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NORTH DAKOTA SUPREME COURT

**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

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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STATEMENT OF ISSUES

[¶ 1] The issues presented by Summit on appeal are:

1. Does 42 U.S.C. § 300j-7(a)(2) deprive the Court of jurisdiction over this appeal?
2. Must a party exhaust administrative remedies available from the Commission, including the hearing described above, before that party can make a claim challenging the constitutionality of Section 38-22-10 in court?
3. Does Section 38-22-10 violate the Takings Clauses of the Federal and North Dakota Constitutions?

Plaintiffs, Appellants, and Cross-Appellees Northwest Landowners Association, Mike Dresser, Sandra Short, and Swenson Living Trust, and Intervenor-Plaintiff, Appellant, and Cross-Appellee North Dakota Farm Bureau, Inc. (collectively, "Plaintiffs") identify a number of issues on appeal not addressed in the present brief. Those issues, and plaintiff's arguments thereon, are more than adequately addressed in the briefs filed by the other appellees in this case. Summit concurs with and joins in the arguments presented by its co-appellees in support of the District Court's decision, but to avoid redundancy Summit does not restate those arguments in any significant way here.

STATEMENT OF THE CASE

[¶ 2] Summit seeks to operate an underground carbon dioxide storage facility in North Dakota. Any person seeking to operate such a facility must proceed under Chapter 38-22 of the Century Code and the regulations issued thereunder by the North Dakota Industrial Commission ("Commission") at Article 43-05 of the Administrative Code. Chapter 38-22 and Article 43-05 comprise North Dakota's Underground Injection Control ("UIC") Program for Class VI injection wells under the federal Safe Drinking Water Act ("SDWA").

[¶ 3] Chapter 38-22 provides, in relevant part, that before an operator may obtain a permit to store carbon dioxide in an underground storage facility, the operator must obtain

the consent of persons who own at least 60% of the storage facility's pore space. If the operator meets this threshold, then Section 38-22-10 provides the Commission discretion to "amalgamate" pore space owned by any remaining nonconsenting owners:

> If a storage operator does not obtain the consent of all persons who own the storage reservoir's pore space, the commission may require that the pore space owned by nonconsenting owners be included in a storage facility and subject to geologic storage.

[¶ 4] Plaintiffs commenced this action seeking a declaration that Section 38-22-10 constitutes a taking under the Federal and North Dakota Takings Clauses.[1] The District Court ultimately did not reach the merits of Plaintiffs' claim. Instead, the court held that the claim was barred by either the six- or ten-year statute of limitations. As a result, the court granted summary judgment in favor of Defendants on Plaintiffs' Section 38-22-10 claim. Plaintiffs then appealed to this Court.

STATEMENT OF FACTS

[¶ 5] In 2009, the North Dakota Legislature enacted legislation relating to the geologic storage of carbon dioxide. The North Dakota Legislature has recognized that "[i]t is in the public interest to promote the geologic storage of carbon dioxide." N.D.C.C. § 38-22-01. Doing so will benefit the state and the global environment, help ensure the viability of the state's coal and power industries, and allow for carbon dioxide's ready

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[1] Plaintiffs also seek a declaration that Section 38-22-10 violates their procedural and substantive due process rights and also challenge the constitutionality of four other statutes. This brief will only address Plaintiffs' claim that Section 38-22-10 violates the State and Federal Takings Clauses. As noted above, Plaintiffs' arguments regarding these other claims are addressed in the briefing of the other appellees.

availability if needed for commercial, industrial, or other uses. *Id*. The Legislature further recognized that geologic storage "requires cooperative use of surface and subsurface property interests and the collaboration of property owners." *Id*. However, it is practically impossible to get every single member of a large group of property owners to collaborate voluntarily. *See id*. Thus, the legislation provides "procedures that promote, in a manner fair to all interests, cooperative management." *Id*.

[¶ 6] Under Chapter 38-22, an operator who desires to geologically store carbon dioxide must apply for a permit from the Commission. *Id*. at § 38-22-04. Upon receiving an application, the Commission must hold a public hearing and provide notice to each affected pore space owner. *Id*. at § 38-22-06. At the hearing, any owner who objects to having carbon dioxide stored in his or her pore space has an opportunity to be heard by the Commission. *Id*. at § 28-32-24. After the hearing, the Commission may issue the storage operator a permit. But before doing so, the Commission must find that the operator (1) "has made a good-faith effort to get the consent of all persons who own the storage reservoir's pore space" and (2) has actually "obtained the consent of persons who own at least sixty percent of the storage reservoir's pore space." *Id*. at § 38-22-08. If the operator satisfies this consent threshold, then Section 38-22-10 authorizes the Commission to amalgamate the pore space owned by any nonconsenting owners that remain. *Id*. at § 38-22-10. But the Commission must still ensure that all nonconsenting owners will be "equitably compensated" for the use of their pore space. *Id*. at § 38-22-08(14).

[¶ 7] On June 21, 2013, North Dakota submitted a program revision application to add Class VI injection wells to its UIC program under section 1422 of the SDWA. *See State of North Dakota Underground Injection Control Program; Class VI Primacy*

Approval, 83 Fed. Reg. 17,759 (Apr. 24, 2018) (to be codified at 40 C.F.R. pt. 147). The EPA reviewed North Dakota's application and published a notice seeking public comment on August 9, 2013. *Id.* On May 19, 2017, the EPA issued a proposed rulemaking seeking public comment on approval of North Dakota's application. *Id.* And on April 24, 2018, the EPA approved North Dakota's application, granting North Dakota primary enforcement responsibility for regulating Class VI injection wells in North Dakota. *Id.* The provisions of the Century Code and Administrative Code that contain standards, requirements, and procedures applicable to owners or operators of Class VI UIC wells were incorporated by reference into 40 C.F.R. § 147.1751, including Section 38-22-10 of the Century Code. *Id.*; *see also id.* at 17,761 (setting forth the EPA's approval of North Dakota Century Code Sections 38-22-01–38-22-23 on Carbon Dioxide Underground Storage as part of North Dakota's Underground Injection Control Program); Br. Pls., Appellants, and Cross-Appellants Nw. Landowners Ass'n, Mike Dresser, Sandra Short, & Swenson Living Trust ("NWLA Br.") ¶¶ 77–79 (explaining federal approval of Chapter 38-22 as part of North Dakota UIC program).

