determine that 42 U.S.C. § 300j-7(a) deprives it of jurisdiction. *See* Summit's Br. ¶¶ 17-22. Second, the Court could decide that Appellants' failure to exhaust their administrative remedy also deprives the Court of jurisdiction. *Id*. at ¶¶ 23-33.

[¶ 3] Alternatively, if the Court proceeds (unnecessarily) to decide whether Section 38-22-10 violates the Takings Clauses, then this Court should determine that it does not. Not every government-authorized physical invasion of property amounts to a taking. The government can authorize invasions of a landowner's airspace so long as the invasions do not "interfere[] with the enjoyment and use of the land." *United States v. Causby*, 328 U.S. 256, 266 (1946). Likewise, the government can authorize invasions of a landowner's subsurface so long as the invasions do not interfere with the enjoyment and use of the land. Accordingly, because the invasions of landowners' pore space authorized by Section 38-22-10

will never under any circumstances interfere with a landowner's enjoyment and use of their land, the statute does not violate the Takings Clauses.

ARGUMENT

I. Section 300j-7(a), 42 U.S.C., deprives this Court of jurisdiction.

[¶ 4] The Administrator of the United States Environmental Protection Agency approved Chapter 38-22 as a part of North Dakota's Underground Injection Control ("UIC") program. The federal courts of appeal have exclusive jurisdiction over any challenge to the Administrator's approval of a UIC program. 42 U.S.C. § 300j-7(a); *see also Western Nebraska Res. Council v. E.P.A.*, 793 F.2d 194, 197 (8th Cir. 1986). The present case is a challenge to Section 38-22-10. Therefore, this Court lacks jurisdiction. *See* Summit's Br. ¶¶ 17-22.

[¶ 5] NWLA disagrees. It claims that it is not actually challenging the Administrator's approval of Section 38-22-10. Rather, it is challenging the North Dakota Legislature's enactment of the statute. NWLA's Reply Br. ¶ 11.

[¶ 6] NWLA's argument fails for two reasons. First, NWLA is, in fact, challenging the Administrator's approval of Section 38-22-10. NWLA is arguing that Section 38-22-10 is unconstitutional because the statute authorizes the North Dakota Industrial Commission ("Commission") to take landowners' pore space. But NWLA also maintains that the statute "was not valid, enforceable or actionable until enacted by the [Administrator]." NWLA's Br. ¶ 20. Thus, without the Administrator approving Section 38-22-10, the statute would have no effect and NWLA would have no claim. As a result, NWLA is "essentially challenging the appropriateness of the EPA Administrator's action in approving a [statute it]

believe[s] to be unconstitutional." *Benning v. Browner*, No. CIV. A. 97-CV-7058, 1998 WL 717436, at *3 (E.D. Pa. Sept. 24, 1998).[1]

[¶ 7] Second, 42 U.S.C. § 300j-7(a) applies to more than just cases that involve a literal challenge to the Administrator's approval of a UIC program. The statute also applies to any case the resolution of which would have the effect of nullifying such approval. *See Stenberg*, 238 F.3d at 948.[2] Thus, whether NWLA is literally challenging the Administrator's approval of Section 38-22-10 is irrelevant. Section 300j-7(a) would still apply to this case because declaring Section 38-22-10 unconstitutional would nullify the Administrator's approval of that statute.

II. This Court also lacks jurisdiction because Appellants have not exhausted their administrative remedies.

[¶ 8] In its initial brief, Summit argued that the Court should dismiss this case because Appellants have not exhausted their administrative remedies. *See*

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[1] The court in *Benning* was interpreting 42 U.S.C. § 7607(b)(1), rather than 42 U.S.C. § 300j-7(a). Because the two statutes use identical language, however, courts interpreting § 300j-7(a) routinely rely on decisions interpreting § 7607(b)(1) as persuasive authority. *See, e.g.*, *State of Neb. ex rel. Stenberg v. United States*, 238 F.3d 946, 948 (8th Cir. 2001).