[¶ 8] Since the legislation codified at Section 38-22-10 was first enacted by North Dakota in 2009, three bills have been introduced that would have repealed it. *See, e.g.*, S.B. 2228, 68th Leg. Assemb., Reg. Sess. (N.D. 2023). Landowners from across the State submitted testimony opposing these bills because they wanted to voluntarily monetize their pore space but could not do so if the statute was repealed. Testimony from Casey Voigt, a landowner in Mercer County, is illustrative:

> M name is Casey Voigt. I am a rancher from south of Zap.
>
> I am opposed to Senate bill 2228.

> It will take away the property rights of landowners. Why should a minority of 10% be able to tell the majority what they can, or cannot do, with their property?
>
> SB 2228 requires 100% support. That is unrealistic. It is not possible to get 100% support on any project.
>
> North Dakota's Legislative process requires a simple majority (50% plus 1) or in some cases a super majority (60%). How many bills would be passed if 100% support was required?
>
> People supporting SB 2228 are saying this bill supports property rights. That is simply not true. They are a minority wanting to take away the property rights of the majority.

Hearing on S.B. 2228 Before the S. Energy and Resources Comm., 68th Leg. Assemb., Reg. Sess. (N.D. 2023) (written testimony of Casey Voigt); *see also id.* (testimony of Jason Pulver) (testifying in opposition to S.B. 2228 that "[a]s a landowner, I want to exercise my right to monetize my pore space which can be done while still being able to utilize my surface as it has always been, while also benefitting the agriculture, coal, and oil & gas industries in the long term."). Because of compelling testimony like Mr. Voigt's, the Legislature rejected all three bills. As a result, Section 38-22-10 is still effective, and storage operators can utilize the statute to benefit the State of North Dakota and its citizens.

[¶ 9] Five Plaintiffs commenced this current action to challenge the constitutionality of Section 38-22-10. One Plaintiff—the Swenson Living Trust—is a trust that is incapable of owning pore space or even being a party to a lawsuit and so should be dismissed.[2] Three Plaintiffs—the Northwest Landowners Association ("NWLA"), the

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[2] *W. Life Tr. v. State*, 536 N.W.2d 709, 712 (N.D. 1995) ("A trust generally is not a separate legal entity, and cannot sue or be sued in its own name. … [T]he Trust's attempted appeal must be dismissed.").

North Dakota Farm Bureau ("NDFB"), and Sandra Short—do not allege that they own any pore space that will ever be amalgamated and therefore have no basis for challenging Section 38-22-10. (R188:3-11); (R189:3-8).[3] The final Plaintiff—Mike Dresser—owns pore space that has already been amalgamated. He willingly accepted the compensation that comes with his pore space being amalgamated, (R154:3:¶¶10-12). Therefore, he has forfeited any right he had to challenge Section 38-22-10.[4]

[¶ 10] Plaintiffs allege that Section 38-22-10 violates the Takings Clauses of the Federal and North Dakota Constitutions. (R118:7-9:¶¶23-33). Plaintiffs claim that the statute empowers the Commission to allow others to take Plaintiffs' property without providing them just compensation. (*Id.*). Instead of seeking just compensation, however, Plaintiffs seek two equitable remedies: a judgment declaring Section 38-22-10 unconstitutional and an injunction barring its enforcement. (R118:15).[5] In the proceedings

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[3] *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 397–405 (2024) (Thomas, J., concurring) ("Associational standing seems to run roughshod over th[e] traditional understanding of the judicial power.").

[4] *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 750 (N.D. 1978) ("[O]ne who seeks and obtains the advantage of a statute is estopped from challenging the constitutionality of that statute.").

[5] *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180, 201 (2019) ("[E]quitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking.").

below, the District Court did not reach the merits of Plaintiffs' claim. (R248:3-5:¶¶7-16). Instead, the District Court held that the claim was barred by the statute of limitations and granted summary judgment in favor of Defendants. (*Id*.).

STANDARD OF REVIEW

[¶ 11] Both issues described above are reviewed *de novo*. *Garaas v. Petro-Hunt, L.L.C.*, 2024 ND 34, ¶ 8, 3 N.W.3d 156; *Northwest Landowners Ass'n v. State*, 2022 ND 150, ¶ 12, 978 N.W.2d 679. Additionally, Summit concurs with the State of North Dakota in its description of the review considerations particular to constitutional challenges, as those are set forth in the Standard of Review section of the brief submitted by the State.

SUMMARY OF ARGUMENT

[¶ 12] "[I]t 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). Here, it is not absolutely necessary for this Court to determine the constitutionality of Section 38-22-10 because this Court can affirm dismissal of Plaintiffs' claim for lack of subject matter jurisdiction.

[¶ 13] Plaintiffs' claims are not properly before this Court, and were not properly before the District Court, because the practical effect of those claims is to challenge a final action by the EPA Administrator under the SDWA. 42 U.S.C. § 300j-7(a)(2) provides the federal courts of appeals, in this case the Eighth Circuit, exclusive jurisdiction to review final actions by the EPA under the SDWA, including the Administrator's approval of Section 38-22-10 as part of North Dakota's UIC Program for Class VI injection wells and

the incorporation of the same into the Code of Federal Regulations. Accordingly, this Court lacks jurisdiction over Plaintiffs' claims as to Section 38-22-10 and must dismiss them.

[¶ 14] Plaintiffs' claims are also not properly before this Court because they have failed to exhaust their administrative remedies. Before the Commission can use that statute to amalgamate any pore space owned by Plaintiffs, the Commission must hold a hearing and provide Plaintiffs notice. At the hearing, Plaintiffs would have the opportunity to be heard by the Commission. If the Commission finds Plaintiffs' evidence and arguments persuasive, then the Commission may choose to deny the request for amalgamation of any pore space owned by Plaintiffs. This would result in no carbon dioxide ever being injected into any pore space owned by Plaintiffs without their consent, thereby providing Plaintiffs with adequate relief. Because Plaintiffs have not exhausted this administrative remedy, this Court lacks jurisdiction and must dismiss their claim.

[¶ 15] Alternatively, if the Court proceeds to deciding the constitutionality of Section 38-22-10 notwithstanding the foregoing, then the Court must hold that the statute is constitutional. Plaintiffs' argument that Section 38-22-10 violates the State and Federal Takings Clauses is based on *Northwest Landowners*, 2022 ND 150; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). Under those cases, the general rule is that any government-authorized invasion of property violates the Takings Clauses.[6]

[6] As in *Northwest Landowners Association v. State*, the Court should "analyze the federal and state claims together because no party has argued the text or history of the state constitutional provision requires us to apply a different standard for per se takings." 2022 ND 150, ¶ 23, 978 N.W.2d 679.

[¶ 16] None of the decisions are controlling in the present appeal. Instead, the appropriate standard is set forth in *United States v. Causby*, 328 U.S. 256 (1946). Under *Causby*, a government-authorized invasion of property constitutes a taking only if the invasion amounts to "a direct and immediate interference with the enjoyment and use of the land." *Id*. at 266. It is undisputed that injecting carbon dioxide into pore space a mile below a landowner's surface does not interfere with his enjoyment and use of his land. Thus, Section 38-22-10 does not constitute a taking and thus does not violate the State or Federal Takings Clauses.

ARGUMENT

I. 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.

[¶ 17] The Court must first determine whether it has jurisdiction over the claims that are the subject of Plaintiffs' appeal, which seek to invalidate Section 38-22-10.[7] As noted above, the EPA approved Section 38-22-10 as part of North Dakota's UIC Program for Class VI injection wells by a final rulemaking on April 24, 2018. *See* 40 C.F.R. § 147.1751; *see also, e.g.*, *State of North Dakota Underground Injection Control Program; Class VI Primacy Approval*, 83 Fed. Reg. 17,759 (Apr. 24, 2018) (to be codified at 40 C.F.R. pt. 147). 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

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[7] "Before a court may say anything worth listening to regarding the (de)merits of a party's claim, that court must have the authority to speak." *Smith v. City of Grand Forks*, 478 N.W.2d 370, 373 (N.D. 1991) (quoting *Petters v. Petters*, 560 So.2d 722, 723 (Miss. 1990)).

UIC program and its incorporation of that program into federal law. NWLA writes, "The state implementation of the UIC program become[s] effective when incorporated into federal law by the EPA as part of its enforcement authority under the SDWA." NWLA Br. ¶ 77. As a result, NWLA argues, its claims regarding Section 38-22-10 did not accrue until April 24, 2018. *See id.* ¶ 79.

[¶ 18] Section 1448 of the SDWA, codified at 42 U.S.C. § 300j-7, states, in relevant part, as follows:

> A petition for review of— (1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and (2) any other final action of the Administrator under this Act may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.

42 U.S.C. § 300j-7(a). The same subsection also states, "Action of the [EPA] Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement *or in any civil action to enjoin enforcement*." *Id.* (emphasis added)

[¶ 19] Challenges to final action by the EPA taken under the auspices of the SDWA must be brought in the federal courts of appeal. "Under the Safe Drinking Water Act, jurisdiction to review an EPA approved UIC program is vested exclusively with the various circuit courts of appeal." *W. Nebraska Res. Council v. E.P.A.*, 793 F.2d 194, 197 (8th Cir. 1986). Similar provisions can be found in other federal environmental legislation, such as the Clean Water Act ("CWA") or Clean Air Act ("CAA"). For example, the CWA provides that review of certain enumerated categories of action by the EPA Administrator "may be had by any interest person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is

directly affected by such action." 33 U.S.C. § 1369(b)(1). The U.S. Supreme Court described the procedure for review of actions under the CWA as follows:

> There are two principal avenues of judicial review of an action by the EPA. Generally, parties may file challenges to final EPA actions in federal district courts, ordinarily under the Administrative Procedure Act (APA). But the Clean Water Act (or Act) enumerates seven categories of EPA actions for which review lies directly and exclusively in the federal courts of appeals.

Nat'l Ass'n of Mfrs. v. Dep't of Def., 583 U.S. 109, 114 (2018).

[¶ 20] Courts have construed these exclusive grants of jurisdiction broadly when faced with challenges to state participation in federal environmental regulation. A leading decision comes from the Ninth Circuit in *California Dump Truck Owners Association v. Nichols*, 784 F.3d 500 (9th Cir. 2015). In *Nichols* a trade group ("Truck Association") challenged a California state environmental regulation in federal district court seeking to enjoin enforcement of the regulation. *Id.* at 502. The Truck Association argued that the regulation was preempted by federal law and was therefore invalid. *Id.* at 503. During the pendency of the lawsuit, the challenged regulation was submitted to and approved by the EPA as part of California's state implementation plan ("SIP") under the CAA and was thereafter incorporated into the Code of Federal Regulations. *Id.* at 503–04.