[2] Courts interpreting 42 U.S.C.A. § 7607(b)(1) have similarly held that "a claim need not be framed as a challenge to the [Administrator] for [42 U.S.C. § 7607(b)(1)] to apply." *California Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 507 (9th Cir. 2015). "Instead, [42 U.S.C. § 7607(b)(1)'s] scope extends to claims that, as a practical matter, challenge an [Administrator] final action …" *Id*.

Summit's Br. ¶¶ 23-33. In reply, NDFB argues that requiring exhaustion and allowing the Commission to make factual determinations and apply its expertise would not aid this Court in deciding whether Section 38-22-10 is constitutional. NDFB's Reply Br. ¶ 20. This argument is flawed for two reasons.

[¶ 9] First, the point of requiring exhaustion is not to aid this Court in deciding whether Section 38-22-10 is constitutional. The point is to help this Court avoid deciding that question entirely. If Appellants are required to exhaust their administrative remedies, the Commission might grant them adequate relief, thereby mooting their claims that Section 38-22-10 is unconstitutional.

[¶ 10] Second, requiring exhaustion would aid this Court in determining whether Section 38-22-10 is constitutional. As is made clear by the briefs filed in this matter, one of the primary issues in this case is whether the doctrine of correlative rights makes Section 38-22-10 constitutional. This Court has recognized that questions concerning correlative rights entail factual considerations and administrative expertise. *See* Summit's Br. ¶ 28. Therefore, this Court has required exhaustion in cases involving correlative rights to allow the Commission to make factual determinations and apply its expertise before the Court eventually decides the legal questions involved in the case. The Court should do the same here.

[¶ 11] NDFB also argues the Court should not require exhaustion because the Commission cannot grant NDFB the exact relief it requests, *i.e.*, a declaration that Section 38-22-10 is unconstitutional. *See* NDFB's Reply Br. ¶ 21. This Court has already rejected an identical argument. *See Long v. Samson*, 1997 ND 174, ¶ 13, 568 N.W.2d 602. It does not matter whether the Commission can provide NDFB its preferred relief. All that matters is whether the Commission can ensure

that Section 38-22-10 is not used to allow third parties to inject carbon dioxide into pore space owned by Appellants or their members. As explained in Summit's initial brief, the Commission can undoubtedly do this. *See* Summit's Br. ¶¶ 25-26.

III. Section 38-22-10 is not a taking.

A. The *Northwest Landowners* Court did not decide that *Loretto* applies to non-surface property.

[¶ 12] This Court has not yet determined the proper standard for assessing whether a government-authorized invasion of non-surface property (*i.e.*, airspace and subsurface) constitutes a taking. *See* Summit's Br. ¶¶ 48-53. NWLA disagrees and argues that this Court has already decided that *Loretto* is the proper standard. *See* NWLA's Reply Br. ¶¶ 9-10. NWLA's argument is based on the following statement made by the Court in *Northwest Landowners Association v. State*: "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. " 2022 ND 150, ¶ 27, 978 N.W.2d 679.

[¶ 13] All this statement demonstrates is that the *Northwest Landowners* Court held that under *Loretto* an invasion of non-surface property is a taking even if it causes minimal economic impact. The statement, however, evades the question here: should the constitutional implications of an invasion of non-surface property be assessed under *Loretto*? The *Northwest Landowners* Court did not consider or decide this question. Thus, this Court is free to address the question on the merits.

B. *Causby* applies to subsurface just as much as it applies to airspace.

[¶ 14] In *Causby*, the United States Supreme Court held that government-authorized invasions of a landowner's airspace do not constitute a taking unless they amount to "a direct and immediate interference with the enjoyment and use of

the land." 328 U.S. at 266. In its initial brief, Summit argued that this Court should extend *Causby*'s standard from airspace to subsurface. *See* Summit's Br. ¶¶ 34-44. NDFB disagrees because it believes airspace and subsurface are distinct in three important ways. "First, unlike in Causby, where Congress declared airspace to be public, pore space is private property protected by well-established law." NDFB's Reply Br. ¶ 15. "Second, landowners have transacted, severed, and used subsurface rights far more extensively than airspace." *Id*. at ¶ 16. Third, whereas there is really only one use for airspace, there are many uses for subsurface. *Id*. at ¶ 17.