[¶ 21] After learning the regulation had been approved as part of an SIP, the federal district court dismissed the Truck Association's claims for lack of jurisdiction, citing the CAA's judicial review statute. *Id.* at 504. The Ninth Circuit affirmed, concluding that "invalidation of an EPA-approved SIP may only occur in the federal appellate courts on direct appeal from the Administrator's decision." *Id.* (quoting *United States v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987)). The court rejected the Truck Association's argument that the CAA's judicial review provision did not apply, concluding that the provision extended to "claims that, as a practical matter, challenge an

EPA final action," including in that case the approval of an SIP. *Id.* at 507. Despite the Truck Association's assertion that the validity of the SIP in that case was not at issue, the Ninth Circuit determined the lawsuit, if successful, would "effectively eviscerate the SIP by precluding its enforcement by [the California Air Resources Board]." *Id.* at 508. The court concluded its consideration of the issue with the following:

> In sum, the practical objective of the Truck Association's preemption suit is to nullify the SIP and challenge the EPA's legal determination regarding its validity. Thus, it is the type of action to which § 307(b)(1) [42 U.S.C. § 7607(b)(1)] applies. Although this case is somewhat unique, in that the EPA approved the SIP after the Truck Association filed suit, subsequent EPA action can divest a district court of jurisdiction. Furthermore, the Truck Association provides no persuasive reason why § 307(b)(1) cannot apply to a regulation that was adopted to be incorporated into a state's SIP, simply because suit was filed prior to the EPA's final action. Indeed, policy considerations underlying the CAA mandate this precise result.

Id. at 510–11 (citations omitted).

[¶ 22] The Plaintiffs' claims in this action seek to invalidate Section 38-22-10, which is included in North Dakota's UIC Program for Class VI injection wells, and to enjoin its enforcement. Like the Truck Association's claims in *Nichols*, Plaintiffs' claims would effectively eviscerate Section 38-22-10 by precluding its enforcement by the Commission. Applying the reasoning of the Ninth Circuit in *Nichols* to this case, the Plaintiffs' claims regarding Section 38-22-10 fall within the scope of the SDWA's judicial review provision, codified at 42 U.S.C. § 300j-7(a). *Cf. All. for California Bus. v. State Air Res. Bd.*, 23 Cal. App. 5th 1050, 1062–68 (2018) (relying on *Nichols* to conclude that California state courts lacked subject matter jurisdiction over plaintiffs' constitutional challenges, among other claims, which sought to invalidate a challenged California environmental regulation that became part of an EPA-approved SIP). Because the federal

courts of appeals (here, the Eighth Circuit) have exclusive jurisdiction over such claims, Plaintiffs' claims are not properly before this Court and should be dismissed.

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

[¶ 23] This Court has "consistently required exhaustion of remedies before the appropriate administrative agency as a prerequisite to making a claim in court." *Garaas*, 2024 ND 34, ¶ 10. This is especially true when it comes to the Commission. *See, e.g., id*. at ¶ 1 (dismissing plaintiffs' claims for failing to exhaust remedies before the Commission); *Armstrong v. Helms*, 2022 ND 12, ¶ 1, 969 N.W.2d 180 (same); *Continental Res., Inc. v. Counce Energy BC #1, LLC*, 2018 ND 10, ¶ 10, 905 N.W.2d 768 (same); *GEM Razorback, LLC v. Zenergy, Inc.*, 2017 ND 33, ¶ 1, 890 N.W.2d 544 (same); *Vogel v. Marathon Oil Co.*, 2016 ND 104, ¶ 42, 879 N.W.2d 471 (same). If a plaintiff does not comply with this requirement, the Court lacks jurisdiction and the plaintiff's claim must be dismissed. *Garaas*, 2024 ND 34, ¶ 8.[8]

[¶ 24] The exhaustion requirement applies even when a party raises constitutional questions. Indeed, "exhaustion is particularly appropriate" when a party raises constitutional questions because "the administrative remedy may eliminate the necessity of deciding [the] constitutional questions." *Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev.*, 907 F.2d 445, 448 (4th Cir. 1990). Thus, this Court has specifically rejected the argument that "the doctrine of exhaustion of remedies does not

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[8] Because exhaustion concerns this Court's jurisdiction, this Court must determine whether Plaintiffs exhausted their administrative remedies before considering any other non-jurisdictional issue. *Garaas*, 2024 ND 34, ¶ 5.

apply to [a party's] constitutional claims." *Thompson v. Peterson*, 546 N.W.2d 856, 863 (N.D. 1996); *Olympic Fin. Grp., Inc. v. North Dakota Dep't of Fin. Institutions*, 2023 ND 38, ¶ 31, 987 N.W.2d 329 (same). As explained below, Plaintiffs have an administrative remedy before the Commission that they have not exhausted. Accordingly, this Court must dismiss this case.

A. Plaintiffs have failed to exhaust their administrative remedies.

[¶ 25] Before the Commission can amalgamate pore space owned by Plaintiffs under Section 38-22, the Commission must hold a hearing and give Plaintiffs notice. *See* N.D.C.C. § 38-22-06. At the hearing, Plaintiffs would have the opportunity to present evidence and argument for why they believe carbon dioxide should not be injected into their pore space. If the Commission is persuaded by Plaintiffs' evidence and argument, the Commission could take several actions. The Commission could simply deny the application of the operator applying for a permit. If the Commission were convinced that the carbon dioxide would not migrate into the Plaintiffs' pore space, the Commission could modify the boundaries of the storage facility to exclude their acreage. Or the Commission could exercise its discretion under Section 38-22-10 and choose not to amalgamate any pore space owned by Plaintiffs. *See* N.D.C.C. § 38-22-10 ("the commission *may* …") (emphasis added). Any of these actions would result in no carbon dioxide being injected into any pore space owned by Plaintiffs without their consent, thereby providing Plaintiffs with adequate relief. And even if the Commission decides against Plaintiffs, Plaintiffs can appeal the Commission's decision to the district court and argue that N.D.C.C. § 38-22-10 is unconstitutional. As this Court has repeatedly noted, "[a]n appeal of an administrative decision is an adequate legal remedy to contest the Commission's decisions." *Garaas*, 2024 ND 34, ¶ 16.

[¶ 26] It is undisputed that Plaintiffs have not exhausted the above-described administrative remedies available to them. Because these administrative remedies could have provided Plaintiffs with adequate relief, Plaintiffs were required to exhaust those remedies before suing in court. Their failure to do so means that their claims must be dismissed for lack of jurisdiction. Accordingly, the district court's judgment dismissing Plaintiffs' claims should be affirmed.

B. Exhaustion of administrative remedies serves at least two important purposes in this case.

[¶ 27] There are two important reasons for this Court to require exhaustion. First, "[i]t is a well-settled rule of decision making that a court will refrain from deciding constitutional issues where there are appropriate alternative grounds to resolve the case before it." *Bismarck Pub. Sch. v. Walker*, 370 N.W.2d 565, 566 (N.D. 1985). As explained above, if the Court requires exhaustion, the Commission could issue a ruling that would ensure no carbon dioxide is ever injected into pore space by Plaintiffs without their consent. Thus, requiring exhaustion could lead to a satisfactory resolution of this dispute without a court having to reach Plaintiffs' constitutional challenge.

[¶ 28] Second, requiring exhaustion would provide this Court "with the benefit of [the Commission's] expertise … in the event of judicial review." *Garaas*, 2024 ND 34, ¶ 10. One of the primary issues between Plaintiffs and Defendants in this case is whether pore space owners have "correlative rights"[9] and whether Section 38-22-10 protects those

[9] This Court has defined "correlative rights" as the "interdependent rights and duties of each landowner in [a] common source of supply." *Hystad v. Industrial Comm'n*, 389 N.W.2d 590, 596 (N.D. 1986).

rights. It is well settled that landowners above an underground oil and gas reservoir have correlative rights in the reservoir, and the government does not commit a taking when it enacts pooling and unitization statutes to protect these rights. Accordingly, before the district court, Defendants argued that pore space owners also have correlative rights, and that the government also does not commit a taking when it enacts a statute like Section 38-22-10 to protect those rights. *See, e.g.*, (R184:27:¶88).

[¶ 29] Plaintiffs disagreed. NDFB claimed that "there are several key distinctions that render the correlative rights doctrine wholly inapplicable to CO2 … storage in pore space." (R208:21:¶50). Similarly, NWLA claimed that "while certain aspects of [sequestration of CO2 into pore space] are similar to oil and gas development, … certain more important aspects are different …" (R224:18:¶35).

[¶ 30] This Court has recognized that "[t]he physical characteristics and reservoir dynamics of the common source of supply necessitate the use of highly technical geological and economic information to determine the extent of correlative rights." *Hystad*, 389 N.W.2d at 596. Thus, "[q]uestions concerning correlative rights … entail factual considerations," *Garaas*, 2024 ND 34, ¶ 15. Given the "Commission's expertise in the resolution of such highly technical matters as the protection of correlative rights," *Hanson v. Industrial Comm'n*, 466 N.W.2d 587, 591 (N.D. 1991), this Court has required exhaustion so that the Commission can resolve any "issues related to the correlative rights." *Garaas*, 2024 ND 34, ¶ 15. If this Court requires exhaustion in the present case, it would give the Commission an opportunity to use its expertise to determine whether pore space owners have correlative rights and whether Section 38-22-10 protects those rights. This

Court would then have the benefit of those determinations while considering the constitutionality of Section 38-22-10 (if necessary).

C. Exhaustion of administrative remedies would not be futile in this case.

[¶ 31] In the proceedings below, Plaintiffs did not dispute that they failed to exhaust their administrative remedies. Instead, Plaintiffs argued that exhaustion should not be required because it would be futile. Plaintiffs asserted that they are seeking a declaration that Section 38-22-10 violates the Takings Clauses because it takes their property without providing them just compensation as determined by a jury. Because the Commission is an administrative agency, Plaintiffs argued, it cannot give Plaintiffs such a declaration. Nor can it cure the statute's alleged constitutional defects by providing Plaintiffs with a jury trial. Thus, according to Plaintiffs, requiring exhaustion would be futile. (R224:22-23:¶¶44-45). The district court ultimately agreed with Plaintiffs that exhaustion would be futile. (R248:6:¶21).

[¶ 32] This Court recently rejected an argument identical to Plaintiffs' argument. In *Olympic Financial Group*, the district court dismissed the plaintiff's constitutional claim because the plaintiff had failed to exhaust its administrative remedies. 2023 ND 38, ¶ 11. On appeal, the plaintiff argued that exhaustion was not required "because the administrative agency is inadequate to adjudicate constitutional questions and it would be futile." *Id*. at ¶ 22. This Court rejected the argument and held that the "district court did not err in concluding the [plaintiff's] constitutional claims did not provide an exception to the doctrine to exhaust administrative remedies." *Id*. at ¶ 31.

[¶ 33] This Court should likewise reject Plaintiffs' argument. Summit recognizes that the Commission cannot declare Section 38-22-10 unconstitutional. Nor can the Commission cure the statute's alleged unconstitutionality by providing Plaintiffs with a

jury trial. But exhaustion is not futile simply because the Commission cannot give Plaintiffs their preferred relief. Rather, whether exhaustion would be futile depends on whether the Commission can give Plaintiffs adequate relief. And this Court has made clear that relief "is not inadequate simply because it may not result in the exact relief requested." *Long v. Samson*, 1997 ND 174, ¶ 13, 568 N.W.2d 602. "Administrative exhaustion is thus typically required so long as there is the possibility of some relief for the action complained of, even if it is not the [plaintiff's] preferred remedy." *Jones Bros., Inc. v. Secretary of Labor*, 898 F.3d 669, 676 (6th Cir. 2018). Here, the Commission can ensure that no carbon dioxide is injected into pore space owned by Plaintiffs without their consent all without declaring Section 38-22-10 unconstitutional. This is undoubtedly adequate relief even though Plaintiffs would prefer that a court instead declare Section 38-22-10 unconstitutional. Thus, exhaustion would not be futile and should be required before a court considers any of the claims Plaintiffs have raised in this case.