[¶ 15] NDFB's first distinction seems to be based on a misunderstanding. In *Causby*, Congress did not declare airspace to be public. Airspace in the United States was (and still is) privately owned. *See Causby*, 328 U.S. at 260. All Congress did was grant an easement for private and commercial air travel across all privately owned airspace. *Id*. Thus, the airspace at issue in *Causby* was just as much "private property" as the pore space at issue in this case is.

[¶ 16] As for NDFB's second and third distinctions, they are distinctions without a difference. The *Causby* Court did not adopt its standard based on how much landowners have transacted, severed, or used airspace rights or on how many uses there are for airspace. Therefore, it is irrelevant whether landowners have used subsurface rights more extensively than airspace or whether there are more uses for subsurface than there are for airspace. Instead, the *Causby* Court based its standard on three facts. First, the public had an interest in using landowners' airspace. Second, it was impossible for the public to use landowners' airspace unless Congress could authorize it. Third, the public using landowners' airspace did not interfere with landowners' use and enjoyment of their surface interests.

[¶ 17] These three facts are equally applicable to pore space. The Legislature has determined that a public purpose exists for utilizing landowners' pore space for geologic storage of carbon dioxide. *See* N.D.C.C. § 38-22-01. It is not possible for the public to use landowners' pore space unless the Industrial Commission can authorize the public to do so. *See id*. And public use of pore space does not interfere with the landowners' use and enjoyment of their surface. Thus, *Causby* is just as applicable to subsurface pore space as it is to airspace.

C. Section 38-22-10 does not amount to a taking under *Causby*.

[¶ 18] Finally, NDFB argues in the alternative that if *Causby* applies, then Section 38-22-10 still constitutes a taking. *See* NDFB's Br. ¶ 18. NDFB explains that "[s]torage operators propose to inject millions of metric tons of [carbon dioxide] into a nonconsenting landowner's property …" NDFB's Br. ¶ 18. "[T]his is not the same as a temporary flight passing overhead that causes no interference with the property." *Id*.

[¶ 19] Injecting carbon dioxide into pore space interferes with landowners' use and enjoyment of their surface far less than air traffic. Landowners can often see and hear planes flying above the surface of their property. By contrast, landowners will never see or hear carbon dioxide migrating into or out of their pore space. For all practical purposes, landowners would likely never know if an "invasion" of their pore space is actually occurring, so any claim of interference is speculative at best.

IV. Eminent domain is not an alternative to Section 38-22-10.

[¶ 20] Finally, NWLA argues that it would be inconsequential if this Court were to declare Section 38-22-10 unconstitutional because the Legislature could

just enact legislation that allows storage operators to use eminent domain. *See* NWLA's Br. ¶ 8. This argument, however, is insincere at best.

[¶ 21] The North Dakota Takings Clause prohibits the taking of property through eminent domain by private entities "unless that property is necessary for conducting a common carrier or utility business." If this Court determines Section 38-22-10 is unconstitutional, Summit will certainly argue that the pore space required to operate a geologic storage facility is necessary in the conduct of its common carrier pipeline business. However, it is just as certain that NWLA and others will argue that it is not.

[¶ 22] Ultimately, both parties will be back before this Court to determine the issue. If the Court determines that Section 38-22-10 is unconstitutional, and subsequently that pore space is not "necessary for conducting a common carrier or utility business," geologic storage cannot occur in North Dakota in the absence of 100% voluntary participation from the owners of the pore space within a proposed geologic storage facility.

Dated this 4th day of April, 2025.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Attorneys for Intervenor-Defendants, Appellees, and Cross-Appellants SCS Carbon Transport LLC, SCS Permanent Carbon Storage LLC, and Summit Carbon Solutions, LLC, hereby certifies the above brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The total number of pages in the brief, excluding the certificate of service and this compliance, is 12 pages.

Dated this 4th day of April, 2025.

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

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the Reply Brief of Intervenor-Defendants, Appellees, and Cross-Appellants SCS Carbon Transport LLC, SCS Permanent Carbon Storage LLC, and Summit Carbon Solution, LLC was, on April 4, 2025, filed and served electronically with the Clerk of the North Dakota Supreme Court and served by e-mail on the following:

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