III. Section 38-22-10 does not violate the State and Federal Takings Clauses.

A. Only government-authorized invasions of subsurface property that interfere with an owner's enjoyment and use of his land constitute a taking.

[¶ 34] If the Court does not require exhaustion and proceeds to consider the merits of Plaintiffs' constitutional challenge, the Court should hold Section 38-22-10 does not constitute a taking or otherwise violate the Takings Clauses of the state and federal constitutions. Plaintiffs' argument for why Section 38-22-10 violates the Takings Clauses is based on *Loretto* and cases decided thereunder. In *Loretto* the U.S. Supreme Court held that any government-authorized invasion of property amounts to a taking. Plaintiffs believe that Section 38-22-10 allows the Commission to authorize such an invasion and therefore violates the Takings Clauses.

[¶ 35] Plaintiffs' reliance on *Loretto* is mistaken. That case's rule is "very narrow," *Loretto*, 458 U.S. at 441, and applied to surface property. When it comes to <u>non-surface</u> property (*i.e.*, airspace and subsurface), the rule articulated in *Causby* should apply. Under that rule, a government-authorized invasion of non-surface property constitutes a taking only if it amounts to "a direct and immediate interference with the enjoyment and use of the land." 328 U.S. at 266. Courts have historically recognized different protections for surface and non-surface property. Since the founding, a landowner has been regarded as the owner of his land's airspace and subsurface based on the *ad coelum* doctrine,[10] but not to the same extent as his surface. Thus, governments have authorized others to invade a landowner's non-surface property, and courts have consistently upheld the propriety of these invasions.

[¶ 36] One of the first examples of these government-authorized invasions came about after the invention of the airplane. Soon thereafter, Congress enacted the Air Commerce Act, which authorized U.S. citizens to fly through landowners' airspaces. *Causby*, 328 U.S. at 260. A landowner eventually sued, alleging that planes flying through his airspace amounted to a taking. On appeal, the United States Supreme Court acknowledged that "[i]t is ancient doctrine that at common law ownership of the land extended to the periphery of the universe." *Id*. However, "that doctrine has no place in the modern world." *Id*. at 261. "Common sense revolts at the idea." *Id*. "To recognize such private claims to the airspace would clog these highways, seriously interfere with their

[10] *Ad Coelum Doctrine*, Black's Law Dictionary (12th ed. 2024) ("The common-law rule that a landowner holds everything above and below the land.").

control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *Id*. The Court concluded that "[t]he airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment." *Id*. at 266. "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id*.

[¶ 37] Just as the *Causby* Court recognized that ownership of airspace is not absolute, other courts have recognized that ownership of subsurface is not absolute. A leading case is *Chance v. BP Chemicals, Inc.* where the court explained that "ownership rights in today's world are not so clear-cut as they were before the advent of airplanes and injection wells," 670 N.E.2d 985, 992 (Ohio 1996). "Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property, ... there are also limitations on property owners' subsurface rights." *Id*. "[S]ubsurface property rights are not absolute and … are contingent upon interference with the reasonable and foreseeable use of the properties." *Id*.; *see also Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 11 (Tex. 2008) ("Wheeling an airplane across the surface of one's property without permission is a trespass; flying the plane through the airspace two miles above the property is not. Lord Coke, who pronounced the maxim, did not consider the possibility of airplanes. But neither did he imagine oil wells. The law of trespass need no more be the same two miles below the surface than two miles above.").

[¶ 38] This Court has itself recognized that ownership of subsurface property is not absolute on several occasions. For example, in *Continental Resources, Inc. v. Farrar Oil Co.* that the Commission may authorize someone to drill through a landowner's

subsurface, 1997 ND 31, ¶ 18, 559 N.W.2d 841. In coming to this conclusion, the Court noted that "[p]roperty rights are protected by the North Dakota Constitution." *Id*. at ¶ 15. "Still, property rights are not absolute." *Id*. This Court affirmed the continuing validity of *Farrar Oil* in *Northwest Landowners*. *See* 2022 ND 150, ¶ 21. The Court explained that "[w]ith pooled spacing units or unitized fields, the implied easement is expanded such that the mineral owner can use any part of the surface estates pooled in the spacing unit or unitized field as reasonably necessary to produce minerals from beneath that unit or field." *Id.* ¶ 21 n.1.

[¶ 39] As another example, in *Northwest Landowners* this Court recognized that the Commission may use its pooling and unitization powers to allow saltwater disposal by one owner into another owner's pore space. Consider the following hypothetical: An individual owns the mineral rights under Tract A but not under the adjacent Tract B. The mineral owner has the right to dispose of saltwater into Tract A's subsurface but does not have the right to dispose of saltwater in the subsurface of the adjacent Tract B. *Northwest Landowners*, 2022 ND 150, ¶ 21. However, if the Commission creates a pooled spacing unit or a unitized field that includes both Tract A and Tract B, then the right of the owner of minerals under Tract A "is expanded such that the mineral owner" would have the right to also dispose of saltwater in the subsurface of Tract B (as well as any other tract included in the spacing unit or unitized field). *Id*. at ¶ 21 n.1. The Commission using its pooling and unitization powers to expand the mineral owner's implied easement into the subsurface of Tract B clearly constitutes a government-authorized invasion. But this Court has never suggested that pooling and unitization are unconstitutional.

[¶ 40] As one final example, landowners in North Dakota at one time owned the groundwater below the surface of their land. *Baeth v. Hoisveen*, 157 N.W.2d 728, 729-30 (N.D. 1968). But "North Dakota is, in part, a semiarid State" and so "concern for the general welfare could well require that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." *Id*. at 733. Therefore, in 1955, the North Dakota Legislature enacted a statute that "specifically declared that all waters under the surface of the earth … belong to the public." *Id*. at 730. This Court upheld the statute against a facial Takings Clause challenge because "there is no absolute ownership of ground water underlying that land which has not actually been diverted and applied to a beneficial use." *Id*. at 732. Thus, the statute would only constitute a taking as applied to those landowners that had actually been using their groundwater before the statute was enacted. *Id*. at 731.

[¶ 41] The foregoing makes clear why *Loretto* should not be applied to non-surface property. Applying that standard to non-surface property would mean that every government-authorized invasion of non-surface property also amounts to a taking. As shown by the cases discussed immediately above, however, many such invasions do <u>not</u> amount to a taking. The government can authorize others to fly through a landowner's airspace, drill through his subsurface, inject saltwater into his subsurface, and take title to his groundwater all without committing a taking. Rather than *Loretto*, *Causby* is the appropriate standard to determine whether a government-authorized invasion of non-surface property amounts to a taking. James Zadick, *The Public Pore Space: Enabling Carbon Capture and Sequestration by Reconceptualizing Subsurface Property Rights*, 36 Wm. & Mary Envtl. L. & Pol'y Rev. 257, 272-77 (2011) (arguing *Causby* should apply

to subsurface property). Although that standard was crafted in the context of airspace, the reasoning behind the standard is equally applicable to subsurface.

[¶ 42] The *Causby* Court reached its holding by balancing two competing interests: (1) the interests of the public and (2) the interests of private landowners. The Court first recognized that the public had an interest in air travel and that it was impossible to advance this interest without Congress being able to declare the air a "public highway." *Causby*, 328 U.S. at 261. If Congress could not do this, "every transcontinental flight would subject the operator to countless trespass suits," thereby clogging "these highways, [and] seriously interfer[ing] with their control and development in the public interest." *Id*.

[¶ 43] But the Court also recognized that private landowners had an interest in using and enjoying their land and the public invading their airspace had the potential to interfere with this interest. The Court explained that invasions of airspace at low altitudes "affect the use of the surface of the land itself" and "subtract from the owner's full enjoyment of the property," and are therefore "in the same category as invasions of the surface." *Id*. at 265. After balancing these two competing interests, the *Causby* Court ultimately held that invasions of a landowner's airspace "are normally not compensable under the Fifth Amendment," but they can be if they "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id*. at 266. In other words, the Court held that the government may authorize an invasion of a landowner's airspace to further a public interest but only if such invasion does not interfere with the landowner's enjoyment and use of his land.[11]

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[11] The *Baeth* Court conducted a similar balancing analysis. *See Baeth*, 157 N.W.2d at 733.

[¶ 44] The reasoning behind *Causby*'s rule is equally applicable to the present case. Just as the public has an interest in air travel, "[i]t is in the public interest to promote the geologic storage of carbon dioxide." N.D.C.C. § 38-22-01. Doing so will benefit the state and the global environment, help ensure the viability of the state's coal and power industries, and allow for carbon dioxide's ready availability if needed for commercial, industrial, or other uses. *Id*. Likewise, just as air travel would have been impossible had Congress not been able to authorize the public to use landowners' airspace, geologic storage is impossible without the Commission being able to authorize storage operators to use landowners' pore space. Geologic storage of carbon dioxide "requires … collaboration of property owners" but "[o]btaining consent from all owners may not be feasible, requiring procedures that promote … cooperative management." N.D.C.C § 38-22-01. And finally, just as invasions of a landowner's airspace have the potential to interfere with a landowner's use and enjoyment of his land, invasions of a landowner's subsurface also have the potential to interfere with a landowner's use and enjoyment of his land. Thus, if a nonconsenting pore space owner can demonstrate that any geologic storage of carbon dioxide authorized by the Commission is interfering with his enjoyment and use of his land, then that landowner would be able to establish a taking.

B. Section 38-22-10 does not authorize any invasion that would interfere with an owner's enjoyment and use of his land.

[¶ 45] Under *Causby*, Section 38-22-10 does not amount to a taking. The injection of carbon dioxide into pore space a mile below the surface does not interfere with landowners' enjoyment and use of their land. The portion of a landowner's subsurface that he needs to be able to enjoy and use his land ends well above the depths of his land's pore space. Indeed, "virtually all subsurface activities by humans—such as building

foundations, mines, and water wells—occur in the very shallow crust within 1,000 feet of the surface." John Sprankling, *Owning to the Center of the Earth*, 55 UCLA L. Rev. 979, 994 (2008); *cf. Northwest Landowners*, 2022 ND 150, ¶ 27 (noting that injecting substances into a landowner's 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").

[¶ 46] Injecting carbon dioxide into pore space a mile below the surface interferes with a landowner's enjoyment and use of her land less than an airplane flying a mile above her surface does. Whereas a landowner cannot see or hear carbon dioxide being injected into her subsurface, she may both see and hear a plane flying through her airspace. Perhaps more importantly, a plane flying through a landowner's airspace at least has the potential to interfere with the landowner's enjoyment and use of her land if flown low enough. But there are no circumstance where injecting carbon dioxide into the landowner's subsurface could. Gases like carbon dioxide are so benign that introducing them directly onto a landowner's <u>surface</u> does not interfere with a landowner's use and enjoyment of her land enough to amount to a trespass. *See* Restatement (Fourth) of Property § 1.2D TD No 4 (2023) ("Injection of gas into a subsurface cavity … does not give rise to trespass liability."); *id*. at cmt. a ("Emission of gases on the surface, even done intentionally, would not be actionable as a trespass."). If injecting gas into a landowner's pore space does not amount to a trespass, it can hardly amount to a taking.

[¶ 47] Ultimately, Section 38-22-10 does not authorize any invasions that will interfere with landowners' enjoyment and use of their lands. The statute therefore does not violate either the State or Federal Takings Clauses. For this reason, the district court's judgment dismissing plaintiffs' constitutional challenge to Section 38-22-10 should be affirmed.

C. *Northwest Landowners* does not preclude this Court from assessing the constitutionality of Section 38-22-10 under *Causby*.

[¶ 48] *Northwest Landowners* does not preclude it from assessing the constitutionality of Section 38-22-10 under *Causby* instead of *Loretto*. Although this Court did apply *Loretto* to non-surface property in that case, the Court did not actually consider and decide the issue of whether *Loretto* was the proper standard. The Court simply assumed that *Loretto* was the proper standard because no party argued for this Court to apply a different standard.

[¶ 49] A judicial opinion is only precedential "on points decided therein." *City of Bismarck v. McCormick*, 2012 ND 53, ¶ 14, 813 N.W.2d 599. Thus, not everything within a judicial opinion is precedent. If a court simply assumes the resolution of an issue without actually considering and deciding the issue, that assumption is not precedential. As explained by one leading treatise:

> Judicial opinions are always premised on a series of assumptions about what the law is. Yet those assumptions—whether implicit or explicit—aren't generally considered precedential. A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome. The assumptions a court uses to reach a particular result do not themselves create new precedent.

Bryan Garner et al., *The Law of Judicial Precedent* at p. 84 (2016).[12] The United States Supreme Court's decision in *Brecht v. Abrahamson* provides an example of this concept.

[12] *See also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478–79 (2006) (explaining that courts often "decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions … are not binding in future cases"); *United Pac. Ins. Co. v. Aetna Ins. Co.*, 311 N.W.2d 170, 174 n.2 (N.D. 1981).

507 U.S. 619 (1993). The issue in that case was whether the "*Chapman* standard" applies in federal habeas cases. Prior to *Brecht*, the Supreme Court had "applied the *Chapman* standard in a handful of federal habeas cases." *Id*. at 630. The *Brecht* petitioner argued that these cases showed the Court had already decided the issue and the Court was therefore bound to apply the *Chapman* standard in his case. *Id*. at 631. But the Court disagreed, explaining that since it had "never squarely addressed the issue, and ha[d] at most assumed the applicability of the *Chapman* standard on habeas, [it was] free to address the issue on the merits." *Id*.

[¶ 50] There is ample evidence that the Court in *Northwest Landowners* simply assumed that *Loretto* applied to non-surface property. First, nowhere in the *Northwest Landowners* opinion does the Court discuss the issue. Had this Court truly decided the issue, one would expect the Court's opinion to acknowledge the difference between surface and non-surface property and then provide an explanation for why the Court believed that—despite these differences—*Loretto* should still be extended to non-surface property. The fact that this Court's opinion does not contain such an explanation shows that this Court did not decide the issue.

[¶ 51] Second, no party in *Northwest Landowners* argued for this Court to apply a different standard. NWLA argued that the case "should be decided under *Loretto*." *Northwest Landowners*, 2022 ND 150, ¶ 24. And the State conceded that *Loretto* applied but argued that the statute at issue was consistent with that case. *See* Reply Br. of Defs./Appellants at p. 7, *Northwest Landowners*, Supreme Ct. No. 20210148. Thus, no party raised or argued the issue. Because this Court does "not consider issues that have not been raised and argued by the parties," *First W. Bank & Tr. v. First Lutheran Church*

Found., 2003 ND 21, ¶ 5 n.1, 656 N.W.2d 726, 728, this Court simply assumed that *Loretto* was the proper standard.

[¶ 52] Finally, given the consequences of deciding that *Loretto* applies to non-surface property, it is extremely unlikely that the Court considered and decided the issue. The Air Commerce Act and N.D.C.C. § 2-03-04 give third parties the right to fly through landowners' airspaces. In addition, N.D.C.C. § 38-08-08 authorizes the Commission to force-pool real property interests within a drilling unit. If *Loretto* applies to non-surface property, these statutes would also need to be held as unconstitutional because they amount to government-authorized invasions, contrary to what this Court held in *Farrar Oil*, 1997 ND 31, ¶ 18, 559 N.W.2d 841. It 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.

[¶ 53] The foregoing should make clear that this Court never actually decided whether *Loretto* applies to non-surface property. As in *Brecht*, since the *Northwest Landowners* Court did not squarely address the issue, and at most assumed the applicability of the *Loretto* standard to subsurface property, this Court is free to decide whether *Loretto* or *Causby* is the proper standard to judge the taking alleged in this case. If the Court disagrees and believes that it has already decided this issue, then Summit urges the Court to reconsider. This Court has made clear recently that the doctrine of *stare decisis* "is not absolute, and it is [this Court's] duty to correct prior errors, particularly when new arguments or different facts reveal flaws in [its] previous reasoning." *Senske Rentals, LLC v. City of Grand Forks*, 2024 ND 172, ¶ 27, 11 N.W.3d 736. The arguments set forth

in this brief were not presented in *Northwest Landowners* and the facts of this case differ significantly from the facts before the *Northwest Landowners* Court.

CONCLUSION

[¶ 54] For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated this 7th day of March, 2025.

FREDRIKSON & BYRON, P.A.

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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 35 pages.

Dated this 7th day of March, 2025.

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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.	

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

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the Brief of Intervenor-Defendants, Appellees, and Cross-Appellants SCS Carbon Transport LLC, SCS Permanent Carbon Storage LLC, and Summit Carbon Solution, LLC was, on March 7, 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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